

NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)

In the matter between:

Case No: 590/2014

L. M. P.

Applicant

AND

C. T. M.

Respondent

Coram: **Chetty J**

Heard: **31 January 2017 and 1 February 2017**

Delivered: **14 February 2017**

JUDGMENT

Chetty J:

[1] The protagonists to these proceedings, and a raft of antecedent litigation, were once a married couple. On 14 February 2007, the bonds of their marital relationship was dissolved by order of the Southern Divorce Court and the deed of settlement concluded between them was

incorporated in the divorce order. Of relevance to these proceedings is clause 3, which, under the rubric, **Minor Child** provided as follows:

“3. MINOR CHILD

The custody and control of the minor child born of the marriage. “

L M is awarded to the Defendant, with the right of reasonable access, at all reasonable times by prior arrangements between the parties, to the Plaintiff.”

[2] On 24 February 2014, the applicant launched proceedings in this court in which the relief sought is, notwithstanding its inelegant formulation, quintessentially, for sole guardianship of L, now aged thirteen (13). The respondent filed a notice of opposition and a counter application wherein he sought wide ranging relief which, given the crisp triable issue, has fallen by the wayside. At the hearing on 19 February 2016 and by agreement between the parties an order was made, inter alia, appointing Dr *Gillian Smale*, a clinical psychologist to render therapeutic services to the parties and L for a two-fold purpose, to wit, to establish whether the relationship between the respondent and L could be restored with the aid of further therapy, and whether meaningful communication between the parties concerning issues pertaining to L and her best interests could be restored. The order furthermore obligated Dr

Smale to compile a report in congruity with her assignment and the application was referred for oral evidence.

[3] Dr Smale conducted extensive interviews with the parties and L and concluded her report as follows: -

“RECOMMENDATIONS

1. Further therapy is unlikely to be productive at this stage and was therefore terminated.
2. L should not be forced to see her father but she should be supported by her mother and family should she ever feel ready to initiate contact with her father. Her mother should desist saying negative things about Dr M. to minimise the possibility that L would experience a conflict of interests should she ever be ready to initiate contact with her father on her own.
3. Dr M. should be encourage to continue to send L friendly and affectionate text message on her birthday and other special occasions, without initially expected or demanding a reply. He has her cell number. This might be one way that he might still be able to establish credibility again with his daughter who might then, in her own time, feel ready to get to know him again.”

[4] At the hearing before me, the parties were ad idem that the applicant’s claim for sole guardianship of L was, as adumbrated above,

the only issue which fell for decision. It will be gleaned from the foregoing historical overview that the order awarding custody of L to the applicant contained no reference to guardianship. In terms of our common law, the respondent thus retained his guardianship, albeit with certain limitations. The promulgation of the **Children's Act**¹, and in particular, s 18, which came into operation on 1 July 2007, remodelled certain of the common law principles, and it is apposite, given the plethora of germane legislative provisions to quote the relevant portion of the commentary where the learned authors² state: -

“At common law, the term 'guardianship' had a wide and a narrow meaning. The meaning of 'guardianship' as defined in the Act more or less corresponds to the narrow meaning the term had at common law, namely the capacity to administer a minor's estate on his or her behalf, and to assist the minor in legal proceedings and the performance of juristic acts. In the wide sense it also included custody. Section 18(3) of the Act essentially codifies the narrow meaning of the term by obliging a guardian to administer and safeguard the child's property and property interests, assist or represent the child in administrative, contractual and other legal matters, and give or refuse any consent that is legally required in respect of the child.

Section 18(3)(c) contains a non-exhaustive list of the juristic acts for which consent is legally required in respect of a child. The acts that are listed in s 18(3)(c) are similar to those for which s 1(2) of the Guardianship Act required the consent of both parents of a legitimate child. However, the scope

¹ Act No, 38 of 2005

² C J Davel and A M Skelton : Commentary on the Children's Act

of s 18(3)(c)(iii) of the Act is wider than that of s 1(2)(c) of the Guardianship Act. While s 1(2)(c) of the Guardianship Act applied only to the removal of the child from the Republic, s 18(3)(c)(iii) of the Act extends to the child's departure from the Republic. In contrast, s 18(3)(c)(v) of the Children's Act is narrower than s 1(2)(e) of the Guardianship Act, for, unlike s 1(2)(e) of the Guardianship Act, s 18(3)(c)(v) of the Act does not apply to any right to immovable property which belongs to the child. Thus, for example, s 18(3)(c)(v) of the Act does not cover alienation of rights in respect of immovable property the child may have as a fiduciary.

Subsections (4) and (5) of s 18 recast and extend the scope of the rule on equal, concurrent powers of guardianship that was contained in s 1(2) of the Guardianship Act. Like s 1(2) of the Guardianship Act, sub-ss (4) and (5) of s 18 of the Children's Act allow any guardian of a child to exercise any responsibility or right arising from his or her guardianship independently and without the consent of the other guardian(s), but they subject this general rule to an exception. Comparing the provisions of the Act to those of s 1(2) of the Guardianship Act, the exception in the Act appears to be more extensive than that which appeared in the Guardianship Act. In terms of the Act, a guardian's power to act independently is subject not only to the requirement of joint consent for the juristic acts that are listed in s 18(3)(c) and to any order of a competent court, but also to 'any other law'. Section 1(2) of the Guardianship Act did not expressly subject guardians' powers of equal, concurrent guardianship to 'any other law'. However, it is submitted that nothing turns on this difference, as it is self-evident that guardians could only exercise their powers of guardianship in terms of the Guardianship Act independently if independent exercise did not violate the provisions of any other law."

