

WEBINAR HANDOUT



Webinar: **PARENTAL RIGHTS AND RESPONSIBILITIES OF MARRIED AND UNMARRIED FATHERS**

Host: Eugene Opperman (Oppermans Inc Attorneys)

Guest speaker: Erin O’Neale (Candidate Attorney at Oppermans Inc Attorneys)

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1. General principles of parental rights and responsibilities

1.1 What are parental rights and responsibilities?

Parental responsibilities and rights are found in section 18 of the Children's Act 38 of 2005 (hereinafter the "Act"). Section 18 provides the following: "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."

The Constitution of the Republic of South Africa, 1996 (hereinafter the "Constitution") makes provision for children's rights in section 28(1). The children's rights provision further affirms that parents have certain responsibilities and rights that they owe towards their children. Therefore, the Act aims to strengthen the rights and responsibilities that parents have in terms of the Constitution.

Moreover, it should from the outset be understood that parental responsibilities and rights are inseparable. This means that you cannot have the one without the other. This has been confirmed in the judgment *GM v KI* 2015 (3) SA 62 (GJ). In the aforementioned judgment it was confirmed that parental rights cannot be separated from parental responsibilities when terminating parental responsibilities and rights. The court found that the terms "responsibilities" and "rights" have to be considered as a collective. This means that the mother cannot only terminate the rights of the father, but that both the rights and responsibilities of the father have to be terminated together.

1.2 Who is a "parent" and "child" in terms of the Act?

"Parent", in relation to a child, includes the adoptive parent of a child, but excludes –

- (a) the biological father of a child conceived through the rape of or incest with the child's mother;
- (b) any person who is biologically related to a child by reason only of being a gamete donor for purposes of artificial fertilisation; and (a gamete donor is someone who donated sperm or ovum)
- (c) a parent whose parental responsibilities and rights in respect of a child have been terminated.

Section 17 of the Act defines a child and states: “a child, whether male or female, becomes a major upon reaching the age of 18 years.” Therefore, a child is any person under the age of 18 years.

2. What is meant by “parental responsibilities and rights”?

2.1 General point of departure

The court in *D v D*¹ confirmed that the parental responsibilities and rights that a parent might have in respect of a child includes: the duty to care for the child, the duty to maintain contact with the child, the duty to act as guardian of the child and the duty to contribute maintenance towards the child.² As has been stated above, a parent can have either full or specific parental responsibilities and rights in respect of their child.

2.2 Duty to care for the child

The duty to care for the child encompasses the duty to ensure that the child has a safe home and living conditions. Parents who are married are normally both primary caregivers of the child. However, upon dissolution of the marriage usually only one parent becomes the primary caregiver. The primary caregiver is responsible for day-to-day responsibilities in respect of the child, and ensuring that the child’s needs are met. The child will on a permanent basis reside with the primary caregiver.

2.3 Duty to maintain contact with the child

The duty to maintain contact with the child is the duty to maintain a close relationship with the child, especially if the parent is the non-primary caregiver and no longer resides in the same home as the child. The child has a right to have a close and healthy relationship with both parents, and this means having daily contact with the parents. This is the right of the parent to visit and be visited by the child. Alternatively, it could mean calling the child via WhatsApp calls, or skype on a daily or weekly basis.

¹ (2012/47100) [2014] ZAGPJHC 132 (26 March 2014).

² S18(2) of the Children’s Act.

2.4 Duty to act as a guardian of the child

To act as the guardian of the child entails making important decisions on their behalf. Section 18(3) of the Act sets out the duties of the guardian as follow: “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.”

2.5 Duty to contribute maintenance towards the child

Maintenance is the obligation of parents to financially support their children. The obligation to pay maintenance is a common law duty of support which both parents have to comply with. This is the duty to contribute payments towards the education, healthcare, food and clothes of the child. The maintenance duty falls on both parents and is not split 50/50. It is rather determined based on the reasonable needs of the child and the means of the parents. It should be noted that if someone does not have the means they cannot be expected to pay maintenance. Maintenance has been extensively discussed throughout this webinar series, and if there is any uncertainty consult some of the previous webinars.

