

KRUGEL v KRUGEL 2003 (6) SA 220 (T)

Headnote : Kopnota

Joint custody of minor children on divorce has been seen as potentially contributing to the promotion of children's rights and the equality between the sexes. It is argued that a child has the right to know and to be cared for by both his or her parents and to maintain personal relationships with both parents on a regular basis. Joint custody ensures precisely this sort of relationship in that it signals to the child that he or she is wanted, loved and looked after by both parents. There is another advantage in the awarding of joint custody. Because it is not a result of the normal 'winner takes all' approach, joint custody may also prevent problems of non-support arising out of bitterness over the custodial decision where one parent feels deprived of his or her right to be involved with their child. It has been pointed out that there is by no means unanimity about the role of joint custody in promoting substantive equality between men and women. It is argued that the effect of a joint custody order is often to lock women into a dependency relationship with their former spouses. In spite of this a preference for joint custody will help to reshape the gender roles within parenthood. (Paragraphs [19] and [20] at 227B - E and 227F/G.)

The various arguments against joint custody awards (especially joint legal custody as opposed to joint physical custody) do not serve the best interests of the children. However, if the changing roles and responsibilities of parents coupled with the relatively new concept of children's rights within the family structure, rights which include the maximum amount of contact with both parents, are considered, a more liberal approach to the granting of joint custody may not be inappropriate. General hostility between the parents should not be a bar to a joint custody order. As long as both parents are fit and proper persons, it is important that they should have equal say in the raising of their children. This is exactly what a joint custody order allows. It has to be weighed up whether input from both parents, even if that input is at times disharmonious, is not preferable to an uninvolved parent. Disagreement and negotiation are a part of life and generally no more so after the divorce than before. Unless the disagreement is of such a nature that the child is put at risk either physically or emotionally, it still seems preferable for the child to learn to deal with the ups and downs of two involved parents, than to lose half of his or her rightful parental input. A joint custody order would not only promote the rights of children subsequent to the divorce of their parents but also help establish equality between the sexes. (Paragraphs [21] and [22] at 227G - G/H and 228A - E.)