IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
(4)	Signature: _____Date: 21 November 2023

CASE NO: 8551/2022

In the matter between:

L. B. **Applicant**

AND

L. A. E. **Respondent**

JUDGMENT

ERASMUS AJ

"History will judge us by the difference we make in the everyday lives of children."

- Nelson Mandela –

INTRODUCTION AND RELIEF SOUGHT BY THE PARTIES

1. The story of the family before this Court is an all too familiar one. The facts before me tells the tale of two parents, who once loved each other, and who undoubtedly had hopes and dreams of a love story that would never end. They got married and started a family. Unfortunately, the parties fell out of love and the bonds of a once happy marriage was dissolved by a divorce order.

2. The harsh reality is that the minor child that was born of this once happy marriage, is now torn between two separate households.

3. I have no doubt that both the parents love their child dearly and they both want what is best for her. I am sure that they want their child to grow up as stable as possible, to be secure, happy and well-balanced and to develop into a young female who will reach her full potential.

4. The applicant also expresses his desire to play a big role in the life of his daughter. At all times the applicant expressed his desire to have a scenario of joint primary residence.

5. I also have no doubt that the minor child before me love both her parents. The evidence speaks of a child that sometimes have a bit of hesitation to go to her father. This, in my experience, is normal behaviour for a child of her tender age. Nothing much can and should be read into that. What is important is that she has the right the know both her parents.

6. The parties, however, are at loggerheads as to what is in the best interest of their minor child. This is evident from the facts before me. The applicant on the one hand ultimately seeks more contact with his child to such an extent that it ultimately comes down to a shared residency scenario, and the respondent is at this stage seeking an order amending the existing order giving effect to a more structured form of contact between the applicant and the minor child

7. Somewhere between the two views lies the best interest of the minor child.

ISSUES TO BE DETERMNED

8. This Court is now called upon to determine: -

8.1 Part A of the applicant's application ("the main application") which entails an order for a referral of the disputes to a clinical psychologist requesting the psychologist to do an investigation and to report back to Court on aspects such as contact with specific reference to midweek contact and further that the contact between him and the minor child be amended pending the investigation by the clinical psychologist; and

8.2 the Counter Application of the respondent seeking an amendment of the parenting plan that was made an order of Court in the divorce proceedings. I need to pause and mention that the Notice of Counter Application does not specifically refer to the amendment of the Divorce Order, but this application can only be interpreted as an amendment of the already existing order.

9. This is a fairly unique situation as Part B of the applicant's application actually walks hand in hand with the counter application of the respondent. There is no formal application before me for the postponement of the Counter Application to be heard together with part B of the main application. I will later herein deal with this aspect and how a Court sitting in a matter dealing with a minor child should approach a matter. Once that is considered it will be clear that, given the powers a Court has in applications of this nature, that there is no need that the Counter Application should be adjourned to be heard with Part B of the main application.

MANNER OF REFERENCE TO THE PARTIES

10. There are two applications before me. For the ease of reference I will refer to Mr Bell as "*the applicant*" and Ms East as "*the respondent*". I will use this manner of reference in both the main application as well as the counter application. Where reference is made to the names of the parties where I quote evidence before me, I will leave out the name of the parties for the protection of the identity of the minor child.

11. The applications before me deal with the best interest of a minor child born of the marriage between the parties. I will omit the name of the minor child from this judgment for the protection of her identity. I will refer to her as either "*the minor child*" or "*AMB*".

THE ROUTE THE LITIGATION FOLLOWED

12. As stated above, this Court granted a decree of divorce during November 2019.

13. During February 2022 the applicant approached the Court with the current application. I have already dealt with the relief the applicant is seeking herein above.

14. The respondent opposed this application, seeking an order that the application be dismissed with costs. Her opposing affidavit was served and filed during March 2022. The replying affidavit by the applicant was served and filed during April 2022.

15. Subsequent to the filing of the replying affidavit the Family Advocate got involved and an investigation was conducted by them. An interim report was made available on 1 June 2022 and the final report and recommendations was circulated to the parties during August 2022.

16. Based on her belief that the current arrangements are not in the best interests of AMB and armed with the report by the Family Advocate, the respondent served and filed a Counter Application in terms of which she seeks the amendment of the Divorce Order.

17. This application on its turn is opposed by the applicant and his opposing affidavit is served and filed during October 2022. The replying affidavit by the respondent is also filed.

18. It is clear that both the parties had access to the affidavits by the other party and all the affidavits have been filed. There can be no prejudice to either of the parties if the two applications are heard and dealt with simultaneously.

LEGAL PRINCIPLES: BEST INTEREST OF THE MINOR CHILD PRINCIPLE AND THE FASHION WHICH A COURT SHOULD DETERMINE APPLICATIONS WHERE MINOR CHILDREN ARE INVOLVED

19. It is prudent that I first deal with the principle of the best interest of the minor child and the legal principles how a Court need to determine the matters relating to minor children before I deal with the reasons why the parties approached this Court.

20. The paramountcy of the best interest standard is firmly established in international law. International law obliges state parties to adhere to the '*best interests'* standard when children are involved. Article 3 (1) of the CRC, 1989 describes the best interest of the child as a primary consideration. [i]

21. It is well accepted that in instances as typified in this matter, the enquiry turns on what is in the best interest of the child which is a constitutional imperative. [ii] In section 28 (2) of the Constitution of the Republic of South Africa, 1996 the principle of the best interest of minor children is raised to a principle of paramountcy.

22. This is also a right that is engrained in the Children's Act, Act 38 of 2005 ("the Children's Act"). [iii] Section 9 of the Children's Act determines as follows:

"9. Best interest of child paramount

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."

23. The answer to the question what exactly the child's best interest entail is a factual one that has to be determined according to the circumstances and merits of each case. [iv] Heaton [v] in the ***Journal for Juridical Science*** aptly explains this child-centred individualized approach as follows:

"Everybody or person who has to determine the child's best interest must evaluate each individual case or situation in light of the individual child's position and the effect that the individual child's circumstances are having or will probably have on the child".

24. Every child has the right to have his or her best interests considered to be of paramount importance in every matter concerning him or her. In ***Minister for Welfare and Population Development v Fitzpartrick*** [vi] Goldstein J held:

"Section 28 (2) requires that a child's best interests have paramount importance in every matter concerning the child. The plain meaning of the words clearly indicates that the reach of section 28 (2) cannot be limited to the rights enumerated in section 28 (1) and section 28 (2) must be interpreted to extend beyond those provisions. It creates a right that is independent of those specified in section 28 (1)."

25. The Children's Act provide guidelines in terms of section 7 where the unexhaustive list of aspects that the Court must take into account has been listed. This section reads as follows:

*"**7 Best interests of child standard***

(1) Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely-

(a) the nature of the personal relationship between-

(i) the child and the parents, or any specific parent; and

(ii) the child and any other care-giver or person relevant in those circumstances;

(b) the attitude of the parents, or any specific parent, towards-

(i) the child; and

(ii) the exercise of parental responsibilities and rights in respect of the child;

(c) the capacity of the parents, or any specific parent, or of any other care-giver or person, to provide for the needs of the child, including emotional and intellectual needs;

(d) the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from-

(i) both or either of the parents; or

(ii) any brother or sister or other child, or any other care-giver or person, with whom the child has been living;

(e) the practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis;

(f) the need for the child-

(i) to remain in the care of his or her parent, family and extended family; and

(ii) to maintain a connection with his or her family, extended family, culture or tradition;

(g) the child's-

(i) age, maturity and stage of development;

(ii) gender;

(iii) background; and

(iv) any other relevant characteristics of the child;

(h) the child's physical and emotional security and his or her intellectual, emotional, social and cultural development;

(i) any disability that a child may have;

(j) any chronic illness from which a child may suffer;

(k) the need for a child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment;

(l) the need to protect the child from any physical or psychological harm that may be caused by-

(i) subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour; or

(ii) exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person;

(m) any family violence involving the child or a family member of the child; and

(n) which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child.

