



THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION)
JUDGMENT

Case No: 6743/2019

In the matter between

P

APPELLANT

and

P

RESPONDENT

Coram:	Rogers, Savage and Nuku JJ
Heard:	18 October & 27 November 2019
Order:	11 December 2019
Reasons and supplementary order:	19 December 2019

JUDGMENT

Rogers J (Savage and Nuku JJ concurring)

[1] This is an appeal against a judgment of Allie J by which she authorised the respondent to relocate to Alaska with the parties' three minor children. The appeal is with leave granted on petition by the Supreme Court of Appeal ('SCA'). On 11 December 2019 we made an order disposing of the merits of the appeal. These are our reasons for the order together with our ruling on reserved costs. [The order of 11 December 2019 appears as an annexure to this judgment.]

[2] Meaning no respect to the parties, I shall refer to the appellant and respondent as Ann and Alan (not their real names). The three children are a son, Larry (born on 10 December 2005), and two daughters, Hayley (born on 21 April 2008) and Lillian (born on 16 March 2011) (also not their real names). Larry has just turned 14. Hayley and Lillian are 11 and 8 years old respectively. Alan was the applicant in the court *a quo* and Ann the respondent.

Factual background

[3] The parties were married in Cape Town in October 2006. Their marriage was dissolved by a decree of divorce granted in August 2013. Incorporated in the decree were the terms of the consent paper. In terms of the consent paper the parties remained co-guardians of the children and co-holders of parental responsibilities. The children were to reside primarily with Ann who was entitled to make decisions affecting their everyday care and routine. Alan was to have reasonable contact on terms specified in the consent paper.

[4] Alan was at that time employed in marine salvage. The consent paper recorded that he was working abroad and would not for the time being be able to

exercise his rights of contact in accordance with the specified schedule. For as long as this remained so, he was thus entitled to exercise fair and reasonable contact during his leave periods by prior arrangement with Ann.

[5] The consent paper provided for Alan to pay Ann maintenance of R2000 per month per child (escalating annually); to pay their reasonable and necessary educational costs; to have them registered as dependants on his medical aid scheme; and to pay all reasonable and necessary medical expenses not covered by the scheme. He was also to pay Ann rehabilitative maintenance for three years.

[6] Alan subsequently remarried an Alaskan, Ms Bingham (not her real name).

Litigation history

[7] The events leading up to the application in the court *a quo* began in 2016. Alan was in South Africa on leave during the last three months of that year. His concerns about the children's welfare caused him to engage a clinical psychologist, Mr Rob Sandenbergh, who prepared a report dated 4 December 2016. Mr Sandenbergh was critical of Ann's performance as a mother and found that the children were suffering neglect. It is clear that Alan by this time intended relocating to Alaska since Mr Sandenbergh's first recommendation was that the children should be allowed to relocate with him to the USA.

[8] In her answering affidavit in the court *a quo*, Ann said that in the period covered by Mr Sandenbergh's investigation she was very stressed due to Alan's failure to pay the agreed maintenance. She was unemployed and was living through her worst financial crisis. She pursued a maintenance claim against Alan in the Simon's Town Magistrate's Court. She had to sell her car in June 2016 and use public transport for six months. Later in the year she lost the Kirstenhof house where she and the children were living. She nevertheless denied that she had

neglected the children. Subsequent to 2016 she had been able to ‘pick herself up’. As at February 2019 she had been in full-time employment for two and a half years.

[9] The first half of 2017 was characterised by complaints from Alan that Ann was obstructing his contact with the children. In her answering papers, Ann explained some of these incidents and denied Alan’s version in relation to others.

[10] In June 2017 Alan launched an application to have primary care of the children awarded to him because of Ann’s alleged neglect of them and her alleged attempts to alienate them from him by frustrating his contact with them (‘the first care application’). He relied on Mr Sandenbergh’s report. Alan claimed in the proceedings in the court *a quo* that as at June 2017 he was still ordinarily resident in South Africa and had no intention of relocating to Alaska. Ann denied this, pointing to Mr Sandenbergh’s recommendations made six months earlier. She also said that in July 2017 Alan had the children inoculated, without her knowledge, so that they could live in America, and flew them to Johannesburg, again without her permission, to facilitate their obtaining visas to go to the USA.

[11] Ann opposed the first care application and filed an answering affidavit. Alan did not pursue it. According to him, Ann continued to be obstructive. In August 2017 and again in January and February 2018 Alan had contact with [XYZ] Primary where the children were at school. He was concerned that Larry was expressing thoughts of harming his mother. In January 2018, at the recommendation of the school counsellor, a Ms Charmaine Wolstenholme from the Department of Social Development (‘DSD’) was appointed to monitor the children’s welfare. She worked with the family for about one year. In general she had no concern about the children’s well-being but confirmed that Larry was very

unhappy. Later in this judgment I shall deal in greater detail with what she reported.

[12] Ms Wolstenholme wrote to Alan on 15 March 2018. She touched on the ongoing complaint that Ann was obstructing his contact with the children. She told him there was insufficient evidence to validate abuse or neglect but that Larry was very unhappy at home. She thought it might be best for Larry to stay with the paternal grandmother for a while. Larry was seeing a counsellor on a regular basis.

[13] In May 2018 Ann engaged attorneys, Norman Winks Stephens ('NWS'), to address Alan about contact. In their first letter, NWS stated that there had been a complete breakdown of trust between the parents and that Ann would only consent to Alan having unsupervised contact with the children once their passports were handed to attorneys for safekeeping.

[14] Alan engaged his present attorneys, Schuld Inc Attorneys ('SIA'), who replied in June 2018. SIA said that the children's passports were with the USA embassy in Johannesburg and that Ann's fear that the father would abscond with the children was unfounded and irrational. SIA addressed the question of contact. They also said that, according to Alan, Larry had undergone behavioural changes and the girls were showing signs of stress. Because Mr Sandenbergh's report was outdated, they proposed that Ms Mia Boon, a clinical psychologist, be appointed to report on the children's current position. Through NWS Ann consented to Ms Boon's appointment and tendered her full cooperation.

[15] In August 2018, with bickering about contact continuing, Alan issued the urgent application (under Case No 14039/18) which culminated in the order against which Ann now appeals ('the main application'). By this time, according to his founding affidavit, he was permanently resident in Alaska. In Part A of his

notice of motion he sought an order that Ms Boon be appointed to investigate the children's care, contact and residence arrangements and that in the meanwhile he should enjoy specified rights of contact. Part B anticipated orders to reflect the implementation of Ms Boon's recommendations.

[16] On 14 September 2018 an order was made by agreement postponing the main application to 20 February 2019. Ms Boon was authorised to conduct an investigation. Interim contact arrangements were specified.

[17] Ms Boon produced her first report on 1 December 2018. She recommended that the children be allowed to relocate with Alan to Alaska. She reported that Ann had become financially stable, had obtained appropriate academic support for Larry and Hayley and was going to great lengths to prepare balanced and healthy school lunches. Ann continued, however, to reprimand the children by using physical force. Her 'abuse and neglect' of the children, and the resultant 'parentification' of Larry, meant that the children craved love, stability and consistency, which Alan but not Ann could provide. I shall return in due course to this and later reports prepared by Ms Boon and other experts.

[18] On the strength of Ms Boon's report, Alan issued an urgent application on 5 December 2018 (under Case No 22355/18), for hearing on the same day, seeking interim primary care of the children pending the determination of the main application, with Ann to enjoy supervised contact ('the interim care application'). Ann opposed the interim care application. On 5 December and by agreement the interim care application was postponed to 12 December with temporary arrangements for Alan's contact with the children. On the latter date a further order was made by agreement, postponing the application to 23 January 2019. Pending the postponed date, the children were to reside with Alan, with

Ann enjoying supervised contact. Ann was to attend filial therapy with a social worker, Natalie de Reuck.

[19] Ann says she agreed to these interim arrangements because Alan would in any event have had the children with him for the first half of the school holidays by virtue of the order of 14 September 2018.

[20] It is important to note that for their entire lives until 5 December 2018 the children had resided with Ann. Until Alan and Ann parted company (which was in December 2012), such residence was jointly with the parents, though Alan was often absent because of his work. As from August 2013 the children resided with Ann alone.

[21] Ms Boon produced her second report on 3 January 2019. She recommended that a social worker (rather than Ann's brother and mother) be appointed to supervise Ann's contact because of her alleged violations of the agreed order. She also recommended that the children not start the new school term in South Africa (Larry would be entering high school at [ABC]) because this would make the move to Alaska disruptive. They should rather be introduced to the syllabus of their new schools in Alaska.

[22] On the following day Alan issued an application to further restrict Ann's contact with the children (which was refused). Ann delivered a counter-application to ensure that the children would start their new South African school terms, and it appears that this is what the court ordered.

[23] On 21 January 2019 Ms Z Edwards from the Office of the Family Advocate, issued a report in which she supported the children's relocation with Alan. She relied on the Sandenbergh and Boon reports.

[24] On 23 January 2019 the main application and the interim care application served before Cloete J. An order was made by agreement postponing the applications to 20 February 2019. Ms Toni Raphael, a counselling psychologist proposed by Ann, was authorised to conduct an investigation. Ms Raphael, Ms Boon and Ms de Reuck were to deliver (updated) reports. In the meanwhile the order of 12 December 2018 remained in force, ie the children continued to reside with Alan.

[25] The matter came before Allie J on 20 February 2019. By that stage Ms Boon had delivered her third report (dated 18 February 2019), Ann had filed her opposing affidavit (dated 19 February 2019) and Ms de Reuck had issued her report (also dated 19 February 2019). Ms Raphael's report was not yet to hand. An order was made by agreement postponing the applications to 14 March 2019. The children were to continue residing with Alan. He was prohibited from removing them from South Africa but Ann was to cooperate in obtaining visas to allow them to travel to and reside in Alaska.

[26] Ms Boon issued a fourth report dated 7 March 2019 and Ms Raphael issued her report the following day. Ms Boon's recommendations remained unchanged. Ms Raphael recommended that Larry be allowed to relocate with Alan on certain conditions but that the daughters remain in Ann's care until Hayley completed her primary school education, whereafter she and Lillian could potentially relocate to Alaska on certain conditions, one of which was that it should first be established that it was the girls' informed choice to do so, free from pressure or undue influence.

[27] Alan delivered a replying affidavit dated 13 March 2019 and on the following day the matter was argued before Allie J. On 20 March she handed down the judgment which is the subject of the present appeal. She accepted Ms

Boon's recommendations and rejected those of Ms Raphael. Alan was thus authorised to relocate with the children to Alaska. Provision was made *inter alia* for Ann's contact with the children, for them to receive counselling and therapeutic assistance, and for the appointment of a parenting coordinator ('PC'). Each party was to bear his or her own costs.

Events since court *a quo*'s judgment

[28] Ann applied for leave to appeal which Allie J dismissed on 28 March. The next day Ann's attorneys, Spencer Pitman Attorneys ('SPA'), wrote to SIA advising that Ann would be petitioning the SCA for leave to appeal. On 2 April 2019, and in response to a request from SPA, SIA furnished an undertaking that Alan would not remove the children from South Africa before Friday 5 April and proposed abridged time-limits for the filing of papers. SPA replied that the SCA was unlikely to rule on the matter by 5 April 2019 and asked that Alan's undertaking be extended until the matter was determined by the SCA. The abridged time-limits were accepted.

[29] SIA's response was that its abridged time-limits required Ann to lodge her petition with the SCA by 4 April 2019. If this were done, Allie J's order would be automatically suspended, and it was thus unnecessary for Alan to extend his undertaking. They said that the matter had to be finalised before 19 April, because Alan had to leave for Alaska with the children by then in order to meet his work commitments. The children also needed to be settled in their new schools.

[30] Ann was not able to deliver her petition by 4 April but on 5 April SPA transmitted to SIA the unsigned founding affidavit. The signed petition, dated 9 April, was served on that day by email. Alan filed his opposing affidavit on 10 April and Ann her replying affidavit on 16 April. On the same day SPA couriered full sets of the papers to their Bloemfontein correspondents who lodged them with

the SCA registrar on Thursday 18 April. SPA emailed SIA at 13:31 to confirm that the documents had been duly lodged and that the case number would follow.

[31] According to Alan's opposing papers in the repatriation application to be mentioned hereunder, his attorney learnt on 18 April that the documents had been sent to Bloemfontein but did not know when this had happened. She confirmed that SIA's email of 18 April was duly transmitted and received by her office but said she only became aware of it when she returned to work on Tuesday 23 April.

[32] It is now clear that in the meanwhile Alan was intent on leaving South Africa so that he could be in Alaska by Wednesday 23 April. On Wednesday 17 April he was in email communication with a potential employer about an interview. He told the employer that there had been a 'delay in obtaining the required departure documents'. He had hoped to have them in time to depart on Thursday 18 April. His lawyers were 'in the process of following up with the courts trying to sort the situation out'. He was very frustrated and was doing everything possible to expedite his departure. Later that day he sent another email saying that he had booked flights for Monday 22 April and that because he did not yet have the required documents he was 'taking a bit of a chance'.

[33] In the repatriation application Alan claimed that on 17 April he told the children that they would be leaving with him for Alaska the next week. According to him, Hayley told Ann that they were packing their bags for Alaska but did not say they would be leaving on 22 April. The children asked their father not to tell their mother this as they were to spend the Easter weekend with her and did not want to upset her.

[34] The children spent the weekend, from Good Friday to Easter Sunday, with their mother. On Easter Monday, 22 April, Ann tried to phone Larry on his cellphone but it was off. Several WhatsApp messages to Alan went unanswered.

According to Alan, he told the children that they would be leaving for Alaska later in the day and asked whether they wanted an opportunity to say goodbye to their mother. They unanimously said no because they were afraid she would ‘create a scene’ and stop them going.

[35] At 18:00 on Monday 22 April Alan and the children departed Cape Town on an Emirates flight for Dubai. In the early hours of the next morning Ann received a WhatsApp message from Larry to say that they were fine and that he would call her when he could. At 09:55 on 23 April Alan and the children departed Dubai on an Emirates flight for Seattle.

[36] Ann, feeling uneasy, made enquiries from the South African customs and emigration authorities. She learned to her dismay that Alan and the children had left South Africa the previous evening. On the same day she issued an urgent application (under Case No 6743/19) to have the children returned to South Africa (‘the repatriation application’). An *ex parte* order, in the form of a rule nisi operating as an interim mandatory interdict returnable on 7 May, was issued. On 7 May the repatriation application was postponed to 21 June on which date it served before Cloete J.

