

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

CASE NO: D326/2018

In the matter between:

M[....] P[....]

Applicant

and

B[....] N[....]

Respondent

ORDER

It is ordered:

- [1] The applicant and the respondent are declared co-holders of full parental responsibilities and rights in respect of the minor child, M[....] N[....] (M[....]), a boy born on 6 July 2015, in accordance with Section 18 of the Children's Act, 38 of 2005.
- [2] The primary place of residence of the minor child shall be with the applicant.
- [3] The respondent is entitled to exercise the following contact with the minor child:
 - 3.1. Every alternate weekend, from Friday after pre-school/school, till Monday morning, when the child is to be dropped off at pre-school/school.

- 3.2. Every alternate Wednesday, from after pre-school/school till Thursday morning, when the child is to be dropped off at pre-school/school. Such contact is to be exercised in the week in which the respondent does not exercise weekend contact.
- 3.3. From 17h00 on the day prior to the respondent's birthday until 17h00 on the day of the respondent's birthday, subject to the proviso that the applicant will be entitled to contact on her birthday from 17h00 on the day prior to her birthday until 17h00 on the day of her birthday.
- 3.4. The sharing of all school vacations, with the halves alternating annually between the parties.
- 3.5. For a reasonable period of time on the minor child's birthday, subject to the proviso that the applicant will also be entitled to contact on the minor child's birthday for a reasonable period of time.
- 3.6. Mother's day and father's day to be spent with the respective parent.
- 3.7. Public holidays attached to a weekend will extend that weekend in favour of the party having contact with the child on that weekend. Other public holidays that do not attach to a weekend, or fall in the school vacations, are to be alternated.
- 3.8. Sharing of Christmas.
- 3.9. Reasonable telephonic contact.
- 3.10. Any further contact the parties may agree to.

[4] Each party is directed to pay their own costs occasioned by the application.

JUDGMENT

HENRIQUES J

Introduction

[1] This is an opposed application in which the applicant seeks to define parental responsibilities and rights as well as primary residence of the minor child, M[....] N[....], a boy born on 6 July 2015, (M[....]). The applicant seeks a variation of the existing shared contact arrangements which have been in place since the parties finally separated and ended their relationship.

[2] The parties have agreed to the matter being disposed of on the papers without an oral hearing. The parties are at *idem* that there are no disputes of fact. I have had the benefit of written submissions as well as heads of argument from both parties' counsel. I am also indebted to counsel for agreeing on the joint statement of issues.

The issues for determination

[3] The parties have submitted a joint statement in which the material issues in dispute and which require determination, are set out as follows therein:

- (i) 'Whether the existing shared contact arrangements should be varied and, if so, whether the primary residence of the minor child, M[...], is declared to be with the applicant;
- (ii) Whether the recommendations of the Office of the Family Advocate are in the best interests of the minor child and, accordingly, whether this Court ought to make an Order in terms of such recommendation, alternatively in terms of the Order proposed by the applicant's counsel or the respondent's counsel.

[4] It is common cause that the parties were previously in a relationship, which resulted in the birth of M[....]. It was an on and off one which persisted over a number of years until they were finally separated in December 2017. The parties have since their separation adopted a shared residence arrangement for M[...]. This is a contact arrangement of alternating periods of two days on and two days off. The applicant indicates that she acquiesced to this arrangement in an attempt to maintain a cordial relationship with the respondent and did not want to antagonise the respondent.

[5] She indicates that the present routine is of no benefit to M[....] as she is

unable to set a stable routine and ensure structure and stability in M[....]'s life. She wants to provide a stable and safe environment for M[....] and the present routine is confusing and disruptive to M[....]. In addition, she submits that the current arrangement would be completely unworkable once M[....] begins attending formal school. She and the respondent have different parenting styles which is not conducive to the current shared contact arrangement.

[6] Prior to instituting this application the applicant had in November 2016 attempted to agree to a draft parental plan with the respondent. This is disputed by the respondent but it appears that the failure to agree on one is what precipitated the application.

[7] The respondent, to a large extent, admits the submissions of the applicant but indicates that the proposal of M[....] having his primary residence with the applicant is not in M[....]'s best interests and wants the application dismissed entirely. Later on, in his affidavit he submits a one week on and one week off shared contact arrangement is best. The respondent, in addition, submits that the current shared arrangement is one that has worked for M[....] and will work in the future and his parenting style is in the best interests of M[....]. He indicates that the applicant had consented to the current shared contact arrangement. In addition, he rejects the recommendations contained in the Family Advocate's report and indicates that the reason for this is that the Family Counsellor did not do a home visit at his home.

