

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case Number: 15992/2012

In the matter between:

S P P

Applicant

And

C P

Respondent

JUDGMENT DELIVERED ON FRIDAY 21 SEPTEMBER 2012

Baartman,J

[1] This application concerns the best interest of 11-year-old M D P (**the minor**). The parties are married and the minor's natural parents. Until 6 August 2012, the couple lived together in the Strand, however, on that date without prior notice to the applicant, the respondent moved to the Free State with the minor.

[2] In this application, the applicant seeks the return of the minor to Cape Town in order for this court to determine what would be in the minor's best interest. At the time of her removal, the minor was a grade 5 pupil who

excelled in both academic and social activities. The applicant alleged that the manner in which the respondent had moved the minor had been traumatic for her because she had not even been given the opportunity to say goodbye to her best friend at school. He further alleged that the abrupt move mid-year had been detrimental to the minor's educational needs.

[3] On 30 August 2012,¹ postponed the matter to allow Dr Mathilda Smit (**Smit**), a social worker, an opportunity to compile a report and make a recommendation concerning the best interest of the minor in respect of her care, contact and schooling. At the time, the respondent and the minor, were living with the respondents brother in Frankfort in the Free State. The respondent indicated that the arrangement was temporary and that she intended to obtain separate accommodation for the minor and her. The respondents parents live in Dewetsdorp in the Free State approximately 600 kilometres away.

[4] It is common cause that the applicant issued divorce summons on 14 August 2012. The respondent has expressed a firm intention to remain in the Free State and suggests that it would be in the minor's best interest to remain with her.

[5] In her report, which was made available on 19 September, Smit suggested that the minor return to Cape Town. She further suggested that a clinical psychologist should consult with both parties and prepare a relevant report before a decision is made in respect of the minor's future. The parties have agreed, albeit the respondent reluctantly, that the report suggested by Smit be compiled.

[6] However, the respondent indicated that she would also be placing a

further social worker's report before the court, the purpose of which would be to gainsay the Smit recommendation. In my view, the psychologists report recommended by Smit would assist a court in making an order to ensure the minor's best interest is met. It is in issue whether the minor should remain in the Free State pending the finalisation of these reports.

THE MINOR SHOULD RETURN TO CAPE TOWN

[7] Before her removal the minor attended 'Primere Skool Gordonsbaai'. As indicated above she was in grade 5 and was excelling. In his founding papers, the respondent described her achievements as follows:

"10.2 Buiten dat sy akademies briljant preste\$, is sy ook 'n leier en staan 'n goeie kans om as Dux-ieverling en seifs hoofmeisie aangewys te word vir Graad 7-jaar. Sy het verlede jaar 9 boekpryse by die prysuitdeling gekry..."

[8] Her achievements at the Gordon's Bay school include 95% for Maths and 92% for Science in 2011. The respondent confirmed these achievements but. indicated that the minor was doing equally well at her new school in Frankfort in the Free State.

[9] In consultation with Smit, the minor indicated that the respondent had discussed the possibility of moving to the Free State with her prior to their departure. On the day of the move, the respondent and her mother (maternal grandmother who at the time resided in the Free State) collected the minor from school. She then learnt that she was on her way to the Free State, which came as a surprise. Smit said the following about the minor's view on the move in consultation with her:

“Para: 4.2.1.5 Eksploreer oor die vertrek vanuit die Kaap op 6 Augustus: Margot vertel dat haar ouma (mateme ouma-“ouma Marie”) van daardie dag sou kom kuier en toe kom haal haar ouma en haar ma haar by die skool. Haar ma het vir die skool gese hulle gaan nou terug Vrystaat toe. Volgens Margot was sy ‘n bietjie verbaas en het haar ma nie die oggend iets gese nie. Haar ma het wel vantevore al met haar daaroor gepraat dat hulle dalk kan weggaan. Margot het nie geweet dat hulle daardie dag sou gaan nie. Sy het nie haar maats gegroet nie (Margot het weer trane in die oë gekry). Op die vraag of sy haar pa gegroet het was haar antwoord: ‘As ons hom sou groet sou hy ons nie laat gaan het nie, hy is baie lief vir my’.”

[10] Despite the respondent's allegations to the contrary, I am of the view that the minor was not prepared for the move when it happened. The respondent alleged that she had fled the common home because she was the victim of domestic violence. I accept that the applicant assaulted the respondent during the course of the marriage. Unfortunately, the respondent did not seek the protection available to her through the appropriate legislative means; instead, she fled. In so doing she has pre-empted a court decision in respect of the minor's primary residence. It remains this court's duty to enquire into the best interest of the minor.

