

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE PROVINCIAL DIVISION

Case Number: 3619/2014

In the matter between

A. J. R.

Applicant

and

A. T.

Respondent

In re: Variation order for care and contact of minors

Citation: R v T

HEARD ON: 8 OCTOBER 2015

DELIVERED: 29 OCTOBER 2015

OPPERMAN, AJ

- [1] This is an application in terms of section 29 of the *Children's Act 38 of 2005*¹ (the Act) for the variation of care and contact in terms of sections 18(2)(a) and 18(2)(b) pertaining to minor children. The sole focus of the application is the variation of the 'permanent residence-order' of the two minor children in the divorce order of the parents. The application is lodged by the father of the boys. The two boys are 12 and 10 years old.
- [2] The application was prompted by a possibility that the mother, the respondent, might re-locate to another town with the boys. An urgent application in terms of rule 16(12)(a) was lodged but warded off when the respondent indicated that the anticipated move was decided against. The matter was postponed and the services and input of the Family Advocate were invited hereafter.

¹ Any reference to a section will be in terms of the Act except if specifically stipulated otherwise.

- [3] The relevant parts of the divorce order reads as follows on matters pertaining to the minors:

“1.²

- 1.1 That parental responsibilities and rights with regards to the care of the minor children as stated in section 18(2)(a) of the Children's Act 38 of 2005 be awarded to both parties.
- 1.2 That permanent residence of the minor children be awarded to the applicant.
- 1.3 That specific parental responsibility and rights with regard to contact of the minor children as stated in section 18(2)(b) be awarded to the respondent and on the following basis:
 - 1.3.2 The respondent will have the right to the following contact:
 - 1.3.2.1 Alternative weekends, a weekend to be from Friday 13h00 to the first Sunday at 13h00.
 - 1.3.2.2 Alternative school holidays and all long holidays and shall all long holidays be divided in two in order that the minor children to spent an alternative Christmas with each parent.
 - 1.3.3 Apart from the above the parties also agree:
 - 1.3.3.1 That public holidays will alternate between the parties;
 - 1.3.3.2 That the respondent have the right of contact with the minor children for at least three hours on the respondents' birthday and on the birthdays of the minor children;
 - 1.3.3.3 Contact on Fathers' Day from 9h00 to 17h00 if Fathers 'Day is not on a contact weekend.
- 1.4 Both parties shall have equal parental responsibilities and rights in terms of ss18(2)(c) and 18(3) of the *Children's Act 38 of 2005* in regard to guardianship in respect of the two minor children.

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That the respondent shall pay maintenance for the two minor children in the amount of R1000-00 per month per child; the first payment to be made on or before the 1st of January 2008 and thereafter on or before the 1st day of each succeeding month. The respondent will also be responsible for the payment of;

- 2.1 Fifty percent of the contribution of the minor children that is not covered by the medical aid of the applicant;
- 2.2 Fifty percent of the school fees of the two minor children.”

² Translation from Afrikaans.

- [4] I understand the dispute between the parties and the adjudication of this matter to be concerned specifically with who will be the sole provider of care in furnishing a suitable place to live in terms of section 1(1)(care)³ and not the common law concept of custody.⁴
- [5] A court vested with the necessary jurisdiction may vary orders of this nature in the event of a material change taking place in the circumstances of either party or a child after the original order and on just cause.⁵
- [6] In determining the type of care order to make, and in favour of which parent, the essential issue is which parent is better able to promote the child's physical, moral, emotional and spiritual welfare.⁶
- [7] In addition to the above; every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration.⁷ The views of the two boys, amongst others, brought this matter to court.
- [8] The following facts are not in dispute between the parties with reference to the material changes since the divorce was granted. These factors

³ Section 1(1): 'care', in relation to a child, includes, where appropriate-

(a) within available means, providing the child with-

- (i) a suitable place to live;
- (ii) living conditions that are conducive to the child's health, well-being and development; and ...

⁴ After the promulgation on 1 July 2007 of the Act there is indeed a material difference in current law of the concepts of custody and parental responsibilities and rights in terms of section 18 of the Act. Section 18 only states care, contact, guardianship and maintenance; not the common law concepts of custody and access. Adjudication is on care, contact, guardianship and maintenance only. The difference is that while the statutory concepts included all the elements of the common law concepts, the statutory concepts are wider than the common law. In this regard see section 1(2) of the Act, *J v J* 2008 (6) SA 30 (CPD) and *WW v EW* 2011 (6) SA 53 (KZP).

Also see http://www.myvirtualpaper.com/doc/derebus/drd_jan_feb_2012/2012012601/42.html
: 27/10/2015

⁵ Section 28.

⁶ Sections 7 and 9.

⁷ Section 10.

are: The ages of the children, the respondent has re-married, the current husband of the respondent and the minor children does not have a cordial relationship, the maternal grandfather currently share the residence and the relationship between him and the minor children is also strained. On one hand the respondent tends to the physical care and needs of the boys. On the other hand, the relationship between the mother and the children is negative and going through severe difficulties. The minor children's care requirements have inevitably changed since 2007⁸ with their increased aged.

- [9] A social worker duly qualified, registered and with six years' experience in the field as family councillor, investigated and reported on the dispute on mandate of the Office of the Family Advocate. The report of the Family Advocate that was handed in as exhibit by agreement, communicated that the boys have voiced their wish to live with the applicant. The respondent is vehemently opposed to this.

- [10] There is palpable animosity between the parents. The evidence of the parents will, due to their subjective and possible idiosyncratic perspective, be regarded with caution. The court will not falter to act to serve the best interest of the minor children even if this cuts across parental rights.

