

Court: Gauteng Division, Pretoria

Case No: 57613/2014

Date(s) heard: 16 April 2015

Delivered: 24 April 2015

Judge: Pretorius, J

DESCRIPTION

Children's Rights – Primary Residency of the child – where the child had grown up been taken care of by his paternal grandmother - the court awarded the father with the primary residence over the child – Held that the child's separation from his mother and little sister would not lead to unstable upbringing as he did not stay with them

SUMMARY

(Par 1 - 12) This matter was an application to confirm a *rule nisi* which awarded the applicant (father of the child) with primary care and residence over the child. The parties had two children; this application concerned the first born, a boy. The boy had grown up been taken care of by his paternal grandmother in Giyani. The parties stayed in Gauteng and would visit the child. Disputes between the parties led the respondent (mother of the child) to move to her home in Ga-Mashashane. She was pregnant with another child (a girl) and remained the primary caregiver of that child. She then went and took the boy-child from the paternal grandparents with the assistance of the SAPS. The applicant launched an urgent *rule nisi* which was granted in his favour.

(Par 14 - 15) The court had to determine what was in the best interests of the child regarding section 7(1) of the Children's Act, 38 of 2005. The court found that the child's separation from his mother and little sister would not lead to an unstable upbringing as he did not stay with them. (Par 24) The court made reference and applied the principle set out in *P v P 2007 (5) SA 94 (SCA)* where it was held that "...the value systems and societal beliefs underpinning the 'maternal preference' or 'tender year' principle have been challenged and Courts have emphasised that parenting is a gender-neutral function and that the assumption that a mother is necessarily in a better position to care for a child than the father belongs to a past era"(sic). (Par 27) The court ordered *inter alia* that parental responsibilities and rights with regard to the residence were awarded to the applicant. The respondent was granted specific contact rights. Each party to pay their costs.

Summarised by: Tshepo Munene (Admitted Attorney of the High Court of South Africa)



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REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA)

CASE NO: 57613/2014

DATE: 24 April 2015

Not reportable

Not of interest to other judges

In the matter between:

D[...] K[...]

APPLICANT

And

P[...] J[...] M[...]

RESPONDENT

JUDGMENT

PRETORIUS J

[1] The applicant launched an urgent application to court which resulted in a *rule nisi* being granted on 15 August 2014 with the following set out:

“2. A rule nisi is hereby granted calling upon the respondent to show cause on the 8/10/14 day of ~~September~~ 2014 at 10:00 or so soon thereafter as the matter may be heard why an order should not be made in the following terms:

2.1 That primary care and residence of the minor child, one R[...] D[...] K[...], who was bom on 05 June 2010, is hereby awarded to the applicant with immediate effect,

2.2 That the applicant be given clothes of the minor child and his birth certificate.

3. The relief sought in paragraphs 2.1 and 2.2 above shall be implemented with immediate effect, pending the return day of this rule nisi.

4. That the Respondent be granted right of reasonable access to the minor child."

[2] On 26 January 2015 the court extended the rule nisi to 13 April 2015 and referred the matter to the Family Advocate for assessment. The Family Advocate investigated the matter and delivered a report and recommendations to the court. Hence the current hearing.

[3] Background:

The parties were married by custom during April 2010. On 6 June 2010 a son, R[...] D[...] K[...] (D[...]) was born. The respondent lived with the applicant's parents after the baby's birth until 9 September 2010, when she returned to Gauteng with the applicant and D[...]. On 30 September 2010 the parties agreed to take D[...] back to the applicant's parents, D[...]'s grandparents, at Giyani, as the respondent desired to look for employment. During November 2010 the respondent started working through an employment agency. This resulted in her not having permanent employment and not being able to visit D[...] regularly at his grandparents' home in Giyani.

[4] It must be taken into account that from the outset the applicant was prepared that the respondent could stay at home and raise their son. It was the respondent's wish to work. D[...] was living with his paternal grandmother and aunt who took care of him on a day to day basis.

[5] On 22 June 2012 the applicant and respondent had a heated argument, as he had wanted to go to Giyani with her to see D[...], but she refused. He went alone. When he returned from home he tried to discuss the matter of D[...] with her, but to no avail. He persuaded her to visit Desmond, which she did from 13 to 16 July 2012.

[6] On 13 August 2012 the applicant learnt that the respondent was pregnant with their second child. He also discovered that she had tried to abort the foetus. He requested her to leave the common home after he had discovered this and she moved and stayed with her sister.

[7] D[...] was still living with his grandmother and aunt with whom he had developed a very strong bond. He was attending the local crèche and was doing extremely well according to his school report.

[8] At all times the applicant was maintaining D[...] and visiting him often. After the birth of the second child the respondent resided with her mother at Ga-Mashashane and refused to come home, either to Giyani or to

Gauteng.

[9] On 29 June 2013, after a meeting of both the applicant's and respondent's families, they were reconciled. The respondent stayed in Giyani with the applicant's family and the two children. On 19 August 2013 the respondent took both children to Gauteng for a visit. On 6 September 2013 D[...] was taken to Giyani to live with his grandmother and aunt by the respondent, as the respondent had decided to seek employment.

[10] On 6 December 2013 the respondent went back to Giyani to stay with the children after she and the applicant had reached an agreement. On 4 March 2014 the respondent took D[...] and told his grandmother that she was taking him to the clinic. However, she did not return and the applicant found out, late at night, that the respondent was at Ga-Mashashane with the children.

[11] On 26 July 2014 the applicant travelled to Ga-Mashashane - after not being able to talk to D[...] or the respondent on the phone. D[...] started crying when he saw the applicant, his father. Both the respondent and the baby were not present and he was told that she could not be contacted as she was far away. Eventually he spoke to her by phone, informing her that he was taking D[...] with him, as D[...] did not want to be left behind.

