V v V 1998 (4) SA 169 (C)

Citation	1998 (4) SA 169 (C)
Case No	16150/96
Court	Cape Provincial Division
Judge	Foxcroft J
Heard	August 6, 1997; September 8, 1997
Judgment	September 10, 1997
Counsel	E Steyn for the plaintiff until 18 August The plaintiff appearing in person from 18 August PK Weyerfor the defendant until 18 August The defendant appearing in person from 18 August
Annotations	None

Flynote : Sleutelwoorde

Husband and wife - Divorce - Custody of children - Joint custody - When to be ordered - Husband seeking custody of two minor children with very limited access to wife - Husband objecting to children being exposed to lesbian relationship in which wife involved - Husband's other concern being wife's state of mind - Wife maintaining that she had fully recovered from psychiatric condition - Parties having exercised joint custody for two years in terms of separation agreement - Most of factors proffered as disadvantages of joint custody not holding water - Court, on facts, having no doubt that defendant suitable and good mother - Court finding that joint custody in best interests of children - In order to prevent further disputes, Court including direction in order that, if agreement could not be reached on issue where joint decision required, dispute to be referred for mediation to two mediators and, if mediators unable to agree, dispute to be referred to arbitrator whose decision would be final.Husband and wife - Divorce - Custody of children - Joint custody - Husband seeking custody of two minor children with very limited access to wife - Situations might arise where best interests of child required that action be taken for benefit of child which effectively cut across parents' rights - Right of child to have access to its parents complemented by right of parents to have access to child - Essential that proper two-way process occurred so that child might fully benefit from relationship with each parent - Access not unilateral exercise of right by child, but part of continuing relationship between parent and child - The more extensive the relationship with both parents, the greater the benefit to child likely to be - Approach that imperative for child to know with whom ultimate say lay salutary in resolving deadlocks but, if situation could be regulated so that threatened dangers of deadlock removed as far as possible, need for ruling of one authoritarian person receding considerably - Fact that child should know 'where it stands' not only consideration of importance - Such fact being part of pattern for child's future which Court attempting to construct, and which had to be balanced against benefits to be obtained when both parents contributing on regular and reasonably equal basis to upbringing of child. Husband and wife - Divorce - Custody - Joint custody - Husband seeking custody of two minor children with very limited access to wife - Husband objecting to children being exposed to lesbian relationship in which wife living - Husband entitled to protect children against what he perceived to be harmful influences - Court having to decide whether fear soundly based or not - In terms of equality clause in s 9 of Constitution of Republic of South Africa Act 108 of 1996, wrong in law to describe homosexual orientation as abnormal - In custody cases, however, dealing only indirectly with parents' rights, child's rights paramount and needing to be protected - Situations might arise where best interests of child requiring that action be taken for benefit of child which effectively cuts across parents' rights - Court having no doubt that defendant suitable and good mother - Would be unjust to compel mother to exercise access rights to children in position of visitor to father's home - Image of a mother's access being restricted in such way

because of her lifestyle unfair to her and children - Children would grow up feeling that mother being punished because of risk that her lifestyle might influence them in wrong direction - No better protection against that than to allow children to continue living with both parents and eventually to judge for themselves whether lifestyle of mother or father more or less harmful than other - Court deciding that joint custody in best interests of children. **Headnote : Kopnota**

In an action for divorce and ancillary relief the plaintiff (husband) sought sole custody of the two minor children born of the marriage. He was prepared to allow the defendant only supervised access to the children, asking that unsupervised access should be granted only if a psychiatrist certified that it was in the best interests of the children that the defendant had access to the children and that such access should be subject to the condition that no third person would sleep under the same roof as the defendant and the children. His attitude was based, firstly, on the fact that his wife had become involved in a lesbian relationship and, secondly, on the fact that his wife was allegedly still suffering from a condition known as 'borderline personality disorder'. Witnesses called by the plaintiff substantiated the continuing effects of the condition. The defendant and her witnesses maintained, however, that the condition had been a consequence of a major post-traumatic stress situation, precipitated when the defendant's suppressed memories of childhood abuse had been rekindled by the discovery that one of her own children was being abused, and that she had recovered from the condition. The defendant was content that an order of joint custody be granted. The parties had in fact been exercising joint custody in practice for two years as a result of a separation agreement in terms of which the children moved between the homes of their mother and father, spending part of every week with each parent.
The Court held that children's rights were no longer confined to the common law, but had also found expression in s 28 of the Constitution of the Republic of South Africa Act 108 of 1996, as well as in a wide range of conventions. The rigours of the common law in regard to guardianship had also been tempered by the Matrimonial Affairs Act 37 of 1953 and then removed by the Guardianship Act 192 of 1993, in terms of which husbands and wives shared equally the right to make decisions affecting their children. (At 176D and 176H/I--I/J.) The Court discussed the factors which had been suggested as major disadvantages of joint custody. The first was the imagined need for the security of one decision-maker; secondly, the view that, if parents had been unable to maintain a stable marriage, they could not be expected to achieve the degree of co-operation required for joint custody; thirdly, the view that joint custody ran counter to the so-called 'clean-break' principle in divorce; fourthly, logistical objections to joint custody where former spouses did not live in close proximity to each other; and, lastly, the view that joint custody might be seen to be the easy way out of relieving the Court from making a decision on a question of sole custody.In regard to these factors, the Court held that the first objection harked back to the patriarchal legal past of South Africa and assumed that there would always be disagreement requiring resolution by one authoritarian parent. The second objection had little to commend it since there were many situations where the parents could not abide each other any longer, but continued to love their children in the same way as they had always done. Thirdly, the so-called 'clean-break' principle seemed to have little to do with the best interests of the child. Fourthly, it was obviously beneficial for joint custodian parents to live reasonably near to each other. The last objection, relating to the perception of an abdication by the Court of its responsibilities might apply in some situations where a decision was reached in the Motion Court in an unopposed trial with a consent paper, but it could have no application to a situation like the present one, where a month had been spent grappling with the respective merits of sole custody or joint custody. (At 179C/D--F.)
The Court further held that the defendant *in casu* had demonstrated, by the manner in which she had conducted herself during the proceedings, that she had grown emotionally during the preceding years. It was thus unnecessary to determine the precise nature of her medical condition. (At 186D--G/H, paraphrased).)
The Court pointed out that it was common cause during the trial that the question of sexual orientation of the defendant was not regarded as an issue between the experts called by the parties. The Court held, however, that the fact that the expert witnesses felt that the defendant's sexual orientation did not present a problem did not mean that the plaintiff was not entitled to

believe that it was problematic. He was fully entitled to protect his children against what he perceived to be harmful influences. In the end, however, what had to be decided was whether his fear was soundly based or not. (At 181G/H--I and 182D--E.) One of the cases to which the Court was referred by the plaintiff was *Van Rooyen v Van Rooyen* 1994 (2) SA 325 (W) , a decision given before the Constitution of the Republic of South Africa Act 200 of 1993 came into force, where the Court made a moral judgment about what was normal and correct insofar as sexuality was concerned. It was clear that the Judge in that case had regarded homosexuality as being *per se* abnormal. The Court discussed the question whether the above judgment would have been in breach of chap 3 of the Constitution of the Republic of South Africa Act 200 of 1993 if it had been delivered after the Constitution had come into effect. In terms of the present equality clause in the Constitution of the Republic of South Africa Act 108 of 1996, discrimination on the grounds of sexual orientation was not allowed. It was thus, in law, wrong to describe a homosexual orientation as abnormal (as had been done in the *Van Rooyen* case). (At 189A--B.)

The Court held that part of the difficulty in dealing with that question was that, in a custody case, one was only indirectly dealing with the parents' rights. The child's rights were paramount and needed to be protected, and situations might well arise where the best interests of the child required that action be taken for the benefit of the child which effectively cut across the parents' rights. Although access rights were often spoken about as the rights of the child, it was artificial to treat them as being exclusive of parents' rights. The right which a child had to have access to its parents was complemented by the right of the parents to have access to the child. It was essential that a proper two-way process occurred so that the child might fully benefit from its relationship with each parent in the future. Access was therefore not a unilateral exercise of a right by a child, but part of a continuing relationship between parent and child. The more extensive that relationship with both parents, the greater the benefit to the children was likely to be. (At 189B/C--E.)

