THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA

FAMILY DIVISION

HCT-00-FD-FC-0072-2009

IN THE MATTER OF MICHAEL AN INFANT

AND

IN THE MATTER OF AN APPLICATION FOR GUARDIANSHIP BY MORSE RICHARD PATERSON JR AND PRICKET TERESSA RENEE

BEFORE: THE HONOURABLE MR. JUSTICE FMS EGONDA-NTENDE

RULING

1. The applicants, a married couple, are United States citizens residing at 1400 Thayer Drive, Phenix City, Alabama 36867 in the United States of America. They are seeking an order of guardianship in respect of one infant, Michael. Michael was abandoned at Jinja Tax park on 8th November 2008 by unknown persons. Michael was handed over to the police officers at the Taxi park. The Senior Probation Officer, Jinja requested Amani Baby Cottage, Jinja, an orphanage, to take responsibility for the baby on 10th November 2008. Subsequently on 30th March 2009 a care order was issued by the Family and Children Court of Jinja committing Michael to the Director, Amani Baby Cottage for an unspecified period.

2. Again on the 30th March 2009 the same Family and Children Court of Jinja committed the care of the infant to the applicants. This is extremely puzzling for two reasons. Firstly on the same day the court committed Michael to the Director, Amani Baby

Cottage. I am not sure which order was first or if one or the other was annulled! Secondly as the applicants were non-Ugandans who were not resident in Uganda they did not qualify to be appointed as foster parents. This care order was therefore irregular.

3. The applicants got married on 8th May 2004 in the Probate Court of Russel County, Alabama, USA. Richard is a medical doctor working with St. Francis Hospital, Inc. Pricket is a nurse practitioner with Columbus Cardiology Associates. The addresses of both work places have not been provided.

4. The applicants have been the subject of an adoption study by Family Link which was completed on 14th February 2009. It was conducted by Clarissa Steplight, a licensed social work accredited by the Alabama Board of Social Work Examiners. That report concludes,

> 'The Morse's have given the option of adoption thoughtful and serious consideration. Mr. and Mrs. Morse believe that they have made an informed and careful decision to adopt. The couple has the support of their family and friends in making this decision. They have the financial resources to support a child, and the emotional and mental stability necessary to take care of children. Based on the information gathered during this study and written documentation provided by the Morse's and others, I recommend that Mr. and Mrs. Morse are allowed to adopt two children.'

5. The applicants have no known criminal record in the United States of America. Neither do they have a history of child abuse or neglect. The applicants do not have children. On January 2009 while on pastoral visit to Uganda the applicants came to learn of Michael's plight. They visited Amani Baby Cottage. They came to the conclusion that they could offer a home to Michael and take him up as their child.

6. 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.

7. The applicants apply for legal guardianship under Sections 33 of the Judicature Act, Sections 3of the Children Act and Section 98 of the Civil Procedure 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.
8. 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.
9. In that the 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.
10. The Presiding Justice 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's Act. The second Justice of Appeal disagreed. Though in agreement with the presiding justice that this court had jurisdiction to grant orders of legal guardianship, the 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's 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. The third Justice of Appeal 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 Presiding Justice.
11. 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 infant?

12. What is needed for this infant and many other infants in his position is a home with loving parents and a family. This infant is being provided an opportunity to grow up in a loving family environment to be provided by the applicants. The infant's current circumstances as a resident of an orphanage are only intended to be temporary, pending the availability of a suitable home in which this infant can be raised. The fate of the infant's parents is not known. No information is available on them.
13. No governmental support, be it local or central, is available for the care and upkeep of the infants generally or specifically in the case of this child. Right now it is under the care of a local non-governmental organisation. There is no offer from Ugandans or non-Ugandans resident in Uganda to take up the responsibility of looking after this infant. I find therefore that exceptional circumstances exist for an order to be made in favour of non citizens who are the only viable alternative.
14. I am satisfied that it is in the infant's best interests to grant rather than refuse this application. Accordingly I grant an order of legal guardianship of Micheal to the applicants effective immediately.
15. Before I take leave of this matter I wish to draw the attention of Government to the unsatisfactory state of the law with regard to guardianship of children and inter-country adoption. Based on the increasing frequency and volume of applications for guardianship by non residents and non citizens of this country in our courts it is apparent that this is so because of the stringent nature of the law with regard to inter-country adoptions that makes virtually impossible adoptions of children born and living in Uganda by non citizens not resident in Uganda.
16. During the proceedings for guardianship there is no independent representation of the child or infant in question to test the suitability of the applicants and the information that they present to court. Basically it is the applicants and the child or children only before the court with a supporting cast of counsel, relatives of the child and or those in custody of the child.
17. There are no statutory guidelines with regard to guardianship of children. There is no register for guardianship orders issued by this court, especially in the case of non citizens who take the children outside the country, unlike the one available for adoption orders. This is bound to make it difficult if any information is required at some stage in the child's or its guardians' life.

18. It appears to me that in its effect Section 46 of the Children Act effectively denies children the possibility of adoption and care, at times, of the only adoptive parents available to them, simply on the basis that those prospective adoptive parents are non-citizens of this country. In doing so this may not be in the best interests of those children in distress with no parents to look after them and no offer from local adoptive parents. In such cases it may well be that Section 46 of the Children Act runs counter to Article 34 of the Constitution that requires, inter alia, laws relating to children to be enacted in their best interests. It is questionable if Section 46 is in the best interests of children.

19. A somewhat similar point was considered by the Constitutional Court of South Africa in The Minister of Welfare and Population Development v Sara Jane Fitzpatrick and Anor Case No. CCT 08/2000. Section 18 (4) (f) of the South African Children Care Act bluntly barred non South African citizens from being able to adopt South African children. The Constitutional Court held that Section 18 (4) (f) was unconstitutional in so far as it failed to give paramountcy to the best interests of children as required by Section 28 (2) of the Constitution. Section 28 (2) of the South African Constitution in substance has the same import as our Article 34 of the Constitution of Uganda though the wording is varied. To an extent, and in its effect, Section 46 of our Children Act is similar to Section 18 (4) (f) of the South Africa Children Care Act although it is not as pervasive as the former. It leaves a small window of opportunity for resident non-citizens.

20. Section 46 of the Children Act does not possibly run counter to our Constitution only but may also be in conflict with Uganda's obligations under Article 3(1) of the International [United Nations] Convention on the Rights of Child which entered in force on 2nd September 1990 which obliges national legislative bodies, among others, to make the best interests of the child a primary consideration in all its actions concerning children which includes law making.

21. It is time to reform this aspect of our law by making inter-country adoption possible where there are no suitable local adoptive parents in order to ensure that all our children grow up in the loving care of their natural parents or adopted parents and are able to develop to their full potential. This would bring the law in line not only with our Constitution and International Obligations but also with international practice under the Hague Convention on the Protection and Co-operation in respect of Inter-country Adoption of Children. It is time too for Uganda to sign up and ratify this

convention for the benefit of its children and take advantage of the availability of a worldwide/international network of government agencies for the protection of children.

Signed, dated and delivered at Kampala this 24th day of June 2009

FMS Egonda-Ntende

Judge