



Parental Responsibilities and Rights & Parenting Plans

When a divorce is inevitable, a couple must decide who will be awarded residency of the minor children and who may regularly contact them at reasonable times. Prior to the enactment of the new Children's Act 38 of 2005 (the Act), which came into effect on 1 April 2010, the parental rights were referred to as custody and access. Now those terms have been extended to include 'parenting responsibilities and rights', which include the obligation to care for the children and the responsibility and the right to maintain contact with the children.

Where parents were not married, the question of parental responsibilities and rights may arise and an agreement pertaining to parental responsibilities and rights may be reached and certain procedures provided in the Act have to be followed.

Where a dispute arises regarding the implementation of the agreed parental responsibilities and rights, parents may, with or without the assistance of the family advocate, create a parenting plan to detail what is required from each other regarding parental responsibilities and rights. The parenting plan has to be registered with the family advocate and/or be made an order of the court.

Parental Responsibilities and Rights Agreements – s 22

In terms of ss 19 and 20 of the Act both parents have equal responsibilities and rights with regard to the children. When separating, both parents have to decide with which parent the children are to reside and what the contact rights of the other parent will be.

Unlike before the promulgation of the Children's Act where one parent had full custody of the children, according to the new Act both parents have full capacity to care for their children after divorce.

However, a situation may arise where parents of a child or children were not married and the question of paternity arises that results in parental responsibilities and rights becoming a dispute.

Section 22(1) of the Act provides that, subject to subs (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'.

Section 22(2) provides that the mother or other person who has parental responsibilities and rights in respect of a child may only confer by agreement on a person contemplated in subs (1) those

parental responsibilities and rights that she or that other person has in respect of the child at the time of the conclusion of such an agreement. That is, the biological father or any other person that has an interest in the care, well-being and development of the child may conclude an agreement with the biological mother of the child whereby the latter will confer such responsibilities and rights to the former.

It is provided in s 22(3) that

‘[a] parental responsibilities and rights agreement must be in the prescribed format and contain the prescribed particulars’.

In terms of s 22(4), subject to subs (6), a parental responsibilities and rights (PRR) 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 a children’s court on application by the parties to the agreement’.

Thus where parties have concluded a PRR agreement without the assistance of the family advocate, a social worker or psychologist, such PRR agreement will not take effect until it is registered with the family advocate or made an order of the High Court, a divorce court in a divorce matter or a children’s court where the parties made an application to register the agreement. A new development is that divorce matters may now be dealt with by a regional court and therefore a PRR agreement will take effect when registered at the regional court in a divorce matter.

Before registering a PRR agreement or before making a PRR agreement an order of court, subs (5) provides that

‘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’.

The family advocate is therefore required by the Act to ascertain that – where a PRR agreement was made by the parties without its assistance and subsequently registered with it – it must satisfy the provisions of s 7 of the Act in addition, in terms of s 9, 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. The court is in the same vein required to ascertain, before it makes it an order of the court, that the PRR agreement meets the best interests standard set out in s 7 and that standard is applied in terms of s 9 of the Act.

In terms of subs 6(a) a PRR 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’.

The subsection therefore provides that the child concerned or any person acting in the child’s interest, may, with the leave of the court, make an application to the family advocate to amend or terminate the PRR agreement. Other than that, a person who does not have parental responsibilities and rights in respect of the child does not qualify to make an application that the family advocate amend or terminate a PRR agreement registered with it.

In terms of subs 6(b) a PRR 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'.

Subsection 6(b) also requires the court that granted the PRR agreement to observe that, other than the child concerned or any other person with the child's interests, both acting with the leave of the court, a person with no PRR in respect of the child cannot make application for that court to amend or terminate it.

In terms of subs 7:

'[O]nly the High Court may confirm, amend or terminate a [PRR] agreement that relates to the guardianship of a child'.

This is by virtue of the High Court being the upper guardian of all minor children.

Parenting plans

Sections 33 and 34 of the Children's Act make provision for 'parenting plans'. Many parents, legal practitioners, social workers, psychologists, social services professional and other suitably qualified persons are now faced with the task of acting in accordance with ss 33 and 34 of the Act.

What is a parenting plan?

The Act does not provide a definition of a parenting plan. However, looking at the provisions of the Act and its regulations dealing with parenting plans, one could define it as a written agreement between co-holders of parental responsibilities and rights, outlining in detail their respective responsibilities and rights of care, contact, guardianship and maintenance with regard to a child.

Who should agree on a parenting plan?

Not all holders of parental responsibilities and rights need to agree on a parenting plan and have it registered with a family advocate or made an order of the High Court. Parenting plans should be entered into only if there is a need for it. However, the choice is always there for the parties should they wish to formalise one.

Section 33 of the Act provides for two situations in which a parenting plan comes into play. They are the optional situation and the mandatory situation.

Optional situation – s 33(1)

Section 33(1) of the Act states the following:

- (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.'