The Court considered the question whether it would be possible to use the limitation clause in the Constitution (s 33(1)) to limit the rights of the lesbian mother. An argument to justify such limitation could be that while there was nothing inherently wrong or abnormal about a lesbian relationship, there might be strong social recrimination from peers and other parents against the child as it became known that his or her mother was a lesbian, and that it might therefore be in the best interests of the child to discriminate against the lesbian mother. The Court held that the approach in certain cases, that it was imperative that a child should know with whom the ultimate say lies and should not be afforded the opportunity of playing one parent off against the other, was obviously salutary in resolving deadlocks and the many disputes which might arise in families without the necessity of recourse to the Courts. If the situation could be so regulated, however, that the threatened dangers of deadlock or disagreement were removed insofar as it was possible to do so, then the need for the ruling of one authoritarian person receded considerably. The fact that a child should know 'where it stands' was not the only consideration of importance. It was part of a pattern for a child's future which a Court attempted to construct, and which had to be balanced against the great benefits to be obtained when both parents contributed on a regular and reasonably equal basis to the upbringing of the child. (At 191D--G.)

The Court held that, on the facts of the present case, no one could predict the future, or say that deadlock between the plaintiff and the defendant would inevitably arise. They had both retained a measure of respect for each other, and the Court was hopeful that, when the traumatic events of the previous two years had faded a little, they would be able to resume their lives for the benefit of the children. There was no evidence that they had ever used the children as weapons of war to get at each other, in which case joint custody would be unthinkable. The children seemed to want to protect their parents for whom they had sympathy and there was no evidence of antipathy against either parent. (At 191G/H--J.) The shock of discovery of his wife's past must have been traumatic for the plaintiff. His need to protect his children was obviously very strong. His belief that he was a more suitable parent was probably equally strong. The Court was, however, struck by the way in which the defendant had been able to cope as well as she had. The Court had no doubt that she was a good and suitable mother, and thought that it would be most unjust to compel her to exercise access rights to her children in the position of a visitor to the father's home. The image of a mother's access being restricted in such a way because of her lifestyle would be unfair to her and also to her children. They would grow up with the feeling that their

mother was being punished, not for anything which she had done to them, but because of the risk that her lifestyle might influence them in the wrong direction. The Court held that there could be no better protection against that than allowing the children to continue living with both parents and eventually to judge for themselves whether the lifestyle of the father or of the mother was more or less harmful than the other. (At 192A--E.)For these reasons the Court held that joint custody was in the best interests of the two children. In order to prevent further disputes, the Court included such directions in the order as would hopefully iron out many difficulties. The order provided, *inter alia*, that, if the parties were unable to reach agreement on any issue where a joint decision was required, the dispute would be referred for mediation to two mediators, who would attempt to resolve the dispute as speedily as possible and without recourse to litigation; that each party would be entitled to nominate a mediator to act on such party's behalf when the need for such mediation arose, and that, if the mediators were unable to agree on a resolution of the dispute, they would jointly refer the dispute to an arbitrator who would decide the issue and whose decision would be final. (At 192H and 194B/C--C/D.)

Annotations:

Reported cases *Best v Wellcome Foundation Ltd and Others* 1994 (5) Medical Law Reports: referred to
Calitz v Calitz 1939 AD 56: considered
Dipper v Dipper [1980] 2 All ER 722 (CA): considered
Fletcher v Fletcher 1948 (1) SA 130 (A) : referred to *Heimann v Heimann* 1948 (4) SA 926 (W) : referred to
Kastan v Kastan 1985 (3) SA 235 (C) : discussed
McCall v McCall 1994 (3) SA 201 (C) : considered
Pinion v Pinion 1994 (2) SA 725 (D) : considered
R v Oakes (1986) 26 DLR (4th) 200: referred to
Schlebusch v Schlebusch 1988 (4) SA 548 (E) : doubted *Van Rooyen v Van Rooyen* 1994 (2) SA 325 (W) : criticised
Venton v Venton 1993 (1) SA 763 (D) : considered
Whiteley v Leyshon 1957 (1) PH B9 (D): doubted.

Statutes Considered

Statutes
The Constitution of the Republic of South Africa Act 200 of 1993, s 33: see *Juta's Statutes of South Africa 1996* vol 5 at 1-136 The Constitution of the Republic of South Africa Act 108 of 1996, ss 9, 28: see *Juta's Statutes of South Africa 1997* vol 5 at 1-172, 1-174
The Guardianship Act 192 of 1993, s 1(2): see *Juta's Statutes of South Africa 1997* vol 5 at 2-107
The Matrimonial Affairs Act 37 of 1953: see *Juta's Statutes of South Africa 1997* vol 5 at 2-119.

Case Information

Civil trial in an action for divorce. The facts appear from the reasons for judgment.
E Steyn for the plaintiff until 18 August.
The plaintiff appearing in person from 18 August. *P K Weyer* for the defendant until 18 August.
The defendant appearing in person from 18 August.
Cur adv vult.
Postea (10 September 1997).

Judgment

Foxcroft J: This is an action for divorce and ancillary relief. It is admitted in the pleadings that the parties were married to each other in community of property on 13 September 1982. It was also common cause that the marriage has ended and that a divorce should be granted. The outstanding issues related to the custody of the children and access arrangements, the proprietary consequences of the marriage and costs. The major dispute related to the question of the custody of the children.
The children were born on 30 May 1984 and 29 October 1985 respectively.Plaintiff sought an order for custody of the children and was prepared to allow defendant access to the children under the supervision of plaintiff or his nominee. Prayer *(c)* of the claim included a further

provision that unsupervised access should be granted during alternate weekends and school holidays if a psychiatrist were to certify that 'it is in the interests of the minor children that defendant has reasonable access to them, which access shall be limited to the following . . .'. Thereafter follow the access arrangements to which I have referred.

An important provision in these access conditions was that 'whenever defendant exercises her access in terms of (i), (ii) and (iii) above, no third person will share the same residence and/or sleep under the same roof as defendant and the children, save with plaintiff's consent in writing'.

This restriction is cast in very wide terms. On the face of it it would include a new marriage partner, companion, friend or even relative. The reason for the condition became apparent during the trial, since it is a continuing concern of plaintiff that his children may become subjected to the allegedly harmful influence of a relationship between their mother and her partner in a lesbian relationship.

Plaintiff made it clear on a number of occasions during this protracted trial and during argument that he is genuinely concerned that his children may grow up with a homosexual orientation if subjected, as he puts it, to the influence of a home where their mother openly lives with a lesbian partner.

In his own testimony, plaintiff said that his other concern was the state of mind of his wife. Indeed, when asked whether his objection to his children spending time with their mother in her home would remain if she were living alone, he answered in the affirmative. He maintained that he was concerned, on the advice of psychiatrists and psychologists, that the state of mind of defendant was such that she could harm the children. He made it clear at various stages during the trial that he did not suggest that defendant would physically harm the children. This had never happened in the past. His objection was that the children would be mentally, emotionally and spiritually harmed by the influence of the lifestyle of their mother and her companion.This was a recurring theme throughout the trial, and I have no doubt that plaintiff sincerely believes that his wife, the defendant, is not yet cured of the problems which beset her a few years ago, and with which I shall deal presently. It is also undoubtedly so that a number of medical specialists and other persons have supported his view that defendant is suffering from a condition known to psychiatrists as 'borderline personality disorder'. In short, he believes that this condition is pervasive, has existed since her teenage years and is still present. Plaintiff asserts that so long as psychiatrists cannot explain to his satisfaction that it is safe for him to leave his children with their mother, he simply cannot do so. He sees such action as a dereliction of his duty to his children. Again, I am satisfied on the evidence presented in Court that plaintiff is a most dutiful father. Defendant underwent a period of behavioural disorder, to use neutral language, for a period of some two years, culminating in admission to the psychiatric casualty ward at Groote Schuur Hospital in April 1991, and she has been seen by a therapist ever since. The manifestation of her disorder, which loomed large throughout the trial, was the ingestion of rat poison, containing a Warfarin compound which is a decoagulant.

Medications of this kind are commonly used in medical practice to prevent clotting of the blood. The effect of the substance is to cause thinning of the blood and over lengthy periods of time a degree of bleeding.

