

MEDICINE AND THE LAW

How does South African law handle cases involving baby swapping?

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Cases of baby swapping in South Africa (SA) are very rare. In 1996 the first of these cases, *Clinton-Parker v Administrator, Transvaal; Dawkins v Administrator, Transvaal*, appeared before our courts. The parties in that instance decided to keep the babies who had been erroneously given to them, but the plaintiffs were awarded compensation for the emotional shock and injury they endured as the result of the defendant's negligence. In recent times we had the case of *Child Law v NN and NS (GP)*, where the parties also decided to keep the children who had been erroneously given to them by the hospital staff. These scenarios, while difficult, have had amicable conclusions, with the parents electing not to pursue custody of their natural children. The situation would be more complex if either of the parties were to decide that they want their natural child back. A number of questions are pertinent here, and will guide the discussion in this article. Is it as simple as both of the 'psychological' parents returning the babies to their natural parents? Do the parents have a claim against the hospital staff? Unfortunately there is not a wealth of legal precedent to assist the SA courts in this regard. The article explores the jurisprudence that speaks to baby swapping, in an attempt to provide clarity and assistance in resolving these difficult cases.

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The phenomenon of baby swapping can be traced back to the times of King Solomon: the Bible tells the story of two women who lived together and delivered their babies at around the same time. Unfortunately one child died during the evening, and the mother of the child who died sought to assert that the living child was her own. The women quarrelled over their biological right to the surviving child, and the dispute was finally decided upon by King Solomon. He suggested that the child be split in half: one mother agreed with this, and the other said she would give up her right to the child if it meant that the child would survive. Solomon then ruled that the mother who was prepared to give up her rights to the child be given the child, declaring that this was in fact in the child's best interests.^[1]

This article will certainly not suggest anything as dramatic as splitting a child in half, but at the same time there are some serious legal issues that need to be considered. The first case before the South African (SA) courts that dealt with the issue of baby swapping was *Clinton-Parker v Administrator, Transvaal; Dawkins v Administrator, Transvaal*,^[2] and the next case was heard nearly two decades later, namely *Centre for Child Law v NN and NS (GP)*.^[3]

Legal issues

Both these cases gave rise to multiple legal issues, the most important being: what is in the best interests of the child? Other sub-issues that were not expressly considered by the courts included how are the interests of the 'biological parents' catered for, should the interests of the 'perceived' siblings of the child be taken into consideration, and does the child him- or herself have a claim against the wrongdoers? The Clinton-Parker case was the first case in SA that dealt with the issue of baby swapping. The plaintiffs discovered about 2 years after the fact that the staff at the maternity ward of the hospital had caused, in a negligent manner, their babies to be swapped at birth. The parents based their claim on the law of delict and contract, and claimed damages from the hospital accordingly. The parents in

this case eventually decided to keep the babies that they were sent home with, and the dispute then centred on the amount of damages to be awarded. The plaintiffs were eventually compensated with ZAR158 248 and ZAR183 824, respectively. Ultimately the court did not have to pronounce on whether the swapped babies had to be returned, as the parents settled that among themselves, and kept the children that they were sent home with.

That point did come before the court in *Centre for Child Law v NN and NS*. In this case, a boy 'Z' and a girl 'M' were born at Tambo Memorial Hospital in Boksburg, Gauteng. The mother 'NS' and father 'DL' took M home, while the other mother 'NN' and other father 'LZ' took 'Z' home. It transpired that 'Z' and 'M' had been switched at birth, resulting in 'NS' and 'DL' being the biological parents of 'Z', and 'NN' and 'LZ' being the biological parents of 'M'. The court had to consider a way forward for the parents and children, taking into account the 'best interests of the child', which are specifically provided for in terms of Section 28 of the Constitution of the Republic of South Africa^[4] as well as Section 9 of the Children's Act,^[5] which provides that 'the child's best interests is of paramount importance in all matters concerning the care, protection and well-being of a child'.