(2) In this section 'parent' includes any person who has parental responsibilities and rights in respect of a child."

26. The question arises, which factors should be considered and used. There can be no doubt that that the factors are to be considered will be dependent on the issue that has to be resolved, and also the facts of the matter.

27. It is also vital to decide how these factors must be considered: The Court must attach such weight to each of these factors as it deems fit and, ultimately, reach a conclusion on a value judgment regarding what is in the best interests in that particular case. [vii] In ***S v M (Centre for Child Law as Amicus Curiae)*** it was held that a child-centred, balanced approach informed by constitutional values and sensitive towards culture and religion should be adopted. [viii]

28. It is within these principles as a guideline that I need to establish and conclude with is in the best interest of the minor child born of the marriage between the parties.

29. It is also prudent that I consider the powers this Court has in dealing with a matter of this nature.

30. The High Court sits as an upper guardian of all children in its jurisdiction whose best interest is at stake and such a Court is clothed with wide procedural powers in determining same. [ix] Accordingly, this Court is not bound by procedural structures or by the limitations of the evidence presented, or contentions advanced or not advanced, by the respective parties. [x]

31. Recently, in ***R.C. v H.S.C*** [xi] the full court of the North Gauteng High Court Johannesburg, in having to determine the best interest of two minor children, made the following observations on the approach to be followed when the best interest of a minor child is the subject of determination –

"A Court should, where a child's welfare is at stake, '…be very slow to determine facts by way of the usual opposed motion approach… That approach is not appropriate if it leaves serious disputed issues of fact relevant to the child's welfare unresolved.' The best interests of the child principle is a flexible standard and should not be approached in a formalistic manner. We find that a sufficiently child-centred approach was not followed by the Court. This is apparent from the wording used by the Court. The Court was concerned with the Appellant being afforded legal rights and embarked upon a process whereby it compared 'The aspects of the case that inure to a finding that the applicant should be afforded rights of contact and care' and with the aspects militating against the relief sought.

The Supreme Court of Appeal has cautioned that this type of litigation is 'not of the ordinary civil kind. It is not adversarial'. The approach, in our view, was correctly summarised by Howie JA in B v S (supra) and has even more application now, having regard to the legislative changes which have been affected since B v S in 1995 and the section 7 considerations in terms of the Children's Act:

> *'In addition it seems to me to be necessary to lay down that where a parental couple's access (or custody) entitlement is being judicially determined for the first time - in other words where there is no existing Court order in place - there is no onus in the sense of an evidentiary burden, or so-called risk of non-persuasion, on either party. This litigation is not of the ordinary civil kind. It is adversarial. Even where variation of an existing custody or access order is sought, and where it may well be appropriate to cast an onus on an applicant, the litigation really involves a judicial investigation and the Court can call evidence mero motu…'"*
>
> (Own emphasis and footnotes omitted)

32. This is then also the route I will adopt in dealing with this matter in the attempt to come to the conclusion what is in the best interest of the minor child before this Court.

33. It is also with these principles in mind that I am comfortable that I can determine the application and the counter application together.

34. At all times it is important to remember that the Court should strive to find the best interest of the child and serve that interest. The standard directs the Court to exercise its discretion to promote the interests of the child. The interest of the parties is secondary to the best interest of the minor child.

BACKGROUND FACTS

35. The applicant, who is currently employed as a Data Architect for Edge Data Wave is about 43 years old. He is since March 2021 living in Pretoria in close proximity of the respondent. He states that he decided to move closer to the respondent in order to make the exercise of the contact easier. This will also make his attendance to the minor child's extramural activities easier.

36. The respondent, a legal practitioner, is about 41 years old. She is self-employed. She also is resident in Pretoria. The minor child is in her primary residence.

37. The parties were previously married.

38. Of the marriage relationship between the parties one minor child was born, being AMB. AMB was born during April 2017 and she is currently 6 years and 7 months old and she is enrolled, according to the evidence before me, as a scholar in the St. Mary's Diocesan School for Girls since January 2023.

39. Due to reasons that is irrelevant to the current application, the marriage relationship between the parties deteriorated to such an extent that the respondent during March 2019 informed the applicant that she wants a divorce. The parties stopped residing together at the end of March 2019 when the applicant left the common home. At the time, the parties were resident in Midrand.

40. According to the applicant the respondent suggested that the parties should attend mediation and that he agreed to this suggestion. The appointed mediator was Ms Irma Schutte ("Ms Schutte").

41. According to the applicant the respondent insisted on the appointment of Ms Schutte. The applicant states that initially he had no doubt to trust the *bona fides* of the respondent. The applicant indicates that at the time of the mediation process he had certain reservation regarding the process as it unfolded, but despite the reservations he had at the time, they managed to settle their disputes and on 14 June 2019 the parties signed a final parenting plan.

42. The respondent sketches a somewhat different picture. She states that the applicant and herself initially managed to stay civil with one another after their separation and they have discussed the prospects of settling the divorce matter. This was described as a fairly easy process as they were married out of community of property and that they had fairly similar views with regard to the minor child – or so she believed at the time. The applicant called upon settlement proposals. At this point the possibility of mediation was discussed. The applicant proposed Dr Robin Fasser and the respondent proposed Ms Schutte. The respondent then suggested that each pay for the mediator proposed by him or her and the applicant then agreed to the appointment of Ms Schutte.

43. Nothing much turns on this dispute as to the true events and what lead to the appointment of Ms Schutte as the mediator. It only has an effect on the suggestion of the applicant that the mediation by Ms Schutte was not done properly for what ever reason. This again does not assist the court in determining the issues.

44. Shortly before the parenting plan was signed between the parties, on 1 June 2019, the applicant relocated, with the minor child, to Pretoria.

45. On 18 November 2019 the divorce was finalised. The parenting plan was made an order of Court.

46. During March 2021 the parties took AMB to Ms Elsa Struwig ("Ms Struwig") for some play therapy. In the feedback session, Ms Struwig indicated to the parties that their minor child presented as secure, happy and well-balanced.

47. The parties then during February 2021 started a new mediation process in order to deal the aspects where they are not in agreement. The parties appointed Ms Linda Botha ("Ms Botha"). The mediation was unsuccessful. This mediation process was stopped during June 2021.

48. During August 2021 the minor child's school teacher contacted the applicant and the respondent and she expressed a concern that she noticed that the minor child is not herself. The respondent confirms that she also realised that the Child Psychologist Marlena Van Schalkwyk ("Ms Van Schalkwyk") was then appointed by agreement between the parents.

49. During March 2022 the applicant then proceeded with the current application, and the litigation followed the route as is mentioned herein above.

RELEVANT TERMS OF THE PARENTING PLAN SIGNED DURING JUNE 2019

50. As is already mentioned, the parties signed a Parenting Plan during June 2019 which was incorporated in the decree of divorce. At the time the parties entered into the parenting plan, and as is highlighted by the respondent, the minor child was a mere 2 years old. In my view, the applicant enjoyed fairly extensive contact rights given the age of the minor child.

