SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and SAFLII Policy

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 13170/2020

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

Date: 2 November 2021 E van der Schyff

In the matter between:

E M D[….] APPLICANT

and

M P[….] RESPONDENT

JUDGMENT

Van der Schyff J

Introduction

[1] The application concerns the determination of the residency and care regime that would be in the best interest of the minor child, L. L is currently almost 5 years and 8 months old. The matter first came before me during March 2020. An interim contact residency and contact arrangement was set in place pending the finalisation of a report by the Family Advocate. This interim contact arrangement was amended several times but the amendments were not extreme.

[2] The Family Advocate's report is dated 7 October 2020, but neither of the parties approached the court for the matter to be finalised before August 2021. A case management meeting was held and a timeline was set for the parties to file supplementary affidavits addressing the Family Advocate's report. In addition to filing a supplementary affidavit, the respondent also filed a counter application at the eleventh hour. The applicant responded to the respondent's affidavit filed in support of the counter application. Since all the affidavits deal with the subject-matter of the appropriate residency and contact regime that will be in the minor child's best interest, I considered all the affidavits filed.

The factual context

[3] The minor child's parents separated during 2018. The relationship between the parents is very acrimonious. Several experts were involved in an attempt to assist the parties and from the onset the parents were made aware of the fact that their persistent conflictual relationship is harmful and damaging to the child's emotional wellbeing. In fact, it was stated by one expert that the conflict 'can be deemed the most harmful and damaging element' in the minor's life.

[4] Despite the involvement of a number of experts, the parties are not able to agree amicably on the residency and contact regime that they regard to be in the minor's best interest. The applicant is of the view that it is in the child's best interest that the child's primary residence vests with her and that the respondent's contact be structured. The respondent is of the view that it is in the minor child's best interest that a shared residency regime be implemented with the minor child spending alternate weeks with each parent.

[5] An analyses of the affidavits reveals that both parents care for the minor child, that neither of the parents pose any physical or emotional risk to the child to the extent that the parent's contact should be supervised or unnecessarily be curtailed. The affidavits also reveal that the applicant and the respondent are mere mortals. They have different personalities, different parenting styles, and different flaws. The applicant is concerned about the respondent's alcohol use, and the respondent expressed concerns regarding the applicant emotional outbursts. The extent of the acrimony between the parties and their inability to co-parent in a civilised and constructive manner defines their dysfunctional relationship. The sad reality of L's life is that irrespective of the order granted, he will be deprived of the benefit of growing up in an atmosphere of happiness, love and understanding that is indispensable to facilitate the full and harmonious development of his personality, unless and until his parents change their confrontational attitudes towards each other. And, I must state, in my view both parents are to blame for the lingering hostility.

[6] After having regard to the affidavits and all the expert reports, although some of the reports are indeed outdated, I have no doubt that:

i. The minor child, has a normal child-parent relationship with both his parents. Both were and are involved in his life, and if it was his choice he would prefer to life with both. He sometimes acts out at his mother's house, and he sometimes is rude with his father over the phone, or objects to eat vegetables – his behaviour is typical of a young child.

ii. Both parents choose to be actively involved in L's life. The applicant expressed the importance of the minor child fostering a good relationship with his father from the onset. Her actions support this expressed view. Her concern, however, is that the minor needed stability and structure and that the haphazard contact regime implemented on the advice of Ms. Wolmarans created confusion and anxiety with the minor child. The applicant who stated from the onset that she was receiving counselling took steps to equip herself to be able to parent her child in the factual matrix of

two parents with different parenting styles who are in an acrimonious relationship. I am concerned about the fact that the applicant is monitoring L's phone calls and summarily ends a phone call when she perceives L to be agitated. This type of behaviour adds to the acrimony between the parents. The respondent perceives the applicant to attempt to alienate the minor from him. No evidence of child alienation is evinced in the affidavits or expert reports. I am concerned about the fact that the respondent tends to act in a manner that indicates that he is the authority figure who will decide how he will exercise his contact rights. His conduct resulted in L being suspended from a pre-school before the urgent court application was instituted. He decides that the minor does not have to take the nap instituted by the school and collects the child at 12h00, instead of 14h00. The respondent counts contact hours and does not seems to comprehend that it might sometimes be in the child's best interest to give up one sleepover so that the child can have the benefit of a special experience with the applicant. The respondent does not seem to realise that he can benefit from guidance regarding co-parenting the minor. He indicated that his daughter just got married and that she is a beautiful adult, as a testimony to his ability to parent a child in a situation where he and the mother were separated. Both parties seem to become emotional when they perceive the other party to appropriate control.

