

SHE WANTS TO HOME SCHOOL THE CHILDREN, WHAT NOW?

Let's set the scene:

The parents are divorced and your ex-spouse (usually the mother) is the day to day custodial parent. In terms of the divorce order and settlement agreement that was made both parents are joint holders of parental responsibilities and rights and the children have been placed in public school. (What is discussed below can equally apply to any situation, married or not, where 2 parties are joint holders of parental responsibilities and rights).

Your ex now informs you (due to the shocking state of our public schools and regular newspaper headlines such as “*System get an F for education*”, “*Gauteng schools dens of vice*” etc.), she has now unilaterally taken the decision to home school the children.

What are the usual areas of concern?

When client's come and consult me in the present factual scenario (which is becoming increasingly regular), the same areas of concern are usually present:

- (1) Is she legally allowed to do this?
- (2) What about the children's socialisation with other children?
- (3) She is not a qualified teacher.

The author will deal with the first point in this article and shall comment in passing on the rest below. As far as point 3 above, research shows (think back of the excellent teachers you had) that motivation and commitment are far more important than a

teachers technical ability and generally a mother (or father) is far more committed and motivated (teaching a class of 2 or 3) than an underpaid, overworked and demoralised teacher teaching a class of 40, whom is preparing for the next strike.

Is she legally allowed to do this?

At the outset it is important to remember Section 28(2) of the Constitution which states that “*a child’s best interest are of paramount importance in every matter concerning a child*”¹ as well as the Children’s Act², specifically section 7 that deals with the best interest of the child and section 2 which states that one of the objects of the act is to ensure that the best interest of the child, in line with the Constitution, are of paramount importance “*in every matter concerning a child*”.

Keeping the above in mind *vis a vi* the shocking state of our public schools and the poor standard of education (we are ranked last, 148th out of 148 countries in maths and science behind Ruanda and Zimbabwe by the World economic Forum) it seems like a no brainer that home schooling a child, should circumstances permit, would as such be in the child’s best interest.

However, re the above factual scenario, what the custodial parent is now intending to do is against and existing order of court (i.e. she, even though she believes and quite possibly correctly so, that it would be in her children’s best interest if she educated them at home as she is now on a course of action that will ultimately place her in contempt of a court order). This now creates an untenable situation in which the non-custodial parent can (and usually does) takes the mother to court saying that she in

¹ *The Constitution of the Republic of South Africa, Act 106 of 1998*

² *Act 38 of 2005*

contempt and she, the mother, stating that she is acting in the children's best interest.

The normal process is that the matter ends up in the Regional Children's Court, whom as of late has taken the stance that such a matter needs to be adjudicated by the High Court, the High Court then preliminary hears the matter and passes the buck the Family Advocate to "*investigate what the best interest of the child would be in this circumstances*" and after a lengthy delay the matter is then back in court with their legal teams, Family Advocates Report and each with their own expert and expert reports facing off on the matter when it could have been sorted out differently.

What would have been ideal is if, in the parties would have communicated with each other before any unilateral decision was made and kept the existing provisions of the Children's Act,³ specifically section 31, in mind which states that "*before a person holding parental responsibilities and rights in respect of a child takes any decision... they must give due consideration to any views and wishes expressed by any co-holder of parental rights and responsibilities in respect of the child*" and

Section 33 (2) "*if the co-holders of parental responsibilities and rights are experiencing difficulties, before seeking the intervention of the court, must first seek to agree on a parenting plan determining theirrespective responsibilities.*

The above, read with section 33(5)(b) "*mediation through a suitable qualified person*" is ideally what should be sought prior to litigation.

³ Act 38 of 2005.

What does the above, in practical terms, mean for the custodial parent whom want's to home school the children?

1. Discuss it with the other parent and try to obtain their agreement,
 - If you reach agreement with them then attend on court with a varied parenting plan that makes provision for home schooling and have it substitute the previous order of court.
2. If no agreement can be reached after reasonable consultation attend on a suitably qualified mediator and agree to attend at least 3 sessions to attempt to reach a solution.
3. If still no agreement, then attend on court (via the parent seeking to amend the parenting plan to accommodate home schooling, with the other parent opposing it and their reasons, and then ask the court to task the Family Advocate to investigate the matter and prepare a report and for the court to make an interim ruling pending finalisation).

What are the legal formalities regarding home schooling?

If there is no objection from any holder of parental responsibilities and rights in respect of a child, will you be falling foul of some law of by law should you take your child out of public school and into home schooling?

There are some administrative formalities. Before a child can be removed from mainstream schooling to home schooling the learner has to be registered as a home schooler with the Provincial Department of Basic Education by the parent filling in the

form entitled *“Application for Registration of a learner for Education at home”* and take the following documentation with:

1. Certified copies of the parents and child’s identity documents;
2. Last copy of child’s school report and immunisation card;
3. Weekly timetable which included contact times per day;**
4. Breakdowns of terms per year; **
5. Learning programme; **
6. Certified copy of child’s birth certificate.

** Items 3, 4 and 5 may seem daunting but fear not, home schooling has become such an industry (as the wheels continue to come off the public school system) that all of the above plus internet links to the best textbooks, best teachers, as well as internet and phone contact with specialist tutors (for the parent whom will be teaching), are all now part of the secondary industries mushrooming around home schooling, along with social activities (dances and outings) and even sports teams / coaches for home schoolers.

