

SOUTH AFRICA / JUDGMENT

B.B v G.B (902/2011) [2014]

ZAECPEHC 82 (1 September 2014)

[2014] ZAECPEHC 82

COURT

Eastern Cape High Court, Port Elizabeth

BEFORE

C K Mey

CASE / FILE NUMBER

902/2011

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION – PORT ELIZABETH)

Case No.: 902/2011

Date delivered: 02 September 2014

In the matter between: B. B. Plaintiff and G. B. Defendant

J U D G M E N T

MEY, AJ:

- [1] On 28 March 2011 the plaintiff instituted action against the defendant seeking a decree of divorce and further ancillary relief. The action was defended by the Defendant, who instituted a claim in reconvention.
- [2] The parties were married out of community of property, without accrual, on 9 November 2002 and their child, G., was born on [.....].
- [3] It is common cause that the marital relationship between the parties has irretrievably broken down and both desire a divorce. The parties have resolved most issues in the matter and seek an order by agreement that G.'s primary care will vest in the plaintiff. The only remaining dispute between the parties, which I am called upon to determine, entails the extent of the contact that the defendant should enjoy with G..

- [4] An interim arrangement currently exists in terms whereof G. spends alternating weeks with each parent. This is in terms of an order granted by agreement between the parties on 14 November 2013 pendente lite. That order also provided for an appointment of Ms R. H., of the Port Elizabeth Justice Centre, to represent G., consult with him and to provide a report to court on the issue of G.'s primary residence post-divorce.
- [5] Ms Herman filed her report on 27 January 2014, indicating that G. has expressed the desire to live primarily with the plaintiff. On receipt of such report the defendant conceded the issue of primary care. In view of the continued dispute regarding contact, the Family Advocate and various other experts proceeded to file reports addressing the issue of G.'s living arrangements post-divorce.
- [6] The defendant contends that the interim arrangement should continue and that the parties should share contact on an equal basis, with G. spending one week with each party and equal time with each party during holidays. The plaintiff however seeks an order that the defendant should only be afforded contact every alternate weekend and should share school holidays. This matter accordingly requires the determination of whether or not it is in G.'s best interests that the parties share equal contact, being essentially what the Courts have previously referred to as "joint custody".

The Evidence

- [7] The parties, the Family Advocate and Ms Herman, having consulted their expert witnesses, expressed the view on 14 November 2013 that it was not appropriate for G. to be interviewed by the Court. That point of view was again confirmed by the parties when the matter came before me, indicating that such interview would cause him unnecessary trauma. I was satisfied that G.'s point of view could be adequately expressed and that his interests would be properly represented through his appointed representative, Ms Herman and that no interview was accordingly required.
- [8] The plaintiff testified and called Rose Gower, a counselling psychologist, as a witness. The defendant testified and called Madelyn Johnston, a clinical psychologist, to testify. The family advocate, who instituted an enquiry in terms of Act No. 24 of 1987 and who produced reports in respect of the matter, also led the evidence of two witnesses, Dennis Stigant, a clinical psychologist, and Anne Moresby-White, the appointed family counsellor. Ms Herman elected not to call any witnesses, instead putting G.'s point of view to the various witnesses called in cross examination, submitting a report and confirming from the bar G.'s election.
- [9] The Plaintiff testified that she and the defendant had married after a whirlwind relationship and that after G.'s birth the defendant worked away from home, while she was for all intents and purposes a "stay at home mom", handling the accounts of her family's business at night in order to ensure that her days were free.

