Krugel v Krugel

[2003] JOL 11028 (T)

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Case No:

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Judgment Date(s):

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Hearing Date(s):

25 / 03 / 2003

Marked as:

Reportable

Country:

South Africa

Jurisdiction:

High Court

Division:

Transvaal

Judge:

De Vos J

Bench:

AM de Vos J

Parties:

Garth Lyndon Krugel (At); Candy Krugel (R)

Appearance:

Adv IEM Delport, Messrs Shapiro & De Meyer Inc (At); Adv L Silberg, Messrs Larry Chimes Attorney (R)

Categories:

Application – Civil – Substantive – Private

Function:

Confirms Legal Principle

Key Words

Family law – Parent and child – Custody – Joint custody –

Guardianship Act 192 of 1993

Mini Summary

Upon their divorce, the parties agreed that they would have joint custody over their two children, with the applicant having actual physical custody. In the present application, the applicant sought sole custody of the minor children whilst tendering certain access to the respondent. The respondent contended that there were no grounds upon which the court should deprive her of joint custody of the minor children.

Held that the Guardianship Act 192 of 1993 provides that a woman shall be the guardian of her minor children born out of her marriage and that such guardianship shall be equal to that of the father under the common law in respect of his minor children.

The court examined the nature of joint custody, and set out its advantages. It was deemed that the best interests of the child also warranted keeping the joint custody intact. The application for sole custody therefore failed.

DE VOS J:

[1] The applicant and the respondent got married on 2 January 1993 and were divorced in 1996. They remarried in December 1997 and were once again divorced on 19 March 1999. There are two minor children born of the first marriage between the parties, a girl now aged 10 and a boy now aged 8.

[2] The parties are the joint custodians of the minor children by virtue of an agreement of settlement which was entered into and made an order of court subsequent to the second divorce but the applicant was granted physical custody of the children.

[3] The applicant is at present residing in Cape Town. He is applying for sole custody of the minor children whilst tendering certain access to the respondent.

[4] The respondent has opposed the application on the basis that there are no grounds upon which this Court should deprive her of joint custody of the minor children. She concedes that for the present the right of residence should remain with the applicant but has brought a counter-application wherein she seeks extended access to the children now that they reside in Cape Town.

[5] There has been previous litigation between the parties with regard to the custody of the children. The applicant makes the case that considering the history of custody claims and given the relationship

between the parties as it is at present they are clearly not in a position to share custody of the children. In order for joint custody to be effective, the parties must work together and act in the best interests of the minor children. It is argued that given the animosity between the parents in this case it cannot work. The respondent's case, however, is that the applicant moved to Cape Town without the respondent's consent. Considering that the parties have joint custody the move was therefore unlawful.

[6] The applicant also argues that the fact that he now resides in Cape Town makes it impossible for the parties to exercise joint custody of the minor children. The respondent's answer is that it is the action of the applicant which has made the joint custody provision of their agreement worthless. She argues that physical distance should not necessarily deprive her of the right to joint custody. The respondent also argues that the facts show that the applicant moved to Cape Town with the specific intention of frustrating the respondent in her rights regarding the children. The applicant, she says, is trying to minimise her influence over the children and therefore wants to disempower the respondent by applying for sole custody. It is argued that the process of joint custody is being sabotaged by the applicant who then uses the fact that the process is not working as a reason for changing the order.

[7] In South African law parental power may be defined as the complex of rights, powers, duties and responsibilities vested in or imposed upon parents, by virtue of their parenthood, in respect of the minor child and his or her property.1 In view of the fact that in

this day and age more emphasis is placed on the rights and interests of the children than on those of the parent, the term "parental power" should probably be replaced by "parental responsibility"2.

[8] In terms of common law parental power was shared by both parents over a legitimate minor child. The father's authority, however, was superior to that of the mother, the mother's participation being subject to the father's decisions regarding the wellbeing of the child. This, however, was changed dramatically by the Guardianship Act 192 of 1993. The Act provides that a woman shall be the guardian of her minor children born out of her marriage and that such guardianship shall be equal to that of the

father under the common law in respect of his minor children. It seems the general consensus is that this is not joint guardianship but equal guardianship.3

[9] In general it can be said that the custodian parent has the right to regulate and control the child's day-to-day life, upbringing and education. This includes the right to choose the child's residence, with whom he or she associates, and to direct the lines along which secular education should proceed. Choice of school, religious instruction and medical care are all dictated by the custodian and the non-custodian has no right to interfere in these matters.4

[10] The right to physical custody of the minor is only one part of the general content of custody. One may differentiate between the concept of joint physical custody and joint legal custody in that one parent may be given the right to physically take care of the child but the other decisions regarding the child's life may be taken jointly by the parents.

