REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 8675/09

DATE: 8 JANUARY 2010

In the matter between:

CRAIG THEO SCHNEIDER N.O.	1 st Applicant
ISOBEL SHAPIRO N.O.	2nd Applicant
ISOBEL SHAPIRO	3rd Applicant

and

ALLISON ASPELING	1 st Respondent
MASTER OF THE HIGH COURT	2nd Respondent

JUDGMENT

DAVIS. J

Before I deliver this judgment I want to state for the record that I received this morning (although I accept the document was generated at the 4th of January and a covering letter of the 6th of January) a notice from first respondent in terms of Rule 34(2) of the Rules of the High Court that first respondent unconditionally has accepted to enrol the two children, S S and D S, at one of the educational institutions referred to in the recommendations of Dr Worrell.

This notice obviously came long after I prepared the judgment. It does cause me to alter the order that ! was proposing to make. As I am working on the assumption that this is an unconditional offer, I want to make that absolutely clear that the order that will follow is thus based on this notice, means that respondent has accepted the children must proceed to school.

It does, however, appear to me to be appropriate to set out the reasons for the order that I was going to give, because there are very serious implications in relation to this matter, which require full examination. In the course of the judgment I will indicate what order I would have granted, were it not for this offer which came so late in the day. Given this introduction, I move to the substance of the judgment.

This matter was initiated by way of an application by the applicants in terms of the following notice of motion;

> "That Advocate Adre Heese, or such other person as this Honourable Court may deem appropriate, be appointed as *curator* ad *litem* to the minor children, S S and S S, and to prepare a report for this Honourable Court in which recommendations are made regarding;
>
> 2.1. The most appropriate schooling for the children both now and in

respect of their high schooling;

2.2. Their reasonable maintenance, including the reasonable accommodation required, and

2.3. Any other matter affecting their best interests that she may deem necessary and appropriate in the context of her mandate.

3. That pending the report of Advocate Heese the first respondent is ordered not to remove the children from their current school and not to commence home schooling."

The background to this application can be summarised briefly as follows First respondent is the biological mother of two children, born out of wedlock on the 22nd of December 1998, while she was in a relationship with the deceased, the late Jonathan Shapiro. The first applicant has approached this Court as executor of the Estate of the Late Jonathan Shapiro and as a nominated trustee of the Will Trust to be formed pursuant to the deceased's last will and testament. He also claims to act in his personal capacity as an interested party in terms of the provisions of both Children's Act 2005 and the Constitution of the Republic of South Africa, Act 108 of 1996 (the Constitution) in regard to the two minor children, twins, D and S (the children). The children are the sole beneficiaries in terms of the last will and testament of the deceased.

The third applicant, Isobel Shapiro, the mother of the late Jonathan Shapiro and the paternal grandmother of the children has joined this application in a representative capacity as a nominated trustee of the Will Trust to be formed and in her personal capacity again in terms of the Children's Act and the Constitution.

First applicant sets out in his affidavit the basis of this background. He avers that the deceased, whom

he knew personally as a friend and a client for more than twenty years, placed considerable store on education, holding a Master's Degree from the University of Cape Town as a qualified town planner. At the age of 46, whilst holidaying in Madagascar on 6 October 2008, he died suddenly and unexpectedly. According to first applicant at the time of the birth of the children, the deceased and respondent had lived together, and continued to live together for a number of months after the birth of the children, whereafter respondent moved out with the children, first to Wynberg, and subsequently some two years later to Hermanus, where she lived for approximately seven years. Accordingly, it appears that the children spent most of their lives in the Hermanus area, but respondent moved to Durbanviile in January 2008, two days before the start of the term.

According to first applicant, respondent moved to this location, owing to a lack of employment prospects in Hermanus and, further, respondent's disagreement with the school which the children had attended, being the Montessori school in Durbanviile. According to first applicant, first respondent announced that she then wished to "home school" the children, relocated back to Hermanus, whereupon the children were removed from the Montessori School.

First applicant avers that both he and third respondent were extremely concerned about this decision to home school the children and uproot them from their current schooling and environment. First applicant avers that shortly before the deceased's death, in the middle of 2008. he insisted on a full evaluation by educational psychologists of both children as it appeared that they were encountering certain learning difficulties.

A report was prepared by an educational psychologist, Lianna Morrison on 12 December 2008, in which mention was made of certain problems of a scholastic nature, being experienced by at least one of the children. The psychologist's report indicated that, while home schooling might have been "an option" for S, it was not recommended for D. The report noted that D was suited to a small

teacher/pupil ratio environment and that he needed not to be moved to an alternative school placement, that he was progressing pleasingly scholastically and "he seemed to be content in his school and home environment".

When the application was initially launched, first applicant, in his affidavit, noted that there was a discrepancy between what the respondent claimed and what was reasonably required for the children's needs, it was thus important that the matter be resolved by way of a appointment of a *curator ad litem.* He then proceeds:

> "It was necessary for me to work prudently both with the executor and trustee. I believe that as trustee and executor it is essential to establish with the inception of fair and reasonable basis upon which to move forward in the best interests of the children, without attack/criticism or fear of recriminations. I believe that an independent investigation by a curator who may choose, if deemed necessary, to obtain expert opinion from an appropriately qualified educational psychologist and/or clinical psychologist as to what is in the best interest of the children would be in the best interests of the administration of the estate and the children."

