

SOUTH AFRICA / JUDGMENT

K.O v M.S (2024-021334) [2025]

ZAGPPHC 192 (24 February 2025)

[2025] ZAGPPHC 192

COURT

North Gauteng High Court, Pretoria

BEFORE

Haupt

CASE / FILE NUMBER

2024-021334

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REPUBLIC

OF SOUTH AFRICA

IN THE HIGH COURT OF

SOUTH AFRICA

GAUTENG DIVISION,

PRETORIA

CASE NO: 2024 - 021334

1.

REPORTABLE: YES

2.

OF INTEREST TO OTHER JUDGES: YES

3.

REVISED: YES

DATE: 24 February 2025

SIGNATURE OF JUDGE:

In the matter between:

K[...] O[...]

APPLICANT

and

M[...]

S[...]

RESPONDENT

JUDGMENT

Summary:

Shared residency of minor children where parents have a high conflict relationship – inability to effectively communicate in a non-confrontational manner an aggravating factor for court to consider.

Shared residency - Reasonable contact does not equate to shared residency. Misconception that shared residency is required for a quality relationship by the non-residential parent with a minor child and for such parent to remain involved in the child's life. Minor children not responsible for fulfilling parents' emotional needs and to adapt their lives to suit parental needs.

Standard to which expert reports pertaining to minor children must adhere restated- status of a social worker's report considered. Mere qualifications and experience do not transform an otherwise non-compliant report into that of an expert report. For it to be an expert report it must meet the requirements of an expert report.

HAUPT, AJ

INTRODUCTION:

- [1] This matter involves a dispute concerning the residency of the minor child, OR, born on 13 March 2017 from the relationship between the applicant and the respondent.
- [2] The matter initially came before me in the Family Court in September 2024, where it was postponed for purposes of allowing the applicant to file a further affidavit and for the Office of the Family Advocate ("Family Advocate") to investigate and report on the best interest of OR.
- [3] An order was granted on 13 January 2025 prior to the commencement of the 2025 school year. What follows below are my judgment and reasons for the order.
- [4] The matter has a long history of high conflict between the parties. The issue of whether shared residency will be in the best interest of the minor child in circumstances where there is high interparental conflict takes center stage in the dispute.
- [5] Of further relevance is the fact that the court was presented with two contradictory reports on the issue of shared residency: one from a social worker, Mrs Irma Schutte, who recommended shared residency, and one from the Family Advocate wherein the view was expressed that shared residency in this instance would not be in the best interest of the minor child, OR, and will add "fuel to the fire".

- [6] Expert reports concerning the interests of minor children, irrespective of whether they are prepared by a social worker, psychologist or psychiatrist must meet the well-established requirements for expert opinions. This includes that such opinion should be based on logical reasoning to be of assistance to the court.
- [7] The fact that establishing the best interests of minor children may involve a flexible approach and is case specific does not mean that the bar is set lower when considering the process followed and reasoning and recommendation of reports filed by suitably qualified professionals in disputes regarding the care, residency and contact of minors. To the contrary, it has been remarked that:
- “... Courts exercising family jurisdiction do not occupy a desert island in which general legal concepts are suspended or mean something different. ...” [1]*
- [8] Given the above, the opposite views expressed by the social worker and the Family Advocate necessitate further consideration of when a report can be regarded as an “expert” report, and what weight should be attached to reports such as the one filed by Mrs Schutte, where the recommendations made were unsupported by the factual findings.

BACKGROUND:

- [9] The facts below are common cause, alternatively not meaningfully challenged.
- [10] The parties met during September 2014 and became romantically involved in July 2015. In 2016 they started to cohabit, and OR was born on 13 March 2017. Their relationship was volatile from the outset, pre- and post OR’s birth, marked by arguments and high conflict.
- [11] During August 2018 the relationship broke down and the parties separated. OR was 1 year and 5 months old when her parents separated. Since the separation OR has been in the primary care and residence of the respondent and the tug of war regarding contact ensued.
- [12] After their separation in 2018 the parties made several unsuccessful attempts to resolve the issue of the extent of the applicant’s contact with OR. This culminated in an application launched by the applicant in this court under case number 46957/2019 to extend his contact with OR. The respondent opposed the application and filed a counter application wherein she inter alia sought an order for maintenance.
- [13] The parties eventually reached a settlement agreement which was made an order of court by Tuchten J on 25 September 2019 (“the 2019 order”). OR was 2½ years old when the 2019 order was made, which provided for the following:
- a. Confirming the applicant as the biological father of OR and that he was a co-holder for full parental rights and responsibilities as provided for in Section 21 (read with Section 18) of the Children's Act.[2]

- b. OR was to continue primarily residing with the respondent. The applicant's contact with OR included every Wednesday afternoon from school until 17:00, alternative weekends from the Friday after school until 16:00 on Sunday when the respondent was to collect OR from her father's home and contact on alternative public holidays, father's day, the child's birthday, on the applicant's birthday as well as four days or half of the school holiday, whichever was the shortest. This arrangement was to be in place until OR reaches the age of 4 years.
- c. From the time that OR reaches the age of 4 and in the event of the parties being unable to reach an agreement regarding an extension of contact, the parties reserved the right to approach the court on the same papers as supplemented and after the Office of the Family Advocate has provided their final report.
- d. The applicant was to contribute to OR's monthly maintenance, including the payment of a cash amount of R6,000.00 per month, her crèche and schooling fees, and 50% of extramural sporting activities (provided that he has consented thereto in writing), books, stationery, clothing and equipment for extramurals. The applicant was also to retain OR on his comprehensive medical aid at his costs until she is self-supporting and pay for 50% of all reasonable and necessary medical costs not covered by his medical aid.
- e. The applicant was to obtain life cover of at least R2 million for the benefit of OR, to safeguard his maintenance obligation.
- f. OR's surname was to be amended to a double-barrel surname to reflect the surname of both her parents. The parties agreed to act in accordance with the requirements provided by the Department of Home Affairs to effect the surname amendment.
- g. Each party was to pay his or her own costs.

[14] After the granting of the 2019 order the parties continued with their lives. The respondent entered into a relationship with Mr Campher and later cohabited with him. From this relationship a minor daughter, AL was born on 9 July

2021. When the matter came before me the applicant raised the concern that this relationship has ended. AL is presently 3 years and 8 months old.