[11] In South Africa there has been a general reluctance to grant joint custody to parents and that not only where there is acrimony

Page 6 of [2003] JOL 11028 (T)

between the parties. In Kastan v Kastan5 the following was said in this regard.

"Orders for joint custody are rare. Such few examples as can be gleaned from the law reports would seem to point emphatically in a direction away from orders of this nature and the reason for this, I would think is clear. Custody of children involves day to day decisions and also decisions of longer and more permanent duration involving their education, training, religious upbringing, freedom of association and generally the determination of how best to ensure their good health, welfare and happiness. To leave decisions of this nature to the joint decisions of parents who are no longer husband and wife could be courting disaster, particularly where the divorce has been proceeded by acrimony and disharmony between the parents. It is because of my concern at these inherent risks that I requested counsel to place some evidence before me."

Page 7 of [2003] JOL 11028 (T)

[12] After reviewing the history of joint custody matters Mullans J had the following to say about joint custody:6

"Nevertheless the interest of the child still remains paramount in deciding question of custody after divorce. Judges claim no expert knowledge which exclude the possibility of a wrong decision in determining custody issues. Furthermore, the views of the parents themselves and the children must be given due weight. However, at the risk of being labelled a legal traditionalist . . ., I view with concern any trend towards the granting of joint custody orders."

That court did not agree with Professor Schäfer's7 assessment that joint custody would have the obvious additional advantage of increased parental cooperation. Instead, the court found joint custody to be more likely to cause disagreement between the parents.

[13] In Venton v Venton8 the court reiterated that in any application for joint custody the interests of the child remain paramount.

[14] In Pinion v Pinion9 the court once again referred to the risks involved in joint custody and described them as follows:

Page 8 of [2003] JOL 11028 (T)

". . . there is undoubted truth in the observation that human relationships are not constant. The future behaviour of parents, as of other humans, is unpredictable; and where their potential behaviour can give rise to a situation which will be detrimental to the interests of the minor concerned, it would, in my view, be better to exclude that possibility by avoiding creating a situation where it can occur, unless the advantages to the minor of such a course are so significant as to justify taking the risk involved. I do not think that the fact that the parties may approach the Court afresh, should the risk materialise, is any justification for taking it; it would serve the minor's interest far better not to take it at all."

The following section of the judgment is also significant:

"In the present case the parties are firmly convinced that they will be able jointly to discharge the function of custodian parents without friction or deadlock. They have faith in their ability to resolve any disputes which may arise by discussion. Whilst I do not doubt the bona fides of their belief, I do doubt their infallibility. I am unconvinced that there is no real risk of acrimonious or irresoluble disagreement between them in the future, which will

Page 9 of [2003] JOL 11028 (T)

rebound to the detriment of the minor. The risk involved is enhanced by the extremely wide field which will have to be covered by their joint decisions as custodian parents, and the extremely long period over which they will be required to function as such. It is, of course, possible that they may be entirely successful; but there exists a very real danger that they will not. Moreover, even if they do succeed ultimately in resolving their differences by discussion, it will not be practically possible to conceal those differences from or present a united front to the minor, particularly as she grows older. It is, in my view, imperative that a child should know, in such a situation, with whom the ultimate say lies, and not be afforded the opportunity of playing one parent off against the other."

The court could find no substantial advantage to children being under the legal custody of both their parents. The application was therefore refused.

[15] A tentative change in attitude is to be found in the Corris10 case where the court was prepared to risk what was described in Pinion,

Page 10 of [2003] JOL 11028 (T)

supra as "irresoluble disagreement" in future because of the possibility of success in the present.

[16] This development was taken further in the matter of V v V11 where a court referred to the fact that there had been a shift from the concept of parental power to that of parental responsibility and children's rights. I agree wholeheartedly with Foxcroft J's response to the disadvantages pertaining to joint custody listed by Schäfer:

"The first is the imagined need for the security of one decision maker. The second argument is that, if parents have been unable to maintain a stable marriage, they cannot be expected to achieve the degree of co-operation required for joint custody . . . Thirdly, it is said that joint custody runs counter to the so-called 'clean break' principle in divorce. This objection obviously relates to the ex-spouses themselves and not to their children. Fourthly, there are logistical objections to joint custody where ex-spouses do not live in close proximity to each other, and, fifthly, joint custody might be seen to be easy way out of relieving the Court from making a decision on a question of sole custody.