[8] Advocate *Correia*, the Family Advocate, and the Family Counsellor, *Ms Sewcharan*, have compiled a report and made recommendations, regarding what arrangements are in the best interest of M[....]. I may add, that even though the respondent challenges these reports and indicated that he would place additional reports before the court he has not done so. The respondent also indicated that at the time of the Family Advocate's report, his affidavit had not been filed. The papers are silent to whether attempts were made by the respondent to file same with the office of the family advocate and ask for a further interview if he believed one was called for, based on his allegation of a one-sided report. This court must thus decide the issues based on the facts presented in the affidavits and the contents and recommendations in the Family Advocate's report and that of the

Family Counsellor.

[9] The Family Advocate endorses the recommendations of the Family Counsellor and has indicated that she has prepared a child focused report rather than a party focused report. The Family Counsellor interviewed both the applicant and the respondent, as well as the minor child. The allegations made by the respective parties were canvassed in the interviews and report. The Family Counsellor's report notes that M[....] had a greater attachment to the applicant and wishes to have more sleeps at her home.

[10] M[....] describes the applicant as the most significant person in his life. The parties' poor relationship has negatively affected M[....]. The parties do not communicate meaningfully and initially they communicated using a book, and thereafter they would correspond via text messages. She comments that this does not appear to be an ideal situation and it is clear that there is much acrimony which characterises the parties' relationship. The Family Counsellor has also noted that the respondent is not emotionally attuned to M[....]'s needs. M[....], in fact, describes the respondent as a '*fun daddy*'.

Analysis

[11] In matters of this nature, the guiding principles are that the best interests of the child are of paramount concern.¹ This approach is now constitutionally entrenched in s 28(2) of the Constitution which provides as follows:

'a child's best interests are of paramount importance in every matter concerning the child.'

Because the best interests² of minor children are involved, the court can have regard to the individual contentions of the parties but is not bound by any of their contentions. Such litigation in reality, the courts have held, amounts to a *Judicial investigation* 'of what is in the best interest of the children.'³

[12] In this particular matter, both parties have advanced their views as to why

¹ Section 9 of the Children's Act 38 of 2005.

² *Jackson v Jackson* 2002 (2) SA 303 (SCA) para 5.

³ *Jackson supra* para 5.

they believe it is in the best interest of M[....] that the arrangements either be varied, alternatively remain the same. I have considered these. Although the respondent has indicated that he is unhappy with the report of the Family Counsellor and Family Advocate, his reason for this is that no home visit was conducted. Despite this, he has not requested that a home visit be conducted.

[13] Having regard to the report of the Family Counsellor, it would appear that the emotional needs and ties of affection of M[....] must also be regarded and in the case of all children, their wishes in the matter cannot be ignored. This view was endorsed in *Van Deijl v Van Deijl*.⁴ I accept that the Family Counsellor did a home visit at one of the parties' homes and not that of the respondent. However, it would have been a simple matter for the respondent to ask that a home visit be conducted if he was of the view that this would change the report or influence the recommendations in any way. However, despite this the Family Counsellor has concluded that both parties are suitable parents and this has not negatively impacted on the recommendations.

[14] I am aware that the report was conducted when M[....] was three and also that he is now five and maybe settled in this arrangement. No explanation has been advanced as to why the matter took approximately three years to be enrolled. However, once he commences formal schooling, such arrangements may be extremely disruptive, not only to his schooling but also to his emotional needs and to the parties themselves. In addition, the authorities have held that the emotional needs of children must be considered.

[15] The factors to be considered when determining what the best interests of children are, were initially set out in *McCall v McCall*⁵ but the criteria which have developed over the years in a number of decisions, as well as additional ones, have been encapsulated in s 7(1) of the Children's Act.⁶

[16] In determining what the most appropriate orders are, the Children's Act⁷ requires the best interests of the child standard to be applied. Section 7 sets out the factors which must be taken into consideration where they are relevant,

⁴ *Van Deijl VS Van Deijl* 1966 (4) SA 260 (R) at 261.

⁵ *McCall v McCall* 1994 (3) SA 201 (C).

⁶ Children's Act 38 of 2005.

