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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case Number: 2026-043256

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: YES

DATE: 11 March 2026

SIGNATURE OF JUDGE:

In the matter between:

M[...] **C[...]** **D[...]**

Applicant

and

N[...] **C[...]** **D[...]**

Respondent

JUDGMENT

Introduction:

[1] This matter was brought as an urgent family court matter and enrolled for hearing on 10 March 2026. The matter concerns the parental responsibilities and rights of the parties in respect of the minor child “**MED**”, the son of the parties, currently 7 years old.

[2] The applicant brings the application in two parts: Part A for urgent relief which is before this court and Part B to be heard in the ordinary course. The substantive relief sought in urgent court in terms of Part A of the application is as follows:

“ ...

2. That the *status quo ante* be restored by placing the minor child [MED], born on 4 September 2018, in the primary care of the Applicant pending further investigations and the adjudication of PART B of this application;
3. That pending the finalisation of PART B of this application, the Respondent shall have the following contact with the minor child:
 - 3.1 Reasonable telephonic contact;
 - 3.2 The right to visit the minor child over weekends on either the Saturday or the Sunday and for a period of four hours;
 - 3.3 That the above-mentioned contact and visitation not interfere with any scholastic or other activities of the minor child;
4. That the Office of the Family Advocate be directed to investigate the best interest of the minor child to be adjudicated under PART B hereof;
5. That PART B hereof be postponed *sine die* with the parties allowed to supplement the papers if necessary;

...”

[3] In Part B of the application, the applicant seeks the amendment of an order of this court dated 25 January 2025¹ effectively amending the primary residence of MED from that of the respondent to the applicant, replacing the contact awarded to the applicant with contact for the respondent upon certain terms, and deleting the maintenance payable by the applicant to the respondent in respect of MED.

¹ The said order, annexure A at CL 002-2, is the divorce order in respect of the parties dealing with divorce, parental responsibilities and rights of the parties, maintenance and the patrimonial consequences of the divorce.

- [4] I am required to consider and evaluate all relevant facts in arriving at a decision as to the best interests of MED. In *J v J* 2008 (6) SA 30 (C) the full court of the Cape Division held as follows at par [20]: (footnotes excluded)

“[20] As the upper guardian of minors, this court is empowered and under a duty to consider and evaluate all relevant facts placed before it with a view to deciding the issue which is of paramount importance: the best interests of the child. In *Terblanche v Terblanche* it was stated that when a court sits as upper guardian in a custody matter -

. . . it has extremely wide powers in establishing what is in the best interests of minor or dependent children. It is not bound by procedural strictures or by the limitations of the evidence presented or contentions advanced by the respective parties. It may in fact have recourse to any source of information, of whatever nature, which may be able to assist it in resolving custody and related disputes.

In *P and Another v P and Another* Hurt J stated that the court does not look at sets of circumstances in isolation:

I am bound, in considering what is in the best interests of G, to take everything into account, which has happened in the past, even after the close of pleadings and in fact right up to today. Furthermore, I am bound to take into account the possibility of what might happen in the future if I make any specific order.

In *AD and DD v DW and Others (Centre for Child Law as Amicus Curiae; Department for Social Development as Intervening Party)* the Constitutional Court endorsed the view of the minority in the Supreme Court of Appeal that the interests of minors should not be 'held to ransom for the sake of legal niceties' and held that in the case before it the best interests of the child 'should not be mechanically sacrificed on the altar of jurisdictional formalism'."

Brief overview of certain salient facts:

- [5] By virtue of the conclusion that I have reached in this matter, having considered all of the facts placed before me, I do not intend to provide an extensive judgment. The determination of the merits regarding the best interests of MED in respect of care and contact will be for the court hearing Part B of the application to decide, with the benefit of expert opinions and views, and with the assistance of the Office of the Family Advocate.
- [6] Nothing stated in this judgment ought to be interpreted as a determination of the best interests of MED for purposes of the determination in Part B of this application.
- [7] Be this as it may, I address very briefly certain salient facts herein.

- [8] The parties were previously married. From the marriage, MED was born on 4 September 2018.
- [9] The parties' relationship broke down.
- [10] The applicant left the former matrimonial home in August 2023, leaving MED in the care of the respondent.
- [11] On 21 November 2023, the Office of the Family Advocate issued an interim report and recommendation² in respect of contact for the applicant (with primary residence to be with the respondent).
- [12] On 25 January 2024, by agreement of the parties, this court granted a decree of divorce granting the respondent primary residence of MED and the applicant certain prescribed rights of contact in respect of MED. The order of court provided for the phasing in of contact rights for the applicant according to the recommendation of a social worker, Ms Christa Botha.³
- [13] During or about mid 2025 the respondent re-located with MED to George where they lived with the respondent's mother.
- [14] The respondent fell extremely ill in October 2025. Until that time, from August 2023, for approximately two years until October 2025, MED had been primarily resident with the respondent, and the applicant had exercised certain contact with MED.
- [15] The severity of the illness was such that the respondent had to be taken into ICU. Her illness was serious and she could not communicate. The respondent's brother contacted the applicant on 18 October 2025 and requested that he care for MED while the respondent recovers.
- [16] Placing MED in the temporary care of the applicant has to be seen in the context of these facts. The respondent did not do so – she was unable to take such a decision. Furthermore, the understanding was that MED would be returned to the care of the respondent once the respondent had recovered from her illness. This is reflected in *inter alia* the contemporaneous letter written by the attorney of record for the applicant where the following is stated *inter alia*:⁴

² Interim report of the Family Advocate, CL 002-9.

³ Par 3.2.4 of the order, annexure A at CL 002-3, par 3.2.4.

⁴ Letter dated 20 October 2025, CL002-22, par 2.

