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

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

Case no: 641/2017

In the matter between

**P T
(ID: [...])**

PLAINTIFF

and

**B T
(ID: [...])**

DEFENDANT

HEARD ON: 13, 14 & 16 AUGUST 2019
& 14 OCTOBER 2019

CORAM: MURRAY AJ

JUDGMENT BY: MURRAY AJ

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- [1] The parties in these divorce proceedings were married to each other in community of property on 4 December 2010 in Allanridge, Free State Province. It is common cause that they have been living apart since January 2017 and that the marriage has broken down irretrievably with no prospects of restoration of the marriage relationship.
- [2] Only two issues remain in dispute: (a) the primary residence of the two minor children, with payment of maintenance by the non-custodian parent and (b) the Plaintiff's right to share in the Defendant's pension interest.
- [3] The two minor children born from the marriage are:
- 3.1 L T, a boy born on [...] August 2009, and
- 3.2 T T, a boy born on [...] December 2012.
- [4] L, who attends [...] Primary School, and T, who attends [...] Crèche, have been living with the Plaintiff's parents in Bayswater, Bloemfontein, since January 2014 and April 2014, respectively. It is undisputed that the Plaintiff himself has been living with the boys at his parents' residence since January 2017.
- [5] The 34-year old Plaintiff, a qualified mechanical engineer, is employed in the family business, JPS Coaches, in Heidedal, Bloemfontein. He works from 06:00 until 17:00 – 18:00 on week-days, mostly in the office, but also on occasion ferries people as a bus-driver. On his evidence, he earns a gross salary of R7 000.00 per month, with a net salary of R6 000.00. He contributes to the parental household by buying food. He maintains the boys, including their school fees and activities, as well as after-school care and extra classes for L, and therapy for T, with the financial assistance of his parents. The Defendant on her own admission has never made any financial contribution towards the boys' maintenance.

- [6] The paternal grandparents have a 4-bedroom house. They, the Plaintiff and T and L, and the Plaintiff's brother and his wife and son live on the premises. L and T have their own room in the house, but during the week the three boys share a room in the second house on the premises ("the lapa") where the Plaintiff's brother and his wife reside, in order for the nanny to get all three of the boys ready for school since the Plaintiff needs to leave for work at 05:30 already. The nanny also sees to their lunch when they get back from school, under the supervision of their aunt.
- [7] In the evenings, according to L, they play with their father and on week-ends they love to sleep in their father's room, and attend sports events with him. They also love hunting with their grandfather and the Plaintiff. According to the school reports the grandparents and the Plaintiff are well-known at the boys' schools and the Plaintiff is actively involved in the boys' school events and attends school meetings.
- [8] From the evidence and the relevant school and other correspondence it is clear, furthermore, that the entire paternal family is actively involved in assisting with L's and T's upbringing. The grandfather is the one taking them to their respective schools – according to the evidence they sometimes walk, and at other times he drives them. The grandmother is the one who takes T for his occupational and speech therapy sessions. The uncle has on occasion taken T to Dr Griessel, and filled out the assessment form. The aunt attends to the boys' homework. Therefore, when the Plaintiff himself is not available he has an entire extended family network who takes care of the boys. As the family Counsellor Mrs van der Westhuizen pointed out, that is part of the boys' heritage, and that is the environment in which, on their own version, they feel safe and secure and where they informed her they wished to remain.
- [9] The Defendant, however, wishes the boys' primary residence to be assigned to her and, accordingly, for them to relocate to Allanridge where she resides. She alleges that the two Family Advocate Reports issued in 2017 and 2019, respectively, which recommended that the children be allowed to stay with the Plaintiff and his parents, were not based on a true version of the evidence

given during the investigation. An application which she instituted in April 2019 to compel the Family Advocate to provide a transcript of all the proceedings at the Family Advocate's Offices failed.

[10] The Defendant has been employed as a traffic officer by the Department of Police, Roads and Transport since 1 August 2016. She works in Welkom and Odendaalsrus, but resides in Allanridge. She lives alone in her childhood home which she co-owns with her brother. It is a 3-bedroomed house which according to her has ample space for the boys. She alleges that if they came to live with her, she would employ a full-time nanny, and have her married aunt, whose youngest child is still at school, come and live with her to take care of the boys when she is at work.

[11] According to the Defendant she has already made enquiries at schools in Odendaalsrus to have the boys transferred there and has contacted therapists for T. She indicated that the boys would have to make use of public transport to get to school. She works shifts: one week she works from 06:00 to 14:00 and the next from 14:00 to 22:00, and has two week-ends per month free. At times, when it is busy, she has to work from 22:00 to 06:00. She earns R17 000 per month.

[12] The Defendant avers that one of the reasons for the breakdown of the marriage was that the Plaintiff allowed his parents to interfere in their relationship and in their parental rights regarding their children. It is undisputed that she and the Plaintiff in 2014 allowed L and T to go and stay with the Plaintiff's parents, Mr J T and Mrs E T, in Bayswater, where they have resided for the past 4.5 years, and where they were joined by the Plaintiff in January 2017 when he left the communal home. They agreed to the arrangement in order to have the children live close to good schools and to enable the Defendant to attend Traffic Officer Training College ("College") for two years, from June 2014 to July 2016.

[13] The agreement was that the boys would come home to the Plaintiff and the Defendant in Fleurdal, Bloemfontein, for weekends, and when the Defendant

finished College, they would come home permanently. When the Defendant completed her training and started working on 1 August 2016, however, the boys did not permanently return to the communal home as had been agreed.

[14] The reason, according to the Plaintiff, was that the Defendant for two years during her training stayed at the Traffic Official Training College (“the College”) during the week, and was home only on some weekends. After completion of her studies, she changed and on several occasions, especially at pay-time, simply left the communal home for two days at a time and stayed away without his knowing where she was, leaving him there with the boys.

[15] The Family Advocate’s Office has thoroughly investigated this matter on two occasions, two years apart. Two different Family Advisors investigated the matter in 2017 and 2019, respectively, and two different Family Advocates consequently provided reports in which they both recommended that the boys be allowed to stay with the parental grandparents and the Plaintiff. It is with that recommendation that the Defendant takes issue.

