

SOUTH AFRICA / JUDGMENT

S v S (2019/13892) [2020] ZAGPJHC 89 (12 February 2020) [2020] ZAGPJHC 89

COURT

South Gauteng High Court, Johannesburg

BEFORE

Spilg

CASE / FILE NUMBER

2019/13892

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NO: 2019/13892

In

the matter between:

MR

S

Applicant

And

MRS

S

Respondent

JUDGMENT

SPILG, J:

INTRODUCTION

1. This is an application in which a father has sought urgent interim relief pending the outcome of a rule 43 application. In the rule 43 application he seeks an order awarding primary residence to him of the daughter born of his marriage to the respondent. The girl was born in April 2016 and is three years of age.

2. The urgent relief may be divided into three parts:
 - a. Orders giving the father immediate primary residence rights with supervised contact being afforded to the mother;
 - b. Orders that certain forensic investigations be undertaken and placed before the court in order for it to ascertain what interim residency arrangements are in the best interests of the child pending the outcome of the divorce. They are;
 - i. that the mother submit to a hair follicle test with Dr M Jordaan of the University of Pretoria Toxicology Laboratory within 48 hours of the grant of the order;
 - ii. that Mrs M Davis-Schulman conducts a forensic investigation into the best interests of the child and produces a report recommending to whom the parental responsibilities and rights as contemplated in s 18 of the Children's Act 38 of 2005 should be allocated;
 - c. An order that the Office of the Family Advocate conducts an investigation and reports to the court on the best interests of the child.
3. The mother denies that the application is urgent and denies the allegations levelled against her. She has in turn brought a counter-application which can be divided into two parts:
 - a. The one is to give the mother immediate primary residence rights with the father being afforded reasonable rights of contact;
 - b. The other requires the father to also submit on similar terms to hair follicle testing by Dr Jordaan. In addition he is required to have his blood and urine tested.

She also supports the obtaining of a report from the Family Advocate.

4. The essence of each party's contentions is that:
 - a. Mr S claims that Mrs S is unfit to properly care for their daughter at this stage because he has discovered that she is a high class prostitute, mixing with people of doubtful integrity and within that environment is subjecting herself and the child to unnecessary risks. He further claims that Mrs S is displaying less and less interest in the child and he has been assuming more of a parenting role. He also claims that Mrs S has still not been able to rid herself of her cocaine addiction- hence the request for the hair follicle test;
 - b. Aside from denying the allegations against her the mother contends that she has always been the primary care giver, that the father's work routine does not permit him to devote sufficient time to their child and that the lifestyle they had both led before their separation was promiscuous and involved the use of narcotics.

URGENCY

5. I was satisfied that if the allegations regarding Mrs S's alleged use of narcotics was proven then, either independently or combined with the people who were now in her life, her lifestyle posed a risk to the child's safety and nurturing at a critical phase of her upbringing.

I believe that I made it plain to both parties that how Mrs S earned a living or the circumstances which may have contributed to it were not per se relevant. Of relevance is whether it impacted adversely on the best interests of the child which included Mrs S's ability to adequately nurture and care for their daughter or if the child was placed at unnecessary risk.[1]

6. Mrs S's attorney believed, after enquiry, that there was a lengthy wait before the Toxicology Laboratory at the University of Pretoria could undertake a narcotics and drugs test. However the applicant's attorney was able to secure an appointment almost immediately. Such a test could provide incontrovertible proof of whether Mrs S was still taking narcotics. I therefore stood the matter down from 23 July to 26 July and ordered that in the meantime both parties submit to a full spectrum narcotic and drug hair follicle test and requested that Dr Mariliese Jordaan provide the test results as a matter of urgency, and preferably prior to the next hearing.
7. The test results proved negative for Mr S and although there was no cocaine detected Mrs S was shown to have been taking methylenedioxy-methamphetamine, commonly known as Ecstasy "during the approx.. four months prior to sample collection". It was noted that Mrs S claimed not to have taken any drugs.
8. I also considered that the work environment in which Mrs S engaged and those with whom she was associating taken together with the toxicology result and her denials created sufficient concern that there was a risk to the child unless Mrs S took a grip on her life and appreciated the potential consequences and in particular the risks of the choices she was making. I also considered that if her parents were not so accommodating towards and protective of their daughter but more assertive in their interactions with her that they presented a strong foundation and lodestar for her.
9. Some six months have passed since I gave that order and from the psychologist's reports I am satisfied that but for the court application and its exposure of her lifestyle and the potential risks it presented for her and her daughter, and the consequent orders I made, she would have continued to be in denial of the consequences of her actions and justified them to herself.