- [10] The parties' marriage relationship deteriorated to such an extent that she left the common home on 25 March 2011, leaving G., then aged [...] years, in the defendant's care. Her decision not to take G. with her was premised on the advice of Ms Gower, G.'s therapist, in order to avoid unnecessary disruption to G., while anticipating that the divorce would no more than eight weeks to finalise.
- [11] Ms Gower had been approached to provide therapy to G. on 10 February 2010, after he displayed concerning "social issues", and has subsequently continued to act as his therapist. Ms Gower had initially diagnosed G. with Asburger's syndrome – high functioning autism – and had recommended that he should be left in his "comfort zone".
- [12] It is common cause that there is a high degree of acrimony between the plaintiff and the defendant and the plaintiff indicated that, rather than abating since their separation, this has increased. She testified that the defendant initially frequently frustrated her contact with G. After she left the common home the defendant refused to let her to move back into the common home in order to re-establish her contact with G.. Initially she had limited contact with G., i.e. telephone contact and day visits, as the defendant insisted that she should first obtain fixed accommodation before sleepovers were allowed. She obtained a fixed residence on 25 May 2013, whereafter the defendant only afforded her contact with G. every second weekend, until 14 November 2013, when the interim order was granted affording her increased contact. However, before the interim order was implemented G.'s behaviour had regressed.
- [13] She described one incident in which she had had to cancel a birthday party she had arranged for G. when the defendant denied her contact, only to later do an about turn and allowing her to see G. because, she discovered later, he went to Bushman's River for the day to attend another birthday party with his girlfriend, B. N..
- [14] On 16 January 2012 the defendant and G. moved in with the defendant's girlfriend and her two teenage children. G. hated this arrangement and did not get on with the defendant's girlfriend or her children. G.'s behaviour regressed and he encountered problems at school. In October 2012 the defendant and G. moved back to the family home.
- [15] The Plaintiff further testified regarding a dispute that arose between the parties on the weekend prior to the commencement of the trial. It was common cause that the parties were unable to agree whether or not G. could remain with the defendant for an extra weekend. The parties even disagreed on whether there had been an agreement reached in this regard, eventually resorting to communicating through their attorneys to resolve the dispute.

- [16] Under cross-examination the plaintiff agreed that the Defendant was a good father who tries his best, that he has G.'s best interests at heart, that there was a good relationship between the two of them and that G. loves his father. She also agreed with the "general proposition" put to her by the Defendant's counsel that there should be as much contact as possible between G. and the Defendant.
- [17] She however disputed that the interim arrangement was working and that it was in G.'s best interests for it to continue, stating that a child needs to have a home and that G. should be with his mother. Further, she testified that although the interim arrangement had seen an improvement in G. he was still unsettled and that G. had continued to express the desire to reside with her.
- [18] The plaintiff's testimony revealed the extent of the acrimony between the parties. This is evident from the fact that the defendant obtained a protection order against the plaintiff and then, when G. was due to stay with her, prevented her from taking G. from school, following a confrontation at the school, in front of G.. The plaintiff explained that she and the defendant have continued to clash in respect of arrangements regarding G.'s practical living arrangements and particularly hand-overs between
- them. She indicated that a dispute had arisen between the parties the weekend before the commencement of the trial, evidencing
- their acrimonious relationship and their inability to reach agreement on issues relating to time spent with G..
- [19] The plaintiff described how even where it appeared that the parties had reached agreement on contact arrangements, as occurred over the weekend prior to the commencement of the trial proceedings, the terms of that agreement appeared to be disputed by the parties, who reverted to communicating through their attorneys, following their failure to communicate effectively with one another.
- [20] The parties' communication occurs mostly by way of email or "whatsapp" text messages. They do not communicate with one another in respect of G.'s schooling and functions and ensure that they attend such only when G. is in their care. She currently exercises her contact with G. at her family's holiday home in Jeffreys Bay, as G. eschews the conflict experienced there between the plaintiff and the defendant's family, and the defendant and the plaintiff's dog.
- [21] The contact arrangement, as prescribed by the interim order, has resulted in an improvement in G., who is now much happier, more confident and positive. G. however remains unsettled and has often expressed his desire to reside with her, his mother, "forever".

