

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Numbers: 2021-017378 and
2023-129706

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
2025/03/13	
DATE	SIGNATURE

In the matter between:

SP

Applicant

and

SH

Respondent

JUDGMENT

FRIEDMAN AJ:

- [1] The applicant and respondent were married to each other under Islamic law in January 2017. On 28 September 2018, they had a son, T. The relationship between the parties deteriorated and, in March 2021, the respondent left the marital home, together with T. The respondent's case is that the conditions in the home became intolerable to her, as a result of emotional manipulation and psychological abuse perpetrated against her by the applicant. The applicant denies this, and from his perspective the events of March and April 2021 were marked by the respondent's refusal to allow him to see T until he brought an urgent application to obtain access. As will become apparent below, I do not intend to dwell on the conflicting stances of the parties on the issue of who is to blame for where we are now. I may simply note that one of the key features of this case – which is relevant to the order I must make – is the significant acrimony between the applicant and respondent.
- [2] The urgent application brought by the applicant in April 2021, sought Part A/Part B relief. That application was resolved by the making of an order by Justice Vally ("Vally J"), in this Court, on 22 April 2021. In simple terms, the order provided for various further investigations and therapy for T, and put in place an arrangement for contact by both parents (who were also confirmed by the order to share full parental responsibilities and rights), pending the finalisation of Part B.
- [3] On 24 July 2023, the applicant sought to amend his original notice of motion in Part B. When the applicant brought his urgent application in April 2021, the respondent brought a counter-application. On 31 August 2023, in response to the applicant's move to amend his original Part B notice of motion, the respondent sought to amend her notice of motion in the counter-application.
- [4] Before the matter finally came before me, there were two further developments.
- [5] First, the applicant brought an urgent application which dealt with two separate periods of time. In the first place, it sought an amendment to Vally J's order to govern the contact arrangements during the December 2023/January 2024 holiday period. Secondly, the applicant sought the variation to Vally J's order on an indefinite basis, by providing for increased contact by the applicant with T. This led to Justice Manoim ("Manoim J") granting an order dealing with the

holiday period starting in December 2023, which made clear that it did not otherwise change the status quo. The second category of relief, which sought to amend Vally J's order for the period from the end of the holidays onwards, and indefinitely, was postponed *sine die*. I return to discuss this below because it is one of the matters which I need to determine in my order.

- [6] Secondly, this matter came before me on 22 November 2024 with the intention that I decide Part B. But, because I realised that I would not be able to give a final judgment before the December 2024/January 2025 holiday period, I gave an interim order on 12 December 2024, together with short reasons, governing that period. In essence, my order made clear that, if I had not handed down final judgment by 15 January 2025, the arrangement reflected in Vally J's order would revive. To my regret, I was unable to finalise this judgment by 15 January 2025, and so the parties have presumably been continuing to apply Vally J's order until now.
- [7] My starting point in a matter such as this – which concerns the best interests of a minor child – is that there should be some flexibility when it comes to procedure. The case should not, of course, become a free-for-all. And, importantly, there has to be an evidentiary basis for any order made. However, when it comes to the procedure applicable, for example, to amendments to notices of motion, the technicalities become less important. There is various material now before me, dealing with the question of appropriate relief. Both parties provided me with draft orders, and submissions were also made about what arrangement should govern the holiday period (leading ultimately to an agreement about holiday access).
- [8] All of this material is based, broadly, on the various notices of motion filed in this matter, but some variation has occurred because of the effluxion of time. I therefore intend to adopt a robust approach, and to make an order based on the updated position addressed in oral argument, taken together with the various documents which I have just described. As a result, there is no need for me to discuss all of the multiple procedural developments in this matter. I may simply remark that there have been multiple procedural steps in this matter and the Caselines file is voluminous. I have not attempted to quantify it, and there is no

index in this matter, but I would guess that the file now takes up more than 2000 pages.

- [9] I proceed to tackle the case on the basis described above – ie, identifying the relief now sought, rather than the procedural history. I simply record that, at the technical level, the two matters now before me are: (a) Part B of the applicant’s April 2021 application, together with the respondent’s counter-application, both as amended in the manner I have already explained and (b) the remainder of the relief sought in the urgent application brought by the applicant in December 2023 for increased access.
- [10] The two orders sought by the parties, which in broad terms (and subject to my discretion to adopt a third way in the best interests of T) are the two options presented to me from which to choose, are described in what follows.
- [11] The applicant’s preferred approach is to refer the main dispute to trial. According to him, the main disputes are (a) whether the parties should be declared co-holders of parental responsibilities and rights as envisaged by section 18 of the Children’s Act 38 of 2005 (“the Children’s Act”) and (b) whether T should primarily reside with the applicant, subject to reasonable contact with the respondent. The applicant then proposes interim relief pending the trial, which is premised on the respondent remaining T’s primary custodian (in the old sense; referring simply to the fact that T will continue mainly to live with the respondent), but subject to increased access.
- [12] The respondent’s proposed order may be broken down into two broad categories: first, an order determining the respondent as T’s primary caregiver, but awarding the applicant contact responsibilities and rights in terms of section 18(2)(b) of the Children’s Act, as set out in the proposed order. Secondly, an order appointing a parenting coordinator. As is to be expected in a matter of this nature, both components of the proposed order are detailed. I return to the detail later.
- [13] Before proceeding any further, I wish to make two points. First, at the risk of repetition, I cannot emphasise enough how the framing which I have just provided of the relief sought by the parties reflects an evolution in their stances.

If I were to take the time to explain, in granular detail, how the relief sought by the parties between April 2021 and now had changed, the judgment would be longer than 100 pages. But I keep emphasising this because, for any outside observer looking at the pleadings, it might take considerable time and effort to understand why I have summarised the relief sought by the parties in this way. I have repeatedly issued this disclaimer, because I would not want there to be any confusion about the seeming disconnection between the way in which I have framed the relief sought, and how the papers appear, at least superficially.

[14] Secondly, I cannot see how the issue of parental responsibilities and rights could be referred to trial, as sought by the applicant. I suspect I know where the confusion originates. Vally J made an order in the urgent application in April 2021, which was brought as a Part A/Part B. The applicant may therefore be labouring under the impression that Vally J's whole order is interim in nature. But, a clear reading of the order demonstrates that this would be wrong. Only one component was made on an interim basis – the part of the order which governs contact, pending the finalisation of part B. But paragraph 2 of the order provides, in very clear terms, that the applicant and respondent are declared to be co-holders of full parental responsibilities and rights in respect of T. This is a final order, which presumably (unless I am overlooking something) renders that issue *res judicata*.

[15] Of course, the Children's Act itself envisages that an application may be brought, in terms of section 28, to suspend or terminate the parental rights and responsibilities of a particular person – so, it is not as if that issue is ever cast in stone. But, in the absence of such an application, I cannot see how paragraph 2 of Vally J's order may be revisited in a trial. I deal with this later, as part of explaining my order.

[16] At the risk of oversimplifying, the parties' positions may fairly, I think, be summarised as follows.

[17] The applicant takes the view that there are multiple disputes of fact on the issue of which parent should have primary responsibility for T and provide T's primary residence. For this reason, he considers a trial to be the appropriate forum to

resolve that issue, so that expert evidence may be led and he may ventilate his version of the facts.

[18] The respondent disputes the applicant's premise. She argues that the applicant has not presented a version of the facts (whether based on expert evidence or otherwise) which gives rise to any genuine disputes of fact – at least in so far as those disputes are relevant to the issues which I must determine. She therefore questions the notion that a trial would, even in the context of normal litigation, be appropriate. But, she also argues that, when it comes to this type of matter, and T's best interests, a trial is also not a good idea.

[19] *Ms Lipshitz*, who appeared for the respondent, argued that, in the context of an acrimonious relationship, the last thing that the parties need is more litigation. She argued that parties in this situation need to learn to co-parent and that the spectre of litigation (in the form of a trial which could remain pending for some time) only serves to harden attitudes and undermine the possibility of the parties learning to co-operate with each other. She also questions the premise that a trial is the right forum to determine T's best interests, taking into account the adversarial nature of that form of litigation in particular.

[20] The respondent's position, therefore is that (a) there are no disputes of fact which would render a trial appropriate (b) I am in a position to determine that the respondent should be the primary caregiver of T, simply on the basis of the expert evidence already before me, in the form of four reports by two experts and the Office of the Family Advocate ("the Family Advocate") (c) once I have done that, it would be appropriate also to put a parenting coordinator in place, because he or she would be well-placed to assist the parties with issues and disputes which would otherwise become the subject of litigation.

[21] If this were ordinary litigation, I would adopt a structured approach of (a) considering whether there are genuine disputes of fact on the papers, (b) if so, determining whether the applicant should be penalised by the dismissal of the application on the basis that he ought to have foreseen those disputes (c) if not, determining whether a referral to trial or oral evidence was appropriate. This approach is inappropriate in a matter concerning the best interests of a child. It

is preferable to adopt a holistic view to determine what order should be made. That is what I hope to do.

[22] My main starting point, in addition to the affidavits of the parties themselves, is the expert evidence on record and also the applicant's written response to some of this evidence. In reaching the decision described below, I have had regard to the following reports and documents:

- a. A report prepared in October 2021 by Dr Santie van der Merwe.
- b. A report dated 12 June 2022 by Dr Ronel Duchon.
- c. A document addressed to the Family Advocate, by the applicant's attorneys of record, in which the applicant's comments on Dr van der Merwe's report are provided in detail (the document is dated 20 October 2022).
- d. A document addressed to the Family Advocate, by the applicant's attorneys of record, in which the applicant's comments on Dr Duchon's report are provided in detail (the document is dated 21 November 2022).
- e. A report by the Family Advocate dated 28 February 2023.
- f. A report by the Family Advocate which is stamped by the court for which it was prepared on 18 September 2024, and which is undated.

[23] It is necessary for me to discuss each report briefly, because it is essential that any order made in this matter takes account of all of the expert evidence on record. Having done so, I explain my assessment of what is disclosed in the papers, and whether a referral to trial will be an effective mechanism to determine T's best interests.

[24] Before I begin, I wish to note something about the evidence. There is a lot of paper in the Caselines file in this matter, with various degrees of relevance. I do not intend to discuss all of it, or even most of it. To take one example, one of the supplementary affidavits contains a detailed account of an incident which led to proceedings under the Domestic Violence Act 116 of 1998, and which included

affidavits from those proceedings as annexures. However, it is not the respondent's case that the applicant should be denied contact with T, or even have his contact with T reduced, as a result of that incident – the respondent's stance is based, at least in part (and as far as I understand it), on recommendations made by the Family Advocate in the second of the reports which I have listed above. In those circumstances, there would be no purpose in discussing it. There is a lot of other evidence which, either because of the way that this case has evolved or simply because of the reframing of the issues in the amended notices of motion on both sides, is not relevant to what I must decide. I therefore do not address it either.

A high-level explanation of the reports

[25] It is appropriate to start by explaining where the reports fit in. As part of the order in Part A of this application, made on 22 April 2021, Vally J ordered that the Family Advocate should be appointed to conduct a thorough investigation and file a report dealing with T's best interests in relation to the exercise by the applicant and the respondent of their parental responsibilities and rights. Vally J also ordered that the applicant and respondent were entitled to appoint their own experts to prepare reports on this issue. The applicant selected Dr Duchen and the respondent selected Dr Van der Merwe. So, the first three reports discussed below (leaving aside the applicant's response to the experts, which is not a report) are the three reports envisaged by Vally J's order.

[26] The second report of the Family Advocate arose out of the domestic-violence proceedings which I mentioned above. The Magistrates' Court seized of the application brought by the respondent ordered the Family Advocate to conduct an investigation, in the light of the issues raised in that matter, of T's best interests.

The Duchen report

[27] I begin with Dr Duchen's report because, to be frank, it comes first in the papers, and so it is most convenient to do (especially because the applicant's critique of it was also given first). It makes no real difference because, although it was

finalised in September 2022 (which is later than Dr Van der Merwe's report), her investigations began in June 2021, not long after Vally J made his order. Dr Van der Merwe's investigations began at roughly the same time (a few weeks earlier).

- [28] Dr Duchen's report is lengthy and so I only intend to focus on the main issues addressed in it. Dr Duchen adopted a very thorough approach, which involved a detailed discussion of various views expressed by each of the parents separately. This took the form of asking them for a comprehensive description of what they wanted (regarding contact) and what roles they had played in the upbringing of T, concerns each of the parents had expressed in writing in response, and related matters. Both parents submitted extensive information to Dr Duchen, although the applicant's various contributions, in particular, are notable for their detail.
- [29] What stood out to me, in the Duchen report, was the number of times which Dr Duchen met with the parents and T. According to her report, she met with the applicant, alone, eight times, the applicant and T together twice, the respondent, alone, ten times and the respondent and T together twice. Dr Duchen conducted an interaction with T and both parents, to observe him transitioning between the parents. She also conducted telephonic consultations with T's teacher. Some of her interviews with the parties took place at their respective residences, notwithstanding that these home visits took place in 2021, when the pandemic was still impacting on contact.
- [30] The report contains a very detailed description of the various interviews and assessments conducted by Dr Duchen with the applicant, respondent and T. It is not possible to do justice, in my description here, of the level of comprehensiveness of Dr Duchen's psychological assessment of each of the parties. She devoted close to 100 pages to describe the various interviews and assessments in great detail. In explaining the process which she followed in preparing the report, Dr Duchen explains that she invited the parents to express their concerns about the assessment "as soon as they experienced such concerns". She said that, by the time she finalised the report, no concerns were raised – which implies, to me, that concerns were noted along the way and

addressed to the satisfaction of the parties. The applicant takes a different view, which I explain below.