Mrs S married at the very young age of 21 to an already successful and older man who, for present purposes, I will accept influenced the lifestyle she adopted. She had been a teacher and sports coach at some leading schools and, after training at a top Cookery School, was selected to cook at one of the leading hotels in the country before she met Mr S. After her marriage she believed that she was being dominated by Mr S and only became a person in her own right ("becoming my own entity") when she won an international title in another activity. According to her, it was from about that time when she started falling apart.

10. Accordingly the submission now made, albeit in the context of costs, that the matter was not urgent demonstrates the failure of the respondent's legal representatives to fully appreciate the content of the two reports, one of which is from Mrs S's own appointed clinical psychologist. I recommend that they, the respondent and her parents analyse the reports more carefully if the daughter is to reach the desired level of either shared or equal residence.[2]

SUBSEQUENT

ORDERS

11. Both parties had sought orders that assessments be undertaken by their preferred clinical psychologists to investigate, report and recommend the allocation of parental responsibilities and rights between the parties as would serve the best interests of their

daughter. It was also accepted that the Office of the Family Advocate would not be able to become involved at this stage. I accept that they would not have the resources to devote the amount of time that was required in the circumstances of the present case.

12. The parties had approached their preferred clinical psychologists who, as I understood it, were agreeable to their appointments and that their reports would be provided expeditiously. On 26 July an order was therefore made appointing both clinical psychologists,

Marilyn Davis-Schulman (the applicant's expert) and Elise Fourie (the respondent's expert). The order required that the investigations commence immediately and that both parties cooperate fully with the experts. The hearing was postponed to 12 August in anticipation of the reports being filed by then. Arrangements were again made for the child's interim care and contact.

13. However on 21 August it was necessary to postpone the hearing to 28 October as the examinations were not yet completed. Again provision was made for interim care and contact. I also directed that the parties submit to another toxicology examination.
14. It became evident to the parties that neither reports would be completed in time for the hearing of 28 October. As early as 18 October the applicant's attorneys sought agreement from the respondent's attorneys to postpone the hearing and agree on a date by when the two reports were to be finalised. There could be no agreement since the respondent's expert claimed that she could only finalise her report in January or February 2020. Despite the early notification, the first meaningful response was on 25 October[3]. The respondent's attorney indicated in his response that Mrs S would ask for the matter to be postponed sine die, that she be afforded an additional contact day and night every week on a Tuesday and also holiday contact. The applicant's attorney required a fixed date for the matter to resume, advised that Mr S would not agree to increased contact and that a date be agreed for the finalisation of both expert reports. This was also on 25 October.

15. On 28 October the parties were able to agree on certain aspects and after hearing argument on the outstanding issues an order was made which ensured that the reports were to be finalised and delivered by 17 January 2020, that the experts would meet on 31 January and prepare a joint minute in relation to their reports and that the matter would be postponed to 10 February. I required the parties to again submit to a full spectrum narcotic and drug hair follicle test on 24 January.

In addition the order provided for holiday contact. There was however no change to ordinary weekly contact.

In terms of the order I would finalise the interim custody issues on 10 February 2020.

HEARING OF 10 FEBRUARY 2020

16. At the hearing of 10 February each of the parties presented a draft order. The points of departure related to:
 - a. An insertion by the respondent which the applicant contends is unnecessary because it follows as a matter of law;
 - b. A requirement by the applicant dealing with the appropriate quality of the contact time while the respondent seeks to insert a provision which addresses the objective of the contact;
 - c. A further requirement by the applicant that Mrs S “shall wake up with (the child) on Thursday mornings and personally prepare her for school and take her to school”;
 - d. A requirement by the respondent that the applicant also submits to drug testing;
 - e. Costs. The applicant seeks the costs of the application while the respondent contends that costs be reserved.

