

## **Parental Plans and Parental responsibilities and rights under the Children Act**

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Chapter 3 of the New Children Act governs both the acquisition and loss of parental responsibilities and rights not only by the parents of the children involved but also in respect of other persons.

### **Parental responsibilities and rights – Section 18**

In terms of Section 18 a person may have either full or specific parental responsibilities or rights in respect of a child. The parental responsibilities and rights that a person may have in respect of a child, include the responsibility and the right to care for the child, to maintain contact with the child, to act as guardian of the child and to contribute to the maintenance of the child.

A parent or other person who acts as guardian of a child must administer and safeguard the child's property and property interests, assist or represent the child in administrative, contractual and other legal matters or give or refuse any consent required by law in respect of the child, including consent to the child's marriage, consent to the child's adoption, consent to the child's departure or removal from the Republic, consent to the child's application for a passport; and consent to the alienation or encumbrance of any immovable property of the child.

Whenever more than one person has guardianship of a child, each one of them is competent, unless any other law or any order of a competent court specifies the contrary, to exercise independently and without the consent of the other any right or responsibility arising from such guardianship. Unless a competent court orders otherwise, the consent of all the persons that have guardianship of a child is necessary in respect of the above paragraph.

### **Parental responsibilities and rights of mothers – Section 19**

The biological mother of a child, whether married or unmarried, has full parental responsibilities and rights in respect of the child. If the biological mother of a child is an unmarried child who does not have guardianship in respect of the child and the biological father of the child does not have guardianship in respect of the child, the guardian of the child's biological mother is also the guardian of the child. However, this does not apply in respect of a child who is the subject of a surrogacy agreement.

### **Parental responsibilities and rights of married fathers – Section 20**

The biological father of a child has full parental responsibilities and rights in respect of the child if he is married to the child's mother or if he was married to the child's mother at the time of the child's conception or the time of the child's birth or any time between the child's conception and birth.

### **Parental responsibilities and rights of unmarried fathers – Section 21**

The biological father of a child who does not have parental responsibilities and rights in respect of the child in terms of section 20, acquires full parental responsibilities and rights in respect of the child if at the time of the child's birth he is living with the mother in a permanent life-partnership or if he, regardless of whether he has lived or is living with the mother consents to be identified or successfully

applies in terms of section 26 to be identified as the child's father or pays damages in terms of customary law or contributes or has attempted in good faith to contribute to the child's upbringing for a reasonable period and contributes or has attempted in good faith to contribute towards expenses in connection with the maintenance of the child for a reasonable period. This does not affect the duty of a father to contribute towards the maintenance of the child in any way.

If there is a dispute between the biological father and the biological mother of a child with regard to the fulfilment by that father of the conditions set out above, the matter must be referred for mediation to a family advocate, social worker, social service professional or other suitably qualified person. Any party to the mediation may have the outcome of the mediation reviewed by a court. This applies regardless of whether the child was born before or after the commencement of this Act.

### **Parental responsibilities and rights agreements – Section 22**

The mother of a child or other person who has parental responsibilities and rights in respect of a child may enter into an agreement providing for the acquisition of such parental responsibilities and rights in respect of the child as are set out in the agreement, with the biological father of a child who does not have parental responsibilities and rights in respect of the child in terms of either section 20 or 21 or by court order; or any other person having an interest in the care, well-being and development of the child.

It is important to note that subject to the above, the mother or other person who has parental responsibilities and rights in respect of a child may only confer by agreement upon a person mentioned above those parental responsibilities and rights which she or that other person has in respect of the child at the time of the conclusion of such an agreement.

A parental responsibilities and rights agreement must be in the prescribed format and contain the prescribed particulars. A parental responsibilities and rights agreement takes effect only if it is registered with the family advocate or made an order of the High Court, a divorce court in a divorce matter or the children's court on application by the parties to the agreement.

Before registering a parental responsibilities and rights agreement or before making a parental responsibilities and rights agreement an order of court, the family advocate or the court concerned must be satisfied that the parental responsibilities and rights agreement is in the best interests of the child.