The First Family Advocate Report: 23 August 2017

[16] The first report, by Family Advocate Vuyani Jamba, based on an investigation into the *pendente lite* residency of the children, was issued on 23 August 2017 when the boys were 8 years old and 5 years old, respectively. Mrs Kgantse Molefi, a Family Counsellor with 18 years of experience as a social worker, and Adv Jamba then consulted with the parties and Mrs Molefi assessed the children. Mrs Molefi also interviewed the paternal grandparents, the paternal aunt and the children’s nanny, the 23-year old maternal cousin (whom the Defendant at that stage indicated would come and live with her to help care for the boys) and the Defendant’s domestic worker and prospective nanny. She also considered the reports of the boys’ teachers and T’s therapists.

[17] L told the Family Counsellor that he loves his grandparents and likes living with them. His grandfather takes them to school and his grandfather and - mother assist them with homework. Their homework is done by the time his

father comes home, so after work they interact and play with him and on week-ends 'bike' with him and go with him to watch soccer games. He identified his father as the most important person in his life, although he also loves to be with his mother and looks forward to visiting her, but is sad that she is not in Bloemfontein so they can be a family again, and sad that she and his father and the grandparents do not have a good relationship. He also reported that the nanny assists in preparing him and T for school and prepares their breakfast and lunch.

- [18] The family counsellor remarked that T has a small left hand without fingers, which makes it hard for him to draw and write, about which other children bully him and make fun of him. He undergoes occupational and physiotherapy, and also sees a speech therapist. The Plaintiff is making arrangements for him to get fitted with an artificial hand, which the Defendant regards as unnecessary. In his drawing of his family he did not include his mother, only his father, L, his paternal grandparents and his paternal aunt.
- [19] The grandparents reported to Mrs Molefi that they were assisting the Plaintiff to take care of the children who have settled down well in their environment. They reported that the Plaintiff has a close relationship with his children, is involved in their activities such as sports, biking, shopping and watching movies. When he is home he assists in bathing them and cuddling them before they sleep. He intends to buy a house where he and the children would reside with the paternal aunt and/or the nanny to take care of them when he has other commitments.
- [20] When asked why, even though the boys had their own room, they had to sleep in the 'lapa' with the nanny during the week, the Plaintiff explained that it was merely a practical arrangement. Since he himself has to leave for work at 5:30 already, which is long before the children need to get up for school, it enables the nanny to wake them and get them ready at the appropriate time.

- [21] Adv Jamba emphasised the importance of taking cognisance of the children's views, with due regard to each child's age, maturity and stage of development, as specified in s 10 of the Children's Act 38 of 2005. He remarked that although both children had a good relationship with both their parents, during the assessment L, the then 8-year old, indicated that he did not want to relocate to Allanridge to live with his mother. It was evident from the investigation that both children were happily established in their grandparents' home where they had lived for most of their lives. He concluded that, during the enquiry there were no substantial and compelling grounds to change the children's living arrangement.
- [22] Both the Family Counsellor and Adv Jamba cautioned that the grandparents were exceeding their role regarding the care of the children. They warned that it appeared that they had completely taken over the parental responsibilities and rights of the biological father to the detriment of the children's mother and had obtained a protection order against the Defendant which made it more difficult for her to have contact with her children at their residence.
- [23] In his report, Adv Jamba pointed out that it appeared that since the separation of the Plaintiff and the Defendant, the Defendant's contact had been frustrated; that she had been excluded from major decisions regarding the children; that the arrangement indeed had been intended to be a temporary one since, after leaving College, the Defendant would take care of the children herself; but that the grandparents then frustrated her contact rights to such an extent that she was even barred from entering their premises by way of the protection order, and that that had led to the acrimonious dispute about the residence and care of the children. Those findings corresponded with the Defendant's evidence in Court, but what also emerged was that she had also obtained a protection order against the grandparents.
- [24] Adv Jamba cautioned that the grandparents should realise that the children's biological parents are co-holders of the parental rights and responsibilities and

that the Defendant, as co-custodian must not be left out of the major decision-making regarding the development and future of the children.

- [25] He advised, furthermore, that the children have a good relationship with both parents and the grandparents, which relationships should be preserved for the children's benefit, to increase their security and stability. He then recommended that the parental responsibilities and rights with respect to the care of the children be retained by both parents, but that the children's primary residence be awarded to their father. It was averred on behalf of the Defendant that this recommendation is contrary to the facts set out in the report.

The Second Family Advocate Report: 23 February 2019

- [26] A second Family Advocate Report by Adv Lucky Holele was issued on 23 February 2019. It resulted from an investigation with a view to the permanent residency of the children upon the Defendant's request. Adv Holele also recommended that the children stay with the Plaintiff subject to the Defendant's contact rights. He was assisted in the investigation by Mrs van der Westhuizen, a qualified Social Worker with 28 years of experience.
- [27] The investigation consisted of a joint interview with the parties, another assessment of the children, consideration of the First Family Advocate report with the recommendations of Mrs Molefi and Adv Jamba, a report from T's Occupational Therapist, and the 2018 school reports of both children.
- [28] The Defendant contended that this report was not in accordance with the evidence led during the enquiry. Mr Palazzi, the Defendant's attorney, in argument submitted that it lacked a factual basis to support the recommendations. He averred that the report contained mostly legal conclusions. I cannot agree with that contention. The Family Counsellor's report contained several material factual findings.