This situation would apply when the parties want to have a structured parental plan in place but none of them intends to go to court on any issue. You could say they are not experiencing difficulties in exercising their responsibilities and rights but want to have a formalised structure on paper. This optional situation may apply where the parents of the child do not live together and there is no document in place regulating their respective care and contact responsibilities and rights in respect of the child.

Mandatory situation – s 33(2)

The other situation where a parenting plan comes into play is where the parties are experiencing difficulties in exercising their responsibilities and rights. In this case the Act prescribes to them to first try to agree on a parenting plan before going to court. Section 33(2) states:

‘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.’

Therefore, all holders of parental responsibilities and rights in respect of a child do not need to enter into a parenting plan from the outset as stated. However, should there be problems and one or more of the parties may want to take them to court, before they do so, they should first try to agree on a parenting plan before approaching the court. Should the parties fail to agree on a parenting plan after following the prescripts of the Act, the court may then be approached.

What must the parenting plan deal with according to the Act?

The contents of both optional and mandatory parenting plans can vary, however, according to s 33(3) of the Act:

‘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.’

Furthermore, the regulations to the Act prescribe child participation, bearing in mind the child’s age, maturity and stage of development. Regulation 11, which deals with participation of a child in preparation of parenting plans states the following:

- (1) Bearing in mind the child’s age, maturity and stage of development, such child must be consulted during the development of a parenting plan, and granted an opportunity to express his or her views, which must be accorded due consideration.

- (2) When a parenting plan has been agreed [on] the child ... bearing in mind the child's age, maturity and stage of development, [must] be informed of the contents of the parenting plan by the family advocate, a social worker, social service professional, psychologist, suitably qualified person or the child's legal representative.'

Therefore, before an optional or mandatory parenting plan can be registered with the family advocate or made an order of court, reg 11 must be applied.

Section 34 of the Children's Act

This section deals with the formalities of a parenting plan that need to be adhered to before it can be registered with the family advocate or made an order of court. It states the following:

- (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.'

Once the parties decide to proceed to try to agree on a parenting plan, they need to have the parenting plan prepared. If s 33(2) applies, they would need to do it with the assistance of the relevant party. However, for both optional and mandatory parenting plans, the best interests of the child principle applies. According to s 33(4) of the Act:

'A parenting plan must comply with the best interests of the child standard as set out in section 7'.

Approval of parenting plans in court

Should parents agree on a proposed parenting plan, the court will usually approve it. If the parents do not agree, the court will decide on a parenting plan after a hearing or trial. The court looks at various factors when coming to a decision, but the most critical issue is that the plan serves the best interests of the child.

Enforcement of the parenting plan

Once the court signs a parenting plan, both parents must adhere to it. For example, a parent may not deny the other parent access if his child support is outstanding.

If one parent does not allow the other to see the child when he has the right to do so, he may be found in contempt of court. If a parent is found in contempt, the court could order jail time, fines or another type of punishment.

Is it possible to alter a permanent parenting plan?

It is difficult to alter a parenting plan after it is final. Usually, it may be changed if the parents agree to the change. If the parents do not agree, the court may make major adjustments, such as whom the child lives with, only if a major change has occurred in the child's life or the other parent's since the original parenting plan was final. It is not sufficient that the parent wanting the change thinks that his life has improved so much that the children should now live with him. Should the parents not agree on the change, one of these things must have occurred before the court will order a change in where the child lives

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the child has gone to live with one parent for an extended period of time with permission of the other parent;

- the parent who does not want the change has been held in contempt of court or has been convicted of interfering with the other parent's time with the child; or
- the child's present life with a parent has been shown to be physically or emotionally harmful.

A party may ask to change a parenting plan through his attorney or on his own through the family courts, but must remember that whatever changes are made, the court must find them to be in the children's best interest.

What if a parent wants to move with the child?

All parenting plans must state what will happen if one of the parents wants to relocate with the child. The law requires the parent who wants to move the child to give the other parent written notice before a move. The notice gives the other parent a chance to object to the move and to ask the court to change the existing parenting plan.

Conclusion

The conclusion of a PRR agreement and the registration of a parenting plan, which is subsequently made an order of the court requires the family advocate and the court to take into account the best interest of a child. Section 7 of the Act lists factors to be taken into account to determine the best interests standard, which is applied in terms of s 9.

It is important to note that our courts will not be looking for the so-called 'perfect parent', as no such type of parent exists. Our courts will opt for a solution that is 'the least detrimental available alternative for safeguarding a child's growth and development'. Our courts have also emphasised that the concept of parenting is a gender neutral function, and the mother or father are seen as equally capable to care for a child. The residence and contact regarding children is determined by the High Court with assistance of the family advocate. Agreements concerning the care of children and arrangements for contact by the parent who does not have the residency of the child should be incorporated into the parenting plan.

By Simphiwe Mtshengu

Simphiwe Mtshengu *Blur LLB (UNITRA) Certificate for Practical Legal Training (East London School for PL Training)* is a family advocate in Mthatha.

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