[15] The applicant met his present wife at the beginning of 2021, and they married a few months later in August of that year.

[16] Shortly after his marriage, the applicant again approached the respondent to have his contact with OR extended. The parties could not agree on the extent of such increased contact.

- [17] They attempted to mediate the dispute for approximately 6 months and in 2022 the parties agreed to a further overnight contact on a Sunday and a 7-day visit during the April holidays. As the parties were not able to reach agreement on further extension of the applicant's contact, the mediator proposed that a social worker be appointed to assess OR's best interest and the extension of contact. The mediator contacted the social worker, Mrs Irma Schutte, and proposed that she assist with the investigation.
- [18] Prior to the parties agreeing to a forensic investigation the applicant's attorney on 23 September 2022 addressed correspondence to the respondent's attorney inviting her to agree to a shared residency arrangement, which resulted in a further exchange of correspondence
- between the parties' respective attorneys. The respondent did not agree with proposals made by the applicant to extend his contact to provide for shared residency as she was of the view that it would be disruptive for OR and not in her interests.
- [19] The above culminated in a letter from the applicant's attorney on 20 January 2023 wherein the applicant inter alia threatened a further application to court to extend his contact rights and imprisonment of the respondent for her allegedly being in contempt of the 2019 order that was granted by Tuchten J.
- [20] In March 2023, the parties agreed to appoint Mrs Schutte.
- [21] The parties had different views on the mandate of the social worker. According to the respondent, Mrs Schutte was to only investigate the best interests of OR, in respect of the extension of contact without varying residency. According to the applicant Mrs Schutte was also to investigate shared residency.
- [22] Mrs Schutte finalised her report on 15 October 2023. In her report she recommends extending the applicant's contact in order to phase in a shared residency regime as from January 2025. At the time when the report was made available to the parties, OR was 6½ of years of age and would be attending Grade 1 as from 2024.
- [23] During November 2023 numerous letters were exchanged between the respective attorneys wherein the applicant's attorneys insisted that the respondent abides by the recommendations of Mrs Schutte. Although the respondent was prepared to consider the recommendation to extend contact to include a midweek sleepover from a Thursday afternoon after school and that the applicant takes OR back to school the following day, as well as alternative weekends from Thursday after school until the Monday morning when OR was to be returned to school, the respondent qualified the arrangement that it was only for a trial period to see how OR would adjust.

[24] The applicant did not agree with the proposal. The applicant insisted that the recommendations of Mrs Schutte be implemented including the appointment of a psychologist as a mediator and to assist with the compilation of the parenting plan. The respondent did not respond to this proposal.

[25] From the correspondence attached to the affidavits it is clear to me that the respondent has been consistent throughout about her concerns with the recommendation made by Mrs Schutte about the shared residency, and that these recommendations were not supported by facts. The applicant, on the other hand, steadfastly believed that Mrs Schutte's report would hold up in court and persisted with his view that the shared residency arrangement as recommended by Mrs Schutte should be implemented.

[26] On 16 January 2024 the following emails were exchanged:

a. From the respondent regarding her concerns in respect of the report:

"I have noted your request with regards to O_'s time spent between us.

May I take a moment and put Irma's recommendations into perspective as I see it. We requested her to advise us on O_'s best interests as far as extended contact with you are concerned, which would at the same time imply less time with me and very importantly, less time with A_.

Irma only address the contact arrangements as it was at the time, with no guidance at all as to the emotional effect that these changes will have on O_ and even more so not to the extent of joint residency, or the big impact of such a decision on both O_ and A_ considering their extremely close bond. She leaps to her recommendations without any

explanation or clarity on how these suggested changes will affect O_.

For this reason, taking O_ into consideration, I believe that it would be the least disruptive for her emotionally, at this point in time, for us to continue with the arrangements as they are now.

The change from Thursday to Mondays on your weekends have just only been implemented (one weekend of last year) and I think we can both agree that it is premature to now introduce further changes to her living arrangements.

With the new baby coming and with O_ starting Grade 1 this year she is already going to experience a lot of changes so I don't believe now would be the time to add more.

For the weeks of my weekends the Wednesday will remain your night. I think this gives us both the opportunity to be part of school

activities, etc on alternative Wednesdays and Thursdays." (own emphasis)

b. The applicant then responded:

"I note your input, but in this respect Irma's expertise and experience in the field lend significant credibility and weight to their

opinions. I am 100% confident that any court would reach the same conclusion.”

c. The respondent subsequent replied:

“You are welcome to proceed as you feel necessary.

You have my input in this regard.

We cannot decide for the courts.”

APPLICANT’S GROUNDS FOR RELIEF SOUGHT:

[27] The application served on 26 February 2024 is voluminous, consisting of 192 pages, including annexures of correspondence dating as far back as 2018. The application was issued under a different case number than the 2019 application.

[28] In the notice of motion, the applicant seeks relief which duplicates most of the relief contained in the 2019 order.[3] No explanation is provided in the founding affidavit why a duplication of relief already granted was in the interest of OR, why

the matter was launched under a different case number and why there was not compliance with the 2019 order in respect of the parties

first obtaining a report from the Family Advocate before approaching the court to revisit the applicant’s contact. The notice of motion further seeks to:

- a. Implement the recommendation of Mrs Schutte, including that Mrs Linda Botha be appointed as the mediator to assist with the compiling of the parenting plan and education on how decisions must be made and manage conflict between the parties as part of her mediation.
- b. That the applicant is entitled to approach the Department of Home Affairs to effect the change of OR’s surname and that the written consent or attendance of the respondent is not further required.
- c. Cost in the event of opposition.

[29] I pause to mention that at the time the matter initially came before me in September 2024 OR was 7½ years of age and in Grade 1, and the changing of her surname had still not occurred. However, this was

subsequently resolved and therefore does not warrant further discussion.

[30] In summary, the motivation in the founding affidavit for the relief sought is:

- a. If the court does not intervene, the applicant’s relationship and contact with his daughter will be at the whim of the respondent.
- b. The mediation process failed, and his contact has only slightly been extended since approximately December 2021.

