

**PAULA LYNN KING (NEE DAKIN)**  
**Versus**  
**ANDRIAN DUNCAN LOYD KING**

IN THE HIGH COURT OF ZIMBABWE  
MOYO J  
BULAWAYO 6 & 19 JULY; 26 OCTOBER  
& 6 DECEMBER 2022 & 9 NOVEMBER 2023

**Matrimonial Action**

**MOYO J:** This is a claim for a decree of divorce and ancillary relief. The parties were married in terms of the Marriage Act then Chapter 5:11 on the 1<sup>st</sup> of August 2015 and the marriage still subsists. Prior to their marriage they entered in a pre-nuptial contract to govern their marital regime. They have 2 minor children born of the marriage namely; Keegan Bruce Duncan King a boy born on 4 June 2016 and Phillipa Ann King a girl born on 22 February 2018.

All the issues between the parties were resolved before, during and after the pre-trial conference that was held by the parties leading to the drawing and signing of a consent paper by the parties that was issued in this court on 10 February 2022. It is thus filed of record. I will not quote the consent paper verbatim but it suffices to say that the issue of custody, maintenance and general welfare of the children was resolved. Also resolved was the issue of the domestic worker's salary of R1 000 per month. A property had already been acquired in the names of the minor children as pledged in the consent paper by the plaintiff. They also agreed on issues pertaining to the plaintiff's medical aid. The parties separated some time in 2019. The only 2 issues that failed to be resolved are as given in paragraph 15 of the consent paper reads as follows:

“We agree that we have failed to resolve the issues pertaining to the defendant's rights of access to the minor children and the personal maintenance claimed by the plaintiff in the sum of US\$600 per month.”

On the issue of the plaintiff's personal maintenance the parties later agreed while the trial was still on course, to settle the issue at the sum of US\$500,00. They later did an amended consent paper to incorporate the agreement on personal maintenance.

The only issue remaining for determination by this court is that of defendant's rights of access to his minor children. This issue was canvassed at great length by both parties.

Plaintiff's case is that defendant should have supervised access and defendant's case is that such is not necessary.

The current obtaining situation is that the defendant exercises supervised access at plaintiff's mother's place which is purportedly a neutral venue. Plaintiff's case against unsupervised access is that defendant has not exhibited love and affection for the children, he has not changed the nappies, he has not taken the children to play with them in the absence of the plaintiff and that the children are uncomfortable in his presence. Also that when he visits them, he just sits on the sofa and does not exhibit an interest towards the children. In a nutshell those are the concerns given by the plaintiff against an unsupervised order for access. That he should get supervised access until his relationship with the children improves. Defendant's case is that he loves his children, that he has played with them on a few Christmas occasions when they were at his mother's place. That plaintiff makes it difficult for him to freely handle the children and that at plaintiff's mother's house, the atmosphere is tense for him. He says he is however interested in relating with his children. Videos were played during court sessions wherein plaintiff recorded defendant's visits at her mother's house. Photographs of the family, either on their own or with extended family were tendered in court.

So what this court should determine is whether per plaintiff an order should be made that the defendant be allowed supervised visits with the children between 3 and 5 pm on the Saturday and Sunday of every alternative weekend at the residence of the plaintiff, or of the plaintiff's parents, for the first 12 months after the granting of this order. Or whether per the defendant's claim he should be allowed unsupervised access to the 2 minor children.

It is trite that in any dispute involving minor children, the court should place the children's interests as being the paramount consideration in the matter. At the core of an access dispute are the best interests of the minor children involves sometimes the personal views or subjective feelings of either parent would not assist the court much in the resolution of such a dispute. In my view, in handling a dispute involving minor children the court should take an objective approach, analyzing the facts before it, and assessing therefore what is in the best interests of the children. The sum total of the objective views before it should enable it to make a value judgment on what is in the best interests of the children. The problem I have often

observed is that parties with a failed marriage sometimes lack the objectivity (due to animosity born of their issues leading to the divorce) to give the court a concrete, fair and credible assessment of what is best for the children in the circumstances. The contest becomes that of the parties' views, sentiments and preferences as well as their perceived judgment of the whole issue, rather than what is truly and honestly in the best interests of the child. In such instances the court should not be caught up in the personal match between the parties and be so engrossed in it as to fail to see what is paramount in the children's best interests.

