IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, MAKHANDA

NOT REPORTABLE

Case No.: CA04/2024

In the matter between:

YCM	Appellant
and	
NDN	Respondent
re:	
LM	First minor child
AM	Second minor child

JUDGMENT

EKSTEEN J:

[1] It has been said that 'grandparents, like heroes, are as necessary to a child's growth as vitamins',[1] but the appellant does not share this sentiment. The respondent, Ms NDN, applied, successfully, in terms of s 23 of the Children's Act[2], to the children's court in Makhanda to be granted contact with her two minor grandsons, LM and AM (the

[1] A statement attributed to Joyce Allston
[2] Children's Act, 38 of 2005.

boys), born to her deceased daughter, Bokkie (the deceased), from her union with the appellant. The magistrate granted her contact with the boys, telephonically or on a multimedia device at least once per week; by visitation in Makhanda at least once per month for a day; and by taking the children to her home in Herschel for at least a week during the June/July school holiday and the December/January school holiday. The appellant was aggrieved by the result and appealed against the order.

[2] The application in the children's court was launched on affidavit and both Ms NDN and Mr YCM filed affidavits. The presiding magistrate directed the Eastern Cape Department of Social Development to conduct an investigation to establish the circumstances of the boys, Mr YCM and Ms NDN[3] and that the matter proceed by evidence *viva voce*. A legal aid representative was appointed[4] to represent the interests of the boys, and Ms NDN instructed an attorney to act for her. As recorded earlier, Mr YCM is himself a practising advocate and he appeared in person both in the children's court and in the appeal. Ms NDN and one of her adult grandchildren, Ms MN testified in support of the application. Mr Ncana, a social worker in the employ of the Eastern Cape department of social development prepared a report that was admitted in evidence[5] and he testified at the hearing. In compiling his report, Mr Ncana enlisted the assistance of a colleague, Ms Dyan, also a duly qualified social worker in the employ of the Eastern Cape Department of Social Development, who investigated the circumstances of Ms NDN and her home and family environment in Herschel.[6] Ms Dyan, too, prepared a report that was admitted in evidence.[7] Mr YCM did not testify, nor did he call any witnesses in support of his case.

[3] The deceased had, in life, been a professional nurse employed by the South African National Defence Force (SANDF) and carried the rank of Captain at the time of her death. She met Mr YCM, at the time a member of the Special Forces Unit of the

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[3] See s 62(1) of the Children's Act.
[4] In terms of s 55 of the Children's Act.
[5] In terms of s 63(1) of the Children's Act
[6] In terms of s 62(1) and (2) as read with s 63 of the Children's Act.
[7] In terms of s 63(1) of the Children's Act.

SANDF, in 2013, when he attended a training course at the military base in Makhanda. Although they were never married, they entered into a romantic relationship and, as I have said, LM and AM were born of their union, on 28 November 2016 and 31 May 2018, respectively. They were in the care of the deceased at the time that she tragically died in a motor vehicle accident on 22 May 2022. The children are currently in the care of Mr YCM, their legal guardian, in Makhanda, where they live, and Mr YCM has a practice as an advocate. They are well cared for, have a stable home and family life and Mr YCM has been described as a good father. LM needs specialist education as he presents with symptoms of autism spectrum disorder, but his educational needs appear to be well met in his current schooling environment.

[4] Ms NDN is a retired nurse and midwife. She has worked extensively in hospitals in South Africa and in the United Kingdom and currently lives in Herschel, near Sterkspruit, in the Eastern Cape. She is a widow and lives alone in a large house with four bedrooms, a bathroom, a kitchen and a lounge/dining room, which is fully furnished. It is situated on a large plot and there is a second dwelling on the premises, occupied, during the week, by her son. She is in good health, both mentally and physically, and said that she is well able to look after the children whilst they are in her care.

[5] Notwithstanding the duration of the relationship between Mr YCM and the deceased, there was very little interaction between Ms NDN and Mr YCM. As adumbrated earlier, Ms NDN had been employed in the United Kingdom throughout this period. She said that she had remained in contact with the deceased throughout. They had written letters to one another and spoken telephonically. She had returned to South Africa at least twice each year, usually in the middle of the year and again in December. On each occasion that she returned she had seen the boys, either on a visit to the deceased, or when the deceased came to visit her in Herschel.

