



Children & Divorce

Before a divorce may be granted, the court must be satisfied that the provisions made with regard to the welfare of the children of the marriage are satisfactory.

In order ensure that the provisions are satisfactory, it is important to know what your parental responsibilities and rights are.

The **Children's Act 38 of 2005**, which became fully operational on 1 April 2010 outlines your parental responsibilities and rights. They include the following:

1. To care for the child;
2. To maintain contact with the child;
3. To act as guardian of the child; and
4. To contribute to the maintenance of the child.

Let us discuss these rights and responsibilities in more detail.

To care for the child

CARE is a new term defined in the Children's Act and replaces the term **CUSTODY**. To care for the child means that within your means and where appropriate, you should provide your child with a suitable place to live; the living conditions must be conducive to the child's health, well-being and development; and give your child the necessary financial support.

It is important to safe-guard and promote the well-being of your child, protect your child from maltreatment, abuse, neglect, degradation, discrimination, exploitation and any other physical, emotional or moral harm or hazards.

It is also important to safe-guard your children against any infringement of the child's rights as set out in the Bill of Rights and Chapter 2 of the Children's Act.

To care for your child also includes the following:

- To guide, direct and secure your 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;
- To guide, advise and assist your child in decisions to be taken by the child in a manner appropriate to the child's age, maturity and stage of development;
- To guide the behaviour of a child in a humane manner;
- To maintain a sound relationship with the child;
- To accommodate any special needs that the child may have; and
- To generally ensure that the best interests of the child is the paramount concern in all matters affecting the child.

To maintain contact with the child

CONTACT is a new term defined in the Children's Act and replaces the term **ACCESS**. To maintain contact with your child means the following:

- To maintain a personal relationship with the child;
- If the child lives with someone else to communicate with the child on a regular basis including: visiting the child or being visited by the child or if that is not possible communicating by telephone, post or any other form of electronic communication.

To act as guardian of the child

A parent who acts as guardian must administer and safeguard the child's property and property interests; assist or represent the child in administrative, contractual and other legal matters; or give consent or refuse any consent required by law in respect of the child, including the following:

- consent to the child's marriage;
- consent to the child's adoption;
- consent to the child's departure or removal from the Republic;
- consent to the child's application for a passport; and
- consent to the alienation or encumbrance of any immovable property.

To contribute to the maintenance of the child

In terms of the Maintenance Act, a parent has a duty to support their child. The duty extends to such support as a child reasonably requires for his or her proper living and up- bringing and includes: food, clothing, accommodation, medical care and education.

The following will be taken into consideration in determining the amount to be paid as maintenance in respect of a child:

- That the duty of supporting a child is an obligation which the parents have incurred jointly; and
- That the parents' respective shares of such obligation are apportioned between them according to their respective means.

It is now clear what your parental rights and responsibilities are and to note that these rights and responsibilities do not terminate upon divorce. Whether your child ends up living with you or not, it is your responsibility as a parent to ensure that you care for your child, maintain contact with your child, act as guardian of your child and contribute to the maintenance of your child.

How to ensure that the provisions made for the welfare of your children are satisfactory?

The most important question that parents should ask themselves when considering their child's welfare in a divorce is the following: What is in the best interests of my child? To answer this question, use the **Best Interests of Child Standard** as set out on the right-hand side of this page.

Parenting Plans

In the event of divorce, the co-holders of parental responsibilities and rights in respect of a child may agree on a parenting plan to determine the exercise of their respective responsibilities and rights in respect of the child.

The parenting plan should include the following:

1. Where and with whom the child is to live.
2. The maintenance of the child.
3. Contact between the child and any of the parties and/or any other person.
4. A parenting plan **MUST** comply with the best interests of the child standard (set out on the right-hand side of this page).

Best Interests of Child Standard

The following factors must be considered:

- The nature of the personal relationship between the child and the parents;
- The attitude of the parents towards the child and the exercise of parental responsibilities and rights in respect of the child;
- The capacity of the parents to provide for the needs of the child, including emotional and intellectual needs;
- 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 –
 - Both or either of the parents
 - Any brother or sister or any other person with whom the child has been living
- The practical difficulty and expense of a child having contact with the parent/s and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parent/s, on a regular basis
- The need for the child to remain in the care of his/her parent and to maintain a connection with his/her family
- The child's age, maturity and stage of development; gender; background; and any other relevant characteristics of the child
- The child's physical and emotional security and his/her intellectual, emotional, social and cultural development;
- Any disability the child may have
- Any chronic illness from which a child may suffer
- The need for the 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
- The need to protect the child from any physical or psychological harm
- Any family violence involving the child or a family member of the child
- Which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child

Formalities of a parenting plan

- A parenting plan must be in writing and signed by the parties to the agreement.
- It may be registered with a family advocate or made an order of court.

Interference by the court during divorce proceedings

In terms of the Divorce Act and the Mediation of Certain Divorce Matters Act, the Court may interfere with parental responsibilities and rights during divorce proceedings. They are entitled to do so by virtue of the High Court's inherent powers as upper guardian of all minors within its area of jurisdiction.

An example is a Rule 43 application – The High Court is empowered in terms of Rule 43 to make orders for interim contact, care and maintenance during the divorce proceedings.

The Family Advocate's Role

All divorce settlement agreements and parenting plans where minor children are involved have to be endorsed by the Family Advocate. The Family Advocate will apply the Best Interests of the Child Standard to ensure that all children are adequately protected.