REPUBLIC OF SOUTH AFRICA

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number: 18/2001
Reportable

In the matter between:

RD JACKSON Appellant

and

DG JACKSON Respondent

CORAM: HEFER ACJ; MARAIS and SCOTT JJA; CLOETE and BRAND AJJA

HEARD: 5 NOVEMBER 2001

DELIVERED: 29 NOVEMBER 2001

SUMMARY

Variation of custody order after divorce – onus; factors relevant where custodian spouse wishes to emigrate with the children.

JUDGMENT

CLOETE AJA:

INTRODUCTION

[1] The appellant is the father of two girls Danica and Tasya now aged nine-and-a-half and seven years respectively. The respondent is the girls' mother. The parties were previously married. They divorced on 22 December 1998. The appellant brought an action for leave to remove the children from South Africa in order to emigrate to Australia.

[2] In May 2000 leave was granted by the judge of first instance (Jappie J) who gave the following order:

> '1. The plaintiff is authorised to remove the two minor children born of the previous marriage namely:-
>
> Danica Skye Jackson and Tasya Erin Jackson permanently from the jurisdiction of this court for permanent residence in Australia.
>
> 2. That insofar as it may be necessary, the defendant is directed forthwith to sign all such documents and take all such other steps as are necessary to enable the plaintiff lawfully to remove the children from the Republic of South Africa, failing which the sheriff of this Court is authorised to take all such steps on her behalf.
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> 3. That the access provisions pertaining to the minor children contained in the final order of divorce under Case Number 10189/98 is varied by the deletion of paragraph 3 and substituted therefor is the following:-
>
> 3.1 It is recorded that the children would live permanently with the plaintiff in Australia.
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> 3.2 The defendant shall have access to the children as follows:-
>
> 3.2.1 Reasonable rights of access to the children in Australia whenever the defendant happens to be in the place where the children reside.

3.2.2 For a three week period in South Africa to coincide as far as possible with the children's mid-year school holiday, as well as a four week period in South Africa to alternate between 20th December and 17th January on the one hand and 2nd January to 30 January on the other each alternate year.

3.2.3 Regular telephonic access with the children at such reasonable times as the defendant wishes to speak to them.

3.2.4 Access as provided in 3.2.2., or any portion thereof, may be exercised in Australia if the defendant so wishes.

3.3 The plaintiff shall be responsible for making the necessary travelling arrangement for the children for those access periods during which the defendant intends to exercise her rights as aforesaid and shall notify the defendant in writing one calendar month before the proposed access period for such travelling arrangements. The travelling costs incurred in respect of the children for the purposes of such access shall be borne by the plaintiff.

3.4 The defendant shall notify the plaintiff in writing prior to exercising her rights of access precisely where she will spend her time with the children and would furnish him with the relevant addresses and telephone numbers so that he can contact them. The plaintiff shall have the right to have telephonic contact with the children during the defendant's access period.

3.5 The plaintiff shall furnish the defendant at regular intervals with copies of the children's school reports and photographs. The plaintiff furthermore will encourage the children to correspond regularly with the defendant.

3.6 The plaintiff is directed, at his own cost to take all steps necessary to cause this order to be made an order of the Family Court having jurisdiction in Australia and/or such other steps as may be

necessary as to ensure that this order is enforceable in Australia, and to provide proof thereof to the defendant as soon as such order of the said Family Court has been granted and/or such other necessary steps have been taken.

4. Each party is to pay their own cost of these proceedings.'

[3] The order given by the trial court was overturned by the full court of the Natal Provincial Division (Levinsohn J; Booysen J and Moleko AJ concurring). The appellant now appeals further with the special leave of this Court.

[4] The divorce was unopposed. Custody of the girls was granted to the appellant. Generous rights of access were accorded to the respondent, who was entitled to have the girls every Monday, Tuesday and Wednesday from 5:30 pm to 7 am the following morning and every alternate Sunday from 7 am until 7 am the following Monday; and also for alternate school holidays (the December holiday being divided into two periods).

ONUS

[5] The relief sought by the appellant of necessity involved a variation of this order and the appellant accordingly bore the onus of showing on a balance of probabilities that such a variation should be granted[1], although it must immediately be said that because the interests of minor children were involved, the litigation really amounted to a judicial investigation of what

[1] *Bailey v Bailey* 1979(3) SA 128(A) at 135D-136D; *Stock v Stock* 1981(3) SA 1280(A) at 1290G-H.

was in their best interests: the court was not bound by the contentions of the parties and was entitled *mero motu* to call evidence[2].

[6] The guiding principle in matters such as the present, as indeed in all cases involving children, is that the interests of the children are paramount. That approach is apparent from previous decisions of this Court[3] and it is now entrenched in the Constitution[4], section 28(2) of which provides:

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

Nevertheless, where a matter goes on appeal, the general principle that a court of appeal must of necessity be guided by the trial judge's impression of the witnesses does not cease to be of application. As Innes CJ said in *Oberholzer v Oberholzer* 1921 AD 272 at 274:

> 'These matrimonial causes throw a great responsibility upon a judge of first instance, with the exercise of which we should be slow to interfere. He is able not only to estimate the credibility of the parties, but to judge of their temperament and character. And we, who have not had the advantage of seeing and hearing them, must be careful not to interfere, unless we are certain, on firm grounds, that he is wrong.'

These remarks are equally applicable to custody matters: *Cook v Cook* 1937 AD 154 at 166 and 168; *Fletcher v Fletcher* (supra, footnote 3) at 138 and *Bailey v Bailey* (supra, footnote 1) at 141 D-G.

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[2] *Shawzin v Laufer* 1968(4) SA 657(A) at 662G-663B; *B v S* 1995(3) SA 571(A) at 584I-585B.
[3] *Fletcher v Fletcher* 1948(1) SA 130(A) at 134; *Fortune v Fortune* 1955(3) SA 348(A) at 353H-354C; *Shawzin v Laufer* (supra, fn. 2) at 662G-663B; *Bailey v Bailey* (supra, fn. 1) *loc. cit.; Stock v Stock* (supra, fn. 1) at 1290F-1291C; *B v S* (supra, fn. 2) at 580B-582C, 585C-F and 586C-I; *T v M* 1997(1) SA 54(A) at 57H-I.
[4] Act 108 of 1996.

[7] I now proceed to examine the factors relevant to the decision whether it is in the children's best interests for them to emigrate to Australia with the appellant.

ADVANTAGES OF AUSTRALIA

[8] Perhaps the most significant feature of the present matter is that whilst the parties were married, they went to Australia with the express purpose of deciding whether to emigrate and they then decided that they would settle with the girls in Brisbane. Even for some six months after they were divorced, the respondent still intended to emigrate. She changed her mind for personal reasons, which had nothing to do with the welfare of the children or the suitability of Brisbane as a place to settle.

[9] Part of the appellant's evidence, given in response to questions put by the trial judge, was the following:

> 'I have no personal desire without children to migrate to Australia. I am doing it for the sake of the children because I believe it's better.
>
> And why do you believe that? ---M'Lord, it perhaps became clearer on this last visit that I did in 1999 in the difference that has occurred in my lifestyle here, in the lifestyle of average citizens of South Africa, and specifically Durban, in comparison with the upbeat change in attitude in Brisbane. I feel the people there have become happier, safer, and it's only in going there in 1996, and having gone there in 1999 that I noticed how much worse we've become, and how much more depressed people are around you, and how we've forgotten to have fun. We really have. And how suppressed my children are. How they just do not lead a normal life like I used to lead when I was a kid. Things have become – they've just become so burdened with the crime, the AIDS, the problems in education, the

concerns that their parents feel for hospitalisation, etc. It is passed on to them. So I think with all of those factors I made the decision that, in the best interests of the children, they must move at this stage ...'

[10[The learned trial judge found (and these findings were not challenged before this Court):

'The major factors which motivated the parties to emigrate and which are still the primary factors which motivate the plaintiff to leave South Africa to settle permanently in Australia are the following:-

The plaintiff has expressed his concern at the level of crime in South Africa. The plaintiff has expressed concern that he as well as his daughters may themselves become victims of violent crimes. This compels him to live a constrained and defensive mode of life. The plaintiff regards this situation as being an unhappy and unhealthy context within which the children would grow up should they remain in South Africa. There are friends who are close associates of the plaintiff who themselves had been victims of violent crimes. Among these were the girls' after-care teacher, Miss Dawn Oldfield; Miss Gale Patterson and a doctor who is a close neighbour of the plaintiff. Coupled with the concern about the crime rate in South Africa the plaintiff is concerned about the HIV infection rate in the Republic. This according to expert testimony has now grown to alarming proportions and will in the foreseeable future have considerable negative impact on the way of life of all South Africans.

It was the evidence of the plaintiff and Miss Patterson that the education system in Brisbane that would be available for the girls is, insofar as private schools are concerned, as good as, if not better, than that available in South Africa. On the evidence it would appear that there is also an excellent public healthcare system available. The social and recreational facilities and services are excellent. This evidence was not challenged.'