- [29] The Family Advocate's Office refused the Defendant's request to provide a transcription of all 'evidence led' during the enquiry. A subsequent court application to compel such delivery was also dismissed. It was held that evidence could be led during the divorce proceedings for the Court to determine whether the evidence is compatible with the recommendation that the children reside with the Plaintiff.
- [29] At the stage of the second investigation L was 9 years old and T 7. L was observed to be a happy child who participates in karate, cricket, rugby and hockey and who resides with his father on the same premises as his paternal grandparents, paternal uncle and aunt, cousin and his brother. He has his own bed in a room which he shares with his brother. He enjoys activities with his father with whom he feels safe. He does miss his mother and wishes to have more contact with her, but indicated that he did not want to reside with her because he did not want to go to a new school. He wants to stay with his father. His school report indicated that his father attended the sport matches and parent meetings and that his father and paternal grandparents are fulfilling his emotional and developmental needs.
- [30] T was 7 years old at the time. The Family Counsellor found him to be extremely shy, with speech and concentration delays. He indicated that he wished to continue to reside with his father and brother in their current house and provided no information about his mother. He was to repeat Grade R because of emotional immaturity and receives medication to improve his concentration levels. He was also referred to an occupational and a speech therapist. He has adjusted well to the routine and structure in the class of [...] Pre-Primary School and relates well with his class-mates, but is still being bullied at times and needs adult assistance in standing up for himself.
- [31] The Family Counsellor determined that although his grandparents are well-known at the school, his mother is unknown and has never shown any interest in his progress or attended school activities. She reported that although T still showed some delays in emotions, independence and understanding of ideas,

place, time and relationships, the Plaintiff is seeking the necessary professional assistance to help him overcome these delays.

[32] Mrs van der Westhuizen indicated that the reasons the Defendant advanced for seeking the children's primary residence is that she is able to care for them herself and that their residing with the grandparents had only been a temporary arrangement. She indicated that she would get a full-time helper to help care for them in Odendaalsrus. She also informed her that she would allow the father the same access rights that she had, and that she would give the grandparents reasonable access to the children as well.

[33] Mrs van der Westhuizen reported that the Plaintiff, on the other hand, informed her that it would not be in the children's best interest to have their current primary residence changed. He stated that it was very important that they be allowed to stay in their current schools where they are settled, are progressing well, also in sport, and where they have their own circle of friends. He informed her that L and T are happy and settled residing with him and that the Defendant has free, regular contact with them.

[34] The Family Counsellor then undertook an extensive evaluation of the facts in terms of the factors listed in s 7 of the Children's Act 38 of 2005 to determine the best interests of the children. Regarding:

34.1 S 7(1)(a)(i)¹ she found that there was a good relationship between both parents and the children, but that it is important to acknowledge the strong and secure relationship between the children and the paternal grandparents with whom they have resided since 2014. (This finding corresponds with that of Ms Molefi in the first investigation.)

34.2 S 7(1)(b)² she found that both parents indicated that they do not have a problem with the other parent exercising his or her parental rights

¹ S 7(1)(a)(i) *The nature of the personal relationship between the child and the parents, or any specific parent.*

² S 7(1)(b) *The attitude of the parents, or any specific parent, towards (i) the child, and (ii) the exercise of parental responsibilities and rights in respect of the child.*

and responsibilities and that they appear to have found an appropriate way to communicate regarding the children's needs and the exercise of contact rights.

- 34.3 S 7(1)(c)³ she found that both parents have the capacity, ability and means to provide in the children's needs, as well as in their emotional and intellectual needs.
- 34.4 S 7(1)(d)⁴ she found that since 2014 the children have been living with the paternal grandparents who have been actively involved in their upbringing, school and especially with T's various therapy sessions. Also that the children are happily residing with their father at the paternal grandparents' residence and are comfortable with the arrangement. They are well-adjusted in school performing and developing well. Significantly, she concluded that it would not be in their best interests to change their primary residence to that of the mother in another town, and to have them change schools and therapists. (This finding, also corresponds with that of Ms Molefi during the first investigation.)
- 34.5 S 7(1)(e)⁵ She found that the mother has been able to exercise regular contact with the children although she resides in Odendaalsrus, 165 km from Bloemfontein. The grandparents have also offered safe transport for the children to her if she paid half of the transport costs.
- 34.6 S 7(1)(f)⁶ She stressed the importance of enabling the children to have regular contact, not only with the other parent, but also with both sides of the extended family, maternal and paternal.

³ S 7(1)(c) *The capacity of the parents or any specific parent to provide for the needs of the child, including emotional and intellectual needs.*

⁴ S 7(1)(d) *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 (i) both, or either of the parents; or any ... care-giver or person with whom the child has been living.*

⁵ S 7(1)(e) *The practical difficulty and expense for a child to have contact.*

⁶ S 7(1)(f) *The possibility to maintain a connection with his or her family, extended family, culture or tradition.*

34.7 S 7(1)(g)⁷ She stressed that the children need to have regular contact with both parents and that their residence with their grandparents is part of their background which plays a vital role in their current situation. (This confirms the finding of Ms Molefi in the first investigation.)

34.8 S 7(1)(h)⁸ She stressed the importance of the mother's active involvement in the children's sport and school activities, and with T's therapists, with as much structured contact with the children as possible to ensure that their bond with her stay strong and secure.

[35] The Family Counsellor, in keeping with the findings of Ms Molefi and Adv Jamba of the situation prevailing during the first investigation, then reminded both parties and the grandparents, in accordance with the provisions of the Children's Act, of their obligations towards the children, pointing out the potential consequences if such conduct were to be allowed to continue, namely:

35.1 S 8(2): That both parents need to be aware that their responsibilities and rights regarding the children, include (i) to care for the child (ii) to maintain contact with the child (iii) to act as guardian to the child, and (d) to contribute to the maintenance of the child.

35.2 That the potential for 'Parental Alienation' could be triggered by one parent withholding from the other parent the right to have regular contact with the children and by preventing the other party to exercise her or her parental rights and responsibilities regarding the children.

35.3 That both parents and the paternal grandparents need to take note of s 35(1) of Act 38 of 2005 and warned that any person who prevents

⁷ S 7(1)(g) *The child's (i) age, maturity and stage of development, (ii) gender, (iii) background, and (iv) any other relevant characteristics of the child.*

⁸ S 7(1)(h) *The child's physical and emotional security and his or her intellectual, emotional, social and cultural development.*

access to the children pursuant to a court order or prevents the exercising his or her parental rights and responsibilities is guilty of an offence which can lead to imprisonment.