- [22] The plaintiff readily concedes that G. is happy in both parties' homes and that he is doing well at school and accepted that the defendant has G.'s best interests at heart. A good relationship has developed between defendant and G. subsequent to the institution of this action. She indicates that prior to this the defendant was an absent father.
- [23] The plaintiff with the proposition put to her by Mr Ronaasen, who appeared for the defendant, that there should be as much contact as possible between G. and the defendant. She clearly however indicated that she did not believe that the interim arrangement served G.'s best interests, as it does not afford him structure and has left him unsettled, stating that he should rather be placed with her permanently. With her he will enjoy time spent with his beloved animals and a structured home environment. According to her G. needs to know when he is being collected by whom and for how long.
- [24] It is evident that the parties are unable to deal rationally with one another, even in respect only of the issue of shared living arrangements and despite the provisions of the interim order. The plaintiff disputed that the interim arrangement was satisfactory and met G.'s needs.
- [25] The plaintiff stated the intention to return to the erstwhile common home, after evicting the defendant from the property. Although she presently lives in a cottage on the property, her time spent with G. is spent at a family holiday home in Jeffreys Bay, with a view to meeting G.'s expressed desire to avoid the negative atmosphere between the parties on the property. It is common cause that G. enjoys living on the property where he is able to spend time with plaintiff's dogs and horses.
- [26] The plaintiff and the defendant entered into new relationships, subsequent to their separation, although the plaintiff indicated that her relationship with one Ferreira had ended in 2011.
- [27] Ms Gower testified that she had been counselling G. on a therapeutic – and not forensic basis - almost weekly since 2010 and had held over one hundred counselling sessions with him. This involved using a method called “the children's voice kit” and avoiding leading questions as an interactive tool. She confirmed that she had advised the plaintiff to leave G. in the defendant's care at the common home, in order to limit the disruption he would experience, anticipating the speedy finalisation of the matter.
- [28] Ms Gower had, on treating G., provisionally diagnosed Asperger's syndrome, the symptoms of which can be relieved with good and intensive therapy. She indicated that when G. initially had minimal contact with his mother he acted out, to the extent that he was rubbing his faeces on the wall. He expressed to Ms Gower the need to her to see more of his mother. In her view the initial contact with his mother was not sufficient.

- [29] She described the relationship between the defendant, Ms N. and G. as not at all being a healthy situation and indicating that the defendant, when she called him in to discuss G.'s expressed negative emotions towards Ms N., had undertaken to ask Ms N. not to have too much contact with G..
- [30] In her second report[1] she recorded that G.'s circumstances had changed in that the defendant in G. had moved from the Heron Road property and were living with the defendant's girlfriend, B. N., and her 2 children. She recorded that they had been a regression in G.'s behaviour at school and he was exhibiting signs of emotional stress. G. again expressed a desire to live with the plaintiff. She concluded her second report with the strong recommendation that G.'s primary residence should be with the plaintiff.
- [31] She indicated that she has always been against an alternate week, shared living arrangement and continues to hold such view.
- [32] She too confirmed an improvement in G.'s status subsequent to the implementation of the interim arrangement and identified the reason for his improvement as G. seeing much more of his mother. In her first report produced[2] she stated that, although G. showed strong attachment ties to both parents, "... during the last session G. indicated very clearly that he wanted to stay with his mother."
- [33] She indicated however that G. remained in a "state of flux" and that she had observed him to be in survival mode "coping with the interim arrangement". She further confirmed that G. preferred to stay with his mother in Jeffreys Bay rather than her home, as he wished to avoid the conflict he observed between his parents there. Ms Gower further had regard to the forensic reports of Mr Stigand and indicated her agreement therewith.
- [34] Despite an indication by the plaintiff that G. appears fearful of the defendant, Ms Gower indicated that G. was not generally afraid of the defendant, but rather feared that expressing his desire to live with his mother would disappoint the defendant.
- [35] While Ms Gower accepted that G.'s current teacher had assessed him as a diligent, normal and well adjusted child who was achieving well in his class environment, she testified that G. would be able to function well in a strongly controlled environment like his school, but that it was evident to her that he experienced deep seated issues. She considers that the interim arrangement should not be continued in the long term. Such an arrangement would be unsettling for any child, and particularly for G., who in her view presents with behaviour akin to Aspergers.
- [36] In her opinion the interim arrangements should not prevail as it is very disruptive to G., and indicates it is in G.'s best interests that he have contact with the defendant in the terms proposed by the plaintiff.

[37] She considers G. mature enough to be able to express his desire regarding where he wishes to live and indicates that his point of view ought to be considered. Ms Herman indicated to her, in the course of cross-examination that G. wished to live with the plaintiff during the week and the defendant on alternate weekends. Ms Gower confirmed that this accords with her understanding and her opinion of what would be best for G.. She mentioned that G. considered himself “almost divorced”. In her view this comment reflects that he is aware of the legal process. He understands that the relief sought by the plaintiff will result in him seeing the defendant in the same manner that he for a substantial period visited his mother. He is intelligent and mature

enough to understand what such an arrangement entails.

[38] Due to the nature of G.’s close relationship with his paternal grandparents he should also be afforded quality time with them whilst in the defendant’s care.

