IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1)	REPORTABLE: **YES**
(2)	OF INTEREST TO OTHER JUDGES: **YES**
(3)	REVISED: **06/12/2023**

Date: **08/12/2023** Signature: LC Haupt

CASE NO: 060704/2023

In the matter between:

AR **PLAINTIFF**

and

BMR **DEFENDANT**

CASE NO: 001200/2023

In the matter between:

IM VD **PLAINTIFF**

and

C VD **DEFENDANT**

JUDGMENT

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 8 December 2023

Summary: Conflict between section 6 of the Divorce Act and Practice Directive. Practice Directive providing for the disposing of unopposed divorces involving minor children by way of affidavit. Process open for abuse and may negate the provisions of Divorce Act. Duty of legal practitioners to ensure full and frank disclosure of all and not selective facts relating to children. Failure to do so frustrates the Court's constitutional and legislative responsibilities. Legal practitioners' overriding duty to the Court not to their clients. Failure in duty resulting in disallowance of fees and referral to LPC. Court as upper guardian does not function as a mere rubberstamp in unopposed divorces.
Sections 30 and 31 Children's Act does not imply joint decision-making.
Shared residency arrangement cannot be used to secure equal time with each parent to the detriment of children having to adjust to demands of an everchanging environment. Such arrangement focusses on the need of the parent(s), not the interest of the child and the need for stability, routine, and security.

HAUPT AJ:

INTRODUCTION

[1] When the interests of minor and major dependent children are in issue in divorce proceedings, irrespective of whether such proceedings are opposed or unopposed, the provisions of section 6 of the **Divorce Act**, 70 of 79 are applicable. The section compels a Court to satisfy itself, which may include considering a report and recommendation by or referral to the Family Advocate,[1] that the order sought indeed serves the child's interest. If it does not, then the Court may not grant a decree of divorce. The provisions of section 6 do not provide the Court

[1] See **Divorce Act** 6(1)(b)

with a discretion. A duty and obligation is placed on the Court by section 6(1) and (3) as follows: [2]

"6. Safeguarding of interests of dependent and minor children.-

(1) A decree of divorce shall not be granted until the court-

(a) is satisfied that the provisions made or contemplated with regard to the welfare of any minor or dependent child of the marriage are satisfactory or are the best that can be effected in the circumstances; and

(b) if an enquiry is instituted by the Family Advocate in terms of section 4 (1) (a) or (2) (a) of the Mediation in Certain Divorce Matters Act, 1987, has considered the report and recommendations referred to in the said section 4 (1).

(2) For the purposes of subsection (1) the court may cause any investigation which it may deem necessary, to be carried out and may order any person to appear before it and may order the parties or anyone of them to pay the costs of the investigation and appearance.

(3) A court granting a decree of divorce may, in regard to the maintenance of a dependent child of the marriage or the custody or guardianship of, or access to, a minor child of the marriage, make any order which it may deem fit, and may in particular, if in its opinion it would be in the interests of such minor child to do so, grant to either parent the sole guardianship (which shall include the power to consent to the marriage of the child) or the sole custody of the minor, and the court may order that, on the predecease of the parent to whom the sole guardianship of the minor is granted, a person other than the surviving parent shall be the guardian of the minor, either jointly with or to the exclusion of the surviving parent.

(4) For the purposes of this section the court may appoint a legal practitioner to represent a child at the proceedings and may order the parties or anyone of them to pay the costs of the representation."

[2] In addition, section 7(1) of the **Children's Act**, 38 of 2005 calls upon the Court to consider various factors when considering the best

[2] Where I use bold font or underline for purposes of emphasising parts or quotations from documents or authorities, such emphasis is my own.

interest of minor children. Section 9 of the **Children's Act** mirrors the constitutional imperative of the best interest of the child that is of paramount importance in all matters concerning a child and which must be applied.[3]

[3] Kollapen AJ (as he then was) remarked as follows in SS v V V-S [4] regarding the protection and enhancement of the interests of minor children when the Court acts as upper guardian:

> *"[24] Thus, when courts act as the upper guardian of each child they do so not only to comply with the form that the Constitution enjoins us to be loyal to, but with the very spirit that is encapsulated in the provisions of section 28(2) of the Constitution that "a child's best interests are of paramount importance in every matter concerning the child".*

[4] Consequently, the Court as upper guardian does not, and cannot, function as a mere rubberstamp for settlement agreements in unopposed divorces. In my view it is the duty of the Court to interrogate settlement agreements insofar as it relates to the interest of minor and dependent children to fulfil its legislative and constitutional duty.

[5] During the three consecutive weeks that I presided in the Family Court[5] hearing unopposed divorces involving minor and dependent major children, I was struck by the following:

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[3] Sec 28(2) of the Constitution of the Republic of South Africa, 108 of 1996
[4] 2018 (6) BCLR 671 (CC) par [24]
[5] In terms of the *Family Court Directive issued by the Office of Deputy Judge President, Gauteng Provincial Division, Pretoria dated 29 March 2023*, with effect from the second term in 2023 in the Gauteng Division

[5.1] Firstly, the way that the Practice Directive[6] for the hearing of unopposed divorces that allows for matters involving minor children being dealt with by adducing evidence on affidavit is open for abuse and may have the practical effect of circumventing the mandatory provisions of section 6 of the **Divorce Act**.

[5.2] Secondly, that Plaintiffs, their attorneys, and/or the counsel moving these unopposed divorces seem to labour under the misperception that the Court functions as a rubberstamp when parties have reached an agreement relating to their children.

[5.3] Thirdly, the manner in which many legal practitioners fail in their duty towards the Court by inadequately advising and/or ensuring that their clients apprise the Court sitting as upper guardian of all, and not just selective facts relevant to establishing the best interests of the particular child.

[6] The attitude seems to be that once the parents have reached a settlement and filed an affidavit, in which the barest of detail is provided thereby paying mere lip-service to the Practice Directive and irrespective whether the settlement is endorsed or not by the Office of

(Pretoria), two judges are allocated per week, sitting in cycles of two weeks each, with the exception of the first and last week of term and the recess. The Family Court *inter alia* hears unopposed divorces, unopposed and opposed Rule 43 applications, surrogacy and Hague Convention applications and interdicts, interlocutory and urgent matters relating to family issues.

[6] Directive 2 of 2022: Judge President's Revised Consolidated Directive, paragraphs 198 to 201 and 208 to 213

the Family Advocate, the Court must grant the divorce. This approach highlights the disconcerting growing tendency of legal practitioners who assist their clients to selectively disclose facts that suit the needs and convenience of the clients and not necessarily the interests or needs of the children involved.

[7] Although legal representatives must serve the interests of their clients, this duty is always subject to their duty towards the Court, the interests of justice and the observance of the law.[7]

[8] A Court seized with a divorce in accordance with the provisions of the **Divorce Act** cannot delegate, directly or indirectly its legislative and constitutional duties to another Court, by granting a divorce with the knowledge that issues relating to care, contact and/or maintenance may still be unresolved and/or require further investigation.

[9] I reserved judgment in two of the unopposed divorces that came before me to highlight the abuse of the Practice Directive and the failure by legal practitioners to provide a proper factual basis to meet the requirements of sections 6(1) and (3) of the **Divorce Act**.

PARTIES

[10] The unopposed divorce of ***AR v BR*** under case number 060704/2023 ("the **AR** matter") involved the interests of three minor children, a boy

[7] Rule 3.3 Code of Conduct for All Legal Practitioners, Candidate Legal Practitioners and Juristic Entities (published under GenN 168 in GG 42337 of 29 March 2019 and as corrected by GenN 198 in GG 42364 of 29 March 2019)

B aged 8, a boy E aged 6 and a girl aged 5. Although the settlement agreement provides that the Plaintiff (Mrs R) is awarded primary care and residency, the Defendant's (Mr R) specific parental rights and responsibilities relating to the exercise of contact provided that the children would be with the Defendant every alternate week from the Monday to the Monday of the next week. In addition, the settlement did not provide for a cash contribution towards the children's maintenance. The Family Advocate did not endorse the settlement and expressed concerns regarding the contact which constitutes a shared residency arrangement.

[11] In the unopposed divorce of **IMVD v CVD** under case number 001200/2023 ("the **VD** matter"), the parties agreed that the minor boy child ("Baby D") who turned 1 years of age on 4 September 2023, would be in the primary care of the Plaintiff (Mr VD) with the Defendant's (Mrs VD) contact to be phased in under the Plaintiff's supervision. However, during the Plaintiff's testimony, it came to light that Mr VD had never had Baby D in his care since the parties separated, the child and Mr VD were living in different provinces and the child was in the care of a third party who launched Children's Court proceedings. The Children's Court proceedings were still pending, and Baby D was found to be a child in need of care.[8] None of these issues were addressed in the affidavit Mr VD deposed to in terms of the Practice

[8] Section 155 of the **Children's Act**, 38 of 2008

Directive. Mr VD merely stated that the settlement reached served the interest of the minor child.

[12] In both matters the parties' oral evidence and the evidence in the affidavits filed in compliance with the Practice Directive were irreconcilable. In both matters the parties and their attorneys were provided with the opportunity to explain their failure to advise and guide their clients to disclose material facts regarding the interests of the children involved, and why the attorneys' fees should not be disallowed, and they not be referred to the Legal Practice Council ("LPC").

[13] These two unopposed divorces highlight the potential conflict and tension between the Practice Directive in the Gauteng Division [Directive 20 of 2022], allowing for the disposal of an unopposed divorce where a minor child is involved at the discretion of the Judge without the benefit of hearing oral evidence on the one hand, and on the other the requirements of sections 6(1) and (3) of the **Divorce Act**.

