

# WEBINAR HANDOUT



Webinar: **HOW TO FILE A COMPLAINT IN TERMS OF SECTION 305 OF THE CHILDREN'S ACT**

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## **During this lunch hour we discuss topics which include:**

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## 1. Explanation of section 305(3) & (4) of the Children’s Act (abandonment of a child)

Section 305 (3) of the Children’s Act reads as follow: “A parent, guardian, other person who has parental responsibilities and rights in respect of a child, care-giver or person who has no parental responsibilities and rights in respect of a child but who voluntarily cares for the child either indefinitely, temporarily or partially, is guilty of an offence if that parent or care-giver or other person –

- (a) abuses or deliberately neglects the child; or
- (b) abandons the child.

Section 305 (4) reads as follow: “A person who is legally liable to maintain a child is guilty of an offence if that person, while able to do so, fails to provide the child with adequate food, clothing, lodging and medical assistance.”

## 2. Explanation of section 110 of the Children’s Act (duty to report abuse)

### 2.1 What does the provision read?



Section 110 of the Children’s Act 38 of 2005 (“the Act”) deals with the reporting of abused or neglected child and child in need of care and protection. The provision reads as follow:

- (1) Any correctional official, dentist, homeopath, immigration, official, labour inspector, legal practitioner, medical practitioner, midwife, minister of religion, nurse, occupational therapist, physiotherapist, psychologist, religious leader, social service professional, social worker, speech therapist, teacher, traditional health practitioner, traditional leader or member of staff or volunteer worker at a partial care facility, drop-in centre or child and youth care centre who on reasonable grounds concludes that a child has been abused in a manner causing physical injury, sexually abused or deliberately neglected, must report that conclusion in the prescribed form to a designated child protection organisation, the provincial department of social development or a police official.
- (2) Any person who on reasonable grounds believes that a child is in need of care and protection may report that belief to the provincial department of social development, a designated child protection organisation or a police official.

- (3) A person referred to in subsection (1) or (2) –
- (a) must substantiate that conclusion or belief to the provincial department of social development, a designated child protection organisation or police official; and
  - (b) who makes a report in good faith is not liable to civil action on the basis of the report.
- (4) A police official to whom a report has been made in terms of subsection (1) or (2) or who becomes aware of a child in need of care and protection must-
- (a) ensure the safety and well-being of the child concerned if the child's safety or well-being is at risk; and
  - (b) within 24 hours notify the provincial department of social development or a designated child protection organisation of the report and any steps that have been taken with regard to the child.
- (5) The provincial department of social development or designated child protection organisation to whom a report has been made in terms of subsection (1), (2) or (4), must –
- (a) ensure the safety and well-being of the child concerned, if the child's safety or well-being is at risk;
  - (b) make an initial assessment of the report;
  - (c) unless the report is frivolous or obviously unfounded, investigate the truthfulness of the report or cause it to be investigated;
  - (d) if the report is substantiated by such investigation, without delay initiate proceedings in terms of this Act for the protection of the child; and
  - (e) submit such particulars as may be prescribed to the Director-General for inclusion in Part A of the National Child Protection Register.
- (6) A designated child protection organisation to whom a report has been made in terms of subsection (1), (2) or (4) must report the matter to the relevant provincial department of social development. The provincial head of social development must monitor the progress of all matters reported to it in terms of paragraph (a).
- (7) The provincial department of social development or designated child protection organisation which has conducted an investigation as contemplated in subsection (5) may –

- (a) take measures to assist the child, including counselling, mediation, prevention and early intervention services, family reconstruction and rehabilitation, behaviour modification, problem solving and referral to another suitably qualified person or organisation;
  - (b) if he or she is satisfied that it is in the best interest of the child not to be removed from his or her home or place where he or she resides, but that the removal of the alleged offender from such home or place would secure the safety and well-being of the child, request a police official in the prescribed manner to take the steps referred to in section 153; or
  - (c) deal with the child in the manner contemplated in sections 151, 152 or 155.
- (8) The provincial department of social development or designated child protection organisation which has conducted an investigation as contemplated in subsection (5) must report the possible commission of an offence to a police official.

## 2.2 Mandatory reporting of child abuse in South Africa

### ***Applicable legislation***

The Constitution of the Republic of South Africa, 1996 (“the Constitution”) addresses the rights of children in section 28 thereof. Section 28(1)(d) of the Constitution reads as follows: “every child has the right to be protected from maltreatment, neglect, abuse and/or degradation”. The Act defines a child as a person under the age of 18 years. Children are subjected to a full spectrum of abuse, including verbal, physical, emotional and sexual abuse. Section 110 specifically deals with the protection of children and resonates with the UN Convention and the AU Charter on the protection of children’s rights.