[39] The defendant testified in support of his case, indicating that the interim arrangement is working well and should continue. He states that this is evidenced by the fact that G. is a normal, happy and well adjusted child in both at home and within his school environment.

[40] He has restructured his business and made substantial changes to his work schedule, in order to accommodate his father’s illness and his contact with G.. He conceded that, after the parties’ initial separation, he had been mistaken in not allowing G. to spend more time with the plaintiff, although he contended that this lack of contact was at the plaintiff’s election. His work obligations sometimes called for his contact arrangements to be varied and he would then make the necessary arrangements with the plaintiff. He undertook to afford the plaintiff first option to take care of G..

[41] He however indicated that the only thing that he and the plaintiff can agree on is that they both love G. and that they are both good parents.

[42] He contended that when G. initially had limited contact with the Plaintiff he was 100% adjusted and claimed that there was accordingly no improvement in his emotional state when his contact with the plaintiff increased, only conceding under cross-examination by the plaintiff’s counsel that it was beneficial to G. to have more contact with the plaintiff. He agreed with the proposition put to him by his counsel that G. should enjoy maximum time spent with both parents.

[43] During cross-examination by counsel for the Family Advocate and Ms Herman he disputed that G. had expressed a wish to live with the plaintiff and only have contact with him on alternate weekends. He further contended that G. was in any event not mature enough to make a choice in this regard and that no weight should be given to G.’s purported expressed desire.

- [44] He indicated that G.'s statement in this regard was as a result of Ms Herman having consulted with G. after he was brought to such consultation by the plaintiff and that G. had thus been influenced. He was unable to explain why G.'s expressed desire had remained the same when he had himself taken G. to Ms Herman for an interview.
- [45] Although he conceded that the relationship between himself and the plaintiff has been and remains very acrimonious, he indicated that did not need to be and proposed that they should receive counselling in order to improve their communication skills. He further confirmed, with reference to the issue regarding G.'s care during the weekend prior to the commencement of trial, that he and the plaintiff are unable to talk to one another. He indicated that they had been an agreement reached, and he disputed the plaintiff's indication that a dispute existed. He however indicated that G. is unable to move freely between him and the plaintiff due to the conflict between them. In his view the plaintiff is unnecessarily rigid about contact arrangements, as she refuses to change the plans made by the parties.
- [46] The defendant had initially sought primary care of G., he now seeks an order that G. spend alternate weeks with him and the plaintiff. His premise for this was research that he had personally undertaken on the issue of care and contact on the internet. He strongly relied on the views of a certain American Dr Farrell, who advocates a shared parenting arrangement. In cross-examination by the plaintiff's counsel, the defendant conceded that he has no expertise in this field himself, but dismissed the alternative viewpoint expressed by Ms Gower and the indicated contrary view of the Family Advocate's expert witnesses. His basis for rejection of the expressed opinions was that said Dr Farrell's recommendation was in G.'s best interests, and he would not consider any alternative view.
- [47] The defendant is currently in a relationship with Bridget N., who herself has two children. They have been in a relationship for the past three years, although they no longer reside together. As previously indicated, G. had at a stage resided with the defendant, Ms N. and her children. He conceded that G. had expressed that he "hated" Ms N.'s children. He disputed that he had told Ms Gower that he had asked Ms N. not to talk to G. until he speaks to her first (despite this not being challenged in cross examination of Ms Gower). However he later indicated that this referenced his agreement with Ms N. that she would discipline her children and he would discipline G.. He did not dispute that G. had "regressed" whilst staying with Ms N. and her children.
- [48] The defendant disavowed any long-term plans for his relationship with Ms N., but indicated that they all recently enjoyed a "family holiday" together over a long weekend. He described G.'s current relationship with Ms N. and her children as good.
- [49] Ms Johnston testified that while she was not G.'s therapist, she came to know him through her association with his school, Woodridge College. She had been contacted to investigate an allegation made of possible sexual abuse, but found no evidence of abuse.

