

**THE REPUBLIC OF UGANDA**

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

**FAMILY DIVISION**

**HCT-00-FD-FC-0082-2009**

IN THE MATTER OF MERCY ELYSSA ASINDE AN INFANT

AND

IN THE MATTER OF AN APPLICATION FOR LEGAL GUARDIANSHIP BY ZANE  
McCOURTNEY AND SUMMER McCOURTNEY

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

**RULING**

1. The applicants, a married couple, are United States citizens residing and working in this country. In this application they are seeking an order of legal guardianship of Mercy Elyssa Asinde, hereinafter referred to as the infant. The applicants applied to be appointed foster parents of the said infant and the Family and Children Court of Entebbe issued a care order dated 2<sup>nd</sup> June 2009 that appointed them as foster parents of the infant.
2. Foster parent is defined under the Children Act, Section 1 (j) as,  
‘means a person not being the biological mother, father, or relative of the child who assumes parental responsibility of the child by way of a care order.’
3. Guardian is defined by the same Act, Section 1 (k) as,  
‘means a person having parental responsibility for a child.’
4. In my view it is clear from the foregoing that a foster parent, appointed by the Family and Children Court, is a guardian of the infant. A foster parent is a guardian of the infant by virtue of appointment as a foster parent. A foster parent has parental

responsibility for the child. A guardian is a person who has parental responsibility for a child. So a foster parent is a guardian.

5. It would appear to me that this application is superfluous given that at law the applicants are already guardians of the infant, albeit, as foster parents. An appointment of the applicants as guardians by this court adds no further value in law to their current status and responsibility as guardians/foster parents of the infant Mercy Elyssa Asinde.
6. This application has been stated to be made under Article 139(1) of the Constitution, Sections 14(1), (2)(b)(i) & (iii), (c), (3), (4) & (5), 33 and 39(2) of the Judicature Act, Sections 2, 3, 4, 5, 6 and 7 of the Children Act, and Order 51 Rules 1 and 3 of the Civil Procedure Rules. I take it that Section 33 of the Judicature Act must have been cited in error. It is a general provision relating to the power of the High Court to grant remedies. Section 14 of the Judicature Act, which deals with the jurisdiction of the High Court, providing that this court is a court of unlimited jurisdiction with jurisdiction in all matters, may be apt.
7. I have perused Sections 2, 3, 4, 5, 6 and 7 of the Children Act, and I am unable to find that they can aid this application in anyway. Section 2 defines who a child is.
8. Section 3 of the Children Act provides that the welfare principles and the children's rights set out in the First Schedule to the Act shall be the guiding principles upon which any decision based on the Children Act may be taken. Clearly the decision sought in this application is not founded upon any provisions of the Act, and is thus not directly applicable. The decision under the Children Act was taken by the Family and Children Court of Entebbe in appointing the applicants foster parents of the infant. That decision is not in issue here.
9. Sections 4, 5, 6 and 7 deal with a child's right to stay with its parents, duty to maintain a child, parental responsibility and harmful customary practices. Those matters are not in issue in this application. None of the provisions cited above refer to the appointment of guardians by this court.
10. It is not in question whether this court has the power to appoint guardians. The Court of Appeal has in the cases of *In the Matter of Francis Palmer an Infant, Civil Appeal No. 32 of 2006*, and *In the matter of Howard Amani Little, an infant, Civil Appeal No.33 of 2006* held that this court has jurisdiction and authority to grant orders of legal guardianship. The decision is not clear in what circumstances this jurisdiction

may be exercised. Two judges that agreed that this court has jurisdiction did not agree on the circumstances in which such jurisdiction may be exercised.

11. Under the common law this court has the jurisdiction to appoint guardians for infants both in respect to their persons and or to their estates. See *In the Matter of Kenneth Kintu an Infant: HCT-00-FD-FC-0112-2008 (unreported)*.
12. I have noted above that in law the applicants are legal guardians of the infant in question already. And that this application, at law, would be superfluous. However, since I am required to declare that which is the case already, for the avoidance of doubt, I do declare the applicants the legal guardians of the infant, Mercy Elyssa Asinde.

Signed, dated and delivered at Kampala this 15<sup>th</sup> day of July 2009

FMS Egonda-Ntende

Judge