- [31] If one were to be hyper-critical, then one might say that there is not always a clear link drawn between the comprehensive assessments reflected in the first part of the report (which is also by far the longest part) and Dr Duchen's ultimate conclusions. But, in fairness to her, if she had sought to retain the same level of detail, but also include the type of analysis I have in mind, the report would have presumably been more than 500 pages. My understanding of Dr Duchen's methodology is that she felt the need to describe her assessments and evaluations in granular detail (as she did) so that the reader could see for himself or herself that the ultimate conclusions are supported by evidence. In no sense is there is a substantive disconnection between the ultimate conclusions/recommendations and what comes before. It is simply that there is not always an explicit link drawn between the evidence and the conclusions.
- [32] In any event, Dr Duchen's analysis revealed her view that, because of the acrimony in the relationship and the short duration of the marriage¹ after T was born, the parties failed to form a parental relationship. This factor, and the assessment of the parties' psychological functioning, suggested that there was a need for a third party to facilitate agreement around the various components of parenting T.
- [33] In her report, Dr Duchen referred to section 31 of the Children's Act. She made the point that, in terms of that provision, holders of parental responsibilities and rights have a special duty when it comes to "major decisions" involving the child. This duty involves giving due consideration to the views and wishes of the child, if it is age appropriate to do so. It also involves giving due consideration to the views and wishes of any co-holder of parental responsibilities and rights. Dr Duchen expressed the view that, because of the nature of the relationship of the

¹ It would perhaps be more accurate to describe the co-habitation, rather than the marriage, to be short-lived because, at least of April 2021 when the applicant deposed to his founding affidavit in the initial urgent application, he described the parties as still married under Islamic law. I have to confess that it remains unclear to me whether they were ever formally divorced. I cannot recall the issue being addressed anywhere in the papers, but I readily concede that I may have overlooked it. Had it occurred to me before oral argument, I would simply have asked the parties. That ship has obviously sailed. Since the issue is not relevant to the issues before me – it being common cause that the relationship has irretrievably broken down – I have not investigated this issue any further.

applicant and respondent and some of the concerns flagged in the psychological assessments, a parenting coordinator should be appointed. In simple terms, she was worried that, without some form of third-party mediation, the parties would be unable to navigate co-parenting without endless discord.

[34] Dr Duchen raised various concerns about the psychological wellness of both parents in her report. I, as a layperson when it comes to psychology, would describe these as relevant to the capacity of the parents to co-operate with one another, but not necessarily disclosing any fundamental issues which would preclude either parent from being able to care for T. Dr Duchen noted that both parents would benefit from their own therapeutic processes regarding these issues. The only difference, as far as I understand the report, is that at that stage the respondent had already shown herself attuned to the need to get help in this area, while the applicant had not. These conclusions do not seem to have impacted on Dr Duchen's ultimate recommendations regarding the contact arrangement because she concluded that there was no need to consider removing T from the care of either of his parents.

[35] However, what does come through very clearly in the report is that, as of the age of four (when the report was finalised – although the investigations began much earlier, in mid 2021 when T was not even three), T was still exhibiting signs of hyperarousal associated with past trauma. Various behaviours were flagged by Dr Duchen as evidence of the trauma which T had faced and, significantly, his desire (as best, at that age, he could reveal it) to make sense of his parents' separation and the conflict in their relationship. This, if I may say so as a non-expert, correlates with my own assessment that, in cases of parental break-up, the presence of conflict is highly significant to the outcome for the children involved – much more so than the separation itself. If I understand a judgment of Acting Justice Diane Davis, which I discuss below, it was the acknowledgement of this reality which led overseas jurisdictions to begin to appreciate the role which a parenting coordinator could play.

[36] The theme which comes through in the Duchen report is that, because of their own struggles, the applicant and the respondent were not well-equipped to prioritise T's needs by avoiding conflict. This is not to say that the report suggests

any lack of love and concern on their part, or a deliberate disregard for T's needs. It is more a case of capacity – for whatever reason, as of the time when the report was compiled, they lacked the ability to avoid this conflict.

[37] Because of the trauma suffered by T, and the impact of his parents' separation on him, Dr Duchen recommended that T undergo therapy. So, the two major interventions which she suggested, to improve the inability of the parents to co-parent effectively and the challenges facing T, were (a) the appointment of a parenting co-ordinator and (b) therapy for T. I return to the significance of these recommendations in due course.

[38] Before I summarise Dr Duchen's conclusions and recommendations (especially in regard to contact), there is something else which is noteworthy about her report. She pointed out that there were some "factual disputes" which she could not resolve by means of a psychological investigation. A traumatic event in March 2021, which was the catalyst for the parties' separation, was a case in point. Dr Duchen pointed out that the parties' versions on the event differed, and that the event remained very important to them and T (all of whom repeatedly referred to it). The point was that these disputes of fact did not need to be resolved in order for her to make her recommendations. Rather, they were evidence that the family system experienced various problems, and that a therapeutic process was necessary to address the fact that T was "clinically compromised". But, beyond that, what I take away from this part of the report is that the factual disputes do not demonstrate that either parent is not capable of caring for T. Rather, they show that the parties' different perspectives cry out for mechanisms to make co-parenting easier.

[39] The following key issues, some of which are directly relevant to the order which I make below, were identified by Dr Duchen in her recommendations:

- a. Rather than drop-offs after visits taking place at the respondent's house, the applicant could drop T at school where appropriate. This would reduce the potential for conflict arising from the necessity of the parents to interact when the applicant drops T off at the respondent's home.

- b. The parents should undertake a once-off, three hour workshop to assist them with reducing conflict and managing co-parenting more effectively.
- c. As already noted above, T should undergo therapy.
- d. As also already noted above, a parenting coordinator should be appointed to mediate disputes between the parties. Examples are provided by Dr Duchen of the type of issues which the parenting coordinator might be well-suited to resolve.
- e. Because the appointment of a parenting coordinator presupposed the existence of a parenting plan, mediation might be appropriate to determine the parenting plan.
- f. Dr Duchen made detailed recommendations about contact time, all of which proceeded from the premise that T would reside primarily with the respondent. Her focus was mainly on how midweek visitation could be facilitated without disrupting T's routine and also how T could be transitioned, as he got older, to accompany the applicant to mosque, even on Fridays when the applicant did not have scheduled contact with T. At that stage, taking into account T's age and need for therapy, Dr Duchen was very aware of the fact that recommendations such as these would necessarily have to evolve over time. I do not intend to go into detail here, regarding each element of Dr Duchen's proposals (for instance, relating to birthdays, holidays etc). I return to them briefly below in the context both of discussing the applicant's critique of the report, and when dealing with the appropriate order in this matter.

The Van der Merwe report

[40] There are various differences, most of which are cosmetic, in the way in which Drs Duchen and Van der Merwe described their methodology. But, in substance, they seemed to have followed very similar assessment processes (which is unsurprising given their expertise and the standardised methodologies practised in this area). Dr Van der Merwe conducted eleven interviews with either the parents alone, one of the parents and T, or T alone, between 5 May 2021 and 7

July 2021. She also had regard to a large volume of documents, including the papers in this matter as they stood at the time, and lots of correspondence.

[41] Because I have already discussed Dr Duchen's findings in detail, and there was some overlap between the two expert opinions, it is most convenient to describe Dr Van der Merwe's report with reference to Dr Duchen's recommendations. In other words, to assess Dr Van der Merwe's recommendations in the context of Dr Duchen's recommendations, to determine whether there is broad agreement, or significant differences of opinion.

[42] Overall, Dr Van der Merwe seemed to be less concerned than Dr Duchen about T's signs of trauma or dysregulation – at least, she did not discuss the topic as extensively. That said, she did notice some of the same behavioural traits (such as clinginess) and drew similar conclusions from those traits. And, most importantly, she too recommended therapy for T, as Dr Duchen had done. She also focused less on the need for the parties to learn to co-parent – at least, expressly – but there are multiple places in her report which show that she was clearly alive to, and concerned about, the need for improvements in co-operative co-parenting.

[43] Dr Van der Merwe referred to a report dated 15 June 2021 prepared by Ms Theresia Mphelo. This was a report also mentioned by the respondent in some of her engagements with Dr Duchen. Unless I am mistaken, the report by Ms Mphelo is not in the papers. It seems to have recommended that T remain in the primary care of the respondent, and have increased contact with the applicant on a phased-in basis. The premise of this "strong" recommendation was that research shows that the bond between a small child and his father requires quality and not quantity. As I understand Dr Van der Merwe (in particular, taking into account that her assessment was conducted when T was not even three), she was concerned to ensure that T's stability was not undermined by too many visits with the applicant at the early stages of his development. So, the idea was to allow T to become more comfortable with staying at the applicant's house, over a six-month period.

[44] While some of the recommendations relating to contact are somewhat out of date, given T's age, it is important to note that Dr Van der Merwe, like Dr Duchen, recommended the appointment of a parenting coordinator. Dr Van der Merwe used the term "Mediator", but it is clear from the context what she meant. Other noteworthy aspects of her recommendations were, first, that she should perform a follow-up assessment in six months (which does not seem to have happened) and that consideration should be given to the role that interference by the extended family (ie, both sets of grandparents and some uncles etc) could be playing in contributing to difficulties between the parties.

The applicant's response to the Duchen and Van der Merwe reports

[45] *Mr Beyleveld*, who appeared for the applicant, made clear in oral argument that the applicants' comprehensive written responses to the reports of Dr Duchen and Dr Van der Merwe reports are the documents which demonstrate the disputes of fact which the applicant says should be referred to trial.

[46] On 21 November 2022, the applicant wrote to the Family Advocate, via his attorneys. The Family Advocate was engaged in a process in which the designated official (Mr Vogel) wanted to consider the expert reports before finalising his own. According to the 21 November letter, the applicant's attorneys had written to the Family Advocate on 22 September 2022, and recorded on his behalf that it was incorrect that the applicant "had no content objections to either expert report". The purpose of the 21 November letter was to inform the Family Advocate of his concerns about Dr Duchen's report. On 20 October 2022, the applicant's attorneys noted the same objection about Dr Van der Merwe's report and that letter informed the Family Advocate of the applicant's criticisms of her report. Again, I have simply addressed these letters in the order in which they appear in the papers. I note that, in the letter regarding Dr Van der Merwe's report, the applicant's attorneys made the point that the applicant had not seen the report by Ms Mphelo, which I mentioned above.

[47] Rather than summarise the applicant's extensive comments in these two letters, it would be more productive for me to address their overall nature. The way in

which the applicant approached the two reports is relevant to the proposed referral to trial, which I must address later on.

[48] The first form of criticism mounted by the applicant, of which there are several examples, is to criticise the reports in a way which shows that the issue is really one of semantics, rather than substance. I have chosen just one example, which, in my view, amply demonstrates what I mean.

[49] In the report, the following statement is recorded: “However, when [the respondent] stopped working on Saturdays, the problem disappeared”. This is a reference to a problem which had arisen before the parties separated in which the applicant felt aggrieved by the respondent’s failure to make an effort to join the applicant’s family for lunch on Saturdays. If I understand correctly, the applicant’s concern was that he made an effort to have dinner with the respondent’s family on Friday nights, but the respondent did not reciprocate with the same effort on Saturdays.

[50] The statement in the report is criticised by the applicant, who says that, in the information document which he submitted to Dr Duchon, he had written: “For me that [ie, the respondent’s failure to attend Saturday lunches] was unfair and unacceptable as I was making an effort on Friday nights yet [the respondent] did not come through on the Saturdays on time (despite being aware of Saturday lunch). . . That eventually changed and then she started making an effort after we discussed the matter (but after quite a while – it was not an instant change in behaviour) . . . [The respondent] only made an effort to attend on time after I raised the matter with her.” The applicant’s criticism of the Duchon report is that it implies, according to him, that the respondent changed her behaviour of her “own volition”.

[51] It is hoped that the reader may see that this is not a criticism which takes the issue at hand – ie, the cogency, or lack thereof, of Dr Duchon’s conclusions and recommendations – any further. The difference between the account, and the way in which the applicant described the issue, is a difference of emphasis. The account in the report does not give the back-story in which the applicant had to

devote effort to facilitating the respondent's change in her ways. But it is also not inconsistent with it.

- [52] Interestingly, the version of the report in the papers has the sentence in question – ie, “when [the respondent] stopped working on Saturdays, the problem disappeared” crossed out (using the strikethrough function in MS Word, not in handwriting). It is not clear to me who made that amendment. In Mr Vogel's Family Advocate report, he refers to the extensive comments submitted by the applicant on the reports and says that the applicant's criticisms were presented to the experts for their feedback. So, it may have been that Dr Duchen made amendments to her report where she felt it appropriate to accommodate the applicant's concerns. Not much turns on this because, as I have hopefully demonstrated, the criticism is not substantively significant.
- [53] There is a more important issue, and this relates to multiple criticisms advanced by the applicant. On many occasions, the applicant describes a statement in Dr Duchen's report as “false” or a “fabrication”. Significantly, though, the comments appeared in a section of the report summarising the respondent's version. At no stage in the report did Dr Duchen make any express finding that, on the facts, she preferred one narrative over the other. Instead she recorded, in great detail, what each of the parties had said.
- [54] In fairness, although the tone of the applicant's letter makes this hard to appreciate, the applicant's substantive complaint does not seem to be directed at Dr Duchen. Rather, my sense is that he was trying to make the point that many aspects of the respondent's narrative were false, and these deficiencies were relevant to the ultimate conclusions relating to contact and the other, related issues. The applicant's criticism of Dr Duchen might more appropriately be described as based on his refusal to accept that her conclusions and recommendations could be valid, when she failed to determine the multiple factual disputes which he had raised.
- [55] The applicant's criticisms of the respondent's narrative occupy thirty, single-spaced pages of his attorneys' letter to the Family Advocate. After mounting these multiple criticisms, the applicant seeks to explain (via his attorneys) that

the criticisms show that the respondent is dishonest. In short, the applicant's point was that the respondent's inconsistencies and "falsehoods" impacted on the interim contact arrangements and T's best interests, as well as influencing the investigations which had been conducted at that stage. He sought to make this point by providing very detailed explanations of multiple statements summarised in the report, which he presumably believed served to undermine the cogency of the respondent's narrative. Many of the criticisms are, again, based on semantic issues, and differences of emphasis, rather than wholesale examples of the parties having diametrically opposed factual versions. Of course, there are some examples where, as I mentioned above, the respondent's version is described as false. But the detailed rebuttals generally do not deal with those, but rather with events which clearly happened, or explanations which are clearly at least partially common cause, but where the parties have significantly different perspectives.

[56] The applicant followed this pattern when assessing other parts of the report which sought to capture the respondent's narrative. To me, the significance of the applicant's lengthy submissions is captured in one of his explanations for spending so much time trying to cast the respondent as a liar or as unreliable. As his attorneys explained: "If one is not careful to question inconsistencies relating to T's behaviour, conduct and wellbeing, and one does not conduct a thorough and proper investigation, inconsistencies and falsehoods in information presented by [the respondent] will taint the result of an investigation impacted thereby".

[57] I have highlighted this communication in particular, because to me it sums up the applicant's approach to this whole matter. It explains why he now seeks a referral to trial. He appears to believe the question of T's best interests to turn on the granular detail of each of the multiple events covered in, for instance, Dr Duchén's report (which is the best example because of how much of the parties' detailed narratives she included in the report). He seems to believe that the recommendations of the experts were reached because they agreed with anything adverse said about him by the respondent, and held against him certain outcomes of the psychological assessments he underwent. As a result, he

seems to think that, if only he could lead oral evidence, the truth would be revealed and it would be demonstrated that he is the better-suited parent to meet T's needs.

