REPORTABLE

**IN THE HIGH COURT OF SOUTH AFRICA**

**(WESTERN CAPE HIGH COURT, CAPE TOWN)**

**CASE NO: 20286/2017**

In the matter between:

**T C** Applicant

and

**S C** Respondent

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**JUDGMENT DELIVERED ON 18 APRIL 2018**

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**DAVIS, AJ**

**INTRODUCTION**

1. This is an application in terms of Rule 43 of the Uniform Rules of Court for interim relief pending a pending matrimonial action. The main issue in the case is whether the High Court has the power, by virtue of its inherent jurisdiction as THE upper guardian of minor children, to make an interim order appointing a facilitator to deal with parenting disputes over the objection of one of the parents.

2. The applicant ("the father") and the respondent ("the mother") are in the midst of an acrimonious divorce. They are the parents of two young boys, "C", age

9, and "M", age 7. In this case, as is sadly often the case in divorce situations, the conflict generated by the breakdown of the marital relationship has spilled over into the parenting relationship. The children have become an arena of struggle where spousal conflict plays out in the form of disputes about care and contact and other parenting issues.

3. The family dynamics are complex. The mother and the father have been described by their experts as "high conflict", ie, a type of person who manifests all-or-nothing thinking, inflexibility, unwillingness to compromise, and a tendency to accuse and blame. Both parents have accused each other of alcohol abuse, the allegations against the father implying a significant risk for the children. And then there is the fact that C is a "high needs child": he suffers from insulin dependent diabetes mellitus - a chronic, potentially life-threatening disease which requires round the clock management - as well as autism spectrum disorder **("ASD"),** and possibly also from attention deficit hyperactivity disorder **("ADHD")**. (The suspected diagnosis of ADHD has yet to be confirmed following an evaluation.) C's issues present a particular challenge for co-parenting in this family, as the potential for different approaches to the proper treatment of C provides fertile ground for frequent and ongoing conflict between the parents.

4. The father is aggrieved because he claims that his contact with the children was unfairly limited by the mother since they separated in 2016, based on what he regards as spurious or exaggerated allegations of alcohol abuse and poor diabetic management on his part.

5. The father instituted action for divorce on 22 June 2016 ("the action"). In the action he seeks *inter alia* an order regulating shared parental responsibilities and rights in respect of the children. However the mother in her counterclaim seeks an order that the father's contact with the children be supervised because of his history of alcohol abuse.

6. Following their separation, the father and mother were unable to agree on what was in the children's best interests. Each one appointed an expert to conduct an assessment and make recommendations regarding appropriate care and contact arrangements and other parenting matters. The experts so appointed, Ms Leigh Pettigrew ("Pettigrew") for the father and Ms Pam Tudin ("Tudin") for the mother ("the experts"), were mandated in terms of a Court order dated 13 June 2017 to file a joint report containing such recommendations.

7. Pettigrew and Tudin state that they have developed a *modus operandi* where they are able to collaborate on the same case, despite having been appointed by opposing parties, on the basis that they both attend all consultations and interviews with children, parents and collaterals, have sight of all correspondence received from the parties, share all pertinent information and write up a joint report reflecting areas of agreement and disagreement.

8. The motivation for this novel and commendable approach is set out in an joint minute of interim care and contact arrangements, dated 3 April 2017, in which the experts state that:

*"The writers felt that given the high levels of conflict in this matter, given the fact this matter has been ongoing for a significant period of time, given that there is no obvious indication that the matter will settle any time shortly, and finally, given that the children have been exposed to a great deal of acrimony, the writers are strongly of the opinion that this model of assessment will serve to reduce the potential for setting the experts up to sustain conflict. Rather the model aims to calm the situation by virtue of its capacity to hold both party's* [sic] *views without it offering them a chance to use the same to perpetuate unnecessary differences at the children's expense. Both parties expressed their agreement with this assessment model to Ms Pettigrew and Ms Tudin."*

9. The experts conducted an in-depth assessment of the family, working separately prior to March 2017 and together thereafter 2017. Their joint report was eventually completed on 15 September 2017 ("the PT report"). The investigation was a Herculean effort which took 73½ hours (excluding report writing) over a period of almost 13 months. The PT report records that the experts spent almost 30 hours interviewing and observing the parties and the children, and 17½ hours interviewing 22 collateral sources which included 7 experts, notably Dr Carrihill, a Paediatric Endocrinologist and Jana Forrester, an Educational Psychologist and specialist on ASD, both of whom had been involved in treating C. Significantly however, no mention was made in the PT report of the experts having consulted with Dr Lesley Carew, the child psychiatrist who has been involved in treating C for anxiety since 2012 ("Dr Carew"). I return to this omission later in this judgment.

10. The PT report contains a comprehensive set of recommendations for care and contact in respect of C and M, which include:

10.1 the appointment of a facilitator team comprised of a lawyer and a psychologist to assist the parents to resolve parenting disputes;

10.2 random breathalyser tests for the father while the children are in his care to monitor for alcohol use;

10.3 that the father and the mother both have a carer present from 19h00 to 07h00 during all contact with the children for the next six months, to ensure the safety of the children in case either the father or the mother should become intoxicated while looking after the children;

10.4 that the father seek urgent professional assistance to manage his anger, and that the mother continue with therapy to address her tendency to provoke conflict with the father;

10.5 that the children remain primarily resident with the mother and have contact with the father for 5 nights in a 14-day cycle, with the father having the children every second weekend from Thursday afternoon after school until Monday morning before school, and on Thursday nights during alternate weeks, from after school until before school on Friday mornings;

10.6 a protocol for the management of C's diabetes, based on the recommendations of Dr Carrihill.

11 In the latter regard, the PT report contained the following paragraph which is significant for present purposes:

> *"It has been strongly recommended by Dr Carrihill that C needs to be on the Medtronic Enlite system sooner rather than later, in C's best interests, in order that more accurate monitoring, amongst other reasons, can take place so that 'safety and control of diabetes management' is better. In this regard both parties are to ensure that C is on this system by no later than November 2017."* [Emphasis added.]

12 Following the release of the PT report on 15 September 2017, conflict arose between the mother and the father regarding the status and implementation of the recommendations. The father evidently wished to see all the recommendations implemented immediately, while the mother was apparently in no hurry to do so. Her attitude was that the recommendations were subject to negotiation between the parties and would only become binding if and when sanctioned by an order of Court following the trial.

13 The father's attorney wrote to the mother's attorney on 11 October 2017, demanding confirmation that the mother agreed to abide by the recommendations of the experts – particularly those in regard to extended contact – failing which an urgent application would be made to court for the immediate implementation of the experts' recommendations *pendente lite*. No mention was made in the letter of 11 October 2017 regarding C's diabetes and the need to use the Medtronic Enlite sensor.

14 The mother's stance at that stage, as conveyed in her attorney's response dated 18 October 2017, was that she was willing to agree to the extended weekend

contact, but not to the mid-week sleepover contact, which she felt would be too disruptive for the children. She also objected to being forced to have a carer present at all times while the children were with her, as she felt that there was no basis for this requirement in her case as opposed to that of the father. Another bone of contention was where the children were going to spend Christmas 2017.

15 On 1 November 2017 the father's attorney wrote to the mother's attorney proposing a round table meeting the next day for the purpose of reaching agreement on the issues in dispute regarding the experts' recommendations and resolving the regulation of the parties' parental rights and responsibilities. It was stated in the letter that:

> *"If, however, agreement is not reached pursuant to the meeting, our instructions are to proceed with an urgent application as the current situation is untenable and not in the children's best interests. Of particular concern to our client is the implementation of the contact arrangements, including holiday contact, the management of C's diabetes in accordance with Dr Carrihill's recommendations, including C's use of the Medtronic Enlite sensor in accordance with paragraph 116.2 of the recommendations, which ought to have been implemented from today and the appointment of a facilitator team (paragraph 112 of the recommendations).*
>
> *In respect of this last issue and to the extent that your client is raising issues, as is my client, regarding the best interests of the children, the immediate appointment of the facilitators will allow for the resolution of the disputes within that forum."*

16 The proposed settlement conference regrettably did not take place on 2 November 2017 as the parties could not agree on what was to be dealt with at the meeting. The mother was vehemently opposed to a piecemeal settlement of the divorce, while the father was equally adamant that discussion would only be

entertained regarding the parental rights and obligations of the parties, and would not extend to financial issues.

17 On 1 November 2017, evidently in anticipation that the proposed settlement meeting would not happen and that litigation was imminent, the mother's attorney wrote to the father's attorney and conveyed that the mother was amenable to the extended weekend contact proposed by the experts, but not the mid-week sleepovers. She did however tender midweek contact every alternate Wednesday afternoon after school until 19h00. It was pointed out that the remaining dispute in regard to contact concerning 1 night in a 14-day cycle hardly warranted an urgent approach to court, especially when the allocation of a trial date was imminent. It was recorded that any application to enforce additional contact would be strenuously opposed.

18 Notwithstanding this warning, the father on 6 November 2017 launched this application for urgent relief in terms of Rule 43, with an urgent hearing sought on 21 November 2017. In terms of the notice of motion urgent interim orders were sought:

18.1 directing that the parties' shared parental responsibilities and rights in respect of the care and contact of C and M be regulated on the basis set out in the document annexed to the notice of motion, marked "X";

18.2 directing that the mother deliver the children's passports and unabridged birth certificates into the custody of a third party, agreed to by the parties or designated by the Court, charged with retaining

custody of these documents until directed otherwise by the parties jointly in writing or by Court order.

19 Annexure "X" to the notice of motion is a 21-page document which is not signed by the parties, but which, in every other respect, resembles a parenting plan envisaged in sections 33 and 34 of the Children's Act 38 of 2005 ("the Act"). It sets out detailed provisions pertaining to the care and contact of C and M, based on the recommendations in the PT report. The contents of annexure "X" are not couched as interim measures *pendent lite*, but as long term provisions regulating the parties' parental rights and responsibilities in respect of C and M. As Annexure "A" is essentially a draft parenting plan, I shall refer to it as "the draft parenting plan".

20 The draft parenting plan *inter alia* made provision for:

20.1 residence and contact arrangements as recommended in the PT report;

20.2 the appointment of a team of two facilitators to resolve disputes between the parties where joint decisions are required regarding the children, and to make binding directives if necessary, on matters such as schooling or tertiary education, major medical treatment or therapeutic intervention, changes in the residence and/or contact arrangements, a decision to vary the children's residence from the southern suburbs of Cape Town to any area in South Africa, with the costs of the facilitators to be shared equally between the parties;

20.3 the management of C's diabetes, including a stipulation that the parties co-operate to ensure that C is on the Medtronic Enlite sensor system by 30 November 2017;

20.4 both parties to have a carer present from 19h00 until 07h00 during all periods of contact with the children in order to assist with the children, for a period of six months with effect from 15 September 2017;

20.5 both parties to undergo therapy as well as CDT and GGT tests every three months for a period of 12 months, with the results to be forwarded to the facilitators.

