

SOUTH AFRICA / JUDGMENT

J J v R V (5832/2019) [2020] ZAFSHC 226 (19 October 2020)

[2020] ZAFSHC 226**COURT**

Free State High Court, Bloemfontein

BEFORE

Opperman

CASE / FILE NUMBER

5832/2019

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****FREE****STATE PROVINCIAL DIVISION****Case****No: 5832/2019****In the matter between:**JGJ
Applicant
and
RV
Respondent
In
re: Minor child, GV
(Born 7 April 2012)**Coram:**Opperman, J
Date
of hearing 15
October 2020
Delivered
This judgment was handed down
electronically by circulation to the parties' legal
representatives by email and release to
SAFLII on 19 October 2020.
The date and time for hand-down is deemed to be 15h00 on 19 October
2020.
Summary
Opposed motion – parental rights
and responsibilities - minor

JUDGMENT

OPPERMAN, J

BACKGROUND

- [1] The matter entered the Court for the first time on an urgent basis in terms of Rule 6(12) on 9 January 2020. It turned on parental rights and responsibilities in regard to G born from the relationship between the parties. The litigation was bitter, emotional and egregious by both parents.
- [2] With the assistance of social workers in private practise as well as the Office of the Family Advocate, the parties managed a quasi-settlement. Counsel for both parties addressed me on the remaining more negligible quarrels and the matter was postponed for judgment of these.
- [3] I pause to express gratitude towards counsel for the manner in which they steered the case, as Officers of Court, towards the stage it has reached. The interest of G, the minor, has indeed been seed by them as the Constitution of the Republic of South Africa, 1996 decrees in section 28(2).
- [4] A major issue is costs. The general rule is that costs follow the event (or result), that is; the successful party should be awarded his or her costs. Cases that involve the rights and protection of minors when parents do not have the ability to establish and manage it, are sue generis as to costs. The doors of Court must remain open to protect children; even against their own parents and the parents against themselves. If costs become an obstacle to access Courts it will be to the detriment of children.
- [5] There is never a “winner” or “loser” in parental rights and responsibility cases and the general rule that costs follow the event cannot be the general principle in these cases. The only outcome must be the successful protection of the best interest of the child. In addition; section 14 of the Children’s Act 34 of 2005 states that every child must have access to Court and has the right to bring, and to be assisted in bringing a matter to a Court, provided that matter falls within the jurisdiction of that Court. The parties in casu both, with immature unawareness, brought the case on behalf of G to the Court.
- [6] There is also no general rule that no order as to costs should be made.[1] In *Bethell v Bland* 1996
- (4) SA 472 (W) at 474 A - D and H, Wunsh J expressed himself as follows on this principle:-

"There is no such 'rule' according to the enquiries I have made from many of my colleagues. The position is rather that in custody and access disputes it is frequently, by reason of the circumstances of the case, appropriate not to make an order for costs... One should not elevate where Courts have not made orders as to costs to 'rule'. At most, they can be guidelines to the exercise of judicial discretion. In each case, the facts are crucial..."

- [7] It is also settled law that if one of the parties to custody and parenting proceedings adopts a deliberately difficult and obstructive approach throughout the litigation, the Court, in appropriate circumstances, should impose punitive costs order.
- [8] Reading of the record shows that the conduct of both parents was troublesome in the beginning. As time went on and with guidance, they became more agreeable and amenable to solutions. They will have to take responsibility for their actions and carry their own costs.

ORDER

- [9] Having considered the evidence that contains statements of the parties, reports of the social workers and the Office of the Family Advocate, the quasi-settlement[2] and having heard counsel for the Applicant as well as the Respondent the following order is made:

Interim

orders

1. All interim orders in this case are set aside.

Parental responsibilities and rights

2. The parties will retain full parental responsibilities and rights in respect of the minor child as provided for in section 18(2) of the Children's Act 38 of 2005 ("the Act") with the specific rights of care as contemplated in Section 18(2)(a) of the Act and contact as contemplated in Section 18(2)(b) of the Act to be regulated as set out below.