Expert witnesses suggested that it is unlikely that a child aged 4 years, and who has been residing with the psychological parents and has clear attachments to both of them and to their 'siblings', would be able to attach to the 'biological parents'. The expert witnesses went on to say that the bond that may be created (with the 'biological parents') will not be as strong as that which was created with the 'psychological parents'. It is not often that expert witnesses agree with each other in cases that are before court; however, in this case, they both shared the view that the children should stay with their psychological parents, and further that full responsibilities and rights should be conferred on the psychological parents.

Ultimately the effective order was that it was in the best interests of the children that they remain with their 'psychological parents'.

These cases give the impression that the law is relatively settled in this regard, that damages can be claimed from the hospital for their negligence in causing the swapping of the babies, and that the court can order that babies who were swapped at birth remain with their psychological parents. The courts, it seems, were assisted by the conduct of the parties in arriving at their decisions. In the Clinton-Parker case the parties came to an agreement early on to keep the babies that they were sent home with, and the only dispute was the quantum to be awarded to them from the hospital. Likewise, in the *Centre for Child Law v NN and NS* case, the parties eventually softened their approach and accepted that they retain the babies that they took home from the hospital.

Future cases

While the previous two cases do provide some guidance as to how instances of baby swapping should be dealt with, neither was decided by the Supreme Court of Appeal or the Constitutional Court, so they are not binding on the entire country. We could also be faced with a situation where a 'biological parent' insists that he or she wishes to have the biological child returned, and pursues further litigation.

It is submitted that the first point of departure would have to be Section 28 of the Constitution of the Republic of South Africa^[4] and the Children's Act,^[5] specifically Sections 7 and 9, which provide for the best interests of the children and, further, that 'in all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied'. Section 19 of the Children's Act is also of importance and states that the biological mother of a child has 'full responsibilities and rights in respect of the child', and Section 20 states that 'the biological father has full responsibilities and rights in respect of the child ... if he is married to the child's mother at the time of the child's conception, the time of the child's birth, or at any time between the child's conception or birth'.

Section 7 of the Children's Act lists the factors that must be considered when determining the best interests of the child, and they are as follows: (i) the nature of the personal relationship between (a) the child and the parents, or any specific parent, and (b) the child and any other caregiver or person relevant in those circumstances; (ii) the attitude of the parents, or any specific parent, towards (a) the child, and (b) the exercise of parental responsibilities and rights in respect of the child; (iii) the capacity of the parents, or any specific parent, or of any other caregiver or person, to provide for the needs of the child, including emotional and intellectual needs; (iv) 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 (a) both or either of the parents, or (b) any brother or sister or other child, or any other caregiver or person, with whom the child has been living; (v) 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; (vi) the need for the child (a) to remain in the care of his or her parent, family and extended family, and (b) to maintain a connection with his or her family, extended family, culture or tradition; (vii) the child's (a) age, maturity and stage of development, (b) gender, (c) background, and (d) any other relevant characteristics of the child; (viii) the child's physical and emotional security and his or her intellectual, emotional, social and cultural development; (ix) any disability that a child may have; (x) any chronic illness from which a child may suffer; (xi) 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; (xii) the need to protect the child from any physical or psychological harm that may be caused by (a) subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour, or (b) exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person; (xiii) any family violence involving the child or a family member of the child; and (xiv) which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child.

The first point listed speaks to the nature of the relationship between the child and his or her parents. This relationship would be lacking in respect of the biological parents, and would probably lend favour to the argument that the child remains with the psychological parents. The second point is one that could potentially lend credence to the case in favour of the biological parents; their attitude could be such that they love their biological child and want to provide a home and the best amenities for him or her. Of course this same argument could be utilised by the psychological parent as well. The third point could be argued in a manner that may support either the psychological or biological parent. The fourth point, it seems, would lend favour to the child remaining with the psychological parents, as not doing so would effectively involve separating the child from a stable household and a familiar setting. The fifth point is one that has been dealt with by the courts, albeit without express reference to the legislation; our courts have ordered that even when the child remains with their psychological parent, the biological parent is still awarded reasonable access to the child. The sixth point is a complex one, because we have no clear indication of which 'parent' the legislation is making mention of. The default position would be, if we were to employ a literal interpretation, that this means that the biological parents would have a right to keep their child, and potentially allow the psychological parents (and their family) reasonable access. The remaining factors speak to the personal circumstances and idiosyncrasies of the child; these are very important and must be given due consideration such that his or her physical and emotional security are adequately catered for.

