The legal role of the Master of the High Court of Zimbabwe as the upper guardian of the minor child(ren) in Zimbabwe in comparison with other jurisdictions

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Introduction

Guardianship and Custody are important legal concepts when dealing with the affairs of minor children. Guardianship and Custody are important concepts in law with regards to minor children. These concepts are closely intertwined, and as such, often confused by many. Custody refers to the physical control and primary responsibility of well-being and daily care that a person has over a minor child, whilst Guardianship encompasses the full rights over the affairs of a minor including dealing with health, education needs, financial security or any welfare needs.[1] The primary focus of this paper is on guardianship, and particularly the roles of the Master of the High Court as the upper guardian of the minor child in Zimbabwe amid the existing inheritance and estate laws in Zimbabwe.

Zimbabwean legal framework

A clarity on who is a minor is, crucial in this paper to lay a good foundation on who the courts of law through the office of the Master of the High Court, protects. A minor in terms of our law any person under the age of 18. The Constitution of Zimbabwe in terms of section 81 (2) provides that, "A child's best interests are paramount in every matter concerning the child". The guiding principle in all matters involving a child, is the promotion of the child's best interest at all times. In Zimbabwe, the Guardianship of Minors Act [Chapter 5:08] regulates the law regarding minors, in accordance with the provisions of the Constitution of Zimbabwe.[2]

Guardianship in its widest sense connotes custody and embraces the care and control of the minor's person as well as the administration of his property and business affairs. There are instances where custody and guardianship are separated; the custodian parent has the care and control of the minor's person, while the guardian parent administers his/her property and business affairs (guardianship) in the narrower sense.[3]

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[1] Black Law Dictionary 8th Edition: West Thompson business, USA

[2] Mazvita C. Nyabereka, 'Guardianship of the Minors in Zimbabwe: Parliament Gazettes Guardianship of the Minors' 32 May 2021, Family Law

[3] The New International Webster‟s Comprehensive Dictionary of the English language (2003 edition): Encyclopaedic edition-Trident Press International

Further, the concept of guardianship and sole guardianship are two different issues. That is why they are governed by different sections under the Guardianship of Minors Act [Chapter 5:08]. Guardianship per se is the paramount right exercised by the father of a child born inside wedlock in terms of common law and this is referred to as guardianship simpliciter.[4] This right is subject to section 3 of the Act and the power of the court as the upper guardian of children.

In terms of section 3 of the Guardianship of Minors Act [Chapter 5:08], a father whose guardianship simpliciter has not been challenged can exercise his rights in consultation with the mother of the child. The consultation duty imposed on the father by the law equally applies to parties who both married and divorced. Situations may arise where parents may disagree on what is best for the child, the Act is clear and it provides as follows,[5]

Not all parents are equipped to know, how to act in the best interests of their minor children. Section 19 of the Constitution prescribes that in all matters involving minor children their best interests are paramount.[6] Whatever, is done if it affects children must always be done to ensure that the children are protected and that they enjoy the rights accorded them as children in the Constitution.[7]

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.[8]In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.[9] A child's best interests are of paramount importance in every matter concerning the child.[10] In all actions concerning the care, protection and well-being of a child the standard that the best

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[4] The New International Webster‟s Comprehensive Dictionary of the English language (2003 edition): Encyclopaedic edition-Trident Press International

[5] Tapiwa Mahlwa, 'Zimbabwe, The Law on Guardinaship, Custody and Access in Zimbabwe' October 2020

[6] Reconceptualising the 'paramountcy principle': Beyond the individualistic construction of the best interests of the child, Admark Moyo* Lecturer in Law, Midlands State University, Gweru, Zimbabwe; PhD Candidate, University of Cape Town, South Africa

[7] Mirriam T. Majone, 'Guardianship and Parental fights' January 20, 2018 Newsday, https://www.newsday.co.zw/2018/01/guardianship-parental-fights/

[8] Art 3(1) United Nations Convention on the Rights of the Child, GA Res 44/25, annex, 44 UN GAOR Supp (No 49) 167, UN Doc A/44/49 (1989) entered into force 2 September 1990.

[9] Art 4(1) African Charter on the Rights and Welfare of the Child, OAU Doc CAB/ LEG/24.9/49 (1990) entered into force 29 November 1999.