- c. The respondent dictates contact, she frustrates every effort to increase his contact, and he is at her mercy in respect of contact during holidays.
- d. OR expressed a desire to spend more time with him. The applicant is of the view that OR is a mature child and that her views must be considered.
- e. The historical issues between the parties are again repeated despite it being placed before the court when the 2019 order was granted by agreement.
- f. The recommendation of Mrs Schutte serves the interest of OR.
- g. Other than indicating that his wife is pregnant with their first child, and it is his wish that OR and her new sibling must be afforded the opportunity to bond with each other no further factual basis is provided why the relief sought serves OR's interests, or why the status quo regarding OR's primary residence since birth no longer serves OR's best interest and requires variation.

[31] The founding affidavit also does not explain why the applicant decreased the cash component of the maintenance in the period when the parties were in a deadlock regarding the applicant's insistence on shared residency. The applicant merely states that when the court considered his application in 2019, he already paid a monthly contribution towards OR of R11,080.00 excluding his 50% of the medical costs not covered by the medical aid, which according to him was "more than reasonable for a two year old." As the parties could not agree to maintenance due to the respondent's alleged overinflated demands, he requested that the maintenance portion be removed from their parenting plan and be separately referred to the Maintenance Court. According to the applicant the respondent refused to agree to the proposed parenting plan unless it also made provision for OR's maintenance.

[32] What is evident from the founding affidavit as well as Mrs Schutte's report, is that the applicant is very critical of the respondent not only as a parent but also on a personal level. His affidavit is replete with emotive words such as "obstructive", "dictatorial", "unreasonable" when he refers to the respondent and that she responds "sarcastically" to proposals. His perception is that since they have separated the respondent has done everything in her power to deny or limit his contact with his daughter.

[33] The applicant's perception is however not reconcilable with the factual position that indicates a continuous discussion and

re-evaluation of his contact. The respondent's emails placed before me also does not reflect a dictatorial or unreasonable

attitude on the part of the respondent. To the contrary, I was left with the impression that it is the applicant that is the more

controlling and prescriptive parent who regards his parenting style as preferable to that of the respondent.

- [34] Although the applicant confirms that the parties have in the interim implemented the extended weekend sleepover and a sleepover during the week when he doesn't exercise weekend contact, he persists that Mrs Schutte's recommendation of shared residency from 2025 is in the best interest of OR and should be implemented.
- [35] The applicant filed a 41 page replying affidavit (including annexures) on 12 June 2024. His affidavit again is replete with various references to how incompatible he and the respondent are. According to him they have
- different approaches to parenting and discipline, and the respondent allows too much screen time and is not as strict regarding discipline as he is in his home.
- [36] In the replying affidavit the applicant explains that the reason for the late filing was that he was awaiting Mrs Schutte's response to the "criticism" of her report by the respondent. His attorney forwarded a letter to Mrs Schutte setting out the paragraphs in the answering affidavit in which the respondent's disagrees with the report and recommendation. Mrs Schutte was requested to provide her feedback so that it can be placed before the court.
- [37] Despite initially indicating on 18 April 2024 that she was not willing to respond to the request without both parties' permission, Mrs Schutte nonetheless proceeded to provide a "Response to the opposing affidavit of the respondent" dated 27 May 2024 ("May 2024 Response") without the respondent having given the requested permission. I deal more fully with Mrs Schutte's May 2024 Response later in my judgment.
- [38] In the replying affidavit the applicant further elaborates on why, in his view, Mrs Schutte's report is well balanced and substantiated. He informs the court that his daughter L was born on 4 April 2024 and if the shared residency recommendation is not implemented OR won't be able to develop a bond with L. The applicant does not provide any further factual context in support of this concern. The applicant primarily relies on Mrs Schutte's May 2024 Response, wherein she further defends her position and her recommendation in support of the relief that he seeks. The applicant interprets the May 2024 Response to imply that shared residency is the only way that OR will have an opportunity to develop a bond with her new sibling, baby L.
- [39] The applicant further contacted Mr Campher's attorneys and obtained information in what can only be seen as an attempt to bolster his case, which he referred to in a supplementary affidavit filed on his behalf on 10 September 2024 and deposed to by his attorney of record. The information obtained included a letter that Mr Campher's attorney sent to the respondent in a personal dispute unrelated to the applicant.
- [40] In this supplementary affidavit the respondent is accused of withholding information pertaining to the termination of her relationship with Mr Campher from the court. It is further presented by the applicant as a given that Mr Campher will be successful in obtaining shared residency of AL, and that such an arrangement will inevitably cause a separation of the siblings. It was then argued before me on behalf of the applicant that,

based on the assumption that Mr Campher will obtain shared residency of AL, the respondent's reason for not wanting to separate the siblings fall by the wayside.

THE RESPONDENT'S GROUNDS FOR OPPOSING THE RELIEF SOUGHT:

- [41] The respondent's concerns regarding the extension of the applicant's contact to result in shared residency have consistently been:
- a. The requests for extended contact and shared residency are motivated by the interests of the applicant and not the interest of OR.
 - b. OR and her stepsister AL have an extremely close bond, and the extended contact will negatively impact on both children.
 - c. The disruptive effect of shared residency.
- [42] In her answering affidavit, the respondent deals extensively with her concerns regarding the disruptive effect that the recommendation of Mrs Schutte would have on OR. Her concerns are summarised as follows:
- a. She refers in detail to the extremely close bond between OR and AL and the disruptive effect shared residency will have on both children.
 - b. She does not dispute the importance of contact between OR and her father. She acknowledges that OR and the respondent share a close bond. However, she disputes that shared residency will serve the best interests of OR.
 - c. The recommendations of Mrs Schutte lack sound reasoning, and does not consider the detrimental effect of a separation between OR and AL.
 - d. Regarding Ms Schutte's mandate, the focus of the investigation shifted from investigating the extension of contact to shared residency. The original mandate of Mrs Schutte was only for an investigation as far as it relates to the extension of contact between OR and her father.
 - e. An explanation is provided for the court to understand the reason for the delay in having OR's surname amended to give effect to the 2019 order, and why the process pertaining to the agreement on a parenting plan and the mediation was unsuccessful.
 - f. The variation of residency is motivated by the applicant's needs and interests not by OR's best interests. She has never disputed that contact with the applicant is in OR's best interest. However, the applicant will not be satisfied until OR is in his care. They are not capable of communicating effectively and the high conflict negatively impacts on OR.
 - g. Mrs Schutte finds in her report that there is no evidence to indicate that OR should not remain in the care of the respondent and have reasonable contact with her father, and that OR expressed that she wanted the present situation to be maintained. Despite her findings Mrs Schutte persists with the recommendation that although the present arrangement does serve OR's best interest, OR will benefit from more time with her father and his family.