[14] In my view, the mandatory provisions of section 6 of the **Divorce Act** necessitates the hearing of oral evidence in circumstances where a settlement has been reached to discharge the Court's constitutional and legislative duties and responsibilities in opposed and unopposed divorces where the interests of minor and dependant major children are involved. The Court should not simply rubberstamp such a settlement without hearing evidence.

[15] Unfortunately, these two matters are but a small sample of the challenge Judges face when sitting in the Family Court or unopposed motion court. Judges hearing unopposed divorces are provided with affidavits and/or oral evidence consisting of bold and general statements that the settlement reached is in the interest of the children. In many cases there is a failure to place before the Court sufficient substantiating facts to comply with the provisions of the **Divorce** and **Children's Act**.

[16] In both matters, the settlement agreements were not made an order of court and a decree of divorce was not granted. Orders were granted postponing both matters pending the finalisation of investigations by the Office of the Family Advocate and reserving judgement. A *curator ad litem* was appointed for the children and the attorneys' fees were disallowed. In the ***VD*** matter, the attorneys were referred to the LPC.

TENSION BETWEEN PRACTICE DIRECTIVE AND THE REQUIREMENTS OF SECTION 6 OF THE DIVORCE ACT.

[17] The best interest of the child principle and the requisites of section 6 of the **Divorce Act** obligates a full and frank disclosure regarding material facts relating to the interests of the minor children involved. Failure in this regard frustrates the interests of justice. It further hampers the functioning of the Court in fulfilling its duty towards children within the relevant legislative and constitutional framework.

[18] Directive 2 of 2022 provides for the adducing of evidence on affidavit in all settled divorce matters in the Gauteng Division. Unopposed divorces are demarcated in 3 categories.[9] Directive 2 of 2022 replaced the Revised Directive dated 11 June 2021 which contained similar provisions.[10]

[19] Unopposed divorces involving minor children fall under Category B. It provides that all settled divorce matters involving minor children must be dealt with by adducing evidence on affidavit and no party shall testify in person save where the judge orders otherwise.[11] The practice note must *inter alia* include reference to a request, if any, to make oral submissions and an affidavit from the Plaintiff setting out the relevant evidence which must address in detail the arrangements contemplated for the minor children and the views or endorsement of the office of the Family Advocate, if any.[12] Matters shall be disposed of at the discretion of the allocated Judge in respect of which *ad hoc* directives may be issued. This may include disposal without an oral hearing, disposal during a video conference which the Court must host or disposal of at a physical traditional hearing.[13]

[20] However, section 6(1) of the **Divorce Act**, prescribes that a Court may only grant a decree of divorce if the Court is satisfied that satisfactory

[9] Directive 2 of 2022: Category B: para 201
[10] Para 145 to 150 thereof
[11] Directive 2 of 2022: Category B: para 208
[12] Directive 2 of 2022: Category B: para 210
[13] Directive 2 of 2022: Category B: para 213

provisions are made or contemplated regarding the welfare of any minor child, or that the provisions made or contemplated are the best that can be affected in the circumstances. Furthermore, section 6(3) provides that a Court, when granting a decree of divorce, may regarding maintenance or custody[14] or guardianship of, or access to a minor child make any order, which it may deem fit. It goes without saying that this discretion must be exercised judicially in accordance with the applicable legal principles.

[21] Unfortunately, a trend has developed wherein Plaintiffs with the assistance of their legal representatives file affidavits with the barest of detail regarding the personal circumstances and the interests of the minor or dependent children. These affidavits filed in terms of the Practice Directive often lack the requisite full and frank disclosure, betting on the odds that the Court will not call for oral evidence. These affidavits fail to provide "material and relevant evidence" regarding aspects which may assist the Court as required by the Practice Directive. This trend does not serve the interests of justice. Neither does it assist the Court in fulfilling its duty in terms of the section 28(2) of the Constitution, sections 7(1) and 9 of the **Children's Act** and sections 6(1) and (3) the **Divorce Act**.

BACKGROUND FACTS: *AR v BMR*: CASE NUMBER 060704/2023:

[14] Section 1(2) of the **Children's Act**, provides that "*In addition to the meaning assigned to the terms 'custody' and 'access' in any law, and the common law, the terms 'custody' and 'access' in any law must be construed also to mean 'care' and 'contact' as defined in this Act."*

[22] The Plaintiff (Mrs R) issued summons on 22 June 2023 against the Defendant ("Mr R"). The reasons for the breakdown of the marriage include that the parties constantly engaged in arguments, that they were not compatible with each other, and that have been unable to communicate meaningfully for a period.

[23] Mr and Mrs R signed a settlement agreement on 22 June 2023. The settlement is attached to the summons. The particulars of claim merely refers as follows to the settlement agreement reached between the parties:

> *"The parties have entered into a settlement agreement and are desirous to have signed make an order of court, with the dissolution of the marriage. The settlement agreement is attached hereto and marked as Annexure "X".*

[24] No facts to substantiate that the clauses that specifically relate to joint decision making, care, residency, contact, and maintenance are in the best interests of the minor children are provided in the affidavit filed by Mrs R in support of the incorporation of the settlement in the divorce order. In addition, no explanation is provided why certain clauses seem to contradict each other.[15] The affidavit deposed to by Mrs R on 7 July 2023 merely repeats the contents of the particulars of claim.

[15] For example clauses 3.2 and 3.3.1 and 3.3.10 and 3.3.11 to 3.3.13

[25] The settlement agreement provides for the parental rights and responsibilities in clause 3 thereof. For purposes of the judgment reference is only made to certain relevant clauses:

"3. JOINT PARENTAL RIGHTS AND RESPONSIBILITIES:

3.1 It is agreed that both parties shall retain full parental responsibilities and rights with regard to care, contact, guardianship and payment of maintenance towards the minor children as contemplated in Section 18(2)(a) and Section 19(2) of the Children's Act 38 of 2005.

3.2 It is agreed between the parties that permanent and primary residence of the minor children born from the marriage be granted to the Plaintiff.

3.3 That specific parental responsibilities and rights with regard to contact with the minor children as contemplated in Section 18(2)(b) of the Children's Act 38 of 2005, be awarded to the Defendant, which rights will be exercised by him subject to the minor children's scholastic, religious, social, cultural and extra-mural activities as follows which shall not be limited thereto.

3.3.1 The Defendant will be entitled to exercise contact with the minor children every alternate week from Monday after school until the following Monday morning where the Defendant will drop the minor children off at school. The Plaintiff will collect the minor children from school on that Monday after the Defendant has exercised his contact week.

3.3.2 ……

3.3.9 To have telephonic contact.

3.3.10 Given the age, maturity, and level of development of the minor children, the parties have complied with the requirement of Section 6(5) and (10) of the Children's Act of 2005.

3.3.11 The parties agree that as soon as the minor children have reached the age, maturity and level of development, the parties will discuss the divorce with the minor children.

3.3.12 The parties agree that this settlement agreement can be reviewed annually with regards to the Defendant's right to exercise contact.

3.3.13 The parties agree that they shall communicate and discuss extension of the Defendant's right to contact if and when applicable but same should be reduced in writing should any amendments be made to the agreement. The amended settlement agreement shall be made an order of Court.

3.3.14 AII decisions pertaining to the minor children's school, medical treatment, religion, sport, and other important matters will be discussed between the parties, and neither party shall make any decisions regarding these important matters in a unilateral way, case of a real emergency.

3.3.15 The parties agree that it is in the best interest of the minor children to retain the minor children in their current schools, and that new schools for the minor children may not be explored or obtained without prior written consent of the other party, which written consent neither party shall unreasonably withhold.

3.3.16 The parties agree that neither party shall remove the minor child from the Republic of South Africa or the province of Gauteng, or the province without prior written consent of the other party, which written consent neither party shall unreasonably withhold.

…….

3.6 The parties agree that they will do everything possible in their power to act in the best interest of the minor children and to have a healthy relationship with each other and the minor children.

3.7 The parties will be obliged to consider the other party's wishes and his or her point of view in his/her capacity of the co-holder of parental duties, responsibilities, and rights with respect to the matters which will have a significant effect on the other party, who is also filled with the position of co- holder of parental duties and rights which will have an effect on the children born from the marriage."

[26] Maintenance is addressed in clause 4 of the settlement. It merely provides that the Mr R pays a specified amount towards the children's respective schools, 70% of the costs of clothes (winter and summer) as discussed and determined between the parties, 70% of the medical excesses, and that Mrs R must obtain his consent prior to incurring such expenses except in the case of emergency. Mrs R is liable to keep the children registered on her medical aid and for payment of 30% of medical excesses and 30% of the costs of the children's clothes.

[27] The agreement relating to primary residence and Mr R's contact with the children and his maintenance contributions, and the 70/30 apportionment is not supported by the information contained in Annexure "A" filed in terms of Regulation 2 in terms of the **Mediation**

in Certain Divorce Matters Act.[16] Mrs R deposed to Annexure "A" under oath on 4 July 2023.

[28] Annexure "A" indicates that Mrs R is unemployed but that she is commencing employment from 10 July 2023. Her estimate gross income is indicated as R33,000.00 and her monthly financial commitments as approximately R24,000.00. Mr R's monthly gross income is indicated as varying between R60,000.00 and R150,000.00 and his monthly financial commitments as approximately R80,000.00 per month. It is further stated that the children's living arrangement will be on a 50/50 basis with each parent and that both parties will contribute on a 50/50 basis when the children are in their care.

[29] The Family Advocate endorsed the settlement agreement on 6 July 2023 indicating that the parties are to testify why the shared residency arrangement is in the best interest of the minor children. No additional affidavit was filed (as required by the Practice Directive) by either of the parties in an attempt to supplement the scant information provided in the affidavit with regards to the interests of the minor children.

