

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG.

Case Number: 2024-024281

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO



14 January 2025

In the matter between:

L[...] **R[...]** **J[...]**
T[...] **J[...]**

First Intervening Party
Second Intervening Party

In re:

In the matter between

J[...] **B[...]** **J[...]**

Applicant

And

E[...] **H[...]** **B[...]**

First Respondent

P[...] **H[...]** **S[...]**

Second Respondent

R[...] **D[...]** **B[...]**

Third Respondent

JUDGMENT

NOKO J

Introduction

[1] This is an urgent application by L[...] R[...] J[...], first intervening party and his wife TJ, second intervening party (“*intervenors or uncle and/or aunt*”) in a pending application (“*pending application*”) between J[...]B[...]J[...] (“*father*”) and EHB (“*grandmother or granny*”) and others. At the centre of all applications is the parental responsibilities and rights¹ of the two children (“*K and C*”) of the father and his late wife V[...] J[...] (“*VJ or the late wife or the deceased*”) who reside at a property situated in Craighall Park, Johannesburg (“*the Craighall residence*”).

[2] In the pending application the father has, immediately after the passing of the wife, approached the Court on an urgent basis for the respondents to hand over the children to him and for the order that his access to the Craighall residence should not be interfered with. The granny opposed the father’s application and launched an urgent counter-application with orders divided into two parts. The orders sought in Part A were, first, an interim order for the contact and care of the children as contemplated in section 23 of the Children’s Act (“*the Act*”) alternatively care in terms of section 32(1) of the Act. Secondly, that a *curator ad litem* be appointed on behalf of the children. The orders sought in Part B for co-guardianship; alternatively, full parental responsibilities and rights in respect of the children and right of contact and care be preceded by the investigation and the recommendations to be made by Dr Giada Del Fabbro (“*Dr Del Fabbro*”), a psychiatrist (to be appointed by the Court) and the *curator ad litem*.

¹ Section 18 (2) of the Children’s Act 38 of 2005 provides that parental responsibilities and rights include the responsibility and right to care for the child, maintain contact, act as guardian and contribute to the maintenance of the child.

[3] The pending application served before Pretorious AJ who delivered judgment on 17 April 2024 in terms of which, *inter alia*, the father's application was dismissed and the costs reserved.

[4] Pretorious AJ granted several following orders in respect of the granny's counter-application, *inter alia*, that the primary care of the children be granted to the granny which will be exercised at the Craighall residence; the exercise of parental responsibilities and rights be granted to the granny and he right to maintain supervised contact with the children be exercised by the father. Tanya Kriel ("*Ms Kriel*") or another Social Worker under her employ was appointed to supervise the contact; Advocate Chrisna Jooste Bekker ("*Adv Bekker or curator*") was appointed as a *curator ad litem* and Dr Del Fabbro was appointed to conduct a forensic investigation into the best interest of the children, including their primary residence, care and contact and suitable guardian(s) and the costs of the supervised contact to be paid for the first two months by the father and third respondent ("*maternal uncle*") and thereafter be shared equally between the two on the one hand, and with granny on the other hand.

[5] Dr Del Fabbro compiled and submitted a report dated 30 September 2024 and recommended that the intervenors be appointed as guardians for the children. Immediately thereafter the intervenors launched this application to intervene in the pending application and sought further relief as set out below:

- 5.1 to be appointed as sole guardians for the children in terms of section 24(1) of the Children's Act,
- 5.2 that parental responsibilities and rights of JBJ to be terminated in terms of section 28(4) of the Children's Act.
- 5.3 that the children be removed from the Republic of South Africa without requiring consent of the Respondent as envisaged in section 18(3)(c)(ii) of the Children's Act and to relocate to Scotland. The attendant costs thereof to be paid by Amber Trust.
- 5.4 JBJ's rights of contact be under supervision by a social worker nominated by Kidsbuzz Supervised Visitation and Binding Therapy Centre during the times when the children travel to the Republic of South Africa which will take place twice per year. The costs

hereof to be paid by Amber Trust including social worker's expenses until JBJ is gainfully employed.

5.5 Certain orders set out in paras 2.2.1 – 2.2.4, 2.3, 2.4, 2.6 and 2.7 of the Pretorious AJ's interim order granted on 17 April 2024 be varied.

[6] The father is opposing the intervention application and has launched a counter-application for the following orders:

6.1. That the applicant retains sole guardianship, full parental responsibilities and rights of the minor children;

6.2. That a three-months re-integration process be commenced and further that Amber Trust be ordered to pay all costs of the six-month re-integration process.

[7] The other parties participating are the curator and the granny.

Background

[8] The background of the *lis* was comprehensively chronicled in the judgment by Prinsloo AJ and the details thereof need not be regurgitated in this judgment. In brief, the father and his deceased wife were married in community of property in 2011. Two children were born from their marriage, a boy aged 13 and a girl aged 7. The deceased was a medical practitioner, Due to her hectic schedule, as a trauma surgeon, she was initially assisted in taking care of the children by an *au pair*, Kristen Herbst ("*Kristen*"), Elizabeth Dube ("*housekeeper*") and her mother. Sandra Wijtenburg ("*Sandra*") was later employed as a second *au pair*.