This subcutaneous bleeding manifested as a skin disorder, and plaintiff spent a great deal of time, effort and money in an attempt to discover the cause of this disorder. He was told by medical persons whom he consulted that it was a rare disease, and it took something like two years for the truth to come out. Defendant eventually confided in the persons treating her in Groote Schuur Hospital that she had been taking rat poison for about two years. There is no suggestion that she is still abusing this substance. The medical and psychological battle which raged before me often concerned this substance abuse. Plaintiff and his cohorts used it as a basis for attempting to prove a borderline personality disorder which had in all probability not been properly treated and had certainly not been cured, while defendant and the witness led on her behalf maintained that the ingestion of Warfarin was a consequence of a major post-traumatic stress situation from which she had recovered.

There was no dispute as to the fact that defendant had been severely abused as a child in Ireland between the ages of six and twelve. Ritual sexual abuse had occurred in the context of a misuse

of the Catholic religion and some of its central features and symbols. The psychiatrists and psychologists were not in serious dispute as to the probability that she had repressed her memories of this abuse, or that they had been suppressed in a sense, and that when her daughter told her that she had been abused by a member of plaintiff's family, the memories of defendant's own abuse during her childhood started to surface. The bubble burst, as Mr Dowdall put it in his evidence, and the pain of the past came flooding back. Fears of further sexual harassment by plaintiff's father followed, and she became very depressed. The death of plaintiff's stepmother, with whom she had formed a close bond, contributed to the onset of this condition. Defendant's case is that she eventually recovered from that psychiatric crisis and that she is a much stronger personality today than she was five or six years ago.

The importance of these issues is that plaintiff sought custody with limited access to defendant, while defendant was content that an order of joint custody be granted. She made it clear in her own evidence that she would prefer to have custody and not joint custody, from her own point of view, but that she was convinced that her children wanted the Court to order joint custody and that she did not want to stand in their way. The parties have in fact been exercising joint custody in practice for the past two years as a result of a separation agreement reached by them in terms of which the children moved between the homes of their mother and father, spending part of every week with each parent. This memorandum of agreement is annexed to the notice of motion in case No 15693/96 as annexure GJ2.In para 35 of plaintiff's affidavit in support of that application, which was for interim custody *pendente lite* to be awarded to him, he said the following:

> 'It was agreed between respondent and myself during October 1995 that the family violence interdict would be withdrawn, as well as a proposed Rule 43 application that she wanted to institute. A settlement was reached, a copy of which is annexed hereto, marked GJ2. At this stage I did not want to take the children away from respondent as I was fearful of what her reaction would be. In a last attempt to see whether or not respondent could *normalise her life* we agreed to joint custody of the children. As a result of respondent's involvement with the lesbian community, a paragraph was specifically inserted in the agreement to protect the children prohibiting respondent from allowing anyone to stay in the house with her, other than visiting friends of the family.'

(Emphasis added by me.) In para 34 of the same affidavit, applicant also spoke of his concern for the emotional and physical well-being of his children.

There is no doubt that over the last number of years the emphasis in thinking in regard to questions of relationships between parents and their children has shifted from a concept of parental power of the parents to one of parental responsibility and children's rights. Children's rights are no longer confined to the common law, but also find expression in s 28 of the Constitution of the Republic of South Africa Act 108 of 1996, not to mention a wide range of international conventions.

In South African law, parental power, to be understood in the sense which I have just mentioned, is made up of two distinct elements. The one is guardianship, the other is custody. Guardians take decisions regarding a child's property and person, whereas in general custodians have control over the day-to-day life of the child. Normally, on divorce, the determination of custody and access issues results in the fixing of the place where children will live and, as a concomitant, which of the parents will be confined to a right of access or visitation. The old position where fathers were almost always left with guardianship on divorce while the custody of young children was invariably granted to mothers has changed. As far as young children are concerned, the pendulum has swung to accommodate the possibility of a father being a suitable custodian parent to young children. The evidence in this case amply demonstrates that plaintiff was a highly suitable father to his two children six years ago, when they would have been aged respectively seven and five (now 13 and almost 12), during the time of their mother's hospitalisation for 4½ months, beginning in April 1991. Equally, the care which he has bestowed upon them in the past two years after the separation between plaintiff and defendant shows that he is a capable father.I should also point out that the rigours of the common law in regard to guardianship were tempered by the Matrimonial Affairs Act 37 of 1953 and then removed by the Guardianship Act 192 of 1993, which came into operation on 1 March 1994. In terms of this last Act, husbands and wives now

share equally the right to make decisions affecting their children and have the same rights to appoint testamentary guardians to succeed them. Each is entitled independently to exercise any right or power and to carry out any duty arising from guardianship, except in matters pertaining to consent to the marriage of a minor, adoption, removal of the child from the Republic, the application for a passport or the alienation or encumbrance of immovable property belonging to the minor. In these cases the consent of both parents is required unless a competent Court orders otherwise. (Section 1(2) of the Guardianship Act.)

I have already pointed out that s 28 of the Constitution entitles children under the age of 18 years to have family or parental (not maternal or paternal) care, and provides in ss (2) that their best interests are of paramount importance '*in every matter concerning the child*'.

As far as custody is concerned, the law has advanced a great deal since *Calitz v Calitz* 1939 AD 56. In that case Tindall JA reaffirmed the patriarchal character of the Roman-Dutch law of custody *stante matrimonio*. What is said at 61 of that judgment was the following:

> 'Although the *patria potestas* of the Roman law was not recognised in the Roman-Dutch Law and the parental power belongs to the mother as well as the father (*Voet* 1.6.3), there is no doubt that under our law at any rate, as it exists today in the Union, the rights of the father are superior to those of the mother. *Grotius* states that the guardianship of children whose parents are alive, belongs to their father who, as father and guardian, appears for them in court and also has the management of all property which may come to them by inheritance or otherwise. *Voet* (26.1.1) states that it is beyond dispute that the children are ruled according to the judgment of the father, if he has them under his authority.

In dealing with a difference of opinion between parents as to whether a child should be allowed to marry, he states that the father's decision governs.' At 62 Tindall JA remarked that it was not correct to suggest that until the father's death, the mother would have no rights at all. He went on to say:

> 'The learned Chief Justice's remarks (De Villiers CJ in *Van Rooyen v Werner* 9 SC 425), read with that qualification, fully bear out the view that the father's authority is superior to that of the mother. The management of the minor's property and the control of the minor's education belong to the father solely. As to the control of the minor's person, though the mother shares it with the father, in case of difference of opinion the father's authority prevails. There is no doubt that such is the law.'

It was inevitable that this view of the superior rights of guardianship and custody of the father during marriage should affect the Court's approach to guardianship and custody on termination of marriage. Except in the case of very young children, custody was frequently awarded to 'innocent' fathers until the interests of the children began to be placed properly in focus. Before the best interests of a child took their proper place, Courts were often influenced by the moral question of the guilt or innocence of the spouses. It was only in 1948 that the Appellate Division in *Fletcher v Fletcher* 1948 (1) SA 130 (A) placed at the pinnacle of its consideration the 'paramount or best interests rule'. In his work on *The Law of Access to Children*, Professor I D Schäfer refers at 27 footnote 143 to many of the factors which operate in decisions of this kind. It is a truism that a child of tender years normally goes to the mother, a son often goes to the father and a daughter to the mother, except, of course, where there are a son and daughter and where it is obviously desirable to keep them together. *Schäfer* rightly makes the point that

> '(d)etermining what is or is not in the best interests of a child depends to a large extent on making predictions. But as Schwartz "Towards Presumptions of Joint Custody" (1984) 18 *Fam LQ* 231--2 points out: "A Judge cannot look into the future and predict what is in the best interests of the child. Lawyers cannot. Mental health professionals cannot. Gurus cannot. When there are two 'good enough' parents, one cannot choose who should parent." '

I have much sympathy for this view, having listened to a number of such predictions in the course of the last month, I have at times felt like the man in the *Rubaiyat of Omar Khayyam*, who said:

> 'Myself when young did eagerly frequent Doctor and Saint, and heard great argument about it and about: but evermore came out by the same door as in I went.' I am also mindful of the words of the Supreme Court of Ireland recorded not many years ago in the matter of *Best v*

Wellcome Foundation Ltd and Others referred to in 1994 (5) *Medical Law Reports* in which it was pointed out that:

> 'It was not possible either for a Judge of trial or for an Appellate Court to take upon itself the role of a determining scientific authority resolving disputes between distinguished scientists in any particular line of technical expertise. The function which a Court could and must perform in the trial of the case in order to acquire a just result was to apply common sense and a careful understanding of the logic and likelihood of events to conflicting opinions and conflicting theories concerning a matter of that kind.'

