

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

MATRIMONIAL CAUSE NUMBER 1 OF 2016

BETWEEN:

EA

PETITIONER

AND

IC

RESPONDENT

AR

CO-RESPONDENT

CORAM: JUSTICE M.A. TEMBO,

M'meta, Counsel for the Petitioner
Mpaka, Counsel for the Respondent
Mpasu, Official Court Interpreter

ORDER

This is this court's order on custody of the two children of the marriage between the petitioner and the respondent following the dissolution of the said marriage by this Court.

The issue of custody over the children pending dissolution of the marriage in this matter has a long history. Initially, custody was shared with the agreement of both parties. Subsequently, the petitioner obtained a variation of the shared custody order and got primary custody of the children. Later, the respondent showed that the petitioner manipulated the children to alienate her from them and this Court varied the custody order and granted primary custody to the respondent.

This Court is now called upon to determine the issue post the dissolution of the marriage between the petitioner and the respondent as the parties rebuild their separate lives.

The petitioner filed several papers in support of his contention that he should be granted custody of the two children herein. The respondent similarly filed several papers in support of her contention that she should continue to have custody of the children herein.

This Court had previously heard the views of the children in this matter of custody and determined that it should not hear them a second time around as their views as expressed to this Court are quite clear on the record of this Court. This is to avert the unnecessary stress on the children associated with the appearance before this Court, albeit in private.

The applicable principles on determination of custody of a child on dissolution of a marriage were already been stated by the parties as indicated by this Court on the last interim custody order in this matter. Those principles are reiterated here.

In custody proceedings, the best interest and the welfare of the child shall be the paramount or primary consideration and not the interests of the disputing parties to a divorce. See Section 23 of the Constitution and section 8 Child Care, Protection and Justice Act.

There is no definition of custody in the Child Care Protection and Justice Act nor in the General Interpretation Act. However, section 8(5) Child Care Protection and Justice Act provides discretion that the Court may make an order granting the applicant custody and may attach such conditions as the Court may consider appropriate.

Courts have understood provisions similar to section 8(5) Child Care Protection and Justice Act and the concept of custody to mean the care and control of the child but also the right to determine the upbringing and education of the child given to an applicant for custody. See Malek, N.A., *"Factors Determining Welfare of the Child in Malaysian Civil Law of Custody"* (2001)15 JUUM 169-178.

The following factors are considered by the courts in determining custody proceedings.

At common law the guideline is that "...all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the best interests of the child's welfare". See *Fredrick v. Fredrick* Matrimonial Cause number 30 of 2013 (High Court) (unreported), *J & Anor v. C & Ors* [1974] 2 MLJ, 51, 52 J v C [1970] AC 668, *Jussa v. Jussa* [1972] 2 All ER 600, *Re W(J.C.)* [1963] 3 All ER 459.

Constitutional and statute law have followed and concretized the common law on the subject by emphasizing that:

1. "the Court shall consider the best interests of the child, on account of age, being with his mother". Section 8 (3) Child Care, Protection and Justice Act.
2. the Court shall consider, "the views of the child, the desire to keep siblings together, and any other matter the Court may consider relevant". Section 8 (4) Child Care, Protection and Justice Act.
3.the best interests and welfare of children shall be a primary consideration in all decisions affecting them...section 23 (1) of the Constitution.
4. there is a constitutional responsibility on duty bearers in managing human rights to protect children "from any treatment that is likely to be hazardous, or interfere with their education, or to be harmful to their...mental or spiritual or social development". Section 23 (5) of the Constitution.

With regard to the extent to which wishes of a child are considered and followed by the court, as with other matters considered by the court in determining who should have custody, the Court will only follow the opinions given by a child, if such opinions are consonant with the best interests of the child. See *Fredrick v. Fredrick* Matrimonial Cause number 30 of 2013 (High Court) (unreported) and *Re KO* 1990 MLJ 123, 125.

Since the petitioner appears to heavily bank on views attributed to the children, it may be worthwhile to recapture the concept of “views of a child” as recorded in statute and note that it is not just views of the child without context that the Court must look at. And that this is evident in the framing of:

1. section 8 (4) Child Care, Protection and Justice Act which requires the Court to consider “the views a of child....and any other matter the Court may consider relevant”.
2. section 95(3)(a) Marriage Divorce and Family Relations Act which requires the Court to “have regard, on the evidence before it, to the wishes of the child considered in relation to his or her age and the level of understanding and the circumstances in which those wishes are expressed”. Though the respondent correctly doubted the applicability of that Act to this matter.
3. Guideline 3(a) Guiding Principles in Matters Concerning Children which dictates that in determining any question relating to the upbringing of child “the Court shall have regard to best interests of the child, including in particular (a) the ascertainable wishes and feelings of the child concerned in the light of his age and understanding. See the implications of those words as detailed in *Re H(Children)* [2014] EWCA, 733 at para. 72.