iii. The parties have different parenting styles and values.

iv. Although both parties may be able to provide in L's emotional and intellectual needs the existing acrimony is harmful to the child. The applicant indicates that L acts out and that he needs time to calm down when he returns from the respondent. One would expect the respondent to prepare the minor child for the return.

v. The parents live sufficiently close to each other to facilitate regular contact between the respondent and L.

vi. L is still young, and this fact cannot be left out of the equation. He is a young boy and as he grows older his need to have more frequent contact with his father will increase.

vii. The respondent's work schedule requires some flexibility. The respondent states that he sometimes has to commence with diving excursions on Wednesdays, Thursday or Fridays. This impacts on the Thursday night scheduled sleepover and the respondent then requests an exchange for a different night. There is no reason why the minor cannot accompany his father on diving excursions when the necessary arrangements are made that the minor will be taken care of while the respondent is involved in dives. The respondent, however, does not indicate how this flexible workshedule can be addressed in a shared residency regime.

Expert reports

[7] It is trite that a court is not bound to follow the recommendations made by an expert witness. A court is, however, to give serious consideration to an expert's opinion if that opinion is substantiated by a factual basis.

[8] In the present matter the following reports were considered:

i. Ruth Garb's report dated 13 September 2018 – Ms. Garb reports that the respondent sought share residency and was unwilling to accept any residential and contact arrangement other than that of shared residency. She indicated that allegations of alcohol abuse by the respondent necessitated investigation. She states 'Mr Pheiffer's implacable position has made an amicable resolution of the matter impossible. He has sought the opinions of various experts, 'shopping' for an opinion that suits his agenda.' Ms Garb referred to a paper written by Dr. Martin Strauss which was quoted in the South African Journal of Psychology, 41 (2), 2011, pp 196-206 wherein he concluded – 'The necessity for overnight contact may be more a case of parental and legal demands than in the best interests of the child.' Ms. Garb stated that neither she nor Ms. Edmonds who was also involved held the view that the respondent is the child's primary attachment figure due to the child's stage of development. She did not recommend overnight contact at that stage.

ii. Ms. Nadine Kuyper an educational psychologist referred in a report dated 19 October 2018 to aspects that should be taken into consideration when overnight contact is considered and stated that these ‘dimensions’ be taken into consideration to prevent unnecessary stress and trauma for Luke.

iii. Ms Melindi Van Rooyen, a social worker, provided a report dated 2 December 2019. She reflected that the then current care and contact arrangements created high conflict between the parents with the respondent expressing the opinion that L should spend equal time with both parents, while the applicant opined that L should reside with her and have regular contact with his father. Ms. Van Rooyen referred to the fact that L was assessed by Ms. E Maartens a social worker in private practice. Ms. Maartens did, however, not file any report. Ms. Van Rooyen records that Ms. Maartens reported that it was difficult to conduct a full assessment on L due to his young age. He appeared to be anxious, cried and was difficult to control. Without providing any factual basis for such opinion, Ms. Van Rooyen states that Ms. Maartens found that L showed a stronger attachment with the respondent and that his attachment with the applicant is ‘also good’. The weight that is to be attributed to this ‘hearsay evidence’ if it is accepted as collateral information, is further diminished by the fact that no factual basis is provided for the conclusions that Ms. Maartens came to. Ms. Van Rooyen concluded that L needs proper care, contact and a relationship with both parents. She also stated that the ‘continuous high conflict between his parents might put this at risk’.

iv. Ms. A Wolmarans was appointed a parental coordinator. She reflected in an email-report dated 8 February 2020. It is evident that the applicant hesitantly agreed to the contact regime proposed by Ms. Wolmarans. The proposed contact regime provided for a four week cycle wherein the minor child would have sleepover contact with his father on the first night of the first week, then three nights sleepover contact with his mother, then three nights with his father followed by two night with his mother, two nights with his father, three nights with his mother, one night with his father, three nights with his mother, three nights with his father, two nights with his mother, two nights with his father and three nights with his mother. I must state, that it escapes

me how such a haphazard contact regime can be said to provide stability and structure in the life of a child who was not even 4 years old.