[37] By this time the SCA had granted Ann leave to appeal to a full court of this division. Alan opposed the repatriation application and delivered a counter-application that Allie J’s order remain operative pending finalisation of the appeal. He did not comply with the interim mandatory interdict.

[38] On 26 June the Judge-President directed that the appeal be heard on an expedited basis on 18 October. On the same day Cloete J issued an order in the repatriation application. In terms thereof Alan was required to ensure the daughters’ return to Cape Town by 6 July, where they were to remain pending finalisation of the appeal. They were to reside with Alan’s mother in Table View,

subject to Ann's right of reasonable contact. Larry was permitted to remain in his father's care but it was recorded that for purposes of the Hague Convention Larry's habitual place of residence remained Cape Town. Alan was ordered to pay the costs of the application on the attorney/client scale.

[39] The punitive costs order was fully justified. Alan claimed that he was not aware, when he and the children left South Africa on 22 April, that the petition had been lodged with the SCA on 18 April. In terms of s 18(5) of the Superior Courts Act 10 of 2013, a decision only becomes the subject of an application for leave to appeal when the application is lodged with the registrar. In the present case SPA for some reason did not immediately lodge the founding papers in the petition with the SCA registrar. Instead they waited for the exchange of affidavits to be completed, in accordance with the agreed timetable, before sending complete sets of the papers to Bloemfontein.

[40] Nevertheless, Alan knew that for all practical purposes an application for leave to appeal was pending. After all, he filed his opposing affidavit on 10 April, and his attorneys received Ann's replying affidavit on 16 April. He must have known that Ann and her attorneys were working on the basis that the application for leave to appeal was pending and were quite possibly under a misapprehension that service on Alan's attorneys was sufficient in law to achieve this result. Given the earlier correspondence, Alan and SIA must have known that if Ann and SPA believed Alan to be at liberty to relocate with the children because the SCA petition had not as yet been lodged with the registrar, they would have insisted on a further undertaking or sought interim protection. There is nothing to show that over the period 16-18 April 2019 Alan or his attorneys took any steps to ascertain from SPA or from the SCA's registrar whether the petition had been lodged. Since Alan was evidently in contact with his attorney about his plans to leave, one

would have expected her to contact her counterpart during the course of 18 April in order to ascertain the state of play.

[41] Allie J's order was suspended by the lodging of the petition on 18 April. Alan thus acted unlawfully in departing with the children on 22 April. I am satisfied, furthermore, that he had at least constructive knowledge that he was acting unlawfully, in that by refraining from making enquiries, including on Thursday 18 April, he deliberately 'closed his eyes' in order to maintain a veneer of ignorance.

[42] I also consider that he acted in a morally reprehensible way, not only by taking advantage of the misapprehension under which Ann and her attorneys were evidently labouring, but by departing without allowing the children to say goodbye to their mother. Even if the children expressed the views which he alleges, he should have known that the children, and particularly the girls, were in no position to make a responsible decision on how they should part from their mother. This was a matter in which the children's proper course should have been determined by their parents, acting with due regard to the views of the professionals. Even though Mr Sandenbergh and Ms Boon recommended the relocation of all three children, the manner in which Alan wrenched them away from their mother by subterfuge was wholly at odds with the methods recommended by the professionals.

[43] Alan applied for leave to appeal against Cloete J's order. Unusually, founding, answering and replying affidavits were filed. On 8 August Cloete J dismissed the application, holding that her order was not appealable. She accepted that implementation of her order would cause disruption but said that Alan had not produced any evidence to show that partial repatriation until the appeal process was finalised would imperil the children.

[44] On 17 September an order was made appointing Ms Jolene Bernstein, a member of the Cape Bar, as the legal representative of the children. This appointment was made on the application of Alan's mother.

[45] On 27 September 2019 Alan, who had not yet ensured the return of the daughters to Cape Town, launched an urgent application to have Cloete J's partial repatriation order declared a nullity on the basis that her order went against the recommendations of a majority of the experts, that she had not heard evidence about the likely effects of splitting the children, and that natural justice had been violated through a failure to 'hear the voice of the children'. This application served before Bozalek J on 14 October. The next day he dismissed it with costs on a punitive scale. (The SAFLII citation is *AP v VP* [2019] ZAWCHC 163.)

[46] In the meanwhile Alan had delivered an application for leave to adduce further evidence at the hearing of the appeal on 18 October. The further evidence was that contained in an affidavit by him dated 30 September. On 11 October Alan filed additional evidence in the form of a report by an Alaskan social worker, Ms Jaime Browning. Ann opposed the receipt of new evidence but did not file responding affidavits. Ms Bernstein filed her first report on 7 October 2019 ('Bernstein I').

Postponement of the appeal and subsequent events

[47] When the appeal was called on 18 October 2019 we expressed reluctance to hear the appeal, or at any rate to hear Alan's counsel in opposition to it, in circumstances where Alan had not complied with Cloete J's order. Apart from the principles relating to non-compliance with court orders, there was the danger that any decision we made might be seen to have been influenced by the very fact that the children were in Alaska.

[48] Alan's lead counsel fairly acknowledged the court's concerns, indicating that the only real impediment was that his client feared contempt proceedings if he returned to South Africa with the children. After the members of the court had conferred, we conveyed that in the very special circumstances of the case we saw no objection to providing Alan with protection against contempt proceedings for a limited period so as to ensure that the children would be in Cape Town when we heard and adjudicated the appeal. The best interests of the children were a paramount consideration. The presence of the children in Cape Town, and the full participation of Alan's counsel in the appeal, would furnish the optimum conditions for arriving at a just decision. Since the *raison d'être* of contempt proceedings is the vindication of the court's authority, it is within the court's inherent jurisdiction to provide a temporary indemnity if the proper administration of justice demands it. Furthermore, the temporary indemnity was directed at procuring compliance with Cloete J's order.

[49] Following these exchanges with counsel, an order was made by agreement postponing the appeal to 27 November 2019 on the basis that the children would be brought back to Cape Town by not later than 14 November. No contempt proceedings were to be taken against Alan from the time he arrived in South Africa until he left again following adjudication of the appeal.

[50] Alan and the children returned to South Africa in accordance with the above order and have been staying with Alan's mother in Table View. In terms of the agreed postponement order, Dr E Durr-Fitschen was appointed as the professional to facilitate Ann's contact with the children. Dr Durr-Fitschen in turn arranged for a social worker, Ms Leigh Haselau, to be present during contact. The children have not been further assessed by psychologists. Ms Bernstein conducted further investigations and delivered a supplementary report on 25 November ('Bernstein II') in accordance with our order of 18 October. She convened a

meeting of experts (Ms Boon, Ms Raphael and Dr Durr-Fitschen) on 22 November and recorded the outcome of the meeting. I shall revert to Ms Bernstein's reports in due course.

[51] The appeal was argued on 27 November 2019. We reserved judgment. Alan's counsel indicated that his client had to leave South Africa on 13 December to return Alaska in order to preserve his green card. We said we would aim to be ready to issue an order before his departure date. It was for this reason that we issued an order on 11 December with reasons to follow. In our order we also reserved for later decision the cost in the court *a quo* and the costs of appeal.

[52] The most contentious element in our order is that primary care of Larry has been awarded to Alan and he has been granted authority to relocate with Larry to Alaska, while primary care of the two girls is to remain with Ann, so that they will continue to live in Cape Town.

The nature of the application

[53] Although counsel on both sides referred to the main application as the relocation application, it is necessary to emphasise that the relief Alan sought on Ms Boon's recommendations was twofold: (a) that primary care of the children be awarded to him; and (b) that he be granted authority to relocate them to Alaska. Relocation would only arise for consideration if he obtained primary care.

[54] It is also necessary to emphasise that it is not Alan's case that Alaska is a better place for the children to be raised than Cape Town. The need to relocate the children to Alaska (if he were granted primary care) is a consequence of Alan's desire to live there in his own interests. He regards it as a preferable location for obtaining work in his chosen field. The fact that his current wife is Alaskan has presumably also played a part.

[55] Where a custodian parent wishes to emigrate with a child, the court will be slow to prohibit this if the wish to relocate is genuine and reasonable – not because this is a right of the custodian parent, but because generally the best interests of the child will not be served by thwarting the custodian parent’s wish (*Jackson v Jackson* 2002 (2) SA 303 (SCA) at 318E-I; *F v F* [2006] 1 All SA 571 (SCA) paras 9-10). Any such decision must inevitably be subject to a careful and appropriate consideration of the best interests of the child, which must include a consideration of the nature and extent of contact possible with the non-custodian parent if relocation is permitted. In the present case, however, Alan did not bring the application as the custodian parent. He wanted to become the custodian parent as a precursor to taking the children away. The interim care arrangement reflected in the order of 12 December 2018, made by agreement pending the determination of the main application, did not make him the custodian parent within the meaning of the cases dealing with relocation.

[56] I have no reason to doubt that Alan genuinely and reasonably believes his own best interests are best served by living permanently in Alaska. This is not a vindictive stratagem to deprive Ann of the children. However, in circumstances where he has to have primary care of the children removed from Ann and vested in himself in order to relocate with them, one cannot treat the request for primary care and the request for relocation in hermetically sealed compartments. What he wants to do with the children once he has primary care of them is important in assessing whether it will be in their best interests that he should have primary care.

[57] At the hearing we asked Alan’s counsel whether, if we were to decide that one or more of the children should remain in Ann’s primary care, his client might elect to remain in Cape Town so that the children need not be separated. The answer was unequivocal – whatever our decision, Alan has determined to make

his life in Alaska. From this it follows that he does not ask for primary care independently of his request that the children be permitted to relocate to Alaska. Put differently, he does not see one of his options as being to have one or more of the children in his primary care in Cape Town. His stance also rules out the possibility of shared care, the children spending time in rotation with each parent.

[58] As Alan would have learnt in December 2016, his insistence on ceasing to live in Cape Town during the children's formative years makes it impossible to achieve what Mr Sandenbergh regarded as being in the children's best interest:¹

'[R]esearch shows that there are considerable benefits for children in having a shared parenting arrangement, not the least of which is maintaining a solid relationship with both parents. Such a positive relationship can be a protective factor in situations where conflict exists. There are real benefits for children in having solid relationships with both parents, something which is anchored in good relationships in the children's tender years. However, with Alan residing in the USA and Ann here in South Africa, such a shared parenting arrangement is not possible.'

[59] In accordance with s 28(2) of the Constitution, s 9 of the Children's Act provides that in all matters concerning the care, protection and well-being of a child, the standard that the child's best interest is of paramount importance must be applied. Section 7(1) details the factors that must, where relevant, be taken into consideration in applying the standard of the best interests of the child. This does not mean that the child's best interest is the only consideration or even that it necessarily trumps all others (cf *S v M (Centre for Child Law As Amicus Curiae)* 2008 (3) SA 232 (CC) para 26). Parenthood is a fundamental and life-affirming human experience. It can be cruel and hurtful, and an insult to a parent's dignity, to deprive him or her of a meaningful role in nurturing and developing and maintaining a bond with the child. The Act speaks not only of the responsibilities but also the rights of a parent in relation to the child. In a case where the best

¹ Para 3.8.11 record A86.

interests of the child are clear and are adverse to a parent's interest in performing a parenting role, the former would, I think, always have to prevail. In other cases, however, it may be far more difficult to discern what course of action will best advance the child's interests, and in such cases the parents' respective interests may come to the fore.

[60] Alan's application for primary care is an application as envisaged in s 23(1) of the Act. In terms of s 23(2), the matters the court must take into account are: (a) the best interests of the children; (b) the relationship between Alan and the children, and between any other relevant person and the children; (c) the degree of commitment Alan has shown towards the children; (d) the extent to which he has contributed towards expenses in connection with the birth and maintenance of the children; (e) any other factor that should in the court's opinion be taken into account.

[61] In regard to Alan's application for relocation, s 18(5) provides that, unless a competent court orders otherwise, the consent of all persons having guardianship of a child is necessary in respect of the matters listed in s 18(3)(c). One of those matters is consent to the child's removal from South Africa. Since Ann and Alan are co-guardians of the children, their relocation requires Ann's consent or an order of court.

[62] Such an order is sourced in s 28(1), since Alan is applying to terminate or circumscribe Ann's right as co-holder of parental responsibilities to withhold her consent. Section 28(4) lists the factors the court must take into account: (a) the best interests of the children; (b) the relationship between the children and Ann; (c) the degree of commitment that Alan has shown towards the children; (d) any other factor that should in the court's opinion be taken into account.

[63] Ann's counsel submitted that the power a trial court exercises under these provisions is not a discretion in the narrow sense, where an appellate court would intervene only if the trial court acted on a wrong principle or arbitrarily or capriciously. It is a discretion in the broad sense, a value judgment in which a court must have regard to a number of disparate and incommensurable features in arriving at a conclusion. In such a case the powers of an appeal court are not restricted (*Knox D'Arcy Ltd & others v Jamieson & others* 1996 (4) SA 348 (A) at 361G-I; *Gaffoor NO & another v Vangates Investments & others* 2012 (2) SA 281 (SCA) para 39; see also *Bailey v Bailey* 1979 (3) SA 128 (A) at 141A-H, dealing specifically with relocation). I agree, and the contrary was not argued on Alan's behalf.

Alan's application to adduce further evidence

[64] Ann's counsel opposed Alan's application to adduce further evidence, emphasising (a) that only in exceptional circumstances will a court receive further evidence on appeal; (b) that the appeal is primarily concerned with whether Allie J's judgment was right, having regard to the material before her; (c) that the supposed need for the further evidence was created precisely because Alan unlawfully removed the children from South Africa and subsequently failed to return them.

[65] Alan's counsel, by contrast, emphasised (a) that this case was concerned with the best interests of children; (b) that the Constitution and the Children's Act 38 of 2005 ('the Act') elevated the children's best interests to a paramount consideration; (c) that in arriving at a just order in accordance with these requirements, an appellate court cannot disregard events which have occurred since the trial court's judgment.

[66] Because the further evidence concerns events in Alaska, on which Ann in the nature of things could not provide a direct response, and since Ann's counsel did not seek time to file further papers if we were minded to receive the further evidence, we have come to the conclusion that we should have regard to the further material. If the further facts were hotly contested, and if this would have occasioned further delay, we might well have taken a different view. We also bear in mind that it might seem inconsistent to exclude Alan's further evidence in circumstances where Ms Bernstein's supplementary report also contains what may be regarded as further evidence.

[67] I nevertheless propose to consider whether Allie J's decision was correct on the material before her. Having done so, I shall consider what effect the further material has on the appropriate order to be made.

