

Court: Free State Division, Bloemfontein

Case No: 4756/2015

Date(s) heard: 3 November 2016

Delivered: 9 December 2016

Judge: Mhlambi, AJ

## DESCRIPTION

*Children's rights – primary residence and care – biological father of the child sought to take her from the mother and grandmother – Family Advocate recommended the child not to stay with the grandmother – the child being emotionally confused about whom to stay with – the court ordered the status quo not to be changed*

## SUMMARY

(Par 1 - 4) The applicant (biological father) sought an order that the primary residence and care of his minor daughter, aged 9, be awarded to him with the contact rights to be awarded to the first and second respondents (biological mother and grandmother of the child). The parties had the child while they were in university during 2006 and agreed that the grandmother of the child would take care of her while they pursue their studies.

(Par 6) The Family Advocate recommended that the child should not stay with her grandmother due to alleged emotional abuse exacted on the child by the grandmother. The grandmother was staying with the child's mother.

(Par 9) The court noted that the child's views with regards to whom she wanted to stay with were inconsistent and lacked emotional maturity. (Par 12 - 13) It held that in the circumstances any change of environment for the child would not be in her best interest and should be deprecated *Dunsterville v Dunsterville 1946 NPO 594 at 597*. The court found that the application could not stand and was therefore denied. Both parents were ordered to remain full holders of parental responsibilities and rights in terms of section 18 of the Children's Act 38 of 2005. No order as to costs was made.

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





**IN THE HIGH COURT OF SOUTH AFRICA,  
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case Number: 4756/2015

In the matter between:-

**M. T.**

Applicant

and

**L., R.N.**

1<sup>st</sup> Respondent

**L., L. L.**

2<sup>nd</sup> Respondent

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**JUDGMENT BY:**

MHLAMBI, AJ

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**HEARD ON:**

3 NOVEMBER 2016

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**DELIVERED BY:**

9 DECEMBER 2016

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- [1] The applicant seeks an order that the primary residence and care of his minor daughter, O., aged 9, be awarded to him with contact rights to be awarded to the Respondents. The application is opposed.

- [2] The applicant is a Forex Exchange Analyst employed at ABSA Capital, Sandton and resides at Unit 88 Epsom Terrace, Bryanston, Gauteng.
- [3] The first respondent is the biological mother of the minor child, O., and currently resides with the second respondent, her mother who is a teacher by profession, at [...] P. S., Bedelia, Welkom. The minor child, who was born on [...] 2007, resides with both respondents.
- [4] The applicant and the first respondent started a romantic and intimate relationship during January 2006 when both were students at the University of the Free State. Out of their relationship the minor child, O., was born. The first respondent and the applicant agreed that the second respondent should take care and bring up the minor child whilst they pursued their studies. The applicant completed his studies and got employed during 2010. As stated in his affidavit, he immediately enlisted the minor child on his medical aid and expressed the view in the beginning of 2011 that he would like to raise the minor child as he was employed and more mature. To reside with the minor child permanently, would fulfil a dream he had to give her all the opportunities he did not have when he grew up.
- [5] Both applicant and the first respondent have full parental responsibilities in terms of sections 19 and 21 of the Children's Act. The second respondent has not been consigned with parental responsibilities in terms of the Children's Act.

[6] In the applicant's heads of argument, the reason for this application is the Family Advocate's recommendation that the minor child, O., should not stay with the second respondent because of the emotional abuse exacted on the child by the second respondent. The fact that the first respondent is staying with the second respondent, meant that the Family Advocate's recommendation was not complied with. The net effect is that the minor child is staying with the second respondent.

[7] The Family Advocate's recommendation for consideration by the court is that the parties' rights and responsibilities be regulated as follows:-

*" 12.1 both parties to remain full holders of parental responsibilities and rights as contemplated in section 18 of the Children's Act 38 of 2005 including care, contact and guardianship;*

*12.2 O. to undergo counselling to improve her emotional and psychological stability;*

*12.3 The applicant and 1st respondent on the professional who will render counselling to O.;*

*12.4 The Applicant and the 1st Respondent to share the costs of the professional's services;*

*12.5 The professional who will be providing counselling to give feedback to the applicant and 1st Respondent regarding the emotional and psychological stability of the child and to indicate what is in O.'s best interests regarding her daily residence and daily care;*

*12.6 The applicant, 1st respondent and 2nd respondent to consult with a professional to improve their parental capacity and*

- skills and how to handle the emotional and psychological issues of O. without causing any damage;*
- 12.7 *O. to remain in the 1st respondent's daily residence and care until the professional indicates otherwise;*
- 12.8 *O. to exercise contact with the applicant every alternating weekends until the professional indicates otherwise;*
- 12.9 *Short school holidays to alternate and long school holidays to be shared equally;*
- 12.10 *Christmas, New Year and other Public Holidays to alternate between the applicant and 1st respondent;*
- 12.11 *Contact on the birthday of the child and the Applicant;*
- 12.12 *Contact on Father's and Mother's day should this day not coincide with a normal access weekend;*
- 12.13 *Regular telephonic contact."*

[8] In the compilation of her report, she was assisted by Miss M May, a registered and qualified Social Worker appointed as Family Counsellor in terms of the Mediation in Certain Matters Act, Act No. 24 of 1987, Miss H Joubert, a registered and private social worker who conducted an interactional analysis of the relationship between the child, the applicant and the first respondent. Dr SO Makola, a psychologist, compiled a report after the child was referred to him for therapy by the first and second respondents.

