

SOUTH AFRICA / JUDGMENT

**C.M v N.G (8026/2011) [2012] ZAWCHC
37; 2012 (4) SA 452 (WCC); [2012] 3 All
SA 104 (WCC) (26 April 2012)****[2012] ZAWCHC 37****COURT**

Western Cape High Court, Cape Town

BEFORE

Gangen

CASE / FILE NUMBER

8026/2011

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[Reportable]

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case no. 8026/2011

In the matter between:

CMApplicant

and

NGRespondent

JUDGMENT DELIVERED 26 APRIL 2012

GANGEN, A J:

Introduction

- [1] This is an Application in terms of Sections 23 and 24 of the Children's Act 38 of 2005("the Act"). Applicant and Respondent were involved in a same sex relationship for several years. The parties did not register a marriage. During the relationship, a child, conceived by artificial insemination, was born. The relationship ended in November 2010. Applicant seeks an order granting her full parental responsibilities and rights in respect of a minor child as contemplated in s 18(2) (3) (4) and (5) of the Act. Ms Anderson appeared on behalf of the Applicant and Ms Maas appeared on behalf of the Respondent. Ms Skelton, of the Centre for Child Law, appeared as amicus curiae.

Facts

- [2] Applicant and Respondent began living together in May 2005. After the first year, the parties moved to London and lived there until June 2010. During December 2006 the parties applied to the Cape Fertility Clinic for Respondent to undergo artificial insemination. In August 2007 a similar process was followed for the Applicant to undergo artificial insemination. As a result of the procedure, the minor child was born on 29 October 2008. Respondent is the biological mother of the child. Applicant has no biological bond with the minor child. The child was born in England. The Respondent, as the birth mother, was recorded as the parent.
- [3] In November 2010 the relationship between the parties ended. Applicant continued to have contact with the minor child after the separation of the parties. On 12 April 2011 Respondent advised Applicant that she wanted to stop her contact with the minor child. The reason for the decision was that it was not in the minor child's interests. The parties agree that the child's primary residence shall be with Respondent.
- [4] On 13 April 2011 Applicant brought this application. The Application was opposed. On 20 April 2011, by agreement between the parties, the matter was postponed sine die. The Family Advocate was authorised to investigate the best interest of the child.
- [5] In May 2011 Applicant approached the Court for an order to compel Respondent to co-operate with the Family Advocate and an expert identified by Applicant. This application was opposed by Respondent. On 24 May 2011 the application was postponed to 1 August 2011. An interim contact order was made.
- [6] On 3 August 2011 the report of the Family Advocate was not available. An order was granted increasing the contact in place in terms of the interim contact order. The matter was postponed to 29 November 2011.
- [7] In September 2011 the Applicant approached this Court for an order interdicting Respondent from relocating to Johannesburg with the minor child. On 16 September 2011 a new contact arrangement was made an order of Court pending the finalisation of the matter.
- [8] The Applicant alleged that it was the intention of the parties to have children together. She stated that she is the minor child's other parent. Respondent on the other hand denies that this is so. She averred that it was always her intention to have children. Respondent stated further that she had considered invitro fertilisation before her relationship with Applicant. She alleged that her decision to have a child was not dependent on her relationship with the Applicant. Respondent stated that Applicant was involved in the process only because of their relationship.

- [9] Applicant submitted documents relating to the Cape Fertility Clinic which indicate that Applicant and Respondent jointly approached the clinic for the artificial insemination procedure. The parties jointly signed documents relating to the in vitro fertilisation of Respondent. Applicant's name was inserted wherever there was reference to husband and the fertilisation 'problem' was referred to as 'lesbian couple'. Respondent in March 2009 also signed forms consenting to the artificial insemination of the Applicant.
- [10] Applicant further submitted various communications wherein Respondent acknowledged that Applicant is the other parent of the minor child.
- [11] In an email of August 2007, Respondent advised her mother that "we have decided to have a baby together". This is contrary to Respondent's assertion in her affidavit that Applicant was involved in the process only because of their relationship and that her decision to have a baby was not dependent on her relationship with Applicant.
- [12] Applicant also submitted other documentation relating to the minor child wherein Respondent makes reference to the child being "their child". This is in communications to their doctor and family members and to Applicant after their separation. In fact Respondent on 27 July 2009 in response to an email from Applicant, said-"/ have never said that he is not your son neither have I said you are not his mother".
- [13] The said email also makes reference to Applicant getting 7ega/ rights' in respect of the minor child. Respondent replied that Applicant was welcome to draw up a document saying that Applicant was his other mother and that she would sign same as agreement of that fact. This was at a stage that the relationship between the parties was going through a rocky patch.
- [14] On 4 December 2010 (after the relationship ended) Respondent also wrote to Applicant advising that "he is also your son. You are his other mom. I will NEVER do anything to destroy that. I am not that kind of a person.... Ryder is our child." [15] Respondent's denial, in the papers, of the intention to have a child together conflicts with her own contemporaneous statements at various earlier dates. These communications span the period commencing before the birth of the child to after the parties

separated. [16] Respondent points out that only she is registered as a parent on the birth certificate. Applicant explains that the reason she was not registered as a parent of the minor child is that he was born in England and when they went to register his birth as a couple, they were informed that it was not possible to have both parties registered as the parents. This is also corroborated in an email dated 5 August 2009 wherein Applicant made enquiries as to the procedure for her to obtain the necessary legal rights as the minor child's parent. [17] Applicant continued to have contact with the minor child after the separation of the parties. Applicant submits that on separation they agreed that Applicant would have contact with the child one day per week and every second weekend. Applicant says that she exercised contact in terms of this agreement. In addition Applicant, from time to time, was allowed to have the child sleep over. On at least two occasions, Respondent allowed the child to stay with Applicant for periods of four days and one week respectively. This was at the end of March 2011 and up to 5 April 2011-just a

few days before Respondent decided to terminate contact.

