

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZAULU-NATAL LOCAL DIVISION, DURBAN**

Case No: 11385/2016

In the matter between:

TARIN KIRSTEN STRYDOM

PLAINTIFF

and

WILLEM JAKOBUS STRYDOM

DEFENDANT

JUDGMENT

MNGADI J

[1] This is a divorce action. At the commencement of the hearing, the parties placed on record that they have agreed on the following, namely;

That a decree of divorce be granted and the division of the joint estate be ordered; that both plaintiff and defendant shall remain co-holders of parental rights and responsibilities of the two minor children of the marriage. The primary residence of the two minor children shall be with the plaintiff, the defendant shall pay maintenance to the plaintiff for the minor children at the rate of R1 500.00 per month per child; the defendant shall pay 50% of all educational creche and allied expenses, such to include but not limited to books, stationery, uniforms, extra-curricular activities and excursions; the defendant shall retain the minor children as beneficiaries of his medical aid scheme.

[2] Further, it was placed on record that; (1) the parties could not reach a settlement relating to the entitlement of the plaintiff to 50% of the defendant's interest in and to his membership of the Momentum

Provident and/or Pension Fund as well to the endorsement in the said Fund of her interest; (2) the exercise of the defendant of contact to the two minor children. These were the only issues for determination.

[3] The plaintiff testified, and she was the only witness for the plaintiff. The defendant testified, he too was the only witness for the defendant.

[4] The divorce action was instituted on 4 November 2016. The parties married each other in community of property on 26 March 2011. There are two minor children born of the marriage, namely; LD, a girl born on [...] 2013 and LW, a boy born on [...] 2015. The parties experienced difficulties in their marriage and separated in October 2016 when the defendant left the common household or was not welcomed back to the common household. The two minor children remained with the plaintiff, their mother.

[5] Initially, the defendant had supervised contact on a Saturday for two to three hours with the children. On 16 March 2017 the court *pendete lite* granted the defendant unsupervised contact with the children on alternate weekends from 9h00 to 16h00 on a Saturday and for ne half of the day on each of the children's birthdays, and on the occasions of the father's day and mother's day.

[6] The Family Advocate appointed in terms of the Mediation in Certain Divorce Matters Act, 24 of 1987 instituted on enquiry as envisaged in terms of s4 of the said Act. In her report dated 12 September 2017, she recommended subject to the parties undergoing co-parenting counselling, the following:

The parties to remain co-holders of full parental responsibilities and rights in respect of the children; the children to reside with the plaintiff, the defendant to be entitled to exercise reasonable contact with the children to be phased in as following:

Phase 1: For a period of two months: they visit from 9h00 to 17h00 on Saturdays and Sundays on alternate weekends.

Phase 2: For a period of six months: one overnight stay from 9h00 on a Saturday to 17h00 on a Sunday on alternate weekends.

Phase 3: After expiry of phase 2: contact from after school on Friday to 17h00 on Sunday on alternate weekends.

[7] In addition, in respect of each phase, the Family Advocate recommended relating to access during public holidays; Christmas and New Year's; Mother's days and Father's days; school holidays and for daily telephone contact.

[8] Contact refers to maintaining a personal relationship with the child and communicating with the child on a regular basis. The court may make whatever order it deems fit regarding contact and may impose any conditions and/or restrictions on contact that it deems in the best interest of the child. See *Van Rooyen v Van Rooyen* [2001] 2 ALL SA 37(T). The court is guided by what is in the best interest of the minor child. See ss7 and 10 of the Children's 38 of 2005. Co-parenting is deemed to be in the interest of the minor child.

[9] The gripe of the plaintiff with the Family advocate's recommendation is that it was done hurriedly and not thoroughly, the period of two months for phase one should at least have been six (6) months. It is imperative that the new situation be phased in gradually so that it will not traumatize the children. She testified that since their birth, she has been staying with the children in one residence and the children are very close to her. She testified that ever since LW, the younger child, experiences difficult sleep patterns and he needs constant monitoring. She testified that she needed to prepare the children by speaking to them and releasing them from their close attachment to her. She supports contact with their father as long as it is done gradually and it does not upset the children.

[10] The defendant testified that the children are now ready for overnight visits. The phases recommended by the Family Advocate were based on the ages of the children at that time. The contact that he has been exercising has prepared the children for a broader contact. he children enjoy his company and he does not expect any problems with the extension of the contact to include overnight visits.

[11] The circumstances of the parties traversed by the Family Advocate in her investigations and reports have not changed. At the time, the Family Advocate notes that 'both parents appeared committed to provide for the needs of their children. The father's attitude is that he had unsupervised day contact with the children over a long period of time and should progress to having the children for one overnight on a weekend. He would like to strengthen his attachment with the children and be a father to them. The mother's attitude is that the children are not ready yet to sleep over and that she has seen the effect on their behavior when they come back from contact visits. They come home crying and unable to settle into their routine'.

