

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)**

Case no: 30377/2008

Date: 27 May 2010

Not reportable

Not of interest to other judges

In the matter between

D[...] J[...] B[...]

Applicant

and

M[...] D[...] P[...]

Respondent

(previously B[...])

JUDGMENT

MATOJANE. J

[1] On the 25 of June 2008 the applicant launched an urgent application in this court in terms whereof the applicant sought the following relief:

1.1 That the matter be dealt with on an urgent basis in terms of Rule 6(12);

1.2 That sole parental responsibilities and rights with regard to the minor child, be awarded to the applicant, subject to the respondent's rights of reasonable contact, alternatively, that parental responsibilities and rights over the minor child be awarded to both applicant and respondent, subject thereto that care and primary place of the minor child be with the applicant, subject to the respondent's rights of reasonable contact;

1.3 That the respondent obtains rights of access to the minor child subject to several conditions and restrictions;

1.4 Costs of the application in the event of opposition thereto.

[2] The applicant and respondent were previously married and finally divorced by the order of this court on 18 March 2005. The settlement agreement concluded between the parties was incorporated as an order of court. In terms of the settlement agreement, custody of their minor child, a central figure in these proceedings was awarded to respondent subject to applicant's rights of reasonable access.

[3] The minor child is a boy born out of the parties' previous marriage on [...]. He is presently 11 years old, lives with the respondent and attends primary school.

[4] The applicant seeks to amend the custody order by having custody of the minor child awarded to him.

[5] After the divorce, applicant married one C[...] B[...] who has two minor children born of her previous marriage. The respondent also remarried after divorce to one D[...] d[...] P[...]. He also has two minor children from his previous marriage.

[6] In his founding affidavit, applicant states that one of the reasons he launched this application for primary residence and care of the minor child was because, in his view, the respondent was exposing the child to excessive use of medication and exposing him to unnecessary and excessive medical examinations and treatments, which process was according to him, seriously debilitating and harmful to the child's general well-being. He further states that the respondent herself suffers from a psychotic condition whereby she is addicted to taking excessive medication for no reason at all and is busy transferring this condition to the minor child. Respondent denies applicant's averments and aver that it is not in the best interest of the minor child, to be moved from the respondent to reside with the applicant. She proposes an alternative relief that the court should order that the applicant, herself and any other relevant party, which the court deem fit, be subjected to professional help regarding any conflict regarding the upbringing of the minor child.

[7] It is not in dispute that the minor child had thirteen prescriptions of antibiotics administered to him over a period of sixteen months and that since 18 October 2007, large amounts of neurological drugs had been prescribed and given to the minor child. Applicant states that he has personal knowledge of the fact that the minor child constantly complains to him and his wife that he is nauseous, suffering from diarrhea and has no energy. He cannot sit for more than five minutes without falling asleep.

[8] In the opposing affidavit respondent states that the minor child has two chronic conditions, the one being heart related and the other being asthma/allergy related. These according to her, are treated by doctors

known to the applicant and by medicines prescribed with applicant's knowledge. She states that the minor child suffers from moods destabilization and anger attacks. This is being treated by a neurologist. She further states that the child is presently taking no drugs for his heart related problems, but chronic drugs for his allergy and neurological related problems and drugs to treat chest infections which are asthma related. She states that her main problem with the applicant is that he refuses to administer, or mal-administer, the child's medicine which leads to the child becoming ill. This furthermore leads to conflict between the applicant and the respondent. She avers that applicant wants to take the child out of a known environment and into an environment where the applicant is against administering the necessary medicine.

[9] As indicated earlier, the applicant launched this application for primary residence and care as a matter of urgency. The respondent opposed the relief sought. The application was heard in urgent court on the 17 July 2008 and pursuant thereof and as agreed between the parties, the matter was referred to an independent specialists for investigation, consultation and subsequent reporting. An order was made to the effect that:

9.1 That the minor child be examined by one Dr Lorna Jacklin, an expert paediatrician, on an urgent basis and that Dr Jacklin report on the child's state of health and the medication presently used by him on or before 30 September 2008;

9.2 The office of the family advocate, Pretoria, was requested to appoint an appropriately qualified psychologist to evaluate and assess the applicant, respondent and the minor child. To assess the possibility of the presence of Munchausen's Syndrome by proxy being present in either of the parties' profile and importantly, what would be in the best interest of the minor child with regard to his primary residence and place of care.

[10] On 17 November 2009 applicant re-launched the application on the urgent roll. As this matter has a long history and the papers are voluminous, preference regarding the opposed motion roll was granted by the Deputy Judge President and the matter was placed for hearing on 25 March 2010.