First respondent vigorously opposed this application, both on the grounds of the *locus standi* of applicants, and on the basis that it constituted an unfair interference with her parental responsibilities which she had reasonably undertaken over the lifetime of the children. In her answering affidavit she states:

> "If the applicant knew anything about home schooling, taking the children's specific needs into consideration, enquired about it, and shown reasonable interest they would not have been concerned, There is nothing unstable about home schooling, and from the children's point of view they will be moving back into a stable environment in Hermanus.
>
> I wish to refer the Court to the affidavit of Van Oostrum where he deals more specifically with these aspects."

In this reporting affidavit !Vlr Leendert Van Oostrum, who is the executive officer, of the Pestalozzi Trust described by him as a trust set up for the legal defence fund for home education, purports, in his affidavit, to be an expert in home education he then provides a detailed report of home education and its many merits. He then states as follows:

> "None of the applicant's stated concerns about home education are supported by any empirical observations recorded in the literature by the specific home education program provided to his children or by the educational environment in which they are situated. Conversely it cannot be shown and not (sic) responsible teacher would claim that any of the assumed benefits to be derived from attendance at the "best schools" proposed to these children will be reaped by both or either of these children. It is common knowledge that there are children in "the best" of schools for whom that school is not the best school

Mr Van Oostrum then makes certain recommendations;

> "I find no reason to advise first respondent to change her choice of home education for these children or, at this stage, to change any aspect of the program offered to them. In my opinion, respondent can best serve the educational interest of her children by continuing the home education in the present manner, adjusting for the development needs of the children as necessary and obtaining specialist services where possible, necessary and affordable. Assessment of the children's progress by an independent educational psychologist after one year of home education will assist her in deciding a further course of action. Such assessment should be repeated at least once every three years thereafter ,.. If on the contrary, involvement of their late father's relatives in the children's education remains negative and destructive as the present evidence suggests, consideration should be given to asking a Court to limit their access to the children to an absolute minimum or to supervised access. Such restriction should be determined and implemented and monitored with the assistance of a forensic psychologist. It should be maintained until the children are less vulnerable to negative labelling of the kind of education their mother has chosen for them and to denigration of or refusal to recognise their short and long term achievements and progress. This could take several years."

On 3.1 August 2009 the parties agreed to deal with the disputes which I have outlined in terms of the following order;

> "Dr Anita Worrell who is hereby jointly appointed to assist in an investigation and the preparation of report(s) containing her recommendations in regard to what is educationally in the best interests of

> the two minor children, S S and D S, both now and in respect of their future secondary schooling. The parties shall cooperate fully with Dr Worrell in carrying out her mandate and the children are to be made available at her request for such sessions as she may deem necessary to assist her in her conduct of the assessment and report ... The parties agree to be guided by the recommendations of Dr Worrell but in the event of either the applicants or the respondents refusing and/or failing to accept the recommendations of Dr Warrell the matter may be determined by this Honourable Court on the postponed date."

The order then provided for certain matters with regards, for example, to maintenance *pendente lite.*

Dr Worrell then produced her report, which proved to be unacceptable to first respondent. Pursuant thereto, first respondent commissioned a further report from Dr Shirley Kockott. The evidence of both experts was then subjected to examination and cross-examination by way of an oral hearing before this Court.

I turn therefore to deal with this evidence. The Evidence

Dr Worrell interviewed both children and their mother. It appeared that she spent at least five hours with each child. She also involved other professionals to assist her with certain of the testing which was required and this was performed separately by different members of the "Pro ED" team of professionals specializing in the field of remedial education. In addition. Dr Worrell visited the Hermanus Montessori School, which had previously been attended by the children, as I have noted, and interviewed the former principal. She also had a discussion with the Montessori School in Durbanviile, which the children had attended between January 2007 and April 2009, whereafter they

had been removed by first respondent. In addition she visited the Overstrand Learning Academy in Hermanus to assess its suitability as a possible school for the children.

Pursuant to her investigations, Dr Worrel! concluded that both S and D, but in particular S, had shown significant gaps in the essential learning areas which in the old parlance are referred to as the three R's, reading, writing and mathematics.

In her view, in S's case the gap was as much as two years in respect of these areas. While D, in her view, did not exhibit the same educational deficit as S, he had also shown inconsistent patterns of knowledge particularly insofar as mathematics was concerned

Dr WorrelI highlighted a concern regarding the children's non attendance at school since April 2009 and the effect that she considered this had on them losing competence, to some extent, compared to that which had been exhibited when tested by Morrison. In addition she questioned why first respondent allowed the children effectively to remain under-stimulated throughout this period and further why first respondent, in her view, had acted precipitously in withdrawing the children from the schooling environment.

It was Dr Worrell's view that this conduct was particularly disturbing because both children, on the tests that she had administered, required structure and discipline in order to make up the gap which had developed at this particular point. She questioned whether any of the two children was capable at present to proceed to Grade 6, which is the grade they should have been at the commencement of the 2010 schooling year. She advanced the view that S most certainly should not enter grade 6, and that D might be able to be admitted to this standard but this could not be confidently predicted in the light of

the testing that she had undertaken.

She gave evidence that she had applied the Welchsler Individual Scale 4 (UK Edition) tests in support of her assessment of both children. Her conclusion was that they were "bright boys" but that their educational problems were manifest. She did not regard the test results obtained by her as being indicative of the children being "exceptionally bright or gifted", a view which had been taken by defendant's expert, Dr Kockott. She did not consider that they had such extraordinary needs that had to be stimulated outside of the normal parameters of schooling. Dr Worrell objected to the notion, in any event, that highly intelligent children could not be more successfully happily catered for in a schooling system, or, indeed, in a special school such as that established by Dr Kockott herself in Johannesburg, Radford House, which had been created to cater for children whom Dr Kockott had referred to as gifted or exceptional.