[6] Ms NDN said that she had always been a part of the lives of the boys and explained that in December 2016, just after LM had been born, she had returned to South Africa and to her home in Herschel, where the deceased and LM visited her. LM appeared to

be a little emaciated and was not drinking well. Thus, Ms NDN explained that she had trained the deceased to breast feed. When the deceased had to return to her employment, Ms NDN accompanied her and stayed with her in Soshanguve, where she lived at the time, for approximately four months to support her and the child.

[7] She recalled the last Christmas with the deceased in December 2021. The deceased, she said, had been on standby duty over Christmas but did manage to visit the family in Herschel, together with the boys, for one weekend. This visit is corroborated by the evidence of Ms MN, although she was unable to recall that Ms NDN had been present on this occasion. Ms MN said that the deceased and the boys had again visited the family in Herschel in April 2022, a month before she died. Ms NDN described her family as a close-knit unit and said that she had maintained a bond with the boys throughout their lives. She produced in evidence a number of photographs of the boys, and other members of the family that she had on her cellphone, some taken by the deceased and forwarded to her, and others that had been taken of the children and the deceased at her home in Herschel. Her account of the cohesive family and their interaction with the deceased and the boys was corroborated by Ms MN.

[8] Ms NDN was in the United Kingdom when the deceased died. She returned to South Africa and lived in the home of the deceased in the military base in Makhanda for approximately six weeks, amongst other things, to arrange the funeral. During this time, the boys stayed with her, and when she returned to Herschel, in mid-June 2022, they remained with Mr YCM in Makhanda. She asked him to allow her to have the boys stay with her in Herschel for a week in the school holiday in June or in September. Mr YCM had no difficulty with the request and agreed that they could visit her in Herschel in September. However, in August he wrote to her and recorded:

> ‘I remember that I did promised. Unfortunately that won’t be possible. I have decided to cut all ties with N…. family and I am doing that for the well-being of my children.’ (*Sic*)

Hence the application.

[9] Mr YCM suggested in his affidavit and in cross-examination of Ms NDN and Ms MN that there had never been any relationship between the deceased and the boys, on the one hand, and Ms NDN. He accused her of misleading the court and suggested that the deceased had resented her mother and disassociated herself from her family. However, as I have said, he did not present any evidence in support of this claim. Rather, he said that his case is based solely on legal arguments and he did not think that he had a case to answer.

[10] Ms Dyan investigated the circumstances of Ms NDN in Herschel. She supported the application and recommended that contact by Ms NDN with the boys would, in her view, be in the best interest of the boys. Mr Ncana made a similar recommendation. Ms Mlalandle, for the boys, too, supported the application.

[11] The account of Ms NDN and Ms MN stands largely uncontradicted. The thrust of Mr YCM's resistance to the relief in the application, and in the appeal, was to be found in the alleged animosity that exists between himself and Ms NDN. The foundation for the argument was the report of Mr Ncana. In his evaluation of the situation, Mr Ncana recorded the existence of 'deep anger, resentment, and arguments' between the parties[8], but he nevertheless supported the application and recommended that Ms NDN be granted reasonable access to the boys. Mr Ncana testified at the enquiry and was subjected to cross-examination, but the factual foundation of this conclusion, that there was anger and resentment between the parties was never explored. In his affidavit filed in the enquiry Mr YCM made no reference to any anger or resentment on the part of Ms NDN and it was not suggested that the boys had ever been exposed to any arguments. He did, however, record his own feelings as follows:

[8] Mr Ncana reported: -'Based on the deep anger, resentment and arguments that exist between the biological father of the children and their maternal grandmother, it is virtually impossible that the parties involved will reach an agreement that may lead to co-parenting between them'.

> 'I need to state this to the court, I do not like the applicant because of how my late partner was towards her, all the anger she had with her and I do not want anything to associate myself with her and I will never share a space with her.
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> …
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> The Applicant left her martial home and went to England, leaving her husband who was sick all by himself, he later died, and she did not even attend his funeral. Those are other reasons that my late partner did not like her and I do not want my children to have any contact with her.'

[12] During the cross-examination of Ms NDN, Mr YCM referred to the conclusion expressed by Mr Ncana of existing anger and resentment, and the record then proceeded:

> 'Mr M: We will never be in a position to talk, accept. There is animosity between the two of us, is that correct? That is the point that I am trying to. May the Court assist (indistinct).
> Ms N: There is no animosity really. Because I do not hold anything against you. What I need is just to see my children, that is all.
> Mr M: Let us proceed. Just last question, Your Worship.
> Ms N: I do not know about you.
> Mr M: Just for the record I personally do not think you and I will ever be in a position to talk about anything.'