51. The terms of the parenting plan that is relevant to the question before me is the following:

*"**C2.1.1 CARE**:*

C2.1.1.1 It is agreed that parental responsibilities and rights to the minor child as described in Section 18 (2) (a) of the Children's Act, Act 38 of 2005 be retained by both Mr. L … B … and Ms. L … A… E… .

C2.1.2 RESIDENCY

C2.1.2.1 Residency of the minor child will be with the biological mother, Ms. L … A… E… .

C2.2 DETAILS PERTAINNG TO MAINTENANCE OF THE MINOR CHILD

…

C.3 DETAIL PERTAINING TO CONTACT WITH THE MINOR CHILD

C3.1 GENERAL ARRANGEMENTS

C3.1.1 *Parental responsibilities and rights pertaining to contact as described in Section 18 (2) (b) be awarded to the biological father, Mr L. B….*

C3.1.2 *Mr. L B… will execute contact every alternative week-end with the minor child in the following manner:*

- *One week-end will be a single night sleep-over contact at the residency of Mr. B…. (This will be reviewed in November 2019) Mr. …I will pick up the minor child at 7:30 on a Saturday morning and return the minor child at 16:00 on a Sunday.*

- *On the alternative week-end it will be a two night sleep-over but with the presence of the parental grandmother. (Either at the residency of the father or the residency of the paternal grandmother / sister) On the Friday afternoon Mr. B… will pick up the minor child at 15:00 and return her on the Sunday at 16:00.*

- *This contact schedule will be revisited when the minor child is three years old.*

C3.1.3 *Midweek contact will be scheduled as follows:*

- *After the week-end that the minor child spends with her mother, Mr. B… will remove the minor child on a Monday and a Wednesday from approximately 16:00 until 18:00.*

- *After the week-end that the minor child spends with the father, Mr. B… will remove the minor child on a Tuesday and a Thursday from approximately 16:00 until 18:00.*

- *In summer the time can be extended to 18:30 and in the winter months, from May to August, until 18:00.*

- *This schedule will be re-visited when the minor child is three years old.*

C3.1.4 *Mr. B… can have daily reasonable contact with his daughter from Monday to Friday. He can phone the minor child on the phone of the caretaker of the minor child or after-hours on the phone of the mother.*

C3.1.5 *Holiday contact: The parties agree that holiday contact will be implemented in an age-appropriate manner. It will be executed in the following manner:*

- *From the age of three to four: One five day holiday as per the agreed contact schedule.*
- *From the age of four to five: Two seven day holidays as per the agreed contact schedule.*
- *From the age of five and older: Half of each school holiday as per the contact schedule.*

C3.1.6 *The parties agree that Public holidays will alternate between them as per the agreed contact schedule.*

C3.1.7 *The parties agree that on her birthday the minor child will spend four hours with the off-duty parent as per the agreed contact schedule.*

C3.1.8 *On Father's day and Mother's day the minor child will spend the week-end with the applicable parent.*

C3.1.9 *The parties agree that religious holidays will alternate between them annually. The minor child will spend Easter of 2019 with her biological mother and Christmas 2019 with her biological father. In 2020 this will alternate."*

DISPUTES ARISING FROM THE PARENTING PLAN AND ATTEMPTS TO APPOINT A NEW MEDIATOR

52. I have already mentioned that the applicant indicated that he, already during the mediation process, had certain reservations about how the process unfolded. He, however, did not terminate the mediation process and the mediation process was finalised.

53. He proceeds to state that the first dispute regarding the parenting plan arose as early as September 2019. The dispute related to the exercising of school holidays. From the facts it is clear that the applicant dealt with the dispute as is suggested in the Parenting Plan and it seems as if the dispute was referred to mediation back to Ms Schutte.

54. At this point I need to pause and mention that the dispute as mentioned was on a date prior to the divorce order being granted. Despite this, and despite the fact that the applicant realised that there are disputes stemming from the parenting plan, he, as is evident from the affidavits filed, did not take any steps to oppose the divorce action. The respondent did not tender any evidence why he did not take the necessary steps to oppose the divorce action. There is also no evidence tendered if the applicant took any steps in order to bring this issue to the attention of the Court who dealt with the matter at the time. The matter was dealt with on an unopposed basis during November 2019.

55. The applicant did not get the desired outcome before Ms Schutte and the issue remained unresolved. This resulted, as is evident from e-mail correspondence that is attached to the founding affidavit that the applicant was of the intention to report Ms Schutte to SAAM (The South African Association for Mediators). Ms Schutte then resigned as the mediator on 19 December 2019.

56. One of the aspects that is clear from the e-mail correspondence attached to the founding affidavit is that Ms Schutte expresses the view that the matter is not suitable for mediation. From the facts before me I agree with Ms Schutte. The animosity between the parties and the differences between them is of such a nature that no mediation will ever be successful. This, however, does not seem to be a contentious issue. It seems as if both the parties are at the point where they realise that at this stage mediation is not an option for them.

57. The applicant attempted to appoint another mediator. Initially he suggested Dr Gina Capitani, which suggestion was not accepted by the respondent. The parties eventually attended a mediation sessions with Ms Botha. The mediation process was terminated on 23 June 2021. The applicant blames the respondent and states that she *"simply hit the proverbial brick wall the instant that the midweek sleepover contact with A…. comes under consideration."*

58. I will now turn to the disputes arising from the Parenting Plan.

59. The applicant highlights the following problems arising from the parenting plan:

59.1 The contact schedule with the minor child AMB was to be revisited when she turned three years, i.e. 14 April 2020;

59.2 The midweek contact regulating his contact with the minor child AMB during the course of a normal week was also to be revisited when she turned three years, i.e. 14 April 2020;

59.3 The school holiday periods was a problem from the very beginning where it seems as if the respondent according to the applicant "*made an about-turn*" and *"It was clearly evident that the respondent had decided to change her mind and did both the respondent and Ms Schutte informed me that the parenting plan "actually" only made provision for one five-day holiday per year."* That being said, the holiday contact will be shared on an equal basis as form April 2022.

59.4 The applicant states that the respondent completely refused to have any regard to any of his views pertaining to the best interests of AMB. He states further that she has adopted an exclusionary stance where only her personal views and opinions are capable of pursuing the best interest of the minor child.

60. The periods set out above when the contact had to be revisited was not adhered to. It will be of no value if I have regard to the finger pointing in the papers. This does not provide the Court with any assistance in determining what is in the best interest of the minor child.

61. What is evident is that the issue of the sleepover rights was again addressed by Ms Botha. This issue was, however, not resolved.

62. The respondent narrows this down and states that the only real dispute between the applicant and herself is the question of the midweek sleepover once a week at the house of the applicant. The applicant is of the view that this is an over simplification of the issues.

63. I agree with the respondent that, and before me, the only real issue in as far as it relates to the reconsideration of the Parenting Plan is the extra one night sleepover. The applicant in paragraph 3 of Part A of the Notice of Motion, define the dispute between the parties which he wishes the independent clinical psychologist to investigate and assess and report back on is *"the aspect of reasonable contact of the respective parties, and more specifically the Applicant's midweek contact (including midweek sleepovers) to the minor child A …. M …. B …."*.

64. In addition, Mr Bezuidenhout who acted on behalf of the applicant stated more than once that *"[i]t cannot be overemphasised that the essential relief the applicant claims in the notice of motion is **not** an order seeking joint residency, co-holding of primary residence, or equally share arrangements, but the applicant merely seeks an interim order in the following terms: …"*

65. The question remains what is it then the applicant seeks at the end of the day. Ms Vermaak-Hay correctly pointed out that Part B of the Notice of Motion does not enlighten the Court where the applicant is heading.

