

**ASHLEY SLAMAT**

— ATTORNEYS AT LAW —

*Success. Understood.*

**THE CHILDREN'S ACT 38 OF 2005**

The purpose of the Act is to:

- Protect children's Constitutional rights,
- Set out principles for the care and protection of children,
- Define parental responsibilities and rights,
- Make provision for children's courts,
- Provide for issuing of providing orders,
- To provide for guidelines for child adoption and surrogate motherhood,
- To prohibit child abduction,
- Create certain new offences relating to children.

The Act also creates the State's responsibility to respect, protect, promote and fulfill the child's Constitutional rights and the rights protected by International Human Rights instruments. Children should be integrated with their communities and families to enable them to grow up and assume their responsibilities within their communities with full development of their personality.

The Act consists of 20 chapters.

Chapter 1 deals with the interpretation, objects, application and implementation of the Act.

The **interpretation** includes definitions such as:

**"Abuse"** of a child is any form of harm or ill-treatment deliberately inflicted on a child.

**"Care"** means a person providing a child with a place to live, suitable living conditions and necessary financial support as well as safeguarding of the child, protecting the child against all forms of abuse, respecting, protecting, promoting and securing the fulfillment, and guarding against infringement of, the child's rights as set out in the Bill of Rights. This also includes the guiding of the child's education and upbringing, decision making in accordance with the child's age, maturity and stage of development, maintaining a good relationship with the child, accommodating special needs and ensuring the best interests of the child is the paramount concern.

**"Child"** is a person under the age of 18.

**“Contact”** in relation to a child means to maintain a personal relationship with the child, and if the child lives with someone else, communication on a regular basis with the child, including visits and/or communication by post or telephone.

A **“guardian”** is a parent or other person who has guardianship of the child.

A **“Parent”** includes any person who has parental responsibilities and rights in respect to the child.

**“Parental responsibilities and rights”** are responsibilities and rights referred to in section 18 of the Act.

**“Street child”** means a child who has left his home, family or community because of abuse, neglect, poverty and live begs or works on the streets or because of inadequate care, begs or works on the streets but returns home at night.

The **objects** of the Act are to give effect to promote the strengthening of families, the protection of constitutional rights, the well-being of children in terms of International Instruments, promotion of structures for development of the child, strengthen community structures, protection of the child from abuse, discrimination, provide care and protection and recognition of special needs and care of children with disabilities.

The **implementation** of the Act is by organs of state in the national, provincial and local spheres of government by taking reasonable measures within available resources to achieve the realization of the objects of the Act.

## Chapter 2:

Here the Act deals with the application of the “best interest of the child” principle as well the fact that children with disabilities, chronic illnesses have special provisions relating to them. Social, cultural and religious practices regarding a child must be dealt with according to the best interest of the child, access to health care information to the child, access to courts are dealt with as well as enforcement of rights of the child, responsibilities of children appropriately and according to his/her age and the age of majority, which is 18 years. The child may participate in expressing his/her views in matters concerning him/herself according to his/her age, maturity and stage of

development and this views must be taken into consideration in matters concerning the child's rights and best interest.

### Chapter 3:

This chapter is divided into four parts.

*Part 1* deals with parental responsibilities and rights regarding mothers, married and unmarried fathers and agreements in regards thereto. Contact and care can also be given to an interested person by order of the court. A court can assign guardianship and care to a person who is the sole guardian of a child or another fit and proper person claiming paternity. The Act describes further how parental responsibilities and rights can be terminated, extended, suspended or restricted and also the court proceedings to all of the above.

*Part 2* describes the interaction with co-exercise of parental responsibilities and rights in major decision taking involving the child.

*Part 3* includes the content and formalities of parenting plans.

All miscellaneous matters are dealt with in *Part 4* of the Act, including the presumption of paternity in respect of child born out of wedlock and the taking of blood samples to determine paternity. The rights of children born in and out of wedlock, also of a voidable marriage and conceived by artificial fertilization are discussed and the child's rights to gain access to information regarding genetic parents.

### Chapter 4:

*Part 1* of his chapter describes the establishment of Children's Courts, access and settings, powers, their jurisdiction arising out of the application of this Act, relief which they can grant and how they promote and protect he rights of children according to legislature and the Constitution. Children's Courts are every Magistrate court in the area which the child is an ordinary resident.

In *Part 2 – 4*, the procedures to be followed in a Children's Court are set out and rights of the children promoted and protected by these courts. Pre-hearing conferences,

family group conferences and all matters relating to this as well as settling matters in or out of court are described.

#### Chapter 5:

- Partial care is provided when a person takes care of more than six children on behalf of their parents or care-givers during specific hours of the day or night, or for a temporary period, by agreement between the parents or care-givers. This excludes the care of a child –
  - i. by a school as part of tuition, training and other activities provided by the school;
  - ii. as a boarder in a school hostel or other residential facility managed as part of a school; or
  - iii. by a hospital or other medical facility as part of medical treatment provided to the child.

The provisions, maintenance, funding, management requirements, registration and accessibility of facilities are prescribed in this chapter. The norms and standards must at all times be maintained according to the chapter and children with special needs provided for accordingly.

Chapter 6 deals with childhood developing programmes.

Chapter 7 sets out the functioning of Child Protection Services as well as the Child Protection Register, which is a record of abused and/or neglected children, their circumstances, the perpetrators in regards to the above and when their identity will be revealed. It's also prescribed how and when children should be removed from parents, guardians or care givers, as well as the process regarding HIV-testing, the counseling thereto and also providing children with contraceptives and removal from the Republic.

Chapter 8 describes the process to be followed for early intervention and prevention programmes and how the courts get involved in the process in South Africa.

Chapter 9 – 10 goes further by identifying children in need of care and support, the decision if a child is in need of care and support and protection of that child by presiding officers or police officers removing them from their circumstances and putting them in

alternative (Chapter 11), temporary care, foster care (Chapter 12), care centers or facilities. Chapter 13 described the rights of children in youth and child care centers, the norms and standards, registration, cancellation of registration, operation and management and regulations relating to these centers. Drop-in centers are described in Chapter 14.

Chapter 15 describes the application and procedures for adoption, which children can be adopted, which people may adopt, consent for adoption and the functioning of the register for adoption. Chapter 16 goes further to describe inter-country adoption and International law relating hereto.

The Act deals with Child abduction (Chapter 17), Trafficking in children (Chapter 18) according to International law and powers of the Courts in regards hereto.

Chapter 19 sets out the regulations regarding to surrogate motherhood. The legal aspects and cancellation of the agreement, consent of the persons involved, prohibitions like payment and revealing of the identities of the persons involved may not be published.

The final chapter (Chapter 20) of the Act stipulates enforcement and offences relating to the Act. Procedures regarding inspection of all the facilities and persons described in this Act can also be carried out.

#### **Acts repealed by the Children's Act:**

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| • Children's Act 33/1960  | Whole     |
| • General Law Further Amendment Act 93/1962   | Section 1 |
| • Age of Majority Act 57/1972   | Whole     |
| • Child Care Act 74/1983  | Whole     |
| • Children's Status Act 82/1987   | Whole     |
| • Prevention of Family Violence Act 133/1993  | Section 4 |
| • Guardianship Act 192/1993   | Whole     |
| • Hague Convention on the Civil Aspects of<br>International Child Abduction Act 72/1996 | Whole     |

- Natural Fathers of Children born out of  
Wedlock Act 86/1997

Whole