A parental responsibilities and rights agreement registered by the family advocate may be amended or terminated by the family advocate on application by a person having parental responsibilities and rights in respect of the child, by the child, acting with leave of the court; or in the child's interest by any other person, acting with leave of the court. A parental responsibilities and rights agreement that was made an order of court may only be amended or terminated on application by a person having parental responsibilities and rights in respect of the child by the child, acting with leave of the court or in the child's interest by any other person, acting with leave of the court. Only the High Court may confirm, amend or terminate a parental responsibilities and rights agreement that relates to the guardianship of a child.

### **Assignment of contact and care to an interested person by order of the court – Section 23.**

Any person having an interest in the care, well-being or development of a child may apply to the High Court, a divorce court in divorce matters or the children's court for an order granting to the applicant, on such conditions as the court may deem necessary contact with the child; or care of the child.

When considering an application contemplated above the court must take into account the best interests of the child, the relationship between the applicant and the child, and any other relevant person and the child, the degree of commitment that the applicant has shown towards the child, the extent to which the applicant has contributed towards expenses in connection with the birth and maintenance of the child, and any other fact that should, in the opinion of the court, be taken into account. If in the course of the court proceedings it is brought to the attention of the court that an application for the adoption of the child has been made by another applicant, the court must request a family advocate, social worker or psychologist to furnish it with a report and recommendations as to what is in the best interests of the Child, and may suspend the first-mentioned application on any conditions it may determine.

The granting of care or contact to a person in terms of this section does not affect the parental responsibilities and rights that any other person may have in respect of the same child.

#### **Assignment of guardianship by order of court – Section 24**

Any person having an interest in the care, well-being and development of a child may apply to the High Court for an order granting guardianship of the child to the applicant. When considering such an application the court must take into account the best interests of the child, the relationship between the applicant and the child, and any other relevant person and the child; and any other fact that should, in the opinion of the court, be taken into account. In the event of a person applying for guardianship of a child that already has a guardian; the applicant must submit reasons as to why the child's existing guardian is not suitable to have guardianship in respect of the child.

#### **Termination, extension, suspension or restriction of parental responsibilities and rights – Section 28**

A co-holder of parental responsibilities and rights in respect of the child and any other person having a sufficient interest in the care, protection, well-being or development of the child may apply to the High Court, a divorce court in a divorce matter or a children's court for an order suspending for a period, or terminating, any or all of the parental responsibilities and rights which a specific person has in respect of a child or extending or circumscribing the exercise by that person of any or all of the parental responsibilities and rights that person has in respect of a child.

An application referred to above may be combined with an application for the assignment of contact and care in respect of the child and may be brought by a co-holder of parental responsibilities and rights in respect of the child, by any other person having a sufficient interest in the care, protection, well-being or development of the child, by the child, acting with leave of the court, in the child's interest by any other person, acting with leave of the court or by a family advocate or the representative of any interested organ of state.

When considering such application the court must take into account the best interests of the child, the relationship between the child and the person whose parental responsibilities and rights are

being challenged, the degree of commitment that the person has shown towards the child and any other fact that should, in the opinion of the court, be taken into account.

### **Court proceedings – Section 29**

An application in terms of section 22(4)(b), 23, 24, 26(1)(b) or 28 may be brought before the High Court, a divorce court in a divorce matter or a children's court, as the case may be, within whose area of jurisdiction the child concerned is ordinarily resident. An application in terms of section 24 for guardianship of a child must contain the reasons why the applicant is not applying for the adoption of the child. The court hearing an application may grant the application unconditionally or on such conditions as it may determine, or may refuse the application, but an application may be granted only if it is in the best interests of the child.

When considering such an application the court must be guided by the principles set out in Chapter 2 of the Act to the extent that those principles are applicable to the matter before it. The court may for the purposes of the hearing order that a report and recommendations of a family advocate, a social worker or other suitably qualified person must be submitted to the court. A matter specified by the court must be investigated by a person designated by the court, a person specified by the court must appear before it to give or produce evidence or the applicant or any party opposing the application must pay the costs of any such investigation or appearance.

The court may, subject to section 55 of the Act appoint a legal practitioner to represent the child at the court proceedings and order the parties to the proceedings, or any one of them, or the state if substantial injustice would otherwise result, to pay the costs of such representation.

If it appears to a court in the course of any proceedings before it that a child involved in or affected by those proceedings is in need of care and protection, the court must order that the question whether the child is in need of care and protection be referred to a designated social worker for investigation in terms of section 155(2) of the Act.

