IN THE HIGITCOURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

In the matter between : CASE NO : 7493/97

J V R (born *H)* **Applicant**

and

W J VAN R **Respondent**

Judgment delivered : **20 April 1998**

KING. DIP Applicant, the mother and Respondent, the father are the divorced parents of two sons, A and L.

The mother is Australian and the father South African; they were married in England in 1987; A was born there on 11 February 1989 and L was born on 2 November 1990 shortly after his parents' move to South Africa.

The marriage was not a success and the parties were divorced by order of this Court on 10 September 1996. The order incorporated a consent paper or agreement between the parties whereby the custody of

the children was awarded to the mother subject to a right of reasonable access reserved to the father.

The mother now wishes to relocate with the children to Albany, Western Australia, her home town. Insofar as the father refuses to consent to the removal of the children from South Africa the mother is obliged to seek the consent of the Court in terms of Section l(2)(c) of the Guardianship Act 192 of 1993. There is of course no restraint on the mother leaving this country but she has made it clear that she would not do so without the children.

The father not only resists the mother's application; he counter applies for an order in terms whereof custody of the children be awarded to him subject to the mother's right of access.

It is with the counter application that I shall deal first. At no stage prior to the mother seeking his consent to the children's removal did the father indicate an intention to apply for custody of the children. It was not an issue at the time of the divorce; the father did not claim custody; nor in the pre-divorce pendente lite proceedings in terms of rule of court 43 in November 1994 nor in earlier proceedings relating to an eviction application in August 1994, and as late as April and May 1997 in

certain correspondence in which the father expressed his concern and dissatisfaction with the prevailing access arrangement, he disavowed any suggestion of a change in the custody order. The conclusion is inescapable that the counter application is a knee-jerk reaction as a consequence of and in response to the application to relocate.

For reasons which will become apparent in the course of this judgment I am satisfied that it is in the best interests of the children that they remain in the custody of their mother.

I refer to the interests of the children. That this is the paramount consideration, the ***'ultimate determinant'*** as it has been called, is clear from, in the first instance, the South African Constitution, Act 108 of 1996, Section 28(2) thereof providing that:

> **"A child's best interests are of paramount importance in every matter concerning the child."**

This is also the criterion which has been applied by our courts over many years.

Turning to the application for relocation, two preliminary issues arise. The first relates to the approach of the court in matters of this nature. It is that there is no onus in the conventional sense; the court will evaluate, weigh«and balance the many considerations and competing factors which are relevant to the decision whether the proposed change to the children's circumstances is in their best interests; the court will make an assessment on the particular facts as they concern these particular children; in other words will apply individual justice in the sense that all the relevant factors, even the mother's fundamental right to freedom of movement, will be assessed in the context of these children's best interests.

The second preliminary consideration is the motivation of the mother. Is she genuine in her belief that her children's interests will best be served by a move to Australia or is she primarily influenced by vindictiveness and spite towards the father after what has undoubtedly been a hostile and antagonistic relationship during and after the marriage, centred after the divorce on the children? Because if the mother is not bona fide there is every reason to suppose that she will do what she can to frustrate the father's access, to his detriment and that of the children.

The mother wishes to return home where she has loving and caring parents and siblings; she is desperately unhappy in South Africa where the failure of the marriage and the strife involving the children have left her angry and distressed; she feels alone and isolated; her support system, to the extent that it exists - and she does have friends in the small town of Knysna where she, as also the father, live - provides some solace but there is no doubt that she will feel and be more secure and contented within herself at home with her family.

The mother's employment opportunities will be better in Australia. In this country she is disadvantaged by reason of being a foreigner and also, in the country districts at any rate, by her inability to speak Afrikaans. The mother's financial position is not good; the joint estate of the parties having been sequestrated as insolvent, the mother received nothing when the marriage terminated, either from the joint estate or from the father's pension entitlement or from any other source. Indicative of her penury is the fact that at the end of February 1998 her car was repossessed; a further consequence of the sequestration is that she is unable to obtain any loan facilities or operate a bank account in her own name.

The father is a dentist in a private practice which he was able, with assistance from a friend, to buy back from the insolvent estate. He pays what maintenance he reasonably can - and with the passage of

time his financial position will improve - but it is clear that the mother can barely make ends meet.

Her position in Australia will be better ; she has good prospects of employment and of various social benefits and of there is available to her and the children rented accommodation from her brother at very favourable terms; the evidence indicates that she and therefor also the children will generally be better off financially than is the case in South Africa. Additionally, satisfactory arrangements for the children's schooling have been made.

These factors illustrate not only the genuineness but also the reasonableness of the mother's desire to relocate to Australia and provide compelling reasons for her to do so. I am satisfied as to the mother's bona fides in this application.

Turning to the merits of the application, the mother is and has always been the children's primary care-giver; they have always been in her custody and it is common cause (subject to what follows) that she is a competent and caring mother who has been almost exclusively

involved in raising the children.

