

SOUTH AFRICA / JUDGMENT

Cunningham v Pretorius (31187/08)

[2008] ZAGPHC 258 (21 August 2008)

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COURT

High Courts - Gauteng

BEFORE

Murphy

CASE / FILE NUMBER

31187/08

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CASE NO: 31187/08

DATE: 21/08/2008

In the matter between: MARYKE CUNNINGHAM (born FERREIRA) App licant and DANI L
JOHANNES JACOBUS PRETORIUS Respondent

MURPHY J

1. The applicant has made application, as a matter of semi-urgency in terms of rule 6(12) , for an order granting her permission to remove her minor child (“B”) permanently from South Africa to the United States of America .
2. The application is made in accordance with the provisions of section 18 of the Children’s Act 38 of 2005 (“the Act”). Section 18(3)(c)(iii) of the Act provides that a parent or other person who acts as guardian of a child must give or refuse any consent required by law in respect of the child, including consent to the child’s departure or removal from the Republic. In terms of section 18(5) , unless a competent court orders otherwise, the consent of all the persons that have guardianship of a child is necessary in respect of matters set out in subsection 3(c). Since the enactment of the Guardianship Act 192 of 1993, now restated in section 18(2)(c) of the Act, concurrent powers of guardianship are conferred by law on both parents of a legitimate child. T he effect of section 18(3)(c)(iii) read with section 18(5) of the Act is that both parents are required to consent to a child’s departure or removal from the Republic. A competent court may order otherwise and substitute consent in the face of opposition by one parent. These provisions recast and extend the scope of section 1(2) of the Guardianship Act 192 of 1993 in that section 18 of the Act now requires consent not only in respect of the

removal of a child from the Republic but also any departure from the Republic.

3. In terms of the notice of motion, the applicant, as stated, seeks permission to remove B permanently from South Africa to the United States and asks further for an order declaring it unnecessary for her to obtain the consent of the respondent (the biological father and former husband of the applicant) as required in terms of section 18(3)(c)(iii) and also in terms of section 18(3) (c)(iv)
 - the latter provision requiring consent of both parents to a child's application for a passport. In addition, she seeks secondary or consequential relief in the form of an amendment to the provisions of the settlement agreement, incorporated into the divorce order dissolving the marriage of the parties, adjusting the respondent's rights of reasonable access (the right to maintain contact - section 18(2)(b)) to take account of the child's possible relocation to the United States. Finally, she asks for an increase in the amount of maintenance payable to her in respect of B.
 4. The respondent opposes the application and has made a counter application requesting the matter to be referred to oral evidence on the ground that there exist a number of disputes of fact. In the alternative, he asks that the application be dismissed and that the primary place of residence and primary care of B be awarded to him subject to specified contact rights in favour of the applicant and her family in South Africa.
 5. Applications for substituted consent are being brought before our courts with increasing frequency. They are never easy and raise difficult emotional and practical issues for divorced parents and their children, not to mention the courts called upon to adjudicate them. I can only repeat the sentiments of other judges that cases like these "give rise to anxious consideration" and pose the "knottiest and most disturbing problems" - *Godbeer v Godbeer* 2000(3) SA 976 (W) and *Ford v Ford*
- [2004] 2 All SA 396 (W). Generally speaking, before substituting consent or refusing leave to a custodian parent to take a child out of the country, the court must carefully weigh and balance the reasonableness of the custodian's decision to relocate, the practical and other considerations on which such decision is based, the competing advantages and disadvantages of relocation, and how relocation will affect the child's relationship with the non-custodian. The court must be guided principally by what will be in the best interests of the child - *F v F* 2006 (3) SA 42 (SCA).
6. Chapter 2 of the Act (sections 6 - 17) contains several directive principles guiding the interpretation and implementation of all legislation applicable to children, as well as to all proceedings, actions and decisions by any organ of state in any matter concerning a child. The principles give concrete expression to the fundamental constitutional rights of children in section 28 of the Constitution and in particular the value in section 28(2) that "a child's best interests are of paramount importance in every matter concerning the child". Thus, for instance, section 6(2)(a) of the Act provides that all proceedings, actions or decisions concerning a child must respect, protect, promote and fulfil the child's rights set out in the

Bill of Rights, the best interests of the child standard set out in section 7 of the Act and the rights and principles set out in the Act. The best interest s standard is a detailed provision to which I will refer more fully in due course. Section 7 of the Act enumerates no less than 23 relevant factors that a court is obliged to consider when applying the best interests of the child standard. Section 9 reiterates the constitutional injunction and provides that in all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be app lied. Section 6(4) is also relevan t to litigation for substituted consent to relocate. It provides that in any matter concerning a child an approach which is conducive to conciliation and problem-solving should be followed , and a confrontational approach and delay s in any action or decision to be taken must be avoided as far as possible.

7. Becaus e B suffers a language disability, section 11(1) of the Act also has some application. It provides generally that due consideration must be given to providing the child with appropriate care within the family and community making it possible for the child to effectively participate in sound cultural, religious and educational activities in a way promoting the child's dignity, self-reliance and active participation in the community.
8. This new framework, arising from the reformulation of the entire body of law affecting children, in my view, obligates courts adjudicating disputes concerning children to engage in a value based method of appropriate dispute resolution and to order the proceedings before them in a manner minimizing adversarial litigation and delays. An understanding of this approach is directly relevant to the respondent's application to refer the matter to oral evidence. The intention of the legislature to encourage courts to deploy appropriate expeditious and cost-efficient methods could not be more clearly stated. As a consequence, earlier judicial pronouncements regarding the applicable principles of evidence and procedure in such cases may lose some of their force and should be re lied u pon with circumspection. I f the legislative injunction to avoid delay and adversarialism is to be given proper effect, it must follow, in my view, at least until specialised tribunals with discrete methods are established , that motion proceedings should normally be regarded as the preferred route ; and courts will do well to abstain from an over fastidious approach to factual disputes ar ising in affidavits . A robust common sense approach is called for and any recourse to oral evidence should be a reluctant choice to be exercised sparingly and only when essential . Furthermore, t he points of contention that inevitably arise in applic ations of this kind tend in the main to concern the inferences which might legitimately be d rawn from undisputed facts or are merely disagreements about the construction or interpretation to be placed upon undisputed facts. Differences of opinion do not necessarily involve disputes of fact requiring oral evidence to resolve them
- see *Godbeer v Godbeer* 2000 (3) SA 976 (W) at 977F.
9. In similar vein, there is no place in enquiries of this kind, when assessing the case of each party, to determine the issue at hand (invariably whether it is in the best inte rests of the child to relocate) with reference solely to whether or not the applicant has discharged his or

her burden, evidentiary or overall, on a balance of probabilities so as to entitle him or her to the relief sought. The incapacity or otherwise of a parent litigant to discharge an evidentiary onus should not be conclusive as to what may or may not be in the best interests of the child. Thus, the pronouncement of Diemont JA in *Baile y v Baile y* 1979 (3) SA 128 (A) at 131 G-H to the effect that the applicant bears an onus of showing that the respondent's refusal of consent is unreasonable can no longer be regarded as unqualifiedly authoritative. The letter and spirit of the new framework, giving supremacy to the best interests of the child, sets a standard which is not proof on a balance of probability. What is required is that the court acquires an overall impression and brings a fair mind to the facts set up by the parties. The relevant facts, opinions and circumstances must be assessed in a balanced fashion and the court must render a finding of mixed fact and opinion, in the final analysis a structured value judgment, about what it considers will be in the best interests of the child.

