

Sylvia Chirawu is the National Coordinator of Women and Law In Southern Africa Research and Educational Trust (WLSA) for the Zimbabwe office. Chirawu holds an LLBS degree (1993) and Msc In International relations (2000) from the University of Zimbabwe. She taught Family Law and the Law of succession at the University of Zimbabwe from 2003-2005. She is the recipient of the Hubert Humphrey Fellowship 2005/6, a Fulbright program which recognizes commitment to public service for mid career professionals in developing countries. As part of the Fellowship, she studied at American University, Washington College of Law specializing in Gender and the international protection of women and children's rights. She also holds an LLM in International Legal Studies (August 2006) from the Washington College of Law. Chirawu has written on violence against women, human trafficking, gender and HIV/AIDS. Chirawu is currently undertaking Doctorate Studies focusing on the impact of migration on family law.

ABSTRACT

The best interests of the child test has been applied by courts in Zimbabwe and elsewhere to determine which parent should have custody of a child. Some states in the USA have come up with laws that can be used to make a determination. In Zimbabwe the courts have provided guidance on the concept of best interests. The major challenge lies in the judicial discretion in determining what the best interests of a child mean. Alternative tests namely primary caretaker presumption and joint custody have been used and proposed as alternatives to the best interests test. Despite its short comings, the best interests of the minor child test still remains the best test for determining custody disputes.

Longing for the wisdom of King Solomon: Custody and the best interests of the child concept.

Introduction

As a young fourth grader in Zimbabwe, the writer played the part of the “nice” mother in the Biblical play of Wise King Solomon opting to give up the baby to the “cruel” mother so that the baby would live. Wise King Solomon realized who the actual mother was by that very act of concern for the child, that acting in the best interests of the child, the actual mother was prepared to give up custody to the other woman. In real life, it is rarely that easy. Custody disputes are very difficult to handle and the children or child at the centre bear the brunt. This biblical analogy was well captured by Brian J Melton as follows:

One of the most well known examples of Solomon's wisdom was his resolution of a dispute between two women, both of whom claimed to be the mother of a child, and both of whom desired custody.But Solomon's wisdom would be lost in the modern day custody disputes. Would Solomon's solution have been as simple if the argument for custody was between the biological mother and father? Would

*Solomon have had to weigh both parties' interests to decide what was in the best interests of the child?*¹

This paper will give an overview of the best interests and custody concept in Zimbabwe and the USA. Zimbabwe ratified the Convention on the rights of the child (CRC) on the 11th of September 1990. The predominant standard in handling custody disputes in CRC and the law of Zimbabwe is the best interests of the child doctrine. Significantly the proposed new Constitution² unequivocally states that in all matters relating to children, the best interests of the child concerned are paramount.³ This standard is fraught with inconsistencies as in most instances; there are no indicators or guidelines. Despite these shortcomings, the test still provides the best method of determining custody.

The paper will start off with the observation that custody disputes arise due to a variety of reasons. As a result the question will be whether or not having one standard for determining best interests is appropriate. The development of laws on custody cases will reveal that CRC did not introduce the best interests standard. It was already in existence. Zimbabwe has not domesticated CRC but it is interesting to note that it has domesticated the Hague Convention which does not deal with best interests of the child but jurisdiction in International kidnapping. An analysis of the practical application of the best interests standard will reveal that the issue of judicial discretion on the part of judges and judicial officers is the major criticism levelled against the test. The writer will use the DC Superior Court Family Court Act of 2001 for reference purposes which provides a model of alternative dispute resolution in child custody cases and also the cooperation between various arms of the law to ensure that the interests of children are taken into account. The writer will rely on cases from the some states in the USA for comparative purposes. Alternative tests to the best interests will be looked at to determine whether they are more appropriate and finally it will be concluded that despite the best interests of the child the standard being fraught with inconsistencies, it still provides the best method of adjudicating on custody disputes. Even the alternative tests are also based on the best interests of the child.

¹ 73 N.D.L Rev 263

² At the time of writing the bill is awaiting Presidential assent after having been adopted by both the House of Assembly and the Senate

³ Section 19(1)

Why do custody disputes arise?