[11] When the applicant re-enrolled the matter on 17 November 2009, applicant also served his supplementary affidavit on the respondent's attorneys. The applicant stated that the respondent had up to 24 November 2009 to file opposing papers, and that the applicant would then reply before 1 December 2009. The applicant failed to reply timeously and only served his replying affidavit on the respondent's attorneys on 5 March 2010. Counsel for the respondent submitted in his heads of argument and in court that applicant's second reply should be disallowed and that the matter be dealt with in terms of the papers up to and including the respondent's supplementary affidavit. For the reasons which follow, I do not agree with this contention.

[12] The welfare of the minor child is at stake, slavish adherence to the opposed motion approach will result

in available crucial evidence being disallowed and in the process the court not being able to decide the issue of the best interest of the child on the papers. The legislature, in enacting section 9 of the Children's Act, Act 39 of 2005, and section 28 of the Bill of Rights recognised the paramountcy of the best interest of the child principle and any dispute relevant to the child's welfare cannot be left unresolved because of technical procedural objections. The objection by the respondent shifts the focus away from the most important consideration in the case, namely, the physical, psychological and emotional well-being of the minor child under the circumstances. HOWIE, JA in **B v S** 1995 (3) SA 571 at 584 par 1 recognised that this kind of litigation is not of usual kind, he held that:

"In addition it seems to me to be necessary to lay down that where a parental couple's access (or custody) entitlement is being judicially determined for the first time - in other words where there is no existing court order in place - there is no onus in the sense of an evidentiary burden, or so-called risk of nonpersuasion, on either party. This litigation is not of the ordinary civil kind. It is not adversarial. Even where variation of an existing custody or access order is sought, and where it may well be appropriate to cast an onus on an applicant, the litigation really involves a judicial investigation and the court can call the evidence mero motu."

[13] Counsel for the respondent submitted that the best interests standard would best be served and applied if the court interview the minor child and hears the minor child's wishes with regard to the primary place of residence and place of care. Applicant contends that such interview will not serve any purpose as respondent allegedly manipulates and influence the minor child against applicant and that she is able to do so by virtue of the fact that his primary residence and place of care is presently with respondent. Section 10 of the Children's Act, 38 of 2005 provides that where a child *"is of such an age, maturity and stage of development as to be able to participate in any matter concerning him"*. The court must give "due consideration" to the child's views. In my view, the minor child, despite his above average intelligence as appears from the reports of various experts, is still young to decide on his own what is in his best interest. He may not, for example, appreciate that living with a strict parent who enforce a diet is in his best interests especially as it is common cause that he is obese. I accordingly declined an invitation to interview the child as I was of the view that he has not yet reached a stage in his development to can make an informed decision about what is in his best interest. I however, note that the minor child informed Prof Jacklin that he wishes to stay with his mother and in the report of Colyn Schutte he was ambivalent preferring to live with both parents.

[14] Section 28(2) of the Bill of Rights provides that a child's best interest are of paramount importance in every matter concerning the child. In considering what is in the best interest of a child, section 7 of the Children's Act enjoins the courts to have regard, *inter alia*, to the nature of the personal relationship between the child and his parents; the attitudes of the parents, or any specific parent towards the exercise of parental

responsibilities and rights in respect of the child; the capacity of the parents to provide for the needs of the child, including emotional and intellectual needs; the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from his parents; the child's age, maturity and stage of development, gender and background; and the child's physical and emotional security and his or her intellectual, emotional, social and cultural development. This list is not exhaustive. These considerations are dealt with in detail in the report of Prof Lorna Jacklin, a specialist paediatrician and Colyn Schutte, a clinical psychologist and other reports.

[15] Prof Jacklin in her report found that the allegation that respondent is abusing her child by excessive, unnecessary medication "Munchausen's by Proxy" could not be validated. The decision to prescribe medication was always that of doctors and respondent informed them about previous medication. She found that the respondent was not doctor-shopping and there is no evidence of enforced invalidism regarding the child. The report states that the psychotropic medication that the minor child was taking was unnecessary, but prescribed by a specialist. The child has been weaned off this medication. The report states that applicant's failure to enforce the use of the child's asthma medication and respondent's failure to enforce a diet regarding the child can be considered as neglect. The report raises the following serious concerns about the child, *inter alia*:

15.1 The child's emotional and physical well-being under his current situation;

15.2 The lack of compliance to a diet in the child's home with his resultant obesity;

15.3 Both parents' ability to care for the minor child. She got the impression that they were both getting at each other through the child. She strongly recommends that the family be monitored by Child Welfare and that both parents should be compelled to attend a parenting course.

