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## **The Children's Act**

### **About the Children's Act 38 of 2005**

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What are the rights of unmarried fathers? Do I as a father of a child born out of wedlock have rights. Do I as a father of a child born in terms of a religious marriage have rights?

In my view, unmarried fathers always experienced difficulties regarding access to their children if they were separated from the mother. What is even worse, is if a couple was married in terms of religion or custom, and not civilly (e.g.) in Court, and the parties separated, where the "unmarried" father's position would be the same as that of an unmarried father who was never married to the mother religiously or customarily. However, if a party was married civilly and divorced, the Divorce Court in the past would deal with the issue of care and contact. The usual phrase used was that the mother would have custody over the child, with the father having rights of reasonable access. The position has however improved with the inception of the Children's Act 38 of 2005 for both divorced and unmarried fathers. As outlined below, an unmarried father would have rights over a child, akin to a divorced father as long as certain conditions are met. However, in my view, based on the custody and contact matters I dealt with since the inception of the Act, mothers are still seen as primary caregivers in practice, and if the mother does not want the father to have contact or care with the child or a say in his or her life, the father would still have to follow the procedures in the Act to give effect to his rights. Sometimes, approaching the High Court is the only solution. However, on the whole, the Child's Act 38 of 2005, is a step in the proper direction for unmarried fathers, and child born out of wedlock. I hope it would improve even more.

Certain sections of the Children's Act (Act 38 of 2005) came into effect with a proclamation (13, 2007) by the President of South Africa in June 2007.

The Children's Act of 2005 brought many changes regarding the responsibilities and rights of parents and children and also deals with other aspects regarding children, e.g. contraceptives and abortion etc.

Interesting to note are the following sections listed below, there are however others depending on your issues.

### **Parental responsibilities and rights**

Section 18 of the Children's Act of 38 2005 states the following:

18. (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).

I shall now deal with what the Children's Act of 2005 says the meaning of "care" and "contact" are, which are not the traditional words used in the past. In the past, the courts and the legal fraternity used the terms "custody" and "access". This would reflect in divorce papers. Now legal documents uses the terms "care" and "contact". Although some might disagree, it is respectfully submitted that "custody" is an aspect of "care" and the Children's Act provides broader responsibilities and rights in this regard.

### **Meaning of Care**

The Children's Act 38 of 2005 defines "care" as follows:

"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; 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;

### **Contact**

According to the Children's Act 38 of 2005, "contact" means the following:

"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;

It is my view that a the Children's Act 38 of 2005 attempts to place greater value to contact between parent and child.

There are many sections in the Children's Act 38 of 2005 that deals with parental responsibilities and rights of parents and children. Get hold of the Act and see how it applies to you.

If you are an unmarried father and your rights are being limited by the mother of the child, I advise you to contact a family attorney and discuss your rights with him or her. And to all unmarried fathers out there, fight for your rights as a father, this would be in the child's best interest.

Kind regards,

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