3. Acquisition of parental responsibilities and rights defined and explained

3.1 Are parental responsibilities and rights shared between parents?

Parents can have either full or specific parental responsibilities and rights. Parents normally acquire parental responsibilities and rights by virtue of being the biological mother or father of the child. Biological parents usually share parental responsibilities and rights depending on the circumstances. However, it is also possible for other persons such as grandparents to acquire parental responsibilities and rights in respect of the child. Therefore, depending on who acquired

parental responsibilities and rights it is possible for these to be shared between multiple people at the same time. Grandparents can by virtue of parenting plans, or section 22 agreements obtain parental responsibilities and rights.

3.2 How does a married/unmarried mother acquire parental responsibilities and rights?

Section 19 of the Act provides that: “the biological mother of a child, whether married or unmarried, has full parental responsibilities and rights in respect of the child.” This means that a biological mother of a child will automatically acquire full parental responsibilities and rights in respect of the child regardless of her marital status.

3.3 How does a married father acquire parental responsibilities and rights?

Section 20 of the Act provides that: “the biological father of a child has full parental responsibilities and rights in respect of the child –

- (a) if he is married to the child’s mother; or
- (b) if he was married to the child’s mother at
 - i) the time of the child’s conception;
 - ii) the time of the child’s birth; or
 - iii) any time between the child’s conception and birth.”

This means that a biological father by virtue of his marital status to the mother can automatically acquire full parental responsibilities and rights in respect of the child.

3.4 How does an unmarried father acquire parental responsibilities and rights?

An unmarried father does not automatically acquire full parental responsibilities and rights in respect of the child. Section 21 of the Act provides: “The biological father of a child who does not have parental responsibilities and rights in respect of the child in terms of section 20, acquires full parental responsibilities and rights in respect of the child –

- (a) if at the time of the child’s birth he is living with the mother in a permanent life partnership; or
- (b) if he, regardless of whether he has lived or is living with the mother –
 - i) consents to be identified or successfully applies in terms of section 26 to be identified as the child’s father or pays damages in terms of customary law;

- ii) contributes or has attempted in good faith to contribute to the child's upbringing for a reasonable period; and
- iii) contributes or has attempted in good faith to contribute towards expenses in connection with the maintenance of the child for a reasonable period.

An unmarried father can also acquire parental responsibilities and rights by means of a parenting plan. Parenting plans are written agreements entered into between the mother and the father of the child. It is a legally enforceable agreement once registered with the Office of the Family Advocate and made an order of court. The unmarried father can approach the Children's court to enter into a parenting plan with the mother. The Children's court is the Magistrate's court nearest to where the child lives. The unmarried father must complete a Form 2 application supported by an affidavit setting out the reason why he is approaching the court. The court will then refer the matter to the Office of the Family Advocate.

4. Maintenance disputes of unmarried fathers

4.1 General point of departure

From the discussion above it is clear that unmarried fathers do not automatically acquire parental responsibilities and rights in respect of their children. Does this mean that the unmarried father does not have to pay maintenance towards his child? No, an unmarried father remains liable to pay maintenance irrespective of whether he has acquired any of the other parental responsibilities and rights. This is confirmed in section 21(2) of the Act. Section 21(2) of the Act states: " This section does not affect the duty of a father to contribute towards the maintenance of the child."

4.2 How are maintenance disputes dealt with?

The mother of the child is able to apply for maintenance against the father at the maintenance court. This is the Magistrate's court nearest to where the mother, or father (respondent) lives or works. The maintenance amount will be calculated based on the income and expenses of the parents, and the needs of the child. Maintenance is a common law duty of support that falls onto both parents. This is a financial obligation that parents owe towards their children.

Maintenance disputes are usually dealt with in terms of a section 6 maintenance enquiry.³ This enquiry takes place in the office of the maintenance officer and not court. It takes the form of a

³ S6 of the Maintenance Act.

mediation. The maintenance officer is the independent third party who speaks to both the applicant (mother) and the respondent (father) to ascertain whether each can afford maintenance. It is important that both parties give concise and honest information to the officer. The maintenance officer will then attempt to resolve the dispute while having regard to the documents, and information provided during the enquiry.