(The 'Miss Patterson' – actually Mrs Patterson - to whom reference is made, is a divorced mother who by now has already emigrated to Australia with her children and with whom it is the appellant's intention to set up house in Australia if allowed to emigrate with the children. Mrs Patterson and her children are well known to Danica and Tasya.)

EMOTIONAL DAMAGE

[11] It was the respondent's case that the children, particularly the younger child Tasya, would suffer emotional damage were they to be separated from her. The experts were divided on this point. So were the courts below.

[12] The learned trial judge held:

> 'A number of experts testified. They were Dr Joy Edelstein, Mr Francois De Marigny, Mrs Sally Van Minnen and Mrs Janet Killian. These experts were in agreement that a lengthy separation of the girls from their mother would be emotionally painful and especially so in the case of Tasya. It was however the opinion of Dr Edelstein and Francois De Marigny that as the bond between the defendant and the children has been firmly established, it is unlikely that a separation between the defendant and the girls would be so traumatic that it would have a lasting psychological effect. According to Marigny, the two minor children are at the optimum stage of their psycho-social development to adapt to the cultural and lifestyle changes which would occur with emigration. All the experts recommended regular contact between mother and daughters as well as on going non-physical access by the defendant to the children. Although both Janet Killian and Mrs Sally Van Minnen have expressed an opinion that it would not be in the children's interest to permit them to emigrate with the plaintiff, their opinions appear to be based largely on sympathy for the defendant. In my view,

much of their evidence has shown a bias in favour of the defendant rather than an objective assessment of the present situation'.

[13] The full court found:

'Now in the Court *a quo* the learned Judge was not impressed with Mrs Killian's evidence. He found that she displayed signs of bias in favour of the Defendant. There is much to be said for this view. Mrs Killian's opinions are to a large extent coloured by the fact that she believed that an injustice had been perpetrated against the Defendant when the Defendant was deprived by the Plaintiff of her rightful place as the custodian of the children. Notwithstanding this I do not think that her opinions can be thrust aside in their entirety. She is after all a clinical psychologist of many years standing. She has also done a specific study on questions of risk and resilience. Her opinions particularly about Tasya cannot be ignored. All the experts including the Court are looking into the proverbial crystal ball attempting to determine what is likely or unlikely to happen. Mrs Killian is adamant that Tasya taken away from her mother will suffer emotional damage. Drs Edelstein and de Marigny think it is unlikely. I am disposed to find on this record that it has been established on a balance of probability that the weight of the evidence points in the direction that there is a substantial risk factor as far as the younger child is concerned'.

[14] Because of the importance of the possible emotional damage to the children, I shall deal with the evidence in a little detail.

[15] The opinion of Mr de Marigny, a clinical psychologist called by the appellant, as to the short, medium and long term effect on the children were they to emigrate with the appellant, appears from the following passages in his evidence (given under cross-examination):

> 'In the short term if the children were to relocate with their father and whatever support system he has to Australia, there would be a period of grieving, of adjustment, but this is where my opinion of the developmental stage of the children and the information that I have to say [sic] that they are well-adjusted children, therefore their defence mechanisms are adequately formed for their ages. The degree of resilience would be, in my opinion, adequate for them to, with time, adapt to that situation. So I'm giving information based on if this were to occur whether the children would be traumatised to the point of being, let's call it being psychologically damaged or not. In my opinion, no, they wouldn't be.'
>
> ...
>
> 'M'Lord, in my opinion, if we take divorce as a given – this has happened to this family, and whatever Mr Jackson's motives are to emigrate if, in effect, the emigration is for the betterment of the children, medium and long term, it is my opinion that if the children were prepared for this move and, as the other professionals or experts have indicated, if Mr and Mrs Jackson are prepared to put in significant time, effort and energy in compensating as much as possible for this move, I do – it is my opinion that the children will adjust. If the move is a necessary move, and it happens, the ingredients for adequate adjustment appear to be there.'

[16] Mrs Edelstein, also a clinical psychologist called by the appellant, expressed the opinion that there would initially be trauma if the children were to move to Australia, although they were of an age and had a support system in their father which would help them cope adequately; that no long term emotional or psychological trauma would be caused by the move; and that their long term interests would be better served by such a move.

[17] Both Mr de Marigny and Mrs Edelstein were agreed that the optimal time to move the children was at the time of the trial. No reason to reject the

evidence of these witnesses appears from the record. In particular, the witnesses were in no way discredited in cross-examination, their expertise was not challenged and there are several examples on the record where Mrs Edelstein was at pains to be scrupulously impartial.

[18] The evidence of the two social workers called on behalf of the respondent, namely, Mrs van Minnen and Mrs Scott, need not be dealt with in any detail. The evidence of Mrs van Minnen was not relied upon in this Court. Mrs Scott, who is also a family counsellor, did express the view that if the children were not able to have regular access to their mother, they would suffer emotionally; but as she herself stressed, she had no psychological qualifications and she was constrained to agree that an expert with better qualifications than she, who had also interviewed the children for longer periods than she had, would be in a better position to express an opinion on this issue.

[19] Mrs Killian, a clinical psychologist called by the respondent, said that the probabilities were fairly good that Danica would be able to deal with the problems of emigration and that she would be able to cope in the long term; but that Tasya was still at a vulnerable age and was far more at risk in terms of her overall adaptation, and that she would blame herself for what she would see as an abandonment of her by the respondent. Mrs Killian even

went so far as to suggest in cross-examination that Tasya would require years of psychotherapy. Mrs Killian, as the trial court found and the full court acknowledged, was, however, biased. Her undoubted expertise – she had undertaken a special study of risk resilience in children, as emphasised by the full court – cannot compensate for the partiality of her approach, which inevitably detracts from the value of her evidence[5].

[20] In my respectful view there was no justification for the conclusion of the full court quoted in paragraph [13] above. On the other hand, the possibility that there may be some risk involved in the case of Tasya simply cannot be excluded: the experts were predicting the future and their discipline is not an exact science. There is in my view no real risk so far as Danica is concerned. The risk to Tasya must obviously be taken into account because of the potentially serious consequences to her; and it is of relevance to the ultimate decision which must be made, in respect of both girls, for as Diemont JA said in *Stock v Stock* (supra, footnote 1) at 1290H - 1291A:

> 'There are many factors to which the Court will have regard in determining whether the welfare of the children calls for such variation. So, for example, where there are several children in the family, it may well be deemed inadvisable

[5] *Stock v Stock* (supra, fn. 1) at 1296E-F: "An expert in the field of psychology or psychiatry who is asked to testify in a case of this nature [a custody dispute], a case in which difficult emotional, intellectual and psychological problems arise within the family, must be made to understand that he is there to assist the Court. If he is to be helpful he must be neutral. The evidence of such a witness is of little value where he, or she, is partisan and consistently asserts the cause of the party who calls him."

> to separate the siblings. Then again the Court will bear in mind that any variation in the order will have a more lasting effect on the younger children than it will on the older children who will become independent sooner and can then make their own decisions. In the case before us the older girl is now 16 years of age and likely to become independent soon; the younger girl is only 8 years old. For this reason more weight may have to be given to the effects on the younger children of an amendment of the custody arrangements in the case where the relative ages warrant this. It will be seen that it is not simply a matter of just counting heads. Furthermore the interests of one child may be seriously prejudiced by moving him to another country, whereas the other children will benefit only slightly. In such a case the prejudice to the one child may be a weightier consideration than the slight benefit to the others.'

[21] It is of course so that the sense of personal loss which the respondent will feel if her children emigrate will be profound and that, at least initially, the children will also grieve. Sadly, one's sympathy for the respondent and one's reluctance to subject the children to even temporary emotional trauma cannot be accommodated if one is convinced that the interests of the children will be served best by allowing them to emigrate with their father. Some consolation exists (although the respondent, understandably, will find that hard to accept) in the generous financial steps which the appellant is prepared to take to enable the respondent to the children spend substantial quality time with her despite the geographical distance which emigration will put between them.

THE PARENTS' PAST BEHAVIOUR

[22] A good deal of time was spent at the trial on question of whether the appellant had misled the respondent about the import of one of the social worker's reports which was obtained prior to the hearing of the action for divorce and whether that led to her agreeing to him being given custody of the children. Both courts were sceptical of both the appellant's and the respondent's evidence in that regard. Some time was also spent on the respondent's transient relationships with other men since the divorce and in particular her visit to Canada to decide whether her future lay with one of them, whilst that entailed being away from the children for three weeks at a time when they were emotionally vulnerable because of the recent separation of their parents. Little is to be gained by attempting to assess to what degree these actions merit criticism, if any. They throw no real light on what is now in the best interests of the children nor do they give reason to believe that the appellant will seek to deny the respondent the access tendered by him and embodied in the order given by the learned trial judge, or that the respondent will not exercise that access should the children emigrate to Australia with their father.