[58] But this is, with respect, a mistaken understanding of the reports. The experts considered the overall factual picture, and the results of their assessments, and noted various points of concern. These included T's state of mind and traumatisation, the clearly dysfunctional co-parenting relationship and the possible negative role (no doubt, not deliberately) played by the respective extended families.

[59] Having noted all of these concerns, the ultimate recommendations on contact were based on the premise that (a) neither parent's behaviour or state of mind was such that he or she should be declined contact with T, in T's best interests (b) as understandable for a child of T's age, he had a deep connection with his mother (c) while having a deep connection with his father too, the connection was not quite as deep (again, which is totally consistent with T's age) (d) the default position should therefore be that T reside primarily with the respondent and (e) quality contact with the applicant was also very important to T's development and so that needed to be facilitated.

[60] None of these findings turns on any adverse finding against the applicant as to his suitability as a parent. It is perhaps the implication of the applicant's criticisms that, through leading oral evidence, it will be revealed that the respondent is wholly unfit to parent T, and that the applicant should be deemed to be T's primary caregiver (which is the relief which the applicant would seek if the matter were referred to trial). If so, then in my view that is an untenable stance. It is simply impossible to conclude, even having regard to the pages and pages of criticisms advanced by the applicant to the Family Advocate, that there is a real dispute of fact on the question whether the respondent is a fit parent. The objective facts clearly demonstrate that she is.

[61] To put it as simply as possible: the expert reports reveal that this is a case in which both parties must shoulder some responsibility for the harm which their conduct is having on T. I am sure that each could mount a plausible case that

the other is primarily to blame. But the experts do not reach that conclusion. Rather, the reports clearly establish that both parents love T and want the best for him. They are (certainly were, at the time of the investigations, and sadly nothing seems to have changed) simply incapable of recognising the impact of their conduct on T's wellbeing. But, if all of this is so – and, in my view, it clearly is – it follows that the individual misdemeanours of the parties were not used by the experts to influence their conclusions. Rather, their recommendations were all based on the higher-level issues which I have summarised in paragraph [59], combined with suggestions designed to alleviate the impact of the acrimony on T. The latter recommendations were made without assigning disproportionate blame to either parent.

[62] In order for me to be as clear as possible, let me say this: I do not consider there to be any evidentiary basis, anywhere in the record, even to suspect that there is a prospect of the respondent being determined in some future proceedings (at least on the facts as they now stand) to be unsuitable to be T's primary caregiver. That does not mean that the applicant could not also potentially play that role, but that is not my focus now. My simple point is: the premise of the applicant's desire to refer the matter to trial seems to be, at least in part, because he thinks oral evidence will reveal that the same problems which caused the relationship to break down are also reasons why the respondent is an unfit parent. To the extent that this is the applicant's premise, then I record that I expressly reject it. It follows that, if that is the sole basis to refer the matter to trial, then referral to trial is inappropriate.

The first Family Advocate report

[63] As noted above, on 28 February 2023, Mr Vogel, of the Family Advocate, completed the report envisaged by Vally J's order. The methodology adopted by Mr Vogel was to allow the two experts to complete their reports, after which he interviewed the parties. The Family Advocate recorded that, as of the time when he finalised his report, the arrangement in force was that T spent every alternative weekend and every Wednesday with the applicant (this was, of course, in terms of Vally J's order). The Family Advocate recorded that the

applicant took the view that his contact with T was insufficient. The respondent said that the emotional difficulties experienced by T, identified in detail in Dr Duchen's report, persisted. The applicant, on the other hand, said that he saw no manifestation of those troubles when T stayed with him. The problem, from the applicant's telling, was that T did not want to return to the respondent's home after each visit and sometimes resisted doing so.

[64] The Family Advocate summarised the views of Drs Duchen and Van der Merwe, placing emphasis on the finding that the parties seemed insufficiently aware of how their inability to co-operate to co-parent was impacting on T. The Family Advocate was, as I have explained, the recipient of the very detailed criticisms by the applicant of the expert reports. Mr Vogel was, as was I, somewhat taken aback at the length of these critiques, which he described as "nearly as extensive as the reports themselves". The Family Advocate accepted, appropriately, that the applicant had a right to respond comprehensively to the reports. However, he remarked that "the applicant's overly verbose and pedantic responses only serve to support Dr Duchen's finding that he employs a very specific and rigid approach to matters. I suspect that this makes co-parenting extremely difficult". Mr Vogel was at pains, though, to explain that the respondent had to shoulder her fair share of responsibility for the failure of the parties to co-parent co-operatively and was also set in her ways. He took the view that, given both parties' intransigence, the appointment of a parenting coordinator was extremely important. He also agreed with Dr Duchen that it would assist the situation if there could be as limited contact between the applicant and respondent as possible.

[65] The Family Advocate concluded his report by recommending (a) that the weekend contact between the applicant and T be extended to three nights, so that the applicant would collect T from school on the relevant Fridays, and return him to school on Monday mornings (b) that the existing arrangement of weekly contact between the applicant and T from Wednesday to Thursday remain in place (c) the parties appoint a parenting coordinator with the rights and duties set out in an annexure to the report and (d) T be enrolled in play therapy forthwith.

The second Family Advocate report

[66] The second report from the Family Advocate, which was prepared by Ms Erasmus with the assistance of Ms Mpogo, is date stamped 18 September 2024. As I explained above, it arose because the respondent instituted proceedings against the applicant relating to an incident of alleged domestic violence. The incident took place on 14 July 2024 and arose in the context of the applicant dropping T off at the respondent's house after a weekend contact visit. The presiding Magistrate ordered that the report should be prepared to determine issues relating to T's welfare and care and contact arrangements relating to T. The methodology of this report is that the parties were interviewed separately on 20 August 2024. On the same date, Ms Mpogo, who is a qualified social worker, conducted an age-appropriate interview with T. She prepared a report, which is annexed to the Family Advocate's report.

[67] In the main report, Ms Erasmus referred to the first Family Advocate report prepared by Mr Vogel. She recorded that the applicant was not satisfied with that report. I presume that, in saying that, she was recounting something which the applicant had said during his interview with her. As of the time of the report, the Family Advocate noted that the applicant had been arrested as a result of the respondent's domestic violence complaint and, as one of the bail conditions,² no contact was allowed with the respondent. This resulted in handovers of T, for contact purposes, taking place in public and facilitated by a mutual friend, Mr Dockrat.

[68] The narratives presented by the parties in their interviews with the Family Advocate were, unsurprisingly, very different. The respondent described being

² I should note that it is not entirely clear to me whether it is accurate that the condition prohibiting the applicant from having contact with the respondent arises from bail having been granted in relation to the criminal charges pressed by the respondent relating to the alleged incident of domestic violence. The respondent sought leave to file a supplementary affidavit dated 8 November 2024, which is the mechanism through which the second Family Advocate report was introduced into the evidence before me. In that affidavit, she refers to an interim protection order, but not to bail conditions. It is possible that the rule mentioned by the Family Advocate's report arises from the interim protection order. Nothing much turns on this, for my purposes, but I felt the need to note it because I am not entirely sure whether the criminal complaint of the respondent went as far as requiring a bail hearing. That said, there is a reference in the respondent's comments to the Family Advocate in response for her request for proposals on contact, which refers to the applicant being willing to pay bail of R300 000. So, perhaps it is correct that the applicant was arrested and granted bail.

in fear of the applicant's temper. She explained that she was scared of the applicant and that he was controlling. She expressed the concern that T was mildly fearful of the applicant and sometimes did not want to visit him. The applicant, on the other hand, repeated what he had said in 2022 to Mr Vogel – that T wanted to be with him and that, at the very least, the current arrangement was inadequate because the applicant and T had insufficient contact.

[69] According to the report, on 22 August 2024, Ms Erasmus asked both parties to make proposals about (a) the role which a parenting coordinator should play (b) how, in the light of the bail conditions imposed on the applicant, telephonic contact between the applicant and T could be facilitated and (c) the contact arrangements which should apply pending the High Court proceedings (ie, the proceedings which are the subject of this judgment), taking into account the volatile relationship between the parties.

[70] The respondent submitted proposals via her attorneys. The applicant did not. Therefore, the Family Advocate had to make a recommendation based on the interviews conducted with the parties themselves, the report relating to T prepared by Ms Mpogo, and the respondent's submissions mentioned above. Based on all of the evidence, the Family Advocate made recommendations which were very similar to those made by Mr Vogel in February 2023. Ms Erasmus was, especially given the recent incident, very concerned about the impact that the conflict between the parties was having on T. The interview with T did not reveal that he was scared of the applicant and, in the interview, T expressed the desire to spend time with the applicant. Rather than fearing the applicant, T expressed concern about the potential for violence and conflict and, even at his young age, expressed the view that it was better for his parents not to be near each other.

[71] For this reason, Ms Erasmus emphasised the importance both of play therapy and the appointment of a parenting coordinator. She also recommended that the applicant and respondent attend a parenting guidance course and that a mobile telephone be purchased so that T could speak to the parent with whom he was not staying at a given time, without the applicant and respondent having to speak to each other. She placed emphasis on the desirability of changeovers taking

place at school, so she too was in favour of extending weekend contact for the applicant so that T could be returned to school on a Monday. She recommended that the same approach apply to the mid-week drop-off.

The role played by disputes of fact in the papers

[72] Having considered the views of the various experts in this matter, it is necessary to turn to the applicant's argument that the matter should be referred to trial. The premise of the argument, as it has to be in motion court, is that there are genuine disputes of fact on the papers. The applicant argues that, given the nature of this case, it would not be appropriate to dismiss the application because of those disputes of fact. Rather, evidence should, in his view, be led to determine T's best interests.

[73] In order to assess the applicant's submission, it is necessary to consider the stances of the parties in their affidavits.

[74] It is well-accepted that, in matters concerning the best interests of a child, we do not approach motion court proceedings by applying *Plascon-Evans*³ strictly.⁴ What this means is that, despite what would be described as genuine disputes of fact in normal motion proceedings, it may sometimes be necessary to grant the applicant relief. In other words, a court should look at the evidence as a whole and decide what order would most appropriately vindicate the child's best interests. Simply deciding the matter on the respondent's version, as *Plascon-Evans* would require, may be inappropriate. But, so too, may a referral to trial. I return to this issue below.

[75] In the meantime, though, it is important to note that, despite the fact that *Plascon-Evans* is not applied strictly, this does not mean that anything goes. The pleadings remain important, at the very least to determine the parameters of the dispute. In this case, the proceedings began almost exactly four years ago, when

³ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) is the leading case on disputes of fact in motion court.

⁴ See *B v S* 1995 (3) SA 571 (A) at 5845; See, further, *QNM v MMM* 2025 JDR 0606 (GJ) at para 13; *DM v CHP* 2024 JDR 0448 (GP) at para 39; *RH v NM* 2024 JDR 1061 (WCC) at paras 36-7; *Kleingeld v Heunis* 2007 (5) SA 559 (T) at para 9.

the applicant brought an urgent application arising from the respondent leaving the marital home with T. The urgent application was brought to enable the applicant to resume contact with T. As I have noted, the arrangement envisaged by the order made in the urgent application by Vally J has prevailed, almost without any variation, since April 2021. The only variation has been the two holiday periods covered by the order of Manoim J in December 2023, and my order in 2024.

[76] T was two and a half when these proceedings were launched, and turned six on 28 September 2024. Furthermore, the various reports which I have discussed above were all prepared after the initial pleadings were exchanged. The affidavits exchanged when the proceedings were first launched have, accordingly, become obsolete in many ways.

[77] The first development of significance, when it comes to the pleadings, was the application brought by the applicant in July 2023 in which he sought to replace the original Part B of his notice of motion with the relief which I have described above. Until oral argument in this matter, and based on the pleadings as they stood at the time, the applicant sought an order that (a) he and the respondent are co-holders of parental responsibilities and rights and (b) T is primarily to reside with the applicant, subject to the respondent's entitlement to reasonable contact with T. Those were the issues which he wanted referred to trial. In his 2023 notice of motion, no provision was made for an interim arrangement. A proposed interim arrangement was introduced by the applicant in his December 2023 application, which Manoim J postponed *sine die*.

[78] As a result of developments in oral argument, and draft orders filed on behalf of the applicant, and the December 2023 application, the applicant now seeks an interim arrangement (ie, to prevail until the trial is finalised) in which there is an alternative week cycle. In week one, he wants contact with T from 14h00 on a Monday (when he would fetch T from school) until 14h00 on a Tuesday, when the respondent would fetch T from school; and then, contact from 14h00 on Thursday (when the applicant would fetch T from school) until 18h00 on Sunday, when he would return T to the respondent's home. In week two, the Monday/Tuesday contact would be the same, but instead of contact for the full

weekend, he would collect T from school on the Thursday, and take him to school on Friday morning, with the respondent to collect him on Friday afternoon from school. He also has proposals for school holidays and special events such as birthdays. I shall not discuss those for now. What I do note is that, in terms of the applicant's proposals reflected in his draft orders, there is no provision for therapy for T, or for the appointment of a parenting coordinator.

[79] When the applicant filed his application to amend his notice of motion in July 2023, he had to motivate for why he sought an order referring the matter to trial. He annexed the reports of Drs Duchen and Van der Merwe and also his comments on both reports. He recorded that he had raised his concerns about the reports with the Family Advocate, but was ignored. The applicant, in his affidavit supporting the amendment application, referred to a decision of the SCA in the matter of *P v P*⁵ in which the court held that a court determining a custody arrangement exercises a value judgement, based on its findings of fact, as to the best interests of the child. The applicant said that, based on this approach, the best interests of a child is a factual matter which necessarily depends on the specific circumstances of each case.

[80] In addition to arguing that, in the light of his extensive comments, there were multiple disputes of fact arising from the Duchen and van der Merwe reports, the applicant identified the following disputes of fact as he saw them at that stage:

- a. The reasons the respondent removed T from the applicant's home in March 2021.
- b. The respondent's "pre- and post-separation alienation of" T from the applicant and/or his family.
- c. The respondent's interference in the psychological assessment process to determine what is in T's best interests.
- d. The respondent's refusal to consent to play therapy for T.

⁵ 2007 (5) SA 94 (SCA) at para 24.

- e. The respondent's refusal to allow T to spend any meaningful time with the applicant over and above what is provided in the court order.
- f. The respondent's "false and negative portrayal of" the applicant post-separation.
- g. The question of who T should reside with. He said that he and the respondent had given conflicting versions in that regard, which required full ventilation and which could not be resolved on the papers.