- [18] Respondent denies that there was an agreement. She says that it was their understanding that the arrangement would be adjusted in accordance with how the child coped. Respondent even goes further to state that Applicant was part of the minor child's life for more than two years and she did not want the minor child to experience a loss of any kind when Applicant moved out. Respondent's failure to confirm that the Applicant exercised regular contact as specified by Applicant is glaring. She does confirm the two longer stays. It is accordingly clear that on Respondent's own version, the relationship was clearly more than that of a "play date" as Respondent would have this court believe. It serves as confirmation that there was a strong bond between Applicant and the minor child. The minor child referred to Applicant as "Mom" and Respondent as "mommy".
- [19] Furthermore, although the extent and scope of the contribution by Applicant is in dispute, it is evident that Applicant paid for some of the expenditure in relation to the fertilisation process. In 2011 Applicant began making contributions of at least R3000,00 per month to the maintenance of the minor child. Applicant was however unable to afford this after relocation of the Respondent to Johannesburg due to the increased expenditure incurred to exercise her contact in Johannesburg.
- [20] The family advocate pointed out that the minor child was brought up in a household that resembled a family unit to the minor child and that there is a strong possibility that both parties presented themselves as parents during the child's formative years and portrayed themselves as a family unit. No justification has been established to erode that foundation.
- [21] I am of the view that, if these were parties in a heterosexual relationship, then a male person in the Applicant's position would have been recognised as the father figure and that the bond with the child would have been recognised as being that of a parent. There is no reason why Applicant should not be treated in the same way.
- [22] It is evident from the aforesaid that it was the intention of the parties to have the child together and that Applicant played the role of a parent to the minor child. The law and the issues
- [23] Applicant is applying in terms of Section 23 and 24 of the Act for full co-parental responsibilities and rights as contemplated in Section 18(2), (3),
- (4) and (5). Sections 18(2) deal with parental rights and responsibilities being care and contact, guardianship and maintenance. Section 18(3) deals with the duties of guardians and Sections 18(4) & 18(5) deal with the situation where there is more than one guardian. Section 18 does not limit the persons who may hold parental rights and responsibilities to a parent or biological parent.

[24] Sections 19, 20 and 21 provide the mechanism for biological and married parents to automatically acquire parental rights and responsibilities. Section 22 provides for parental rights and responsibilities to be conferred by agreement on persons having an interest in the care, well-being

and development of the child.

[25] Section 23 deals with applications for 'care' or 'contact'. Section 24 deals with applications for guardianship. Applications in terms of these sections may be brought by 'any person having an interest in the care, well-being or development of a child

[26] Respondent submits that in terms of Section 23, Applicant may apply for care or contact, but not both. She states that as Applicant is not applying for the child to be placed in her care, she is only entitled to contact. Furthermore, Respondent submits that as Applicant has not alleged that Respondent is not a suitable guardian, she is not entitled to apply in terms of Section 24(3) for guardianship.

[27] The two questions of law to be determined are whether an interested person applying in terms of Section 23 is entitled to an order for both care and contact and secondly, whether an interested party applying in terms of Section 24 for guardianship is only entitled thereto if the party can show that the existing guardian is not suitable having regard to the

provisions of Section 24(3). [28] I shall first deal with the issue of whether both care and contact may be awarded to an interested person in terms of Section 23. [29] Section 23(1) reads as follows—"Any person having an interest in the care, well-being or development of a child may apply to the High Court, a divorce court in divorce matters or the children's court for an order granting to the applicant, on such conditions as the court may deem necessary—

(a) contact with the child; or

(b) care of the child.

[30] Respondent relies on the word "or" between (a) and (b) of Section 23 (1). She submits that Section 23(1)(a) and (b) should be read disjunctively and that Applicant cannot apply for both care and contact.

[31] The question is whether that was the intention of the legislature. In *Ngcobo and others v Salimba CC: Ngcobo v van Rensburg* 1998(8)BCLR 855 SCA the Court found that it is sometimes appropriate to read clauses conjunctively although the text appears to set them out disjunctively. In that matter, Olivier JA said that- "It is unfortunately true that the words "and" and "or" are sometimes inaccurately used by the legislature, and there are many cases in which one of them has been held to be the equivalent of the other (see the remarks of Innes CJ in *Barlin v Licensing Court for the Cape* 1924 A D at 478). Although much depends on the context and the subject matter (*Barlin* at 478), it seems to me that there must be compelling reasons why the words used by the legislature should be replaced; in casu why "and" should be read to mean "or", or vice versa. The words should be given their ordinary

meaning "... unless the context shows or furnishes very strong grounds for presuming that the legislature really intended" that the word not used is the correct one (see Wessels J in *Gorman v Knight Central GM Co Ltd* 1911 TPD 597 at 610; my underlining). Such grounds will include that if we give "and" or "or" their natural meaning, the

interpretation of the section under discussion will be unreasonable, inconsistent or unjust (see *Gorman* at 611) or that the result will be absurd (*Grevling and Erasmus (Pty) Ltd v Johannesburg Local Road Transportation Board and Others*, 1982

- (4) SA 427 (A) at 444 C-D) or, I would add, unconstitutional or contrary to the spirit, purport and objects of the Bill of Rights (sec 39 (2) of the 1996 Constitution.)"
- [32] Both 'care' and 'contact', are components of 'parental rights and responsibilities ' in terms of Section 18(2). The definitions of care and contact are relevant to this aspect.
- [33] Care as defined in Section 1 of the Act includes, where appropriate and within available means, providing the child with a suitable place to live, proper living conditions and financial support. It also includes safeguarding and protecting the child from abuse and harm. It deals with guarding against any infringement of the child's rights, directing the child's education and upbringing, including religious and cultural education and upbringing and guiding the behaviour of the child in a humane manner. 'Care' is also about maintaining a sound relationship with the child, accommodating any special needs that the child may have and ensuring the best interests of the child is the paramount concern in all matters affecting the child.
- [34] If one has regard to the aforesaid definition of 'care', it is clear that the concept of care goes beyond the common law concept of custody {*Wheeler v Wheeler* 2011(2) SA 459 KZP}. Respondent's submission that because Applicant does not seek an order that the minor child be placed in her care, Applicant is only entitled to contact is not sustainable in light of the definition of 'care'. In fact, if one has regard to the *Wheeler* judgment(supra), it indicates that it will be necessary to delineate the specific aspects of care and contact to be allocated to each party where there is no agreement between the parties in relation to parental responsibilities. I agree with this view because if one has regard to the best interest of the child standard, in each case the specific facts of the matter will determine what is in the child's best interest. It may be that not all aspects of 'care' or 'contact' as set out in the definition are applicable to a particular set of facts. The Court retains the discretion to delineate the specific aspects of care and contact to be allocated to each party.
- [35] The definition of 'Contact' in terms of Section 1 of the Act is as follows- "Contact", in relation to a child, means — (a) maintaining a personal relationship with the child; and
- (b) if the child lives with someone else —