[30] When the matter was called in the Family Court, Mr R testified as Mrs R was not available due to work commitments.[17] Mr R simply repeated the allegations as referred to in the particulars of claim. His response

[16] 24 of 1987

[17] The unopposed divorce was on the Family Court roll of 28 August 2023

to the question why the settlement refers to primary residence being awarded to Mrs R, but his contact rights practically amount to a shared residency arrangement, was that he has a good relationship with the children and wants to stay involved in their lives.

[31] He also testified that Mrs R is a medical representative who travels frequently due to work commitments. Mr R has his own business which he conducts from the former matrimonial home. Consequently, he is readily available to assist with the day-to-day care of the children. His whole family resides in Pretoria and Mrs R has no support structure in Pretoria other than Mr R. He could not provide further evidence or factual context in response to the concerns raised by the Family Advocate regarding the shared residency arrangement.

[32] Regarding the lack of a cash contribution towards the maintenance of the minor children, Mr R's testified that as the children share equal time with each parent, each parent provides for the children when they are in his/her care. Mr R could not provide any explanation why in the settlement the parties agreed on an apportionment of their pro rata contribution towards the minor children's expenses on a 70% (Mr R) and 30% (Mrs R) basis. It logically follows that Mrs R earns substantially less than Mr R and therefore is not in the same financial position as Mr R to provide in the children's need when the children are in her care. Expenses such as rental, domestic services, security services, pets, internet, DSTV, insurance and motor vehicle expense

remain constant irrespective of whether the children only reside every alternative week with Mrs R, or not.

[33] A representative of the Office of the Family Advocate was present at Court and was subsequently requested to investigate and provide the Court with a report on an urgent basis. The matter stood down to the following week to hear the evidence of Mrs R and for the Family Advocate to investigate and report.

[34] The Family Advocate provided an interim report dated 13 September 2023. The observations and concerns of the Family Advocate and Family Counsellor are summarised as follows:

[34.1] Mr R worked away from home from 2010 until 2014. From 2014 until 2016 he worked in Secunda but returned home daily. He has his current business from 2017. Mrs R was primarily a homemaker during the marriage. Mrs R obtained permanent employment as a medical representative from July 2023.

[34.2] According to both parents they were of the opinion that the current arrangement regarding shared residency is working well and is in the interests of the children.

[34.3] Mr R confirmed to the Family Advocate that his girlfriend was going to move in with him. The girlfriend has three

minor children. Mr R's children and the girlfriend's children will share rooms in the week that the children are with Mr R. Furthermore, the girlfriend's five-month-old baby sleeps with Mr R and his girlfriend in their room.

[34.4] The children have not adapted to the current arrangement of shared residency. The children exhibit acting out behaviour. They are confused regarding when they are with which parent. The minor child E did not know who would fetch him at the end of that day. He waits every day to see who will fetch him from school. The minor daughter N displayed similar confusion.

[34.5] The parents display a lack of insight into the disruptive effect of the shared residency agreement on their children despite the disruptive effect being evident. Mr and Mrs R informed the Family Counsellor that they intend to continue with the shared residency arrangement, even if the Court finds that it is not in the best interests of the children.[18]

[34.6] All three children indicated Mrs R as their primary caregiver and primary emotional attachment. The children

[18] Family Counsellor's Report para 3.1.12.

identify with Mrs R as the parent that is most available for them as she took care of them during the marriage. The minor child B indicated to the Family Counsellor that as far as he can recall both his parents were involved in caring for them during the marriage but that his father worked long hours and that his mother was the primary caregiver.

[34.7] The minor children informed the Family Advocate that Mr R's girlfriend had already moved in. E and N share their rooms and beds with two of the girlfriend's children.

[34.8] B and E confirmed to the Family Counsellor that their sister N often cries in the week that they are in the care of their father. N requests to be taken back to her mother.

[34.9] The Family Counsellor remarked that N was very clingy and displayed separation anxiety. The Family Counsellor also observed this when the children waited in the consultation room when their parents were interviewed. N just wanted to remain with her mother. Mrs R admitted to the Family Counsellor that N displays severe separation anxiety. According to Mr R, N does not display separation anxiety when she is in his care.

[34.10] N also expressed confusion regarding where her residence is and was confused when she would be with which parent. The Family Counsellor remarked that during the interview, it was evident that N sought emotional security and stability from her two brothers rather than her parents. However, N expressed a clear indication that her mother is her primary caregiver and primary emotional attachment figure.

[34.11] Although the parties were of the view that they can effectively communicate with each other in the interests of the children, and that they both live relatively close to the children's schools and have a home environment where all of the children's personal belongings such as clothes and school necessities were available in order for the children not to have to move their belongings each week, this "idyllic" situation as sketched by the parents was contrary to the children's experience. Even the school remarked that they observed a change in the emotional functioning of E and that he has become more withdrawn. E also displayed anxious behaviour.

[35] The saying goes that the road to hell is paved with good intentions. Although both Mrs R and Mr R might have been of the view that shared residency would be in their children's interests as it would give them

equal exposure to both parents, the practical result of this arrangement is disruptive and confusing for the children. The disruptive effect of the shared residency arrangement on B, E and N and the impact thereof on their sense of security, stability, and routine is apparent to independent third parties, but apparently not to the children's parents.

[36] The following remarks by the Family Advocate highlight the challenges of a shared residency arrangement as follows in paragraphs 7 and 8 of the report and encapsulates the concerns raised in many judgments regarding shared residency:

> *"7.1 Adults and children have very different experiences of shared residency and there is a risk that this shared arrangement will benefit the adults and there needs and not that of the children.*
>
> *7.2 A concern regarding a shared residency arrangement is the exposure of the minor children to two different households, with parents who differ in parenting styles and discipline.*
>
> *7.3 The shared residency arrangement requires a child to make transitions between the two homes. The constant emotional pressures, due to transitions, may lead to more emotional difficulties. Any transition could cause feelings of worry, fear, anxiety and crying as the child anticipates leaving the security of the parent they are with, which mean the child experiences the change is difficult. It would not be in the interests of the children to cope with the significant demands of an ever-changing environment.*
>
> *7.4 Another concern regarding shared residency arrangement is the exposure of the minor children to two different households, with parents who differ in parenting styles and discipline.*
>
> *8.*
>
> *8.1 A shared residency arrangement as mentioned above seems to favour the satisfaction of the parents and not the best interest of the minor children. The children have to make significant adjustments and may feel overburdened by the demand of the arrangement. The question is whether this shared residency arrangement will ensure a climate of growth and well-being for the children, who already suffer from emotional dysfunction. E and N experience a loss of emotional security*

with the shared residency arrangement and it is detrimental to their well-being.

8.2 *Parents often believe that the amount of time spent with the child will determine the quality of the relationship with the child. The best interest of the child, after separation, is not connected to any amount of contact, but to the quality of parenting and the quality of the relationship between parents. The conclusion is that the quality of contact is more important than the frequency of contact. A shared residency arrangement cannot be used to secure equal time with each parent, with the focus on the need of the parent not the best interests of the children."*

[37] The Family Advocate recommends that the children remain in the primary care and residency of Mrs R subject to contact with Mr R on alternate weekends and school holidays. The Family Advocate also requires further information.

[38] The interim report was made available the day before Mrs R was to testify. Mr R was also provided with the opportunity to further testify. Mr R's further evidence is summarised as follows:

[38.1] He became involved in a relationship with his girlfriend during May 2023 when Mrs R and children moved out of the matrimonial home. Although he was vague regarding precisely when his girlfriend and her children moved into his home it would seem it was about three months after their relationship commenced.

[38.2] He was similarly vague and evasive regarding the financial contribution his girlfriend is making towards the benefit of

accommodation and other domestic services she and her children are enjoying in Mr R's home.

[38.3] Mr R seemed unwilling to acknowledge that as he earns a higher income than Mrs R, his apportionment of the maintenance duty and contribution is more including a cash component. He did not take the Court into his confidence regarding his actual financial position and did not refute the indication of his income in the Annexure "A" deposed to by Mrs R.

[38.4] He referred to hobbies such as motorbike/ motorcross sport which he and B participates in and which he pays for, but he was reluctant to acknowledge that the children are entitled (finances permitting) to enjoy the same standard of living whether they are in the care of Mrs R or Mr R.

[38.5] He merely referred to the fact that he has already paid Mrs R an amount of R280 000.00 in full and final settlement of the divorce[19] and that she must now repay him. Mr R seemed unable to comprehend that the payment to Mrs R in relation to the patrimonial consequences of their marriage is separate from his maintenance obligation towards his children.

[19] Clause 5 of the Settlement Agreement

[39] Mrs R's evidence is summarised as follows:

[39.1] Mr R is a good father, and the children have a good relationship with him. This was the reason why they decided on the shared residency arrangement. They also agreed on shared residency as this was an arrangement that one of their divorced friends had and was working well for them.

[39.2] They did not consult with a suitably qualified professional to obtain guidance regarding whether their proposed agreement would suit the specific emotional and physical needs of their children given the children's ages and different stages of development.

[39.3] She knows that Mr R's girlfriend is now residing in the former matrimonial home. She does not know the girlfriend well. They have greeted each other, and the girlfriend seems friendly.

[39.4] She acknowledged that N is very clingy at times and that E's school expressed concerns regarding a change in his behaviour. E did receive therapy at school at some stage and now seems to be "fine".

