

McCALL v McCALL 1994 (3) SA 201 (C)

Citation	1994 (3) SA 201 (C)
Case No	369/91
Court	Cape Provincial Division
Judge	King J
Heard	June 2, 1993; June 3, 1993; June 7, 1993; June 8, 1993; June 9, 1993; June 10, 1993; October 14, 1993; October 15, 1993; October 16, 1993; October 17, 1993; October 18, 1993; October 19, 1993; October 21, 1993; October 25, 1993; October 26, 1993; October 27, 1993; December 8, 1993; December 9, 1993
Judgment	January 14, 1994
Annotations	<input type="checkbox"/>

Flynote : Sleutelwoorde

Husband and wife - Divorce - Custody of children - Application by non-custodian parent for variation of consent paper (made an order of Court) granting custody of minor child to other parent - Onus on non-custodian parent to show that existing situation detrimental to child's interests and that variation of custody arrangement would be to child's advantage - What is in the best interests of the child - Factors or criteria to be applied in determining such best interests - When Court to have regard to child's preference.

Headnote : Kopnota

In an application by a divorced non-custodian parent for the variation of a consent paper, which has been made an order of Court, granting custody of a minor child to the

1994 (3) SA p202

other parent, the *onus* rests on the non-custodian parent to show that the existing situation is detrimental to the child's interests and that a variation of the custody arrangement would be to the child's advantage. (At 204I.)

In determining what is in the best interests of the child, the Court must decide which of the parents is better able to promote and ensure its physical, moral, emotional and spiritual welfare. This can be assessed by reference to certain factors or criteria, namely:

- (a) the love, affection and other emotional ties which exist between parent and child and the parent's compatibility with the child;
- (b) the capabilities, character and temperament of the parent and the impact thereof on the child's needs and desires;
- (c) the ability of the parent to communicate with the child and the parent's insight into, understanding of and sensitivity to the child's feelings;
- (d) the capacity and disposition of the parent to give the child the guidance which he requires;

- (e) the ability of the parent to provide for the basic physical needs of the child, the so-called 'creature comforts', such as food, clothing, housing and the other material needs - generally speaking, the provision of economic security;
- (f) the ability of the parent to provide for the educational well-being and security of the child, both religious and secular;
- (g) the ability of the parent to provide for the child's emotional, psychological, cultural and environmental development;
- (h) the mental and physical health and moral fitness of the parent;
- (i) the stability or otherwise of the child's existing environment, having regard to the desirability of maintaining the *status quo*;
- (j) the desirability or otherwise of keeping siblings together;
- (k) the child's preference, if the Court is satisfied that in the particular circumstances the child's preference should be taken into consideration;
- (l) the desirability or otherwise of applying the doctrine of same sex matching;
- (m) any other factor which is relevant to the particular case with which the Court is concerned. (At 204I/J-205G.)

With reference to the child's preference ((k) above), if the Court is satisfied that the child has the necessary intellectual and emotional maturity to give in his/her expression of a preference a genuine and accurate reflection of his feelings towards and relationship with each of his parents, in other words to make an informed and intelligent judgment, weight should be given to his/her expressed preference. (At 207H-I.)

In casu, an application in a Provincial Division for the variation of a consent paper, where the evidence revealed a strong bond between the parties' son, R, aged 12 years, and his father, the applicant, such bond being stronger than that between the child and his mother; where witnesses testified to the excellent relationship and mutual understanding existing between R and his father; where the Court was particularly impressed with the easy communication between father and son and had no reason to doubt the applicant's understanding of R and his needs and his ability to cater for these; and where R, found by the Court to be an intelligent, articulate, persuasive, sincere, candid and mature child, capable of forming and expressing an intelligent and informed judgment on what he subjectively perceived to be in his best interests, had persistently expressed a strong desire, indeed longing, to go and live with his father, the Court held that, making due allowance for the fact that R was still of tender years, that he was expressing a subjective view and that he might well have been influenced to some extent by the views of others, although there was no indication of this, still less of any overt manipulation of the child, R's expressed statements and views came across to the Court as his own, genuine and accurate reflection of his feelings towards and his relationship with each of his parents, and that the Court was satisfied that it could and should give weight to his preference for his father so clearly and firmly expressed. (At 208D-E/F.)