35.4 That, since both parents are holders of parental rights and obligations regarding the boys, the person with the primary right of care and residence needs to take into consideration any views or wishes expressed by his or her co-holder of rights before taking any major decisions regarding the children, in accordance with s 31(2)(a) of the Children's Act.

[36] Based on her investigation, her findings, and the 'best interest of the child' analysis in terms of s 7 of the Children's Act, the Family Counsellor then recommended that the parental responsibilities and rights be awarded to both parents, and that the primary residence remain with the Plaintiff.

[37] Family Advocate Holele recommended accordingly.

The Evidence in Court:

[38] The Plaintiff's evidence was that there was no prospect of the marriage being saved. He confirmed that he left the communal home in January 2017 already and that he has since resided with the two children in his parents' residence. Also that, until then the boys, by agreement, had lived with his parents and only came home on weekends.

[39] His reason for leaving, according to him, was the dispute between him and the Defendant, as well as the Defendant's dispute with his parents over the children, and her swearing at his mother and father. He maintained that he brought up and maintained the children, supported the Defendant through College, then helped her to find employment. According to him, when she received her first salary in August 2016, however, she simply disappeared and he did not know where she was or what she did with her money. That was when he started seeing payments to her parents. According to him, she

was gone for the entire September, including the 4 weekends during which the children came home and stayed with him. Yet, even on her own version, she never contributed financially to the children's maintenance.

[40] According to him, since he had been taking care of the children, together with his parents, he knows them and their needs better than the Defendant does. His parents assist with transporting the children to school, sport and other activities, medical appointments and therapy sessions when he is not available. They live close to the childrens' schools, apparently within walking distance, in a 4-bedroom house with the grandparents and the Plaintiff's brother, his wife and their son. The boys have their own room but love sleeping with the Plaintiff when possible, which they do on weekends.

[41] He testified that L loves and excels at rugby, and is the captain of the school's u/11 team. They attend rugby matches together. The boys also love hunting, which they do together with him and his father. He indicated that T has special needs because of an attention deficit disorder and a physical disability because he has no fingers on his left hand. His grandmother takes him for physio- and occupational therapy twice a month, and arrangements have been made for him to get an artificial hand.

[42] The Plaintiff testified, furthermore, that the Defendant is a Government employee and as such has a Medical Aid, but only recently provided them with a Medical Aid card for the children. He indicated that his father pays for T's Occupational and Speech therapy sessions, while he and his parents pay the children's school fees, clothes, extra-mural, school materials and aftercare for L.

[43] According to him, since the Interim Order, the Defendant has fetched the children for the holidays. However, during 2019, except for the Easter long week-end, and the June holidays, she never fetched the boys for a weekend even though she is entitled to have them every second weekend. Previously, when she fetched them for weekends, she would forget that they have school

the next day and would only bring them back at 20:30 or would send them back with unknown people. These allegations were not denied.

- [44] The Plaintiff also indicated that in December 2017 he called the Defendant to tell her that he was coming to see the children as per their arrangement, but when he arrived, she told him they had gone to Bothaville with her uncle. When he went to the Police Station to report the matter, they called the Defendant's uncle who denied having taken the children along. After the Plaintiff had driven back to Bloemfontein with the items that he had bought for the children, the Defendant sent a message telling him to come the next day, but he could not do so.
- [45] He testified that he had discussed the possibility of a move with the boys, and that they had indicated to him that they wanted to stay with him in Bloemfontein and not in Allanridge with their mother. They enjoy Bloemfontein and a change from the environment of Bloemfontein to that of Allanridge would severely impact their school work.
- [46] He confirmed that the Defendant works in Welkom and Odendaalsrus, but resides in Allanridge. Also that she works shifts which every second week start at 6:00 while the children only have to leave for school at 7:00, and that during holidays and Christmas she sometimes has to work through the night.
- [47] Under exhaustive, two-day long cross-examination, the Plaintiff testified that he refused to have the children come home after the Defendant returned from College because he could see how she had changed and could see that she was not taking care of them. He averred that, although he did not report that during the family advocate investigation because he was not asked about that, she could not even cook food for the children. He stated that the problems between the Defendant and his parents started even before she went to College. While she was studying, she would stay at the College during the week and only come home to him and the children on some weekends.

- [48] According to him his parents supported his decision that the children should stay with them, and, although the Defendant did not want them to stay with the grandparents, which caused the dispute between her and the parents, and did not care about the children getting a better education, she accepted the decision. He said at first she agreed, then she refused and after the two of them talked about it, she agreed again, but also told the grandmother that if she failed to look after the children, she would take them to Allanridge.
- [52] He testified that when he left the communal home, he arranged with the landlord that he would continue to pay the rent so the Defendant could stay on in it. He testified that the Defendant sometimes went to see the children during school hours, which disrupts their classes. She averred that she did so because the Plaintiff and his parents would not allow her to see the children when she wanted to. He stated, furthermore, that the Defendant tried to take the children to Allanridge without his knowledge and he only found out about that when the school called him and told him the Defendant had requested a transfer to a school in Odendaalsrus.
- [50] The Plaintiff testified that the Defendant was present when he left the communal home in January 2017 and took with him a TV, couches, his clothes and some smaller items and left her with what he considered to be 50% of their belongings. He testified that the Defendant never made any financial contribution to the joint estate, even when she was employed.
- [51] The Plaintiff maintained that the joint estate needed to be divided 50/50 because of the marriage in community of property, that the Defendant needed to contribute 50% of the children's upkeep, and that he should still get his 50% of the Defendant's Pension Fund. He disagreed, when it was put to him in cross-examination, that on his own version he finally divided all the estate assets when he left the communal home in January 2017 and, since he thereafter made no contribution to the Defendant's pension interest, he was not entitled to claim 50% thereof. The Defendant admitted that they never discussed her pension fund.