10. In any event, it has been long recognised that the method for resolving the facts in motion proceedings propagated by Corbett JA in *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*

[1984] ZASCA 51; 1984 (3) SA 623 (A) leaves limited scope for consideration of the probabilities. The overriding principle, by necessity, must always be (and no thing has changed in this respect) whether the relief to be granted will be justified with reference to the common cause facts, the facts put up by the respondent, and those facts put up by the applicant, the denials of which by the respondent are untenable or uncreditworthy to the extent that they can be rejected and the contrary allegations of the applicant safely accepted. Moreover, bearing in mind that at least 23 factors are mandated by section 7 of the Act for consideration in relocation cases, none of which alone ordinarily will be decisive of what is in the best interests of the child, a court should hesitate to order recourse to oral evidence to resolve a dispute of fact about any one such factor when findings in relation to the others have been satisfactorily resolved and point inexorably to a particular resolution. Then, to state the obvious, the respondent's version of the disputed fact should rather be accepted, unless of course it is uncreditworthy. Where, however, on the rare occasion, that fact alone might prove decisive or critical in one way or another then a reference to oral evidence may still be justified.

11. As mentioned, the respondent at the commencement of the hearing made application for the matter to be referred to oral evidence. The disputes of fact alleged by him pertain mainly to differences arising from the various expert reports annexed to the affidavits of both parties. In keeping with the preceding sentiments, I therefore directed the parties to argue the matter in accordance with the Plascon-Evans formula and reserved my decision to grant or dismiss the application on the papers or alternatively to refer any specific factual disputes to oral evidence for determination on the probabilities should I reach the conclusion that such was necessary.

12. Against that backdrop I turn now to the facts, relevant considerations and issues arising in the application.
13. The applicant and the respondent are still relatively young parents. They were divorced in December 2005 when B , the only child born of the marriage , was 18 months old. In terms of the settlement agreement incorporated into the order of divorce, custody of B was awarded to the applicant subject to the respondent's reasonable rights of access and contact. The access agreed upon , on the recommendation of the Family Advocate, was of a limited nature. Until the child turned 3 (he is currently 4) the respondent was restricted to seeing him every alternative Saturday at the home of the applicant for a period of 3 hours. Between the age of 3 and school going age the respondent would be entitled to see the child one day on every alternative weekend between 08h00 and 18h00. Once the child reached school going age (which he has yet to do) more generous access would be granted.
14. It is common cause that since the divorce the parties have not stayed within the parameters of the access agreement. The respondent currently removes B on alternative weekends from Friday 12h15 until Sunday 18h00, and sees him every Tuesday and Thursday afternoon for a few hours, alternative public holidays, father's day and on the respondent's birthday.
15. On 22 December 2007 the applicant married Mr . Sean Cunningham ("Cunningham") a citizen of the USA . The applicant met Cunningham in 1999 for the first time and had limited contact with him over the following 8 years. They nevertheless corresponded on a regular basis. They met on a few occasions, spending relatively short holidays together, before their engagement and marriage. Cunningham is an attorney and is currently employed as the Chief of Staff of a member of the Texas House of Representatives. He owns a double story, three-bedroom, three- bathroom home in Round Rock, a suburb of Austin , Texas . The house is in good condition, has a good sized front yard and includes a separate bedroom and playroom available to B . This house will become the marital home to which the applicant wishes to relocate B .
16. The applicant's reasons for wanting to relocate with B are therefore fairly straightforward. She is a 29 year old woman, recently married to a successful professional living in the USA . As she puts it, she has a new life and family in the USA . She wishes to make B a part of it and feels entitled to do so because she has since birth been B 's primary care giver . She indisputably has a close bond with B , who is still of tender years. There is no argument that B needs the support , love and help of his mother. The applicant proposes in the first years after relocation to the USA to be a "stay-at-home-mom" to enable her to better assist B to adjust to his new environment. She contends that it would be in B 's best interests to relocate to Austin , which , according to the report of Ms Susan Galvin, a social worker based there , is ranked as No. 5 in the USA among best cities for relocating families . It is moreover rated No. 13 of safest cities in the USA according to a national study conducted by a reputable research company.

17. B, being only 4 years old, currently attends a pre-school in Garsfontein, Pretoria. He has a language difficulty, the nature, cause and extent of which is a matter of some disagreement. He lives mainly with the applicant who has since divorce resided with her parents. In accordance with the de facto arrangements he spends every second weekend with the respondent, who has recently re-married. The respondent's second wife, Suzanne, is currently pregnant. B is being brought up as a Christian. He enjoys the support of his maternal grandparents with whom he lives. He seems also to benefit from a satisfactory relationship with his paternal grandparents with whom he has regular contact. B has spent short periods with Cunningham, including time at the home in Round Rock. According to the applicant, B and Cunningham are in the process of fostering a loving relationship. She and Cunningham share similar family values and an appropriate approach to discipline. Cunningham earns a good living and is a practising Christian. In the two month period B spent with Cunningham in Austin, Cunningham's extended family reached out to B and accepted him with comfort, while B in turn responded to them with ease.
18. The respondent has put up strong opposition and relies on expert opinion in support of his contention that it will not be in B's best interests to relocate to the USA. The following conclusions drawn from the expert opinion of Dr L Hartzenberg, an educational psychologist, with clinical and forensic experience are of particular relevance: •

B has an exceptionally close bond with both parents.

•

B identifies strongly with the respondent as his father and tends to model his behaviour.

Although B's language development has improved since November 2007 a significant language backlog still exists.

B's possible relocation to the USA, resulting in a separation from his significant attachment figures may result in regression of his development milestones.

B will be exclusively dependant on the applicant if he relocates to the USA for the structuring and maintaining of his memories of his paternal family, which may prove problematic due to the acrimonious relationship between the applicant and the respondent.

Relocation will have implications for B's language development and usage, particularly his backlog with Afrikaans.

One should not assume that B will adjust well to residing in the USA exclusively on the basis of his performance there during a two month holiday over the Christmas period.

The applicant has no emotional support network in the USA other than her new family with whom she has had limited contact.