There are some inconsequential matters which are unnecessary to deal with albeit that they result in a change to the formulation of the order proposed by both parties.

17. In addition both parties were agreed to a clause which provides that contact shall be subject to, among other things, that one or other party

“testing negative for all narcotics in respect of the drug test performed on the 24th of January 2020 and all future drug tests either directed by the parenting co-ordinator to be appointed between the parties alternatively by Court Order”

It is necessary to have clarity on who is to direct further testing. In addition counsel confirmed that both their clients’ results for the testing on 24 January proved negative. Accordingly it will be unnecessary to deal with an historic event.

18. In order to determine these issues it is first necessary to consider the reports of the two experts.

THE EXPERTS' REPORTS

19. The experts compiled a joint minute in accordance with the earlier court order.

20. They are in agreement that:

- a. It is important that the child enjoys the benefits of contact with both parents and therefore that it is in the best interests of

the child that both parties should be afforded the opportunity to enhance their parenting skills;

- b. Mrs S should focus on developing her parental skills in an independent manner “thereby ensuring that she provides (the child) with the best possible parenting”;
- c. The appointment of a parenting coordinator is essential and must be implemented immediately;
- d. The monitoring and controlling of the progress of both Mr and Mrs S should be left to the discretion of the parenting coordinator with no interference by any family member or any other party;
- e. There should be a phased in approach with regard to care and contact keeping in mind the emotional stability and safety of the child;
- f. More frequent contact of shorter duration is recommended for the nonresident parent; i.e. Mrs S;
- g. Once Mrs S is living independently of her parents “she will be afforded to develop the necessary parenting skills (through parental guidance) away from the scrutiny and active supervision of external people”;
- h. It is strongly recommended that the housekeeper who has been with the child even when the parents were living together accompanies the child on sleepover visits at Mrs S until the parenting coordinator considers it no longer necessary;
- i. Mrs S should commit to spending an appropriate amount of time with the child during her contact time.

21. The experts highlighted that all phasing-in contact should be approved by the parenting coordinator and all controls, checks and follow-up tests should also be determined by the coordinator.

22. The experts were also agreed on the contact arrangements going forward as well as holiday periods. They were however agreed that for the first two years the child should not be longer than, respectively, 5 and 6 nights at a time away from the other parent with equal care and residence to be achieved in January 2023 if the parenting coordinator considers it to be in the child's

best interests.

23. In taking these decisions regard was also had to certain views expressed by the parties to the experts as well as the experts' own observations. .
24. Ms Davis-Shulman noted a comment by Mrs S to the effect that the court order at present;
"is limiting my time with her that was always spent very constructively in the afternoons and evenings..."

Mrs S also informed her that;

"due to having just started off my business, and with no financial assistance from (Mr S) I cannot afford to take her away every second weekend as (he) does. So I am very stresses with regards to this, developing my business so that I can financially provide (the child) with experiences. I feel that (Mr S) wants to create a pied piper scenario"

Later Ms Davis-Shulman noted that Mrs S emphasised that she would compensate for not being present in the morning by ensuring that she spends each afternoon from 2pm with her daughter and engage in an appropriate manner with her.

Under a different topic Ms Davis-Shulman noted that the child did wake up to her grandparents when Mrs S has to train her clients in the early hours of the morning. While stating that this variation is not out of the ordinary for the child, the expert considered that it would be optimal for the child to wake up secure in the knowledge that one or other parent is at hand to attend to her needs.