v. Family Advocate (FA) and Family Counsellor's (FC) reports dated October 2021 – the FA reported that the acrimony between the parties and the level of conflict is having an impact on the parties' ability to structure a contact arrangement that is in the best interest of the minor child. He is aware of the conflict and it causes him emotional distress. The FC reported that L indicated that he lives with his mother and father, but was unsure of the number of sleepovers he has at each house. He has fun at both homes. The FC reflected that the contact arrangement made by this court on 4 August 2020 worked well for the child. School reports indicate that the child is less anxious and that L is settled with the collections and handovers from and to schools. The FC thus recommended that the child's primary residency remains with the mother. When the child starts to attend school from age 6 she suggested alternate weekend and holiday contact.

vi. Dr. Stoker-Braun was appointed to provide at least five sessions of parenting counselling to the parties. She reported that co-parenting proved to be extremely challenging in their case and recommended further sessions because she opined that this would 'minimize the aspect of competition and animosity' between the parties and keep the focus on doing what is best for L.

Discussion

[9] This court must determine the residency and contact regime that it finds to be in the minor child's best interest within the factual matrix of this specific case. It was stated by King J in *McCall v McCall*[1] that where a court is tasked with determining the best interests of children, the court is not adjudicating a dispute between antagonists with conflicting interests to resolve their discord. In section 7 of the Children's Act, the legislature provides a list of factors that courts must take into

[1] 1994 (3) SA 201 (CPD).

consideration when determining what is in the best interests of the child. These factors were considered in light of the facts of this application.

[10] Research indicates that shared residence can be a positive outcome where parents can co-operate and where all decisions are centred around the child's needs. In high conflict cases where parents experience difficulty co-parenting, research indicates, however, that shared residency can be associated with adverse outcomes for children.[2] In the present case the high level of acrimony between the parents, their distrust of each other, their different parenting styles and their inability to co-parent disqualifies shared residency as the appropriate residency, care and contact regime that would be in L's best interests.

[11] The respondent's unique and unpredictable work schedule, and the school reports that L is settling down and is less anxious since the implementation of the interim residency, contact and care regime, substantiates a finding that L's primary residence vests with the applicant. L is secure enough with the applicant to 'act out' when he is hurt or unhappy. This being said, L has a right and needs to have regular and meaningful contact with his father. The respondent's perceived loss of the opportunity to spend equal time with L, is on the one hand a fallacy and on the other a consequence of separation. It is a fallacy, because even where parents are married or live together, they don't spend a mathematically calculable equal amount of time with the children. The separation of the parties brought inevitable consequences and the respondent needs to accept that it is the quality of the time that he spends with his son and not the quantity, that will in the long run determine the strength of their bond.

[12] L is turning six in March 2022. Although he is still young, his mother is not required to be his protector when he interacts with his father or when he visits his father, unless circumstances arise where it is evident that the child is in physical or psychological danger. But this responsibility goes both ways. I accept that the respondent frequently uses alcohol. However, I find it unacceptable that he was required to do breathalyser tests whenever the applicant requested him to do so. I

[2] L Trincer *Shared residence: A Review of Recent Research Evidence* 2011 Family Law (Chichester) 40.

accept that the applicant has her own history, and is extremely sensitive to the effects of potential alcohol abuse. The facts, however, do not indicate that the respondent's use of alcohol has, to date, caused any harm to L. As for the applicant's concern to allow L to accompany the respondent on dive excursions, I am of the view that L is now old enough to accompany his father, provided that it does not interfere with any school activities and that the respondent ensure that L is properly taken care of when he is busy with clients. Having said that, the respondent need not obtain the applicant's permission regarding the arrangements in this regard, but he must keep her informed. When L gets agitated when he communicates with his father telephonically the applicant is also not to unilaterally end the communication. The applicant is to ensure that L is ready to engage with the respondent telephonically at 19h00 every day that he is in her care.

[13] Having found that the minor child's primary residency vests with the mother, the challenge is to endeavour to accommodate the respondent's workshedule in an appropriate and regular contact regime. In structuring a contact regime, the court is to accommodate the fact that the parties cannot tolerate each other and that handovers are to take place at a neutral venue as far as possible. I also considered that children are generally adaptable and that proper planning can alleviate a great number of the parents' perceived practical inconveniences.

[14] The remaining issue that needs to be adjudicated is the applicant's view that L is to be enrolled to attend Dunvegan Primary School while the respondent wants to enrol him in Laerskool Rooihuiskraal. Where parties cannot come to an agreement, the court as upper guardian needs to intercede. Taking into account that the minor child's primary residence vests with the applicant, that she will have to assist L with his homework and that she is well aware of the fact that the bulk of the financial responsibility to enrol L in the school of her choice will, for now, fall on her shoulders, she is granted permission to enrol him in Dunvegan Primary School or any English Primary School of her choice. If she is considering enrolling L in an Afrikaans School, she must consider the respondent's preference for Laerskool Rooihuiskraal. She must keep the respondent informed of her choice and the reasons therefor.