- (i) communication on a regular basis with the child in person, including — (aa) visiting the child; or (bb) being visited by the child; or (ii) communication on a regular basis with the child in any other manner, including — (aa) through the post; or (bb) by telephone or any other form of electronic communication

[36] What is clear from the definitions set out above and the Wheeler

judgment

(supra) is that the concepts of 'care' and 'contact' do not correspond exactly with the concepts of 'custody' and 'access'. The concepts are also not mutually exclusive. Both are components of parental rights and responsibilities in terms of Section 18(2). The

- [37] Court in the Wheeler case (supra)said- 'Although the two statutory concepts of care and contact correspond broadly with their common law equivalents, the correspondence is not exact. The difference is this. Whilst the statutory concepts include all the elements of the common law concepts, the former are wider than the latter. For example, paragraphs (h) and (i) of the definition of care and paragraph (a) of the definition of contact, were not traditionally components of custody and access respectively'
- [38] It is relevant that Section 23 applies to 'interested parties' and is not limited to 'parents'. Interested parties may vary from unmarried parents to grandparents and to employers of parents or caregivers.
- [39] The wording of Section 28(2) where reference is made to "an application in terms of Section 23 for the assignment of contact and care in respect of the child to the applicant in terms of that section" strengthens the interpretation that Section 23(1)(a) and (b) be read conjunctively.
- [40] Section 23 is also headed 'Assignment of contact and care to interested person by order of court' [my emphasis]
- [14] On 4 December 2010 (after the relationship ended) Respondent also wrote to Applicant advising that "he is also your son. You are his other mom. I will NEVER do anything to destroy that. I am not that kind of a person.... Ryder is our child."
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"It is unfortunately true that the words "and" and "or" are sometimes inaccurately used by the legislature, and there are many cases in which one of them has been held to be the equivalent of the other (see the remarks of Innes CJ in *Barlin v Licensing Court for the Cape* 1924 A D at 478). Although much depends on the context and the subject matter (*Barlin* at 478), it seems to me that there must be compelling reasons why the words used by the legislature should be replaced; in casu why "and" should be read to mean "or", or vice versa. The words should be given their ordinary meaning "... unless the context shows or furnishes very strong grounds for presuming that the legislature really intended" that the word not used is the correct one (see *Wessels J in Gorman v Knight Central GM Co Ltd* 1911 TPD 597 at 610; my underlining). Such grounds will include that if we give "and" or "or" their natural meaning, the

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[34] If one has regard to the aforesaid definition of 'care', it is clear that the concept of care goes beyond the common law concept of custody {*Wheeler v Wheeler* 2011(2) SA 459 KZP}. Respondent's submission that because Applicant does not seek an order that the minor child be placed in her care, Applicant is only entitled to contact is not sustainable in light of the

definition of 'care'. In fact, if one has regard to the Wheeler judgment(supra), it indicates that it will be necessary to delineate the specific aspects of care and contact to be allocated to each party where there is no agreement between the parties in relation to parental responsibilities. I agree with this view because if one has regard to the best interest of the child standard, in each case the specific facts of the matter will determine what is in the child's best interest. It may be that not all aspects of 'care' or 'contact' as set out in the definition are applicable to a particular set of facts. The Court retains the discretion to delineate the specific aspects of care and contact to be allocated to each party.

[35] The definition of 'Contact' in terms of Section 1 of the Act is as follows-

"Contact", in relation to a child, means —

- (a) maintaining a personal relationship with the child; and
- (b) if the child lives with someone else —
 - (i) communication on a regular basis with the child in person, including —
 - (aa) visiting the child; or
 - (bb) being visited by the child; or
 - (ii) communication on a regular basis with the child in any other manner, including —
 - (aa) through the post; or
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[38] It is relevant that Section 23 applies to 'interested parties' and is not limited to 'parents'.

Interested parties may vary from unmarried parents to grandparents and to employers of parents or caregivers.

- [39] The wording of Section 28(2) where reference is made to "an application in terms of Section 23 for the assignment of contact and care in respect of the child to the applicant in terms of that section" strengthens the interpretation that Section 23(1)(a) and (b) be read conjunctively.
- [40] Section 23 is also headed 'Assignment of contact and care to interested person by order of court' [my emphasis]
- [41] The intention of the legislature, having regard to the heading of Section 23 and having regard to the fact that any interested party may apply in terms of Section 23, in inserting the word 'or' was clearly intended to indicate that both care and contact will not be automatically awarded to an interested party. This is consistent with the delineation referred to in the Whee/er judgment (supra).
- [42] In any event, to interpret the section such that Section 23(1)(a) and (b) are read disjunctively will render it inconsistent with the objects of the Children's Act and with Section 28 of the Constitution. Having regard to Section 9 and the 'best interest of the child' requirement, it may well be in the best interests of the child that both 'care' and 'contact' are awarded to an interested party. In such circumstances, the Court as upper guardian should not be limited by a strict interpretation.
- [43] It is accordingly my judgment that an interested party applying in terms of Section 23 for parental rights and responsibilities would be entitled to an order for both contact and care where it is in the best interests of the child.
- [44] I now turn to the interpretation of Section 24(3) relating to the issue of guardianship. Applicant is applying for full co-parental responsibilities and rights as contemplated in Section 18(2), (3), (4) and (5). Section 18(2)(c) makes reference to parental responsibilities and rights including the responsibility and the right "to act as guardian of the child". Sections 18(4) and (5) deal with the situation where there is more than one guardian. [45] Respondent submits that as Applicant has not alleged that Respondent is not a suitable guardian in terms of Section 24(3), she is not entitled to apply for an order of co-guardianship.
- [46] Section 24(3) states that- 'In the event of a person applying for guardianship of a child that already has a guardian, the Applicant must submit reasons as to why the child's existing guardian is not suitable to have guardianship in respect of the child.'
- [47] Whereas Section 23(4) specifically mentions that 'the granting of care or contact to a person in terms of this section does not affect the parental responsibilities and rights that any other person may have in respect of the same child, Section 24(3) points in the opposite direction. Section 24(3) appears to indicate that in any application for guardianship in respect of a child, the existing guardian loses guardianship. [48] Section 29 deals with court proceedings and subsection (2) makes reference to Section 24 and appears to support the view that the