21 The application was opposed by the mother, who delivered an answering affidavit on 20 November 2017 wherein she disputed the alleged urgency of the matter and the attempt to impose on her the terms of a parenting plan to which she had not agreed. In particular the mother objected to the appointment of facilitators without her consent, the forced change of C's insulin pump-sensor by 30 November 2017, the imposition of a mid-week sleepover every alternative week and the insistence that the mother have a carer present from 19h00 until 07h00 at all times when the children are with her.

**THE HEARINGS ON 21 NOVEMBER 2017 AND 6 DECEMBER 2017**

22 The matter first came before me in the urgent lane of the motion court on 21 November 2017. On that day it was agreed between Counsel that argument would

be confined to a point *in limine* concerning the Court's jurisdictional competence to make the order sought in prayer 2 of the Notice of Motion[1] despite the mother's opposition thereto.

23 Mr Pincus, who appeared with Ms Reilly for the mother, argued that this Court did not have jurisdiction to grant an order in the terms sought in prayer 2 of the Notice of Motion on the grounds that:

23.1 first, the document in annexure "X" was essentially a parental responsibilities and rights agreement or parenting plan as contemplated in sections 22(3), 33 and 34 of the Children's Act 38 of 2005 ("the Act"), but since the mother had not agreed the contents of annexure "X" and the document had not been signed by both parties as required in section 34(1)(a) of the Act, it could not be made an order of court; and

23.2 second, inasmuch as annexure "X" made provision for the appointment of a team of facilitators empowered to issue binding directives regarding matters requiring joint decision-making by the parties, this was an improper delegation of judicial authority and the order was therefore legally incompetent.

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[1] Prayer 2 of the Notice of Motion asks for an order *"directing that, pendent lite, the parties' shared parental responsibilities and rights in respect of the care and contact of the minor children born of the marriage* [C and M] *be regulated on the basis as determined in annexure "X" hereto."*

24 Ms Dicker, who appeared for the father, contended that the document in annexure "X" was not a parenting plan but a draft order containing detailed measures for regulating care and contact arrangements in respect of C and M *pendente lite*. She argued that the Court, as the upper guardian of minor children, can make any such order as may be required, and in such detail as may be necessary, in order to regulate care and contact arrangements in the best interests of minor children. She contended that the appointment of a facilitator in this case was necessary to avoid ongoing conflict and litigation between the parties about parenting issues, which was detrimental to the well-being of C and M, and that the Court had the power to make such an order in terms of its inherent jurisdiction as upper guardian.

25 If annexure "X" is regarded as unsigned parenting plan, then Mr Pincus is clearly correct that it cannot be made an order of court. On the other hand, if annexure "X" is regarded in substance as a draft order containing provisions regulating care and contact arrangements, then it would be highly pedantic to refuse to grant any relief in terms thereof merely because the "prayers" are contained in a document annexed to the notice of motion as opposed to being set out individually in the notice of motion. And when Courts are dealing with children care must be taken that the interests of minors are not *"held to ransom for the sake of legal niceties"*[2] or *"mechanically sacrificed on the altar of jurisdictional formalism."*[3]

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[2] *De Gree and Another v Webb and Others (Centre for Child Law as Amicus Curiae)* 2007 (5) SA 184 (SCA) para 99.

[3] *AD and DD v DW and Others (Centre for Child Law as Amicus Curiae; Department of Social Development as Intervening Party)* 2008 (3) SA 193 (CC) para 30.

26 With these warnings against formalism in mind, I considered it important to look beyond the technical shortcomings of prayer 2 of the notice of motion, and deal with any matters requiring the urgent intervention of the Court for the sake of the wellbeing of C and M. I therefore indicated to Counsel during the course of the hearing on 21 November 2017 that, while I had reservations regarding the manner in which prayer 2 of the notice of motion was framed and was not prepared to grant an order in the terms sought, I was not inclined to dismiss the application outright and was prepared to hear argument on the question of the 2017 Christmas holiday contact arrangements, the management of C's diabetes and the question of whether the father should be permitted to have mid-week sleepover contact with C and M *pendente lite*. My willingness to entertain argument on these aspects did not mean that I accepted that the matter was urgent or that any relief was indeed required: it simply meant that I thought these aspects merited further enquiry.

27 As regards the appointment of a facilitator, I indicated to Counsel during the hearing on 21 November 2017 that the question whether or not the Court has jurisdiction to appoint a facilitator to non-consenting parents was one of importance which required time for further research and consideration. It was not an issue which could or should be dealt with on an urgent basis, particularly where no great urgency in this regard had been demonstrated in the founding affidavit. I made it clear that if the father, notwithstanding the mother's opposition, persisted in seeking relief pertaining to the *pendente lite* appointment of a team of facilitators, judgment would have to be reserved

and a considered decision handed down in due course. Ms Dicker was amenable to the matter being dealt with on that basis.

28 In the event I granted an order postponing the application to 6 December 2017 for further argument on the questions of:

28.1 the management of C's diabetes;

28.2 whether or not the father should be permitted to have mid-week sleepover contact with C and M;

28.3 the parties' contact with C and M over the 2017 Christmas holiday period.

29 I think it important to state that my willingness to overlook the technical difficulties with prayer 2 of the notice of motion should not be understood as a license to depart from the requirements of the Uniform Rules of Court simply because one is dealing with minor children. It bears emphasis that prayer 2 of the notice of motion is irregular, for it is incumbent on a litigant to set out in the notice of motion exactly what relief the Court is being asked to grant. It is undesirable that a Court, or a litigant, should have to trawl through the detailed provisions of a document resembling a parenting plan in order to try and discern precisely what relief is being sought so as to establish whether or not a proper case has been made out therefor in the founding affidavit. This practice is burdensome for the Court, potentially prejudicial to the opposing party, and should be discouraged.

30 When the matter came before me again on 6 December 2017, the parties, assisted by their legal representatives, had agreed the contact arrangements for the Christmas 2017 holiday period. Despite my intimation on 21 November that I had a difficulty with the broad-ranging relief sought in prayer 2 of the notice of motion in the context of a Rule 43 application, Ms Dicker handed up two draft orders which the Court was asked to make, both of which were worded substantially in accordance with the document in annexure "X" to the notice of motion. The first order dealt with residence and contact arrangements (including holiday contact for December 2017), the management of C's diabetes, alcohol related issues, and a protocol for communication between the parties. The second draft order dealt with the appointment of facilitators.

31 I heard further argument from Ms Dicker on the question of the Court's power to appoint a facilitator to deal with parenting disputes in the absence of consent by both parents,[4] and Counsel for both parties addressed me on the question of the management of C's diabetes and mid-week sleepover contact.

32 During the course of the hearing on 6 December 2017, my attention was drawn to the fact that the experts had not consulted with Dr Carew, C's treating psychiatrist. I accordingly requested that the experts engage with Dr Carew and obtain her input on the question of the disputed mid-week sleepover contact.

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[4] Mr Pincus had advanced full argument on this issue on 21 November 2017, and had nothing to add in this regard at the hearing on 6 December 2017.

33 I deal in the remainder of this judgment with the issues of the Court's power to appoint a facilitator over the objection of one of the parents, the management of C's diabetes and the mid-week sleepover contact.

## DOES THE COURT HAVE THE POWER TO IMPOSE A FACILITATOR ON PARENTS IN THE ABSENCE OF CONSENT BY BOTH PARENTS?

34 The alternative dispute resolution process referred to as facilitation in the Western Cape, and as case management in Gauteng, is known internationally as parenting co-ordination. In the remainder of this judgment I shall, for the sake of uniformity, use the term parenting coordination and parenting coordinator ("PC") respectively.

35 Parenting coordination is a non-adversarial dispute resolution service provided by mental health professionals or family law lawyers who assist high conflict parents in divorce situations to resolve child-related disputes in an expeditious and child-focused manner, in order to minimise parental conflict with its associated risks for children. It is a *sui generis* process which requires legal, psychological and conflict resolution skills, and combines assessment, education, case management, conflict management and decision-making functions.[5]

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[5] Anna Parker and Mark Wilson, *"Parenting Coordination: A New Option for High Conflict Families?"* (2013) Australian Family Lawyer Vol 23, No 3, at 32; Nicole Garton *Conflict Analysis & Intervention Selection for Parenting Coordinators: Strategies for Success* (2017) https://www.mediate.com/articles/GartonN1.cfm at 2 A; Madelene (Leentjie) de Jong *Is parenting coordination arbitration?* (2013) *De Rebus* (July) 38.

36 Parenting coordination evolved in response to the widespread recognition that *"[t]he level and intensity of the parental conflict prior, during, and after divorce proceedings, rather than the divorce itself, is thought to be the most dominant factor in a child's psychological and social development post-divorce. Exposure to conflict can result in problems such as perpetual emotional turmoil, depression, substance abuse, and educational failure. Thus, it is imperative to avoid even those conflicts regarding minor issues, and implement mechanisms of resolving those conflicts amenably."* [6]

37 The Association of Family and Conciliation Courts ("AFCC"), an international, interdisciplinary association of professionals which has published guidelines for parent coordination, describes it as *"a child-focused alternative dispute resolution process in which a mental health or legal professional with mediation training and experience assists high conflict parents to implement their parenting plan by facilitating the resolution of their disputes in a timely manner, educating parents about children's needs, and with the prior approval of the parties and/or the court, making decisions within the scope of the court order or appointment contract."* [7]

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[6] Joi T. Montiel, *"Is Parenting Authority a Usurpation of Judicial Authority? Harmonizing Authority for, Benefits of, and Limitations on this Legal-Psychologial Hybrid"* (2014) Tennessee Journal of Law and Policy Vol 7, Iss. 2, 364 at 397. See, too, Linda Eldrod and Mildred Dale, *"Paradigm Shifts and Pendulum Swings in Child Custody: The Interests of Children in the Balance"* (2008) Family Law Quarterly Vol 42, No 3, 387 at 388; Joan B. Kelly, *"Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practice"* (2002) Virginia Journal of Social Policy & the Law Vol 10:1 129 at 142 – 143; *Jordan v Jordan* 14 A.3d 1136 (2011) (D.C. Ct. App. March 10, 2011) at Part III. C.

