

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 22608/2020

(1) REPORTABLE: NO  
(2) OF INTEREST TO OTHER JUDGES: NO  
(3) REVISED: NO

Date: 21 February 2022 E van der Schyff

GOODMAN, PETER JOHN

Applicant

and

RYSKULOVA, NARGIS

Respondent

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JUDGMENT

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**Van der Schyff J**

**Introduction**

[1] This application, regarding the appropriate residency and contact regime to be implemented in the best interest of the parties' two minor sons, was initially heard by me on 2 June 2020 in the urgent court. An interim order was granted and the application was postponed to 30 June 2020. After hearing extensive argument, a judgment with an interim order was handed down on 3 July 2020. The Office of the Family Advocate was requested to conduct an urgent investigation. The parties consented to an investigation by a psychologist, Dr. R. Fasser. Dr. Fasser was

requested to conduct a full investigation and assessment of the parties and the children, and to make recommendations regarding the exercise of the parties' respective parental responsibilities and rights in the best interests of the children, which shall include recommendations pertaining to the children's residence and the children's contact with each party.

- [2] Dr. Fasser's report was filed in December 2020. Because her recommendations were not implemented subsequent to her report being filed, and no parenting co-ordinator was appointed as a result of which there was 'no current observed or validated mental health input regarding the wellbeing or otherwise of Alex and George in light of the parties implementing an increased contact schedule', as recommended by her, she required a supplementary investigation to ascertain the current family dynamics. On 20 July 2021 after a case management meeting was called for, a directive was issued that Dr. Fasser was authorised to conduct a supplementary investigation, that her report be delivered to the Family Advocate who was requested to file a final report after conducting a round table conference with all the experts involved in the matter. The parties were afforded the opportunity to supplement their papers after receipt of the final reports. A timeline was agreed on for the filing of supplementary papers, and the matter was, by agreement, set down to be heard on 11 February 2022. A case management meeting was called for after the respondent requested an extension of the time agreed on for the filing of her supplementary affidavit. The respondent averred that the applicant's supplementary affidavit and annexures were unexpectedly voluminous and this rendered it impossible to answer to within the agreed time. The best interests of the children dictate that both parties' papers are before the court before the matter is finally dealt with and the hearing was postponed for a week, to provide the respondent to file her supplementary answering affidavit. No new timeline was directed for filing the supplemented answering affidavit which had, by agreement to be filed by 8 February 2022. The respondent's supplemented papers were only filed on 16 February 2022, two days before the hearing date.
- [3] Dr. Fasser recommended the gradual implementation of a residency regime that would over time culminate in a shared residency regime. The Family Advocate

recommended that the children's primary residence be awarded to the respondent, with the applicant being afforded sleepover contact on alternative weekends. It is thus not strange that the parties contested the reports and recommendation of the respective experts who did not support the relief they each sought.

- [4] I find the reports of both Dr. Fasser and the Family Advocate to be objective and reflecting their respective findings. Dr. Fasser's reports provide detailed insight regarding the children and the parties. As an objective reader, I don't find the reports to be far apart in their conclusions regarding the children's experiences, attachments, and needs, although the respective recommendations regarding the residency regime that would be in the children's best interests, differ. Dr. Fasser emphasises the importance of children developing and maintaining a meaningful relationship with both parents, and the positive impact of the involvement of fathers in the upbringing of children. She, however, does not indicate why a shared residency regime per se is recommended in accordance with the structure proposed by her. She does not set out the scientific basis for recommending a shared residency regime above a regime that provides for regular weekly contact and sleepover contact on alternative weekends. Dr. Fasser foresaw the emotional challenges that may be brought about when changes are affected to schedules of contact for young children and therefore proposed the appointment of a parenting coordinator to monitor the accommodation of changes in the contact schedules.
- [5] As for the perceived partiality of the Family Advocate, it must be stated that it is unfortunate that it is indicated in the papers, that the applicant's written response to certain issues as requested by the Family Advocate was shared with the respondent, although the respondent's written response was not shared with the applicant. The perception of the Family Advocate impartiality became the applicant's reality and this clouded the applicant's reading and interpretation of the Family Advocate's report. The applicant was concerned about the involvement of Dr Van Zyl, a clinical psychologist, in the roundtable discussions facilitated by the Family Advocate. It is common cause that Dr. Van Zyl did not interview either of the parties or the children. I indicated to counsel that a court will not be able to attach value to the propositions of an expert who did not interact with the children