According to Dr Worrell, given the remedial educational needs, particular of S, the children's best interests would be served by attending the type of school which she had identified in her report, together with the children being subjected to the necessary remedial therapy from outside therapists.

in summary, she rejected the option of home schooling as being in the best interests of these particular children, given the test that she administered, their educational profile, and results, which she had established pursuant with the tests which I have outlined. Unquestionably, children would require a skilled educationist to supervise and coordinate a program which would be required for them to catch up with other children of their age group. In her view, the fact that a person, such as first respondent, could simply coordinate a schedule of remedial teachers could not, in this case, be considered to be in the best interests of these children, given their particular needs. Dr Worrell emphasized to the Court that a home schooling option would constitute too great a risk for these children. The chances of them

successfully reintegrating into a main stream education, in the event that home schooling failed after six months, would even be more difficult.

She also expressed concern regarding first respondent's ability to put in place the type of structure and routine that is required to 'home school' children, given the first respondent's past failure to display any such ability. She also questioned the mother's general ability to cope with the task of home schooling two children with the complex educational needs exhibited by the two boys.

In short she concluded thus;

> "S cannot be home schooled. He requires very considerable routine. Structure and organisation, something that has not been shown in home schooling" so far. Furthermore the twins are at very different levels and will both be frustrated, S because he cannot catch up with D and D because he will be held back by S as the latter requires fairly consideration reputation."

So much for a summary of Dr Worrell's evidence. First respondent placed two reports before the Court, both designed to refute these recommendations. Dr Kockott, of the Centre of Integrated Learning Therapy, produced a report, as did Mr J E M Coetzee, a psychologist, although the latter was never called as a witness. It appears that Ms Coetzee interviewed the first respondent, and found her to be in psychological distress and recommended psychological counselling, both at present and for the

foreseeable future. She also made a recommendation that first respondent be allowed to home school, only if she underwent a fairly rigorous course of psychotherapy.

The key witness on behalf of first respondent was Dr Kockott. Significantly, when asked about Ms Coetzee's report she conceded that she had never been shown these recommendations, which itself was somewhat curious.

The thrust of Dr Kockott's evidence can be summarised thus: the children were particularly gifted, by which I took it to mean that they were extraordinarily intelligent, by virtue of the scoring which they had achieved in accordance with a further set of tests undertaken by Dr Kockott which were based on "a South African individual scale". I should add that Dr Worrell had certain problems with this particular test, but I do not need to resolve these particular epistemological difficulties.

The test was not however administered by Dr Kockott, but rather by Ms Morrison. I should add that these tests were not made available to the Court, nor to Dr Worrell (according to whom they had been requested). Based on these findings, Dr Kockott concluded that they were gifted, and, as gifted children, they required more than was offered at any regular school where their exceptional intelligence would not receive the ordinary stimulation that they required. On this basis, she considered home schooling to be a viable option.

Significantly, when pressed by the Court to indicate whether, if the children lived in the Gauteng area, she would prefer them to attend her school rather than home schooling, she desperately tried to avoid answering the question. Finally, after persistence from the Court, she conceded, with extraordinary reluctance, that she would have recommended attendance at her school.

Dr Kockott accepted that the children were in need of urgent remedial intervention, because she accepted that they had certain significant scholastic gaps: "S is experiencing stress in the academic environment and is not coping with scholastic demands, in particular he is said to struggle with spelling, writing, working memory and concentration."

She accepted that D had problems with regard to his sensory motor systems, his auditory memory and his eye sight. In her view, this set of descriptions indicated that the two children were "doubly exceptional", by which I understood her to mean that they had two reasons to attend her school or home schooling. Her preferred program was that of integrated learning therapy. According to her, this program could be run, if first respondent so wished, in conjunction with other remedial programs although a six week initial period would be preferable. Further remedial therapy would not have to wait indefinitely as it could work in tandem with her therapy. That therapy, in her view, would, together with other remedial therapy be able to resolve many of the problems which the tests had identified

I regrettably need to deal in more detail with concerns regarding the evidence of Dr Kockott.

The first turns on her expertise, the second on her mandate. From her CV, she indicates that she had been an associate professor at the University of South Africa until December 2006. Nonetheless, she described herself as Professor Kockott. Usually, and I consider the Court can take cognisance of this, associate professors are not full professors and cannot retain the title of professor upon resignation from their office. Indeed the only time that a retired professor can retain the title of professor is when he or she has attained the status of emeritus professor.

This *point may* see to be trivial, but people who claim qualifications or titles which they do not possess, need to be treated with some measure of circumspection. Furthermore, she conceded that educational psychologists, which was the area in which she had been trained, do not train formally in neurology or neurological development. When asked by the Court as to her qualifications in this regard, she claimed to have done a number of courses over a number of months. It does raise serious questions about her expertise in this complex field, but I do not need, for the purposes of this judgment, to do more than raise these questions.

