

(26 January 2018 – to date)

[This is the **current** version and applies as from **26 January 2018**, i.e. the date of commencement of the Children's Amendment Act 17 of 2016 and the Children's Second Amendment Act 18 of 2016 – **to date**]

CHILDREN'S ACT 38 OF 2005

(Gazette No. 28944, Notice No. 610)

(Commencement date of certain sections: 1 July 2007 [Proc. No. R13, Gazette No. 30030])

(Commencement date of remaining sections: 1 April 2010 [Proc. No. R12, Gazette No. 33076])

As amended by:

*Children's Amendment Act 41 of 2007 - Gazette No. 30884, No. 313. Commencement date: 1 April 2010
[Proc. No. R13, Gazette No. 33076]*

Child Justice Act 75 of 2008 – Gazette No. 32225, No. 549. Commencement date: 1 April 2010.

Judicial Matters Amendment Act 42 of 2013 – Notice 38 in Government Gazette 37254 dated 22 January 2014. Commencement date: 22 January 2014.

*Legal Aid South Africa Act 39 of 2014 – Government Notice 1013 in Government Gazette 38315 dated 9 December 2014. Commencement date: **1 March 2015** [Proc. No. R7, Gazette No. 38512 dated 27 February 2015].*

*Prevention and Combating of Trafficking in Persons Act 7 of 2013 – Government Notice 544 in Government Gazette 36715 dated 29 July 2013. Commencement date: **9 August 2015** – unless otherwise indicated [Proc. No. R. 32, Gazette No. 39078 dated 7 August 2015].*

*Judicial Matters Amendment Act 8 of 2017 - Government Notice 770 in Government Gazette 41018 dated 2 August 2017. Commencement date: **2 August 2017**.*

*Children's Amendment Act 17 of 2016 - Government Notice 42 in Government Gazette 40564 dated 19 January 2017 and Children's Second Amendment Act 18 of 2016 in Government Gazette 40565 dated 19 January 2017. Commencement date of both Acts: **26 January 2018** [Notice No. 49 in Gazette No. 41399 dated 26 January 2018]*

Note:

See the Regulations and Notices for the following:-

1. Court Orders published under Government Notice 441 in Government Gazette 34303 and Government Notice 585 in Government Gazette 34472 regarding foster care orders

2. *Constitutional Court Judgment published under Government Notice 301 in Government Gazette 35246 regarding the constitutional invalidity of sections 151 and 152 of the Children's Act 38 of 2005.*
3. *Court order published under Government Notice 10 in Government Gazette 37222 dated 17 January 2014 regarding adoption orders*

GENERAL EXPLANATORY NOTE:

***** Areas marked with five asterisks indicate omitted provisions which will be inserted by way of an Amendment Bill. That Bill will be dealt with in terms of the procedure prescribed by section 76 of the Constitution - as explained in paragraph 1 of the Memorandum on the Objects of the Bill.

(English text signed by the President.)

(Assented to 8 June 2006.)

ACT

To give effect to certain rights of children as contained in the Constitution; to set out principles relating to the care and protection of children; to define parental responsibilities and rights; to make further provision regarding children's courts; to provide for partial care of children; to provide for early childhood development; to provide for the issuing of contribution orders; to provide for prevention and early intervention; to provide for children in alternative care; to provide for foster care; to provide for child and youth care centres and drop-in centres; to make new provision for the adoption of children; to provide for inter-country adoption; to give effect to the Hague Convention on Inter-country Adoption; to prohibit child abduction and to give effect to the Hague Convention on International Child Abduction; to provide for surrogate motherhood; and to create certain new offences relating to children; and to provide for matters connected therewith.

(Long title substituted by section 1 of Act 41 of 2007)

PREAMBLE

WHEREAS the Constitution establishes a society based on democratic values, social justice and fundamental human rights and seeks to improve the quality of life of all citizens and to free the potential of each person;

AND WHEREAS every child has the rights set out in section 28 of the Constitution;

AND WHEREAS the State must respect, protect, promote and fulfill those rights;

AND WHEREAS protection of children's rights leads to a corresponding improvement in the lives of other sections of the community because it is neither desirable nor possible to protect children's rights in isolation from their families and communities;

AND WHEREAS the United Nations has in the Universal Declaration of Human Rights proclaimed that children are entitled to special care and assistance;

AND WHEREAS the need to extend particular care to the child has been stated in the Geneva Declaration on the Rights of the Child, in the United Nations Declaration on the Rights of the Child, in the Convention on the Rights of the Child and in the African Charter on the Rights and Welfare of the Child and recognised in the Universal Declaration of Human Rights and in the statutes and relevant instruments of specialised agencies and international organisations concerned with the welfare of children;

AND WHEREAS it is necessary to effect changes to existing laws relating to children in order to afford them the necessary protection and assistance so that they can fully assume their responsibilities within the community as well as that the child, for the full and harmonious development of his or her personality, should grow up in a family environment and in an atmosphere of happiness, love and understanding,

BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa, as follows:-

TABLE OF CONTENTS

CHAPTER 1

INTERPRETATION, OBJECTS, APPLICATION AND IMPLEMENTATION OF ACT

1. Interpretation
2. Objects of Act
3. Conflicts with other legislation
4. Implementation of Act
5. Inter-sectoral implementation of Act

CHAPTER 2

GENERAL PRINCIPLES

6. General principles
7. Best interests of child standard
8. Application
9. Best interests of child paramount
10. Child participation
11. Children with disability or chronic illness
12. Social, cultural and religious practices
13. Information on health care
14. Access to court
15. Enforcement of rights
16. Responsibilities of children

17. Age of majority

CHAPTER 3

PARENTAL RESPONSIBILITIES AND RIGHTS

Part 1

Acquisition and loss of parental responsibilities and rights

18. Parental responsibilities and rights
19. Parental responsibilities and rights of mothers
20. Parental responsibilities and rights of married fathers
21. Parental responsibilities and rights of unmarried fathers
22. Parental responsibilities and rights agreements
23. Assignment of contact and care to interested person by order of court
24. Assignment of guardianship by order of court
25. Certain applications regarded as inter-country adoption
26. Person claiming paternity
27. Assignment of guardianship and care
28. Termination, extension, suspension or restriction of parental responsibilities and rights
29. Court proceedings

Part 2

Co-exercise of parental responsibilities and rights

30. Co-holders of parental responsibilities and rights
31. Major decisions involving child
32. Care of child by person not holding parental responsibilities and rights

Part 3

Parenting plans

33. Contents of parenting plans
34. Formalities
35. Refusal of access or refusal to exercise parental responsibilities and rights

Part 4

Miscellaneous

36. Presumption of paternity in respect of child born out of wedlock
37. Refusal to submit to taking of blood samples
38. Effect of subsequent marriage of parents on child
39. Rights of child born of voidable marriage

- 40. Rights of child conceived by artificial fertilisation
- 41. Access to biographical and medical information concerning genetic parents

CHAPTER 4

CHILDREN'S COURTS

Part 1

Establishment, status and jurisdiction

- 42. Children's courts and presiding officers
- 43. Status
- 44. Geographical area of jurisdiction of children's court
- 45. Matters children's court may adjudicate
- 46. Orders children's court may make
- 47. Referral of children by other court for investigation
- 48. Additional powers
- 49. Lay-forum hearings
- 50. Investigations
- 51. Appeals