There must be an objective assessment of each party's roles in the circumstances. From the facts before me I have noted the following:

1. Whatever went wrong in the marriage between the parties before me, left them polarized and in acrimony. Even the atmosphere in the court room was emotionally charged to the extent that even both counsel were being dragged to a certain extent into the emotional arena. There were numerous objections and counter objections throughout the trial. It is my considered view that the parties before me still have a residue of acrimony between them which almost turned this access dispute into a slanging match with the children suffering the consequences of polarized parents.

This court is the upper guardian of minors in terms of the Guardianship of Minors Act Chapter 5:08. It should stand in objectivity and assess fairly what is in the best interests of the children.

Looking at the evidence by the plaintiff on why defendant should have supervised access we have the following and I quote:

"The children have absolutely no relationship with their father, so much so that they don't acknowledge him when he visits. The children are nervous around him, they are very uncomfortable when he comes to visit the children. The children don't even talk to him. He sits for the entire 45 minutes on the couch on the Saturday and Sunday that he visits. He makes no effort to engage the children like playing with them. He just sits and watches television despite my telling him to do something with the children and engage them. ... Before the separation defendant did not come about the children, he however fed them, take them to bed or been in the car alone with them. He arrives for the visit at 4:10 or 4:15, greets the children, Keegan pushes him away."

A question was put to her during examination in chief.

Q - Defendant suggests that he should be allowed to take the children from 8:00 am to 1pm every Sunday.

A - This is physically impossible. The children won't leave the house to go with him. The children will be hysterical before they even leave the house. She further added that he does not tell the children that he loves them and when she told him to do so, defendant said there is no need as they already know.

Defendant's case was that his relationship was normal with the children during the happier times in the marriage. He told the court that during the happier times, he had unlimited access to the children, he saw them every day as they stayed together and would play with them and watch television with them. The family would visit the plaintiff's family or his family together with their children. He said it was in 2019 when the parties now slept in different bedrooms that the plaintiff asked him to give her space so his access rights also became limited as plaintiff did not want him around her and yet the children were with her. He said later in their separation he could only say good night to the children briefly in the evening and he could only visit them at the weekend. He said all this, plaintiff was telling him he did not agree to it.

A lot of issues were further canvassed on the cross examination of either party but I hold the view that nothing was added or subtracted from the crux of the matter.

In determining important issues like access and custody rights where the interests of the child are paramount, a court must be guided by the objective standard of what a parent should be like to be able to access his/her children. Subjective views of what an acceptable standard of a parent should be, cannot and will not be used by these courts to assess both child and parental rights *vis-à-vis* the relationship between the 2. A child is born of 2 people and primarily deserves and is entitled to the relationship he/she must have naturally from either parent. It is not for one parent to apply their subjective views on how the other parent must behave just before they can relate in a certain way with their own child.

From the facts adduced in this court, I draw the following conclusions.

1. The parties led a normal family life prior to their marital problems (that they conducted themselves differently in engaging the children does not make any parent better than the other, as surely some of these attributes are even a matter

of character. The plaintiff wanted to supervise the defendant's conduct towards his and the children, she wanted him to act in a certain way. She had her own subjective standard, which if he did not meet, then he is not a good father. I take this from her own testimony where she says she told defendant to tell the children that he loves them and he said it is not necessary because they know. That he did not bathe or change their nappies. This is the plaintiff's own subjective view of what a good father is. It is not an objective view and a general standard to be used by a court of law in assessing and pronouncing parental rights and juxtaposing these rights with the children's best interests.