- [11] Two assessments were conducted with the boys: 28 October 2014 and 23 March 2015 by the mentioned social worker. The boys were found to have the capacity to contribute to the proceedings. Upon examination of the assessment reports by this court, this court is convinced of the correctness of the respective findings. The boys remained constant in their assertions. The detail and spontaneity in the boy's statements support lack of undue influence and honesty. The evidence of the strained relationships with the respondent, her husband and the maternal

⁸ The date of the divorce order.

grandfather emphasise the cause of their view. The boys' anger and frustration, possibly arising from the frustrating conditions, is confirmed in the report of Dr. Luttig.

[12] The social worker reports as follows:

"Upon the two assessments, the children have expressed a strong desire to reside with the applicant. The amount of anger and frustration that the children have displayed at residing with the respondent and her husband is a *cause for concern* especially if the children are forced to reside with the respondent and her husband. Louw and Louw (2007: 6-8) states that children who are in the developmental stage of the two minor children often react with anger and hostility towards persons they feels have betrayed them. The children feels betrayed because the mother put the needs of her husband before them." (My accentuation)

[13] The concern of the social worker with the emotional state of the children is underscored and corroborated by the repeatedly stated discontent by the minors at being cared for by the respondent's husband and the maternal grandfather. A method of disciplining the boys; that was confirmed by the respondent, support the statements of the children of belittlement by the husband and an unwillingness of the respondent to intervene. The non-observance of the prerequisites in the definition of care,⁹ to guiding the behaviour of the children in a humane manner and maintaining a sound relationship with the children, in addition, concerns the court. The conduct of the respondent towards the children caused a level of detachment and emotional stress with the boys that eventuated in a recommendation of immediate psychological assistance and therapy by the social worker.

[14] The assertions by the respondent must be unravelled to comply with the best interest of the children and their right to family and safety. The

⁹ Section 1(1) 'care' (g) and (h).

social worker did investigate the accusations during the compilation of the report and made an effective and objective report that causes an inference of unsubstantiated and untrustworthy averments. The respondent did not place all her cards on the table during the interviews with the social worker. In her statements she maintained that her children are in dire and immediate physical and emotional danger in the care of the applicant. She maintains that she was too intimidated by the applicant to divulge this during the interview. She did nothing about the situation since 2007 and just 'managed it in her own way'; this according to argument by her legal representative. If the allegations are true she is clearly not one that will protect her children. Fittingly relevant to this case it was stated in *B v S* 1995 (3) SA 571 (A) that custody and access is an inherent entitlement of the child and not the parent.

[15] The social worker conducted interviews with a good sample of role players in the lives of the children and the court is convinced that the proper primary care of the children lies with the applicant. The finding of the social worker is the applicant to be an effective father that carries the best interest of his children at heart. The paternal grandmother, the housekeeper that cared for the children since birth and the friends of both the applicant and the respondent, describes him as a good father. It may be safely assumed by this court on the evidence that they will act as protectors and defenders of the boys where the applicant fails. The same cannot be said of the environment that prevails with the respondent. It is common cause that both parents can give adequate financial and housing support but the environment of the applicant is substantially better than that of the respondent; physically and emotionally.

[16] I am satisfied that on the basis of the evidence before this court it to be in the best interest of the minor children that the order be varied to the extent necessary and in respect of the responsibilities and rights of the

parties of care and contact only. The applicant will therefore be the primary provider of care in furnishing a suitable place to live in terms of section 1(1) 'care' (a)(i). Joint care in all other regards in terms of the Act will be granted to the parties. Contact will be granted to both parties and as specified in the order. The order in respect of guardianship remains unaffected.

- [17] The issue of maintenance is affected i.e. who pays the maintenance, for what purpose and in what amount? A court will have to review the detail of this responsibility with a financial inquiry into the changed circumstances. The order for maintenance will consequently only be provisional and the applicant or respondent must urgently apply in terms of the *Maintenance Act 99 of 1998* to remedy the situation.

[18] **Order**

1. In result the following order is granted:

1.1 Paragraphs 1 and 2 of the order in case number 4333/07 dated 13 December 2007 is substituted with the following order:

- (a) Subject to the paragraphs below, both parties shall have full parental responsibilities and rights in terms of sections 18(1) and 18(2) read with section 1 of the *Children's Act 38 of 2005* in respect of the two minor children.
- (b) The applicant shall be the primary provider of residence to the two minor children in terms of section 1(1)(care) (a)(i) and (a)(ii) of the *Children's Act 38 of 2005* subject to the following conditions:
 - (i) The respondent shall have reasonable contact and on the following basis:
 - (ii) Contact on alternative weekends from Fridays 17h00 until Sundays 17h00,
 - (iii) Contact shall alternate on Public Holidays between the parties,

- (iv) Short school holidays shall alternate between the parties and long school holidays are shared equally on the basis that the two children spent a December school holiday and Christmas alternatively with each parent,
- (v) At least 3(Three) hours contact to be had by the respondent on the children's birthdays and her birthday,
- (vi) The respondent shall have contact with the minor children from 9h00 until 17h00 on Mother's day if it does not fall on a contact weekend and;
- (vii) Telephonic contact at all reasonable times and hours.

1.2 The parties shall have equal parental responsibilities and rights in terms of sections 18(2)(c) and 18(3) of the *Children's Act 38 of 2005* in regard to guardianship in respect of the two minor children.

1.3 It is ordered in terms of section 18(2)(d) of the *Children's Act 38 of 2005* that existing maintenance orders shall remain in effect until such time as another court amends it.

1.4 The Office of the Family Advocate shall interview both parties to give guidance on parental skills and conflict resolution.

1.5 No order as to costs.

M. OPPERMAN, AJ

On behalf of applicant: Adv. J. Els
Instructed by:
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On behalf of respondent: Adv. S. Tsangarakis
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