THE STATUS QUO

[23] Much was made by the full court and by counsel for the respondent of the existing arrangements regarding access which were said to be tantamount to joint custody. The access to the children which the respondent currently has is extensive and the appellant is obliged to consult her with regard to their "health, education and any child minders". However, that falls far short of joint custody. While the appellant is obliged to consult the respondent about their health, education and child minders, the ultimate decision is his to make. Moreover there are important areas of the children's lives which he alone may regulate such as what social activities are permissible; with which other children they may consort, in which other homes they may spend the night or part of school holidays; whether they may ride bicycles and the like or participate in boating, skateboarding, of rollerblading, and, if so, where. The list is not exhaustive but it suffices to show that the respondent's position cannot be equated with that of a joint custodian.

[24] The counterclaim by the respondent for a variation of the custody order was withdrawn by the respondent when the appellant made it clear that he would remain in South Africa if permission to take the children with him to Australia were to be refused. The respondent has thus chosen to

acquiesce in the appellant retaining his role as the custodian parent as long as he remains in South Africa with the children. It is true that her acquiescence cannot be taken to extend to the changed situation which would arise if permission were given to the appellant to take the children to Australia and that it might theoretically be open to her to resuscitate the issue of a variation of the custody order but, once it has been concluded that it is in the best interests of the children that they be permitted to emigrate with their father, it is quite unrealistic to suppose that any such application could succeed. It is not a situation in which it could be argued that the appellant had become, solely by reason of his emigration, an unsuitable custodian. Accordingly, an attempt to have the existing custody order varied merely by reason of the impending emigration to Australia would in reality amount to an attempt to re-open an issue which had already been resolved, namely, whether it was in the best interests of the children to go to Brisbane with their father despite the curtailment of the respondent's rights of access which that entails. It is therefore encumbent upon the court to consider the question before it on the footing that, whatever its decision may be, the appellant is and will continue to be the custodian parent.

[25] The presently existing extensive rights of access have facilitated a considerable amount of joint parenting by the parties up until now, but they

cannot be regarded as a continuing point of departure in assessing the best interests of the children as they grow older – even were the appellant to continue to reside in KwaZulu-Natal, a possibility that the trial court considered unlikely for the reasons appearing from the passage quoted in paragraph [32] below and with which I respectfully agree. The present arrangement is likely to prove increasingly disruptive for the girls. Indeed, even Mrs Killian (the psychologist called to give evidence by the respondent) expressed the view that the existing arrangement was too disruptive for the children and that alternative weeks (instead of split weeks) with each of the parents would be preferable. I have little doubt that, as the children grow older, even alternate weeks will prove irksome and disruptive to them as their educational, sporting, cultural, recreational and social horizons expand. If the best interests of the children are to prevail as the future unfolds, that is likely to lead to diminished access by the respondent.

[26] This is not a case in which it is possible to take the easy way out by saying that at present the children's best interests are not being adversely affected and that, if and when they are, it will be time enough to allow them to emigrate with their father. Emigration to Australia is not an ever present option for the appellant. Its availability will diminish as the years go by.

The potential for unhappiness and regret if the appellant and the girls do not emigrate now appears from the following evidence given by the appellant:

> 'I think to remain here, and to sit back, in five years' time when I'm no longer able to get entry into Australia ... and say, "I wish we had because we could have then but we can't now", I would feel very distressed that I'd have to tell my children that I had the opportunity, and didn't take it. If we go over, and things don't work out, we do have the option of returning. If things improve dramatically here in Africa, we have that option of returning, but I don't have the option in five years or ten years' time of leaving with the children, and making a new life for them – a suitable life for them – and we may just regret that at the end.'

As for the children, by the time they are old enough to form their own responsible judgments, and should they choose to emigrate, their prospects of being admitted entry in their own right may well be non-existent.

[27] The full court was also influenced by the separation of the children from Darren (the respondent's son of a previous marriage) which emigration would involve. In this Court counsel for the respondent correctly conceded that this was not a significant factor: Darren is now nearly 16 years of age and increasingly likely to have little in common (in terms of shared interests) with the two little girls.

[28] In short, I do not think that the presently beneficial aspects of the *status quo* should be allowed to loom so large in assessing what will be in the best interests of the children as they progress from childhood through adolescence to adulthood.

DECISION OF THE CUSTODIAN PARENT

[29] Counsel representing the appellant relied on the decision of the English Court of Appeal in *P(LM)(otherwise E) v P(GE)* [1970] 3 ALL ER 659(CA) and more particularly on the following passage which appears in the judgment of Sachs LJ at 662h-j:

> 'When a marriage breaks up, then a situation normally arises when the child of that marriage, instead of being in the joint custody of both parents, must of necessity become one who is in the custody of a single parent. Once that position has arisen and the custody is working well, this court should not likely interfere with such reasonable way of life as is selected by that parent to whom custody has been rightly given. Any such interference may, as Winn LJ has pointed out, produce considerable strains which would be unfair not only to the parent whose way of life is interfered with but also to any new marriage of that parent. In that way it might well in due course reflect on the welfare of the child. The way in which the parent who properly has custody of a child may choose in a reasonable manner to order his or her way of life is one of those things which the parent who has not been given custody may well have to bear, even though one has every sympathy with the latter on some of the results.'

[30] The approach of the English Court of Appeal in *P's* case, which has been followed in numerous cases decided subsequently[6], was explained by Ormrod LJ in *Chamberlain v De la Mare* (supra, footnote 6) at 442C-D and 443B-C as follows:

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[6] *Nash v Nash* [1993] 2 All ER 704 (CA);*A v A (child: removal from jurisdiction)* (1979) 1 FLR 380(CA); *Chamberlain v de la Mare* (1983) 4 FLR 434 at 439 (CA); *Lonslow v Henning (formerly Lonslow)* [1986] 2 FLR 378 (CA); *Belton v Belton* [1987] 2 FLR 343 (CA); *Re F (a ward)(leave to remove ward out of the jurisdiction)* [1988] 2 FLR 116(CA); *Tyler v Tyler* [1989] 2 FLR 158(CA); *Re H (application to remove from jurisdiction)* [1999] 2 FCR 34(CA).

> 'What Sachs LJ was saying, I think, is that if the court interferes with the way of life which the custodial parent is proposing to adopt so that he or she and the new spouse are compelled adopt a manner of life which they do not want, and reasonably do not want, the likelihood is that the frustrations and bitterness which would result from such an interference with any adult whose career is at stake would be bound to overflow on to children.
>
> ...
>
> The reason why the court should not interfere with the reasonable decision of the custodial parent, assuming, as this case does, that the custodial parent is still going to be responsible for the children, is, as I have said, the almost inevitable bitterness which such an interference by the court is likely to produce. Consequently, in ordinary sensible human terms the court should not do something which is, *prima facie,* unreasonable unless there is some compelling reason to the contrary. That I believe to be the correct approach.'

Thus explained, the approach of the English Court of Appeal reflects the perspective dictated by our Constitution and accords with our law. In *Bailey v Bailey* (supra, footnote 1) the court a quo said[7]:

> 'I have no doubt that applicant will be in a position to provide the children with a happier and more stable home in England than if she remains here, a lonely and discontented person longing to return to England ... I am satisfied that it is, in fact, in the best interests of these children that the mother as their custodian can establish a home for them in the country in which she desires to be and where she will be able to provide a happier and more stable home for them. A happy and contented mother is surely of the essence of a happy and stable home, and the more so where she is the custodian parent.'

[7] 1979(3) SA 128(A) at 142 B and G.

Trengrove JA said at 144D-F:

> 'Counsel submitted that the learned Judge was clearly influenced by his conviction that the respondent would become "a lonely and discontented person, longing to return to England". He argued that this was a misdirection, for the respondent has made no such allegation on the papers, and the learned Judge himself has not made any explicit finding to this effect. There is no real substance in this contention. It is a fair inference, from her statements in her affidavits, that the respondent is a most unhappy, perhaps even embittered woman, at present. She is filled with resentment against the appellant whom she blames for the breakdown of their marriage and, what is even more important, the continuing dissension between them and she is longing to return to England, with her children, to be close to her family relations; and, if she is not given permission to go, the learned Judge's description of the appellant may well come true.'

[31] The full court distinguished *P's* case on the basis that:

> 'It is not without significance that the [appellant] will remain in South Africa if he is refused permission to take the children with him. That factor removes the case from the principle which was enunciated in the case of *P(LM) v P(GE) ...'*

This was a misreading of the facts in *P's* case: in that matter the stepfather and the mother expressly indicated that should leave to take the child to New Zealand be refused, they would give up their plans to go there[8].

[32] The appellant is a civil engineer. The learned trial judge held:

> 'A further factor which has motivated the plaintiff to leave the Republic of South Africa for Australia is that he believes that his economic prospects are better in Australia. According to the evidence the economic position of companies in the civil engineering industry in which the plaintiff's companies participate has, over

[8] [1970] 3 All ER 659(CA) at 660g-h.

> the last few years, deteriorated and is particularly vulnerable to the social and economic dynamics of the present day and will continue to be so for the foreseeable future. This is particularly so in KwaZulu-Natal. In his evidence, the plaintiff pointed out that if he was unable to emigrate to Australia with the children, and were to remain in South Africa for he does not intend to leave without them, then for economic reasons, he would have to relocate from KwaZulu-Natal and in all likelihood relocate his business activities to Cape Town.'