The most common cause of custody disputes is divorce. The dilemma facing children is aptly put by Trish Oleska Haas:

When I asked him the usual question that we ask all children of divorce – if you had three wishes, what would they be? – he said, “I want to die.” Startled at this response, I said, “Why? What would happen if you died?” “If I were dead,” the little boy said in a somber tone, “I’d be in heaven. My dad would be there. My mom would be there. And we’d live in the same house.”⁴

The child instead of making a preference, would rather have died and be in heaven with his parents just as it used to be. This speaks volumes of the difficulties placed on children. Custody disputes have however not been entirely confined to divorce. With a rapidly evolving world, custody has taken on many dimensions and overtones. In *Ward v. Ward*,⁵ the father was black and the mother white. *Jones v. Jones*⁶ involved a Native American father and a white mother. In *re Baby Clausen*,⁷ the dispute was between adoptive and natural parents of the child. A grand parent was awarded custody in the Kentucky state case of *Mcnames v. Corum*.⁸ In the famous case of *In re Baby M*,⁹ the surrogate mother refused to give up the baby despite signing a prior contract agreeing to do so. In Zimbabwe, the court had to deal with the rights of a non marital father in *Cruth v. Manuel*.¹⁰ In *W v. W*,¹¹ the court had to deal with the award of custody to a third party. In *Domboka v. Madhumu*,¹² the child had been left in the custody of a grandparent whilst the mother went to work overseas following a divorce.

⁴ 81 U. Det. Mercy L. Rev 333

⁵ 216 P. 2d 755

⁶ N.W 2d 119

⁷ 502 . N.W 2d 649

⁸ 683 SW 2d 246

⁹ 525 a.2d 1128

¹⁰ SC 73/98

¹¹ 1981 ZLR 243

¹² HH-179-04

Yet still as observed by Bajpai,¹³ custody applications are not final. Parties may apply for a variation of the custody order. Although the Zimbabwean courts have not yet been called upon to deal with issues of surrogacy from a survey of cases involving custody, it is apparent that custody cases have taken many dimensions the fastest emerging one being of parents migrating from Zimbabwe and wanting to take the children with them .¹⁴ Given this fact, does the best interests of the child offer the best solution given the fact that one standard is being applied to different scenarios?

The development of custody laws.

The USA literature and case law presents a clear history of the development of custody issue. North Dakota historically resorted to English law which gave a preference to the father.¹⁵ The paternal preference was replaced in 1839 by the tender years doctrine. Parliament created a presumption that custody of a child under the age of seven should go to the mother.¹⁶ The tender years doctrine became the yardstick of much of American law on custody. The doctrine was however applied differently. It was viewed as either weak or strong.¹⁷ If strong, custody was given to the mother unless she was declared unfit. If weak, a comparative analysis of the parents was required.¹⁸ In North Dakota, therefore the law was that if all was equal between the parents, the standard to be used was the best interests of the child. The tender years doctrine was replaced with the gender neutral best interests of the child statute.¹⁹

Michigan codified the tender years doctrine in 1873 as follows:

*That in the case of the separation of husband and wife having minor children, the mother of the said children shall be entitled to the care and custody of all such children under the age of 12 years, and the father of all such children shall be entitled to the care and custody of all such children of the age of 12 years or over....*²⁰

¹³ Child rights in India: law, policy and practice page 108

¹⁴ Domboka v Samudzimu note 12. In that case the natural father of the child sought variation of the custody and courts resorted to the best interests of the child concept to determine the case.

¹⁵ 75 . N.D L. Rev 394

¹⁶ Id

¹⁷ Id page 396

¹⁸ Id 397

¹⁹ Id page 399

²⁰ Mich. Comp . Laws § 722.541

This provision was however a mere guideline and did not in any way inhibit “the power of the court to make such award of custody as it deemed in the child’s best interest”.²¹ In 1970 Michigan enacted the Child custody Act specifically providing for a best interests analysis. The best interests doctrine is usually traced to the opinion expressed by Justice Cardozo in *Finlay v. Finlay*²² in which he stated that “The chancellor in exercising his jurisdiction upon petition does not precede upon the theory that the petitioner, whether father or mother has a cause of action against the other or indeed against anyone. He acts as *parens patriae* to what is best for the interests of the child” The best interests doctrine though is applied differently. “In some states, the best interests of the child is said to be the exclusive factor on which a court should base its custody decisions. In other states, it is the major but not necessarily the only”²³ factor.

In Zimbabwe, the development of custody laws cannot be divorced from socio-cultural factors. Prior to colonization in 1896, the system of law then applicable was the customary law one. In terms of this system, a child did not belong to an individual but to the whole family. The concept of family should be understood in the context of the wider family which included the grand parents, aunts, cousins and uncles. Perhaps the most important factor then was the payment of bride price commonly known as lobola. This is a system which involves the payment of money or consideration to the family of the bride. Prior to colonization and the advent of a cash economy, payment was in the form of a hoe and cattle. If the bridegroom was unable to pay, he would spend a year at his future father in law’s place working the fields until they were satisfied that he had paid his dues. This practice has now become commercialized.²⁴ With the payment of lobola, the rights of custody and guardianship were transferred to the father but more to his family than to him as an individual. Most custody disputes did not find their way to court but were resolved within the family. Such settlements took the interests of the child into consideration. The current Constitution of Zimbabwe recognizes the dualism of law in section 89 by providing that” Subject to the provisions of any law for the time being in