- h. Mrs Schutte's report provides no reasoning or basis regarding the impact of the separation between OR and AL if the shared residency is implemented, including the emotional impact thereof on OR and AL. In addition Mrs Schutte fails to indicate any benefit to OR to substantiate the material change in and disruption of OR's living arrangements or any authority and evidence as to the success of shared residency and in circumstances where siblings will be separated as a result thereof.
 - i. She accepts the recommendation of Mrs Schutte that for the remaining period of 2024, OR will exercise contact with the applicant every alternative weekend from Thursday after school until the Monday morning when the applicant is to return OR to school. At present, the applicant has been removing OR on Wednesdays and returning her to school on Thursday mornings preceding her weekend with OR. She has after due consideration of all relevant factors consented to the extended contact that the applicant presently enjoys.
 - j. In respect of Mrs Schutte's recommendation to appoint a mediator the respondent is of the view that it may be superfluous until such time as her and the applicant's views on shared residency are reconciled.
 - k. She denies that it was necessary for the applicant to bring an application resulting in the 2019 order to obtain further contact with OR. At that stage the only dispute, according to the respondent, was the extent of the holiday contact arrangements. The respondent confirms that she launched a counter application in respect of maintenance as the applicant had failed to address this aspect in his application. However, the applicant launched a maintenance court application to reduce the cash component towards OR's maintenance from R6,000.00 to R3,000.00 per month.
 - l. Although Mrs Schutte found that OR verbalised her close relationship with AL this fact is ignored and consequently the respondent is of the view that Mrs Schutte's findings are contradictory to the recommendation made.
 - m. She acknowledges that the applicant is a good father. However, the applicant does not allege in his application that she is not a good mother. Nor does Mrs Schutte make such a finding.
- [43] In her affidavit filed on 11 September 2024 in answer to the applicant's supplementary affidavit, the respondent also expresses the view the applicant has a personal vendetta against her, and he has now resorted to Mr Campher to assist him in this regard. The respondent denies that she withheld information from the court and remains adamant that she would oppose any shared residency in respect of AL for the same reason as her opposition to shared residency for OR. She further confirms that at the time there was no pending litigation between her and Mr Campher, especially in respect of shared residency. According to her it is disingenuous of the applicant's attorney to state in the supplementary affidavit that the separation of the siblings is imminent.
- [44] I now turn to the report of Mrs Schutte.

MRS SCHUTTE'S REPORT AND THE WEIGHT TO BE ATTACHED TO IT:

[45] Mrs Schutte's report and recommendations need to be considered within the context of the well-entrenched principles relating to expert opinions and reports. [4] The SCA in *Coopers* held:

"An expert's opinion represents his reasoned conclusion based on facts or data, which are either common cause, or established by his own evidence, or that of some other competent witness. Except possibly where it is not controverted, and expert's bold statement of his opinion is not of any real assistance. Proper evaluation of the opinion can only be undertaken if the process of reasoning which led to the conclusion, including the premise from which the reasoning proceeds, are disclosed by the expert."[5]

[46] The primary purpose of an expert report is to assist and provide a court with an objective opinion. The expert's task is to assist the court with information based on scientific facts and research that would have been unavailable, without the expert's contribution. The expert brings an understanding of the emotional dynamics and interpersonal interactions. The expert may provide an understanding of the needs of the child and the influence of traumatic events on the child's behavior. However, the opinion of the expert cannot replace the court's decision. The role of an expert has been described as "to assist the Court with the utmost social responsibility and justice, while maintaining standards and ethics".[6] If an expert is to be helpful, the expert must be neutral. [7]

[47] In my view the requirements for expert reports should be strictly complied with to ensure that vulnerable children are protected and not exposed to a situation where they are expected to satisfy the expectations of a parent(s) and adapt their lives to accommodate a parent's needs or the recommendation of an expert.

[48] In the November 2024 report filed by the Family Advocate the requirements of an expert report are summarised as follows:

- a. The expert must obtain a comprehensive history, background information and collateral information from various sources. The expert cannot rely on limited information to compile a report. A thorough investigation and evaluation and consideration of all facts has to be done and facts are either confirmed or rejected by collateral sources before an expert draws a conclusion.
- b. When submitting a final report, the role of the expert is to use his/her knowledge and experience to address a legal question, as judges in the legal fraternity in general do not have the necessary knowledge.
- c. Collateral information is essential to verify information obtained during the investigation. The expert should identify the people from whom collateral information was obtained. This includes friends, schoolteachers, medical practitioners or family members.