The applicant has not spent a significant period of time with her new husband and it is difficult to assess how their relationship will evolve beyond the so-called honeymoon phase.

19. The respondent also avers that the applicant has constantly frustrated his efforts to exercise his access rights and has submitted that she will do likewise more easily if permitted to relocate B to the USA . The parties have litigated against each other more than once in relation to the applicant removing B temporarily to visit the USA and again when the applicant made an aborted attempt to visit Cunningham in Belgium . I accept that the acrimonious relationship between them has probably resulted in access to B not being quite in accordance with the respondent's wishes. However, one should not lose sight of the fact that the respondent has been granted access in excess of that provided for in the settlement agreement. Had the applicant wanted to frustrate the respondent's contact with B she could have more vigorously defended her rights under the initial agreement. That she did not do so points towards a measure of equanimity on her part.
20. The respondent is genuinely and bona fide concerned about the relatively short period the applicant and Cunningham have known one another. He fears that the relationship may not work out and B will then be uprooted and returned to South Africa . In contrast, he maintains, he is in a well-established and stable relationship with Suzanne with whom he has been residing for about 18 months since November 2006. He places little in store by the fact that the applicant and Cunningham have known one another for 8 years. He accentuates rather the fact that they have resided together intermittently for no more than a few months in total since 2006 .
21. The respondent adds that if allowed to relocate B will be deprived of forming a relationship with his sibling due to be born in December 2008. He and Suzanne have decided that when the new baby is born, Suzanne too will be a "stay-at-home-mom" , and will be able to look after B during the day . As a self-employed businessman he too can contribute significantly to B's care in view of his flexible working hours. If B stays in South Africa he will have the advantage of remaining among family and friends who share the same culture, traditions and language.
22. The respondent and B have a good relationship . This is confirmed by all the expert reports and the applicant. Despite his young age, B has spent extended periods with the respondent. Under the relaxed access arrangements he has stayed every alternate weekend with the respondent for the past two years or so. The longest uninterrupted stay B has had with him appears to be about 2 weeks during July 2007 when the applicant visited Cunningham in Ireland . All this redounds favourably to the credit of the respondent, supporting his uncontested assertion that he is a good involved father. It flies somewhat in the face though of his often repeated claim that the applicant regularly and unjustifiably sought to frustrate his contact with B .
23. The respondent concedes that the acrimony between him and the applicant may be partly as a result of his having conducted an extramarital affair during the marriage , which led to the divorce and the applicant returning to live with her parents. That acrimony , he says, includes recent efforts on the part of the applicant to breakdown his image as B's father .

24. Finally, the respondent mentions occasions on which B has expressed the wish not to return to the applicant after visiting the respondent and has voiced enthusiasm about the arrival of his soon to be born sibling . The applicant submits that this should not be interpreted to mean B would prefer to be left behind in South Africa while she relocated to the USA .
25. No less than six experts have filed reports in this matter. There are three reports dealing with B 's language difficulty: t wo by Ms MA Jessop and one by Ms N Rau B heimer. There are two reports from social workers: Ms Susan Galvin, a licensed clinical social worker in Texas ; and Ms E Scheepers, a social worker in South Africa . Finally, there are three reports from psychologists: two from Dr L Hartzenb e rg and one from Ms C van der Walt. The reports from the social worker s and the language therapists are for the most part uncontroversial. Those of the psychologists, on the other hand, have led to several disputed submissions and contentions.
26. I will deal first with the reports of the speech therapists and the issue of B 's language. Both parties con cede there is a difficulty but differ as to the extent and consequences of it. B 's teacher Ms L Uys has filed an affidavit in which she avers that B is well adjusted and a popular child. Desp ite being Afrikaans, B appeared to her to be more comfortable speaking English, chose to play with English speaking children and understood English instructions better than Afrikaans. B attended speech therapy from December 2006 to November 2007 with Jessop on a weekly basis. He continued with therapy from March 2008. Both parents are actively involved. Rau B heimer evaluated B in May 2008. Her findings are e ss ent i ally that B is experiencing developmental difficulties in auditory perception, expressive vocabulary, expressive language, story repetition, receptive language and other areas of language development. According to Jessop's second report, despite significant progress in receptive and expressive language and auditory processing skills, B 's receptive and expressive language development were not yet at an age-equivalent level. He has difficulty with auditory sequential memory, the planning stages (ideation) of language, number concepts, word selection and sequencing, as well as comprehension, organisation and structuring of various linguistic elements. She recommends that B 's parents communicate with him using his first language and states that schooling in a second language could pose a barrier to B 's ability to access his full learning potential, as lang uage is a significant predictor of academic success.
27. None of the evidence related to B 's language ability is in dispute. Where the parties differ is in their interpretation of the problem and their opinions of what should be done about it. The applicant believes B will B efit from a better education system and superior facilities in Texas . The respondent submits on the contrary that it will not be in B 's best interest to be exposed to schooling in English when he has not mastered his first language, namely Afrikaans. He also maintains that there is insufficient information regarding the kind of schooling B will eventually receive in Texas . He is concern ed that moving B to Texas will entrench B 's learning difficulties, while the emotional support and constancy B experiences in South Africa will ease the problem.

28. Galvin's report provides useful insight into the environment B will move to if relocated to Texas . The respondent has not launched a serious challenge to its contents, other than to repeat his assertion that the applicant's support structure in Texas has yet to be seriously tested. It is obvious from the report that Cunningham is well to do, has a sizeable and attractive home and is successful professionally. The house is safe and is located in a quiet neighbourhood close to an elementary and middle school (up to Grade 9). The schools have been ranked in accordance with appropriate tools of measurement as among the best in Texas . Cunningham belongs to a close extended family , who live in the same neighbourhood. Galvin observed that while in Texas B was able to separate from his mother and engage with her appropriately without undue separation anxiety. None of this is in dispute.
29. The reports of the two psychologists have become controversial and are disputed in significant respects.
30. The applicant has annexed the report of Ms van der Walt (an e ducational p sychologist) who was requested to do an evaluation on whether it would be in B 's best interest to relocate with the applicant to the USA . Ms van der Walt chose to complete her evaluation without any psychometric tests. Because Dr Hartzenberg (the respondent's preferred psychologist) had already done psychometric tests in November 2007, van der W alt decided to limit her evaluation to interviews wit h the applicant and respondent. She also observed B 's interaction with the applicant but not the interaction between B and the respondent. She conducted a number of separate interviews with the parties, B , and the grandparents , between 13 March 2008 and 8 May 2008. Her reason for not observing the interaction between B and the respondent is not clearly explained in the report.
31. For reasons which will become clear presen tly, I do not propose to attach much weight to the report of Ms van der Walt . It is sufficient for present purposes merely to record some of her observations, findings and recommendations. The following are the most noteworthy . •

In her first evaluation of B it became evident to her that B was under tremendous strain and had difficulty understanding her.