Part 2

Court Proceedings

- 52. Rules and court proceedings
- 53. Who may approach court
- 54. Legal representation
- 55. Legal representation of children
- 56. Attendance at proceedings
- 57. Compulsory attendance of persons involved in proceedings
- 58. Rights of persons to adduce evidence, question witnesses and produce argument
- 59. Witnesses
- 60. Conduct of proceedings
- 61. Participation of children
- 62. Professional reports ordered by court
- 63. Evidence
- 64. Adjournments
- 65. Monitoring of court orders
- 66. Protection of court case records
- 67. Clerk of court
- 68. Referral of matters by clerk of children's court

Part 3

314. Transitional matters

315. Short title and commencement

Schedule 1

Schedule 2

..... *(Schedule 3 deleted by section 48, Schedule, of Act 7 of 2013)*

Schedule 4

(Table of Contents amended by section 2 of Act 41 of 2007)

CHAPTER 1

INTERPRETATION, OBJECTS, APPLICATION AND IMPLEMENTATION OF ACT

1. Interpretation

(1) In this Act, unless the context indicates otherwise-

“abandoned”, in relation to a child, means a child who-

- (a) has obviously been deserted by the parent, guardian or care-giver; or
- (b) has, for no apparent reason, had no contact with the parent, guardian, or care-giver for a period of at least three months;

“abuse”, in relation to a child, means any form of harm or ill-treatment deliberately inflicted on a child, and includes-

- (a) assaulting a child or inflicting any other form of deliberate injury to a child;
- (b) sexually abusing a child or allowing a child to be sexually abused;
- (c) bullying by another child;
- (d) a labour practice that exploits a child; or
- (e) exposing or subjecting a child to behaviour that may harm the child psychologically or emotionally;

“adopted child” means a child adopted by a person in terms of any law;

“adoption compliance certificate”-

- (a) in relation to a convention country, means a certificate issued in terms of Article 23 of the Hague Convention on Inter-country Adoption; or

- (b) in relation to a non-convention country, means a similar certificate prescribed in the relevant agreement;

“adoption registrar” means the person designated by the Director-General in terms of section 247(1);

“adoption service” includes-

- (a) counselling of the parent of the child and, where applicable, the child;
- (b) an assessment of a child by an adoption social worker in terms of section 230(2);
- (c) an assessment of a prospective adoptive parent by an adoption social worker in terms of section 231(2);
- (d) the gathering of information for proposed adoptions as contemplated in section 237; and
- (e) a report contemplated in section 239(1)(b);

“adoption social worker” means-

- (a) a social worker in private practice-
 - (i) who has a speciality in adoption services and is registered in terms of the Social Service Professions Act, 1978 (Act No. 110 of 1978); and
 - (ii) who is accredited in terms of section 251 to provide adoption services;

(Paragraph (ii) of the definition of “adoption social worker” amended by section 1(a) of Act 18 of 2016)

- (b) a social worker in the employ of a child protection organisation which is accredited in terms of section 251 to provide adoption services; or

(Paragraph (b) of the definition of “adoption social worker” amended by section 1(a) of Act 18 of 2016)

- (c) a social worker in the employ of the Department or a provincial department of social development, including a social worker employed as such on a part-time or contract basis, who has a specialty in adoption services and is registered in terms of the Social Services Professions Act, 1978 (Act No. 110 of 1978);

(Paragraph (c) of the definition of “adoption social worker” added by section 1(a) of Act 18 of 2016)

“adoption working agreement”, for the purpose of Chapter 16, means a written agreement entered into by a child protection organisation accredited in terms of section 259 in the Republic with an

equivalent organisation in another country to facilitate inter-country adoptions between the Republic and the country concerned;

“adoptive parent” means a person who has adopted a child in terms of any law;

“after-care” means the supportive service provided by a social worker or a social service professional to monitor progress with regard to the child's developmental adjustment as part of-

- (a) family preservation or reunification services;
- (b) adoption or placement in alternative care; or
- (c) discharge from alternative care;

(Definition of “after-care” inserted by section 3(a) of Act 41 of 2007)

“alternative care” means care of a child in accordance with section 167;

(Definition of “alternative care” inserted by section 3(a) of Act 41 of 2007)

“area”, in relation to-

- (a) a metropolitan or local municipality, means the area for which the municipality has been established; and
- (b) a district municipality, means those parts of the area for which the municipality has been established which do not fall within the area of a local municipality;

(Definition of “area” inserted by section 3(a) of Act 41 of 2007)

“artificial fertilisation” means the introduction, by means other than natural means, of a male gamete into the internal reproductive organs of a female person for the purpose of human reproduction, including-

- (a) the bringing together of a male and female gamete outside the human body with a view to placing the product of a union of such gametes in the womb of a female person; or
- (b) the placing of the product of a union of male and female gametes which have been brought together outside the human body, in the womb of a female person;

“assessment of a child” means a process of investigating the developmental needs of a child, including his or her family environment or any other circumstances that may have a bearing on the child's need for protection and therapeutic services;

(Definition of “assessment of a child” inserted by section 3(b) of Act 41 of 2007)

“assessment of a programme” means a process, conducted by a suitably qualified person, of determining whether the provision and the content of a programme complies with prescribed national norms and standards;

(Definition of “assessment of a programme” inserted by section 3(b) of Act 41 of 2007)

“authorised officer”, in relation to any specific act, means a person who is authorised in writing by the presiding officer of the children's court to perform that act;

“Bill of Rights” means the Bill of Rights contained in Chapter 2 of the Constitution;

“care”, in relation to a child, includes, where appropriate-

- (a) within available means, providing the child with-
 - (i) a suitable place to live;
 - (ii) living conditions that are conducive to the child's health, well-being and development; and
 - (iii) the necessary financial support;
- (b) safeguarding and promoting the well-being of the child;
- (c) protecting the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation and any other physical, emotional or moral harm or hazards;
- (d) respecting, protecting, promoting and securing the fulfilment of, and guarding against any infringement of, the child's rights set out in the Bill of Rights and the principles set out in Chapter 2 of this Act;
- (e) guiding, directing and securing the child's education and upbringing, including religious and cultural education and upbringing, in a manner appropriate to the child's age, maturity and stage of development;
- (f) guiding, advising and assisting the child in decisions to be taken by the child in a manner appropriate to the child's age, maturity and stage of development;
- (g) guiding the behaviour of the child in a humane manner;
- (h) maintaining a sound relationship with the child;
- (i) accommodating any special needs that the child may have; and

- (j) generally, ensuring that the best interests of the child is the paramount concern in all matters affecting the child;

“care-giver” means any person other than a parent or guardian, who factually cares for a child and includes-

- (a) a foster parent;
- (b) a person who cares for a child with the implied or express consent of a parent or guardian of the child;
- (c) a person who cares for a child whilst the child is in temporary safe care;
- (d) the person at the head of a child and youth care centre where a child has been placed;
- (e) the person at the head of a shelter;
- (f) a child and youth care worker who cares for a child who is without appropriate family care in the community; and
- (g) the child at the head of a child-headed household;

“child” means a person under the age of 18 years;

“child and youth care centre” means a facility described in section 191(1);

(Definition of “child and youth care centre” inserted by section 3(c) of Act 41 of 2007)

“children's court” means a children's court referred to in section 42;

“Child Care Act” means the Child Care Act, 1983 (Act No. 74 of 1983);