This Court must take into account that the wishes or views of the child as expressed may be under the influence of other people. See *Fredrick v Fredrick*. And that it is here that the concept of parental alienation becomes key.

This Court has to do a detailed analysis of the evidence to see whether the views of the children were tainted by the petitioner’s alleged scheme of parental alienation.

Statute law expressly places mothers in a special position by directing the Court to consider “the importance of the child, on account of age, being with his mother when making an order for custody”. Section 8 (3) Child Care Protection and Justice Act.

This is a statutory limitation of equality of the parents as against the right to custody over children. She then referred to section 44(1) and (2) and 200 of the Constitution.

This Court disagrees with Mwaungulu, J., as he then was, in *Fredrick v. Fredrick* at p. 13 where he holds that by virtue of “section 20 of the Constitution...as between

the parents there cannot be preference as to who is more entitled to custody of child....”.

This Court, as dictated by statute, considers that the more immature the child the more important it is that the mother has custody. And section 20 of the Constitution cannot be used to assail this legally sound and common-sense position.

Strong grounds would be needed to rebut the position that the mother is a front runner in matters of custody for children because of the following.

As per Wan Yahya, J. in *K. Shanta Kumari v. Vijayyan* [1986] 2 MLJ 216, 218

Even going on the assumption that both parents are equally capable of providing the care, comfort and attention to the infant, the Courts have always leaned in favour of the mother being given custody of young infants. The reason is very obvious. An infant of tender age is by nature more physically and spiritually dependent on its own mother than anyone else, and

Section 23(5)(c) of the Constitution, recognizes that children must be protected “from any treatment harmful to their mental or spiritual or social development”.

On managing wishes of a child and parental alienation in child custody cases, children’s wishes are not always in their best interests. See Malek, N.A, “*Factors Determining Welfare of the Child in Malaysian Civil Law of Custody*” (2001)15 *JUUM* 169-178, Wiley, Francesca, QC., “*Serious Parental Alienation-The Approach of the Courts and Practitioners in 2016*” found at <http://www.familylawweek.co.uk>. And see, Hale, Charles, QC, “*Private Law Children Update: If You were Sleeping...Time to Wake Up*” Family Law Bar Association, May, 2015 and *Fredrick v. Fredrick*.

As a result, the Court needs to look far more closely at the context of the children’s wishes, and promptly eliminate, the long and short-term effects of parental alienation by an appropriate framework suited to the circumstances of a given case. See guideline 2 Guiding Principles in Matters Concerning Children and section 134(2) and 138 Child Care Protection and Justice Act.

When cases have get to this stage, a speedy and robust approach from the Court is required and pressure to defer addressing the allegations until final hearing should be resisted because, as per Kevin Jackson, “*Parental Alienation: New Initiatives*” Children-Private Law (CAP) found at <http://www.familylawweek.co.uk> and Wiley, Francesca, QC., “*Serious Parental Alienation-The Approach of the Courts and Practitioners in 2016*” found at <http://www.familylawweek.co.uk>.,

- (i) the impact upon children of being recruited and alienated consciously or unconsciously by a vengeful parent should not be underestimated,
- (ii) there is likely to be ongoing emotional harm to the children, irreparable damage to the relationship between the children and the alienated parent, and the risk of professionals (and even the Court itself) being flummoxed and then believing allegations and having done so, subsequently finding it difficult to ‘row back’ if the accused parent is exonerated.

As such, a robust and speedy approach is prescribed in sections 134(2) and 138 Child Care Protection and Justice Act and guideline 2 of the Guidelines on Matters Concerning Children as read with section 23 of the Constitution. See *Fredrick v Fredrick*.

This robust and speedy approach in parental alienation cases is consistent with the common law guideline outlined above, namely, the idea of “taking into account all relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances and weighing them in determining which course to follow”.