Page 11 of [2003] JOL 11028 (T)

The first objection harks back to the patriarchal legal past of South Africa, and assumes that there will always be disagreement requiring resolution by one authoritarian parent. The second objection has little to commend it, since there are many situations – and the present case demonstrates this – where parents cannot abide each other any longer, but continue to love their children in the same way as they always have done. The so-called 'clean break' principle seems to have little to do with the best interest of the child. It is obviously beneficial for joint custodian parents to live reasonably near to each other. The last objection relating to a perception of an abdication by the Court of its responsibilities might

apply in some situations where a decision is reached in a Motion Court in an unopposed trial with a consent paper. It can have no application to a situation like the present one, where a month has been spent on grappling with the respective merits of sole custody to the father, or joint custody."12

And further on:13

Page 12 of [2003] JOL 11028 (T)

"The authors also refer to the decision in Pinion v Pinion 1994 (2) SA 725 (D) and comment that this was a situation where the Court refused to grant joint custody in circumstances where it appeared, in the view of the authors, to be a thoroughly appropriate order. Page J took the traditional view, which forms the basis of much of the thinking in earlier decisions, that:

'It is, in my view, imperative that a child should know, in such a situation, with whom the ultimate say lies, and not be afforded the opportunity of playing one parent off against the other.'

(At 730J.) This approach is obviously salutary in resolving deadlocks and the many disputes which might arise in families without the necessity of recourse to the Courts, but if the situation can be so regulated that the threatened dangers of deadlock or disagreement are removed insofar as it is possible to do so, then the need for the ruling of one authoritarian person recedes considerably.

In my view, the fact that a child should know 'where it stands' is not the only consideration of importance. It is part of the pattern for a child's future which a Court attempts to construct which has to be balanced against the great benefits to be obtained when both

Page 13 of [2003] JOL 11028 (T)

parents contribute on a regular and reasonably equal basis to the upbringing of the child. I have no doubt that most children who love their parents as deeply as the children in this case appear to, would always choose to have the kind of contact with both parents which they have enjoyed before divorce. If that contact will inevitably lead to further instability in the lives of the children, then it should not be permitted. No one can predict the future, or say that deadlock between plaintiff and defendant will inevitably arise."14

[17] In England joint custody was frequently awarded until the passing of the Children's Act of 1989 in terms of which the parental responsibility of both parents now continues after divorce unless a different approach is called for.

[18] In the United States of America the judicial trend is that if it is found to be in the child's best interest joint custody must prevail even though the parents have not agreed to it.

[19] Joint custody has been seen as potentially contributing to the promotion of children's rights and the equality between the sexes.

Page 14 of [2003] JOL 11028 (T)

It is argued that a child has the right to know and to be cared for by both his or her parents and to maintain personal relationships with both parents on a regular basis. Joint custody ensures precisely this sort of relationship in that it signals to the child that he or she is wanted, loved and looked after by both parents.

There is another advantage in the awarding of joint custody. Because it is not a result of the normal "winner takes all" approach joint custody may also prevent problems of non-support arising out of bitterness over the custodial decision where one parent feels deprived of his or her right to be involved with their child.15

[20] It has been pointed out that there is by no means unanimity about the role of joint custody in promoting substantive equality between men and women.16 It is argued that the effect of a joint custody order is often to lock women into a dependency relationship with their former spouses. The parent who does not live with the child, usually the father, is given authority and control over decisions affecting the child and thereby also to some extent authority and

control over the other parent. The caretaking parent, usually the mother, has significantly diluted powers in that she is obliged to consult the other parent whilst bearing all the responsibilities of the daily care of the child with little if any real assistance from the other parent. In spite of this argument I am of the view that a preference for joint custody will help to reshape the gender roles within parenthood.17

[21] The various arguments against joint custody awards (especially joint legal custody as opposed to joint physical custody) do not to my mind serve the best interests of the children. In this particular case the argument is that the ongoing hostility and conflict between the parties indicates that it would be better for the children if one parent were given authority over them. I do not think that the hostility between the parents would cease should the joint custody order be changed to a sole custody order. It has been pointed out that the traditional award of custody to one parent is no guarantee against ongoing conflict between the parties.18 If one considers the changing roles and responsibilities of parents coupled with the

relatively new concept of children's rights within the family structure, rights which include the maximum amount of contact with both parents, as I am of the view that a more liberal approach to the granting of joint custody may not be inappropriate. I do not believe that general hostility between the parents should be a bar to a joint custody order.