[15] As for costs. I am of the view that each party is to carry its own costs. Any costs that is to be incurred in regard of play therapy and parental counselling shall be shared by the parties equally.

ORDER

In the result, the following order is made:

1. Both parties retain their full parental responsibilities and rights towards the minor child, L, as envisioned in sections 18, 19 and 21 of the Children's Act, 38 of 2005;
2. Primary residency of the minor child vests with the applicant;
3. The respondent is awarded the following specific rights of contact towards the minor child:

3.1. Remainder of 2021

3.1.1. Every Thursday after school until Friday morning when the respondent drops him off at school;

3.1.2. If the respondent cannot take L on the Thursday, he is entitled to contact with L on a similar basis on Tuesday-Wednesday subject thereto that the arrangement must be communicated to the applicant by the preceding Friday;

3.1.3. Every alternate weekend from after school on Friday until Monday morning when the respondent takes him to school;

3.1.4. Half of the December school holidays, subject to the existing arrangement regarding with whom L will spend Christmas and/or New Year based on the arrangement that was in place for 2020-2021;

3.1.5. Face-time/ video calling or telephone contact every day between 19h00 and 19h30 (the same arrangement applies *mutatis mutandis* regarding the applicant's right to communication when L is visiting the respondent);

3.1.6. Contact every alternate public holiday that falls on a weekday from 09h00 to 19h00;

3.1.7. L is to spend father's day with the respondent and mother's day with the applicant and the parties' birthdays with each other. Such contact will include sleepover contact on the evening prior to the birthday or mother's or

father's day. If the relevant party cannot accommodate the sleepover contact the evening preceding the birthday or mother's or father's day such sleepover contact is forfeited.

3.2. From 2022

3.2.1. From January 2022 every Thursday from after school until Friday morning when the respondent drops him off at school. The respondent must ensure that L's homework which was handed out the previous day for the following day, is done.;

3.2.2. If the respondent cannot take L on the Thursday he is entitled to contact with L on either the Tuesday or Wednesday afternoon from after school until 18h30, subject thereto that the arrangement must be communicated to the applicant via WhatsApp by the preceding Friday, and the respondent must ensure that L's homework which was handed out the previous day for the following day, is done. The respondent must drop the minor child off at the applicant's residence by 18h30. No further telephone contact is scheduled for the day.;

3.2.3. Every alternate weekend from after school on Friday until Monday morning when the respondent takes L to school;

3.2.4. Short holidays must be shared equally between the parties;

3.2.5. Half of each of the long holidays, with Christmas and New Year rotating between the parties annually;

3.2.6. Face-time/ video calling or telephone contact every day that the respondent does not have contact with the minor, between 19h00 and 19h30 (the same arrangement applies *mutatis mutandis* regarding the applicant's right to communication when L is visiting the respondent);

3.2.7. Contact every alternate public holiday that falls on a weekday from 09h00 to 19h00 when the respondent will return the minor to the applicant;

3.2.8. L is to spend father's day with the respondent and mother's day with the applicant and the parties' birthdays with each other. Such contact will include sleepover contact on the evening prior to the birthday or mother's or father's day. If the relevant party cannot accommodate the sleepover contact the evening preceding the birthday or mother's or father's day such sleepover contact is forfeited;

3.2.9. L's birthday is shared between the parties. The parent with whom he does not have sleepover contact that evening is entitled to have L for 3 hours during the day unless the parties come to another arrangement;

4. The minor child must attend play therapy with a registered play therapist and the parties share the fees or portion thereof not covered by the medical aid fund. In the event that the parties cannot agree on the identity of said play therapist a final decision on the identity of the play therapist shall be made by the parental counsellor;
5. Both parties continue with parental guidance sessions to assist co-parenting and communication. Sessions are to be attended at least once a month and is for each party's account. Unless the parties can agree regarding the identity of a parental counsellor within three weeks of this order, sessions are to be continued with Dr. Stoker-Braun who is also to assist the parties as a parental coordinator;
6. Each party is to pay their own costs.

_____

E van der Schyff

Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email. The date for hand-down is deemed to be 2 November 2021.

Counsel for the applicant:	Adv. B. Bergenthuin
Instructed by:	Bronwyn May Inc.
The respondent:	In person
Date of the hearing:	25 October 2021
Date of judgment:	2 November 2021