- d. The reliance on collateral or external information is a fundamental aspect of a forensic report. Collateral information can be valuable to either support, confirm or reject the information obtained from the individuals being evaluated.
- [49] It is trite that experts are not the judges of fact, and a judicial officer must not allow the expert's opinion to take the place of his/her own findings.[8]
- [50] I have not been referred to any authorities which indicate that a forensic report on the best interest of a minor child irrespective of whether it is provided by a mental health practitioner, or a social worker is to be held to a lesser standard. I take no issue with Mrs Schutte's qualifications and many years of experience. However, mere qualifications and experience does not transform an otherwise non-compliant report into that of an expert report. In order for it to be an expert report it still has to meet the requirements of an expert report as enunciated by the courts over the years.
- [51] I am not satisfied that the report of Mrs Schutte meets that of an expert report for the following reasons.
- [52] Save for the intake consultation Mrs Schutte had with both parties, she only had one "forensic consultation" with each of the parents. The interactional analysis between the applicant and OR was conducted on 31 May 2023 and between OR and the respondent on 11 June 2023. The minor child was assessed on two occasions, the first being 19 June and the other 21 June 2023. Mrs Schutte also did a home visit at the home each of the parents. However, Mrs Schutte does not indicate the duration of the consultations, interactional analysis or home visits.
- [53] Nowhere in Mrs Schutte's report is there any reference to updated theoretical or empirical evidence, research or literature that was applied or considered during her investigation as would be expected of an expert when shared residency is recommended in high conflict parental relationships. Although Mrs Schutte states that for purposes of her investigation she provided the parties with a biographical questionnaire and a reference list, no further explanation of the relevance of such questionnaire(s) is provided. It is not stated that she employed theoretical and/or psychometric sound data gathering instruments on which the conclusions and recommendations are based. She also does not indicate whether standardised tests were conducted, and if so, the reliability and validity of such tests.
- [54] Mrs Schutte merely refers to a Keirsey Personality Test that she conducted with the parties to ascertain their personality profiles and that the parties' test results indicate a certain personality type profile, without any reference to the scientific credibility of the test methodology that she applied. The same applies to her reference to the Parenting Questionnaire that both parents completed to evaluate their parenting style and a Rosenberg Self-Esteem Scale that was conducted. Consequently, I have difficulty in reconciling the inferences and conclusions Mrs Schutte draws from these "tests" and methods that she employed as the theoretical and scientific credibility of the "tests" / methods employed are not addressed in the report.

[55] The only methodology indicated in the report utilised in the assessment of OR is with regards to techniques from the Child's Voice Toolkit with specific reference to the "My World Board" (Attachment B) and "Moms/Dads House" technique. Again, the report fails to indicate what the reliability or validity of this technique is and whether the Child's Voice Toolkit it is indeed an accredited test that has been subjected to peer review and is generally recognised as a standardised test and assessment method. If it is only a tool as suggested by the name, then any assessment based on it will have no evidentiary value as it will not yield a formally recognised test result.

[56] I further find difficulty reconciling Mrs Schutte's recommendation with her factual finding. By way of example: on page 55 of her report, she states the following

"At this stage there is no reason or evidence to indicate that the minor child should not remain in the care of her mother and have reasonable contact with Mr Ox."

[57] Mrs Schutte's recommendation of shared residency finds no support in her factual finding that there is no reason or evidence for the minor child not to remain in the care of her mother and have reasonable contact with her father. "Reasonable contact"

does not equate to shared residency, and it is a misconception that shared residency is required for a quality relationship by the non-residential parent with a minor child. Unfortunately, the applicant, like many other parents, legal practitioners and even

professionals, incorrectly subscribe to the notion that shared parenting involves a 50% timeshare in raising children.[9]

[58] Mrs Schutte further considered it necessary to respond in the May 2024 Response to what the respondent stated about her report in her answering affidavit. This response was in the form of an email addressed to the applicant's attorney despite the respondent not having given the permission for such response initially sought by Mrs Schutte.

[59] I consider such a response inappropriate. The inappropriateness thereof is further amplified by the fact that the response was addressed only to the applicant's attorney in a letter. The correct way for an expert to put further information relevant to the dispute regarding minor children before a court is by way of a further report. By having responded in the way she did and attempting to defend her position by inter alia criticising the respondent, Mrs Schutte entered the fray of litigation. In my view, this defensive position taken and the personal criticisms levelled at the respondent in a letter addressed to the applicant's attorney, severely taints Mrs Schutte's objectivity.

[60] This is supported by what Davis J stated in *Schneider NO and Others v AA and Another*:

"An expert is not a hired gun who dispenses his or her expertise for the purposes of a particular case. An expert does not assume the role of an advocate, nor give evidence which goes beyond the logic which is dictated by the scientific knowledge which that expert claims to possess."[10]

[61] In Mrs Schutte's report dated 15 October 2023 she described the reason for referral as "to conduct a forensic investigation regarding the best interest of the minor child, O____, specifically pertaining to her residential

arrangement." This implies that she had to look at the present circumstances and make a recommendation based on the present facts. In her May 2024 Response Mrs Schutte stated in paragraph 18 of the letter that "...I must also devise a plan that serves the long-term best interest of the minor child."

[62] It could never have been Mrs Schutte's mandate to "devise a plan" for the long-term. Devising a plan and making a decision taking into account the facts and recommendations by suitably qualified

professionals, including the Family Advocate, falls exclusively within the purview of this court as upper guardian when applying the best interest of the child principle.[11] At most Mrs Schutte could make recommendations regarding the best interest of the minor child based on the circumstances as found

during her investigation.

[63] Professionals assisting the court with reports should guard against usurping the role of the courts when making recommendations, whether it be in the High Court, Regional Court or in the Children's Court. It is not the role of a professional to make recommendations to achieve a particular outcome such as shared residency, where such outcome is not substantiated by facts, accredited tests and/or data and/or empirical research and literature. This is tantamount to fitting a proverbial square peg into a round hole.

[64] Although social workers no doubt have an important and often vital role to play in the context of minor children in need of care and protection and/or where it comes to issues of adoptions or alternative and foster care and family reunification services,[12] I have my reservations as to whether their specific expertise is best suited to situations such as the present one where shared residency is in issue between parents in a high conflict dynamic. In my view compiling forensic reports to assist the court in such situations falls more within the field of expertise of mental health professionals such as psychologists. This is because the psychological functioning of the parents may impact on effective and child-centred co-parenting and will need to be considered by a suitably qualified professional in making recommendations in respect of residency and contact.

INPUT RECEIVED FROM THE OFFICE OF THE FAMILY ADVOCATE:

[65] The Family Advocate conducted an interview with the parties as well as OR in October 2024 and approached OR's school for collateral information.

