

CHILD LAW MATTERS

ISSUE 7

FRIDAY 22 FEBRUARY 2008

Developments in Child Law

Parental rights and responsibilities

Dear Colleagues

The law of parent and child has been codified for the first time in South Africa whereas previously this was in the domain of the common law. This issue is an overview of the main provisions on rights and responsibilities in Chapter 3 of the Children's Act. The majority of the sections in chapter 3 have been in operation since 1 July 2007, in particular the sections pertaining parental rights and responsibilities. In future updates we will focus on specific provisions in more detail for example the criteria in terms of which unmarried fathers qualify for full parental rights and responsibilities in terms of section 21. If you have an interest in receiving information about other aspects of chapter 3 of the Act, please do not hesitate to make suggestions in this regard.

Parental rights and responsibilities in the Children's Act 38 of 2005: An overview

Strengthening families and giving effect to children's right to parental and family care are key objectives of the Children's Act. One of the significant improvements effected by the Act is the introduction of extensive and comprehensive provisions on parental rights and responsibilities in respect of children. The common law previously referred to as parental power or parental authority is replaced by parental responsibilities and rights which is more in line with the constitutional shift in family law from parental rights to children's rights. The parent centred approach to rights of custody of and access to a child is replaced with a child centred approach in which it is the child's right to be cared for and have contact with a parent.

Parental rights and responsibilities are dealt with in Chapter 3 of the Act. There are four parts to this chapter and some of its provisions are highlighted herein.

Part 1 sets out rules and requirements regarding the acquisition and loss of parental rights and responsibilities. The provisions indicate what such rights and responsibilities entail, who can acquire them and how they are to be acquired. Some of the significant changes to the law in this regard includes provisions relating to the acquisition of rights and responsibilities by unmarried fathers, granting rights and responsibilities to any person with an interest in the care, well-being and development of the child through agreements, applying for care and contact or guardianship of a child to a High Court, divorce court or children's court and appointing another guardian or care giver for a child through a will. Part 1 wraps up with provisions on court applications to terminate, extend, suspend or restrict parental rights and responsibilities and how the courts are to deal with these and other applications in this regard.

Part 2 deals with the exercise of parental rights and responsibilities by co-holders of such rights and responsibilities. The provisions indicate how co-holders of parental rights and responsibilities may exercise their rights and responsibilities in relation to the child and other co-holders. Decisions which could change or adversely affect the exercise of parental rights and responsibilities of co holders cannot be taken without first considering their views and wishes. Likewise, depending on the age, maturity or development of a child, his or her views and wishes must be taken into account before major decisions involving the child are taken. Such decisions include those which would affect contact between the child and co-holders, decisions to refuse or consent to the marriage, adoption or removal of the child from the Republic, decisions to assign guardianship or care of the child to someone else and decisions which would affect the education, health, living conditions or family relations of the child. Part two ends with provisions on the

responsibilities placed on persons who have no parental rights and responsibilities in respect of a child but who care for the child.

Difficulties may arise between co-holders in the exercise of their parental rights and responsibilities over a child. To address or prevent such difficulties parenting plans can be adopted by the co-holders. Part 3 includes provisions obliging holders of rights and responsibilities to seek to agree on a parenting plan when they are experiencing difficulties before resorting to litigation. In other words, before the parties may approach the court they must try and mediate their dispute. This is in line with the general principle in section 6(4) that conflict should be avoided in matters concerning children. The parenting plan must either be drafted with the assistance of a family advocate, social worker or psychologist or the parties must seek mediation while preparing the parental plan.

Part 3 creates two new offences which has a dramatic effect in the field of child and family law. It is an offence to refuse access to or prevent the exercise of responsibilities and rights in respect of a child by a person who is allowed to have access to the child or who holds such rights and responsibilities in respect of a child. It is also an offence for a person who has care and custody of a child to change his or her residential address without notifying persons holding access rights or parental rights and responsibilities in respect of that child.

For more information on this issue please do not hesitate to contact us

King Regards

Prinslean Mahery
Legal Assistant: Centre for Child Law
Tel: 012 420 6208
Fax: 012 420 4499