[81] In addition to identifying these examples of disputes of fact, the applicant provided additional evidence of ways in which he considered the reports to disclose bias. He also pointed to the supposed failure to take account of various facts relevant to the question of T's attachment to him, and T's desire not to return to the respondent after visits. The theme, at least in part, was again that the respondent had sought to interfere with the investigation by, for instance, encouraging T to refuse to play building blocks with the applicant during the assessments. The bottom line for the applicant was that, in his view, the reports should be disregarded. That left multiple disputes of fact which could not be resolved other than through a trial.

[82] At that stage, as I have already explained, the respondent filed an answering affidavit which also served to support a counter-application. That was the mechanism which introduced the dispute, broadly speaking, as it remains in the proceedings before me. The parties uploaded draft orders after the oral hearing before me, which in part supersede their amended notices of motions. But the applicant's amendment application and the respondent's counter-application, dating from July and August 2023, reflect the last formal amendments to the pleadings. The relief sought by the respondent in the counter-application is, in essence, the same relief which she seeks now.

[83] It is not necessary for me to discuss the respondent's August 2023 affidavit in great detail. It may conveniently be divided into two parts. The first part addresses the reports which I have summarised above, as part of the respondent's explanation for the relief sought in the counter-application. That relief is designed to give effect to the recommendations of Drs Duchon and Van

der Merwe, and the recommendations of the Family Advocate (at that stage, of course, the second Family Advocate report did not exist). The second part of the affidavit goes into detail about the play therapy which T underwent and, on the respondent's version, the applicant's frustration of the continuation of that therapy. The respondent also explained the refusal of the applicant to co-operate in the appointment of a parenting coordinator. The respondent's overall point was that the applicant's approach to this matter shows that he is not truly concerned with T's best interests. He asks this Court to disregard all of the expert evidence, and on the basis of his factual allegations determine that his criticisms are at least sufficiently plausible to justify a trial.

[84] On 23 September 2023, the applicant filed a replying affidavit in his amendment application. His main focus, in response to the respondent's minimisation of the relevance of supposed disputes of fact, was on the experts. He repeated his allegation that the experts did not conduct their investigations properly and fairly, which was the main focus of his contention that the disputes of fact were too great to be resolved without oral evidence. He also doubled down on his allegation that it was the respondent, and not he, who had initially frustrated play therapy for T.

[85] On 3 October 2023, the applicant filed an answering affidavit in the counter-application. In it, the applicant recorded that, from when a boy turns seven, a father has a duty under Islamic law to attend to that son's education and religious development. He also said that he did not have an objection to the appointment of a parental coordinator in principle. However, he said that some of the powers which the counter-application asked this Court to confer on the parental coordinator were unnecessary. He gave the example of the entitlement to call for hair follicle tests, given that neither he nor the respondent had substance abuse problems. He also said that, in his view, it was not necessary to appoint a parenting coordinator for as long as 24 months.

[86] The matter was then progressed (albeit slowly) towards the hearing before me, with heads of argument filed (belatedly by the respondent). Shortly before the hearing, in November 2024, the respondent filed a supplementary affidavit (on 8 November 2024) and the applicant responded to it (on 14 November 2024). The

purpose of the supplementary affidavit was to explain the facts relating to the domestic violence proceedings and to explain the recommendations of the Family Advocate. The key point was to reiterate the need, in the respondent's view, for T to remain primarily with her. She did not contend that the incident which gave rise to the domestic violence proceedings disqualified the applicant from seeing T. However, she referred to the significant acrimony between her and the applicant, which she linked to her contention that a trial would only serve to make things worse.

[87] The applicant filed a "provisional replying affidavit" on 14 November 2024. If I understand correctly, it was described as provisional because the applicant did not concede that the respondent's 8 November 2024 affidavit was properly before court. In any event, in his affidavit, the applicant disputed various allegations of the respondent, including the notion that he had frustrated play therapy for T. He also gave a contrary version on various issues relevant to the Family Advocate's investigation and the respondent's version of the "incident" which gave rise to the domestic violence proceedings. He also adduced expert evidence which suggested that a recording used by the respondent to support her claim of domestic violence had been tampered with. His main point was to reiterate that T does not fear him, and loves spending time with him.

[88] I should, for completeness, deal with the urgent application which was brought by the applicant in December 2023, which I mentioned briefly above. It is relevant here primarily because it reflects the first time when the proposed arrangement, now reflected in the applicant's draft order as the proposed relief to apply pending the trial, relating to increased contact was introduced. I return to discuss the detail of the applicant's proposal in due course. At this stage, I simply note that, in the papers in the 2023 urgent application, the battle lines were largely the same as throughout – ie, the applicant pressing for more contact and the respondent arguing that the parenting coordinator should mediate the terms of any increased contact. One issue, of significance, arising from the papers in the 2023 urgent application is that, because of the relief sought by the applicant (now reflected in the draft order), the respondent had the opportunity to address it. In her answering affidavit, she explained that she opposed the proposed increased

contact (the details of which I address below) because it would be too disruptive to T's schooling. The two main issues which she was concerned about were, first, the travelling distance between the applicant's home and T's school and the negative impact on T; and, secondly, her concern that, in the past, there was evidence that the applicant too readily allowed T to skip school. She made the point that, given that he was older, and school would be becoming more serious, absences from school would become more prejudicial.

The appropriateness of a referral to trial in matters relating to children

[89] The most important issue of substance which I must decide is whether the matter should be referred to trial. Much of everything else will fall into place, after that. That is not to trivialise the secondary dispute about the parameters of contact, because even if I were to refer the matter to trial, there would be a long intervening period before the trial determined the issues. So, the question whether the applicant's proposed increased contact should apply, whether pending the trial or not, is also important. But the trial remains the main focus.

[90] The applicant seems to have in mind a trial in which he will be able to lead extensive evidence, perhaps (although this has never been expressly spelled out) with the assistance of experts, to refute various factual conclusions reached by the experts thus far. More importantly, the aim seems also to be able to lead evidence to cast doubt on the respondent's fitness to co-parent T. This is clear from the two letters submitted by the applicant in response to the Duchon and Van der Merwe reports. Much of the content of those letters is devoted to taking the respondent's version as conveyed to the experts, and presenting a detailed counter-version. The idea, presumably, is for the applicant to elaborate on these disputes with evidence, to demonstrate that he is correct in respect of a whole host of issues – for instance, whether the respondent tried to influence T's responses during the investigations in 2021/2022, whether the respondent really cares about T despite not using even 50% of the telephonic opportunities available to her while T was staying at the applicant,⁶ and similar issues.

⁶ During the course of providing information to Dr Duchon as part of her investigation, the applicant created a spreadsheet which analysed the days on which T was staying with him and how often, on those days, the

- [91] There is nothing before me to contradict my assumption that the applicant cares deeply for T. All of the objective evidence would seem to confirm that. Dr Duchon described the applicant as “rigid”. The Family Advocate considered the extensive submissions made by the applicant to corroborate Dr Duchon’s view. These conclusions are understandable, when one has regard to the documentary evidence and submissions which the applicant has produced since April 2021. This judgment is somewhat lengthier than I had initially hoped. Even so, I have not come remotely close to capturing the vast material on record which has been produced by the applicant in support of the various components (as they have evolved) of his case.
- [92] The applicant is legally trained and clearly tries to adopt a thorough and rigorous approach to factual matters. The acrimony since 2021 must also have taken its emotional toll. I have immense sympathy for the applicant because, since 2021, T has lived primarily in the respondent’s care and, as a result, all of the applicant’s efforts appear to have been devoted to trying to use facts and argument to address what he clearly has perceived as fundamental unfairness.
- [93] Of course, each party has a version of events which reflects very poorly on the other. And if some of the respondent’s allegations over the years are true, the applicant may well have trouble with anger and related matters. Since none of the experts – including Ms Erasmus of the Family Advocate’s office in her recent investigation, notably conducted in the context of allegations of domestic violence – has reached such a conclusion, I have no basis to do so either. I simply point out that, in expressing my sympathy for the applicant’s position, I do not make any final assumptions about any of the versions put up by the parties. I am open, for what it is worth, to the idea that one or both of the parties has behaved inappropriately at stages in these proceedings.
- [94] If the respondent’s version of the incident in 2024 is accurate, then the applicant’s conduct that day was unacceptable. All humans should be slow to judge others,

respondent took up the court-ordered right to speak to T on the phone. He then converted those incidences into percentages, to demonstrate to the Family Advocate that the respondent had only taken up 53.245 percent of the total opportunities available to her and that for September, October and November 2021, the percentage dropped to 35.51 percent. The spreadsheet also recorded several other inputs, such as the number of “good, mediocre, poor interactions and refusal to interact (by [T])”.

especially in an emotionally-fraught context such as this one. But violence and aggression are always totally unacceptable, and worse in the presence of a child. That said, it seems to be generally accepted by all involved (perhaps, at least partially, with the exception of the respondent) that any improper conduct in which the applicant may have engaged was targeted at the respondent and motivated by his frustration at the arrangements in relation to T. There may or may not be aspects of the applicant's personality which have made him ill-suited to deal appropriately with this whole situation – and at the sake of repetition, I must repeatedly emphasise that no violence is acceptable in any context. But, I do not think it can seriously be disputed that the applicant loves T and wants the best for him, as the applicant perceives T's best interests.

[95] Despite everything which I have said above, I do not consider the applicant's perspective of how to resolve this dispute to be attractive. *Ms Lipshitz* argued that a trial is the last thing that the parties need now. She pointed to the undisputable acrimony which has prevailed thus far, and argued that a trial will inevitably cause that acrimony to persist for the next several years. When parties are engaged in any litigation, attitudes harden. This applies with even greater force when it comes to family law matters. This is why mediation and alternative dispute resolution is such a bedrock of our approach to this area of law. There is even a specific provision in this division's practice manual,⁷ which entitles a judge to stay family-law matters and require parties to exhaust mediation possibilities before re-enrolling the matter. All of this is because our courts acknowledge the special emotional overlay to family law matters.

[96] For most sensible people, litigation should be a matter of absolute last resort. Of course, in all walks of life we get overly litigious individuals and companies who reach the point of last resort much earlier than everyone else – objectively, too early. And, while every person has the right to access court for civil proceedings, it is sometimes necessary for courts to insist on curbing litigious impulses. The present case is what I would describe as a textbook example of why litigation is not desirable, if it can be avoided, when addressing a child's best interests. T's

⁷ I refer here to paragraph 29.13 of Practice Directive 1 of 2024 (as amended). Although styled as a practice directive that document is, in substance, the practice manual currently applicable in this division.

best interests cannot be determined by days of analysis of factual disputes about which party did what to whom for the past four years (and even further back to before the demise of the relationship). And this is the fundamental reason: by definition, the dispute between the applicant and the respondent concerns them, and not T. Of course, they are now fighting over T, so he is the subject-matter of the dispute. But their acrimony is towards each other and he is collateral damage.

[97] The parties' culpability relates to their failure to be able to put their acrimony to one side, and to repress their own impulses in order to protect him. But that is precisely why the applicant's envisaged trial will make things worse, and not better. The more "he said, she said" evidence is led about each misdemeanour perpetrated by one of the parties against the other, the more the acrimony will be entrenched. And, the best interests of T will never be determined, because the entire enquiry will be misdirected.

[98] The experts are all in agreement that neither of the parents is disqualified from caring for T. If the position were different, then this entire discussion would be different. There may well be cases where oral evidence is necessary to determine the fitness of a person to have responsibility for a child. But this is not such a case. And, when it is common cause that both parents should have regular contact with a child, their misdemeanours towards each other are invariably irrelevant to the child's best interests. A court in my position, and this would also be the position of the trial court if the applicant were to get his wish, has to take the acrimony as a given and proceed from the assumption that, even with oral evidence, no judge could get to the bottom of the deep-seated cause of the breakdown in civility between the parties. Working from that premise, the court (whether me, now, or a trial court in due course) will have to ask: taking the acrimony as the default position now, what steps may be implemented to allow both parties appropriate contact with T, while at the same time somehow reducing the acrimony in T's interests? That analysis does not turn on the types of disputes of fact identified by the applicant. It turns on the available mechanisms to take the heat out of the relationship between the parties (which, for example, might take the simple form, as suggested by Dr Duchon, of reducing

direct contact between the applicant and respondent at drop-offs and pick-ups or the more complicated intervention of appointing a parenting coordinator).

[99] It follows that a trial will serve no purpose because the oral evidence which the applicant has in mind will not be relevant to the task presented by this case. For the reasons given by *Ms Lipshitz*, a trial will also serve to increase the acrimony because the parties will live, for the foreseeable future, with the battle lines of the trial guiding their conduct. I also agree with *Ms Lipshitz* that a trial would be counter-productive because of the time it will take for the matter to be trial-ready. By then, T could be ten years' old, with all of the expert evidence now on record hopelessly out of date. This will require a never-ending cycle of repeat investigations, to make sure that the evidence led at the trial remains relevant. This cannot possibly be in anyone's best interests, let alone the best interests of the most important person here – T.

[100] I accordingly find that the applicant's application to refer this matter to trial must be fail.

What order is appropriate

[101] Since I have found that a referral to trial would, in the circumstances of this case, be inappropriate, the question that arises is: what order should be made to address the issues of care of, and contact with, T?

[102] It follows from the fact that I have decided not to refer this matter to trial that the order which I must now make must finally dispose of all of the pending litigation. This does not, of course, mean that the details reflected in my order can never be changed – it will no doubt be necessary for the arrangements relating to T's care to evolve over time. But, changes will have to be agreed between the parties (by far, the first prize) or be the subject of some future, new litigation (to be avoided at all costs).

[103] It has to be acknowledged that the Duchon and Van der Merwe reports are now quite out of date. T was born in September 2018. So, he was only three when Dr Van der Merwe completed her report, and four when Dr Duchon completed hers. He will turn seven this year, and it goes without saying that he would have

developed significantly in the two and half years since Dr Duchon conducted her investigations. That said, the second Family Advocate report was prepared in August 2024 and so its recommendations remain relevant, at least when it comes to the impact of T's having grown older. More importantly, all of the reports, in my view, remain very useful when it comes to issues of principle which have nothing to do with T's age – most notably, the challenge of handling the acrimony so that T may be protected from it as much as possible and the related issue of the trauma which he has suffered.

[104] It should therefore be apparent from what I have said above that I readily accept a point which the applicant has made more than once in the papers. He refers to the expert reports, especially the one prepared by Dr Duchon, which noted that contact arrangements would have to evolve to take account of T's age. As I have just noted, the expert reports are already, in some sense, out of date because T has grown up so much since they were prepared. Even if one accepts the premises of the report, as I do, the experts themselves would freely acknowledge that the precise parameters of appropriate contact in 2025 could look different to what they might have been in 2022. Where I part ways with the applicant is in identifying the mechanism to address this.