[40] Considering the oral evidence of the parties and the Family Advocate's interim report I was not satisfied that the settlement served the interests of B, E and N. The shared residency arrangement is only convenient for Mr and Mrs R, not their children. A further concern is that despite Mr R and/or Mrs R being aware of the minor daughter's N separation anxiety and the change in the emotional functioning of E since the separation and residency arrangement, they have failed to take adequate steps to protect and/or support the emotional integrity and security of the children. The parents seem to expect their children to adapt to what suits the needs of the parents and not necessarily the needs of the children. This is contrary to the best interest of the child, which should be the paramount consideration.

[41] Mr R has no financial responsibility towards his girlfriend and her minor children, however, he does a duty of support towards B, E and N. I am concerned that Mr R might be feathering his second nest to the detriment of the first.

[42] Consequently, having regard to the provisions of sections 6(1) and (3) of the **Divorce Act,** a decree of divorce cannot be granted until the court is satisfied that proper provision is made for the children's care, contact and maintenance. The matter was postponed pending the Family Advocate's final report. Due to concerns regarding the children's interest, and the parents' apparent lack of insight into the effect of their actions on the children, a *curatrix ad litem* ("*curatrix*")

was appointed to represent B, E and N in the interim pending the finalisation of the matter, in accordance with the provisions of section 6(4) of the **Divorce Act**. The costs of the *curatrix* are to be shared between the parties on a 70 (Mr R) / 30 (Mrs R) apportionment.

[43] The *curatrix's* duties and powers also included to assist the Family Advocate in their investigation and to approach the Court to protect the interests of the children, including their right to have or to be spared contact with the non-residential parent,[20] and to be adequately maintained as to enjoy the same standard of living at the parents' respective homes.

BACKGROUND FACTS: ***IMVD v CVD****:* CASE NUMBER 001200/2023

[44] Mr VD who resides in Witbank issued summons during January 2023 seeking an order that Mrs VD be awarded the primary residence of the minor child D subject to Mr VD's contact. When summons was issued Baby D was nearly 4 months old.

[45] The Annexure "A", deposed to under oath by Mr VD on 26 October 2022, attached to the particulars of claim, indicates his gross income

[20] ***B v S*** 1995 (3) SA 571 (A) at 581J -582A: *"The dicta in these cases are clear and persuasive. They show that no parental right, privilege or claim as regards access will have substance or meaning if access will be inimical to the child's welfare. Only if access is in the child's best interests can access be granted. The child's welfare is thus the central, constant factor in every instance. On that, access is wholly dependent. It is thus the child's right to have access, or to be spared access, that determines whether contact with the non-custodian parent will be granted. Essentially, therefore, if one is to speak of an inherent entitlement at all, it is that of the child, not the parent."*

as approximately R18 000.00 and his expenses as totalling approximately R16 000.00 per month. Mrs VD's residential address and the name and address of her employer as well as her gross monthly income and extent of monthly commitments were indicated as "unknown". It was stated that the minor child was living with his mother and that both parents were supporting Baby D.

[46] During April 2023 a Rule 28 notice was served, amending the relief sought by Mr VD. The amendment related to primary care and residence of D being awarded to him subject to Mrs VD's contact rights. Mrs VD's contact with D was to be phased in and included supervised contact at Mr VD's home. Provision was also made for Mrs VD to pay R1 000.00 monthly maintenance in respect of the child which would escalate annually, with the official inflation rate.

[47] Initially a notice of intention to defend was filed by Mrs VD's then attorney of record. Her attorneys withdrew during May 2023.

[48] The parties signed the settlement agreement on 28 July 2023 in Bronkhorstspruit. In terms of the settlement, it was agreed in clause 1 that both parties would be awarded joint parental responsibilities and rights, including guardianship. The primary residence of D would vest with Mr VD. It was further agreed that the parties would make joint decisions regarding major issues pertaining to the minor child. However, the day-to-day decisions regarding the child will be made by the parent with whom the child is residing at the specific time.

[49] Regarding the exercise of contact, the parties agreed that reasonable contact with the minor child will not be limited to the following and that the parties will always be able to change the arrangements amicably between themselves[21]

[49.1] Clauses 1.5 to 1.10 of the settlement regulates Mrs VD's contact to D until the age of 2 years and 2 months. It provides that Mrs VD visits D at Mr VD's home for one hour each week and on every second Saturday for two hours. The child may also spend every Christmas with Mrs VD for two hours and the child will spend his alternative birthday as well as Mrs VD's birthday and Mother's Day with Mrs VD for two hours. Clauses 1.12 to 1.18 regulates contact from D turning the age of 2 and 3 months. It provides that Mrs VD's visits will still be at Mr VD's home.

[49.2] Clauses 1.19 to 1.32 regulates contact from the age of 2 years and 3 months to 2 years and 9 months. The contact is still to be exercised at Mr VD's home, but the contact on Sundays is extended to 4 hours and thereafter to 6 hours. From the age of 2 years and 9 months to 3 years weekend contact on Sundays is increased to 8 hours and Baby D is also allowed to spend one day and one night at Mrs VD's house every alternative weekend.

[21] Clause 1.4 of the Settlement Agreement

[49.3] From the age of 5 years the exercise of supervised contact at Mr VD's home falls away. Mrs VD may exercise contact every alternative weekend and a 5-day holiday twice a year. From the age of 6, contact is extended to include a 10-day holiday twice a year. From the age of 7 the parties agree that the holiday contact will be divided equally and rotate between the parties.

[50] Mrs VD's maintenance contribution towards D is stipulated as R1 000.00 per month. No date on which the maintenance is to be paid each month is specified. An escalation of 10% per year, effective on the first day of the month following the anniversary of the first payment made by Mrs VD, is applicable.

[51] Mrs VD signed a notice of withdrawal of defence dated 12 July 2023, stating that she withdraws her defence because: "*… the parties entered into an agreement of settlement which agreement of settlement the parties are desirous, should it please the above Honourable Court, be made an order of Court at the hearing of this action.*" Both Mr VD and his attorney (Mr Human, the junior attorney acting on behalf of Mr VD) deposed to affidavits in compliance with the Practice Directive. The attorney confirmed under oath that there was compliance with the Judge President's Consolidated Revised Directive dated 8 July 2022.

[52] The notice of set down was emailed to Mrs VD on 15 August 2023, indicating the hearing date on the unopposed roll of 4 September 2023.

[53] Mr VD deposed to an affidavit on 16 August 2023 confirming in paragraph 3 thereof as follows:

"*The purpose of this affidavit is to deliver evidence in support of the granting of a divorce order .....*"

[54] Mr VD deals as follows with the settlement in paragraph 6 and 7 of the affidavit:

"*6.2 I confirm that the Defendant and I have subsequently entered into a settlement agreement, which settlement inter alia addresses not only patrimonial aspects regarding the division of assets and liabilities of the parties, but also seeks to regulate restrictive parties' parental rights and responsibilities, including primary residence and contact rights with regards the minor child.*

6.3 For the sake of brevity, I do not wish to repeat each and every aspect of the above-mentioned settlement, but confirm that same has already been presented to Court and have been endorsed by the office of the Family Advocate. Therefore, in short, I confirm that the parties are ad idem and have agreed to the following –

6.3.1 That each party shall have full parental rights and responsibilities with regard to the care, contact with, acting as guardians of and contributed towards the minor child as contemplated by the provisions of the Children's Act, 38 of 2005.

6.3.2 The primary residence of the minor child shall vest with me, subject to the Defendant's reasonable rights of contact.

7.

I confirm that this settlement was prepared and signed by the respective parties, having due to regard to what we believe to be in the minor child's best interest."

[55] Regarding the reasons for the breakdown of the marriage Mr VD merely states that marriage has irretrievably broken down as a result

of no meaningful communication, that Mrs VD became verbally abusive and quarrelsome, that the parties do not live together as husband and wife, and they have their lost their love and respect for each other. No factual basis is provided in support of why joint decision making will serve Baby D's interests given the alleged difficulty in communication and Mrs VD's alleged abusive and quarrelsome behaviour. No further elaboration is provided regarding the payment of maintenance and whether Mrs VD is employed given the content of Annexure "A" completed by Mr VD during October 2022.

[56] A practice notice with a draft order making provision for a decree of divorce incorporating the Settlement Agreement was filed on 29 August 2023. The practice note states as follows under the heading "Requirements for oral evidence":

> *"16. The Plaintiff has disposed to the necessary evidence affidavit, however, the Plaintiff shall avail herself for evidence to be adduced should it be determined necessary by the presiding judge."*

[57] The practice note concludes with the submission that a proper case has been made out, and that counsel will be moving for a decree of divorce incorporating the settlement agreement.

[58] When the matter was called on 4 September 2023 Mr VD was represented by another counsel than the counsel who filed the practice note. Counsel indicated that the Plaintiff will be seeking a divorce order incorporating the settlement and that the Family Advocate raised no

concerns. Mr VD during oral evidence merely repeated that the settlement was in the interest of Baby D without further elaboration other than he enjoys the support of his family. It was only when the Court enquired regarding the reason for the amendment during April 2023 that the true facts came to the fore. Mr VD's testimony is summarised as follows:

[58.1] Mrs VD could no longer look after D as she obtained employment. Prior to that she cared for D. She relocated from Witbank to the Bronkhorstspruit/Brits area to find employment. Her father and her stepmother reside in Bronkhorstspruit.

[58.2] Although Mr VD is also employed, he can take better care of D because he has a support structure. He resides with his father. He could provide no reason why Mrs VD would not be able to care for Baby D if she is employed or why her contact with Baby D had to be phased in under his supervision until D reaches a certain age.

[58.3] Mrs VD resides in Bronkhorstspruit close to and/or with her father and her father is taking care of D. The minor child has been left in the care of the maternal grandfather and his life partner for more than 5 months.