existing guardian loses guardianship. Section 29(2) states that- 'An application in terms of Sections 24 for guardianship of a child must contain the reasons why the applicant is not applying for the adoption of the child'. However, the legal consequences of adoption, unlike guardianship, terminate the parental rights and responsibilities of the biological parents.

- [49] Sections 30 to 32, on the other hand, deal with the co-exercise of parental rights and responsibilities. Section 30 states that - "(1) More than one person may hold parental responsibilities and rights in respect of the same child.
- (2) When more than one person holds the same parental responsibilities and rights in respect of a child, each of the co-holders may act without the consent of the other co-holder or holders when exercising those responsibilities and rights, except where this Act, any other law or an order of court provides otherwise.
- (3) A co-holder of parental responsibilities and rights may not surrender or transfer those responsibilities and rights to another co-holder or any other person, but may by agreement with that other co-holder or person allow the other co-holder or person to exercise any or all of those responsibilities and rights on his or her behalf.
- (4) An agreement in terms of subsection (3) does not divest a co-holder of his or her parental responsibilities and rights and that co-holder remains competent and liable to exercise those responsibilities and rights.
- [50] Section 30 does not exclude guardianship. Furthermore Section 31 deals with major decisions involving a child and makes specific reference to Section 18(3)(c) which deals with components of guardianship. This would mean that the concept of co-guardianship is not specifically excluded from the Act as Section 24(3) appears to indicate.
- [51] It was submitted by the amicus curiae that it appears that during the drafting of the Children's Bill, the South African Law Reform Commission (SALRC) noted concerns regarding inter-country adoptions, in particular the use of guardianship as a means for non-citizens to remove the child from South Africa and to adopt the child in the Applicant's country of origin.
- [52] This appears from a record of the discussion of the SALRC at page 72, where it is stated -To further discourage the potential misuse to which an allocation of parental rights and responsibilities might give rise, the Commission recommends that all applicants applying for full parental rights or responsibilities or exclusive guardianship rights, must state reasons in the application why the adoption route is not followed.' [53] The interpretation of the Act such that guardianship will be lost to the existing guardian would mean that an unmarried father who was unable to obtain parental rights and responsibilities in terms of Section 21 (automatically) or in terms of Section 22 (by agreement) has to show that the biological mother is not a suitable guardian. This would be absurd and not in keeping with the objectives of the Act, namely, to promote the preservation and strengthening of families and to give effect to the constitutional rights of children, including family care or parental

care and that the best interests of a child are of paramount importance in every matter concerning the child. [54] The same absurd outcome will result where grandparents who are the child's primary caregivers apply for guardianship. It would not be necessary to terminate the parental responsibilities and rights of the biological parents or to show that they are not suitable guardians. [55] In interpreting this section, there are however the two overarching considerations of "the High Court as upper guardian of all children" and the "best interest of the child". In *Ex parte Kedar* 1993(1)SA 242, the Court held that as upper guardian it was entitled to grant joint guardianship to the parties in the best interest of the child and that that did not deprive the existing guardian of her rights and responsibilities. In that case the mother and the employer made an application for joint guardianship in order to enable the child to be enrolled at the school close to the employer's residence.

- [41] The intention of the legislature, having regard to the heading of Section 23 and having regard to the fact that any interested party may apply in terms of Section 23, in inserting the word 'or' was clearly intended to indicate that both care and contact will not be automatically awarded to an interested party. This is consistent with the delineation referred to in the *Wheeler* judgment (*supra*).
- [42] In any event, to interpret the section such that Section 23(1)(a) and (b) are read disjunctively will render it inconsistent with the objects of the Children's Act and with Section 28 of the Constitution. Having regard to Section 9 and the 'best interest of the child' requirement, it may well be in the best interests of the child that both 'care' and 'contact' are awarded to an interested party. In such circumstances, the Court as upper guardian should not be limited by a strict interpretation.
- [43] It is accordingly my judgment that an interested party applying in terms of Section 23 for parental rights and responsibilities would be entitled to an order for both contact and care where it is in the best interests of the child.
- [44] I now turn to the interpretation of Section 24(3) relating to the issue of guardianship.
Applicant is applying for full co-parental responsibilities and rights as contemplated in Section 18(2), (3),
(4) and (5). Section 18(2)(c) makes reference to parental responsibilities and rights including the responsibility and the right "to act as guardian of the child". Sections 18(4) and (5) deal with the situation where there is more than one guardian.
- [45] Respondent submits that as Applicant has not alleged that Respondent is not a suitable guardian in terms of Section 24(3), she is not entitled to apply for an order of co-guardianship.
- [46] Section 24(3) states that-

'In the event of a person applying for guardianship of a child that already has a guardian, the Applicant must submit reasons as to why the child's existing guardian is not suitable to have guardianship in respect of the child.'

[47] Whereas Section 23(4) specifically mentions that 'the granting of care or contact to a person in terms of this section does not affect the parental responsibilities and rights that any other person may have in respect of the same child, Section 24(3) points in the opposite direction. Section 24(3) appears to indicate that in any application for guardianship in respect of a child, the existing guardian loses guardianship.