The Court went on to hold that, although the respondent offered R the loving, nurturing rearing of a child which was the traditional and natural role of a mother, and that she had done it well, R had now reached the stage of his development, at the doorstep of puberty,

where his need for the discipline and guidance of a father was greater than his need for the protectiveness of a mother: R was ripe for his father and

1994 (3) SA p203

KING J

needed the masculine environment. The Court was accordingly satisfied that R's best interests would be served by placing him in the custody of his father. Since, however, this arrangement was new and unchartered, it would be appropriate if it was to be monitored by the Family Advocate. (At 208F/G-G read with 206I-J and 209A/B-B.)

Case Information

Application for the variation of a consent paper granting custody of a minor child to the respondent. The facts appear from the reasons for judgment.

W A King for the applicant.

J G Dickerson for the respondent.

Cur adv vult.

Postea (January 14).

Judgment

King J: There is available in the United States of America a greeting card with which persons whose marriage has been terminated advise their friends with the words 'The war is over, we are divorced'. The parties were divorced on 28 February 1992, but sadly the war is not over. The particular battle which has been fought out in this Court concerns the custody of one of the two children of the marriage, the son of the parties, Rowan, born on 18 February 1982. There is also a daughter, Rorie, aged 14 years, who is and will remain in the custody of her mother (respondent).

In view of the unremitting enmity between the parties, it is as well to remind them that the Court is determining what is in the best interests of their child. The Court is not adjudicating a dispute between antagonists with conflicting interests in order to resolve their discordance. The Court's concern is for the child.

Lest this admonition should convey the impression that the parties are two unfeeling and selfish brutes, let it immediately be said that both are essentially fine and decent persons, of good repute and background. Neither can be described as an unfit parent and I accept that both are motivated by what they believe to be in the best interests of their child. The sadness is that this matter could not be settled on an amicable basis, resulting in this arduous and costly litigation to the detriment of the parties and their already miserable relationship with each other and also the cause of great anguish and sorrow to Rowan.

Applicant and respondent were married to each other on 6 October 1972. Applicant is 55 years of age and respondent is aged 50. Both are schoolteachers by profession. In 1989 the parties separated, with both children remaining in respondent's *de facto* custody. An attempted reconciliation early in 1990 failed, and in April 1990 the parties again separated, the children remaining in respondent's custody.

Applicant removed the children from respondent's custody on 22 April 1990, which provoked at the instance of respondent an urgent application before this Court, pursuant whereunto respondent was awarded interim custody of the two minor children. From that time both children have been in the custody of respondent.

In January 1991 applicant instituted divorce proceedings wherein he

1994 (3) SA p204

KING J

claimed, *inter alia*, an order awarding custody of the two minor children to respondent. The divorce action was set down for hearing on 24 February 1992. On 11 February 1992 applicant indicated for the first time that he intended making application for the custody of one or both of the children. The matter was referred to the Family Advocate, who appointed Dr Gillian Mudie to conduct an investigation and she produced two reports on 19 and 21 February 1992.

On the strength of these reports applicant launched an urgent application on 24 February 1992 in which he sought a postponement of the action and an order awarding him interim custody of Rowan.

That application and also the divorce action were subsequently settled in terms of a consent paper which was made an order of Court on 28 February 1992, and in terms whereof in the first instance custody of both children was granted to respondent.

The consent paper, however, created a mechanism involving the appointment of a psychologist, firstly, to provide counselling to the parties and/or the children in an attempt to resolve the parental conflict, and, secondly, to enable the psychologist to monitor the family on an ongoing basis, investigate the best interests of both children and advise accordingly.

The appointed psychologist was obliged, in the event of his at any stage deciding that the best interests of Rowan would be served by placing him in the custody of his father, to make a recommendation to this effect in a written report.

Mr Larry Loebenstein was appointed as the psychologist/counsellor in terms of the consent paper and on 7 September 1992 he recommended that with effect from 1 January 1993 Rowan should be placed in the custody of applicant. This recommendation was not acceptable to respondent and in the event the present application was launched on 15 October 1992.

It was argued on behalf of the applicant that, insofar as the consent paper provided that the question of the custody of Rowan was subject to determination by the appointed psychologist, and he had decided that Rowan should go to his father, in these proceedings respondent bears the *onus* of showing that the decision of the psychologist should not be adhered to, in other words, that it is respondent who in essence seeks variation of the order of Court and that the *onus* is accordingly on her. Compare *Stock v Stock* 1981 (3) SA 1280 (A) at 1290F.

It is conversely respondent's case that it is applicant who is seeking a variation of the order in terms whereof the custody of Rowan was awarded to her and that applicant has accordingly to satisfy the Court that the order should be varied. Insofar as the interests of the child provide the criterion by which the Court's decision is to be made, the *onus* is

perhaps less a decisive factor than is ordinarily the case, but in my view that *onus* rests on the non-custodian parent, here the applicant, to show that the present situation is detrimental to the child's interests and that a variation of the custody arrangement would be to the child's advantage.