The second concern regarding Dr Kockott's evidence is of far greater import. In this connection, it is necessary to deal with the role of an expert. In Zeffertt and Paizes, The South African Law of Evidence (Second Edition), at 330 the learned authors, citing an English judgment of National Justice Compania Navierasa v Prudential Assurance Co Limited 1993(2) Lloyd's Reports 68 at 81, set out the duties of an expert witness thus:

> "1. Expert evidence presented to the Court should be, and should be seen, to be the independent prod uct of the expert uninfluenced as to form or content by the exigencies of litigation;
>
> 2. An expert witness should provide independent assistance to the Court by way of objective, unbiased opinion in relation to matters within his expertise... An expert witness should never assume the role of an advocate;

3. An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion;

> 4. An expert witness should make it clear when a particular question or issue falls outside his expertise;
>
> 5. If an expert opinion is not properly researched because he considers that

> insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one. In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report."

In short, an expert comes to Court to give the Court the benefit of his or her expertise. Agreed, an expert is called by a particular party, presumably because the conclusion of the expert, using his or her expertise, is in favour of the line of argument of the particular party. But that does not absolve the expert from providing the Court with as objective and unbiased opinion, based on his or her expertise, as is possible. An expert is not a hired gun who dispenses his or her expertise for the purposes of a particular case. An expert does not assume the role of an advocate, nor give evidence which goes beyond the logic which is dictated by the scientific, knowledge which that expert claims to possesses.

Sadiy: every single one of these strictures was breached by the evidence of Dr Kockott. I regrettably have to deal with this issue in some detail. Under cross-examination, Dr Kockott was asked as to whether she was given any instructions as to the evidence which she would provide to the Court. Notwithstanding strenuous objection, she reluctantly stated that she had been given certain instructions, initially described as oral, but then it appeared that an e-mail had been generated by Mr Van Oostrum dated the 30th of November 2009. It was headed "Core issues in Shapiro v Aspelling". It appears to have been sent to Dr Kockott as well as to first respondent's instructing attorney on which more presently.

Mr Van Oostrum writes as follows;

> I have taken the liberty to summarise below the core issues that we need to be able to answer in response to the views of Dr Anita Worrell. I am sending this to Jan (first respondent's instructing attorney) as well so that he can tell us if he disagrees with me. At issue in this case is whether the Court is justified in infringing the children's constitutional right to parental care by overruling the decision by the mother to educate them at home."

Thereafter Mr Van Oostrum provides something of a summary of the law. He then continues:

> "Our enquiry from Professor Kockott and Ms Coetzee is whether they agree on the evidence that the home education will be contrary to the best interests of the Shapiro children ... The reports from Professor Kockott and Mrs Coetzee should therefore in addition to a general conclusion whether home education will be contrary to the best interests of the children and to the extent that it is possible for them to answer that on information available to them and that they can obtain answer the following specific questions."

A set of questions are then provided and the e-mail continues;

> "It seems that Worrel! relates this in some way to the fact that "S now irritates (D) and the boys fight. They see too much of each other. My response wow! And how are they to learn and live and work with co-workers one day? Will they never serve in the army or on ships or

> yachts or might they not given their heritage go and live on a kibbutz where they might have to live cheek by jowl with others for extended periods of time."

He then continues:

> "What is the construction of independence that Dr Worrell refers to? This is an opportunity for us to infuse our own constructions into the debate." (My emphasis).

The e-mail concludes:

> "I think that the above covers the most important elements at issue at the present time. No doubt others will arise along the way, and might be flung at us in the witness box without warning, but these are the ones we must answer at this time. Jan should let us know if he disagrees on the above." (My emphasis)

It is clear from his e-mail that Dr Kockott was hired as a person specifically to undermine Dr Worrell's evidence, that is before she considered the facts. Although I have to accept that she did try to place an impartial gloss on much of the evidence, her reluctance to concede, when faced with a clear obstacle, her inability to acknowledge the possibility of another expert's view and the general contradictory nature of her evidence, particularly with regard to whether home education was suitable, preferable, or

simply in equipoise with school education has to be evaluated in terms of the mandate that she was given.

It also appears that she recommended home schooling without ever discussing with first respondent the choice of the home schooling method favoured and identified by the latter. A particularly interesting illustration of the difficulties that she encountered took place when it was put to her that first respondent had chosen the "Son light program". It appeared that this particular program, developed by a self-pro claimed "Evangelical Christian Prosthyletising" group, adopted a particular religious line, ironically a line with which even Mr Van Oostrum presumably would disagree, given his earlier reference to the children's Jewish heritage.

What was so significant about Dr Kockott's performance was the fact that it was obvious, both from her demeanour and her reluctance to answer, that she knew that this was an unsuitable program. After the most intricate ofevidential egg dances, she finally, reluctantly, conceded that it may well not have been suitable. In my view, her evidence raises significant problems as to the independence, credibility and her expertise.

That takes care of the evidence. I turn to deal firstly with first respondent's arguments. Mr Theron, who appeared on behalf of first respondent, submitted that generally speaking on the subject of the welfare of children the custodian parent, in this case first respondent, has the right to have the children with her, to control their lives, to decide questions of education, training, and religious upbringing. In this connection he cited the case of Van Qudenhove v Groover 1981(4) SA 857 (A) at 867. In his view, the opinion and desires of the custodian parent could not be ignored by the Court.

Mr Theron submitted that the applicant's founding affidavits did not contain any primary facts which would justify the Court's exercise of its jurisdiction as upper guardian of the children and which therefore would justify it overriding the decision taken by first respondent as the mother. He submitted that Dr Worrell did not have regard to any of the qualitative or quantitative studies comparing mainstream education to home education, and had to resort to anecdotal evidence to support her view that home schooling was unsuitable for the minor children. He submitted further that, when Dr Worrell was questioned on the factors that would militate against home schooling, she primarily contended that home schooling could not provide the necessary structure and the necessary specialist teachers and other professionals might not be available and that she believed that a normal mother could not teach without formal qualifications.