[22] As long as both parents are fit and proper persons, it is important that they should have equal say in the raising of their children. This is exactly what a joint custody order allows. One has to weigh up whether input from both parents, even if that input is at times disharmonious, is not preferable to an uninvolved parent. Disagreement and negotiation are a part of life and generally no more so after the divorce than before. Unless the disagreement is of such a nature that the child is put at risk either physically or emotionally, it still seems preferable for the child to learn to deal with the ups and downs of two involved parents, than to lose half of his or her rightful parental input. To my mind a joint custody order would not only promote the rights of children subsequent to

the divorce of their parents but also help establish equality between the sexes.

[23] In view of what is said above I am of the opinion that in this particular case the best interests of the children will be served by keeping the joint custody order intact.

[24] In view of the fact that the respondent and the children live far apart I think it is imperative to keep as much contact as possible between the respondent and the children. I therefore agree that the respondent's counter-application regarding access should at least partly be granted and make the following order:

1.

The applicant's application is dismissed with costs.

2.

The respondent should have reasonable access to the children which access shall include the following:

(i)

every short school holiday;

(ii)

half of every long school holiday;

(iii)

daily telephonic access;

(iv)

access on one weekend every two months;

(v)

an order that the applicant will be responsible for paying one half of the travelling costs of the children to the respondent every second month;

(vi)

access to the children every other long weekend;

3.

The applicant is ordered to pay the costs of the application including the costs of the counter-application.

Footnotes

1

Boberg's Law of Persons and the Family (2 ed) p 313.

2

The South African Constitution (Act 108 of 1996) specifically enshrines children's rights in Act 28 which provides as follows:

"(1)

Every child has the right–

(a) to a name and a nationality from birth;

(b) to family care or parental care, or to appropriate alternative care when removed from the family environment;

(c) to basic nutrition, shelter, basic health care services and social services;

(d) to be protected from maltreatment, neglect, abuse or degradation;

(e) to be protected from exploitative labour practices;

(f) not to be required or permitted to perform work or provide services that–

(i) are inappropriate for a person of that child's age; or

(ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;

(g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be–

(i) kept separately from detained persons over the age of 18 years, and

(ii) treated in a manner, and kept in conditions, that take account of the child's age;

(h) to have a legal practitioner assigned to the child by the state, and at state expense, if substantial injustice would otherwise result; and

(i) not to be used directly in armed conflict, and to be protected in times of armed conflict.

(2) A child's best interests are of paramount importance in every matter concerning the child.

(3) In this section 'child' means a person under the age of 18 years."

3

Belinda van Heerden & Brigitle Clark "Parenthood in South African Law – Equality and Independence? Recent Developments in the Law Relating to Guardians" (1995) 111 SALJ 140.

4

Birch v Birch 1986 (1) SA 670 (E) at 672C and Mattee v McGregor, Auld and another 1981 (4) SA 637 (Z) at 640D–F.

5

1985 (3) SA 235 (C).

6

Schlebush v Schlebush 1988 (4) SA 548 (E) at 551.

7

The article entitled joint custody appearing in (1987) 104 EAST LJ, at 149. Ivan Schäfer "Joint Custody" (1987) 104 SALJ 149.

8

1993 (1) SA 763 (D).

9

1994 (2) SA 725 (D).

10

Corris v Corris 1997 (2) SA 930 (W).

11

V v V 1998 (4) SA 169 (C).

12

Page 179A–F.

13

See p 191D–I.

14

The court aided joint custody in spite of the apparent risks involved.

15

See articles 7 and 9 of the United Nations Convention on the Rights of the Child. Sheila FG Schwartz "Towards a Presumption of Joint Custody" (1984–85) 18 Family LQ 225 at 2312 40 Kaganas in Murray "Gender and the New South African Legal Order" 169 at 175 Clark and Van Heerden op cit (1995) 112 SALJ 315 at 319.

16

Clark and Van Heerden op cit (1995) 112 SALJ 315 at 320.

17

See Cathryn T Bartlett and Carol D Stack "Joint Custody, Feminism and the Attendancy Dilemma" in Fallberg Joint Custody 63 at 86.

18

Boberg's (supra) p 557.