[16] Colyn Schutte, a clinical psychologist, in his report was able to give direct evidence of the interaction of the two families in their home settings. He interviewed and psychologically assessed the applicant, his wife and children from her previous marriage. He did the same with the respondent and her family and made the following recommendations:

"9.1. H[...] B[...] in die residensie van sy biologiese vader, meneer D[...] B[...] geplaas word, en dat redelike toegang tot die biologiese moeder toegestaan word.

H[...] B[...] verkeer in 'n pedagogiese noodsituasie. Sy verbesonderde opvoedingsbehoefte word nie in sy huidige plasing sodanig fasiliteer dat sy persoonsvoltrekking optimaal verloop nie. Die gevestigde dinamiek in sy spesifieke gesiteerdheid is sodanig dat die prognose vir wysiging ongunstig is. Die voortsetting van die huidige 'siek kind' rot is duidelik tot die direkte nadeel van H[...]. Ofskoon

H[...] baie geheg is aan die persoon van Mnr d[...] P[...], gaan sodanige gehegtheid in hoofsaak oor sy oorlewing in die d[...] P[...] opset en nie oor ongunstige verhoudings met die biologiese vader of Mev B[...] nie. Die werksomstandighede van Mnr d[...] P[...] behels dat hy nie deurentyd beskikbaar is om die groot taak te volbring wat hy in die verlede gedoen het nie. Selfs met Mnr d[...] P[...] voltyds beskikbaar, is die prognose vir herstel nie gunstig nie. Deur sy ingrepe word die balans in die gesin fasiliteer, maar nie die fundamentele verandering wat nodig is nie.

Die noodsaak aan spoedige verligting vir H[...] is dringend. en weeg swaarder as die aanpassingsopgawe wat 'n verskuiwing teweeg sal bring.

H[...] funksioneer reeds gunstig in die pedagogiese opset in die B[...] gesin, waar hy nie pre-disponeerd is tot die 'siek kind' rol nie, en waar sy persoonswording voltrek sonder die ontremmende dinamika waarbinne hy homself bevind. Die assessering en analise toon duidelik dat daar gevestigde verhoudings tussen H[...] en die biologiese vader, sy vrou en hulle kinders bestaan. Daar is empatie en begrip vir H[...] se behoeftes, en die gesinsdinamiek is sodanig dat H[...] goed ondersteun word wat betref aanpassingsopgawe. Voormelde verhoog die prognose vir aanpassing van H[...], asook die prognose vir sy herstel aansienlik.

9.2 H[...] deur 'n plaaslike kundige in Potchefstroom ondersteun sal word ter wegruiming van ongunstige betekenis wat by horn betsaan. Sodanige steungewing behoort gereelde ouerbegeleiding in te sluit. Beide H[...] en sy ouers kan baat vind by steungewing, welke verstelde betekenis asook verstelde opvoedingshandelinge kan fasiliteer.

9.3 Daar 'n ekstensiewe ouerskapplan opgestel word betreffende die minderjarige kind, H[...] B[...].

'n Grondige ouerskapplan met ingeboude dispuutresolusiemeganisme kart veel doen om die voortslepende konflik en twis tussen die partye, waartoe beide mildelik bydra, te bekamp. Ongeag waar H[...] homself bevind, is dit absoluut noodsaaktik dat daar 'n ingryp sal wees ten einde die effek van die voortslepende konflik te bekamp."

[17] Counsel for the respondent in his heads of argument and in court submitted that Jacklin's report does not support Schutte's finding that the child is in a pedagogical emergency situation, which can be remedied by changing the child's residence to the applicant. He further argued that the minor child's scholastic performance contradicts the finding that the child is in such an emergency situation. He submits that the conflict between the child's parents should be brought to an end in order to improve the child's situation, as the conflict is the core of the problem.

[18] Prof Jacklin is an expert pediatrician who was requested to bring out a report on the minor child's state

of health and the medication used by him. She is not qualified to make recommendations regarding primary residence and place of care of the child. Schutte on the other hand was appointed for a specific purpose, he was to assess the parties and prepare a report with regard to the general situation and what would be in the best interest of the child with regard to his primary residence and place of care. His recommendations are based on independent investigations and observations and not on the medical treatment received by the child. The court will not easily ignore his recommendations as his expertise and neutrality is not in dispute.

[19] Counsel for the respondent concedes that the family advocate's report was very hastily put together. The family counselor, Ms Maluleka, a social worker with 13 years experience perused the reports of Jacklin and Schutte and informally assessed the minor child and the child's workbooks and interviewed the child. She did not see the child in his home environment and did not perform tests on the child. She reports that the minor child expressed his wish to stay with his mother during the interview. She noted that the hostile relationship between the parties clouds their objectivity pertaining to the needs of the minor child. She recommended that both parents retain full parental responsibilities and rights in respect of the minor child with regard to care, guardianship and maintenance.

