

SOUTH AFRICA / JUDGMENT

D v D (2012/47100) [2014] ZAGPJHC 132 (26 March 2014) [2014] ZAGPJHC 132

COURT

South Gauteng High Court, Johannesburg

BEFORE

Siwendu

CASE / FILE NUMBER

2012/47100

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REPUBLIC

OF SOUTH AFRICA

SOUTH GAUTENG HIGH

COURT

JOHANNESBURG

CASE

NO: 2012/47100

NOT

REPORTABLE

NOT

ON INTEREST TO OTHER JUDGES

DATE:

27 MARCH 2014

In

the matter between:

D.

S. D.

Applicant

and

D.

D. C.

Respondent

JUDGEMENT

SIWENDU AJ

[1] The applicant brings an application for the variation of a Settlement Agreement which had been made an order of court on 31 March 2008 relating to two minor children of the marriage born in [.....]. ("The Settlement Agreement"). When the matter came before me on the 10 March 2013; I reserved judgment to enable me to consider contents of the family advocate's report which were made available to the court only at the hearing of the matter. The matter had been adjourned on 28 January 2013 to 10 March in order to procure the family advocate's report. The respondent was advised that the postponement would be a final postponement and was given an opportunity to seek legal representation. She failed to appear at the hearing.

[2] The applicant seeks an order in the following terms:

1 That the Settlement Agreement which was made an order of court on 31 March 2008 by Her Ladyship Ms Justice Hechter under case number 6572/2008 be varied by deleting the whole of paragraph 2 thereof and by substituting it with the following :-

2 PARENTAL RIGHTS AND RESPONSIBILITIES AND PRIMARY RESIDENCY TO THE MINOR CHILDREN

2.1 The plaintiff shall have full parental rights and responsibility over the two minor children.

2.2 The primary residency of the minor children shall vest with the plaintiff.

3 That the respondent be ordered to do all things necessary and take all reasonable steps to facilitate the applicant obtaining his own medical aid within 30 (THIRTY) days from the granting of this order, failing which the Sheriff or his duly authorized and appointed agent be authorized to do all things necessary and take all reasonable steps to effect same on behalf of the respondent;

4 That the respondent be ordered to pay the costs of this application, only in the event of opposition;

5 Further and/or alternative relief.

[3] At the hearing the applicant abandoned the prayer relative to the medical aid. It is noted that reference to "plaintiff" in the Notice of Motion dated 22 July 2013 is erroneous. The correct reference should have been the "defendant" now the applicant in these proceedings. The "plaintiff" is the respondent in the current proceedings.

[4] The divorce proceedings which led to the Settlement Agreement had been instituted in the then Central Divorce Court Johannesburg under Case No. 6572/06. Clause 2 of the Settlement Agreement provides that:

- (a) Both parties shall have joint custody of the two minor children;
 - (b) The defendant (applicant) shall exercise daily control over the minor children;
 - (c) The minor children shall reside with the defendant (applicant) at all times.
- [5] Over and above the settlement provisions relating to joint custody, the respondent (then plaintiff) in the court aquo was granted the right of access and contact which was subject to, amongst others that:
- (a) It was exercised at reasonable times;
 - (b) Subject to educational, recreational and cultural activities of the minor children;
 - (c) In the presence of a responsible person and which was to be reviewed in six months.
- [6] The grounds for the variation of the Settlement Agreement are detailed in the applicant's application papers. One of the minor

children was diagnosed with partial hydrocephaly and a shunt had to be inserted into his brain. It is alleged that post-natal, the respondent's personality dramatically changed and she subsequently filed for divorce.

- [7] The two reports which will be dealt with below, detail a deterioration in the respondent's health and mental health which may

have been either precipitated by drug addiction or compounded by it. It is alleged in the application papers and confirmed in the report (Van der Walt) that:

- (a) The respondent had sporadic contact with the minor children;
- (b) She had taken the children to shopping centers to beg for money from strangers;
- (c) She had exhibited abusive behaviour towards the applicant extending this to the children and the children's school principal and teachers.
- (d) She had attended at the school while under the influence of alcohol and /or medication causing her to be escorted out of the school for abusive behaviour.

- [8] I am mindful that the respondent has not countered the claims made against her, save for concessions made to the Family Advocate that she had been negligent relative to the intake of Epileptin, Lamitol and Stilnox in the past.

- [9] I have already alluded to the two reports relative to the matter presented to the court dealing with the circumstances of the two minor children. The first report is by Mariska van der Walt dated 19 March 2012. She is an expert procured by the applicant. The second report is by Frederick Jacobus Vogel assisted by Vijay Naidoo of the Family Advocate. The latter is a registered Social Worker appointed in terms of Section 3(1) of the Mediation in Certain Divorce Matters Act 24 of 1987.