Professor *Schäfer*, to whom I have already referred, discussed the problem of joint custody in a lecture reported in (1987) 104 *SALJ* at 149. He pointed out that a marked process of evolution has occurred in England in recent years. In 1980 Ormrod LJ, sitting in the Court of Appeal in *Dipper v Dipper* [1980] 2 All ER 722 (CA) at 731, said the following:

> 'It used to be considered that the parent having custody had the right to control the children's education, and in the past their religion. This is a misunderstanding. Neither parent has any pre-emptive right over the other. If there is no agreement as to the education of the children, or their religious upbringing, or any other major matter in their lives, that disagreement has to be decided by the Court. In day-to-day matters the parent with custody is naturally in control. To suggest that a parent with custody dominates the situation so far as education or any other serious matter is concerned is quite wrong.'

In that case, a joint custody order was made since it seemed entirely right to the Court that the father had an intention to play an active part in his children's lives. Ormrod LJ added that

> '(i)t is right, therefore, that the order of the Court should be in a form which recognises the situation as it will be'.

English Law certainly separates the concepts of custody meaning decisions in regard to important matters on the one hand, and care and control on the other. It is, however, important to note that at 731 of *Dipper v Dipper* Ormrod LJ also said:

> 'The basis of the Judge's order giving custody to the father and care and control to the mother was, in my view, unsound. In any event, these split orders are not really desirable. There are cases where they serve a useful purpose, but care has to be taken not to affront the parent carrying the burden day-to-day of looking after the child by giving custody to the absent parent.'

At 160 of his reported lecture, *Schäfer* lists the major disadvantages of a joint custody order. The first is the imagined need for the security of one decision-maker. The second argument is that, if parents have been unable to maintain a stable marriage, they cannot be expected to achieve the degree of co-operation required for joint custody. I interpose to say that plaintiff has emphasised this aspect, pointing to the welter of litigation which has occurred in the past year or two. Thirdly, it is said that joint custody runs counter to the so-called 'clean-break' principle in divorce. This objection obviously relates to the ex-spouses themselves and not their children. Fourthly, there are logistical objections to joint custody where ex-spouses do not live in close proximity to each other, and, fifthly, joint custody might be seen to be the easy way out of relieving the Court from making a decision on a question of sole custody.

The first objection harks back to the patriarchal legal past of South Africa, and assumes that there will always be disagreement requiring resolution by one authoritarian parent. The second objection has little to commend it, since there are many situations - and the present case demonstrates this - where parents cannot abide each other any longer, but continue to love their children in the same way as they always have done. The so-called 'clean-break' principle seems to have little to do with the best interests of the child. It is obviously beneficial for joint custodian parents to live reasonably near to each other. The last objection relating to a perception of an abdication by the Court of its responsibilities might apply in some situations where a decision is reached in the Motion Court in an unopposed trial with a consent paper. It can have no application to a situation like the present one, where a month has been spent on grappling with the respective merits of sole custody to the father, or joint custody. I know of only one reported case in this Division where an order was granted in terms of a consent paper which provided for

joint custody. That was the matter of *Kastan v Kastan* 1985 (3) SA 235 (C) . The judgment is criticised by Professor *Schäfer* on the basis that it did not spell out whether joint physical custody or joint legal custody was granted, or both, but welcomed as a landmark decision.
In the matter of *Schlebusch v Schlebusch* 1988 (4) SA 548 (E) Mullins J refused to grant an order in terms of a consent paper which provided for joint custody. The learned Judge relied on remarks by James J in *Whiteley v Leyshon* 1957 (1) PH B9 (D) to the effect that '(t)he rule that gave the custodian parent the right to direct the whole life of a child and deal with such matters as his education, health and associations, was merely an offshoot from the principle that the Court was concerned primarily with the true interests of the child, it being recognised that it was in the child's interests that it should know that there was one definite person who in the last instance controlled it and who made not only the long-range decisions concerning its future, but also the day-to-day decisions relating to its food, clothes, conduct and friends. It was because of this that the Courts have always been loath to put the non-custodial parent in a position where he could dispute or undermine the authority of the custodian parent; for a child must know where he stood.' While these remarks may well have reflected a practice in 1957, I have said enough, particularly in reference to the attitude in the English Court of Appeal, to show that it must at least be questionable to say that it is recognised that it is in the child's interest to know where he stands in the sense that it is necessary that only one person be entitled to tell him where he stands. Mullins J was aware of the article to which I have referred. He did not regard the judgment in *Kastan v Kastan* as a landmark decision, since he felt that King AJ, as he then was, had reiterated the inherent risks in joint custody orders. It is true that King AJ said that orders for joint custody are rare, and that he said that to leave decisions involving the day-to-day life of children and longer and more permanent issues to two parents who have been involved in acrimonious divorce proceedings would be 'courting disaster'. Mullins J accepted that Judges claim no expert knowledge which excludes the possibility of a wrong decision in determining custody issues, yet he viewed with concern any trend towards the granting of joint custody orders. To my mind, a failure to consider the desirability of a joint custody order is as much an abdication of the responsibility to reach the best possible solution as any other. Mullins J felt that the award of joint custody would not, nor was it even likely to, ensure 'a continuing relationship between the child and both its parents, so that it need not feel deserted, abandoned or rejected by the absent parent'. I agree that such a 'continuing relationship' cannot be ensured, but I do believe that there is a better prospect of a 'continuing relationship' with both parents where custody is shared.
Another reported decision which I have come across is the more recent one in *Venton v Venton* 1993 (1) SA 763 (D). In that matter, Didcott J referred to the fact that requests for joint custody are rare and that the reason seems obvious. As he said, the personal circumstances of parents who live separately are seldom conducive to the request. He referred to the two cases to which I have referred, and *Heimann v Heimann* 1948 (4) SA 926 (W) . There are no reasons provided in *Heimann's* case for the refusal to grant joint custody. It was simply regarded as undesirable. Didcott J felt that Mullins J had decided the case before him in *Schlebush v Schlebusch* on the facts and went on at 765B to say:

> 'Neither decision lends support to the notion that, in principle and irrespective of the circumstances, joint custody is unobtainable and should never be decreed.'

Didcott J then referred to *Kastan v Kastan*, and at 766E he went on to say: 'Everything depends, however, on the particular circumstances of each individual matter. Joint custody will not be awarded unless they satisfy the Court that no practical impossibility of any consequence seems likely to ensue. And, if some unforeseen trouble happens to develop after the grant of the order and a dispute erupts over it, that will hardly be a calamity. The Court will simply have to be approached to resolve the dispute.'

Didcott J went on to say that he fully agreed with the approach in *Kastan v Kastan* and that the power to award joint custody should be cautiously used in order to avoid the obvious pitfalls.On the facts of *Venton v Venton* the situation positively cried out for a joint custody order. The parties were sensible, mature, responsible and temperamentally stable; the relationship had been remarkably good despite the collapse of the marriage; they respected, trusted and remained fond of each other; they had shared the duties of parenthood amicably and constructively; they had

similar outlooks and values; compromise rather than altercation had been their way of coping with differences; they never disparaged either parent in the eyes of the children, and in fact made a point of praising each other in their presence. They had also acted as joint custodians ever since their separation.
Would that that were the position in the present case.
The parties before me were at arms' length, although relatively civil to each other. Each accuses the other of the undermining of respective positions with the children. Hostility and anger are often present in their relationships with each other, but it does not seem that any untoward anger or irritation has been expressed by either parent towards the children. It is true that there is much evidence that the children feel intimidated by their father, although he resolutely denies this and says it is part of a plot to undermine him.
What was obvious, however, was that both parents are very concerned for their children, and plaintiff, in particular, has expended an enormous amount of money on this case, asserting that he had to do this for the sake of his children. Even if he has become obsessive in his desire to protect the children from a harm which he perceives, I have, as I have already said, no doubt that this belief is genuine. There is therefore no reason to believe that he will cease to be a dutiful and supportive parent after the divorce. If one accepts that custodian parents will share their duties and responsibilities in the same way as guardians of children do, and if one is satisfied that there is no obvious risk of conflict in that area, then the objection to joint custody really relates to the objection to what is called 'care and control' in English law. It is here where the father's main anxiety lies. He does not wish to have his children exposed to what he regards as unhealthy practices in their mother's home. It is for that reason that he insists upon free access to the children by their mother at his home, or visits to their mother when her lesbian companion is not physically present. I shall deal presently with the evidence of the psychiatrists and psychologists in this case, but I would say at once that it was common cause, and never in issue during the trial, that the question of sexual orientation of the mother is not regarded as an issue between the experts called by the parties. Mr Dowdall, a registered clinical psychologist and executive director of the Child Guidance Clinic at the University of Cape Town, as well as the head of Clinical Psychology Training at that University, said at p 98 of the 'Expert Bundle' under the heading 'Central issues in the current application':