[9] The relationship between the father and the deceased broke down in 2019. The father moved out of the parties' residence in Craighall and moved into the parties' other property situated in Midrand. The deceased instituted divorce proceedings in 2020 but passed on whilst with her partner, Shaan Riley, in March 2024 before the divorce was finalised.

[10] It is stated that at the centre of the breakdown of the marriage was, *inter alia*, the father's drug abuse, specifically CAT. Further that the father's conduct became aggressive and the wife feared for her life and the safety of the children. This led to her obtaining a protection order against him not to access the Craighall residence.

[11] As set out above the intervenors brought an application, (after the report from Dr Del Fabbro) which was set down on 5 November 2024. Both parties argued the matter and I directed that the Office of the Family Advocate prepare and submit a report on, *inter alia*, on the appropriateness of the request that the minor children should relocate to Scotland. The report was due early December 2024 and the Family Advocate requested an extension to finalise the report. The said extension was duly granted. The report was finally submitted on 10 December 2024 and the parties were then invited to address the Court and make submissions.

[12] Before addressing the merits of the application, I will address myself to the questions of urgency and intervention application. The father requested condonation for the late filing of his opposing affidavit and raised a point *in limine* that the uncle's affidavit was not properly commissioned. The condonation application was granted and intervenors committed to upload the commissioned copy of the affidavit. I had regard to issues and submissions by both parties and do not find that they should detain this Court as procedural formalities should not be used as weapons in matters dealing with interests of the children.

Urgency.

[13] The intervenors submitted that that the application is urgent, firstly, because Kristen who has been very close to the children has resigned and would be leaving at the end of October which she extended to the end of November 2024. Dr Del Fabbro and the therapist stated that the children needed a stable environment and cannot continuously be placed under *au pairs*. Further that there is an urgent need to sell the Craighall residence as it became expensive to maintain. In addition, since it was the end of the school term in South Africa it would be appropriate that the children be allowed to relocate and start their new life in Scotland. They will also be able to start schooling in Scotland in December 2024.

[14] The father advanced arguments to resist the submissions on urgency and primarily contended that the intervenors have created their own urgency. That the intervenors were aware of the resignation by the Kristen and the report by Dr Del Fabbro earlier and should have then proceeded to court with urgency.

[15] I had regard to the nature of the matter I am seized with and concluded that the application deserves the attention of the urgent Court and in any event the father launched a counter-application which required the attention of the urgent court. In the premises both applications will be dealt with on urgent basis.

Application for the Intervention.

[16] Counsel for the intervenors submitted that Dr Del Fabbro has recommended that guardianship should be awarded to them. In addition, they have established a relationship with the children and to this end submitted that they have demonstrated that they have interest in the matter. Counsel further contended that the Act provides that any person having sufficient interest in the care, protection and development of the child may approach the court to be assigned guardianship and parental rights and responsibilities of the minor child.

[17] It is settled law that the test for intervention is direct and substantial interest in the subject matter of the proceedings before the court.² For the purposes of this application section 28(3) read with section 28(1) of the Act provides that any person with a sufficient interest in the care, protection, well-being and development of the child may bring an application to, *inter alia*, to terminate the parental rights and responsibilities of a person in respect of a child. I had regard to the submissions by both parties and concludes a proper

² Harms: Civil Procedure in the Superior Courts Vol 1, B-112(5); Rule 12 of the Uniform Rules of the Court; *South African Riding for the Disabled v Regional Land Claims Commissioner and Others* [2017] ZACC 4; 2017 (5) SA 1 (CC) at paras 9-11.

case has been made for an order for intervention. The intervenors are therefore joined as parties in the pending *lis*.

Submissions and contentions on the merits.

[18] The intervenors were born and bred in South Africa and relocated to Scotland in 2021 together with their 15 years-old son. They plan to apply for the permission to remain in the United Kingdom indefinitely and will be eligible to acquire British citizenship in 2026. They are currently renting a three-bedroom house and had plans to acquire a bigger house in two years. This plan has now changed and with the possibility of the children relocating to Scotland they intend to acquire a bigger house for the children to have their respective rooms.

[19] The intervenors contended that they are suitable candidates to be awarded the responsibilities and rights in respect of the minor children. They have demonstrated care to the family of the children and had kept contact with V[...]J[...] and the family prior to her passing. They were involved in the arrangements for the funeral and paid for certain services and goods from their own pockets whilst awaiting payments from the insurance policies taken out by the deceased. They were subsequently refunded.

[20] They visited the family and stayed at the residence for a period of 3 hours prior to the deceased's passing. The aunt has also stayed at the residence for a period of more than three weeks after V[...]J[...]’s death.

[21] They have kept contact with the children consistently via telephone and video calls. The uncle has a stable job and is running a company, Group Funeral Services (Pty) Ltd which was previously owned and managed by the deceased's father. The aunt is employed in Scotland and due to her good performance, she was also promoted to a higher position. In addition, the counsel continued that uncle stated that “[t]he Amber Trust has committed to overseeing the financial affairs of the children and we are equally dedicated to ensuring their financial well-being and support” and as such the father will not be required to make any contribution towards maintenance.