- [66] The Family Advocate refers to literature in support of the concern that one of the cornerstones of successful shared residency is that parents can communicate effectively with each other. The present matter has a long history of high conflict and negative levels of communications. Even the applicant's wife confirms this. Consequently, OR is going to be exposed to an ongoing war, hostility and continuous litigation. Shared residency will only add fuel to the fire and will not be in OR's her interests.
- [67] The Family Advocate also referred the court to relevant literature and research on the role of experts, concerns regarding shared residency in high conflict relationships and that quality parenting and close meaningful relationships are unrelated to the amount of time the non-residential parent and the child spent together. The literature also indicates that co-operative co-parenting and high-quality parenting from the residential parent is more beneficial than living with each parent for 50% of the time.
- [68] It was argued on behalf of the applicant that the Family Advocate:
- a. Has not properly considered the information contained in the report of Mrs Schutte.
 - b. Expressed an opinion on the expertise of Mrs Schutte which was unwarranted in the circumstances and consequently overstepped its functions and/or boundaries.
 - c. Failed to consider that Mrs Schutte found that OR will benefit from the phasing in of extended contact.
 - d. Did not make an effort to investigate the new circumstances of the respondent and to obtain any significant collateral information.
 - e. Their recommendation for contact on alternative weekends from the Friday until the Sunday at 17h00 does not serve the interests of OR, as it is far less than what the status quo presently is. Presently OR exercises weekend contact every alternative Thursday to the Monday when the applicant returns her to school and a midweek sleepover during the week when the applicant does not exercise his weekend contact.
- [69] The criticism levelled against the Family Advocate is not justified within the context of the facts before this court. The applicant's main concern was not necessarily the respondent's failed relationship with Mr Campher but rather the issue he raised with the Family Advocate of alleged cocaine use by the respondent. The Family Advocate investigated this concern and took appropriate steps by referring each parent for drug tests.
- [70] The important role of the Family Advocate in assisting the court by providing objective insight and assistance is well established in our law, The Family Advocate follows a neutral approach in order that the true facts and circumstances are ascertained. They assist the court by placing facts and considerations before it and by making a balanced recommendation without taking sides against one party in favour of the other.[13]

[71] As remarked in *Terblanche v Terblanche*, a failure to refer a matter concerning the interests of a minor child for an investigation by the Family Advocate may in certain

circumstances be unwise and may even give rise to a result, which is neither just nor expeditious.

[14] In the present matter the further involvement of the Family Advocate was envisaged by the 2019 order.

THE BEST INTERESTS OF OR:

[72] When the court sits as upper guardian in a dispute regarding the interests of minor children, it has extremely wide powers to establishing what is in the best interest of the minor child and is not bound by procedural structures or by the limitations of the evidence presented or the contentions advanced by the respective parties.[15]

[73] The court may have recourse to any source of information of whatever nature which may be of assistance in resolving the residence or contact dispute. I do not agree with the arguments raised by the applicant. The Office of the Family Advocate has been of great assistance in this matter to the court and raises important issues for the court to consider.

[74] As already indicated above, I agree with the Family Advocate's concerns that Mrs Schutte makes several findings in her report that do not support shared residency. They include:

- a. That there exists no need to change OR's status quo regarding her residency and contact.
- b. The high conflict relationship between the parties and the different parenting styles and routines, which was also confirmed by the applicant's spouse and OR. The parties agree that they cannot communicate meaningfully.
- c. The long-term litigation between the parties.
- d. That the applicant seeks shared residency as he wants to be more involved in the upbringing of OR, however the facts show that he already has a close bond with OR and is an involved parent.

[75] The facts before this court does not support a shared residency regime. In *P V Z v L V Z* this court considered the possible disruptive effect of shared residency and whether the granting of shared residency serves the

interests of the minor children, which concern has been highlighted in various judgements.[16]

[76] Some of the reasons for refusal by our courts to grant shared residency or to endorse shared residency agreements include high conflict between the parties, the parties' inability to effectively communicate as parents, children having to continuously adapt to changing homes and different parenting styles, the having to accommodate the separation of their parents by being expected to adjust to different routines and often socio-economic circumstances as they commute from one parent's home to the other.

[77] I share the Family Advocate's concern that OR shows emotional deregulated behavior as reported by both parents to the Family Advocate and as observed by Mrs Schutte. The applicant reported that on Thursdays when he drops off OR she is emotional. The respondent reported that OR is clingy after she returns from the applicant. Mrs Schutte observed that OR started to scratch herself and her facial expression became somber when the issue of whether she wants to spend more time with her father and live in both homes was canvassed with her. This is not age-appropriate behavior for a 7 year old.

[78] The Family Councilor also reports that the reason for the visit to the Family Advocate according to OR was due to the court not getting enough information from "Mrs Irma". I am concerned that OR is caught up in the crossfire between

her parents and is placed in a highly undesirable position where she is acutely aware of one or both parents' expectations. On the facts before me I am concerned that OR's emotional well-being will be negatively impacted if the status quo regarding primary residence is varied.

[79] It is not a child's responsibility to ensure a parents' emotional happiness and to adapt their lives and forfeit the stability and security of their established home environment to accommodate shared residency to address a parents' fear of missing out or that the parent is not spending enough time with the child.[17] In the present matter the facts indicate that the application for shared residency is motivated by the applicant's fear of

missing out and remaining relevant in OR's life and upbringing, and not by OR's needs and interests. The applicant

despite not having shared residency is an involved parent, and he shares a close and loving bond with OR.

[80] OR's school confirms that the applicant is an involved parent. Consequently, there is no reason to increase his contact to such an extent, to include shared residency to ensure that he continues to be involved in OR's life and to build and nurture the parent-child relationship. The parent-child relationship is already in existence and is well-established - Mrs Schutte and the Family Advocate both found that a good relationship exists between OR and her father.

[81] To consider the best interest of OR, the court cannot look at a set of circumstances in isolation. Regard should be had to not only what happened in the past but also after the close of pleadings and even right up to the day when the court considers the evidence including the possibility of what might happen in the future if the court makes a specific order.[18]

[82] As upper guardian I am concerned that OR who turns 8 on 13 March 2025 is exposed to an ever-changing environment and the Family Advocate observes that she reacts negatively to the demands of the frequent moves between the two homes. I share the Family Advocate's concern that to implement a phased-in contact which will result in shared residency on a week/week rotation will not serve OR's interests as it will be disruptive. OR is presently well

cared for in the primary residence of the respondent and there is no compelling reason to vary the status quo to accommodate shared residency.