Section 110 of the Act places an obligation/duty on certain professional sectors to report any suspected cases of child abuse, neglect or maltreatment as soon as the suspicion is formed on reasonable grounds. The professional has an obligation to report the abuse to any one of the following persons:

- Police official;
- designated child protection organisation; or
- provincial department of social development.



### **Who has a duty to report child abuse?**

Section 110(1) states that the following persons have an obligation to report suspected child abuse, neglect or maltreatment.

“(1) Any correctional official, dentist, homeopath, immigration, official, labour inspector, legal practitioner, medical practitioner, midwife, minister of religion, nurse, occupational therapist, physiotherapist, psychologist, religious leader, social service professional, social worker, speech therapist, teacher, traditional health practitioner, traditional leader or member of staff or volunteer worker at a partial care facility, drop-in centre or child and youth care centre who on reasonable grounds concludes that a child has been abused in a manner causing physical injury, sexually abused or deliberately neglected, must report that conclusion in the prescribed form to a designated child protection organisation, the provincial department of social development or a police official.”



Section 110 does not compel ordinary citizens to report suspected cases of child abuse, neglect or maltreatment but gives them a discretion. However, the Sexual Offences Act makes it clear that all persons who are aware, or who subsequently become aware of any sexual abuse to a child are compelled to report such conduct to the police.

### 2.3 Form 22: Reporting of abuse or deliberate neglect of child (section 110 of the Children’s Act)



# Form 22

REPORTING OF ABUSE OR DELIBERATE NEGLECT OF CHILD  
(Regulation 33)  
[SECTION 110 OF THE CHILDREN’S ACT 38 OF 2005]

REPORTING OF ABUSE TO PROVINCIAL DEPARTMENT OF SOCIAL DEVELOPMENT,  
DESIGNATED CHILD PROTECTION ORGANISATION OR POLICE OFFICIAL

**NOTE: A SEPARATE FORM MUST BE COMPLETED FOR EACH CHILD**

Form 22 is a formal way to report child abuse in any form. Form 22 is accompanied by an affidavit outlining the reasonable grounds of suspicion of child abuse, neglect or maltreatment.

If any professional persons suspect that a child is being abused or neglected (there must be reasonable grounds), it is not optional but ordered that such person report it. This can be done by completing Form 22 and submitting this form to a designated child protection organization, the Department of Social Development or a police official.

A person who makes such a report in good faith, cannot be liable for civil action. To guarantee the child's safety, the social worker looking into the situation must determine if the report is accurate or unsubstantiated and take appropriate action.

When a police officer learns about this report, they have 24 hours to ensure the children described in it are safe and to contact the Department of Social Development or another certified child protection agency.

### **3. Discussion of arguments that non-payment of maintenance amounts to abuse and neglect in terms of the Children's Act**

The non-payment of maintenance is a contravention of the Maintenance Act and amounts to a criminal offence. It also constitutes a form of domestic violence. Financial abuse is a type of domestic violence that can take many different forms. Typically, it involves one spouse stealing from the other or controlling the other's finances.

After a relationship ends, refusing to pay child support is a tactic used to maintain power over the other person. Refusing to help support a child is a way of forcing the parent with care to put all of their assets into a joint responsibility, in turn ensuring they remain at a disadvantage financially.

Withholding child maintenance is both a crime of omission (in neglecting a child's needs and failing to provide for them) and a crime of commission (in financially abusing the parent with care).

Section 1 of the Children's Act defines care quite extensively and makes it clear that children should not be subjected to abuse, neglect, maltreatment or any other physical or emotional harm (and this also includes financial abuse).



#### **4. Step-by-step guide on how to complete an affidavit to file at SAPS**

##### 4.1 Step one: Approach your nearest police station

SAPS has a pre-format affidavit which can be completed at your nearest police station. An affidavit is a written statement made under oath. You can also approach an attorney to assist you in drawing up the affidavit (this affidavit accompanies the Form 22).

##### 4.2 Step two: Title the affidavit

The title describes the purpose and nature of the affidavit i.e., report for suspected child abuse, neglect or maltreatment. Title found in the tram lines = “Founding affidavit in terms of section 305(3) and (4) of the Children’s Act 38 of 2005 (as amended)”.

The following words are used directly under the title: “I, the undersigned (indicate your full name and surname) hereby declare under oath”.