She did not observe any aggressive or emotional outburst s (as had been noted by Dr Hartzenberg) but concluded that B was depressed and hence that B had probably "exchanged his aggressive behaviour for depression". She described B as "emotionally unstable".

While she experienced the applicant as co-operative, she perceived the respondent as unrealistic, very manipulative and controlling, so much so that she stated: "after a telephonic conversation with Mr. Pretorius, in which he was intimidating, unrealistic, demanding and controlling, I decided not to subject myself to any more contact with him". Further in the report she concludes:

“He questions everything Mrs . Cunningham does, to the extent that she finds it almost impossible to cope. This leads to their constant fighting to which B is subjected. Although I overheard one of their fights, Mr . Pretorius denies that they do fight.... As it is with manipulative controlling people, one just gives up in trying to bring a standpoint across.”

The report includes many similar assertions about the respondent that lead one to the unavoidable conclusion that Ms van der Walt developed a strong dislike for the respondent and disapproved of his parenting. •

After consulting with experts, she was of the view that B was likely to benefit from the emotional stability he would experience in Texas which could have a positive effect on his language development.

She recommended that B be permitted to accompany the applicant to the USA and made certain proposals regarding the respondent’s contact and access rights. Her principal reason for the recommendation is that it was quite clear to her that the applicant “is by far the better parent”, is B’s “primary attachment figure” and “a loving, caring mother”. She believes furthermore that B’s depression and emotional instability, as well as his regression in speech, are related to the conflict between the applicant and respondent because she noted a marked improvement when B returned from the USA after spending two months there with the applicant and Cunningham.

32 . On the basis of Ms van der Walt’s observations, the fact that she has always been B’s primary care giver and the close bond between her and B , the applicant submits that B clearly and quite naturally needs to accompany her to the USA .

3 3 . The respondent objects strongly to and disagrees with many of the statements, findings and conclusions in the van der Walt report. In the first place he points out that van der Walt perceptibly dislikes him . He accordingly questions the objectivity and impartiality of the report. He also states that her observations and evaluations are based on a few perfunctory contacts and only one interview. The applicant does not deny this.

3 4 . Whether the respondent is indeed possessed of the negative character traits ascribed to him by van der Walt is a question of fact. Assuming, without deciding, that such traits did manifest in his contacts with van der Walt, a question would always remain about the weight and significance to attach to them. Human nature being what it is, one can expect parents in custody disputes to fall short of the best standard of behaviour they normally expect of themselves or others might prefer to witness. Without recourse to oral evidence , I am denied the opportunity to judge the character or temperament of the respondent. I am also reluctant to do so on the basis of a report drawn up at the request of the applicant on so restricted a method of evaluation involving a limited number of contacts between the analyst and the respondent. The respondent denies the credibility and reliability of the facts and opinions in the report. Accordingly, the safest course is to leave the van der Walt report out of reckoning entirely . By that I intend no criticism of Ms van der Walt. Rather the potential for a multiplicity of factual disputes constrains me to do so if I am to resolve the matter in accordance with the Plascon-Evans approach. Taking account of the limited method used and the respondent’s reasonable apprehension of a measure

of bias, his denials cannot be characterised as untenable or uncreditworthy to the point that I would be justified in rejecting them. I am compelled, therefore, to rely instead on the allegations and opinions pertaining to the psychological aspects put up by the respondent in his affidavit.

35. As Ms van der Walt herself stated, the report of Dr Hartzenberg is based on a more scientific method and is more complete. The respondent aligns himself fully with the factual allegations and opinions contained in the report which he has annexed to his answering affidavit. The report in fact comprises two reports: one dated 5 November 2007 and the other 17 July 2008. I have already drawn attention to Dr Hartzenberg's key conclusions by way of background. It is now necessary to elaborate upon them more fully.

36. Dr Hartzenberg has an impressive array of tertiary qualifications from the University of Pretoria. She holds the following degrees: BA; Dip Tertiary Education; B Ed (Psych); M. Ed (Career Orientation) cum laude; M Ed (Psych); and PhD. The focus of her expertise is centered primarily on psycho-diagnosis and intervention with children and families. She has executed numerous assessments in sexual abuse as well as custody and access cases, which have culminated in reports for forensic purposes. She has been involved in academic research and presentations, counselling and training. She is registered as a service provider with the Health Professions Council of South Africa and has offered accredited courses to social workers and psychologists dealing with: assessment and intervention for traumatised children, adolescents and families; the use of expressive and projective media for diagnostic and therapeutic purposes; and the role of the psychologist in divorce and custody cases.

37. The applicant has challenged the objectivity and impartiality, and hence credibility and reliability, of Dr Hartzenberg's report. Her concerns arise out of an alleged relationship between Dr Hartzenberg and the respondent's family. The respondent's father, Mr. Pretorius Snr, like Dr Hartzenberg, is an educational psychologist. It is common cause that Mr. Pretorius Snr and Dr Hartzenberg are professionally acquainted with each other. The applicant's allegation, made for the first time in the replying affidavit, is that the relationship goes further than that and is in fact a friendship and that the respondent has utilised her services because she is known to the family. The respondent has not sought leave to file a further affidavit dealing with this allegation, which leave he might confidently have assumed would have been granted in light of the importance of the issue. Nevertheless, I was informed by counsel from the bar that Dr Hartzenberg, while admitting a professional acquaintanceship, denies the relationship has attained the level of a friendship such as to compromise her objectivity. I am prepared, in the interests of avoiding further delay, to rely on counsel's assurance and accept that the association is a professional one, though I do so mindful of the possibility that it could have had some influence.

38. The applicant's second concern about Dr Hartzenberg is that she considers Dr Hartzenberg to have been compromised because the respondent's family sent her (the applicant) to Dr Hartzenberg for psycho-therapy during the divorce proceedings. The suggestion was also made, with reference to a Discussion Document of the Health Professions Council of South Africa Professional Board for Psychology, defining the scope of practice of the different kinds of psychologists, that Dr Hartzenberg in offering psycho therapy had strayed beyond the

professional boundaries for which she is registered. Dr Hartzenberg has had no opportunity to respond to this and I accordingly express no view in relation to it. As for the therapy session itself, the invoice for the services rendered to the applicant, annexed to the replying affidavit, indicates that there was only one session involved. That fact, measured with the quality of both the tone and content of the report itself, does not in my opinion negate the objectivity of the report.

39. The aim and objective of Dr Hartzenberg's assessment was to evaluate the cognitive functioning and stability, and parental ability and functioning of both the applicant and the respondent; as well as B's cognitive and social-emotional development. To this end Dr Hartzenberg evaluated the nature of the relationship between B and his parents, with specific attention to the impact of B's possible relocation. And finally she looked at the nature of B's relationship with Cunningham.