Resolving factual disputes

[68] Many of the allegations which the parties made against each other were disputed as were the facts on which the experts based their assessments and recommendations.

[69] It has been said that in matters concerning the best interests of children there is no onus 'in the conventional sense' (*Van Rooyen v Van Rooyen* 1999 (4) SA 435 (C) at 437I-J; *B v M* [2006] 3 All SA 109 (W) para 5). The court conducts an investigation into the matter, a process in which it may act more inquisitorially than would be acceptable in adversarial proceedings. Nevertheless, there is authority that where a parent seeks a relocation order which amounts to a variation of a divorce order, it is for such parent to establish on a balance of probability that a variation should be granted (*Jackson supra* 307G-H and cases there cited – although Cloete AJA's was a minority judgment, the majority did not express disagreement with the legal principle). This is no doubt why Howie JA in

B v S 1995 (3) SA 571 (SCA) said that there was no onus where custody and access were being judicially determined ‘for the first time – in other words where there is no existing Court order in place’ (at 584I-J).

[70] Alan was seeking a variation of the divorce order. In terms of that order, Ann had primary care of the children. He wanted primary care transferred to him coupled with a right to relocate the children. He thus needed to show on a balance of probability that this variation should be granted. This does not mean that the trial court could not act inquisitorially to establish the facts. But if at the end of the process the court was unpersuaded that the best interests of the children would be served by departing from the *status quo* established by the divorce order, the application had to fail.

[71] The court *a quo* cited *B v S supra* at 585C-E and *T v M* 1997 (1) SA 54 (A) at 57J-58B for the proposition that in proceedings of the present kind a court should be slow to determine facts by way of the usual approach adopted in opposed motions, ie by the *Plascon-Evans* rule. The learned judge did not, however, explain how she intended to resolve disputed factual matter. What the above cases show is that where, in determining a child’s best interests, it is necessary to resolve one or more factual disputes, the court should always consider the desirability of hearing oral evidence rather than having recourse to the *Plascon-Evans* rule. However, if the trial court elects not to hear oral evidence, the *Plascon-Evans* rule must be applied. The trial court is not at liberty to resolve the facts by assessing the probabilities on paper. A parent’s version can in such circumstances only be rejected if it is so far-fetched or untenable that it can be dismissed out of hand without further investigation.

[72] In the present matter there might well have been value in the trial judge’s hearing evidence from the parents and from Ms Boon and Ms Raphael. This need

not have been a lengthy process aimed at resolving every point of difference. Given the inquisitorial nature of the investigation, the trial judge herself could have conducted the questioning rather than allowing it to escalate into an adversarial trial in the hands of the lawyers. She could have allowed each parent an opportunity to describe his or her relationship with the children and what such parent saw as being in the best interests of the children. The judge could have put some key concerns to each parent. This might have enabled her to gain a better impression of them than appeared from the written word. In the case of the experts, it would probably have sufficed to explore the main points of difference. All of this might have been achieved in a day.

[73] However, this was not done, and unless the matter is now referred back for oral evidence we must apply the *Plascon-Evans* rule. The stress of the litigation has already taken its toll on the parents and more particularly on the children. To leave the matter unresolved while oral evidence is heard by the trial court, followed possibly by a further appeal, would be most undesirable.

Primary care and the children's best interests

[74] The experts understandably tried to gauge Ann and Alan's respective parenting skills and relationships with the children. When one reads this material one must not lose sight of the important fact that Ann is the only parent who has ever consistently performed the role of primary caregiver. Even before Alan left the matrimonial home, he was often absent for work reasons. When Alan saw the children, he was generally on holiday. Ann told Mr Sandenbergh that Alan had 'no clue' about being a father – when he came to Cape Town he was on holiday and did not have to 'deal with the routines of life'.²

² Para 2.1.3 record A55.

[75] The artificial nature of Alan's parenting relationship with the children continued after he unlawfully removed them to Alaska. He decided to take time off to help them adjust. He was able to treat them to new and exciting sights and experiences. Some of Ann's frailties have been exposed by the relentless demands of full-time parenting; Alan has yet to be similarly tested.

[76] This resulted in what Ms de Reuck described as 'the seemingly unbalanced focus on [Ann's] behaviour in particular and the "unforgiving" nature of the inspection into her skills or lack thereof'.³ This was at least partly the cause, in Ms de Reuck's opinion, of Ann's increased levels of insecurity and vulnerability during the assessment period. The following observation by Ms Raphael about the reports of Mr Sandenbergh and Ms Boon is on point:⁴

'The author [Ms Raphael] would like to note that both prior assessments have been comparing Ann's parenting, based on 14 years of primary parenting, with Alan's primary parenting, of which there is not yet a record.'

Omissions in Alan's papers

[77] Before I consider the matters on which the experts differed, I must deal with omissions in Alan's papers which in my view presented an insuperable obstacle to the relief he claimed. The first is the absence of allegations about the domestic and schooling arrangements he had in mind for the children. Nothing was said about the home in which they would be living or the schools at which he intended to enrol them. There was thus no way to compare their proposed circumstances with the *status quo*. On the evidence before the court *a quo*, Ann's circumstances had stabilised to the point where she and the children were renting a small but adequate home in Kalk Bay, next to a community park and close to a tidal pool. The girls were happy at [XYZ] Primary and had many friends.

³ Record B69.

⁴ Para 7.6.6 record 160.

[78] The second is Alan's failure to deal with his employment and income. Although in 2016 Ann's financial circumstances were challenging, by 2019 she had been in stable employment for several years and had also started her own biscuit business. Together with the maintenance (albeit low) from Alan, she was able to meet the children's needs financially.

[79] Alan, by contrast, was unemployed throughout the period of assessment (September 2018 to March 2019). Although he had interviews lined up, there was nothing definite. His employment prospects and financial position were relevant to the children's best interests for three reasons.

[80] The first reason is that he needed to show that he was able to fund the children's needs, including their healthcare, in Alaska.

[81] The second reason concerns funding the reasonable contact which Ann would have to be afforded with the children. Mr Sandenbergh and Ms Boon both acknowledged that she would need generous access if relocation were authorised, since it was in the children's best interests to maintain a good relationship with their mother. This would involve flying them to Cape Town at least once a year.

[82] It is clear Ann could not afford this. Alan did not in his affidavit even tender to pay such costs, let alone prove that he could afford them. Ann's counsel told us that in argument in the court *a quo* Alan made a tender through counsel but this did not cure the evidential defect. This is all the more important when one bears in mind that Alan told Ms Raphael that he could not commit to paying for the children to fly to South Africa annually and did not even see it as his responsibility. He thought Ann should rather pay to fly herself to Alaska to visit the children.⁵

⁵ Para 7.5.8 record 158.

[83] Alan's attitude as recorded by Ms Raphael strikes me as callous, unrealistic and displaying lack of insight into the best interests of the children. It is not Ann's life choice, but Alan's, which has resulted in the parents living halfway around the world from each other. Alan knew that Ann would struggle to fund travel to Alaska. Even if she could afford it, she would have no home and social network in Alaska. How and where would she spend time with the children? I cannot believe that Alan's counsel was serious when he said that she could take them travelling in Alaska.

[84] The third reason is that if Alan is unable to obtain ordinary employment in Anchorage, he may have no choice but to do what he has done in the past, *viz* work for lengthy periods away from the home and become, as he previously was, an absentee father. The children's stand-in parent would then be Ms Bingham. Ms Raphael, who gave a fair and favourable assessment of Ms Bingham, said that 'it is not acceptable to remove the children from their mother to be placed in the primary care of a third party, in a new and foreign country'. I agree. The children's circumstances in Ann's care would have to be dire indeed before one reconciled oneself with such a removal.

[85] In *F v F supra* the SCA found the relocating parent's failure to deal with matters of this kind crucially important in dismissing her appeal (see paras 20-21). For the sake of completeness I should add that even if Ms Bingham's income and financial circumstances had been fully canvassed (and they were not), she is under no legal obligation to maintain the children or fund Ann's access to them.

Mr Sandenbergh's assessment

[86] The court *a quo* rejected a submission by Ann's counsel that Mr Sandenbergh's report was largely irrelevant. The court said that the report provided a yardstick against which to measure the children's progress and their

relationship with each parent. The learned judge summarised and quoted extracts from Sandenbergh's report.

[87] The factual disputes permeating Mr Sandenbergh's report were not resolved. Ann cooperated fully in his investigation. In her opposing affidavit she confirmed and expanded on explanations given when he interviewed her. She said that when her 'abusive' relationship with Alan terminated, she had struggled to regain confidence. She described Alan as a man with a violent temper who had not balked at assaulting her. (This Alan denied, instead accusing her of having a quick temper.) She had battled to find work but was trying to start a bakery. Particularly once Alan's three-year rent contribution in terms of the consent paper lapsed, she found it hard to make ends meet on R2000 per child. (Mr Sandenbergh described this amount as certainly 'low for a middle-class family'.⁶)

[88] She denied Alan's allegations to Mr Sandenbergh that she neglected the children. She said they were fed adequately even though things were tight. (Larry reported to Mr Sandenbergh that they had been short of food 'once or twice'.) The fact that Hayley had to have a decayed tooth removed she attributed to the fact that Alan had refused to pay for earlier treatment. As to patched and old clothing, she said it was Alan who supplied the children the second-hand clothing. (Hayley told Mr Sandenbergh that her mother used to do washing by hand so they did not always have a clean change but that they now had a washing machine.) Concerning a complaint that Lillian had gone to school without warm clothes, Ann said that the girl had refused to take them but that she (Ann) now packed them in her school bag.

[89] There was a complaint of corporal punishment. This was something of which Larry and Hayley spoke with Mr Sandenbergh. Ann acknowledged that she

⁶ Para 3.8.17 record A87.

sometimes gave the children hidings but ‘not often’. She had hit Larry with a flip-flop because he had written his name on a cupboard with a Koki pen. She did not smack Lillian because she was too little. (Lillian’s teacher told Mr Sandenbergh she had no suspicion that the child was being smacked. She did, though, have concerns that Lillian sometimes arrived at school hungry or without underwear or shoes or warm clothes. All the children, it seems, had lice from time to time.)

[90] The reports from the teachers did not in general raise serious points of concern. Lillian was described as very sweet, polite, an above-average learner, a pleasure in class and developmentally on track. Although Hayley did not always do her homework, her grade 2 teacher said there had been an improvement. She always had food and the right uniform and sports kit. Although she was often 10 or 15 minutes late for school, she was not frequently absent. (The previous year’s report from the grade 1 teacher was far less positive.) Larry needed a lot of academic support but otherwise there were no real concerns. Frequent school changes had been disruptive to his education. There were no behavioural issues. The school counsellor said the children were always in uniform and she had no concerns about hygiene. (Regarding occasional lateness, Ann was at this time accompanying the children by train to school which also involved a 20 minute walk from Steenberg station to the school.)

[91] Mr Sandenbergh described Hayley as a talkative, confident and social child who liked [XYZ] Primary and had lots of friends. Larry presented as a talkative and gentle-mannered boy though carrying many concerns about his circumstances.

[92] To Mr Sandenbergh, Alan presented as an affable and sociable man who was psychologically stable though there were indications he had a temper. Ann presented as ‘stressed and concerned’. His impression was that she may have

suffered from a mood disorder. (She had suffered from postnatal depression following Larry's birth and spoke of her low self-esteem in consequence of the alleged abusive relationship.) She seemed to have a 'laissez-faire approach' to issues such as hygiene and the presentation of the children, her parental authority was unclear, leading the children to be defined, and this had probably caused her to have recourse to corporal punishment, which was counter-productive.

[93] One must bear in mind, however, that Ann was in straitened financial circumstances. Although on her version she was emotionally affected by the fraught marital relationship and its termination, there was and is no evidence that she was in 2016 suffering from a mental disorder. As to her parental authority, Mr Sandenbergh's description of a 'laissez-faire approach' may be fair but as against this Ann told him that she felt Alan undermined her and spoke negatively about her with the children. Already in the latter part of 2016, Alan was (on Ann's version) preparing the children for a new life in Alaska. She said the children would sometimes say to her that they were going to live with their father in Alaska and thus did not have to listen to her. He had painted a picture of fun and excitement by which their current lives and schoolwork 'were turned into unpleasant tasks that in their little minds were pointless'.⁷

After Sandenbergh – 2017-2018

[94] If an application had been brought at the end of 2016 on the strength of Mr Sandenbergh's report to place the children in Alan's primary care, whether in Cape Town or Alaska, it would in my view have failed. The law does not demand perfection from a parent. In the event, though, Alan did not take immediate action on the strength of Mr Sandenbergh's report and seems to have been content to leave the children in Ann's care. However, when (on his version) Ann obstructed

⁷ Para 2.1.3 record A54-55.

his contact with the children during the first half of 2017, he brought the first care application in June but abandoned it in the face of opposition.

[95] Alan was in South Africa for two months from mid-November 2017. During one of his contact periods in early December, he took Larry to a doctor because of bruising on his right upper arm. Larry reported that Ann had hit him with a shoe a couple of days before. The doctor found the bruising to be mildly tender with no obvious imprint. Larry was bright and responsive. There were no obvious features of malnutrition or other injuries. Larry did not have the stigmata of a chronically abused or neglected child.⁸

[96] In her answering affidavit about this incident, Ann said that following Larry's repeated disobedience when they moved into their new house in Kalk Bay she got upset and hit him on his arm with his school shoe. It was not a hard hit and there was no bruising the next day and it was not mentioned again. The only bruises he had were from rugby or playing rough with his friends.

[97] Following allegations by Larry of physical and verbal abuse from his mother, Ms Wolstenholme, a social worker from the DSD, was appointed in January 2018, and she worked with the family for the rest of that year. She did not consider that the children to be in need of care or protection. She found that several statements made by Larry were untrue, including an allegation that Ann had given the girls a hiding on a particular occasion, something the girls themselves in a separate interview denied, instead saying that they had had 'the best time ever with their mother'.

[98] Ms Wolstenholme interviewed five teachers at [XYZ] Primary. None of them reported any concerns about abuse or neglect. Many children at the school were repeatedly infected with lice. The teachers were concerned, however, that

⁸ See record A148 for Dr Meghan O'Brien's report.