[7] The Association of Family and Conciliation Courts, *"Guidelines for Parenting Coordination"* (2005) at 2.

38 In 2014 Montiel wrote that thirteen states in the United States of America had adopted statues or court rules permitting parenting coordination, some with and some without decision-making authority, and that at least ten states were using parenting coordination without specific authority.[8] That number has doubtless since increased. The Massachusetts Probate and Family Court, for instance, in 2017 issued Standing Order 1 – 17, effective from 1 July 2017, which regulates the appointment of parenting coordinators in the Commonwealth of Massachusetts. This happened pursuant to the decision of the Supreme Judicial Court of Massachusetts in the case of *Bower v Bournay-Bower*[9] in which the Court declared the appointment of a parenting coordinator unconstitutional because of an unlawful delegation of judicial decision-making authority, but went on to say that:

*"Although the order appointing the parent coordinator in this case must be vacated ... we recognize the valuable role that parent coordinators may play in assisting families involved in the Probate and Family Court system. Consequently, we refer this matter to the Probate and Family Court to review and consider the promulgation of a rule governing the appointment of parent coordinators."* [10]

39 In South African there is currently no statute or court rule governing the appointment of parenting coordinators. The practice which has evolved in the Western Cape is that divorcing parents, acting on the recommendations of their legal and mental health advisers, agree to the appointment of a PC who is tasked with mediating parenting disputes between the parties and, where mediation has not been successful, empowered to make directives which are

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[8] Montiel *(supra)* at 377 – 378.

[9] 469 Mass. 690 (2014).

[10] *Id.* at p 707.

binding until set aside by the Court on review. The agreement to appoint a PC is usually embodied in a consent paper or parenting plan which is made an order of Court when the parties are divorced. An agreement to appoint a PC may also be embodied in an interim parenting arrangement which is made an order of Court during Rule 43 proceedings for interim relief *pendente lite*.

40 Since this Court has historically appointed PC's by agreement between the parties, or at least in circumstances where its power to appoint a PC was not pertinently challenged by one of the parties,[11] the question of whether or not the appointment of a PC constitutes an unlawful delegation of judicial authority has not arisen for determination in this division. In this case, however, the mother opposes the appointment of a PC, and the point has been squarely raised by Mr Pincus that the appointment of a PC with decision-making power to break deadlocks between parents is an impermissible delegation of the Court's judicial authority.

41 Mr Pincus relied in this regard on the decision of the South Gauteng High Court in *Hummel v Hummel ("Hummel")*,[12] in which the Court refused an opposed application for the appointment of a PC empowered to make decisions binding on both parents. Sutherland J held in this regard that *"no court has the jurisdictional competence to appoint a third party to make*

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[11] See *Schneider N.O. and Others v Aspelling and Another* 2010 (5) SA 203 (WCC); *MM v AV* (unreported WCC decision in case number 2901/2010) [2011] ZAWCHC 425 (16 November 2011); *CM v NG* 2012 (4) SA 452 (WCC).

[12] Unreported judgment in case number 6275/2012 (SGJ) delivered on 10 September 2012.

*decisions about parenting for a pair of parents who are holders of parental power as contemplated in section 30 and 31 of the* [Children's] *Act."*

42 Mr Pincus also referred me to the decision of this Court in *Wright v Wright ("Wright"),* [13] in which Van Staden AJ, in the face of opposition by the mother to the appointment of a new PC to replace one which had resigned, declined the father's request for the appointment of a replacement PC. Van Staden AJ referred to the decision in *Hummel*, with apparent approval, and went on to hold that in the particular case before him parenting coordination was not a practical alternative since the mother was opposed to it and the father had been unhappy with the rulings made by the previous PC. He was of the view that in these circumstances the parties would have to agree to accept the reasonable determinations of a PC as final before parenting coordination would be a practical option.[14] Although the decision in *Wright* might, at first blush, be construed as support for the statement of principle laid down in *Hummel*, it seems to me that a closer examination of Van Staden AJ's reasoning in *Wright* shows that the decision was based not on principle but on expedience: the Court declined to appoint a PC because the resistant attitude of the parties meant that parenting coordination was unlikely to work.

43 Ms Dicker argued that this Court has the power to appoint a PC notwithstanding the opposition of a parent where this would be in the best interests of the minor child involved. She relied in this regard on section 28(2) of the Constitution of the Republic of South Africa Act 108 of 1996 ("the

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[13] Unreported judgment in case number 20370/2014 (WCD) delivered on 18 April 2016.

[14] Para 19.

Constitution"),[15] sections 6(4)[16] and 7(1)(n) of the Act,[17] and the Court's inherent jurisdiction at common law as the upper guardian of all minors.

44 Ms Dicker referred me to the decision of *Hay v B and Others ("Hay")*[18] in which Jajbhay J had to balance a child's right to life against the parent's religious beliefs, which prohibited blood transfusions. The learned Judge held, with reference to the Constitutional principle that the child's best interests are of paramount importance, that:

> *"The High Court is the upper guardian of all minors and, where it is in the best interests of such minor to receive medical treatment, an order that the minor receive such treatment is appropriate notwithstanding the refusal by the minor's parents to consent to such treatment."* [Emphasis added]

45 To my mind Jajbhay J's approach in *Hay* demonstrates that a High Court may permissibly resort to its inherent jurisdiction as the upper guardian of

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[15] Section 28(2) of the Constitution states that *"A child's best interests are of paramount importance in every matter concerning the child."* This Constitutional principle is entrenched in section 9 of the Children's Act 38 of 2005 ("the Children's Act"), which provides that *"In all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied."*

[16] Section 6(4) of the Children's Act provides that:

*"In any matter concerning a child-*

*(a) an approach which is conducive to conciliation and problem-solving should be followed and a confrontational approach should be avoided; and*

*(b) a delay in any action or decision to be taken must be avoided as far as possible."*

[17] Section 7(1)(n) of the Children's Act stipulates that one of the factors to be taken into account in determining the best interests of the child is:

*"which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child."*

[18] 2003 (3) SA 492 (WLD).

minor children in order to fulfil its duty to protect the Constitutional rights of children. And, where necessary, a Court may, in terms of section 173 read with section 39(2) of the Constitution, develop and extend the common law relating to its inherent jurisdiction as upper guardian in order to respect, protect, promote and fulfil the fundamental rights of children.

46 Ms Dicker also referred me to an article by Professor Madelene de Jong[19] in which the learned author argues that there is authority, *inter alia* on the basis of section 28(2) of the Constitution and the inherent jurisdiction of the Court as upper guardian of minors, to sustain a Court appointment of a PC in the best interests of the child where the parents would otherwise be engaged in frequent conflict and re-litigation.[20] She goes on to suggest appropriate limitations on the appointment of a PC with a view to countering the objection that the appointment of a PC is an improper delegation of judicial authority.[21]

47 In my respectful opinion the judgment in *Hummel* is susceptible to the criticism that the Court lacked an understanding of the proper function of parent coordination. I say that because it regarded the case manager as "*a creature of statute invented to facilitate the achievement of the aims of section 33; ie the formulation of a plan and to promote agreement on the provisions of such plan.*"[22] In so doing, in my view, it conflated the role of the

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[19] M de Jong, *"Suggested Safeguards and Limitations for Effective and Permissible Parenting coordination (Facilitation or Case Management) in South Africa"* (2015) Potchefstroom Electronic Law Journal, Vol 18, No 2.

[20] *Id,* para 4.3.1, pp 163 – 165.

[21] *Id,* para 4.3.2, pp 165 – 170.

[22] *Hummel (supra)* para 8.

person referred to in section 33(5) of the Act,[23] whose task is to assist the parents to reach agreement on the terms of a parenting plan, with that of the PC, whose proper task is to assist the parents to implement the terms of an agreed parenting plan – I elaborate on this aspect below.

48 In *Hummel* the Court held, with reference to section 33(5) and section 34 of the Act,[24] that there was no hint that a Court could impose a parenting plan on a pair of parents in the absence of agreement. That, with respect, is indubitably correct. But the Court went on to say, with reference to section 33(5) of the Act, that *"the role [of] any other 'suitable person' (by any other name, including 'case manager') is to facilitate decision making rather than be the decision-maker."* This statement, in my view, indicates an erroneous equation of the function contemplated in section 33(5) with that of parenting coordination. It is understandable how this confusion of functions arose in *Hummel*: in that matter there was no agreed parenting plan and the case manager appointed to monitor contact arrangements had attempted unsuccessfully to assist the parties to agree on a parenting plan, and because parenting disputes were ongoing the court was asked to authorise the case manager to make wide-ranging decisions for the parents absent the framework of an agreed parenting plan.

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[23] Section 33(5) of the Children's Act states that:

*"In preparing a parenting plan as contemplated in subsection (2) the parties must seek –*

*(a) the assistance of a family advocate, social worker or psychologist; or*

(b) *mediation through a social worker or other suitably qualified person."*

[24] Section 34 of the Children's Act deals with the requirements for having a parenting plan registered with the family advocate or made an order of court. In essence the parenting plan must be in writing and signed by the parties, i.e. agreed, and the application to have the parenting plan registered or made an order of court must be brought by both parents.

49 It just so happened in *Hummel* that there was a co-incidence of the functions of the person contemplated in section 33(5) and that of the PC. But the roles are conceptually separate, and care should be taken to treat them as such. In my view it does not follow that because the contents of a parenting plan have to be agreed and cannot be imposed on parents, that necessarily means that the Court cannot, in appropriate cases, appoint a PC with limited decision-making powers to assist the parties in implementing the terms of an agreed parenting plan which has been made an order of court.

50 Furthermore, it seems to me that the wide statement in *Hummel* that *"the appointment of a decision maker to break deadlocks is a delegation of the court's power, itself an impermissible act"* [25] needs to be qualified. While I agree that the decision-making authority which the Court was asked to confer on the PC in *Hummel* was so broad in scope as to be impermissible, I consider that it is possible, by means of appropriate limitations on the scope of the PC's authority, to craft a role for the PC which does not constitute an unlawful delegation of judicial decision-making authority, but permits the parties (and indeed the Court)[26] to benefit from the services of a PC. In my view the appointment of and powers conferred on a PC can and should be limited in a number of essential respects in order to avoid an impermissible delegation of judicial authority.

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[25] *Hummel (supra)* para 13.

[26] Parenting coordinators can fulfil a useful purpose in the administration of justice by conserving judicial resources which would otherwise be taken up by high-conflict parents who are frequent litigators regarding post-divorce disputes.