In my view the report of Ms Davis-Shulman failed to flesh out the relationship between the child and the grandparents in sufficient

detail to enable a court to test the proposition that the situation that does occur on occasion in the early mornings is not adequate bearing in mind that;

- a. the child had been very familiar with the presence of the grandparents and that grandparents can play an important supportive role;
- b. the mother , due to her having to reach the state of independence from her own parents (as required by both experts) , is of necessity required to work at the most lucrative peak times in her profession which obviously includes the early morning period. Either the eventual financial settlement will cater for this or it will not. If not Mrs S cannot be prejudiced because of necessity, nor can Mr S benefit from that situation- it conceivably may amount to having ones cake and eating it;
- c. unlike most working mothers who are unable to return home until at least 17:00, if not much later, the child will have the benefit of the regularity of a mother who can be home in the afternoons and will in into the future be able to fetch her from school and be present during her extra-mural activities.

The expert also noted that in when interviewing Mr S he referred to Mrs S as being an amazing mother for short periods of time. His other comments to the expert supported Mrs S's claim that when she started becoming her own person the marriage started falling apart: He said that Mrs S's attitude changed towards him and his family and that she was getting more and more attention from more and more males, a comment I found when reading it to display symptoms of jealousy.

It is evident that at the same time as she was claiming to become her own person he perceived that he was losing his control over her and found it difficult to deal with, seeing it more as a threat to him than her gaining her own self-esteem and individuality. About two thirds into her lengthy report the expert refers to Mr S as having a tendency to be jealous and requires re-assurance.

25. The expert confirmed to some degree the allegations made by Mr S regarding Mrs S's parenting. Ms Davis-Shulman observed that Mrs S does not always optimize the relatively little time she has been allotted with her daughter. She also noted that Mrs S has not consistently put the needs of the child above her own and that her capacity to function as a "good-enough parent, given the history is uncertain/guarded".
26. It is unfortunate that Ms Davis-Shulman at times confines herself to the allegations made by Mr S in the papers without noting the denials or explanations by Mrs S. She also noted asking him to comment on all the allegations regarding "extramarital affairs, use of narcotics, self-prescribing prescription medication and the impact of the TLE diagnosis on his parenting capacity".

I could not find the answer given. It certainly was not in the section where the question was posed.

27. Without taking away from its overall value I am therefore somewhat cautious to accept her report without qualification despite in many cases the expert referring to the very positively aspects of Mrs S's relationship with her daughter. Without minimizing the positive attributes that Mr S brings in his own right to the child's nurturing and his obvious commitment to her well-being, the report remarks on the extensive warmth of the relationship between mother and daughter and the extent to which Mrs S provides activities for her daughter; which no doubt has resulted in much of the confidence and remarkable motor skills she displays at such a young age- and despite the trauma that any child, whatever the age, goes through when parents are at each other's throats and then separate.
28. The report of Ms Fourie reflects that Mrs S has a tendency to impulsiveness and lacks insight into her personality. She also may be self-centered in relationships and deny responsibility. Of concern is the observation that Mrs S appears to be at risk to take narcotics and the possibility of an addictions should be considered. The reason for concern is that Mrs S's decision to use narcotics appears to be related to the manner in which she functions as a person.

29. With regard to Mr S, Ms Fourie considers that he appears to be aware of the physical, security, cognitive and emotional needs of the child, seems able to fulfil these needs but appears to be somewhat vindictive towards Mrs S despite the past history of anti-social behavior shared by both of them.

She also comments that certain actions and verbalizations she observed during the consultations with him indicate possible future

manifestations of parental alienating behavior. A significant concern regarding Mr S is that he “may act in a vindictive manner, under the guise of acting in a highly moral manner to gain acceptance and approval from other persons. In view of his opinion the (Mrs S) is an immoral person, despite his own inappropriate decisions in the past, these actions and thinking patterns pose a risk that (Mr S) may act in a manner which leads to the alienation of (the child from Mrs S).

UNNECESSARY INSERTION OF A MATTER WHICH FOLLOWS BY LAW

30. I do not believe that this is a valid criticism. After all the parties are not lawyers and they should not have to spend more money

understanding the legal implications of the document. They are entitled to have a legal consequence of this nature spelt out for

them in clear terms so that there is no misunderstanding.