²¹ 81 U Det. Mercy L. Rev 335

²² 204 NY 429 , 148 NE 624 (1925)

²³ Kramer T Donald : Legal rights of children page 39

²⁴ See Lobola: Its implications for women’s reproductive rights : Women and Law In Southern Africa

force in Zimbabwe relating to the application of African customary law, the law to be administered by the Supreme Court, the High Court and by any courts in Zimbabwe subordinate to the High Court shall be the law in force in the Colony of the Cape of Good Hope on 10th June , 1891 , as modified by subsequent legislation having in Zimbabwe the force of law.”²⁵ The customary law position has been overridden by statute law in the form of section 5 of the Customary law and local courts Act which provides that:

In any case relating o the custody or guardianship of children, the interests of children concerned shall be the paramount consideration irrespective of which law or principle is applied.

The effect of this provision is to make all custody matters whether falling under customary or general law, subject to the best interests of the child test. The Zimbabwean High Court confirmed this issue in *Moyo v. Sithole*²⁶ . It was held that the issue of lobola was irrelevant to a determination of custody, the paramount consideration being that of the best interests of the child. In contrast, in the case of *Tawonanhasi v Tshuma and others*,²⁷ the applicant was the father of a boy born during the brief subsistence of an unregistered customary law union. The mother of the child left Zimbabwe and went to live abroad. As in the *Domboka* case, the mother left the child in the custody of it’s great –grand mother, a third party. The court held that what had happened was clearly undesirable. The mother of the child should have left the child in the custody of the applicant who happened to be the natural father. He had paid *lobola*. There was no need to give custody to a third party when one of the parents was still alive and available. A natural parent should not be deprived of custody unless there are strong and compelling reasons to do so. Under the old Roman Dutch law, the father’s right of custody was seen as superior as long as the marriage remained intact. On divorce, custody was awarded to the innocent spouse. Section 10 (2) (3) of the Matrimonial Causes Act of 1985 now provides that the best interests of the child shall be of paramount consideration.²⁸ The dichotomy created by making the best interests of the child paramount from a general law perspective is that “ the very act of bringing a custody case into a formal system means

²⁵ The new Constitution preserves legal pluralism by stating that “ The law to be administered by the courts of Zimbabwe is sthe law that was in force on the effective date, as subsequently modified.

²⁶ HC – B – 35/85

²⁷ HB -63-08

²⁸ Mutetwa v Mutetwa 1993 (1) ZLR 176

first that “best interests” will be decided by an institution that is not recognized by the (rules, customs and traditions of the indigenous people of Zimbabwe) and that best interests will largely be interpreted according to the general law, based on foreign “western” values”²⁹ While Armstrong made some valid observations, she presupposes that in the indigenous system, the best interests of the child are not taken into account. This is an erroneous assumption because of paramount concern in this system is that the child is well looked after and does not lose benefits she/he would have if she/he was staying with parents. Although it may not consciously be called best interests within the social framework, it certainly takes the best interests of the child into account. Despite the differentials in the development of the best interests concept in both USA and Zimbabwe, the most important thing to note is that, CRC did not introduce the best interests concept into the laws of both countries but rather confirmed what was already in existence.³⁰

Custody of children and the human rights discourse

As noted *infra*, Zimbabwe signed and ratified CRC on the 11th of September 1990. That does not mean however that it becomes part of Zimbabwean law. In terms of section 111 B: Effect of international conventions:³¹

Except as otherwise provided by this Constitution or by or under an Act of Parliament, any convention, treaty or agreement acceded to, concluded or executed by or under the authority of the President with one or more foreign states or governments or international organizations-----

(a) shall be subject to approval by Parliament ; and

*(b) Shall **not** form part of the law of Zimbabwe unless it has been incorporated into the law by or under and Act of Parliament.*

The effect of the section is that there is no automatic transmission of the rights provided for in an international instrument into the laws of Zimbabwe. Despite this seemingly drawback in the Constitution, courts are not precluded under the cloak of judicial

²⁹ 30 Colum. Hum. Rts L Rev page 174

³⁰ 30 Colum. Hum. Rts . L. Rev 172

³¹ In the proposed new Constitution, international conventions, treaties and agreements are provided for in Section 327. Section 327(2) (a) and (b) are in tandem with Section 111 but section 327 (6) states that when interpreting legislation, every court and tribunal must adopt any reasonable interpretation of the legislation that is consistent with any international convention, treaty or agreement which is binding on Zimbabwe, in preference to an alternative interpretation inconsistent with that convention, treaty or agreement.

activism from incorporating international human rights instruments into judgments.³²

The late Zimbabwean Chief Justice Dumbutshena put this succinctly in the case of *A Juvenile v. The State*³³:

*.....the courts of this country are free to import into the interpretation of
(the Declaration of Rights) , interpretations of similar provisions in
International and Regional Human Rights Instruments such as , among others ,
the International Bill of rights , the European Convention for the Protection of
Human Rights and Fundamental Freedoms , and the Inter – American Convention
on Human Rights. In the end, international human rights norms will become part
of our domestic human rights law. In this way, our domestic human rights
jurisdiction is enriched.*

The USA as noted infra signed the CRC on the 16th of February 1995 but has not ratified it. This has not stopped critics from suggesting that CRC “ virtually mimics U.S law”³⁴ Those opposed to the ratification of the convention point out that it will supplant the rights of parents and destroy traditional family units because states and local authorities will become powerless to control children’s rights as they see fit.³⁵

Both the USA and Zimbabwe domesticated the Hague Convention on the civil aspects of International Child abduction. The convention is designed to protect the rights of parents for children who have been wrongfully removed or retained. The US Congress in 1988 passed the International Child abduction Remedies Act to implement the convention. Zimbabwe passed the Child Abduction Act 12 of 1995 which came into operation as from the 1st of June 1996. USA is one of the contracting states for purposes of enforcing the act. Although the convention does not deal strictly with the best interests of the child, the fact that both countries domesticated it is proof that international instruments are being taken seriously to some extent. Non- domestication of CRC by both countries may point to hesitancy on the comprehensiveness of the convention. The major short coming

³² See note 28 above

³³ 1989 (2) ZLR 61 @ 72

³⁴ Levesque Roger J.R ; Culture and family violence

³⁵ Id 164

of the Hague convention is the emphasis on the issue of jurisdiction and not best interests of the child.

An analysis of the practical application of the best interests concept in custody cases.

From the onset, it is important to describe what the best interest of the child test really is.

Gayle Pollack states as follows:

The best interests of the child test, the test prescribed by statute in most states to determine child placement in custody disputes , takes a broad look at factors which impact the well being of the child. Under this test, courts have substantial discretion to study parents closely to determine who will provide the best home for the child. ³⁶

Implicit in that statement is the overarching emphasis on judicial discretion an issue which has posed the greatest challenge to the test. Michigan has got twelve factors that a court must consider in making a custody determination. These are:

- (a) The love, affection and other emotional ties existing between the parties involved and the child.
- (b) The capacity and disposition of the parties involved to give love, affection, and guidance and to continue the education and rising of the child in his or her religion or creed, if any.
- (c) The capacity and the disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of the state in place of medical care, and other material needs.
- (d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.
- (e) The permanence, as a family unit, of the existing or proposed custodial home or homes.
- (f) The moral fitness of the parties involved.
- (g) The mental and physical health of the parties involved.
- (h) The home, school, and community record of the child.

³⁶ 23 N.Y.U Rev. L. Soc change 604

- (i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.
- (j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent – child relationship between the child and the other parent or the child and the parents.
- (k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.
- (l) Any other factor considered by the court to be relevant to a particular child custody dispute.

CRC in article 3 makes best interests of the child a primary consideration. Article 9 mandates that children shall not be separated from their parents against their will unless a competent court orders so and such separation shall be in the best interests of the child. A child who is capable of forming his/her views shall freely express them and such views shall be given due weight (Article 12) On paper the Michigan law seems to take into account the relevant provisions of CRC. Eight other states have through the Uniform Marriage and divorce Act, adopted similar provisions as the Michigan Child Custody Act. In Zimbabwe, as part of a divorce settlement, parties can agree on the issue of custody and file a consent paper which also deals with other issues of ancillary relief. From the writer's experience, courts rarely question the contents of a consent paper as consensus is invariably reached with the involvement of lawyers. Courts also play a part in a pre trial conference. All parties file summaries of evidence that will be led at the trial. A conference is held in the chambers of a Judge who will probe the matter actively with a view to the parties reaching a settlement. Parties though are not forced to reach consensus. If they do not agree, the matter will be rolled over for trial and the judge who presided over the pre trial conference will not preside over the trial. In Michigan, "Once a court exercises jurisdiction over a child custody dispute, a court may not accept a stipulated agreement reached by the parties to change custody unless the trial court determines that such a change is clearly in the best interests of the child"³⁷

While the goal of reaching consensus is laudable, it is the writer's contention that interests of children may not be taken into account but rather those of the parents. In