[48] Section 29 deals with court proceedings and subsection (2) makes reference to Section 24 and appears to support the view that the existing guardian loses guardianship. Section 29(2) states that-

'An application in terms of Sections 24 for guardianship of a child must contain the reasons why the applicant is not applying for the adoption of the child'.

However, the legal consequences of adoption, unlike guardianship, terminate the parental rights and responsibilities of the biological parents.

[49] Sections 30 to 32, on the other hand, deal with the co-exercise of parental rights and responsibilities. Section 30 states that -

"(1) More than one person may hold parental responsibilities and rights in respect of the same child.

(2) When more than one person holds the same parental responsibilities and rights in respect of a child, each of the co-holders may act without the consent of the other co-holder or holders when exercising those responsibilities and rights, except where this Act, any other law or an order of court provides otherwise.

(3) A co-holder of parental responsibilities and rights may not surrender or transfer those responsibilities and rights to another co-holder or any other person, but may by agreement with that other co-holder or person allow the other co-holder or person to exercise any or all of those responsibilities and rights on his or her behalf.

(4) An agreement in terms of subsection (3) does not divest a co-holder of his or her parental responsibilities and rights and that co-holder remains competent and liable to exercise those responsibilities and rights.

[50] Section 30 does not exclude guardianship. Furthermore Section 31

deals with major decisions involving a child and makes specific reference to Section 18(3)(c) which deals with components of guardianship. This would mean that the concept of co-guardianship is not specifically excluded from the Act as Section 24(3) appears to indicate.

- [51] It was submitted by the amicus curiae that it appears that during the drafting of the Children's Bill, the South African Law Reform Commission (SALRC) noted concerns regarding inter-country adoptions, in particular the use of guardianship as a means for non-citizens to remove the child from South Africa and to adopt the child in the Applicant's country of origin.
- [52] This appears from a record of the discussion of the SALRC at page 72, where it is stated -To further discourage the potential misuse to which an allocation of parental rights and responsibilities might give rise, the Commission recommends that all applicants applying for full parental rights or responsibilities or exclusive guardianship rights, must state reasons in the application why the adoption route is not followed.'
- [53] The interpretation of the Act such that guardianship will be lost to the existing guardian would mean that an unmarried father who was unable to obtain parental rights and responsibilities in terms of Section 21 (automatically) or in terms of Section 22 (by agreement) has to show that the biological mother is not a suitable guardian. This would be absurd and not in keeping with the objectives of the Act, namely, to promote the preservation and strengthening of families and to give effect to the constitutional rights of children, including family care or parental care and that the best interests of a child are of paramount importance in every matter concerning the child.
- [54] The same absurd outcome will result where grandparents who are the child's primary caregivers apply for guardianship. It would not be necessary to terminate the parental responsibilities and rights of the biological parents or to show that they are not suitable guardians.
- [55] In interpreting this section, there are however the two overarching considerations of "the High Court as upper guardian of all children" and the "best interest of the child". In *Ex parte Kedar* 1993(1) SA 242, the Court held that as upper guardian it was entitled to grant joint guardianship to the parties in the best interest of the child and that that did not deprive the existing guardian of her rights and responsibilities. In that case the mother and the employer made an application for joint guardianship in order to enable the child to be enrolled at the school close to the employer's residence.
- [56] Section 45(4) of the Act expressly states that "Nothing in this Act shall be construed as limiting the inherent jurisdiction of the High Court as upper guardian of all children".
- [57] Section 9 endorses the constitutional imperative in terms of Section 28(2) of the Constitution that "a child's best interests are of paramount importance in every matter concerning the child."

[58] It is clear that Section 24(3) would only be applicable where a party was applying for exclusive rights as to guardianship (sole guardianship). The High Court's inherent jurisdiction, as upper guardian of all children, to grant an application for guardianship to any person without affecting the rights of an existing guardian are not limited by Section 24(3). Applying the law to the

facts

[59] It is apparent that the Applicant has no automatic parental responsibilities and rights in terms of Sections 19 to 21 as she has no biological link to the child.

[60] The applicant furthermore does not acquire automatic parental rights and responsibilities in terms of Section 40 which deals with children conceived by artificial insemination as she did not enter into a marriage with the Respondent.

[61] In the absence of an agreement in terms of Section 22, Applicant's recourse is to apply to court in terms of Sections 23 and 24 of the Act. [62]

[62] The Court thus has to consider this application against the criteria set out in the Act. Sections 23(2) and 24(2) of the Act set out the criteria that the Court must take into account when considering an application in terms of Section 23 and 24 respectively.

[63] Common to both sections are-(1) the best interests of the child, (2) the relationship between the applicant and the child, and any other relevant person and the child (3) any other factor that should, in the opinion of the court, be taken into account.

[64] Section 23(2) goes further to specify the degree of commitment that the applicant has shown towards the child and the extent to which the applicant has contributed towards expenses in connection with the birth and maintenance of the child.

[65] Section 7 of the act sets out the factors that are to be taken into consideration whenever the best interests of the child standard is to be applied.

[66] The factors referred to in Section 7 relate, inter alia, to- the personal relationship between the child and the parents, or any specific parent and the child and any other person,

the attitude of the parent towards exercising parental responsibilities and rights

which action or decision would avoid or minimise further legal or administrative proceedings

the likely effect on the child of any change in the child's circumstances.

