

I want to emigrate with my child - can my ex refuse consent?

It is true, now more than ever, that people follow opportunities. Our geographical mobility, combined with the increase in separations and divorces between parents, causes us to be confronted with the following question more frequently - what can I do if my ex refuses consent for me to emigrate with our child?

This was the case in *RW v CS* 2019 (6) SA 168 (GJ) where a mother of a four-year-old boy, approached the court for relief when the father of the child refused his consent for her to relocate to New Zealand with their child.

In terms of section 18(3)(c)(ii) of the Children's Act 38 of 2005 ("the Act"), a parent must give or refuse any consent required by law in respect of the child. This includes consent to the child's departure or removal from the Republic. Section 18(5) of the Act continues to state that, unless a competent court orders otherwise, the consent of all persons that have guardianship of a child, is necessary in respect of certain matters, which also include a child's departure from the Republic.

The father's refusal prompted the mother to request the court to waive this requirement, leaving the court, as upper guardian of minors, to decide how it was to exercise its discretion under s 18(5).

It is important to note that the court's discretion in these matters, is not defined, and there is no onus that needs to be satisfied for the court to determine whether or not the child may accompany a parent over the RSA borders.

When deciding whether the court will substitute the parent's consent with its own, the court focuses on the bona fides and reasonableness of the parent's decision. It will not lightly refuse leave for the child to depart from the country, if it is satisfied that the decision to emigrate is indeed bona fide and reasonable.

In judging the aforementioned criteria, it is important to determine whether the decision to emigrate, is driven by a desire to exclude the other parent from access to the child, or whether the parent has taken that decision reasonably, having regard to her own future and the future of the child.

The applicant justified her bona fides by clearly stating that she would encourage daily telephonic or Skype contact between the father and child. It also became apparent that the child had a very strong bond with the mother's fiancé, who would move with them, and had been given a lucrative work opportunity, that would enable her to be a stay-at-home mom for the child. Coupled with our country's high crime statistics, it was clear that they would be able to build a better life abroad.

Although the father opposed the relief sought, he did not have a strong preference to having the child stay with him, should the mother wish to emigrate. In his papers, he merely stated that: 'If the applicant wishes to emigrate, I would happily look after our son for as long as it would be required.' His main argument was centred around his conviction that the mother's relationship with her fiancé would not last the test of time.

The court was of the opinion that it was clear that the mother had been given a rare opportunity, and that if she failed to take advantage of it for the benefit of both herself and her son, she would miss the chance to establish a solid future in New Zealand for the two of them. The court subsequently granted the necessary consent.

Emigrating or relocating undoubtedly has a significant impact not only on the child concerned, but also other parties in the context of their extended family, education and social life. The court will, however, substitute its consent with that of a parent, where it is proven to be a reasonable and bona fide decision.

Nicola Le Maitre, Van Velden-Duffey Inc