51 To my mind the following three factors provide a useful starting point for a consideration of the limitations which should be imposed on a PC's powers:

51.1 First, the AFCC definition of parenting coordination[27] envisions the role of the PC as assisting high-conflict parents to implement their parenting plans and, to that end, with the consent of the parties or the authority of the court, making decisions within the scope of the court order or appointment contract. This definition of parenting coordination, which I endorse, contemplates the existence of a parenting plan in which the parties' parental rights and obligations have already been agreed or fixed by an order of court.

51.2 Second, the Act sets out the substantive matters which lie within the exclusive preserve of a court to decide, having regard to the standard of the best interests of the child. These matters include care and contact, guardianship, and the termination, extension, suspension or restriction of parental responsibilities and rights. Any purported delegation to a PC of the power to decide these matters would be unlawful. Thus, for example, it would be unlawful and invalid to confer on a PC the power to change the primary residence of a child, or to alter the allocation of contact between the parents, or to determine whether or not a parent's contact with a child should be supervised.

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[27] Quoted above at paragraph 37.

51.3 Third, section 34(5) of the Act prescribes that parenting plans which have been made an order of court may only be amended or terminated by an order of court on application, while section 22(7) provides that only the High Court may confirm, amend or terminate a parental responsibilities and rights agreement which relates to guardianship of a child. These provisions make it clear that a PC cannot make a valid directive which has the effect of amending a court ordered parenting plan.

52 To my mind these three considerations provide a roadmap for the limitations which need to be imposed on the functions and powers of a PC.

53 In my view the first and foremost limitation on the appointment of a PC should be that the parties must have already reached agreement on the terms of a parenting plan, whether interim or final, which has been made an order of court, [28] and the PC's role must be limited to addressing implementation of or compliance with an existing court order.

54 I stress this requirement, as an agreed parenting plan which has been made an order of court is necessary to provide the framework which delineates the PC's proper function and authority. Without it one runs the risk of an improper delegation of judicial decision-making power of the type which the

[28] I do not mean to suggest that the parties must necessarily also have agreed that a PC be appointed, although that will be the case in most instances where the parties have managed to agree the contents of a parenting plan. I deal further below with the situation where the parties do not, in their parenting plan, consent to the appointment of a PC.

Court was being asked to authorise in *Hummel*. But where there is a court order in place, the PC may be confined to making decisions consistent with the court order in order to assist the parties to comply with it, and the PC's role may be conceived as supervision of the implementation of the court's order.[29]

55 This was the view of the Kentucky Court of Appeals in the case of *Telek v Bucher*,[30] in which it was held that the trial court's appointment of a PC was not an improper delegation of judicial authority because the PC was simply supervising the trial court's orders to ensure that the terms thereof were carried out. The Kentucky Court of Appeals also held that the trial court had inherent authority to enforce its own orders.

56 In my view the High Court in South Africa by virtue of the provisions of section 173 of the Constitution[31] likewise enjoys inherent authority to ensure that its orders are carried out. It is well-established that the High Court has inherent jurisdiction to enforce its orders by committal to prison for contempt of court.[32] I see no difficulty, therefore, with the notion that the High Court may, in the exercise of its inherent power to protect and regulate its own process, appoint a PC tasked with supervising compliance with the court's order to ensure that its terms are carried out.

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[29] Montiel *(supra)* at 406; De Jong *(supra)* at 168.

[30] Case No. 2008-CA-002149-ME, 2010 WL 1253473*5 (Ky. Ct. App. April 2, 2010).

[31] Section 173 of the Constitution provides that:

*"The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."*

[32] See *Bannatyne v Bannatyne* 2003 (2) SA 363 (CC).

57 The second limitation which I propose on a PC's power is related to and flows from the first, namely that the PC's decision-making power must be confined to ancillary rulings which are necessary to implement the court order, but which do not alter the substance of the court order or involve a permanent change to any of the rights and obligations defined in the court order, so that the PC does not trespass on the Court's exclusive jurisdiction in terms of the Act.

58 In this regard the decision of the District of Columbia Court of Appeals in *Jordan v Jordan ("Jordan")* [33] provides a useful example. In that case the trial court, which decided the issues of custody and visitation, appointed a PC over the objection of the mother with permission to *"make decisions resolving day-to-day conflicts between the parties that do not affect the court's exclusive jurisdiction to determine ... fundamental issues of custody and visitation*" and the trial court's order specifically stated that *"[n]othing in this order shall be construed to be or confer on the special master* [PC] *the right or obligation to make a custody evaluation ... [or] to make decisions that conflict with the parties' right to make decisions regarding the children's religion or the children's observation of religious requirements."* [34]

59 On appeal the court in *Jordan* rejected the argument that the trial court lacked authority to appoint a PC over the objection of the mother. It held that the trial court enjoyed authority under a rule which empowered it to appoint

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[33] 14 A.3d 1136 (D.C.2011).

[34] *Id.*

and delegate powers and functions to a "special master". While there is no equivalent rule in South Africa, the inherent jurisdiction of the High Court as upper guardian in my view creates a legal basis for a similar appointment. The appeal court in *Jordan* went on to say:

*"Of course, the court's ability to delegate authority to a special master or parenting coordinator has limits. Most clearly, in this context, a trial court may not abdicate its responsibility to decide the core issues of custody and visitation. By statute, when custody of a child is disputed, the trial court must decide what type of custody arrangement is appropriate. In addition, we have held that it is improper for a trial court to delegate decisions regarding a party's right to visitation.*

*In keeping with these limitations, the Special Master Order specified that the parenting coordinator may 'make decisions resolving day-to-day conflicts between the parties that do not affect the court's exclusive jurisdiction to determine fundamental issues of custody and visitation.' The Special Master Order further stated, 'In the event of a dispute between the parties as to issues significantly affecting their children, the Special Master may make decisions regarding the following day to day issues' ... Thus, the order properly acknowledged and preserved the trial court's responsibility to decide the issues of custody and visitation."* [Emphasis in the original]. [35]

60 The reasoning in *Jordan* is to the effect that a limited delegation to a PC will not amount to an improper delegation of judicial authority if it is confined to decisions about day-to day conflicts which do not trespass on the exclusive jurisdiction of the court to decide the core issues of custody and visitation. By parity of reasoning, an appointment of a PC in South Africa will not constitute an impermissible delegation of judicial power if the PC is not tasked with deciding the various issues referred to in the Act which lie within the exclusive preserve of a court to determine.

[35] *Id.*

61 In the case of *Yates v Yates ("Yates")* [36] the Superior Court of Pennsylvania adopted a similar approach to that taken in *Jordan*. In Yates an appellate court rejected the argument that the decision-making power conferred on a PC was an improper delegation of judicial authority in circumstances where the trial court had already resolved the primary issues relating to legal custody, physical custody and visitation, and had only authorised the PC to resolve *"ancillary custody disputes, such as determining temporary variances in the custody schedule, exchanging information and communication, and coordinating [the child's] recreational and extracurricular activities."* [37]

62 A simple example serves to illustrate the difference between a decision which is ancillary to the court order and one which operates as an amendment of the court order: the court order stipulates that the child will spend alternate weekends with her parents, and that mother's day will be spent with the mother and father's day with the father. A conflict arises, however, where mother's day falls over the father's weekend and he is unwilling to agree to a change of the weekend schedule. If the PC in these circumstances were to direct that the child should spend the day from 10h00 to 18h00 with the mother on mother's day but the rest of the weekend with the father, such a decision would not amount to a permanent variation of the terms of the consent order since the default position of alternating weekends remains the same. But the ruling of the PC would fulfil a vital function in

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[36] 963 A.2d 535 (Pa. Super. Ct. 2008).

[37] *Id.* para 14.

ensuring the fair implementation of the court order in the best interests of the child: acrimony would be kept to a minimum and the undesirable situation prevented where a party is denied justice because of a lack of time or funds to approach the Court for a decision on a relatively trivial matter.

63 As Professor de Jong points out, in most jurisdictions in the USA and Canada, PC's are allowed to make decisions on minor issues only, such as temporary changes to the contact schedule which do not substantially alter the basic allocation of time share between the parents, the transportation and "handover" of the child between the two homes, the temporary care of a child by a person other than one of the parents, telephone and skype contact with the non-resident parent, a child's daily routine including extramural activities and routine medical care. [38]

64 In Idaho, for instance, the parenting coordination rule gives examples of what matters a trial court may authorise a PC to decide, which include: time, place and manner of pickup and delivery of children; child care arrangements; minor alterations to parenting schedule in respect of weeknight, weekend or holiday contact which do not substantially alter the basic time share allocation; participation by significant others and relatives in contact; first and last dates of long holiday contact; schedule and conditions of telephone contact; manner and methods of parental communication; and approval of travel plans.[39] The Idaho rule also specifically precludes a PC from making binding decisions on more significant matters such as: which parent may

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[38] De Jong *(supra)* at 168.

[39] Montiel *(supra)* at 434.

authorise treatment or counselling for a child; which parent may select a school; supervision of contact; submission to a care and contact assessment, and maintenance for the child.[40] Furthermore, the Idaho rule includes a salutary overall limit that the PC make only make decisions insofar as necessary to serve the best interests of the child. It provides that:

*"The goal of the Parenting Coordinator should always be to empower the parents in developing and utilizing adaptive parenting skills so that they can resume the parenting and decision making role in regard to their own children. When it is not possible for the parents to agree, the Parenting Coordinator shall provide only the amount of direction and service required in order to serve the best interest of the child by minimizing the degree of conflict between the parties."*[41]
[Emphasis added]

65 Similarly, in British Columbia, Canada, a parenting coordinator may only make determinations in respect of matters such as a child's daily routine, the participation of the child in extracurricular activities and special events, the provision of routine medical care to the child, transportation and exchange of the child, and contact during vacations and special occasions. A parenting coordinator may not, in British Columbia, make determinations in respect of the relocation of a child or changes to guardianship, the allocation of parental responsibilities or parenting time and contact.[42]

66 The apparent triviality of the sorts of issues which PC's may be authorised to decide should not cause one to lose sight of the importance of the PC's function. Research has shown that high-conflict parents are more prone to

[40] *Id.*

[41] Montiel *(supra)* at 435, citing Idaho Rules of Civil Procedure 16(1)(1).