“child-headed household” means a household recognised as such in terms of section 137;

(Definition of “child-headed household” inserted by section 3(d) of Act 41 of 2007)

“child labour” means work by a child which-

- (a) is exploitative, hazardous or otherwise inappropriate for a person of that age; and
- (b) places at risk the child's well-being, education, physical or mental health, or spiritual, moral, emotional or social development;

“circumcision”, in relation to a female child, means the removal of the clitoris by any means;

“clerk of the court” means clerk of the court of the relevant magistrate's court; means the person appointed by the Director-General: Justice and Constitutional Development as the clerk of the children's court of the relevant magistrate's court;

“cluster foster care” means the reception of children in foster care in accordance with a cluster foster care scheme registered by the provincial head of social development;

(Definition of “cluster foster care” inserted by section 3(e) of Act 41 of 2007)

“cluster foster care scheme” means a scheme providing for the reception of children in foster care, managed by a nonprofit organisation and registered by the provincial head of social development for this purpose;

(Definition of “cluster foster care scheme” inserted by section 3(e) of Act 41 of 2007)

“college” means college as defined in the Continuing Education and Training Act, 2006 (Act No. 16 of 2006);

(Definition of “college” inserted by section 1(b) of Act 18 of 2016)

“commercial sexual exploitation”, in relation to a child means the procurement of a child to perform sexual activities for financial or other reward, including acts of prostitution or pornography, irrespective of whether that reward is claimed by, payable to or shared with the procurer, the child, the parent or care-giver of the child, or any other person;

(Definition of “commercial sexual exploitation” substituted by section 48, Schedule, of Act 7 of 2013)

“commissioning parent” means a person who enters into a surrogate motherhood agreement with a surrogate mother;

“Constitution” means the Constitution of the Republic of South Africa, 1996;

(Definition of “Constitution” inserted by section 1(a) of Act 17 of 2016)

“contact”, in relation to a child, means-

- (a) maintaining a personal relationship with the child; and
- (b) if the child lives with someone else-
 - (i) communication on a regular basis with the child in person, including-
 - (aa) visiting the child; or

- (bb) being visited by the child; or
- (ii) communication on a regular basis with the child in any other manner, including-
 - (aa) through the post; or
 - (bb) by telephone or any other form of electronic communication;

“contribution order” means an order referred to in section 161, and includes a provisional contribution order referred to in section 162(2);

“convention country” means, in accordance with the wording of Article 45 of the Hague Convention on Inter-country Adoption, any country in which the Convention has entered into force, except for a country against whose accession the Republic has raised an objection under Article 44 of the Convention;

“delegation”, in relation to a duty, includes an instruction to perform the duty;

“Department” means the national department responsible for the provision of social development services;

“designated child protection organisation” means an organisation designated in terms of section 107 to perform designated child protection services;

(Definition of “designated child protection organisation” inserted by section 3(f) of Act 41 of 2007)

“designated child protection service” means a child protection service referred to in section 105;

(Definition of “designated child protection service” inserted by section 3(f) of Act 41 of 2007)

“designated social worker” means a social worker in the service of-

- (a) the Department or a provincial department of social development;
- (b) a designated child protection organisation; or
- (c) a municipality;

“Director-General” means the Director-General of the Department, or where the context indicates the Director-General of another department, that Director-General;

“Divorce Act” means the Divorce Act, 1979 (Act No. 70 of 1979);

“divorce court” means the divorce court established in terms of section 10 of the Administration Amendment Act, 1929 (Act No. 9 of 1929);

“drop-in centre” means a facility referred to in section 213;

(Definition of “drop-in centre” inserted by section 3(g) of Act 41 of 2007)

“early childhood development programme” means a programme referred to in section 91(3);

(Definition of “early childhood development programme” inserted by section 3(g) of Act 41 of 2007)

“early childhood development services” means services referred to in section 91(2);

(Definition of “early childhood development services” inserted by section 3(g) of Act 41 of 2007)

“early intervention programme” means a programme referred to in section 143(2);

(Definition of “early intervention programme” inserted by section 3(g) of Act 41 of 2007)

“exploitation”, in relation to a child, includes-

- (a) all forms of slavery or practices similar to slavery, including debt bondage or forced marriage;
- (b) sexual exploitation;
- (c) servitude;
- (d) forced labour or services;
- (e) child labour prohibited in terms of section 141; and
- (f) the removal of body parts;

“family advocate” means a family advocate appointed in terms of the Mediation in Certain Divorce Matters Act;

“family member”, in relation to a child, means -

- (a) a parent of the child;
- (b) any other person who has parental responsibilities and rights in respect of the child;
- (c) a grandparent, brother, sister, uncle, aunt or cousin of the child; or
- (d) any other person with whom the child has developed a significant relationship, based on psychological or emotional attachment, which resembles a family relationship;

“foster care” means care of a child as described in section 180(1) and includes foster care in a registered cluster foster care scheme;

(Definition of “foster care” inserted by section 3(h) of Act 41 of 2007)

“foster parent” means a person who has foster care of a child by order of the children's court, and includes an active member of an organisation operating a cluster foster care scheme and who has been assigned responsibility for the foster care of a child;

(Definition of “foster parent” inserted by section 3(h) of Act 41 of 2007)

“gamete” means either of the two generative cells essential for human reproduction;

“genital mutilation”, in relation to a female child, means the partial or complete removal of any part of the genitals, and includes circumcision of female children;

“grade 12” means grade 12 as defined in section 1 of the Higher Education Act, 1997 (Act No. 101 of 1997);

(Definition of “grade 12” inserted by section 1(c) of Act 18 of 2016)

“guardian” means a parent or other person who has guardianship of a child;

“guardianship”, in relation to a child, means guardianship as contemplated in section 18;

“Hague Convention on Inter-country Adoption” means the Hague Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption signed at the Hague on 29 May 1993, a copy of the English text of which is set out in Schedule 1 to this Act;

“Hague Convention on International Child Abduction” means the Hague Convention on the Civil Aspects of International Child Abduction signed at the Hague on 25 October 1980, a copy of the English text of which is set out in Schedule 2 to this Act;

“High Court” means the High Court contemplated in section 166 of the Constitution;

“higher education” means higher education as defined in section 1 of the Higher Education Act, 1997 (Act No. 101 of 1997).