VIEWS EXPRESSED BY EXPERTS ALREADY INVOLVED AND REPORTS BY INDEPENDENT THIRD PARTIES

66. At the outset, I am mindful of the view of the applicant that the session with Ms Van Schalkwyk does not constitute a formal forensic evaluation and assessment. I took this into consideration in coming to the conclusion as to whether the relief in Part A of the main application should be granted or not.

67. As is already mentioned elsewhere in this judgment, there is already experts involved in the lives of this family. In summary:

67.1 During March 2021 the minor child attended Ms Struwig, and the minor child was subjected to play therapy. Ms Struwig found the minor child to be "*a secure, happy and well-balanced child".*

67.2 During August 2021 the minor child's teacher mentioned that the minor child is not herself, and the parties decided to have the minor child subjected to a child psychologist. The parties jointly appointed Ms Van Schalkwyk and after an assessment of the child she was found to be balanced and happy.

68. The school teacher, Ms Marlene Greyling, at the baby and nursery school the minor child used to attend during, August 2022 reported on the minor child as follow:

"A …. Is aan my bekend vanaf sy 'n ingeskrewe kleuter by Graslands is. A… was nog altyd volwasse vlr haar ouderdom, en speel graag met haar eie klasmaats.

Sy is baie goed aangepas en sy neem aktief deel aan klas aktiwiteite.

Sy verkies 'n roetiene en gestruktureerde aktiwitieite. Daarom word sy elke oggend deur dieselfde persoon (haar Ma) afgelaai. Sy word 1x per week deur haar Pa opgetel, en kom dan soms huiwerig voor.

Sy is baie gelukkig in haarself en deel graag stories tussen haar en haar Ma. Haar Ma moedig ook 'n goeie verhouding aan tussen haar en haar Pa.

Sy was die een middag ontsteld om saam met haar Pa huistoe te gaan, waar haar Ma mooi aan haar verduidelik het dat sy dit sal geniet. (Sy het my kom vra, da tons haar Ma bel.)

Alex is tans op 'n baie goeie plek. Alvorens enige nuwe veranderinge, sal 'n evaluering deur 'n Kindersielkundige voorgstel word."

69. Subsequent hereto, the Family Advocate, assisted by a Family Counsellor did an investigation.

70. In summary, the Family Counsellor, came to the following conclusions:

70.1 The minor child is displaying behaviour that she is still not settled after the divorce and still experience an inner conflict of being torn between two households.

70.2 In light of the persistent animosity between the parties, shared residency should not be considered;

70.3 The minor child does identify with her mother as her primary caregiver and primary emotional bonding figure and the mother's residence as her primary residence.

70.4 The minor child is aware of the father's need for her to spend more time with him. More contact with her father is not the expressed need of the minor child. The father even had to employ an au pair to assist him during the after school midweek visits with the caretaking of the minor child, since the midweek visits transpires during the working hours when the father is fully available to spend quality time with the minor child;

70.5 The current contact regime is preventing the child from settling emotionally after the divorce and that a more age-appropriate contact plan should be structured;

70.6 It is concerning that the minor child, at this age, still needs to wear a nappy at night.

70.7 The possibility that the minor child is experiencing emotional insecurity and emotional disruption and/or trauma could be a factor that contributes towards the aforementioned developmental delay, and it is therefore in the minor child's best interest to provide the most optimal environment for her to feel emotionally secure and safe.

71. The only members of this family that have not been subjected to an investigation by a psychologist is the applicant and the respondent. They have, however, partook in the investigation by the Family Advocate and the Family Counsellor.

APPLICANT'S BASIS FOR RELIEF SOUGHT TO APPOINT AN INDEPENDANT CLINICAL PSYCHOLOGIST

72. At the outset I need to indicate that on the day of the hearing of this application I have indicated to both the parties that they can accept that I will not make the minor child an experiment. I am still not of the intention to make her an experiment at the request of either of her parents. Where there is no basis for the relief sought, I will not grant such relief. If no grounds are set out in the affidavit supporting the request and illustrating that it is in the best interest of the minor child to grant such relief, I will not grant it. If I grant the relief where there is no basis for it and where such relief is not in the child's interest, I will fail in my responsibilities as the upper guardian of the minor child before me.

73. As I have already mentioned herein above, the applicant seeks an order that "*the disputes*" between him and the respondent be referred to a qualified and practising clinical psychologist in order to conduct an investigation and to make the necessary recommendations to the Court.

74. The disputes the applicant refers to can be summarised as follows:

74.1 The development of the parenting plan and the inclusion and/or phasing-in of midweek sleepover contact.

75. At this point I need to pause and mention that throughout the founding affidavit by the applicant his intention to move to a shared residency scenario is clear. This is in contradiction with the Heads of Argument filed by the applicant indicating that it cannot be overemphasised enough that joined residency, or equally shared arrangements is not what the applicant is seeking. The question of joined residency is, however, not something that is currently before me and another Court may consider this somewhere in the future.

76. The only basis I could find in the affidavits before me in terms of which the applicant justifies the relief as set out in Part A of the main application being the appointment of a clinical psychologist to assess not only the minor child but also both the parents, is the following:

76.1 In paragraph 36 of his founding affidavit the applicant stated as follows:

"36. I respectfully submit that the overriding dispute which considers expert intervention and consideration remains the development of the parenting plan and the inclusion and/or phasing-in of midweek sleepover contact. Clearly the respondent and I have vastly differing views of what militates in the best interests of our minor daughter and would the above honourable court require the assistance of a proficient expert in pursuing these best interests."

The contents of this paragraph can be separated into two grounds, namely:

76.1.1 The Court will need the assistance of a proficient expert in pursuing the best interest of the minor child;

76.1.2 The overriding dispute being the development of the parenting plan and the inclusion and/or phasing in of midweek sleepover contact needs the intervention of an expert. This is based on the fact that the applicant and the respondent has vastly different views of what militates the best interest of their minor child.

76.2 In addition, the applicant states that Ms Schutte during December 2019 recommended a full forensic investigation into the matter of the parties.

76.3 He is concerned about the current circumstances of the minor child in that:

76.3.1 The applicant is extremely concerned about certain emotional aspects of the minor child's life. This is supported by the notion of the applicant that the respondent does not display any interest nor intention to co-parent with the applicant;

76.3.2 The applicant is of the view that the respondent has in the past maligned him to the minor child and discouraged contact;

76.3.3 The respondent justifies her combative approach to the adopting and development of the contact regime as that of allegedly being in the best interest of the minor child;

76.3.4 The respondent does not encourage contact between himself and the minor child;

76.3.5 The respondent is content with the limited access between himself and the minor child.

76.4 The respondent refers to the views expressed by the Family Councillor mentioned that there are some concerns raised *inter alia* the following:

76.4.1 The possibility exist that the minor child is experiencing any one or a combination of emotional insecurity; emotional disruption, trauma or developmental delays;

76.4.2 Despite the patent absence of a clear and decisive finding or diagnosis, then proceeds to make recommendations on the premise of these serious concerns possibly existing.

76.5 On a contextual consideration of the contents of the reports by the Family Advocate and the Family Counsellor, their concerns were clearly borne out by the fact that the minor child was still using happies at the age of 5. The respondent proceeds to state that this requires a more in-depth consideration of the facts in this regard.