“2. Our client was contacted on Saturday morning the 18th of October 2025 by your client's brother ..., who informed him that your client is in ICU in George and enquired from our client what should happen to [MED]. Our client informed him that he would fetch [MED] **to take care of him until your client has recovered completely and is in a position to take care of him.**”

(own emphasis)

- [17] During the period that MED was in the care of the applicant, the applicant took MED to a number of professionals. The applicant furthermore took steps to arrange for the future enrolment of MED in school. The applicant states that he also managed to wean MED from diapers, obtained a diagnosis that dispels the autism diagnosis previously obtained by the respondent in respect of MED, and has generally improved the wellbeing of MED.
- [18] The respondent was discharged from hospital. The respondent requested that MED be returned to her care, but the applicant refused. Various letters and communications were exchanged between the legal representatives for the parties, but they were unable to resolve the dispute.
- [19] On 18 February 2026, the respondent, relying on the divorce order granting her primary residence, collected MED. This was done with the assistance of the SAPS and a social worker.
- [20] Pursuant to the aforesaid, the applicant launched the present application.

The interim relief sought:

- [21] Whilst the respondent raised certain points *in limine*, these need not detain the court as the parties proceeded to argue the merits of the relief sought in Part A of the notice of motion. I am further of the view that the matter is sufficiently urgent to justify enrolment, hearing and adjudication of Part A.
- [22] The applicant seeks on an urgent basis that MED be placed in his care pending the outcome of Part B of the notice of motion for the variation of the court order. The applicant has advanced a number of arguments in support of placing MED in his care including that on a balance, it would be better for MED to be in the care of the applicant (for various reasons), that there has been an improvement in the wellbeing of MED and that the applicant is able to offer MED a stable environment whilst the respondent does not. The applicant further advances various criticisms in respect of the respondent's care of MED including, *inter alia*, that the respondent has moved home repeatedly and does not provide the

stability that MED requires, and that the applicant has concerns that the respondent is not giving MED his medication.

[23] On a consideration of the totality of the facts in this matter, I do not believe that it would serve the best interests of MED to be uprooted and placed in the care of applicant in the interim. The reasons for my finding in this regard include the following:

- a. The applicant's version of a restoration of the *status quo ante* is artificial when one considers the reason and purpose for the temporary stay of MED with the applicant (as has been described in the judgment already). In my view, the *status quo ante* in the life of MED is in fact in the care of the respondent – this has been the position for a number of years.
- b. To uproot MED again, with the risk that he may need to be placed back with the respondent after the determination of Part B of the application, is also a risk that weighs against the interim order sought by the applicant.
- c. The respondent has not brought any form of proceedings prior to the present proceedings for an amendment of the order for primary care with the respondent. This lends credence to the fact that any concerns that the applicant may have are not of such a nature or extent to justify taking MED out of the care of the respondent on an urgent basis. In fact, as recently as 8 January 2026, the applicant proposed that the parties enjoy shared residency in respect of MED, if in his best interests, for a week at a time in a letter from the applicant's attorney of record.⁵
- d. There is an extant court order, granted after the intervention of the Office of the Family Advocate and after their interim expert recommendation, providing for primary care of MED to be with the respondent with certain prescribed contact rights for the applicant. The facts placed before the court do not justify a deviation from such court order, and do not justify such variation on an urgent basis where

⁵ Letter dated 8 January 2026, CL002-61, par 6.

urgency risks not being favoured with all relevant facts and not having the benefit of expert opinions and views in the fullness of time.

- e. The social worker, appointed in terms of the divorce order to assist with phasing in the contact rights of the applicant to MED,⁶ and who has been involved in this matter for a substantial period of time, has recommended that MED remain primarily resident with the respondent pending the outcome of an investigation into care and contact.⁷

[24] In my view, it would be imprudent to say any more about the merits of best interests of MED in the long run as this is truly the domain of the court that will hear Part B, and because I do not have the benefit of more comprehensive expert views. In my view, in the interim, the *status quo* ought to remain in place, namely that MED remain primarily resident with the respondent, and as is provided for in the order of this court granted on 25 January 2024.⁸

[25] Counsel for the applicant submitted that costs of Part A ought to be costs in the cause of Part B, and the attorney on behalf of the respondent agreed with this submission. The parties are further agreed that the issue of primary residence and contact in respect of MED ought to be referred to the Office of the Family Advocate for investigation.

Order:

[26] The following order is accordingly granted:

- a. The Office of the Family Advocate is requested to investigate the best interest of the minor child regarding primary residence and contact to be adjudicated under PART B hereof, and to file a report with the court in this regard.
- b. Part B of the notice of motion is postponed *sine die* and the parties are granted leave to supplement the application papers once the report of the Office of the Family Advocate has been filed.
- c. The remainder of the relief sought in Part A of the notice of motion is dismissed.
- d. The costs of Part A of the application are costs in the application in Part B.

⁶ Par 3.2.4 of the order, annexure A at CL 002-3, par 3.2.4.

⁷ Report of the social worker, Christa Botha at CL 006-17.

⁸ Divorce order CL 002-3.

**WOODROW AJ
ACTING JUDGE OF THE HIGH COURT
PRETORIA**

This Judgment was handed down electronically by circulation to the parties and or parties' representatives by e-mail and by being uploaded to CaseLines. The date and time for the hand down is deemed to be 10h00 on this 11TH day of March 2026.

Appearances:

Counsel for the Applicant: E Janse van Rensburg instructed by: Bornman Attorneys

Attorney for the Respondent: Mr Raudenheimer of Mostert and Raubenheimer Incorporated

Date of Hearing: 10 March 2026

Date of Judgment: 11 March 2026