In his view, Dr Kockott's evidence indicated clearly to the contrary, that the two children were potentially suitable for home education. Mr Theron submitted further that the Court was asked to exercise its jurisdiction as the upper guardian of minors and therefore to invade the private sphere of first respondent in so drastic a manner both by the appointment of a *curator ad litem* and by taking away the decision which first respondent had made with considerable care.

These submissions necessitate some inquiry into the applicable legai principles. Section 28(2) of the Constitution provides that the child's best interest is of paramount importance in every matter concerning the child. The concept of the 'interest of the children', being of paramount consideration is reflected in article 3(1) of the United Nations Convention on the Rights of Children. The Convention was adopted by the General Assembly of the United Nations on the 20 November 1 989 and South Africa became a signatory on 29 January 1 993, with ratification taking place on 16 June 1995.

I should note that even before the Constitution came into force and before ratification of the

Convention in Terblanche v Terblanche 1992(1) SA 502(W) at 504 C-D the Court said;

> "[a] Court has extremely wide powers in establishing what is in the best interests of minor or dependent children. It is not bound by procedural strictures or by the limitations the evidence presented or contentions advanced by the respective parties. It may in fact have recourse to any sou re e of information of whatever nature, which may be abie to assist it in resolving custody in related disputes."

Even earlier, in Seqall v Seqali 1959(3) SA 687(C) Tebbutt. AJ (as he then was) said that, in previous cases it was considered that the Court would not interfere with parental decisions -

> "unless the foundation had been first laid by proof to the satisfaction of the Court that there had been an abuse by the custodian parent of his powers; either that or no discretion had been exercised at all. that is to say that the actual decision had been capricious or vitiated by unreason in the sense that no reasonable person could have arrived at, or that the decision was inspired by motive which was quite foreign to a due and proper regard to the interests of the children."

In B v S 1 995(3) SA 571(A) at 581A (a case which did take place after the creation of our constitutional dispensation) Howie. JA (as he then was) said, citing Re KD, an House of Lords decision:

> "Parenthood in most civilised societies is generally conceived as conferring

> on parents' exclusive privilege of ordering within the family the upbringing of children of tender age with all that that entails that it is a privilege which, if interfered with without authority would be protected by the courts but it is privilege circumscribed by many limitations imposed both by the general law, and where the circumstances demand by the Courts or the authorities on whom the legislature has imposed a duty of supervising the welfare of the children and young persons. When the jurisdiction of the Court is invoked for the protection of the child, the parental privileges do not terminate. They do however become immediately subservient to the paramount consideration which the Court has always in mind, that is to say the welfare of the child."

Further, Howie JA says:

> "Whatever the position of the parent may be as a matter of law, and it matters not whether he or she is described as having "a right" in law. or a '"a claim" by the law of nature or as a matter of common sense, it is perfectly clear that "any right" vested in him or her must yield to the dictates of the welfare of the child."

The Constitution and international instruments now provide concrete amplification of these *dicta.*

All of these *dicta* can now be viewed through the prism of the most recent articulation of what constitutes the best interests of the child by the Constitutional Court in S v M (Centre for Child Law

(as *amicus curiae)* 2008(3) SA 232(CC) where the Court said:

> "Section 28 must be seen as responding in an expansive way to our international obligations as a State party to the United Nations Convention on the Rights of the Child ... Section 28 has its origins in the international instruments of the United Nations ...The four great principles of the CRC which will become international currency and as such guide all policy in South Africa in relation to children are said to be survival, development, protection and participation. What unites these principles and lies at the heart of S28 I believe is the right of a child to be a child and enjoy special care. Every child has his or her own dignity. If a child is to be constitutionally imagined as an individual with a distinctive personality and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them." (at paras 16-17)

If a child-centred approach is adopted to this particular set of facts, as must be the case in terms of the law as I have set it out. the following emerges:

1) What method of education can be regarded as best suited to the particular needs of these children? In this case the Court is not concerned as unfortunately appeared to have been the case with a test case with regard to home schooling . This is not a test case about home schooling, and thus this judgment is not to be construed as an evaluation of the merits or demerits of home schooling. It is a case which deals only with one question, the determination of the best interests of two vulnerable, young children, and what in fact will be in the best interest of them not just now, but which will impact upon them for the rest of their lives. The Court is not concerned in this case, with the 'great' questions of home schooling; these will have to await for some other

occasion which mercifully is not this case.

2) The Court is required to evaluate the evidence of Dr Worrell versus that of Dr Kockott. As I have already said, the latter was a questionable expert, there were doubts about her independence, there were doubts about the quality of her evidence, her reluctance to answer candidly.

3)Even if Dr Kockott's evidence is placed in the best possible light, it amounts to no more than a hesitant acceptance that home education may be no worse than education in a special school, which is effectively the thrust of Dr Worrell's unequivocal evidence.

4) In this case there may be other interests, interests of the first respondent to look after her children, but the paramount principle dictates that the child's interest is of cardinal concern, not the child as an instrument to decide as to whether one form of education in some grand scheme is better than another.