There is nowhere in the court record where we are told that the defendant has conducted himself in a manner that is harmful and detrimental to the children's best interests so as to be sufficient to subject him to the supervised access that the plaintiff wants this court to give. That a child cried while being changed their nappies by the defendant has got nothing to do with his conduct as a father, there are possibilities as to why children cry, maybe they just do not want that particular person to change their nappies, maybe they prefer someone else, perhaps it is the way he does it. There are so many variables for a court to latch onto such and use it to determine access rights. In any event, the extent of him trying to change these diapers could be interpreted as having the converse effect of showing that he was making efforts towards his children. From an objective point of view that cannot be used to discredit him. Not only has there been no harmful or detrimental conduct shown by the plaintiff on defendant's part *vis-à-vis* his relationship with the children but already, the consent paper speaks volumes of the kind of father the defendant is.

Here is a man who voluntarily without a court order agreed to the following:

1. That plaintiff can have custody of the children.
2. That he will take care of all their upkeep, school fees up to tertiary level including extra mural and extra-curricular activities.
3. He has agreed to meet the medical aid subscription on an international medical aid.
4. He has agreed to pay US\$300 per month per child as maintenance.

5. He has agreed to contribute US\$100 per month for the purchase of meat for the children.
6. He has undertaken to meet their upkeep until when they reach the age of 21.
7. He has agreed to pay the domestic worker until the younger child completes her primary education.
8. He has agreed to meet the children's bedding and entertainment needs until they are 21.
9. He has already purchased a property for them in Burnside, Bulawayo.
10. He has offered to pay US\$500 personal maintenance to the plaintiff the mother of his children.

Here is a man who has gone above and beyond, it is not usual in these courts to have co-operation on a separation *vis-à-vis* the children to the extent that the defendant has done. This court takes judicial notice of the fact that the defendant has really volunteered to ensure that his children's welfare remains intact long after the separation of the parties. Nowhere from these facts can one infer lack of love and interest towards his children. Fine, people being different express things in different ways and it is allowed to be different but the defendant is definitely a responsible and a reasonable father just by assessing the aforesaid. If he did not care about his children, he could have refused all these issues and left it to the court to decide the fate of the children upon separation.

There is no justification at all about the need for supervised access in this matter. No valid reason whatsoever has been given. All this court has been given are plaintiff's subjective views and perceptions of how defendant must first behave before he could be free to see his children unsupervised. Children learn what they live so goes the saying, plaintiff must allow these children to develop a relationship with their father, in whichever way that relationship begins and moves. She need not come up with a formula or criteria for the children and the father on how they should develop their relationship. She must stand aside, allow the relationship to begin and blossom, it might stagger initially, but with time it will smoothen. This court is not persuaded by the plaintiff's assertions that the children did not like their father, that they scream in his presence and refuse to go with him. Since we have not been shown how the defendant harms these children, it defies logic that they would just scream and not be

interested in their own father for no reason. Why would they just resent their own father who takes care of them to such a great extent? After all they are too young to start choosing one parent over another for no apparent reason. Plaintiff must allow these children the freedom to relate with their father so that they can develop a relationship with him. It is necessary and it is important and in their best interest that children keep a relationship with their father. This is a fundamental right of the children and cannot be subjected to the plaintiff's subjective views and perceptions. We should use the general approach to what a responsible father is and using that criteria on defendant, there is no need at all to restrict access to his children. My reasoning herein is fortified by the decision of the High Court in *Kumirai v Kumirai* HH-17-06 a judgment by MAKARAU J (as she then was). This is what the learned judge had to say on access;

“The plaintiff claims reasonable access to the minor child as the non-custodian parent. The defendant concedes that the plaintiff is entitled to access but wishes the court to restrict such access to supervised access only.

It is trite that access, in the absence of good reason, is not to be confined to such an extent that it stultifies the nurturing of a meaningful relationship between the child and the non-custodian parent. (See *Marias v Marias* 1960 (1) SA 644(C) and *N v N* 1999 (1) ZLR 459 (H).

Nothing that has been said by the defendant in her evidence satisfies me that there is good reason to stultify the nurturing of a meaningful relationship between the plaintiff and Tanatswa.

The defendant has testified that the plaintiff never used to spend much time with the minor child during the subsistence of the marriage, that he would rather spend time with his friends and their children and that during the subsistence of the marriage, he never spent time alone with the minor child in her absence. She has also complained that the plaintiff has never assisted the child with his homework and has only bought the child five items of clothing.