[12] On 29 July 2014 the respondent turned up at the applicant's home in Giyani accompanied by the police and took D[...] away to Ga-Mashashane, although D[...] was crying all the time as he did not want to leave. Thereafter an urgent application was launched which resulted in the abovementioned *rule nisi* being granted on 15 August 2014.

[13] I have studied the Family Advocate and Family Councillors reports. I can find no reason to conclude that either the family counsellor or the family advocate was biased in their assessment.

[14] Section 7(1) of the Children's Act, No. 38 of 2005 deals with the standard of the best interests of the child. I am aware of the facts that the court has to consider with the best interest of the child in mind and will apply the provisions of section 7 to the prevailing circumstances of D[...] when deciding what is in his best interest.

[15] It is so that there is a younger sister born on 26 March 2013, who is presently two years old. She has been in her mother's care since birth. D[...] has only stayed with the respondent and his sister for very limited periods. He has been separated from his sibling for most of her life and the court cannot find that it will lead to an unstable upbringing if he does not stay with the respondent and his baby sister

[16] The family counsellor interviewed both the applicant and the respondent jointly in the presence of the family advocate. An interview was conducted with D[...] with the assistance of Mr Powane, a family

counsellor appointed in terms of section 3(1) of the Mediation in Certain Divorce Matters Act, No. 24 of 1987.

[17] At the time of the interview D[...] was living at his paternal grandmother's home in Giyani and attending pre-school. The applicant had telephonic contact every morning with D[...] and visited him every month. The respondent, on the other hand had had physical contact on 20 August 2014 with D[...].

[18] It is common cause that the respondent had threatened with suicide and to take D[...]’s life as well. This threat is of great concern to the court. The respondent alleges that she tried to have contact with D[...] in December 2014, but her access was frustrated. She did not take any steps to rectify this and has not seen him since the interview with the family advocate.

[19] It is unfortunate that, according to the family counsellor’s report, D[...]’s mother does not form part of his life according to him. This must be addressed and rectified immediately. It is not in the interest of a child to grow up without contact with his mother and the opportunity to form a bond with her.

[20] At present the respondent’s residence in Gauteng is dependent on the permanence of her employment, as her present contract ends at the end of May 2015. She is residing with her sister and child in a 2 bedroomed, 4 roomed house. The applicant is self-employed as an attorney and has been caring for D[...] since his birth.

[21] It must be strongly emphasized that D[...] has been residing with his paternal grandmother for the last three years with the respondent’s consent. She took him to his paternal grandmother’s home when he was eighteen months old as she was seeking employment. He is presently four years and ten months old. He has spent most of his life with his paternal grandmother and aunt with the respondent’s permission and consent. The paternal grandmother and aunt must be regarded as D[...]’s primary caregivers at the present time.

[22] The applicant has clear plans of action for the minor child. He will leave him with his grandmother to finish pre-school. He will buy a house and enrol D[...] in a school where Shangaan, D[...]’s first language, is the language of choice.

[23] Section 6(2) of the Children’s Act, No. 38 of 2005 provides:

“(2) All proceedings, actions or decisions in a matter concerning a child must-

(a) respect, protect, promote and fulfil the child’s rights set out in the Bill of Rights, the best interests of the child standard set out in section 7 and the rights and principles set out in this Act, subject to any lawful limitation;

(b) respect the child's inherent dignity;

(c) treat the child fairly and equitably;

(d) protect the child from unfair discrimination on any ground, including on the grounds of the health status or disability of the child or a family member of the child;

(e) recognise a child's need for development and to engage in play and other recreational activities appropriate to the child's age; and

(f) recognise a child's disability and create an enabling environment to respond to the special needs that the child has"

[24] I must agree with the court in **P v P 2007(5) SA 94 (SCA)** where Van Heerden JA found at paragraph 26 that:

“In more recent cases, the value systems and societal beliefs underpinning the 'maternal preference' or 'tender years' principle have been challenged and Courts have emphasised that parenting is a gender-neutral function and that the assumption that a mother is necessarily in a better position to care for a child than the father belongs to a past era. ”

[25] I have carefully considered the recommendations by the family advocate. It is clear that the transition from Limpopo to Gauteng must be handled carefully and that the assistance of an expert should be obtained to assist D[...] to move to Gauteng with as little emotional and physical upheaval as possible.

[26] There is no doubt that the respondent has to play a significant part in D[...]’s life and the applicant will have to assist to accomplish this. D[...] needs both his parents’ care and love to enable him to reach his full potential and to thrive in a loving and stable environment.

[27] **Therefor I make the following order:**

- 1. The applicant and respondent retain full parental responsibilities and rights with regard to the care and guardianship of D[...];**
- 2. The parental responsibility and right with regard to residency is awarded to the applicant.**
- 3. The respondent is granted specific parental responsibility and rights regarding contact as contemplated in Section 18(2)(b) of the Children’s Act 38 of 2005 with the minor child which should include but not be limited to:**

3.1 Contact with the minor child every alternate weekend from Friday 17h00 until

Sunday 17h00.

3.2 Regular telephonic contact to be maintained.

3.3 The parties to alternate the short holidays and long weekends. Each party is entitled to have D[...] for half of the long school holidays, commencing in June 2015;

4. A clinical psychologist has to be appointed to assist the minor child, D[...], with the transition from Giyani to Thembisa.

5. Each party to pay its own costs.

Judge C Pretorius

Case number: 57613/2014

Application heard on: 16 April 2015

For the Applicant: Adv. SS Tebeile

Instructed by: RJL Attorneys & Cost Consultants

For the Respondent: Adv. K Mhlanga

Instructed by: Raphesu (JL) Attorneys

Date of Judgment: 24 April 2015