

# Guardians of Justice: Prioritizing the Best Interests of the Child in M B v N G

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## INTRODUCTION

In the case of M B v N G (17885/2020) [2024] ZAGPJHC 1539 (6 March 2024), the Applicant, a concerned father, approached the High Court to seek the urgent appointment of a forensic psychologist to assess the well-being of his six-years old son, who is currently under the care of his mother. This paper will focus on the Court's commitment to upholding the best interests of minor children, invoking its inherent common law powers as the upper guardian of all minors.

## BACKGROUND

The minor child, Z, was born on 7 December 2017. Following the parent's divorce on 2 December 2022, a settlement agreement was incorporated into the court order, granting primary residence to the Respondent, his mother, and reasonable contact rights to the Applicant. On 11 September 2023, a complaint was filed with the parenting coordinator, Dr. Martin Strous, alleging that Z had been sexually assaulted by the Applicant's brother-in-law Devonne Carey. Dr. Strous referred Z for a psycho-legal assessment by Ms. Belinda de Villiers whose report raised significant concerns about the Respondent's capability to care for Z.

During an urgent mediation on 7 December 2023, the parties agreed to a new forensic assessment being conducted to determine Z's best interests regarding his residence, care, and contact. However, despite several requests from the Applicant's attorneys, the Respondent delayed her response in respect of agreeing to a therapist and commencement of the forensic assessment. She also disputed Ms. de Villiers' initial report on Z, and instead filed criminal charges against Mr. Carey in January 2024.

## COURTS INTERPRETATION – BEST INTEREST OF THE CHILD

After considering the contents of Ms. de Villier's report which raised concerns regarding Z's wellbeing, the Court had to decide whether it was in Z's best interest to remain in the Respondent's care as his primary

residence pending the outcome of the Family Advocate's report as well as commencement of the now delayed forensic assessment. This was despite the fact that the Applicant did not seek primary care of Z as his interim relief in this application. The Court considered several factors listed on Ms. De Villier's report, including Z being exposed to explicit sexual content, the Respondent's lack of interest in Z's educational progress, Z not being fed nutritious food and the Respondent substituting her parenting with technology to appease Z.

During the hearing the Respondent's senior counsel argued that an order that grants primary care to the Applicant cannot be granted. They argued that the Applicant did not make out a case for vesting primary care of Z nor had an amendment been made on his notice of motion to this effect contending therefore that the Court could not make a pronouncement on Z's primary residency pending his forensic assessment.

In response, the Court emphasized that a court cannot have a "wait and see" approach in these circumstances, especially when the Court is concerned about the well-being of the child. As such, the Court referred to B v B and stated that "the court has inherent common law powers as upper guardian of all minors to make any order which it deems fit in the best interest of the minor child".

The Court further referred to several case laws to support the notion that the Court is empowered to decide on the issue of Z's primary residence out of its duty to protect the best interests of the child, even if it's a decision that was not presented before the Court for adjudication. It endorsed the view in AD and DD v DW and Others that the interests of minors should not be compromised for the sake of legal technicalities and emphasized that the child's best interest should not be rigidly sacrificed to jurisdictional formalism.

The Court held that although the father did not request interim relief in the form of primary care of the child in his urgent application pending the forensic clinical assessment, this did not exempt the Court from its duty as the upper guardian of the child to make a determi-

nation on this aspect. Under sections 6, 7, and 9, in conjunction with section 28 of the Constitution, the Court is obligated to protect the child's best interests at all times.

Given Ms. De Villiers's preliminary observations and pending the completion of a report by the Family Advocate and a forensic assessment on Z, the Court ordered that Z be placed in the Applicant's primary care temporarily. The Respondent was granted contact to Z, and the Respondent was mandated to ensure that his brother-in-law had no contact with the child.

## CONCLUSION

The case highlights the Court's unwavering commitment to prioritizing the best interests of minor children over procedural technicalities and legal formalism. By exercising its inherent common law powers as the upper guardian of minors, the Court ensured the best interests of the child, Z, were protected. The Court's decision to temporarily place Z in the Applicant's primary care, despite the Applicant's initial application not seeking such relief, demonstrates a proactive approach to protecting the child's well-being. This case reaffirms the judiciary's essential role in making decisive interventions to safeguard children's welfare, ensuring their safety and development are not compromised.

*Please note: Each matter must be dealt with on a case-by-case basis and you should consult an attorney before taking any action contemplated herein.*



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