- [51] The Plaintiff denied, furthermore, that the application which he brought on 9 March 2017 to have the primary residence of the children assigned to his parents could be construed as an acknowledgment that he was not a fit and proper person to take care of them. He explained that it was merely an interim measure since they were responsible for housing the children and taking them to school and to their other activities when he was not available. He admitted that he had suffered from depression at some stage, but had not needed to take medication for that for the past two years.
- [53] The Plaintiff was confronted with several so-called examples of his father actually being the real father figure in the children's lives, not him, such as a statement in the interim application that his father plays a vital role in the children's lives; an invoice for Lindo's extra classes made out to his father; a letter that stated that Lindo's grandparents taught him good manners; a note by Dr Griessel which stated that T benefits from the stability of staying with his grandparents; and with T's sensory profile which was completed by the Plaintiff's brother.
- [54] The Plaintiff explained that he provided the money for T's therapist, and that his family members take the children to appointments or therapy sessions when he himself was not available. In my view the examples above merely illustrate the importance of the Plaintiff's having a supportive family structure who can and does help him take care of L and T, one in which, moreover, they feel secure, as stated by the Family Counsellors. On the Defendant's evidence such an extensive support system would not be available if they were to relocate to Odendaalsrus.
- [55] The Defendant's version is that she is able to look after her children and want them to live with her. Her main reasons for saying that she should be awarded their primary residency are: 1) that they are still young; 2) that they should still be under the control of their parents; and 3) that they need a mother's love, care and guidance. She averred that she would have time to find out what their needs are whereas the Plaintiff would not. The only time she would not be able to take care of them, are the times when she is on duty,

but thereafter she could come back to take responsibility. When she works the 6:00 – 14:00 shifts she will be with them in the afternoons; when she works from 12:00 - 20:00 she will be home late. During Easter and the Festive Season she works night shifts.

[56] The Defendant stated that when she works morning shifts which start at 6:00 she will have a family member assist her to get the children ready for school and they will be transported from Allanridge to Odendaalsrus by “scholar transport” against a monthly payment. When she works night shift, the family member would sleep over and in the morning would wash and feed the children and take them to school. It is not clear whether she meant the lady would really take them to school, or that she would accompany them to where they would board the ‘scholar transport’. The nature of the said transport was not explained.

[57] When she is doing the afternoon shift, the lady would assist until she completes her shift at 20:00. In cross-examination she averred that the said family member with whom she has an agreement, would be one Sehapi Seloacoe, a middle-aged lady married to the Defendant’s cousin with three children of her own and of which the youngest is still in school. The Defendant could not say what would happen to the said lady’s own household or her own children.

[58] The Defendant testified that she has already made arrangements in Odendaalsrus with Brandwag Volksskool, and with a Speech Therapist as well as an Occupational Therapist for T, and handed up three documents as proof thereof. She confirmed that she is a member of a Medical Aid Scheme and that the children are beneficiaries thereof, whereas the Plaintiff does not have a Medical Aid Scheme. She did not dispute that the Plaintiff would claim R2000 per month per child maintenance from her if the children’s residence were to be awarded to him, and *vice versa*, and would not indicate what amount of maintenance she would be willing to pay. She did confirm that if primary residency were to be awarded to her, she would abide by the contact rights assigned to the Plaintiff and the paternal grandparents by the Court.

- [59] Under cross-examination she admitted that since their marriage in 2010 until she finished College and started working in August 2016, the Plaintiff took full care of her financially. She also admitted that L went to stay with his grandparents in January 2014 already, even though she was at home and not working and before she started College in June 2014, although she stated that that was only during the week, for purposes of school, and that he came home to her and the Plaintiff on weekends. Also that T went to stay with them in June 2014 when she started College.
- [60] According to her, she reluctantly agreed to both children staying with the grandparents because they would be closer to school there, but only because the Plaintiff and his parents insisted and they were three against one. She denied that when she received her first salary at the end of August 2016, she disappeared without letting the Plaintiff know where she was, leaving the children with him or the grandparents. When asked why her attorney spent almost an hour trying to disprove the Plaintiff's claims about the specific dates and total duration of her periods of absence, but never put to the Plaintiff during cross-examination that she never disappeared, she averred that she never discussed it with her attorney, then averred that she did tell him so at the end of the day on which she heard the Plaintiff's evidence to that effect.
- [61] The Defendant maintained that, because she only started earning a salary in August 2016, the Plaintiff should forfeit his portion of her pension since on the day he left in January 2017, he took everything he needed and left her with only what he did not need. She conceded that they never discussed her pension. Regarding the fact that he took care of her since 2010 she said that was because they were husband and wife and did things together, whereas at this time they are no longer staying together and after 2 January 2017 they did not share anything.
- [62] The Defendant testified that she earned a monthly salary of R17 000 before deductions, and a net salary of R10 000 – R12 000, depending on overtime. She maintained that she did not know the amount of her monthly deductions,

but conceded that as a government employee 7% of her gross salary is deducted. She has no bond payments, does not own a car, has no insurance and listed monthly expenses of around R 4 200.

[63] She also admitted that she has never contributed any money towards maintenance of the boys, although she has bought clothes for them when they visited her. She averred that the reason for not making any contribution was because she was fighting for the boys to stay with her and if they had stayed with her, she would have paid their school fees. She stated that she did not see the need to contribute towards their care because she did not have a good relationship with the paternal grandparents and she could not talk to them to find out what the boys needed. She averred that she was not allowed to see them when she wanted to, so she gave them what they needed at school. She also averred that the grandparents did not return her calls, so she could not make monthly payments for the boys.

[72] On a question why she could not make arrangements with the Plaintiff to make monthly contributions when she saw him, she admitted that during December 2017 when the children were staying with her and the Plaintiff called to tell her he was on his way to see them, as per their arrangement, she told him that the children were not home. She averred that she could not make arrangements with him then because he called late and wanted her to come to the Police Station. She would have had to walk and it was already dark. She averred that she could not make such arrangements when she took the children back to Bloemfontein, either, because she merely dropped them off.