(Definition of “higher education” inserted by section 1(d) of Act 18 of 2016)

“in need of care and protection”, in relation to a child, means a child who is in a situation contemplated in section 150(1);

“labour inspector” means a labour inspector appointed under section 63 of the Basic Conditions of Employment Act, 1997 (Act No. 75 of 1997);

“Maintenance Act” means the Maintenance Act, 1998 (Act No. 99 of 1998);

“marriage” means a marriage-

- (a) recognised in terms of South African law or customary law; or
- (b) concluded in accordance with a system of religious law subject to specified procedures,

and any reference to a husband, wife, widower, widow, divorced person, married person or spouse must be construed accordingly;

“MEC for social development” means the member of the Executive Council of a province who is responsible for social development in the province;

“Mediation in Certain Divorce Matters Act” means the Mediation in Certain Divorce Matters Act, 1987 (Act No. 24 of 1987);

“medical practitioner” means a person registered or deemed to be registered as a medical practitioner under the Health Professions Act, 1974 (Act No. 56 of 1974) and includes a dentist so registered or deemed to be registered;

“mental illness” means mental illness as defined in the Mental Health Care Act, 2002 (Act No. 17 of 2002);

“midwife” means a person registered as a midwife under the Nursing Act, 1978 (Act No. 50 of 1978);
(Definition of “midwife” inserted by section 3(i) of Act 41 of 2007)

“Minister” means the Cabinet member responsible for social development, or where the context indicates another Minister, that Minister;

“municipality” means a metropolitan, local or district municipality established in terms of section 12 of the Local Government: Municipal Structures Act, 1998 (Act No. 117 of 1998), but to the extent that a municipality may or must implement a provision of this Act in or in relation to an area which falls within the area of both a local municipality and a district municipality, “municipality” in such a provision means the relevant local municipality;

(Definition of “municipality” inserted by section 3(j) of Act 41 of 2007)

“Municipal Systems Act” means the Local Government: Municipal Systems Act, 2000 (Act No. 32 of 2000);

“National Child Protection Register” means the register referred to in section 111;

“neglect”, in relation to a child, means a failure in the exercise of parental responsibilities to provide for the child's basic physical, intellectual, emotional or social needs;

“nurse” means a person registered as a nurse under the Nursing Act, 1978 (Act No. 50 of 1978);

(Definition of “nurse” inserted by section 3(k) of Act 41 of 2007)

“organ of state” means an organ of state as defined in section 239 of the Constitution;

“orphan” means a child who has no surviving parent caring for him or her;

“parent”, in relation to a child, includes the adoptive parent of a child, but excludes-

- (a) the biological father of a child conceived through the rape of or incest with the child's mother;
- (b) any person who is biologically related to a child by reason only of being a gamete donor for purposes of artificial fertilisation; and
- (c) a parent whose parental responsibilities and rights in respect of a child have been terminated;

“parental responsibilities and rights”, in relation to a child, means the responsibilities and the rights referred to in section 18;

“partial care” means partial care referred to in section 76;

(Definition of “partial care” inserted by section 3(l) of Act 41 of 2007)

“party”, in relation to a matter before a children's court, means-

- (a) a child involved in the matter;
- (b) a parent;
- (c) a person who has parental responsibilities and rights in respect of the child;
- (d) a prospective adoptive or foster parent of the child;
- (e) the department or the designated child protection organisation managing the case of the child; or
- (f) any other person admitted or recognised by the court as a party;

“permanency plan” means a documented plan referred to in section 157(1);

(Definition of “permanency plan” inserted by section 3(m) of Act 41 of 2007)

“person unsuitable to work with children” means a person listed in Part B of the National Child Protection Register;

“police official” means any member of the South African Police Service or a municipal police service appointed in terms of the South African Police Service Act, 1995 (Act No. 68 of 1995);

“prescribed” means prescribed by regulation;

“presiding officer” means a presiding officer of a children's court designated in terms of section 42;

“prevention programme” means a programme referred to in section 143(1);

(Definition of “prevention programme” inserted by section 3(n) of Act 41 of 2007)

“provincial department of social development” means the department within a provincial administration responsible for social development in the province;

“provincial head of social development” means the head of the provincial department of social development;

“psychologist” means a psychologist registered or deemed to be registered as such in terms of the Health Professions Act, 1974 (Act No. 56 of 1974);

“Public Service Act” means the Public Service Act, 1994 (Proclamation No. 103 of 1994);

“quality assurance process” means the process referred to in section 211;

(Definition of “quality assurance process” inserted by section 3(o) of Act 41 of 2007)

“RACAP” means the Register on Adoptable Children and Prospective Adoptive Parents contemplated in section 232;

“regulation” means a regulation made in terms of this Act;

“removal of body parts” means the removal of any organ or other body part from a living person in contravention of the National Health Act, 2003 (Act No. 61 of 2003);

“residential care programme” means a programme described in section 191(2) which is or must be offered at a child and youth care centre;

(Definition of “residential care programme” inserted by section 3(p) of Act 41 of 2007)

“respondent” means any person legally liable to maintain or to contribute towards the maintenance of a child for whose maintenance, treatment or special needs a contribution order is sought or has been made in terms of Chapter 10;

“school” means-

- (a) an independent school registered or deemed to be registered in terms of section 46 of the South African Schools Act, 1996 (Act No. 84 of 1996); or
- (b) a public school contemplated in Chapter 3 of the South African Schools Act, 1996 (Act No. 84 of 1996);

“secure care” means the physical containment in a safe and healthy environment-

- (a) of children with behavioural and emotional difficulties; and
- (b) of children in conflict with the law;

(Definition of “secure care” inserted by section 3(q) of Act 41 of 2007)

“serve”, in relation to any notice, document or other process in terms of this Act, means to serve such notice, document or other process in accordance with the procedure provided for the serving of process in terms of the Magistrates’ Courts Act, 1944 (Act No. 32 of 1944), and the rules applying to the proceedings of magistrates’ courts;

“sexual abuse”, in relation to a child, means-

- (a) sexually molesting or assaulting a child or allowing a child to be sexually molested or assaulted;
- (b) encouraging, inducing or forcing a child to be used for the sexual gratification of another person;
- (c) using a child in or deliberately exposing a child to sexual activities or pornography; or
- (d) procuring or allowing a child to be procured for commercial sexual exploitation or in any way participating or assisting in the commercial sexual exploitation of a child;

“sexual offence” means sexual offence as defined in the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007), and any offence of a sexual nature in any other law;

(Definition of “sexual offence” inserted by section 1(b) of Act 17 of 2016)

“social service professional” includes a probation officer, development worker, child and youth care worker, youth worker, social auxiliary worker and social security worker who are registered as such in terms of the Social Service Professions Act, 1978 (Act No. 110 of 1978);

“social worker” means a person who is registered or deemed to be registered as a social worker in terms of the Social Service Professions Act, 1978 (Act No. 110 of 1978);

“street child” means a child who-

- (a) because of abuse, neglect, poverty, community upheaval or any other reason, has left his or her home, family or community and lives, begs or works on the streets; or
- (b) because of inadequate care, begs or works on the streets but returns home at night;

“surrogate mother” means an adult woman who enters into a surrogate motherhood agreement with the commissioning parent;

“surrogate motherhood agreement” means an agreement between a surrogate mother and a commissioning parent in which it is agreed that the surrogate mother will be artificially fertilised for the purpose of bearing a child for the commissioning parent and in which the surrogate mother undertakes to hand over such a child to the commissioning parent upon its birth, or within a reasonable time thereafter, with the intention that the child concerned becomes the legitimate child of the commissioning parent;

“temporary safe care”, in relation to a child, means care of a child in an approved child and youth care centre, shelter or private home or any other place, where the child can safely be accommodated pending a decision or court order concerning the placement of the child, but excludes care of a child in a prison or police cell;

“traditional authority” means any authority which in terms of indigenous law or any other law administers the affairs of any group of indigenous people or any other persons resident within an area under the control of a traditional leader;

“this Act” includes-

- (a) any regulation made in terms of this Act;
- (b) the rules regulating the proceedings of the children's courts in terms of section 52;

“trafficking”

(Definition of “trafficking” repealed by section 48, Schedule, of Act 7 of 2013)

“UN Protocol to Prevent Trafficking in Persons”

(Definition of “UN Protocol to Prevent Trafficking in Persons” repealed by section 48, Schedule, of Act 7 of 2013)

- (2) In addition to the meaning assigned to the terms “custody” and “access” in any law, and the common law, the terms “custody” and “access” in any law must be construed to also mean “care” and “contact” as defined in this Act.
- (3) In this Act, a word or expression derived from a word or expression defined in subsection (1) has a corresponding meaning unless the context indicates that another meaning is intended.
- (4) Any proceedings arising out of the application of the Administration Amendment Act, 1929 (Act No. 9 of 1929), the Divorce Act, the Maintenance Act, the Domestic Violence Act, 1998 (Act No. 116 of 1998), and the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998), in so far as these Acts relate to children, may not be dealt with in a children's court.