[13] Neither the *viva voce* evidence nor the affidavits filed raised any incident demonstrative of anger or resentment on the part of Ms NDN or any members of her family. The evidence to which I have referred that is uncontradicted, is of a healthy relationship between the deceased and the boys, on the one hand, and her mother on the other.

[14] In his affidavit Mr YCM had suggested that the application was resisted primarily for safety of the children. With reference to the relief sought, in particular the visitation rights over the holiday, Mr YCM recorded:

> 'This is absolutely shocking that I had to share my parental rights with someone that my children do not know. The only visitation that can be made is visiting the children in a safe environment like a Police station and I can facilitate that.
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> My children are very young, and they are not in any position to distinguish between the right person and a wrong person and to tell me on what did they eat or who gave them food. I strongly oppose this application mainly for the safety of my children.'

[15] The reason for this apprehension is not readily apparent and he did not refer to any act of physical violence allegedly committed by Ms NDN, nor to any incident of food contamination. The issue of the safety of the boys was not pursued in cross-examination. Mr Ncana said that he could not find anything to suggest that the boys would be subject to any form of abuse if they were to visit Herschel, and he concluded that Ms NDN had only their best interests at heart. Accordingly, he was of the view that there was no reason for supervised access. Notwithstanding his opinion, Ms Dyan tendered in her report, that the Lady Grey office of the Department of Social Development would avail themselves to render supervision and after care services to the family, if required. Ms Mlalandle, who represented the interests of the boys also supported the relief sought on the strength of the evidence adduced.

The order of the children's court

[16] At the conclusion of the trial the children's court issued the following order:

‘1. The Applicant be allowed to contact the children telephonically at least once a week; on a telephone or a multi-media device through the Respondent;

2. The Applicant be allowed to visit the children in Makhanda at least once a month, for a day;

3. The Applicant be allowed to have the children visit in her home in Herschel for at least a week during the June/July school holidays and December/July school holidays.’

I shall revert to the form of the order.

[17] In the appeal Mr YCM contended that the magistrate had erred in finding that it was in the best interest of the boys to have physical contact with Ms NDN and that she had incorrectly interpreted and applied s 23 of the Children’s Act. Accordingly, Mr YCM acknowledged, during the course of his argument, that the appeal was not directed at paragraph 1 of the order.

The legal argument

[18] That brings me to the legal argument. Mr YCM referred us to *S v L*[9] where Mullins J said that the power of the supreme court as the upper guardian of minor children, is not unlimited, in the sense that the court may not interfere with the decision made by the guardian of the child merely because it disagrees with that decision. This conclusion was based on the test set out in *Calitz*[10], and the cases that follow that reasoning.[11]

[19] However, there has been considerable development in the law relating to access to children in a changing society, particularly over the last thirty years. Accordingly, to address the argument, it is necessary to have regard to the salient features of this

[9] *S v L* 1992 (3) SA 713 (E) at 721. *S v L* was not a case concerned with custody of or access to children. It was an application to compel a custodian parent to subject her child to blood tests in order to determine paternity.
[10] *Calitz v Calitz* 1939 AD 56.
[11] See *S v L* at 721A-I.

development. *Calitz* was concerned with the custody by the father of a legitimate child in a situation where the parents were neither divorced nor judicially separated. In that context, Tindall JA looked to the Scottish law, which he presumed to correspond with the South African law. He quoted with approval the common law position expounded in *Nicolson v Nicolson,*[12] in Scotland, where it was said:

> 'The legal right to the custody of a lawful child is in the father. But that right is not absolute, it is not beyond the control of the law. It is within the power of the Court to mitigate the severity of the general rule by interfering in exceptional cases. The exceptions must be few and must rest on clear grounds … . When the interests of the child in regard to life, health or morals have required it, the Court refused to permit the father to retain the custody.'[13]

[20] *Calitz* was intended to address the issue of a custody dispute between parents during the subsistence of a lawful marriage, and it turned on the preservation of the integrity of the marital family.[14] In *S v L* Mullins J observed, correctly, that a long line of cases followed the *Calitz* decision, save that the exceptional cases were not limited to life, health and morals. However, courts have tended to apply the test to any interference with the right of a custodial parent[15] to custody, also where access was sought by a father of a child born out of wedlock or a non-parent.