⁷ Section 9 of the Children's Act 38 of 2005

namely:

- ' (a) the nature of the personal relationship between-
 - (i) the child and the parents, or any specific parent; and
 - (ii) the child and any other caregiver or person relevant in those circumstances;
- (b) the attitude of the parents, or any specific parent, towards-
 - (i) the child; and
 - (ii) the exercise of parental responsibilities and rights in respect of the child;
- (c) the capacity of the parents, or any specific parent, or of any other caregiver or person, to provide for the needs of the child, including emotional and intellectual needs;
- (d) the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from-
 - (i) both or either of the parents; or
 - (ii) any brother or sister or other child, or any other caregiver or person, with whom the child has been living;
- (e) the practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis;
- (f) the need for the child-
 - (i) to remain in the care of his or her parent, family and extended family; and
 - (ii) to maintain a connection with his or her family, extended family, culture or tradition;
- (g) the child's-
 - (i) age, maturity and stage of development;

- (ii) gender;
- (iii) background; and
- (iv) any other relevant characteristics of the child;
- (h) the child's physical and emotional security and his or her intellectual, emotional, social and cultural development;
- (i) any disability that a child may have;
- (j) any chronic illness from which a child may suffer;
- (k) the need for a child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment;
- (l) the need to protect the child from any physical or psychological harm that may be caused by-
 - (i) subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour; or
 - (ii) exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person;
- (m) any family violence involving the child or a family member of the child; and
- (n) which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child.'

[17] Essentially, in *P v P*,⁸ Van Heerden JA was of the view that when one determines what custody arrangement will best serve the interests of a child in any particular case, it involves the court making a '*value judgment, based on its findings of fact, in the exercise of its inherent jurisdiction as the upper guardian of minor children.*'

[18] Our courts have held that when applying s 28 of the Constitution and s 7

⁸ *P v P* 2007 (5) SA 95 (SCA) para 14.

(1) of the *Children's Act*, one weighs up various competing interests and rights and at times, the determination of the children's best interests. The fact that the child's best interests are of paramount concern, does not imply that the child's best interest rights is absolute.⁹

[19] In *S v M*,¹⁰ Justice Albie Sachs observed the following in relation to s 28:

'[14] . . . s 28(2), read with s 28(1), establishes a set of children's rights that courts are obliged to enforce ... the question is not whether s 28 creates enforceable legal rules, which it clearly does, but what reasonable limits can be imposed on their application.

[15] The ambit of the provisions is undoubtedly wide. The comprehensive and emphatic language of s 28 indicates that just as law enforcement must always be gender-sensitive, so must it always be child-sensitive; that statutes must be interpreted and the common law developed in a manner which favours protecting and advancing the interests of children; and that courts must function in a manner which at all times shows due respect for children's rights.'

[20] In this particular matter, one has the parties' contentions, coupled with that of the Family Counsellor and Family Advocate. The experience and expertise of the Family Counsellor was not placed in issue, her having some 23 years' experience as a counsellor in dealing with such matters. This court will thus have to rely on the factual findings inherent in such report.

[21] In such a matter, in determining what constitutes the best arrangements for M[...], I am not looking for 'the perfect parent,' but I must find 'the least detrimental available alternative for safeguarding M[...]'s growth and development.'¹¹ I align myself with the sentiments that parenting is a gender neutral function and that the assumptions of the past, that a mother is necessarily in a better position to care for a child than the father, belongs to a past era. However, in this particular matter, I cannot ignore M[...]'s views which he expressed as well as his emotional needs. The respondent has to some extent conceded that because he had to go out and work, M[....] 's emotional needs

⁹ *GT v CT & Others* [2015] 3 All SA 631 (GJ) para 35.

¹⁰ *S v M (Centre for Child Law as amicus curiae)* 2008 (3) SA 232 (CC) paras 14 - 15.

have to a large extent been catered for by his mother and he appears to have indicated that he would prefer '*more sleeps*' with his mother.

[22] The respondent has acquired full parental responsibilities and rights to M[....] in terms of s of 21 of the Children's Act as at the time of M[....]'s birth he was living with the applicant in a semi-permanent relationship.

[23] In the Family Counsellor's evaluation and report, she considers the provisions of s 7 of the Children's Act. Of concern for her in respect of the shared residence arrangement is that the parties have an acrimonious relationship and have resorted to communicating via text messages only. M[....] has been exposed to domestic violence between the parties which has resulted in him displaying violent tendencies at school. When he attended school, the parents were called in as M[....] had bitten a child. The applicant felt that this was a cause for concern, whereas the respondent was of the view that M[....] *only* bit the other child when they took his toy away or he does not want to share and that such aggressive behaviour he has learnt from his mother.

[24] In respect of the first factor to consider ins 7, *Ms Sewcharan* is of the view that the shared residence arrangement was only agreed to by the applicant as she was not familiar with the law and wanted to appease the respondent. However, such arrangement was extremely disruptive for M[....]. When she interviewed M[....], she established that M[....] shared a closer attachment and bond with the applicant and wanted more sleeps with her. Despite the shared residence arrangement, M[....] views his mother as his primary attachment figure and his mother provides him with a secure attachment.

[25] The respondent is a good provider but did not appear to be emotionally in tune with M[....]'s needs. In fact, during the course of her interview with the respondent, he indicated that although the applicant stayed at home and took care of M[....] as well as his emotional needs, he was unable to do so as someone needed to work. It is common cause that the applicant is studying and has not been employed and M[....]'s financial needs are taken care of by the respondent in the main.