INTRODUCTION

OF A QUALITATIVE OR OBJECTIVE ELEMENT TO CONTACT

31. The applicant wishes to introduce a qualifier to the right of contact being subject to the respondent personally being with the child throughout the contact period.
32. The respondent wishes to introduce a phrase reading; “to ensure as much contact ... as possible with a view to phase in additional contact with“ the child. It is evident that the purpose is to identify the objective which contact is intended to achieve and recognise that Mrs S may have work commitment while still acknowledging the desirability of as much actual contact as possible if equal residence has a realistic prospect of being realised.
33. The qualifier sought by the applicant is inappropriate considering the experts unanimous acceptance that the applicant is in a profession which will necessitate her being away from the child at certain times whereas they see the necessity for her to gain her own independence from her parents by setting up her own home- a situation that can only eventuate if Mrs S earns her own income.

Accordingly the quality of contact must depend on the situation the respondent finds herself in and conscious of the experts' view that she must live independently of her parents. This in turn requires Mrs S to balance the needs of her child and building a practice in circumstances where her husband does not appear to be contributing much, if at all.

34. An experienced parenting coordinator will be sensitive to the inherent imbalance and inequality of opportunity (where Mr S is well established and would have achieved sufficient financial independence to spend more time with the child than Mrs S who is much younger and struggling to build a business and gain sufficient income to be able to live independently of her parents- as recommended by the experts if she is to bring herself to a parity of residence with Mr S in relation to their child).
35. The external manifestations of the quality of contact is but one aspect determining the strength and true nature of the bond which grows between parent and child. It is not a matter for lawyers to write into a document which then becomes the subject matter of a representation to a parenting coordinator with the risk that the coordinator's decision must now be subject to it, or worse, be reviewed against it.
36. It is evident that the experts wish to give the parenting coordinator as wide a discretion as possible because of the acknowledgement that the parties will select, through their legal representatives, an appropriately skilled and qualified person[4]. And that such a person naturally will appreciate that ultimately, however a document of this nature may be framed, she must look at the best interests of the child in the short, medium and long term when the role of one parent may appropriately take on greater significance during the course of a child's development while at a different stage the immediacy of the other parent and the strength of that bond may become vital.
37. It is evident from a synopsis of the experts' joint minute and a consideration of their individual reports that the objective of residence and contact is to achieve at least a state of equality between the parties. Although neither counsel in argument stated as much when asked, the reports are clear in this regard. That is the objective which the parenting coordinator is directed to assist the parties to achieve if possible and the purpose of interventions as the experts are of the view that at this stage equality is attainable with intervention and proper dedication by the parties.

I believe that the objective is to be included as I did not understand either counsel to suggest that the reports were flawed in this regard. What occurs if equality is achieved is at this stage premature to predict, but that the objective at this early stage is to move towards at least parity of contact is clear.

38. I therefore prefer not to unduly restrict the parenting coordinator in the considerations that may have to be weighed nor create a situation where there may be undue interference, in the way in which the decision is arrived at, to either extend or retain any existing residency protocol provided the objective is clear; and if unattainable then the parenting coordinator will be in the best position through the interaction she will have to make that call and recommend accordingly.

Nonetheless the respondent should be required to make a commitment to achieve the desired degree of interaction when she does exercise contact.

REQUIREMENT OF MRS S's PRESENCE WHEN THE CHILD ARISES

39. The applicant requires that Mrs S "shall wake up with (the child) ... and personally prepare her for school and take her to school"
40. This may be considered as a rather callous precondition to continued contact as presently agreed upon. Mr S should know that the experts consider that Mrs S will obtain a greater degree of "residence time" if she is able to set up an independent home: He also knows that he is not contributing an amount that will allow her at this stage to acquire a residence of her own. He would also know that her most lucrative working period is in the early morning. The fact that the expert clinical psychologist may not have appreciated this consequence is the very reason why her view is an opinion which is respected within the field of her expertise.
41. However the application of that expertise to the reality of the world is a matter for the courts to assess, as are the other factors such as the circumstances in which the parties find themselves, the fairness of their conduct towards each other, the inherent inequality that may exist between the parties once separated, the perpetuation of that inequality that may wrongly benefit the one party, and in turn detrimentally affect the child, and of course the overarching requirement which is the need to ensure the long term best interests of the child which in itself involves the psychological wellbeing of both parents.
42. The proposal is therefore rejected as potentially creating great inequality without any evidence that all the other compensating factors, to which I have already alluded to in this context, do not adequately compensate- let alone provide other beneficial consequences for the overall wellbeing and nurturing of the child. The issue of weaning the child away from the grandparents and how it is to be done, or the appropriate degree of continued and healthy contact, has not been considered at all by the experts other than to infer that the present level of interaction is unhealthy and excessive.

