

Form 4 removals

In terms of section 12 (1) of the Child Care Act a policeman, social worker or an authorised officer may remove a child from any place without a warrant in the following instances:

- (i) he or she believes that the child is a child in need of care and protection and
- (ii) the delay in obtaining a warrant will prejudice the safety and welfare of the child.

The removal must be done on Form 4 as set out in the Regulations to the Child Care Act. On the form, the person authorised to remove the child must indicate his or her reasons for removing the child and in most instances a removal is done in terms of section 12(1) of the Child Care Act. This type of removals are over utilised and very seldom challenged.

Grounds on which to challenge a form 4 removal

A form 4 removal in terms of section 12 can only be valid if the person authorised to remove the child, in the first place, believes that the child is in need of care and protection. This belief should be based on the presence of certain factors which would determine whether the child is in need of care and protection before the child is removed. These factors are:

1. The child has no parent or guardian; or
2. the child's parent or guardian cannot be traced; or
3. - the child
 - has been abandoned or is without visible means of support;
 - displays behaviour which cannot be controlled by his or her parents or the person in whose custody he or she is;
 - lives in circumstances likely to cause or conduce to his or her seduction, abduction or sexual exploitation
 - lives in or is exposed to circumstances which may seriously harm the physical, mental or social well-being of the child;

- is in a state of physical or mental neglect;
- has been physically, emotionally or sexually abused or ill-treated by his or her parent or guardian or the person in whose custody he or she is; or
- is being maintained in contravention of section 10.

If none of these factors are present then a form 4 removal of a child should be challenged on that ground. The second requirement for removing a child under section 12 without a warrant is that the circumstances in which the child is living should be such that if the child is not immediately removed then his or her safety and welfare would be in jeopardy. So even if there is an indication that the child could be in need of care and protection, the person authorised to remove a child based on section 12 would still not be acting in line with this provision if the child is removed despite the fact that no harm or prejudice to the child's well-being would befall the child if a warrant is first obtained.

In 2005 the Centre for Child Law successfully lodged an urgent application in the Transvaal High Court for an order setting aside a form 4 removal in respect of a six year old girl. The decision to remove the child was challenged based on the fact that the social worker did not follow the correct procedure in that the child concerned was not in need of care and protection and no danger or harm would have been caused in delaying the child's removal until a warrant was obtained. The social worker simply did not heed much attention to the home circumstances of the child before she was removed. Recently newspapers highlighted also the case of a father whose baby girl was removed by social workers in terms of section 12 because *inter alia* the father was blind. The decision to remove the child was set aside and the father was reunited with his child. The case highlighted again the use of form 4 removals on illegitimate grounds and social workers' sometimes clearly unfounded urge to exercise their powers to remove children in terms of section 12.

The proper course of action would be to open a children's court enquiry with a Form 5 which would allow the social worker to investigate whether the child is

indeed in need of care and protection. The decision whether or not to remove the child can be made after such investigation.

Will the Children's Act protect against unjust form 4 removals?

The Children's Act also gives a social worker or police officer discretionary powers to remove a child without a court order. This is done in terms of section 152 of the Act which is not yet in operation. Section 152 of the Children's Act goes a bit further than section 12 of the Child Care Act and requires the discretion to remove the child to be based not only on whether the child is in need of care and protection but that the child should be in need of immediate emergency protection. Furthermore if removal is done based on a belief that a delay in obtaining a court order would jeopardise the child's safety or well-being then the Act requires that the removal of the child from his home must be the only way to secure the child's safety. Removal of the child is essentially the last resort. If the child's safety could be secured by other means for example, the Act empowers the police to remove the person abusing the child, and then the child should not be removed. Any decision must however be based on what would be in the best interests of the child.

The Act emphasises that the determining factor to consider before removing the child should be the child's best interest and first priority should be the safety and well-being of the child. One further improvement made by the Act in its removal procedure under section 152 is that it sets penalties for social workers and police officers who misuse their powers to remove children without a court order.

All these safeguards put in place by the Children's Act are clearly directed at preventing unnecessary removal of children, which currently takes place regularly under removal provisions in the Child Care Act. The extra guidelines on how and when the discretion to exercise removal powers in terms of the Act should be used could go a long way in preventing removals based on flimsy ground. When section 152 comes into operation it will give legal representatives more grounds for challenging unnecessary removals of children.