5) The evidence suggests that first respondent is a concerned parent, who has strong views about the best interests of these children. This view must be taken seriously. Expressed differently, there is no evidence that first respondent is not deeply concerned about her children, not concerned about the best interests of her children and does not have strong convictions about home education. Three further facts emerge which are of critical importance:

i. First respondent removed the children from school in which they appeared to making progress. I find it significant that no reports or copies of reports were procured by first

respondent to assist this Court with regard to this line of enquiry. It was suggested by applicants that the children were progressing well at the Montessori School. It was suggested that a request had been made for reports to be provided. I was informed that the reports had been lost but no suggestion

was ever provided to this Court as to why copies could not have been procured, which would have indicated, in an unequivocal

fashion, the extent of the development of the children at the school prior to them being

removed.

ii. Little education took place, once the children were removed from school in April 2009. There was some suggestion on the basis of the evidence of Mr Van Oostrum that a gap between the formal school and home schooling should take piace, but it was never explained to this Court as to the reason for such a lengthy period,

iii. Of particular importance, is that the decisions of first respondent in this connection are contrary to the law. I need therefore briefly to deal with this.

In terms of South African Schools Act 84 of 1996, and particularly Section 3(1), every parent must cause every learner for whom he or she is responsible to attend a school, from the first school day of the year in which such learner reaches the age of 7 years, until the last school day of the year in which such learner reaches the age of 15, or the 9th grade, whichever occurs first. Section 3(5) provides that if a learner who is subject to compulsory attendance in terms of (1) is not enrolled at or fails to attend a school, the head of department may (a) investigate the circumstances of the learners absence from school, (b) take appropriate measures to remedy the situation, (c) failing such a remedy issue written notice to the parent of the learner requiring compliance with Section 3(6) provides, subject to the Act and any other applicable law, (a) any parent who without just cause and after written notice from the head of the department fails to comply with (1). is guilty of an offence and liable of conviction to fine cr imprisonment for a period not exceeding six months, or (b) any other person who, without just cause, prevents a learner who is subject to compulsory attendance from attending a school, is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding six months.

Section 51 of the Act is also significant. It provides that for the registration of learner for education at home:

1) A parent may apply to the head of department for the registration of a learner to receive education at the learner's home.

2) The head of department must register a learner as contemplated in (1) if he or she is satisfied that (a) the registration is in the interests of the learner, (b) the education I ike L Y to be received by the learner at home, (i) will meet the minimum requirements of the curriculum at public schools; and (ii) will be of the standard not inferior to the standard of education provided at public schools: and (c) the parent will comply with any other reasonable conditions set by the head of department.

3) The head of department may, subject to (4), withdraw the registration referred to in (1).

4) The head of department may not withdraw the registration until he or she (a) has informed the parent of his or her intention to so act and the reason therefore, (b) has granted the parent an opportunity to make representations to him or her in relation of the action and (c) has duly considered any such representation received.

5) A parent may appeal to the Member of the Executive Council against the withdrawal of a registration or the refusal to register a learner in terms of that.

There is no evidence that first respondent has complied with section 51 of the Act, nor that she is not in breach of section 3 of the Act. in short, this case, ironically, was run on the basis of requesting this Court to sanction a continued breach of the relevant law. Had it not been for the Rule 34(2) Notice, in which the first respondent has now unconditionally accepted that the children must be enrolled at school, I would have considered, and was going to order, that it was not necessary to determine whether home schooling was in the best interests of the children, nor ultimately to decide whether the first respondent's discretion should trump the evidence of Dr Worrell, because I would have found that first respondent must comply with the applicable law.

The order that I proposed wouid have been interlocutory of nature, that is, pending relevant authorisation by the education department, the children had to be registered in school. Were authorisation to be granted then either party was free to approach this Court on papers duly supplemented. That however is no longer necessary because I have worked on the assumption that first respondent has unconditionally accepted the children must now go to school. I make these

observations, because there must be no retreat from this unconditional offer. If so, first respondent would be in breach of the law, and applicants would be free to approach this Court accordingly.

Before I deal however with the order that I must make in the light of these findings, I have to deal with some unfortunate conduct on this whole matter. I do this, and I wish to place on record, I do so for the first time in my judicial career.

This is not an issue which I take lightly, and it has taken me a long time, after anxious consideration, to make the following comments, and decisions.

The disturbing conduct to which I make reference can be summarised thus: I was provided with a very lengthy affidavit from Mr Van Oostrum. He correctly describes himself as the Chief Executive Officer of the Pestalozzi Trust which deals with the defence for home education, but outside of that there was no indication of his involvement in this case. The entire affidavit purported to be that of an expert, providing this Court with independent evidence with regard to the merits of home education. Nowhere in the affidavit, nor anywhere else, was I ever informed that the Pestalozzi Trust had funded this litigation.

Secondly Mr Van Oostrunrs e-mail reveals that Dr Kockott was brought in as an expert, apparently with the connivance of first respondent's attorney, as "a hired gun". Again, none of these facts were ever brought to the attention of this Court until cross-examination took place.

This is an agonisingly difficult case. Were this to have been a case dealing with a commercial matter, I am not certain that I would have been as distressed by the relevant conduct of the first respondent's

representatives. But this was a case dealing with the best interests of two children. I said to Mr Theron early on in his cross-examination that I did not wish this case to be conducted as a criminal trial, but as a quasi inquisitorial process so that the Court could truly come to the best decision in the interests of the children. See Terblanche's case, supra.

I find these cases the most difficult for a judge. These are not my children. That is a difficult enough task. These are other people's children for which I, as a Judge of this Court, am now to assume responsibility. That is a terribly weighty decision to make in a case such as the present dispute. Respondent's legal team, as officers of this Court, owe a fiduciary responsibility to the Court as they pursue the best interests of their client.