With respect, the defendant was not properly advised as to what evidence would persuade the court to deny a natural parent of unsupervised access to his child. The plaintiff is no stranger to the child whose unsupervised introduction into the child's life may traumatize the child. It was not shown that the plaintiff has been violent or abusive towards the child. (see *N v N supra*), or that his social life or domestic arrangements are such that exposure to them will injure the best interests of the minor child. It was attempted to show that the plaintiff on one occasion told the minor child the name of his current girl-friend and that he is therefore not suitable to have unsupervised access of his child on this account. That the plaintiff will have other women in his life now he is divorced from the defendant cannot be avoided. The minor child will have to know of and be acquainted with his father's friends sooner than later. This cannot be avoided and cannot be used as a ground for denying the father access to his child as long as

contact with his father's friend or friends is tastefully handled. There has been no suggestion in casu that the introduction of the minor child to his father's friend was not tastefully done or that it was done in a manner likely to injure the best interests of the minor child.

In conclusion it is my finding that the plaintiff poses no danger to the life, health or morals of the minor child and as such, his access to the minor child shall not be rendered illusory by the imposition of any restrictions other than what is reasonable and in the best interest of the child. His access to the child shall not be supervised."

I could not agree more with the aforestated quote. I have alluded to the cases cited by plaintiff's counsel and it is my view that whilst it is correct that the guidelines in determining custody are as given in the case of *McCall vs McCall* 1994 (3) SA 201 as approved by our Supreme Court in the case of *Coumbis vs Coumbis & Another* SC-150-21 and whilst I accept that the guidelines are truly as enunciated, those cases did not deal with the issue of supervised or unsupervised access. Again, each case depends on its own facts, even if there is a case that dealt with the granting of supervised access, it is my considered view as I have already found herein that no case has been made at all for supervised access as no fact was adduced whatsoever, that would lead the court to come to an objective observation that there is indeed a need for such. In this matter there is no grain of concern that the minor children would either be harmed or their interests detrimentally affected by the unsupervised access. If they can adapt and get used to a child minder or if they can go to school and be left there with strangers on the first encounter of school, and they have not been hysterical in that situation, there is definitely no reason for them to fail to adapt to situations when their father takes them to his home. It is for these reasons that the issue of access is resolved as per defendant's counter claim and as follows:-

- (a) That defendant be allowed to collect the children from their home on every Sunday morning at 8am and return them at 1pm on the same day and that this is adhered to for 2 months being 60 days.
- (b) That after the first 2 months, he shall be entitled to collect the children at 8am on every Sunday morning and return then at 5pm on the same day for a period of 2 months, the 2 months being 60 days.
- (c) Thereafter the situation concerning his access rights shall be reviewed.

- (d) In addition to the afore-stated above weekly arrangements, he shall also have the right to weekly access to the children at their home for a period of one hour a week from 5 – 6pm on every Wednesday.

The 2<sup>nd</sup> issue raised by plaintiff's counsel is that of costs of suit. From the outset the issue of costs was not referred to trial for determination and this obviously does not come as a surprise as this is a matrimonial matter where the general rule is that each party should bear its own costs.

It is thus not necessary in my view to throw in the issue of costs at this stage. However, even if one were to suggest that in every matter an order of costs must be pronounced since the pre-trial conference memo is silent on them. I would still order that each party bears its own costs for the simple reason that this being a matrimonial matter there is no need to burden any one party with the costs. Secondly, I would still order that each party bears its own costs as the defendant can still not be burdened with costs in a battle that the court has agreed with his claim. There is therefore no basis at all to revisit the issue of costs. I will simply order that each party should bear its own costs.

The rest of the issues are as settled in the consent paper signed by the parties and issued by this court on 20 September 200.