[11] It is common cause that the applicant has never displayed any violent behaviour towards the minor, in her consultation with Smit she expressed her affection for both her parents. She said:

"

4.2.1.1 Margot het aangedui dat sy met beide haar pa en haar ma 'n hegte binding het en dat sy emosioneel albei haar ouers in haar emosionele leefwereld plaas. Sy blyk ook albei haar ouers te vertrou. Huidig identifiseer sy sterker met haar ma en beleef dat sy meer ingestel is op haar ma. Sy noem by herhaling dat sy nie daarvan hou as haar pa kwaai is met haar ma nie. Dit laat haar bang voel. Hierdie gedrag van haar pa teenoor haar ma kan haar gevoelens jeens haar pa negatief beïnvloed omrede Margot in wese 'n vredemaker is en glad nie van enige aggressie of konflik hou nie. ”

[12] In addition, the respondent indicated that the applicant, who has apparently told the minor that he might seek employment in the Free State, would be able to have the minor with him at weekends and in the holidays in the event of that happening. "... Sy kan dan naweke en vakansies na hom toe gaan." It follows that the respondent foresees no harm to the minor in the company of the applicant. The applicant holds a different view in respect of the minor's safety in her present abode. He indicated that the respondent had been sexually molested and raped by her brother who currently resides in. Paarl. The respondent's parents were aware of the sexual assault but did not act to protect her. In her opposing papers, the respondent denied the allegations, however, in her consultation with Smit she admitted that she had been molested, by her brother. This is not the brother with whom she currently resides. Despite the geographical distance between the respondent and her brother, the applicant remains concerned for the minor's safety. He has reservations about the respondent's ability to protect the minor should her brother from Paarl visit.

[13] The parties have further made allegations about inappropriate sexual behaviour against each other. It appears from the papers that the parties engaged in unsavoury sexual practices during the course of their marriage. The minor was not exposed to her parent's deviant sexual practices, although Smit said the following in this respect:

"5.7 Kommer heers oor Mev Pauls se vermoë om Margot te beskerm teen seksuele wanpraktyke. Geen sekerheid bestaan oor wat die effek van Mev Pauls se e/e situasie as slagoffer op haar seksuele ontwikkeling gehad het nie. Terselfdertyd heers kommer oor Mnr Pauls se "oplossings" vir die seksuele bevrediging in sy huwelik

[14] The minor has indicated to Smit that she would prefer to stay with the respondent. In giving effect to the minor's expressed preference, it is important to assess her emotional maturity. She is 11 years old and it is apparent from the papers that both parties have tried to influence her. I am not persuaded that the minor is currently able to express a genuine preference. (See **McCall v McCall** 1994 (3) SA 201 (C)).

[15] The applicant has offered the former common home to the respondent should she elect to accompany the minor to Cape Town in the event of a court ordering her return. Alternatively, he has suggested that his mother, I P, who has attested to an affidavit in agreement, live in the home with the minor.. The respondent's counsel has submitted that it would be absurd to remove the minor from her mother to live with her grandmother especially, so the argument went, since the applicant is at work during the day and the respondent not. That submission loses sight of the fact that the minor would be at school during the day. She would be in no different a position than many children her age whose: parents work. In addition, the respondent has been a house wife until now but since she

is about to be divorced, she will also have to find employment.

[16] In my view, the available evidence suggests that it would be in the minor's best interest to return to Cape Town pending a final decision in this matter. I intend to order that the applicant vacate the common home in the event that the respondent should elect to return with the minor. In that eventuality, the applicant should also refrain from visiting the common home pending finalisation of this matter. Should the respondent elect not to return, I P, the paternal grandmother, will stay in the common home with the applicant and the minor child.

CONCLUSION

[17] I, for the reasons stated above make the order as per "X" annexed hereto.

Baartman J

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

On Friday: 21 September 2012

Before: The Honourable Justice E. Baartman

Case Number: 15992/2012

In the matter between:

Steven Phillips Pauls

Applicant

And

Caria Pauls

Respondent

ORDER

Having heard counsel for the parties and having read the papers filed of record:

IT IS ORDERED THAT

[1] The matter is postponed to 10 December 2012.

[2] The respondent must return the minor child, Margot Donne Pauls (**the minor**), to the Strand by 3 October 2012. The applicant will carry; the costs associated with the relocation. The minor will primarily reside in the former common home with the respondent should the respondent choose to accompany the minor.

[3] If she does, the applicant must vacate the common home before the respondent takes up occupation. The applicant must refrain from entering the common home pending the return date.

[4] The applicant may have contact with. the minor every alternate weekend pending the return date. Contact arrangements must be made through the Office of the Family Advocate.

[5] Alternatively, in the event the respondent does not accompany the minor, the minor will reside at the common .home with the applicant and his mother, Mrs Isabel Pauls.

[6] The parties must appoint an expert, for the applicant's account, in accordance with recommendations made in paragraphs 6.2 and 6.3 of Dr Mathilda Smit's report dated 13 September 2012.

[7] The relevant offices of the Family Advocate are directed compile a report in respect of the best interests of the minor.

[8] The respondent may file in good time any further expert report should she wish to do so.

BY ORDER OF COURT

COURT REGISTRAR