This case appeared to be run as a test case for home schooling, not as a case about what was in the best interests of the children. I asked first respondent's attorney to explain his conduct. He deposed to an affidavit. In it he informed me of the following:

> "Shortly after the application was served I received a telephone call from Mr Van Oostrum as the Chairman of the Pestalozzi Trust Legal Defence Fund for its members. Mr Vanoostrum advised me that the first respondent is a member of their association and requires legal assistance for which the Trust would pay. I thereupon required Mr Van Oostrum to arrange that the papers be forwarded to me either by courier or by way of electronic means to enable me to assess the position of the first respondent, *viz a viz* the application with regards to her right as sole guardian of the children, and the rights of the children seen in the light of the Children's Act. Schools Act and the Constitution. At no stage did I consult with Mr Van Oostrum with regard to the merits of the matters, and only requested him to supply me with an affidavit

setting out his involvement as well as his opinion as an expert with regard to home schooling. I only advised him- that I was satisfied that the respondent did have a plausible defence to the application. On receipt of the application I perused it and on Saturday, the 9th day of May 2009 I had an extensive telephonic consultation with applicant, took instructions to get background with regard to the application and discussed the merits of the application with her, and was satisfied on the papers that, in my opinion, not a proper and sufficient case is made out for the applicants to be successful with the application. I thereupon drafted an answering affidavit for the first respondent and after I finalised the draft I again had a long telephonic discussion of about an hour with the first respondent .... At no stage during my consultations with the first respondent did I take instructions from the said Van Oostrum or any other third party with regard to the matter. My only contact in this regard with Van Oostrum was my advice to him that I was of the opinion that the first respondent's rights were in fact infringed on by the application, and I was satisfied to act on her behalf ... At all times Mr Van Oostrum knew that by taking the instruction, my objective would be to look after the interests of the members and not to endeavour to enhance the objects and principles of home schooling. Being in practice for some time there are ethical standards to which I adhere to and will not be influenced by any 3rd party... In my initial instruction to Advocates Botha and Theron it was directly stated by myself that although the Pestalozzi Trust would be paying our fees, that we are acting on behalf of the first respondent, and the first respondent is our client and we abide to her instructions. It can also be explicitly stated that both counsel stated that under no circumstances they would be prepared to act in advancement of the principle of home education and would only act in the interests of the first respondent and the children.... After receipt of Dr Worrell's

> report I contacted and discussed the report with the first respondent and suggest that we obtain the services of Mrs J E Coetzee to investigate and render us a report and as there are cost implications involved I contacted Mr Van Oostrum and advised him that I would like to make use of the services of Mrs Coetzee. He advised me that he knows of a certain Dr Kockott whom he would contact .... Prior to receiving Dr Kockott's report I did not have any contact with her, and only discussed the report in short with her telephonically prior to meeting with her in Cape Town with advocate Theron. Judge Davis also mentioned correspondence being referred to in the evidence which was an e-mail forwarded by Mr Van Oostrum to Dr Kockott. I attended a meeting in Judge Davis' chambers on 30 November 2009, and only recall having seen the letter on the 2nd December 2009 ... Taking into consideration that i have a fairly busy practice and preparing for a Supreme Court trial .... I did not have time to contact or to communicate with Dr Kockott and/or Mr Vanoostrum with regard to his e-mail."

Unfortunately, this affidavit does not explain the nature of Mr Van Oostrum's suggestions that "Jan" will also put his input, no denial that there appears to have been a strategy between the two, does not explain the repeated references to Mr Schnettler in the e-mail of Mr Van Oostrum nor does it explain how an affidavit was deposed to by Mr Van Oostrum, who is effectively the funder of first respondent, and who was then represented as being an independent expert in this case.

Reluctantly I must come to the conclusion that there are very serious questions about the conduct of this case. Mr Theron never informed the Court of any of these facts, nor was the Court ever informed about the manner in which Dr Kockott had been instructed, the role of the Pestalozzi Trust, or that Mr Van Oostrum who had a very significant interest in this particular case, deposed to an affidavit

purporting to be that of an independent expert in which he makes very serious averments that third respondent should have no access to her grandchildren.

In the ordinary course, there would have been no objection to the Pestalozzi Trust being admitted as an *amicus curiae*. Certainly there would have been no objection, on the part of this Court, to Mr Theron and Mr Schettler acting on behalf of the Pestalozzi Trust and effectively generating the same sort of evidence and argument. But the Court would then have known the nature of their purpose and the objective of the entire case. That did not happen. For this reason, I am going to .submit a copy of this judgment to the Law Society of the Western Cape, and to the Johannesburg Bar Council. I want the conduct of both Mr Schnettler and Mr Theron to be investigated and I want a full report to be provided to this Court as to the conclusions of the Bar Council in Mr Theron's case and in Mr Schnettlers case by the Law Society.

The Court takes this conduct very, very seriously. I emphasize this is the first time in my career, which spans more than eleven years on this bench, that I have ever done this, but given the nature of a case concerning small vulnerable children, I do not consider that I have any other alternative, particularly because I wish to remind the legal community that they have a duty to this Court, as they also do to their clients.