[22] Their residence in Scotland is situated in a child-friendly location, the standard of education is high and the level of crime is not alarming as compared to South Africa. There are better opportunities for the children in Scotland than South Africa. According to the uncle once they come to live in Scotland "... the world would truly become their oyster".³

[23] On being asked about the tenure and stability of the accommodation of the intervening parties their counsel argued that they are renting a property as it is difficult to own properties in Scotland and that is the reason why they have not acquired same. They will be in a position to rent or acquire a bigger house once the children relocate to Scotland. It being noted, counsel continued, that ordinarily the children will make contribution to the bond repayments as it is the case in South Africa that repayment of the bond includes contributions by the children. In this instance the Amber Trust would make contribution on behalf of the children.

[24] The relocation of the minor children is being supported by the Family Advocate, the executor, the curator *ad litem* and the children's maternal grandmother.

[25] Counsel for the intervenors submitted that the father, on the other hand, is not a suitable candidate to exercise parental responsibilities and rights over the minor children. He has over a period of time failed to make contribution towards the maintenance of the minor children. He spent money litigating with Amber Trust instead of applying same to launch a rule 43 application to exert some of the rights including unsupervised visitations or relaxation of the prescribed intervals.

[26] Furthermore, the counsel continued, the father's financial position is unstable and he may not be able to financially take care of the children. The father made a claim that he is employed and has been challenged to produce proof of employment in the form of, *inter alia*, payslip and to no avail. He has been absent in the lives of the minor children for a period in excess of 4 years. He has failed to pay for the monthly bond repayment in respect

³ See para 99 of the Intervenor's Founding Affidavit at CL 32 - 52.

of the Midrand property for a period of 18 months and the foreclosure proceedings are looming.

[27] In one of the reports from the Office of the Family Advocate it was recommended that the resumption of unrestricted contact to the minor children only if the father has been clean from drugs for a period of at least 2 years. Though he submitted the drug test's results this was only in respect of CAT and not any other drugs. Dr Del Fabbro stated that the father is abusing alcohol and this was mentioned in his latest report.

[28] Counsel for the intervenors had regard to the report of the Family Advocate and summarised certain aspects as follows. First, that K stated that her father has cheated on her mother; that she would wish to relocate to Scotland as she is aware that Scotland is safer as compared to South Africa. Counsel submitted further that the father on the other hand has been talking bad about the uncle to the children and was also talking bad to the principal at the children's school.

[29] In addition, the children's grandmother who has been awarded primary care and residence has relayed her reluctance to continue as ordered by the Court and has left the Craighall residence.

[30] Importantly, so went the submissions, the Family Advocate applauded the current development and efforts by the father in his relationship with the children. She further stated that the proposal for a formal re-integration is also lauded but it is far too late hence the children should be allowed to relocate to Scotland.

[31] The counsel acting on behalf of the granny submitted that it is not correct that the granny is no longer pursuing her claim to be awarded guardianship of the children and would persist thereon if the Court decide not to award guardianship to the intervenors. In addition, it is the view of the granny that the application by the father has no merits as he is not a suitable candidate to be awarded parental responsibilities and rights.

[32] The curator *ad litem* submitted that the father was initially not cooperative despite her efforts to encourage him to participate in the supervised visitations. His reasons were that his attorneys have advised him not to participate as they believed that the supervised contact is unwarranted. In addition, he attributed his reluctance to participate in the supervised visitation as the social worker was unaffordable. This position has improved as the new social worker's expenses are reasonable and she has also persuaded the trustees to assist with the funding of the costs associated with the supervised visitation. Dr Del Fabbro has also suggested that the supervised visit can be reviewed after the period of three months which comes to an end at the end of January 2025.

[33] The curator stated further she had challenges in preparing the children for the interviews with the social worker in compliance with my directive that a further investigation should be conducted by the Office of the Family Advocate. She consulted with the children's therapist and the father. Though they both agreed the father cautioned that such issues may have to await the completion of the examination or be approached with a measure of caution. With the assistance of the *au pairs* the issue of the interviews relating to relocation to Scotland or staying with the father was discussed and the immediate reaction from K was what about her school and friends. This took place on one of the Fridays and fortunately the discussion did not negatively affect her preparation for the examination which was on the following Monday as her school results were still good.

[34] The curator *ad litem* intimated, when asked by the Court of Dr Del Fabbro's suggestion, agreed that that supervised visitation can be revisited after three months and this period would lapse at the end of January 2025. If possible, an independent social worker could be invited at the end of 3 months to provide a report on progress. She however disavows possible inference which can be drawn that her sentiments that the social worker currently supervising the visitation is not independent.

[35] That notwithstanding she agrees with the Family Advocate and the intervenors that the relationship between the children and the father cannot be salvaged and it is too late to work on re-integration. The curator persisted with this stance despite her assertion that the

father has been cooperating and there was progress in the relationship between him and the children "...which became stable and relaxed".

[36] The father's counsel contended that the submissions by the curator *at litem* amounted to presenting evidence from the bar and should not be accepted. The counsel was given opportunity to reflect and make written submissions in response to any aspect of the submission which he could not address as it was not mentioned before in a report from the curator. The counsel submission fell short of noting that the Court is at large to consider any evidence presented before it.⁴

[37] The father who represented himself at the beginning contended that he has complied with the conditions set out by the first Family Advocate to be free of drugs for a period of two years before unsupervised contact is re-considered. He had undertaken drugs tests over a period of time and came out clean. Further that the reasons he could not keep up with the supervised contact was as per advice from his attorney that it was unwarranted and in addition, he was unable to afford to pay for the services of the social worker as the uncle and other trustees have terminated his salary, he was receiving from the properties owned with his late wife. His feud with the brother has a long history and started when they fought over the management and money generated by the company, they both worked for which was established by V[...]J[...]’s parents. In addition, so the father argued, the uncle’s objective for him to fight for the sole guardianship and relocation of the children to Scotland is to have unfettered access to the Trust money which he would use, *inter alia*, to buy himself property in Scotland.