THE APPLICANT ALSO TO SUBMIT TO DRUG TESTING

43. The failure of the applicant's expert to elicit a response from the applicant in this regard is of concern. I have gone through the relevant portions of the rule 43 papers and believe that it is appropriate that this court directed regular testing for both parties without inhibiting the parenting coordinator if she believes it in her sole discretion to be appropriate to require both parties to undergo further testing.

COSTS

44. The applicant seeks the costs claiming that he is the successful party. In the alternative he seeks an order that two days of costs be paid by the respondent because they were unnecessarily incurred.
45. I start off on the basis that any cost order obtained against Mrs S will compromise her ability to find the money to fight the divorce which involved not only the issue of custody but also maintenance for her and the child and patrimonial claims. This in turn would affect her fair trial right.
46. By the same token a party cannot act in an obstructive manner or in a manner that results in the other party incurring unnecessary costs, either in the belief that such debilitating conduct can be achieved with impunity or even if it is unintended, but results in these consequences.
47. In my view these are the only considerations which should apply as I am not certain it can be said that either party achieved the success they really wanted- the knockout blow that would have ended it all. I am also not certain that the applicant would have settled for anything other than very limited contact of it were not for the two experts' reports.
48. However I am concerned that the respondent or her attorney have on occasion frustrated the expeditious progress of this case which has resulted in unnecessary extra expense. The hearing of 28 October could have been curtailed and the extent of preparation reduced and the respondent engaged the applicant more openly, sooner and less adversarial about the reports not being submitted in time and in insisting that the matter be postponed sine die when it should have been evident to both the respondent's counsel and attorney that the court would not countenance such a proposal. I accept that the issue of seeking additional visitation rights was an added aspect but the question of holiday time was resolved.
49. The preparation for the hearing of 10 February could have also been substantially curtailed if the respondent's attorneys had put in place a means of notifying him of any important documents that would be served at its offices while he was acting as a judge in the Pretoria High Court. He was aware, because of the time limits imposed in my earlier order, that the experts would have to deliver a minute of their meeting and that this would be the foundation of any proposal made by either his client or the applicant.

It will be apparent from what I have already dealt with, that the issues were very narrow, yet as late as Friday last week he indicated, after receipt of the applicant's proposed draft order, that it was unacceptable without any counter-proposal. The proposal had been sent to his offices the morning after the experts had delivered their report. I consider that this amounts to an unnecessary buildup of costs both for his client and for the applicant.

50. Litigating in this manner is to be discouraged in an appropriate way. I believe that two thirds of each of the two days costs incurred by the applicant is to be paid for by the respondent. If the respondent did not instruct her attorney to engage in litigating in this manner then it is a matter which she can take up with him in due course. I am not going to undertake a separate enquiry as to whether the cost should be de bonis propriis.
51. However, so as not to prejudice the respondent at this stage, such costs may be taxed now but can only be claimed and sued upon when the final order dealing with all the claims in the divorce proceedings have been finalised. In this way the amount which the respondent is to pay the applicant will be known shortly but will only be recovered later whether as part of a settlement or at the end of the litigation.

ORDER

52. I therefore make the following order pendente lite:
 1. Both parties retain full parental rights and responsibilities, with regard to guardianship and care of (hereinafter referred to as "the child"), as contemplated in section 18(2) and 18(3) of the Children's Act 38 of 2005.
 2. The child shall remain primarily resident with the Applicant.
 3. The Respondent shall be entitled to exercise contact to the child as follows and subject to what is set out in paragraph 4 below:-

3.1 Week 1

3.1.1 The Respondent shall collect the child from school on Wednesday and shall spend the night in the Respondent's care. The Respondent shall deliver the child to school on Thursday morning.