[21] The effect of the *Calitz* decision was that, for many years, the father of a legitimate child had a right of access that would only be limited in exceptional cases[16], whilst an unmarried father had none, and a court would only grant him access where there was very strong ground compelling it to do so.[17] Thus, an unmarried father, or a non-parent, seeking access to a child bore an onus, and was required to adduce evidence to show

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[12] *Nicolson v Nicolson* (1869) 6 Sc. LR 692 (Ct Sess).
[13] At 693. See *Calitz* at p, 64.
[14] At p. 64 Tindall JA said: "The non-existence of the common home, brought about as it has been by the wife's unlawful desertion is not a factor which a Court of law can allow to operate in her favour on the question of the custody of the child. … [S]he had no just ground for leaving her husband, her duty is to return to him and look after her child under his roof."
[15] In the case of an illegitimate child the right to custody vested in the mother.
[16] *F v B* 1988 (3) SA 948 (D) at 950.
[17] *F v B* at 950 and *B v S* 1993 (2) SA 211 (W).

that the custodial parent was so unfit to exercise exclusive parental authority as to render the case exceptional.

[22] However, in *B v S*[18], after stating the common law position that a right to access was an incident of parental authority,[19] Howie JA, relying on English cases,[20] questioned the substance of this right. He concluded:

> '[N]o 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.'[21]

[23] Thus, the Supreme Court of Appeal (SCA) held that the legal difference between parties with parental authority and unmarried fathers, who had no parental authority, was more illusionary than real. It said:

> 'It is true that the father of a legitimate child has a right of access at common law …, with which right he can confront the mother if she refuses access. But that right will be to no avail if for any reason she persists in her refusal. He will then have to go to Court for an order enforcing access. If access is found to be adverse to the child's welfare, he will fail. By comparison, the father of an illegitimate child who considers access is in the best interests of the child can confront the mother with the contention that he should, on that ground, be granted access. If she refuses to concede that, he will have to go to Court to obtain an order granting him access. As in the other example, he will fail if access is not in the child's best interests.'[22]

[24] Thus, after 1995, it was of no consequence that an unmarried father, or a non-parent, did not have an inherent right of access to a child, and the custodial parent's

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[18] *B v S* 1995 (3) SA 571 (A).
[19] At p 575D-E.
[20] *A v C* [1985] FLR 445 (CA); Re *KD (A Minor)(Ward: Termination of Access*)[1988] 1 All ER 577 (HL).
[21] At 581-582.
[22] At 582.

unfettered right to control access to the child became more illusionary than real. As Howie JA explained:

> '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.'[23]

[25] Accordingly, in *B v S* the SCA rejected the conventional approach towards applications for access, in terms of which the applicant bore an onus of satisfying the court that access would be in the child's best interest.[24] It held that proceedings of this nature are not adversarial nor were they litigation 'of the ordinary kind'; rather they require 'a judicial investigation' into the child's best interests.[25] Neither party bears an onus. The approach to disputes of fact in motion proceedings, as enunciated in *Plascon-Evans,*[26] does not apply.[27] Thus, earlier decisions, and decisions thereafter, that invoke the reliance upon the right of the custodian parent, and place an onus on the non-custodial parent, or non-parent, should be treated with caution.

[26] The Constitution[28] confers a right on every child to family care or parental care, or to appropriate alternative care when removed from the family environment.[29] This accords with the view expressed in *B v S* that the inherent right is that of the child.[30] The Children's Act commenced on 1 April 2010 and was enacted to give effect to the rights of children as contained in the Constitution. All matters relating to contact with children must now be decided in terms of the Children's Act. Section 23 clothes any person having an interest in the care, well-being or development of a child with locus standi to seek an order granting them contact with the child or care of the child.[31] It also confers jurisdiction upon

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[23] *B v S* at 582A-B.
[24] See also *B v P* 1991 (4) SA 113 (T) at 117F.
[25] *B v S* at 584-585.
[26] *Plascon-Evans Paints Limited v Van Riebeeck Paints (Pty) Limited* 1984 (3) 623 (A) at 634E-I.
[27] See *B v S* at 585B-E.
[28] The 1996 Constitution.
[29] Section 28(1)(b) of the Constitution.
[30] See fn 23. See also *P and Another v P and Another* 2002 (6) SA 105 (N) at 107-108.
[31] 'Contact' is defined in s 1 of the Children's Act being: '(a) maintaining a personal relationship with the child; and (b) if the child lives with someone else-

the children's court to make orders in respect of contact and care of minor children. The children's court is presided over by a magistrate,[32] is not the upper guardian of children, and orders are made in terms of the Act.

