

JACKSON v JACKSON 2002 (2) SA 303 (SCA)

Headnote : Kopnota

Per Scott JA; Hefer ACJ and Brand AJA concurring; Marais JA and Cloete AJA dissenting on the facts: The interests of the children are the first and paramount consideration where the variation of the terms of a custody order are sought. Generally speaking, where, following a divorce, the custodian parent wishes to emigrate, a Court will not lightly refuse leave for the minor children to be removed from the country if the decision of the custodian parent is shown to be bona fide and reasonable. This is not because of the so-called rights of the custodian parent but because, in most cases, even if access by the non-custodian parent will materially be affected, it would be in the best interests of the children that the custodian parent not be thwarted in his or her endeavour to emigrate pursuant to a decision rationally and genuinely taken. Each case must, however, be decided on its own particular facts: no two cases are ever precisely the same. While past decisions based on other facts might provide useful guidelines, they play no bigger role than that. Similarly, the dicta of Judges made in the context of the particular facts and circumstances with which they were concerned must not be elevated to rules of law. (Paragraph [2] of Scott JA's judgment at 1.)

It is wrong to afford less weight to something as important as the relationship between a mother and her young daughters simply because the mother is the non-custodian parent, particularly where, after divorce, both parents continue to exercise a more or less equal parenting role and where there has been no real separation between the children and the 'non-custodian' parent. The fact that the mother is the non-custodian parent is irrelevant to the enquiry whether it is in the interests of the children to be separated from their mother and taken to another country. (Paragraph [14] of Scott JA's judgment at 2.)

The advantage which a trial Judge enjoys by having the opportunity to observe witnesses while they testify must not be over-emphasised, particularly where the witness in question is a professional person, such as a psychologist. To the extent that a professional person's reasoning can be tested by the Court hearing the appeal, the appeal Court is in as good a position as the trial Court. (Paragraph [16] of Scott JA's judgment at 3.)

When the appellant and respondent were divorced in December 1998 custody of their two minor daughters, then aged four and six, was awarded to the appellant, their father. The respondent's rights of access involved the children's spending three evenings and nights per week, each alternate Sunday and alternate school holidays with her. The respondent was also to be consulted with regard to their 'health, education and any child minder'. Within a year of the divorce the appellant applied for a variation of the custody order to enable him to emigrate to Australia with the children. His principal reason for wishing to emigrate was his conviction (previously shared by the respondent, even subsequent to the divorce) that Australia was a better country than South Africa in which to raise the children and that it was in their long-term interests that they make Australia their home. The appellant had

made it clear that he would not leave South Africa without the children. The application had been granted by a single Judge but that decision was reversed on appeal to a Full Bench.

In a further appeal,

Held, that, unlike many cases where the access of the non-custodian parent was limited, in this instance there had been no real separation between mother and children. If the children were taken to Australia the respondent's almost equal parenting role would effectively be replaced by no more than biannual visits of a few weeks each. (Paragraph [10] of Scott JA's judgment at 4.)

Held, further, that the evidence the clinical psychologists and social workers who had testified for the parties was that both children would suffer 'a great deal of pain and trauma' if they were separated from the respondent and taken to Australia. Although the psychologists were divided on the issue, there was a real risk of psychological harm to the younger child. (Paragraph [12] of Scott JA's judgment at 5.)

Held, further, that the risk of the appellant's not being accepted as an immigrant to Australia as he grew older had to be weighed against the diminishing risk, as the children grew older, of their being harmed by the trauma of being separated from the respondent. Given the primacy of the interests of the children (and notwithstanding the acceptance of the appellant's assessment of the difference in the quality of life afforded by South Africa and Australia at present and in future), the inevitable pain and trauma to both children and the risk of psychological harm to the younger child far outweighed the risk of their possibly not being able to emigrate when the children were older, if the circumstances still warranted such a far-reaching step. (Paragraphs [12] and [13] of Scott JA's judgment at 6.) The appeal was accordingly dismissed.

The decision of a Full Bench of the Natal Provincial Division in Jackson v Jackson confirmed.