³⁷ Haas O Trish supra 340

Zimbabwe, children are seldom involved in the process of reaching consensus. It is left to the two parents to decide. No guardian *ad litem* is appointed for the child and inevitably, the interests of the child are not taken into account. The Michigan statute of requiring a high evidentiary burden, that of the best interests of the child test in spite of any agreement that the parents have come up with is more preferable. The best interests concept has been mired in racial overtones in the USA. Pollack argues that “Race clearly plays a role in custody disputes over biracial children , but remain vague about how the races of the child and of the parents mesh with other parenting factors to support the final custody determination”³⁸ Judges in the USA are socialized to negatively stereotype blacks.³⁹ In *Palmore v. Sidoti*,⁴⁰ which Pollack discusses,⁴¹ a Florida trial court had transferred custody of children from the natural mother to the father on the basis that the former had married a black man. The Supreme Court set aside the transfer on the basis that it discriminated on the basis of race. The difficulty even with the Michigan statute is that “the best interests test does not specify the relevance of race”⁴² In *re Marriage of W.J.W.*, the court stated that as a recognized fact of life, it is generally seen that the mother of a girl of tender years is deemed better suited to care for that child.⁴³ The same was stated in *Buntyun v. Smallwood*.⁴⁴ Courts are not agreed on the effect of a child’s preferences but “ the overwhelming majority of courts have concluded that the wishes of a child as to which parent he or she prefers as the primary custodial parent is helpful and important to a court in reaching a decision about a placement , but is nonetheless not binding on the court if there are countervailing reasons why custody should not be awarded to the preferred parent”⁴⁵ The Uniform Marriage and Divorce Act provides that courts *shall consider* the wishes of a child regarding custody. The state of Georgia gives a child who has reached the age of 14 years the right to select a custodial parent and the court is obliged to do so unless the person is not *fit and proper*.⁴⁶ Kramer lists the

³⁸ 23 N.Y.U Rev . L and Soc change 614

³⁹ Id

⁴⁰ 466 U.S 429(1984)

⁴¹ Pollack supra 615

⁴² Id 612

⁴³ 643 SW2D 85 (Mo app 1986)

⁴⁴ 412 So 2d 236 (Miss 1982)

⁴⁵ Kramer supra at 45

⁴⁶ Id 47

following factors as guiding the courts in determining the weight to be given to the wishes of a child particularly where there is no controlling statute:

1. The child's mental capacity to make an informed and intelligent decision
2. The child's level of maturity
3. The child's age , often referred to as the age of discretion
4. Whether a child is a good judge of what is best for him or her
5. The strength , clarity , or sincerity of the child's expressed preference
6. Whether a child's wishes are motivated by a parent who suggests that he or she will apply less discipline and restraint
7. Whether the expressed preference was wrongfully induced by a parent (such as through the promise of favors or where a parent allegedly poisoned the child's mind)
8. Whether the child's wish is to live with a nonparent ⁴⁷

The manner of eliciting views is important and generally most judges favor interviewing the children in chambers without the involvement of lawyers and parents. ⁴⁸The CRC strongly favors the involvement of children in matters that concern them and that such views shall be given "due weight". The USA laws in this regard seem to conform with CRC especially on the value of children's views not being the only factor but falling among other factors that the courts consider as best interests. Other indicators from the USA courts include the issue of religion. In *re Marriage of Gersovitz* , ⁴⁹ custody of a Jewish boy was given to his non -Jewish mother on the basis that religious instruction should not predominate other factors. In *Millard V. Millard*, ⁵⁰ a mother who engaged in an extra marital affair was denied custody.

The Zimbabwean courts have not been consistent in the application of the best interests of the child concept. In *Ryan v. Ryan* , ⁵¹ the custodian parent sought divorce on the grounds of cruelty. She was granted custody of the less than one year old child of the marriage. The court seemed to have been influenced by the tender years doctrine.

⁴⁷ Id 48

⁴⁸ Id 50

⁴⁹ 779 P2d 883 (Mont 1989)

⁵⁰ 782 SW2d 93 (Mo App 1988)

⁵¹ 1963 R and S 356

Judicial biases are also apparent in some cases. In *Zvorwadza v. Zvorwadza*,⁵² the parties were married in terms of the Customary Marriages Act Chapter 5:07 that allows a man to marry more than one wife. The trial judge awarded custody of a boy child to its father despite the fact that at no point had the father even indicated that he wanted custody. He led no evidence that it would be in the best interests of the child that he be awarded custody. The judge was apparently of the view that under customary law, the custody of a male minor had to go to the father. The Supreme Court upheld the appeal filed by the mother of the child and pointed out that :

- (a) It was difficult to see any proper basis for the trial court's decision in the absence of any specific evidence from the father on the best interests of the child.
- (b) Both in general and customary law, the interests of the child are the paramount consideration when it comes to custody.
- (c) Courts should ascertain the child's preferences about which parent it wishes to live with where neither parent can be said to be unsuitable to be awarded custody and the child in question is of sufficient age and intelligence to be able to express a proper opinion.
- (d) The fact that one party has more earning power , which would enable him to afford superior accommodation and amenities , is not the crucial aspect in matters of this nature.