the child's age, maturity and stage of development, gender and background;

the child's physical and emotional security and intellectual, emotional, social and cultural development;

the need to bring up the child within a stable family environment

- the need to protect the child from any physical or psychological harm

- [67] I shall deal with the criteria and factors set out together. The child is a boy aged just over 3 years. During the parties relationship, they conducted their lives in the same manner as one would find in a marital relationship, there being mutual support, sharing of a common home and duties of the household including daily sharing of care giving tasks in respect of the minor child. According to the family advocate, the Respondent was the primary caregiver and the Applicant was the secondary caregiver. The minor child was clearly brought up in a household that resembled a family unit to the minor child.
- [68] It also is clear from the papers that even after the relationship ended, Applicant continued to enjoy contact with the child which included sleepovers for a few days. Inasmuch as Respondent's attitude is that Applicant is not the child's parent and therefore not entitled to the relief claimed, as stated earlier, from the information before the Court it is clear that the parties intended to have the child together and that Respondent on many occasions confirmed Applicant's position as the minor child's parents. As primary residency with the Respondent is not in dispute, the issue of the likely change in the child's circumstances does not raise any specific difficulty. This is also against the background that Applicant enjoyed contact with the minor child subsequent to the relationship ending in November 2010 and continues to do so in terms of the interim contact arrangement currently in place.
- [69] I have already dealt earlier with the matters raised in Section 23(2) dealing with the extent to which Applicant has contributed towards expenses in connection with the birth and maintenance of the child. As to the degree of commitment that the applicant has shown towards the child, it is clear that the Applicant has incurred great expenditure in approaching the Courts as set out above. The Respondent's relocation to Johannesburg has also placed the Applicant under financial stress.
- [70] The minor child has been brought up in a family unit where both parties were regarded as his parents and he is accordingly entitled to continue that relationship and bond with the Applicant. There are many parents who do not care for their children and it is significant that Applicant wants to be a part of the child's life and is willing to contribute to his maintenance. The Applicant's commitment is also reflected in the fact that Applicant brought this application on the day after Respondent advised her that she was ending Applicant's contact with the minor child. Respondent's only explanation for why it was not in the child's best interests for contact to continue was that the child became unsettled when he was away from her. This was after

Respondent left the child alone with Applicant for several days when she went to Johannesburg. The child was just under two and a half years at the time.

- [71] With regard to the issue of guardianship, Applicant does not wish to deprive the Respondent of her rights of guardianship and, having regard to the interpretation of Section 24(3) above, there is no reason why she ought to show that Respondent is not a suitable guardian. In fact Applicant referred to Respondent as being a good mother.
- [72] I have no doubt that Applicant is entitled to parental responsibilities and rights as set out in Section 18 as it would be in the best interests of the child to have a relationship with two parents. It is also important in a situation such as this where there is much conflict between the parties that processes be put in place for the due exercise of both parties' parental rights and responsibilities. Costs
- [73] Our courts have held that in disputes relating to children, where parents in contesting the case have acted in the best interests of the child, there is no winner or loser and accordingly each party should pay their own costs. {McCall v McCall 1994(3) SA 201 (CPD) at 209 B-C}.
- [74] However, in this matter, the Applicant is the successful litigant and I believe that Respondent's conduct warrants a cost order against her. It is clear from the papers filed that the Respondent did not take this Court into her confidence and that she was not honest about the parties' decision to have children together, and despite the interim court order, had attempted to deprive Applicant of contact when she went on holiday. The Respondent's conduct when she was deciding to relocate, in light of the interim contact order, is to be frowned upon. The Respondent despite her submissions that she was acting in the child's best interests, when she advised Applicant that she was no longer going to allow her contact after allowing fairly liberal contact and when she submitted that she was prepared to allow the Applicant contact but failed to tender the terms thereof, clearly was not motivated by the best interests of the child. Respondent also opposed the appointment of an expert identified by the Applicant and then failed to appoint an expert. It was only when the Respondent did not agree with the Family advocate's report that she

requested a postponement to appoint an expert. She also did not do so immediately when she was advised of what the import of the family advocate's report was going to be. [75] Respondent's attempts to frustrate the Applicant's contact with the child were also the reasons for the many times that the Applicant had to approach this Court for assistance. [76] It is accordingly ordered that-

1. Applicant and Respondent shall be co-holders of parental responsibilities and rights in respect of the minor child as contemplated in sections 18(2) (3) (4) and (5) of the 2005 Children's Act.>
2. The Applicant and Respondent shall be co-guardians of the minor child. 3. The minor child shall have his primary residence with Respondent. 4. The parties shall enter into a parental plan within 60 days from date hereof.

5. In order to facilitate joint decision making and the parental plan, a facilitator shall be appointed by the parties who shall be conversant with working with children and families in the context of disputed care and contact matters (referred to herein as "the facilitator"). The appointment shall be made within 14 (fourteen) days from date of this order.
 6. If the parties fail to reach agreement regarding the appointment of the facilitator, the facilitator shall be appointed by the Chairperson for the time being of FAMAC (Family Mediators Association of Cape Town). The facilitator shall continue to act until he/she resigns or both parties agree in writing that his /her appointment shall be terminated or his/her appointment is terminated by an order of the High Court. If the facilitator's appointment is terminated, he/she shall be substituted by another facilitator appointed by FAMAC;
- [56] Section 45(4) of the Act expressly states that "Nothing in this Act shall be construed as limiting the inherent jurisdiction of the High Court as upper guardian of all children".
- [57] Section 9 endorses the constitutional imperative in terms of Section 28(2) of the Constitution that "a child's best interests are of paramount importance in every matter concerning the child."
- [58] It is clear that Section 24(3) would only be applicable where a party was applying for exclusive rights as to guardianship (sole guardianship). The High Court's inherent jurisdiction, as upper guardian of all children, to grant an application for guardianship to any person without affecting the rights of an existing guardian are not limited by Section 24(3).

Applying the law to the

facts

- [59] It is apparent that the Applicant has no automatic parental responsibilities and rights in terms of Sections 19 to 21 as she has no biological link to the child.
- [60] The applicant furthermore does not acquire automatic parental rights and responsibilities in terms of Section 40 which deals with children conceived by artificial insemination as she did not enter into a marriage with the Respondent.
- [61] In the absence of an agreement in terms of Section 22, Applicant's recourse is to apply to court in terms of Sections 23 and 24 of the Act. [62]
- [62] The Court thus has to consider this application against the criteria set out in the Act. Sections 23(2) and 24(2) of the Act set out the criteria that the Court must take into account when considering an application in terms of Section 23 and 24 respectively.
- [63] Common to both sections are-(1) the best interests of the child, (2) the relationship between the applicant and the child, and any other relevant person and the child (3) any other factor that should, in the opinion of the court, be taken into account.