3.1.2 The Respondent shall collect the child from school on Thursday afternoon and deliver her to the Applicant's care by 17h00.

3.2 Week 2

3.2.1 The Respondent shall collect the child from school on Tuesday, take her to her extra murals and deliver her to the Applicant's care by 17h00.

3.2.2 The Respondent shall collect the child from school on Wednesday and The child shall spend the night in the care of the Respondent. The Respondent shall deliver the child to school on Thursday morning.

3.2.3 The Respondent shall collect the child from school on Friday afternoon and the child shall remain in the Respondent's care until Sunday at 18h00 whereupon the Respondent shall deliver the child to the Applicant's care.

3.2.4 The child shall spend the balance of Weeks 1 and 2 in the primary care of the Applicant.

3.2.5 Each parent shall offer the other parent first right of refusal in the event that that parent cannot personally be with the child for a period of 12 hours or longer. This should not constitute time to be forfeited or made up by the other parent. If the other parent is not available to care for the child during the specific time then the parent whose care the child is in shall make alternative appropriate arrangements.

4 The contact set out in paragraph 3 above shall be subject to the following:-

4.1 The Respondent shall commit to spending an appropriate amount of time with the child during her contact time allocated to ensure as much contact with the child as possible with a view to phase in additional contact with her.

4.2 The Respondent shall personally care for the child on Wednesday evenings through to Thursday mornings subject to her bona fide work commitments

4.3 The alternating Tuesday and Thursday afternoon contact time from 14h00 to 17h00 shall, subject to the overriding discretion of the parenting coordinator to ameliorate this requirement in any respect, apply provided the Respondent utilises the time meaningfully for suitable mother/daughter activities which are age appropriate for the child.

4.4 Both the Applicant and the Respondent testing negative for all narcotics in respect of drug tests to be performed, on the same full spectrum basis as hitherto ordered at the University of Pretoria Toxicology Laboratory every third month commencing in the last week of the April 2020 on the same date for both parties, which report shall be submitted to the parenting coordinator to be appointed and the parenting coordinator may direct such other narcotic/drug tests on any other occasion as such co-ordinator considers appropriate in order to fulfil his or her duties and functions

5. Holiday contact between the child and the Applicant and Respondent as well as special weekends and special days shall be allocated as follows:-

5.1 The Easter weekend commencing 10 April 2020 is to be shared between the parties equally.

5.2 The December holiday:

5.2.1 The December contact schedule shall be drawn up by the parenting co-ordinator with the input of both parents. The parenting co-ordinator shall ensure that the child is not away from either parent for more than 5 (five) nights.

5.2.2 The child shall spend Christmas and New Year Eve until 10h00 on the following day with the one party and Christmas Day and New Year day from 10am with the other party, to alternate for 2020 and 2021, and thereafter subject to considerations as to the continuance of the 5 night rule and the advisability of enabling the child to spend half the long holidays with each parent on an alternating basis; taking into account the child's own school vacations and the ability of the parents to take leave during these periods..

5.3 Insofar as the parties are unable to agree upon any holiday contact the issue is to be referred to the parenting coordinator for determination and the parenting co-ordinator shall be empowered to issue a directive in relation to the division of holiday contact time.

6. The parenting co-ordinator

6.1 Doctor Lynette Roux shall be appointed as the parenting co-ordinator and the parties agree to sign and be bound by Dr Roux's mandate and terms of engagement in relation to her powers and authority, such powers and authority to include those set out in the joint minute compiled by Marilyn Davis-Shulman and Elise Fourie which is attached to this draft Court Order.

6.2 Insofar as Dr Roux is for whatever reason unable to accept the appointment as parenting co-ordinator or becomes unable to continue in her role as parenting co-ordinator then and in this event the parties shall, within 14 calendar days of Dr Roux's notification of her unavailability or inability to continue in her role as parenting co-ordinator agree upon a replacement parenting co-ordinator who shall be a psychologist with at least 15 years post qualification as a clinical or counselling psychologist.

