

PINION v PINION 1994 (2) SA 725 (D)

Headnote : Kopnota

The plaintiff in an undefended divorce action had applied also for an order awarding custody of the minor child of the marriage, a girl, D, aged six years, to the plaintiff and the defendant jointly. In the light of this prayer an enquiry was held in terms of the Mediation in certain Divorce Matters Act 24 of 1987 and the parties were interviewed by the Family Counsellor, who compiled a report. It emerged from her report that the parties had told her that D cared very much for both of them and that they wanted to spend as much time with her as possible; that they had resolved their feelings regarding the breakdown of their marriage and were in a position to discuss issues regarding D in a mature and responsible manner; that both parties wanted joint custody of D because they believed it was in her best interest; that they were able to communicate effectively with each other regarding the minor child's needs and F feelings; that they shared the same parenting values and respected each other as parents; that when they disagreed on anything regarding D, they discussed it until it was resolved; that both parties were actively involved in the minor child's life, in taking her to school and to occupational therapy sessions which she attended; that they shared a good enough relationship to both attend school or extramural functions together; that they had so far successfully implemented the principle of joint custody in a way, from the time of their separation, and that they planned to adopt a joint custody arrangement in the case of D whether an order was granted or not. The Family Counsellor concluded that the parties appeared to be very concerned parents who wanted their divorce to cause as little disruption and distress to D as possible; that they had accepted the breakdown in their marriage and had worked through the negative feelings involved in the divorce; that both parties wanted to be involved in D's life as they had been in the past, and that D appeared to have adjusted to this arrangement and felt comfortable with both her parents. The Family Counsellor accordingly recommended that custody of D be awarded jointly to the plaintiff and the defendant. The Family Advocate interviewed the parties and the child and concurred in this recommendation. In the alternative, she recommended that custody be awarded to the plaintiff, subject to the defendant being allowed reasonable rights of access.

After reviewing the relevant authorities, the Court held that there was undoubted truth in the observation that human relationships were not constant and that the future behaviour of parents, as of other humans, was unpredictable; and that where their potential behaviour could give rise to a situation which would be detrimental to the interests of the minor concerned, it would be better to exclude that possibility by avoiding creating a situation where it could occur, unless the advantages to the minor of such a course were so significant as to justify taking the risk involved; and the fact that the parties might approach the Court afresh should the risk materialise was no justification for taking it: it would serve the minor's interests far better not to take it at all. (At 730D/E-G.)

The Court went on to hold that while it did not doubt the bona fides of the parties' belief that they would be able jointly to discharge the function of custodian parents without friction or deadlock and that they could resolve any disputes which might arise by discussion, it did doubt their infallibility and was unconvinced that there was no real risk of acrimonious or irresoluble disagreement between them in the future, which would redound to the detriment of the minor. The risk involved was enhanced by the extremely wide field which would have to be covered by their joint decisions as custodian parents, and the extremely long period over which they would be required to function as such. It was, of course, possible that they might be entirely successful, but there existed a very real danger that they would not. Moreover, even if they did succeed ultimately in resolving their differences by discussion, it would not be practically possible to conceal those differences from or present a united front to the minor, particularly as she grew older. It was imperative that a child should know, in such a situation, with whom the ultimate say lay, and not be afforded the opportunity of playing one parent off against the other. (At 730G/H-J.)

The Court held, further, that as against this it was unable to see any substantial advantage to the minor in being under the legal custody of both her parents. It was open to the parties to regulate the upbringing of the child by agreement inter se irrespective of the fact that legal custody vested in only one of them, and indeed that is what they professed to intend doing whether an order was granted or not. There was no suggestion that such an arrangement would have any detrimental effect on the child or be any less satisfactory from her point of view than a joint custody order. It would, however, have the undoubted advantage of excluding the risks referred to. (At 731A-B/C.)

In the premises the Court was of the view that it would not be in the best interests of the minor to make an order awarding custody to the plaintiff and the defendant jointly and, in accordance with the parties' request, it therefore made no order in the action. (At 731C.)

Undefended civil trial in an action for divorce and for an order awarding custody of the minor child of the marriage to the plaintiff and the defendant jointly. The facts appear from the reasons for judgment.