40. The first report was completed before the applicant's marriage to Cunningham (November 2007), the second report thereafter.

41. The method of evaluation employed by Dr Hartzenberg involved the obtaining of information through semi-structured interviews, clinical observations, biographical information supplied by the parties, documentary evidence and psycho-diagnostic tests in which B, his parents and their respective partners participated.

42. Dr Hartzenberg employed six universally acknowledged standard psycho-diagnostic tests, namely: •

The 16 Personality Factor Questionnaire (16 PF) which is one of the most important personality tests available to the behavioural sciences. The test results can offer an insight into these aspects of a person's primary personality structure that can contribute to or impair an individual's performance within his environment.

Parent-Child Relationship Inventory (PCRI) which yields a quantified description of the parent-child relationship that complements other assessment procedures used in clinical evaluations of children and families. By quantifying aspects of parent-child interactions, the instrument makes it possible to verify clinical hypotheses about individual and family disturbance against a background of objective data.

Thematic Apperception Test (TAT) which qualitatively analyses stories told by the testees while interpreting pictures. The test determines the world view of the testee, perceptions regarding interpersonal relationships and the level of a person's anxiety.

Structured Objective Rorschach Test (SORT), as standardised for South African conditions, is aimed at obtaining psychologically meaningful data by means of which a broad overall picture of the individual can be obtained.

Emotional Profile Index (EPI) which is designed to yield information about basic personality traits and personality conflicts in an individual's life. It is used as a supplement to the SORT.

Rotter Incomplete Sentences which requires the client to complete incomplete sentences to determine recurrent themes present in the sentences and language usage.

4 3 . The application of these tests has generated a wealth of information about both parties and B . What follows is a summary of that most relevant to the present application.

4 4 . The respondent is an only child (now aged 31) with a close bond with both his parents. His family was stable. He completed matric and then enrolled at university to study sport s science but did not complete his degree. His marriage to the applicant lasted only 18 months and ended as a result of his involvement in an extra-marital affair. He describes his relationship with his present wife as more stable. He is a director of his own business and works flexible working hours. Dr Hartzenberg described him as friendly, outgoing and spontaneous. He states his viewpoint with conviction. He accepts that the applicant is a good mother , but believes that she is not acting in B 's best interests. He view s B 's language developmental backlog as a significant factor and has been actively involved in ensuring appropriate interventions to deal with the problem. He has average general intellectual abilities. The SORT revealed him to be a person who tends to ignore fine details and as not very precise in his thinking. He has a tendency to stick to fixed ideas, with an unwillingness to change his point of view. He enjoys taking part in group activities and would probably submit his own immediate needs to the long term interests of others. His emotional energy t ends to dissipate in non-productive channels which could impact on his ability to follow through on planned action. He displays a strong predisposition not to deviate from a set course, which could seem like stubbornness. Yet, he is quick to offer support and understanding to friends, family and colleagues, and is generous in his interpersonal relationships. He is unlikely to be manipulative, but can howe ver be seen to be blunt and tact less on occasions and may exercise poor judgment in certain situations. He indicates an extremely high level of knowledge of and involvement with B and has a positive self-image as a father. He has adequate parental attitudes, congruent with good parenting, but may find it difficult to remain emotionally objective in his relationship with B . He yearns for a close-knit family.

4 5 . The applicant also comes from a relatively stable family. She has one sibling, an older brother. She moved back to her parents after the failure of her marriage to the respondent. She too matriculated. She commenced her tertiary education in architectural studies which she failed to complete. She is currently a 2 nd year law student at UNISA. She works as a broker consultant for a financial services company. She believes a relationship with God, respect for self and others and a good education are the most important factors in B 's upbringing. She is antagonistic towards the respondent and critical of him and his style of parenting. She has high-average general intellectual abilities. She tackles problems in a concrete and practical manner. She has above average ability to reason on both a deductive as well as inductive level indicating mental adaptability and efficiency. Her intellectual potential is therefore more effective, because of the versatility of her logical processes. She has a high predisposition for mental alertness, precision and exactness in perception of reality and an awareness of and conformity with the demands of her environment. She too, like the respondent , exhibits a tendency to stick to fixed ideas with an

unwillingness to change her point of view. She is however empathetic. The SO R T revealed that she has high aspirations to attain certain goals, with a willingness to accept life's challenges with the quality of mature self-control. The 16PF shows that she does not enjoy group activities and is unlikely to submit her own immediate needs to the long-range interests of others. She has the ability to control her emotional energy and can therefore follow through on planned action. She can be blunt, tactless and suspicious. Yet, she is practical, conventional and careful in her approach to problems. She attaches greater value to family ties than to friendships. She is currently experiencing high levels of tension and free-floating anxiety. The TAT shows that she is suffering a recurring theme of rejection, mistrust and unmet emotional needs. She evidently feels humiliated and betrayed by the respondent's extra-marital affair and projects emigration as a good way to start a new and better life.

46 . At risk of over-simplification, what the psycho-diagnostic tests reveal is two young people displaying relatively normal personality strengths and weaknesses , acting out the strain and tensions to be expected in the circumstances they find themselves. Neither is bedeviled by any peculiar pathology which operates to disqualify them from the parenting role.

47 . With regard to B , Dr Hartzenberg confirms that he has a significant developmental backlog with regard to his language development. During 2007 B was experiencing a significant degree of anxiety (to be expected, in the circumstances) which has resulted in aggressive and emotional outbursts . He has not achieved his developmental stage of development successfully, on both a cognitive and emotional level. Nevertheless, his fine-motor and gross-motor co-ordination is normal.

48 . The interaction between B and the respondent is described as indicating a secure emotional bond between them and a relationship of understanding, trust and authority.

49 . The applicant is described as managing B in a calm and confident manner. B responds to her positively and her patience with him is particularly noticeable. Here too , there is a successful relationship of understanding, trust and authority.

50 . Dr Hartzenberg conducted an interaction analysis with Cunningham after B had been on holiday with him in the Kruger National Park . Her conclusions in this regard read:

“ B appears to be comfortable in Mr. Cunningham's presence. However, as a result of B not understanding English and Mr. Cunningham not understanding Afrikaans, communication between Mr. Cunningham and B transpires problematically and with difficulty. Mr. Cunningham attempts to participate in B 's play activities, but B becomes so engrossed in his play that he tends to ignore him or becomes irritated with Mr. Cunningham's endeavours to interact with him, which appears to make Mr. Cunningham feel somewhat uncomfortable ”.

Besides the evident contradiction between the first and last sentence of this statement, Dr Hartzenberg's assumption about the language issue is at odds with the views of Ms Uys, B's teacher who describes him as more proficient in English, something the respondent has not denied. In fact, my understanding is that one of the respondent's main concerns is that B lacks

proficiency in Afrikaans and will lose it further if he relocates to the USA . In other parts of her report Dr Hartzenberg reiterates her view that Mr. Cunningham is not a significant attachment figure for B at this stage.