(Commencement date of section 1: 1 July 2007)

2. Objects of Act

The objects of this Act are-

- (a) to promote the preservation and strengthening of families;
- (b) to give effect to the following constitutional rights of children, namely-
 - (i) family care or parental care or appropriate alternative care when removed from the family environment;
 - (ii) social services;
 - (iii) protection from maltreatment, neglect, abuse or degradation; and
 - (iv) that the best interests of a child are of paramount importance in every matter concerning the child;
- (c) to give effect to the Republic's obligations concerning the well-being of children in terms of international instruments binding on the Republic;
- (d) to make provision for structures, services and means for promoting and monitoring the sound physical, psychological, intellectual, emotional and social development of children;

- (e) to strengthen and develop community structures which can assist in providing care and protection for children;
- (f) to protect children from discrimination, exploitation and any other physical, emotional or moral harm or hazards;
- (g) to provide care and protection to children who are in need of care and protection;
- (h) to recognise the special needs that children with disabilities may have; and
- (i) generally, to promote the protection, development and well-being of children.

(Commencement date of section 2: 1 July 2007)

3. Conflicts with other legislation

- (1) In the event of a conflict between a section of this Act and-
 - (a) provincial legislation relating to the protection and well-being of children, the conflict must be resolved in terms of section 146 of the Constitution; and
 - (b) a municipal by-law relating to the protection and well-being of children, the conflict must be resolved in terms of section 156 of the Constitution.
- (2) In the event of a conflict between a regulation made in terms of this Act and-
 - (a) an Act of Parliament, the Act of Parliament prevails;
 - (b) provincial legislation, the conflict must be resolved in terms of section 146 of the Constitution; and
 - (c) a municipal by-law, the conflict must be resolved in terms of section 156 of the Constitution.
- (3) For the proper application of subsection (2)(b) the Minister must in terms of section 146(6) of the Constitution submit all regulations made in terms of this Act and which affect a province, to the National Council of Provinces for approval.
- (4) In this section “regulation” means-
 - (a) a regulation made in terms of this Act; and
 - (b) a rule regulating the proceedings of children's courts in terms of section 52.

(Commencement date of section 3: 1 July 2007)

4. Implementation of Act

- (1) This Act must be implemented by organs of state in the national, provincial and, where applicable, local spheres of government subject to any specific section of this Act and regulations allocating roles and responsibilities, in an integrated, co-ordinated and uniform manner.
- (2) Recognising that competing social and economic needs exist, organs of state in the national, provincial and where applicable, local spheres of government must, in the implementation of this Act, take reasonable measures to the maximum extent of their available resources to achieve the realisation of the objects of this Act.

(Commencement date of section 4: 1 July 2007)

5. Inter-sectoral implementation of Act

To achieve the implementation of this Act in the manner referred to in section 4, all organs of state in the national, provincial and, where applicable, local spheres of government involved with the care, protection and well-being of children must co-operate in the development of a uniform approach aimed at co-ordinating and integrating the services delivered to children.

(Commencement date of section 5: 1 July 2007)

CHAPTER 2 GENERAL PRINCIPLES

6. General principles

- (1) The general principles set out in this section guide-
 - (a) the implementation of all legislation applicable to children, including this Act; and
 - (b) all proceedings, actions and decisions by any organ of state in any matter concerning a child or children in general.
- (2) All proceedings, actions or decisions in a matter concerning a child must-
 - (a) respect, protect, promote and fulfil the child's rights set out in the Bill of Rights, the best interests of the child standard set out in section 7 and the rights and principles set out in this Act, subject to any lawful limitation;

- (b) respect the child's inherent dignity;
 - (c) treat the child fairly and equitably;
 - (d) protect the child from unfair discrimination on any ground, including on the grounds of the health status or disability of the child or a family member of the child;
 - (e) recognise a child's need for development and to engage in play and other recreational activities appropriate to the child's age; and
 - (f) recognise a child's disability and create an enabling environment to respond to the special needs that the child has.
- (3) If it is in the best interests of the child, the child's family must be given the opportunity to express their views in any matter concerning the child.
- (4) In any matter concerning a child-
- (a) an approach which is conducive to conciliation and problem-solving should be followed and a confrontational approach should be avoided; and
 - (b) a delay in any action or decision to be taken must be avoided as far as possible.
- (5) A child, having regard to his or her age, maturity and stage of development, and a person who has parental responsibilities and rights in respect of that child, where appropriate, must be informed of any action or decision taken in a matter concerning the child which significantly affects the child.

(Commencement date of section 6: 1 July 2007)

7. Best interests of child standard

- (1) Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely-
- (a) the nature of the personal relationship between-
 - (i) the child and the parents, or any specific parent; and
 - (ii) the child and any other care-giver or person relevant in those circumstances;
 - (b) the attitude of the parents, or any specific parent, towards-

- (i) the child; and
- (ii) the exercise of parental responsibilities and rights in respect of the child;
- (c) the capacity of the parents, or any specific parent, or of any other care-giver or person, to provide for the needs of the child, including emotional and intellectual needs;
- (d) 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-
 - (i) both or either of the parents; or
 - (ii) any brother or sister or other child, or any other care-giver or person, with whom the child has been living;
- (e) 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;
- (f) the need for the child-
 - (i) to remain in the care of his or her parent, family and extended family; and
 - (ii) to maintain a connection with his or her family, extended family, culture or tradition;
- (g) the child's-
 - (i) age, maturity and stage of development;
 - (ii) gender;
 - (iii) background; and
 - (iv) any other relevant characteristics of the child;
- (h) the child's physical and emotional security and his or her intellectual, emotional, social and cultural development;
- (i) any disability that a child may have;
- (j) any chronic illness from which a child may suffer;

- (k) 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;
 - (l) the need to protect the child from any physical or psychological harm that may be caused by-
 - (i) subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour; or
 - (ii) exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person;
 - (m) any family violence involving the child or a family member of the child; and
 - (n) which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child.
- (2) In this section “parent” includes any person who has parental responsibilities and rights in respect of a child.

(Commencement date of section 7: 1 July 2007)

8. Application

- (1) The rights which a child has in terms of this Act supplement the rights which a child has in terms of the Bill of Rights.
- (2) All organs of state in any sphere of government and all officials, employees and representatives of an organ of state must respect, protect and promote the rights of children contained in this Act.
- (3) A provision of this Act binds both natural or juristic persons, to the extent that it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

(Commencement date of section 8: 1 July 2007)

9. Best interests of child paramount

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.

(Commencement date of section 9: 1 July 2007)

10. Child participation

Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration.