- [50] Ms Johnston testified that between July 2011 and March 2012 she saw G. on 8 occasions. She made much of the fact that she was not in a therapeutic relationship with G., but rather conducted intervention sessions at school, as required. She later conceded in cross examination by the plaintiff's counsel that she had counselled him. G. had, according to her, spontaneously and for no apparent reason, informed her that he had his own lawyer appointed to represent him in this matter and, further, that he wanted to live with the defendant. It is common cause that at the time when G. gave his indication to Ms Johnston the plaintiff was involved in a relationship with one Ferreira, whom G. did not get on with. That relationship has now ended.
- [51] She contended that the plaintiff had been acting in breach of the interim order, as she was not residing at the premises identified in that order. She however accepted the family advocate's indication in cross-examination that a change of address had been undertaken on a temporary basis, after consultation with the family advocate.
- [52] She criticised Ms Gower, indicating that she considered it inappropriate for the family advocate's interview to have been held in the course of Ms Gower's therapy session. She however accepted that Ms Gower knew G. better than she did. She had also given G. "therapeutic assistance" and had even "stepped in" when Ms Gower was ill. When it was put to her that they had been no objection from the defendant's legal representative to the testimony of Ms Gower, she indicated that that had surprised her.
- [53] She further disputed Ms Gower's diagnosis of Asburger's syndrome, indicating that G.'s symptoms were brought on by the trauma of his mother not being available to him. She confirmed that G. had displayed aggressive behaviour at school during the course of 2013, using foul language and hitting another child.
- [54] Ms Johnston initially refused to accept G.'s election to stay with his mother, as put to her by Ms Herman. She is of the view that G. is too young to be consulted on his opinion regarding contact arrangements and criticised Ms Herman for requiring him to make such an election, also calling into question her qualifications to address such issues with him, although later conceding such.
- [55] G.'s statement that he is the one "getting divorced", in her opinion, reflects his failure to properly appreciate the legal process. She agreed with the defendant that no regard should be had to G.'s "voice".
- [56] She further critiqued the report of the expert appointed by the family advocate by agreement between the parties, Mr Dennis Stigant, who conducted a forensic investigation. She contended that his report showed a clear bias in favour of the plaintiff, having regard to the number of lines therein addressing his evaluation of the defendant, as opposed to the plaintiff.

- [57] While she did not herself conduct a forensic investigation in the matter, she too prepared a report in which she, inter alia, referred to the plaintiff's son from another relationship and to the plaintiff having had a nervous breakdown, consulting a psychiatrist and having a "psychotic history". She conceded in the course of cross-examination that these statements are factually incorrect and ought to have been corrected.
- [58] She stated that she did not contend that the other experts consulted in the matter were wrong, but rather that the correct process was not followed. In her view G. is stable and adjusted living in two homes.
- [59] Ms Johnston agreed that it requires a high level of co-operation between parents for equal shared accommodation of a child to work. In her view, there were some level of co-operation between the parties, exhibited by their exchanges of photos and videos by cellular phone, and this could be improved by guidance being provided to them. She indicated that there was no need to consider what would occur if one or both of the parties was unwilling to participate in such process, as proper guidance would ensure that the level of co-operation improved.
- [60] Mr Stigant testified that he was appointed as an independent party to conduct a forensic investigation and to assess the conflicting psychologists' reports regarding G.'s wishes regarding his place of primary residence. He had no prior involvement with either party or G..
- [61] He conducted psychological tests on both parties and on G. and consulted with them. He found G. to be very articulate. While he did not interview G.'s paternal grandparents, he did not consider such interview as forming part of his instructions or necessary. He confirmed his recommendation in his report and explained that his report, which devoted 17 lines to the defendant and 81 lines to the plaintiff, was drafted in such manner because the defendant had made numerous allegations concerning the plaintiff which required investigation and needed to be addressed. He further indicated that he spent more time consulting with the defendant, who had more to say about the matter.
- [62] He established very quickly that G.'s primary attachment was to his mother. He displayed a strong emotional need for maternal nurturing and attention and wants to be with his mother. Mr Stigant was concerned that G. did not feel open enough to share his secrets with the defendant. He is of the view that the defendant can still enjoy a good relationship with G. even if they only have contact with each other on alternate weekends and half of the school holidays.
- [63] He confirmed that G. had not liked Mr Ferriera and that it would have placed him in a stressful situation to place him in his mother's care whilst she was involved in a relationship with Ferreira. He indicated that consideration should be given to G.'s expressed preference to stay with his mother, but this is not the only factor to be taken into account.

