

**REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA**

**FAMILY DIVISION**

**HCT-00-FD-FC-0081-2009**

**IN THE MATTER OF HILLARY KAKEETO AN INFANT**

**AND**

**IN THE MATTER OF AN APPLICATION FOR GUARDIANSHIP BY JASON WAYNE  
FORQUER AND HEDDA CHRISTIN FORQUER**

**BEFORE: THE HONOURABLE MR. JUSTICE FMS EGONDA-NTENDE**

**RULING**

1. The applicants are United States citizens living at 8317, Carriage Lane, Wichita Falls, Texas 76305, in the United States of America. In this application they are seeking to be appointed guardians of one Hillary Kakeeto, an infant, currently a ward of Sanyu Babies Home, Namirembe, Uganda. This application is supported by affidavits of the applicants, Sarah Buzabalyawo, the Probation and Social Welfare Officer, Lubaga Division, W/CPL Margaret Andiru of the Child and Family Protection Unit, Old Kampala Police Station and Barbara Nankya, Administrator of Sanyu Babies Home.
2. Hillary was found abandoned near Namirembe Cathedral by one Jackline Nakazibwe on the 2<sup>nd</sup> December 2008. She picked the child, reported the incident and delivered the child to the Child Protection and Family Unit of Old Kampala Police Station. The police referred this child to Sanyu Babies Home. On the 21<sup>st</sup> April 2009 the Family and Children Court at Mwanga 11 issued a care order formally committing this infant into the care of Sanyu Babies Home.

3. Sanyu Babies Home now introduces the applicants as the couple that has offered to take responsibility for this child and therefore supports this application for guardianship.
4. Jason is a 37 year old Lieutenant in the United States Airforce working as a special needs coordinator and Officer in Charge of the special needs programme at Wichita Falls, Texas, US. He is married to Hedda since 3<sup>rd</sup> November 1993. She is employed as a Foster/Adopt Certification Specialist by the Texas Department of Family and Protective Services, Wichita Falls, Texas. They are blessed with one biological child and three adopted ones ranging from 13 to 5 years old. They claim to have worked as volunteers at Sanyu Babies Home, and it is from that contact that they met the infant, the subject matter of these proceedings.
5. An Adoptive Study has been carried on the applicants by a one Sara E. Paxton a master level social worker and it was notarized on the 23<sup>rd</sup> March 2009. It states in part,

**‘MOTIVATION TO ADOPT**

Jason and Hedda are a happy, enthusiastic, spiritual and loving couple, married 15 years and successfully raising four children. Jason and Hedda are both securely employed, while providing a warm, nurturing home. The family enjoys a comfortable and active lifestyle. Jason and Hedda first discussed adoption even before they were married. Hedda’s mother was adopted as a child and adoption has always been very close to her heart. The Forquers are experienced adoptive parents and welcome the joys and challenges of adopting more children. They have the necessary knowledge, education, support and motivation to seek outside professional assistance and will access such services if needed. They currently have services in place for their other children and are pleased with all current providers. Jason and Hedda feel a great need to share the love and faith they have in their marriage with these children and believe they have as much to give as to receive in this adoption.’

6. The report concludes,

**‘EVALUATION AND RECOMMENDATION**

Jason and Hedda Forquer offer an exceptionally nurturing environment for a child to develop and grow. They have healthy, well-rounded personalities, good maturity levels and an ability to handle stress. They are independent thinkers and demonstrate excellent overall judgment and logical thinking. They display a strong, healthy marital relationship, are supportive of one another and care deeply about each other. Positive letters of reference from 3 friends and 2 family members attest to the stability, maturity, financial responsibility and sensitivity of the individuals.

As a professional social worker, I highly recommend and approve Hedda and Jason Forquer as adoptive parents of two children, male, or female, ages zero to 5 from Uganda, and may have known mild to severe non-correctable special medical needs. With the completion of this home study by Sara E. Paxton, a Master Level Social Worker, Jason and Hedda Forquer have successfully met the pre-adoptive requirements of the State of Texas.’