⁴ It was stated in *J v J* 2008 (6) SA 30 (C) at para 20 that "[A]s the upper guardian of minors, this court is empowered and under a duty to consider and evaluate all relevant facts placed before it with a view to deciding the issue which is of paramount importance: the best interests of the child. In *Terblanche v Terblanche* [1992 (1) SA 501 (W) at 504 C] it was stated that when a court sits as upper guardian in custody matters.... It has extremely wide powers in establishing what is in the best interests of minor or dependent children. It is not bound by procedural strictures or by the limitation of the evidence presented or contentions advanced by the respective parties. It may have recourse to any source of information, of whatsoever nature, which may be able to assist it in resolving custody related disputes." In *P and Another v P and Another* [2002 (6) SA 105] Hurt J stated that the court does not look at sets of circumstances in isolation: I am bound, in considering what is in the best interests of G, to take everything into account, which has happened in the past, even after the close of pleadings and in fact right up to today. Furthermore, I am bound to take into account the possibility of what might happen in the future if I make any specific order.

[38] He contended further that it appears he is fighting against a wall as he has no funding for his legal representation whereas his opponents have access to the funds from Amber Trust which dispersed funds for all and sundry without him being consulted though being one of the Trustees.

[39] He managed to ultimately secure services of a counsel who appeared after the recent Family Advocate's report which was compiled at my instance was submitted. The counsel submitted that the main reason in the *lis* between the parties was that the father was a drug addict. This position has changed and everyone has accepted that the father is clean and no evidence could be tendered to gainsay this position. The allegations about alcohol abuse just cropped up and appear to be shifting of the goal posts. In any event same is disputed and the father's position is that though he takes alcohol he cannot be considered to be an alcoholic.

[40] In addition, there is no basis for the children to be uprooted from their birth country to a foreign country. The curator has already stated the first question raised by K regarding relocation was what about her school and friends. The children would now have to be introduced to schools which have English as medium of instruction whereas they have been attending Afrikaans schools. They would also have to be introduced to dreary weather and be taken away from their close and extended family members including, their father and friends.

[41] In addition, the uncle appears not to have made any plans for the children. He has no money to undertake what he has proposed to do as it requires someone with good means. Instead, he has his eyes on the trust funds. He has not been able to afford to acquire a property ever since he relocated to Scotland and even in South Africa though allegedly being employed in a senior position. It is correct that he is running the company of the father's in-laws but the correct position is that he is running it down and it is in the process of laying off employees. In supporting his denial of the contention, argument continues, the uncle could have been open to the Court with the financials of the company and his own finances but has decided to rebuff same and now wish that the Court should just wish away the question of their finances.

[42] To the best of his understanding the reason why the granny had to leave the Craighall residence was as a result of animosity with Kristen and the curator who hijacked the planning of birthday planning coordinated by the granny and passed it over to the aunt to coordinate. Further that the aunt is the one who in fact kicked the granny out of the Craighall residence and changed the locks for her not to access the residence.⁵

[43] In addition, counsel submitted that what the court should have regard to is the best interest of the children. That there is no evidence presented which demonstrate without any equivocation that the father has conducted himself inconsistent with what is in the interest of the children.

[44] The Family Advocate, counsel argued further, has noted that the father has recently demonstrated keenness to re-integrate with the children but unfortunately is it little too late and the children must just relocate to Scotland with their uncle. What is lacking, counsel continued, is the proper foundation for this stance and it is not substantiated.

[45] The counsel for the father further submitted that the Family Advocate's report categorically indicated that there is no exceptionally close relationship between the children with either the uncle or the father and now the decision to be made is whether the children should be with their father or the uncle. The uncle only paid the children a visit for only 3 hours in 2023 and followed by aunt over three weeks in 2024. The intervenors have not been in the lives of the children and cannot claim to be better than the father. The report by the Family Advocate painted a good and positive picture of what the curator has observed in the relationship between the children and their father. Further that the children have demonstrated a sincere desire to be with the father and spent time with him.

[46] Counsel further argued that there is no evidence currently which demonstrates that the father has shown a wayward behaviour which is inconsistent with what is in the interest of the children. The Family Advocate has stated that there is no diagnosis of mental illness

⁵ See para 76 of the Affidavit.

and that the social worker who has been supervising the visits is in general satisfied with progress to date.

[47] Lastly, so counsel continued, whilst the perspectives of the children should be considered not much weight should be attached thereto. They are young, vulnerable and can be easily influenced. In addition, it is applauded that the curator has testified that the performance of the children at school has not been negatively affected by their situation and as such there is no basis to interrupt such performance by uprooting the children from their conducive and familiar environment.

[48] Counsel for the intervenors in reply submitted that despite the fact that there is no diagnosis for the any mental illness the Court should not ignore the report by Dr Del Fabbro that the father has disorders. In addition, what would work against the decision to have their father in their lives is the fact that the *au pairs* have stated that they are not ready and/or available to work with the father.