Larry felt he had to be ‘the man of the house’, that this was taking a toll on his schoolwork and self-esteem, and that he wanted to live with his father. Ms Wolstenholme was concerned, that Larry was placing pressure on the girls ‘to collude with his and Alan’s narrative about Ann’. At times she felt that Larry ‘was not always using his own words’.⁹

September 2018-March 2019

[99] Despite these indications that things had improved, rather than deteriorated, during 2017 and 2018, Alan launched the main application in August 2018, pursuant to which Ms Boon was authorised to conduct an investigation. Ann did not oppose Ms Boon’s appointment but told her that she was upset Alan had chosen to take legal action now that she had ‘turned it around’: ‘We lost everything. I fixed it.’¹⁰

[100] Since Ms Boon and Ms Raphael conducted their assessments during a similar period, I shall deal with the main issues arising from their reports thematically. As a general preface, however, I should say that unlike the court *a quo* I found Ms Raphael’s report to be more balanced and thorough than Ms Boon’s. Since the court *a quo* did not hear oral evidence, we are in as good a position to judge this as the trial court was.

[101] Ms Boon’s reports focus primarily on Ann’s parenting. She has a lot of criticism for Ann, very little for Alan. She correctly noted that less was known of Alan’s parenting skills than Ann’s but immediately added that what one knows is that the children experience him ‘as consistent, loving and protective – the parenting attributes they desperately need’.¹¹

⁹ This is how Ms Raphael reported on the information supplied to her by Ms Wolstenholme: para 9 record B122-4. See also Wolstenholme’s email to Alan 15 March 2018 (record A144) recording that, as stated in her previous emails, there was ‘insufficient evidence to validate abuse or neglect at this moment but Larry is very unhappy at home’.

¹⁰ Para 10.4 record B21.

¹¹ Para 11.1.6 record B30.

[102] What is striking is that despite recommending that Alan be awarded primary care with permission to relocate, she omitted to deal with his employment prospects and income. From her first report we can see that Ms Boon elicited information from Ann about her financial position. She also recorded Alan's concern that since the divorce Ann had seldom had employment and that he was worried about her financial stability. One must assume that she asked Alan similar questions yet her report does not reveal the answers she received. It was irresponsible to make the recommendations she did without knowing that Alan could afford to fund Ann's contact with the children. It is noteworthy that her recommendations did not say who was to fund contact.

[103] Ms Boon appears not to have been sufficiently alert to the danger that what she was hearing from Hayley and Lillian might be unreliable in view of the influence exerted, wittingly or unwittingly, by their father and older brother. In general, Hayley and Lillian appear to have been happy and well adjusted girls, something they would not have been if Ann had been an abusive and neglectful mother. Larry was undoubtedly unhappy and wanted to be with his father. He told Ms Raphael that he had been wanting to go to Alaska with his dad for five years (ie as far back as 2015).

[104] While Larry may have been a moderately troubled boy, one cannot place all the blame for this on Ann. Both before and after the divorce, his father was largely absent. Though this was attributable to work commitments, one cannot blame the mother for the emotional and psychological ill-effects suffered by a boy through the absence of his father.

[105] There was evidence that when he was at home Alan was far from a perfect father. According to Ann, he was abusive to her, verbally and physically. The children were aware of parental fighting. Alan admitted to Ms Boon that he got

angry with Ann and had physical altercations with her. Ann also said that Alan used to get drunk. She showed Ms Boon notes which Alan wrote to Ann telling her he did not want her or the children. One indication of lack of impartiality by Ms Boon then manifests itself. Alan, she writes, most likely must have been drunk and angry when he wrote those notes.¹² This smacks of special pleading – rather concede Alan’s drunkenness and anger than that he really did not want the children.

[106] Ms Boon’s second, third and fourth reports (3 January, 18 February and 7 March 2019) add to my impression of a lack of balanced impartiality. Her second report was prompted by Alan’s allegation to her that Ann had breached the order of 12 December 2018. Ms Boon immediately interviewed the children, seemingly accepted everything they said, and concluded that Ann was abusing contact in order to change the children’s minds about relocating and turning them against Alan.

[107] She thus recommended that henceforth Ann’s contact be supervised by a social worker, meaning no overnight contact. She also recommended that the children should not start the new South African school term. She seems to have thought it was a *fait accompli* that all three children wanted to relocate and that the court would order their relocation. The relief that Alan sought on the strength of this report was not granted. In my view it was irresponsible for Ms Boon to advise that the children not return to school in January. She was prejudging the outcome of a matter she knew to be opposed.

[108] In her third report Ms Boon stated that Larry had secretly recorded the filial therapy sessions conducted by Ms de Reuck between Ann and the children. Instead of considering the possibility that Larry may have been acting

¹² Para 11.1.5 record B29.

manipulatively, she confidently expressed the view that his behaviour showed that he had little confidence in the process. She introduced a trope which was to become a recurrent theme from Alan's side – that the children were afraid 'that their voices are not heard'. She seems to have begun to conceive her role as being a mouthpiece for the children's voices, as if what they told her was reliable, consistent and unanimous.

[109] She claimed in this report that Larry had been 'crying out for help' since 2015 but had 'not been heard by his mother or the legal system' and that it was 'no wonder that he has lost faith in the system'. She gives credence to this construction in disregard of certain facts. First, by omission she implies that Alan (unlike Ann) had not failed to hear his son's voice. Yet Alan did not take immediate action on the strength of Mr Sandenbergh's report in December 2016 nor did he pursue the first care application of June 2017. It was only in August 2018 that Alan began the proceedings with which this appeal is concerned. Second, by the time Ms Boon wrote her third report, the court had not yet been asked to engage with the merits of the case, because the four orders made to date had all been by agreement, and one of them had resulted in Alan having interim primary care of the children.

[110] When she wrote her third report Ms Boon knew that the appointment of Ms Raphael had by agreement been approved by Cloete J. Instead of waiting to see what a fellow professional might make of the children's best interests in a troubling case, she instead seems to have resented Ms Raphael's appointment. It would not, she said, be in the children's best interests to delay the case further. Their voices 'simply must be heard', they were 'losing faith not only in the legal system, but also in health professionals and adults in general': 'There is abundant evidence to show that it is in the children's best interests to relocate to Alaska

with Alan'.¹³ Since Mr Sandenbergh's report was more than two years old, the 'abundant evidence' was primarily that of Ms Boon herself. She evidently did not attach any significance to Ms Wolstenholme's opinions or those which Ms Raphael would in due course express.

[111] Ms Boon's fourth report was essentially a commentary on Ms de Reuck's report of 19 February 2019. Unfortunately it again calls Ms Boon's objectivity into question. Statements by Ms de Reuck critical of Ann are approved while statements adverse to Alan's case are said to lack sufficient motivation. In regard to Ms de Reuck's concerns about Larry's secret recording of sessions, Ms Boon says that Larry has been concerned for many years that his voice has not been heard. Larry trusted Ms Boon 'to be the voice for him and his sisters'.¹⁴

[112] Ms Boon also chose to anticipate several questions which she expected to be raised by Ms Raphael. One was the question of splitting the siblings. Another was the concept of parental alienation, which Ms Boon dismissively described as a 'fashionable strategy in numerous divorce cases'.¹⁵ Finally, she devoted a section to 'the voice of the children'.

[113] Ms Raphael's report ran to 83 pages. Ms Boon's first report was 32 pages. While length does not necessarily equate to quality, I found no unnecessary padding in Ms Raphael's report. It was all helpful and relevant. Unlike Ms Boon, she obtained collateral information from the extended family, friends and neighbours, from the family doctor, from Ann's support of therapist and parental counsellor, from Ms Wolstenholme and Ms de Reuck. She very properly set out what she had learnt about Alan's work prospects and her concerns if he were not able to get settled employment in Anchorage.

¹³ Para 4 record B59.

¹⁴ Para 2.2 record B72.

¹⁵ Para 4 record B80.

[114] I did not detect any bias in Ms Raphael's report. She did not present Ann as a perfect parent – only a 'good enough parent'. She did not seek to disparage Alan or Ms Bingham. Although Ann had expressed to her (as she had to Ms Boon) a belief that Alan wanted to take the children to Alaska to spite her, Ms Raphael found that his relocation request was *bona fide*. She said Ms Bingham displayed insight into the responsibility and challenges which relocation would present and appeared to be ready, equipped and willing to take on the responsibility of caring for the children. Of Alan she said he had positive attachments with all three children. She accepted his account of what the children had told him and of the different emotional reactions and distress they displayed. She did not observe anything to suggest that he would not be a good enough parent. He interacted playfully with them but remained an authority figure.

Corporal punishment?

[115] The criticism of Ann's use of corporal punishment is overblown. On her version, she only ever smacked them on their bottoms and only with her hand – she had not used flip-flops or spoons. She has not spanked either of the daughters since Ms Wolstenholme was appointed at the beginning of 2018. She once held Hayley by her arms and put her in the bathroom for 'timeout'. This may or may not be the bruising of 30 November 2018 of which Ms Boon spoke in her first report. She explained the one incident where she smacked Larry with his school shoe (this was in January 2018). It is clear that some of the allegations are untruths or exaggerations by Larry and to a lesser extent the daughters.

[116] According to Ann, when she received the children on 3 February 2019 she noticed bruises on Larry and Hayley's arms and took photographs. This is not to suggest that Alan manhandled the children. Larry told her that he and his father had been play-fighting. Hayley said her bruising probably came from Larry. Ms Raphael said that Larry had in the past hurt Hayley physically. Lillian told Ms

Boon that Hayley sometimes smacked her – that very morning, Hayley had punched her on her arm. Ms Raphael observed Larry and Ann to engage in play-fighting and said that the three children often played roughly with each other. Bruising was not a sign of abuse.

[117] According to Ann, when Alan was in the home he used corporal punishment on Larry and had smacked all the children. Ann's mother corroborated this, claiming that with Alan his first reaction was to smack whereas with Ann it had been a last resort. There is uncontested evidence, among others from the children themselves, that Alan is quick-tempered and given to angry outbursts. If Ann told Ms Boon about Alan's use of corporal punishment, Ms Boon did not mention it in her report.

[118] Moderate parental corporal chastisement has only recently been declared unconstitutional. Neither Ann nor Alan has been shown to be violent with the children in a way which, either in its nature or frequency, has been harmful to the children or which renders either parent unfit. Ms Boon was thus blowing matters out of proportion when she said that although Ann had made strides since 2016 she had a 'recorded history' of 'aggressive outbursts and 'continues to reprimand the children using physical force'.¹⁶ The only recent example Ms Boon mentions is the bruising on Hayley's arms which happened the day before.

[119] Ms Raphael's professional assessment was that the children were not at all afraid of Ann. This view was supported by several neighbours (including Ann's landlord, who lives upstairs) and by unsolicited information from two mothers whose children spent time at Ann's home and sometimes slept over there. The family doctor, who has known Ann since she was a child, says he has never had any concern about the well-being of the children.

¹⁶ Paras 11.1.5 and 11.1.6 record B29.

Neglect of the children?

[120] I have already dealt with this in the context of Mr Sandenbergh's report. Once again, the complaints against Ann are exaggerated. She has properly clothed and fed the children. Their medical needs have been met. She has helped the children with their homework. For about six months when she did not have a car, she accompanied them to school by train.

[121] An example of an incident of which much has been made, as if it were typical, is an occasion when Hayley went to school without her skirt. According to Ann, this happened only once. Hayley had completely refused to get dressed for school. Eventually Ann took her wearing her shirt and leggings. Ann carried the skirt and handed it in at the front desk, saying that Hayley could put it on at school.

[122] As to the complaint that the girls sometimes went to school without knickers, she says they hate wearing them. She did not insist that they do so when they were wearing a skirt over leggings. If they were wearing shorts or only a skirt, they would always have knickers.

[123] The problem of lice at schools is well known. It cannot be taken as a sign of neglect.

[124] Mr Sandenbergh said that Ann had a 'laissez-faire approach 'to the children's hygiene and physical presentation. Ann's supportive therapist, Ms Maxwell, spoke of her parenting style as 'permissive' and sometimes 'chaotic' but she had no concerns about the children's safety in her care. The family doctor used the expression 'liberal' of her parenting, the opposite of authoritarian and abusive, and likewise had no concerns. Ms Raphael adopted the latter descriptions – 'permissive, liberal and sometimes chaotic'. The home she had created for the

children in Kalk Bay was ‘warm and comfortable, although small, cluttered and untidy’.¹⁷

[125] Larry has his own reasons for being unhappy and burdened. They are not a consequence of physical abuse or neglect. Children who were suffering abuse or neglect would not present as these children did. Lillian was only five when Mr Sandenbergh observed her but she seemed to play happily in his presence. Hayley presented as a talkative, confident and social child. Larry was talkative and gentle-mannered and impressed as intelligent. When Ms Boon prepared her first report years later, the children were still in Ann’s care. Hayley came across as a ‘bubbly, talkative and happy . . . girl’.¹⁸ Lillian presented as ‘bubbly, well-mannered and well-behaved’, ‘very chatty’.¹⁹ By all accounts they are happy in school and have a social circle appropriate to their ages. This is not the behaviour of children who have been physically and emotionally neglected.

The parents’ abilities

[126] I have already mentioned how various professionals have described Ann’s parenting style. She has struggled to exert her parental authority, leading the children to sometimes behave in a defiant or petulant manner. These problems were identified by Mr Sandenbergh in December 2016 and have not disappeared though there is evidence of improvement.

[127] Ann’s supportive therapist and parenting counsellor, Ms Maxwell, reported to Ms Raphael that Ann was engaging in the therapeutic process and was trying hard to learn more effective ways of parenting. Ann was aware of her difficulty ‘in establishing boundaries in her parenting’ and of the historical

¹⁷ Para 7.8.4 record B154.

¹⁸ Para 10.2.1 record B15.

¹⁹ Para 10.3 record B18.

reasons for this.²⁰ Her insight into the children's experiences and what they needed from her was improving.

[128] Ms de Reuck had seven filial therapy sessions with Ann in January and February 2019 – three with Ann alone and four with her and the children in various combinations. Ann demonstrated eagerness and willingness to participate in the filial sessions. At first she struggled to listen to the children – particularly in Larry's case, she interjected as he explained his views to Ms de Reuck, trying to get him to understand her perspective. However, she showed a willingness to work on her 'reflective listening skills'. Good parenting was a learned skill in which, in Ms de Reuck's experience, many parents fell short. Ann's difficulties were compounded by resistance, particularly from Larry. Over a short period of time there had been progress in the way she related to the children.²¹

[129] Ms Raphael found that Ann was a 'good enough mother' who was able to meet the emotional, social, physical and other needs of the children adequately, even though she had struggled to manage all three children optimally at times, especially in 2016. She noted that Larry was thought to suffer from Attention Deficit Disorder ('ADD'). This is a condition that can be extremely challenging for parents and teachers. Currently Ann was emotionally stable though somewhat fragile due to the legal process.