### **Co-holders of parental responsibilities and rights – Section 30**

More than one person may hold parental responsibilities and rights in respect of the same child. When more than one person holds the same parental responsibilities and rights in respect of a child, each of the co-holders may act without the consent of the other co-holder or holders when exercising those responsibilities and rights, except where the Children's Act, any other law or an order of court provides otherwise.

A co-holder of parental responsibilities and rights may not surrender or transfer those responsibilities and rights to another co-holder or any other person, but may by agreement with that other co-holder or person allow the other co-holder or person to exercise any or all of those responsibilities and rights on his or her behalf.

An agreement in terms of the above paragraph does not divest a co-holder of his or her parental responsibilities and rights and that co-holder remains competent and liable to exercise those responsibilities and rights.

### **Content of Parenting Plans – Section 33**

The Children's Act does not contain a definition of a parenting plan. Looking at Section 33 (1) one it is obvious that a parenting plan refers to an agreement in which the co-holders of parental responsibilities and rights can make arrangements on the way in which they will govern and exercise their respective rights and responsibilities.

The new children's act discourages co-holders of parental rights and responsibilities from approaching the court as first resort when they experience difficulties in exercising their rights and responsibilities. The Act instructs co-holders who experience difficulties to mediate before seeking court intervention. The parties are not compelled to enter into a parenting plan. The act simply instructs them to attempt to agree on parenting plan. If one looks at section 33 (2) it seems that if one of the co-holders refuse to engage in discussions about a parenting plan, the court may be approached.

Section 33 (5) instructs parties to seek assistance of a family advocate, social worker or a psychologist, or mediation through a social worker or suitably qualified person in preparing a parenting plan as contemplated in section 33. It is obvious from the wording of section 33 that the co- compelled to seek the assistance of a family advocate, social worker or psychologist, or mediation through a social worker or suitably qualified person. It is therefore quite obvious that a party cannot approach the court unless the matter is referred to mediation as discussed above.

It is important to note that the above deals with instances where the parties experience difficulties in exercising their parental rights and responsibilities. Co-holders who are not experiencing difficulties in exercising their parental rights and who are merely entering into a parental plan need not obtain the assistance of a family advocate, social worker or psychologist or go for mediation. Only when the parties have difficulties in exercising their responsibilities and rights are a statement by a family advocate, social worker or psychologist or mediation required.

### **Formalities – Section 34**

A parenting plan must be in writing and signed by the parties to the agreement; and may be registered with a family advocate or made an order of court. An application by co-holders contemplated in section 33(1) for the registration of the parenting plan or for it to be made an order of court must be in the prescribed format and contain the prescribed particulars and be accompanied by a copy of the plan.

An application by co-holders contemplated in section 33(2) for the registration of a parenting plan or for it to be made an order of court must be in the prescribed format and contain the prescribed particulars and be accompanied by a copy of the plan and a statement by a family advocate, social worker or psychologist contemplated to the effect that the plan was prepared after consultation with such family advocate, social worker or psychologist or a social worker or other appropriate person contemplated in section 33(5)(b) to the effect that the plan was prepared after mediation by such social worker or such person.

A parenting plan registered with a family advocate may be amended or terminated by the family advocate on application by the co-holders of parental responsibilities and rights who are parties to the plan. A parenting plan that was made an order of court may be amended or terminated only by an order

of court on application by the co-holders of parental responsibilities and rights who are parties to the plan, by the child, acting with leave of the court or in the child's interest, by any other person acting with leave of the court.

### **Refusal of access or refusal to exercise parental responsibilities and rights – Section 35**

Any person having care or custody of a child who, contrary to an order of any court or to a parental responsibilities and rights agreement that has taken effect as contemplated in section 22, refuses another person who has access to that child or who holds parental responsibilities and rights in respect of that child in terms of that order or agreement to exercise such access or such responsibilities and rights or who prevents that person from exercising such access or such responsibilities and rights is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding one year.

A person having care or custody of a child whereby another person has access to that child or holds parental responsibilities and rights in respect of that child in terms of an order of any court or a parental responsibilities and rights agreement as must upon any change in his or her residential address forthwith in writing notify such other person of such change. A person who fails to comply is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding one year.