

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

29/4/16

CASE NO: 32126/2015

Not reportable

Not of interest to other judges

Revised.

In the matter between

A C

Applicant

and

J E C

First Respondent

THE FAMILY ADVOCATE

Second Respondent

JUDGMENT

MADIMA, AJ

[1] The applicant and the first respondent are the parents of three minor children, JD who was born on 6 February 2011, E who was born on 16 October 2013 and baby N who was born on 7 August 2015.

[2] The parents are in the midst of an acrimonious divorce. They bicker about almost everything including the important issue regarding the primary residence for the minor children. This Court intervened, and on 8 May 2015 made *inter alia* the following orders:

- 2.1. the minor children (JD Cowley and E Cowley) be immediately returned to the applicant and remain in the applicant's primary care and residence pending the finalisation of this application;
- 2.2. pending the finalisation of this application the first respondent may have the following contact with the children
 - 2.2.1. the right to collect the children in order to take them to school every day;
 - 2.2.2. every Wednesday from after school for the night to remove JD C;
 - 2.2.3. the right to visit the children every day from 17:00 to 19:00;
 - 2.2.4. the right to remove the children every alternative weekend from Friday after school until Monday morning where he will take JD and E to school;
 - 2.2.5. pending finalisation of this matter the children and the applicant and the first respondent must undergo a forensic psychological evaluation at Dr Henk Swanepoel (by agreement between the parties);
 - 2.2.6. parties must contribute 50/50 to the cost of the aforesaid evaluation and take all necessary steps to ensure that the evaluation is done as soon as possible

[3] The first respondent, due to the urgent nature of the earlier application brought by the applicant, was only in a position to file his answering affidavit on 12 August 2015, as well as a counter application in which he sought the following relief:

- 3.1. The applicant's urgent application be dismissed;
- 3.2. Both parties to retain joint parental rights and responsibilities of the minor children;
- 3.3. That primary care and residence of the minor children, JD and E C, is

awarded to the respondent *pendente lite*;

3.4. That the applicant be afforded reasonable rights of contact to the minor children, JD and E C, pendent lite, including but not limited to:

3.4.1. alternative weekends from Thursday after school until the following Monday when the applicant will deliver the minor children to school;

3.4.2. contact with the minor children twice a week for a period of two hours after school as arranged between the parties;

3.4.3. contact with the minor children on Wednesdays after school until Thursday morning in the week where the applicant will not have the minor children for the weekend;

3.4.4. contact with the minor children for half of each school holiday and Christmas and Easter to rotate yearly between the parties;

3.4.5. contact with the minor children on their birthdays and such times as agreed to between the parties;

3.4.6. reasonable telephonic contact daily with the minor children.

[4] The applicant filed her answering papers to the first respondent's counter application on 28 August 2015. The matter was set down for 31 August 2015 in the unopposed motion roll as a Rule 43 application. On that date it could not be heard and removed from the roll on the grounds that the papers were voluminous and instead be enrolled on the opposed motion court roll. This is how the matter ended in this Court.

[5] Currently the first respondent enjoys the following rights of contact with the minor children:

5.1. He collects the minor children, save for baby N, every morning to take them to school;

5.2. He collects the minor children from school at 15:00 and stays with them until 17:00 when he returns them to the applicant's residence. The first respondent is also entitled to spend some time with baby N at this stage;

5.3. JD sleeps over at first respondent's residence every evening, whilst E is returned to the applicant;

5.4. JD and E spend alternative weekends with the first respondent from after school on a Friday until the commencement of school on a Monday morning. , he first respondent was to return the two minor children to the applicant and their primary residence was to remain with the Applicant pending the finalisation of the application

[6] The applicant and the first respondent both have disputes regarding the expert reports and do not agree with the recommendations of Dr Henk Swanepoel. The applicant's main concern is that the minor children are being separated by the current arrangements. Her wish is that all the three minor children be, at all times together under one roof be it at her residence or at first respondent's.

[7] The applicant is also concerned that the first respondent will alienate JD from her. A report by Dr Lore Hartzenberg, an educational psychologist seems to confirm her fear where it is stated that "JD appears to be fixated on his relationship with his father, to the degree that he replies to questions about other matters inappropriately, by referring to his father when the answer has nothing to do with the question posed to him. He also perseveres with the same replies even if that answer is not applicable. This behavior may be a defense strategy to cope with stress and anxiety and to avoid the demands of the assessment or possibly as a result of influence or coaching to respond in a specific manner during the assessment".

[8] Further the report states that "...JD appears to have a need to exclude his mother's role as his parent, in favour of his father. JD states that he enjoys being with his father, but when asked about the activities they share, he reports that he plays on his own. It would appear from JD's interview that his father and paternal grandfather buy him gifts,

give him money and toys. This was evident on the occasions that he was brought to the assessment by his father and also when Ms Cowley brought him to the assessment directly after a weekend visit with his father".