- [64] In his view G.'s improvement since the introduction of the interim arrangement is to be ascribed to G. spending more time with the plaintiff and a sense that the divorce trial was reaching finality and "the war was over".
- [65] Mr Stigant agreed that the co-parenting plan in terms of which both parents have equal contact is the ideal, but that this often caters for the needs of the parents then the child and that he was in principle, not in favour they are cause a child to be insecure, living a "nomadic existence", having to move home 50 times a year. Such arrangement requires constant adaptation by the child to the different discipline regimes in the different households. He did not consider a shared contact arrangement to be G.'s best interests. In his opinion it is critical for a child's emotional development and personality that he be provided with a constant, secure home base.
- [66] He indicated that a shared living arrangement requires a high degree of co-operation between the parents and to that the odds were against it succeeding without such co-operation. In his view the interim arrangement has had limited success and he was reluctant to endorse the extension thereof, considering such to be no more than an experiment.
- [67] He considered that, in view of the indication that G. was concerned parties father's reaction should he elect to stay with his mother, more weight should be accorded to G.'s expressed election.
- [68] Ms Moresby-White confirmed that the initial family advocate's report, supported by her in her report[3] recommended that G. should live primarily with the defendant and that the plaintiff should enjoy structured contact, being daily telephone contact, every alternate weekend from Thursday after school to Monday morning and shared school holidays. She indicated that circumstances have changed substantially since the initial report was drafted. G. had at that stage been in the defendant's primary care for 7½ months and the plaintiff was involved in a relationship with aforesaid Ferreira, whom G. did not like.
- [69] A further enquiry was undertaken by the family advocate and an addendum report[4] was prepared, recommending to court that G. live primarily with the plaintiff and that the defendant be afforded reasonable contact with him, every second weekend and half of every school holiday. She confirmed her findings in this report and her view that this is the appropriate contact to be awarded.
- [70] She also observed G.'s need for routine in the course of her investigation, during his therapy session with Ms Gower.
- [71] She too indicated that in order for successful co-parenting to take place the parties need to be able to communicate properly and must fully support each other in their relationship with the child. Consistent parenting routines would also need to be implemented in both households. She stated that in 2011 the antagonism between the parties was extremely high, to the extent that the police were involved in the parties' disputes. The antagonism was so

intense that the plaintiff and defendant refused to be consulted together at the family advocate's offices at the same time. This has continued and the parties have expressed that they are unable to communicate. She did not consider it effective co-operation or co-parenting for the parties to consult G.'s teacher's separately and to attend school activities only when G. is in their care, such arrangement having been made in recognition of their inability to communicate and be present together. She is unable to conceive how any co-parenting arrangement

will be successful in the long term.

- [72] She indicated that G. has a long school day, particularly after completion of his sport and activities and travelling back from school. It is accordingly important for him to have a home base. She considered it extremely disruptive to his schoolwork to spend extended time with the defendant during the week, instead of remaining with the plaintiff.
- [73] As I indicated earlier, Ms Herman, as G.'s representative, did not testify, but placed a report before court, and further placed on record G.'s indicated election regarding his choice of primary residence. She also expressed G.'s antipathy towards Ms Nieman and her children.
- [74] She stated that G. had indicated that he wishes to reside primarily with the plaintiff and to have contact with the defendant on alternate weekends, the opposite arrangement having been in place prior to the interim order being implemented. She indicated that G. expressed a clear understanding of the practical impact of such arrangement.
- [75] The family advocate has submitted two contrary reports, however I am satisfied that the later report represents a reconsidered and updated position. Mr Stigant and Ms Moresby White were both excellent and convincing witnesses.
- [76] The plaintiff and the defendant both obviously have the concerns of G. at heart. The plaintiff presented as a good witness, who was understandably emotional about the present circumstances. The defendant did not impress me as a witness. While I accept that his own emotions may be presented in a different manner to the plaintiff's, he presented as arrogant and his indomitable attitude in relying on unqualified hearsay evidence relating to the best interests of a child in order to justify his claim, was disappointing. He failed to make concessions where such were appropriate, even going so far as to claim that G. has always been fine, whereas it is clear that G. suffered substantial emotional trauma when his contact with his mother was severely limited.
- [77] Ms Gower indicated that she was present to represent G.'s interests and not that of the parties. In my view she was a good witness and successfully completed her objective. I am not convinced that there is any merit in the criticisms raised by Ms Johnston to the reports and testimony of Ms Gower or the report and investigation of Mr Stigant. Ms Johnston's evidence regrettably failed to impress me. Her denial of having acted as a therapist to G. appears clearly directed at seeking to place herself in a position to critique Ms Gower's evidence. Her refusal to consider G.'s stated election to stay with his mother flies in the face