[10] Sec 28(2) Constitution of the Republic of South Africa, 1996.

interest of the child is of paramount importance, must be applied. [11] Courts play the role of a guardian angel in promoting and protecting the interests of children.[12]

When a serious dispute on any guardianship aspect arises either parent whether they are married to each other or not can approach the High Court for resolution of the dispute. The High Court is the upper guardian of minors and has the last say in all matters regarding the welfare of the minor child. And who has the final decision between the custodial and non-custodial parent? Custody and guardianship are not the same. The ideal situation is provided for in section 26 (d) as read with sections 19 (1) and 81 (2) of the Constitution.21 Ideally, the Courts centre more on needs at welfare benefit level of the children and custodial parents upon divorce. Furthermore section 46 (1) (c) of the constitution provides that the Court must also take into account international law, all treaties and conventions to which Zimbabwe is a party. As a result international human rights instruments such as the UN Convention on the Rights of the Child22 and the African Charter on the Rights and Welfare of the Child providing for the best interest of the child must be taken into account.

The Matrimonial Causes Act, 1985, does not have any provision which directs the Court to ensure that arrangements for the welfare of children have been made and are satisfactory or the best that can be devised under the circumstances before a divorce is finalised. It is submitted that on this shortcoming, there are lessons that can be learnt from Zambia. The Zambian Matrimonial causes Act 97 provides that a decree *nisi* of dissolution of a marriage or nullity of a voidable marriage shall not become absolute unless the Court by order has declared that it is satisfied that:

"Proper arrangements in all the circumstances have been made for the welfare, and where appropriate, education or advancement for those children"

Section 71 of the said Act further provides that the decree shall not be made absolute except where it is impracticable for the party or parties appearing before the Court to make such arrangements. Section 71 (2) is couched as follows,

[11] Sec 9 South African Children's Act 38 of 2005.

[12] V.C. Govindaraj, 'Law Relating to Children: Custody of Minors and the Role of Courts as Parens Patriae' October 2018

"The Court shall not make an order declaring that it is satisfied...unless it has obtained a satisfactory undertaking from either or both of the parties to bring the question of the arrangements for the children named in the order before the Court within a specified time".

Failure to abide by this provision leads to a void order. Similarly, section 41 of the English Matrimonial Causes Act, as amended provides that,

"The Court shall not make absolute a decree of divorce or nullity of marriage, grant a decree of Judicial separation, unless the Court by order, has declared that it is satisfied that b (i) arrangements for the welfare of every named child have been made and are satisfactory or the best that can be devised under the circumstances".

The above provisions are consistent with the sentiments of this paper. It is the argument of this research that upon the distribution of matrimonial property following divorce, the Court must direct their attention in the first instance to the provision of a home for children. It can achieve this for instance by ordering the transfer of the house to the parent with whom the child is to live, or the division of proceeds of sale permitting her to purchase accommodation, or settling it on terms that it be not sold during the children's dependency. This remains ideal and can only be possible when there is a specific provision in the Act directing the Courts to ensure that the arrangements for the welfare of the child are adequate before a divorce is finalised.

The English Framework: *Parens Patriae Doctrine*

In England, the court come into the picture of the welfare of the minor child through the common law *parens patriae* doctrine. From the earliest time, the sovereign, as *parens patriae*, was vested with the care of the mentally incompetent. This right and duty, as Lord Eldon noted in ***Wellesley v. Duke of Beaufort [(1827), 2 Russ. 1, 38 E.R. 236] . . . at 243*** is founded on the obvious necessity that the law should place somewhere the care of persons who are not able to take care of themselves. In early England, the *parens patriae* jurisdiction was confined to mental incompetents, but its rationale is obviously applicable to children and, following the transfer of that jurisdiction to the Lord Chancellor in the 17th century, he extended it to children under wardship, and it is in this context that the bulk of the modern cases on the subject arise. The *parens patriae* jurisdiction was later vested in the provincial superior courts of this country, and in particular, those of Prince Edward Island.

The origin of this doctrine is in common law and was made use by the English chancery to give power to the Crown to administer estates of orphans. The same doctrine was applied by the United States Supreme Court in the case of **Louisiana v. Texas**.[13] Later this doctrine has found its way into the Indian legal system. The term '*parens patriae'* means 'parent of the nation'. It places the state in the role of 'parent of nation'.

If we look at the doctrine narrowly, it is primarily used in juvenile justice cases where the state is given the power to intervene and act for the welfare of the child thus replacing the negligent parent or guardian. The state can not only interfere for minors but can also act as the parent for disabled and incompetent persons who are unable to represent themselves. As per the modern guardianship status, both the state and the court need to act accountably and respect the fiduciary relationship with the thought that they were to be directly accountable to the incompetent person if he were to turn competent again.[14] The *parens patriae* jurisdiction is . . . founded on necessity, namely the need to act for the protection of those who cannot care for themselves. The courts have frequently stated that it is to be exercised in the "best interest" of the protected person, or again, for his or her "benefit" or "welfare".