In addition to the legislation, our courts have also interpreted in other judgments, usually in the relation to custody battles, what they consider to be in the best interests of a child. Barrie^[6] provides a useful overview in this regard. The following cases were considered: *P v P 2007 5 SA 559 (T)*, where it was held that the 'court is not looking for the perfect parent'. The objective of the court is to establish the least detrimental path, such that the child's growth and development are safeguarded. Interestingly, it was also stated in this judgment that 'expert witnesses should not be allowed to usurp the functions of the Court'. In *Terblanche v Terblanche 1992 1 SA 501 (W) 504 C*, the court reiterated that it is the upper guardian of all minors, and that when it assumes this role, it has 'extremely wide powers in establishing what is in the best interests of minor children'. 'The child's views and preferences, where maturity allows for it, must be seriously considered as well.'^[6] The above outlines the position in SA, but we may look at other jurisdictions as well.

Section 8 (3) of the Constitution^[4] states that 'When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court – (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1)'. In this regard, Section 39 is also worthy of attention. It states that 'when interpreting

the Bill of Rights, a court, tribunal or forum – (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law.’ Furthermore, ‘When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.’ This gives the SA courts authority for considering foreign law. While not binding, it could be of assistance when a court is tasked with developing the common law.

The USA has dealt with several cases of baby swapping over the decades and could be of assistance in this regard. It must be noted, however, that it has a very different legal system and socioeconomic conditions compared with a country like SA. Nevertheless, decisions from its courts could shed further light on the issue. In *Prince v. Massachusetts* 321 U.S. 158 1944,^[7] it was held that ‘it is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.’ The parental right doctrine seems to have its roots in early custody determinations that regarded only the parents’ interests. As the child’s needs came to the foreground, courts still adhered to the parental doctrine by applying a presumption that giving custody to a biological parent necessarily serves the best interests of the child. In *Doe 638 N.E.2d 181*,^[8] the court was of the view that if the best interests of the child were the paramount test in determining custody, ‘then anyone with more money, intelligence, or education could challenge any biological parents’ rights to their own child.’ We can see that US courts do not automatically rule that the psychological parents retain the babies they went home with. Crane^[9] further elaborates on this point by observing that in cases involving baby swapping, it must be borne in mind that biological parents do not knowingly surrender their right to parent their own child, and that their rights must be taken into consideration as well. The position in the USA does provide an argument in favour of parents who wish to have their biological child returned, and one would expect that this will be pleaded in an SA court should a biological parent wish to continue with litigation in this regard.

Conclusion

Cases of baby swapping that have come before our courts are few and far between. Complex legal issues are raised, and difficult decisions need to be made. SA legislation protects the rights of children and

states that the rights of the child are paramount in any decision concerning the child. In both of the cases that our courts have dealt with, the end result was that the children who were swapped remained with the parents that they went home with, the so called ‘psychological parents.’ We therefore have judicial precedent on this point. However, we need to consider two things here: (i) neither of those judgments was delivered by the Supreme Court of Appeal or the Constitutional Court, so the judgments do not bind the entire country; and (ii) the parents seem to have eventually come to an agreement to keep the children that they were sent home with. The parents were awarded damages for the negligent conduct of the hospital staff, but the greater issue is certainly what happens to the children who were swapped. There may be instances where a biological parent wishes to have his or her child returned and persists with litigation in this regard. Should this happen, we will again have to apply the ‘best interests of the child’ principle. Foreign law may be consulted as provided for in the Constitution,^[4] and the rights of the biological parents as outlined by the US courts may be argued accordingly. The current position, however, seems to be relatively settled in that our courts are inclined to order that babies who are swapped remain with the parents that they went home with, namely the psychological parents.

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