[130] Ms Raphael also found that Ann had actively encouraged Alan's involvement in the children's lives and had not attempted to withhold contact. This was certainly Ann's version. In her answering affidavit, Ann explained the various incidents alleged by Alan. Without oral evidence, it is not possible to dismiss what she says out of hand. Nevertheless, given the level of acrimony

²⁰ Para 16.9 record B139-140.

²¹ Record B67-70.

between the parents I do not discount the possibility that at times she has been less than helpful in facilitating telephonic communication.

[131] Ms Boon thought that Ann had not managed adequately to juggle the four general principles of ‘good enough parenting’: (a) meeting the child’s health and developmental needs; (b) putting the child’s needs first; (c) providing routine and consistent care; (d) parental acknowledgment and engagement with support services. I do not consider that this criticism was justified, at least not in late 2018/early 2019.

[132] As to factor (a), the children have suffered no serious health problems. I have already dealt with the question of lice and Hayley’s dental treatment. Larry and Hayley are said to be overweight. Ann engaged a personal trainer for Larry in the latter part of November 2018. According to her, their weight has not reduced since the children have been in Alan’s care. She says Alan refused to allow Larry to continue with his personal trainer and karate classes. He has also put a stop to the girls’ dancing classes. In former times he was not active with the children when on leave.

[133] There was a complaint from Alan that she had failed to allow Larry to take Ritalin for his ADD. Her response was that she refused to medicate Larry because she believed he needed to see an educational therapist and medical doctor for a proper assessment. Alan agreed that monthly Ritalin would be expensive and should not be done without a proper assessment. She herself could not have afforded the Ritalin. They attended a meeting at [DEF] Primary (which the children were at that time attending) but she could not proceed with the educational therapist without Alan’s financial assistance. [XYZ] Primary, she says, has never requested her to medicate Larry.

[134] She also says that with the improvement in her financial position she was able in 2018 to pay for Hayley's dyslexia to be assessed, and Hayley is now able to be assisted with reading and writing during exams. Alan, she states, has said that this was a 'major medical decision' and has to date refused to pay for it.

[135] As to factor (b), I do not think it is at all fair to say that Ann has not put the children's needs first. If there were lapses, they were not endemic. On the contrary, Ann subjectively seems always to have loved the children and has tried her best.

[136] As to factor (c), there appear in recent times to have been no material departures from routine and consistent care. Ms Boon does not identify in what way the children lack routine.

[137] As to factor (d), Ms Boon does not explain what it means. If it means acknowledgment by the parent of his or her responsibility, Ann has done so. If it means acknowledging the other parent's participation, she says she has done so. In regard to engaging with support services, there is no indication that she has at any stage spurned assistance, and recent evidence is that she is willing and eager to learn.

[138] Later Ms Boon writes that what struck her most was Ann's lack of insight into her own behaviour and her children's feelings and needs. She cites as an example Ann's comment that she had a good relationship with Larry whereas Larry 'by all accounts cannot wait to leave to his dad so that he does not have to ever be in her care again'.²² Over a period of some years Larry's attitude indeed seems to have hardened into the one Ms Boon expresses. I think one should, however, allow for the possibility that the views Ann expressed to Ms Boon were motivated by a deep desire not to lose any of her children. She is unlikely not to

²² Record B22.

have been aware of Larry's strong preference to live with his father. This does not mean that all Larry's interactions with her are unpleasant. Ms Maxwell and Ms de Reuck indicate that Ann is eager to improve her parental insights.

[139] Alan does not have a track record of primary parenting. His historical contact with the children, and more recently the interim care he has had, have taken place under artificial circumstances. Ms Raphael's assessment was that he would be a 'good enough parent'. It is noteworthy that Ms Boon did not apply to Alan the four principles of 'good enough parenting'. If she had, she might have considered the following: (a) Alan's alleged failure to cover medical and therapeutic interventions for the children; (b) the extent to which he has supported or undermined Ann's parental authority and relationship with the children; (c) his behaviour in the matrimonial home and his interactions with the children when he was on leave; (d) his decision to settle permanently in Alaska at a time when this would inevitable disrupt one or other of the parents' access to the children; (e) what the foregoing factors say about his insight into the important role which both parents should play in the lives of the children.

[140] Like Ann, Alan is not without his flaws. I have referred to his acknowledged temper which, on the version of Ann and her mother, sometimes found expression in physical chastisement of the children. Ann also spoke of his abusive and violent treatment of her. There also does not appear to be a dispute that in the past Alan abused alcohol though Alan's mother told Ms Raphael that Alan no longer drank alcohol during the week. In 2016 Larry told Mr Sandenbergh that he was worried about his father's smoking – his father was intoxicating himself and he was scared his father would die.²³ Whether Alan still smokes, and does so in the home, might be a point of concern though it was not further ventilated in the papers.

²³ Record A69-70.

[141] To the extent that Alan has wittingly or unwittingly behaved in a way which has alienated one or more of the children from Ann, this would call his parenting into question, since such conduct is harmful for the children. The same applies to Ann's claim that Alan undermined her parental authority. Good parenting requires a parent to have the child's best interests always in mind.

The children's views

[142] Section 10 of the Children's Act provides as follows:

‘Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration.’

[143] In terms of s 31(1)(a), a person holding parental responsibilities and rights must, before taking a decision on a matter *inter alia* listed in s 18(3)(c) (this includes removal from South Africa), ‘give due consideration to any views and wishes expressed by the child, *bearing* in mind the child's age, maturity and stage of development’. In terms of s 10, the court must do likewise. The statutory provisions do not mean that a child's view must prevail, only that it must be taken into account if the preconditions for doing so are satisfied.

[144] There is nothing to show that in the court *a quo* anybody asked the judge to interview the children and they were not at that time separately represented. Their views (or alleged views) were, however, extensively canvassed in the affidavits and in the expert reports.

[145] Larry turned 13 while he was being assessed by Ms Boon. It is clear that she and Ms Raphael are agreed that Larry's preference to live with his father should be respected. The reasons for Larry holding this adamant position by December 2018 are likely to be psychologically complex. Apart from any

deficiencies in Ann's parenting, Alan's absence from his life has probably played an important role.

[146] In December 2016, when Larry's position was not as entrenched as it now is, Mr Sandenbergh recorded an observation by Larry that 'he lives with three girls and likes time with his father so that he can be a boy'. He was sad that his father lived away from them, and he missed him. Larry added, though, that his mother did love them. Mr Sandenbergh found that the children were clearly attached to both parents though there was a degree of tension, anger and hurt on Larry's part towards his mother.

[147] By the time of the more recent assessments, however, Larry's position had become more extreme. Ms de Reuck observed that Larry went to great lengths to explain his relationship with his mother and appeared to carefully choose words that he knew would hurt her most. Ms de Reuck wondered whether certain events were 'scripted' by Larry. It should be remembered that these were the sessions Larry secretly recorded.

[148] Ms Raphael said that by the time she interviewed him (he secretly recorded those interviews too), 'he had prepared and rehearsed his case, and was frustrated and anxious'. He presented with most indicators for Parental Alienation Syndrome ('PAS'), though she did not think Alan had deliberately tried to alienate Larry from Ann. For Larry, Alan is now all good, Ann all bad. He demonstrated no ambivalence as one would expect even in cases of child abuse. Ms Raphael expressed her conclusion on Larry thus:²⁴

'Larry's alienation from his mother is complex. It is the result of multiple factors, including some parent failures on Ann's part, Alan's disrespect and mistrust of Ann, and Larry's own attempt to resolve the crisis of his polarized parents and inability to bridge the two worlds of

²⁴ Para 17.1.10 record B147.

his mother and father. It is the author's opinion that Larry needs his father, but as felt that he has to amplify his case in order to be able to go and in order to align himself with his father.'

[149] The position of the girls is more difficult. At the time of the recent assessments Hayley was 10 and Lillian 7. They were not only younger than Larry. There is clear evidence that they were strongly influenced by him. It was not only parenting defects on Ann's part, but also Alan's sustained absences, that resulted in Larry becoming a 'parentified' child.

[150] Ms de Reuck said that during the filial sessions the girls were very relaxed with Ann and interacted with each other. They displayed an openness to be comforted and embraced which contrasted sharply with their behaviour when Larry was present. When Larry was around, they first sought his approval, and it appeared that some of their statements had been rehearsed. They also seem to have got it into their heads that if they were not placed in their father's care they might be placed in foster care with different families. This idea could only have been planted, wittingly or unwittingly, by an older person.

[151] When Ms Raphael interviewed Hayley, she did not spontaneously mention relocation or express any preference. Ms Raphael decided not to ask the question directly. By contrast, when Ms Boon interviewed Hayley, the girl said she was aware of the relocation application, knew that Larry wanted to go to Alaska and was definitely going with him. In general, with Ms Raphael Hayley was reserved and cautious but engaging and polite. Since the same child presented to Ms Boon as bubbly, talkative and happy, Hayley might have been prepped to view Ms Raphael as being 'on the other side'.

[152] In her interactions with her mother, Ms Raphael found Hayley to be relaxed, cheerful and affectionate. Ms Raphael records that at one point Hayley said to her in private that she would miss Larry if he went to Alaska. After this

session Ms Raphael received a voice note from Hayley to say that she wanted Larry and Lillian to go to Alaska but she wanted to stay with her mother. But later in the evening it was reported to Ms Raphael that Hayley had told her father that it was Ms Raphael who had suggested only Larry go to Alaska. The children were reportedly crying, and Larry was vomiting, at the suggestion that Ms Raphael was going to split them up. Alan also claimed that one of the children (Hayley it seems) had reported that Ms Raphael had been over friendly with Ann, hugging her and drinking wine during the home visit.²⁵ These statements, Ms Raphael said, were untrue. She had not introduced the idea of splitting and had drunk coffee with Ann precisely as she had done with Alan. Evidently something happened between the time Ms Raphael's session concluded and the above reports were made.

[153] Overall, Ms Raphael concluded that Hayley was ambivalent about relocating and reluctant to express a preference. She believed Larry had exerted pressure on the girls, and especially Hayley, to support his narrative and preference.

[154] Lillian, perhaps too young to maintain the reserve which Hayley did, came across to Ms Raphael as she did to Ms Boon, talkative, friendly and spontaneous. Ms Raphael reported that she spoke of Larry with admiration and love. She wished he was still at [XYZ] Primary, a school about which she spoke spontaneously and excitedly. She proudly showed Ms Raphael her merit badge and class-captain badge. She was spontaneous, affectionate and playful with Ann just as she was with Alan. She said Ann had taught her to skateboard and helped her to ride a bicycle. Ms Boon thought that of the three children Lillian was likely to miss Ann the most.

²⁵ Paras 5.18-5.20 record B97-98 and para 17.2.2 record B149.

[155] Lillian told Ms Boon that her mother usually did her homework with her. When Ms Boon asked Lillian who she would have with her on her ideal island, she named both her parents, Larry, Ms Bingham and a school friend. It appears from material in the reports of Ms Boon and Ms Raphael that there is sometimes tension between the two girls, perhaps not unusually for their ages. Hayley told Ms Raphael that Lillian liked getting her and Larry into trouble. Lillian told Ms Boon that she did not like Hayley, Hayley scared her and smacked her. In psychometric testing, almost all Lillian's negative feelings were directed at Hayley.

[156] It is clear, from some of the things Lillian said to Ms Raphael, that she was highly impressionable and held ideas which must have been put there by older people. Understandably for a young girl who had never travelled, she was excited by the thought of going on an aeroplane. Alaska was a beautiful crime-free wonderland where they could build snowmen, erect lemonade stands, run an energy bar for cyclists, go fishing, see polar bears. As against this, in South Africa there was a water crisis – 'What will we bath in and drink? . . . How will we water the plants and get air to breathe?' And on politics: 'And soon the president will say that whatever whites want to stay have to pay. Others must go.'²⁶ They had spent 15 years in Cape Town, it was now time for Alan to get some time with them:²⁷

'It's not fair that Dad has to travel, he might run out of money, then he can't see [Ms Bingham] again. And he has to get four people [to Alaska] too. . . Dad said if Mom wins you have to go to Mom's or a foster home. If Dad wins we get to go to Alaska.'

[157] Maybe some of this came from Larry, some of it from Alan or other adults. Wittingly or unwittingly, it was inappropriate, even cruel, that she was being primed in favour of Alaska and against Cape Town before any definite

²⁶ Para 6.8 record B99-100.

²⁷ Para 6.3 record B98.

decision about relocation was made. As Ms Raphael said, it was understandable for her age that Lillian had ‘idealized and romanticized the trip and living in Alaska’ but she was concerned that Lillian had adopted the narrative of others, including possibly Larry and Alan. Part of Lillian’s concern seemed to be fairness to her father and the cost of travel: ‘Lillian should not be concerned with protecting either parent’s interests.’²⁸

Conclusions

[158] Given the deficiencies in Alan’s papers, particularly concerning his financial position and the question of Ann’s contact with the children if they relocated, I am somewhat doubtful as to whether Alan showed that it would be in Larry’s best interests to be placed in Alan’s primary care in Alaska. The court *a quo* should, I think, have used its inquisitorial powers to call for additional information on these matters.

[159] It is important to emphasise that even though it might for the time being be best for Larry to be in Alan’s primary care, Ms Raphael warned that PAS can cause short and long term damage to a child. It may well be that the interventions required to remedy this problem will be bedevilled by geographic separation. The court *a quo* was not in a position to know that Alan could even financially guarantee that Ann would see Larry for three or four weeks a year.

[160] On the other hand, the reports disclose that Larry had a strong desire to be with his father. The absence of a father figure may already have been harmful for him, and he is entering an age when a son might naturally start adhering more closely to his father than his mother. Ms Boon said that Alan is best suited to guide Larry through this difficult phase in his life. The level of his alienation from Ann is such that it would probably not be feasible to insist that he carry on living

²⁸ Para 7.3.1 record B150.

with her. Furthermore, there are indications in the reports that his presence may be harmful to preserving a healthy relationship between Ann and the girls. A period of time with his father may help to normalise his position in the family.

[161] On the other hand, I am satisfied that on the material before the court *a quo* it was not shown to be in the best interests of the girls that they should be placed in Alan's primary care for relocation to Alaska. Ms Raphael found Hayley's views about relocation to be ambivalent. Both girls had been influenced by Larry and perhaps by Alan. Ms Raphael was far from convinced that Hayley truly wanted to leave Ann's care and thought that separating Lillian from her mother could be psychologically damaging. Although Lillian expressed a desire to go to Alaska, she was 'not developmentally able to understand the reality and irreversibility of such a move'²⁹ and there had been some fear-mongering in her case.