[105] Even on the applicant's approach (ie, premised on a referral to trial), there will be a long interim period which needs to be governed. The applicant is aware of this, of course, because he has proposed a contact arrangement (which involves longer weekend access and a change to week-day access to provide for greater contact in weeks in which the respondent has T for the weekend) to apply in the meantime. The fundamental problem with the applicant's proposed order is that it makes no provision for the appointment of a parenting coordinator or therapy for T. Those two recommendations were the bedrock of all of the expert reports. Correctly so, in my view. What the applicant, in essence, wants me to do is to conclude that his proposed enhanced access is more appropriate than the status quo (reflected in Vally J's order) and so I should simply put it in place, without more, until the trial. Even once the trial is out of the picture, the applicant presses for the arrangement reflected in his draft order, without more. This means that if anything changes to make the current arrangement unsuitable in the future, the

parties will be forced to run back to court to try to persuade the next judge to change the arrangement to suit their proposed approaches (which, almost inevitably, will conflict with one another).

[106] Clearly, the preferable approach to this matter is to put a parenting coordinator into place, to try to mediate these types of disputes. I agree with *Ms Lipshitz* that the advantage of a parenting coordinator, who will be a trained and experienced psychologist, is that he or she will be equipped to teach the parties to co-parent in a co-operative way. By “teach”, I do not mean (and *Ms Lipshitz* did not mean) that they will be sat down and given lectures on co-parenting. What I have in mind is a process of mediated solutions to a range of possible sources of conflict. These could include minor parenting issues such as contact on a grandparent’s birthday, swapping contact weekends, attending school meetings and the like. They could also potentially include bigger issues such as choices of school, issues to do with medical treatment and the like.

[107] There is no end of the potential topics which parents may need to discuss, and disagreements to resolve, which might arise during the course of their child’s development (which lasts all the way to the end of high school, at the very least). This is a major challenge, at the best of times. To address these issues in the context of the acrimony now prevailing is essentially impossible. It has to be asked: even if I were to make an interim order which tweaks the contact arrangement, as now proposed by the applicant, what is supposed to happen to all of the conflicts which will inevitably arise between now and the trial (or some other future event, such as a fresh application to amend the contact arrangement again, when T is older)? There has to be a mechanism to try to avoid a situation in which every conflict is either left unresolved (to the detriment of T) or is the subject of future litigation (also to the detriment of T).

[108] In one of his affidavits, as I summarised above, the applicant recorded that he did not object to a parenting coordinator in principle. Rather, he considered some of the proposed powers of the parenting coordinator to be unnecessary and the proposed period of two years to be excessive. I return to the details of the parenting coordinator’s power shortly, but for now I have mentioned this because it is important for another reason. It helps to identify the applicant’s true

complaints with the expert reports. His objection did not relate to the appointment of a parenting coordinator, at least in principle. The meta-theme of his whole approach was that he should either have been given much more contact or even be designated as the primary caregiver. He may not have framed his approach precisely in those terms, but the overall theme related to conclusions which he perceived as relevant to the virtues (or lack thereof) of the respective parents, rather than the other components of the recommendations.

[109] If I understood *Mr Beyleveld* correctly in oral argument, the applicant's stance was that he has no objection to the appointment of a parenting coordinator to assist in implementing the court's order. His main concern, at that stage, was about holiday access during December 2024/January 2025, because the respondent's approach sought to place that aspect in the hands of the parenting coordinator. He objected to that, primarily because there was insufficient time left to achieve it. But, since that was addressed through my interim order, I understand the applicant to have no major objection to a parenting coordinator.

[110] The same applies to the recommendation to place T in therapy. In fact, on the applicant's version, it was the respondent who obstructed this process, which is why he says that one of the factual issues in dispute is the question whether he or the respondent is responsible for T's therapy coming to an end. By now it should be clear that I am not concerned with culpability on this issue, especially historic culpability. The point is that it seems to be common cause that T would benefit from therapy.

[111] All of this is to say that, while one might describe the expert recommendations on contact to be outdated, the value of the recommendations relating to a parenting coordinator and therapy are not. At the very least, my order must make provision for those. That is, if it is competent for me to make such an order.

[112] In principle, courts have an extremely wide discretion to make any order which is in the best interests of a child. This power predated the Children's Act and was always recognised as a component of the court's role as the upper guardian of the child (see, for example, *Terblanche v Terblanche* 1992 (1) SA 501 (W) at 503-4). I take the point made by Sutherland J, as he then was, in the *Hummel*

case (discussed below) that it will be rare for the common law to address the best interests of children in a manner which is not superseded by the Children's Act. It seems to be beyond dispute that sections 6-9 of the Children's Act confer an equally wide discretion on courts in matters concerning the best interests of children.

[113] So, in principle a court may impose sensible conditions when making an order providing for the care of, and contact with, a child. On this basis, making an order requiring the parties to co-operate with each other to facilitate therapy for T strikes me as uncontroversial.

[114] The position is less straightforward when it comes to the appointment of parenting coordinators, because that issue engages questions of principle which go beyond the simple issue of the width of the courts' discretion to impose conditions when dealing with care and contact.

The scope of the power to appoint a parenting coordinator

[115] The power of a court to order that a parenting coordinator should be appointed was the subject of a comprehensive judgment by Diane Davis AJ in *TC v SC* 2018 (3) SA 530 (WCC). With respect, I cannot do better than the nuanced discussion of the topic by Davis AJ, and may simply commend the judgment to anyone requiring a detailed explanation of the issues which arise in this context.

[116] The controversy about whether a court has the power to order the appointment of a parenting coordinator has its origin in the decision of Sutherland J, as he then was, in *Hummel v Hummel* 2012 JDR 1679 (GSJ). In that case, the applicant sought an order appointing a case manager to mediate disputes between the parties. The main feature of the order, which occupied the focus of the judgment, was the notion that either party could refer disputes to the parental coordinator (except in relation to relocation and primary residency) to be mediated. In the case of deadlock, the proposed order provided that the decision of the parental coordinator would be binding on the parties, unless and until it was overturned by a court.

[117] The main point to emphasise about *Hummel* is that the parties had tried and failed to conclude a parenting plan. The order which the applicant sought would essentially empower the parenting coordinator to take binding decisions (which could apply for a considerable time in the event of one of the parties seeking to challenge the decision but having to await a hearing in the ordinary course to do so) which would have been the subject of the parenting plan.

[118] Sutherland J, correctly with respect, held that our courts do not have a power to appoint a third-party such as a case manager to impose a parenting plan on parents holding parental responsibilities and rights. Davis AJ addressed this in *TC v SC*. Although she expressed doubt about some of the reasoning of Sutherland J – in respect of which I do not wish to express a view because it is unnecessary for me to do so – her judgment is, at least in part, aimed at reconciling her views on the power to order the appointment of a parental coordinator in appropriate circumstances with the premise of Sutherland J's judgment.

[119] It seems to me that a fair summary of the correct position is what I say in the paragraphs that follow.

[120] There are, in essence, three ways for the details of parental responsibilities and rights to be determined. The first, and preferable way, is for the powers to be exercised by the parties themselves, in a co-operative attempt to pursue the best interests of the child. Secondly, there is the middle ground where parties do not have sufficient capacity to co-operate in this matter, but are able to see the value in agreeing to a reasonable parenting plan, to take the heat out of each individual decision which may need to be taken. Often with the help of the different persons listed in section 33(5)(a) of the Children's Act or mediation in terms of section 33(5)(b), the parties are able to agree to the contents of a parenting plan. The third, and most undesirable but often necessary, situation is where the parties cannot agree on the reasonable exercise of their responsibilities and rights. In that situation, a court will have to determine those responsibilities and rights itself – or, to be more precise, determine the parameters in which those existing responsibilities and rights may be exercised and performed.

[121] Once one acknowledges these categories, one may see that there is no room for a fourth category – ie, the imposition by a court of forced arbitration on the scope or exercise of parental responsibilities and rights. As Sutherland J pointed out, again, with respect, quite correctly, mediation and arbitration should not be conflated. Mediation is a consensual process and if it does not yield results, the parties may walk away. Any proposed order (such as the one put before Sutherland J in *Hummel*) which allows a mediator to make binding decisions amounts, in substance, to court-ordered arbitration. There is no power on courts to make such an order.

[122] In *TC v SC*, Davis AJ focused much attention on the role of a parenting plan. This is because a parenting plan is the mechanism envisaged by the Children's Act for parents to reach agreement on parenting responsibilities and rights. Her main point was that, if parties agreed to the appointment of a parenting coordinator as part of a parenting plan, this should be respected and enforced by court order, if needs be (it being recalled that, in terms of section 34(1) of the Children's Act, a parenting plan may be made an order of court). This is what led Davis AJ, in paragraph 71.1 of the judgment, to delineate conditions which she held to apply to the power of a court to appoint a parenting coordinator by agreement between the parties.

[123] Davis AJ was at pains to say that, even in such as a case, the parties could not, in a parenting plan, agree that a parenting coordinator should take binding decisions in a manner which would be a de facto arbitration (that is my very liberal paraphrasing). She held that a parenting coordinator could, as part of the power to implement a court order (which included a parenting plan) make directives and rulings "which are necessary to implement the court order, but which do not alter the substance of the court order or involve a permanent change to any of the rights and obligations defined in the court order" (at para 71.1(c)). Whether this is right or wrong, this is not inconsistent with *Hummel*, because Sutherland J did not have to decide the issue of what may properly form part of a parenting plan.

[124] I do not have to consider the position where the role of a parenting co-ordinator has been determined in a parenting plan. There is no parenting plan here. And, although I do not understand the applicant to object in principle to the

appointment of a parenting coordinator, he certainly has never expressly endorsed the notion that a parenting coordinator should be given the power of an arbitrator. So, the issue which I have to determine is: in what circumstances may I order the appointment of a parental coordinator when there is no agreement as to the scope of his or her powers?

[125] In my view, and leaving aside the correctness of every component of Davis AJ's judgment, the imperative is to give effect to what has been summarised above in relation to the need to avoid imposing compulsory arbitration of the parties. If the parenting coordinator is to play the role of a mediator, then it cannot be objectionable for a court to conclude that the parties would benefit from the assistance of a parenting coordinator to reduce acrimony. This can be done in a case, such as the present, where there is no parenting plan. This is because the remainder of the court's order establishes the conditions applicable to contact and the like, and replaces the role which a parenting plan would have played, had the parties been able to reach agreement. All that the parenting coordinator does is to act as a facilitator to ensure that components of parental responsibilities and rights which cannot possibly be foreshadowed in the court's order (given that, by their nature, they pop up all the time and cannot be anticipated in advance without composing a court order of 500 pages setting out each possibility and then a range of consequences for each of those possibilities depending on the context) may be resolved with minimal conflict.

[126] Unfortunately – because, in an ideal world, we would wish that courts could make orders which would eliminate acrimony between parents in this situation – if the mediation efforts of the parenting coordinator fail, then the status quo (as reflected in the court's order) will have to remain. To take an example from this case: one of the big issues which troubles me is that, as T grows older, the present contact arrangements may need to change. Having a parenting coordinator on the scene to try to mediate agreement to changes to the status quo is certainly better than nothing. But, since I cannot give the parenting coordinator the power to make binding orders, there is no guarantee of non-litigious solutions to future disputes about contact. If the parties cannot learn,

through the guidance of the parental coordinator, to co-parent cooperatively, rather than vindictively, then litigation may be unavoidable.

A parenting plan

[127] Before concluding this topic, I wish to address the issue of a parenting plan. In argument, the respondent's stance was that the applicant frustrated the unanimous recommendation of the experts for the parties to adopt a parenting plan, and that this was one of the reasons why a punitive costs order should be made against him. I deal with costs later, and for now my concern is section 33(2) of the Children's Act. That provision requires parents in the position of the parties here, who experience difficulties in exercising their parental rights and responsibilities, to try to agree a parenting plan before approaching a court for assistance. It follows from that provision – and this may be motivating the respondent's arguments on costs – that a person applying to court for relief in relation to parental responsibilities and rights, would need to explain why a parenting plan could not be concluded.

[128] The rule reflected in that provision is consistent with a distinction which should be apparent from various things which I have mentioned throughout this judgment. Courts cannot compel parties to submit to arbitration on parenting matters. Courts may also not abdicate the duty to serve as the upper guardian of all children by passing the buck to an appointed third party, such as a parenting coordinator (subject, possibly, to agreement between the parties, which is not something I must decide here). But they can refuse to entertain litigation in the family-law context if the parties have not attempted mediation or non-litigious solutions such as attempting to formulate a parenting plan.

[129] My concern is that, if the parenting coordinator is only, in essence, a mediator who cannot make binding orders, and there is no parenting plan, future litigation is all but inevitable. Even if the parenting coordinator makes great strides in reducing the acrimony, it may be too optimistic to assume that the arrangement envisaged even in the respondent's draft order (which deals comprehensively with the proposed powers of the parenting coordinator) will help to avoid future disputes about contact. It is not essential for me to deal with a parenting plan in

my order. This is because, if one of the parties wants to go to court in due course, he or she will have to address section 33(2) before obtaining relief. But, in my view, it would help if my order expressly empowered the parenting coordinator to help the parties to formulate a parenting plan. I would have been reluctant to do so in circumstances where the parenting coordinator could bind the parties to such a plan. However, since he or she will be unable to do so, it strikes me as useful for the parties to try to formalise a parenting plan once and for all, rather than having to mediate each dispute as it arises.

The terms of the order

[130] There is then the question of what actual contact arrangement should apply.

[131] The reasonable starting point on this issue is to take account of the recommendations of the experts. I have made the point above that, in my view, the applicant's framing of the disputes of fact is not appropriate in the context of this case. Mr Beyleveld referred me in argument to cases such as *Williams v Member of the Executive Council, Department of Health, Eastern Cape* [2023] 1 All SA 562 (ECP) at paras 19-19, which draw the important distinction between the court as the tryer of fact, and the expert as the provider of opinion evidence based on the established facts. An expert's report must express an opinion on facts which are either proved in due course, or common cause. The expert may express an opinion on assumed facts, for the purposes of giving his or her evidence, but then the opinion becomes irrelevant if those facts are not proved in due course. The argument, as I understand it, is that, because the facts set out in the Duchon and Van der Merwe reports are disputed by the applicant, the opinions in those reports are not helpful. Furthermore, it is the court's job, and not the expert's, to decide if the factual premise of the expert opinion has been established.