[27] Section 23(2) lists a number of factors[33] which must be considered in an application for contact or care and, unsurprisingly, foremost is the consideration of the best interests of the child. Section 7(1), in turn, lists a number of factors[34] that must be considered, where applicable, when deciding the best interests of a child.

(i) communication on a regular basis with the child in person, including –
(aa) visiting the child; or
(bb) being visited by the child; or
(ii) communication on a regular basis with the child in any other manner …'
It is a term incorporated in the Act to refer to the earlier concept of 'access'.

[32] Section 42 of the Children's Act.

[33] Section 23(2) provides:
'When considering an application contemplated in subsection (1), the court must take into account-
(a) the best interests of the child;
(b) the relationship between the applicant and the child, and any other relevant person and the child;
(c) the degree of commitment that the applicant has shown towards the child;
(d) the extent to which the applicant has contributed towards expenses in connection with the birth and maintenance of the child; and
(e) any other fact that should, in the opinion of the court, be taken into account.'

[34] Section 7(1) provides:
'Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely-
(a) the nature of the personal relationship between-
(i) the child and the parents, or any specific parent; and
(ii) the child and any other care-giver or person relevant in those circumstances;
(b) the attitude of the parents, or any specific parent, towards-
(i) the child; and
(ii) the exercise of parental responsibilities and rights in respect of the child;
(c) the capacity of the parents, or any specific parent, or of any other care-giver or person, to provide for the needs of the child, including emotional and intellectual needs;
(d) the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from-
(i) both or either of the parents; or
(ii) any brother or sister or other child, or any other care-giver or person, with whom the child has been living;
(e) the practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis;
(f) the need for the child-
(i) to remain in the care of his or her parent, family and extended family; and
(ii) to maintain a connection with his or her family, extended family, culture or tradition;
(g) the child's-
(i) age, maturity and stage of development;
(ii) gender;
(iii) background; and

Application of the principles

[28] As adumbrated earlier, selective quotations from earlier decisions on the subject, decided in terms of the common law, ought to be approached with caution. The decisive consideration herein is the best interests of the boys, weighed against the further factors listed in s 23(2) of the Children's Act.

[29] As I have explained, the thrust Mr YCM's argument is that it will not be in the boys' best interest to have contact with Ms NDN, or her family because of the anger and resentment that exists between them. In support of the argument Mr YCM relied heavily on *Townsend-Turner*[35]. The matter was decided in terms of the common law, prior to the commencement of the Children's Act. It involved an application by a grandmother in circumstances similar to those which prevail in the current matter, for access to her grandchild. There had been considerable animosity between the grandmother of the child, the applicant, on the one hand, and the father and his new partner on the other. The young child had been drawn into their disputes and they involved him directly. Knoll J held, on the facts, that the grandmother was more concerned that her own needs be fulfilled and, in doing so, she had reacted to the seven-year-old child inappropriately. The conduct of the adult role-players had placed the child in an invidious position. Knoll J, accordingly, directed that a period of mediation be embarked upon in order to improve their relationship before access should be ordered.

(iv) any other relevant characteristics of the child;

(h) the child's physical and emotional security and his or her intellectual, emotional, social and cultural development;

(i) any disability that a child may have;

(j) any chronic illness from which a child may suffer;

(k) the need for a child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment;

(l) the need to protect the child from any physical or psychological harm that may be caused by-

(i) subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour; or

(ii) exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person;

(m) any family violence involving the child or a family member of the child; and

(n) which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child.'

[35] *Townsend-Turner and Another v Morrow* 2004 (2) SA 32 (C).

[30] In the current dispute, as I have said, the social workers concluded that Ms NDN has only the best interests of the boys at heart. There is no suggestion in the evidence of any incident where the boys have either been present or involved in the disagreements between Mr YCM and Ms NDN. The evidence to which I referred earlier demonstrates Mr YCM's intense dislike for Ms NDN and his obstinate refusal to engage with her. During the argument in the children's court, he reiterated his stance. He said:

> '… I do not talk to that grandmother, I do not want to talk to the applicant. And I will never talk to the applicant.'

