

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 14812/2020

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

Date: 3 June 2022 E  
van der Schyff

In the matter between:

P[...] S[...] PLAINTIFF

and

A[...] S[...] DEFENDANT

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JUDGMENT

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Van der Schyff J

[1] The plaintiff and defendant are married in community of property. The marriage was concluded on 13 November 2010. Two children were born during the

existence of the marriage. Both parties are desirous to obtain a decree of divorce. The only contentious issue is the primary residence of the minor children.

[2] It is common cause that the plaintiff left the communal home during February 2020. The minor children remained in the care of their father. An order was granted in terms of Rule 43 of the Uniform Court Rules on 26 August 2020. The order provides for the minor children's primary residence to be with their father, the defendant. The plaintiff was awarded contact rights in that she was to have sleepover contact with the children as follows:

- i. Every alternative weekend from 14h00 on the Friday to 17h00 on the Sunday;
- ii. Every alternative short school holiday;
- iii. Half of every long school holiday;
- iv. Every alternative Christmas and Easter;
- v. Half a day on every child's birthday.

[3] The Office of the Family Advocate was requested to investigate and report on the issue of primary residence of the minor children and the concomitant right of contact.

[4] The Family Advocate's report was filed and the matter was enrolled for finalisation. The Family Advocate recommends that: (i) both parties retain full parental responsibilities and rights towards the minor children in respect of care, guardianship and maintenance; (ii) the minor children be placed in the primary care and residency of the defendant; and (iii) the plaintiff be awarded specific parental responsibilities and rights of contact towards the minor children which should include but not be limited to alternative weekends and alternative long and short school holidays.

[5] The plaintiff seeks an order to the effect that the minor children's primary care and residency vest in her. Both the plaintiff and the defendant testified. It is evident that the parties both love their children, that both can provide in their children's emotional and physical needs, although particularly the plaintiff would need a

substantial maintenance contribution from the Defendant if the *status quo* was altered and the children's primary residency was awarded to her, and that the children would not need to change school if the plaintiff was awarded primary residency.

- [6] The plaintiff lives in a two-bedroom house. When the children visit her, they share a bedroom. The evidence led by the plaintiff indicates that she is of the view that the defendant is overbearing and controlling. She said that the children are not 'absolutely happy' living with their father's girlfriend. She related that the defendant laid a rape charge against her boyfriend alleging that the parties' minor daughter was raped. This charge turned out to be false. She submitted that a caring father would not have subjected his minor daughter to the examination following such a charge, knowing that it is false. The plaintiff averred that the children would be better off with her since she is their mother.
- [7] The defendant testified that he has been the children's primary caregiver even before the plaintiff left the communal home. He said that she would often come home during the late hours of the night and he had to ensure that the children were fed and bathed, that their homework was done and that they were tucked in bed. He explained that he has a housekeeper who is assisting him. This housekeeper has been with the family for the past 9 years.
- [8] As indicated above, I am not convinced that either of the parties is what can be described as a 'bad' parent. Accidents happened and children fall ill, no court will summarily accept that a parent is a 'bad' parent merely because a child was injured whilst in that parent's care. The mere fact that the defendant indicated, when asked by me, that the children's sleepover visits with the plaintiff can be increased, belies his evidence that she is not an adequate mother. Children also need social contact with family and peers and it is not to be frowned upon if a parent allows regulated sleepovers with friends. On the other hand, a court will not disqualify a parent as the potential primary caregiver merely because his children 'are not absolutely happy with his girlfriend.'