The father is critical of the mother's perceived inability to discipline the children; he is a firm but not

unfair disciplinarian and it is so that in recent times he has been better able than their mother to control them - during the weekends and holidays that they spend with him.

The mother has had difficulty in handling the boys. They have, inevitably, been affected by the discord between their parents and have been acting up; they have become manipulative and undisciplined. However the mother has been conscious of the problem and has sought professional assistance for both herself and the children with good effect. The situation has improved and, it must be said, will inevitably further improve if the mother is relieved of the emotional turmoil which she has been experiencing and which necessarily impinges upon the quality of her parenting which in turn impacts adversely upon the children.

The existing relationship between the children and their mother is basically good and strong and the present discipline problems which are largely a product of the present environment, more particularly the bad relationship between the parents and its effect on the mother which will of course not be present if the parents are geographically separated.

The father's case is founded, as to its positive side, on the strength of the relationship between himself and the children. This is undoubtedly so; he is a good father and there is a strong bond, based on affection and respect, between the children and him. It is also so that the children are well behaved when they are with him and they are very fond of the lady, ***Use Mostert*** with whom he lives - they intend to marry in the near future - who is herself a loving and caring person who has a very good relationship with the children.

On the other hand the father is in the nature of things untested as a custodian and Miss Mostert, good woman as she undoubtedly is, is not the children's mother; at best she is a good substitute or surrogate, but these two young boys have always been with their mother and now with the break up of the marriage, they need her all the more. This is particularly so of the younger child, L and of course there is no question of the two boys being separated.

Their young lives have already been disrupted and there is no doubt that they will be further disrupted by the deprivation of frequent contact with their father. Furthermore, they will move to a new environment far from that to which they have been accustomed, with a new school, new friends to be made and in some ways a new culture to which to adapt. On the other hand children, particularly young children do adapt and the children will be part of a large and loving family circle in Australia. They will also be in the care of a mother who will be happy and contented and at peace within herself which will equip her to cope with the inevitable initial difficulties which will attend the change in the children's circumstances.

All in all, the children's lives will be more stable and secure than they are now. It is trite that the interests of the children are - all else being equal - best served by the maintenance of a regular relationship with both parents. Sadly, however, children of divorced parents do not live in an ideal familial world and the circumstances necessitate that the best must be done in the children's interests to structure a situation whereby access by the non-custodian parent is curtailed but contact between him and the children is effectively preserved.

Something was sought to be made by the father of the children's perceived preference; in appropriate circumstances a child's wishes will be taken into account, but here the children are of tender years, they are presently in a state of emotional confusion, they are susceptible to parental influencing and the reasons they have given for wishing to go to Australia or stay in South Africa are in themselves so childishly immature, that I am satisfied that it would be unwise and indeed irresponsible to have any regard to such preference as they are supposed to have expressed.

If the mother is to relocate, the position can be palliated and the disruption to the children minimised by the generous allocation of block access which is proposed. The children will see their father for a

three week period mid-year and a four week period at year's end, to be enjoyed either in Australia or South Africa according to the father's choice. The father has reestablished his dental practice and will, I am confident, be is a financial position to exercise the right of access afforded to him.

One of the father's concerns is that the mother will make the exercise of access difficult, if not impossible. I do not think this will happen. The mother recognises and acknowledges the need and desirability of continued contact between the children and their father and I believe that she is bona fide in this regard. Additionally the mother has undertaken to have the order of this court, where appropriate, made an order of the court of competent jurisdiction in Australia and the order which I propose to make will oblige her to do so.

I am very much mindful of the effect which the loss of frequent contact with their father will have on the children. He is very much part of their lives and the absence of frequent contact with their father and the loss of his immediate presence will be a diminishing factor in their young lives. I am however satisfied that this can be compensated for, significantly if not entirely, by the generous blocks of access proposed and by such other palliatives as will be incorporated in the Court's order. I would reiterate that I accept the mother's good faith and emphasise that it is her sacred duty to respect and foster the relationship between the children and their father.

In summary the decision in this matter has been reached after much anxious thought by reference to the following competing factors and considerations.

1. The decision reflects the Court's view of what will best serve the interests of the children.

2. The mother's wish to relocate to Australia is bona fide and genuine.

3. There is a strong bond between the children and their mother who has throughout their lives been their primary caregiver and has shown herself to be a competent and caring mother.

4. The mother's arrangements and prospects in Australia are such that her situation will improve markedly and the present discontent and unhappiness will disappear.

5. This will impact favourably on the children more particularly by reason of the removal of the strife between their parents which has undoubtedly affected them and the more effective parenting which the mother, at peace with herself and at home with her family, will be able to give them.

6. The bond between the children and their father is strong and meaningful. He is a loving and concerned parent; this will both increase the degree of deprivation which the children will experience and also impact adversely on the father.

