HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Not reportable
Not of interest to other Judges
CASE NO: **3376/2016**
31/3/2016

In the matter between:

E S Applicant

and

J F S Respondent

JUDGMENT

MAKGOKA. J

[1] This is an opposed application in terms of rule 43 of the Uniform Rules of Court. The applicant seeks interim primary residence of a minor child pending an investigation by the Family Advocate as to best interests of the minor child with regard to the primary residence and care.[1] Ancillary to that, the applicant seeks maintenance in respect of the minor child. The respondent contends for the maintenance of the *status quo,* pending that investigation. A divorce action between the parties is pending in this court.

[1] During the hearing, I was informed from the Bar that the Family Advocate has scheduled 7 March 2016 for the parties to attend a consultation.

[2] The parties married each other on 20 September 2003, from which marriage, J, a boy aged 4 (the minor child) was born on […] 2011. The respondent has issued summons out of this court against the applicant for a decree of divorce and certain ancillary relief, which includes primary residence of the minor child. The applicant has pleaded to the respondent's action and filed a counter-claim, in which she also, among others, claims primary residence of the minor child. As a result of this dispute around the primary residence of the minor child, the Family Advocate is investigating that aspect.

[3] The dispute around primary residence of the minor child arose as follows. Up to July 2015 the parties shared their common home with the minor child. On 31 July 2015 the applicant was admitted to a psychiatric hospital after being diagnosed with depression. When the applicant was admitted to the hospital, the minor child was left in the care of the respondent, who was assisted by the applicant's mother in caring for the child. The applicant says that her mother 'moved in' with the respondent to help care for the child, which is disputed. It is clear, however, that the applicant's mother provided some form of support to the respondent in caring for the minor child during the applicant's hospitalization.

[4] The applicant was discharged from hospital on 20 August 2015. Upon discharge, she did not return to the common home, supposedly on the advice of her doctors. She stayed with her brother and mother for a brief period. She moved into her new residence on 5 September 2015. It appears that the respondent only allowed the applicant limited contact with the minor child during that period.

[5] During early December 2015 the parties, with the assistance of their respective legal representatives, reached agreement on the holiday arrangements in respect of the applicant's contact with the minor child. However, the parties could not agree on the issue of primary residence and care of the minor child. That resulted in the present application.

[6] The applicant says the reason she approaches the court now is that she is concerned with the emotional well-being of the minor child. She says that the minor

child's 'emotional security' lies with her and that the minor child is very attached to his maternal grandmother, who is her support system. She is best equipped to attend his day to day care and educational needs. Furthermore, the applicant alludes to the respondent's 'emotional volatility'. She points out that the respondent has been on anti-depressants from May/June 2015 and has threatened to commit suicide by shooting himself. She mentions an incident in which the respondent had to be dissuaded by a friend from committing suicide after he had threatened to do so. In sum, the applicant contends that the emotional well-being of the minor child is not served by the child being in the primary residence of the respondent.

[7] On the other hand, the respondent strongly disputes the applicant's assertions. The main thrust of his case is that he has been solely taking care of the child since 31 July 2015 when the applicant was hospitalized. He denies that the applicant's mother moved in with him into the former common home to assist with the care of the minor child, when the applicant was hospitalized. He concedes, however, that the applicant's mother assisted him during the applicant's hospitalization, and before that, when his own mother passed away on 21 July 2015. The respondent says that the applicant's mother assistance came in handy when his work responsibilities required him to be on stand-by, during which she would take care of the minor child until he returned home.

[8] As to the present circumstances of the minor child, the arrangement between the parties is that the child spends two successive weeks with the respondent and a week with the applicant. (It is not clear from the papers as to the fourth week of the month). The applicant has reasonable telephone access to the minor child and is entitled to contact him every night before his bedtime at 19:30. The applicant is entitled to visit the child every day on reasonable advance notice.

[9] The applicant leaves for work at approximately 06:15 in the morning. The respondent says that this usually means that he has to take the child to school even in the week the child spends with the applicant. The respondent works flexi-hours and is not office bound. He is on standby every week, and this is the week that minor child stays with the applicant. According to the respondent, the minor child has become accustomed to a certain routine over the past six months.

[10] From a general reading of the papers both parties blame each other as being non-suitable for the role of primary care-giver and for provision of primary residence for the minor child. Both parties suffer depression and need therapy themselves. Both have attended individual and joint parental guidance sessions.

[11] The *status quo* has been in place for the past six months prior to the launching of the application. I agree with the respondent that during that period, the minor child has obviously got used to a certain routine. There does not seem to be anything alarming about the respondent being the primary care giver of the minor child during this period. On the contrary, it seems that the respondent is a dedicated father who cares for the minor child - he bathes him, puts him to bed, takes him to school, etc.

[12] This is in no way a negative reflection on the applicant. The parties live in close proximity to each other, and of the minor child's school, and their interim arrangement in respect of the minor child seems to be working relatively well. There appears to be no basis to interfere with the *status quo* pending the report of the Family Advocate, which should be available in due course, now that, hopefully, the consultation has been completed.

[13] As stated above, this arrangement has been in place for over six months at the time the application was launched. The reason why it has taken that long for the applicant to seek the minor child's primary residence is simply because she did not insist, once she was discharged from the hospital in August 2015, that such residence be with her. Never once, before November 2015, did she take issue with the fact that the respondent was having primary residence of the minor child. She consulted her attorney only during November 2015, seeking contact rights, supposedly because of lack of funds. I do not accept this explanation. The applicant's mother is an attorney, and therefore there is no reason why she, or a colleague, could not have assisted her *pro-bona,* to bring this application earlier.

[14] The result of the delay is that the minor child has been accustomed to the *status quo* - spending two weeks with the respondent and one week with the applicant. There is nothing on the papers to suggest that that arrangement is not working or that it affects the minor child negatively. For that reason I am not inclined to disturb the *status quo,*

which should remain pending the report of the Family Advocate. In the light of this conclusion, it is becomes unnecessary to consider the applicant's ancillary relief relating to maintenance. In the result the application falls to fail. The costs should be in the main divorce action.

[15] In the result the following orders is made:

1. The application is dismissed;

2. The costs are to be in the main divorce action.

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T. M. Makgoka

Judge of the High Court

Date of hearing: 18 February 2016

Date of judgment: 31 March 2016

For the Applicant: Adv. L. Kok

Instructed by: Motla Conradie Inc., Pretoria

For the Respondent: Adv. l.N. Kruger

Instructed by: Cynthia Van Dyk Attorneys