##### 4.3 Step three: Give a statement of identity and provide sworn confirmation of your facts

#### ***The following information must be contained in paragraphs 1 – 7:***

- (1) The person making the affidavit will state “I am in the applicant in this matter and confirm that the facts contained herein are within my personal knowledge and belief true, unless the content indicates the contrary.” – this follows directly after the oath declaration. In this part of your affidavit, you swear that your facts are honest and to the best of your knowledge. The statement is equivalent to standing in front of a courtroom and swearing under oath. It is written in the first person context, where you also identify yourself in the confirmation.
- (2) The following paragraph will indicate the name & surname, gender, age, occupation and place of residence of the applicant.
- (3) The following paragraph will indicate the cell-phone number and email address of the applicant.
- (4) The following paragraph will indicate the applicant’s full 13-digit South African identity number.
- (5) This paragraph will set out the name, surname, age, gender, occupation and place of residence of the Respondent (last known address).
- (6) The following paragraph will indicate the cell-phone number and email address of the Respondent.

(7) The following paragraph will indicate the Respondent's full 13-digit South African identity number.

#### 4.4 Step four: List the facts of the matter

Because you must list each fact you are aware of, this section of the affidavit may be the longest. As long as the information is accurate, the section's length is unconstrained. The facts, including names, dates, times, and addresses, must remain precise, impartial, and concise. Try to present your information chronologically, with each fact being expressed in a separate paragraph and being accompanied by supporting documentation.

#### 4.5 Step five: Date and sign the affidavit

The affidavit must then be dated and signed by yourself and a Commissioner of Oaths.

### **5. What are the next steps that will be taken when FCS division of SAPS get involved and what might be possible outcomes?**

SAPS Family Violence, Child Protection and Sexual Offences Units (FCS). The FCS Units fight against sexual offences against children, person-directed crimes (where the family is involved), illegal removal of children under the age of 12 and crime facilitated through the electronic media. The FCS division of SAPS will then investigate the allegations.

### **6. Practical advice on how to use your rights in terms of the Children's Act when it comes to child maintenance**

#### 6.1 Am I entitled to apply for child maintenance?

Section 18 of the Children's Act 38 of 2005 deals with parental responsibilities and rights. Section 18 (2) reads as follow: "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; to act as guardian of the child; and (d) to contribute to the maintenance of the child."

Section 15(1) & (2) of the Maintenance Act reads as follow: "Without derogating from the law relating to the liability of persons to support children who are unable to support themselves, a maintenance order for the maintenance of a child is directed at the enforcement of the common law duty of the child's parents to support that child, as the duty in question exists at the time of the issue of the maintenance order and is expected to continue. The duty extends to such support



as a child reasonably requires for his or her proper living and upbringing, and includes the provision of food, clothing, accommodation, medical care and education.”

In terms of the common law both parents must support their children proportionately, according to their means. Thus the fact that in the past the father almost invariably was, and today often still is, in the stronger economic position does not mean that the mother has no liability, even though the father has adequate means.

## 6.2 How does visitation work?

Visitation rights are limitation or restrictions on a parent right to have contact and care (previously known as custody and access in terms of the common law) with their child. Upon dissolution of a marriage, or the breakup of a relationship, parents can either acquire sole or shared/ joint custody. In most cases parents will have shared custody. Courts are hesitant to withhold contact rights because children should be allowed to have a close and healthy relationship with both their parents. The child has a right to visit and be visited by both their parents. Visitation rights can however be limited in the following ways: supervised and phased in visitation rights.

Section 1 of the Children’s Act (the Act) defines care quite extensively and makes it clear that children should not be subjected to abuse, neglect, maltreatment or any other physical or emotional harm. It is possible for children to be removed from the care of their parents/guardians. Point of departure would normally be to obtain a court order for the removal of the child from their home and placement into alternative care.

Therefore, if a parent has a history of violence or abuse (especially sexual abuse) towards either the child or the other parent, courts will give that parent no or limited contact with their child. This will be done where a court is of the opinion that the child will be exposed to danger, or it would be in the best interests of the child to not have contact with that parent given their history and violent tendencies. If a court considers the parent to be stable and perceives the child not to be exposed to danger, the court will order that parent supervised or phased in contact (limited contact).

## 6.3 Can my visitation be denied by the other parent if there is non-payment of maintenance?

No, refusing contact would amount to a criminal offence. The other parent (the aggrieved parent) is able to lay a complaint at the police station, and the primary parent will face punishment in the

form of a fine or imprisonment for up to one year.<sup>1</sup> Moreover, the aggrieved parent can apply to the Children's Court or the High Court for the committal of contempt of a court order.

Disclaimer: Although every measure was taken to ensure that the information contained in this webinar handout is legally correct at the time when it was presented, the information given and presented is ultimately the view of the individual presenter and constitutes an opinion and interpretation of certain portions of the law. It should not be construed as legal advice. The information presented is for educational and informative purposes and if you require legal assistance with your legal matter, you are advised to contact a reputable family law practitioner to assist.

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<sup>1</sup> S35 of the Children's Act.