Primary residence and care

3. The primary residence and care of the minor child shall remain with the Respondent.

Specifics to the parental responsibilities, rights and the best interest of G

4. Specific to the parental responsibilities, rights and the best interest of G the following significant[3] aspects must be adhered to:

4.1 As the minor child will reside with the Respondent, the Respondent shall timeously inform the Applicant of all aspects relating to the minor child's health, cultural, schooling and extra mural activities in advance to ensure their availability and/or attendance of said activities.

4.2 Each party will ensure that the views of the other party in their respective capacities as joint holders of parental responsibilities are considered pertaining to the best interest of the minor child and/or all issues that might negatively impact on the wellbeing of the minor child and/or any issues that might affect the co-holder of responsibilities and rights as contemplated in Section 31(2) of the Children's Act.

4.3 Both parties shall consider the minor child's wellbeing and best interest with regards to:

4.3.1 Any decision that might affect the child in the manner set out in Section 10[4] and Section 18(3)[5] of the Children's Act;

4.3.2 Any decision that could affect the rights of reasonable contact between the minor child and the co-holder of parental responsibilities;

4.3.3 All decisions that impact on the minor child's living conditions, education, health, inter-personal relationships with a parent, or the minor child's general wellbeing;

4.3.4 The parties shall consult with their child when making significant decisions about her welfare. The parties shall if conflict arises over their child's upbringing, health, welfare, education or support, which cannot be solved between the parties in a constructive and negotiated way, make every effort to resolve such conflict through a co-operative process using counseling or mediation to resolve the issue;

4.3.5 Each parent shall have the right to participate in activities and receive information regarding their child's education. The parties shall pass on to each other any information they receive about their child's education. Both parties shall be entitled to records depicting the minor child's achievements, education, medical and other aspects including but not limited to school reports;

4.3.6 Both parents shall be informed of any conference with teachers, counsellors and school administrators beforehand;

4.3.7 The Respondent shall ensure that the Applicant's contact details are added to the contact list at the school in order to ensure that the Applicant receives communication directly from the school.

4.4 The parties shall make joint decisions and the one shall require the consent of the other, in respect of: -

4.4.1 The education and related activities and affairs of the minor child including, but not limited to the choice of educational institutions of the minor child;

4.4.2 The religious affairs, upbringing and activities of the minor child;

4.4.3 The residence of the minor child with prior notice to the Applicant and Office of the Family Advocate of South Africa of 60(sixty) days of any change;

4.4.4 Any major medical care and/or treatment of the minor child;

4.4.5 The enrolment of the minor child for any extra-mural activities;

4.4.6 Any other matter which is likely to significantly affect the living conditions and/or wellbeing of the minor child.

4.5 Neither parents shall make derogatory comments about the other parent or the other parent's family or allow anyone else to do the same in the minor child's presence. Neither parent shall do anything that shall estrange the minor child from the other or impair the natural development of the minor child's love and respect for each parent. Each party is to refrain from discussing parental issues during the exchange of the minor child between them on the understanding that the minor child is not to be involved in any of the parental discussions between the parents.

4.6 Each party shall, inform the other if he/she has taken the minor child to a doctor and/or hospital:

4.6.1 The parties shall inform the other of any medication that is provided and/or given to the minor child;

4.6.2 Both parties shall inform the other parent as soon as reasonably possible of any serious medical intervention that the child may require, including any hospitalization or operation and to adhere to the provisions of the Act as contained in Sections 30 and 31;

4.7 If a conflict arises or if the parties cannot reach an agreement where a joint decision is required in terms of this order, both parties shall apply the following process:

4.7.1 The parents must discuss the issue;

4.7.2 Failing the aforementioned, the parties shall appoint a mediator to act as mediator between the parties and child (if necessary) to facilitate the dispute between the parties and to attempt to reach an agreement;

4.7.3 The cost involved in the above dispute resolution process will be paid one half by each parent;

4.7.4 This process does not detract from any parties' right to approach the High Court or any other Court with jurisdiction for relief after the above process failed to yield solutions.