In determining what is in the best interests of the child, the Court must decide which of the parents is better able to promote and ensure his physical, moral, emotional and spiritual welfare. This can be assessed by

1994 (3) SA p205

KING J

reference to certain factors or criteria which are set out hereunder, not in order of importance, and also bearing in mind that there is a measure of unavoidable overlapping and that some of the listed criteria may differ only as to nuance. The criteria are the following:

- (a) the love, affection and other emotional ties which exist between parent and child and the parent's compatibility with the child;
- (b) the capabilities, character and temperament of the parent and the impact thereof on the child's needs and desires;
- (c) the ability of the parent to communicate with the child and the parent's insight into, understanding of and sensitivity to the child's feelings.
- (d) The capacity and disposition of the parent to give the child the guidance which he requires;
- (e) the ability of the parent to provide for the basic physical needs of the child, the so-called 'creature comforts', such as food, clothing, housing and the other material needs - generally speaking, the provision of economic security;
- (f) the ability of the parent to provide for the educational well-being and security of the child, both religious and secular;
- (g) the ability of the parent to provide for the child's emotional, psychological, cultural and environmental development;
- (h) the mental and physical health and moral fitness of the parent;
- (i) the stability or otherwise of the child's existing environment, having regard to the desirability of maintaining the *status quo*;
- (j) the desirability or otherwise of keeping siblings together;
- (k) the child's preference, if the Court is satisfied that in the particular circumstances the child's preference should be taken into consideration;
- (l) the desirability or otherwise of applying the doctrine of same sex matching, particularly here, whether a boy of 12 (and Rowan is almost 12) should be placed in the custody of his father; and

- (m) any other factor which is relevant to the particular case with which the Court is concerned.

Before considering the various above-stated criteria, it will be appropriate to make certain general observations. Firstly, there is a general *consensus* between the lay witnesses and also the expert psychologists that neither of the parties is a bad parent. Indeed, the view of the psychologists was that both were good and fit parents. Reyner van Zyl, called on behalf of respondent, stated that there was a slight difference of emphasis between his view and that of the psychologists called on behalf of applicant, Mr Loebenstein and Dr Mudie. Faye Heald, called by respondent, was concerned, as was Mr Van Zyl, with applicant's temper. Otherwise her preference for respondent was based on factors not directly concerned with the personal qualities of the parties.

Mr Van Zyl's preference for respondent as custodian was largely influenced by his perception of the frequency and intensity of applicant's temper. This, and I shall deal with it more specifically in due course, was not regarded by either Mr Loebenstein or Dr Mudie as a factor which negates applicant's claim to custody.

The first of the criteria enumerated above, (a), may be taken together with the second, (b), and the third, (c), as constituting an enquiry into the

1994 (3) SA p206

KING J

bonding between the child and each of his parents. In this context it must immediately be said that both parties love Rowan very deeply and that this is reciprocated. Rowan undoubtedly loves both his parents, but I am satisfied that, certainly from Rowan's side, the bond between child and father is stronger than that between him and his mother. This is not only to be deduced from Rowan's strong desire, indeed longing, to go and live with his father, but also from the evidence of numerous of applicant's friends, some of them friends also of respondent's, who testified to the excellent relationship and mutual understanding that exists between Rowan and his father. I refer here particularly to the evidence of Mrs De Klerk, Dr Penman and Mr Cook. This is also the view of the psychologists, and it was obvious to me from hearing applicant's evidence and from what Rowan said to me when we met. In my view there is a strong bond between applicant and Rowan. I am particularly impressed with the easy communication between father and son and I have no reason to doubt applicant's understanding of Rowan and his needs and his ability to cater for these. Applicant has been described as a role model for Rowan. Applicant is a man's man. He has a love of the outdoors and participates in manly activities. Rowan loves to join his father and identifies with him. In short, he idolises his father.

The character and temperament of applicant was attacked on two grounds, that he has a quick temper and that he is not honest. Applicant has a temper, of that there is no doubt. Instances of his loss of temper were detailed in evidence and applicant candidly admitted as much. On the other hand, friends and teaching colleagues of applicant, some of whom have known him for years, have never seen any displays of temper. Much of applicant's loss of temper was directed at respondent, particularly during the marriage, and was obviously a result of the strife that existed between them. Occasionally this anger has been directed at Rowan. There was an occasion deposed to by Mrs Davies, his class teacher at the time, and there was an incident when Rowan disobeyed his father and received corporal

punishment, and there were one or two other instances alluded to in the evidence. These did nothing to impair the relationship between Rowan and his father and I do not regard applicant's temper as an impediment to his suitability as Rowan's custodian.