of the indications regarding G.'s ability to express his needs, as testified to by all the witnesses, save the defendant, which was confirmed by his representative, Ms Herman. Her further persistent claim that the plaintiff was in breach of the interim order by moving to Jeffreys Bay unfortunately smacks of an inappropriate interest in the matter and she impressed me as having an obvious bias towards the defendant's claim. In the circumstances I am satisfied that it is appropriate to accept the evidence presented by the plaintiff's and the family advocate's expert witnesses and to disregard that of Ms Johnston.

[78] While the abovementioned experts may be of the view that it is in G.'s interests that he reside primarily with the plaintiff and have only reasonable contact with the defendant, it remains for me to make such determination with regard to the evidence before me, after giving consideration to the law applicable to matters of this nature.

[79] There is no preclusion against maintaining the status quo despite a contrary recommendation by the family advocate.[5] It is common cause that the parenting abilities of the parties are not placed in issue. They are co-holders of full parental responsibilities and rights, which include the responsibility and rights to care for G., maintain contact with him, to act as his guardian, and to contribute towards his maintenance.[6]

[80] The best interests of the child standard is to be applied in all enquiries of this nature.[7]

[81] Section 7(1)(a) of the Children's Act [8](the Act) provides as follows:

"7(1) Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely –

- (a) the nature of the relationship between –
- (i) the child and the parents, or any specific parent; and
- (ii) the child and any other care giver relevant in those circumstances..."

[82] In *McCall v McCall*[9] the court set out a number of criteria which are useful in determining the best interests of the child in matters of this nature, namely:

- (a) the love, affection and other emotional ties which exist between parent and child and the parent's compatibility with the child;
- (b) the capabilities, character and temperament of the parent and the impact thereof on the child's needs and desires;
- (c) the ability of the parents to communicate with the child and the parents' insight into, understanding of and sensitivity to the child's feelings;
- (d) the capacity and disposition of the parent to give the child the guidance he requires;
- (e) the ability of the parent to provide for the basic physical needs of the child, i.e. his economic security;

- (f) the ability of the parent to provide for the educational well-being and security of the child, both religious and secular;
- (g) the ability of the parent to provide for the child's emotional, psychological, cultural and environmental development;
- (h) the mental and physical health and moral fitness of the parent;
- (i) the stability or otherwise of the child's existing environment having regard to the desirability of maintaining the status quo;
- (j) the desirability or otherwise of keeping siblings together;
- (k) the child's preference, if the court is satisfied that in the particular circumstances the child's preference should be taken into consideration;
- (l) the desirability or otherwise of applying the doctrine of same sex matching, which is apposite when considering whether to place a boy in the care of his father;
- (m) any other factor which is relevant to the particular case with which the court is concerned.

[83] The defendant contends that a shared living arrangement in the nature of the regime which applies at present can be introduced and implemented despite the existence of acrimony between the parties, where it will continue to serve the best interests of the child.[10] He further submits that there has been no indication of instability in G.'s existing environment.

[84] Section 10 of the 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."

[85] Although it was agreed that it was inappropriate for G. to be interviewed by the court, Ms Gower, Mr Stigant and Ms Herman agree that G. has the necessary level of maturity to be able to express a view in respect of his practical living arrangements.[11] Having considered the evidence and submissions presented in this regard I am satisfied that it is appropriate that I give heed to G.'s expressed preference.

[86] Joint custody of minor children has sometimes been awarded in South Africa, because it has been regarded in the exercise of the court's discretion to be in the best interest of such children.[12] However, joint custody has been refused in other cases.[13] In *Edwards v Edwards*[14] Jansen J expressly stated the following at 524 in respect of shared or joint custody of children:

"It is plain that an agreement of this nature should not be made an order of Court. In this regard I refer to the case of Heimann v Heimann[15], where Murray J refused to make a similar agreement in respect of custody, an order of Court. It seems to me a legal impossibility that the legal custody of a child could be shared equally between two individuals. The legal custody involves the privilege and

responsibility of taking certain decisions in regard to, for example, the education of the child. It would seem that such a decision should appertain to a single individual. If the responsibility is shared between two individuals there is the continuing possibility of a deadlock arising over every triviality. Essentially, it would seem that an agreement in regard to the custody of the child after divorce cannot affect the legal custody as determined by common-law and not otherwise arranged by the Court.”