Note that it should not take more than 30 days for the application to be processed and it’s free, without the application you are not allowed to home school and / or remove the child from formal schooling.

*What is the legal basis for home schooling?*⁴

Leendert van Oostrum and Andre Williams have written an excellent piece on this, entitled “*The legal basis for home education South Africa*” (on behalf of a home schooling lobby group called the Pestalozzi Trust) and what follows is simply the writer paraphrasing and condensing their work.

The right to education is a core component of the right to dignity, one of the human rights from which most other human rights flow, and is essential for the autonomy of an individual.

It is important to keep in mind at all times that human rights are not granted by the Constitution or the state and that humans have them by virtue of being human and furthermore that it is the duty of the state “*respect, protect, promote and fulfil*” them.⁵

Human rights are indivisible and cannot be ranked one above the other (hence the right to dignity cannot be ranked above the right to education and both flow into and from one another), the fulfilment of one may not violate another human right and the right that a person has against the state is a positive one, in that the state has an obligation to make it possible for an individual to freely exercise the right.

A legal nuance that needs to be kept in mind at this juncture is that compulsory education is not a fulfilment of the right to education but rather a limitation on the free exercising of a person’s right to education as the fulfilment of a positive right cannot

⁴⁴ Leendert van Oostrum and Andre Williams, “*The Legal basis for home education in South Africa*” presentation to a meeting on the review of home education policy, law and regulations under the auspices of the Department of Basic Education delivered on October the 09th, 2014.

⁵ van Oostrum and Williams, “*The Legal basis for home education in South Africa*”

be achieved by compulsion as same would be in violation of an individual's free exercise of such a right.⁶

The correct view is that compulsory education would be subject to the limitation imposed by Section 36 of the Constitution, in that the rights may only be limited "*in terms of the law of general application to the extent that the limitation is reasonably justifiable*".⁷

There are 5 factors that the Constitutional Court considers in its test to determine whether or not a human rights may be limited. Due to constraints the author will only focus on the last test being, "*Is there a less restrictive means to achieve the purpose?*".

200 Days over a minimum of 9 years to have a individuals personal freedom restricted has to serve a definite purpose, being the education of an individual. The burden being on the state to prove school attendance will indeed result in an educated individual, (with present result where children in high school struggle with basic comprehension and literacy, this may be a bigger challenge for the government to prove than it may appear at first glance).

If the same purpose (education) can be achieved using a less restrictive manner of the free exercise of a right, the less restrictive mans must be employed, differently put, the burden is on the state to prove that the individual cannot receive an education meeting the minimum standards in ways less restrictive than public school attendance.

⁶ *Ibid*

⁷ *The Constitution of the Republic of South Africa, Act 106 of 1998*

Furthermore, it is important to note that in terms of section 29(1) of the Constitution, the right to education is not a children's right but a universal right "*everyone has the right to a basic education, ...*", and the Constitution makes neither education nor school attendance compulsory and hence any compulsion is then subject to the Section 36 limitations as discussed above.⁸

The limited definitions of education provided for in our law (The National Education Policy Act of 1996) is problematic and it would serve us better to look towards the extensive definition found in the United Nations Convention on the Rights of the Child ("UNCRC") to which South Africa is a signatory. An extract from this definition reads:

"The development of the child's personality, talents, mental and physical abilities to their fullest potential", and , "The development of respect for the child's parents, their own cultural identity, language and values,..." and so on.

What is clear from the above is that "education" that fails in regard to the above, fails to fulfil the Constitutional right to education.⁹

Coupled with the above is Section 28(1)(b) of the Constitution¹⁰ which states, "*Every child has the right...to family and parental care, or to appropriate alternative care when removed from the family environment*"

It is important to note that this right is a negative right in that the state may not interfere with a child's right to parental care except as provided for in section 36 of the Constitution or where it is required that, in the child's best interest they be

⁸ *van Oostrum and Williams, "The Legal basis for home education in South Africa"*

⁹ *van Oostrum and Williams, "The Legal basis for home education in South Africa"*

¹⁰ *The Constitution of the Republic of South Africa, Act 106 of 1998;*

removed to a place of safety to be protected from maltreatment, neglect, abuse or degradation.

The above was so confirmed in the Constitutional Court case *Grootboom* [2000] at par 77: “*The Constitution... contemplates that a child has the right to parental and family care in the first place, and the right to alternative appropriate care only where that is lacking*”.

In the Children’s Act¹¹ the definition of “*parental care*” and indeed “*care*” are in section 1(a) – (j). Section 1(e) states, “*guiding, directing and securing a child’s education and upbringing*”. Section 1(e)¹² read with *Grootboom* it is clear that the child has the right to have his or her education guided, directed and secured by his parents.

All of the above of course fall under the ambit of in all matters concerning children, the child’s best interest is paramount.

Conclusion:

The child’s right to education is a human right and part of the right to human dignity. The child’s has a right to parental care which includes having his or her education guided and directed by its parents.

Our public school system is failing our children and failing to deliver on their right to education.

¹¹ Act 38 of 2005, section 1(e)

¹² *Ibid*

Should a parent have the means to home school a child opposed to having the child attend public school (and it is by no means cheaper option) and does not, is a strong argument to be made that, that parent is failing to act in the child's best interest.

Home schooling is for the most part, a better option and more in line with the UNCRC definition of education, than what is being delivered in public schooling.

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