The decision in *Zvorwadza* seems to imply that it is only when both parents are suitable that the court should take the views of the child into consideration. CRC deals on the other hand with the capability of the child to freely express his/her views. Zimbabwe case law is therefore not consistent with CRC in this regard though the intention to decide where the best interests of the child lie is the same. The manner of eliciting the views of the children is often done in the Chambers of the Judge or the presiding Magistrate if the case is being heard at the Children's Court. This is consistent with Article 12(2) of CRC which states that children give views in a non threatening environment.

⁵² 1996 (1) ZLR 404

*Hackim v. Hackim*⁵³ set out factors that the court should take into account in considering what is in the best interests of the child. These are :

- (a) sex
- (b) age
- (c) health
- (d) educational needs of child
- (e) social and financial position of each parent
- (f) character and temperament of each parent
- (g) past behavior of parent towards child
- (h) Child's personal preferences if they have reached the age of discretion

With regards to sex, the court held that there is no principle of law that a son is better off with his father than his mother. The sex of the child is merely one of the considerations to be taken into account. And yet in a subsequent case, the court held that *prima facie*, the interests of a female child are best better served by placing them in the custody of their mother.⁵⁴ The same decision had been reached in *Nyathi v Nyathi*⁵⁵ that the physical and emotional development needs of a 12 year old girl would be best served if she were in the custody of her mother. The Zimbabwean courts flirtation with the tender years doctrine is revealed clearly in the treatment of custody cases upon separation. Whilst custody is joint when parties are living together, upon separation, the Guardianship of Minors Act Chapter 5: 08 provides in section 5 (1) that:

(1) Where either of the parents of a minor leaves the other and such parents commence to live apart; the mother of that minor shall have the sole custody of that minor until an order regulating the custody of that minor is made

If the mother is denied custody or the child is removed from her custody, she can apply to the Children's court to have her rights restored. Although the operative statute reads that the "Children's Court **may**"⁵⁶ make an order restoring custody to the mother, it was held in the *Mutetwa*⁵⁷ case that until the father brings an application and can show that it is in the best interests of the minor children that he should have custody, the mother is entitled

⁵³ 1988 (2) ZLR 61

⁵⁴ *Goba v. Muradzikwa* 1992 (1) ZLR 212

⁵⁵ HC – B 161/87

⁵⁶ Section 5 (2) (b)

⁵⁷ *Supra*

to custody. This interpretation is also not consistent because it had been held in other cases that the courts are not there to just rubber-stamp the seemingly predominant right of the mother to custody upon separation but should look at the best interests of the child.⁵⁸ Political factors have also been considered in the best interest of the child test. In *Dolby v. Lewis*,⁵⁹ the natural father applied for custody on the basis that the mother of the child has attempted to smuggle the child to then apartheid ruled South Africa. This would be detrimental to the child if she was made to grow up in a divided society. Custody has also been awarded to third parties. In *Z v Z*,⁶⁰ the natural mother of the children subjected them to physical abuse. The natural father engaged in extra marital affairs. Custody of the children was awarded to the grandmother. In *Samudzimu v Ngwenya*⁶¹ the court stated that a custodian parent is in absolute charge of the day to day needs of the children. She determines where they go to school, which church they go to, which houses they visit, which friends they play with. She does not exercise these powers in consultation with anyone. As long as these are in the best interests of the children, she cannot be impugned. In that case, the onus was placed on the respondent to show that the respondent's relocation to another country was not in the best interests of the minor children. It therefore seems that the courts in Zimbabwe look to the custodian parent as having absolute rights over the children and this is part of the best interests of the child concept. In *Berens v Berens*⁶² the court stated that while the custodian parent may consult the non-custodian parent, as this would in some cases be in the best interests of the child, failure to consult would not on its own turn a good decision into an unreasonable or irrational decision.

Both the USA and Zimbabwe jurisdictions provide ample evidence of the application of the best interests of the child test in custody cases. However, the challenge is the lack of parameters or guidelines on what exactly constitutes best interests. The major challenge is that children do not have legal capacity until they reach a certain age. In Zimbabwe, it

⁵⁸ See *Lynch v Lynch* 1965 (2) SA 49 (SR); *Marira v Marira* HH-167-87 and *Mutseriwa v Mutseriwa* HH-113-85

⁵⁹ SC 34 /87

⁶⁰ HC – B – 17/87

⁶¹ HH-92-08

⁶² HH-28-09

depends on the age of the child and the controlling statute. In terms of the Legal Age of Majority Act of 1982, now Section 15 of the General Law Amendment Act, a child becomes a major at 18 years. In terms of the Marriage Act, in section 22 boys can marry at 18 and girls at 16. Once a girl marries at 16 she becomes a major and this status remains unaffected even if she divorces before reaching the legal age of majority.⁶³ The basis of the attack of the best interests test is precisely the discretion given to Judges. Commenting on the factors considered, Bartlett *et al* postulate that “the difficulty with such factors is that they are so subjective and future looking as to leave room for wide discretion for Judges to decide what is best for the child in accordance with their own instincts and biases”⁶⁴ Statistically, mothers get physical custody in approximately 72 % of the cases, fathers 9% and both parents 16%.⁶⁵ These are however mostly uncontested cases.⁶⁶