[42] Nicole Garton *(supra)*.

arguing about day-to-day issues than major child-related decisions.[43] And it bears emphasis that ongoing parental conflict over minor – even petty – issues can have a major impact on the well-being of children post-divorce. It is no exaggeration to say that the ravages of incessant parental conflict pose a real threat to a child's Constitutional rights to dignity,[44] parental care,[45] and protection from abuse.[46] Entrenched parental conflict, which can have a devastating impact on a child's feelings of security, well-being and self-worth, constitutes a form of emotional abuse of the child. That being the case, I consider it incumbent upon the High Court, in appropriate cases, to "forge new tools and shape innovative remedies" in order to provide an effective remedy against the threat to a child's fundamental rights posed by ongoing parental conflict post-divorce or separation.[47]

67 The third limitation on a PC's powers, which I regard as essential to avoid an impermissible delegation of judicial authority, is that all decisions of the PC must be subject to comprehensive judicial oversight in the form of a full reconsideration of the decision.[48] This means that the rulings of the PC, even if they operate immediately pending review, <u>are not final in effect</u> because

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[43] De Jong *(supra)* at 169. See, too, Kelly *(supra)* at 142, *"Many of the disputes of chronic litigators are relatively minor, and often have no basis in law or psychology, nor do they often have important long-term consequence for their children."*

[44] Section 10 of the Constitution.

[45] Section 28(1)(b) of the Constitution.

[46] Section 28(1)(d) of the Constitution.

[47] See *Bannatyne v Bannatyne (supra)* para 19; *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 69.

[48] De Jong *(supra)* at 169. While the literature on parenting coordination generally speaks of the need for judicial review, it seems to me that what is contemplated is an appeal in the wide sense of a complete re-hearing and fresh determination of the merits of the matter.

they are susceptible to alteration by the Court. By permitting a PC's rulings to operate immediately, subject to a party's right to apply to Court for a stay of the ruling pending a review, one strikes a necessary balance between the need for expeditious and effective conflict resolution by the PC and the need for judicial scrutiny of the PC's rulings. If the default position is that a PC's rulings are not operative until such time as they have been endorsed by the Court, the essential rationale for parenting coordination, viz. an expeditious and inexpensive form of dispute resolution which reduces the involvement of the Courts, will be undermined.

68 The fourth limitation which I would impose on the appointment of a parenting coordinator involves a cluster of findings which a Court should, in my view, be a condition precedent to the appointment of a PC in the situation where the parents do not consent both to the appointment of a PC but also to the conferral of limited decision-making powers on the PC. The necessary determinations or findings are:

68.1 That the welfare of the child or children involved is at risk through exposure to chronic parental conflict because the parties have demonstrated a longer-term inability or unwillingness to make parenting decisions on their own (for instance by resorting to frequent, unnecessary litigation), to comply with parenting agreements or court orders, to reduce their child-related conflicts, and to protect their children from the impact of that conflict.[49]

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[49] See AFFC *"Guidelines for Parenting Coordination"* (2005) at 2; De Jong *(supra)* at 166 – 177; Montiel *(supra)* at 410 - 418.

68.2 That mediation has been attempted and was unsuccessful, or is inappropriate in the particular case. (This is a necessary finding to ensure that the appointment of a PC without parental consent is a last resort reserved for the cases of particularly intractable conflict.)

68.3 That the person proposed for appointment as the PC is suitably qualified and experienced to fulfil the role of PC. Parenting coordination is not for the faint-hearted. It demands the patience of Job and the wisdom of Solomon, not to mention training in mediation and an understanding of family law and psychology. As Kelly observed, *"[i]t is a unique hybrid role, and requires excellent developmental, psychological and legal knowledge and skills, a concern for children, objectivity and patience, and comfort with high levels of pressure and conflict."*[50] Before a Court imposes a PC on parties without their consent, it must be sure that the person appointed has the proper skill-set, personal qualities and professional experience to do the job properly. Needless to say, an unskilled or temperamentally unsuitable PC could inflame a volatile conflict situation and do more harm than good.

68.4 That the fees charged by the proposed PC are fair and reasonable in the light of his or her qualifications and experience, that the parents can afford to pay for the services of the PC, and that at least one of the parents agrees to pay for the services of the PC. It goes without

[50] Kelly *(supra)* at 144.

saying that a Court should not impose a PC on parties where they are not in a position to pay for those services, where the PC's proposed charges are unreasonable, or where neither parent is willing to pay for the services of the PC. [51]

69 Absent the consent of the parties to the appointment of a PC and the terms of his or her appointment, a Court should not, in my view, impose a PC on parties without conducting the necessary enquiries and making the findings referred to above.

70 It is noteworthy that the Court in *Hummel* did admit of the possibility that the High Court's common law power as the upper guardian of minor children may, in exceptional cases, form the basis of a special remedy to achieve an appropriate outcome.[52] I respectfully share the view of Sutherland J that circumspection is required when exercising the power conferred by section 38 of the Constitution to craft a remedy for every fundamental right. I also agree that it was not appropriate on the facts in *Hummel's* case to appoint a PC. But I am of the firm view that where there is a court-ordered parenting plan in place, and there is evidence which shows that the child is at risk due to a demonstrated inability or unwillingness of the parents to co-parent peacefully in the best interests of the child, then the circumstances are sufficiently exceptional to warrant the invocation of the court's inherent power

[51] Standing order 15 of the Massachusetts Probate and Family Court Standing Order on Parenting Coordination requires that the Court enter a finding that one or both parties consent to the allocation of fees of the PC and that the party or parties have the financial means to make such payment. If neither party is willing to pay for the services of the PC, the Court may not make an order requiring the use of a PC.

[52] *Hummel (supra)* para 14.

both to enforce compliance with its own orders and to ensure protection of fundamental rights.

71 To summarise then: I consider that a High Court may, in the exercise of its inherent jurisdiction as the upper guardian of minor children:

71.1 appoint a PC with the consent of both parties, provided that:

a. there is already an agreed parenting plan in existence, whether interim or final, which has been made an order of court;

b. the role of the PC is expressly limited to supervising the implementation of and compliance with the court order;

c. any decision-making powers conferred on the PC is confined to ancillary rulings which are necessary to implement the court order, but which do not alter the substance of the court order or involve a permanent change to any of the rights and obligations defined in the court order;

d. all rulings or directives of the PC are subject to judicial oversight in the form of an appeal in the wide sense described in *Tickly & Others v Johannes N O & Others,*[53] ie *"complete re-hearing of, and fresh determination of the merits of the matter with or without additional evidence or information."*

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[53] 1963 (2) SA 588 (T) at 590G – 591A.

71.2 appoint a PC without the consent of both parties, provided that Court is satisfied not only that the conditions listed in a. to d. are met, but also that:

e. the welfare of the child is at risk from exposure to chronic parental conflict based on evidence of the parents' inability or unwillingness to co-parent peacefully;

f. mediation has been attempted and was unsuccessful, or is inappropriate in the particular case;

g. the person proposed for appointment as the PC is suitably qualified and experienced to fulfil the role of PC;

h. the fees charged by the proposed PC are fair and reasonable in the light of his or her qualifications and experience, that the parents can afford to pay for the services of the PC, and that at least one of the parents agrees to pay for the services of the PC.

65 That brings me to the question of whether or not this Court should appoint a PC in this case where the mother is opposed to such appointment. In the light of what I have stated above it should be clear that the answer is "no". In this regard:

65.2 In the first instance, the contents of the parenting plan have not yet been agreed and aspects of the parenting plan proposed by the father are still hotly disputed. If these disputes are not resolved by negotiation, they will have to be determined by the trial court. Absent an agreed parenting plan which has been made an order of court, what I consider to be an essential precondition for the appointment of a PC, namely that the PC's role be limited to addressing the implementation of or compliance with an existing court order, is lacking.

65.3 Secondly, while it does appear that the parties in this case fall into the category of "high-conflict" parents, this may have to do with the fact that the divorce litigation is still underway so that emotions are running high and the parties have not yet had an opportunity to settle into their new reality. It may turn out to be the case that the parties are able to resolve ongoing parenting conflicts through mediation once the divorce has been finalised and a court order put in place with regard to residence and contact arrangements. Unless both parents consent to the appointment of a PC, parenting coordination should, in my view, only be imposed as a measure of last resort where mediation has first been attempted and has failed, or is not appropriate because of special circumstances, such as domestic violence.

66 I consider that the request for the appointment of a PC at this interim stage of the matter is premature, and I decline, for the reasons set out above, to make an order appointing a PC as requested by the father.

**THE MANAGEMENT OF C'S DIABETES**

67 As part of his treatment for Type I diabetes, C is required to wear an insulin pump and a sensor for continuous glucose monitoring ("CGM"). These are medical devices which are inserted subcutaneously and attached to C's body. The dispute before me concerns the manner and timing of a proposed change of the CGM sensor currently worn by C to another brand of CGM sensor which offers advantages in the monitoring and control of C's blood glucose levels.

68 In order properly to evaluate the dispute regarding the change of C's CGM sensor, it is important to understand C's particular challenges as a sufferer of ASD and anxiety disorder. Dr Carew noted in a report dated 11 October 2016 that C *"has always manifested anxiety when faced with disrupted routines. This is a feature of Autism Spectrum Disorder."* In a report dated 9 November 2017, Dr Carew wrote the following regarding C:

*"Anxiety has been the primary psychiatric symptom receiving attention in the practice.* [C] *was prescribed Serdep 25mg at night to address his high levels of anxiety in 2012. He presented with behavioural symptoms in new situations where he felt overwhelmed. He would become controlling or cry and avoid new situations. His heart would race and it would take 20 minutes to calm him down….*

[C's] *anxiety has a genetic basis. Children with diabetes and with autism are also prone to much higher rates of anxiety than the general population.* [C] *still struggles with transitions, has a fear of needles and is anxious about medical procedures. The breakdown in his parents' relationship and their subsequent separation and the change in living arrangements escalated his anxiety. The dosage of Serdep was*

*increased to 50mg daily in 2016. I have also notices a change in* [C's] *mood recently."* [Emphasis added.]

69 Ms Jana Forrester, an educational psychologist and specialist in ASD who first diagnosed C with ASD in 2011, and who subsequently assisted the mother in understanding and managing C's symptoms and behaviours, wrote the following in a report dated 11 November 2017:

"[C] *is an able student and shows good learning potential. The most salient features of his ASD have been his precocious number sense, his obsessional interests and behaviours, his inflexibility and consistently high levels of anxiety when faced with unpredictability. Typical of children with ASD,* [C] *does not always read situations nor the perspective of others, and hence negotiates life on his terms. <u>He implodes emotionally when he feels unsure and hence needs life and his surroundings to be structured and ordered</u>.* [C] *functions best when there is routine and sameness to his day/week/programme…*

*<u>[C] should be managed with a low arousal approach as this alleviates anxiety and does not exacerbate his cortisol and blood sugar levels</u>. He should be managed with firmness and not fear at all times, care should be taken to distract him out of stuck patterns of behaviour rather than trying to talk and reason him out of them.*

*It is important to prepare [C] for changes to his environment or routine. Give him time to ready himself for change or shift from one activity to the next. Explain in few words and be as concrete as possible. Use visual schedules where possible to help him shift."* [Emphasis added]

70 I consider that the views of Dr Carew and Ms Forrester, experts who have dealt with C and are familiar with his condition, are vital for this Court to be attuned to C's needs and be able to understand and appreciate why his parents are in dispute over the transition from one CGM sensor to another.