77. The argument on behalf of the applicant in favour if appointing an independent expert can be summarised as follows:

77.1 In order to illustrate the argument that the Court need the assistance of an expert in order to come to the conclusion as to what is in the best interest of a minor child, the applicant relied on the judgment in the matter of ***V v L*** [xii] where the Court held that:

"Even if the Court is the upper guardian over all minor children, however, it is with great difficulty that a Judge who does not know the child, except reading in the pleadings about the child, has to decide on what is in the child's best interest as parents are emotionally unable to decide this for their child."

77.2 It is common cause between the parties that the parenting plan itself contemplates an evolvement over time of the parties' respective rights of contact with the minor child;

77.3 That Ms Schutte, when she resigned, recommended that a full forensic assessment be conducted and that the Family Advocate gets involved;

77.4 It is evident that the respondent was not even inclined to engage in a fair and transparent process of considering the further evolution of the applicant's contact with the minor child.

77.5 Ms Botha intimated that the issue of midweek sleepover contact must be broached in due course and that the respondent's persistent refusal to even contemplate this necessitated the launching of this application.

77.6 The minor child attended a psychologist after some uneasiness was displayed by the minor child. Ms Van Schalkwyk found that the minor child is happy and balanced. He proceeds to argue that there was 1 issue identified causing the minor child some uneasiness that that was that the psychologist picked up on the fact that the respondent was confusing the minor child by trying to convince her that she lives with her mother (the respondent) and only visits her father (the applicant). This was addressed by the psychologist and she advised the respondent to be more cautions of separating the two homes and suggested that the respondent try and incorporate the notion of 2 homes.

BASIS FOR THE RESPONDENT'S OPPOSITION TO THE RELIEF SOUGHT BY THE APPLICANT TO HAVE AN INDEPENDENT EXPERT APPOINTED

78. The respondent before me makes the following averments in opposition of the appointment of an independent expert:

78.1 The only dispute between herself and the applicant is the question if the minor child should sleep over at his house once a week;

78.2 This request is the reason why the applicant continuously requests for mediation sessions;

78.3 The mediation sessions do not bear any fruit since it comes down to a repetition of the same argument;

78.4 As soon as it becomes apparent that the mediator does not support the applicant's view, he embarks upon a process to discredit the mediator or terminate the mediation;

78.5 Having realised that he will not achieve his goal with mediation, he has now embarked upon a quest to appoint an expert in the hope that the expert might find in his favour.

79. The respondent ends off by stating that she will not agree to such a process, for the simple reason that any process of evaluation will place tremendous strain on the minor child and further that it will be extremely costly.

80. She proceeds to state that there are no allegations of psychological problems that warrant an investigation by a psychologist.

81. She further states that she knows her child best. She states that the most important issue is the need of the minor child.

82. The argument by the respondent can be summarised as follows: -

82.1 The applicant brings this application, seemingly in the best interest of the minor child, but actually, it is rather about serving his own best interest;

82.2 No parent in a parental rights and responsibility dispute is of a right entitled to an investigation by an expert to determine whether or not there should be a variation of parental rights and responsibilities – such request is not for the mere taking;

82.3 It is only when the Court is of the opinion that there are aspects that should be investigated and reported on by an expert that will assist the Court in coming to a finding, such investigation should be ordered;

82.4 The Court should be weary of a party who is merely on a fishing expedition, who does not possess *prima facie* evidence to substantiate the ultimate relief that he seeks, but who insists on an investigation by an expert in the hope that something will come out of the investigation to give that party a basis of support;

82.5 The Court should weigh up the need for an investigation against the undeniable negative aspects of an investigation, such as the pressure exerted on the child and the stress that it causes for both parties and the minor child and the costs involved;

82.6 Disputes regarding parental rights and responsibilities are normally referred to the Family Advocate for investigation;

82.7 No allegations are made regarding any psychological issues that should be investigated, which makes this request untenable;

82.8 No *curriculum vitae* from any of the nominated persons have been attached to the papers and no confirmation of the said experts are attached that they are willing and available to be appointed;

82.9 Ultimately, the only determining factor is whether the child in question has a need for the extension of parental rights and responsibilities, considering her unique circumstances;

82.10 Upon a consideration of the applicant's case, it immediately become evident that he is extremely vague about the aspects that he wants the expert to investigate, as well as the ultimate relief that he seeks.

THE ROLE AND FUNCTION OF THE FAMILY ADVOCATE AND THE RECOMMENDATION MADE BY THE FAMILY ADVOCATE

83. As is stated above, the Family Advocate was involved in the matter and a report was filed. This is despite the fact that the respondent in her opposing affidavit indicated that any investigation (including an investigation by the Family Advocate) will be traumatizing for the minor child. The Court is grateful that this investigation was in fact done. It assists in a great deal coming to the determination as to what is in the best interest of the minor child.

84. It follows that I consider the principle of the investigation by the Family Advocate as this stage together with the request of the applicant to have an independent expert appointed.

85. This report by the Family Advocate is not accepted by the applicant, and he is persisting with the appointment of an independent psychologist. In amplification of this the respondent reminded the Court of the judgment in the matter of ***Van den Berg v Le Roux*** [xiii] where the court held that:

"It must be born in mind that at the conclusion of the hearing or trial the court may reject the Family Advocate's report in toto or portions thereof or accept the factual findings but yet make an order that materially differs from his / her recommendations."

86. This therefore unfortunately leads to the position where I have to consider the role and function of the Family Advocate and whether the report that was placed before me is sufficient to assist me in coming to a determination in this matter.

87. The role and mandate of the Family Advocate is trite and clearly set out in Mediation in Certain Divorce Matters Act 24 of 1987 (as amended) ("the Mediation Act"). It plays a significant role in determining and presenting the minor child's views to the Court.

88. As we were reminded in ***Brown v O K Abrahams & Others*** [xiv] when the Family Advocate conduct an investigation, it has to take into account all evidence provided by the parties and to promote the best interest of all minor children involved in that specific litigation.

89. In ***Soller NO v G*** [xv] Satchwell J stated as follows:

"The Family Advocate provides a professional and neutral channel of communication between the conflicting parents (and perhaps the child) and the judicial officer."

90. The Family Advocate may not take sides or attempt to usurp the Court's discretion. The court is required to take into consideration any report produced by the Family Advocate, but it is not bound by the recommendation by the Family Advocate.

91. I agree with Mr Bezuidenhout that the Court is not bound by the report of the Family Advocate. It is important to remember that the Court retains its traditional function as upper guardian of all minors within its area of jurisdiction and is therefore at liberty to decline to follow these recommendations should it conclude that the best interest of the children concerned lies elsewhere.

92. Regarding the investigation by the Family Advocate I wish to highlight the following:

92.1 There is no prescribed pattern or procedure for the conducting of an enquiry.

92.2 Regulation 5 (1) of the promulgated Regulations in terms of the Mediation Act specifically authorised the Family Advocate to institute an enquiry in such a manner as he or she may deem expedient or desirable.

92.3 If necessary, and in terms of Regulations 5 (2), the Family Advocate may require any person to submit to him or her "such affidavits or other statements in writing or reports, documents or things" as may be required.

92.4 Regulation 6 also authorises the Family Advocate to appoint one or more persons to assist him or her in the enquiry.

93. It is not for the purposes of this judgment necessary that I consider any of the other rights and powers the Family Advocate have in order to assist the Court in coming to the determination as to what is in the best interest of the minor child(ren).