There is no evidence of a similar attitude on her part nor is there any suggestion that the children have at any stage been caught up in this feud.

[31] It is common for access orders to be resented by custodial parents, particularly where there is an acrimonious relationship with the person seeking access. Where their opposition is based on a well-grounded fear of harm to the children, it would generally have good prospects of success. However, where the opposition lacks any reasonable foundation in relation to the child's welfare, it would not necessarily pose an impediment to the granting of an access order. In *Kougianos*[36] Booysen J noted that 'if an absence of stress should be the criterion for deciding access cases hardly any access would be granted'. Similar pronouncements may be found in English law. Sir Thomas Bingham MR explained:

> 'Neither parent should be encouraged or permitted to think that the more intransigent, the more unreasonable, the more obdurate and the more uncooperative they are, the more likely they are to get their own way.'[37]

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[36] *Kougianos v Kougianos* unreported AR 926/94 (23 June 1995 (N)) at 5-6 of the transcript.
[37] *Re O* (*Contact: Imposition of Conditions*) [1995] 2 FLR 124 (CA) at 129-130.

[32] In Re *H*[38] it was recognised that 'implacable opposition' by a custodial parent is an 'unattractive argument'.[39] Implacable opposition relates usually to opposition which, viewed objectively, lacks any reasonable foundation in relation to the child's welfare.

[33] As I have explained, the Children's Act calls for a child centered approach. It does require the court to have regard to the personal relationship between the child and the parent, caregiver, or any other person relevant in the circumstances. The boys have a very good relationship with Mr YCM. There is no dispute in this regard. However, the magistrate correctly concluded that there had been a relationship between them and Ms NDN until the deceased passed away. Thereafter, as a result of the recalcitrance of Mr YCM, they have not had any meaningful contact in the last two years. The enquiry established that Ms NDN, given her medical qualifications, her comfortable home and reasonable financial situation, is well able to care for the boys and to provide for their reasonable needs when they are with her in Herschel. Neither their legal representative nor any of the social workers have raised any concerns arising from their age, maturity, stage of development, or physical and emotional security.

[34] Section 7(1)(f) of the Children's Act enjoins the court to have regard to the need for the child to remain in the care of the parent, family, and extended family and to maintain the connection with his family, extended family, culture and tradition. Usually, it is in the best interests of a child to maintain a close relationship with his grandparents[40]. The evidence established that members of the extended family interact closely and gather, on special occasions, at Herschel. *Schäfer*[41] has noted that there is a growing acknowledgement of the benefits to a child maintaining relationships with non-parents, particularly members of the extended family. The enquiry further established that the family was a cohesive family that practiced their cultural traditions. All of these factors militate in favour of contact being in the best interest of the boys.

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[38] *Re H* (A Minor)(*Contact*) [1994] 2 FLR 776 (CA).
[39] See *Lawrence Schäfer: The Law of Access to Children* at 68-69.
[40] See *LH and Another v LA* 2012 (6) SA 41 (ECG); and *LF and Another v TV* 2020 (2) SA 546 (GJ).
[41] At p. 67.

[35] As I have said, Mr YCM's initial opposition was primarily as a result of his concern for the safety of the boys. He is not opposed in principle to physical contact with Ms NDN or her family but suggested that it should occur at a 'safe place', like a police station. As recorded earlier, no foundation has been laid for the apprehension that he holds and visitation of the boys with their grandmother in a police station strikes me as most inappropriate for their emotional and psychological well-being. During argument in the appeal Mr YCM was constrained to acknowledge this, but insisted nevertheless, if visitation rights are granted, it should be supervised visitation. Two social workers have expressed the view that such supervision would be unnecessary, but Ms Dyan tendered supervision and after-care services by the office of the department of social development in Lady Grey in respect of visits to Herschel, if this form of access were granted. Generally, I think the opinion of the social workers must be accepted, save as set out in the order below.

The form of the order

[36] I am unable to find any material misdirection in the magistrate's reasoning or her conclusion. However, Mr YCM has candidly, and repeatedly, articulated his intense dislike for Ms NDN and his resolute intention not to cooperate with her in respect of the execution of the boys' right of access to her and their extended family. Wherever the fault lies for the breakdown in the relationship, it cannot be in the boys' best interest that it continues. What is required is sober reflection by all concerned. More often than not, in family feuds, as the present is, it is difficult to persuade parties to retreat from their entrenched positions. But the boys' interests are not best served by protracted and repeated litigation, with financial implications for all, and continuing tensions and uncertainty. There should be a sustained effort to arrive at a workable solution that best serves the boys' interests.