71 As part of their investigation the experts requested Dr Carrihill to review the historic treatment and management of C's diabetes and make recommendations for the management of his diabetes going forward. Dr Carrihill produced a report dated 20 August 2017 ("the Carrihill report") which was annexed to the PT report and formed the basis of the recommendations in the PT report regarding the future management of C's diabetes.

72 In the Carrihill report it was noted that C is currently using the Medtronic 640G insulin pump, but that he is not using the corresponding Medtronic Enlite CGM sensor ("the Enlite sensor"). It is common cause that C is currently using the Libre CGM sensor ("the Libre sensor"), which is not synchronised with the Medtronic insulin pump, unlike the Enlite sensor. Dr Carrihill recommended that C use the Enlite sensor instead of the Libre sensor because it offers advantages in terms better monitoring and tighter control of blood glucose levels. She explained that:

> *"The Medtronic 640G insulin pump is a sensor augmented pump, which means that together with the Medtronic Enlite sensor, it extends its function to enhance safety and control of the diabetes management by allowing for the pump to suspend insulin delivery in anticipation of a low sugar level, and then the resumption of delivery when the sugar level returns to normal. This enhanced function, called the SmartGuard, has not been used in* [C], *because he has been using the Enlite sensor."*

73 In her report Dr Carrihill noted that the reason why C was still using the Libre sensor had to do with C's anxiety and unwillingness to accept the Medtronic sensor, but she stressed that the Libre sensor was not ideal. She stated in this regard that:

"[The mother] *has said that* [C] *would not accept the Enlite sensor, due to his anxieties about the noise the pump makes when it is alarming in response to the sensor readings.* [The mother] *has managed to get* [C] *to accept the Libre flash glucose monitoring system, which at least allows for frequent checking of* [C's] *sugar level without pricking him, and allows for trends to be followed. Unfortunately, it in no way replaces the Enlite as it cannot forewarn of high or low sugar levels, and it cannot interact with the pump to perform the described SafeGuard functions."*

74 Dr Carrihill concluded that:

*"It is my opinion that* [C] *would benefit from using the Enlite sensor with the 640G SmartGuard function. I recommend that he is guided by his parents and his counselling therapists to accept the Enlite sensor. I would recommend that this is facilitated to occur within three months. There is no benefit to deferring this decision, as* [C's] *anxiety towards the Enlite would only build in the intervening time. Rather, with sensitive and appropriate guidance, I believe* [C] *will come to accept the Enlite, as he did the 640G (he demonstrated extreme reluctance to change to the new pump when the old pump had to be replaced when it reached 4 years of use). I will facilitate the reduction of his anxiety towards the alarms by reducing the alarm settings to only the minimum hypoglycaemia alert in the beginning."* [Emphasis added]

75 Based on Dr Carrihill's recommendation in August 2017 that C's transition to the Medtronic sensor occur within three months, the experts in the PT report recommended that *"both parties are to ensure that* [C] *is on* [the Medtronic] *system by no later than November 2017."*

76 In the founding affidavit the father accuses the mother of refusing to facilitate the switch to the Enlite sensor despite Dr Carrihill's recommendations and of compromising C's well-being. It seems to me that this accusation is unfair on a number of scores.

78.1 Firstly, it was made clear in a letter addressed by the mother's attorneys to the father's attorneys on 2 November 2017 (and subsequently confirmed in the mother's answering affidavit) that the mother was not opposed to the transition to the Medtronic sensor, but that her concern was that the transition should be managed with sensitivity and not be imposed according to an arbitrary timetable which did not take into account C's particular challenges as a sufferer of ASD and anxiety disorder, which meant that the changing of a medical device attached to his body was a traumatic event for him. The relevant portions of the letter bear quoting as, to my mind, they show that the mother was not refusing to implement the change to the new sensor, but was rather concerned to manage the transition at a pace and in a manner sensitive to C's particular needs:

*"In regard to* [C's] *diabetic problems, you have clearly overlooked the fact that* [C] *suffers from ASD (Autism Spectrum Disorder) as well as an anxiety disorder and the changing of his regimen has always been an extremely sensitive and traumatic event for the child….*

*If your client does not accept the said sensitivity and traumatic effect set out above, then may we suggest that you request your client to attempt to insert the Medtronic Enlite Sensor himself. He is welcome to do so at our client's home at any time suitable to your client. He will then witness for himself how traumatic it is for* [C] *and how it affects his anxiety levels…. Our client is not prepared to force* [C] *to undergo this stress without taking cognisance of* [C's] *difficulties and working patiently with him.* [C] *currently wears the Libre CGM sensor which took several months of working with him to get him to accept so it's not as if he is without this technology. The transition requires the same level of sensitivity and due care. Our client is working under the guidance of* [C's] *child psychologist and his child psychiatrist in this regard.*

*In addition a play therapist has been contacted to commence working with the child.*

*What Dr Carrihill has overlooked is that the child is not nerotypical in his responses and is on the spectrum.*

*However, our client has noted the recommendations and benefits of the new sensors and our client will continue to endeavour her best to insert the sensors while working within the constraints of* [C's] *condition and with the guidance of the professionals she consults with."* [Emphasis added]

78.2 Secondly, the father seems to place all the responsibility for managing the transition to the Medtronic sensor on the mother. He is an armchair critic who is quick to find fault but does not offer to assist in shouldering the burden of this undoubtedly difficult task. Until he has walked a mile in the mother's shoes it ill behoves him to cast aspersions on her conduct.

79 In her answering affidavit deposed to on 20 November 2017, the mother expressed concern that the experts compiled their report without having consulted with Dr Carew, who she describes as *"a critical member of* [C's] *treatment team for the past six years"*, despite the fact that she provided them with Dr Carew's particulars. This omission is difficult to fathom, particularly when one considers the extensive range of interviews conducted by the experts. It is a striking flaw in an otherwise meticulous report crafted with commendable sensitivity and care to promote healing in this troubled family. The experts confirmed in a supplementary report dated 2 February 2018 that neither of them had telephonic contact with Dr Carew regarding C,

and that this occurred *"partly as a result of a miscommunication"*. They state, however, that they had sight of Dr Carew's report dated 11 October 2016 and took this into account in making their recommendations. I am not convinced that the cryptic reference to a *"miscommunication"* is a satisfactory explanation for what seems to me to be a significant *lacuna* in the experts' investigation. I would have thought that the necessity of engaging with C's treating psychiatrist regarding the likely impact of any proposed changes to his diabetic treatment and daily routine was obvious. The experts will no doubt amplify their explanation in this regard at the trial.

80 Be that as it may, the important point for present purposes is that I must have regard to the views expressed by Dr Carew regarding the change from the Enlite sensor to the Medtronic sensor.

81 In a report dated 9 November 2017, a copy whereof is annexed to the mother's answering affidavit, Dr Carew opined that:

> "[C] *at age 9 is starting to express his feelings about the burden of diabetes and the treatments involved. He is becoming resistant to the introduction of new ideas. This can be seen not only as part of the autism as it is not uncharacteristic for a child with diabetes to present with this behaviour. We also need to consider the impact of the breakdown in his parents' relationship on his sense of disempowerment.*
>
> *It is fortunate that* [the parties] *are in a position to afford the best possible medical treatment for their son's diabetes and I am sure that they are both committed to providing the best possible care. <u>However, it is not in the best interests of the child to force a new pump sensor upon</u>* <u>[C]</u>*<u>. It is my opinion that any attempt to force</u>* <u>[C]</u> *<u>to adopt a new pump-sensor without working with him individually would be detrimental in both the short and long-term. I would recommend that an independent therapist become involved to work on his anxiety, self-image, and</u>*

*health-related behaviours and in so doing facilitate the required changes in treatment.* [C's] *complex co-morbid physical and psychiatric disorders require specialist intervention and support to facilitate change. An instruction for one parent to institute a new treatment and then manage the consequences would be contrary to [C's] psychological development and is likely to sabotage his adherence to his diabetic treatment in the long-term."* [Emphasis added.]

82 A copy of Dr Carew's report dated 9 November 2017 was furnished to Dr Carrihill, prompting a response from Dr Carrihill to Dr Carew the same day by way of a letter in which she thanked her for her *"very valuable input"* and expressed the hope that they could work together to help C's diabetes care. She explained that C required tighter control with fewer swinging blook sugar levels, and that this needed to be achieved *"in at least the medium term, as in within the next year"* before the onset of puberty with the associated physiological and psychological stressors. With this in mind she asked Dr Carew:

*"Would we be able to work together to guide an independent therapist to work with [C], with the (diabetes related) aims of:*

1. *Allowing blood to be drawn so that I can do the essential surveillance he is long-overdue.*
2. *Working at changing over from the Libre to the Medtronic sensor over the next 6 months?"*

83 Dr Carew responded positively to the invitation to work together with Dr Carrihill, and on 10 November 2017 she addressed an email to Dr Carrihill and the parties in which she stated that there was a need to reach consensus on how to transition to the Medtronic sensor. She requested a joint meeting with Dr Carrihill to *"integrate the physical and psychiatric*

*aspects of his care in a way that centres on* [C's] *best interests"* and expressed confidence that this could be achieved. I regard these developments as positive. This is exactly the sort of multi-disciplinary cooperation between experts which will ensure the best possible care for C.