The appellant's lack of enthusiasm for the last option is reflected in his description of it as 'a reasonable survival tactic'. The finding of the full court that 'this is not a case where a person wishes to move with the children to further his career or business prospects' accordingly requires qualification: although the appellant was prepared to subordinate his interests to those of the children, his interests (quite naturally) did play a part in his decision and his own interests would, on the undisputed evidence, be adversely affected if he were not to be permitted to emigrate with the children.

[33] Yet there was no suggestion whatever during the trial, which lasted some eight days, that the appellant would become bitter or frustrated if he remained in South Africa. Nor was this possibility so obvious that it could remain unsaid. Of course the possibility exists that the appellant may come to regret having to stay in South Africa; but in view of his actions which

have always been dictated by his opinion as to what is in the best interests of the children, and his obvious devotion to them, I do not for a moment believe that there is any real possibility that he will take out any frustrations which he may feel on them, or that he will allow any bitterness which he may feel to impact on the happy relationship which he has with them and the secure emotional environment which he has provided for them. I do not wish to be understood as saying that the appellant's altruism should be held against him, but I do not believe that in the present matter the factor much stressed in the English cases should be accorded significance, much less be decisive (as it was, with one exception[9], in the cases decided by the Court of Appeal).

[34] Reliance was also placed by the appellant's counsel on part of the dictum of Miller J (as he then was) in *Du Preez v Du Preez* 1969(3) SA 529(D) at 532C-G, approved by the majority of this Court in *Bailey's* case (supra, footnote 1) at 136 A-C. Miller J said *inter alia:*

> 'This is not to say that the opinion and desires of the custodian parent are to be ignored or brushed aside; indeed, the Court takes upon itself a grave responsibility if it decides to override the custodian parent's decision as to what is best in the interests of his child and will only do so after the most careful consideration of all the circumstances, including the reasons for the custodian parent's decision and the emotions or impulses which have contributed to it.'

[9] The exception is *Tyler v Tyler* (supra, fn.6).

This statement requires explanation. The fact that a decision has been made by the custodian parent does not give rise to some sort of rebuttable presumption that such decision is correct. The reason why a court is reluctant to interfere with the decisions of a custodian parent is not only because the custodian parent may, as a matter of fact, be in a better position than the non-custodian parent in some cases to evaluate what is in the best interests of a child but, more importantly, because the parent who bears the primary responsibility of bringing up the child should as far as possible be left to do just that. It is, however, a constitutional imperative that the interests of children remain paramount. That is the 'central and constant consideration'. [10] Accordingly, the reason why the 'custodian parent's decision and the emotions or impulses which have contributed to it' require examination, is because that decision may be egocentric or prompted by a desire to deny the non-custodian spouse access to the child – both of which may not be in the best interests of the child itself.

CONCLUSION

[35] When I have regard to the various factors discussed above, I am not persuaded that the learned trial judge was incorrect in his conclusion. I would, on the record, have come to the same conclusion. The learned trial

[10] *Cf B v S* (supra fn. 2) at 581J; *T v M* (supra, fn. 3) at 57 I.

judge had the additional advantage of seeing and hearing the parties and the expert witnesses. In matters such as the present it is not only in the assessment of credibility that the judge of first instance enjoys an advantage; that advantage extends to the assessment of the personality, sense of responsibility and good faith of each of the parents. The trial judge here has not been shown to have misdirected himself in any material respect in assessing where the best interests of the children lie nor, in my view, does the recorded evidence show him to have been clearly wrong. In my respectful opinion, there was not sufficient justification for reversing the considered decision of the trial judge. On the contrary, there was good reason to uphold it. The immediate, medium and long term advantages to the children of emigration to Australia, as they appear from the detailed evidence given in this regard, are clearly established. Indeed, the respondent herself shared that view until she decided it was not in her personal interests to emigrate. I do not consider that the possibility that Tasya may suffer emotional distress with which she may have some difficulty in coping, outweighs those advantages; or that the risk of that occurring and causing lasting psychological harm is of such an order that the interests of Danica for whom (again, I stress, on the evidence) settlement in Australia with her

father would undoubtedly be highly beneficial, should be subordinated to it. It goes without saying that there is no question of separating the children.

[36] For these reasons I would allow the appeal, with costs, and reinstate the judgment of the court of first instance by setting aside the decision of the full court, with costs.

.....
TD CLOETE
ACTING JUDGE OF APPEAL

SCOTT JA:

[1] I have had the advantage of reading the judgment of my brother Cloete. I regret that I cannot agree with the conclusion to which he has come.

[2] It is trite that in matters of this kind the interests of the children are the first and paramount consideration. It is no doubt true that generally speaking where, following a divorce, the custodian parent wishes to emigrate, a court will not lightly refuse leave for the children to be taken out of the country if the decision of the custodian parent is shown to be *bona fide* and reasonable. But this is not because of the so-called rights of the custodian parent; it is because, in most cases, even if the access by the non-custodian parent would be materially affected, it would not be in the best interests of the children that the custodian parent be thwarted in his or her endeavour to emigrate in pursuance of a decision reasonably and genuinely taken. Indeed, one can well imagine that in many situations such a refusal would inevitably result in bitterness and frustration which would adversely affect the children. But what must be stressed is that each case must be decided on its own particular facts. No two cases are precisely the same and while past decisions based on other facts may provide useful guide-lines they do no more

than that. By the same token care should be taken not to elevate to rules of law the *dicta* of judges made in the context of the peculiar facts and circumstances with which they were concerned. In my judgment the present case is one of those in which in all the circumstances leave to take the children out of the country should have been refused. I am also satisfied that the Court *a quo* was justified in setting aside the decision of Jappie J.

[3] The parties were divorced on 22 December 1998. The younger daughter, Tasya, was then only four years of age; the elder daughter, Danica, was six. The experts were agreed that both parties were good parents but differed as to who should be given custody. The matter was settled and the appellant ("the father") was awarded custody. But the extent of the access afforded to the respondent ("the mother") was such that each parent was to have the children for almost an equal amount of time each week. In terms of the consent paper the mother was to have the children for three nights one week and four nights the next. She was also to have the children every alternate Sunday. In addition, she was to be consulted on matters relating to the health and education of the children as well as in relation to their carers, presumably during the day. As I have

indicated, it was common cause that the mother is a good parent. Indeed, she was described by Mrs Joy Edelstein, a clinical psychologist who gave evidence on behalf of the father, as "a loving mother" who was "performing her task well". In these circumstances, and having regard in particular to the tender age of the children, it is difficult to imagine a court ever awarding custody to the father in the absence of an arrangement along the lines of that agreed upon.

[4] Whether such a regime may properly be called *de facto* joint custody, or shared access or whatever, is not in issue. The point is that its consequence was that both parents continued, albeit separately, to exercise their ordinary function as parents. Of importance is that following the divorce there was no separation between parent and child of the kind that normally occurs upon divorce where the access of the non-custodian parent is limited to something of the order of alternate weekends and in later years shared school holidays. As I have said, both parents continued to exercise a parenting function in relation to the ordinary day to day welfare of the children.

[5] Whatever the demerits of the present arrangement may be – and it was criticised for its disruptive effect on the children – the experts were agreed that both

children were coping well with the divorce and continued to enjoy secure attachments to both parents. Mrs Edelstein acknowledged that by reason of the amount of time the mother spent with the children the bond between mother and daughters remained intact. The relationship between them was a close one and in the case of the younger child, Tasya, her relationship with her mother, whom she found to be the major source of love, was closer than her relationship with her father. Indeed, Tasya's relationship with her mother appears to have become closer subsequent to the divorce. After making the point that initially both parents were the main object of Tasya's love, Mrs Edelstein, in her evidence in chief, added the following:

> "That has, I think, changed in the last report because it spans a whole difference of a year, and I think *now* the younger child tends to have a closer relationship – she loves both parents equally but she finds her mother the source, the major source of love." (My emphasis)

[6] Within a year of the divorce the father approached the Court for leave to take the children to Australia. The mother had by then refused to consent to the move. The father is a semi-retired civil engineer. He is a man of considerable means with business interests both in South Africa and abroad. Although it would suit him to live in

Australia, his principal reason for wishing to emigrate was his conviction that Australia was a better country in which to bring up children and that it was in their best long term interests that they make Australia their home rather than remain in South Africa. He made it clear, however, that he would not emigrate without the children and if leave were refused he would remain in South Africa. In view of his attitude, the mother withdrew her counter claim for custody.

[7] The question which ultimately had to be decided therefore was whether it was in the best interests of the children for them, at the present stage of their lives, to emigrate with their father to Australia leaving their mother back in South Africa, or whether their interests would be better served by the retention of the *status quo* with the children spending more or less equal time with each parent. As appears from the judgment of Cloete AJA, the trial Court decided that the former was in their best interests but this decision was reversed by the full bench. Before turning to the evidence of the experts there are two preliminary aspects which require consideration.