4.8 The parties shall not frustrate each other's access to the minor child in terms of this order.

Rights of contact

5. The Applicant is entitled to rights of contact with the minor child, provided that such rights of contact are exercised in the child's best interests and subject to her educational, religious, social, sporting and extra-mural activities, which rights of contact shall be the following, and which contact shall be:

5.1. The Applicant is permitted telephonic or video call contact with the minor child on a Wednesday and Sunday evening between 19h00 and 20h00;

5.2 When the minor child is visiting the Applicant, the minor child is to have telephonic contact with the Respondent every day;

5.3 The Applicant will have the right to have the minor child with him every alternative weekend from the Friday at 17h00 to the Sunday at 17h00;

5.4 The Applicant will have the right to have the minor child with him every alternate short school holiday and half of every long school holiday on the basis that Easter, Christmas and New Year shall rotate between the parties. The minor child will spend Christmas 2020 with the mother;

5.5 The weekend that includes Father's Day. This same provision shall mutatis mutandis apply to the Respondent on Mother's Day, should the child not be with her on this day;

5.6 Half of all available contact on the minor child's birthday, alternatively every alternate birthday of the minor child;

5.7 The Applicant shall be entitled to contact with the minor child on the Applicant's own birthday and as follows: -

5.7.1 If the Applicant's birthday falls on a Friday/Saturday/Sunday - the parties must rotate their respective weekends as set out in sub-paragraph 5.3 supra to such an extent that the minor child will spend that weekend with the Applicant;

5.7.2 If the Applicant's birthday falls on a Monday to Friday, the Applicant will be permitted to have the minor child with him from 15h00 to 19h00, which contact is subject to the minor child's school, school related obligations as well as extra mural activities;

5.7.3 This same provision shall mutatis mutandis apply to the Respondent on the Respondent's own birthday, should the child not be with her on this day.

5.8 The right to attend and be involved in any extra-mural activities, events, functions and/or other activities in which the minor child partakes;

5.9 Additional public holidays and religious holidays forming part of a long weekend must form part of a weekend visit as set out in sub-paragraph 5.3 supra and the parties must ensure that each party is effectively entitled to the same number of long weekends in a calendar year, alternatively ensure that over a period of 24 months both parties have been allocated the same number of long weekends;

5.10 The Applicant and Respondent shall be open to discuss the exchange of weekend visitations and/or holidays and as both parties' availability and/or work circumstances in as far as reasonably possible;

5.11 The division of the periods and/or part of the school holidays to be spent with the respective parties, shall be agreed between the parties annually and will be recorded in writing for purposes of proper planning. In the event that it is not possible, the parties must endeavor to agree to the division of the respective school holidays, in writing on a quarterly basis and in advance;

5.12 The parties will sufficiently inform each other of the exact details, duration and contact details of the planned holiday when the minor child is to accompany him/her on holiday and to provide the other party with same at least 1 (one) calendar week before leaving on such holiday;

5.13 The parties agree that the Applicant shall inform the Respondent at least one week in advance in the event where he will not be exercising his rights of contact as set out above;

5.14 Due to the nature of the Applicant's employment he might not at all times exercise his contact rights with the minor child as stipulated above and consequent variations shall not be regarded as a waiver or abandonment with regards to his rights of contact with the minor child;

5.15 Neither of the parties shall be entitled to remove the minor child from the Republic of South Africa for any purposes without the prior written consent of the other party, which consent shall not be unreasonably withheld.