(Commencement date of section 10: 1 July 2007)

11. Children with disability or chronic illness

- (1) In any matter concerning a child with a disability due consideration must be given to-
 - (a) providing the child with parental care, family care or special care as and when appropriate;
 - (b) making it possible for the child to participate in social, cultural, religious and educational activities, recognising the special needs that the child may have;
 - (c) providing the child with conditions that ensure dignity, promote self-reliance and facilitate active participation in the community; and
 - (d) providing the child and the child's care-giver with the necessary support services.
- (2) In any matter concerning a child with chronic illness due consideration must be given to-
 - (a) providing the child with parental care, family care or special care as and when appropriate;
 - (b) providing the child with conditions that ensure dignity, promote self-reliance and facilitate active participation in the community; and
 - (c) providing the child with the necessary support services.
- (3) A child with a disability or chronic illness has the right not to be subjected to medical, social, cultural or religious practices that are detrimental to his or her health, well-being or dignity.

(Commencement date of section 11: 1 July 2007)

12. Social, cultural and religious practices

- (1) Every child has the right not to be subjected to social, cultural and religious practices which are detrimental to his or her well-being.
- (2) A child-

- (a) below the minimum age set by law for a valid marriage may not be given out in marriage or engagement; and
 - (b) above that minimum age may not be given out in marriage or engagement without his or her consent.
- (3) Genital mutilation or the circumcision of female children is prohibited.
- (4) Virginitv testing of children under the age of 16 is prohibited.
- (5) Virginitv testing of children older than 16 may only be performed?*[sic]*
- (a) if the child has given consent to the testing in the prescribed manner;
 - (b) after proper counselling of the child; and
 - (c) in the manner prescribed.
- (6) The results of a virginitv test may not be disclosed without the consent of the child.
- (7) The body of a child who has undergone virginitv testing may not be marked.
- (8) Circumcision of male children under the age of 16 is prohibited, except when-
- (a) circumcision is performed for religious purposes in accordance with the practices of the religion concerned and in the manner prescribed; or
 - (b) circumcision is performed for medical reasons on the recommendation of a medical practitioner.
- (9) Circumcision of male children older than 16 may only be performed-
- (a) if the child has given consent to the circumcision in the prescribed manner;
 - (b) after proper counselling of the child; and
 - (c) in the manner prescribed.
- (10) Taking into consideration the child's age, maturity and stage of development, every male child has the right to refuse circumcision.

13. Information on health care

- (1) Every child has the right to-
 - (a) have access to information on health promotion and the prevention and treatment of ill-health and disease, sexuality and reproduction;
 - (b) have access to information regarding his or her health status;
 - (c) have access to information regarding the causes and treatment of his or her health status; and
 - (d) confidentiality regarding his or her health status and the health status of a parent, care-giver or family member, except when maintaining such confidentiality is not in the best interests of the child.
- (2) Information provided to children in terms of this subsection must be relevant and must be in a format accessible to children, giving due consideration to the needs of disabled children.

(Commencement date of section 13: 1 July 2007)

14. Access to court

Every child has the right to bring, and to be assisted in bringing, a matter to a court, provided that matter falls within the jurisdiction of that court.

(Commencement date of section 14: 1 July 2007)

15. Enforcement of rights

- (1) Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights or this Act has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights.
- (2) The persons who may approach a court, are:
 - (a) A child who is affected by or involved in the matter to be adjudicated;
 - (b) anyone acting in the interest of the child or on behalf of another person who cannot act in their own name;
 - (c) anyone acting as a member of, or in the interest of, a group or class of persons; and
 - (d) anyone acting in the public interest.

(Commencement date of section 15: 1 July 2007)

16. Responsibilities of children

Every child has responsibilities appropriate to the child's age and ability towards his or her family, community and the state.

(Commencement date of section 16: 1 July 2007)

17. Age of majority

A child, whether male or female, becomes a major upon reaching the age of 18 years.

(Commencement date of section 17: 1 July 2007)

CHAPTER 3 PARENTAL RESPONSIBILITIES AND RIGHTS

Part 1 Acquisition and loss of parental responsibilities and rights

18. Parental responsibilities and rights

- (1) A person may have either full or specific parental responsibilities and rights in respect of a child.
- (2) The parental responsibilities and rights that a person may have in respect of a child, include the responsibility and the right-
 - (a) to care for the child;
 - (b) to maintain contact with the child;
 - (c) to act as guardian of the child; and
 - (d) to contribute to the maintenance of the child.
- (3) Subject to subsections (4) and (5), a parent or other person who acts as guardian of a child must-
 - (a) administer and safeguard the child's property and property interests;
 - (b) assist or represent the child in administrative, contractual and other legal matters; or

- (c) give or refuse any consent required by law in respect of the child, including-
 - (i) consent to the child's marriage;
 - (ii) consent to the child's adoption;
 - (iii) consent to the child's departure or removal from the Republic;
 - (iv) consent to the child's application for a passport; and
 - (v) consent to the alienation or encumbrance of any immovable property of the child.
- (4) Whenever more than one person has guardianship of a child, each one of them is competent, subject to subsection (5), any other law or any order of a competent court to the contrary, to exercise independently and without the consent of the other any right or responsibility arising from such guardianship.
- (5) Unless a competent court orders otherwise, the consent of all the persons that have guardianship of a child is necessary in respect of matters set out in subsection (3)(c).

(Commencement date of section 18: 1 July 2007)

19. Parental responsibilities and rights of mothers

- (1) The biological mother of a child, whether married or unmarried, has full parental responsibilities and rights in respect of the child.
- (2) If-
 - (a) the biological mother of a child is an unmarried child who does not have guardianship in respect of the child; and
 - (b) 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.
- (3) This section does not apply in respect of a child who is the subject of a surrogacy agreement.

(Commencement date of section 19: 1 July 2007)

20. Parental responsibilities and rights of married fathers

The biological father of a child has full parental responsibilities and rights in respect of the child-

- (a) if he is married to the child's mother; or
- (b) if he was married to the child's mother at-
 - (i) the time of the child's conception;
 - (ii) the time of the child's birth; or
 - (iii) any time between the child's conception and birth.

(Commencement date of section 20: 1 July 2007)

21. Parental responsibilities and rights of unmarried fathers

- (1) 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-
 - (a) if at the time of the child's birth he is living with the mother in a permanent life-partnership; or
 - (b) if he, regardless of whether he has lived or is living with the mother-
 - (i) 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;
 - (ii) contributes or has attempted in good faith to contribute to the child's upbringing for a reasonable period; and
 - (iii) contributes or has attempted in good faith to contribute towards expenses in connection with the maintenance of the child for a reasonable period.
- (2) This section does not affect the duty of a father to contribute towards the maintenance of the child.
- (3)
 - (a) If there is a dispute between the biological father referred to in subsection (1) and the biological mother of a child with regard to the fulfilment by that father of the conditions set out in subsection (1)(a) or (b), the matter must be referred for mediation to a family advocate, social worker, social service professional or other suitably qualified person.
 - (b) Any party to the mediation may have the outcome of the mediation reviewed by a court.

- (4) This section applies regardless of whether the child was born before or after the commencement of this Act.