[58.4] He visits D as and when he can in Bronkhorstspruit. However, he is not allowed to remove D. He has never taken care of D at his home in Witbank since the parties separated. He pays for D's daycare and medical needs, and he loves his child very much.

[58.5] The maternal grandfather approached the Children's Court in Bronkhorstspruit, and a social worker is involved. He was uncertain as to the reasons why a social worker was involved. He and the attorney from the firm who is assisting him with the divorce appeared in the Children's Court on 31 August 2023 and the matter was postponed.

[59] Mr VD could provide no explanation why no mention was made of the above material facts in the affidavit he deposed to on 16 August 2023. He deposed to the affidavit less than two weeks prior to the Children's Court proceedings.[22] By 16 August 2023 Mr VD and his attorney knew of the Children's Court proceedings as Mr VD had deposed to an answering affidavit in the pending Children's Court proceedings.

[22] Section 1(4) of the ***Children's Act***, provides as follows:

"(4) Any proceedings arising out of the application of the Administration Amendment Act, 1929 (Act 9 of 1929), the Divorce Act, the Maintenance Act, the Domestic Violence Act, 1998 (Act 116 of 1998), and the Recognition of Customary Marriages Act, 1998 (Act 120 of 1998), in so far as these Acts relate to children, may not be dealt with in a children's court."

However, when a child is in need of care as envisaged by the provisions contained in Chapter 9 of the ***Children's Act***, section 1(4) is not applicable.

[60] The matter was stood down to later in the week to hear Mrs VD's evidence. When Mrs VD testified, she indicated that she was not aware that her contact was to be phased in under the supervision of Mr VD in terms of the settlement she signed during July 2023. According to her this was never explained to her by the attorney. She testified that Mr VD was a good father, and she can't understand why her father approached the Children's Court. She was D's primary caregiver since his birth and only left D with the maternal grandfather as she applied for employment on a game farm and was unsure about her accommodation arrangements.

[61] After hearing the parties' evidence, Mr VD's attorneys were provided with the opportunity to explain on affidavit why all the material facts were not placed before the Court, including the non-disclosure of the pending Children's Court proceedings and that Mr VD has never had the minor child in his physical care since the birth of the child. The attorneys were also provided with the opportunity to explain whether they fulfilled their duty towards the Court, why their fees should not be disallowed, and why they are not to be referred to the regulatory body of legal practitioners, being the LPC.

[62] The order granted on 18 October 2023 not only postponed the matter pending an investigation by the Family Advocate but also provided for the exercise of contact between Baby D and his parents. There is no evidence before this Court to suggest that it will not be in the child's interest to have the opportunity to spend time with each parent

including sleepover contact. The right to have contact or to be spared contact is the right of Baby D, not his parents.[23]

[63] A *curator ad litem* was also appointed to protect and represent Baby D's interests in the divorce and Children's Court proceedings. Due to the financial constraints of the parties, Mr VD is only liable for the *curatrix's* costs as far as it relates to her travelling and copying expenses. This Court appreciates the willingness of Ms Fourie, the *curatrix*, to assist Baby D on a *pro bono* basis.

AGREEMENT ON JOINT DECISION-MAKING AND SECTIONS 30 AND 31 OF THE CHILDREN'S ACT:

[64] There seems to be a misinterpretation of the provisions of the **Children's Act** as far as it relates to the exercise of parental rights and responsibility, and decisions pertaining to minor children.

[65] In both matters, and in many of the other settled divorces that came before me, the parties agreed on joint decision-making regarding education, medical, social, religious and other issues relating to a child's day to day life.

[66] In most divorces, the parties indicate that one of the reasons for the breakdown of the marriage is the lack of communication, constant arguments and/or different value systems. However, surprisingly they

[23] See ***B v S*** in footnote 20 *supra*

then agree to take joint decisions relating to the children. Unfortunately, if parties are unable to communicate effectively or they have different value systems (which may impact on parenting styles) this usually does not happen in isolation.

[67] When parents do not effectively communicate it often results in a checkmate situation where parents are unable to reach a "joint" decision. The inability to reach consensus (which is often symptomatic of unresolved personal issues stemming from the failed marital relationship) impacts negatively on the children's medical, educational, and therapeutic needs. This results in children's needs being left in limbo because the parents can't reach an agreement, or one parent refuses to provide consent.

[68] The provisions of the **Children's Act** do not infer or suggest joint decision-making. The Act provides for engagement (not consensus) between parents before a parent decides.[24] Co-parenting does not automatically entail joint decision-making resulting in a situation where one parent may "veto" the other parent's decision.

[69] The **Children's Act** is very clear on when joint consent required. Only sections 18(3) and (5) of the **Children's Act** provide that guardians of a child must both consent to marriage before the age of majority, adoption, and consent for a child to depart or be removed from the

[24] The provisions of Sections 18, 30 and 31 deals with parental rights and responsibilities.

Republic of South Africa, to apply for a passport and to consent to the alienation or encumbrance of any immovable property of the child.[25]

[70] Similarly, section 31 of the **Children's Act** does not require joint consent. It merely provides that before a person holding parental responsibilities and rights in respect of a child takes any decision in connection with the matters listed in section 18(3)(c), or that affects the contact between the child and the other co-holder of the parental rights or is likely to significantly change or have an adverse effect on the child's living conditions, due consideration must be given to any views and wishes expressed by any co-holder of parental rights and responsibilities ("co-holder").[26]

[71] Due consideration and joint decision-making are two different concepts. Joint decision-making requires consensus. Due consideration requires engagement. Section 31 merely requires due consideration being given to the other co-holder's views and wishes before deciding and not that the co-holder is bound by such views.

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[25] Section 18(3)(c)

[26] Section 31 provides as follows:

(1) (a) Before a person holding parental responsibilities and rights in respect of a child takes any decision contemplated in paragraph (b) involving the child, that person must give due consideration to any views and wishes expressed by the child, bearing in mind the child's age, maturity and stage of development.

(b) A decision referred to in paragraph (a) is any decision-

(i) in connection with a matter listed in section 18 (3) (c);

(ii) affecting contact between the child and a co-holder of parental responsibilities and rights;

(iii) regarding the assignment of guardianship or care in respect of the child to another person in terms of section 27; or

(iv) which is likely to significantly change, or to have an adverse effect on, the child's living conditions, education, health, personal relations with a parent or family member or, generally, the child's well-being.

(2) (a) Before a person holding parental responsibilities and rights in respect of a child takes any decision contemplated in paragraph (b), that person must give due consideration to any views and wishes expressed by any co-holder of parental responsibilities and rights in respect of the child.

(b) A decision referred to in paragraph (a) is any decision which is likely to change significantly, or to have a significant adverse effect on, the co-holder's exercise of parental responsibilities and rights in respect of the child.

[72] If the Legislature intended to provide for joint decision-making as the default position the provisions of section 31 would have clearly stated so. In addition, section 30 of the **Children's Act** deals with the co-exercise of parental rights and responsibilities. This section provides that each of the co-holders may act without the consent of the other co-holder when exercising parental rights and responsibilities, except where the act or any other law and order of court provides otherwise.[27] Under section 30 parents who are co-holders of parental rights and responsibilities, enjoy a large measure of autonomy. [28]

[73] In the ***AR*** matter the parties agreed to reach consensus on all aspects including which schools the children should attend and even removal of the children outside of Gauteng Province. In the ***VD*** matter the parties similarly agreed to joint decision relating to all aspects affecting the child.

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[27] Section 30(2): *When more than one person holds the same parental responsibilities and rights in respect of a child, each of the co-holders may act without the consent of the other co-holder or holders when exercising those responsibilities and rights, except where this Act, any other law or an order of court provides otherwise*.

[28] See: ***J v J*** 2008 (6) SA 30C, para 31 and 35:

"[31] By clause 2 of the agreement of settlement, the custody of the child was awarded to the respondent. The custodian parent generally has the right to have the child with him or her to regulate its life and to decide all questions of education training and religious upbringing ... As holder of custodial rights, the respondent was in terms of s 3(2) of the Act entitled to act without the consent of the appellant. "

and

"[35] If the appellant's contention is correct that the respondent was indeed obliged to give due consideration to the views and wishes of the appellant before coming to her decision, she was in no way bound to give effect to the respondent's views and wishes. Once she has given such consideration, she may act independently. Moreover, failure to give consideration to the views and wishes of the appellant, and failure to inform the appellant of her decision in terms of s 6(5) of the Act, do not in themselves render the decision made by the respondent void or invalid - the decision is subject to review, the determining factor being whether or not the decision is in the child's best interests."

[74] In both the **AR** and **VD** matters one of the reasons for the breakdown of the marriage relationship was a lack of effective communication and frequent arguments. In the **VD** matter Mr VD alleged the Mrs VD was argumentative and verbally abusive. The reasons for the breakdown of the marriage in both matters serve as an aggravating factor against an order for joint decision-making.

[75] In my view, if parties wish to provide for joint decision- making in a settlement agreement, a proper case must be made out why it will serve the child's best interest in light of the provisions of the **Children's Act**. The Court should also consider the reasons for the breakdown of the marriage, insofar as it may be relevant.

CONDUCT OF LEGAL REPRESENTATIVES:

[76] I now return to the lack of sufficient particularity in the affidavits filed to comply with the Practice Directive and the conduct of the legal representatives. I have already recounted how the litigation unfolded prior to the hearing of oral evidence.

[77] The parties in both matters, as lay persons in legal matters, relied upon and acted pursuant to the guidance and advice they received from their attorneys. This included guidance and advice on compliance with the applicable legislative principles, court rules and the Practice Directive.