[73] The Defendant averred that she did tell the Family Advocate that the current environment was not in the children's best interests, that they are not properly cared for and that they are complaining a lot that they are afraid where they are staying. When asked why the Court should not accept the two Family Advocate recommendations that the children remain with their father, she simply stated that she thinks that, as their mother, they should stay with her

and that the Court should look at the reasons why they should not stay with her

[74] I made use of my right to enquire fully into the circumstances in which the children presently live by asking the paternal grandparents to appear before me as well and to testify about their involvement in and care of the two boys in their residence, which they did. I am satisfied that they are not acting in their own selfish interests by having the boys stay with them, but are acting with the children's best interests in mind. They are and have confirmed under oath willing and able to continue to give the Plaintiff the necessary support and assistance in taking care of L and T if the children's primary residence were to be awarded to the Plaintiff. They obviously care for the children and assist, not only financially, but by being actively involved in their school environment, educational needs and T's therapy, and even in their recreational activities, and in so doing contributing to a stable and secure atmosphere in which the boys can grow emotionally. They are by all accounts doing that well.

[75] Although I also invited the Defendant through her attorney to have the potential carers in Allanridge, the aunt and the nanny, appear before me, that invitation was not acted upon.

[76] I found no reason to doubt the veracity and reliability of the two Family Advocate reports. Both Family Counsellors who assessed the family and the two boys are highly experienced social workers who have been trained to observe and assess people and to test children, and to form and express a professional opinion on their assessment and observations. Neither of them would have gained anything by omitting crucial information or by providing false facts or findings.

[76] I found no major discrepancies between the evidence in court and the contents of the two reports, except for the Defendant's allegation of alleged unreported information. It is in fact significant that Mrs Molefi and Adv Jamba, despite noticing and commenting on the strained relationship between the

grandparents and the Defendant, still regarded it to be in the children's best interests to recommend that their primary residence be awarded to the father.

- [77] The Defendant averred that she told the Counsellor that the children were unhappy and scared in their present situation and that they continuously complained about the strict discipline at their grandparents' house. I could not find any substantiation for that allegation, however. The contention in fact flies in the face of all the school and therapists' letters and reports, the observations by the two Family Counsellors, the children's reports to the two Counsellors and the father's evidence that both boys have indicated that they wished to stay with their father.
- [78] Regarding the desirability of causing the children to move to Allanridge, I have carefully evaluated all the documentary evidence at my disposal, the parties' evidence, the contents of the two Family Advocate reports and all the surrounding circumstances and have come to the conclusion that it would neither be justifiable nor be in the best interests of L and T to uproot them from their present caring and supportive environment in the absence of any substantial and material grounds for doing so.
- [79] As it is, T is already at a disadvantage due to his physical disability and emotional immaturity, and his speech and concentration delays. He appears to be gaining confidence and making progress with the help of a speech and an occupational therapist and Dr Griessel, the Principal Specialist in the Neuro-Developmental Clinic at the Department of Paediatrics and Child Health, who has been treating him for the past three years. He is also awaiting the fitting of an artificial hand which in itself will need patience, adjustment and emotional support. The entire paternal family seems to be involved in assisting with his special needs already.
- [80] It is significant that, according to Mrs Molefi, T did not include his mother in his drawing of his family in which he depicted his father, his brother, his grandparents and his paternal aunt. And also that, according to Mrs van der Westhuizen, he does not talk about his mother. That is consistent with the

school's report that his mother is unknown there and has never shown any interest in his progress or attended school activities, and that he indicated to Mrs van der Westhuizen that he wished to continue to reside with his father and his brother, and her observation that the Plaintiff is seeking the necessary professional assistance to help him overcome his cognitive delays. The Defendant's absence of active participation in T's life is also evident from the Plaintiff's testimony that, although the Defendant has the right in terms of the interim court order to have the boys every second weekend, she has not fetched them for a weekend since Easter. And consistent with her admission that she has never paid maintenance for them.

- [81] In my view it would have a profound negative impact on T to be removed from this supportive family set-up to a strange town and a strange school with a mother who has not been actively involved in his life for the past 4,5 years, and where his adjustment will have to start all over again with new therapists and new caretakers when his mother is at work until past his bedtime every second week. Especially so since there are no substantial and material grounds for doing so, as Adv Jamba stated.
- [82] L, who is older, has also expressed the wish to stay with his father. Contrary to the Defendant's averment that the children are scared in their current situation, Mrs van der Westhuizen reported that he is a happy child who feels safe with his father, while the school reported that his father and paternal grandparents are fulfilling his emotional and developmental needs. From the two Family Counsellors' observations and investigations it is clear that he is also settled and secure in his present circumstances. He reportedly enjoys the activities with his father and grandfather and although he misses his mother, he does not want to live with her and move to Allanridge and a new school. He obviously has friends and is the captain of the u/11 rugby team at his school.
- [83] Although a move to Allanridge would probably have less of a long-term negative impact on L than on T, it would still not be justifiable to deprive him of the security of his present situation with all the activities he presently enjoys

with his father and grandfather and friends and teammates at school in the absence of any pressing reasons such as, for instance, maltreatment, abuse, neglect, alcohol abuse, violence, disinterest in their well-being, or a toxic environment, none of which are present.

[84] That his mother wishes to have the two of them live with her, is understandable. It is trite, however, that in situations like this it is the best interests of the child or children and not the interests or wishes of the parents that are paramount. The Children's Act No 38 of 2005 makes that very clear and provides for the determination of the children's best interests by way of an investigation in accordance with the non-exhaustive check list of criteria set out in Section 7 thereof, such as the one that was indeed conducted by Mrs van der Westhuizen.

[85] A further factor which tips the scale in favour of primary residence with the Plaintiff is the importance being assigned to the children's views in divorce matters when they are of sufficiently mature age and emotional development to take cognisance of their wishes. L clearly identified his father as the most important person in his life and has expressed the wish to stay with him. He is of an age where his wishes should be taken into account as one of the important factors which the court needs to consider. T did the same, albeit indirectly, by including his father in his picture but not his mother. That is supported by the grandparents' evidence that the father is very involved in the children's activities and care, as well as by the school reports commenting on the involvement of the father and the grandparents.

[86] In **P v P**⁹ it was stated that

“...determining what custody arrangement will serve the best interests of the child in any particular case involves the High Court making a value judgment based on its findings of facts in the exercise of its inherent jurisdiction as the upper guardian of minor children...”