[132] I accept this argument, as far as it goes, but the extent to which the factual underpinnings of an expert report must be established, is necessarily context-specific. Of course, in any context, including matters concerning the best interests of children, there has to be a factual basis for an expert's conclusions. And I do not mean to abdicate my responsibility to decide the facts entirely to the

experts. But the type of investigation conducted by Drs Duchen and Van der Merwe was necessarily based on a series of value-judgements. That is simply the nature of psychology. The evaluations which the experts conducted involved assessing the state of mind of human beings, sitting in front of them in a room, talking about traumatic and emotional events. The factual criticisms levelled at the reports by the applicant are not of the nature to undermine the cogency of the evaluations conducted by the experts. I have no reason to reject the broad parameters of their conclusions, even if each and every factual matter recorded by them is not beyond dispute.

[133] I should return to a point described above – many of the applicant's criticisms relate to records by the experts of the versions of the parties. His intention was to establish that the respondent's version was false in various respects. But I do not understand the experts to have preferred one version over the other. Dr Duchen, for instance, recorded in meticulous detail what each party had said about the matter. But, in her final evaluation, and in making her recommendations, she only referred to facts and issues which she considered relevant. She did not, in making her recommendations, endorse a particular perspective. A robust reading of her report is that she said: (a) here is what each parent had to say (b) clearly there is lots of acrimony (c) given T's age, it is appropriate for him to live primarily with his mom and (d) there have to be mechanisms to address the acrimony and the trauma which T has suffered. Viewed in that light, the expert reports form a proper basis to guide me in the exercise of my value judgement as to what is in the best interests of T.

[134] The more important issue, when it comes to the reliability of the expert reports, is the fact that T is now significantly older (he has lived almost half his entire life since the investigations reflected in the reports were conducted). In theory, this could render the premise of the experts – that T is best-placed living primarily with the respondent – out of date. However, even the applicant's proposed interim order (to apply pending the trial, according to his preferred approach) is premised on T living primarily with the respondent for now.

[135] As much as the world is changing at an ever-faster pace, the default position is still, generally speaking, that young children of both genders tend to be placed

with their mothers when their parents split up. Of course, this is not an inflexible rule, if it is even appropriate to describe it as a rule. But it is what I might describe as an informal default position. Its only real implication (given that the “rule” may simply be dislodged by proper evidence that it is in the best interests of a particular child to live primarily with his or her father) is that, in a case such as this where nobody has suggested that, at least for now, T should live primarily with the applicant, we do not face a blank canvass. Everyone seems to agree that, when T is older, it is a somewhat open question, at this stage, as to where he should primarily live. The answer may still be the respondent, but it is not something which can be predicted now. Equally, everyone seems to agree that, for now, he should remain with the respondent. So, I have no basis to order otherwise.

[136] The parties take different views, unsurprisingly, about the extent of contact for the applicant. The applicant’s draft order substantially increases the amount of contact which he would enjoy with T. He proposes two-week cycles. In the first week, he would have contact for 24 hours from Monday to Tuesday (but taking into account that the Monday school day forms part of those 24 hours, necessarily meaning that the real hours of contact would be less than 24) and then contact from after school on Thursday, until Sunday evening.

[137] In the second week, he would not have weekend contact, but he would have contact from Monday after school until Tuesday morning (when he would drop T at school) and then from after school on Thursday until Friday morning, when he would drop T at school. There is then separate provision for holidays and special occasions, but I address those separately below.

[138] In contrast, in the respondent’s draft order, provision is made for the applicant to have contact with T every alternative weekend, starting after school on Friday (when the applicant would fetch T from school) and ending on Monday morning (when the applicant would return T to school). Then, in each alternative week (being the weeks without weekend contact), the applicant would collect T from school on a Wednesday and return him to school on a Thursday morning. In this, and in other proposals as to contact, for instance, over special occasions, the respondent’s proposed order is designed to minimise the direct contact between

the applicant and the respondent. It takes its cue from the expert reports, which proposed mechanisms to avoid such direct contact.

[139] It is unavoidable, in a case like this, for the court to exercise a value judgement which is not entirely guided by expert recommendations. Because of the way the parties have framed their cases, with so many hundreds of pages devoted to sometimes extraneous issues, there is no clearly demarcated dispute on the precise terms of contact. There are, though, broad themes. The applicant's main point of emphasis is that the status quo, and the proposal of the respondent of what should apply going forward, give him insufficient contact with T. So, on this issue his position is simply that he wants more time. The respondent, on the other hand, is primarily motivated by three main issues. First, the desire to avoid contact between the parties, as described above. Secondly, the desire to minimise disruption to T by having to move up and down between homes, especially taking into account the far distance between the applicant's house and T's school. Thirdly, the desire to disincentivise the applicant from allowing T to "bunk" school, to spend more time with him.

[140] In her heads of argument, *Ms Lipshitz* provided a helpful table, which showed the applicant's proposed contact in a way that resembles a calendar. She described the arrangement proposed by the applicant as, in substance, "shared residency". She pointed out that, on the applicant's approach, T would stay with the respondent for only four days more than the applicant, per month. I agree with her that the proposal does indeed appear to resemble what used to be described as joint custody.

[141] *Ms Lipshitz* made various compelling arguments about the undesirability of the applicant's proposed order. One of them was based on the point made by Haupt AJ in *PB VZ v L VZ* 2024 JDR 4601 (GP) at paras 49-51 about the need to approach shared residency with caution; and, in particular, the premise that courts would need to be satisfied that shared residency would not give rise to acrimony and discord before allowing it. The remainder of her arguments about the inappropriateness of the applicant's proposed order were based on her analysis of the expert reports.

[142] Although the expert reports are somewhat out of date, they are consistent with the approach which the case law adopts. *Ms Lipshitz* fairly acknowledges that the applicant does not expressly ask for shared residency. I agree, though, that in substance this is what his proposed order will entail. I agree, further, with *Ms Lipshitz's* analysis of the undesirability of anything resembling shared residency in the context of a highly acrimonious relationship. I also find her arguments about disrupting T's weekly schedule to be persuasive.

[143] On the applicant's proposed arrangement, T will be exposed to multiple long trips to and from school per month (ie, on each occasion when he stays at the applicant before or after a school day – which would, on the applicant's proposal, be often). He will also be forced to move up and down between the residences, almost as if he is constantly travelling. As Haupt AJ pointed out in *PB VZ v L VZ* at para 48, the desirability of such arrangements must necessarily be determined on the facts of each case. One can imagine a situation where divorced parents have split amicably, live close to each other and their children's school and generally adopt a co-operative approach to co-parenting. Maybe in such a case shared residency would be appropriate. Even then, I have my doubts about children being shipped up and down – and I personally see merit in arrangements in which one parent visits the other for an hour or two at the primary residence (particularly during the week), with much more contact on some weekends and maybe even most holidays. That type of arrangement is simply out of the question where there is acrimony of the level we see in the present case.

[144] The expert reports remain the most cogent evidence on record to address T's best interests. Their stance, endorsed by the Family Advocate as recently as last year, is consistent with the general approach to these matters in our law. In these circumstances, I do not have any evidentiary basis to depart from the terms of the respondent's draft order. It has the added advantage – although this could be tweaked on any approach – of avoiding almost all contact between the parties, since most of the applicant's contact with T begins and ends with a school drop-off/pick-up and does not involve the applicant attending at the respondent's home.

[145] I wish to emphasise again that nothing is ever permanent in this context. It may be appropriate to revisit these arrangements in the future. For instance, I understand the applicant's position to be that, as T gets older, it would be desirable for him to attend mosque with the applicant. The respondent's current proposed arrangement would already enable that now, every second week. It may be appropriate to make that possible every week in the future, for instance by making the alternating weekday contact applicable from Thursday to Friday (meaning that every second weekend with the applicant would begin on Thursday after school, along the lines of what the applicant proposes now).

[146] The point is this – and I speak here to the applicant especially because (a) he is the one who will no doubt wish to change the arrangement in the future and (b) he has shown himself to be a proponent of litigation, and extensive, detailed submissions, to vindicate his position – the sooner there is the realisation that litigation is not desirable, the better. And the sooner there is a realisation that holding onto anger arising from past incidents is, in the long-run, counterproductive, the better.

[147] In a situation like the present, compromise will always be necessary. Litigation is not preferable to compromise, even for people who believe their counterparts to be incapable of reasonable compromise. In the long run, the best solution for all involved would be for the applicant to give cooperativeness a chance. If he uses the parenting coordinator as intended, and works towards the formulation of a parenting plan, he has every reason to expect his interests to be taken into account. If his retort to me would be to say that, if I only knew the truth about the respondent, then I would realise that she is the unreasonable one, I would say this: if that is true, he will be vindicated in the end because an independent third-party will be well-equipped to assess what is reasonable. But he should at least try to give the new arrangement, and the scope for co-operation, a chance. He should realise that the alternative – launching a fresh application at the first sign of adversity – will hurt all involved. T will be the first victim, but he will not be alone. It will take years of heartache and expense, and is likely to achieve much less than what can be negotiated under the guidance of someone with the time and expertise to address matters fairly.

Holidays and special occasions – the parenting plan

[148] Both of the parties have made proposals, in their draft orders, about how to handle special occasions (such as T's birthday and the parties' birthdays), religious holidays, and school holidays. The applicant sets out the precise details of his proposal in his draft order. The respondent, on the other hand, adopts a hybrid of what should apply as the default in some cases, and then leaves other issues to be resolved by the parties with the assistance of the parenting coordinator. One aspect of the respondent's draft order must immediately be ruled out – it is proposed that the parenting coordinator will decide the precise parameters of contact during the school holidays. For the reasons given above, I do not consider that to be a competent order for me to make.

[149] It seems to me that the most sensible way to proceed is the following. First, I should determine the main issue of contact – ie, which applies during the working and school year – on the terms proposed by the respondent (for the reasons given above). I should then also provide a default for everything else. I should then delineate the role of the parenting coordinator and include in that a process for determining a parenting plan. If the parties cannot conclude a parenting plan, then they will have to continue to apply the terms of my order as best they can, subject to the possibility of mediating issues, on an ad hoc basis, with the assistance of the parenting coordinator. I have to give the order dealing with the parenting plan and parenting coordinator as much teeth as possible, stopping short of passing the buck to the parenting coordinator. All of this will, in my view, constitute the most likely way to avoid future litigation. It is, in any event, the best we can do in the circumstances.

[150] By way of conclusion, and for completeness, I should explain that I do not wish to adopt the respondent's proposal of conferring powers on the parenting coordinator as reflected in the document annexed to the Family Advocate's report of February 2023. One or two of those powers is probably inconsistent with the caselaw which I have discussed above. Furthermore, incorporating another document by reference is liable to cause confusion, especially since neither the Family Advocate nor the respondent has envisaged building the

procedure for the conclusion of a parenting plan into the order. What I intend to do instead is to adopt a hybrid of the respondent's draft order and the Family Advocate's suggestions, adapted to accommodate my reasoning on the different elements above.

The prospect of further representations on the order

[151] During argument, I raised with the parties the novel (at least, as far as I am aware) idea of me circulating my proposed order to them, to enable them to comment before I finalise it. I still think that this would be a good idea, in principle, in cases involving children. However, for three reasons I ultimately decided not to adopt that approach here.

[152] First, I have largely adopted the respondent's proposed approach to contact (and, in the case of school holidays, have drawn very heavily on an agreement already reached by the parties and reflected in my 12 December 2024 order). I already know the position of the parties on that issue, so further representations are unnecessary. My suggestion was premised on the idea that I might introduce something radically different to what either party has proposed. Since I do not, I do not think that representations would be of much assistance.

[153] Secondly, and this relates to the first issue, I underestimated how long this judgment would take to prepare. Given the stakes, I found it essential to read everything in the record, and there was a lot to read. As a result, this judgment comes much later than I expected and hoped, and I would not wish to hold it up further unless further representations would make a material difference.

[154] Lastly, it occurs to me that there are two, equally undesirable options when it comes to my idea. One option would have been to circulate the proposed order only for comment (this was my original idea) without the rest of the draft judgment. The problem with this approach would have been that it is not easy for the parties to comment meaningfully on an order when they are unsighted as to the reasoning underpinning it. The other option – ie, of providing the whole draft judgment – is not practical. It would open the door to lengthy submissions on all components of my reasoning or, at the very least, make the process quite time-

consuming (and, therefore, costly to the parties). For all of these reasons, and despite patting myself on the back for creativity, I have decided that my idea will not work properly in this case.

Costs

[155] The respondent, as shown above, has been substantially successful in this application – at least, as understood in the context of ordinary litigation (as to which, see further below). She seeks a punitive costs order against the applicant. In the proceedings before Manoim J in December 2023, the costs were reserved, so the respondent’s submission that I should make a punitive costs order applies to those proceedings too.

[156] In *KG v CB* 2012 (4) SA 136 (SCA) at para 61, the SCA approved the words of King J in *McCall v McCall* 1994 (3) SA 201 (C) at 209C that “both parents have, in contesting this case, acted in what they believe to be the best interests of their child. There is no winner and loser. There are two concerned parents”. This has led to the acceptance by our courts of what might be described as a default position in which costs orders are not made in cases concerning care and contact.

[157] I am mindful that the view has been expressed that this is not a “general rule” (see *B v K* 2024 JDR 2019 (FB) at para 60 and its reference, there, to AC Cilliers *Law of Costs* (March 2024) at 12.11A). However, whether one describes this as a rule or not, it is clearly the well-recognised starting point. This default position has generally been altered when one of the parties has misbehaved in some way (see, for example *CM v NG* 2012 (4) SA 452 (WCC) at paras 73-4; *B v K* (supra) at paras 64-5). In fact, the case cited by the *Law of Costs* for the proposition that there is no “general rule”, *KL VC v SDI* [2015] 1 All SA 532 (SCA) at para 39, is another example of a case where a party’s conduct motivated the court to depart from the default position and make an adverse costs order against the misbehaving party.

[158] It is interesting to note that in the SCA decision of *KL VC v SDI* which I have mentioned above, the appellant’s conduct was described as requiring “serious

censure . . . as it borders on abuse of court process” (at para 39). Despite this, the SCA made an ordinary costs order. This is consistent with a default position (let us not quibble about whether it is a rule) that there should be no order as to costs, and a practice of marking displeasure with the conduct of a particular litigant in matters concerning children by making an ordinary costs order. The making of a punitive costs order, as requested by the respondent, would require deplorable conduct.

[159] Viewed holistically, the overall conduct of this litigation has been undesirable. It should not be necessary for a matter of this nature to generate such a lengthy record, and to span four years. This is precisely what the modern trend towards alternative dispute resolution has been intended to resolve. When it comes to the conduct of the applicant in particular (because, after all, the question is whether he should pay the costs of this matter, whether on a punitive scale or otherwise), it should be broken down into two subcategories. There is his conduct as a person and a parent, outside of the litigation context. And there is his conduct of the litigation.