94. It has been stated in ***Terblanche v Terblanche*** [xvi] by the Honourable Judge Van Zyl that the primary purpose of the office of the Family Advocate is to identify and establish what is in the best interest of the children concerned and that the Family Advocate is particularly well equipped to perform this function,

"having at his or her disposal a whole battery of auxiliary services from all walks of life, including family counsellors appointed in terms of the Act and who are usually qualified social workers, clinical psychologists, psychiatrists, educational authorities, ministers of religion and any number of others who may be cognisant of the physical and spiritual needs and problems of the children and their parents or guardians, and who may be able to render assistance to the Family Advocate in weighing up and evaluating all relevant facts and circumstances pertaining to th welfare and interests of the children concerned."

95. I have considered the reports by the Family Advocate and the Family Counsellor. I cannot fault the Family Advocate or Family Counsellor in the manner in which the investigation was done.

96. The applicant criticizes the Family Advocate and Counsellor, in essence accusing them of turning a blind eye to glaring issues, such as : -

96.1 the conclusion that the minor child is displaying behaviour that she is still not settled after the divorce and still experience an inner conflict of being torn between 2 households, and

96.2 that it is concerning that the minor child, at this age, still needs to wear a nappy at night; and

96.3 that the possibility exist that the minor child is experiencing emotional insecurity and emotional disruption and/or trauma could be a factor that contributes towards the above developmental delay, and it is therefore in the minor child's interest to provide the most optimal environment for her to feel emotionally secure and safe.

97. I do not agreement with the views and criticism expressed by the applicant.

CURRENT WELL-BEING OF THE MINOR CHILD

98. The respondent describes the minor child before me as *"thriving, happy, secure and well-balanced".* This is supported by the views of independent experts.

99. On the admission of both the parties this is as a result of the fact that the minor child has a significant time with both her parents.

100. However, the Family Advocate and the Family Counsellor did raise some aspects of concern. I have already deal with the conclusions by the Family Counsellor.

101. In general, it seems as if the minor child is well balanced and happy. It may be so that she has some developmental delays and that she is still not settled after the divorce of her parents. The question is whether it is so severe that it calls for an assessment and investigation by a clinical psychologist. This is something than can be addressed with therapy.

CONCLUSION ON THE APPOINTMENT OF AN INDEPENDENT EXPERT

102. The best starting point is to consider what relief the applicant is in actual fact seeking in prayers 1, 2 and 3 of Part A of the main application.

103.

103.1 The first leg of the relief sought by him, is that the disputes between the parties be referred to a qualified and practicing clinical psychologist. The answer for what these disputes are the applicant wishes the Court to refer to the clinical psychologist is locked up in prayer 3. The dispute listed by the applicant include the aspect of rights of reasonable contact of the respective parties, and more specifically the applicant's midweek contact, including midweek sleepovers.

103.2 The second leg of the relief sought by the applicant is that the family as a whole be referred to a clinical psychologist for an assessment and an investigation.

103.3 The third and last part of the relief in Part A is that the appointed clinical psychologist should report back to this Court on the dispute.

104. At the outset, I agree with the argument of the respondent that an order like this is not for the mere taking. There should be compelling reasons why such an order is granted.

105. I will now turn and consider the arguments by the parties:

106.

106.1 The first argument the applicant placed before the Court is that the Court, sitting as the upper guardian of the children in its jurisdiction, needs the assistance of an independent expert to resolve the dispute(s) and determine what is in the best interest of the minor child. I agree with the notion that a Court needs to be assisted by an independent expert in order to determine what is in the child's best interest. This is, however, not true in all the matters. This assistance is only from time to time.

106.2 I do not agree with the argument by Mr Bezuidenhout that the facts before me call for assistance of a clinical psychologist.

106.3 As I have already indicated above, the dispute the applicant wishes to refer to an independent expert is very limited. This is something that was considered by the Family Advocate and the Family Counsellor. There is therefore a report by an independent expert.

106.4 I have access to the report by the Family Advocate and the Family Counsellor. The dispute is very limited. It boils down to the one extra night sleepover in the middle of a week.

106.5 This is not a sufficient ground for the matter to be referred for a costly clinical evaluation.

107. I agree with the applicant that due to a lapse of time and in light of the time frames agreed in the Parenting Plan, that the contact need to be revised. If all the facts are taken into account and if all the facts are considered, the mere fact that the parenting plan needs to be amended does not call for a clinical evaluation and investigation. This ground is therefore not sufficient reason to refer the dispute to a clinical psychologist.

108.

108.1 Hand in hand with this goes the argument that the respondent is not inclined to engage in a fair and transparent process of considering the further evolution of the applicant's contact with the minor child.

108.2 He further complains that the respondent refuses to co-parent with him, that she discourages contact.

108.3 These are not aspects that calls for an investigation by a clinical psychologist. These are aspects that the parties need to address by for example attending co-parenting classes. No number of forensic investigations will resolve these issues.

109. I take note of the argument that Ms Schutte recommended a full forensic assessment and that the Family Advocate should get involved. This remark was made in 2019. This is not placed in context and I could not find any evidence by Ms Schutte illustrating why she formed this view. Little weight should therefor be attached to this remark that was made almost 4 years ago.

110. I cannot agree with the notion by Ms Botha on which the applicant relies that the fact that the respondent does not consent to sleep over rights calls for this application, in actual fact suggesting the appointment of a clinical psychologist is warranted. The refusal by a parent to agree to contact that he or she believe is not in the best interest of their minor child does not automatically warrant the appointment of a clinical psychologist. This is simply not a basis for it. As I have already stated herein above, no number of clinical investigations will resolve this.

111. I agree with the argument by the respondent that the applicant failed to place any real concerns before me why the respondent should be subjected to a clinical evaluation.

112. I have considered the concerns that was raised by the applicant regarding the well-being of the minor child, such as the uneasiness that was picked up by Ms Van Schalkwyk, the developmental delays of the minor child, the fact that the child was at the time still not settled after the divorce of the parties. These are aspects that can and should be addressed on a another level. The causes and possible causes of the aspects were considered by the experts and the answer to resolve this does not lie in an assessment and investigation by a clinical psychologist.

113. This Court has the benefit of the report by the Family Advocate. As I have already stated, I cannot fault the investigation by the Family Advocate and Counsellor.

114. One aspect I also considered is the scope of powers the Family Advocate enjoys in terms of the relevant legislation. The Family Advocate has the right to refer the parties and the children to an independent expert. The Family Advocate raised certain concerns. Despite the concerns, they did not regard it necessary to refer the parties to an independent expert. I agree with this approach. As stated above, there is no issues raised of such serious concerns that needs to attention of a clinical psychologist.

115. In conclusion, I need to emphasize that the report by an expert will not carry more weight in determining the best interest of the minor child than report of the Family Advocate. The same principles apply. The Court is also not bound by any recommendations made by an independent expert. The test remains what is in the best interest of the minor child.

116. I am therefore not willing, especially where no real evidence is placed before me for the quest to have a clinical psychologist appointed, to appoint any expert at this stage.

117. Part A of the Notice of Motion therefore should fail.

AMENDMENT OF PARENTING PLAN / DIVORCE ORDER IN AS FAR AS IT RELATES TO THE APPLICANT'S CONTACT WITH THE MINOR CHILD

118. This brings me to the question of the contact between AMB and the applicant should be altered at this stage, and if I form the view that the contact should be amended, how should it be amended.

