When can a custodian parent remove a minor from RSA after the divorce?

In the matter of Schutte v Jacobs [No 1] 2001(2) SA 470(W) our Courts had to consider an application by the custodian parent of a 4-year old child for the removal of the child from the RSA to Botswana. The Guardianship Act 192 of 1993, requires either the consent of both parents or a court order permitting the removal of a minor from the RSA.

In this case the parents had been divorced and the custody and control of the child had been awarded to the mother of the child. She had formed a relationship with a new partner and wished to move to Botswana with the child to be with him. The father refused to consent to this.

Factors that the court considered in coming to a decision were the following: · Whether acceptable arrangements had been or would in the future be made for the accommodation, schooling and church membership and attendance of the minor.

· Whether there would be any question of a severe dislocation in the life of the minor if removed to Botswana.

· Whether the father's rights of access to the minor would be severely curtailed should the minor so be removed.

· The stability of the applicant's relationship with her new partner.

· How the minor would be affected by the curtailment of her contact with her father.

· The willingness of the applicant to give detailed undertakings regarding visits to the RSA and the opportunities afforded to the minor to spend time with her father.

The Court found that acceptable arrangements for the child's accommodation etc had been or would in future be made. It also found that no severe dislocation

would take place as a 4-year old child that had not yet started primary school should easily be able to adapt to a new environment.

As far as the curtailment of the father's rights of access was concerned the court took into account that Gaberone (Botswana) was only 350 kms from Johannesburg and that applicant intended to travel to RSA regularly at which times the father could exercise his rights to see the child.

As far as the matters referred to in points 4, 5 and 6 above were concerned, the court did not have sufficient information to make a finding and referred the matter to the Family Advocate to investigate those aspects before making a final decision.

After the Family Advocate had investigated the matters referred to, the application was again considered by the Court {Schutte v Jacobs [No 2] 2001(2) SA 478(W)}. The Family Advocate reported that the child's relationship with both parents was good, that the applicant and her new partner were involved in a steady and apparently long-lasting relationship and that it was in the interests of the child to have regular contact with her father.

The family Advocate then also made suggestions as to how this contact could be arranged.

According to the court the 3 factors it had to weigh up in such cases were:

· the interests of the child;

· the right of the custodian parent to carry on with his or her life; and

· the impact of the emigration on the other parent's right of access.

The court was of the opinion that the arrangements proposed by the Family Advocate for the father's access were reasonable and that the applicant's relationship with the minor was clearly of a steady nature and that there was no reason to question her bona fides as far as these arrangements were concerned. Although the implementation of the arrangements would entail a curtailment of the father's access to the child, it had to be kept in mind that Gaberone was not far away.

The Court concluded by granting the application by the mother to remove the

child from the RSA to Botswana as the applicant was bona fide, she had given a reasonable and acceptable explanation for her desire to emigrate, and reasonable arrangements for the father’s access to his daughter would exist.

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