[10] The Van Der Walt Report flows from an assessment that occurred over a period from 28 January 2012 to 25 February 2012. Both the respondent and the applicant participated in the process of assessment. It confirms that the respondent became addicted (to drugs) and attended rehabilitation as well as family counseling and there had been no progress in her health. The respondent is reported to have no fixed place of abode and has consistently moved from place to place. She has been residing in a Wendy house on the premises of a friend and has been unemployed for a period. She receives a state disability grant.

[11] Insofar as the applicant is concerned, it points to a healthy, well-adjusted, close, stable relationship focused on the children's

needs and emotional wellbeing on the one hand, while on the other to an insecure attachment between the respondent and the children which is emotionally abusive and which directly impacts on the children's sense of self-esteem.

[12] The report recommends that full parental rights and responsibility be granted to the applicant so as to provide the children with a stable, structured routine. It also recommends reasonable supervised contact with the respondent (as provided in the Settlement Agreement) as well as parental guidance. A further recommendation is that the respondent attends ongoing Bonding Therapy to help re-define the parent child relationship. The need for the children to have a close relationship with their mother is highlighted in the report albeit in reality the mother is not sensitive to their emotional or physical needs.

[13] The Family Advocate's Report was completed on 24 July 2014. Both applicant and respondent were interviewed towards the preparation of this report. It is noted that the respondent reported having suffered a stroke in 2010, Ischemia and Trans-Ischemia seizures with intermittent short term memory loss and Post-Traumatic Stress Syndrome ("PTSS") albeit that she had not been treated

for the PTSS. She is not allowed to drive.

[14] She is reported to have denied drug addiction but conceded having acted negligently previously. She reports the contact with the children as "disgusting"(unsatisfactory) and being frustrated by the applicant. Contact is reported to have deteriorated

to an extent that she saw the children twice in a month in 2013 and speaks to them no more than once a week. She reports that if it had been clear that the applicant was actually applying for sole parental rights, she would have opposed it.

[15] Significantly the report states that the applicant is applying for parental responsibility rights which he already has and exercises. It notes that the respondent's concerns with regard to her guardianship being terminated are valid and not without merit and should not be terminated. There are other, less obtrusive recommendations that can be made to remedy the situation without resorting to termination of all her or some of the respondent's parental responsibilities and rights.

- [16] The children were interviewed by a social worker, Vijay Naidoo. The report notes that the children do love the respondent. The children expressed a desire to maintain contact with their mother. In the case of the boy, he is reported to prefer supervised contact over weekends without sleeping over at the respondent's.
- [17] The full parental rights sought by the applicant would have entailed all the rights in Section 18 of the Children's Act 38 of 2005 including those referred to in Section 18(3)(c) are granted to him. It is trite law that the best interest of the minor children are of paramount importance to secure their stability, safety, physical and emotional wellbeing. The "court has an unalienable right and discretion to establish what is in the best interest of the children and to make corresponding orders to ensure that such interests are effectively served and safe guarded". *Girdwood v Girdwood* 1995 (4) SA 698 (C) – 708 J – 709 A; *B v B* [2007] ZAGPHC 306; 2008 (4) SA 535 (W) – 542 I – J
- [18] In determining what is in the best interest of the children the criteria enunciated in *McCall v McCall* 1994 (3) SA 201 (C) at 204 I and 205 A – F remains valid and binding, namely that regard must be had for:
- (a) the need for the love, affection and other emotional ties which exist between the parent and child and the parent's comfortability with the child;
 - (b) the capabilities, character and temperament of the parent and the impact thereof on the child's needs and desires.
 - (c) the ability of the parent to communicate with the child and the parent's insight into, understanding of and sensitivity to the child's feelings.
 - (d) the capacity and disposition of the parent to give the child guidance which he requires, amongst others.
- [19] Based on the reports, it is clear that the respondent's current circumstances point to a dire situation with no clear prognosis on whether her circumstances will improve or deteriorate in the near future. Equally the common feature in both reports points to the undisputed need of the children to have contact with their mother. This is not in dispute.
- [20] I now turn to the issue of parental rights sought to be varied and referred to in Section 18 of the Children's Act. I had invited counsel for the applicant to address the court on the actual content of the rights in this section, in particular, whether the rights are composite or divisible, include or exclude custodial rights sought to be varied. No particular ("helpful") submissions were made in this regard, but the applicant was emphatic that they do not seek to interfere with the respondent's right of access to the minor children. The future welfare of the minor children were the applicant to demise was also raised as part of the main consideration for the application for full parental rights.
- [21] Section 18 which reads:

'...(1) a person may have either full or specific parental responsibilities and rights in respect of a child.

(2) the parental responsibilities and rights that a person may have in respect of a child, include the responsibility and the right –

(a) to care for the child;

(b) to maintain contact with the child;

(c) to act as guardian of the child; and

(d) to contribute to the maintenance of the child.