119. At the outset I need to stress that I am in agreement that the Parenting Plan needs to be amended. In my view the contact set out in the Parenting Plan is not in the minor child's interest. This aspect is also confirmed by the Family Counsellor in his report. He is clear that the current arrangement is contributing to certain of the problems the minor child is experiencing.

120. I agree with the applicant that the Parenting Plan needs to be evolved.

121. Where I, however, disagree with the views of the applicant is that the Parenting Plan should evolve in such a manner to make provision for more contact, including sleep over rights. It should be evolved in order to serve the best interest of AMB. Not that of the parties.

122. On the careful consideration of the argument by the applicant, it is clear that he is of the opinion that evolve means that the contact automatically should increase. This can never be true. Any Order relating to children is flued and it should be adjusted as to the best interest of the child. Not the wishes of the parents. It may be so that the initial idea was that the minor child should at some point have mid-week sleep over rights. At the time this idea was formed, the parties did not know what the future holds and how the minor child will develop. The only real evidence before me is that the minor child born of the marriage is a child that needs structure. She is described as a child that is not settled in after the divorce. The Family Counsellor (who has considerable years of experience) attributes this to the Parenting Plan and contact as set out in the Parenting Plan does not cater for the minor child's best interest.

123. The applicant seeks an amendment to the contact regime pending the finalisation of the proposed report by an independent expert. As is already

indicated, I am not of the intention to allow the relief as sought by the applicant for the reasons mentioned herein above.

124. I will, however, consider his relief for the contact. At this point I need to pause and mention that the wording of the relief sought by the applicant regarding the interim contact leave space for some concern. He makes reference to the contact arrangements by both parents. This is inconsistent with the current order. The primary residence vests with the respondent subject to the right of contact with the applicant. It can not be on the facts before me that both parents have the right of contact.

125. From the facts before me, the applicant is currently exercising his contact with the minor child as follows:

125.1 The applicant removes the minor child every alternate weekend directly from school at 13h30 on the Friday until 16h00 on the Sunday;

125.2 The applicant removes the minor child directly from school from 13h00 until 18h00 / 18h30 (seasonally depending) on a Monday and a Wednesday after a weekend that the minor child spend with the respondent and on a Tuesday and Thursday after weekend that the minor child spent with the applicant;

125.3 The applicant has the minor child with him every alternative public holiday, on Father's day, for four hours on the birthday of the minor child (unless it is his contact day in which event the respondent then has four hours);

125.4 From 2022 a 7 night sleep-over holiday period on the basis that all holiday periods are shared equally between the parties.

126. The respondent states that she has agreed to the extension of the applicant's contact with the minor child to the point where the applicant had the minor child for the year prior to the application for almost 50% of the time.

127. In Part A of this Notice of Motion, and pending the proposed investigation by the independent expert, the applicant seek an order that he exercise his contact with the minor child as follows:

127.1 That the applicant have contact with the minor child every alternative weekend from 13h00 on the Friday afternoon until 16h00 on the Sunday, at which time the applicant will drop Alex off at the respondent's residence;

127.2 That the applicant shall have midweek after the weekend that the minor child spends with the respondent, the applicant will remove the minor

on a Monday and a Wednesday from approximately 16:00 until 18:30. After the weekend that the minor child spends with the applicant, the applicant will remove the minor on a Tuesday and a Thursday from approximately 16:00 until 18:30;

127.3 That contact on official public holidays are to be alternated between the applicant and the respondent;

127.4 That the off-duty parent is entitled to spend four hours with the minor child on her birthday;

127.5 That the minor child shall spend Father's Day and Mother's day with the applicable parent;

127.6 That as of 14 April 2022 the minor child would have a 7-night sleepover with the applicant in regards to long school holidays and all short school holidays are to be share equally between the applicant and the respondent;

127.7 That Christmas and Easter holidays are to alternate between the applicant and the respondent annually.

128. In her counter application, the respondent seeks the following relief in as far as it deals with contact between the applicant and the minor child:

128.1 Until the minor child reaches the age of 6:

(i) Every alternative weekend from Friday at 17h00 to Sunday at 17h00, during school term;

(ii) One midweek visit of one hour, every Wednesday during school term.

(iii) Two holiday periods per year of 5 days each.

(iv) Telephonic contact on every Tuesday, Thursday, and alternative Sunday (of the weekend that the minor child does not spend time with the Applicant) between 18h30 and 19h00.

(v) Father's Day and the Applicant's birthday.

(vi) Half of the available hours on the minor child's birthday, or alternatively the Saturday following the minor child's birthday if her birthday falls on a school day

128.2 Between the age of 6 and 7:

(i) Every alternative weekend from Friday at 17h00 to Sunday at 17h00, during the school term.

(ii) One midweek visit of one hour, every Wednesday during school term.

(iii) Two holiday periods per year of 10 days each.

(iv) Telephonic contact on every Tuesday, Thursday and alternative Sunday (of the weekend that the minor child does not spend time wit the Applicant) between 18h30 and 19h00.

(v) Father's Day and the Applicant's birthday.

(vi) Half of the available hours on the minor child's birthday, or alternative Sunday (of the weekend that the minor child does not spend time with the applicant) between 18h30 and 19h00;

128.3 After the minor child reaches formal school going age (7):

(i) Every alternative weekend from Friday at 17h00 to Sunday at 17h00 during school term;

(ii) Every alternative and rotating short school holiday and the alternative and rotating half of every long school holiday. Christmas and New Year's Day to rotate between the parties.

(iii) Telephonic contact on every Tuesday, Thursday, and alternative Sunday (of the weekend that the minor child does not spend time with the Applicant) between 18h30 and 19h00.

(iv) Father's Day and the Applicant's birthday

(v) Half of the available hours on the minor child's birthday, or alternatively the Saturday following the minor child's birthday if her birthday falls on a school day.

129. This is in line with the recommendation by the Family Advocate.

130. In order to consider this request, I had regard to all the facts that was placed before me.

131. I also had regard to *inter alia* the following:

131.1 There is a number of experts already involved and save for some aspects of concern, the minor child is generally described as happy, secure and balanced.

131.2 The parenting styles of the parties differ tremendously, for example the respondent describes herself as the parent who disciplines the minor child, in contrast with the applicant who is described as the parent who is unable / unwilling to discipline the minor child.

131.3 There are allegations that the minor child is not kept in her routine by the applicant when she is with him;

132. If one considers the guidelines that is prescribed in section 7 of the Children's Act, the following is factors that I took into account:

132.1 The attitude of both the parents towards each other in as far as it relates to the exercise of parental responsibilities and rights in respect of the child.

132.2 The capacity of both the parents to provide for the needs of the minor child, emotionally and intellectually;

132.3 The need of the minor child to remain in the care of the respondent;

132.4 The need of the child to maintain in contact with her father;

132.5 The minor child's age, maturity and stage of development and the characteristics of the minor child;

132.6 The minor child's physical and emotional security and her development;

132.7 The need of the minor child to be brought up within a stable family environment or in an environment resembling as closely as possible a caring family environment.

APPLICATION OF THE PRINCIPLES TO THE FACTS

133. What is evident is that the current arrangement is not in the minor child's best interest. It is clear that it is creating some uneasiness with her.

134. The evidence before me is that the minor child appreciates structure and routine. And there are in actual fact certain measures in place in order to give her this structure, for example her mother is the person that drops her off at school every day. This contributes to the structure of the minor child.

135. Taken this into account, there is no doubt that the current arrangements do not promote the required structure and routine. Every second week is a different routine. The one week she sees her father only one day a week and the following week she sees him two days a week. It makes sense that she has not settled in. She constantly needs to adapt to a different arrangement every second week.