84 On 29 November 2017, between the first and second hearings on 21 November 2017 and 6 December 2017 respectively, the mother deposed to a supplementary answering affidavit in which she stated that she consulted with Dr Carew at her request for an hour on 20 November 2017 following a meeting which Dr Carew had had with the father. Pursuant to her meetings with both parents, Dr Carew on 21 November 2017 issued a report, a copy hereof was annexed to the mother's supplementary affidavit, in which she recorded that:

*"There are 2 main issues which you* [Dr Carrihill] *– as the treating physician – have raised:*

- *The need for blood tests to ensure the long-term surveillance of the diabetes*
- *The transition from the Libre CGM (Constant Glucose Monitor) to the Medtronic Enlite sensor.*

*Both parents support this position and the onus has been placed on* [the mother] *to achieve the outcome.*

[The mother] *attends the Diabetic Support group and seeks information, advice and support from other parents with children in similar circumstances. She has found introducing* [C] *to other children with diabetes to be beneficial and the peer exposure and support has encouraged him to try new treatments e.g. Libre sensor.*

[The father] *has recommended that the parents learn about and introduce the Medtronic sensor to [C] with the support of Mrs Michelle Ridgeway, Medtronic representative, who has a son with diabetes.* [The mother] *is in agreement with this and has previously been in communication with Mrs Ridgeway.* [The father] *has*

*requested that this process be undertaken over the December holidays prior to* [C's] *transition to Grade 4.*

*We are all in agreement that* [C's] *blood tests are long overdue. I have even questioned the possibility of an admission to ensure that it is done.* [The mother] *has described in detail her efforts to encourage* [C] *to voluntarily* [sic] *present for blood tests. He agrees in principle but his anxiety escalates and behaviour shifts when they leave for the laboratory. With the prospects of long-term testing required, it is better to appeal to [C's] reasoning and not have his primary care-giver forcibly restrain him. We discussed alternatives. I have agreed to a trial of short-acting benzodiazepine to see if the anxiety is sufficiently reduced to allow* [C] *to be voluntarily tested. If this fails, we will need to explore alternatives.*

[C] *is due for his 3 monthly review with you* [Dr Carrihill] *on 6 December 2017. I would hope that there has been progress by then with the blood results available and contact made with Mrs Ridgeway."*

85 In her supplementary answering affidavit of 29 November 2017, the mother indicated that while she had agreed to work with Mrs Ridgeway to facilitate C's transition from the Enlite sensor to the Medtronic sensor and had indeed scheduled an appointment with Mrs Ridgeway for 5 December 2017, she could not accede to the father's request that the transition be undertaken during the December holidays prior to C starting Grade 4. She pointed out in this regard that Mrs Ridgeway would be on leave from 15 December 2017 to 10 January 2018, and that it might not be possible to make an immediate transition to the new sensor. She reiterated that C's resitance to change needs to be taken into account, and stated that:

*"At this stage all I can promise is that I will try to facilitate the transition to the Medtronic sensor and will monitor [C's] reaction thereto. I cannot force [C] to accept the new sensor but I will keep trying and working with him so that he will accept the change when he is ready to do so."*

86 She expressed agreement with Dr Carrihill's view that the change should occur within the next 6 months to a year, which she regarded as a reasonable timeframe having regard to C's difficulties.

87 One would have thought that this would have been the end of the dispute regarding the transition to the Medtronic sensor. Drs Carew and Carrihill had agreed to co-operate on the way forward; the mother had agreed to work with Mrs Ridgeway - the person proposed by the father - to facilitate the transition to the Medtonic sensor, and Dr Carihill has indicated that the transition needed to take place within the next 6 months to one year.

88 All of this notwithstanding, the father filed a supplementary affidavit on 5 December 2017, in which he alleged that the mother *"continues to refuse to assist with the facilitation of the switch"* and that *"Dr Carew endorses my suggestion that the Respondent and I introduce the Medtronic sensor to [C] over the December holidays, prior to [C's] transition to Grande 4, with the support of Mrs Michelle Ridgeway."* The upshot was that the father wanted this Court to make an order that C's transition to the Medtronic sensor take place over the December 2017 holidays.

89 The father's accusation that the mother was continuing to refuse to assist with the facilitation of the transition to the Medtronic sensor is unfounded: it is not borne out by the contents of Dr Carew's report dated 21 November 2017 and the mother's supplementary affidavit dated 29 November 2017. And the allegation that Dr Carew *"endorsed"* the transition over the December holiday period is not accurate. Dr Carew merely recorded that this was what the

father had <u>requested</u>. I regard this request as unreasonable when one considers that Mrs Ridgeway was going to be away on leave from 15 December to 10 January 2018, and that Dr Carrihill had opined that the transition needed to happen within the next 6 months to a year. There was simply no good reason for the father to insist on a rapid transition over the December 2017 holidays. To my mind his dogged persistence in this regard is indicative of a blinding desire to enforce his will over that of the mother, which makes him insensitive to the needs of C.

90 When one stands back and considers the genesis of the dispute over the transition to the Medtronic sensor, it strikes one as most unfortunate that the experts did not consult with Dr Carew and obtain her input on the matter <u>before</u> making a recommendation that the transition be effected by November 2017. Ideally they should have encouraged Drs Carew and Carrihill to engage on the matter and come up with an interdisciplinary approach to the problem – which is ultimately what happened during November 2017.

91 With the benefit of hindsight it is evident that the recommendation in the PT report regarding the timing of the transition to the Medtronic sensor was based on incomplete information. As soon as Dr Carrihill was exposed to Dr Carew's views, she took into account C's anxieties and stubborn resistance to change and modified the timeframe within which the transition was to be effected to one which respected C's needs as a whole person.

92 Unfortunately the father latched onto the (incomplete) recommendation in the PT report as a reason to approach this Court for urgent relief pertaining to C's diabetes treatment when there was, in truth, no need for urgent relief in this regard – particularly given that the allocation of a date for the trial of the matter was not far in the offing.

93 The father's stubborn pursuit of a Court order to enforce his preferred timeframe for the transition to the Medtronic sensor notwithstanding the revised timeframe set by Dr Carrihill, and his continued casting of aspersions at the mother despite her undertaking that she would work with Mrs Ridgeway to facilitate C's transition to the Metronic sensor, is both incomprehensible and inexcusable.

94 All things considered, I find that there is no need for this Court to make an urgent interim order regarding the management of C's diabetes, in particular the transition from the Enlite sensor to the Medtronic sensor. I am satisfied that the mother is well aware of the obvious advantages of the Medtronic sensor, and that she is committed to working with professionals to ensure that the transition happens within the revised timeframe set by Dr Carrihill in her letter of 7 November 2017, i.e. within 6 months to a year. Should she fail to follow through and make reasonable progress in this regard, that is a matter which can be dealt with by the trial court, as I intend to make an order directing the parties, through their respective Counsel, to approach the Judge President for the allocation of an urgent trial date for the matter.

**MID-WEEK SLEEPOVER CONTACT EVERY FORTNIGHT**

95 In the PT report the experts recommended that C and M reside primarily with the mother and that the father have contact with the children every alternate weekend for an extended weekend from after school on a Thursday until Monday morning before school, with pick-ups and drop-offs to take place at school to minimise contact and conflict between the parents. In addition, the experts recommended that the father have sleepover contact with the children every alternate Thursday night immediately before the mother's weekends, from after school on Thursday afternoon until Friday morning before school.

96 Following the release of the PT report on 15 September 2017, the mother adopted the stance that the recommendations were only recommendations and that the parties still needed to negotiate and agree on the contents of a parenting plan. For that she cannot be faulted. Where she can fairly be criticised, however, is that she was not proactive in furthering negotiations and reaching agreement on a parenting plan. She made it clear in her attorney's letter of 18 October 2017 that she did not agree to the mid-week sleepover contact on account of the fact that she regarded it as too disruptive for the children, and it was implicit from her stance in that regard that she had no objection to the extended weekend contact. Yet she took no steps to implement the extended weekend contact until 9 November 2017 – at a stage when this application had already been launched. That is most unfortunate, as her conduct gave rise to an understandable feeling on the part of the father that she was dragging her feet with regard to the implementation of the extended weekend contact, and that without the

intervention of the Court he would not be afforded extended weekend contact.

97 That having been said, by 1 November 2017 – before this application was launched – the mother had already formally tendered the extended weekend contact, as well as mid-week contact every alternate Wednesday afternoon from after school until 19h00. The sole issue in dispute, therefore, was whether or not the father should have mid-week sleepover contact every alternate Thursday night as recommended by the experts. In this regard it was pointed out by the mother's attorney in a letter dated 1 November 2017 that:

> *"The contact to which our client agrees … translates to your client having the children 4/14 days in a 14-day cycle (plus the midweek contact) as opposed to the 5/14 days your client seeks (inclusive of midweek contact). The difference of a maximum of one day hardly constitutes grounds for an urgent approach to the court, especially when the allocation of a trial date is imminent."* [Emphasis added]

98 In her answering affidavit the mother explained that she is opposed to the mid-week sleepover contact at this stage because of the particular difficulties which C suffers with transitional anxiety and changes to his routine. The mother presented reports from Ms Forrester and Mr Terence Dowdall, Clinical Psychologist, in support of her position that the mid-week sleepover contact was not in the best interests of C and M. Ms Forrester opined that C required time to adjust to the extended weekend contact before implementation of mid-week sleepover contact. She stated in this regard that:

> *"It will take time for* [C] *to get used to any new plan and care should be taken to help him through this uncertain phase with a* low-arousal approach *that does not inflate his anxiety nor escalate his emotional state. I recommend that the changes listed in the* [PT] *report be* implemented incrementally one at a time *and not simultaneously as this would bring with it too much instability and anxiety for* [C]*. As it is, he is facing changes to his school space in 2018 (moving to the other campus in Grade 4), a new teacher, shifting between homes as well as having to get used to a new insulin pump* [sensor]*. If these changes are staggered and introduced at his pace,* [C] *will likely be less inflexible and resistant and able to self-regulate better."* [Emphasis in the original]

99 I am aware of the fact that it has been some time since Ms Forrester treated C as opposed to rendering support services to the mother for how to manage C's symptoms and behaviours. Nevertheless, she has assessed C personally in the past and has been involved in his treatment, and is therefore personally familiar with C. Not only that, she is a recognized expert in the field of ASD, and I consider that her opinion provides valuable assistance to this Court on the matter in issue.

100 Mr Dowdall's report was based not on any direct observation of the parties or the children, but consisted of comment on the contents of the PT report, affidavits and other medical reports, including those of Ms Forrester and Dr Carew. To some extent Mr Dowdall's opinion is superfluous inasmuch as it consists of comment on documents from which this Court is in a position to draw its own conclusions. But since Mr Dowdall is clearly able, by virtue of his special expertise as a Clinical Psychologist and his vast experience working with children, to express an informed opinion on the issues at hand, his views are relevant and of assistance to this Court. Naturally this Court

takes into consideration that, unlike the experts, Mr Dowdall has not himself interviewed or observed the parties and the children.