[37] Accordingly, in the interim, the order granting access must be more structured than that issued by the children's court so as to avoid the potential for further strife. In this regard, the parties agreed that telephonic, or multimedia contact should be exercised once per week between 18h00 and 19h00 each Monday. In respect of paragraph two of the order, Mr *Smith,* on behalf of Ms NDN, proposed that she should be permitted to visit

the boys in Makhanda once per month by collecting them from their home at 09h00 on the third Sunday of each month and returning them to their home by no later than 17h00 on the same day. Mr YCM acknowledged that if we were inclined to grant contact in the form of visitation, the time frame was acceptable.

[38] In respect of the visits to Herschel, Mr *Smith* proposed that Ms NDN should be permitted to collect the boys from their home on the first Sunday of their mid-year school vacation at 09h00 and to return them to their home at 17h00 ten days thereafter. In respect of the December/January school vacation he proposed that the boys should spend Christmas with Ms NDN every alternate year and that she should collect the boys on 16 December at 09h00 and return them on 28 December at 17h00 in these years. In every other year she should be entitled to collect the boys at 09h00 on 29 December and return them at 17h00 on the 9 January.

[39] The children's court ordered that the boys should spend 'at least' a week during the long school holidays in June/July and in December/January in Herschel. Hence, Mr *Smith's* proposal that they spend ten days with Ms NDN on each occasion. The formulation provides a recipe for conflict in respect of the period of the visits. No compelling reason has been advanced to extend the period beyond the week referred to by the children's court, nor for the removal of the boys over Christmas from their family in in Makhanda, and the order of the children's court did not provide for it. Accordingly, I intend to confine it to seven days, the December visit to commence on 29 December of each year.

[40] Whatever the true source of the animosity between the parties might be, the boys have, in fact, not spent time away from Mr YCM since 2022, and I have no doubt that the initial visits to Herschel may be more disruptive to them than the visitation in Makhanda. This being so, it seems to me to be in their best interest to delay the commencement of their visits to Herschel so as to allow the boys to re-establish their relationship with their grandmother, before the first visit occurs. In addition, the Lady Grey office of the

Department of Social Development should be requested to provide supervision, in accordance with Ms Dyan's tender, during the first two visits to Herschel.

Costs

[41] Mr *Smith* has urged us to make an order that Mr YCM pay the costs of the appeal. As I have said, the situation calls for responsible, mature and calm heads in order to craft a path forward in the best interests of the boys. An award for costs could serve only to further fuel the acrimony which exists. I have no doubt that Mr YCM has pursued the litigation in the *bona fide* belief that he was acting in the best interest of the boys. Mr *Smith* did not contend otherwise. Thus, I intend to make no order for costs.

[42] In the result, I make the following order:

1. Save to the extent as set out below, the appeal is dismissed.

2. The order of the magistrate is set aside and substituted with the following:

'It is ordered that:

1. The applicant is permitted to contact the children telephonically once per week on a telephone or a multimedia device, with the assistance of the respondent.

2. The applicant is permitted to visit the children in Makhanda once per month by collecting the boys from their home at 09h00 on the third Sunday of each month, and returning them to their home by no later than 17h00 on the same day.

3. The applicant is permitted to have the children stay with her, at her home in Herschel, for one week during the long school holidays in

June/July and in December/January in accordance with the following timeframe:

(a) By collecting the children from their home in Makhanda at 09h00 on the first Sunday of the mid-year school vacation, and returning them to their home by no later than 17h00 on the first Saturday thereafter; and

(b) By collecting them from their home at 09h00 on the 29 December, and returning them to their home by no later than 17h00 on the 4 January.

4. The office of the Eastern Cape Department of Social Development is requested, in accordance with their tender, to render supervision services to the family and the children concerned during the first mid-year visit and year end visit which visits shall commence in mid-2025.'

J W EKSTEEN
JUDGE OF THE HIGH COURT

RONAASEN AJ:
I agree.

O H RONAASEN
ACTING JUDGE OF THE HIGH COURT

Appearances:

For Appellant:	In person
For Respondent:	Adv D Smith
Instructed by:	Neville Borman & Botha Inc MAKHANDA
Date Heard:	18 October 2024
Date Delivered:	10 December 2024