Gender biases have been alleged in the test. In 1994, a Michigan judge courted controversy when he awarded custody of 3 year old Maranda Ireland to her father because her mother used a daycare facility while she was attending college classes.⁶⁷ The indicators of the bias include the fact that mothers are held to a high standard of personal behavior , they make and earn less money and “in the majority of cases, women get custody because fathers do not want custody. When fathers want custody, they stand a very good chance of getting it”⁶⁸ The best interests test standard is described as “an indeterminable, vague standard” that is subjective.⁶⁹ In the weakness of judicial discretion may actually lie the strength of the best interests test. Courts even where guidelines are set out , are given the leeway of looking at other factors that may influence there decisions. Custody cases can never be homogeneous and giving a discretion allows all factors to be taken into account.

D.C Superior Court

⁶³ Section 78 of the proposed new Constitution states that every person who has attained the age of 18 years has the right to found a family presumably meaning marriage. The constitution does not define family

⁶⁴ Gender and the Law. Theory, doctrine , commentary page 489

⁶⁵ Id

⁶⁶ Id

⁶⁷ 13 Ga. St. U.L.R page 845

⁶⁸ Id page 856

⁶⁹ Id page 849

The DC Code on child custody specifically states that in any proceedings involving custody of children, the best interests of the child shall be the primary consideration regardless of race, color, national origin, political affiliation, sex or sexual orientation. Furthermore, a court is empowered to make orders as to sole custody, sole physical custody, joint legal custody, joint physical custody or any other custody order which the court considers to be in the best interests of the child.⁷⁰ A distinction is drawn between legal and physical custody. The Act empowers courts to keep frequent contact between parents and children. There is a rebuttable presumption that joint custody is in the best interests of the child unless there is evidence of abuse and parental kidnapping. The law has guidelines on what the courts should consider as the best interests. However, the courts are not limited to the factors outlined but are free to consider other factors. Among the factors listed are, the wishes of the child where practicable, the wishes of the child's parents and the interaction and interrelationship of the child with his or her parents and siblings.⁷¹ The observations on the uncertainty of the best interests test therefore hold true for the DC Superior Courts.

The most important intervention however lies with the promulgation of the Family Court Act of 2001 for DC. Jurisdiction of the court includes custody of children.⁷² The family court is provided for in the act as one of the divisions of the court.⁷³ More importantly the act provides for alternative dispute resolution as follows:

*To the greatest extent practicable and safe, cases and proceedings in the Family Court shall be resolved through alternative dispute resolution procedures in accordance with such rules as the Superior Court may promulgate.*⁷⁴

The act further provides that court personnel undertake training in various aspects of Family Law. This includes use of technology and child friendly atmosphere. A written report must be submitted to Congress within 90 days after the end of each calendar year. Funds may be appropriated by the Mayor of DC.⁷⁵ On paper therefore, DC Superior

⁷⁰ DC St 1981 16- 914

⁷¹ Id

⁷² 11- 1101 (4)

⁷³ Id 1104

⁷⁴ 11 - 1102

⁷⁵ 11 -1104 and 1106

Courts Family Law division presents a classic case of the multi disciplinary approach to deal with all issues involving children, from custody to children in conflict with the law. The Family Court Act is in conformity with CRC in going beyond just law but administrative procedures to ensure that the rights of the child are protected.

Family Court in action

At the DC Superior Court, the domestic relations branch which handles child custody cases falls under the Family Courts. A family court intake center was opened in August 2004. This is a free walk in center where persons with *inter alia* custody issues are assisted. The intake center is colorful and adorned with art made by school children from DC public schools. In that way it provides an atmosphere which is not threatening to children. The domestic relations branch has established a rapport with the DC Bar which provides services free of charge. For example every month, volunteer attorneys and paralegals present a two session workshop to help individuals file for child custody without an attorney. The form that has been designed by the DC Bar places the best interests of the child at the center⁷⁶. Applicants are asked to state why they think it is in the best interests of the children that they be awarded custody.