With these remarks I can now turn to the relief. As I have already indicated the order that I now must make takes cognisance of the notice in terms of Rule 34(2). There is one last issue however that I must now raise, the question of costs. Ms Weyer who, with great distinction, appeared on behalf of the applicants, urged me, as a mark of the disapproval of the Court, to order costs on the basis of *de bonis propriis* against the first respondent's attorney. Given the manner in which this case was conducted, the real issue, being the best interests of D and S, was not ventilated in a proper and cost efficient

manner between the parties because the dispute was hijacked and prolonged by the complications to which I have made reference. There is no question that a cost order against first respondent's attorney *de bonis propriis* on the scale as between attorney and client is justified, but not for the whole case. Evidence would have had to be led in any event, and accordingly the order will be granted for the second day of evidence, as a mark of the extreme displeasure of this Court in the manner in which this case was prosecuted.

For these reasons the following order will be made:

1. The first respondent shall:

1.1. Enrol the two minor children, S S and D S (the children) forthwith for the commencement of the 2010 academic year at one of the educational institutions referred to in the recommendations of the jointly appointed expert Dr Anita Worrell, contained in the reports prepared by her in respect of the children and filed on record on 3 November 2009. First respondent shall provide documentary proof to this Court of such action not later than Monday 18 January 2010.

1.2. Continue with the education in a manner consistent with the recommendations of Dr Worrell in the best interests of the children.

2. Whilst at school the progress and educational remedial needs of the children shall be further monitored by Dr Warrell at six monthly intervals, beginning June 2010 and fully investigated and assessed by her prior to 31 June of the year in which the children are respectively in grade 7. Dr Worrell is requested to direct at that stage whether the assistance of duly qualified experts that she may deem necessary to assist her to evaluate and recommend in her report what schooling afterwards would be in the best interests of one or both of the said children in respect of their secondary education. The deceased estate of the late Jonathan Shapiro (hereinafter the deceased estate) and represented in these proceedings by the first and third applicants, shall be bear the costs of

Dr Worrell and such further experts that she may require to assist her in performing her duties and functions in terms of paragraph 1 above.

3. The first respondent is ordered to cooperate with Dr Worrell in carrying out these duties.

4. The parties agreed that the following maintenance shall be payable by the deceased estate in respect of the minor children until they attain the age of majority, which amount shall be payable monthly in advance on or before the 1st day of each calendar year into such account as first respondent may nominate in writing from time to time.

4.1. The amount of R5 000 (Five Thousand Rand) per month per child.

4.2. The amounts so payable shall be escalated annually by the average increase for the preceding year in the headline CPIX as published from time to time in the Government Gazette with effect from 1 January 2011.

4.3. The reasonable costs from time to time of accommodation and such rental with respect to the minor children.

4.4. The reasonable educational and related costs, including school fees, school clothes, reasonable extra mural activities, extra tuition, remedial teaching/support and like or similar education expenses in respect of the minor children, provided that same is in accordance with the recommendations of Dr Worrell or unless agreed to in writing by the parties.

4.5. The costs in maintaining the minor children (and the respondent until such time as the children attain the age of majority without accepting any legal obligations so to do) on the Discovery Health Coastal Core Medical Aid Plan or a plan offering similar benefits thereto. The deceased estate shall also bear the costs of all reasonable medical. dental, pharmaceutical (on prescription), surgical, hospital, orthodontic, ophthalmic (including spectacles and/or contact lenses) and similar medical expenses reasonably incorrect in respect of the minor children only, including any sums payable to a

physiotherapist, chiropractor, psychologist or psychiatrist which are not covered by the medical aid scheme. The Estate shall not be responsible for the payment of respondent's medical costs which are not covered by her one third portion of the medical aid scheme benefits.

4.6. The deceased estate shall pay any such expenses not covered by the medical aid scheme within fourteen calendar days of presentation of invoice/proof of payment being made to Mr Schneider: all claims for the payment of excesses or claims not paid or not payable by the scheme against the deceased estate must be submitted to Mr Schneider or his nominee within a reasonable time of the scheme refusing to pay the claim.

4.7. First respondent shall ensure that she complies with the rules of the medical aid scheme and she shall submit all claims to the scheme within 30 days of date of invoice to her. Any failure by her to comply with the rules of the scheme, including authorisations or pre-authorisations, or failure to submit claims timeously to the scheme, shall result in the deceased estate not being liable in respect of that claim.

4.8. Any dispute in regards to the payment of any medical expenses defined herein shall be referred to a FAMAC appointed facilitator shall be entitled to facilitate the dispute and make a ruling that is binding on both parties, unless it is varied by a Court of competent jurisdiction, alternatively varied by the facilitator following a separate review. The costs of the facilitator shall be shared equally between the parties unless directed to the contrary by the facilitator.

5. In regard to the issue of contact with the children the paternal family has agreed as follows;

5 1 There shall be contact between the fourth applicant, Mrs Shapiro, on two weekend days per month, on either a Saturday or a Sunday, such reasonable periods as may be agreed between Mrs Shapiro and first respondent from time to time.

5.2. For so long as it may be reasonably required an agreed third party, acceptable to both parties, will

accompany the children to their visits to Mrs Shapiro.

5.3. The siblings of the deceased and Mrs Shapiro shall have reasonable telephonic and electronic contact to the minor children at all reasonable times.

5.4. In the event of deceased siblings or their immediate families wishing to have contact with the children this shall be arranged directly with the respondent who shall attempt to facilitate rather than obstruct such reasonable cond uct.

5.5 In the event of there being any dispute regarding contact howsoever arising it is agreed to the matter being referred to a facilitator as set forth in 4.8 above.

6. The costs of the second day of the hearing shall be paid by the respondent's attorney *de bonis propriis* on a scale as between attorney and own client, as a mark of the Court's displeasure at the manner in which the proceedings have been conducted by him. There is no other award as to the costs.

DAVIS, J