> '1. Does homosexual orientation and lifestyle *per se* constitute a moral or other threat to the wellbeing of the children?
>
> There is no evidence that sexual orientation as such constitutes a "moral" or psychological threat to the wellbeing of children. Inappropriate sexual behaviour which impinges on children by persons of whatever sexual orientation is a different matter, but no evidence has thus far been given in this regard, nor has
>
> any such information come to my attention. I have not, however, canvassed this matter thoroughly thus far, since beyond the generalisation the matter has not really been raised thus far by any parties to the dispute.
>
> Embarrassment or stigmatisation on the part of the children is certainly possible, and must weigh in any such overall assessment. However, in my conversations with the children they stated that their mother had explained that she was involved with a woman, and that they had accepted this. I cannot, of course, given the situation in this particular case, rule out the possibility that they are to a greater extent "protecting" their mother by this blanket denial; neither can I comment at this stage on the likelihood of future embarrassment.'

In the report of Drs Quail and Teggin and Mr Loebenstein in the urgent application and dated 12 February 1997, which has been known as the 'joint report', it is stated that '(t)he question of homosexual orientation is irrelevant at this stage'.
This statement which I have quoted above was an answer to the remarks of Mr Dowdall.
The professional witnesses called by plaintiff did not expand on this during the trial. The fact that the experts feel that this does not present a problem does not, of course, mean that plaintiff is not entitled to believe that it may present a problem. He is fully entitled to protect his children against what he perceives to be harmful influences. In the end, however, I have to decide whether his alleged fear is soundly based or not. Professor Robbertze, called by the Family Advocate, took a

strong view on this issue. I am going to read from the English translation of his report for the benefit of the defendant, who, being Irish, does not speak or understand Afrikaans. Dr Teggin had undertaken the translation. Professor Robbertze said: 'Mrs V contracts Ms F not for a clinical psychological therapeutic relationship but for a healing process with Ms F as the healer, whereby Mrs V becomes the victim of what I, for want of a better term, have to call the "F cult". Over the following years, Mrs V is liberated by Ms F of amongst other things her marriage, her feminine identity, her beautiful long hair and her womb. She is introduced to the RAPCAN association and, according to unconfirmed reports, she has been sexually abused. She has now established a lesbian marriage and unofficially she has become Ms F's in-law relative.'It is not clear where this information allegedly came from, but Professor Robbertze did say during his evidence that he had relied on a lengthy document which had been provided to him by plaintiff in this case. He had also seen the defendant in preparing his report. Professor Robbertze went on to say things like '(t)he possibility exists that the professional team in the case also forms part of the network . . .' and that he thought that Mrs V had been trapped in a cult, which he then defined and referred to in quasi-religious overtones, ending this part of his report by saying: 'The fact of the matter is that, in terms of the Medical Dental and Supplementary Health Service Professions Act 56 of 1974, the South African Medical and Dental Council has an obligation in respect of the psychological profession to look after and protect the community against what has been here perpetrated by a registered psychologist, Ms F, against Mrs V and which destroyed her personal and feminine identity.'

These are very strong views and Professor Robbertze kept coming back to this Act 56 of 1974, which he apparently had had something to do with. He felt it his duty to protect the public from people like those to whom he was referring in his report.

Professor Robbertze, an emeritus professor of Pretoria University and a man who is a psychiatrist as well as a psychologist, produced four reports and adopted an attitude at the trial which I found quite extraordinary. He was led by the Family Advocate, who asked him very few questions, but which led to the delivery of lengthy expositions as to his diagnosis of defendant. He had been appointed by the Court to assess the psychiatric state of both plaintiff and defendant, and he had decided that defendant was suffering from borderline personality disorder. He supported the plaintiff's claim for sole custody and he went further in later reports to accuse the medical and related experts who had delivered expert summaries on defendant's behalf as members of some imagined cult. I agree with Mr Dowdall, who testified on behalf of defendant, that the references to these persons as being members of some malevolent cult were bizarre and unsubstantiated. Professor Robbertze gave a clue as to why he held this belief when he explained that he had been the object of an attack by certain members of the Church of Scientology over some period of time and that he had seen it as his duty to protect the public from persons giving treatment to others with mental illnesses or disorders. It was clear that he simply lumped the professionals on defendant's side into the category of what many people would call 'quacks'. He even took exception to their use of the word 'healing', saying that this showed them for what they were. Perhaps he was thinking of 'faith healers' as opposed to other healers of the sick. He repeatedly referred to Act 56 of 1974 which had been passed to prevent this kind of amateurish practice. As his evidence progressed, it became more and more bizarre, extending to a description of the persons who had been treating defendant, and in particular her therapist, as some sort of 'sangomas', as he put it. He started to compare the treatment given to that in traditional African medicine, and he showed strong bias for plaintiff's case. I put it to him at one stage that he seemed to be arguing plaintiff's case rather than presenting a professional opinion, but he denied this. It was almost impossible for counsel to cross-examine him in the sense that he either evaded the question, or simply made another speech. I also regret to say that he displayed what I would regard as dishonesty when simply excluding certain diagnostic criteria when it suited him. An example of this relates to his answer in regard to his diagnosis of factitious disorder (also known as Baron von Munchausen syndrome). The diagnostic criteria are set out in the *Standard Text Book DSM IV* (exh L, p 24). They are:

'A. Intentional production or feigning of physical or psychological signs or symptom

B. The motivation for the behavior is to assume the sick role.

C. External incentives for the behavior (such as economic gain, avoiding legal responsibility or improving physical well-being, as in malingering) are absent.'

In his first report, Prof Robbertze refers only to the first and second diagnostic criteria for factitious disorder. These were obviously quoted from *DSM IV*. Even the American spelling of the word 'behavior' was slavishly followed. When asked why he had not mentioned 'C', his answer was that he had not been aware of any external factors. At best, this was to misunderstand the nature of diagnostic criteria. At worst, and this was how I saw it, it was a shabby attempt to avoid the obvious inference, viz that he left out what did not suit his diagnosis. In a later report he tried to qualify this by saying that he should have said 'Primêre sielkundige (as opposed to psychiatric) siekte toestand' (para 11.1 and 11.2 of report of 13 May).
If this is true, why are only two of the *DSM IV* (psychiatric) criteria referred to?
In the end plaintiff quite properly abandoned any reliance upon Professor Robbertze's diagnosis of factitious disorder or the Baron von Munchausen syndrome. The theory obviously drew no real support from the other psychiatrists.
Doctor Teggin, who was a psychiatrist also called on behalf of plaintiff, described Professor Robbertze as a witness who expressed himself badly. Dr Teggin said, however, that he agreed with the medical view of Prof Robbertze and supported the diagnosis of borderline personality disorder.
Dr Teggin was not led in any great depth, and what was disturbing about his support of the diagnosis of Prof Robbertze was that he had not even seen the defendant. He explained that he had wanted to see defendant, but that she had refused to see him. That is undoubtedly so, but does not detract from the fact that one can have little regard to the view of a psychiatrist who reaches a conclusion as to the mental state of a person without ever having spoken to that person. Dr Teggin's answer was that he had studied Ms F's therapy notes and that these notes, which were very full, had led him to the clear view that defendant was suffering from a borderline personality disorder.
Dr Teggin gave his evidence in a refreshingly candid manner, even suggesting that it was quite possible that the therapy which defendant had received for the last six years from Ms F was as good as any that might have been received at the hands of a professional psychiatrist. He felt that defendant was still suffering from this disorder, but acknowledged that he was somewhat at odds with other members in the plaintiff's team, since he felt that the condition was treatable in the long term. He felt that it was possible that defendant might be restored to full health, but that in the interim she should be given sole custody so as to assist in her recovery process, but that custody should be immediately removed from her and placed in the hands of a curator. Admittedly, Dr Teggin gave this opinion when pressed by me as to what he thought should be done. The suggestion is unhelpful, from a practical point of view.Mr Larry Loebenstein had signed a joint three-page interim report by
Drs Quail and Teggin and himself. He had also not seen the defendant, and had not carried out a proper investigation at all. Indeed, he seems to have simply supported a view reached by Dr Quail in the first place.
Dr Quail did not give evidence and, as Dr Teggin commented, 'he had probably had enough of this case'.
Mr Dowdall gave full and clear evidence in regard to his view that defendant was not suffering from a borderline personality disorder. Insofar as he is not a psychiatrist, he acknowledged that he could not reach a medical diagnosis. He accepted that a psychiatrist should reach such a diagnosis and pointed out that Dr Gittelson, who had also provided an expert notice and summary, had reached the conclusion that borderline personality disorder was not properly demonstrated in this case. He referred to the fact that the discharge report from Groote Schuur Hospital had also not mentioned this as the diagnosis and that there was at least an equal possibility that all that defendant was suffering from at the time was depression and a post-traumatic stress disorder.
In regard to the Groote Schuur Hospital Report, Dr Jedaar gave evidence that he had treated defendant from April to August 1991. Exhibit J shows an admission date of 3 April 1991. He explained that the diagnosis was one of major depression in terms of Axis 1 (DSM III R criteria) and self-defeating personality disorder (ICD 9) in respect of Axis 2. (The letters DSM relate to an American diagnostic system and ICD to the British equivalent.) He added that this diagnosis 'would be interpreted in today's terms as a borderline personality disorder'. This, he explained, was necessitated by the fact that the self-defeating personality disorder no longer appears in the