There is persuasive authority of this robust and speedy approach as exemplified in many English cases before highly experienced family law Judges drawing from a deep well of legal knowledge on the subject given that the English Family Division was established in 1857 and has since delivered informative jurisprudence on matrimonial causes including custody of children. See-Danaya C. Wright, “*Untying the Knot: Analysis of English Divorce and Matrimonial Causes Court Records*,

1858-1866" University of Florida Levin College of Law: UF Law Scholarship Repository found at <http://scholarship.law.ufl.edu/facultypub>.

This Court has considered the following several persuasive English decisions on the subject.

Thorpe, LJ in *S (Children)* [2010] EWCA Civ 447 concluded that wishes and feelings of children need to be seen in the correct context recognizing how heavy a decision it is to decide whether to restore contact between manipulated children and an alienated parent is. He said

... in reality, it burdens them with a responsibility they should not be asked to bear at the respective ages of 12 and 13, and noting that wishes and feelings of children do not always rule because children have to have their lives regulated by adult judgement.

Parker, J in *H (Children)* [2014] EWCA Civ 733 whose opinion was unanimously upheld in the Court of Appeal (Tomlison, McFarlane and Davis LLJ) immediately transferred residence of the children aged 11-16 in order to re-establish a relationship between the children and an alienated parent recognizing that:

...parental manipulation of children is exceptionally harmful. It distorts the relationship of the child not only with the parent but also the outside world...I am disappointed that the professionals in this case are unable to understand this message [that] parents who obstruct a relationship with the other parent are inflicting untold damage on their children and it is, in my view, about time that professionals understood this.

Munby, LJ in *Re C (a Child)* [2011] EWCA Civ 521 delivering a judgement of the Court of Appeal recounted the principles at para. 37-47 prescribing judicial control and noted that:

Contact between parent and child is a fundamental element of family life and is almost always in the interests of the child...it is to be terminated only in exceptional circumstances, where there are cogent reasons for doing so and where there is no alternative. Contact is to be terminated only if detrimental to child's welfare

There is a positive obligation on the state, and therefore on the Court, to take measures to maintain and reconstitute the relationship between parent and child, in short, to maintain and restore contact

The Court should take both medium term and long-term view and not accord excessive weight to what appear likely to be short term or transient problems....

Ward LJ in *M (Children)(Contact: Long Term Best Interests)* [2005] EWCA Civ. 1090 pronounced the duty of the Court more succinctly saying:

“Where, as is the case here, the Court has the picture that a parent is seeking without good reason, to eliminate the other parent from the child, or children’s lives, the Court should not stand by and take no positive action. Justice to the children and the deprived parent, in this case the mother, require the Court to leave no stone unturned that might resolve the situation and prevent long term harm to the children”

Modern legal luminaries in the area of child justice in which manipulation of children is evident, recognize the approach to managing intractable cases of the present kind by accepting Macur, LJ’s prescription in *M (Children)* [2013] EWCA Civ 1147. And, in that case, Macur LJ sitting in the Court of Appeal restated the approach to the agreement of Longmore and Underhill, LLJ thus

In dealing with an application for custody of children, “the Judge was obliged to reach conclusions on the whole of the evidence and was not bound by the opinions of others however eminent in their field...

And that it is “advisable that any Judge appraising [evidence] in the emotionally charged atmosphere of a contested family dispute should warn themselves to guard against an assessment solely by virtue of their behavior in the witness box and to expressly indicate they have done so.”

“A child’s continuing relationship with a non residential parent is highly desirable and contact should not be denied unless the child’s welfare demands it. Domestic violence is not, in itself, a bar to direct contact, but must be assessed in the circumstances as a whole”

“...there is no question but that an order that there should be no contact between a child and his non residential parent is draconian. In this case, the order dated 17 May 2013

can only be lawful within the meaning of Art 8(2) of the Convention if the order for no direct contact is necessary in a democratic society for the protection of the right of the mother, and consequently the minor children in her care, to grow up free from harm. In order to reach that conclusion the court must consider and discard all reasonable and available avenues which may otherwise promote the boys rights to respect for family life, including, if in the interests of promoting their welfare during minority, contact with their discredited father.

This Court must therefore consider all the factors in this matter in so far as the relevant evidence is concerned as presented before it and accordingly make its own conclusions. It must not base its decision on one aspect of the evidence but must consider the whole of the evidence.

Children have the right to be raised by their parents. And parents are the duty bearers as per section 23 (3) of the Constitution. It is in the interests of children to be so raised.