[78] Mrs R's legal representative, Ms Heuer, an attorney with right of appearance assisted the parties in drafting the settlement and the affidavit in terms of the Practice Directive. Ms Heuer also appeared on behalf of the parties to move the unopposed divorce and lead Mr R's evidence at the first appearance. After the first appearance, Ms Heuer was provided with the opportunity to file an affidavit explaining why all material facts were not dealt with in Mrs R's affidavit in support of the relief sought, whether she has complied with her duties towards the Court in the manner required by the professional rules and whether her fees should be disallowed, and she be referred to the LPC.

[79] Ms Heuer filed an affidavit explaining that she did advise the parties regarding concerns that the Family Advocate might raise regarding the shared residency arrangement. She again advised in this regard when the Family Advocate raised concerns. However, the parties' instructions remained that the shared residency arrangement was in the best interest of the children. Her explanation was corroborated by Mrs R during her testimony. There are no facts to suggest that Mrs Heuer was informed of the concerns regarding the change of behaviour in E and N, the children's confusion or that Mr R's girlfriend and her children were residing with him and the impact thereof on B, E and N.

[80] When it comes to the interests of minor children, legal practitioners and the Court cannot follow a cookie-cutter approach. Each matter must be approached and considered on its own merits. Each child is an individual with his/her own specific needs. Consequently, when

considering the best interest of children and when parties reach an agreement regarding the exercise of parental rights and responsibilities, such an agreement must be specifically tailored to suit the unique needs of the child involved. In addition, the evidence in support of the relief sought, should specifically address the best interest of the child within the unique context of the particular child.

[81] Mrs R and Ms Heuer's affidavits filed in accordance with the Practice Directive did not contain sufficient facts to sustain the relief sought by Ms Heuer's clients.

[82] No reference is made in any of the affidavits filed of a "shared" residency arrangement. The affidavit of Mrs R is couched in such terms to deflect the attention away from the fact that although the settlement provides that the primary care of the children vests with Mrs R, the practical effect of Mr R's contact is that residency is shared on a week-to-week basis.

[83] As an attorney, Ms Heuer has knowledge of the applicable legal principles and Practice Directives, not Mrs R. As the attorney it was her duty to advise her clients on what facts should be contained in the affidavit. She also had a duty towards the Court to ensure that the relevant information was provided to assist the Court. This was not done. It is for this reason that the attorney is disallowed her fees and more particular having regard to the following shortcomings in the affidavit drafted and filed by Ms Heuer on behalf of her client Mrs R:

[83.1] Mrs R's affidavit creates the impression that primary care and residency vests with Mrs R. Nowhere in the affidavit is there any reference to a shared residency arrangement or a factual basis why such arrangement serves the interests of the children.

[83.2] Nowhere in the affidavit is the maintenance contribution addressed and that it is sufficient to provide in the children's needs, given the information provided in the Annexure "A" completed by Mrs R.

[83.3] The affidavit does not address why joint decision-making including consent to remove the children from Gauteng serves the children's interests considering the provisions of sections 18(3) and (5) and 30 and 31 of the **Children's Act** and given the reasons for the breakdown of the marriage.

[84] In the **VD** matter Mr Human, the junior attorney who assisted Mr VD in the Children's Court proceedings, and Mr Van Zyl, the senior attorney who represents him in the divorce action both filed affidavits. The affidavits were deposed to 11 and 13 September 2023 respectively.

[85] In the affidavit deposed to by Mr Human on 11 September 2023 he confirmed that he represents Mr VD in the Children's Court

proceedings that are pending in Bronkhorstspruit. He attached the papers filed in the Children's Court to his affidavit. The Children's Court proceedings were instituted on 1 June 2023 by the maternal grandfather and his life-partner ("the Applicants"). An interim order was granted on 1 June 2023 requesting a report and recommendation by a designated social worker by 31 August 2023 and Mr and Mrs VD could anticipate the return on12 hours written notice.

[86] The Children's Court order further provides that it appears that Baby D may be at risk if removed from the care of the Applicants and might be exposed to circumstances, which may harm his emotional, mental, and physical well-being. Consequently, pending the outcome of the social worker's investigation, Baby D was not to be removed from the care of the Applicants or from his daycare facility. A social worker from CMR Bronkhorstspruit was ordered to investigate in accordance with section 155(2) of the **Children's Act.**

[87] The maternal grandfather's affidavit deposed on 1 June 2023 expresses serious concerns relating to Baby D's emotional and physical welfare. The maternal grandfather's affidavit is summarised as follows:

[87.1] Mrs VD found out she was pregnant after she and Mr VD had already separated. Originally the minor child was residing with Mrs VD and her girlfriend in Bronkhorstspruit. Mrs VD required support from him and his life partner. During January

2023 Mrs VD obtained employment in Brits and informed the maternal grandfather that she would not be able to take Baby D with her, resulting in the minor child residing with the maternal grandfather and his life partner since then.

[87.2] Mr VD makes regular contact with them to exercise contact at their home as his current employment commitments and his "living arrangements in Witbank" makes it difficult for him to have Baby D in his permanent care. Mr VD is also paying D's daycare facility since March 2023 as Mrs VD failed to make payment. Mrs VD has shown little interest in the care and well-being of D since January 2023.

[87.3] Baby D enjoys Mr VD's company. They are unsure whether Baby D, given his age, can comprehend the nature of his relationship with Mr VD.

[87.4] The parents seem to be at odds with each other regarding the future residency and contact of baby D and the Family Advocate was requested to conduct an investigation. A copy of the notice of the Family Advocate's appointment, scheduled for 24 May 2023, was attached to the affidavit of the maternal grandfather.

[87.5] They approached Children's Court as Mrs VD on 31 May 2023, informed them that she intends to remove Baby D from their care on 3 June as she wants to relocate to her mother who resides in Witbank. Mrs VD's mother resides in a single room at the place of employment of her fiancé, she suffers from "severe symptoms of cancer" and is no longer able to walk without assistance. The maternal grandmother requires care and will be of no assistance in the care of Baby D. They fear that the child will be neglected and/or mistreated if left in the care Mrs VD without proper processes to facilitate such a transition.

[88] A replying affidavit deposed to by Mr VD in the Children's Court proceedings dated 6 July 2023, was also attached to Mr Human's affidavit. In the replying affidavit, Mr VD simply states that he is the natural father of D and the Plaintiff in the divorce action, in which he is claiming primary care and residence to be awarded to him. The Applicants are fully aware of the divorce matter and that he and Mrs VD attended a consultation at the Office of the Family Advocate in Pretoria on 24 May 2023. Mr VD confirmed that he consents to the involvement of the Children's Court and for the appointment of a social worker.

[89] A replying affidavit deposed to by Mrs VD on 28 July 2023 is also attached to Mr Human's affidavit. In the affidavit, she merely states that the divorce action has become settled and the settlement has been

signed and is to be endorsed by the Family Advocate. She concluded her affidavit by making the submission that it would be in the best interest of the minor child that primary residence vests with Mr VD.

[90] A report from the CMR dated 4 August 2023, is also attached to Mr Human's affidavit. From the report, it is evident that the only individuals contacted for information to compile the report was the maternal grandfather and his life partner. The social workers conclude that they are of the opinion that the Applicants are fit and proper to care for Baby D. An email dated 31 July 2023, from the social workers is also attached wherein a request was made regarding whether there has been a referral to the Family Advocate's Office. The CMR in Witbank were further requested to investigate the circumstances of Mr VD, focusing on a family preservation process.

[91] According to Mr Human, it is standard practice in their firm that he attends to instructions that fall under the jurisdiction of the Magistrates Court and that the senior attorney, Mr Van Zyl attends to instructions received that fall under the jurisdiction of the High Court. According to him, he "thoroughly" explained what transpired at the Children's Court (including the proceedings on 31 August 2023) and the effects of the Children's Court proceedings on the current divorce proceedings to his client and Mrs VD.

[92] However, despite Mr Human's explanation to the parties it became apparent from the oral evidence of Mr VD and Mrs VD before this Court

that they did not fully comprehend what the Children's Court proceedings entailed and the relevance thereof for the relief they sought in this Court.

[93] Mr Human further explained that after the Children's Court proceedings, he discussed the outcome of the Children's Court proceedings with Mr Van Zyl, after which they made telephonic contact with their client, as well as Mrs VD. Both parties expressed their intention to proceed with the divorce on 4 September 2023 and to leave the aspect pertaining to the primary residence in the hands of the Children's Court, however, to still make provision for the contact rights of Mr VD in that he is able to spend time with the minor child, every alternative weekend.

[94] Mr Van Zyl apparently proposed that an addendum to the settlement be drafted and signed by the parties to indicate their intention to proceed with the divorce as well as their decision to leave the judgement pertaining to the primary residence of the minor child in the hands of the Children's Court as an interim arrangement and to make provision that the child spends alternative weekends with Mr VD. Confirmation of the email regarding the addendum is attached to Mr Human's affidavit and is dated 31 August 2023 at 14h13.

[95] The email requests the parties to urgently sign the addendum so that the divorce can be finalised on 4 September 2023. The 31st of August was the Thursday before the Monday of 4 September, when the matter

was before this Court. Nothing about the draft addendum and the pending Children's Court investigation was placed before this Court in a supplementary affidavit prior to the hearing of the matter on 4 September 2023. This information was also not disclosed in the practice note filed or when the matter was called on 4 September, or when the parties testified. The disconnect between the attorney's version on how the litigation unfolded, the instructions to counsel and the oral evidence of the parties, is of great concern to this Court.

