

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

Headnote : Kopnota

In an application by a divorced non-custodian parent for the variation of a consent paper, which has been made an order of Court, granting custody of a minor child to the other parent, the onus rests on the non-custodian parent to show that the existing situation is detrimental to the child's interests and that a variation of the custody arrangement would be to the child's advantage. (At 204I.)

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

- (a) the love, affection and other emotional ties which exist between parent and child and the parent's compatibility with the child;
- (b) the capabilities, character and temperament of the parent and the impact thereof on the child's needs and desires;
- (c) the ability of the parent to communicate with the child and the parent's insight into, understanding of and sensitivity to the child's feelings;
- (d) the capacity and disposition of the parent to give the child the guidance which he requires;
- (e) the ability of the parent to provide for the basic physical needs of the child, the so-called 'creature comforts', such as food, clothing, housing and the other material needs - generally speaking, the provision of economic security;
- (f) the ability of the parent to provide for the educational well-being and security of the child, both religious and secular;
- (g) the ability of the parent to provide for the child's emotional, psychological, cultural and environmental development;
- (h) the mental and physical health and moral fitness of the parent;
- (i) the stability or otherwise of the child's existing environment, having regard to the desirability of maintaining the status quo;
- (j) the desirability or otherwise of keeping siblings together;
- (k) the child's preference, if the Court is satisfied that in the particular circumstances the child's preference should be taken into consideration;
- (l) the desirability or otherwise of applying the doctrine of same sex matching;
- (m) any other factor which is relevant to the particular case with which the Court is concerned. (At 204I/J-205G.)

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

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

The Court went on to hold that, although the respondent offered R the loving, nurturing rearing of a child which was the traditional and natural role of a mother, and that she had done it well, R had now reached the stage of his development, at the doorstep of puberty, where his need for the discipline and guidance of a father was greater than his need for the protectiveness of a mother: R was ripe for his father and needed the masculine environment. The Court was accordingly satisfied that R's best interests would be served by placing him in the custody of his father. Since, however, this arrangement was new and unchartered, it would be appropriate if it was to be monitored by the Family Advocate. (At 208F/G-G read with 206I-J and 209A/B-B.)