[12] The children are born of the marriage between the plaintiff and the defendant. Their father's home is just as their mother's home. It is critical that they develop healthy relationship with both parents, that is in the best interest of the children. The Family Advocate remarked quoting from literature that 'the goal of any access schedule should be to avoid long separations from both parents to minimize separation anxiety and to have sufficiently frequent and broad contact with each parent to keep the infant secure, trusting and comfortable in each relationship'. Meaningful contact is meant to and may benefit the child.

[13] It is not clear what more does the plaintiff need to do to prepare the children for overnight visits. Since the separation of the parties in October 2016 the defendant has been exercising limited access to the children. The children are more familiar with the visits and are a little older. Whilst the children were younger it was necessary that they not be separated from their mother for extended periods. There is no indication that overnight visits will in any manner harm the children. The plaintiff has had more than enough time to prepare the children for a broader contact. The children are at the stage of development where learning develop their own identities, to become more independent and to explore their environment. I don't regard the extension of the contact as introducing any measure change to the current situation of the children. In my view, it will be in the interest of the minor children that the defendant's contact extends to overnight visits on alternate

weekends. The plaintiff must accept the inevitable and be supportive.

[14] The plaintiff testified that she has by virtue of the marriage in community of property a right to 50% of the defendant's interest in the Pension/Provident Fund. Therefore, it is argued, that she is entitled to the relief she is seeking. The defendant responds that the issue has not been raised in the pleadings and therefore it may not be sought as a relief at the hearing stage without any amendment to the pleading. Section 7 of the Divorce Act 70 of 1979 regarding the division of the spouses' assets allow a divorced spouse to share in the pension interests of the other spouse. The pension interest of a party to a divorce shall, for purposes of the division of assets, be deemed to be an asset of his/her estate. A pension interest is that amount a member of a pension fund would have received had he/she resigned as a member of the fund on the date of divorce. At the date of separation, both parties were employed and were members of pension funds. The plaintiff was subsequently retrenched and was paid her pension fund benefits. After few months she was re-employed, and she remained so employed.

[15] It is correct that the plaintiff in her particulars of claim did not make any averments relating to the claim to the defendant's pension interest, either in the body of the particulars of claim or in the relief sought. Further, there was no amendment to the particulars of claim that was applied for and granted. There was no notice served to the defendant's pension fund relating to the plaintiff's claim to the defendant's pension fund interest. In my view, the defendant is correct the issue has not been raised and, therefore, it may not be adjudicated upon.

[16] In the result, judgment is granted in the following terms, with no order as to costs:

1. Decree of divorce is granted.
2. The joint estate shall be divided.
3. Both parties shall remain co-holders of parental rights and responsibilities in respect of the minor children:
 - (a) LD, a girl born on [...] 2013
 - (b) LW, a boy born on [...] 2015.
4. The minor children's primary residence will be with the plaintiff.

5. The defendant shall pay the maintenance to the plaintiff for the minor children at the rate of R1 500.00 per month per child with effect from 31 October 2018. The defendant shall pay 50% of all educational crèche and allied expenses, such to include, but not limited to books, stationery, uniforms, extra-curricular activities and excursions.
6. The defendant shall retain the children as beneficiaries on his medical aid and further pay half of all medical and allied expenses not covered by his medical aid scheme.
7. The defendant shall from 20 October 2018 exercise contact with minor children as follows:
 - (a) Alternate weekends from 9h00 on a Saturday to 17h00 on a Sunday from 20 October 2018 to 20 April 2019 and thereafter contact from after school on Friday to 17h00 on a Sunday on alternate weekends.
 - (b) Public Holidays to be alternated.
 - (c) Children's birthdays to be alternated.
 - (d) Each parent entitled to have the children with him/her on his/her birthday.
 - (e) Children to spend mother's day with plaintiff and father's day with the defendant.
 - (f) Shared school holidays, halves of the long school holidays to be alternated on a yearly basis.
 - (g) The first two long holidays (June and December) to be shared on an alternate week basis between the plaintiff and the defendant.
 - (h) Each parent is granted a right to daily telephonic contact with each child.
 - (i) The plaintiff and defendant are ordered to attend co-parenting counselling with effect from 20 October 2018 as directed by and to the satisfaction of the Family Advocate.

MNGADI J

APPEARANCES

Case Number: 11385/2016

For the Plaintiff: Mr G Reddy

Instructed by: Thandroyen and Partners
DURBAN

For the Defendant: Mr A Manilall

Instructed by: Manilall Chunder & Company
DURBAN

Matter argued on: 08 October 2018

Judgement delivered on: 12 October 2018