If a parent is to be deprived of parental responsibility and a child denied access on account of alleged domestic violence, there is a comprehensive and strict legal framework to be followed. See sections 4 and 21 and Schedule I and II to the Prevention of Domestic Violence Act.

In respect of allegations of abuse or violence against children the standard is as set out in section 23 Child Care Justice and Protection Act.

And as a result of this position, “an application for an emergency [ex-parte] protection order is, at law, a very serious step. It should not be regarded as being an automatic response in a case of suspected child abuse or as routine.... The Court will require full, detailed, precise and compelling evidence that the situation is sufficiently serious to justify such an interference with family life. The importance of following correct and demonstrably fair procedure on an application for an emergency [ex-parte] protection Order has been emphasized”. See *Halsbury's Laws of England*, 5th Ed. Vol IX para. 607 and *Re X (Emergency Protection Orders)* [2006] EWHC 510(Fam) and sections 4, 21 and Schedule I and II to the Prevention of Domestic Violence Act and section 23 Child Care Protection and Justice Act.

This Court wishes to state that there was an application for a protection order in issue this matter which was granted early on by my brother judge but it was later abandoned by the petitioner. As far as the decision of this Court on custody variation order shows, the protection proceedings do not play any role in this Court's decision. Those proceedings having been abandoned by the petitioner will not play any role in this Court's determination.

This Court observed the following facts in relation to the petitioner and the respondent as well as the children upon consideration of the evidence on this final custody order hearing.

Both parties are financially capable of taking care of the children in this matter.

There is extreme acrimony between the parties in view of the break-down of their marriage and subsequent divorce.

The petitioner tried to punish the respondent by taking away the children and denying the respondent access to the said children for that duration soon after the break-down of the marriage.

It transpired however that both the petitioner and the respondent were both to blame for the break-down of their marriage. The petitioner accepted his wrong in terms of cruelty and the respondent accepted her wrong in terms of adultery.

This Court notes that the petitioner was using drugs and actually admitted binging on drugs at times. There is some evidence that the respondent also used some drugs but the petitioner was using far more than the respondent.

Once this Court granted shared custody with the consent of the petitioner and the respondent, the petitioner could not easily work with the respondent to allow the respondent access to the children and let them have interaction with her.

Instead, the petitioner applied to this Court, and this Court granted a variation of the custody order and was moved by the wishes of the children that they wanted to be with the petitioner and not so much the respondent until such time as the children felt comfortable to be with the respondent. This is the first varied custody order.

However, during the subsistence of the first varied custody order, the petitioner could not work with the respondent to let the children have interaction with the respondent. A lot has been said about this aspect.

The petitioner denies that he ever was obstructionist in allowing the children time to interact with the respondent who is the mother of the children.

However, when this Court evaluated the evidence before it, this Court concluded then and concludes now that the petitioner was not proactive in ensuring that the children had interaction with the respondent during visitation as sanctioned by this Court.

For a considerable period of time all that happened was that the issue of visitation by the respondent was left only to be handled by the parties and their lawyers without any visits being made by the respondent to the children who by then were in the custody of the petitioner.

At this point, the respondent applied for variation of the first custody variation order and she alleged that the respondent was manipulating the children and therefore alienating them from her.

This Court analysed all the evidence brought before it and concluded that indeed there was strong indications that the petitioner was manipulating the children and was working a scheme aimed at alienating the children from their mother while at all times appearing to champion the wishes of the children to be with him and not the respondent their mother.

This Court consequently ordered a variation of the first custody variation order to reverse any effects of the parental alienation and granted custody of the children to the respondent. This was the second custody variation order.

Significantly, this Court has observed that since the second custody variation order the petitioner has not relented in his scheme to alienate the respondent from the children herein.

This observation is borne out of the incidents surrounding this Court's decision to let the children travel with their mother outside this jurisdiction, for a period, in an effort to help heal the damage caused by the parental alienation.

During that travel, there were several incidents that took place that put it beyond doubt that the petitioner has not relented in his scheme to alienate the children from their mother the respondent. This is in contrast to any arguments and assertions by the petitioner to the contrary.

There was an order made by this Court allowing the children to travel with the children abroad. The petitioner appeared to have dropped out of the picture. Yet his

acquaintances actively came on the scene and pushed his agenda. These acquaintances of the petitioner feigned ignorance of the order of this Court allowing the children to travel abroad with the respondent.