[162] Awarding Alan primary care of the girls would not only remove them from their mother, the only one who has consistently parented them during their short lives. They would be uprooted from a community where they had friends and from a school where they were very happy and which was seeing to their needs. Ms Raphael also observed that the children would cease to have real contact with their paternal grandmother and with their maternal grandparents (both of whom are alive). Ms Raphael thought it important for the children to 'enjoy meaningful relationships with their extended family, both paternal and maternal'.³⁰ This was not considered by Ms Boon, but is one of the mandated factors to be taken into account when assessing the best interests of children (s 7(1)(f)).

²⁹ Para 7.8.5 record B164-5.

³⁰ Para 7.4.6 record B154.

[163] These considerations against awarding Alan's primary care are exacerbated by the uncertainty as to whether he will be able to afford to ensure that Ann has regular contact with the girls if they were placed in his care and as to whether they might end up being left for long periods with Ms Bingham if Alan has to revert to offshore work. Section 7(1)(e) requires a court, when applying the standard of the best interests of the child, to take into consideration

‘the practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis.’

This, too, was a consideration which Ms Boon seems entirely to have overlooked.

[164] Although one must always think carefully about separating siblings, the infinite variety of circumstances and the overriding focus on the best interests of the children make it impossible to speak of a presumption one way or the other. Section 7(1)(d) requires a court, when applying the standard of the best interests of the child, to consider how a child will be affected by separation from a parent and by separation from a sibling. If in the present case the considerations against splitting were so powerful as to rule it out as a feasible option, I would incline to the view that all three children should remain with Ann than be placed with Alan.

[165] However, I think in this case that splitting for the next couple of years is the option to be preferred. It results in an older son going with his father and the two younger daughters remaining with their mother. With the litigation at an end, Larry will be relieved of the burden of trying to ‘win the case’ for his father and can become a child again. Temporary separation from his mother might be good for both of them, though steps will have to be taken to ensure that Ann's parental bond with him is not irretrievably severed. With the litigation at an end, and Alan and Larry in Alaska, the girls' natural relationship with their mother can be

normalised without unhealthy external influence. Although the girls will be split from Larry, they will, in addition to the care they will receive from Ann, have each other.

[166] An incidental advantage which might accrue from splitting is that neither parent will be able to see himself or herself as a ‘winner’. Since I am sure they both love all three children and want to maintain relationships with them, splitting will foster reciprocal cooperation in relation to contact and will, quite apart from any legal condition imposed, provide Alan with a strong motivation to visit South Africa with Larry at least once a year.

[167] The court *a quo* criticised Ms Raphael for failing to consider and express what impact the removal of Larry would have on the two younger children who looked to him for emotional and physical support and comfort. I do not think that this criticism is justified. Ms Raphael described at great length the nature of the bonds between the children. She found that Larry exercised an unhealthy influence over the girls. The way in which they looked to him for approval was not normal. Although she acknowledged that it is often recommended that siblings stay together, there are exceptions. In the present case Lillian was the ‘most vulnerable child’, and she thought it would be psychologically damaging for Lillian to be separated from her mother. It would not have escaped Ms Raphael that at first the splitting of the siblings would be traumatic for them. Her recommendation was concerned with the children’s well-being in the longer term.

[168] The court *a quo* also found it astounding that Ms Raphael should support splitting on the basis that Ann had difficulty managing Larry effectively – a problem of that kind should not be found in the removal of the child but rather in therapy and counselling. I do not share the trial court’s astonishment. Ms Raphael did not recommend splitting Larry from his sisters on this basis. What she was

considering is whether Larry's best interests would be served by being in Ann's care or Alan's. The fact that Ann's found Larry's behaviour challenging to manage was but one aspect of Ms Raphael's holistic assessment in favour of granting Alan principle care of Larry. Among Ms Raphael's other, and perhaps more important reasons, were Larry's strongly stated preference; that Larry was a boy and a teenager, so that it was understandable that he wanted to align himself with his father; that being with his father would be beneficial to his healthy development; that, unlike the girls, Larry was not happy at school and was not doing well; and that a change could be positive in terms of his relationships with both parents.

[169] The trial court took Ms Raphael to task for not having considered the literature on splitting of children or providing a court with an analysis of how it applies to the facts of this case. It may be observed, in this regard, that Ms Boon had anticipated the question of splitting, stating that there was 'overwhelming support for the non-separation of siblings post-divorce'. There were exceptions. Split residency was proven to work when the parents lived in close geographical proximity, communicated and cooperated well, and didn't enter into relationships with new partners. She did go on to say, however, that research had shown that older children in split-custody families were likely to be male and to be living with their fathers.³¹

'The number of older boys in the custody of fathers shows the potential of split custody to provide sons with the opportunity to negotiate the important developmental task of separating from mothers, a task which could be even more difficult for boys living in father-absent homes.'

[170] Although Ms Boon said that she did not regard this as a viable option for Larry, this was based on her assessment of Ann as an unfit parent. On any

³¹ Record B79.

reckoning the geographic separation of the parents presents a great problem in this case. It has been brought about by a post-divorce life-choice made by Alan, not Ann. If primary care of all three children were awarded to Alan, Ann's relationship with the children may well be irremediably broken.

[171] *En passant*, the most recent of the four works cited by Ms Boon as constituting the 'overwhelming support', a 2015 thesis,³² does not deal with the question of splitting at all and contains, not very encouragingly I would have thought for Ms Boon's assertion, the following statement in the introduction:

'[U]nfortunately, widely overlooked by researchers is the role that siblings play in undermining or promoting positive adjustment for children and adolescents of parental divorce – a gap in knowledge that has driven this study. While most of the research that does exist on this topic focuses on the parent-child relationship, only a small body of literature exists on the role that siblings may play in coping with divorce. (In fact, the paucity of research in this area reflects the relative lack of research on sibling relationships in all dimensions of child development.)

[172] Of the other three works cited by Ms Boon, the only one I have been able to consult in full is the 2012 paper by Jacobs and Sellars.³³ It, too, does not deal with the question of splitting. These articles focus on the support which siblings can give each other during the break down and in the immediate aftermath of their parents' marriage. In the present case the question arises six years after the divorce.

[173] The trial court thought that Ms Raphael's recommendations, which included therapy and parenting guidance for Ann for at least one year, and that the girls' well-being should be monitored by a social counsellor, were not capable of

³² Hallberlin, Jessica 'Surviving the Divorce: The power of the sibling relationship' (Smith College School for Social Work, Massachusetts 2015).

³³ Jacobs, Kimberley and Sillars, Alan 'Sibling Support during Post-Divorce Adjustment: An ideographic analysis of support forms, functions and relationship types' *Journal of Family Communication* Vol 12(2) 167-187.

being monitored effectively, and presupposed the financial wherewithal to pay for a social worker and counsellor for a period of four years. The court *a quo*'s reference to 'four years' appears to be an error. As to affordability, the DSD will, if so directed by a court order, appoint a government social worker to monitor a child's well-being. Ms Wolstenholme was just such a social worker. In regard to personal counselling for Ann, she will be able to obtain this at an affordable rate from one of several NGOs which charge means-related, and often nominal, fees (examples are The Parent Centre, FAMSA and The Counselling Hub).

[174] In general, it is my respectful view that the court *a quo* adopted an overly-critical approach to Ms Raphael's report while not subjecting Ms Boon's reports to searching analysis.

[175] Accordingly, I consider that the court *a quo* erred in finding, based on the material then available, that all three children should be placed in Alan's primary care with authority to relocate. An order placing Larry in Alan's primary care was probably warranted, but in that case the girls should have remained in Ann's primary care.

Subsequent events and further evidence

[176] What remains for consideration is whether these conclusions are disturbed by subsequent events and the further evidence we have decided to admit.

[177] Ms Boon issued a fifth report dated 5 August 2019 which was attached to the replying affidavit of Alan's attorney in her client's unsuccessful application for leave to appeal against Cloete J's order of 26 June 2019. Although those papers were placed before us, we were not asked to receive Ms Boon's fifth report as further evidence in the appeal.

[178] Be that as it may, Ms Boon in that report described her recent telephonic interviews with the children in Alaska in which they said they were happy and did not want to come back. Ms Boon stated that throughout her assessment, and during these particular telephone conversations, it was clear to her that Lillian and Hayley were not influenced by Larry or their father. I have not accepted that view of the matter, and the problem was only likely to have been exacerbated once Alan unlawfully removed the children and they were permanently with him and Ms Bingham.

[179] On 8 August 2019 Cloete J refused leave to appeal. A week later Ms Bingham wrote an unpleasant letter to Ann, apparently following a fraught telephone call in which Ann had questioned her and Alan's motives.³⁴ It is necessary to quote from the letter in order to understand something of the domestic environment to which the children were being exposed in Alaska:

‘Why in the world would you think [the children] are better off in your care after everything that has transpired? Do you understand that the original court order stated that they’d be better off with Alan and I because you were an “unfit mother”? Three psychologists Ann. Three! [*This is of course incorrect.*] This is absolutely not normal! Do you understand that Alan and I would have never sought relocation if you’d been a proper care giver? What of this don’t you understand? . . . I don’t think you can grasp the thought of living a wonderful life which I did as a child but you obviously did not. Alan has never been accused of abuse or neglect but you have Ann and you’ve admitted to it. . . You are in the wrong and you know it. The fact that these crooked attorneys and judges are in it for the money only exasperates the situation. Do they have children? Who in their right mind would ask for two minor girls to fly across the world, unaccompanied, 35 hours, to return to an abusive mother who admitted as early as last night that she “needs to come home to clear my name and look like a good mother”? . . . You did your part, thank you for birthing three lives, now it’s time for us to show them what a true family is.’

³⁴ Annexure “P12” to Bernstein I.

[180] From Ms Bernstein's first report there is other evidence of alienation that was occurring in Alaska. Hayley evidently knew of the application which Alan's mother intended to bring in South Africa to have a legal representative appointed for the children because on 22 August 2019 – several weeks before the application was actually launched – she told her mother that they were getting their own lawyer and that she should stop fighting with them 'because the judge had said she is an unfit mother'.³⁵ This shows inappropriate sharing of legal matters with the children.

[181] On 14 September 2019 Larry sent his mother a text message with reference to their recent communication: 'I recorded the whole conversation I have proof you a liar you going down.'³⁶

[182] Ms Bernstein had an interview with Ann on 1 October 2019. Ann said that over the last three weeks dialogue between her, Hayley and Lillian had been 'extremely strained or non-existent'. They told her she should stop fighting with their father and come and live in Alaska. (It is unsurprising that children of their age do not appreciate the multiple difficulties which would prevent Ann from living in Alaska even if she wished to do so.)

[183] Unfortunately Ms Bingham then again intervened, copying Ms Bernstein on an email to Alan's Cape Town attorneys.³⁷ She expressed outrage at the 'questions and tone' of Ms Bernstein's conversations with the children, claiming that Ms Bernstein 'does not seem unbiased at all!'. The children were expressing concern that Ms Bernstein did not have their best interests in mind. Ms Bernstein was supposed to be representing them, not Ann. The letter continued at some length in emotive language, returning to the theme of Ann's supposed neglect and

³⁵ Bernstein I para 104.

³⁶ Bernstein I para 98.

³⁷ The email is annexure "P8" to Bernstein I.

abuse of the children and of the wonderful home Alan and Ms Bingham were providing for them.

[184] From what Alan told Ms Bernstein it appears that anticipated freelance projects with Resolve Marine had not yet come to fruition – these would involve absences of three to four weeks at a time. Another possibility was employment involving a two-week-on/two-week-off rotation which he would prefer. Because Ms Bingham had got a promotion and salary increase, they had decided ‘to concentrate on the kids here for a bit’, meaning (I assume) that he would stay at home and look after the children. Although he had started looking for local work to supplement their income, there was no evidence that he was yet employed. Ms Bernstein battled to get clarity as to whether he and Ms Bingham would be in a position to pay for therapy and the children’s medical expenses.

[185] Among the concerns which Ms Bernstein disclosed in her first report were the following:

- (a) The children appeared to be settled in Alaska, were adamant that they were happy and did not want to return. (Ms Bernstein noted this in the context of Cloete J’s observation that as the period of the children’s removal from South Africa lengthened, so did the risk – if Ann’s appeal succeeded – of the dilemma created by the children’s becoming settled in Alaska, even though this was the result of Alan’s unlawful conduct.)
- (b) There was a ‘commonality in the narrative’ of the children, Alan and Ms Bingham, and it appeared that the children had been included in adult conversation from which they should have been shielded. Ann had also been guilty of this.
- (c) It was apparent that Ms Bingham or Alan had interrogated the children regarding Ms Bernstein’s conversations with them.

- (d) Ms Bernstein was concerned that Larry was hearing a message that his mother did not want him and that nothing was being done to refute this.
- (e) Ms Bernstein's impression was the opposite of Ms Boon's impression that Alan would ensure optimal contact between the children and Ann. Neither Alan nor Ms Bingham appeared fully to appreciate the importance of the children's maintaining a relationship with their mother.
- (f) Alan had removed the children from South Africa in the face of Ms Boon's recommendation that the children's acrimonious relationship with Ann be addressed in a therapeutic setup before relocation.
- (g) Like Ms de Reuck, Ms Bernstein formed the view that Alan played a dominant role in influencing the children.
- (h) Ms Raphael had recommended that the parents not use the language of 'winning and losing/mom v dad'. This unfortunately had not been heeded.
- (i) Alan's employment status was a real worry for Ms Bernstein as was the prospect that the children would be left for substantial periods in Ms Bingham's care, a concern exacerbated by the tone of some of Ms Bingham's emails.
- (j) Ms Bernstein was concerned that the children had had an exciting introduction to Alaska during a holiday period and had not experienced life as it would be when their father started working.
- (k) The children had not yet started the counselling and therapeutic assistance for which Allie J's order had provided. Alan told Ms Bernstein that he was waiting for the court case to be over but in her view there was no connection between the two processes.
- (l) Although Allie J's order entitled Ann to contact with and information from the school, this was being prevented pending resolution of the case.

(m) Concerning the girls' bed-wetting, Ms Bernstein had received contradictory information from Larry and Ms Bingham.

[186] Alan's further evidence, in the form of his affidavit of 30 September 2019, deals with the circumstances in which he left South Africa with the children, why the children did not say goodbye to Ann, Ann's urgent repatriation application and his alleged inability to purge his contempt. I have already alluded to some of this material and expressed my views thereon. In regard to his non-compliance with Cloete J's order, he says the children were distraught when they became aware of it and refused to cooperate. The girls refused to board an aeroplane to South Africa despite his encouragement. He does not say that he bought tickets and took them to an airport. If necessary, he should have travelled with them.

