

**Amina Khatib, ex parte
(2003) SLR 36**

Melchior VIDOT for the Applicant
Philippe BOULLE for the Respondent

Ruling delivered on 30 July 2003 by:

PERERA J: Subsequent to the ruling of 3 October 2002, the Respondent contended that before any other guardian is appointed, a hearing to determine whether the father of the child is incompetent must be held. It was submitted that it was only then that there would be "ouverture de la tutelle" paving the way for the appointment of any other suitable person, who would be the Applicant.

It is conceded by Learned Counsel for the Applicant that the procedure proposed by Counsel for the Respondent as regards procedure is correct. In *Attorney-General (1977) SLR 260*, the parents of a minor child were lawfully married. Subsequently their marriage was dissolved, and the decree of divorce was pronounced against the wife. Later, the husband died, and the Attorney-General applied for the appointment of a guardian under Article 402 of the Civil Code. Article 386 precluded the wife from being the guardian of the minor child.

Sauzier J held that guardianship commenced with the death of the parents, and that guardianship vests as of right on the surviving parent. Full effect of Article 386 applied only as regards the enjoyment of the child's property until a guardian is appointed by the Court:

the mother of the children who is guardian as of right succeeds to the guardianship under Article 440 before a new guardian is appointed by the Court.

In the present case, the Respondent, as the surviving spouse of the late Georgette Andrade, a daughter of his wife by a previous marriage, was resident in Kenya, as the guardian of the child who was also living with her at the time of her death. That affidavit was sworn and declared on 10 days after the death of his wife, before a Commissioner for oaths in Nairobi, pursuant to the provisions of the Statutory Declaration Act of Kenya. On 9 November 2000, the said Michelle Van Tongeren, by an affidavit sworn and declared before a Commissioner for oaths in Nairobi, Kenya and duly authenticated by the Registrar of the High Court of Kenya, The Kenya Embassy in Abu Dhabi, and the United Arab Emirates Ministry and Foreign Affairs in Dubai, vested the legal guardianship of the child in Mrs Amina Khatib (the Applicant) resident in the United Arab Emirates, who is a sister of the late Georgette Andrade, and therefore an aunt of both Michel Van Tongeren, and of the

Respondent. Learned Counsel for the Respondent submitted that, there should be a hearing to determine whether the father of the child is incompetent before "ouverture de la tutelle" paving the way for the appointment of any other suitable person, who would not necessarily be the Applicant.

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of the parents, and that guardianship vests as of right on the surviving parent. Full effect of Article 386 applied only as regards the enjoyment of the child's property until a guardian is appointed by the Court:

the death of the father by virtue of Article 390, would have to be replaced by the mother as guardian under Article 440 before a new guardian is appointed by the Court.

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minor child.

Article 401 of the Civil Code provides that:

The guardian appointed by the father or mother shall not be bound to accept the guardianship.

If the guardian who is appointed does not wish to Act, the Court shall have authority either to compel him to Act or to appoint another....

The granting of legal guardianship of the child to his aunt therefore constituted an Act indicating that she did not wish to act as guardian. However, pursuant to Article 401, it was only the Court that had authority to appoint another person. Hence the vesting of guardianship on the Applicant was invalid, and perhaps, it is for that reason that she is presently before this Court for appointment as guardian.

Article 401 does not provide that where a guardian appointed by the mother or father does not wish to act, the guardianship reverts back to either of them. Mr Boulle contended that the affidavit dated 28 September 2000, whereby guardianship was granted to Michelle Van Tongeren, was both invalid, and inadmissible under the laws of Seychelles. He cited the Constitutional Court case of *Robert Poole v Government of Seychelles* (Const Case no 3 of 1996) where the Court held inter alia that –

A commissioner of oaths or a notary in any country is authorised to attest or execute deeds and documents that have legal validity in their own country....

a document notarially executed in a foreign country will not be admissible in judicial proceedings in Seychelles, save in circumstances contemplated in Sections 12 and 28 of the Evidence Act.

Mr Vidot, Learned Counsel for the Applicant submitted that the affidavit dated 28 September 2000 whereby Michel Hoareau granted custody and legal guardianship of the child to Michelle Van Tongeren, which is a declaration before a Commissioner of oaths in Nairobi, Kenya was a valid appointment under Article 392 of the Civil Code. Article 392 provides that "a person entitled to appoint a guardian of minor children may do so 1st by a last will or 2nd, by a declaration made before a Judge or before a Notary".

An affidavit is a formal declaration of facts upon oath or affirmation. Section 17 of the Civil Procedure Code provides that an affidavit may be sworn in Seychelles - "before a Judge, a Magistrate, a Justice of the Peace, a Notary or the Registrar."

The dicta cited from the case of *Robert Poole* (supra) must be distinguished as in that case an affidavit sworn before a Notary in Kenya was filed as an affidavit of facts under Rule 3(1) of the Constitutional Court Rules. The Court ruled that only documents authenticated by a Diplomatic Mission or by a Foreign Court or competent Jurisdiction could be admitted in proceedings before a Court in Seychelles by virtue of Section 28 of

the Evidence Act. In the present case, the Court is concerned with the validity of an appointment under Article 392 of the Civil Code. The pertinent affidavit is not being sought to be filed as part of the pleadings but merely as evidence of a lawful Act. Admittedly, Michel Hoareau, Michelle Van Tongeren, the child Nelson Hoareau, and the Notary were all present in Nairobi, Kenya when the affidavit was sworn. Hence that was a valid Act of appointment in terms of the statutory Declaration Act of Kenya in respect of a minor residing there at that time.

Although the appointment of the Applicant by Michelle Van Tongeren is valid, she had by her Act indicated that she did not wish to act as guardian on the appointment made by the Respondent. Hence in terms of Article 401, the Court has authority either to compel her to act or to appoint another person. But that would arise only where both parents are dead. In the present case, as the father is alive, he ought to be first removed from his guardianship as of right, before the Court appoints any other person, including the Applicant as parental power cannot be voluntarily alienated.

Hence procedurally, the Applicant, who admittedly has the de facto custody and care of the child in the United Arab Emirates, has the capacity as an "interested party" as envisaged in Article 445 of the Civil Code to proceed with the application and to establish that the Respondent is incompetent, for the reasons adduced in the Application. The Respondent would undoubtedly have the right under Article 447 to be heard in opposition, and even suggest any other person to be appointed as guardian. In the ultimate analysis, it would be the duty of the Court to decide on the guardianship upon consideration of the best interest of the child.

Record: Civil Side No 158 of 2001