The same may be said of applicant's alleged dishonesty. At times during nearly four days in the witness box, during the bulk of which applicant was under searching cross-examination, he departed from the truth. Applicant also misled the Legal Aid Office when, during the course of the trial, he applied for legal aid. I prefer to take a practical and pragmatic rather than a puritanical view of these lapses. Applicant was fighting for his child. It is a cause in which he believes passionately. What he did was human and I do not regard this as a blot on his character such as to diminish his claim to acceptability as a custodian parent.

Respondent is a good woman and a good mother. She can also become angry at times, both in the home and in the school. What she offers Rowan is the loving, nurturing rearing of a child which is the traditional and natural role of a mother and respondent has done it well. I believe, however, that Rowan has now reached the stage of his development, at the doorstep of puberty, where his need for the discipline of a father is greater than his need for the protectiveness of a mother.

1994 (3) SA p207

KING J

As to (d), there is nothing to suggest that either parent lacks the capacity or disposition to give Rowan guidance. In my view Rowan has reached the stage of his development where the guidance of his father is more necessary for him.

As for the creature comforts and economic security (e), there is not a great deal to choose between the parties. Respondent is somewhat better off financially and her house is in what might be described as a better area, but applicant's home and the arrangement he is able to make for Rowan are quite satisfactory and applicant is able to provide adequately for Rowan's material needs.

As to (f), the parties agree that Rowan is to remain at his present school, St George's, where his reports show his performance to be continuously improving. His secular education is assured. Religion plays rather more of a part in respondent's life but applicant will see to Rowan's religious education and, of course, St George's is a church school.

As to (g), Rowan's general development, there again there is in my view nothing to choose between the parties, both of whom are able to see to this. However, the type of development which Rowan needs and will need increasingly as he gets older can in my view be better provided by applicant.

As to (h), both parents are in good health mentally and physically and neither is in my view morally unfit either as a parent or otherwise.

As to (i), Rowan's existing environment, namely his mother's home, is not providing him with the emotional stability he requires. Rowan's own behaviour manifests this. I am not attributing fault to anyone in particular. It is the result of a number of factors, not least the struggle between his parents. The relationship between Rowan and his sister, Rorie, is not good; it has apparently been worse, but the desirability of not splitting siblings, (j), is definitely not a factor in this instance. Rowan's attitude towards his sister is negative and

Rorie's attitude towards her brother is at best neutral.

As to (k), Rowan's preference and the weight, if any, to be given thereto, Mr *Dickerson*, who appeared for respondent, referred me to the judgment of Flemming J, as he then was, in *Greenshields v Wyllie* 1989 (4) SA 898 (W) , where the learned Judge expressed the view that the Court is not inclined to give 'much weight' to the preferences of children of 12 and 14. On the other hand it is clear from such decisions as *French v French* 1971 (4) SA 298 (W) at 299H; *Manning v Manning* 1975 (4) SA 659 (T) at 661H and *Märtens v Märtens* 1991 (4) SA 287 (T) at 294-5 that, if the Court is satisfied that the child has the necessary intellectual and emotional maturity to give in his expression of a preference a genuine and accurate reflection of his feelings towards and relationship with each of his parents, in other words to make an informed and intelligent judgment, weight should be given to his expressed preference. I do not, with respect, understand Flemming J to differ from this view.

On the afternoon of 20 December 1993, after judgment had been reserved, I had a talk, *tête-a-tête* with Rowan. This was at the request of applicant and without objection by respondent, whose attitude towards the meeting was neutral. This is unsurprising since Rowan had persis

1994 (3) SA p208

KING J

tently expressed to anyone who cared to listen to him an emphatic preference for living with his father. As expected, this preference was repeated to me explicitly and positively by an intelligent, articulate, persuasive, sincere and candid child who displayed to me a degree of maturity and intellectual development that satisfied me that he is capable of forming and expressing an intelligent and informed judgment on what he subjectively perceives to be in his best interests. Rowan contrasted the calmness and happiness which he experiences with his father with the unease and tension which he feels with his mother. He recognised what he described as the need to learn to mature, which he felt would be better served by the paternal environment rather than in the maternal domain where he felt his mother to be over-protective and too motherly. Rowan on more than one occasion during the interview stressed to me the strain which he is under in his mother's home and the ease of his relationship with his father and said to me that he did not know what he would do if he was not placed in his father's custody. As he put it to me, 'I really need my dad'.