- [83] The applicant like many other parents, legal practitioners and even professionals seem to be of the view that shared parenting involves a 50% timeshare in raising children. This is a misperception.[19]
- [84] A child is not a joint estate which has to be divided equally between the parents in order for the child and the non-residential parent to have a healthy and close bond, or for the non-residential parent to be fully involved and remain relevant in the child's life.
- [85] I agree with the view expressed by the Family Advocate that parents often believe that the quality of their relationship with the child is determined by the amount of contact time they spend with the child. However, the quality of a relationship between a parent and a child depends on the quality of the parenting, not the quantity of time spent with the child. In this regard the Family Advocate referred the court to relevant research and literature.
- [86] In addition, this court cannot ignore the detrimental effect of the high conflict between the two parents on the parenting of OR, the different parenting styles and routines at each home as experienced by OR and confirmed by the applicant's wife. High interparental conflict in my view is an aggravating factor against the implementation of a successful shared residency regime.
- International research highlights the polarised views within the legal, psychological and social workers' fraternity whether shared parenting/residency is likely to be in the best interest of children in separated families when there is a high level of interparental conflict and the detrimental effect thereof on children's mental health. [20]
- [87] A child's care, residency and contact is not a social experiment – either the facts support a variation of residency and/or contact, or they don't. There are no facts before me, which indicate that the status quo with regards to OR remaining in the primary care of the respondent is not in her best interest.
- [88] The significance of section 7(1)(b) of the Children's Act which refers to the attitude of the parents or any specific parent towards the exercise of parental rights and responsibilities in respect of the child should not be brushed aside. As upper guardian I am very concerned of the overly critical approach that the applicant takes in respect with the way the respondent cares for OR. His concerns have not been confirmed by important collaterals sources such as the school.

[89] From the facts before me it is evident that OR still considers the respondent as her primary caregiver despite the extended contact with her father. Section 7(1)(d) provides for the likely effect on the child of any change in the child's circumstances, including the likely effect on OR of any separation from a sibling or other caregiver should be considered. On the facts before me OR has a particularly close bond with her sister AL and she has been cared for by the respondent and the same nanny since her

birth. The fact that OR now has a new baby sister L, and that she over time may well also develop a close bond with L, does not mean that OR's primary residence should be disrupted, just so that she can spend more time with baby L.

[90] To reconsider residency and contact every time a new stepsibling is born will lead to courts being inundated with applications by parents, arguing that the residency or contact should be varied in order for the child from a previous union to be able to form a bond with a child from a new union. This will not serve the interests of minor children nor the interest of justice. The facts before me, do not indicate that the respondent will frustrate the development of a healthy relationship between OR and baby L.

[91] Having regard to the facts before me and considering the factors listed in section 7(1) of the Children's Act it is in OR's best interest that the extended weekend contact should remain as reflected in my order. As OR's is now in school, and as raised by the Family Councilor, she is busy with school related activities during the week, the midweek sleepover is replaced with a midweek visit to strike a balance between OR's need for contact with her father on the one hand and to ensure the least disruption in her routine and emotional wellbeing on the other.

COSTS:

[92] Costs remain in the discretion of the court. The applicant's bold approach that no court will disagree with the expert that found in his favour and substantiating the relief that he seeks exclusively on the report of Mrs Schutte whilst he knew beforehand what the respondent's concerns regarding the report were, left the respondent with no option but to oppose the application. The applicant's papers further largely consisted of a repetition of the 2019 application. Furthermore, this court takes a dim view of the way the applicant attempted to cast the respondent in a bad light by referring to what was said in confidential mediation proceedings and by exploiting her failed relationship with Mr Campher and using the perceived issues pertaining to the child born from that relationship to bolster his case for shared residency. This approach warrants a punitive cost order.

[93] The application was also launched and set down for hearing before a report by the Family Advocate was obtained as provided for in the 2019 order.

[94] The respondent raised valid concerns in respect of the recommendations made by Mrs Schutte. I therefore see no reason why the respondent should be out of pocket in these circumstances. Both parties were represented by experienced legal practitioners and consequently Scale B is appropriate.

ORDER

[95] The order I make is:

1. Paragraph 3 of the order granted on 25 September 2019 by Tuchten J under case number 46957/2019 is hereby varied by the following order.
2. The primary residence of the minor child O_ R_ S_ ("O_"), born 13 March 2017 shall remain with the respondent.
3. The Applicant is to exercise contact to O_ as follows:

3.1 Alternate weekend contact from Friday after school when the applicant shall collect O_ from school until the Monday morning when the applicant shall drop O_ off at school;

3.2 Midweek visits every alternate Wednesday from after school when applicant shall collect O_ from school until 17:30 when the applicant shall drop O_ off at the respondent's residence;

3.3 Alternate short school holidays and half of every long school holiday with Easter and Christmas (including New Years eve and New Years Day) to rotate on an annual basis, with one parent to have O_ for the first half of the holiday and the other parent to have O_ for the second half of the holiday;

3.4 Alternate public holidays, not attached to a weekend. The applicant shall collect O_ at 9:00 from the respondent and return her to the respondent by 18:00 or on such other time as agreed to between the parties;

3.5 The parties to share O_'s birthday parties' subject thereto that such contact does not disrupt O_'s school and extra-mural responsibilities and/or activities;

3.6 O_ shall have reasonable time with her half-sister A_, and her half-sister L_, on their respective birthdays as agreed between the parties' subject thereto that such contact does not interfere with or disrupts O_'s school and extra-mural responsibilities and/or activities;

3.7 O_ to spend the weekend of Father's Day with the applicant and the weekend of Mother's Day with the respondent, commencing on a Friday after school until Monday morning;

3.8 The principal of right of first refusal shall apply if either the applicant or respondent cannot take care of O_ for sleepover contact in their allocated time;

3.9 Regular telephonic contact to be maintained;

3.10 Such further contact as agreed to between the parties from time to time.

4. The applicant is to pay the costs of the application on an attorney and client scale, to be taxed on Scale B.

HAUPT AJ

JUDGE OF THE HIGH COURT

This Judgment was prepared and authored by the judge whose name is reflected and is handed down electronically by circulation to the parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines system and by release to SAFLII. The date for hand down is deemed to be 24 February 2025.

Counsel for the Applicant Adv. L Bedeker Instructed by: DI SIENA ATTORNEYS Appearance for Respondent Mr S L Augustyn (Attorney with right of appearance) Matter heard on: 17 September and 7 November 2024.