[5] Notwithstanding the foregoing legislative prescripts and common law provisions which accord to both parents equal and concurrent powers of guardianship, a court of law, as the upper guardian of all minors, retains its inherent jurisdiction to grant to either parent sole guardianship or sole custody when it considers it to be in the interests of the minor child. Our case law accentuates the paramountcy of that principle and has, over the years, laid down certain guidelines, perhaps, the most instructive, the criteria listed by King J in **McCall v McCall**³ as follows: -

“(a) the love, affection and other emotional ties which exist between parent and child and the parent's compatibility with the child;

(b) the capabilities, character and temperament of the parent and the impact thereof on the child's needs and desires;

(c) the ability of the parent to communicate with the child and the parent's insight into, understanding of and sensitivity to the child's feelings.

(d) The capacity and disposition of the parent to give the child the guidance which he requires;

(e) the ability of the parent to provide for the basic physical needs of the child, the so-called 'creature comforts', such as food, clothing, housing and the other material needs - generally speaking, the provision of economic security;

(f) the ability of the parent to provide for the educational well-being and security of the child, both religious and secular;

³ 1994 (3) SA 201 (C)

(g) the ability of the parent to provide for the child's emotional, psychological, cultural and environmental development;

(h) the mental and physical health and moral fitness of the parent;

(i) the stability or otherwise of the child's existing environment, having regard to the desirability of maintaining the *status quo*;

(j) the desirability or otherwise of keeping siblings together;

(k) the child's preference, if the Court is satisfied that in the particular circumstances the child's preference should be taken into consideration;

(l) the desirability or otherwise of applying the doctrine of same sex matching, particularly here, whether a boy of 12 (and Rowan is almost 12) should be placed in the custody of his father; and

(m) any other factor which is relevant to the particular case with which the Court is concerned."

[6] In determining whether L's interest would best be served by an award of sole guardianship to the applicant it is apposite therefore to juxtapose the evidential material, both *vive voce* and on affidavit with the criteria enumerated in McCall. Given L's pre-eminence in this application, it is pertinent to commence the enquiry with her testimony. L, despite her youthfulness exudes confidence and a maturity beyond her years. Her narrative (in chief) of the interaction between herself and the respondent traversed the period of her earliest recall to the present day and, sadly,

accentuates the chasm between father and daughter. The extent of that filial disintegration was encapsulated by her riposte to a question posed under his cross-examination - *"I want nothing to do with you."* The suggestion that her answer was the product of not only hurt and rejection but engineered by the applicant can readily be discounted. My observation of her in the witness box decries any notion that she is manipulable and her testimony, tailored. The respondent's characterisation of her evidence as untruthful demonstrates, quite unequivocally, the schism between them.

[7] An analysis of the evidence adduced shows that the opposition to sole guardianship is actuated purely by the respondent's truculence towards the applicant's current marital status. This animosity surfaced during his cross-examination of the applicant when he berated her for living with her husband prior to the solemnisation of their marriage. This, he pontificated, was morally reprehensible and had had a deleterious effect of L. The respondent's angst is entirely misconceived and at variance with the accepted facts. Both the applicant and L espouse the familial bond which the applicant's remarriage has wrought upon them.

[8] There is no doubt that L's economic security is more than adequately catered for in her current home environment. The bond between mother and daughter is readily apparent, nurtured and sustained, no doubt by the applicant's devotion to L. Contrariwise, the

respondent's rebuff of her in the shopping mall. I accept L's evidence that he was dismissive of her. Such conduct is completely at variance with his evidence that he was a caring father. It is common cause that he denied paternity and the explanation tendered thereanent is patently nonsensical. The attendant emotional trauma must inevitably have had a profound effect on L and his insensitive behaviour was clearly not in her best interest.

[9] It is abundantly clear that the applicant's remarriage is the unending source of the respondent's belligerence towards her and the underlying motivation for opposing her application. Two examples will suffice to demonstrate that L's best interests are secondary to his. It is common cause that L was selected to participate in a synchronized swimming event at the Commonwealth Student games in Perth, Australia. It is furthermore not in issue that in order to acquire the requisite transit documents the respondent's written consent was required. Although the respondent sought to deny that he wilfully withheld his consent, his denial is patently false. I accept that the applicant's recourse to this court was actuated by his refusal and, given L's passion for her sport, the respondent's intransigence clearly not in her best interests.

[10] Secondly, the respondent's obdurateness in seeking to thwart the applicant's endeavours to provide the best scholastic path for L is further

exemplified by his puerile behaviour concerning her intended placement at Collegiate Primary. Despite his protestations to the contrary, I accept the applicant's evidence that he was deliberately obstructive. Here too, his conduct was clearly not in her best interests. In the result the following order will issue: -

- 1. The applicant is awarded sole guardianship of L.**
- 2. The respondent is ordered to pay the costs of this application including the qualifying fees of Dr Smale and the costs of the interlocutory application.**

D. CHETTY

JUDGE OF THE HIGH COURT

Obo the Applicant: *Adv A. Beyleveld S.C*

Instructed by *Cecil Beyleveld Attorneys, Room 512, Oasim
South, Pearson Street, Central, Port
Elizabeth*

Tel: (041) 582 1695

Obo the Respondent: *In Person*