ICD 9 system. 'Borderline personality disorder' as it is now understood in the DSM system would be the diagnosis closest to the obsolete 'self-defeating personality disorder' of the ICD 9 classification. It was not clear to me why one should not look for the closest diagnosis in the ICD 9 system.
Dr Jedaar also felt that it was unlikely that there would be a risk that defendant would cause harm to the children in the next ten years. She would require long-term psychotherapy or psychoanalysis or both, with intermittent medication to control her properly. Dr Jedaar's evidence that borderline personality disorder 'was the closest alternative to self-defeating personality disorder' supported Mr Dowdall's view that, while they may present in a similar fashion, they are not the same disorders.
Dr Jedaar was also at pains to distinguish between personality disorder on the one hand and mental illness or psychiatric disorder on the other. The latter requires hospitalisation and treatment. He added:

'Now we need to very clearly clarify or distinguish between personality disorders and mental illness in that, if one suffers a mental illness or a psychiatric disorder, which requires hospitalisation and treatment, then those are then referred to as mental illness in terms of the Mental Health Act. So personality disorder itself *per se* is not a mental illness, it is not a psychiatric disorder, a major psychiatric illness, but it does require assessment and management from time to time as a result of its effects on the individual and on society. Later, Dr Jedaar conceded that associated conditions (like the ingestion of harmful substances) would require treatment if they recurred. He adhered to the view expressed in his letter of 9 December 1996 (exh Y) that defendant's qualities of 'concern and protectiveness of her children qualifies her to be a capable custodian of their on-going care and well-being and I therefore support her application for custody'. That view was stated in a letter supporting interim custody, and Dr Jedaar readily conceded that 'one would need to do an in-depth assessment and analysis of the individua l together with collateral sources of information to make a complete assessment' of defendant's 'fitness as a custodian parent or anything else for that matter or her state of recovery or her state of management' since 1991.
This, of course, shows the weakness of the views of Dr Teggin and Mr Loebenstein, who carried out no analysis of the individual, ie defendant. Mr Dowdall, who testified on behalf of defendant, was subjected to a barrage of hostile and often offensive cross-examination from plaintiff himself, who by this time had been conducting his case in person for several weeks, as was the position with defendant.
As I pointed out to plaintiff several times during his cross-examination, there seemed to me little point in solving the riddle of the precise nature of the mental condition. What was important was to demonstrate the risks of the respective custodial possibilities in the case. Plaintiff also conceded a number of times during the cross-examination and in argument that he was not concerned that defendant would cause any physical harm to the children if her support structure remained in place. He was concerned that she posed, in his view, a potential emotional and psychological threat to the children in her home.
Plaintiff and defendant gave evidence themselves and were cross-examined at great length. I was particularly struck by the manner in which defendant coped with courteous but hard cross-examination from plaintiff. She showed that she was fully able to cope with the onslaught, and indeed showed some compassion for plaintiff during this episode. Far from being unable to stand on her own feet, as had been suggested by Professor Robbertze, she demonstrated that she was a match for her husband. In the end I became convinced that defendant had grown in the past few years, particularly in her work with survivors of violence, incest and sexual abuse, while plaintiff had become obsessed by the case and his quest for the salvation of his children from an imagined enemy or monster in the shape of a lesbian relationship, on the one hand, and the perceived risk that his wife might harm the children when entering another psychotic phase, on the other.
Defendant called a number of friends and associates, who testified to her work and to her mothering skills. Plaintiff had no quarrel with this aspect of her life, but viewed her case as an untrue reflection of her real state of mind. He was obliged to mount his major attack on Mr Dowdall, whom plaintiff described in argument as 'an opportunistic mental health professional who sells his professional qualification by his own admission to one legal practice'.This was a

gross distortion of Mr Dowdall's evidence that he had recently done most of his work in Court for the firm of Messrs Miller Gruss, Katz and Traub, and ignored his evidence that he had in a recent case been called by the other side when he disagreed with those first consulting him. It would also be absurd for a professional to behave in this way - his bias would rapidly become apparent. The way in which plaintiff attempted to demean the evidence of Mr Dowdall was unfair, and an unedifying spectacle which did the plaintiff no credit. When viewed against the evidence of Dr Teggin and Mr Loebenstein, who diagnosed defendant without examination, it is ridiculous to suggest that Mr Dowdall, the only professional to conduct a thorough in-depth assessment of the children in both parents' homes, adopted a one-sided approach.

I have already made clear my view in regard to Professor Robbertze. He allowed his preconceptions, personal opinions and emotions to get the better of him. At times they ran riot. His evidence was unreliable and he did plaintiff and the Court a disservice in the way in which he reported on the parties, and in the extraordinary way in which he testified.

In the end, it became clear that plaintiff's prime objection to joint custody was his wife's sexual orientation. Because Mr Dowdall would not join in condemnation of lesbian lifestyles, plaintiff attempted to smear him. In this he failed signally, in my opinion.

In the course of argument, plaintiff referred me to two decisions where the best interests of the children were examined. One is the decision in *McCall v McCall* 1994 (3) SA 201 (C) . Plaintiff referred to the criteria to which King J referred at 205 of that decision, and claimed that he qualified as a proper custodian parent in respect of all of the criteria there stated. There are a number of similar 'checklists' used in such situations. For the most part they represent accumulated case law and obviously serve only as guides. Each case is different and must be determined on its own facts.Apart from the question of the preference of the children, I have no reason to dispute plaintiff's suitability as a custodian parent. Whether the children truly prefer to remain with their father in his house, only to be visited by their mother in his house, is a matter which was contested at the trial. The defendant and Mr Dowdall testified to the effect that the children expressed a wish to live with both parents, as they have done for some time. While it seems that the children have told their father that they would prefer to be with him in a sole custody situation, they have also told their mother that they only told him this because they felt sorry for him and did not want to hurt him. Of course, I make these comments on the basis of what the parents and the witnesses have told me. I have not spoken to the children since I was not specifically asked to do so, and I would in any event have considered it unwise to question the children where the possibility exists that they have been saying different things to different parents. It was common cause before me that children will often give different versions to different parents in stressful situations like the present. More particularly will this be the case where they spend time with each parent separately every week and where they wish the relationship with each parent to be as harmonious as possible. If the children had 'admitted' to me that they have indeed not been entirely truthful with their father or their mother, one can well imagine the consequences in the next years before they reach majority.

The list of criteria provided in *McCall v McCall* is obviously not intended to be exhaustive. Indeed, para *(m)* is 'any other factor which is relevant to the particular case with which the Court is concerned'. Plaintiff did not challenge defendant's ability to pass the test as reflected in these criteria of being a good custodian parent, save in two respects. He objected to his children being exposed to the lesbian relationship in which his wife was living. He did not want his children to be aware of this relationship in the sense of being physically present at any place where the relationship was being carried on. Effectively, this meant that while the children could visit their mother at her house, her lesbian partner should not be present during such visits.