or the parties, but nonetheless express a view on a residency regime that he deemed to be in the best interests of the children. As Dr. Van Zyl did not interact with the children or the parties his critique of Dr. Fasser's recommendation is not substantiated. Dr. Van Zyl's opinion is, however, but one opinion that informed the Family Advocate's report. The family councillor's observations after having interviewed and engaged with the children and the parties cannot in totality be disregarded.

- [6] Both Dr. Fasser and the Family Counsellor held that the children enjoy their contact with both the applicant and the respondent. They have strong and positive relationships with both parents who both makes an effort to spend quality time with the children. The children gave no indication of being fearful of their father. Both parents love their children and want what is best for them. Dr. Fasser's report contained annexures indicating that both parents engaged in some parental counselling after the first court order was granted. This indicate that they are dedicated to improve their parenting skills. Dr Fasser records the positive impact of parental skills' training on the applicant's ability to enforce discipline and engage with both children simultaneously.
  
- [7] The reports portray both children as vulnerable. The eldest suffers from Tourette Syndrome although it seems as if his condition is improving. The youngest portray developmental gaps.
  
- [8] Both Dr. Fasser and the Family Counsellor pointed out that the children have been exposed to long standing conflict and hostility between the parents. The affidavits and reports filed indicate that both the applicant and the respondent may regress to impulsive emotional behaviour when they are of the view that their relationship with their children is threatened and their ability to parent is being questioned. As Dr. Fasser aptly stated, neither is a perfect human being, and both have strengths and weaknesses.
  
- [9] None of the reports indicate that either parent is unfit to care for the children. It is also evident that the parties are capable of working together and communicating effectively when it comes to caring for their children. Both the applicant and the

respondent need the assistance of an *au pair* or caregiver when the children are in their care.

- [10] One of the unique factors that determines the context within which this application is to be considered, is that both the applicant and the respondent are foreign citizens who are working in South Africa. The respondent clearly expressed that she will be returning to the United States of America by July or August 2022. This fact is undisputed.

## Discussion

- [11] It cannot be gainsaid that an increasing number of children grow up today in family arrangements other than the nuclear family due to high numbers of separation and divorce. It is without a doubt generally the best for children to have frequent and continuous contact with both their parents. Berman and Daneback<sup>1</sup> indicate that post-separation dual-residence arrangements have gone from extremely rare to a feasible residency arrangement for parents over the last 40 years. They state:

‘if parents separate, children appear to profit from dual-residence arrangements (regardless of the definition) if they are of the cooperative, communicative, low-conflict and non-violent type and the children are above the age of four. (When it comes to children below the age of four, research is yet too scarce to draw any conclusions.) Many studies have shown that children in dual-residence arrangements report better wellbeing and mental health than children who live mostly or only with one parent. Some qualitative studies suggest that certain core conditions, such as division of responsibility, parents’ cooperation, family communication, need to be in place for a beneficial outcome for children, while others argue for similar conditions but do not put it as a prerequisite. Research based on interviews with children align that it is crucial that parents give

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<sup>1</sup> Rakel Berman & Kristian Daneback (2020): ‘Children in dual residence arrangements: a literature review’, *Journal of Family Studies*, DOI: 10.1080/13229400.2020.1838317, <https://doi.org/10.1080/13229400.2020.1838317>

priority to their children's well-being over their own needs and interests and that parents are able to communicate and exchange information regarding children's daily life. Additional positives are geographic closeness to both homes and inclusion of the children's perspectives in the living arrangements. While the findings from this review point to positive outcomes for dual-residence children in general, we must be careful not to apply group-based results to individual cases mechanically. Some of the qualitative studies have highlighted how specific conditions interplay with the way dual residence is experienced by children. Interviews with children who have grown up in dual-residence arrangements make clear that an arrangement that suits every child does not exist. Thus, it seems like there is no one-size-fits-all solution to resort to when it comes to prescribing the best possible living arrangement for children post-divorce