[49] On being asked by the Court for the intervenors' refusal to provide their address in Scotland the counsel submitted that the father has the tendencies of behaving badly and would, once informed of the address, go all out to frustrate the intervenors' intentions. By way of illustration of the father's unacceptable behaviour he also terrorised the curator *ad litem* with emails even though she mentioned that she was admitted at a hospital. The only time when the address would be made known, especially for the father, is after the Court has made an order that the children should relocate to Scotland with the uncle. In the meantime, the address can only be made available to the Court.

[50] When asked by the Court as to why the uncle did not present any evidence of their financial stability and affordability as demanded of the father, counsel argued that what the intervenors have stated about their finances has not been challenged and therefore the Court should accept their version. The comparison with the father's situation would also not be appropriate as the evidence has been presented showing that the father's finances have been perilous at all times.

[51] The counsel for the intervenors was flabbergasted by the contention by the counsel of the father that the children's version should be accorded less attention. She submitted that the children may still be young but there is a forest of authorities stating that the children's views should be invited and considered. Section 10 of the Children's Act decrees that their perspective need to be taken into consideration.

Issues for determination

[52] The issue for determination is whether the parties have made up a case for the relief sought in their respective applications for the granting of the parental responsibilities and rights and the relocation to Scotland.

Legal principles and analysis

Interest of the children

[53] It is trite law that the overriding consideration where there are disputes regarding the minor children is the interest of the children and not of the disputants.⁶ The courts have over time emphasised that stability in the lives of children is of paramount importance though not an exclusive factor or etched in stone. The children's existing environment should not readily be disturbed, and any unnecessary moves should be discouraged and avoided on the grounds of security and stability.

[54] In general, parental responsibilities and rights⁷ may be terminated for the following reasons, financial neglect⁸; emotional neglect and abuse⁹ and physical neglect and abuse¹⁰

⁶ See section 28 of the Constitution and section 9 of the Children's Act. It was held in *LH and another v LA* 2012 (6) SA 41 (ECG) at para 12 that the best interest of the child have remained the determining the best interest of the child would generally be established with reference to the check list of factors set out in section 7 of the Act.

⁷ Section 18(2) of the Children's Act provides that parental responsibilities and rights include the right and responsibility "...to care for the child; to maintain the child; to act as a guardian of the child; and to contribute to the maintenance of the child".

⁸ Failing to attend to the financial needs of the child.

⁹ Displaying emotional neglect, abuse, or expose their children to harmful situations.

¹⁰ Failing to provide basis physical, intellectual, emotional and social needs and or engage in physical abuse.

Intervenors

[55] The counsel for the intervenors contended that no evidence was presented to put into question their financial position but this is not correct as the father did argue that the intervenors' financials have not been disclosed. Further that to the best of his belief the intervenors' have their eyes on the Trust funds. The Court has to be persuaded that the intervenors have the financial capacity to cater for themselves, let alone to provide for the primary care needed by the children. Moreso that one of their main arguments is that the father has no financial means to take of the children. What is clear for now is that the intervening parties have been in Scotland for 4 years and have not secured a house of their own. They would only get a bigger house once the children relocate to Scotland. In retort to the Court asking counsel for the intervenors submitted that the Trust monies would contribute to the acquisition of the property. This was because, so counsel continued, that even in South African law a child may share in the contribution for the payment of the bond. This lend credence to the argument by the father that the intention of the intervenors is to have access to the Trust funds. The intervenors need to demonstrate their financial position that they are able to provide proper accommodation in Scotland without exploiting the funds in the Trust.¹¹ It is noted that counsel for the intervenors stated that it is indeed expensive to acquire a property in Scotland.

[56] It is disconcerting that the intervenors submit that the Court should be able to order relocation without any details of the where the children would be staying. The description they posited is just a general exposition of the said unknown area or locality. This information cannot even be made available to the father who is entitled to assess and make submissions whether it is suitable for his children before the Court makes its conclusion. The said information has not been given to the Family Advocate and to this end the Family Advocate appears to have been denied an opportunity to make an assessment of whether the suggested place would be suitable for the children.

¹¹ Mr Henk having informed the Family Advocate at para 122 that Grouper Holdings' shares are registered in the name of the Trust, it has many expenses with a minimum share value and the intervenors did not take umbrage with this perspective.

[57] The intervenors should have provided evidence that they qualify to acquire a new and bigger house¹² and further submit a report from Scotland to appraise the Court that their residence and position is appropriate and suitable for them to stay with K and C. If they do not qualify, they should be able to demonstrate how much of the trust funds would have to be applied for the acquisition of the house. If the order is granted for relocation, it means that the children would have to share a bedroom, something which they may not be used to.¹³ Absent any indication that the intervenors would qualify for a bigger house any decision that relocating to Scotland would be in the interest of the children would be based on conjecture an exercise which am loathe to consider. The children would also be placed in a cramped three-bedroom house which is different from their current set up.