The other objection concerned her mental and physical health. It is noteworthy that plaintiff was not so concerned about this possible risk as to let it stand in the way of the separation agreement in October 1995, which introduced a *de facto* joint custody situation.

The other case to which I was referred by plaintiff was that of *Van Rooyen v Van Rooyen* 1994 (2) SA 325 (W) . This decision was given before the interim Constitution of the Republic of South Africa Act 200 of 1993 came into force. As is pointed out in an article by Pierre de Vos in (1994) 111 *SALJ* at 687, Flemming DJP, who presided in that matter, commented as follows in regard to what he regarded as 'wrong signals' in a situation similar to the present one:

> 'The signals are given by the fact that the children know that, contrary to what they should be

taught as normal or what they should be guided to as to be correct (that is male and female who share a bed), one finds two females doing this . . . as a matter of preference and a matter of mutual emotional attachment. . . . It is detrimental to the child because it is the wrong signal. . . .'

(At 329I--330B.) It is so that the Court made a moral judgment about what is normal and correct insofar as sexuality is concerned, and there can be no doubt that the learned Judge regarded homosexuality as being *per se* abnormal. It is clear to me that plaintiff has used the thinking of this judgment to influence a good deal of the presentation of his case before me. He also regarded it as only right that defendant should separate her personal position from the best interests of the children. He said that the children should come first and defendant's sexual orientation and lifestyle should come second. That is what Flemming DJP said at 329F--G:

'But, insofar as the interests of the children require it, she will have to make the choice between persisting in those activities or part thereof and having access on a wider basis than would otherwise be permitted. The choice, as in regard to her bedroom life, is hers. She cannot, however, make a choice which limits what should be appropriately done in regard to the children.'

The author of the article to which I have referred poses the question whether the judgment would have been in breach of chap 3 (the 'Bill of Rights' chapter) of the Constitution of the Republic of South Africa Act 200 of 1993, if it had been delivered after the Constitution had come into effect. The present equality clause (s 9) in the Constitution, Act 108 of 1996, makes quite clear that the State may not unfairly discriminate, directly or indirectly, against anyone on one or more grounds, including sexual orientation, and in ss (4), that no person may unfairly discriminate directly or indirectly against anyone on one or more of those same grounds. In law, it is therefore wrong to describe a homosexual orientation as abnormal. Part of the difficulty in dealing with this question is that, in a custody case, one is only indirectly dealing with the parents' rights. The child's rights are paramount and need to be protected, and situations may well arise where the best interests of the child require that action is taken for the benefit of the child which effectively cuts across the parents' rights. Although access rights are often spoken of as the rights of the child, it is artificial to treat them as being exclusive of parents' rights. To my mind, the right which a child has to have access to its parents is complemented by the right of the parents to have access to the child. It is essential that a proper two-way process occurs so that the child may fully benefit from its relationship with each parent in the future. Access is therefore not a unilateral exercise of a right by a child, but part of a continuing relationship between parent and child. The more extensive that relationship with both parents, the greater the benefit to children is likely to be.

I raised this difficulty with plaintiff during argument, asking him in particular whether it was not being punitive to deny full unsupervised access in the shape of joint custody to the children in their mother's home, but he remained adamant in his view that he had been advised by lawyers and medical specialists that it was his duty to protect his children from the influence which his wife's unnatural, in his eyes, relationship would have. At 691 of the same law journal article, the author says the following:

'Section 33(1) (of the Constitution) allows for these rights to be limited by law of general application, where the limitation is reasonable and justifiable in an open and democratic society based on freedom and equality, and where it does not negate the essential content of the right.

Does this mean that a more subtle justification for the same order would be constitutionally valid? In other words, will currently existing bigotry and its consequences be a valid reason to limit the constitutionally guaranteed rights of the lesbian mother? The argument could be formulated as follows: There is nothing inherently wrong or abnormal about a lesbian relationship. But while the child is growing up, there will be strong social recrimination from peers and other parents against the child as it becomes known that his or her mother is a lesbian. The child might also become confused and distressed by his or her mother's unwillingness to conform to a generally accepted norm. It might therefore be in the best interests of the child to discriminate against the lesbian mother, because that will be the only way in which her children could be spared unnecessary suffering.' It will be seen that this was very much the argument of plaintiff in the present case. The article continues, suggesting that there may well be situations where a Court will override the equality clause in the best interests of protecting the child, but would then do so on the basis of the leading Canadian case on the meaning of the reasonableness of such

limitations (*R v Oakes* (1986) 26 DLR (4th) 200). The writer reaches the conclusion after considering the further question which arises that

> 'a discriminatory order by the Court against a lesbian mother in an application for access rights to her children that is solely based on her sexual orientation will not easily pass constitutional muster. In the same way that the Court cannot take cognisance of racism or religious intolerance when it decides on the access of a mother to her children, the Court cannot take cognisance of prejudice in our society. To do that would be to unreasonably limit, or perhaps even negate, the essential content of the right not to be discriminated against on the ground of sexual orientation.'

As I have already said, the problem before me is not merely one of a mother's right of access to her children *per se*, but the extent of the children's rights of access and right to parental care. Section 28 of the Constitution provides that every child has the right

> '(1)*(b)* to family care or parental care, or to appropriate alternative care when removed from the family environment'.

In an article entitled 'Sexual Orientation, Family Law and the Transitional Constitution' (1995) 112 *SALJ* at 481, it is stated at 488 as follows:

> 'That there were no reported South African cases in which homosexual parents sought to retain custody of or have access to their children until *Van Rooyen v Van Rooyen* is unsurprising, given the moral and legal climate predating the transitional Constitution.'

At 498 of this article the writer deals with the point of ridicule by friends, which reared its head a number of times in the proceedings before me.
On the evidence before me, the children are not so embarrassed by the situation that they let this prevent them from having friends to stay with them at their mother's house overnight, even while the mother's partner is there. There probably will be a certain amount of talk about the situation. Whether it will be elevated to the level of ridicule is something which I cannot predict.
The article to which I have just referred obviously deals in the main with the rights of homosexuals to enjoy family rights which heterosexuals have enjoyed for centuries. It is largely concerned with the rights of the homosexuals and not the children, who form part of that 'family unit'.I have, in the limited time available, looked at another article in the same volume of the *SA Law Journal*, ie vol 112 (1995). This appears at 315 and is headed 'Joint Custody: Perspectives and Permutations'. The writers, Brigitte Clark and Belinda van Heerden, point out that legal encouragement of joint custody has been most evident in the United States, with California being the first state to enact that agreed joint custody is presumed to be in the child's best interest. They add that the initial enthusiasm has diminished slightly, and although nearly 80% of divorced parents in California have joint legal custody, the State has recently amended its legislation to remove a presumption in favour of joint custody being in a child's best interests when agreed. The English position is that the Courts are not in favour of a wholesale adoption of joint custody, but the problem is skirted - as has already been pointed out in relation to the remarks of the Court of Appeal in *Dipper v Dipper* - since equal status in important areas is bestowed on both parents, each parent having the power independently to make decisions about the child (s 2(1) and (2), (7) and (8) of the Children Act, 1989). The language of the English statute is couched in terms of parental responsibility rather than rights, which is in accordance with international trends. In England, even after parental separation or divorce, both parents in theory retain full independent decision-making power in relation to the child's upbringing. The authors point out that the practical effect is that the Legislature is in fact supporting the sole custody of the parent who has physical day-to-day care of the child.
In discussing the beneficial effect in some cases of joint custody, the writers say that what is obviously required is a situation where both parents are committed to making it work because of their love for their children. The authors also refer to the decision in *Pinion v Pinion* 1994 (2) SA 725 (D) and comment that this was a situation where the Court refused to grant joint custody in circumstances where it appeared, in the view of the authors, to be a thoroughly appropriate order. Page J took the traditional view, which forms the basis of much of the thinking in earlier decisions, that:

'It is, in my view, imperative that a child should know, in such a situation, with whom the ultimate say lies, and not be afforded the opportunity of playing one parent off against the other.' (At 730J.) This approach is obviously salutary in resolving deadlocks and the many disputes which might arise in families without the necessity of recourse to the Courts, but if the situation can be so regulated that the threatened dangers of deadlock or disagreement are removed insofar as it is possible to do so, then the need for the ruling of one authoritarian person recedes considerably. In my view, the fact that a child should know 'where it stands' is not the only consideration of importance. It is part of the pattern for a child's future which a Court attempts to construct which has to be balanced against the great benefits to be obtained when both parents contribute on a regular and reasonably equal basis to the upbringing of the child. I have no doubt that most children who love their parents as deeply as the children in this case appear to, would always choose to have the kind of contact with both parents which they have enjoyed before divorce. If that contact will inevitably lead to further instability in the lives of the children, then it should not be permitted. No one can predict the future, or say that deadlock between plaintiff and defendant will inevitably arise. They have both retained a measure of respect for each other, which was evident during the proceedings before me, and I am hopeful that when the traumatic events of the past two years have faded a little, they will be able to resume their lives for the benefit of their children. I feel reasonably certain that both parents will get on with their own lives. There is no evidence that they have ever used the children as weapons of war to get at each other. Joint custody in such a situation would be unthinkable.In the present case, the children seem to want to protect their parents for whom they have sympathy. There is no evidence of antipathy against either parent, as was the case in *McCall v McCall*.