[96] A legal practitioner's overriding duty is towards the court and not towards his/her client who wishes to obtain the proverbial "quicky divorce. It is not to pay mere lip-service to the interest of the child and then to advise that further disputes regarding care, contact and/or maintenance can be sorted out in the Children's or Maintenance Court after the divorce has been granted. The advice of Mr VD's attorneys ignored the legislative and constitutional duty of this Court as upper guardian over all minor children within the Court's jurisdiction.

[97] According to Mr Human, Mrs VD informed him that she was not willing to sign the addendum. The attorneys then advised Mr VD, that in all probability the divorce would not proceed. They informed Mr VD of their intention to give the appointed counsel instruction to remove the matter from the roll. However, no practice note in respect of this development was filed. The only practice note filed clearly indicated

that the matter was ready to proceed for an order incorporating the settlement agreement.

[98] Mr Human explained further that on Monday, 4 September, Mrs VD sent him a WhatsApp voice note to request that the divorce proceeds and to enquire what the current situation were. He informed Mrs VD that they had provided counsel with instructions to remove the matter from the roll. In support of this he attaches a WhatsApp.

[99] Apparently, Mrs VD contacted Mr Human and pleaded that the divorce should proceed as she wants to close this chapter of her life. He informed her that he would contact his client. Mr Human apparently also attempted to obtain conformation from the counsel instructed whether he had already removed the matter from the roll.

[100] Mr Human explains that he attempted to make telephonic contact with the counsel instructed on 4 September 2023 whereupon counsel informed him that the matter had not been removed from the roll. A call-log indicating the telephone calls that took place is attached. It is difficult to reconcile the content of the call log with the affidavit as the call log does not indicate who phoned who. In any event, the counsel who filed the practice note, and with whom Mr Human made contact, was not the counsel that appeared before this Court.

[101] The counsel that appeared before this Court called the matter and requested leave to call the Plaintiff to testify and to move for an order that the divorce be granted incorporating the settlement. Again, the

disconnect between Mr Human's affidavit and the evidence led and submissions of counsel during the week of 4 September 2023, is of concern.

[102] Mr Human indicates that a joint decision was made to provide counsel with instructions to have the matter stand down in order to further discuss the addendum to the settlement with both Mr VD and Mrs VD and subsequently the matter stood down until 7 September 2023. This is not my recollection of what transpired at Court. The matter was stood down by this Court for Mrs VD to testify. At no stage was this Court informed that the attorney is awaiting a further instruction regarding an addendum to the settlement.

[103] Mr Human states that due to a "*bona fide*" and undeliberate oversight (between him and Mr Van Zyl) the addendum was not signed and subsequently not handed up in Court on 7 September 2023. He further explains that neither he nor Mr Van Zyl had any intention to mislead the Court and an unforeseen illness led to his inability to be present at Court on 7 September. Unfortunately, with the exception that the Court was informed of Mr Human's illness when the matter was re-called none of the information set out in Mr Human's affidavit and as confirmed by Mr Van Zyl was disclosed in the practice note filed or when the matter proceeded.

[104] Mr Van Zyl, the director at Van Zyl Incorporated provides the same apology in exactly the same terms as Mr Human in his affidavit. Mr

Van Zyl elaborated on the background to the matter including when he received instructions on 26 October 2022 from Mr VD. After the summons was served it came to his client's attention that Mrs VD had moved out of her father's home, commenced a romantic relationship with a woman and left the minor child in her father's care without his consent. Mr VD was experiencing difficulties exercising contact with Baby D and realised that it would be in the best interest of the child to primarily reside within him. This led to the amendment of the particulars of claim. There is a mere reference to the meeting at the Office of the Family Advocate, but no further details are provided by Mr Van Zyl.

[105] Like Mr Human, Mr Van Zyl also refers to the proposed addendum drafted and that it was never the intention to mislead the Court to make a ruling on the primary residence of Baby D, but rather to provide the social workers with the opportunity to finalise their report. The affidavit in support of the divorce was apparently according to Mr Van Zyl drafted on the presumption that after the finalisation of the divorce, the maternal grandfather will withdraw the Children's Court proceedings and that the minor child shall reside with their client. However, this presumption is not evident from the maternal grandfather's affidavit filed in the Children's Court. Mr Van Zyl also stated as follows:

> *"10.2 I can see that the current affidavit in support of divorce does not make mention the fact that the minor child is residing with his maternal grandfather but state that this omission was in no way intended to mislead the Court as there no contradicting statements and/or evidence before this Court.*

10.3 *The omission of such fact was merely an oversight on the part of our office and at no point was it our intention to attempt to keep the Court in the dark about the status quo of the minor. The omission was not made mala fide and I apologise to the Court for not having included the statement."*

[106] Mr Van Zyl states further that his offices always had their client's as well as the minor child's best interest at heart. His office also attempted to accommodate Mrs VD and to assist her where they could. Mr Van Zyl concludes his affidavit with the submission that a "*bona fide* error" occurred that does not justify the Court to give an order for them to forfeit their fees as it was not an intentional error as explained.

[107] The explanation provided by Mr Van Zyl who is a senior attorney and director of the firm on his own version, is unsatisfactory and disconcerting. What transpired in the **VD** matter goes far beyond human error and a "*bona fide* oversight" and "misunderstanding". The "misunderstanding" and "*bona fide* oversight" amounts to an extraordinary lax approach to the litigation process, ignorance of the applicable legal principles and failure to act diligently and professionally.

[108] When the matter proceeded before me the following week, counsel was informed that the Court's concerns with specific reference to the attorneys' duty towards the Court and to advise and guide their client in a diligent and professional manner and thereby upholding the rule of law, was not sufficiently addressed in the affidavits dated 11 September 2023. Mr VD's attorneys were provided with a further

opportunity to file further affidavits. This was done on 13 September 2023. Nothing new of real substance or assistance was placed before this Court. The attorneys merely repeated the same apology that it was a *bona fide* oversight on their part.

PRACTITIONERS' DUTY TO THE COURT AND COSTS:

[109] Closer scrutiny of the affidavits filed by Mr VD's attorneys reveal a lack of a reasonable explanation for the unsatisfactory way the litigation has been conducted. This is further supported by events that transpired prior to their client deposing to his affidavit in compliance with the Practice Directive. This Court is still in the dark in relation to on what basis the Court was to grant an order if all the relevant facts was not placed before it.

[110] The attorneys knew as early as 6 July 2023 when they advised and assisted their client with the drafting of an answering affidavit in response to the Applicant's application in the Children's Court and the subsequent appearance in Children's Court that the unopposed divorce could not proceed. The circumstances relating to Baby D had changed.

[111] The parties signed the settlement after Mr VD deposed to his affidavit in the Children's Court. However, more than a month later they advised and assisted Mr VD to depose to an affidavit on 16 August

2023, stating under oath that the settlement is in Baby D's interest and that a divorce should be granted. No mention is made of the factual position of Baby D and that he has since his birth never resided with Mr VD. No mention is made of the pending Children's Court proceedings and investigation and that Baby D was found to be a child in need of care. No mention is made of an addendum to the settlement.

[112] The Constitutional Court in ***General Council of the Bar of South Africa v Jiba and others*** [29] stated:

> *"[1] The proper administration of justice may not be achieved and justice itself may not be served unless truthful facts are placed before the courts. Legal practitioners are a vital part of our system of justice. Their important role includes preventing false evidence from being presented at court hearings, and by so doing they protect judicial adjudication of disputes from contamination by fabricated facts. As a result, the law demands from every practitioner absolute personal integrity and scrupulous honesty.*[30]
>
> *[2] One of the reasons for holding legal practitioners to this high ethical and moral standard was furnished on these terms in **Swain**:*
>
> *"[I]t is of vital importance that when the Court seeks an assurance from an advocate that a certain set of facts exists the Court will be able to rely implicitly on any assurance that may be given. The same standard is required in relations between advocates and between advocates and attorneys. The proper administration of justice could not easily survive if the professions were not scrupulous of the truth in their dealings with each other and with the Court."*[31]

[113] It is clear from the evidence before this Court and what transpired when the matter was called, that Mr VD, supported by his attorneys,

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[29] 2018 (8) BCLR 919 (CC) at para 1 - 2

[30] *Kekana v Society of Advocates of South Africa* [1998] ZASCA 54; 1998 (4) SA 649 (SCA) at 655-6 (*Kekana*); *Ex parte Swain* 1973 (2) SA 427 (N).

[31] *Swain* id at 434.

wanted to proceed to obtain a decree of divorce, incorporating the settlement in circumstances where the Baby D was *de facto* never in his physical care, where investigations in the Children's Court were pending, and Mr VD has never removed D not even for contact visits to his home in Witbank. Mr VD's attorneys should have known and advised their client accordingly.

[114] As attorneys, they should be aware of the provisions of Section 28(2) of the Constitution, the **Children's Act** as well as the **Divorce Act** as far as it relates to divorces and the interest of children involved.

[115] It is trite that is expected of legal practitioners to familiarise themselves with the relevant legislation, the Rules of Court, and the Practice Directives. It is evident that the attorneys in this matter had not attempted to comply with the relevant legislation and guiding jurisprudence on the best interest of the child.

[116] If this Court had failed to call for oral evidence and excepted the affidavits on face value, the consequences would have been grave. An order without the benefit of oral evidence would have *inter alia* had the following consequences:

[116.1] The integrity of the Children's Court process and its jurisdiction would have been infringed upon.

[116.2] The functions and/or obligations of the Office of the Family Advocate in terms of the relevant legislative framework would have been undermined.

[116.3] This Court as upper guardian of Baby D would have been compromised in exercising its constitutional duties without the full and correct facts, which in turn would have led to the integrity of this Court and its processes being compromised.

[116.4] Given the correct facts that only came to light during oral evidence, there is a probability that Baby D's emotional and/or physical wellbeing may have been jeopardised.