[58] The relationship between the uncle and the father appears to be very toxic (and not your ordinary siblings' rivalry) and its history can be gleaned from the following factors, their battles as directors of the family company, accusations, *inter se*, their battle as trustees, refusal by the intervenors to provide the father with address where they are staying in Scotland and the intention to permanently terminate the father's rights. The funds in the Trust may also be flaring the battle between the uncle and his brother. Based on their previous experience and his alleged mischievous propensities the uncle believes that if the address is made known to the father now, he will do all to frustrate the possible relocation. The trustees have refused to assist with the funding of the supervised contacts but are prepared to use the funds to pay for the legal costs of other parties. Even more worrying and strange is the fact that the order sought by the intervenors include that the Trust should fund the supervised contact of the father with the children after relocating to Scotland. Though the court ordered that the granny and third respondent pay for costs the trustees reimbursed those costs as it was incurred in the interest of the children. To this end the *prima facie* view is that the application for relocation may not be bona fide.

[59] The intervenors further argued the requirements for sole guardianship is required by the UK immigration regulations without providing any supporting authorities or

¹² Noting that it was all times being their plan to acquire a bigger house.

¹³ It was stated in *P and another v P and another* 2002 (6) SA 105 (N) where accommodation is cramped same would not be suitable for the children.

reference thereto. To this end it appears that the intervenors enjoins the Court to decide without presenting persuasive evidence and this invitation is bound to be declined.

[60] The contention that the granny is out of the picture and that there are two parties fighting for parental responsibilities and rights, and that the recommendation of the Family Advocate should be accepted is unsustainable as granny has stated that her counter-application is not withdrawn. In addition, as will be shown below the recommendations by the Family Advocate are not cast in stone.

The position of the father.

[61] The contention that there has not been any contact over a period of 4 years by the father is unsustainable as Ms Kirstyn Layton informed the Family Advocate recently that “[S]he supervised several contact sessions during 2020 and 2021 and provided supervision for the majority if not all of the sessions in 2023 and 2024”¹⁴, prior the passing of the mother.

[62] It is not in contention that the critical and worrying fact to the late V[...]J[...] was the drug abuse which she considered as endangering the lives of the children. She took effort even to get the father admitted into a rehabilitation centre. The abuse of drugs was also the basis for the recommendation by the Family Advocate availed to Pretorious AJ that the contact should be supervised. The current evidence suggests that drug abuse is no longer an issue and all the parties appear to be in agreement. The father can therefore be considered a recovering addict.

[63] The explanation proffered with regard to the precarious financial situation seem to have been due to various factors, including, his salary being terminated by the trustees which include the uncle and having to be involved with the trustees in litigation matters for the access to the funds and his entitlement. The current financial position is questioned by the intervenors and the father could have at least presented more persuasive evidence

¹⁴ See para 129 of the Family Advocate’s Report

including and not limited to payslips. Just like the intervenors the father is also accused of eyeing the trust funds to augment his precarious or perilous finances.

[64] In his favour is the fact that he is no longer into drugs and both Family Advocate, curator *ad litem* and the current social workers have noted progress in his relationship with the children. But both the curator *ad litem* strangely¹⁵, together with the Family Advocate states that it is a bit late for the re-integration with the children and as such they must just relocate to Scotland. This stance is not founded on any tangible evidence or argument. The children appear to have performed well at school, they still prefer their current place of abode and progressing well with their relationship with their father.

[65] It is still unsettling as reported by the Family Advocate that he lack proper communication skills as shown by the utterances he made to the principal and his continued blame game of all and sundry, despite that his situation was a result of his own making.

[66] Termination of parental responsibilities and rights has far reaching implications and cannot be granted lightly. Evidence has been presented that there is improvement by the father in his relationship with the children. The children stated that things are improving. The Trust is funding the visitation. Dr Del Fabbro said¹⁶ that the arrangement for a supervised contact should be revisited after three months which would be the end of January 2025. Without underplaying the role of a stable family setting of having both parents this cannot be used to persuade the Court that it would be interest of the child to relocate to Scotland on the assumption that at least there will be the proverbial ‘oysters’ for the children. It is noted that both the father and mother were not very close to the children and even with their absence the school performance has not been rudely interrupted.¹⁷

Curator ad litem

¹⁵ As she went all out to assist and acquire the services of a social worker who is affordable.

¹⁶ As stated by the Curator *ad litem*.

¹⁷ Kristen informed the Family Advocate at para 84 that “she and the minor children were able to bond quickly because ...[V] was extremely busy and not at home very often.”

[67] The curator appears to have outsourced some of her responsibilities to the intervenors who are now running the Craighall residence. In view of the litigation between the parties and being alive to the possibility that the Court's decision may go against the intervenors exposing the children to intervenors may inculcate in their minds that intervenors are their future may not be in their best interest. The fact that she also supports relocation without knowing the circumstances of the forwarding address is worrisome. All this may give an inclination as advanced by the father that her independence is becoming compromised.¹⁸ The fact that she encouraged the granny to leave the Craighall residence (which is contrary to the Court order) due to conflict with Kristen, , created an opportunity for the aunt to take over the granny's responsibilities as per Court order.

[68] That notwithstanding, all is not lost as she made efforts to persuade the trustees to cater for the supervised visitation's expenses and continuously encouraged the father to be involved despite the father's alleged difficult disposition.

Office of the Family Advocate.

[69] Section 29(5)(a)¹⁹ of the Children's Act empowers the court to request a report to be compiled by the Family Advocate, a social worker or suitably qualified person which may assist the Court when resolving a dispute impacting on the rights and interest of the minor children. It was against this background that I issued a directive inviting the Family Advocate to investigate and report to the court.