¹¹ *P v P supra* para 24.

[26] *Ms Sewcharan* was also concerned that the respondent did not view M[....]'s behaviour at school, ie biting other children, as a problem. She was of the view that if this kind of behaviour was not addressed, M[....] would have no friends at school and would become isolated.

[27] When considering the attitude of both parents and their exercise of parental responsibilities and rights, she was of the view that the relationship between the parties is an extremely acrimonious one and they are unable to communicate as parents with each other. This results in M[....] being exposed to conflict when his parents are in contact with each other and he presents as a troubled child. She was of the view that this was not in his best interests.

[28] The family counsellor and advocate are of the view that both parents are competent and have the capacity to provide for M[....]'s needs, however they both needed to accept that they play an equally significant role in M[....]'s life. The Family Counsellor was of the view that, after considering the applicant's and the respondent's particular individual circumstances and M[....]'s needs and where he is in his developmental stage, he ought primarily to reside with the applicant. He is comfortable with both his parents and would benefit from maintaining regular contact with the respondent. She is thus of the view that the shared arrangement is not one that would be in his best interests, when one applies the considerations in section 7 of the Children's Act.

[29] I have carefully considered the affidavits filed by both parties and the submissions made by both the applicant and the respondent. I must be guided however, by the report of the Family Counsellor as well as that of the Family Advocate. Given the nature of the relationship between the parties, the fact that it is acrimonious and hostile, it seems to me that the applicant's proposal of defined time periods may assist the parties in managing handover times and minimising the friction between them, which has resulted in a hostile and acrimonious relationship.

[30] I am of the view that an order which considers the recommendations of the family advocate and that proposed by the applicant is the most appropriate in the circumstances. I agree that M[....] needs stability and routine especially when he commences pre-school and formal schooling. The current two days on and two

days off relationship would be too disruptive. The mid-week visit when the respondent is not exercising weekend contact will also benefit M[....] and the respondent.

Costs

[31] Although both parties seek an appropriate costs order against each other, I am of the view that it matters not which party has been largely successful, and that both parties have involved themselves in litigation in what they believe is the best interest of M[....]. I agree with the submission of *Mr Bond* that neither party has acted *ma/a fide* and has put forward their respective views and their reasons for the orders that they seek. Given the fact that the matter is one involving children, the most appropriate order in the absence of *mala fides* is for each party to be liable for their own legal costs. The award of costs falls in the discretion of the court and given that this was a matter relating to what was in the best interest of M[....], I am persuaded that the most appropriate order in this matter, would be for each party to pay their own legal costs.

[32] In the result, the following orders are issued:

[32.1] The applicant and the respondent are declared to be co-holders of full parental responsibilities and rights in respect of the minor child, M[....] N[....], a boy born on 6 July 2015, in accordance with Section 18 of the Children's Act, 38 of 2005.

[32.2] The primary place of residence of the minor child shall be with the applicant.

[32.3] The respondent is entitled to exercise the following contact with the minor child:

32.3.1 Every alternate weekend, from Friday after pre-school/school, till Monday morning, when the child is to be dropped off at pre-school/school.

32.3.2 Every alternate Wednesday, from after pre-school/school till Thursday morning, when the child is to be dropped off at pre-school/school. Such contact is to be exercised in the week the respondent does not exercise weekend contact.

- 32.3.3 From 17h00 on the day prior to the respondent's birthday until 17h00 on the day of the respondent's birthday, subject to the proviso that the applicant will be entitled to contact on her birthday from 17h00 on the day prior to her birthday until 17h00 on the day of her birthday.
- 32.3.4 The sharing of all school vacations, with the halves alternating annually between the parties.
- 32.3.5 For a reasonable period of time on the minor child's birthday, subject to the proviso that the applicant will also be entitled to contact on the minor child's birthday for a reasonable period of time.
- 32.3.6 Mother's day and father's day to be spent with the respective parent.
- 32.3.7 Public holidays attached to a weekend will extend that weekend in favour of the party having contact with the child on that weekend. Other public holidays that do not attach to a weekend, or fall in the school vacations, are to be alternated.
- 32.3.8 Sharing of Christmas.
- 32.3.9 Reasonable telephonic contact.
- 32.3.10 Any further contact the parties may agree to.

[32.4] Each party is directed to pay their own costs occasioned by the application.

HENRIQUES J

Date of Set Down : 10 July 2020

Date of Judgment : 30 July 2020

Appearances

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This judgment was handed down electronically by circulation to the parties' representatives by

email and released to SAFLII. The date and time for hand down is deemed to be 09h30 on 30 July 2020.