

P AND ANOTHER v P AND ANOTHER 2002 (6) SA 105 (N)

Headnote : Kopnota

The matter concerned the custody and guardianship of and access to the minor child, G, who had been living with her uncle and aunt, the plaintiffs, for a continuous period of four years. The second plaintiff faced possible relocation to the United States for employment reasons for a period of four years and the issue of whether the plaintiffs should be allowed to take G to the United States with them arose. G's biological mother, the second defendant, and her husband, the first defendant, opposed G's move to the United States on various grounds, fuelled by a concern that they would not be able to maintain the parent/child relationship with G if she were so far removed from them. The plaintiffs had in the past made a concerted effort to ensure that G regularly visited the defendants.

Held, that the first aspect which emerged from s 28 of the Constitution of the Republic of South Africa Act 108 of 1996 in relation to the issues under consideration was that it was the child's rights which were defined and not those of the parents. In law, the existence of a right was tantamount to the creation of a duty on the part of another to fulfil that right. Guardianship and custody were not to be viewed as rights vesting in the parent but as duties imposed upon the parent. The Constitution required those duties to be exercised in the interests of the child. In considering what was in the best interests of the child, the courts had always regarded the biological bond between the child and its parents as almost sacrosanct and only to be disrupted or affected by the intervention of the Court in its capacity as upper guardian where the interests of the child, and not those of the parents, so dictated. (At 107I/J - 108B/C.)

Held, further, that, had the defendants sought an order for custody or for G to be restored to them in the present circumstances, the Court would not have been persuaded to grant it. The evidence showed that the defendants were clearly not in the position to give G the type of stable background and room for improvement which she needed to develop and become a useful member of society. It would not benefit G in any way to be returned to the defendants' home as it was at present, with cramped accommodation and serious personality conflicts being only two of the many problems which she would encounter. To remove G from the environment in which she had been nurtured for the past four years would clearly do her substantial damage and it would accordingly not be in the child's interests to restore custody to the defendants at this time. (At 109H - J, 110E - E/F and F - G.)

Held, further, that, if the Court were to preclude G from travelling to the United States with the plaintiffs and living there with them, it would effectively be restoring custody to the defendants, which was undesirable. G should accordingly be allowed to travel with the plaintiffs to the United States. (At 110G/H - I.)

Held, further, that the plaintiffs needed to be empowered to act as guardians of G in circumstances where she would be so far away from her natural guardians. In addition, G would require the appropriate endorsements from her guardians in matters such as the acquisition of a passport and admission to the United States as a temporary resident. (At 111B - C.)

Held, accordingly, that the guardianship vesting in the defendants in respect of G should be ordered to be suspended until a further order on the issue was made by the Court. In addition, the plaintiffs should be appointed as joint guardians of G, it being contemplated that such guardianship would subsist for as long as the plaintiffs were resident in the United States. Such guardianship was made subject to the defendants' rights of access with special arrangements being made for regular access to be arranged at the plaintiffs' expense. (At 111I - 112B/C.)