[8] The first is the contention that the present arrangement cannot in any event be maintained indefinitely and that as the girls grow older they will find it irksome and

increasingly disruptive. The answer is that whatever changes might have to be made in the best interests of the children in the future should the existing regime be left undisturbed for the present, is not in issue; nor was it properly investigated. If the father were to relocate to another city in South Africa, as he says he might, the mother may well be able to arrange for her employer to transfer her to that city. Until that happens what the solution would be in the best interests of the children is a matter of speculation. There is certainly no basis for assuming that if the children do not go to Australia the existing custody arrangement will in any event soon be varied so as to terminate the parenting function which the mother presently exercises. It was of course on the premise that the existing relationship between mother and children be maintained that the father was awarded custody in the first place. Had it been clear it could not, the award of custody may well have been different. This is especially so in the light of the tender age of the children and the acknowledged capability of the mother as a parent.

[9] The second is the fact that the mother herself had for some-while favoured emigrating to Australia. Prior to the divorce the parties had visited Australia with this in mind and had considered Brisbane to be a suitable city in which to settle.

Even after the divorce the mother continued for some months to favour emigration. But her support for Australia as a country in which to bring up the children was premised on the assumption that she herself would emigrate and that the existing custody arrangement would be maintained. Once she took the decision not to emigrate, the situation from the point of view of the welfare of the children changed entirely. Nor can her decision be categorized as unreasonable in the circumstances. To emigrate as a family, and with a wealthy husband, is one thing, but following the divorce the picture changed. She has a good job in South Africa and has been with the same employer for the past 13 years. She also enjoys the support of her family. To emigrate to Australia as a single parent with her young son from a former marriage would obviously involve considerable risk and it is understandable that she would not wish to be dependent on the appellant.

[10] Of particular importance in the present case is the fact that there has as yet been no real separation between mother and children. To this extent therefore the present case differs materially from all those where the access of the non-custodian parent is limited to something in the region of alternate weekends. Were the children to be taken to Australia the consequence would be the replacement of the mother's almost equal

parenting role with what in effect would be no more than biannual visits of a few weeks each. Mrs Edelstein accepted that if the children were to emigrate they would initially suffer a great deal of pain and trauma as a result of their separation from the mother. She thought this was justified in the light of her pessimistic view of the future of this country. It is perhaps not without significance that her husband had been the victim of a high-jacking. She was of the view, however, that the children would not suffer permanent psychological harm as a result of the separation. In support of her view, she referred to the natural resilience of children but at the same time stressed the importance of the need of the mother to maintain contact with the children. Another clinical psychologist, Mr Jean-Francois De Marigny, also gave evidence on behalf of the father. He had, however, not consulted with the children or the parties and his evidence was tendered purely on a theoretical basis. He testified that on the information made available to him the children were well bonded with both parents and were resilient. He expressed the view that provided sufficient effort were made by the mother to maintain contact with the children the traumatising effect of the separation on them would not reach the point of causing permanent damage.

[11] A different view was taken by Mrs Beverley Killian, a clinical psychologist, Mrs Sally Van Minnen, a social worker, and Mrs Rosemary Scott, the social worker and counsellor appointed by the family advocate. (Mrs Van Minnen had been engaged by the father to investigate the issue of custody at the time of the divorce, but she had recommended that the mother be awarded custody and not the father.) All three were of the opinion that the children should not be separated from their mother and therefore should not be taken to Australia. Of particular importance was the evidence of Mrs Killian. She is a clinical psychologist of many years standing with experience gained from working both in hospitals and in private practice. She is presently a senior lecturer in the department of psychology in the University of Natal. She has furthermore made a special study of risk and resilience in children which involves a study of the types of children likely to be adversely affected by the vagaries of life in contrast with those able to cope and rise up above adversity. In her view Danica was a relatively resilient child, but not Tasya whom she rated as an "at-risk" child with a poor self esteem and whose attachments were less secure than those of Danica. Furthermore, she said that Tasya was still at the stage of egocentric reasoning and would perceive the move to

Australia as an "abandonment" by her mother rather than simply a separation. In short, while recognising that it is impossible to make any definite prediction, Mrs Killian was of the view that both children would be adversely affected by the separation from their mother but, unlike Danica who would probably be able to cope, Tasya would not; she was likely to perceive the separation as an abandonment by her mother which could have serious psychological consequences for her in the future.

[12] What emerges from the evidence, viewed in its totality, is that if removed from their mother and taken to Australia both young girls, to use the words by Mrs Edelstein, will suffer "a great deal of pain and trauma". Although opinions may differ, as far as the younger child Tasya is concerned, there must, at the least, be a real risk of psychological harm. The father made it clear that his primary reason for wishing to emigrate to Australia was for the sake of the children. The question is therefore whether the advantages of a move to Australia at this stage in the lives of these young children justify the pain and trauma they will undoubtedly both experience and the real possibility of Tasya suffering psychological harm.

[13] Much evidence was adduced on behalf of the father to highlight the problems that confront South Africa at present. These included the high crime rate, the prospect of an aids epidemic and a bleak economic outlook. By contrast, much was said in praise of Australia. But no problem is insoluble and in a changing world the question whether to emigrate or not is one on which opinions differ and to which there seldom is a definite answer. Nonetheless, one must accept the genuineness of the father's assessment of the quality of life available in the two countries, both at present and in the future. The father points out that as he grows older there is a greater risk that he may not be accepted in Australia. But by the same token as the young girls grow older the trauma of being separated from one or other parent and the risk of harm will diminish. When these two considerations are weighed up I have little doubt that the inevitable pain and trauma to both children and the risk of psychological harm to Tasya far outweigh the risk of possibly not being able to emigrate when the children are older, if the circumstances still warrant such a far-reaching step.

[14] I turn to the judgment of Jappie J. After finding that the father's wish to emigrate with the children was reasonable and *bona fide*, he said the following:

> "The defendant [the mother] is a good parent and she is devoted to the welfare of her children. There is a strong bond between the girls and the defendant. However, she is the non-custodial parent. As already stated, the plaintiff [the father] who is the custodial parent has decided to emigrate with the girls to Australia. His decision to emigrate is based on factors which he considers to be in the best interest of the girls. He has come to his decision in good faith. It is a settled principle of our law that a court will not readily interfere with the responsibly and reasonably made decisions of a custodial parent."

This passage requires comment. As previously indicated, the inquiry in each case is what is in the best interests of the children. It is true that a court will not readily interfere with a decision of the custodian parent which is reasonably taken and in good faith. But it will refrain from doing so because to do otherwise would ordinarily not be in the children's best interests. In the passage quoted, the judge refers to the fact that the mother is a good and devoted parent and that there is a strong bond between mother and children, but proceeds to dismiss this as a relevant factor or at least afford it less weight because the mother is the non-custodian parent. To

afford less weight to something as important as the relationship between mother and young daughters simply because the former is the non-custodian parent is to prefer the rights of the custodian parent over the interests of the children. That is a wrong approach. It is particularly so on the facts of the present case where both parents continued to exercise a more or less equal parenting role and where there had been no real separation between children and the "non-custodian" parent. It cannot be over-emphasised that each case must be decided on the basis of its own particular facts. The question in issue was whether it was in the interests of the children that they be separated from the mother and taken to Australia. That she was the "non-custodian" parent was of no relevance to this inquiry.

[15] As far as the experts were concerned, Jappie J referred to the opinion of Mrs Edelstein and Mr De Marigny, which was that "it is unlikely that a separation between the defendant and the girls would be so traumatic

that it would have a lasting psychological effect", and then proceeded to dismiss the views of Mrs Killian and Mrs Van Minnen in two sentences. (The judgment contains no reference to the evidence of Mrs Scott.) They read –

> "Although both Janet Killian and Mrs Sally Van Minnen have expressed an opinion that it would not be in the children's interest to permit them to emigrate with the plaintiff, their opinions appear to be based largely on sympathy for the defendant . In my view, much of their evidence [has] shown a bias in favour of the defendant rather than an objective assessment of the present situation".

The evidence of both these witnesses undoubtedly called for more attention than it received. Neither the finding that their opinions were based on sympathy nor the finding of bias was in any way motivated. Both witnesses were firmly of the view that the mother, rather than the father, ought to have been awarded custody at the time of the divorce. Given the age of children, their sex and the mother's recognised parenting capabilities, such a view was

hardly unreasonable. They also suggested that the mother had been misled at the time by the father as to Mrs Van Minnen's recommendation regarding custody. The Court *a quo* found this indeed to have been the case and categorized the father's conduct as "deserving of deprecation". But whatever it was that the learned judge had in mind in saying that they were sympathetic towards the mother, I can find nothing in the record to suggest that their opinions were based on such sympathy. As far as the reference to bias and lack of objectivity is concerned, this was presumably intended to indicate that the witnesses in question were partisan and unreasonably supported the cause of the mother. This is a far reaching finding to make of a professional witness, particularly when the finding is unsupported by reasons. In my view it was unjustified.