⁹ 2007 (5) SA 94 (SCA0 at par [14])

- [87] Regarding the Defendant's averment that she should get the children because they are still young and need a mother's love and guidance, the court in **Van Pletzen v Van Pletzen**¹⁰ held that mothering is not only a component of a woman's being, but is also part of a father's being, and that a father in appropriate circumstances possesses the capacity and the capability to handle the care of a child just as well as a mother.
- [88] Likewise in **Van der Linde v Van der Linde**¹¹ it was held that the concept of mothering is indicative of a function rather than a *persona* and includes the sensitive attachment which 'flows from the attention devoted day-to-day to the child's need of love, physical care, nutrition, comfort, peace, security, encouragement and support.'
- [89] There is therefore no reason why a father cannot assume the role of 'mother' in raising his children and, as stated in **V v V**¹², it is no longer the case that where young children are concerned courts would automatically assign the child's primary residence to the mother. The court then held that "as far as young children are concerned, the pendulum has swung to accommodate the possibility of a father being a suitable custodian parent to young children."
- [90] In **Baloyi v Baloyi**¹³ as in this case, the father and the mother both contended that it would be in the children's best interests to reside with them. As in the present case where the Family Counsellor indicated that both parties are capable of providing the boys with the necessary love and emotional support, no serious allegations pertaining to each party's capacity to care for the children were made and as a result there were no clear "red flags" raised against either parent's name. In that case, too, the father had interim residency of the children, a boy and a girl aged 6 and 4 years old, respectively.

¹⁰ 1998 (4) SA 95 (O) at 101 B – D/E

¹¹ 1996 (3) SA 509 (O) at p.515

¹² 1998 (4) SA 169 (C) at p 176

¹³ (6208/2014) [2015] ZAGPPHC 728 (16 October 2015)

- [91] As is clear from **Baloyi**, a decision on the child's best interests should be made on the facts and the particular circumstances of the case, and not on generalisations such as 'the tender age of the child doctrine' or the principle of 'preserving the status quo'. The court also stated that far-reaching statements such as 'young children should reside with their mothers' are unsustainable and that, despite the 'traditional' roles that used to be attributed to men and women in a parenting scenario, there is no doubt that over the last few years the roles and responsibilities of parents within the family structure, as well as social norms and patterns in this regard have changed with fathers taking up parenting roles and mothers following their own careers.
- [92] In the present case, over and above the factors set out above, the physical circumstances if the children were to have to move to Allanridge would be less favourable than those in the current situation. There they would have to travel to another town to attend school, would be dependent on public or "school transport" instead of being able to walk to school, and would not live in the school neighbourhood among their school friends. The Defendant will be away from home every second week for the entire week until after the children's bedtime, and they would not have the large family support structure to rely on that they have enjoyed for the past almost 5 years. They will therefore be in no better a position if they were to be placed in the Defendant's care.
- [93] The Defendant's lack of active involvement in the children's lives in the past 5 years, as is evident from the school reports, the Plaintiff's testimony, the Defendant's own evidence, and from the Family Councillors' reports regarding L and T, as well as her failure to contribute to the children's maintenance because of her negative relationship with their grandparents raise the concern that her conduct may be indicative of a lack of insight into what is in the children's best interests. That impression is underscored by the averment that she does not regard an artificial hand for T as necessary while according to the Family Counsellors he is still being bullied and ridiculed because of his deformed hand with which he struggles to perform the necessary developmental tasks such as cutting with a pair of scissors. While

it is undeniable that the grandparents and Plaintiff have to share to a large extent in the blame for her absence of more active involvement, as Adv Jamba and Mrs Molefi pointed out, it is the factual situation.

- [94] On a careful evaluation of all the factors in this situation, I cannot find that it would be in L's and T's best interests to change their primary residence and award it to the Defendant whilst there are no substantial and compelling reasons to do so.

Forfeiture:

- [95] The parties are married in community of property, therefore they are by law entitled to share 50/50 in all the assets and benefits of the marriage unless there are grounds for forfeiture. Section 9(1) of the Divorce Act 70/1979 authorises forfeiture, either wholly or in part, depending on the duration of the marriage, the circumstances that gave rise to the breakdown and substantial misconduct by the relevant party, if the court is satisfied that if forfeiture is not granted, one party will unduly benefit in relation to the other.
- [96] The Defendant has been a member of the Government Employees Pension Fund since she was first employed in August 2016, therefore for the past three years. In terms of the marriage in community of property the Plaintiff lays claim to 50% of the Defendant's interest in the said Fund as at date of divorce. She denies that he has any right to the pension fund because he did not contribute it.
- [97] She avers, furthermore, that when the Plaintiff left the communal home, he took all the assets that he had contributed towards the marriage, and left her there with what she had contributed. According to her that was the final division of the estate and it would only be fair for each party to retain the assets presently in his or her possession and, accordingly, for the Plaintiff to forfeit his share in her pension interest.

- [98] A party who claims forfeiture needs to provide the grounds on which he or she makes the claim. As held in **Klerck v Klerck**¹⁴ the common law principle that no person ought to benefit financially from a marriage which he or she caused to fail, no longer forms the basis for a forfeiture order. South African Courts have abandoned fault or conduct of a party as the main reason for a forfeiture order, therefore, as was held in **JW v SW**¹⁵ a finding of substantial misconduct does not on its own justify a forfeiture order.
- [99] It is clear that a pension interest is an asset in both parties' estates. As was confirmed in **Ndaba v Ndaba**¹⁶ the pension interest of a member spouse is at date of divorce by operation of law part of the joint estate for purposes of determining the parties' patrimonial benefits as is determined by s 7(7)(a) and s 7(8) of the Divorce Act 70 of 1979.
- [100] In **Wijker v Wijker**¹⁷ the Supreme Court of Appeal made it clear that the equitable principle of fairness cannot be used to justify an order of forfeiture since it runs counter to the basic concept of community of property. The Court consequently held that s 9 does not provide for the application of the principle of fairness in order to deviate from the nature of community of property and that the notions of equity and fairness have no relevance in what would constitute an undue benefit.
- [101] The court stated that the first step to determine if forfeiture is warranted, is to determine whether or not the party against whom the order is sought, will in fact benefit if forfeiture is not ordered. Once it is established that the party will benefit, regard has to be had to the factors set out in s 9 to determine if such benefit will be an undue one