[9] In paragraph 9 of the Family Advocate's report on pages 459 and 460 of the paginated bundle, the following is stated: "*O. expressed contradictory views regarding the person she wants to reside with. In her assessment with Me May she informed that she wants to reside with the 2nd respondent and in her assessment with Me Joubert she informed*

*that she would like to try living with the applicant, but afterwards retracted her statement by saying that maybe she should live with the 1st Respondent.*

*O. is inconsistent with her wishes and as such, gave views that were ill-informed and immature as it was based on emotion and undue influence from the parties in an attempt to try and please people she loves.*

*O. also informed Me May that she wants a new father, and she believes that even the 1st Respondent's boyfriend, who was unknown to her at the time, will be able to take care of her. it is my humble submission that this might be seen by O. as a safer option amidst the conflict that she is caught in.*

*O. wanted Me May to inform the Applicant that he must get out of her life and he is no longer her father, yet after the conclusion of the assessment she went to the applicant and gave him a hug. This is also viewed as conflicted behaviour.*

*O.'s views were not consistent, lacked emotional maturity and was not consequent given the time line, it is my humble submission that due weight cannot be attached thereto for it to be considered an informed decision in her best interest".*

On page 462 of the report it is stated that it is possible that a change in the minor child's daily care and residence will have a bearing on her emotional well-being and can contribute to the deterioration thereof if it is not therapeutically addressed, before the question is answered whether it will be in her best interests to relocate to the applicant or remain with the first respondent.

[10] The fundamental principle in custody disputes is entrenched in section 28(2) of the constitution which provides that a child's best interests are of paramount importance in every matter concerning the child. See **Potgieter v Potgieter** [2007] SCA 47 (RSA) case no 215/06; **Jackson v Jackson** 2002(2) SA 303 (SCA) at 3071- 308A. The criteria for the best interests standard is encapsulated in section 7(1) of the Children's Act 38 of 2005. The thrust of the application as indicated above is that the status *quo* should not be maintained as it would result in further psychological trauma being inflicted on the child by the second respondent. The first respondent, according to the Report of the Family Counsellor on page 469 of the paginated bundle, refused an offer by her erstwhile company to relocate to Cape Town so that she could focus on the application for the primary residence of O.. As at 31 May 2016, she was in the process of registering her own business which she would operate from the maternal grandmother's house until the business generated enough income to enable her to rent alternative accommodation.

[11] Section 6(4)(a) of the Children's Act 38 of 2005 provides that in any matter that concerns the child, an approach which is conducive to conciliation and problem-solving should be followed and a confrontational approach should be avoided. Section 9 of the said Act provides that in all matters concerning the care, protection and well-being of a child, the standard that the child's best interest is of paramount importance, must be applied. On a consideration of all the affidavits filed of record, it is evident that the real priorities and/or interests of the minor child were placed on a back burner while the adults pointed fingers at each other.

The applicant and the first respondent are the parents of the minor child; but sight should not be lost that the second respondent played a pivotal role in her upbringing since birth while the parents were at university until the relations soured about two years ago. Both parents are not without blame in the creation of the unbecoming state of affairs, whether by arrogance or inaction in the care, protection and well-being of the child.

[12] In my view, it is high time that the applicant and the first respondent faced their responsibilities as parents to the minor child, forge a closer collaboration and create an atmosphere that is conducive to the overall development and growth of O.. In the given circumstances, any change of environment for the minor child would not be in her best interests and should be deprecated: **Dunsterville v Dunsterville** 1946 NPO 594 at 597. I come to the conclusion that this application cannot stand and is therefore denied. I also deem it appropriate, from the very nature and circumstances of this matter, that no order as to costs be made.

[13] The following order is therefore made:

1. 13.1 Both parties to remain full holders of parental responsibilities and rights as contemplated in Section 18 of the Children's Act 38 of 2005 including care, contact and guardianship;
2. O. to undergo counselling to improve her emotional and psychological stability;
3. The Applicant and the 1<sup>st</sup> Respondent to decide on the professional who will render counselling to O.;

4. The Applicant and the 1st Respondent to share the costs of the professional's services;
5. The professional who will be providing counselling to give feedback to the Applicant and the 1st Respondent regarding the emotional and psychological stability of the child and to indicate what is in O.'s best interest regarding her daily residence and daily care;
6. The Applicant, the 1st Respondent and the 2nd Respondent to consult with a professional to improve their parental capacity and skills and how to handle the emotional and psychological issues of O. without causing any damage;
7. O. to remain in the 1st Respondent's daily residence and care until the professional indicates otherwise;
8. O. to exercise contact with the Applicant every alternating weekend until the professional indicates otherwise;
9. Short school holidays to alternate and long school holidays to be shared equally;
10. Christmas, New Year and other Public Holidays to alternate between the Applicant and 1st Respondent;
11. Contact between the Applicant and the minor child on her birthday;
12. Contact on Father's and Mother's day should this day not coincide with a normal access weekend;
13. Regular telephonic contact between O. and the Applicant.
14. No order as to costs.

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J.J. MHLAMBI, AJ

On behalf of the applicant:

Adv. A. Berry  
Instructed by:  
Hugo Bruwer Attorneys  
BLOEMFONTEIN

On behalf of the respondents:

Adv. S. Boonzaaier  
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