[187] The Alaskan social worker, Ms Browning, said that the daughters' position was clear – they wished to remain in Alaska. They expressed fear about returning to Cape Town, especially if Larry was not with them. The children repeated the old complaints of corporal punishment. Although they expressed negative views of their mother, they were also able to identify positive memories, expressing a desire to have a positive relationship with her 'outside of the current relocation matter with the court'.

[188] Ms Browning's opinion was that all three children were being influenced by their parents. She was unable to determine, based on her limited scope and access, whether or not such influence was the direct source of the children's expressed living preferences. After discussing the concept of parental 'gatekeeping', which could be positive or negative, she said that it was possible that 'the closed gatekeeping by [Alan] is a protective stance' though it was also possible that it included 'intentional or unintentional alienating behaviours'. She expressed concern that phone and video contact between Ann and the children

was being used as an opportunity, possibly by both parents, to continue to assert their personal views.

[189] She reported that according to the girls' school principal there were no concerns and they were assimilating appropriately. She provided no information about Larry's schooling. Generally they appeared to be living a happy and active lifestyle and were making friends. The children did not yet have a paediatrician or counsellor. Efforts were being made to add them to Ms Bingham's health insurance. Larry and Hayley expressed concerns to her about their body weight. (By this stage they had been in Alan's case for close on a year.)

[190] Ms Browning said that the children had repeatedly been placed in the position of having to express their desires and revisit issues that had a traumatising effect on them. She recommended that further professional interviews with them cease or be restricted. She also recommended that the adults take greater care not to speak of the other parent or legal proceedings when the children were nearby.

[191] Ms Bernstein's second report dealt with her involvement on and after 18 October, the day on which the appeal was postponed. Before Ms Bernstein came to court she received a WhatsApp message from Larry saying: 'So you were supposed to represent us but all you did was take my moms side and lie'. After the hearing Ms Bernstein spoke with Alan's attorney to say that she did not think it appropriate for Larry to have seen her report. There was a difference of opinion on this, because Alan's attorney thought that because Ms Bernstein was the children's legal representative they were entitled to see what she wrote. On this I quite agree with Ms Bernstein. She was appointed by the court to ensure that the children's interests were represented independently of the parents. She was not a private lawyer for the children, and even if she was it does not follow that it was

appropriate for them to see her report. Ms Bernstein needed to be able to communicate candidly with the court without being afraid that what she said could cause distress or harm when read by youngsters lacking the maturity to understand and process the information. (Larry subsequently apologised for his message.)³⁸

[192] Before the children arrived back in South Africa Ann told Ms Bernstein that she had not spoken again with Larry. In talking to the girls there were good and bad days but mostly the communication was strained.³⁹

[193] The postponement order of 18 October required the parties to appoint a childcare professional to facilitate Ann's contact with the children when they returned to South Africa. Alan was required to meet these costs *pro tem*. When Ms Bernstein took this up with Alan's attorney on 6 November, the latter advised her that she did not know what to do since her client was unable to pay the professional's costs. Ms Bernstein explained this difficulty to Ann on 8 November. Ann offered to contribute R4000. Alan's attorney then said her client would contribute a like amount. Ms Bernstein proceeded to appoint Dr Durr-Fitschen. After Ann had paid her share of R4000, Alan told Ms Bernstein, much to her dismay, that he had always had the money available to pay the expert. Ms Bernstein insisted that all further payments be made by him.⁴⁰

[194] Understandably, but perhaps unwisely, Ann went to the airport when the children's plane arrived. The children apparently became upset when they saw her through a window in the arrivals hall. Alan phoned Ms Bernstein and said there was meant to be no contact without the involvement of the expert. Ms Bernstein phoned the girls and spoke with them. She then phoned Ann and asked her to

³⁸ Bernstein II paras 3-5.

³⁹ Bernstein II para 12.

⁴⁰ Bernstein II paras 8-14.

leave. Ann was sobbing and obviously distraught. The tenor of Alan's conversation with Ms Bernstein does not suggest that he displayed any sensitivity to the mother's desire to see her children from whom – because of his unlawful conduct – she had been physically separated for seven months.⁴¹

[195] Alan contacted Ms Bernstein on 14 November, the day after the children arrived back in Cape Town, to say that he had just found out that there was a large family reunion in Cape Agulhas from 19-24 November and would like to participate with his children. Ms Bernstein said she did not think it was a good idea as it would be a significant time away. Dr Durr-Fitschen agreed with Ms Bernstein.⁴² This later became a 'bargaining point' by the children with their mother.

[196] Dr Durr-Fitschen's initial view, following a session on 15 November, was that the children should not be split because of their seemingly close relationship. She told Ms Bernstein that it was a pity the parties lived so far apart 'as there was a lot of scope for the children to have a positive relationship with their mother'. In the supervised contact there were many warm moments between the mother and the children. She did not think the children were alienated from Ann but 'they were severely negatively influenced and had the wrong information'.⁴³

[197] During Ann's supervised contact at the Waterfront on 17 November, Ms Bernstein received a message from Larry essentially expressing unhappiness that his mother was paying attention to the girls and ignoring him. He said he did not think the children's voices were being heard and the girls were complaining about Ann's 'whispering in our ears'. This type of language was subsequently repeated by the girls. Ms Bernstein formed the view, shared by Dr Durr-Fitschen, that

⁴¹ Bernstein II paras 16-19.

⁴² Bernstein II paras 42-44.

⁴³ Bernstein II paras 45-49.

Larry was controlling his sisters' narrative and influencing them: 'His relationship with them is observed to be overly close emotionally and physically, and that he had, as a parentified child, fully taken on the fatherly role.' He even referred, in his message to Ms Bernstein, to 'my girls'.⁴⁴ The social worker who was supervising the contact, Ms Haselau, expressed concern about Larry's need for control and thought that it must be exhausting for him.⁴⁵

[198] It is apparent from Ms Bernstein's interaction with the children that a factor which was hampering Ann's contact with them was their belief that if things went well, and they said good things about her, it would be used against Alan in the court case. Apart from certain repetitive phrases in the individual interviews, both Lillian and Hayley expressed distorted beliefs about the house in which they would live if they remained in Ann's care. Hayley went so far as to claim that her mother had said she was going to buy a house for her and the girls to live in, not Larry. When Ms Bernstein probed this, Hayley became embarrassed and said her mother had not expressly said that the house would only be for her and Lillian but she had inferred this because it would be a three-bedroom home. Ms Bernstein reminded her that the house in Alaska was also a three-bedroom house (as indeed was the Kalk Bay house).⁴⁶

[199] In the next session with the expert (on 18 November), the children were tense, and Larry was especially negative, which in turn affected the girls. Dr Durr-Fitschen said that she intended splitting the children up for the next visit. Larry did not like the girls to have fun and laugh with their mother and have a good time. He stared at them and made it difficult for them to be comfortable in Ann's company.⁴⁷

⁴⁴ Bernstein II paras 53-58.

⁴⁵ Bernstein II para 59.

⁴⁶ Bernstein II paras 61-69.

⁴⁷ Bernstein II paras 74.

[200] Dr Durr-Fitschen met with Alan before meeting with the children individually on 19 November. He told Dr Durr-Fitschen that Larry argued with his sisters after the meetings ‘as they do not open up about their complaints and their views’. Alan stressed that he would like Ann and the children to have a relationship and would not be opposed to them staying with her if they were cared for properly.⁴⁸

[201] This was followed by a good session with the girls. They were relaxed and chatty, though Lillian seemed to avoid physical contact with her mother. Lillian said that Larry was the boy in the house and they did not want to be without him. She also said it was ‘dad’s turn’ since they had been with their mother for such a long time.⁴⁹

[202] Larry’s individual session went better than the previous contact. Dr Durr-Fitschen told Ms Bernstein that Larry has the perception that his mother is trying to separate him from his sisters. It eventually came out that he thought (erroneously) that Ann had only applied for the girls to return from Alaska, not him too. Larry remained adamant that his mother was an unfit parent, and raised the topic of corporal punishment, which his mother said he was exaggerating and embellishing. He felt he could only work on his relationship with his mother after the court case. He repeated that he did want a relationship with her, and they agreed they would both make an effort. He hugged her.⁵⁰

[203] The girls had unsupervised contact with Ann on 20 November. Ann said they relaxed after a short while. She thought they were more affectionate than they would have been had Larry been present. She felt the contact went well. She noted, however, that Hayley and Lillian had developed a fear of being in South

⁴⁸ Bernstein II para 88.

⁴⁹ Bernstein II para 89.

⁵⁰ Bernstein II paras 90-93.

Africa.⁵¹ Alan conveyed to Ms Bernstein the next day that the girls appeared to have had a good time.⁵²

[204] Larry had unsupervised contact with his mother on 21 November and it seems to have gone reasonably well, with some displays of physical affection.⁵³

[205] From the debriefing session which Dr Durr-Fitschen had with the children on 22 November it is apparent that the children's expressed views about wanting to live in Alaska have not changed.⁵⁴

[206] On 22 November Ms Bernstein met with the experts (Ms Boon, Ms Raphael and Dr Durr-Fitschen). Ms Boon and Ms Raphael said that they stood by their previous reports and recommendations. However the experts were agreed on certain matters, and it is desirable to quote at length Ms Bernstein's recordal of the agreement.⁵⁵

'Larry's voice should be heard and taken into consideration, taking heed of his manipulation and exaggerations of events which he seemed to do in order for him to motivate his desire to relocate. He steadfastly expressed his desire to live with his father in Alaska.

Hayley and Lillian's voices are so compromised and contaminated that no weight can be afforded to the expression of their wishes. It is agreed that all three children not be returned to the care of their mother. Larry will be too resentful as he chooses to live in Alaska, and he will continue to make his mother's life unbearable should they all three live with her.

Scenarios discussed:

The experts discussed the fact that it would be easier, logistically and in the short term, for the children to return to their father's care in Alaska. They have already settled into school there and report that they are happy living with Alan and [Ms Bingham]. With a first-glance consideration of what would be in the interests of the children, it would seem

⁵¹ Bernstein II para 95.

⁵² Bernstein II para 97.

⁵³ Bernstein II paras 98-99

⁵⁴ Annexure "PEP11" to Bernstein II.

⁵⁵ Annexure "PEP12" Bernstein II.

the best for them not to once again have to move, and to relocate and continue living with their father and stepmother. Here [ie in Alaska] they feel cared for, they get on well with their stepmother, they live in a house, and their lives would be easier in some practical ways (eg being closer to the school). It may be that the children will feel more positive towards their mother if she “allows” them their wishes to live in Alaska, and that with regular visits she may be able to develop and maintain a closer relationship. The greatest concern, should this scenario prevail, is the alienation of all three children from their mother.

The other scenario is one where Larry returns to Alaska in his father’s care and Hayley and Lillian should remain in their mother’s care in South Africa:

Larry is a parentified child which burdens him emotionally. The relationship between Larry and his sisters is an unhealthy one. Should he live with his father on his own, he will be freed from his perceived responsibilities and parentified role and will be able to regain an enjoyment of his childhood. Failure to separate Larry and the girls, even temporarily, could have severe long-term consequences for all three children. Larry is opposed to being separated from his sisters, but his reasons for this are dysfunctional and not indicative of a positive, secure bond.

Larry has a detrimental authority and control over his sisters and their perceptions. It is verily believed that he negatively influences them against their mother with a campaign of denigration. Should they be in their mother’s care without Larry present, they may be able to develop their own relationships with her independently so. They can only find and express their own voices when they are not with Larry, and their relationship with Ann can only be normalised in his absence.

Toni Raphael is of the opinion that the mother will be able to care for the two younger children adequately. Elzabe Durr-Fitschen expressed reservations based on the history of financial difficulties, the distance to the school, her lenient parenting style and aspects such as that the children are exceedingly disrespectful, challenging and defiant towards her.’

[207] There is no doubt that Alan’s unlawful conduct in removing the children from Cape Town, and their resultant seven-month stay in Alaska, has made a solution to this case more difficult. There has been much criticism of Ann in this

case so it is only fair to say that Alan's behaviour in this regard was a gross failure to have proper regard to the best interests of the children.

[208] It is clear that an order made, now, that the girls remain in Cape Town will be more disruptive and traumatic for them than would have been the case had they not been unlawfully removed from Cape Town in the first place. However, they are now back in Cape Town.

[209] The additional evidence does not cast significant new light on the historical complaints against Ann's parenting. While I can understand Dr Durr-Fitschen's reservations, she is not as fully steeped in the evidence in this case as the court is, and I have already dealt with such evidence.

[210] Conversely, the behaviour of Alan and to some extent Ms Bingham is a cause for concern. I do not think one can feel confident that they will nurture in the children a good relationship with Ann or facilitate optimal contact with her. The evidence of ongoing alienation from Ann has mounted. Despite the passing of time, there is no new evidence about Alan's employment prospects and financial position.

[211] As I understand Ms Bernstein's second report and her explanation thereof in court, the experts agree on the various pros and cons recorded in the two scenarios. There is thus a recognition that there could be harmful long-term consequences for the children if Larry and the girls are not separated. Larry's presence is likely to inhibit the development of their own independent relationships with her. At the same time, Larry's separation from the girls will free him from his parentified role.

[212] At least in the short term, following this course is likely to be very traumatic, particularly for the girls. It is primarily this feature that makes the first

scenario more palatable. But it seems to me on balance preferable to grasp the nettle now. Ms Boon's views have been strongly premised on her finding that Ann is not an adequate parent. If that view is rejected, as I have done, it appears to me that the second scenario is the one most likely to advance the children's best interests in the medium to long term. At any rate, Alan needs to satisfy this court that the care arrangements contained in the divorce order should be varied, *inter alia* insofar as the girls are concerned. The new evidence has not caused this burden to be discharged.

Conclusion

[213] These, then, are the reasons for the order we issued on 11 December 2019. In that order we reserved the question of costs below and in this court. The court *a quo* made no order as to costs. Although we have varied the court *a quo*'s order, I do not think we should disturb the costs order. Both parents were acting in what they conceived to be the best interests of the children, and Alan has still partially succeeded in his application.

[214] In this court, however, I think costs should follow the result. The order we have substituted for the court *a quo*'s order is essentially the one which Ann was seeking in the court *a quo* on the strength of Ms Raphael's recommendations, although we have tweaked some of the detail.

[215] I do not think it would be appropriate for any of the adults who come into possession of this judgment to allow the children to read it. From this I exclude paras 217 to 221 below.

[216] We wish to thank Ms Bernstein for the diligent and thorough way in which she has discharged a most difficult mandate.