[64] Section 23(2) goes further to specify the degree of commitment that the applicant has shown towards the child and the extent to which the applicant has contributed towards expenses in connection with the birth and maintenance of the child.

[65] Section 7 of the act sets out the factors that are to be taken into consideration whenever the best interests of the child standard is to be applied.

[66] The factors referred to in Section 7 relate, inter alia, to-

the personal relationship between the child and the parents, or any specific parent and the child and any other person,

the attitude of the parent towards exercising parental responsibilities and rights

which action or decision would avoid or minimise further legal or administrative proceedings

the likely effect on the child of any change in the child's circumstances.

the child's age, maturity and stage of development, gender and background;

the child's physical and emotional security and intellectual, emotional, social and cultural development;

the need to bring up the child within a stable family environment

- the need to protect the child from any physical or

psychological harm

[67] I shall deal with the criteria and factors set out together. The child is a boy aged just over 3 years. During the parties relationship, they conducted their lives in the same manner as one would find in a marital relationship, there being mutual support, sharing of a common home and duties of the household including daily sharing of care giving tasks in respect of the minor child. According to the family advocate, the

Respondent was the primary caregiver and the Applicant was the secondary caregiver. The minor child was clearly brought up in a household that resembled a family unit to the minor child.

[68] It also is clear from the papers that even after the relationship ended, Applicant continued to enjoy contact with the child which included sleepovers for a few days. Inasmuch as Respondent's attitude is that Applicant is not the child's parent and therefore not entitled to the relief claimed, as stated earlier, from the information before the Court it is clear that the parties intended to have the child together and that

Respondent on many occasions confirmed Applicant's position as the minor child's parents. As primary residency with the Respondent is not in dispute, the issue of the likely change in the child's circumstances does not raise any specific difficulty. This is also against the background that Applicant enjoyed contact with the minor child

subsequent to the relationship ending in November 2010 and continues to do so in terms of the interim contact arrangement currently in place.

- [69] I have already dealt earlier with the matters raised in Section 23(2) dealing with the extent to which Applicant has contributed towards expenses in connection with the birth and maintenance of the child. As to the degree of commitment that the applicant has shown towards the child, it is clear that the Applicant has incurred great expenditure in approaching the Courts as set out above. The Respondent's relocation to Johannesburg has also placed the Applicant under financial stress.
- [70] The minor child has been brought up in a family unit where both parties were regarded as his parents and he is accordingly entitled to continue that relationship and bond with the Applicant. There are many parents who do not care for their children and it is significant that Applicant wants to be a part of the child's life and is willing to contribute to his maintenance. The Applicant's commitment is also reflected in the fact that Applicant brought this application on the day after Respondent advised her that she was ending Applicant's contact with the minor child. Respondent's only explanation for why it was not in the child's best interests for contact to continue was that the child became unsettled when he was away from her. This was after

Respondent left the child alone with Applicant for several days when she went to Johannesburg. The child was just under two and a half years at the time.

- [71] With regard to the issue of guardianship, Applicant does not wish to deprive the Respondent of her rights of guardianship and, having regard to the interpretation of Section 24(3) above, there is no reason why she ought to show that Respondent is not a suitable guardian. In fact Applicant referred to Respondent as being a good mother.
- [72] I have no doubt that Applicant is entitled to parental responsibilities and rights as set out in Section 18 as it would be in the best interests of the child to have a relationship with two parents. It is also important in a situation such as this where there is much conflict between the parties that processes be put in place for the due exercise of both parties' parental rights and responsibilities.

Costs

- [73] Our courts have held that in disputes relating to children, where parents in contesting the case have acted in the best interests of the child, there is no winner or loser and accordingly each party should pay their own costs. {McCall v McCall 1994(3) SA 201 (CPD) at 209 B-C}.
- [74] However, in this matter, the Applicant is the successful litigant and I believe that Respondent's conduct warrants a cost order against her. It is clear from the papers filed that the Respondent did not take this Court into her confidence and that she was not honest about the parties' decision to have children together, and despite the interim court order, had attempted to deprive Applicant of contact when she went on holiday. The Respondent's conduct when she was deciding to relocate, in light of the interim contact order, is to be

frowned upon. The Respondent despite her submissions that she was acting in the child's best interests, when she advised Applicant that she was no longer going to allow her contact after allowing fairly liberal contact and when she submitted that she was prepared to allow the Applicant contact but failed to tender the terms thereof, clearly was not motivated by the best interests of the child. Respondent also opposed the appointment of an expert identified by the Applicant and then failed to appoint an expert. It was only when the Respondent did not agree with the Family advocate's report that she

requested a postponement to appoint an expert. She also did not do so immediately when she was advised of what the import of the family advocate's report was going to be.

[75] Respondent's attempts to frustrate the Applicant's contact with the child were also the reasons for the many times that the Applicant had to approach this Court for assistance.

[76] It is accordingly ordered that-

1. Applicant and Respondent shall be co-holders of parental responsibilities and rights in respect of the minor child as contemplated in sections 18(2) (3) (4) and (5) of the 2005 Children's Act.>
2. The Applicant and Respondent shall be co-guardians of the minor child.
3. The minor child shall have his primary residence with Respondent.
4. The parties shall enter into a parental plan within 60 days from date hereof.
5. In order to facilitate joint decision making and the parental plan, a facilitator shall be appointed by the parties who shall be conversant with working with children and families in the context of disputed care and contact matters (referred to herein as "the facilitator"). The appointment shall be made within 14 (fourteen) days from date of this order.
6. If the parties fail to reach agreement regarding the appointment of the facilitator, the facilitator shall be appointed by the Chairperson for the time being of FAMAC (Family Mediators Association of Cape Town). The facilitator shall continue to act until he/she resigns or both parties agree in writing that his /her appointment shall be terminated or his/her appointment is terminated by an order of the High Court. If the facilitator's appointment is terminated, he/she shall be substituted by another facilitator appointed by FAMAC;
7. Unless otherwise agreed by the parties, or otherwise directed by the facilitator, the parties shall bear the costs of the facilitator in equal shares;
8. If the parties are unable to reach agreement on any issue concerning the children's best interests or any issue where a joint decision is required in respect of the children, the dispute shall be referred to the facilitator;