The situations under which it can be exercised are legion; the jurisdiction cannot be defined in that sense. As Lord MacDermott put it in ***J. v. C., [1970] A.C. 668, at 703***, the authorities are not consistent and there are many twists and turns, but they have inexorably "moved towards a broader discretion, under the impact of changing social conditions and the weight of opinion . . . " In other words, the categories under which the jurisdiction can be exercised are never closed. Thus I agree with Latey J. in Re X [(a minor), [1975] 1 All E.R. 697] . . . at 699, that the jurisdiction is of a very broad nature, and that it can be invoked in such matters as custody, protection of property, health problems, religious upbringing and protection against harmful associations. This list, as he notes, is not exhaustive.

What is more, as the passage from Chambers cited by Latey J. underlines, a court may act not only on the ground that injury to person or property has occurred, but also on the ground that such injury is apprehended. I might add that the jurisdiction is a carefully guarded one. The courts will not readily assume that it has been removed by legislation where a necessity arises to protect a person who cannot protect himself.[15]

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[13] Louisiana v. Texas, 176 U.S. 1 (1900).

[14] S. Payton, The concept of the person in the parens patriae jurisdiction over previously competent persons, PUBMED (May 3, 2021, 9:18 PM), https://pubmed.ncbi.nlm.nih.gov/1479309/.

[15] https://juriscentre.com/2021/05/10/doctrine-of-parens-patriae/

> *. . . the jurisdiction may be used to authorize the performance of a surgical operation that is necessary to the health of a person, as indeed it already has been in Great Britain and this country. And by health, I mean mental as well as physical health. In the United States, the courts have used the parens patriae jurisdiction on behalf of a mentally incompetent to authorize chemotherapy and amputation, and . . . in a proper case our courts should do the same. Many of these instances are related in* ***Strunk v. Strunk, 445 S.W. 2d 145****, where the court went to the length of permitting a kidney transplant between brothers. Whether the courts in this country should go that far, or as in* ***[Matter of Quinlan, Re 355 A. 2d 647 (N.J. S.C., 1976)] . . .***

Sometimes, even courts exceed their parens patriae jurisdiction by using it in unnecessary circumstances. In the case of **Shafin Jahan v. Asokan K.M**.[16] (better known as the Hadiya case), the parents of a missing girl filed a writ petition in the High Court asking to annul her marriage but the girl gave a statement of having free will while entering into the marriage. Even after her statement, the court annulled the marriage by applying the doctrine of *parens patriae*. In analysing the above, the Supreme Court later pointed out that the *parens patriae* jurisdiction cannot be used in every circumstance arbitrarily but can only be used in exceptional circumstances where the incompetency of the person or group of persons or endangering circumstances is perfectly visible.[17]

The United States of America

In the United States, the doctrine of *parens patriae* commonly refers to the government's responsibilities as supreme guardian of children, mentally ill adults, and people who are otherwise legally incompetent. Under *parens patriae*, U.S. and state courts have the power and obligation to intervene on behalf of the best interests of a child or incompetent person, in the event his or her welfare is in jeopardy. This may be in circumstances of divorce and child custody, healthcare, and other issues.

South Africa

A Master of the High Court is appointed for every provincial division of the High Court of South Africa. Masters' Offices are situated in Bloemfontein , Cape Town , Grahamstown , Kimberley , Mmabatho/Mafikeng , Nelspruit, Pietermaritzburg , Pretoria , Umtata , Bisho, Thohoyandou, Johannesburg, Polokwane, Durban, and Port Elizabeth. The Master of the High Court is a creature of statute and various Acts regulate the duties and powers of the Master. The most

[16] Shafin Jahan v. Asokan K.M., 2018 SCC OnLine SC 343.
[17] Archita Tiwari, 'The Doctrine of Parens Patriae' June 2020

important of these are the Administration of Estates Act, 1965 (Act 66 of 1965), the Insolvency Act, 1936 (Act 24 of 1936), the Companies Act, 1973 (Act 61 of 1973), the Close Corporations Act, 1984 (Act 69 of 1984) and the Trust Property Control Act, 1988 (Act 57 of 1988).

The Rationalisation of the Administration of Estates Act, 1965, which includes the functioning of the Guardian's Fund and the appointment of the Master, has not been yet completed. In terms of the present Act the Master's Offices execute inter alia the following functions which are crucial to this discussion:

(i) The administration of estates of deceased and insolvent persons in accordance with the applicable statutory prescriptions.
(ii) The protection of the interests of minors and legally incapacitated persons.
(iii) The protection and administration of the funds of minors, contractually incapacitated and undetermined and absent heirs, which have been paid into the Guardian's Fund.

Conclusion

Conclusively, there is a lacuna in terms of Zimbabwean law where the office of the Master of the High Court is underutilised in terms of protection of minor children and yet it is at the heart and soul of that legal mechanism. The Master of the High Court’s office must be bestowed and endowed with both legal and administrative powers to enhance, promote, regulate and supervise the protection of minor children in the country.