- [9] In deciding the issue of the children's primary residency I am bound by the principle that the decision I come to must be in the best interests of the children. As stated, I am of the view that both parents are able to provide primary care and residency. Due to the still-existing acrimony between the parties shared-residency is not a viable option.
- [10] It cannot be disputed that parents' divorce is a traumatic experience for minor children. The children often have to turn to each other as a stabilising factor in turbulent circumstances. Courts are therefore very reluctant to grant order that will result in the separation of siblings. In this matter, neither party proposed that the siblings be separated and it is not considered as a viable option. What is important, is the Family Advocate's opinion that the minor children seem to be accustomed to reside in the primary care of their father, although they long for the presence of their mother. They recognise that they have two homes and enjoy a good relationship with both parents.
- [11] I am aware of the fact that a final determination of primary residence should not be made solely on an agreement made between parties when they were in turmoil.<sup>1</sup> The reality is, however, that the children in question have adapted to living with one parent and regularly visiting the other. Although the plaintiff might have been the children's primary caregiver when they were small, it is undisputed that the defendant acted as the primary care giver for the immediate period before the plaintiff left the communal home, and for the two years thereafter. It is of no consequence whether the plaintiff regularly came home late during the time before she left because of work or social obligations, the reality is that only the reason for her absence and not the fact thereof, was disputed when the issue was raised by the defendant. The plaintiff's bid for primary residency is founded in her need and longing, as mother, to care for her children. Although this longing cannot be faulted, it is trite that the maternal preference rule was significantly altered with the promulgation of the Children's Act 38 of 2005.<sup>2</sup> A parent is not merely awarded primary residence of young children because that parent is the mother. It was held

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<sup>1</sup> See *AD & DD v DW* 2008 (3) SA 183 (CC).

<sup>2</sup> See *inter alia V v V* 1998 (4) SA 169 (C) at 176.

in *Van Pletzen v Van Pletzen*<sup>3</sup> that mothering is not only a component of a woman's being, but it is also a part of a man's being.

[12] No residency regime is cast in stone, and in the event that circumstances change as the children grow older or any of the parties intend to move, the issue of the children's primary residence can be revisited. More important, is that both parties must acknowledge that their children need both their continued involvement, companionship, love and support to enhance their sense of security. If the parties are not able to overcome their own insecurities and the animosity between them, they should seek professional assistance in this regard.

[13] As for the children's maintenance, it is common cause that the defendant bore the brunt of the parties' maintenance obligation. No evidence was placed before this court regarding the parties respective financial position. The plaintiff testified that she has limited funds available to contribute to her children's maintenance in the event that the *status quo* remains, in excess of catering to their needs when they visit her.

[14] As for costs. I am of the view that it is fair and just for each party to pay its own costs.

## **ORDER**

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

1. A decree of divorce is granted and the parties' marriage is dissolved;
2. The joint estate is to be divided equally between the parties;
3. Both parties retain full parental rights and responsibilities towards the minor children in respect of care, guardianship and maintenance;
4. The defendant is awarded care and primary residence of the two minor children;
5. The plaintiff shall have the right of contact with and to remove the minor children as follows:
  - 5.1. Every Friday from after school to Saturday until 13h00, unless otherwise arranged between the parties;

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<sup>3</sup> 1998 (4) SA 95 (O) 101B-D/E.

- 5.2. Every alternative weekend from 14h00 on Friday until 17h00 on Sunday,
  - 5.3. Every alternative short school holiday;
  - 5.4. Half of every long school holiday;
  - 5.5. Every alternative Christmas and Easter;
  - 5.6. Daily telephonic or video calls with the minor children. When the children are with the plaintiff the defendant is entitled to same;
  - 5.7. Half a day on each child's birthday, unless otherwise arranged between the parties;
  - 5.8. Every alternative public holiday that does not fall within a short or long school holiday, contact to commence after school on the day preceding the public holiday;
  - 5.9. Every mother's day, contact to commence on the day preceding mother's day. The defendant is entitled to contact on father's day, contact to commence on the day preceding father's day. Thereafter contact proceeds as normal unless otherwise arranged between the parties.
6. The plaintiff is to pay a contribution of R500.00 per month to the defendant for the children's maintenance;
  7. Either party may approach the Maintenance Court with the necessary jurisdiction for a variation of this maintenance order.

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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.

Counsel for the plaintiff:	Adv. T E Hlokwete
Instructed by:	S.E Kanyoka Attorneys
For the defendant:	Adv. Z F Kriel
Instructed by:	Du Toit's Attorneys
Date of the hearing:	31 May 2022
Date of judgment:	3 June 2022