¹⁴ 1991 (1) SA 265 (W)

¹⁵ 2011 (1) SA 545 (GNP)

¹⁶ (600/2015) [2016] ZASCA 162 (4 November 2016)

¹⁷ 1993 (4) SA 720 (A)

[102] In **Moodley v Moodley**¹⁸ the court held that what the party forfeits is not his share of the common property but only the pecuniary benefit he would otherwise have derived from the marriage, and therefore that the party claiming forfeiture must prove some kind of contribution that exceeds the contribution of the other party towards the joint estate. And in **Engelbrecht v Engelbrecht**¹⁹ the court in dealing with the factual determination of 'benefit' said that:

“Unless the parties (either before or during the marriage) make precisely equal contributions the one that contributed less shall on dissolution of the marriage be benefitted above the other if forfeiture is not ordered” (against such party).

[103] It is common cause that the T-marriage endured from December 2010 until January 2017 when the Plaintiff left the communal home, a period of approximately 7 years, and that for the last two years thereof the Defendant attended College and resided on campus, only coming home on some weekends. It is common cause, too, that the Plaintiff financially supported her and the children in all respects, even though the Defendant obtained employment in August 2016, until January 2017 when he left.

[104] Although the Defendant contributed to the household since December 2010 by keeping house and taking care of the children, for all practical purposes her non-pecuniary contribution stopped in June 2014. Her contribution therefore spanned only three of the seven years. From the parties' evidence it appears that once she started working in August 2016 she did not contribute to the household financially, either. And on her own evidence she never contributed to the children's maintenance.

[105] In August 2016 the Defendant started building up a pension interest. The next 6 months of the marriage was evidently marred by strife and in January 2017 the Plaintiff left to move in with his parents and the boys. The Defendant then moved to Allanridge to live in her late mother's house.

¹⁸ (KZD) (Unreported case no 7241/2002 (14 July 2008)

¹⁹ 1989 (1) SA 597 (K)

- [106] The question therefore is whether, in view thereof that the Defendant never made any financial contribution to the household at all, and that her non-pecuniary contribution endured for less than half the duration of the marriage, an order that the Plaintiff is to forfeit his share of her pension would be justifiable.
- [107] There is no evidence that the Plaintiff committed serious misconduct which should count against him regarding the forfeiture claim. The Defendant avers that the Plaintiff caused the breakdown of their marriage by allowing his parents to interfere in the marriage regarding the children. He, on the other hand avers that the Defendant caused the failure of the marriage by disrespecting and swearing at his parents, and by simply disappearing for two days at a time around pay-time once she started earning a salary.
- [108] The Defendant averred that the Plaintiff could not share in her pension interest because he made no contribution to it. It is so that for the 6 months leading up to his departure from the common home, the Plaintiff did still support the Defendant by still financially maintaining the household and, with his parents' assistance, the children, while according to him, the Defendant made payments to her relatives but none to the common household.
- [109] In view of the circumstances of this case, taking into account the substantially larger contribution that the Plaintiff made to the common estate, the absence of substantial misconduct, the relatively short duration of the marriage during which the Defendant made no financial contribution and a non-pecuniary contribution for less than half the marriage, and the circumstances that led to the irretrievable breakdown of the marriage, it might be argued that it would be fair if a forfeiture order were not to be made against the Plaintiff. But, as is clear from the case law, principles of fairness and equity do not play a role in claims for forfeiture.
- [110] The Defendant's pension interest is the only remaining asset in the common estate and the only one regarding which forfeiture is claimed. In my view the Defendant did succeed in proving that she made the only pecuniary

contribution to that particular asset, as indicated in **Moodley v Moodley**²⁰, in that her pension interest only started to accumulate 5 months before the Plaintiff left the communal home and stopped supporting her financially. Thereafter, from January 2017 the parties went their separate ways. In view of the short duration of the accumulation of the pension fund, and in view thereof that the parties for only 5 months thereof still shared a common household, the Plaintiff would be unduly benefited with reference to that specific asset if a forfeiture order were not to be granted.

[111] In the particular circumstances of this case, I therefore conclude that a forfeiture order against the Plaintiff with reference to the Defendant's pension fund is warranted.

[112] Given the discretion vested in the Court with regard to costs, it would in my view be just and equitable for each party to bear its own costs.

WHEREFORE I make the following order:

1. The marriage between the parties is dissolved.
2. The Plaintiff shall forfeit his share of the Defendant's Pension Interest.
3. The parental responsibilities and rights with regards to the care of the minor children, **L T** and **T T**, as contemplated in Section 18(2)(a) of the Children's Act, Act 38 of 2005, are awarded to both parties.
4. The specific parental rights and responsibilities in respect of the primary residence of the minor children as contemplated in Section 18(2)(b) of the Children's Act, Act 38 of 2005, are awarded to the Plaintiff .
5. The specific parental rights and responsibilities in respect of contact with the minor children as contemplated in Section 18(2)(b) of the Children's Act, Act 38 of 2005, are awarded to the Defendant in the following manner

5.1 The Defendant may take the children with her every second weekend.

²⁰ *Supra*.

- 5.2 Short holidays to alternate between the parties.
- 5.3 Half of every long holiday and Christmas to alternate between the parties.
- 5.4 The Defendant shall be entitled to take the children with her for five hours on each of their birthdays, and for the entire day on Mother's Day and on the Defendant's birthday if such days do not fall on the regular contact days.
- 5.5 The Defendant shall be entitled to have telephonic contact with the children at all reasonable times.
- 5.6 The parental rights and responsibilities with regards to guardianship of the minor children as contemplated in Section 18(2)(c) and 18(3) of the Children's Act, Act 38 of 2005, are awarded to the parties jointly.
6. The Defendant is ordered to pay maintenance of R2000.00 per month per child to the Plaintiff and to keep the two minor children on her Medical Aid.
7. Each party is to pay its own costs.

MURRAY AJ

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