7. However, the loss of frequent and immediate contact between father and children will to an appreciable extent be ameliorated by the generous block access (and other arrangements) which will be afforded to the father and which he will be in a financial position to exercise.

8. No account has been taken of the alleged preferences of the children who are not sufficiently emotionally and intellectually mature to express an informed opinion.

9. The degree and permanency of the proposed material change in the children's circumstances and the concomitantly understandable wishes and concerns of the father have of course received due consideration.

10. However I have reached the conclusion - and there is no doubt in my mind about this -that the interests of the children will be best served by allowing them to accompany their mother to Australia.

I trust that it will be recognised and accepted by ***both*** parents that there is no winner and no loser in this matter; there are two concerned parents each seeking what is best for the children; a court can only lay down the rules; the parents must see that they are observed.

I propose accordingly to grant the application for relocation incorporating in the order such access provisions in favour of the non custodian parent as can reasonably and suitably be imposed.

In this particular matter justice and fairness will best be served if no order is made as to costs.

It is ordered :"

1. That the Respondent's counter - application for custody is dismissed.

2. That the Applicant is authorised to remove the two minor children born of the previous marriage between the parties, namely A VAN ROOYEN and L VAN ROOYEN, permanently from the jurisdiction of this Court for permanent residence in Australia.

3. That insofar as may be necessary, the Respondent is directed forthwith to sign all such documents and take all such other steps as are necessary to enable Applicant lawfully to to remove the children from the Republic of South Africa, failing which the Sheriff of this Court is authorised to take all such steps on his behalf.

4. That the access provisions pertaining to the minor children contained in the Consent Paper concluded between the parties on 9 September 1996 and incorporated in the decree of divorce granted by this Court under Case No. 9221/1994 on 10 September 1996 be varied by deleting

paragraphs 2.1 to 2.3 thereof and substituting in their stead the following:

2.1. It is recorded that the children will live permanently with Plaintiff in Australia.

2.2. Defendant shall have access to the children as follows:

2.2.1. Reasonable rights of access to the children in Australia whenever Defendant happens to be in the place where the children reside;

2.2.2. For a three-week period in South Africa to coincide as far as possible with the children's mid-year July school holiday, as well as a four-week period in South Africa to alternate between 20 December and 17 January on the one hand, and 2 January to 30 January on the other, each alternate year;

2.2.3. Regular telephonic access with the children at such reasonable times as Defendant wishes to speak to them.

2.2.4. Access as provided in 2.2.2., or any portion thereof, may be exercised in Australia if Defendant so wishes.

2.3. Defendant shall be responsible for making the necessary travelling arrangements for the children for those access periods during which he intends to exercise his rights as aforesaid and shall notify Plaintiff in writing one calendar month before the proposed access period of such travelling arrangements. The travelling costs incurred in respect of the children for the purposes

of such access visits shall be borne by Defendant.

2.4. Defendant shall notify Plaintiff in writing prior to exercising his rights of access precisely where he will spend his time with the children and will furnish her with the relevant address (es) and telephone number(s) so that she can contact them. Plaintiff shall have the right, at her cost, to have telephonic contact with the children during Defendant's access periods.

2.5. Plaintiff shall furnish Defendant at regular intervals with copies of their school reports and photographs. Plaintiff furthermore will encourage the children to correspond regularly with Defendant."

5. That Applicant is forthwith upon her arrival in Albany, at her own cost to take all steps necessary to cause this order to be made an order of the Family Court of Western Australia and/or such other steps as may be necessary so as to ensure that this Order is enforceable in Australia, and to provide proof thereof to Respondent as soon as such order of the said Family Court has been granted and/or such other necessary steps have been taken.

6. 6.1 The Applicant agrees and undertakes to pay into an interest-bearing trust account operated by her attorneys of record herein an amount of R20 000.00 which amount may be applied by the Respondent towards the reasonable cost of any litigation that might arise out of

non-compliance by the Applicant with her obligations in terms hereof, provided that:

(ii) it is specifically recorded that the aforegoing is not to be construed to mean that a Court adjudicating any dispute between the parties is deprived of its discretion relating to the making of a costs order, and, in the event of an adverse costs order being made against the Respondent, he will be obliged to comply therewith and, if necessary, be required to refund to the abovementioned litigation fund any amounts withdrawn by him therefrom.

6.2 In the event of the Respondent failing to return the children to the Applicant after exercising access to them in South Africa, the Applicant shall be entitled to utilise the above amount, or part thereof, to pay any legal costs incurred by her in securing the return of the children, provided that she obtains the leave of this Court to do so.

6.3 Upon L attaining the age of twenty-one years the litigation fund will be dissolved and the Applicant will become entitled to the full balance thereof.

7. Each party is to pay their own costs of these proceedings.