5 1 . In her ultimate assessment Dr Hartzenberg opines that younger children face greater psychological risk than older children when their attachment to a significant other is disrupted. Children are capable of and often profit from multiple simultaneous attachments. Therefore, while she accepts that the applicant is B's primary attachment figure, there is no denying the long-term benefits to children of maintaining high quality relationships with both parents and concomitantly the harm associated with disrupted relationships. In her second report she elaborates on the point by saying that the traditional emphasis on the mother-child relationship has probably led to neglect of the importance of attachment security with other significant partners. In B's case he has significant attachments to both sets of grandparents and his stepmother. She underlines that where a child is exposed to an overload of changes and adjustments, following inter alia from a separation from attachment figures , such may exceed his coping capabilities and result in stress and anxiety. She predicts this will result in B's case and lead to further regression in his language ability.

5 2 . Her ultimate conclusion, therefore, based on her specific findings set out earlier in this judgment , is as follows :

"It is the opinion of the undersigned psychologist that it is likely to be detrimental to B's psychological well-being, as well as his special education needs in terms of his language backlog, that he be relocated to the USA . Ms Ferreira's (the applicant) application to relocate with B to the USA should be denied based primarily on the "best interest of the child criterion".

5 3 . The report by the social worker Ms Scheepers, annexed by the applicant , does not take matters much further. In the final analysis, the issues raised in that report do not add or subtract anything of consequence to the findings made by Dr Hartzenberg.

5 4 . In F v F 2006 (3) SA 42 (SCA) Maya AJA (as she then was) elucidated the overall approach to substituted consent applications. Keeping the best interests of the child paramount, the fundamental rights of the parents are nonetheless equally involved. Thus, she explained (at 49B-D):

"From a constitutional perspective, the rights of the custodian parent to pursue his or her own life or career involve fundamental rights to dignity, privacy and freedom of movement. Thwarting a custodian parent in the exercise of these rights may well have a severe impact on the welfare of the child or children involved. A refusal of permission to emigrate with a child effectively forces the custodian parent to relinquish what he or she views as an important life-enhancing opportunity. The negative feelings that such an order must inevitably evoke are directly linked to the custodian parent's emotional and psychological well-being. The welfare of a child is, undoubtedly, best served by being raised in a happy and secure atmosphere. A frustrated and bitter parent cannot, as a matter of logic and human experience, provide a child with that environment."

5 5 . In Jackson v Jackson 2002 (2) SA 303 (SCA) at 318 Scott JA made essentially the same point with slightly different emphasis. He said:

“It is no doubt true that, generally speaking, where following a divorce, the custodian parent wishes to emigrate, the Court will not lightly refuse leave for children to be taken out of the country if the decision of the custodian parent is shown to be bona fide and reasonable. But this is not because of the so-called rights of the custodian parent, it is because, in most cases, even if the access by the non-custodian parent would be materially affected, it would not be in the best interests of the children that the custodian parent be thwarted in his or her endeavour to emigrate in pursuance of a decision reasonably and generally taken.”

5 6 . Added to that, as pointed out by Maya AJA in F v F (at 49F), it is still predominantly women who care for children and that reality appears to be reflected in many custody arrangements upon divorce. Hence, she concluded:

“The refusal of relocation applications therefore has a potentially disproportionate impact on woman, restricting their mobility and subverting their interests and the personal choices that they make to those of their children and former spouses.”

However, the learned judge of appeal went on to caution (at 50C-D):

“While attaching appropriate weight to the custodian parent’s interests, Courts must, however, guard against ‘too ready an assumption that the [custodian’s] proposals are necessarily compatible with the child’s welfare’ - Payne v Payne [2001] 1 FLR 1052 (CA) in para 40 (per T horpe LJ). The reasonableness of the custodian’s decision to relocate, the practical and other considerations on which such a decision is based, the extent to which the custodian has engaged with and properly thought through the real advantages and disadvantages to the child of the proposed move are all aspects that must be carefully scrutinized by the Court in determining whether or not the proposed move is indeed in the best interests of the child.”

5 7 . These judicial pronouncements add an important gloss in relocation cases to the basket of factors normally taken into consideration when the best interests of the child standard is applied in terms of section 7 of the Act.

5 8 . Some of the factors identified for consideration by section 7(1) can be immediately discounted as having no relevance to the present application. For instance, B does not suffer from any chronic illness (section 7(1)(j)); nor is there any need to protect him from abuse or family violence (section 7(1)(l) and (m)).

5 9 . The primary factors in this case are the nature of the relationship between B and his parents, and the attitude of both towards him. I have no doubt at all , on the basis of the evidence and opinions , that B has a deep attachment to both parents and that they have entirely appropriate loving relationships towards him. That they may presently be unable to see the negative impact upon him of their litigious conduct towards each other is understandable. A decision granting permission to relocate will coincidentally have the advantage of avoiding or minimising further legal or administrative proceedings in relation to B because of the distance, a relevant

consideration in terms of section 7(1)(n), but one which should not be weighed uncritically in isolation of other more meaningful factors .

60 . There is no escaping the reality that if B relocates his relationship with his grandparents and his stepmother will be negatively affected and he will suffer the loss of them. It is common cause that these relationships constitute vital attachments. There is every likelihood that the loss of them will diminish B's ability to cope. This disadvantage , however, will be mitigated by the capacity of the applicant (and Cunningham) to provide for B's needs including his emotional and intellectual needs in Texas

- (section 7(1)(c)) . Dr Hartzenberg's assessment of the applicant's intellectual potential, the versatility of her logical processes and her predisposition to be aware of and to meet the demands of her environment present an optimistic picture of her ability to help B adjust to a new situation and compensate for his loss of attachments. It is common cause that she is an empathetic and involved mother.

61 . There is no dispute about the fact that if B relocates to Texas his physical environment will be secure

- section 7(1)(d) and (h). Cunningham has a decent and appropriate home in a desirable neighbourhood and is on a successful career track. On the assumption that the marriage works out, the lifestyle and opportunities he will provide to the applicant (and ultimately B) will offer satisfaction and fulfilment to the applicant, in accordance with her high aspirations to attain her goals and her readiness to accept life's challenges. Her identified quality of mature self-control will ensure the desired degree of security.

62 . Whatever these compensations though, B will not only lose his attachments, but will also lose the benefit of a full relationship and regular contact with his sibling to be born in December 2008. By the same token, and without wishing in any way to diminish the importance of the respondent's relationship with B , the birth of his second child will bring the respondent some comfort should B relocate.