If the section 6 enquiry fails and the dispute is not resolved a section 10 enquiry will then be held. This will take place in court. The court must then determine the pertinent issues relating to the duty of support. The court will then make a maintenance order on an amount that is fair in terms of the income and expenses of the parties, and the needs of the child.⁴

5. Brief reference to major decisions by one parent and visitation rights

5.1 What are the major decisions affecting the child?

Section 30(2) of the Act states that parents who share parental responsibilities and rights are able to independently from the other parent exercise their responsibilities and rights. This means that each parent can make decisions without consulting the other parent, except in limited circumstances. Section 31 (a) & (b) of the Act states: “before a person holding parental responsibilities and rights in respect of a child takes any decision contemplated in paragraph (b) involving the child, that person must give due consideration to any views and wishes expressed by the child, bearing in mind the child’s age, maturity and stage of development. Section 31(b) provides: “A decision referred to in paragraph (a) is any decision –

- i) in connection with a matter listed in section 18(3)(c);
- ii) affecting contact between the child and a co-holder of parental responsibilities and rights;
- iii) regarding the assignment of guardianship or care in respect of the child to another person in terms of section 27; or
- iv) which is likely to significantly change, or to have an adverse effect on, the child’s living conditions, education, health, personal relations with a parent or family member or, generally, the child’s well-being.”

⁴ *Geyer v Bekker* (A395/2011) [2012] ZAWCHC 60 (1 March 2012) para 13.

Section 18(3)(c) states that: “the guardians of the child must 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.

Section 31(2)(a) & (b) states that: “before a person holding parental responsibilities and rights in respect of a child takes any decision contemplated in paragraph (b), that person must give due consideration to any views and wishes expressed by any co-holder of parental responsibilities and rights in respect of the child; (b) a decision referred to in paragraph (a) is any decision which is likely to change significantly, or to have a significant adverse effect on, the co-holder’s exercise of parental responsibilities and rights in respect of the child.”

5.2 Should the unmarried father be included in the decision making?

As discussed, if the unmarried father has acquired parental responsibilities and rights in respect of his child, he must be included in the major decision making of his child’s life. However, if the unmarried father has not acquired any parental responsibilities and rights in respect of his child, he does not have to be included in the decision making of his child’s life. The mother is considered the primary guardian and does not require the consent of the father.

5.3 Must the unmarried father be informed of the relocation of his child?

If the unmarried that has acquired contact and care rights in respect of his child, then the mother has an obligation to inform the father of any change of address. It is a criminal offence if the mother fails to adequately inform the father of change of address. Section 35(1) states that: “any person having care or custody of a child who, contrary to an order of any court or to a parental responsibilities and rights agreement that has taken effect as contemplated in section 22(4), refuses another person who has access to that child or who holds parental responsibilities and rights in respect of that child in terms of that order or agreement to exercise such access or such responsibilities and rights or who prevents that person from exercising such access or such

responsibilities and rights is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding one year.”

5.4 What are visitation rights?

Visitation rights are limitations and restrictions on a parent’s right to contact with their child. The unmarried father can acquire contact rights in respect of his child. Courts are hesitant to withhold contact rights. Children have a right to have a close and healthy relationship with both their parents. Therefore, it is the right of the child to visit and be visited by their parents.

There are different forms of visitation rights that a court can grant. These include –

- Supervised visitation;
- Phased in visitation;
- Unsupervised visitation.

5.5 Can the unmarried father be awarded visitation rights?

It is possible for the unmarried father who wishes to have visitation rights to apply to the Children’s court. The Children’s court can hear matters relating to care, contact and maintenance of a child. The unmarried father will complete a Form 2 application supported by an affidavit. The application form will set out the reasons and purpose why the father is approaching the court. Visitation rights falls within the ambit of contact rights in respect of the child. The court is able to award the unmarried father rights to contact with his child.

The court will consider various factors before granting visitation rights. These include: the best interests of the child; the relationship between the father and the child; the degree of commitment shown towards the child; and how visitation will affect the living conditions of the child. In granting visitation rights the parents will be referred to the Office of the Family Advocate to mediate and ensure that a contact schedule or parenting plan is drawn up. This will set out how visitation will work.

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 views 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.