[160] To the extent that the former is relevant to the costs of the litigation, I have no factual basis to censure the applicant. The domestic violence proceedings are (or were – judgment may have since been given) before another court and it was accepted by counsel in the matter before me that it was not for me to enter into the merits of that matter. The most that there is, is a series of allegations made against the applicant, which cannot be determined on the papers.

[161] When it comes to the litigation context, I suppose that one could criticise the overall approach of the applicant – ie, to insist on the ventilation of multiple factual issues irrelevant to the best interests of T, including by incorporating into the papers the extensive submissions made to the Family Advocate on the deficiencies in the expert reports as perceived by the applicant. Perhaps the more trenchant criticism of the applicant’s conduct may be found in the respondent’s answering affidavit in the December 2023 proceedings which led to Manoim J’s order. There, she was critical of the applicant’s refusal to cooperate with the appointment of a parenting coordinator, as recommended by the experts. She explained that, had the recommendations been followed, there

would have been no need for urgent litigation in relation to the December 2023 holidays – ie, this is one of the issues which would have been mediated by the parenting coordinator. The applicant's response in the replying affidavit was to say that, since he was in the process of challenging the expert reports (which was the basis of his amended case based on referring the matter to trial), he could not be expected to accede to the experts' recommendations.

[162] So, in essence, for me to make a costs order against the applicant (including a punitive costs order), I would have to take the position that the applicant's conduct in challenging the expert reports, and preferring litigation as a mechanism to resolve everything (including holiday contact) was unreasonable. I do not believe that I can go that far. My personal view is that much of this litigation was unnecessary, and that cooperation with the assistance of the parenting coordinator would benefit everyone. But this enquiry tends to become somewhat circular because the whole reason for the applicant's position is that he believes that the respondent has consistently frustrated his ability to spend time with T, in T's best interests. As one unpeels each layer of the onion, there is a dispute of fact about each party's conduct (including the conduct of the litigation) which has to be resolved before one may conclude that either is to blame for where we are now.

[163] I do not think it is appropriate to attempt that exercise. Instead, it is hoped that this judgment sends the applicant the message that, while he was entitled to try to vindicate his rights in litigation, the litigation was objectively misguided. Going forward, he would be well-advised to comply with the spirit of my order, and to work towards more cooperative co-parenting with the respondent. Since this cuts both ways, no costs order is appropriate at this stage. A future court considering this issue – in the unfortunate event that my order does not preclude future litigation – may take a different view.

The order

[164] Most of the explanation for my order appears from what I have said above. I wish only to add six things.

[165] First, although I am confident that paragraph 2 of Vally J's order remains in force, I intend to follow the wording in the respondent's draft order and declare that the parties "remain" co-holders of parental responsibilities and rights. There is no downside in doing this, and it seems desirable in the interests of certainty.

[166] Secondly, *Mr Beyleveld* made the point in argument that, while the applicant had no in-principle objection to the appointment of a parenting coordinator, there would not be much of a role for him or her, if the precise parameters of contact were set out in my order. That point is well-made, as far as it goes, and in the short-term it is assumed that, on a day-to-day, week-to-week or even month-to-month basis, the parties will simply be able to give effect to the contact arrangement without burdening the parenting coordinator. However, even leaving aside the parenting plan, which clearly constitutes a mechanism for the parenting coordinator to give real, substantive assistance to the parties, there is also the question of the medium-term future. Even if the parties cannot agree to a comprehensive arrangement in a parenting plan, there may be various reasons to amend the status quo, including to deal with holidays as T gets older. This is why I must disregard the applicant's objection that it is unnecessary to put the parental coordinator in place for two years. It is, in fact, in the applicant's best interests for the parental coordinator to be available for at least that long, to assist the parties to amend the terms of contact in the event of a parenting plan not being concluded (or even if one is, because it may be impossible for the parties to agree, in such a plan, to how contact will work in three years' time).

[167] The advantage of the hybrid approach reflected in the order below is that it creates a default position which cannot be altered other than by consent (so there is certainty in the event that no solutions may be mediated) coupled with a mechanism which provides for the resolution of any or all disputes without the need for litigation. Of course, no one may be deprived the right to ventilate disputes in court (subject to very limited exceptions, such as vexatious litigants). Therefore, there is no guarantee that the order will prevent future litigation. At the very least, though, I hope that it is clear that the parenting coordinator is by no means superfluous.

[168] Thirdly, I have, as is the norm, redacted this judgment in order to protect the identity of T. In the order below, it has been necessary for me to refer to T by his full name. What I intend to do is to arrange for the unredacted judgment to be uploaded to Caselines, where the identity of the parties is already clear. In all other versions (ie, the version circulated to the parties by email, and the version which will be sent to the online publications in due course), T's name will remain redacted in the order.

[169] Fourthly, in the respondent's draft order she requests a declaration that she "is awarded the right to provide primary care and place of residence to the minor child". In paragraph 2 of Vally J's order, which I confirm below on almost the precise terms (since I do not believe that I have the jurisdiction to alter them, in the absence of an application in terms of section 28 of the Children's Act), it is provided that both parents have full parental responsibilities and rights as envisaged in section 18 of the Children's Act. I am not convinced that it is consistent with a situation in which both parties hold full rights and responsibilities in respect of a children for a court then to say that one of them is the primary caregiver or primary custodian. It is not necessary for me to decide that issue, because I consider it better, either way, simply to provide a carve-out from the full rights and responsibilities that the applicant has, which is that he is required to exercise care and contact only in terms of the parameters of the order.

[170] Fifthly, in the proceedings before me the question of holiday contact was front of mind because the December 2024 holidays were imminent. As I mentioned briefly above, I addressed that holiday period with an interim order. As may be seen from my short reasons for the order which appears in the Caselines file, the order which I made was made by agreement between the parties. I made the point there, and reiterate it here, that it is hoped that the pragmatism shown by the parties in respect of the holiday period will serve as a precedent for future productive co-parenting. In any event, the respondent's proposal has been, from the time when a parenting coordinator was first proposed, that holiday contact should be determined by agreement, facilitated by the parenting coordinator. I agree that that is desirable, and hope to encourage it with the order I make below by making, as the ultimate goal, holiday contact subject to yearly agreements

which take account of T's age. However, since I cannot give the parenting coordinator any powers to make binding orders, and since I do not want to encourage either party to run back to court if agreements cannot be reached on the holiday, I intend to provide for a default position.

[171] Again, even this is not ideal because it is insufficiently flexible to deal with T's development and any changes arising from him growing older. But, it is the best that can be done in the circumstances. The way in which I intend to address this – which strikes me as the fairest and most appropriate mechanism – is to use the agreement for December 2024/January 2025 as the basis for future holidays. If the parties decide that, as time passes, the agreement reflected in my interim ruling (and below, subject to appropriate adjustments) is out of date, then they have another incentive to cooperate with each (under the guidance of the parenting coordinator) to reach a new accommodation for the holidays.

[172] Lastly, there is not much daylight between the proposals of the parties in relation to special occasions such as T's birthday, the parties' birthdays, religious holidays and other special days like Fathers' Day. There are some subtle, but important differences, which speak mainly to the issue of direct contact between the applicant and the respondent. In the order below, I intend to address those issues in a manner consistent with my overall goal of reducing contact between the parties, and therefore acrimony, as much as possible. This will result in the applicant getting slightly more time than he asked for in respect of some of the occasions (for instance, by having T for two nights, instead of one, around the applicant's birthday) to enable T to be returned to school, rather than the respondent's home, at least on weekdays.

[173] In the agreement reached by the parties in respect of the holidays, provision was made for certain third parties to assist with drop-offs and pick-ups by the applicant. Since some special occasions will inevitably fall on weekends and holidays, it will not always be possible for the applicant to collect T from school and/or return him there. Therefore, I intend to provide for the same third parties to assist in this regard. However, since I do not have any updated evidence on their continued willingness to assist, I also provide a fallback position, in case they are not.

[174]I accordingly make the following order:

1. Subject to the terms of this order, the applicant and respondent shall remain co-holders of full parental responsibilities and rights in respect of the minor child, T (“the minor child”), as set out in section 18(2) of the Children’s Act 38 of 2005 (“the Act”), read together with section 18(3) of the Act.
2. All affidavits filed on record which would, in terms of rule 6(5)(e) of the Uniform Rules require permission to be admitted, are admitted into evidence.
3. All amendments sought by the parties to their pleadings are, to the extent necessary, granted.
4. It is declared that, notwithstanding paragraph 1 above, it is in the minor child’s best interests for the arrangements set out below to apply. It is accordingly ordered that, unless the parties agree otherwise – either in a parenting plan as envisaged in section 33 of the Act or in an ad hoc agreement covering any of the terms set out below which is reduced to writing – or a competent court amends the terms of this order, the following contact arrangements shall apply:
 - 4.1. Save as set out below, the minor child will reside at the residence of the respondent.
 - 4.2. The applicant shall have contact with the minor child (as envisaged by paragraph (b)(i)(bb) of the definition of “contact” in the Act) as follows:
 - 4.2.1. Every alternative weekend from Friday after school, when the applicant will fetch the minor child from school, to Monday morning, when the applicant will return the minor child to school.
 - 4.2.2. In weeks when the applicant does not have weekend contact, the applicant will exercise contact with the minor child from Wednesday to Thursday. The applicant will fetch the minor child from school on Wednesday and return the minor child to school on Thursday morning.

4.2.3. Contact during the school holidays, public holidays and religious holidays is to be determined in terms of paragraphs 9, 10 and 11 below.

4.2.4. Contact on the minor child's birthday shall be as follows:

4.2.4.1. In odd years, the applicant will be entitled to exercise contact with the minor child from after school the day preceding the minor child's birthday until the morning of his birthday when he will be returned to school (if it falls on a school day) or until 12H00 (if it falls on a weekend) when the minor child will be returned to the respondent's home. Should the day before the minor child's birthday fall on a weekend, the applicant shall collect the minor child from the respondent's home at 14h00 on the day before the minor child's birthday.

4.2.4.2. The respondent thereafter will exercise contact with the minor child on his birthday from either after school (if it falls on a school day) or 12H00 (if it falls on a weekend) on the day of his birthday until the next morning, whereafter the normal contact regime recommences. This will be facilitated by (a) when the next day is a weekday, the respondent dropping the minor child at school the next morning and then the relevant parent who, in terms of the normal contact regime, has residential contact on that day collecting the minor child from school and (b) when the next day is a weekend, and if that day is a contact day for the applicant, by the applicant collecting the minor child from the respondent's home at 9h00.

4.2.4.3. In even years, this arrangement will be reversed, and the arrangement as described in paragraphs 4.2.4.1 and 4.2.4.2 above shall apply, with the changes necessary for the context.

- 4.2.5. If the applicant's birthday falls outside his contact times, then the applicant is entitled to collect the minor child from school the day preceding his birthday or at 16h00 on the day preceding his birthday, if that day falls on a weekend. The applicant will then have contact with the minor child until 09H00 the day after the applicant's birthday, when the applicant will return the minor child to the respondent or to school (adjusting the time of 9h00 should the minor child's school day begin earlier, to ensure that the minor child is not late for school), whichever is applicable. The arrangement described in this paragraph will apply also to the respondent's birthday, with the changes necessary for the context.
- 4.2.6. If Fathers' Day falls outside his contact times, then the applicant is entitled to collect the minor child from school the day preceding Fathers' Day or at 16h00 on the day preceding Fathers' Day, if that day falls on a weekend. The applicant will then have contact with the minor child until 09H00, the day after Fathers' Day, when the applicant will return the minor child to the respondent or to school (adjusting the time of 9h00 should the minor child's school day begin earlier, to ensure that the minor child is not late for school), whichever is applicable. The arrangement described in this paragraph will apply also to Mothers' Day, with the changes necessary for the context.
- 4.2.7. For the sake of clarity, it is ordered that, in all situations where the arrangement described in paragraphs 4.2.1 and 4.2.2 above ("the normal arrangement") is altered by any of the arrangements described in paragraphs 4.2.4, 4.2.5 and 4.2.6 above ("the special situation arrangement"), the normal arrangement shall resume as soon as the special situation arrangement comes to an end. It is ordered further that, when the special situation arrangement alters the normal arrangement, neither party is entitled to expect any compensating adjustments to the normal arrangement.

- 4.3. Subject to section 31 of the Act, and any arrangements agreed with the parenting coordinator as set out in paragraphs 5-7 below, the party with whom the minor child resides in any of the periods contemplated above, shall exercise all of the responsibilities and rights of care as envisaged by section 18(2)(a) of the Act.
- 4.4. The following individuals may assist the applicant, to the extent necessary, with any pick-up or drop-off which must be done from, or to, the respondent's residence and/or which must be done in the respondent's presence:
- 4.4.1. Mr. Zunaid Dockrat;
- 4.4.2. Ms Kauthar Gamiieldien; and
- 4.4.3. Mrs Moshina Patel.
- 4.5. Should none of the individuals listed in paragraph 4.4 above be available to assist the applicant, then all drop-offs and pick-ups other than those to and from the minor child's school must take place at a public place in the vicinity of the respondent's residence. The parties shall be entitled to agree, in writing, to alternative people to the people mentioned in paragraphs 4.4.1 to 4.4.3 above to perform their role. In that event, the arrangement contemplated in paragraph 4.4 will continue to apply and it will not be necessary for drop-offs and pick-ups to be done at a public place.
- 4.6. The parties are to purchase a smart cellular telephone, with a suitable mechanism for payment of the account (ie, by agreement between the parties, a contract may be concluded or alternatively a pay-as-you-go arrangement may apply), to be used by the minor child as envisaged by this subparagraph. The parties are to share the cost of the purchase of the smart cellular telephone, unless they agree, in writing, otherwise. The following arrangement will apply:

- 4.6.1. The party with whom the minor child is not residing at any point is entitled to have ten minutes of video contact between 18h00 and 20h00 every day, using Facetime and/or WhatsApp and/or any other suitable application.
- 4.6.2. The parties are to use their best endeavours to agree with the parenting coordinator appointed in terms of paragraph 5 below to an arrangement which ensures that the video calls envisaged in this paragraph take place at a predictable time, and in a manner which is as convenient as possible to the parties.
- 4.6.3. In the absence of a suitable agreement, the system to be followed is:
 - 4.6.3.1. The parent with the right to video contact shall initiate the video call by phoning the minor child's phone during the window described above.
 - 4.6.3.2. The parent with whom the minor child is residing is to ensure that the minor child picks up the call and begins the video contact.
 - 4.6.3.3. If there is a reason why, when the call is made, it is not possible or convenient for the minor child to answer, the parent with whom the minor child is residing is to send a text message to the parent trying to initiate the video call, at the soonest possible opportunity, and advise of a specific time when the call may be made. It shall then be the responsibility of the parent with whom the minor child resides to ensure that the minor child answers the call at the designated time.
- 5. To ensure the facilitation, on an ongoing basis, of cooperative family functioning, including but not limited to the resolution of disputes that may arise from the parties' exercise of their parental responsibilities and rights, the parties must appoint a parenting coordinator ("PC") as provided for in

paragraph 5.1 below to deal with those and other contentious matters relating to the minor child.

