

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: XP 89/2017

[2017] SCSC 701

In the matter of

EX PARTE: JERINA AGNES BELLARD

Petitioner

In the Presence of:

THE ATTORNEY GENERAL as Ministere Publique

Counsel: Mrs. A. Benoiton for the petitioner
Mrs. Carmen Cesar for the Attorney General as Ministere Public

Delivered: 14th July, 2017

ORDER

Carolus Master

[1] Jerina Agnes Bellard of Mont Buxton, Mahe, Seychelles, (hereinafter referred to as the Petitioner) has petitioned this Court for an Order appointing her as the Guardian of a Minor Child namely, Andria Valerie Matombe (hereinafter referred to as the Minor Child). The Minor Child is the daughter of the Petitioner and the late Andy Christopher Matombe who died on the 10th October, 2016, (hereinafter referred to as the Deceased) at

Mont Buxton, Mahe. The Petition is supported by an Affidavit sworn by the Petitioner and other relevant documents.

[2] The following averments are made in the Petition and the Affidavit in support thereof:

- (i) That the Petitioner is the mother of the Minor Child Andria Valerie Matombe born on the 2nd November, 2000.
- (ii) The father of the Minor Child is late Andy Christopher Matombe who passed away in Seychelles on the 10th October, 2016.
- (iii) The Petitioner is the former partner of the Deceased and since before the death of the Deceased, the Minor Child was in the custody and care and under the control of the Petitioner.
- (iv) The Deceased left behind succession comprising of money, moveable and immovable property that the Minor Child is entitled to inherit and in this connection the Petitioner will be applying to the Supreme Court to be appointed as the executor of the Deceased's succession.
- (v) That as a result of the demise of the Deceased, a guardian should be appointed or confirmed for the Minor Child.
- (vi) That it is urgent and necessary that a guardian to, and legal administrator of the property of, the Minor Child be appointed.
- (vii) That the Petitioner is able and willing to be appointed as the Guardian to the Minor Child and to carry out the duties of Guardian as laid down by the laws of Seychelles.
- (viii) That the Petitioner is not subject to any legal incapacity to be appointed as the Guardian of the Minor Child.

[3] The Director of Social Services who was notified of the Petition pursuant to section 21 of the Children Act submitted a report dated 13th July, 2017. It is stated in the Report that

the Petitioner was married to the Deceased on 22nd December, 2000, and according to the Petitioner they separated on 3rd September, 2003. The marriage was subsequently dissolved and the conditional order of divorce made absolute on 5th April, 2005. It is also stated in the Social Services Report that on 15th March, 2004, the Petitioner was granted custody of the Minor Child and that the Deceased was granted access to, and ordered to pay maintenance for, the child. According to the Social Services Report, the Petitioner has learnt that the Minor child might have immovable property that she is entitled to inherit and the Petitioner has been advised that she needed to be legally appointed as the guardian of the child to be able to act on the child's behalf and safeguard her interests until she is an adult. It is stated in the Report that the Minor Child who is sixteen years old is agreeable to the Petitioner being appointed as her guardian. The Report concludes by recommending in favour of an Order for the Petitioner to be appointed as the Guardian of the Minor Child.

- [4] The legal provisions applicable to guardianship of minors are found in Section I of Chapter II of Title IX of Book I of the Civil Code of Seychelles Act entitled "The Guardianship of the Parents". Articles 389 and 390 under that Section of the Act deals with the guardianship of Minor Children born within a marriage. These Articles provide as follows:

"Article 389

1. The father during marriage shall be the administrator of the property of his minor unemancipated children with the exception of such property as may have been given or bequeathed under the express condition that it be administered by a third party. He shall be accountable both for the property and the income from property which he is not entitled to enjoy; he shall be accountable for the property only if he is entitled to the usufruct of it.
2. If the father cannot act or if he is deprived of his administration, the mother shall have such administration with all the powers that the father previously enjoyed.
3. In case of divorce or judicial separation the administration shall be entrusted to the spouse who has the custody of the children, unless the Court orders otherwise.

4. An ad hoc administrator shall be appointed by the Court where there is a conflict of interests. The powers and duties of such a legal administrator are regulated by such laws as are enacted from time to time.

Article 390

After the dissolution of marriage caused by the death of either of the spouses, the guardianship of Minor Children who have not been emancipated shall belong as of right to the surviving spouse.”

[5] Article 394 deals with guardianship of illegitimate children. This Article provides as follows:

“1. Illegitimate children shall have a guardian in the same manner as legitimate children. If the father and mother of the illegitimate child have both recognised the child, the Court may decide which of them shall become guardian. If only one of the parents has recognised his child he shall be his guardian.

2. If an illegitimate child has not been recognised he shall have his natural mother as a guardian as of right. The Court shall be entitled to grant the custody of a child to the mother, even if the father has recognised the child and acts as guardian.

3. If the illegitimate child has no parent, or if the latter is unable to act, the guardian of the child shall be appointed by the Court.”

[6] The Certificate of Birth of the Minor Child shows that the Petitioner is the mother and the Deceased is the father of the Minor Child. Both the Petitioner and the Deceased recognised the Minor Child as evidenced by said Birth Certificate which bear the names of both her father and mother. The evidence also shows that the Deceased died on the 10th October, 2016. It is averred in the Affidavit sworn by the Petitioner in support of the Petition that “The Petitioner is the former partner of the Deceased and since before the death of the Deceased, the Minor Child was in the custody and care and under the control of the Petitioner.” In addition, it is stated in the Social Services Report that the Petitioner

and the Deceased were married on 22nd December, 2000, and subsequently divorced. I note that there is no indication as to whether the child who was born on 2nd November, 2000, before the marriage was legitimated by the subsequent marriage of the Parties. If this had been the case, then the Minor Child being considered as a legitimate child of the marriage, on the death of her father, guardianship of the child would have belonged as of right to the surviving parent. Vide Attorney General, Ex Parte (1977) SLR 260. There being no documentary evidence before this Court that the Petitioner and Deceased were married or that the child was legitimated by the marriage of her parents, she is considered as an illegitimate child, and Article 394 being silent as to guardianship of an illegitimate child who has been recognised by both parents one of whom dies, it falls on this Court to appoint a guardian for that child.

- [7] I am of the view that it is in the best interests of the Minor Child that this Petition is granted since the Petitioner is the surviving parent of the Minor Child and the child is currently in her custody and care and also under her control, and has been since 2004. I also take into account that, according to the Social Services Report, the Minor Child who is 16 years old agrees to her mother being appointed as her Guardian.
- [8] I am further satisfied, on the strength of the averments in the Affidavit in support of the Petition, that the Petitioner is able and willing to be appointed as Guardian of the Minor Child and to carry out the duties of a Guardian as laid down by the laws of Seychelles and that she is not subject to any legal incapacity to be so appointed.
- [9] I also take into consideration that the Social Services, in their report submitted to this Court, recommended in favour of the appointment of the Petitioner as guardian of the Minor Child, and that Mrs. Cesar representing the Ministere Publique did not object to the Petition.
- [10] In the circumstances and in accordance with the legal provisions cited above, I hereby appoint the Petitioner Jerina Agnes Bellard as the Guardian of the Minor Child Andria Valerie Matombe.

Signed, dated and delivered at Ile du Port on 14th July, 2017

Carolus.

E. Carolus

Master of the Supreme Court