7. The applicants have no known criminal record in the United States. Neither do they have a history of child abuse or neglect. I am satisfied that the applicants, on the facts available to me, are suitable adoptive parents and or guardians. I must now turn to the law and determine whether it is possible for this court to make the order sought.
8. The applicants are applying for legal guardianship under Article 139 (1) of the Constitution, Sections 14, 33 and 39 of the Judicature Act and Section 3 of the Children Act. It is clear that the applicants’ intention is to adopt the infant in question and intend to do so in the USA in case this application succeeds. Given that scenario I would have been inclined to find that the applicable law should be Section 46 of the Children Act which deals with inter-country adoption. In which case, this application, on its face, would have failed given the fact that the applicants would not have complied with the residency requirement and the 36 months foster period unless those conditions raise constitutional issues that may lead to their successful ouster by a competent court.

9. However, the Court of Appeal, in the case of In the Matter of Francis Palmer an Infant, Civil Appeal No. 32 of 2006, and in the case of In the matter of Howard Amani Little, an infant, Civil Appeal No.33 of 2006 held that this court has jurisdiction to grant orders of legal guardianship by a 2 to 1 decision. What that decision does not make clear are in what circumstances should a court issue that kind of order, especially in cases that are akin to inter country adoptions.
10. In that decision the Court of Appeal was divided as to when and how the High Court may grant orders of legal guardianship in the circumstances where the applicants were foreign applicants resident outside this country and whose intention of applying for legal guardianship was to take the children outside this jurisdiction.
11. L M Kikonyogo, DCJ., was of the view that legal guardianship was to be resorted to where the applicants could not fulfil the conditions under Section 46 of the Children Act. C Kitumba, JA., disagreed. Though in agreement with the learned Deputy Chief Justice that this court had jurisdiction to grant orders of legal guardianship, the learned justice of appeal stated that it should not be applicable where the applicants were foreign applicants who did not qualify under Section 46 of the Children Act. To allow such applicants to obtain orders of legal guardianship, while they did not qualify to adopt the children under the Act, would be an infringement of the Act. A Twinomujuni, JA., did not agree that the High Court had the power to grant orders of legal guardianship, such power being only available to Family and Children's Court, by the issue of care orders and appointment of Foster Parents. Nevertheless he concurred in the granting of the order of guardianship proposed by the Deputy Chief Justice.
12. The Court of Appeal decision, given the conflicting legal positions taken by each justice, provides no authoritative guidance as to how this court should exercise its power in granting orders of legal guardianship. In the result, perhaps, I must turn to simply one question. Is the grant of such an order in the best interest of the children?
13. What is needed for this infant and many other children in a similar position is a home with loving parents and a family. This child is being provided an opportunity to grow up in a loving family environment to be provided by the applicants. The child's

current circumstances as a ward of an orphanage were only intended to be temporary, pending the availability of a suitable home in which she could be raised.

Unfortunately no suitable home has been available locally since she was picked up abandoned. Institutional upbringing denies children their natural and legal rights of being raised by their parents whether natural or adopted.

14. No governmental support, be it local or central, is available for the care and upkeep of children in distress generally or specifically in the case of this infant. Right now the infant is under the care of a local non-governmental organisation. There is no offer from Ugandans or non-Ugandans resident in Uganda to adopt this child. It is imperative that her stay in an institution be terminated as soon as possible. I find therefore that exceptional circumstances exist for an order to be made in favour of non citizens who are the only viable alternative.

15. I am satisfied that it is in this infant's best interests to grant rather than refuse this application. Accordingly I grant an order of legal guardianship of Hillary Kakeeto to the applicants effective immediately.

Signed, dated and delivered at Kampala this 8<sup>th</sup> day of July 2009

FMS Egonda-Ntende

Judge