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IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

Case number: 1025/2016

In the matter between:

H S

Applicant

and

J S

Respondent

CORAM: DAFFUE, J

HEARD ON: 28 FEBRUARY 2019

JUDGMENT BY: DAFFUE, J

DELIVERED ON: 7 MARCH 2019

- [1] The applicant and respondent, respectively the mother and father of two minor children aged 9 years and 10 months and 7 years, are at loggerheads pertaining to the primary care of the children.
- [2] The parties were married to each other, but on 22 December 2016 I granted a decree of divorce in the unopposed motion court, incorporating a deed of settlement which *inter alia* included arrangements pertaining to the care and residency of the children. In short, the parties agreed that the children would stay one week with the applicant and one week with the respondent and further arrangements were made in respect of holidays.
- [3] When the decree of divorce was granted, the children were 5 and 3 years old respectively. I remember vividly that I had serious doubts about the arrangements, but was eventually convinced that the best interests of the children would be served as applicant testified that the arrangement had been ongoing in practice for about 18 months.
- [4] On 30 November 2017, less than a year after divorce, applicant instituted the present application in terms whereof she seeks a variation of the deed of settlement on the basis that the children reside primarily with her, subject to certain defined contact rights to be granted to respondent.
- [5] Respondent gave notice to oppose the application and on 16 January 2018 he filed his answering affidavit and a conditional

counter application wherein he seeks primary care of the children. Applicant filed a replying affidavit on 19 February 2018.

- [6] On 8 March 2018 an order was made by agreement, *inter alia* in terms whereof the Family Advocate was requested to conduct the necessary investigation. An investigation having been conducted, the Family Advocate's report was filed as late as 18 November 2018. The parties filed short supplementary affidavits in terms of leave being granted to them earlier and the matter was set down for hearing on 28 February 2019.
- [7] Applicant went out of her way not to portray respondent in a negative light. According to her they are both very involved in the children's lives and equally equipped to take care of them. When the deed of settlement was entered into, the parties believed that shared primary care was a "wonderful idea" as endorsed by Dr Zendré Swanepoel, a psychologist who assessed the family.
- [8] The applicant is now of the view that she and respondent have remained locked in conflict since the divorce and this is regarded as the principal reason for the application. She believes that respondent has not overcome his feelings of resentment towards her because of a "one night stand" which contributed to the breakdown in the marriage. Respondent disputes the alleged conflict and alleges that the two parents sit together at school functions and communicate almost daily regarding the children.

- [9] According to respondent he complied with a recommendation of Dr Swanepoel and had regular sessions with a psychologist and also attended a course offered by his church. Therefore, he is of the view that he has put aside his resentment towards applicant.
- [10] Applicant has in the meantime married an air force officer and colleague of respondent, Mr Bellingan, and she is expecting his child. She resigned from her employment and nowadays plays the role of a full time mother.
- [11] During the weeks that the children stay with respondent, applicant collects them from their schools, provide them with lunch and afternoon care and also assists them with their homework. Respondent picks them up after work. The effect of this arrangement is that applicant is in practice the primary caregiver of the children on a daily basis from Monday to Friday.
- [12] It is clear from the Family Advocate's report that Mr Bellingan's influence has much to do with the present application. He opined that the children need more stability with one home and one set of discipline, instead of the current situation of two household with different routines, structures and disciplines. This viewpoint is not strange insofar as minor children are always subjected to a different approach to discipline from their respective parents, especially when one or both parents remarry. This is so even

when there is not shared primary care. Courts often hear that the non-custodial parent allows for more flexibility and less discipline than the primary caregiver.

[13] I am surprised that the Family Advocate, the family counsellor, the social worker, Ms du Plessis, as well as the teacher, Ms Adendorff, came to the conclusion that shared residence worked well in the past and that future shared residence would be in the best interests of the children. The primary reason advanced by them is the on-going practice of over three years to which the children have become accustomed.

[14] I do not want to be unnecessary critical of the recommendations of these four persons, but wish to emphasise that they totally ignored the fact that the children are presently attending school which was not the case when the decree of divorce was granted. I considered postponing the matter for a month with directions to the Family Advocate and her counsellor to reconsider their recommendations based on the practicalities relating to school attendance and extra-mural activities. Mr van Aswegen, who appeared for the applicant, submitted that such ruling was not required as sufficient evidence had been placed before the court to adjudicate the application.

[15] I do believe that both parties and applicant in particular could and should have provided the court with more information as to any difficulties experienced pertaining to the attendance of school and

extra-mural activities. As it is, there is not enough evidence of changed circumstances and the effect on the children. Fortunately, the children attend the St Andrews and Eunice Primary Schools which are located between the parties' respective residences. It might have been more troublesome if the parties were staying much further apart than the present 7 kilometres and applicant had to collect the children from respondent's home before school and deliver them there after school. This is not the case as I have been informed from the bar at my request.

[16] Mr van Aswegen submitted that the children needed more stability and that this can only be achieved by varying the deed of settlement. If pertinent and material evidence was placed before the court, his submission might have been valid and convincing. Contrary to his version, Mr Groenewald submitted that applicant was seeking a variation of the deed of settlement solely because the present arrangements are inconvenient to her. He emphasised that respondent complied with Dr Swanepoel's recommendations and he is even prepared to submit himself to counselling by FAMSA which applicant is not prepared to do.

[17] If I had to consider joint primary care without the history of joint primary care of nearly four years, I would probably not be prepared to grant such an order. It is my personal view that however good the intentions of divorced parents may be, conflict will on all probabilities always be much greater in the case of joint primary care than otherwise. However, *in casu* the children have become

used to their circumstances and apparently cope well. Therefore, I do not believe that it is in their best interests to change the *status quo*.

[18] Respondent filed a counter application as indicated above, but Mr Groenewald was quite taken aback when I called for his submissions in that regard. Clearly such application was not seriously brought and Mr Groenewald was not prepared to argue the issue.

[19] The only outstanding issue is the costs of the application. I recorded my views on shared primary care. It is also apparent that applicant did not want to belittle respondent and his ability to care for the children. Although applicant's new husband might have had a role to play, I am of the view that applicant has always had the best interests of the children at heart. The general rule is that the successful party is entitled to his/her costs, but that rule is not cast in stone, particularly regarding litigation pertaining to the best interests of children.

ORDERS:

[20] Consequently the following orders are made:

1. The application is dismissed.
2. Each party shall be liable for the payment of his/her costs of the application.

J P DAFFUE, J

On behalf of Applicant: Adv W A Van Aswegen
Instructed by:
Mcintyre & Van der Post
Bloemfontein

On behalf of Respondent: Adv W J Groenewald
Instructed by:
Phatshoane Henney Inc
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