The Multi- door dispute resolution division helps parties to settle disputes through arbitration, case evaluation and conciliation. Services at Multi door are free for anyone living in DC. According to the 2004 report filed with Congress mediation is beneficial because it is faster than adjudication; it provides faster case closure, faster settlement of cases and low recidivism rate.⁷⁷ American Bar Association Model Standards of Practice for Family and Divorce Mediation state that mediation from experience can promote the best interests of children.⁷⁸ However mediation is not appropriate for all families.⁷⁹

The case evaluation program works with experienced family law attorneys who evaluate custody cases and advise parties on the strength and weaknesses of their case. Alternative dispute resolution is not without its critics. It has been described as (1) stressful (2) expensive (3) facilitates exploitation of one party (4) produces unfair or irrational compromises (5) may subordinate women if it is made compulsory (6) the mediator is

⁷⁶ A copy of the form is attached

⁷⁷ Note 62 at page 21

⁷⁸ 35 Fam. L, Q 28

⁷⁹ Id

supposed to be impartial and not represent the interests of one party over the other and (7) the best interests of the child is not the primary focus but accommodation between parents.⁸⁰ The major downside is that children are not involved. It is parents, attorneys, mediators but no children. Given these facts, the paramount question then becomes of what other alternative test there is to ensure that custody cases are decided in a manner that is beneficial to the child.

Alternative standards

While alternative dispute resolution as practiced at the DC Superior Courts provides a non- adversarial method of handling custody disputes, one test that has been touted as a possible alternative for the best interests test is that of primary caretaker presumption. This test involves determining which parent provides day to day care of the child including (1) preparing and planning meals (2) bathing, grooming and dressing (3) purchasing , cleaning and care of clothes (4) medical care including nursing and trips to physicians (5) arranging for social interaction among peers after school (6) arranging alternative care (7) putting child to bed at night , attending to child in the middle of the night , waking the child in the morning (8) disciplining , teaching general matters and toilet training (9) educating and (10) teaching elementary skills.⁸¹ The primary caretaker test has been described as more determinate than the best interests test in that it links parental rights with involvement in the daily lives of children.⁸² Ronald Henry postulates that the list weighs heavily in favour of women.⁸³ It also “incorporates the same kind of gender based stereo- types that disadvantages women under a best-interests- of – the child test”⁸⁴ Judge Gary Crippen criticized the primary caretaker test and found that contrary to expectations, the primary caretaker preference in Minnesota increased litigation and relied inappropriately on fault and gender stereo- typing.⁸⁵ The test may just be another attempt to return to tender years doctrine and that best interests lie with the mother.⁸⁶ Another test is that of joint custody. Bartlett *et al* postulate that this trend

⁸⁰ 13 Ga. U.L Rev U. L. Rev page 898

⁸¹ Bartlett Supra 490

⁸² Id

⁸³ Id

⁸⁴ Id page 491

⁸⁵ See 75 Minn. L. Rev 452-486

⁸⁶ 73 N. D Law Rev 274

was fuelled in the 1980s by father's who wanted the same rights of access for fathers.⁸⁷ Indeed groups like Justice 4 Father's in the UK have raised awareness of this issue by among other things dressing up as Spiderman and climbing the walls of Buckingham Palace.⁸⁸ As noted infra the DC Code has a presumption in favor of joint custody unless this is not in the best interests of the child. Oregon prohibits joint custody unless parties want it.⁸⁹ Feminists argue that "...to the extent that joint custody exerts any pressure against familiar gender stereo types , it does so by reducing the custodial rights of mothers who have acted as primary caretakers in order to give custodial rights to fathers who have not earned them"⁹⁰ The North Dakota Supreme Court pointed out that the test " cannot control the relationship between parents beyond the walls of the court and that the parents will determine whether or not the relationship will work"⁹¹ In other words, the interests that will now be paramount are those of the parents and not the children. In Zimbabwe, the concept that is used is that of access. A non custodial parent is entitled to access so that the bond between parent and child is not broken.⁹² The problems caused by access were well set out in the case of *Reith vs. Antao*.⁹³ Custody had been awarded to the mother. During access visits, the father told imparted negative information to the then four year old daughter about her mother and her new husband. The mother of the child taped some of these conversations and expert reports revealed that the child was frightened and traumatized by her father. Joint custody though ideal is fraught with inconsistencies as it results in the child being shuffled between one home and another.

Conclusion

While is conceded that the best interests test is based on judicial discretion, it is still the ideal test as it attempts to take a holistic approach in dealing with custody matters. The alternative methods and tests all point out to the fact that ultimately, all parties are concerned with what is best for the child and not the parents. Joint custody and primary caretaker tests instead must as in most states be among the factors that courts take into account in determining best interests of the child and not as stand alone. The last word

⁸⁷ Page 491

⁸⁸ See www.fathers-4-justice.org

⁸⁹ Or. Rev. Stat § 107.169(3)

⁹⁰ Bartlett supra page 492

⁹¹ Note 77 Supra page 278

⁹² Section 6 Guardianship of Minors Act

⁹³ HH- 229/90

goes to Jacobs who states aptly that, “Although the best interests of the child standard invites judicial subjectivity, most Judges do have the best interests of the child at heart and so far no alternative standard offers a better solution.”⁹⁴

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