Postscript

[217] At around 18:00 on 10 December, the day before we were to issue our order, my registrar received the following email:

‘We the [P] kids are requesting to speak to the judge because the decision he makes will change our lives for ever. We don’t think our voices and needs have been taken into account.

We have request my dad’s lawyers, my dads advocate and Jolene that they ask if we could speak to you but no one has done anything.

Please let us talk to you before you make your final decision.

Larry, Hayley and Lillian

[218] After conferring with my colleagues, I notified the legal teams and Ms Bernstein of the above email and that we were unanimously of the view not to entertain communication with the children. We asked Ms Bernstein to convey this to the children and to tell them that we would explain in our judgment why we had taken this view but that we were fully aware of their desire to have their voices heard.

[219] Our reasons are the following. There was extensive evidence as to the views expressed by the children. We had no reason to believe that if we spoke personally with them they would express different views. The difficulty was not in knowing what they were saying but in knowing why they were saying it and in assessing whether it would be in their best interests to give effect to those views.

[220] We could not have hoped, in a brief interview with the children, to have formed a more reliable impression than skilled experts who had spent hours with them. The experts were in agreement that Larry should be allowed to relocate with his father and to that extent his voice has been heard. There was strong evidence, on the other hand, that the girls had been influenced over a long period by their older brother and their father. Although the girls may now seem genuinely to hold

the views they express, one cannot trust that those are the views the girls would have had if they had not been subject to unhealthy influence. As recorded in Ms Bernstein's joint minute, the girls' voices are 'so compromised and contaminated that no weight can be afforded to the expression of their wishes'.

[221] This leads to a final observation. We could not be confident that the email was a spontaneous communication from all three children. The children should not have had my registrar's email address. My registrar had email communication with the legal teams on 10 December about Alan's departure from South Africa and the issuing of an order. Quite possibly Alan's attorney forwarded such communications to Alan, but it should not have gone further than that. The sentence, 'We don't think our voices and needs have been taken into account', has a decidedly adult ring to it.

Order

[222] The following order is made by way of supplement to the order of the 11 December 2019:

- (a) In the court *a quo* the parties shall pay their own costs.
- (b) The respondent shall pay the appellant's costs of appeal, including those attendant on the employment of two counsel.

Judge O L Rogers

Judge K Savage

Judge L Nuku

Annexure: Order made on 11 December 2019

[1] The appeal is upheld.

[2] The order of the court *a quo* is set aside and substituted with the order attached hereto marked 'X'.

[3] Questions of costs in the court *a quo* and on appeal stand over for determination when the court delivers its reasons.

Annexure 'X' to order of 11 December 2019

[1] In this order, the following persons shall be referred to as indicated [not their real names]:

- (a) the appellant (the respondent in the court *a quo*) – 'Ann';
- (b) the respondent (the applicant in the court *a quo*) – 'Alan';
- (c) Alan and Ann collectively – 'the parents';
- (d) [the son] – 'Larry';
- (e) [the older daughter] – 'Hayley';
- (f) [the younger daughter] – 'Lillian';
- (g) Larry, Hayley and Lillian collectively – 'the children';
- (g) Hayley and Lillian collectively – 'the daughters'.

[2] It is recorded that on 1 August 2013 the marriage between Alan and Ann was dissolved by a decree of divorce incorporating a consent paper.

[3] The terms of this order supersede those contained in para 2 of the said consent paper.

Guardianship and parental responsibilities:

[4] Subject to the further provisions of this order, the parents remain co-guardians of the children as provided in ss 18(2)(c), 18(3), 18(4) and 18(5) of the Children's Act 38 of 2005 ('the Act').

[5] Subject to the further provisions of this order, the parents remain co-holders of parental responsibilities and rights in respect of the children as referred to in ss 18(2)(a) and 18(2)(b) of the Act.

[6] The parents shall remain involved in the care of the children, including making decisions regarding their education, development and general well-being, due regard being had to the views of the other parent and the children's best interests.

[7] The parents shall make joint decisions about major issues concerning the children in accordance with ss 30 and 31 of the Act, including but not limited to the following:

- (a) major decisions relating to the children's education, including their enrolment in any school or tertiary institution, their involvement in cultural, extramural and sporting activities, the courses they take and the extra tuition they receive;
- (b) major decisions about the children's medical and mental health care that require treatment of a serious nature (both in terms of the risk posed by the treatment and the cost thereof), except in case of an emergency;
- (c) any significant change in the rearing of the children with regard to religious beliefs and cultural values;
- (d) decisions affecting the residency and contact arrangements in respect of the children;

(e) any other decision which is likely significantly to change or have an adverse effect on the children's living conditions, education, health, personal relations with a parent or family member or the child's well-being in general.

[8] Schooling matters:

(a) The parents shall forthwith notify the children's schools that they are co-holders of parental rights and responsibilities.

(b) Both parents shall be entitled to attend all school-related events, occasions and meetings as well as extramural activities in which the children may be involved.

(c) Both parents shall be entitled to be identified as contact parents at the children's schools and to have the right to receive all school reports, assessments, calendars, invitations and notifications. The children's schools shall be authorised to forward duplicate reports and other communications to the parents, and for this purpose the particulars of both parents shall be provided to the schools.

(d) Where reasonably practicable, the relevant parent shall advise the other parent timeously of all major school-related events and occasions and extramural activities in which the children may be involved, including parent/teacher meetings and sporting and cultural activities.

(e) Both parents are entitled to communicate directly with the children's school principals, teachers and after-care teachers, and the latter are authorised to release information to that parent personally about the children and their educational progress and to report directly to that parent.

(f) Both parents are entitled to engage in electronic communication with schools and extramural groups or through online portals so as to keep up to date with the children's activities, commitments and schedules.

[9] Medical matters:

(a) The parent in whose care a child for the time being is shall immediately notify the other parent should such child become ill or suffer any injury, provided that this paragraph shall not apply to minor and routine ailments such as colds and flu.

(b) Both parents may communicate directly with the children's medical practitioners, including mental health practitioners and therapists, concerning the children's health, and therapeutic and medical treatment. Such practitioners and therapists are authorised to release information to that parent personally and to report directly to that parent about the child's condition and treatment, subject to any duty of confidentiality owed by the practitioner or therapist to the child.

Larry:

[10] Larry shall reside primarily with Alan.

[11] Alan is authorised to relocate with Larry to Alaska in the United States of America ('USA').

[12] Alan must have the relocation order registered as a mirror order in a competent court in the relevant jurisdiction of Alaska within sixty (60) days of this order, at his cost, and must provide Ann with a copy thereof.

[13] Alan may not further relocate with Larry from Alaska to any other state within the USA, or to any other country, without Ann's written consent.

[14] Counselling for Larry:

(a) Within two weeks of this order, Alastair must arrange for Larry to be assessed by a psychologist or other appropriate professional with a view to

determining such programme of counselling and therapeutic assistance as is reasonably required to help him adjust to the separation from his mother and sisters and to maintain a relationship with them and with Alan.

(b) Alan must thereafter ensure that Larry receives the counselling and therapeutic assistance recommended by the professional.

[15] Decisions affecting Larry's everyday care and routine shall be made by Alan.

[16] Alan shall ensure that Larry is at all times the holder of a valid South African passport.

[17] Upon Larry's relocation, Ann shall have the following rights of contact with Larry, which rights she may exercise alone or with the daughters:

(a) for at least three weeks every year, in Cape Town, on exact dates and times to be arranged by agreement between the parents and on reasonable notice, with Alastair to bear the cost of Larry's travel including the cost of any responsible adult who is required to accompany him;

(b) in addition to the three weeks mentioned in 17(a), reasonable contact on such other occasions as Larry may be in South Africa;

(c) every alternative Christmas (which Alan may require to form part of a period of contact referred to in 17(a)).

(d) by Skype or other electronic facetime contact for at least one hour per week on a Wednesday and Sunday from 19:30 to 20:00 (Alaskan time) or at such other times as may be agreed;

(e) such additional telephonic and electronic contact, including email and WhatsApp and other social media message boards, as may be reasonably

possible during the week with due regard to the 11-hour time difference between Alaska and South Africa.

The daughters:

[18] The daughters shall reside primarily with Ann.

[19] The hand-over of the daughters to Ann from their current place of residence with Alan's mother in Table View shall take place within not more than one week of the date of this order, such hand-over to be facilitated by Dr Elzabe Durr-Fitschen who shall determine the precise manner and timing of the hand-over.

[20] Ann may not relocate with the daughters to any place outside the Cape Peninsula without Alan's written consent.

[21] Counselling for the daughters:

(a) Within two weeks of this order, Ann must arrange for the daughters to be assessed by a psychologist or other appropriate professional with a view to determining such programme of counselling and therapeutic assistance as is reasonably required to help them adjust to the separation from their father and Larry and to maintain a relationship with them and with Ann.

(b) Ann must thereafter ensure that the daughters receive the counselling and therapeutic assistance recommended by the professional.

[22] Decisions affecting the daughters' everyday care and routine shall be made by Ann.

[23] Ann shall ensure that the daughters are at all times holders of valid South African passports.

[24] Unless Alan gives his prior written consent to the daughters attending another primary school, they shall remain at [XYZ] Primary, and Ann shall ensure that they attend the school regularly, have such equipment as the school reasonably requires, and that they diligently do their homework.

[25] Alan shall have the following rights of contact with the daughters, which rights he may exercise alone or with Larry:

- (a) three weeks in Cape Town, at his own cost, on exact dates and times to be arranged by agreement between the parents and on reasonable notice;
- (b) in addition to the three weeks mentioned in 25(a), reasonable contact on such other occasions as Ann may be in Alaska;
- (c) every alternative Christmas (which Alan may require to form part of a period of contact referred to in 25(a)).
- (c) by Skype or other electronic facetime contact for at least one hour per week on a Wednesday and Sunday from 19:30 to 20:00 (South African time) or at such other times as may be agreed;
- (d) such additional telephonic and electronic contact, including email and WhatsApp and other social media message boards, as may be reasonably possible during the week with due regard to the 11-hour time difference between Alaska and South Africa.

[26] During the contact referred to in 25(a), Alan may elect to have the girls reside with him at his mother's home or at another suitable residence within the Cape Peninsula.

[27] The alternating contact which the parents will have with the children at Christmas shall be arranged so that the three children always spend Christmas together with one parent or the other.

[28] Ann shall provide Hayley with a cellphone on which Alan and Larry can contact the daughters. Ann shall ensure, as far as reasonably possible, that the cellphone is kept charged.

[29] For as long as Alan's mother and sister reside in the Cape Peninsula, the daughters shall be entitled to have contact with them (not overnight contact) at least twice a month.

Counselling and parenting guidance for the parents:

[30] By not later than Friday 13 January 2020, each of the parents must each arrange for himself or herself to be assessed by a psychologist or other appropriate professional with a view to determining a programme of counselling, therapeutic assistance and parenting guidance as may help to improve their respective parenting skills and to instil in them an understanding of the unhealthy effects of parental and family conflict, the long-term ramifications for children of parental alienation, and the dangers inherent in the parentification of children, to the ultimate end of enabling them to build healthy relationships with all their children.

[31] Following such assessments, each parent must comply with the programme recommended by the relevant professional, which programme shall have a duration of not less than one year.

[32] Both parents must conduct themselves in a manner which does not alienate the children in any way from the other parent and must refrain from speaking in derogatory or demeaning terms of the other parent.

Parent coordinator:

[33] Within one month from the date of this order, the parents shall jointly appoint a parent coordinator ('PC').

[34] If the parents cannot agree on the identity of the PC, they may each nominate two people and may each veto one of the two nominated by the other person. The remaining names will be provided to the chairperson for the time being of the Family Mediation Association of the Cape (FAMAC) who shall appoint a PC from the said names.

[35] The PC shall have his or her office within a reasonable distance of Ann's residence.

[36] The PC shall continue to act as such until he or she resigns or until such appointment is terminated by a written agreement between the parents or by an order of the High Court.

[37] Neither party may commence legal proceedings for the removal of the PC or bring to the court's attention any grievance regarding the performance or actions of the PC without first addressing the grievance in writing to the PC and affording the latter an opportunity to resolve the grievance within a period of 72 hours.

[38] The PC's function shall be:

- (a) to assist the parents in implementing and complying with the provisions of this order;
- (b) to mediate joint decisions in respect of the children;
- (c) to make recommendations in respect of any issue concerning the welfare or best interests of the children, which shall not be binding upon the parents unless they constitute directives made pursuant to para (e) below;
- (d) to engage any professional to assist him or her in making recommendations, provided the parents have agreed in writing as to how the costs of such expert shall be borne;

(e) to make directives binding on the parents and the children until a court of competent jurisdiction orders otherwise, limited to the following aspects:

- (i) the time, place and manner in which the children will be transported and exchanged between the parents during contact period;
- (ii) minor temporary departures from the contact arrangements contained in this order;
- (iii) the time, manner and frequency of telephonic and video contact.

[39] It is specifically recorded that the PC is not authorised to make binding directives in regard to the following matters:

- (a) the children's primary residence;
- (b) guardianship of the children;
- (c) the children's relocation or travel within or outside South Africa.

[40] The PC's directives shall be subject always to the oversight of a court of competent jurisdiction and shall be binding upon the parents and the children only for as long as a court of competent jurisdiction has not ordered otherwise.

[41] The parents shall share the costs of the PC equally, save that any attendances of the PC involving communication with one parent only shall be borne by such parent.

Monitoring:

[42] The Department of Social Development must appoint a Child Protection Social Worker whose function will be to monitor:

- (a) the daughters' circumstances and well-being;
- (b) compliance with the programme of counselling and therapy for the daughters;

(c) compliance by Ann with the programme of counselling, therapy and parenting guidance for herself;

(d) compliance by Ann with the other provisions of this order.

[43] The said social worker shall be entitled to carry out random home visits.

[44] Monitoring as aforesaid shall endure for one year from the date of this order, save that if the social worker considers that monitoring for a further period is reasonably required, monitoring shall continue for such further period as the social worker considers to be reasonably required.

[45] Ann shall lend her full cooperation to the social worker to enable him or her to perform his or her functions.

[46] The monitoring social worker shall furnish quarterly reports (the first such report to be furnished by 31 March 2020) to Alan identifying any material non-compliance with the terms of this order and any material concerns the social worker has regarding the welfare of the daughters.

Within one month from the date of this order, Alan must appoint a social worker in Anchorage, Alaska, to perform monitoring functions and to render quarterly report to Ann *mutatis mutandis* in accordance with paras 42 to 46 above.

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