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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NO: 12093/2019

- [1] REPORTABLE: YES / NO
[2] OF INTEREST TO OTHER JUDGES: YES / NO
[3] REVISED.

Date:

WHG VAN DER LINDE

In the matter between:

I H

Applicant

and

M W

Respondent

J U D G M E N T

Van der Linde, J:

- [1] This is an application in which the mother of a 16 year old boy seeks an order that the biological father of the boy returns the minor child to her pending an investigation by appropriate experts in the form of specialist clinical psychologists and the family advocate as to which of the two parents ought to have the primary residence of the boy. The father, who appeared in person as the respondent, opposes the relief sought. The application is

urgent, so it is contended, because it was only on 21 March 2019 that the minor boy, N, left his mother and went to stay with his father, expressing an intention not to return to live permanently with his mother.

- [2] The applicant's case as set out in her founding affidavit is that she, born in the Ukraine, came to South Africa in 1999; she is a qualified ophthalmologist but this was not recognised in South Africa and so she commenced working as a technical translator; she met the respondent and they started dating; she fell pregnant after six months with N; during the fifth month of her pregnancy the respondent suddenly informed her that he no longer loved her and that he did not want to marry her; and thereafter he began seeing other women. N was born and despite problems with his birth he survived and has spent his life up to now living with his mother as his primary caregiver.
- [3] The applicant and the respondent never stayed together as husband and wife in a permanent heterosexual life partnership, and they never signed any formal parental rights and responsibilities agreement in respect of N. It was merely agreed between them informally that N would stay primarily with her and that the respondent would have reasonable rights of contact with N as agreed between the parties. They also agreed to divide N's expenses on a *pro rata* basis according to their restrictive incomes.
- [4] The respondent has a busy travelling schedule and often travels throughout South African countries and also overseas. He has had a number of short-term relationships with female friends.
- [5] In the meantime the applicant has married Mr H and that marriage produced a daughter, M.
- [6] Despite being above average intellectually, N did not grow up without problems. He is very sensitive and could not comprehend why his parents were separated. By the time he was in

Grade 8 he already had to attend counselling sessions with psychologists as a result of his parent's separation.

[7] In time he graduated from Bedfordview Primary School and he was then enrolled in Reddam House High School, a reputable private school in Bedfordview. There it transpired that he had some attention deficit disorder problems and he attended five sessions with a psychologist, to the chagrin of the respondent who appeared not to take seriously the suggestion that N had an attention deficit disorder.

[8] At all events the respondent has been seeing N regularly, every alternative weekend, every Tuesday until Wednesday, every alternative school holiday, every alternative public holiday; and in the past two years N has been spending more time with the respondent, at N's request.

[9] The applicant ascribes this to the respondent's generally more lenient attitude towards the upbringing of N. And she says that when she found marijuana, a cigarette, as well as a few bottles of alcohol in N's weekend bag on 9 February 2019 after a return from the respondent, she ascribed it to the generally too relaxed attitude that the respondent adopts towards the upbringing and discipline of N.

[10] The events that led to the current application being brought urgently out of term was when N asked on 21 March 2019 whether he could go and stay with his father, and told his mother that he had taken advice from a lawyer who said to him that since he was 16 years old (Grade 10) he could decide where he wanted to live. He followed through on this.

[11] Since 21 March 2019 the applicant has had no contact with N and he refuses to speak to her.

[12] The respondent, when he addressed the court, stressed that in his view N should stay with him as this was in the best interest of N. He agreed that, reasonably speaking, the views of a

third party ought first to be obtained, such as that of a family advocate. He explains in his answering affidavit that his mother and his older sister lives with them and so too his son Stephen from a prior relationship. He believes that the real reason why N wants to live with him is not only because he has a desire to see more of his father, but also because his mother is too strict.

[13] During the course of the hearing I put to both parties the possibility that pending the report of a family advocate (which it appeared common cause should be obtained), N shares primary residence equally between the two parents. Initially the respondent seemed enamoured of the notion. However, after an adjournment of an hour and a half, the respondent came back and reported that he was not agreeable to this, since N was not agreeable; and he said that N said to him that his stepfather had on occasion said to him that he wanted to kill him.

[14] This assertion does not appear anywhere in the papers and therefore was not dealt with by the applicant. I have my doubts as to whether any credibility can be attached to it because if it was said, and if it was seriously intended by the stepfather and seriously understood as such by N, then no doubt it would have found its way into the papers at an earlier time.

[15] The applicant, for her part, reported that although she thought the arrangement impractical and potentially disruptive, she would nonetheless be prepared that primary residence be shared between the two biological parents, pending the report of the family advocate.

[16] In the view that I take of the matter, the custody in respect of N should indeed be shared equally between the parents pending the report of a family advocate. I am swayed to this conclusion primarily for the following reasons.

[17] First, that retains to some extent the *status quo*, where N has been spending the last 16 years of his life. It is also true however that in the past two years he has been seeing his

father more frequently; and so to that extent the sharing of custody by the respondent is justified as having been introduced gradually. Second, there can be no disputing that the household in which N has grown up was steady and afforded him a safe haven. Barring the incident to which I have referred above, and to which I do not attach credibility, the respondent has not offered any objection to the way in which the applicant has cared for N. After all, he was the one who walked out of the relationship in the fifth month of the pregnancy.

[18] Third, it appears that there are no problems affording N access to the respondent; and there ought not to be any problems affording N access to the applicant, and such an order ought to issue. The respondent will no doubt assist in achieving that objective, and the court order should be so formulated to achieve that end.

[19] In the fourth place, it is important that a weighty life decision such as the one which N wishes to take, should not be taken in isolation of those that care for him, nor in isolation of appropriate professional advice that can be obtained, especially given the fact that N has experienced some difficulties before; and of course the marijuana in the bag after the visit to the father.

[20] In the fifth place, I do find it disconcerting – as I have just said - that N had access to marijuana, and a measure of control should continue to be exercised over that aspect of his social life. His mother appears more concerned generally that his upbringing should be appropriately disciplined.

[21] Finally, N has half-siblings at both residences, and the residences are in the same suburb of Johannesburg; it seems to me he is in a position more favourable than most children in families that have split up. Practical arrangements ought to be easily made to overcome the difficulties and disruptions that the applicant envisaged.

[22] In the circumstances I am prepared to make an order which provides for shared custody of N; which provides for reasonable access by the one parent while N is with the other parent, expressly to be ensured by the opposite parent; and for the obtaining of a report by the family advocate. I do not envisage any other reports.

[23] I invite the parties therefore to agree on a draft order in the light of this judgment, to submit it to me by latest Monday 15 April 2019 at 13h00, whereafter I will make an order on Tuesday 16 April 2019 at 10h00.

WHG van der Linde
Judge, High Court
Johannesburg

Date argued: 9 April 2019
Date judgment: 11 April 2019

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