- [1] Binns-Ward J in *Thomas Christopher van Zyl N.O. v Bernice Kaye N.O.; Egor Vukic N.O. and Seven Other Respondents* 2014
 - (4) SA 452 (WCC) at para 24 and footnote 16 of the judgment and in reference to the judgment by the English Court in *Prest v Prest and Ors*
 - [2013] UK SC 34, [2013] 4 All ER 673; [2013] BCC 57
 - [2] 38 of 2005 – Section 21 provides for the parental responsibilities and rights of unmarried fathers
 - [3] This included that the parties shall retain full parental rights and responsibilities pertaining to the minor child including
- guardianship, that the parties should take notice of Section 31(1)(2) of the Children's Act, and the principle of the right of first refusal.
- [4] *Schneider v AA* 2010 (5) SA 203 (WCC) at 211E – 212B; *Michael and Another v Linksfeld Park Clinic (Pty) Ltd and Another* 2011
 - (3) SA 1188 (SCA) para 34 – 40; *Price Waterhouse Coopers Inc and Others v National Co-operative Limited and Another* [2015] 2 All SA 403 at para 99; *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft Für Schädlingsbekämpfung MBH* 1976
 - (3) SA 352 (A) at 371A-H; *AM and Another v MEC for Health, Western Cape* 2021
 - (3) SA 337 (SCA) *supra* at para 21 and the reference in footnote 18 thereto; *Holtzhauzen v Roodt* 1997 (4) SA 766 SA (W) as applied by Satchwell J in *S v Kleynhans* 2005 (2) SACR 582 (w) at para 9 – 12 in respect of the report provided by a social worker
 - [5] 1976 (3) SA 352 (A) at 371A - H
 - [6] *An Introduction for Forensic Psychology* (2003): Roos V and Vorster C as referred to by the Family Advocate
 - [7] *Stock v Stock* 1981
 - (3) SA 1280 (AD) at 1296 E — F; *Schneider supra* at 212A – B; Zeffertt, Paizes & St Q Skeen : *The South African Law of Evidence* (Butterworths 2003) at 306

- [8] Zeffertt & Paizes *supra* at 299 -301
- [9] The Family Advocate referred to relevant research and literature indicating that the quality of parenting is not defined by the quantity of time a parent spends with a child.
- [10] 2010
- (5) SA 203 (WCC) at 212B
- [11] The best interest of the child as the paramount consideration in all matters concerning minor children is confirmed by sections 9 of the Children's Act and 28(2) of the Constitution of the Republic of South Africa. In addition, section 7(1) of the Children's Act sets out factors that must be considered where relevant, when applying the best interest of the child standard. In *S v M*
- [2007] ZACC 18; 2007 (2) SACR 539 (CC) at para 24B – C, Sachs J articulated the importance of the best interest of the child in all matters concerning children as follows: “A truly child-centred approach requires a close and individualised examination of the precise real-life situation of the particular
- child involved. To apply a pre-determined formula for the sake of certainty, irrespective of the circumstances, would in fact be contrary to the best interests of the child concerned.”
- [12] Chapters 7 to 15 of the Children's Act regulates the protection of children, prevention and early intervention services, alternative and foster care, adoption and inter-country adoptions and the role social workers play in these processes
- [13] *Terblanche v Terblanche* 1992
- (1) SA 501 (W) at 503C-H; *Soller N.O. v G and Another* 2003 (5) SA 430 (WLD) at para 23, 24 and 27
- [14] At 503C
- [15] *Shawzin v Lauver* 1968
- (4) SA 657 (A) at 662H – 663A as referred to in *Terblanche supra* at 504C
- [16] *P V Z v L V Z and 2 Others* matters (047502/2024; 36830/2022 ; 064524/2023) [2024] ZAGPPHC 1046 (10 October 2024) at para 49 to 51
- [17] *P V Z supra* para 69
- [18] *P v P and Another* 2002
- (6) SA 105 (N) at 110C-D
- [19] *B v M* [2006] 3 All SA 109 (W) at 185
- [20] Morbech M, Sellers R, Gustavson K & Holt T: Interparental Conflict and Children's Depressive and Anxiety Symptoms in Four Residence Arrangements (Family Transitions 2024, VOL.65, NO. 5, 355-380) Published online: 7 August 2024 - <https://>

doi.org/10.1080/28375300.2024.2382991; Deck P, Eisensmith S, Skinner B & Cafaro J: Identifying Indicators of High-Conflict Divorce Among Parents: A Systematic Review (Advances in Social Work: Summer/Fall 2023, 23(2), p392 – 408; Nikupeteri A & Laitinen M: High-Conflict Separations and Differentiated Professional responses – From Confrontational Interaction to Post-Separation Violence and Stalking (Journal of Divorce & Remarriage 2022, VOL.63, NOS. 7-8, 506 -525)Published online: 26 December 2022 – <https://doi.org/10.1080/10502556.2022.2157667>; Martinez-Pampliega, Herrero M, Cormenzana S, Corral S, Sanz M, Merino L, Iriarte L, Ochoa de Alda I, Alcaniz L & Alvarez I: Custody and Child Symptomatology in High Conflict Divorce: An Analysis of Latent Profiles (Psicothema 2021, Vol. 33, No. 1, p 95 – 102); O’Hara KL, Sandler IN, Wolchik SA, Tein J & Rhodes A (Arizona State University):

Parenting Time, Parenting Quality, Interparental Conflict, and Mental Health Problems of Children in High-Conflict Divorce (J Fam Psychol. 2019 September ; 33(6): 690-703.doi: 10. 1073/fam0000556; Stokkebekk J, Iversen AC, Hollekim R & Ness O: “Keeping balance”, “Keeping distance” and “Keeping on with life”: Child positions in divorced families with prolonged conflicts (Children and Youth Services Review 102 (2019) 109 -119); Mahrer NE, O’Hara K, Sandler IN & Wolchik: Does Shared Parenting Help or Hurt Children in High Conflict Divorced Families? (Journal of Divorce & Remarriage 2018; 59(4): 324-347. Doi: 10.1080/10502556.2018. 1454200)

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