I accordingly make the following order:-

1. That a decree of divorce be and is hereby granted.
  2. That plaintiff shall be awarded custody of the minor children of the marriage namely: Keegan Bruce Duncan King a male child born on the 4<sup>th</sup> of June 2016  
Phillipa Ann King a female child on the 22<sup>nd</sup> February 2018.
- (2a) That defendant be allowed to collect the children from their home on every Sunday morning at 8am and return them at 1pm on the same day and that this is adhered to for 2 months being 60 days.
- (b) That after the first 2 months, he shall be entitled to collect the children at 8am on every Sunday morning and return them at 5pm on the same day for a period of 2 months, the 2 months being 60 days.

- (c) Thereafter the situation concerning his access rights shall be reviewed.
  - (d) In addition to the afore-stated above weekly arrangements, he shall also have the right to weekly access to the children at their home for a period of one hour a week from 5 – 6pm on every Wednesday.
3. That as his contribution towards the upkeep, development and wellbeing of the minor children, defendant shall be responsible for payment of both children's school fees at such schools as they currently attend and at any future schools as we may agree upon in consultation, including tertiary education. Such payments by defendant shall include payment of the school tuition fees, examination fees, any school levies, school uniforms, sports equipment and sportswear.
  3. That in addition to being responsible for the educational expenses of the aforesaid children as described in the preceding paragraph, defendant shall also be responsible for any extra-mural or extra-curricular activities provided that we agree to the child partaking in such activities.
  4. That defendant also agrees to pay all fees, subscriptions, shortfalls or other dues necessary to maintain each child on the medical aid scheme with same level of benefits as at the time of issuance of summons which is Health International MASCA and GP Network.
  5. That defendant shall contribute USD\$300 per month per child or the equivalent thereof at the auction rate of the day, as monthly maintenance of the children.
  6. That defendant shall also contribute USD\$100 per month or the equivalent thereof at the auction rate of the day towards the purchase of meat for the children.
  7. That defendant undertakes to provide and pay for all the aforesaid children's educational expenses, extra-curricular activities as described above and to maintain the children and the medical aid cover also stipulated above until each aforesaid child has turned 21 years old or becomes self-supporting, which ever shall be first.

8. That defendant further undertakes to contribute towards the remuneration of the domestic worker employed by plaintiff at the rate of ZAR1000 per month until PHILLIPA ANN KING completes her primary education.
9. That defendant will continue to provide plaintiff with USD\$150 or the equivalent thereof at the auction rate of the day per month for fuel for school runs for as long as plaintiff will be driving the children to and from school and extra-curricular activities.
10. That plaintiff shall be responsible for the provision of the children's, bedding, entertainment, including the provision of the children's necessary play things and other objects of amusement and all other day to day maintenance expenses necessary for the growth and development of the said children not otherwise covered by defendant as provided for above, and such support to endure until each such child shall have attained the age of 21 years or become self-supporting, which ever shall be the first.
11. That defendant has sold the immovable property, a Certain Piece of Land situate in the District of Bulawayo measuring 2429 square metres called Stand 6793 Bulawayo Township of Stand 6872A Bulawayo Township more commonly known as 24 Hall Road, Kumalo, Bulawayo and has used the proceeds of the sale to purchase and improve an immovable property, selected by the plaintiff with the approval of the defendant, in the names of the minor children subject to a life time usufruct in favour of the plaintiff.
12. That the defendant shall pay any Capital Gains Tax that may be assessed as due and payable upon the sale of the aforesaid house No.24 Hall Road, Kumalo, Bulawayo and the plaintiff has paid for the costs of transferring the property into the names of the children and registering the usufruct over the property Including, conveyancing fees and stamp duty.
13. That defendant will pay all fees, subscriptions, shortfalls or other dues necessary to maintain plaintiff on the medical aid scheme with same level of benefits as at the time of Issuance of Summons which is Health International, MASCA and GP Network, until the Plaintiff remarries or dies.

14. That defendant will pay, from the 1st of October 2022, USD\$500 per month or the equivalent thereof at the auction rate of the day as personal maintenance for the plaintiff until the plaintiff remarries, dies or enters into a civil partnership in terms of the Marriages Act (Chapter 5:15).
15. That each party will retain as their sole and absolute property the movables in their possession.
16. That each party bears its own costs.

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