[117] The important role that legal representatives play in the functioning of the Court and the administration of justice have been restated over many years. The overriding duty of a legal practitioner is to the Court.[32]

[118] The duty extends to even when adherence to such duty may create an unfavourable result for his client and that duty is to disclose to the Court all factors and matters relevant to the matter in issue in order that a fair and just result may be obtained.[33] This has not been done in the **VD** matter and to a lesser extent in the **AR** matter. The conduct of Mr VD's attorneys go further – they failed to place relevant information before the Court or to instruct the counsel appearing

[32] LAWSA Vol 14: Legal Practitioners at para 257 at p 250 to 251: *"Advocates and attorneys are as much a part of the courts in which the practice as the judges who preside over them. Their duty is not only to the clients but also to the court. Although there are not court employees and practice independently in private practice, they are often loosely referred to as officers of the court, to emphasise their duty to the administration of justice and the court's discipline relationship with its practitioners."* Also compare ***Kekana v Society of Advocates of South Africa*** 1998 (4) SA 649 (SCA) at 655I – 656B

[33] LAWSA Vol 14, para 451 at p 406 – 407

accordingly. The versions of Mr Human and Van Zyl are not supported by the oral evidence of the parties, or the practice note filed by counsel. Despite the attorneys having knowledge of the true facts, they persisted in instructing counsel to proceed with the divorce. The non-disclosure in the **VD** matter is material and breaches the trust relationship between the Bench and its officers.

[119] Furthermore, the Office of the Family Advocate could not comply with their legislative duties due to the material non-disclosure in the **VD** matter. Had the Family Advocate been informed of the true position of Baby D, they would have never endorsed the settlement as being in the interest of the minor child.

[120] Therefore, in my view there is no reason why Mr VD, who is a lay person, seeking the advice of his legal representatives, should be required to pay the attorney's costs and expenses.

[121] The primary consideration for the disallowance of fees and referral of the attorneys to the LPC in the **VD** matter is the unacceptable conduct of the attorneys which compromised the best interest of Baby D and the proper administration of justice. In my view their conduct warrants a referral to the LPC for consideration and to take such steps which the regulator may deem appropriate.

ORDERS GRANTED:

[122] In **AR v BMR**, (case number 060704/23) the following order was granted:

1. The matter is postponed *sine die*.
2. The Office of the Family Advocate is requested to urgently finalise their investigation and file a final report and recommendation regarding the best interests of the minor children BR (born on 12/05/2015), EMR (born on 28/03/2017) and NR (born on 24/04/2018) regarding the exercise of parental rights and responsibilities and more particular, the following:
   2.1 The Defendant's specific parental rights and responsibilities regarding contact as contemplated in clauses 3 to 3.3.13 of the settlement agreement signed on 22 June 2023 ("the settlement agreement"); and
   2.2 Joint decisions and consent to relocate as contemplated in clauses 3.3.13 to 3.3.16 of the settlement agreement.
3. Pending the final report of the Family Advocate both parties shall retain full parental rights and responsibilities in respect of the minor children, subject to the primary care and residency of the minor children vesting with the Plaintiff and the exercise of specific parental rights and responsibilities by the Defendant in respect of contact with the minor children.
4. Pending the final report of the Family Advocate the Defendant's contact with the minor children includes the following:
   4.1 Contact every alternative weekend from the Friday at 17h00 until the Sunday at 17h00. The Defendant shall collect the minor children from the home of the Plaintiff and return the minor children after the weekend visit.
   4.2 Contact every Wednesday for one hour between 17h30 and 18h30. The Defendant shall collect the minor children from the home of the Plaintiff and return the minor children after the weekend visit.
   4.3 Telephonic contact between 18h30 and 19h00 every Thursday and Tuesday and on alternate Sundays when the children are not visiting the Defendant.
   4.4 On alternate public holidays and alternate short school holidays and the half of every long school holiday, Christmas, and New Year to rotate between the parties.
   4.5 On the Defendant's and the minor children's birthdays on such times as discussed and agreed between the Plaintiff and the Defendant.

4.6 The contact on alternative weekends shall be exercised in such a manner that the minor children spend the weekend of Father's Day with the Defendant and the weekend of Mother's Day with the Plaintiff.

4.7 The right of first refusal in the event of the Plaintiff not being able to care for the children for an extended period of 24 hours.

5. The contact in 4 above does not affect the right of any party to approach the Court in terms of the provisions of Rule 43 for an extension and/or curtailment of contact and for the contribution to the minor children's maintenance.

6. NATASHA FOURIE, an attorney with right of appearance (LPC number: 43448) is hereby appointed as curator ad litem on behalf of the minor children with the following powers and duties:

6.1 To represent and advance argument on behalf of the minor children in the divorce proceedings under the above-mentioned case number and in any other proceedings which affects the interests of the minor child.

6.2 To have unrestricted access to the minor children for purposes of her investigation.

6.3 To consult with any party, she may deem necessary for purposes of her investigation.

6.4 To refer the minor children for therapy if she deems fit.

6.5 To monitor the exercise of contact rights.

6.6 To assist the Office of the Family Advocate to expedite their investigation regarding the best interests of the minor child.

6.7 To investigate and report to the Court concerning the best interests of the minor child regarding primary care, residence, and the exercise of contact.

6.8 To approach the Court to extend her powers and duties if she deems it necessary.

7. The parties are liable on a 70% (Defendant) a 30% (Plaintiff) basis for the payment of the curatrix’s fees and the fees are payable with 1 (one) calendar month from date of receiving the curatrix's invoice.

8. Attorney Tilicia Heuer from Heuer Attorneys is disallowed any fees for the consultations, drafting and filing of the affidavits, practice notes and draft orders in accordance with the Practice Directives for Unopposed Divorces, including the further affidavits directed by the Court and appearance on 28 August

2023 in the Family Court. If the attorney has received payment for these services, the attorney shall ensure that such fees are repaid to the parties.

[125] In ***IMVD v CVD*** (case number 001200/2023) the following order was granted:

1. The matter is postponed *sine die*.
2. The Office of the Family Advocate is requested to urgently investigate the best interest of the minor child DVD, born on 30 September 2022 from the marriage relationship between the Plaintiff and the Defendant and to file a report and recommendation regarding the exercise of parental rights and responsibilities in respect of the minor child in relation to primary care, primary residence, and the exercise of contact by the non-residential parent.
3. NATASHA FOURIE, an attorney with right of appearance (LPC number: 43448) is hereby appointed as *curator ad litem* on behalf of the minor child with the following powers and duties:
   - 3.1 To represent and advance argument on behalf of the minor child in the divorce proceedings under the above-mentioned case number and in any other proceedings which affects the interests of the minor child, including but not limited to the pending proceedings in Children's Court for the District of Tshwane East (Held at Bronkhorstspruit) under reference number 14/1/4-35/2023.
   - 3.2 To have unrestricted access to the minor child for purposes of her investigation.
   - 3.3 To consult with any party, she may deem necessary for purposes of her investigation.
   - 3.4 To monitor the exercise of contact rights.
   - 3.5 To assist the Office of the Family Advocate to expedite their investigation regarding the best interests of the minor child.
   - 3.6 To investigate and report to the Court concerning the best interests of the minor child regarding primary care, residence, and the exercise of contact.
   - 3.7 To approach the Court to extend her powers and duties if she deems it necessary.
4. The *curator ad litem* ("*curatrix*) is appointed to assist on a *pro bono* basis except for travelling and copying costs incurred by

the *curatrix* in the exercise of her duties and functions.

4.1 The Plaintiff shall be liable for the payment of such costs incurred by the *curatrix*.

4.2 The *curatrix* shall provide the Plaintiff's attorney with her invoice on/before the last day of each month and the invoice is payable within 30 calendar days from date of receipt hereof.

5. Pending the finalisation of the Family Advocates' investigation and report, the Plaintiff and Defendant are granted contact to the minor child, which contact includes the right of removal, on alternate weekends from the Saturday at 9h00 to the Sunday at 16h00 and reasonable telephonic contact, including Facetime, daily.

6. The Plaintiff's attorneys are disallowed any fees for consultations, drafting and fling of affidavits, practice notes and/or draft orders and enrolment of the matter in accordance with the Practice Directives for Unopposed Divorces and the further affidavits filed as directed by the Court. In the event of the Plaintiff's attorneys having invoiced and received payment for such consultations, drafting, filing and enrolment, such fees are to be repaid to the Plaintiff.

7. The Legal Practice Council, Gauteng Provincial Office, ("*LPC*") is requested:

7.1 To investigate the conduct of the Plaintiff's attorneys, WILLIE JOHANNES VAN ZYL and FRANCOIS EUGENE HUMAN from Van Zyl's Incorporated including whether the attorneys acted in accordance with the Code of Conduct for All Legal Practitioners, Candidate Legal Practitioners and Juristic Entities in complying with their duty towards the Court, their client, the interests of justice and observance of the law and whether the fees as referred to in 6 above have been repaid; and

7.2 to take and/or implement such steps and/or procedures as the LPC may deem appropriate.

8. The Plaintiff's attorneys shall provide the LPC with hard copies of all the papers filed under the abovementioned case number and a copy of this order.

9. The Plaintiff's attorneys shall serve by email a copy of all the papers filed under the abovementioned case number and a copy of this order on the Defendant.

10. The Plaintiff's attorneys shall file an affidavit to confirm compliance with 8 and 9 above.

HAUPT AJ

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

HEARD ON:	31 August, 4, 7 and 14 September 2023
DATE OF ORDERS:	18 October 2023
DATE OF JUDGEMENT:	8 December 2023