

## **SOLLER NO v G AND ANOTHER 2003 (5) SA 430 (W)**

### **Headnote : Kopnota**

The instant case concerned the custody of a 15-year-old boy, one K, who sought a variation of his custody order on the ground that he wanted custody to be awarded to his father. The application was initially brought on K's behalf by one S (the applicant), an attorney who turned out to have been struck from the roll. The presiding Judge felt that the matter required the assignment, under s 28(1)(h) of the Constitution of the Republic of South Africa Act 108 of 1996, of a legal representative to assist K. It decided to appoint one M, a respected attorney, to do so. S initially sought an order appointing him as K's legal representative; allowing K and his parents to lead evidence about whether K should return to live with his mother (the first respondent) after having run away from home to live with his father (the second respondent); and that custody be granted to the father. In postponing the matter to await the report of the Family Advocate and M the presiding Judge decided not to allocate it to another Judge but to proceed with it herself because (1) she had already received affidavits from and conducted interviews with both K and his parents and was thus au fait with the circumstances and personalities involved; (2) a postponement would involve duplication of efforts and leave K in the lurch; (3) the family had been appearing in the Division concerned on a regular basis since their divorce in February 2001; and (4) there was a perceived need for 'case management', including the allocation of presiding Judges to specific litigation. The instant judgment dealt, inter alia, with the distinction between a legal practitioner appointed in terms of s 28(1)(h) of the Constitution and the office of the Family Advocate, established in terms of the Mediation in Certain Divorce Matters Act 24 of 1987 and with the extent to which the views of a young adult such as K were decisive of issues of access and custody, particularly in the light of his alienation from one of his parents due to manipulation by the other one. It appeared that the father had since the divorce order, in which sole custody of K had been awarded to the mother, engaged in litigation so excessive and damaging that he was declared a vexatious litigant. As a result of the legal battle between the parents over K and money the relationship between husband and ex-wife had become extremely acrimonious, although the father got along well enough with K, with whom he had remained in regular communication. The father had also managed to procure his own sequestration, with the result that he was able to avoid making his maintenance payments. Several psychologists who had interviewed K had stated that K's attitude sprang from a so-called 'parental alienation syndrome', essentially a post-divorce alignment with one parent at the cost of affection for the other parent. The syndrome arose chiefly from the influence of the first parent, combined with the child's own contribution to the campaign of denigration of the other parent. The evidence was that the father had instructed K to be obstructive and had placed him in the position of having to choose between family members. K himself wished to live with his father, and had run away from his mother's house to do so. Both the Family Advocate and M were of the opinion that, in the light of his expressed preference, K had to be put in the care of his father. The latter was also of the

opinion that K's request was not the result of duress or undue influence by his father.

*Held*, that the distinction between the respective functions of the office of the Family Advocate and the legal practitioner appointed in terms of s 28(1)(h) of the Constitution had to be clearly understood and abided. The former provided a professional and neutral channel of communication between conflicting parents (and perhaps the child) and the Court, while the latter was squarely in the corner of the child and had the task of presenting and arguing the child's wishes in Court. The legal practitioner also had to provide adult insight into those wishes and apply legal knowledge to the child's perspective, giving the child a voice without being merely a mouthpiece. (Paragraphs [20] and [27] at 437B - C and 438D/E - G.)

*Held*, further, that K's father presented as a presumptuous man, obsessive to the point of fanaticism where his interests were concerned, dishonest and without insight to the impact of his behaviour on his family and contemptuous of authority and the judicial process. The mother, on the other hand, presented as dignified, mature, intelligent, wise and forgiving. (Paragraphs [40] - [42] at 441D/F - H/I and 443B.)

*Held*, further, that it was clear from the evidence that K suffered from parental alienation syndrome, having advanced well along the textbook definition of the child victim of an obsessive and manipulating parent. (Paragraph [52] at 445D - E.)

*Held*, further, that it had to be accepted in the light of the evidence that K had made up his mind on the issue of custody and would not be deterred by his mother, the Court or threats of custodial care. (Paragraph [53] at 445F.)

*Held*, further, that it was trite law that the best interests of the child were paramount in deciding the issue of custody. In determining these interests it had to be decided 'which of the parents was better able to promote and ensure the child's physical, moral, emotional and psychical welfare' (*McCall v McCall* 1994 (3) SA 201 (C) at 205E/F). (Paragraphs [54] - [55] at 445H - J.)

*Held*, further, that although the child's expressed wish to live with a parent was usually only a persuasive factor, it had in the present case become the determinant factor. K had clearly expressed a desire and acted upon it and it was obvious that his mother, despite her suitability as a role model, was incapable of enforcing the existing custodial access arrangements on him. There was, despite the father's clear unsuitability as a role model, obvious ties of love and affection between him and K. He did not beat or abuse K, provided him with food and shelter and ensured that he attended school. (Paragraphs [57] - [62] at 446B/C - 447B/C.)

*Held*, further, that the only focus of the present enquiry was the best interests of K, and that the Court could not in its assessment allow itself to be polluted by the overwhelming amount of earlier litigation or its negative assessment of the father. It had to be ensured that the custodial and residential

arrangements regarding K were not seen as a reward for the mature behaviour of one parent and a punishment for the despicable behaviour of the other. (Paragraphs [63] - [64] at 447C - E.)

*Held*, further, that, although it was clear that the present application was really being brought by the father in the guise of K, it appeared that K had either learnt his lessons well or genuinely wanted to live with his father. In this respect M's view that K's expressed wishes were not the result of duress or undue influence but that he really did want to be with his father also had to be taken into account. (Paragraphs [66] - [67] at 447F - I.)

*Held*, further, that, although K and his father's attitude that they would do as they wished irrespective of the Court's directions could not be approved or rewarded, it would not be proper to punish K by sending him to prison or a place of safety. Returning him to his mother would not help because it was clear that he would not stay, nor was it desirable or possible physically to restrain him there. It could furthermore not be in K's best interests for him always to be in opposition to his mother, those in authority and the courts. (Paragraphs [68] - [69] at 447I/J - 448C/D.)

*Held*, accordingly, that the recommendation of the Family Advocate and M that K should be put in the care of his father but that the arrangement should be a provisional one so as to enable the Court to monitor the situation to protect him against abusive or unsavoury parenting had to be accepted. Custody, however, had to remain with the mother in order to ensure that the father's parenting was controlled as far as possible and that K's residential arrangements could be reviewed whenever appropriate. The order had to make provision for specific periods to be spent with the mother and for K to be counselled by someone other than his parents. (Paragraphs [71] - [73] at 448E - 449C.) So ordered.