(Commencement date of section 21: 1 July 2007)

22. Parental responsibilities and rights agreements

- (1) Subject to subsection (2), 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-
- (a) 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
 - (b) any other person having an interest in the care, well-being and development of the child.
- (2) The mother or other person who has parental responsibilities and rights in respect of a child may only confer by agreement upon a person contemplated in subsection (1) 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.
- (3) A parental responsibilities and rights agreement must be in the prescribed format and contain the prescribed particulars.
- (4) Subject to subsection (6), a parental responsibilities and rights agreement takes effect only if-
- (a) registered with the family advocate; or
 - (b) 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.
- (5) 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.
- (6)
- (a) A parental responsibilities and rights agreement registered by the family advocate may be amended or terminated by the family advocate on application-
 - (i) by a person having parental responsibilities and rights in respect of the child;
 - (ii) by the child, acting with leave of the court; or

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

23. Assignment of contact and care to interested person by order of court

- (1) 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-
 - (a) contact with the child; or
 - (b) care of the child.
- (2) When considering an application contemplated in subsection (1), the court must take into account-
 - (a) the best interests of the child;
 - (b) the relationship between the applicant and the child, and any other relevant person and the child;
 - (c) the degree of commitment that the applicant has shown towards the child;
 - (d) the extent to which the applicant has contributed towards expenses in connection with the birth and maintenance of the child; and
 - (e) any other fact that should, in the opinion of the court, be taken into account.
- (3) 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-

- (a) 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
 - (b) may suspend the first-mentioned application on any conditions it may determine.
- (4) 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.

24. Assignment of guardianship by order of court

- (1) 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.
- (2) When considering an application contemplated in subsection (1), the court must take into account-
- (a) the best interests of the child;
 - (b) the relationship between the applicant and the child, and any other relevant person and the child; and
 - (c) any other fact that should, in the opinion of the court, be taken into account.
- (3) 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.

25. Certain applications regarded as inter-country adoption

When application is made in terms of section 24 by a non-South African citizen for guardianship of a child, the application must be regarded as an inter-country adoption for the purposes of the Hague Convention on Inter-country Adoption and Chapter 16 of this Act.

26. Person claiming paternity

- (1) A person who is not married to the mother of a child and who is or claims to be the biological father of the child may-
- (a) apply for an amendment to be effected to the registration of birth of the child in terms of section 11(4) of the Births and Deaths Registration Act, 1992 (Act No. 51 of 1992), identifying him as the father of the child, if the mother consents to such amendment; or
 - (b) apply to a court for an order confirming his paternity of the child, if the mother-

- (i) refuses to consent to such amendment;
- (ii) is incompetent to give consent due to mental illness;
- (iii) cannot be located; or
- (iv) is deceased.

(2) This section does not apply to-

- (a) the biological father of a child conceived through the rape of or incest with the child's mother; or
- (b) any person who is biologically related to a child by reason only of being a gamete donor for purposes of artificial fertilisation.

27. Assignment of guardianship and care

(1)

- (a) A parent who is the sole guardian of a child may appoint a fit and proper person as guardian of the child in the event of the death of the parent.
- (b) A parent who has the sole care of a child may appoint a fit and proper person to be vested with care of the child in the event of the death of the parent.

(2) An appointment in terms of subsection (1) must be contained in a will made by the parent.

(3) A person appointed in terms of subsection (1) acquires guardianship or care, as the case may be, in respect of a child-

- (a) after the death of the parent; and
- (b) upon the person's express or implied acceptance of the appointment.

(4) If two or more persons are appointed as guardians or to be vested with the care of the child, any one or more or all of them may accept the appointment except if the appointment provides otherwise.

(Commencement date of section 27: 1 July 2007)

28. Termination, extension, suspension or restriction of parental responsibilities and rights

- (1) A person referred to in subsection (3) may apply to the High Court, a divorce court in a divorce matter or a children's court for an order-
 - (a) 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
 - (b) 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.
- (2) An application in terms of subsection (1) may be combined with an application in terms of section 23 for the assignment of contact and care in respect of the child to the applicant in terms of that section.
- (3) An application for an order referred to in subsection (1) may be brought-
 - (a) by a co-holder of parental responsibilities and rights in respect of the child;
 - (b) by any other person having a sufficient interest in the care, protection, well-being or development of the child;
 - (c) by the child, acting with leave of the court;
 - (d) in the child's interest by any other person, acting with leave of the court; or
 - (e) by a family advocate or the representative of any interested organ of state.
- (4) When considering such application the court must take into account-
 - (a) the best interests of the child;
 - (b) the relationship between the child and the person whose parental responsibilities and rights are being challenged;
 - (c) the degree of commitment that the person has shown towards the child; and
 - (d) any other fact that should, in the opinion of the court, be taken into account.

29. Court proceedings

- (1) 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.

- (2) 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.
- (3) The court hearing an application contemplated in subsection (1) 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.
- (4) When considering an application contemplated in subsection (1) the court must be guided by the principles set out in Chapter 2 to the extent that those principles are applicable to the matter before it.
- (5) The court may for the purposes of the hearing order that-
 - (a) a report and recommendations of a family advocate, a social worker or other suitably qualified person must be submitted to the court;
 - (b) a matter specified by the court must be investigated by a person designated by the court;
 - (c) a person specified by the court must appear before it to give or produce evidence; or
 - (d) the applicant or any party opposing the application must pay the costs of any such investigation or appearance.
- (6) The court may, subject to section 55-
 - (a) appoint a legal practitioner to represent the child at the court proceedings; and
 - (b) 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.
- (7) 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).

Part 2

Co-exercise of parental responsibilities and rights

30. Co-holders of parental responsibilities and rights

- (1) More than one person may hold parental responsibilities and rights in respect of the same child.

- (2) 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 this Act, any other law or an order of court provides otherwise.
- (3) 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.
- (4) An agreement in terms of subsection (3) 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.

(Commencement date of section 30: 1 July 2007)

31. Major decisions involving child

- (1)
 - (a) Before a person holding parental responsibilities and rights in respect of a child takes any decision contemplated in paragraph (b) involving the child, that person must give due consideration to any views and wishes expressed by the child, bearing in mind the child's age, maturity and stage of development.
 - (b) A decision referred to in paragraph (a) is any decision-
 - (i) in connection with a matter listed in section 18(3)(c);
 - (ii) affecting contact between the child and a co-holder of parental responsibilities and rights;
 - (iii) regarding the assignment of guardianship or care in respect of the child to another person in terms of section 27; or
 - (iv) which is likely to significantly change, or to have an adverse effect on, the child's living conditions, education, health, personal relations with a parent or family member or, generally, the child's well-being.
- (2)
 - (a) Before a person holding parental responsibilities and rights in respect of a child takes any decision contemplated in paragraph (b), that person must give due consideration to any views and wishes expressed by any co-holder of parental responsibilities and rights in respect of the child.

- (b) A decision referred to in paragraph (a) is any decision which is likely to change significantly, or to have a significant adverse effect on, the co-holder's exercise of parental responsibilities and rights in respect of the child.

(Commencement date of section 31: 1 July 2007)

32. Care of child by person not holding parental responsibilities and rights

- (1) A person who has no parental responsibilities and rights in respect of a child but who voluntarily cares for the child either indefinitely, temporarily or partially, including a care-giver who otherwise has no parental responsibilities and rights in respect of a child, must, whilst the child is in that person's care-
- (a) safeguard the child's health, well-being and development; and
- (b) protect the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation, and any other physical, emotional or mental harm or hazards.
- (2) Subject to section 129, a person referred to in subsection (1) may exercise any parental responsibilities and rights reasonably necessary to comply with subsection (1), including the right to consent to any medical examination or treatment of the child if such consent cannot reasonably be obtained from the parent or guardian of the child.
- (3) A court may limit or restrict the parental responsibilities and rights which a person may exercise in terms of subsection (2).
- (4) A person referred to in subsection (1) may not-
- (a) hold himself or herself out as the biological or adoptive parent of the child; or
- (b) deceive the child or any other person into believing that that person is the biological or adoptive parent of the child.

