

Parenting Plan

Agreed to by:

Mom
&
Dad

**Parenting Plan guide as provided for in sections 33 & 34 of the
Children's Act 38 of 2005 (Including Regulations)**

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Sections 33 and 34 of the Children's Act 38 of 2005 (the Act) came into operation on 1 April 2010. These sections make provision for "parenting plans". As many parents, legal practitioners, social workers, psychologists, social services professional and other suitably qualified persons would be faced with the task of acting in accordance with sections 33 and 34 of the Act; this guide attempts to facilitate a quick understanding.

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.

Below I shall outline the relevant provisions of the Act and its Regulations dealing with parenting plans and how they should be applied in practice.

Who should agree on a parenting plan?

Not all holders of parental responsibilities and rights need to agree on a parenting 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 (2) situations in which a parenting plan comes into play. This I shall refer to as the optional situation and the mandatory situation.

Optional situation – section 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 wants 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 to the child.

Mandatory situation – section 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 it 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 precepts of the Act, the Court may then be approached.

As outlined later, once the parenting plan has been agreed upon by the relevant parties, it may either be registered with a Family Advocate or made an Order of Court.

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 section 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 prescribes 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 the child must, bearing in mind the child's age, maturity and stage of development, 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 a Family Advocate or made an Order of Court, Regulation 11 must be applied.

Section 34 of the Children's Act deals with the formalities of a parenting plan that need to be adhered to before it can be registered with a 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 decided to proceed to try to agree on a parenting plan, they need to have the parenting plan prepared. If section 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 apply. According to section 33(4) of the Act:

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

Now we look at the Act and Regulations that come into play in preparing a parenting plan.

Optional parenting Plan – sec 33(1)

With regard to an optional parenting plan (sec. 33(1)), the parties may attend to preparing the parenting plan without the assistance of the Family Advocate, Social Worker or psychologist but they need to make sure it complies with this Act. It is however suggested that they approach a legal practitioner to assist them in this regard. As outlined later, once the parenting plan has been agreed upon and signed, it needs to be attached to **Form 8**.

With regard to mandatory parenting plans, other parties get involved to either assist in preparing the parenting plan or for mediation.

Mandatory parenting plan – section 33(2)

According to section 33 (5) of the Act:

"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."

Regulation 9 to Act deals with the registration of parenting plans and having them made Orders of Court. It states:

(1) An application for the registration of a parenting plan at the office of the family advocate or for it to be made an order of court must be completed in writing in a form identical to **Form 8** and must-

- (a) be signed by the parties to the parenting plan or, if a person whose signature is required is incapable of furnishing a signature, a thumbprint of that person must be effected and duly attested by a commissioner of oaths;
- (b) contain the titles, full names, dates of birth, identity numbers or passport numbers (as the case may be), residential, work addresses, and contact details

- of all co-holders of parental responsibilities and rights named in the parenting plan; and
- (c) contain the full names, dates of birth, identity numbers or passport numbers (as the case may be), residential addresses and contact details of any child or children named in the parenting plan.
- (2) Where parental responsibilities and rights are to be exercised in the same manner by the holders of those responsibilities and rights with respect to more than one child in the same family, the application for registration of the parenting plan must be completed for each child.
 - (3) The applicant or applicants for the registration of a parenting plan must file copies of such plan with the family advocate, children's court or High Court, as the case may be, to enable each co-holder to retain a copy of the registered parenting plan.

Therefore, once the parenting plan complies with the Act and its Regulations, **Form 8** needs to be completed for both optional and mandatory parenting plans. However there is a further instruction in term of the Regulations regarding mandatory parenting plans.

The Regulations to the Act further instructs on what other form needs to be completed should a mandatory parenting plan (**sec. 33(2)**) be registered with a Family Advocate or made an Order of Court. Regulation 10 states the following:

- (1) The co-holders of parental responsibilities and rights as contemplated in section 30 and who are experiencing difficulty in exercising their responsibilities and rights as envisaged in section **33(2)** of the Act must seek to agree on a parenting plan on matters referred to in section 33(3) of the Act.
- (2) The parenting plan contemplated in sub-regulation (1) must be prepared:
 - (a) with the assistance of a family advocate, social worker or psychologist as contemplated in section 33(5)(a) of the Act, and must be completed in writing in a form identical to **Form 9**; or
 - (b) after mediation by a social worker or other suitably qualified person as contemplated in section 33(5)(b) of the Act, and must be completed in writing in a form identical to **Form 10**.

It would seem that the relevant form(s) and parenting plan should be left with the with the Office of the Family Advocate or the Registrar of the High Court to have the parental plan registered or made an Order of Court as the case may be. It does however not seem that Rule 6 of the Uniform Rules of the High Court are applicable. However, it would seem prudent, failing directives to the contrary to make the Application in terms of Rule 6 and attach the relevant documents referred to herein with a supporting affidavit(s) and file same with the Office of the Family Advocate.

Once the parenting plan is registered with a Family Advocate or made an Order of Court, the parties would be expected to adhere to the parenting plan.

Court proceedings for optional parenting plans

Interesting to note is section 34 (6) of the Act where it states:

"Section 29 applies to an application in terms of subsection (2)."

Section 34 subsection (2) refers to the registration of parenting plans with a Family Advocate and for it to be made an Order of Court which was dealt with above.

Section 29 of the Act deals with various applications in the High Court, a divorce court in a divorce matter or a children's court as the case may be. Looking at the Section 29, the Court is not obliged to make any parenting plan an Order of Court and may only grant an application if it's in the best interests of the child.

Section 29 (5) states the following:

The court may for the purposes of the hearing order that –

- (a) a report and recommendations of the 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.

Therefore, the Court would not blindly make a parental plan an Order of Court, but would first need to be convinced that it is in the child's best interests.

It is submitted that before a Court makes a mandatory parental plan (sec. 33(2)) an Order of Court, notwithstanding it being prepared or mediated with the assistance of the relevant person, the Court would still need to be satisfied that the parenting plan is in the minor child's best interests before making the parenting plan an Order of Court. If the Court is not so satisfied, it may make an order similar to those provided for in section 29(5) referred to above.

Contempt of Court

The question which may be posed is what is better, having the parenting plan registered with the Family Advocate or made an Order

of Court? In my view, it would be better to make it an Order of Court as this would force all parties to comply with it or they would be in contempt of Court.

Furthermore, section 35 of the Act states amongst other things that it is a criminal offence to refuse or prevent a co-holder of parental responsibilities or rights to exercise such responsibilities and rights and may be liable on conviction to a fine or to imprisonment for a period of not exceeding one year.

Therefore, having the parental plan made an Order of Court is a wiser option for mandatory parenting plans.

For comments, feel free to email us on info@ourlawyer.co.za

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