[20] In her supplementary affidavit respondent submit that the "*pedagogiese noodtoestand*" as referred to by Schutte in his report has already been remedied as she has taken steps to remedy those aspects of her behavior for which she was criticized in the reports. It is common cause that the child is showing very good academic progress at school and has been chosen as a Grade 4 prefect. In my view, these are by no means the only considerations the court must take into account in judicial decision-making process employed in matters concerning the child's welfare. See **McCall v McCall** 1994 (3) SA 201. What is disconcerting is that almost a year after the report by Schutte and Prof Jacklin, it would seem that the minor child is still being exposed to extensive medical examinations. According to the Claims Transaction History that reflects the use of the medical aid by the respondent for the minor child for the period 25 March 2009 to September 2009, various medical practitioners saw the minor child on 16 different occasions and 52 medical prescriptions were purchased through the Discovery Medical Aid Scheme within 6 months. This raises considerable uncertainty whether the doctors' prescriptions are as a result of existing symptoms correctly conveyed to them by the respondent.

[21] In my judgment, there is no reason for doubting the correctness of the factual and clinical observations of Schutte and the validity of his opinion. In my view, the best interest of the minor child will best be served if his residence vests with applicant as recommended by Schutte in his report. The disruption in the minor child's life will be mitigated by the fact that since birth the child lived with both parents and after divorce in 2005, there have been liberal rights of access between the son and his father. There is no suggestion that applicant is unsuited as a custodian parent or that he is disqualified from this role, there is accordingly, no

uncertainty that the child's best interest will not be served if he lives with applicant.

[22] On the question of costs, It is clear that the respondent did not oppose the application unnecessarily. Both parties acted in what they perceived to be the best interest of the minor child. When the applicant re-enrolled the matter, on the then urgent basis, the applicant served his supplementary affidavit on the same day but failed to adhere to the rules laid down by him by failing to reply timeously. The applicant also failed to index and paginate the papers timeously resulting in unnecessary costs for the respondent. In my view, it will be unreasonable to order the respondent to pay applicant's costs as respondent's opposition was reasonable under the circumstances. It will be fair and proper if each of the parties pays his or her own costs in the matter.

I accordingly make the following order:

1. The applicant and respondent shall each retain full parental responsibilities and rights with regard to the care of the minor child born of the marriage, but that the minor child shall reside permanently with the applicant, who shall retain permanent residence of the minor child.
2. The applicant and respondent shall consult each other concerning all important decisions relating to the minor child, more particularly, the taking of the minor child to any medical practitioner for treatment.
3. Both parties are ordered to participate in parental guidance with a suitably qualified person nominated by the family advocate, Pretoria.
4. Specific parental responsibilities and rights with regard to contact to the minor child, shall be granted to the respondent as contemplated in Section 18(2)(b) of the Children's Act, provided that it does not disrupt, interfere with or prejudice the minor child's religious, cultural, educational and social activities and the respondent shall have contact with the minor child at all reasonable times. In particular, the respondent shall have contact with the minor child as follows:
 - 4.1 Every alternate weekend from 17h00 on a Friday until 18h00 on Sunday evening, or earlier if agreed between the parties.
 - 4.2 Alternate public holidays.
 - 4.3 Alternate short school holidays with the Easter holiday period alternating between the parties.
 - 4.4 One half of each long school holiday, with the second half of the December school holiday

period (including the Christmas/ New Year period) alternating between the parties.

4.5 Every birthday of the minor child for 50% of the available time, the remainder of the available time the respondent shall be entitled to contact the child.

4.6 Every Father's Day and birthday of the applicant from 17h00 until the following morning, when the applicant shall be obliged to take the minor child to school or back to the respondent, subject to the proviso that should Father's day and/or the birthday of the applicant fall on a weekend that he does not have contact, then the weekend access periods will be exchanged between the parties and the applicant will have contact with the minor child for that weekend.

4.7 The provisions of clause 4.6 hereof shall apply to the respondent in respect of Mother's day and the birthday of the respondent.

5. The respondent shall further be entitled to have such further reasonable contact with the minor child as may be agreed upon between the parties from time to time, due regard being had to the minor child's religious, scholastic and other extra-mural activities.

6. Both parties shall provide each other with reasonable notice should it not be possible for such party to exercise contact with the minor child on a specific date, in order not to inconvenience the other party.

7. In the event, that either party requires to remove the minor child from the Republic of South Africa for a holiday period, then and in such event, it will be necessary to obtain the written consent of the other party, which consent shall not be unreasonably withheld. The party wishing to remove the child from the Republic of South Africa shall provide the other party with full details and contact numbers relating to such holiday out of the Republic of South Africa.

8. Each party to pay his or her own costs.

K E MATOJANE

JUDGE OF THE HIGH COURT