[70] The recommendations from the Family Advocate are important to the Court but the Courts are always at large and may depart from the said recommendations. The SCA stated in *Z D E v C E*²⁰ that

¹⁸ Now that the Trustees have resolved to pay for the Curator's services, they wouldn't expect the curator to act in a particular as she is enjoined to remain independent, object and do all in the interest of children without favour. The Court would also frown at any party withdrawing payments on the basis that the curator is acting objectively.

¹⁹ The Court "*May for the purpose of the hearing order that a report and recommendations of a family advocate, a social worker or other suitable qualified person must be submitted to the court.*"

²⁰ (1011/2022) [2024] ZASCA 159 (18 November 2024); JDR 4976 (SCA).

“The reports and recommendations of a Family Advocate are undoubtedly of great assistance to a court in determining the custody arrangements that will serve the best interests of the child. However, the court is not bound to follow the said recommendations and retains its own discretion. The court sitting as upper guardian, may as in this case, call evidence *mero motu* to assist it in the judicial investigation to establish what is in the child’s best interests.”

[71] The interviews and the report on the statements of those interviewed demonstrate that the Family Advocate went an extra mile in compiling a report which, as requested by the Court on short notice, was intended to shed light or guidance on the issues between the parties and recommendation regarding relocation. The efforts are laudable.

[72] Amongst those interviewed by the Office of the Family Advocate includes the children who are the subjects of the litigation. Section 10 of the Children’s Act emphatically enjoins the Court to have regard to the wishes of the children with regard to, *inter alia*, where they would wish to reside. This should be dependent on their age and their ability to appreciate the issues at hand. In this case it is noted that C appears to be indifferent and is prepared to stay either with his father alternatively his uncle. On the other hand, K stated that she would wish to stay with the uncle in Scotland whereas in other instances stated that she would prefer to stay at the Craighall residence, further that the relationship with father has improved.

[73] The curator *ad litem* stated, when asked by the Court, that K appears to have stated that Scotland is safer than South Africa as she carried out research by herself and this is inconsistent with what the uncle stated before the Family Advocate²¹ which is that he is the one who informed K that Scotland is safer.

[74] Due to her age, she could be easily influenced and her response appears to depend as to who is eliciting the information. Views of the children should therefore be considered having regard to the totality of factors and evidence presented to the Court.²²

²¹ This report was also available to all including the curator.

²² The Court in *P and Another v P and Another* 2002 (6) SA 105 (N) version of the child who alleged sexual assaults by the uncle did not persuade the Court to deny the said uncle primary residence.

[75] The Family Advocate in summation noted that the issue of the drug abuse is no longer of any concern. Further that the relationship between father and the children seems to be improving.²³ Despite this the Family Advocate felt that it was a bit late to re-integrate the children with their father and to this end recommended that the prayers as requested by the intervenors should be granted.

Conclusion

[76] In conclusion I am concerned about the uprooting of the children from their familiar environment and also losing sight of various factors as raised by the father, e.g. the question of language, unfamiliar weather, their familiar environment with school, their residence, friends and extended family members and the fact that re-integration is still possible. It also means that the children will be cramped during the period when the intervenors commence their efforts to look for a bigger house. At this point in time the order that the children relocate to Scotland would be based on insufficient information to determine if that it is in the interest of the children.

[77] Dr Del Fabbro recommended that the children remain in the country and together with the therapist refused to support the wish for the relocation.²⁴ Further that guardianship should be given to the intervenors who should visit frequently. The reluctance by Dr Del Fabbro to support relocation is telling. It cannot therefore be argued that now that the children are in an unstable set up without both parents that they must just be shipped to an area unknown (and not assessed of its suitability) to the Court²⁵ and/or the father and/or the Family Advocate to the intervenors who are not better off as compared to the father.

²³ Family Advocate stated at para 194 that “it is not disputed that ... [father] had a meaningful relationship with those children at the time of his separation from their mother. Even now, the minor children are comfortable interacting with him and his fiancée. The minor children view ... [father] as a positive figure and have a sincere desire to spend time with him and there is no information to suggest that they do not enjoy his company, at least on the fact of it.”

²⁴ The therapist informed the advocate that despite what K’s preference appears to be she does not believe the children have fully developed concept or understanding of what is taking place. See para 138 of the Family Advocate’s Report. The Family Advocate also added at para 200 that “Nevertheless, I acknowledge the therapist’s opinion that a recommendation cannot be based on how the minor children feel”.

²⁵ It is noted that the intervenors were prepared to provide the court the address.

[78] The similarities between the two brothers is that with guardianship they would both have access to the trust fund and would not have financial woes in taking care of the children financially. Seeing that the current supervising social worker has returned positive feedback about the supervised contact there is no valid reason to prefer the brother in relation to the father. The fact that the intervenors have been given a latitude by the curator to spend time with the children recently cannot justify the submission that the progress made by the father in establishing relationship with the children is of no value to the children and that it should be jettisoned. This does not imply that it is guaranteed that the father may not relapse. The re-integration should therefore commence and be reviewed within a period of 3 months of the order. In the process the father should to undergo monthly tests for alcohol abuse and drug tests.