These close acquaintances of the petitioner emphasized to the children herein that they could not travel abroad with their mother the respondent if they so wished even in the face of the clear order of this Court which their close acquaintance the petitioner was aware of.

These close acquaintances of the petitioner encouraged the children to resist the order of this Court that they travel with their mother. This Court agrees with the respondent that it is highly likely that the petitioner was behind this incident.

The petitioner was in close contact with both the children and his close acquaintances who were apparently very concerned with the situation of the children that there is no way the petitioner could have not known what was going on.

The respondent was forced to seek legal advice on what to do given that this incident occurred on the eve of her travel.

Understandably, the respondent contacted her lawyer. In the situation, her lawyer advised her to contact the police to come in and explain to the children that the children were under an obligation to obey the order of this Court.

The respondent proceeded as advised and two police officers visited her home and spoke to the children informing them to travel in compliance with the order of this Court and specifying that the consequences of non-compliance would be imprisonment.

It is regrettable that the respondent was pushed to this extreme. The prudent thing to do in the circumstances would have been for the respondent to advise this Court of the situation and this Court would as a matter of urgently sorted out the situation.

This Court notes that the respondent was pushed to this extreme situation by the behind the scenes machinations of the petitioner.

As if this was not enough, the close acquaintances of the petitioner then reported to the police that the respondent committed the offence of intimidating the children herein using the police.

Further, that the respondent was forcing the children to travel outside the jurisdiction. In the end the respondent was charged with the offence of intimidation

and was released on bail. This is not merited at all and has abuse of the criminal process written all over it. This Court therefore does not accept the arguments by the petitioner in the circumstances that the respondent intentionally decided to intimidate her children and that this is an element to compel this Court to order custody in his favour.

As if these pre-departure events were not enough the petitioner activated another scheme in the foreign jurisdiction where the respondent travelled with the children herein for purposes of reversing the effects of the petitioner's alienation of the respondent from the children.

When the respondent arrived at the foreign jurisdiction, police in that jurisdiction got a report that the respondent had travelled with the children to that jurisdiction without proper legal mandate. This insinuated child abduction.

There is a report tendered in evidence by the respondent showing that police visited her residence after the report of alleged child abduction or something akin to that. The police verified the allegation and were shown the order of this Court upon which they closed the matter noting that the report made to them was without any basis.

The foregoing facts clearly demonstrate to this Court that whilst the petitioner appears to champion the wishes of the children herein to live with him and not their mother the respondent as a paramount consideration, beneath it all, the petitioner is always scheming to alienate the children and have them all to himself without any concern about the constitutionally recognized essential requirement to child well-being that they should be raised by both parents.

This Court notes that the scheme of the petitioner is not in the best interest of the children herein. If he is allowed custody of the children, what that entails is that the petitioner will eventually achieve his aim of completely and irreversibly alienating the children from their mother and cause grave damage to these children upbringing.

As Ward LJ persuasively pronounced in *M (Children)(Contact: Long Term Best Interests)* [2005] EWCA Civ. 1090, the duty of this Court in such a case is not to stand by and take no positive action. Justice to the children and the deprived parent, in this case the mother, require this Court to leave no stone unturned that might resolve the situation and prevent long term harm to the children.

Consequently, this Court does not agree with the petitioner's prayer to have custody of the children because he is well paid and that he can take care of the children who he strongly submits wish to live with him.

This Court finds that the respondent equally has means to look after the children.

This Court consequently, orders that the respondent shall have full custody of the children and that the petitioner have visitation rights with the children. The pattern of visitation shall continue on a fortnightly basis as is the case now.

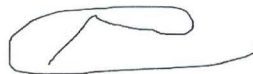
The petitioner and the respondent shall equally provide for the school fees and school related expenses for their children.

Considering the protracted nature of this case, this Court agrees with the prayer of the respondent and orders that, save for a possible appeal against this order, no application shall be made by the petitioner in relation to the children herein without the leave of this Court.

This Court orders that the intimidation proceedings against the respondent be brought up before the Criminal Division of this Court for review in view of the observations of this Court concerning the circumstances in which the said charges arose. The respondent shall see about this aspect in liaison with the office of the Registrar. This is in response to the respondent's prayer that this Court also consider to manage the said criminal proceedings in the circumstances.

Given the nature of these proceedings, each party will bear its own costs in this matter.

Made in chambers at Blantyre this 7th September 2018.



M.A. Tembo

JUDGE