- [12] Although it has been stressed, and I am aware of the fact that this application is not a relocation application, I cannot ignore the fact that the parties' presence in South Africa is temporary. In fact, the respondent indicated that the necessary arrangements for her to relocate and work in the United States of America is at an advanced stage. The applicant indicated that he would move to wherever his children are. However, I am not privy to the residency arrangements in the United States and I do not know whether the parties will reside in close proximity to each other. It is also not clear whether the applicant and respondent will be able to leave the country simultaneously. In these circumstances I am not in a position to determine whether a dual-residency arrangement will be experienced by the children as stabilising or de-stabilising. Dr. Fasser's report does not deal with the impact that the implementation of a shared or dual residency regime will have on the boys' sense of stability. She required that an independent mental health professional monitor the implementation of her proposals. It is unclear whether she discussed this possibility and the realities of a dual residency regime with the children as she stated in her report:

‘Views of adolescents will carry more weight than those of much younger children. However, the children cannot bear the responsibility of any final decision, but their opinions should be factored into the considerations. As Alex and George are very young, their wishes cannot be considered given their lack of maturity’.

The Family Counsellor reported that the eldest child communicated that he is happy with the current living arrangement and does not wish for any changes. Although young children’s views will never be determinant, their expressed opinions cannot summarily be ignored.

- [13] Due to the fact that the divorce proceedings have not been initiated at this point in time, I am of the view that any order given at this stage regarding the appropriate residency and care regime remains interim.
  
- [14] A shared residency regime is not the only model that will provide for both parents to give their consistent input and remain involved in their children’s lives. In the present context shared residency will, in my view, not be in the children’s best interests. I do agree, however, that it is imperative and in their bests interest to be afforded regular contact with their father and that the need to differentiate between the two boys regarding a sleepover regime, dissipated.
  
- [15] The order granted below is structured to facilitate predictable, stable and consistent contact between both parents and their children in a context where the children’s present condition is prone to change dramatically within the foreseeable future.
  
- [16] After considering the arguments relating to costs, I am of the view that each party should carry its owns costs relating to this litigation, this includes all reserved costs.

## **ORDER**

**In the result, the following order is granted:**

1. The applicant and the respondent shall remain co-holders of full parental responsibilities and rights in respect of the children;
2. The children's primary residence vests with the respondent;
3. The applicant is to have contact with the children on the following basis:
  - 3.1. Contact every Tuesday and Friday afternoon, or as arranged by the parties. The applicant is to collect the children after school and return them to the respondent's residence by 18h00;
  - 3.2. Sleepover contact every alternate week from Thursday to Sunday. The applicant is responsible for collecting the children on a Thursday after school and return them to the respondent's residence by 18h00, or any time as arranged between the parties;
4. Each party is responsible to ensure that the children attend all scheduled extramural and remedial activities and complete their homework when they are in the party's care;
5. The parties shall both exercise contact with the children as follows:
  - 5.1. The applicant and respondent shall be entitled to spend an equal amount of time with the children on each of the children's birthdays by prior arrangement between the parties;
  - 5.2. The respective parties shall be entitled to spend father's day and mother's day respectively, with the children;
  - 5.3. The parties will alternate public holidays, with contact starting after school on the day prior to a public holiday until 18h00 on the day of the public holiday;
  - 5.4. The children's school holidays shall be shared equally between the parties, providing that the youngest child will not be separated from the mother for more than 13 consecutive nights until he reaches the ages of 5 (five);
  - 5.5. The parties will have reasonable telephone and video call contact while in the care of the other party;
  - 5.6. The parties shall make joint decisions with regard to the children's education, extramural activities and medical treatment (save in the case of an emergency).
6. Each part is to pay its own costs.

**E VAN DER SCHYFF**



**JUDGE OF THE HIGH COURT**

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email. The date for hand-down is deemed to be 21 February 2022.

Counsel for the applicant:	Adv. A de Wet SC
Instructed by:	Clark Attorneys
For the respondent:	Adv. N Riley
Instructed by:	Bolus Attorneys
Date of the hearing:	18 February 2022
Date of judgment:	21 February 2022