[79] Having regard to the conclusion arrived at below it is advisable for the intervenors in the event they wish to contend for the parental responsibilities and rights be awarded to them in future they should therefore prepare and present concrete evidence that they will be able to afford a bigger house in Scotland and also present comprehensive plans for the children, including the schools to be attended, a report by the relevant authority in Scotland that their situation is suitable for their intended wish. A visitation could also be arranged for the children to visit Scotland for a shorter period so that the children can also assess the place.

[80] It is noted that the Kristen would be resigning effective from end of January 2025 and has previously extended her notice since end of October 2024 to the end of November 2024 and now to the end of January 2025. It is further noted that she was not alone and was assisted by both Sandra and the housekeeper in taking care of the children. Though she is deemed to be the one closer to the children it appears that Sandra has been considered equally important hence the intervenors suggested that she (and not Kristen) should accompany the children and stay with them in Scotland for a while. The absence of Kristen due resignation would also take away the basis for which the curator encouraged the granny to move out of the Craighall residence.

[81] The granny having persisted with her application the order of Pretorius AJ may have to remain. It is noted however that she is elderly but should remain responsible for the care of the children who will remain at Craighall residence until another person is awarded parental responsibilities and rights alternatively pending finalisation of the re-integration process. It is noted that due to her age she may not take permanent appointment and she is preferred in comparison to both the uncle or the father who are all fighting for a permanent arrangement. It is clear that she has received sufficient funds from the deceased's policy and this should dissuade her from hoping to spend the trust fund for own benefit. She will be assisted by the curator whose responsibilities have been detailed in annexure A to the order of Pretorius AJ. To the extent that the curator finds her powers wanting she may approach the Court to augment same. This would include having to appoint a case manager if necessary. With the object of avoiding the process becoming prohibitive, further attempts should be made to have the Amber Trust absorbing the costs associated with re-integration with the father.

Costs

[82] The parties appeared to have generally presented their versions, bar my reservations with regard to the bona fides of the intervenors, for the Court to arrive at a decision which best caters for the interest of the children. I therefore find that no costs order should be made against either of the parties and this applies to costs reserved by Pretorius AJ. If the Trustees resolved to cover legal costs for the intervenors it may be proper that the legal costs of the father should be covered on the same basis that the interest of the children were at stake and legal and proper submissions were important to enable the Court to come to a correct conclusion. The same reasons which the Trustees advanced for the motivation to use the trust money to reimburse the granny and the third respondent which has the effect of thwarting clear terms of the Court order that they pay for the legal costs.

[83] That notwithstanding the trustees (being inter alia, the uncle, granny and second respondent) who have participated in the *lis* in whatever capacity did not quarrel with the relief sought by the intervenors that costs associated with supervised contacts after relocation (including relocation and possibly acquisition of the property in Scotland)

should be paid by the Amber Trust. I therefore see no reason why costs associated with re-integration should be considered differently by those parties as the ultimate object is to benefit the children. Unless the best interest of the children is dependent only on guardianship being awarded to the intervenors. This would certainly be preposterous. The interest of the children should not readily be frustrated on the basis that the father may be impecunious²⁶ though the expenses associated with supervised contacts should preferably be dealt with as is currently agreed to between the curator and the Trust. A rough sketch of costs for re-integration, though not properly introduced to the Court did not present possible costs which may be associated with the relocation and therefore present a skewed perspective.

[84] It is impressed on the curator to ensure that the costs of the exercise as directed by the Court should be minimal and not exhaust the Amber Trust. To this end if appropriate she must consider whether it is necessary to appoint a second *au pairs* after Kristen's departure. In addition, and where experts are needed (e.g. case manager) such experts may be appointed through the relevant government departments where possible to provide necessary expertise at no charge.²⁷ Re-integration should therefore be commenced immediately by the curator sourcing three experts from which the father and granny would chose one failing which the curator will with proper motivation appoint an expert to undertake re-integration with the sole purpose of restoring the relationship between the father and the children.

Order

[85] The following orders, substituting the order of Pretorius AJ save as set out herein, are made:

85.1 Application by the intervenors is dismissed;

85.2 The re-integration process for a period of 30 days should be commenced within 5 days of the order coordinated by the Curator who shall provide a list

²⁶ Noting that as a beneficiary his status may have not been finally determined by the Courts or his entitlement to share in the estate of his late wife.

²⁷ It is noted and applauded that the curator has succeeded in appointing a social worker whose fees were affordable to the father.

of three suitably qualified experts and invite the father and EHB to choose and agree on one expert within 3 days failing which the curator shall appoint an expert within 2 days thereafter.

85.3 The supervised contacts be continued as per order of Pretorius AJ, and to be reviewed by Dr Del Fabbro after the end of January 2025.

85.4 Care of the children is granted to EHB and primary residence of the minor children shall remain at Craighall residence with EHB.

85.5 Advocate Chrisna Jooste Bekker's appointment as curator ad litem remain extant.

85.6 Co-guardianship is granted to EHB.

85.7 No order as to costs.



M V NOKO
JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, JOHANNESBURG.

Dates:

Hearing: 5 November and 19 December 2024.

Further submissions – 19 December 2024 and 29 December 2024.

Judgment: 14 January 2025

Appearances:

For the Intervenors

:Adv P Tement.

Instructed by Meikle Attorneys

For the Applicant

: Adv DE Matlatle.

For the First Respondent

: Adv N Strathern.

Instructed by Ulrich Roux and Associates

For the second Respondent

:Strydom & Bredenkamp Attorneys