Part 3

Parenting plans

33. Contents of parenting plans

- (1) The co-holders of parental responsibilities and rights in respect of a child may agree on a parenting plan determining the exercise of their respective responsibilities and rights in respect of the child.
- (2) If the co-holders of parental responsibilities and rights in respect of a child are experiencing difficulties in exercising their responsibilities and rights, those persons, before seeking the intervention of a court,

must first seek to agree on a parenting plan determining the exercise of their respective responsibilities and rights in respect of the child.

- (3) A parenting plan may determine any matter in connection with parental responsibilities and rights, including-
 - (a) where and with whom the child is to live;
 - (b) the maintenance of the child;
 - (c) contact between the child and-
 - (i) any of the parties; and
 - (ii) any other person; and
 - (d) the schooling and religious upbringing of the child.
- (4) A parenting plan must comply with the best interests of the child standard as set out in section 7.
- (5) In preparing a parenting plan as contemplated in subsection (2) the parties must seek-
 - (a) the assistance of a family advocate, social worker or psychologist; or
 - (b) mediation through a social worker or other suitably qualified person.

34. Formalities

- (1) A parenting plan-
 - (a) must be in writing and signed by the parties to the agreement; and
 - (b) subject to subsection (2), may be registered with a family advocate or made an order of court.
- (2) 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-
 - (a) be in the prescribed format and contain the prescribed particulars; and
 - (b) be accompanied by a copy of the plan.

- (3) 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-
- (a) be in the prescribed format and contain the prescribed particulars; and
 - (b) be accompanied by-
 - (i) a copy of the plan; and
 - (ii) a statement by-
 - (aa) a family advocate, social worker or psychologist contemplated in section 33(5)(a) to the effect that the plan was prepared after consultation with such family advocate, social worker or psychologist; or
 - (bb) 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.
- (4) 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.
- (5) A parenting plan that was made an order of court may be amended or terminated only by an order of court on application-
- (a) by the co-holders of parental responsibilities and rights who are parties to the plan;
 - (b) by the child, acting with leave of the court; or
 - (c) in the child's interest, by any other person acting with leave of the court.
- (6) Section 29 applies to an application in terms of subsection (2).

35. Refusal of access or refusal to exercise parental responsibilities and rights

- (1) 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(4), 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.

(2)

- (a) 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 contemplated in subsection (1) must upon any change in his or her residential address forthwith in writing notify such other person of such change.
- (b) A person who fails to comply with paragraph (a) is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding one year.

(Commencement date of section 35: 1 July 2007)

Part 4 Miscellaneous

36. Presumption of paternity in respect of child born out of wedlock

If in any legal proceedings in which it is necessary to prove that any particular person is the father of a child born out of wedlock it is proved that that person had sexual intercourse with the mother of the child at any time when that child could have been conceived, that person is, in the absence of evidence to the contrary which raises a reasonable doubt, presumed to be the biological father of the child.

(Commencement date of section 36: 1 July 2007)

37. Refusal to submit to taking of blood samples

If a party to any legal proceedings in which the paternity of a child has been placed in issue has refused to submit himself or herself, or the child, to the taking of a blood sample in order to carry out scientific tests relating to the paternity of the child, the court must warn such party of the effect which such refusal might have on the credibility of that party.

(Commencement date of section 37: 1 July 2007)

38. Effect of subsequent marriage of parents on child

- (1) A child born of parents who marry each other at any time after the birth of the child must for all purposes be regarded as a child born of parents married at the time of his or her birth.

- (2) Subsection (1) applies despite the fact that the parents could not have legally married each other at the time of conception or birth of the child.

(Commencement date of section 38: 1 July 2007)

39. Rights of child born of voidable marriage

- (1) The rights of a child conceived or born of a voidable marriage shall not be affected by the annulment of that marriage.
- (2) No voidable marriage may be annulled until the relevant court has inquired into and considered the safeguarding of the rights and interests of a child of that marriage.
- (3) Section 6 of the Divorce Act and section 4 of the Mediation in Certain Divorce Matters Act apply, with the necessary changes required by the context, in respect of such a child as if the proceedings in question were proceedings in a divorce action and the annulment of the marriage were the granting of a decree of divorce.
- (4) Section 8(1) and (2) of the Divorce Act apply, with the necessary changes as the context may require, to the rescission or variation of a maintenance order, or an order relating to the care or guardianship of, or contact with, a child, or the suspension of a maintenance order or an order relating to contact with a child, made by virtue of subsection (3).
- (5) A reference in any law-
- (a) to a maintenance order or an order relating to the custody or guardianship of, or access to, a child in terms of the Divorce Act must be construed as a reference also to a maintenance order or an order relating to the custody or guardianship of, or access to, a child in terms of that Act as applied by subsection (3);
 - (b) to the rescission, suspension or variation of such an order in terms of the Divorce Act must be construed as a reference also to the rescission, suspension or variation of such an order in terms of that Act as applied by subsection (4).
- (6) For purposes of this Act, the father of a child conceived of a voidable marriage where such marriage has been annulled is regarded to be in the same position as the father of a child who has divorced the mother of that child.

(Commencement date of section 39: 1 July 2007)

40. Rights of child conceived by artificial fertilisation

- (1)
 - (a) Whenever the gamete or gametes of any person other than a married person or his or her spouse have been used with the consent of both such spouses for the artificial fertilisation of one spouse, any child born of that spouse as a result of such artificial fertilisation must for all purposes be regarded to be the child of those spouses as if the gamete or gametes of those spouses had been used for such artificial fertilisation.
 - (b) For the purpose of paragraph (a) it must be presumed, until the contrary is proved, that both spouses have granted the relevant consent.
- (2) Subject to section 296, whenever the gamete or gametes of any person have been used for the artificial fertilisation of a woman, any child born of that woman as a result of such artificial fertilisation must for all purposes be regarded to be the child of that woman.
- (3) Subject to section 296, no right, responsibility, duty or obligation arises between a child born of a woman as a result of artificial fertilisation and any person whose gamete has or gametes have been used for such artificial fertilisation or the blood relations of that person, except when-
 - (a) that person is the woman who gave birth to that child; or
 - (b) that person was the husband of such woman at the time of such artificial fertilisation.

(Commencement date of section 40: 1 July 2007)

41. Access to biographical and medical information concerning genetic parents

- (1) A child born as a result of artificial fertilisation or surrogacy or the guardian of such child is entitled to have access to-
 - (a) any medical information concerning that child's genetic parents; and
 - (b) any other information concerning that child's genetic parents but not before the child reaches the age of 18 years.
- (2) Information disclosed in terms of subsection (1) may not reveal the identity of the person whose gamete was or gametes were used for such artificial fertilisation or the identity of the surrogate mother.
- (3) The Director-General: Health or any other person specified by regulation may require a person to receive counselling before any information is disclosed in terms of subsection (1).

CHAPTER 4 CHILDREN'S COURTS