63 . Of critical importance, of course, is the fact that B is at a tender stage of development. He is 4 years old and has lived most of his life with his mother, his primary care giver - section 7(1)(g) . It would be a disconcerting loss for both of them were she to be compelled to relocate without him. The reports do not fully explore the implications for B of a loss of this order . It is safe to assume that to a 4 year old boy the loss of his primary care-giver, his mother, with whom he has lived more than 95% of the time and with whom he has a healthy, unproblematic and deeply bonded relationship, would be profoundly disturbing and harmful. Leaving aside the relocation issue, and keeping in mind the Family Advocate's recommendations at the time of divorce, there is no legitimate reason to deprive the applicant of custody of B . Any refusal of the application to relocate would therefore compel the applicant to face a stark choice between her marriage and her child. While the respondent is free to start a new family, she would not be.

6 4 . This brings me to the bona fides and reasonableness of the applicant's decision to relocate. The respondent has made no attempt to assail the bona fides of the applicant's reasons for wishing to relocate. The applicant has fallen in love with and married a foreigner. She wants to join her husband and to forge a better future for herself and B . The respondent, however, does attack the reasonableness of her decision. His views appear from what has been said above . He believes the applicant's decision is impulsive and has not been properly thought through. While conceding that B will have the prospect of certain opportunities in the USA , the impact of the move on his language difficulties will impede his academic development. The applicant will have a limited support network in the USA and it will therefore be difficult to maintain the positive memories of his significant attachment figures. The respondent questions the stability of the applicant's relationship with Cunningham, describing it as still being in the "honeymoon phase" and contrasting it to his own relatively recent marriage which he describes as "well-established and stable".

6 5 . In support of his assertion that the applicant has acted impulsively in getting married, the respondent referred in the answering affidavit to an observation recorded by Dr Hartzenberg in her second report that the applicant during a consultation in July 2008 indicated to her that she had not planned to get married during her December 2007 visit to the USA but had done so in response to encouragement from Cunningham's family . This behaviour , the respondent submitted, is indicative of how the applicant takes major decisions in her life - "head over heels without taking time to weigh up all the pros and cons" - and thus , he maintains, the decision to relocate to the USA was not properly weighed up by the applicant.

6 6 . I can find no similar criticism of the applicant in any of the expert reports. On the contrary , the results of the psycho-diagnostic tests paint the opposite picture of her . Dr Hartzenberg assessed her to be a woman who "has the ability to control her emotional energy and can therefore follow through on planned action". She is also described as practical, conventional and careful in her approach to problems. The inference drawn by the respondent is accordingly inconsistent with the facts alleged and opinions stated by his own expert. Besides that, Dr Hartzenberg considers the applicant to be adaptable, efficient and logically versatile, and hence likely to be effective. She thus most likely will be able to counter and adapt to any unforeseen consequences arising from her decision with relative ease

6 7 . The applicant denies that she told Dr Hartzenberg that she had not planned to marry in December 2007, and in general terms defends her decision to marry. She has known Cunningham for 8 years, and although the courtship was relatively brief, and their actual time spent together intermittent and short , considering her psychological profile, there is no justification for concluding that her marriage is destined for failure. Her previous marriage failed because of the respondent's infidelity of which the applicant continues to feel ashamed. Her psychological and emotional profile is such that she likely will do everything to ensure the success of her marriage. By contrast, according to Dr Hartzenberg, the respondent is a person whose "emotional energy tends to dissipate in non-productive channels which could impact on his ability to follow through on planned action". These are the facts and opinions put up by the

respondent. They do not support a conclusion that the applicant has acted impulsively or with unreasonable haste. I accordingly see no need to seek resolution of the dispute of what was or was not said by the applicant to Dr Hartzenberg during the consultation in July 2008 regarding her decision to marry.

6 8 . Hard as the reality facing the respondent may be, the way in which the applicant may choose in a reasonable manner to order her life is one of those things he may simply have to bear . His unjustified speculations about the prospects of her marriage can have little influence - P (LM) (otherwise K) v P (GE)

[1970] 3 All ER 659 (CA) at 662 h-j. Were I to refuse permission on this ground , and compel the applicant and her new spouse to adopt a manner of life which they do not want, the frustrations and bitterness that would cause would not only strain their new marriage but would adversely impact on B 's interests - see *Chamberlain v De La Mari*

[1983] 4 FLR (CA) at 439.

6 9 . In the result , I am persuaded that the applicant's decision to emigrate is not only bona fides , but also reasonable. That alone though does not justify the grant of permission. There remain other considerations of the child's best interests that still need to be weighed; not least the competing advantages and disadvantages of relocation and the impact on the relationship with the non- custodian parent; some of which I have already discussed .

70. B 's language difficulties present their own peculiar difficulties. The language therapists do not make a clear diagnosis of the cause of the problem. That there is a problem is beyond dispute. The prognosis for improvement is not clear either. However, Ms Jessop strongly recommends that the parties continue to communicate with B using his first language (Afrikaans), and that schooling should also be in this language. Her view is that schooling in a second language could pose a barrier to B 's ability to access his full learning potential. In other words, a move to Texas , in her view , could have a harmful effect.

71. Whatever the nature of B 's language difficulty, whether it is an intrinsic developmental deficit or a product of his present acrimonious environment, all of the options he faces will pose additional challenges. The move to Texas will not be easy. Remaining behind without his mother will add even greater strain. And remaining here with a mother thwarted in satisfying her own needs will bring its own emotional and psychological complications. Whichever way it goes, B faces a challenge that will impact on his language and intellectual development. The relatively privileged environment to which he will move in Texas, the equal if not superior support systems likely to be on offer there, as well as his mother's adaptable, focused and efficient character, lead me to believe that his disability, if it is indeed such, will be adequately managed in Texas with dignity and in a manner promoting his ultimate self-reliance. Moreover, I do not accept that his difficulty is of an order justifying either separating him from his mother or the compulsion of the applicant to stay in South Africa against her wishes, possibly causing her to forfeit any prospect of a happy marriage. I am fortified in this conclusion by the following observation made by Dr

Hartzenberg in her most recent consultation with B after he returned from spending two months with the Cunningham family in the USA :

“No behavioural indications of aggression or depression were observed and he happily complied with all the tasks given. He preferred to converse in Afrikaans with the evaluator, but when communication took place in English he switched over to that language without comment and it is noticeable that he uses an American pronunciation with certain words. His expressive language and more specifically his articulation have greatly improved. However, significant language confusion with a combination of English and Afrikaans is evident.”

I read this observation to mean there are reasons for optimism in the prognosis. But B , like many bilingual children, will still be challenged by his bilingual environment.