136. This is an arrangement that might have worked if she was older. But she is of a tender age and the constant changing every alternative week is clearly not in her interest.

137. The question then arises but why can she not enjoy mid-week sleepovers with the applicant every week. Especially in light of the definition of contact in the matter of ***B v S*** [xvii]where the court held that contact is the right of the child and not the right of the parent.

138. An independent expert alerted me to the fact that at this stage the minor child did not express a desire for more contact with her father. This is rather the need of the father. The needs of the parents are not the test. The only question is what is in the best interest of the child.

POSSIBILITY OF REFERRING THE PARTIES TO PARENTAL GUIDANCE

139. In her heads of argument Ms Vermaak-Hay, who acted on behalf of the respondent, aptly argued that in most cases which involves the best interest of the minor child, the animosity between the parties clouds their judgment and stands in the way of identifying what is really in their child's best interest.

140. From the facts before me it is clear that there is no reason why the minor child should be subjected to a clinical assessment. This is a drastic measurement and I could not find any reason in the evidence before me that justifies such drastic step.

141. From the facts before me, the following is evident:

141.1 The parties cannot co-parent. There is a fair share of finger pointing between the parents, the one accusing the other of the unwillingness to co-parent.

141.2 Both the parties are set in their views as to what is in the best interest of their child and they are not willing to consider any other alternatives as to what may or may not be in the best interest of the minor child.

142. These aspects do not justify the referral of a child who is a mere 6 years old to an investigation by a clinical psychologist.

143. At the outset I need to stress that I accept that there is no such thing as a perfect human being, let alone a perfect parent. We all have shortcomings. But we all can (and should) at some point consider what is our own short comings and endeavour to improve on them. We do not do this only for ourselves, but also for our children.

144. During my exchange with the representatives of the parties and the possibility of referring them to parental guidance classes it was clear that neither of them are open for such a suggestion. Despite the fact that I do have powers wide enough to make such a referral, I have decided not to do it. Both the parties are well qualified and both of them should have the necessary insight in their own shortcomings. I can only hope that at some point the parties will deal with their own shortcomings as parents before subjecting the minor child to further litigation.

COSTS

145. In matters where children's best interests are at stake, where parent's desperately vied for primary residency and extended contact, and specifically in circumstances where it is evident that both the parents love their children and care for their children, courts should be slow to grant costs orders.

146. There are no victorious parties in family law litigation.

147. Since I am of the view that both parties are to blame for the continued acrimony between them that ultimately underpins this litigation, I am of the view that each party should be responsible for their own costs.

CONCLUSION

148. I have to comment both the parties on their dedication towards their minor child. Not all children are so blessed to have two parents that care about him or her in the fashion the minor child before the court has. The only unfortunate part is that the dedication of the parents and the end visions of the parents and their views as to what is in the best interest of their child does not meet each other.

149. For a child, being carefree is intrinsic to a well-lived life. The applicant and the respondent have the opportunity and means that the minor child can grow up in a care free environment.

150. They are to take responsibility to provide a carefree environment for their minor child seriously. How they behave towards each other and react to another party's perceived acrimony are pivotal to their children's well-being.

151. Both the parties should heed to wise words of Solomon: "A gentle answer turns away anger, but a harsh word stirs up wrath."

152. I can only hope that the proposed order will bring, for now, an end to the parties current quest to have their way forced off on each other and rather focus on working together to create an environment where their beautiful little girl can grow up to reach her full potential.

ORDER

153. The following order is therefore made:

153.1 Part A of the applicant's application is dismissed;

153.2 Each party is to pay his / her own costs associated with Part A of the applicant's application.

153.3 The divorce order dated 18 November 2019 is amended as follows:

153.3.1 Both the applicant and the respondent shall retain full parental responsibilities and rights with regard to the minor child, ALEX MORGAN BELL (hereinafter referred to as “the minor child”), as more specifically set out in section 18 (2) of the Children’s Act, No 38 of 2005 (“the Children’s Act”);

153.3.2 The primary residency of the minor child shall remain with the respondent;

153.3.3 The respondent’s contact will include the following:

(i) Every alternative weekend from Friday at 14h30 to Sunday at 18h00 during school term where the applicant will collect the minor child from the home of the respondent and return the child to the home of the respondent;

(ii) One midweek visit of 90 minutes every Wednesday during school term with the understanding that the minor child will not be returned to the respondent later than 18h30, and provided that the applicant is available to take care of the minor child in the time that she is with him and that the care of the minor child not be exercised by a third party or that the minor child is left in the care of a third party;

(iii) Every alternative and rotating short school holiday and the alternative and rotating half of every long school holiday. Christmas and New Year's Day to rotate between the parties.

(iv) Telephonic contact on every Tuesday, Thursday, and alternative Sunday (of the weekend that the minor child does not spend time with the Applicant) between 18h30 and 19h00.

(v) Father's Day if the weekend on which Father's day fall does not coincide with the weekend that the minor child is in his care with the specific understand that the minor child is to spend mother's day with the respondent;

(vi) Half of the available hours on the minor child's birthday, or alternatively the Saturday following the minor child's birthday if her birthday falls on a school day.

153.4 Each party is to pay his or her own costs associated with the Counter Application.

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Erasmus AJ

Acting Judge of the High Court of South Africa

Gauteng Division, Pretoria

Appearances:

For the Applicant in the main application / Respondent in counter application:

Adv WJ Bezuidenhout

For the Respondent in the main application / Applicant in counter application:

Adv I Vermaak-Hay

Date of delivery: 21 November 2023

[i] Also see the United Nations Convention on the Elimination of All Forms of Discrimination Against Women, 1979 (CEDAW) articles 5(b) and 16 (1) (d), which use the term “paramount” instead of “primary”. This document was ratified by South Africa in December 1995.
[ii] Section 28 (2) of the Constitution of the Republic of South Africa
[iii] Section 9 of the Children’s Act
[iv] ***Fletcher v Fletcher*** 1948 (1) SA 130 (A); ***Van Oudenhove v Gruber*** 1981 (4) SA 857 (A) at 868C; ***F v F*** 2006 (3) SA 42 (SCA) at para 8; ***S v M (Centre of Child Law as Amicus Curiae)*** 2008 (3) SA 232 (CC) at para 24 ***Godbeer v Godbeer*** 200 (3) SA 976 (W) 981
[v] (2009) 34 (2)
[vi] **2000 (3) SA 422 (CC)** paragraph [18]
[vii] ***P v P*** 2007 (5) SA 94 (SCA) paragraph [14]; ***K v M*** [2007] 4 All SA 883 (E)
[viii] 2008 (3) SA 232 (CC) paragraph [15], [18] and [25]
[ix] ***Kotze v Kotze*** 2003 (3) SA 628 (T) at 630 G and endorsed by the Constitutional Court in ***Mpofu v Minister for Justice and COntitutional Development and Others*** [2013] ZACC 15; 2013 (9) BCLR 1072 (CC) at para 21
[x] *Id*
[xi] [2023] ZAGPJHC 219; 2023 (4) SA 231 (GJ)
[xii] (1575/2021) [2022] ZAFSHC 284 at para [63]
[xiii] [2003] 3 All SA 599 (NC)
[xiv] [2004] 1 JDR 0011 (C) at 414 - 424
[xv] 2003 (5) SA 430 (W)
[xvi] 1992 (1) SA 501 (W) at 503 E - H
[xvii] 1995 (3) SA 571 (A)