Plaintiff is a man who feels deeply wronged by the awful experience of attempting to analyse the cause of his wife's bleeding disorder. The shock of discovery of his wife's past must have been traumatic. His need to protect his children is obviously very strong. His belief that he is a more suitable parent is probably equally strong.

What really struck me during the trial was that a person with the history which the defendant has was able to cope as well as she did. She was quite able to withstand vigorous cross-examination from her husband and to conduct her case in a perfectly competent manner. I have no doubt that she is a good and suitable mother, and I think that it would be most unjust to compel her to exercise access rights to her children in the position of a visitor to the father's home. That image of a mother only being permitted to come to visit them because of her lifestyle would be unfair to her and also to her children. They would grow up with the feeling that their mother was being punished, not for anything which she had done to them, but because of the risk that her lifestyle might influence them in the wrong direction. What better protection against that can there be than continuing to live with both parents and judging for themselves eventually whether the lifestyle of the father or the mother was more or less harmful than the other?

The plaintiff continued to assert that he was not what he called a 'control freak'. He acknowledged that he was a person used to exercising authority and that he would not be able to command an aircraft if this were not so. While a good deal of defendant's feeling that plaintiff is overbearing and oppressive may simply be caused by his personality, his determination to control is demonstrated by the fact that he will only allow access between mother and children on his terms and primarily on his property. This relentless quest was, in all probability, generated after the separation agreement was broken by defendant when she consorted with her partner while the children were present. There was evidence that that was probably what really angered plaintiff, and made his position non-negotiable. While he had every right to feel affronted by this breach of faith, I cannot allow his anger against defendant to be visited upon his children. They broke no agreement and should not be deprived of real mothering.

It is for these reasons that I have decided that joint custody is in the best interests of the two children of the parties. In order to prevent further disputes, I shall attempt to include such directions in the order which I propose to make, which will, I hope, iron out many difficulties.As far as the proprietary consequences of the marriage are concerned, I am unpersuaded that there should be a forfeiture. The parties are married in community of property and plaintiff's case is that defendant, through no fault of her own, fell ill and caused a great deal of unnecessary expense. His accusation of gross misconduct on the part of defendant is that she lied to him about her condition and was only eventually prevailed upon to tell him what had happened to her in her

childhood and thereafter after being admitted to hospital.
There can be no doubt that defendant's reluctance to reveal these details came from a deep sense of guilt and shame, and that it was only when her process of healing commenced that she was able to start to reveal these details to her family.
Plaintiff's case is that she is still ill and still suffering from the condition of borderline personality disorder. There can therefore, on his case, be no misconduct on her part worthy of an order of forfeiture of the benefits. I see no reason to depart from the usual order where no gross misconduct is shown, and I will order a division of the joint estate.
As far as maintenance is concerned, I am going to reduce the amounts which were claimed, bearing in mind that the children will be residing for half of the time, whatever the time may be, with their mother and for half with their father. Some expenses are always there, even if children are not present, but I have made an adjustment. I have also decided to give maintenance for the defendant only for one year, which will enable her to get herself established in her career and by which time the division of the joint estate should have been effected. In my view, this is not a case where the plaintiff should continue to pay maintenance for his wife who, in my view, is clearly capable of earning her own living, and will have what remains of the joint estate after it has been divided.
As far as costs are concerned, plaintiff has failed to show that he should be awarded sole custody. That was the major issue in this trial action, and costs should follow the event. Defendant sought custody, but was at all times prepared to consent to an order for joint custody, believing that that is what the children wanted. In the circumstances she should not have to bear the costs of defending this action.
The order is therefore as follows:

1. There will be a decree of divorce. 2. Plaintiff and defendant are appointed as the joint custodians of their two minor children, D and D.

2.1 The said children shall spend equal time with plaintiff and defendant as arranged between the parties. 2.2 All decisions regarding and relating to education, schooling, religious upbringing and extra-curricular activities shall be taken by the parties jointly. Each party individually shall have the power to sign any necessary documentation required by the relevant authorities.

2.3 The parties shall be entitled to use different medical and dental practitioners in regard to the minor children and shall keep each other informed of the names of such practitioners and the nature of the treatment administered. 2.4 In regard to psychiatric or psychological treatment, defendant shall be permitted to retain the services of the clinical psychologist, Mrs Monica Spiro (D, the daughter) and the clinical social worker, Ms Melanie Horwitz (D, the son) if the children wish to continue in therapy with these persons for a period of one year. Defendant shall decide whether the children wish to continue, which decision shall be taken by her in consultation with the said professionals. After one year, the parties shall jointly decide on the need for any further treatment of this kind for the children, and any such future treatment.

2.5 Long and short school holidays will be alternated between the parties. The December-January holiday shall be divided into two equal portions and the parties shall alternate these periods so that the children spend alternate Christmases with each party.

2.6 If the parties are unable to reach agreement on any issue where a joint decision is required, the dispute shall be referred for mediation to two mediators, who shall take such steps as they deem appropriate to resolve the dispute as speedily as possible and without recourse to litigation. Each party shall be entitled to nominate a mediator to act on such party's behalf when the need for such mediation, if any, arises. If the mediators are unable to agree on a resolution of the dispute, they shall jointly refer the dispute to an arbitrator, who will decide the issue, and whose decision will be final.

3. Maintenance for the children
Plaintiff shall pay maintenance in respect of the two minor children, D and D, until each

such child reaches the age of 21 years or becomes self-supporting, whichever event last occurs, as follows:

3.1 An amount of R1 750 per month per child, payable monthly in advance on or before the first day of each and every month into defendant's bank account or at such other place specified by defendant. This sum shall be increased annually in accordance with any rise in the Consumer Price Index, the first such increase to occur on 1 October 1998.

3.2 All medical, surgical, hospital, prescribed pharmaceutical, orthodontic and opthalmological treatment.

3.3 All school fees, including private school fees, and the cost of extramural activities, afterschool care and additional tuition, school uniforms, books and other requirements, as also all clothes, equipment and attire relating to agreed extramural and sporting activities engaged in by the children.

3.4 The cost of tertiary education in respect of the children if the parties decide that tertiary education is appropriate.

4. Maintenance for defendant

Plaintiff shall pay personal maintenance to defendant at the rate of R2 500 per month for a period of one year only. Thereafter such payments shall cease.

5. Proprietary rights

5.1 It is ordered that the joint estate of the parties be divided.

5.2 It is further ordered that plaintiff's pension benefits and pilot's fund benefits shall form part of the joint estate. An endorsement is to be made in the records of the relevant pension fund or funds and pilot's fund (as defined in s 1(1)of the Divorce Act 70 of 1979 as amended), entitling defendant to payment of a one-half share therein as calculated at date of divorce (10 September 1997) and which payment shall be effected to defendant when any benefits shall accrue to plaintiff.

5.3 The parties shall be given a period of three months in which to reach agreement in regard to the manner of division of the joint estate. Failing such agreement, a receiver shall be appointed by agreement or, failing such agreement, by the chairman of the Accountants Board, to realise and distribute a one-half share of the joint estate to each party. Such receiver shall exercise the powers set out in prayer C(iv) of defendant's amended counterclaim dated 27 June 1997 and shall act in accordance with prayers (C)(v) and (vi) of that amended counterclaim.

6. Plaintiff shall pay the costs of these proceedings on a party and party scale. Plaintiff's Attorneys: *De Klerk & Van Gend*, Claremont, Cape. Defendant's Attorneys: *Miller, Gruss, Katz & Traub Inc*.