7 2 . Perhaps the most vexing of the issues in balancing all relevant factors is the practical difficulty and expense involved in B having contact with the respondent if he relocates and the substantial impact it is likely to have on B ’s right to maintain a meaningful, personal relationship with his biological father - section 7 (1)(e). In the modern world, marked by globalisation and increased mobility, when marriages break up , one parent’s interests invariably will have to yield to those of the other. When the balance of factors (in this case the age of the child, the bond, the favourable environment and opportunities available at the place of relocation , and the custodian parent’s capacity) all favour the custodian parent , the best the court can do is to ensure that meaningful contact and access continues with the non-custodian parent , albeit in a less satisfactory manner, and will not be thwarted by the custodian parent.

7 3 . The respondent has alleged that the applicant has consistently sought to frustrate his access rights. He claims it was only due to his insistence that he managed to exercise access. As I have already intimated, considering where the parties now find themselves, and the acrimonious tone of the litigation, I am certain that the parties have not been able to exercise their shared parental rights and responsibilities with the ease and comfort most beneficial to B . The psycho-diagnostic tests indicate that the applicant, a committed Christian, holds the family as central in her value system. This is evidenced by her extension to the respondent of access rights more generous than those to which he is entitled, her continued engagement with him and her efforts to ensure that B ’s removal and departure from the Republic are proper and legal. It is reasonable to infer from these facts that she will not seek to frustrate his ongoing access and contact over the long term. There is consequently no need to resolve the disputes of fact involving various incidents of post matrimonial strife with the aim of labelling one or other of the parents as unfit . They are both manifestly fit and loving parents. Their occasional bad behaviour towards each other falls within the norm of what can be expected in the circumstances, and the resolution of the disputes of fact one way or another will add or take nothing away from my finding that there is little likelihood that access and contact will be unjustly thwarted in the future . On the contrary I am optimistic that it will be encouraged.

74 . The access and contact proposals put forward by the applicant in her prayer for amending the settlement agreement are reasonable. She proposes internet communication via skype three times a week, regular contact during the school holidays and a sharing of the cost of airplane tickets. There is not much else that can be done to improve upon contact and access.

75. My ultimate conclusion therefore differs from the opinion of Dr Hartzenberg. It is perhaps trite to observe that a court dealing with custody issues can profitably be instructed by expert opinion evidence on the psychological issues involved. To the extent that such opinions include a recommendation or an opinion that it will or will not be in the best interests of a child to relocate , there may be some argument for regarding that evidence as inadmissible, to be excluded entirely from consideration because it amounts to the usurpation by the witness of the court's function of adjudicating the particular issue; and courts should be vigorous in avoiding any abdication of a function reserved by law to them. This line of thinking states the point too strongly. The experts in this case do not seek to usurp the court's function. The balance, professional quality and genuine effort to remain impartial , discernable in Dr Hartzenberg's report, are aimed at offering assistance to the court.

76 . Still, the court is not bound by the opinion of Dr Hartzenberg, or any other expert for that matter, on the primary issue for adjudication. As should be apparent from the previous discussion, many of the opinions expressed about the parties' personalities and B's stage of development have been of appreciable help. But the court must decide the issue of " the best interests of the child " itself and is free to reject any contrary opinion on that question expressed by a witness called by either party. There is nonetheless , as I have just said, much of value in the report of Dr Hartzenberg upon which I have been able to rely with confidence. Her opinion that B should not be allowed to relocate rests principally upon her apprehension that the applicant's marriage has not been tested by the day to day realities and challenges of life. In her cautious assessment, relocation to the USA with B , where the applicant would be solely dependent on Cunningham for financial and emotional support within an untested relationship, in an unknown country, would probably be a risk. She sees the adverse disruption in the relationship of B to his other significant attachment figures as outweighing the positive consequences of relocation. I respectfully disagree. A measure of prudent caution is usually a sensible thing, but equally much good can come from taking risks. And with due regard to the applicant's personality I prefer a more optimistic assessment that she is up to the risks and is capable of managing them in the best interests of both herself and B .

77 . In conclusion , therefore, having regard to the allegations and opinions put up by the respondent, as well as the common cause facts, and leaving aside the untenable assertions by the respondent that the applicant will frustrate his contact and access, I am able to decide that it will be in B's best interests to relocate with his mother. The applicant has made a reasonable and balanced judgment as to what she thinks is best for her and B . The financial position of both parties will ensure continuity of contact between B and his father. And the environment to which B will move is likely to be sufficiently secure and comfortable to compensate for any loss or difficulty the transition will entail. Quite evidently no court can predict the future with certainty,

yet life in Texas for B and the applicant clearly holds many attractions. The sentiment expressed by Nugent J (as he then was) in *Godbeer v Godbeer* (supra; at 981 J - 982B) rings true in this case too and thus bears repeating. He said:

“Undoubtedly the welfare of all children is best served if they have the good fortune to live with both their parents in a loving and united family. In the present case that was not to be. The respondent and the applicant considered that it was in the best interests of themselves, and no doubt the children, that they should live separate lives, thereby anticipating that their lives might take them on different paths. I do not think the applicant can be expected to tailor her life so as to ensure that the children and their father have ready access to one another. That would be quite unrealistic. The applicant must now fend for herself in the world and must perforce have the freedom to make such choices as she considers best for her and her family.”

7 8 . From what I have already said there is accordingly no need to refer any of the alleged disputes of fact to oral evidence because I am able and inclined to grant the applicant relief on the common cause facts and those alleged by the respondent. It is in the best interests of B that he be permitted to relocate with the applicant . The respondent’s withholding of consent is unreasonable and should be substituted with the consent of the court in terms of section 18(5) of the Act. Hence, the applicant is further entitled to the amendment to the divorce settlement which she seeks. Moreover, her claim for maintenance in the amount of R3000 is reasonable and affordable, being in effect a mere 10% increase in the total amount currently paid by the respondent. It follows that the counter application cannot succeed. As with most matters of this kind, I do not think any order for costs should be made.

7 9 . The following orders are accordingly issued:

1. The respondent’s counter application is dismissed.
2. The applicant shall be entitled to remove the minor child, B , and to depart with him from the Republic of South Africa to the United States of America without the consent of the respondent . 3. The consent of the respondent is not required by the applicant or the relevant authorities for the purposes of applying for or the issuing of a passport to the minor child, B Pretorius.

4 . Paragraph 4.2 of the settlement agreement annexed to the order of this court dated 2 December 2005 is deleted and replaced by the provisions set out in paragraph 4 of the notice of motion dated 27 June 2008.

5 . The respondent is ordered to pay R3000 maintenance per month for the minor child payable on or before the 3rd day of each month , which amount will be subject to a 10% increase per year.

JR MURPHY JUDGE OF THE HIGH COURT TRANSVAAL PROVINCIAL DIVISION

Date Heard: 31 July 2008 For the Applicant: Adv M van Deventer , Pretoria Instructed By: Jan Ehlers Prokureurs For the Respondent: Adv RG Tolmay SC, Adv LC Haupt , Pretoria Instructed By: Rynhart Kruger Prokureurs

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Prepared on 11 October 2026 · Esheria