

**IN THE HIGH COURT OF SOUTH AFRICA  
(TRANSVAAL PROVINCIAL DIVISION)**

Case no: 33232/2005

Date: 11/11/2005

UNREPORTABLE

In the matter between:

MARK ANTHONY SANTOS

Applicant

and

ILONA SANTOS

Respondent

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*Custody of two tiny boys awarded to the mother who would bring stability to their lives.*

**Van Rooyen AJ**

[1] The parties are involved in divorce proceedings. They are now in a dispute as to the custody of their two boys, aged three and four. The boys have been in the custody of the applicant, their father, who is a vegetable farmer and lives 15 kilometers from town on a farm. The mother, who left them in April 2005, lives with her boyfriend in a three bedroom house in town.

[2] So as to put an end to the dispute as to where the boys should live, the applicant brought this application that the custody be awarded to him, with visitation rights to the respondent including weekends. The respondent, however, believes that it would be in the best interest of the two boys if they were to be placed in her custody in town so that they may attend a nursery school on weekdays. She has a job, which leads to her being away from home between 07:00 and 17:00.

[3] The preliminary advice of a psychologist was provided to me. She described the children as uncooperative and clinging to the parent with whom they were when they met with her. She advised that the custody be divided between the two parents for the half of

every month. An earlier advice by a different psychologist was that they alternate evenings and days with each parent ( a view which was rightly rejected by the applicant).

[4] I am of the view that stability is absolutely necessary in the lives of the boys, who are still very young. I do not believe that it would be in their interest to await any further report and to make my order today dependent on possible changes on the advice of the psychologist or the family advocate.

[5] The boys must be enjoying the farm life to which they are accustomed. The question is, however, whether this kind of life in the company of their working father and his employees is in the interest of the boys. The applicant describes the normal day of the boys as follows:

“ The boys are generally awake by no later than 06:00 at which stage I dress them, breakfast having been prepared by me prior to that time. We then enjoy breakfast together where after they climb into the vehicle with me to get the labourers to the land where after they meander between the farmhouse and the labourers, interacting with the labourers, making mud pies, wrecking the vegetables and/or assisting with the picking thereof, but always within eyesight of myself or on occasions when they wander off to the farmhouse, under the supervision of the maid, Maria, who has been in my employ for the last two years but who only works Mondays, Wednesdays and Fridays. At approximately 11:00 I travel to Witbank to deliver vegetables and usually both boys fall asleep in the vehicle and enjoy their midday nap between 11:00 and 13:00. On Tuesdays and Thursdays generally I have lunch with my parents who live on the farm 311 Zeekoeiwater, district Witbank, which is situated approximately 15 kilometres from my farm. On the other weekdays I travel to the farm where they have lunch. In the evenings

we have supper together where after the boys retire at approximately 20:00. The routine described above is more or less the same routine that was followed prior to the respondent leaving the farm on 2 April 2005 and the only difference now is that the respondent no longer resides with us.”

[5] It was argued by Ms *Barnard*, counsel for the applicant, that any substantial change in the routine would be disruptive and that, in any case, the applicant would take the oldest boy to a nursery-school in 2006. He is also in a relationship with his previous wife, who could also assist him. However, she does not live with him. It was submitted that the applicant has a good support system.

[6] If the children were to be placed under the custody of the respondent, they would both be placed in a nursery school in town. They would obviously not be in the presence of their full day working mother, but it was not in dispute that access and contact would not be difficult, if it became necessary during the day. Ms *Hartmann*, for the respondent, accentuated the need for stability, which the respondent would be able to provide.

[7] I have no doubt that both parents are loving and caring individuals and that they would not neglect the children. The benefit of living with the applicant would be that they would, apparently, be close to him for most parts of the day. On the other hand, I was struck by the almost nomadic life which the children were living: to bake mud pies and assist with the picking at times and then to take their midday nap in the vehicle of the applicant, is hardly the life which tiny children should live. That they might enjoy the freedom is probably not difficult to believe. Contrasted to that would be the nursery school where they would, at least, play educational games at times and be under the eye of an adult. I can hardly believe that the daily life described by the applicant is in the best

interests of the two boys : children must, of course, play but there is more to the upbringing of children than that. Furthermore, the female employee is only in attendance on three days a week. To put it plainly: the two tiny boys need a mother to take care of them on a daily basis and they need stability and some educational input. In town they would be mixing with other children and their mother would be at their call. The kind of life which the applicant leads as a father is obviously a good life full of adventure and action. But, this mobility of the children is simply not in their best interests. Contact with other children and some pre-school education is important. Life with their father lacks stability during the week. I am not surprised that they were uncooperative when visiting the psychologist : their insecurity is clearly caused by the strife between the parents and their isolated life on the farm, where they would be out in the open the whole day and not enjoy the stability which an accessible house provides.

I accordingly make the following order:

- (1) The custody of the children is awarded to the respondent pending the divorce.
- (2) The applicant is entitled to take the boys with him every Wednesday from 17:00 until the Thursday morning, when the applicant will take the children to the nursery school.
- (3) The applicant is entitled to take the children with him every alternate weekend, this weekend of the 11<sup>th</sup> November 2005 being the weekend when they will stay with the respondent as from 17:00; they will be delivered to the respondent by the applicant before or at 17:00. The weekend times are as follows: Fridays from 17:00 until Sunday at 17:00.

- (4) In so far as holidays are concerned: the applicant is permitted to take the children with him on a holiday twice a year or more than twice a year with the permission of the respondent. The period of such a holiday may not be longer than ten days, unless the respondent agrees to a longer period.
- (5) In so far as the 2005 Christmas is concerned, the children will spend from 20 December 2005 to 26 December 2005 with the applicant and from 26 December 2005 from 10:00 with the respondent until 2 January up to 10:00, in spite of the above mentioned conditions. This arrangement is to be alternated for the 2006 Christmas and New Year and after that, if applicable.
- (6) Costs of this application to be costs in the cause.

JCW van Rooyen.....

Acting Judge of the High Court

11 November 2005

For the Applicant: adv Barnard instructed by Furstenberg Attorneys c/o Schoemans Attorneys Pretoria

For the Respondent: adv Hartman instructed by Van Heerden & Brummer c/o Hack, Stupel & Ross, Pretoria