- 5.1. The parties shall appoint a PC who must be a South African Clinical Psychologist with at least 10 years of experience in private practice by agreement within 10 days of the granting of this order, failing which either party may request the Gauteng Family Law Forum or, alternatively, the Family Advocate to appoint the PC.
- 5.2. The PC shall, by exercising the powers set out below, and in terms of the process described in paragraph 6 below, support and guide the parties in their roles of co-parenting in order to navigate issues and problems that may arise, reduce conflict and manage disputes, including but not limited to the scheduling of contact on an annual basis in January of each year, and on public and religious holidays, and any disputes that may arise between the parties in relation to any occurrences of unhealthy parenting, holiday dates, medication or school uniform and purchasing of school necessities, and any disputes regarding decisions that need to be made in terms of Section 18(3) of the Act.
- 5.3. Without limiting the entitlement of either party to approach a competent court in circumstances where the urgency of the situation precludes the parties from doing so, the parties shall first approach the PC to assist in resolving disputes before approaching a court.
- 5.4. In any court proceeding between the parties relating to the minor child's best interests including, but not limited to, any litigation to amend the terms of this order, the parties will be required to address, in the relevant affidavits and/or pleadings, the question of why the parties were unable to resolve any disputes which are the subject of that litigation with the assistance of the PC.
- 5.5. If court proceedings ensue, whether prior to or after the PC's recommendation/s are made, the evidence available to the PC or any documents so tabled, including relevant documentation in possession

of the PC, including from past and present medical practitioners or mental health professionals, the decision/s and/or recommendations/s and reasons therefore of the PC or other professional/s shall be admissible in such court proceedings.

- 5.6. The parties shall co-operate civilly with each other and the PC. They shall attend to the PC when requested by the PC to assist with any facilitation, mediation, assessment, recommendation, and/or decision made by the PC.
 - 5.7. Recommendations of the PC shall, where requested by either party, be made in writing, duly supported by reasons for the recommendation.
 - 5.8. Nothing in this order should be interpreted to preclude the parties, with the assistance of the PC or otherwise, from amending the terms of this order as they relate to contact by agreement, so long as the agreement is reduced to writing.
 - 5.9. Both parties shall be equally liable for the PC's costs unless the parties agree to an alternative arrangement in writing.
 - 5.10. The PC's appointment shall be for a period of 24 months from the date of signature by all parties of the PC's contract, whereafter (subject to paragraph 5.11 below), a new PC must be appointed in terms of clause 5.1 above. There is nothing stopping the parties, in terms of a written agreement, appointing the same PC as appointed in terms of paragraph 5.1 above after the expiry of the initial 24-month period.
 - 5.11. The PC's contract may be jointly terminated by both parties in writing.
 - 5.12. The parties shall forthwith comply with all that is necessary and required by the PC to facilitate his or her appointment as the PC.
6. The PC's facilitative role shall be exercised as follows:
 - 6.1. If the parties are unable to reach agreement on any issue where a joint

decision is required in respect of the minor child or on an issue concerning the minor child's welfare which has become contentious, the dispute shall be referred in writing to the PC by either the applicant or respondent and the PC shall attempt to resolve the dispute as speedily as possible. Without limiting the generality of the issues which may be referred to the PC in terms of this paragraph 6.1, it is expressly provided that either party may refer a dispute to the PC in relation to a request to modify the contact arrangements addressed in this order. The entitlement of either party to approach the PC in this regard is subject to the proviso that, unless an amended arrangement is reflected in a parenting plan (and subject to the entitlement of the parties to agree varied access on school, public and religious holidays), neither party shall be entitled to ask the PC to mediate a dispute in relation to amending the contact determined by this order any sooner than 12 (twelve) months from the date of this order.

- 6.2. The parties, and the minor child (if necessary and appropriate), shall participate in the dispute-resolution process as requested by the PC.
- 6.3. If the PC, in the exercise of his or her sole discretion, regards a particular issue raised by one of the parties as trivial or unfounded, he or she is authorised to decline the referral of such issue.
- 6.4. The PC shall conduct proceedings which are informal in nature and is entitled to receive information by means of telephone, correspondence, and other suitable methods, whether electronically or otherwise. The PC shall use his or her discretion in considering the weight and sufficiency of information provided and may expand his or her enquiry as he or she deems necessary.
- 6.5. The PC shall determine the protocol of all communications, interviews and sessions, including who shall or may attend meetings. Legal representatives are not ordinarily entitled to attend such meetings, but the PC shall be entitled to permit the attendance of legal

representatives if the PC determines exceptional circumstances to warrant such a decision.

- 6.6. As part of the mediation process, the PC shall be entitled to confer individually with the applicant and/or respondent and/or the minor child (if necessary) as well as other family members, partners of either the applicant or respondent (and any step-children as there may be), school and educational personnel, care providers, therapists and healthcare providers of the minor child or the parties and such persons are, as a result of this order, authorised to provide information to the PC.
- 6.7. The parties shall not be entitled to insist that any meeting or session is tape-recorded, videoed or recorded in any other manner.
- 6.8. The parties are obliged to ensure that the PC is able, at his or her discretion, after a dispute has been referred to him or her, to meet with the minor child and/or confer with the minor child at reasonable times and places without the parties being present.
- 6.9. Save as expressly provided in this order, the PC shall have the discretion as to the nature of any record which he or she keeps in respect of any particular issues referred to him or her for mediation by the parties in terms of paragraph 6.1 above.
- 6.10. All participants in the process described in this paragraph, including the PC, the applicant, the respondent, and the legal representatives of the parties shall use their best efforts to preserve the privacy of the family and the minor child, and restrict dissemination of information related to decisions to those who need to know the information.
- 6.11. If the PC is unable to resolve a dispute by mediation, then he or she shall furnish a short, written report describing the process and the reasons why the dispute could not be resolved, which must be furnished to the parties.

7. The PC shall assist the parties to formulate a parenting plan in terms of section 33 of the Act, and to address the terms of contact during school holidays, religious holidays and public holidays in terms of the following process:
 - 7.1. Within two months of the PC's appointment, the parties shall jointly instruct the PC to assist them in the formulation of a parenting plan.
 - 7.2. The parties may, by written agreement (or through their legal representatives), decide to delay the time-period in paragraph 7.1 above for a period of no longer than 12 (twelve) months from the date of this order.
 - 7.3. The PC shall, in his or her discretion, adopt a suitable procedure to consult with each of the parties separately and/or to take written representations from them, as to the issues which they consider to be the proper subject of the parenting plan.
 - 7.4. Once the PC has obtained the necessary information from the parties, the PC shall prepare the first draft of the parenting plan. This requirement is subject to the proviso that the PC may, in his or her discretion, delegate the task to another suitable healthcare provider with the necessary expertise.
 - 7.5. Once the PC (or his or her delegate) has prepared the first draft of the parenting plan, it shall be furnished to each party. The PC shall thereafter adopt a process modelled on the process described in paragraph 6 above, with the changes necessary for the context, to facilitate a mediation between the parties as to the final contents of the parenting plan.
 - 7.6. Either party shall have the right to determine, at any stage during the mediation, that he or she is not amenable to conclude the parenting plan on the terms reflected in the latest draft of the parenting plan or at all. At that stage, the PC shall bring the mediation in respect of the parenting plan to an end, and issue a short written recordal of the

nature of the mediation process and the reason why it failed to result in an agreement between the parties on the contents of a parenting plan.

8. In the event of the parties being unable to agree a parenting plan, then the terms of this order shall apply unless and until varied by an order of a competent court.

9. In the event of the parties being unable to agree on arrangements applicable during school holidays, then the following arrangement will apply:

9.1. In any calendar year in which the last Friday in November results in the first day of December falling on a Sunday or a Monday, the following arrangement will apply:

9.1.1. The applicant will exercise contact with the minor child on the following days during the Holiday Period:

9.1.1.1. From 18h00 on the last Friday in November until 18h00 on the next Sunday (ie, approximately two days later);

9.1.1.2. From 18h00 on the next Wednesday until 18h00 the next day (Thursday);

9.1.1.3. From 18h00 on the Saturday after that Thursday until 18h00 on the next Thursday after that Saturday;

9.1.1.4. From 18h00 on the next Tuesday after that Thursday until 18h00 on the Sunday after that Tuesday;

9.1.1.5. From 18h00 on the Friday after that Sunday until 18h00 on the Wednesday after that Friday; and

9.1.1.6. From 18h00 on the Monday following that Wednesday until 18h00 on the Saturday after that Monday.

9.1.2. The respondent will exercise contact with the minor child on the following days during the Holiday Period:

- 9.1.2.1. From 18h00 on the first Sunday after which this arrangement begins until 18h00 on the Wednesday after that Sunday;
 - 9.1.2.2. From 18h00 on the Thursday after that Wednesday until 18h00 on the Saturday after that Thursday;
 - 9.1.2.3. From 18h00 on the Thursday after that Saturday until 18h00 on the Tuesday after that Thursday;
 - 9.1.2.4. From 18h00 on the Sunday after that Tuesday until 18h00 on the Friday after that Sunday;
 - 9.1.2.5. From 18h00 on the Wednesday after that Friday until 18h00 on the Monday after that Wednesday; and
 - 9.1.2.6. From 18h00 on the Saturday after that Monday until 14h00 on the Wednesday after that Saturday.
- 9.2. In any calendar year in which the last Friday in November results in the following Sunday or Monday still falling in November, then the following will apply:
- 9.2.1. The applicant will exercise contact with the minor child as follows:
 - 9.2.1.1. The applicant will exercise contact from 18h00 on the first Friday in December until 18h00 on the next Sunday (ie, approximately two days later).
 - 9.2.1.2. Thereafter the arrangement set out in paragraph 9.1 above shall apply, with the adjustments necessary to give effect to the requirements of this paragraph 9.2.
 - 9.2.2. The respondent will exercise contact with the minor child as follows:
 - 9.2.2.1. The respondent will exercise contact from 18h00 on the Sunday after the first Friday in December.

9.2.2.2. Thereafter the arrangement set out in paragraph 9.1 above shall apply, with the adjustments necessary to give effect to the requirements of this paragraph 9.2.

9.3. The arrangements arising from this paragraph 9 will begin as determined above, and will come to an end on the Wednesday closest to 15 January of the particular year (it being provided that the relevant Wednesday shall fall no later than 16 January of the particular year). On that Wednesday (whatever the specific date may be), the applicant will collect the minor child from school (if school has resumed for the year) or from the respondent's home at 14h00 (if school has not resumed for the year), whereafter the normal arrangement will resume.

9.4. The arrangement described in this paragraph 9 will apply only to the end-of-year holiday period. Should the parties fail to agree on an arrangement for other school holidays, the normal arrangement will apply to those school holidays.

10. In the event of the parties being unable to agree on arrangements applicable during public holidays, then the following arrangement will apply:

10.1. In the event that a public holiday falls on a Tuesday, Wednesday or Thursday, the normal arrangement shall continue to apply.

10.2. In the event that a public holiday falls on a Friday or a Monday, each of the parties shall be entitled, on an alternating basis, to have contact with the minor child for the long weekend ("long-weekend contact"), as follows:

10.2.1. Where the public holiday falls on a Friday, the parent entitled to contact for the long weekend, shall collect the minor child from school on the Thursday before the public holiday, and return the minor child to school on the following Monday morning.

10.2.2. Where the public holiday falls on a Monday, the parent entitled to contact for the long weekend, shall collect the minor child from

school on the Friday before the long weekend, and return the minor child to school on the following Tuesday morning.

10.2.3. After the minor child is returned to school on the Monday or Tuesday morning, whatever the case may be, the normal arrangement will resume.

10.2.4. Should long-weekend contact come to an end on a day which is, for any reason, not a school day, then:

- If the Monday or Tuesday after the long weekend (as applicable in the circumstances) is a day on which the respondent ordinarily would have contact, the applicant shall return the minor child to the respondent's residence by 9h00 (unless, because that weekend is a long-weekend on which the respondent has contact, he is already there).
- If the Monday or Tuesday after the long weekend (as applicable in the circumstances) is a day on which the applicant would ordinarily have contact, the minor child must remain with the applicant until the end of the applicant's relevant contact period under the normal arrangement. If that long weekend is a long weekend on which the respondent had contact, then the applicant shall collect the minor child from the respondent's residence at 9h00.

10.3. The parent to have contact with the minor child for the first long weekend which arises after this order is handed down will be the parent who already has weekend contact with the minor child on that weekend, in terms of the normal arrangement. Thereafter, the other parent will have contact for the next long weekend, and they will alternate long-weekend access after that.

- 10.4. Where a long weekend results in a parent, who would have had contact with the minor child over the relevant weekend in terms of the normal arrangement, not having contact on that weekend, the normal arrangement will be altered so that the parent who missed out on contact on the relevant long weekend will have contact on the following weekend.
11. In the event of the parties being unable to agree on arrangements applicable during religious holidays, then the following arrangement will apply:
- 11.1. Each parent will have contact with the minor child for half of the available time on Eid Al Fitr.
- 11.2. Each parent will have contact with the minor child for half of the available time on Eid Al Adhar.
- 11.3. In order to facilitate the arrangement described in paragraphs 11.1 and 11.2 above, the same arrangement applicable to the minor child's birthday as described in paragraph 4.2.4 above will apply. For the sake of clarity, it is ordered that the odd year/even year formulation in paragraph 4.2.4 above will apply both to Eid Al Fitr and Eid Al Adhar so that the contact in relation to both of them will be the same in each calendar year (with the terms determined by whether it is an odd or even year).
12. Should it occur that any drop-off or pick-up time envisaged above, or altered by agreement between the parties in writing, falls later than 16h00, the relevant drop-off or pick-up time will be amended to 16h00 during Ramadaan.
13. Immediately after the appointment of the PC, the minor child is to be placed in therapy with a play therapist whose identity shall be established and directed by the PC.
14. The parties are to pay their own costs in this application, including in respect of the costs reserved by this Court, in the order made by Justice Manoim, on 19 December 2023.



ADRIAN FRIEDMAN
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

Delivered: This judgment was prepared and authored by the Judge whose name is reflected above and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter. The date for hand down is deemed to be **13 March 2025**.

Heard:

22 November 2024

Appearances:

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