Making due allowance for the fact that Rowan is still of tender years, that he was expressing a subjective view and that he may well have been influenced to some extent by the views of others, although there was no indication of this, still less of any overt manipulation of the child, Rowan's expressed statements and views came across to me as his own genuine and accurate reflection of his feelings towards his relationship with each of his parents. I am satisfied that I can and should give weight to his preference for his father so clearly and firmly expressed.

As to (l), the question is whether Rowan, about to turn 12, should be placed in the custody of his father by reason of the fact that he is a boy. This was central to Mr Loebenstein's recommendation that custody should be awarded to applicant, and it was also regarded as important in the view of both Mr Van Zyl and Dr Mudie. It is based on the premise that boys as they grow older should be placed with their father. It is a well-established proposition. In my view it is of particular application here. Rowan is, so to speak ripe, for his father. He

needs the masculine environment, including the discipline that his father will provide. With his mother Rowan is in an all-female environment, his mother, his sister, his grandmother and to a lesser extent his aunt. The only male person with whom Rowan has come into contact with in the maternal milieu is a Mr Chant, a friend of respondent, who is many years younger than she and who suffers from some form of brain damage. Far from being a male role model for Rowan he is a negative factor, so much resented by Rowan and his sister that respondent has arranged that his visits take place after the children have gone to bed, thereby avoiding contact between them.

There is one other factor. It is implicit in what has been said above. If this Court rules that he is to remain in the custody of his mother, Rowan will be devastated. He told me of the strain he is under in his mother's home; he desperately wants to go to his father. This is not just a child's whim, nor is this a child who has been bought over by an indulgent father; quite the contrary. I am satisfied that it is in Rowan's best interests that effect be given to this longing on his part. If there had been any compelling reason for not giving effect to Rowan's wishes, a reason such as to indicate that it would nevertheless not be in his interests, that reason would have

1994 (3) SA p209

KING J

had to prevail, the deleterious effect it would have had on Rowan notwithstanding. There is, however, no such reason.

I am satisfied that Rowan's best interests will be served by placing him in the custody of his father. Because this arrangement is new and uncharted, it would be appropriate if it was to be monitored by the Family Advocate. This was suggested by applicant's counsel, and the Family Advocate has expressed her willingness for her office to undertake this role.

As I have said, both parents have, in contesting this case, acted in what they believe to be the best interests of their child. There is no winner and no loser. There are two concerned parents. I intend to make no order as to costs. The effect of this is that each party will bear their own costs. Mr *Dickerson* asked for a special costs order in respect of a Rule 35 application that was brought during the course of the proceedings. There is in my view insufficient in this regard to justify any departure from the order which I propose to make.

It is generally agreed that midweek access is disruptive and should be discontinued. However, the precise nature of the other access was not debated at the trial and I am not sure whether the parties wish the prevailing access to remain, namely three out of every four weekends, and the school holidays, as provided for in the existing consent paper, or whether access should be limited to the more usual alternate weekends, and school holidays as heretofore. The legal representatives of the parties can advise me of this. My main concern has been to deliver this judgment prior to the commencement of the school year.

It is ordered:

- (a) Paragraph 2.2-9 of the deed of settlement between the parties dated 27 February 1992 and incorporated in the order of this Court dated 28 February 1992 are deleted.

(b) In substitution therefor:

- (i) Plaintiff (applicant in these proceedings) shall have custody of the minor son of the parties, Rowan.
 - (ii) Defendant (respondent in these proceedings) shall have access to Rowan as later determined.
- (c) (i) The Family Advocate is to monitor applicant's exercise of custody aforesaid for so long as such monitoring is in the opinion of the Family Advocate necessary.
- (ii) The Family Advocate is requested to report to this Court on the aforesaid exercise of custody on 1 August 1994 or before that date if deemed necessary by the Family Advocate.

(d) No order is made as to the costs of these proceedings.

Applicant's Attorneys: *Miller, Gruss, Katz & Traub*. Respondent's Attorneys: *Brian Musto*.

1994 (3) SA p210

DU TOIT v PROKUREURSORDE VAN DIE ORANJE-VRYSTAAT 1994 (3) SA 210 (O)

Citation 1994 (3) SA 210 (O)
Case No 390/94
Court Oranje-Vrystaatse Provinsiale Afdeling
Judge Wright R
Heard March 10, 1994
Judgment March 10, 1994
Annotations 