101 As regards the question of mid-week sleepover contact, Mr Dowdall endorsed the view of Ms Forrester that changes to C's routine be introduced incrementally. He stated in this regard that:

*"...I have reservations about beginning the alternate weeks midweek sleep-over however.* [C] *is not the average nine-year old. He is a severe diabetic with other developmental challenges – he is diagnosed as having Autism Spectrum Disorder (ASD), and with this he seems somewhat rigid in his thinking and emotional response. Transitions are clearly particularly difficult for him, and I have seen a video of his intense emotional reaction when he is told that he is going to visit his father. I am mindful of the fact that when he is at his father's home, at least in the daytime, he enjoys the contact. When he has fully settled into the long weekends, perhaps after about a year, I would introduce the Wednesday* [Thursday] *afternoon and evening sleep-over; but at this point it would plainly be too disruptive.*

...

*My sense of children like* [C] *that I have worked with in the past is that Ms Forrester is making relevant points here, and it would be sensible for* [the parents] *to give careful consideration to phasing things in. It is in this sense that I would propose that the mid-week visit and sleep-over on alternate weeks NOT be included from the beginning of the altered schedule for around a year. The problem is that the boy's anxiety becomes intense at least a day and a night before he goes on a contact visit, and this would interfere with the school week, and affect a large part of the middle of the week."* [Emphasis added]

102 At the request of the father's attorney, the experts compiled a supplementary report dated 30 November 2017 in order to comment on the dispute regarding mid-week sleepover contact and to respond to Dowdall's report. In this supplementary report the experts pointed out that their contact

recommendations, including the proposed mid-week sleepover contact, were carefully designed to permit corrective experiences between the children and their father to make up for the fact that their contact with him had been limited in the past on account of allegations against the father for which they could find no current basis. The experts expressed the concern that:

"[A]*t this age, the children are most impressionable and as such, given their closeness to their mother, are vulnerable to losing the internalised 'good' father they have, if together with the mixed message of support for contact with their father, it is conflated by vast gaps of time between such contact. Significant gaps in contact will only entrench this dynamic."*

103 The experts were of the view that mid-week afternoon contact on alternate weeks was not adequate, since:

*"Simply being fetched by* [the father] *during the week and driven around to extra-murals, taken for dinner and then returned will not allow the children to experience* [the father's] *style of parenting.* [The father] *has created a boundaried, happy and secure home for the children, one that with all due respect, Mr Dowdall did not see or experience first-hand. The boys enjoy and benefit from their father's home, way of doing homework, night time routine (story time, bath time etc) as they do their mother's."*

104 The experts alluded in their supplementary report to the fact that the various professionals who have worked with this family are very split in their views on the situation. They expressed concern that Mr Dowdall, by only citing one or two professional reports in his comments, had perpetuated this dynamic where the parties draw professionals into alliances and polarise them. They explain that it was for this very reason that they consulted so widely before

arriving at their considered position on contact. But the irony in the latter statement is inescapable given that the experts failed to consult with Dr Carew and to obtain her input before making recommendations on contact. Notwithstanding the fact that Mr Dowdall did not consult with the parties – and perhaps precisely because of that fact given the reported polarisation of the various experts – it seems to me that his views are balanced and sensible and offer useful guidance to this Court.

105 During the hearing on 6 December 2017 Mr Pincus requested permission to play, and I agreed to watch, a video filmed by the mother of C having an emotional "melt-down" when he was told that he would be spending an extended weekend with his father starting on 9 November 2017. I witnessed first-hand C's violent reaction to a change in his normal routine. He had a temper tantrum, wept uncontrollably, screamed and shouted and threw himself around. It was clear that he was highly upset and it seemed to me, as a matter of common sense, that it could not possibly be good for C to be in that state on a weekly basis – or for the mother and M to have to witness him in that state on a weekly basis. One does not need to be a medical doctor to know that C's heart rate and blood pressure was likely elevated, and that there might be other physiological consequences as a result of his extreme emotional reaction. I found myself wondering how long it would take for C to calm down after an outburst like that, and whether and how his ability to concentrate at school might be affected.

106 Because of these questions in my own mind, and since I was concerned that the experts had not obtained input from Dr Carew before making their

recommendations, I requested that the experts make contact with Dr Carew and obtain her professional opinion with regards to the contact schedule, specifically the proposed mid-week sleepover contact once a fortnight. I wanted to hear from Dr Carew what the effect on C's functioning would be, if any, of C being upset in the manner depicted in the video once a week as opposed to every fortnight.

107 Unfortunately the experts' supplementary report dated 2 February 2018 did not address my concerns – through no fault of the experts – because Dr Carew was, understandably, unwilling to make recommendations regarding contact arrangements for C, which is not her field of expertise. I was, of course, not asking her to do so. I wanted to know, from a medical perspective, what the likely impact on C's functioning was if he had to be emotionally upset in the manner which I witnessed on the video clip every week instead of once a fortnight. I should perhaps have made myself clearer in this regard.

108 The experts state that they are aware of, and have seen, the video clip of C's "melt-down" which was played in Court, but they point out that the anxiety which C experiences before transitioning to visit his father is short-lived and that he settles down happily once he is with his father. I do not doubt it. But that is not the point. The difficulty which I have is that there is no way one can wish away the <u>very real distress</u> which C experiences as evidenced by the video clip. Whether or not C's reaction is subliminally influenced by the mother's own ambivalence about the children's contact with their father (which is what the experts seem to be suggesting by their reference to their

ability to *"test the veracity of the video's in terms of many criteria including the potential impact of the videoing parent on the videoed behaviour of the children"*), the fact remains that his feelings of distress are real and intense and need to be taken into account.

109 The experts express the view in their supplementary report that C's anxiety is more likely to be heightened if there is a 10-day break between periods of contact with his father because the long break would serve to create heightened anticipatory anxiety. That may perhaps be so. But the difficulty I have is that I am faced with diametrically opposed expert opinions on the question of the mid-week sleepover contact, both of which are plausible. On the one hand I have Ms Forrester and Mr Dowdall saying that the mid-week sleepover contact would be disruptive for a sufferer of ASD such as C, and on the other hand I have the experts saying that the failure to have a mid-weekend sleepover would be more disruptive for C because it would heighten his anticipatory anxiety. I cannot properly decide between these divergent opinions without the benefit of oral evidence and cross-examination. This is a matter which will need to be ventilated at the trial.

110 I am faced with a difficult choice in this matter. I have to weigh the very real and concrete distress which C experiences at having to adapt to changes to his routine, against the possible impairment of the development of the relationship between the children and their father through being deprived of mid-week sleepover contact with him every alternate week.

111 At the end of the day I consider it best to take a cautious, common sense approach to what is, after all, a temporary situation. As I have already indicated, one does not need to be a medical doctor to know that it cannot be good for C to be subjected to a profound level of emotional distress, with accompanying physiological consequences, every single week. It makes more sense to me give him time to adapt to the extended long weekends with his father before phasing in the mid-week sleepover contact, and to prepare him well in advance for such mid-week contact. This, to me, is the best way to respect C's dignity and be responsive to his particular needs. I am mindful that it is not only C's interests, but also those of M, which are involved in the decision regarding mid-week sleepover contact. But in my view M stands to benefit if he and his mother are spared the trauma of C's outbursts which are likely to occur every week if the alternate mid-week sleepover contact is enforced at this point in time.

112 The postponement of the mid-week sleepover contact is only temporary, as the different views of the experts will be aired and scrutinized at the trial and a proper determination made with the aid of cross-examination. Furthermore, the trial Court will benefit from updated information regarding how C has adapted to the extended weekend contact and the transition to the Medtronic sensor, which will be helpful in making an informed decision about his readiness for mid-week sleepover contact at that stage.

113 It also seems to me that the negative effect of a 10-day gap in between contact periods can be mitigated by the father accepting the mother's offer of Wednesday afternoon contact every alternate week. While it might not be

ideal, since the children miss out on the bed-time routine at their father's house, it is better than not seeing him at all for 10 days. With a little effort and imagination the afternoon visits can be made into special times and positive experiences built. Even when a parent drives children to and from extra murals that is real parenting which offers an opportunity for bonding. I am surprised that the father does not grasp with both hands the opportunity to spend this extra time with the children. It makes one wonder whether he is not perhaps more interested in being "right" and getting his own way than in spending time with the children even if he has to compromise in order to do so.

114 For all the reasons set out above I am not inclined to make an order *pendente lite* enforcing mid-week sleepover contact every alternate week. I am, however, willing to grant an order in the terms which have been agreed by the mother, namely that the children will have contact with their father every second weekend from Thursdays after school until Monday mornings. Since the father has rejected the mother's tender of mid-week contact on alternate Wednesday afternoons, I will not make any order in this regard. I do however hope – indeed I expect – that if the father changes his mind and wishes to exercise the mid-week contact tendered by the mother, the offer will still be on the table.

115 For purposes of determining costs I must record my view it was not necessary for the father to bring this application in order to enforce the extended weekend contact. Although the mother was slow to implement that

contact, it had in fact been formally tendered before this application was launched and the application was therefore not necessary on that score.

**CONCLUSION**

116 For all the reasons set out in this judgment, I conclude that the father has not made out a case for the granting of an order regarding the appointment of facilitators, the implementation of C's transition to the Medtronic sensor or the enforcement of mid-week sleepover contact. I mention, for the sake of completeness, that no case whatsoever was made out for the relief sought in prayers 3 and 4 of the notice of motion regarding the placing of the children's passports in the custody of a third party.

117 In my view this application was unnecessary in the light of the mother's tender – albeit belated – to implement the extended weekend contact recommended by the experts. The application was also ill conceived given that the remaining disputed issues clearly required *viva voce* evidence and cross-examination, and fell to be dealt with in the ordinary course at the trial. The alleged urgency around the transition to the Medtronic sensor was exaggerated and based on incomplete information. The mid-week sleepover contact is likewise not so urgent that it cannot wait until the trial, particularly if an early trial date can be obtained. In my view it should have been clear, once the mother's answering affidavit was filed, that there were serious factual disputes and differences of expert opinion which could only be resolved at the trial. It is regrettable that the father nonetheless saw fit to

persist with this application, which has only served to increase legal costs and escalate hostilities between the parties.

118 I can see no reason in this case why the ordinary rule should not apply that the costs follow the result. I am mindful that this is a family matter and that the father was no doubt convinced that he was acting in the children's best interests. But the fact of the matter is that the mother has incurred expenses in placing expert evidence before this Court in order to resist this application, and I consider that it would be unjust for her to be burdened with these costs.

119 In the result I make the following order:

119.1 The application is dismissed, with costs.

119.2 The applicant is directed to pay the respondent's costs of suit on the party and party scale, such costs to include the costs of two counsel as well as the cost of procuring the reports of the experts relied on by the respondent.

119.3 The parties are directed, through their respective counsel, to approach the Judge President within three weeks of the granting of this order in order to request the allocation of an early trial date in the divorce action.

**D M DAVIS, AJ**

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