[9] Currently the first respondent enjoys the following rights of contact with the minor children:

- 9.1. He collects the minor children, save for baby N, every morning to take them to school;
- 9.2. He collects the minor children from school at 15:00 and stay with them until 17:00 when he returns them to the applicant's residence. The first respondent is also entitled to spend some time with baby N at this stage;
- 9.3. JD sleeps over at his father's house every Wednesday evening whilst E is returned to the applicant.
- 9.4. JD and E spend alternative weekends with the first respondent from after school on a Friday until the commencement of school on a Monday morning.

[10] The Court is required to determine mainly whether the applicant and the first respondent should share residency over the three minor children. The first respondent is of the view that residency should be shared between both parents. The applicant is of the otherwise view. Primary residence over the minor children should, according to applicant vest with her. The first respondent should only have reasonable contact, at applicant's convenience.

[11] The applicant's main concerns with the current arrangements are that the children are separated. With this separation the applicant fears possible alienation of her from the minor children. I must point out that these fears and concerns were raised with the experts, however they upheld their initial recommendations.

[12] There is little doubt that children of JD, E and N's ages need to ordinarily live with their mother. I must point out however that there is nothing that precludes the same

arrangement to vest with their father. Modern males are equally capable of raising their children just as well.

[13] Our courts have entertained the question whether children should be separated in applications for custody. In Van der Linde v Van Der Linder [1996 (3) SA 509] the court stated that the question comprises of two enquiries, (a) is it desirable that children should be separated from each other and (b) is the quality of a parental role determined by gender? With regard to (a), all being equal, siblings should not be unnecessarily separated from each other. The reason being that siblings experiencing the trauma of a divorce tend to form a bond with each other. A bond which to a greater extent gives them a feeling of security against the 'onslaught from outside'. On the other hand, however, it will be necessary for children to be separated from each other if one child with the custodian parent is not properly cared for or is neglected. Also if the change will be a substantial improvement. As to (b), for decades it has been accepted that the quality of a parental role is determined by gender, it has been accepted that mothering was a component of a woman's being only. At the present juncture it is to be doubted whether that acceptance can by itself serve as a universal prevailing axiom. These days mothering is also part of a man's being. The concept 'mothering' is indicative of a function rather than a persona and this function is not necessarily situated in the biological mother.

[14] There is no clear indication that the first respondent is not a good, loving and capable 'mother'. In fact all indications are that he is very devoted to his children. He is willing and capable to look after them just as well as the applicant. There is no reason why the applicant and first respondent should not share, as a temporary arrangement, and pending the finalization of their divorce action, the raising of the minor children.

[15] I have taken into account the reports by the two experts and I come to the conclusion that residency of the minor children should indeed be shared *pendente lite* between the applicant and the first respondent. In that regard I make the following order:

15.1 That a Case Manager, who shall be an advocate with a minimum of 7 years' experience in child law, is nominated I appointed by the Chairman of the Pretoria Bar on behalf of the minor children.

15.2. The duties and powers of the Case Manager shall be the following:

- 15.2.1. to investigate and mediate disputes regarding the minor children;
- 15.2.2. to provide insight into and legal knowledge to the monitoring and implementation of the provisions of this order;
- 15.2.3. to make such further enquiries as deemed necessary with whoever is deemed relevant in the execution of his/her mandate;
- 15.2.4. to refer the minor children for assessment or therapy with relevant experts as deemed appropriate;
- 15.2.5. to produce a report setting out any and all facts or circumstances pertinent to the minor children's representation in the applicant and first respondent's divorce action.

15.3 The applicant and the first respondent shall share the costs of the Case Manager on an equal basis.

[16] The applicant and the first respondent shall have equal parental responsibilities and rights over three minor children.

[17] The applicant and first respondent shall share residency of the minor children as follows:

- 17.1. JD, E and N shall sleep over at the applicant's residence every Monday and Tuesday;
- 17.2. The first respondent will spend time with N (between 15:00 - 18:00) together with JD and E when he has them after collecting them from school;
- 17.3. JD and E shall sleep over at the first respondent's residence every

Wednesday and Thursday;

17.4. the first respondent shall have JD and E with him on alternative weekends from Friday after school until Sunday at 18:00.

[18] With respect to N, a Case Manager as appointed herein, is authorised to gradually (initially on alternative weekends when JD and E are with the first respondent) phase in sleep over contact at the first respondent's residence to the eventual position where N will spend the same time with each parent as JD and E;

[19] The picking up and dropping off to and from school arrangement regarding the minor children shall remain the same;

[20] Holidays shall be shared equally and on a rotating basis with respect to all the minor children, with the specific times established by the Case Manager;

[21] The costs of this application shall be cost in the divorce action;

[22] The restrictions in terms of Rule 43(7) and (8) shall not be applicable.

TS MADIMA: AJ

ACTING JUDGE OF THE HIGH COURT

On behalf of the Applicant:

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On behalf of the First Respondent:

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Dates of Hearing:	18 April 2016
Date of Judgment:	29 April 2016