Hostel residence

6. Since the minor child is not currently enrolled or residing in a hostel and should it become necessary for the minor child to be enrolled in a hostel prior to the age of 14 (fourteen) years old, the parties shall:

6.1 Discuss and make a joint decision with regard to the enrollment of the minor child into a hostel, before enrollment;

6.2 The parties shall in the event of them being unable to reach a joint decision with regard to the enrollment of the minor child into a hostel consult a psychologist or social worker, with no less than 5 (five) years standing, to investigate the best interest of the minor;

6.3 In the event of the parties being unable to agree upon a psychologist or social worker, the parties may then refer the matter to FAMSA (Family and Marriage Society of South Africa / Family Life Centre), who shall then be requested to appoint such psychologist or social worker alternatively the parents shall request FAMSA (Family and Marriage Society of South Africa / Family Life Centre) to appoint a mediator to assist in the resolution of the dispute;

6.4 The cost of the aforesaid psychologist or social worker shall be borne and paid for by the parents in equal shares;

6.5 The recommendation of the psychologist, social worker or FAMSA shall not preclude relief to be sought in the High Court of South Africa or any other Court having jurisdiction.

Immediate and extended families

7. The minor child will have contact with her immediate and extended families to support and encourage love in the family unit without bias about how the family units are constructed; the minor will have regular and ongoing contact with her grandparents and members of each parent's extended family by visits or telephone; the parties shall ensure that neither of their extended family degrades each other in front of the minor child. Both parties shall ensure contact with the half-sister of the minor as soon as the baby is born in 2021 and it is practical to do so.

Variation of order

8. No addition, alteration, variation or cancellation of this agreement shall be of any force or effect unless reduced to writing and signed by both parties and made an order of a Court with jurisdiction.

Costs

9. Each party shall pay their own costs.

M OPPERMAN, J

APPEARANCES

On behalf of Applicant

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Instructed by:

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PRETORIA

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On behalf of Respondent

Advocate LA Roux

Instructed by:

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[1] Kirsch v Kirsch [1991] 2 All SA 193 (C) at 215.

[2] The order will simulate the wording of quasi-settlement as far as it is in accord with the final judgment of the Court.

[3] Section

31. Major decisions involving child.— (1)(a) Before a person holding parental responsibilities and rights in respect of a child takes any decision contemplated in paragraph

(b) involving the child, that person must give due consideration to any views and wishes expressed by the child, bearing in mind the child's age, maturity and stage of development.

(b) A decision referred to in paragraph

(a) is any decision—

(i) in connection with a matter listed in section 18 (3) (c); (ii) affecting contact between the child and a co-holder of parental responsibilities and rights; (iii) regarding the assignment of guardianship or care in respect of the child to another person in terms of section 27; or (iv) which is likely to significantly change, or to have an adverse effect on, the child's living conditions, education, health, personal relations with a parent or family member or, generally, the child's well-being. (2)(a) Before a person holding parental responsibilities and rights in respect of a child takes any decision contemplated in paragraph (b), that person must give due consideration to any views and wishes expressed by any co-holder of parental responsibilities and rights in respect of the child. (b) A decision referred to in paragraph

(a) is any decision which is likely to change significantly, or to have a significant adverse effect on, the co-holder's exercise of parental responsibilities and rights in respect of the child.

[3] Section

31. Major decisions involving child.—

(1)(a) Before a person holding parental responsibilities and rights in respect of a child takes any decision contemplated in paragraph

(b) involving the child, that person must give due consideration to any views and wishes expressed by the child, bearing in mind the child's age, maturity and stage of development.

(b) A decision referred to in paragraph

(a) is any decision—

(i) in connection with a matter listed in section 18 (3) (c);

(ii) affecting contact between the child and a co-holder of parental responsibilities and rights;

(iii) regarding the assignment of guardianship or care in respect of the child to another person in terms of section 27; or

(iv) which is likely to significantly change, or to have an adverse effect on, the child's living conditions, education, health, personal relations with a parent or family member or, generally, the child's well-being.

(2)(a) Before a person holding parental responsibilities and rights in respect of a child takes any decision contemplated in paragraph (b), that person must give due consideration to any views and wishes expressed by any co-holder of parental responsibilities and rights in respect of the child.

(b) A decision referred to in paragraph

(a) is any decision which is likely to change significantly, or to have a significant adverse effect on, the co-holder's exercise of parental responsibilities and rights in respect of the child.

[4] Section

10. Child participation. —Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning

that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration.

[5] Section 18 (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.

[5] Section 18 (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.
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