6.3 In the event that the parties are unable to agree upon the identity of Dr Roux's replacement then and in this event Marilyn Davis-Shulman and Elise Fourie shall jointly nominate the replacement parenting co-ordinator and the parties shall be bound by such nomination.

6.4 The parenting co-ordinator shall have the power to issue directives in relation to the implementation of this court order which directives shall have the force and effect of a court order.

7. The Respondent shall make payment of two thirds of the opposed party and party costs incurred in respect of the hearings on 28 October 2019 and 10 February 2020, the costs to be taxed or agreed forthwith but only due and payable on finalisation of the issues before the high court raised under the above case number whether by settlement agreement or otherwise.

SPILG, J

DATES OF HEARINGS: 23 and 26 July, 8 August, 21 August, 28 October 2019 and 10 February 2020

DATES OF ORDERS: 26 July, 29 July, 21 August, 28 October 2019 and 12 February 2020

DATE OF JUDGMENT: 12 February 2020

FOR APPLICANT: Adv L Segal

Lowndes Dlamini Attorneys

FOR RESPONDENT: Adv B Fourie SC (on first occasion) with Adv S Stadler

Adv S Stadler (thereafter)

Hartzenberg Inc

- [1] Although neither party challenged the length of the affidavits filed by the other or the obtaining of experts' reports or the undertaking of examinations at this interim stage of the divorce proceedings I was satisfied that the factors I have just mentioned in the body of the judgment elevated issues concerning the child's rights as set out in the Children's Act and its foundational principles as guaranteed in s 28 of the Constitution to a degree which justified the application of Rule 43 (5). The reasoning I applied in *Ts v Ts* 2018
- (3) SA 572 (GJ) to maintenance for children applies equally if not more so to their care and contact. A court should be slow to reject the introduction of bona fide relevant material at any stage of interim proceedings that are before it which relates to the child's condition or that of either parent and which may impact on the decision the court is obliged to make. *Ts v TS* was approved by the Full Court in *E v E* and related matters 2019 (5) SA 566 (GJ) and cited in *S v S* and others 2019
- (6) SA 1 (CC) (8) BCLR 989 (CC) at para 26. In the present case the failure to consider either of the experts' reports regarding the child and the parents or the toxicologist's report, or to have considered the papers filed as being too long, may have resulted in the application either being dismissed, considered not to be urgent as the child had already been removed

from the mother, or in the court acceding to either of the party's applications, with potentially irreversible consequences for all concerned, instead of putting in place a solution, based on a proper reflection of the considerations provided by the reports, which affords the child the best prospects for her future wellbeing (let alone that of both parents) and for her nurturing.

- [2] The literature on the subject explains that joint or shared parenting is not the same as equal parenting. It is unnecessary in

this judgment to deal with the underlying premises and research or lack of a sufficient sample of empirical data especially in high conflict situations. See Braver & Lamb of the Dept. of Psychology, Arizona State University and Cambridge University

respectively titled *Journal of Divorce & Remarriage- Shared Parenting after Parental Separation: The views of 12 experts and the implicit concessions made*. Compare the article by Diane Post in the *Berkley Journal of Gender, Law and Justice* (December 1989) entitled "Arguments Against Joint Custody" which identifies circumstances that may militate against joint parenting.

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- [3] The earlier letters of 21 October simply stated that the respondent's attorney was awaiting advice from Ms Fourie but did not deal with the substance of the 18 October request
- [4] I believe that allowing the parenting coordinator such a discretion is consistent with the objectives of the Children's Act, and in particular s33(5), does not usurp the function of the court, which is in no position to police parental behaviour on an ongoing basis, let alone expeditiously and at a significantly lower cost (as legal representatives do not participate in the process). I believe that cases such as MB v NB 2010
- (3) SA 220 (GSJ) at paras 52 to 59 and FS v JJ and another 2011 (3) SA 126 (SCA) encourage the desirability of resolving issues of this nature through processes of this nature.
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Prepared on 12 October 2026 · Esheria