(3) subject to subsections (4) and (5), a parent or other person who acts as guardian of a child must –

(a) administer and safeguard the child's property and property interests;

(b) assist or represent the child in administrative, contractual and other legal matters; or

(c) give or refuse any consent required by law in respect of the child, including –

(i) consent to the child's marriage;

(ii) consent to the child's adoption;

(iii) consent to the child's departure or removal from the Republic;

(iv) consent to the child's application for a passport; and

(v) consent to the alienation or encumbrance of any immovable property of the child.

(4) whenever more than one person has guardianship of a child, each one of them is competent, subject to subsection (5), any other law or any order of a competent court to the contrary, to exercise independently and without the consent of the other any right or responsibility arising from such guardianship.

(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)...

[22] Nevertheless, on the examination of these provisions, it is clear that a person may either have full or specific parental responsibilities and rights in respect of a child. It is clear that the applicant has and already exercises the rights in Section 18(2) relative to the minor children including the components of the rights of guardianship referred to in Section 18(2) (c) and has done so since

2008. It is not clear however whether or not the applicant would have exercised the rights in Section 18(3)(a) and (b). The content of the right in these provisions relative to the rights of guardianship in Section 18(2)(c) was not argued.

[23] These Section 18(3)(a) and (b) rights seem integral to the common law right and duty of guardianship insofar as guardianship relates to the legal duty and capacity to assist the minor children in juristic acts. It is my considered view that the common law term of "custody" in its wide sense incorporates this right to guardianship.

[24] The Settlement Agreement granted joint custody to the parties. The effect is that the applicant is required to seek the respondent's

consent in all juristic matters pertaining to the children, in particular those rights in Sections 18(2)(c) and Section 18(3)(a),(b)and(c) of the Children's Act. This could extend to those matters pertaining to the minor children's schooling, medical treatment and associated consents.

Notwithstanding that the particular areas were not were not fully canvassed in the applicant's submissions, an untenable situation to the prejudice of the minor children would arise if the applicant were required to seek the

respondent's consent on such matters and it would not be in the best interest of the minor children.

[25] Having considered the facts of this case, I am loathed to deprive the respondent all of her parental rights solely on the grounds advanced in argument some of which seem to be based on convenience and conjecture. No compelling case was presented to warrant a total deprivation of the respondent's parental rights. If I were to do so, it would mean that the applicant could singularly immigrate with the children for example without reference to the respondent. I find favour with this aspect of the recommendation

expressed by the Family Advocate. Terminating the respondent's parental rights in toto ought to be a remedy of last resort. Section 18(1) is clear that parental rights may or may not vest in a single person or parent. The rights are divisible, but care should be taken that this is not done in a way that renders them impractical to exercise or in a way that affects the best interest of the children

involved.

[26] Notwithstanding, the special circumstances of this case borne out by the current life circumstances of the respondent, namely that she has no fixed place abode of her own as well the circumstances relating to her health and mental health, warrant a curtailment of her parental rights in the interest of certainty and stability in the life of the minor children. As the primary care giver, the applicant must be placed in a position to fully discharge all the duties necessary and ancillary to the day to day parenting of the minor children. In the circumstances, I have determined that it is in the best interest of the minor children that the Settlement Agreement be varied but without depriving the respondent all of her parental rights.

[27] In the result I make the following order.

[28] It is ordered that the Settlement Agreement which was made an order of Court on 31 March 2008 under case number 6572/2008 be varied by deleting the whole of paragraph 2 and substituting it with the following:

"PARENTAL RIGHTS AND RESPONSIBILITIES AND PRIMARY RESIDENCY (TO/OF) THE MINOR CHILDREN:

- (a) Both the plaintiff and defendant are co-holders of parental rights and responsibilities over the two minor children;
- (b) The primary residency of the children shall vest with the defendant;
- (c) The plaintiff's parental rights shall be limited so that the defendant shall have the final decision making authority with regards to:-
 - i. The day to day lives, activities, living arrangements schooling and education, medical care, social and religious practices of the minor children.
 - ii. The responsibility and rights in Sections 18(3)(a) and 18(3)(b), excluding the rights in section 18(3)(c) in the Children's Act 2005
 - iii. The rights in Section 18(3)(c) shall be exercised jointly by the plaintiff and defendant".
- (d) It is ordered further that to the extent that the current circumstances of the respondent prevail, the applicant may make a testamentary appointment of a primary care giver who shall exercise the same rights currently enjoyed by the applicant in the event of the applicant's death.
- (e) The respondent was not present at the final hearing to oppose the application. She is clearly impecunious. The matter involves the best interest of the minor children. In those circumstances it will be unfair to mulct her with costs.
- (f) Each party shall pay their own costs.

JUDGE OF THE SOUTH GAUTENG

HIGH COURT, JOHANNESBURG

APPEARANCES:

For Applicant:

Adv. S van Aswegen

Instructed by:

Lindie Lombaard Attorneys

For Respondent: In

Person (Absent)

Hearing date:

11 March 2014

Judgment

date:

27 March 2014

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