

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE, EAST LONDON)**

Case no: EL 1691/11

ECD 2228/11

Date heard: 7 August 2012

Date delivered: 24 August 2012

In the matter between:

**CE U R-I
(born BERGSTEDT)**

APPLICANT

And

MI R-I

RESPONDENT

JUDGMENT

SMITH J:

[1] All that the Respondent wants is to be allowed to see his two minor children. The children, namely S, a boy aged 12, and S, a girl aged 9, have been living with the Applicant since the parties separated during October 2009. The divorce proceedings between the parties are still pending.

[2] On 10 January 2012, and pursuant to a Rule 43 application brought by the Applicant, Hartle J ordered that the Applicant be appointed as primary carer of the children, and awarded her *pendente lite* custody of the children,

subject to the condition that the Respondent should be allowed contact with them.

[3] In terms of that order the parties were allowed to approach the court for a further order defining the Respondent's right of access, in the event of them being unable to reach agreement in this regard, "*or in the event that the agreed upon access be harmful*" to the children.

[4] The parties have not been able to agree on how the Respondent's right to contact would be exercised, and he has now moved for an order defining that right. Despite Hartle J's order, the Applicant has apparently refused to allow the Respondent access to the children, and he has not had any contact with them since March 2010.

[5] Hartle J's order was apparently made after having considered, *inter alia*, reports submitted by the Family Advocate and Family Counsellor, and which recommended that the Respondent initially be allowed contact with the minor children under supervision by psychologists.

[6] It appears that the Applicant initially contended that contact with the Respondent would not be in the minor children's best interests because the Respondent was prone to outbursts of anger, had abused alcohol, and has

been excessively harsh when disciplining the children. The Applicant had relied, in particular, on an incident when the Respondent had lost his temper and had allegedly hit Scott with a riding crop and belt-buckle. These incidents, she averred, have traumatized the children and they are now scared of their father.

[7] It appears from the further reports filed by the Family Advocate and the Family Counsellor during May 2012, that they had established, after having interviewed all interested parties, that no new issues had been raised, and that the Applicant's opposition is still based on the incidents which had allegedly happened about three years ago.

[8] Mrs *Watt*, who represented the minor children, stated that they were adamant that they did not want any contact with the Respondent. They were aware that they could see him any time in the future if they so choose, but stated categorically that they do not wish to have any contact with him at this stage.

[9] Ms *Watt* stated that S, in particular, had been unusually outspoken about his refusal to see his father. He was still upset about his father's inability to control his temper and his excessive drinking. She submitted that it was clear that Scott had been traumatised and insecure, but that he has

been much calmer since he has not had any contact with the Respondent.

[10] When Hartle J made the order allowing the Respondent contact with the minor children, all these facts had been placed before her, and she was obviously of the view that despite these allegations, it would be in the children's best interests if contact with their father was resumed. No new allegations have been placed before me to justify a variation of that order.

[11] In terms of s. 10 of the Children's Act, no 38 of 2005, I must give due consideration to the views expressed by the minor children if they are of an age, maturity, and stage of development to be able to meaningfully participate in the proceedings. Their views should however be considered in the context of the fact that they have been in the Applicant's sole custody for more than two years, and that during this period they have not had any contact with their father. It is therefore not surprising that they would harbour some residual hostility towards him. As the family advocate has correctly pointed out *"due to the breakdown of the emotional bond and relationship between the children and their father, the fact that they have been in the exclusive care of the Applicant and her personal feelings towards the Respondent it is only natural that they will verbalise their unwillingness to see the Respondent."*

[12] There are a plethora of cases where our courts have held that

reasonable contact and interaction with both parents are usually in the best interests of minor children, unless there are compelling reasons to prohibit access to either parent.

[13] I am persuaded that the Respondent has indeed accepted responsibility for his role in the breakdown of the marriage, and that his conduct has contributed to the fact that his children have become estranged from him. While he appears genuinely contrite, he is also equally determined to mend his dysfunctional relationship with his children. In my view it is only reasonable that he should be allowed this opportunity.

[14] Though articulate the children might have been regarding their refusal to see their father, they are still very young and obviously unaware of the potential long-term negative psychological consequences of such a stance. It is in my view almost unavoidable that they may yet live to regret this decision, if their views are to prevail. In my view the circumstances of this case, and their best interests, demand that contact with their father be re-established, even if it means going against their explicitly stated wishes.

[15] The Family Advocate and Family Counsellor have carefully considered the basis on which the initial contact must be arranged, and in my view it is difficult to conceive how contact with their father on that basis could be

harmful to the children. The contact will be carefully supervised, and they will be counselled by professional psychologists to assist them in dealing with the inevitable emotional trauma they will experience when they come face to face with their father after having been separated from him for such a long time. It is only on the basis of further recommendations by the psychologists that further contact will be allowed.

[16] In the result I make the following order:

1. The Respondent will initially have contact with the minor children, subject to supervision by the psychologists, Ms Lynda Graetz and Ms Janet Burnes;
2. Further contact will resume on the basis of recommendations by the psychologists;
3. The supervised contact must be reviewed once the psychologists indicate that the minor children are emotionally ready for alternative contact.

J.E SMITH
JUDGE OF THE HIGH COURT

Appearances

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