[16] Much was made of the advantage of the trial judge who is afforded the opportunity of observing the witnesses while they testify. No

doubt this is true, but the advantage must not be over-emphasized; this is all the more so when the witness in question is a professional person such as a psychologist. As Diemont JA observed in *Stock v Stock* 1981 (3) SA 1280 (A) at 1296 F –

> "…when it comes to assessing the credibility of such a witness (a psychologist), this Court can test his reasoning and is accordingly to that extent in as good a position as the trial Court was".

[17] The evidence of Mrs Killian was of particular importance to the mother's case. As previously indicated, she is a senior academic with many years of practical experience in the field of psychology. She spent many hours consulting with both parents and the children, conducting psychological tests and generally investigating the background to the dispute. Thereafter she compiled a detailed and comprehensive report which she elaborated upon in her evidence. Her view that Tasya's separation from her mother at this stage of her life could have serious

psychological consequences for her, was fully motivated. By contrast, she expressed the opinion that Danica would probably be able to cope with the separation. I can find nothing in her reasoning to suggest bias or lack of objectivity on her part. In my view the trial judge misdirected himself by simply disregarding the evidence of Mrs Killian. The evidence of Mrs Van Minnen and Mrs Scott was of lesser importance regarding the question of psychological harm as they were social workers and not psychologists. It is accordingly unnecessary to deal with their evidence.

[18] It follows that in my view leave to take the children out of the country ought to have been refused by the trial Court and the Court *a quo* correctly set aside the decision of that Court.

[19] The appeal is dismissed with costs.

D G SCOTT

JUDGE OF APPEAL

CONCUR

HEFER ACJ
BRAND AJA

MARAIS JA/

MARAIS JA: [1] I have had the benefit of reading the judgments of both my brothers Scott and Cloete. The differing outcomes and the difference of opinion in the judgments of the Court of first instance and the court *a quo* reflect just how difficult these human (rather than legal) problems are. On balance I share the conclusion which Cloete AJA has reached. In broad my reasons are that I do not believe that sufficient justification existed for overruling the decision of the trial judge and because, in any event, my own assessment of the evidence as a whole is that it would be in the best interests of the children to allow their father to emigrate with them to Australia.

[2] In matters of this kind there are few certainties. The disruption of the existing situation which, although not ideal, is for the moment catering adequately for the children's needs and allows for continuing extensive access to their mother, is obviously not something which should be permitted unless the evidence convinces one that their best interests will be

substantially better served by tolerating the disruption. But in considering that question it is unavoidable that best estimates have to be made of the likely results of preservation of the status quo in the immediate and foreseeable future as compared with the likely results of disrupting it.

[3] Risk assessment plays a large role in the exercise and there will always be legitimate differences of opinion in such an exercise. Because of its essentially speculative nature and the unfortunate consequences for children of an assessment which the subsequent unfolding of events may prove to have been wrong, it behoves a court of course not to be too easily dismissive of identifiable risks. But, for the same reason, the comfort afforded by simply prolonging an existing situation should not lead a court to magnify such risks unduly. That is all the more so in a case where the children stand to benefit greatly if the risks do not eventuate. If a court, conscious of and responsive to these *caveats*, does conclude that the risks are

too great to be run even when measured against the undoubted benefits to the children which will accrue from emigration, it should refuse to allow emigration. If, on the other hand, it regards the risks as worth running in the interests of the children, it should allow emigration.

[4] In the present case I think that that is really the bone of contention and it is the differing assessments of the risk of permanent psychological damage to Tasya which account for the differences of opinion which exist. Although the courts which have considered the matter have contented themselves with findings that the appellant genuinely believes that Brisbane will offer the children a substantially superior quality of life both now and in the foreseeable future and that he is bona fide in wishing to take them there, they abstained (Jappie J to a lesser degree) from making any express finding as to whether, on the evidence before the court, the appellant was correct in so believing.

[5] The reluctance of courts to make or to be seen to be making findings of fact which may reflect adversely upon the quality of life in the countries in which they are situated is entirely understandable. It is an invidious task. However, if they are to do their duty by children whose future is in their hands, it is, in my respectful view, an obligation which cannot be avoided if that quality of life is the dominant reason advanced for the contention that it would be in their best interests to emigrate. That is the case here.

[6] As to that, there is really no contest on the evidence. It is the reason why the respondent herself joined in believing, even after the divorce, that the best interests of the children would still be served by relocating to Brisbane. A considerable body of evidence was placed before the court on the superior quality of life available to the children there as compared with that on offer here and there was no rebuttal of it. The comparison made did not relate to such trivia as to whether the beaches were better but to aspects

of life which are of critical and fundamental importance to the growth and development of healthy, happy and stress-free children. Nothing in that respect has changed since the respondent held, and on the evidence justifiably held, the view that a move to Australia was in the best interests of the children. All that has changed is her evaluation of her own purely personal interests. Her decision now is to give them pride of place. That of course is her right and, if her interests alone were the only consideration, hardly unreasonable, but viewed from the perspective of the children's best interests, her change of mind has given rise to a conflict of interests. Regrettably, it is the unenviable lot of the court to have to resolve the clash of interests. In doing so, it has to put the interests of the children first if the conflicting interests cannot be reconciled.

[7] I am unable to agree that Jappie J misdirected himself in the respect set forth in para [14] of the judgment of Scott JA. He prefaced his

discussion of the case with the observation that "the only issue which has now to be decided --- is, whether it is now in the best interest of the girls for the [appellant] to be permitted to remove them permanently from the jurisdiction of this court for permanent residence in Australia." Later in his judgment he said "Having considered all the evidence, and in particular the [respondent's] reasons for withholding her consent, I am nevertheless persuaded that the interest of the children would be best served by allowing them to accompany their father to Australia." He was aware that the "practical effect of the access arrangements was such that each parent more or less spent equal time with both their daughters". He was very much alive to the possible risk of psychological damage if they went to Australia without their mother and to the virtues of the status quo and he put pertinent questions thereanent to the witnesses. His entire approach to the case and the approach of both counsel in the presentation of their cases was that the

best interests of the children were paramount and that, while a court would not lightly overrule a custodian parent's responsibly and reasonably made decisions, it would be obliged to do so if it was satisfied it was in the best interests of the children.

[8] This was not the usual class of case in which the judge is faced with a custodian parent who wishes to emigrate for personal reasons and, from the point of view of quality of life, the interests of the children would be equally well served whether they go or stay, but the non-custodian parent with more limited rights of access objects to the move. It was a case in which, as Jappie J was aware, the extensive rights of access enjoyed by the respondent had resulted in her fulfilling a co-parenting role to a degree greater than is usually found. In that capacity the respondent had continued to concur in the previously jointly made decision to emigrate in the best interests of the children. It was not a case in which the parents were at odds as to whether

the best interests of the children (in terms of sheer quality of life) lay in going to Australia or remaining in South Africa.

[9] I do not think that Jappie J dismissed the fact that the respondent was a good and devoted parent and that there was a strong bond between her and the children or that he afforded it less weight simply because the respondent was the non-custodian parent. That would not be consistent with the rest of his judgment and the concern he showed during the leading of the evidence about the psychological consequences for the children of going to Australia without their mother. He was also aware that, desirable as life in Australia might have been if both parents had moved to Australia, that was no longer going to happen, and that the postulated absence of the respondent necessitated a reconsideration of how the interests of the children would be best served: by letting them go or by making them stay.

[10] Bluntly put, the respondent's stance amounted to this: "Yes, it was in the children's best interests to grow up in Australia even although we were divorced and would be living apart there, but it no longer suits me to accompany them to Australia. Because my change of mind will severely curtail my access to them if they are allowed to go, and that in turn will be detrimental to them psychologically, they must forego the advantages of life in Australia which we both wanted for them, and stay in South Africa, and so allow me to live my life as I wish to live it." It was thus *a fortiori* a case in which emigration should not have been prohibited unless the risk of permanent and significant psychological damage to the children arising from curtailed contact with the respondent was so likely to eventuate that it would best serve their interests to remain in South Africa notwithstanding the forfeiture of the substantially better quality of life in Australia which that would entail.

[11] The assessment of the risk arising from the curtailment of access depends upon the view one takes of the conflicting expert evidence. The trial judge preferred the view of Mrs Edelstein and Mr De Marigny. Jappie J considered that Mrs Killian displayed signs of bias in favour of the respondent. The court *a quo* said: "There is much to be said for this view" but "did not think that her opinions can be thrust aside in their entirety." That is no doubt so but one's confidence in them is obviously much diminished. Examples of apparent bias (not in the sense of deliberately given false evidence, but in the sense of a professional witness so emotionally wedded to the idea that her client had been the victim of an injustice when she agreed to custody of the children going to the appellant at the time of the divorce, that her objectivity was impaired) were not spelt out by either of the courts. But they are not far to seek.

[12] Mrs Killian was confronted with the accusation that despite the fact that the appellant had made it quite plain that, if he was not allowed to take the children to Australia, he would remain in South Africa, she had none the less recommended a variation of the custody order. It was put to her that she had persisted in recommending that even although the respondent was not seeking such a variation if the appellant remained in South Africa, and even if he did remain in South Africa.