9. The dispute shall be referred to the facilitator in writing, who shall attempt to resolve the dispute as speedily as possible and without recourse to litigation;
10. The facilitator's recommendation shall be binding on the parties in the absence of any Court order overriding such recommendations.
11. Until finalisation of the parental plan referred to in 4 above, the minor child shall have reasonable contact with the Applicant which shall be exercised to include (but not limited to) the contact currently exercised in terms of the interim court order.
12. In the event that the parties fail to finalise the parental plan in terms of this order, the recommendations of the Family Advocate with regard to contact, joint decision making and sharing of information as set out in Annexure "A" hereto will take effect on expiry of the 60 days referred to in this order.
13. Respondent is to pay the costs of this Application, including the costs under case no 18449/11. GANGEN, A J
7. Unless otherwise agreed by the parties, or otherwise directed by the facilitator, the parties shall bear the costs of the facilitator in equal shares;
8. If the parties are unable to reach agreement on any issue concerning the children's best interests or any issue where a joint decision is required in respect of the children, the dispute shall be referred to the facilitator;
9. The dispute shall be referred to the facilitator in writing, who shall attempt to resolve the dispute as speedily as possible and without recourse to litigation;
10. The facilitator's recommendation shall be binding on the parties in the absence of any Court order overriding such recommendations.
11. Until finalisation of the parental plan referred to in 4 above, the minor child shall have reasonable contact with the Applicant which shall be exercised to include (but not limited to) the contact currently exercised in terms of the interim court order.
12. In the event that the parties fail to finalise the parental plan in terms of this order, the recommendations of the Family Advocate with regard to contact, joint decision making and sharing of information as set out in Annexure "A" hereto will take effect on expiry of the 60 days referred to in this order.
13. Respondent is to pay the costs of this Application, including the costs under case no 18449/11.

GANGEN, A J

Annexure "A"

[1] Contact

Applicant shall be entitled to reasonable contact with the minor child. Such contact shall include, but not necessarily be limited to:

[1.1] In the event that Applicant and the minor child do not reside in the same general geographical area.

[1.1.1] Applicant shall be entitled to take the minor child into her care every alternate Saturday at 09h00 and shall return him to the care of Respondent at 15h00 on the Sunday morning.

[1.1.2] Applicant shall be entitled to spend a minimum of 2 hours with the minor child on every day while she finds herself in the same geographical area as the minor child and arrangements in this regard shall be agreed to between the parties, if necessary with the assistance of the facilitator.

[1.2] In the event that Applicant and the minor child reside in the same general geographical area:

[1.2.1] Applicant shall be entitled to take the minor child into her care from after creche / school on every alternate Friday and shall return him to Respondent's care at 16h00 on the Sunday.

[1.2.2] Applicant shall be entitled to take the minor child into her care every Wednesday from after creche / school and shall return him to school on the Thursday morning.

[1.3] Irrespective of whether Applicant and the minor child reside in the same geographical area:

[1.3.1] Applicant shall be entitled to take the minor child into her care from after creche / school on her birthday, in the event that her birthday falls on a weekday, or from 09h00, in the event that her birthday falls on a weekend, and shall return him to creche / school, in the event that Applicant's birthday is followed by a school day, or to Respondent's care by 09h00, in the event that Applicant's birthday is followed by a weekend day, the following morning. The same shall apply mutatis mutandis to contact between the minor child and Respondent on the latter's birthday.

[1.3.2] Applicant shall be entitled to spend a reasonable time with the minor child on his birthday and arrangements in this regard shall be agreed to between the parties, if necessary with the assistance of the facilitator. In the event that the minor child would ordinarily have been in Applicant's care on his birthday, this arrangement shall apply mutatis mutandis to Respondent's contact with the minor child on his birthday.

[1.3.3] Applicant shall be entitled to take the minor child into her care every alternate Christmas, provided that where practicable, Respondent shall have contact with the minor child on Christmas day.

[1.3.4] Applicant shall be entitled to take the minor child into her care every alternate Mother's Day from 09h00 until 16h00. Likewise, Respondent shall be entitled to have the minor child in her care from 09h00 on alternate Mother's Days, irrespective of whether the minor child would ordinarily have been in Applicant's care on that particular day.

[1.3.5] Both parties shall be entitled to telephonic or electronic contact with the minor child at all reasonable times and they shall provide each other with a number or address on which the minor child may be reached during such times.

[1.3.6] Holiday contact shall be determined by the parties, if necessary with the assistance of the facilitator, when appropriate.

[2] Joint decision making

[2.1] The parties shall participate equally in decisions relating to the minor child with respect to all major matters including:

[2.1.1] Decisions relating to his schooling and tertiary education;

[2.1.2] Decisions relating to his mental health care and medical care, excluding emergency medical care;

[2.1.3] Decisions relating to his religious and spiritual upbringing;

[2.1.4] Decisions affecting contact between the minor child and either of the parties;

[2.1.5] Decisions which are likely to significantly change the living conditions of the child or which are likely to have an adverse effect on his general wellbeing, including a decision relating to the residence of the minor child outside of the Republic of South Africa or any relocation that will impact on Applicant's contact with the minor child.

[2.1.6] The abovementioned excludes participation in day to day decision making while the minor child is in the care of the other party, in which case the party in whose care the minor child is at that time will make a day to day decisions without the input of the other party.

[3] Sharing of information

[3.1] Each party is entitled to be kept informed about the child's progress at school, his development and his involvement in extra-mural and cultural activities. In this regard the parties shall:

[3.1.1] advise each other timeously of all sporting, social and cultural activities and events in which the minor child may be involved, so as to ensure that both parties or either of them is able to attend at such activity, should they so choose;

[3.1.2] keep each other advised of all parent/teacher meetings so that they may both attend it if it is their desire to do so;

[3.1.3] advise the schools that both parties are entitled to receive directly all school reports, medical reports and school terms and calendars, extra-curricular activity calendars and any other documentation or correspondence relating to the minor child.

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Prepared on 10 October 2026 · Esheria