- [87] The courts have often considered that it is undesirable that a child of tender years should be subject to these constant changes.
- [88] It is common cause that the parties possess the qualities indicated in *McCall v McCall* supra. Both have a loving relationship with G. and are able to provide him with proper care. The refusal of the defendant, however, to recognise the emotional issues experienced by G. when he enjoyed only limited contact with the plaintiff, causes me to query whether in fact he has sufficient insight into, understanding of and sensitivity to G.’s feelings.
- [89] It is common cause that both parties are able to provide for G.’s economic security and for this reason I have been called upon by both Counsel not to make any determination in respect of maintenance, that issue not being in dispute between the parties and being capable of resolution outside of this forum, should that be necessary in due course.
- [90] I am satisfied that both parents are fit and suitable to be granted care of and contact with G.. However, having regard to the continuing antagonism that is evident between the parties, the fact that they have refused to be in the same building in the course of the family advocate’s investigation in this matter and their enduring arrangement to attend school functions and activities only when the other is not present, I am satisfied that, taking into account the substantial weight of the expert evidence before me, this is incompatible with a joint parenting arrangement.
- [91] The plaintiff, the family advocate and Ms Herman have all expressed the view that joint custody is not feasible in this case because of the turbulent relationship between the parties and the negative effects of the litigation between them. I entirely agree with them.
- [92] Despite the fact that the interim order has been implemented for some time, I do not believe that this is an appropriate matter to maintain the status quo. The negative impact of the interim arrangement has been well explained by Mr Stigant and Ms Moresby White and I believe it appropriate to remove G. from his present state of flux and to afford him security and a proper home base.
- [93] The defendant has conceded that the plaintiff should be G.’s primary caregiver and it is accordingly not necessary for me to deal with this aspect any further, save to state that I am satisfied that that is an appropriate arrangement.

[94] I am enjoined by the Act to give due consideration to the views of the child. It appears from all the reports that he is of an age and level of maturity to make an informed decision. In my judgment I do consider it to be in his best interests alter the interim arrangement.

[95] There remains the question of costs. Counsel were unanimous that the parties bear their own costs. Such an order seems meet. In the result the following order will issue –

- (a) A decree of divorce will issue;
- (b) The plaintiff is appointed as the primary caregiver of G., the child born of the parties' marriage;
- (c) The defendant will enjoy reasonable contact with G., being alternative weekends and half of every school holiday;
- (d) Each party will pay their own costs;

C K MEY

JUDGE OF THE HIGH COURT (ACTING)

Appearances:

For the plaintiff:

Adv N Mullins

Instructed by:

Gregory Clark & Associates, Port Elizabeth

For the defendant:

Adv O Ronaasen

Roelofse Meyer Inc, Port Elizabeth

Family Advocate: Adv E. Botha

For the minor child:

Ms R. Herman

P.E. Justice Centre

[1] dated 21 February 2012

[2] [1] dated 15 July 2011

[3] dated 25 November 2011

[4] dated 21 October 2013

- [5] Isemonger v Isemonger 2009 JDR 0973 (GNP) at pp 2-3
- [6] section 18 of the act
- [7] This is in terms of both the common law and the Children's Act No 38 of 2005
- [8] No 38 of 2005
- [9] 1994
- (3) SA 2001 (CPD) at 205 A-G
- [10] See GW v GC 2012 JDR 0074 (KZD)
- [11] See Lubbe v du Plessis 2001 (4) SA 57 (C) at 73F and HG v CG 2010 (3) SA 352 ECP at para 7
- [12] Kastan v Kastan 1985 (3) SA 235 (C) at 236D.
- [13] Heimann v Heimann 1948 (4) SA 926 (W); Edwards v Edwards 1960 (2) SA 523 (N) at 524G.
- [14] 1960
- (2) SA 523 (N)
- [15] 1948
- (4) SA 926 (W)
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