[13] The following exchanges occurred:

> (a) "Are you really suggesting that you made the recommendation for a variation of custody just in case he was lying in his pleadings, and came and asked for leave to emigrate again later on? --- I am essentially saying that that is what I did.
>
> Where did you say that that's what you were doing in the report? --- I didn't say that.
>
> Where did you give any hint in this report that that is what you were doing? --- I think right at the beginning of my report.
>
> You may think that that's what you did, but it doesn't read that way. Mrs Killian, isn't it so that, as you said to His Lordship, you during the course of this assessment, developed a concern – a real

concern – that the wrong person had ended up with custody in the first place. You nodded. Do you agree with that? --- That is correct.

Yes. And is it not also so that that concern had a great deal to do with two things, (1) your perception that it's unusual for a suitable mother of two small children not to end up as the custodian, correct? --- That is correct.

And (2) with the notion that Mr Jackson had, by some means, misled or defrauded or tricked Mrs Jackson into giving up custody in the first place? --- That is correct, without me having clear knowledge about the circumstances under which Mrs Jackson had the incorrect perception of what the final recommendation of Mrs Van Minnen's report was.

Did you accept that she truly did have that incorrect perception? --- I did.

Did you accept that it was because she only learnt too late that that was incorrect that she had allowed herself to be persuaded to give up custody? --- I did."

(b) "[W]ould it not be fair to say that your persistence in recommending that variation was at least, in part, influenced by your settled perception at that stage that Mrs Jackson had been conned out of custody – she's been taken advantage of? … I would even go as far as saying that that is in large part an issue, given the situation that I had spoken about previously … [intervention]

Yes, well, that explains it. --- … particularly because after I'd seen the father, he had confirmed to me that he had implicitly, indirectly not told her, "Hey, hold on. You've got Mrs Van Minnen

recommending that you get custody". That among the things that I wanted to canvass with the father was, did I have right end of the story.

Okay, so that makes sense then. That is why, in spite of there being absolutely no need for you to make an unqualified recommendation about variation of custody, you actually did? Yes? --- Among the reasons, yes.

Well you said a large part of the reason. --- Yes, but I'm also saying that there were other factors that were taken into consideration."

(c) "When you were coming to your conclusions, the impression I have, and please correct me if I'm wrong, [was] that somehow or the other Mrs Jackson had been cheated out of having given up custody of the children. Is that one of the conclusions which you came to? --- I certainly had a strong sense that that was – that could have been what had happened, yes.

That somehow it was possible? --- Yes.

And together with what you regarded as a prejudicial financial settlement, as far as the divorce was concerned, did you take that into account as well? --- I'm really not in a position to know the criteria by which financial assets are partitioned off but it didn't make sense.

You had an idea that Mr Jackson is a wealthy man, and all she was getting out of it was … [intervention] --- Some pittance, relatively.

That was also a factor - well, I won't say a factor, but that was also something which you were concerned about? --- Yes.

> And the idea that the attorney appeared to have been more on Mr Jackson's side than Mrs Jackson's side, from what you've heard? --- I was worried about that.
>
> Would it appear then that when coming to your conclusions you were somehow or other attempting to right what could have been a wrong that had occurred? --- I could very well have been considering that."

[14] A perusal of Mrs Killian's evidence as a whole leaves me with the clear impression that she was reluctant to make any concession which might reflect adversely upon the respondent, even in the face of good reason to do so. The convoluted and almost incoherent way in which she sought to justify her "abandonment" proposition is, to my mind, yet another illustration of insufficient objectivity. I quote from her evidence:

> "You're seriously suggesting that this child is going to be in therapy for significant portions of her older life if she's separated from Mrs Jackson now? --- I think that she will feel that her mother abandoned her because of her own badness in one way or another, and I'm serious about that.
>
> And is that what motivates you to suggest that she should not be permitted to go to Australia at this stage? --- That is correct.

Now, she has, according to you, at least an equally strong psychological bond with her father. --- That is correct.

Why then did you so glibly recommend at the end of your report that the mother be granted custody, and father and mother, with help, negotiate liberal access arrangements to suit decisions made by the father as to whether he will go to Australia or not? It didn't seem to perturb you at all that Mr Jackson might go to Australia, and separate from his children. --- It certainly wasn't intended to be a glib recommendation. This was a difficult and complex matter which actually took a lot of time to think through carefully. I think at the back of my mind was still the apparent injustice that had happened at the time of the divorce. It also just didn't seem to me to be logical or consistent with my experience that here was a loving, caring mother who had actually lost custody of her children … [intervention]

JAPPIE J Well, I think the point is this. On the one hand, you say, "Well, if the children go to Australia with the father, in particular Tasya, this could leave psychological scars. However, if the children stay with the mother, and the father goes off to Australia, the same sort of prognosis is not foreseen". I think what counsel wants to know is, "How do you reconcile the two?" --- No, I would see the same consequences should the father go off. However, leaving, and somebody else – you yourself leaving, and somebody else leaving are seen very differently by young children. So the fact that father was the one that left won't as readily be seen as an abandonment because of the egocentric factors that I've mentioned earlier in terms of them going away, and leaving mother, which would then be turned against the self. So to argue it more clearly, because I know I've not been

clear, if it was father staying here, and mother going to Australia my remarks would remain exactly the same. It doesn't matter which one stays and which one goes, and that is also building into the equation the fact that once they go to Australia, I expect there to be a period of adaptation during which time the children will be making sense of why they no longer have contact with their mother, and it will be that initial adaptation period which will be critical and significant.

MR HUNT So you are suggesting that the child who leaves a parent perceives the parent as having abandoned them but the child whose parent does abandon them doesn't? --- No, because I don't think these … [incomplete]

JAPPIE J Yes, well, what's the response to that, Mrs Killian? --- Okay. Because when children go to live in a different country, there's first of all the excitement. "We're going on an aeroplane. We're packing up". You know, all that excitement. It's almost like, "We're going on this big adventure. Mom's not part of that, therefore I'm going to feel bad once I get to Australia because I've left her behind and she's been excluded from the adventure".

MR HUNT I thought the point was that these children were going to feel abandoned by their mother. That seems to be the way you've put it hitherto. Now you're talking about them feeling guilty about abandoning their mother. --- I'm saying the abandonment is a reciprocal factor.

Oh, now they've both abandoned each other? --- Tasya, in particular, will perceive that she's been abandoned by mother. We're dealing with perceptions rather than realities. You know, the logical thing is that the children would be able to go to Australia, and say,

"Right, we were brought here because, in fact, both parents had our own interests at heart", and that's what happens in many cases when people emigrate. But in this situation it is different.

So you say."

[15] In the case of Mrs Van Minnen she too had made a recommendation that custody be transferred to the respondent. She did so without bothering to interview the appellant despite the fact that the children had been in his custody since the divorce. When taxed on her failure to do so, she replied that she was not asked to look at his suitability. Taxed further, the following occurred:

"JAPPIE J Just before Mr Hunt cross-examines, I see in your third report – that is the report that we were dealing with, the one that's – the report of the 8th January this year, in which your recommendation as to variation is made, at page 19 of that report, I see, "Sources consulted". --- Yes.

I see amongst those sources is not Mr Jackson, the plaintiff --- No, I didn't consult with him.

CROSS-EXAMINED BY MR HUNT As the Court pleases. Why was that, Mrs Van Minnen? --- I didn't think it was necessary to deal with it in this – for this report, M'Lord.

Why? --- Because I had been asked to look at – to up – to look at … [intervention]

Update? --- Update – that's the word I'm looking for, thank you. To update the circumstances of Mrs Jackson, and I'd been asked to focus on a suitability report in terms of custody.

No, you'd also been asked to make a recommendation about variation of custody, hadn't you? --- Yes, variation too, yes.

And you'd last had any sight of Mr Jackson or his circumstances more than a year beforehand? --- That's right. I wasn't asked to look at his suitability in this instance, M'Lord.

We're not talking about suitability, Mrs Van Minnen. Don't be naï ve. We're talking about a variation … [intervention]

JAPPIE J Well, I think that's putting it a bit strongly, Mr Hunt. The question really is that you had seen him almost a year before you --- Yes, I had, ja.

And we simply want to know why you didn't consult him. --- Okay, I've given my one reason, and the other reason was that I'd actually had sight of the pleadings and the concerns that he had with regard to her circumstances, and I dealt with those in the report – in my assessment.

MR HUNT well, do we understand by that that you were only really looking at Mrs Jackson? --- For the purposes of this report, yes.

But surely a recommendation that custody be varied involves an assessment also of the custodian parent, who has had the children for the last year, and how they are coping with it --- I have not negated the fact that he's actually been looking after the children. I didn't look at his – I wasn't asked to look at his competency as a parent. I

have been asked, as I said, to look – to update the report in terms of mother's suitability to have custody of the minor children, and that is what I've actually – that is the purpose of my report.

Mrs Van Minnen, you're a professional. --- Yes, I am.

You're not a lay person. You surely understand the implications of making a recommendation for the variation of children's custody, as opposed to making an original recommendation at the time of divorce? You appreciate that there's a difference between those two functions? --- I have to just agree that I didn't consult with him, for the reasons that I actually gave M'Lord.

Well, do you regard those as adequate reasons, given that you end up with a recommendation that custody be changed? --- Yes, I do, M'Lord.

You didn't think it was necessary to look at his side of the story, and what had been going on between him and the children for the last year? --- I had looked at his side of the story prior to that, and I also know that he has been greatly involved in the lives of the children. I don't think that I – I have never ever at any stage even in a previous report had I actually said that he was an incompetent parent. I actually, at the time of writing the one dated the 27th of the 11th, I felt it was in the children's interests at that time to be in the custody of their mother, and I gave reasons for that. So that's what I've done.

Before coming to a recommendation, a seriously-made, professional recommendation to the Court that custody of two children be varied, you didn't think it was necessary to hear Mr Jackson's side of the last year? --- Well, I think his concerns about

her suitability were laid out in the pleadings, as I've said, and that is what I addressed.

Pleadings are not evidence, Mrs Van Minnen. --- Well, those were his concerns.

How do you know that he didn't have other concerns? Did you ask him? --- Well, his concerns also have changed quite a lot as well from the initial investigation. He had concerns but he didn't raise some of those in the previous year.

You didn't bother to check, did you? --- I didn't feel the need."

[16] At another point in her testimony one finds this:

"Is it not so that, when you are asked to make a recommendation about the variation of an existing custody arrangement, the first step is to analyze whether there is anything wrong with the existing arrangement? --- Yes, it is so.

What was wrong with this existing arrangement? --- Well, there was nothing wrong with the existing arrangement, other than that Mrs Jackson wanted to go – had told me that she was going to apply for variation of custody, and – because she felt that they should be with her, and that was why I looked at her suitability. She raised no queries about his incompetence to look after the children.

Exactly, exactly, Mrs Van Minnen. --- So I didn't need to then look at his – whether he was competent or not on that level. I was needing to look at whether hers was, she is still suitable, and whether I

still could agree with my previous recommendation. That was where I was coming from with that.

Mrs Van Minnen, if the starting point of a variation recommendation is to check whether there's anything wrong with the existing situation, how can you recommend a variation if you don't find anything wrong with the existing situation? --- Initially – I'll just go back again to the November of the previous year. I know what you're saying, and I understand what you're saying but from the initial investigation at the time I actually felt – at that time I recommended, and I gave reasons for why I actually felt the mother should be the custodial parent. I just – I up-dated my report, based on the concerns that were raised about her lifestyle, and I just – in order to see whether my recommendation still – whether it was still – I could still recommend her as a custodian, and that is what I found. That was my point of departure.

Is that a normal approach in recommending a variation of custody? --- No, but different cases warrant different approaches sometimes."

[17] Then there is this:

"That's a letter purportedly dated the 30th November 1998 from Gail Patterson to you. Did you receive that? --- Yes, I did get this. I got a fax, yes.

Yes, well, however you got it … [intervention] --- Ja.

… you did get it. --- It was, yes, dated 30th.

Did you pay any attention to what she had to say? --- Yes, I did read it, yes, I did.

Perhaps I should put it this way. Did you give any weight, or what weight did you give to what Mrs Patterson had to say? --- Nothing really, because a lot of these issues I had actually investigated in the report, and my report at that time – this fax came through on the 30th November, and my report was compiled on the 27th November, and it was actually finished.

You were aware of Mrs Patterson's role as a kind of girlfriend/good friend of Mr Jackson since the break-up of the Jackson marriage? --- Yes.

Now let's accept that your relationship with Mr Jackson was strained, to say the least, after the fight over your report during December 1998. Have you anything against Mrs Patterson, or would you expect her to have anything against you? --- Well, there shouldn't be, no.

And, according to your information, when you redid updated your assessment for these proceedings, was Mrs Patterson still involved with Mr Jackson and his family? --- As far as I know, yes.

Why didn't you try and contact her, to get her perspective on how he was coping with the children, to get her perspective on how the children were coping with the separation from their mother, and so forth? --- I don't actually – I didn't think it was necessary to contact her either.

JAPPIE J well, as I'm given to understand, one of the persons who … [intervention] ---She apparently – sorry, M'Lord.

> One of the persons you spoke to as how Mrs Jackson got on with the children was Mrs Jackson's boyfriend, I think. --- Yes.
>
> Gary Osmond. --- Yes.
>
> But you knew there was a relationship between Mr Jackson and Mrs Patterson? --- Ja.
>
> And that she interacts with Mr Jackson. --- Yes.
>
> The children, but you didn't consider it necessary to consult her? --- No, because I think, as I've said earlier my report was focusing on Mrs Jackson's circumstances, and Mrs Patterson, I don't believe, would be able to comment on her circumstances. I know that she was involved with Mr Jackson but I didn't think she'd be able to give me first-hand information on it."

[18] It is not surprising that Jappie J made the comment which he did about the extent to which her sympathy for the respondent entered into her evaluation of the best interests of the children. Nor is it surprising that the court *a quo* made no reference at all to her views on the present controversy.

[19] The belief that the respondent had been "conned" into agreeing to the appellant having custody at the time of the divorce and the resultant feeling of sympathy for her is understandable in the light of the misleading

information which the respondent gave these witnesses. However, it was allowed to play too great a role in their evaluations. The court *a quo* said:

> "There is a strong possibility that the [appellant] had been guilty of an active non-disclosure. On the other hand, the evidence that the [respondent] has given about what happened when she found out there had been this non-disclosure, is unsatisfactory and in my view improbable. The fact of the matter is that she allowed the order to be made and the [appellant] was installed as the custodian of these two little girls. It is somewhat strange, given the [respondent's] version of the events, and her protests, that she would not have taken the opportunity when the present action was instituted to right the wrong which had been inflicted on her by seeking a reversal of the custody order."

I agree.

[20] The evidence of Mrs Scott, a social worker, was of little real value in assessing the risk of permanent psychological harm to Tasya. It amounted to stating what was obvious: that the proposed move would cause emotional trauma to the children because of "significant maternal deprivation" resultant upon lack of contact with a parent with whom they have a close

bond. The question was whether significant and lasting psychological harm will be done. She has no training in psychology and her predictions as to that count for little.

[21] It is so that Mrs Edelstein regarded the respondent as a loving mother but she did not unqualifiedly support the proposition that she was "performing her task well". She had reservations about that. I do not read her evidence as supportive of the proposition that Tasya's relationship with her mother was closer than her relationship with her father. What she said in that connection was this: "Tasya has a very close and loving relationship with both her parents, but she perceives the [respondent] as being *marginally* [my emphasis] more loving toward her. (One more incoming response is directed to the [respondent] than to the [appellant].) However more of her dependency feelings are directed to the [appellant]. (Information from the Bene-Anthony Family Relations Test.)" Moreover, Mrs Edelstein's tests

and her interviews with the children convinced her that the appellant and not the respondent was the *primary* psychological parent.

[22] I am unable to agree that it is not relevant to the present enquiry that the present arrangement is regarded by both Mrs Edelstein and Mrs Killian as unsatisfactory in so far as it involves frequent short term shuttling between the parents. The point is simply that it cannot be taken as an unqualified given that the existing access regime will continue indefinitely.

[23] I am also unable to accept that there has as yet been no real separation between mother and children. She no longer lives in what was their common home. Her access to them is generous but they cannot fail to be aware that she no longer lives with them and the parent they regard as their primary psychological parent. The case may differ from the more common type of case in which children spend time with the non-custodian parent but it is only a difference of degree and not one of kind.

[24] I am also troubled by the extent to which the appellant's decision to abandon his proposed move to Australia if he cannot take the children with him was allowed by the court *a quo* to colour the issue of where the best interests of the children lie. There is, to my way of thinking, an element of putting the cart before the horse inherent in that approach.

[25] Leaving the issue for another day does not seem to me to be realistic. The problems which actuate the appellant in wishing to take the children to Australia exist now. If they are indeed soluble they are certainly not soluble in the short to medium term. The next ten to fifteen years are what matter for that is the period during which the children will be growing to adulthood. The window of opportunity for emigration which presently exists is unlikely to remain open indefinitely and, on the evidence, the children are at an age where a move now is likely to cause the least problems of adjustment for them.

[26] Nor do I think that the scenario which Mrs Killian sketches if Tasya were to fare badly psychologically is realistic. If it were to happen that Tasya was inconsolable and showing evidence of potentially serious psychological damage, I cannot accept that the appellant would simply acquiesce in that. He is quite plainly a highly responsible and devoted parent who is very conscious of the welfare of the children. The sacrifices he has made in the interests of the children and the extent to which he has modified his life to cater for their welfare are quite inconsistent with the notion that he would doggedly remain in Australia notwithstanding the harm it was doing to Tasya.

[27] I too would restore the order of Jappie J and make the appropriate orders as to costs.

R M MARAIS

JUDGE OF APPEAL