

COMPILING A PARENTING PLAN DURING OR AFTER DIVORCE / SEPARATION BY MEDIATION

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1. The Children's Act, No 38 of 2005 (referred to as "the Children's Act")

- In July 2007, sections of the Children's Act came into effect, and certain articles in the Act, such as those regarding the drawing up of a parenting plan, were promulgated on 1 April 2010.

- In addition to the protection provided under the Bill of Human Rights, as described in Chapter 2 of the Constitution of the Republic of South Africa, 1996, the best interests of the child are also paramount under the Children's Act.

- Both parents, after their divorce or the separation of unmarried parents, remain the holders of full parental responsibilities and rights with regard to their minor child(ren) (under the age of 18 years). (Certain criteria are stipulated in the Children's Act in terms of which an unmarried, biological father qualifies as holder of parental responsibilities and rights with regard to his minor child(ren). The Family Advocate's Office may issue a certificate confirming the biological father's responsibilities and rights. See end of page 3.)

- Section 33(2) of the Children's Act stipulates that "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".

- The parents may also, in the absence of a dispute, voluntarily decide to have a parenting plan drawn up in which both parents' parental responsibilities and rights as well as the exercising of these responsibilities and rights are prescribed. With such a plan, possible future problems could be identified, discussed and resolved timeously.

- In the event of divorce, the parenting plan could be attached as an addendum to the settlement agreement between the parties. The plan would first be registered with the Office of the Family Advocate, after which it would be made an order of court together with the settlement agreement. If the court has already granted a divorce, a parenting plan could still be compiled and the court requested to attach the plan as an addendum to the existing settlement agreement between the parties thus making it an order of court.

- A parenting plan could still be compiled, registered with the Family Advocate's Office and made an order of court even if the parents of the child are not married and a settlement agreement between the two parties is not applicable or necessary. (Ideally, both these steps should be taken.)

NB: A parenting plan has greater enforceability in law when it has been made a court order than when it has been registered only with the Family Advocate's Office.

1.1 Purpose of a parenting plan

The purpose of a parenting plan is threefold:

- i. to, as far as possible, express the underlying principle of the Act, which is to ensure that the best interests of minor children are secured and to make provision for meeting their needs;
- ii. to stipulate clearly and protect each parent's responsibilities and rights with regard to the minor child(ren);
- iii. to ensure the continued involvement of a particular parent or other person with the minor child(ren) after the parents' divorce or after the separation of unmarried parents.

These aims are reached by both parents following a mediation process with a qualified mediator (in terms of the Act) who facilitates the process and draws up the parenting plan. This person may be a family advocate, psychologist, social worker or other suitably qualified person.

1.2 Legal prescriptions with regard to parenting plans

The legal prescriptions include that the parenting plan

- should be in writing and signed by both parties to the agreement as well as the mediator who drew up the agreement;
- may be registered with the Family Advocate or made an order of court;
- should be accompanied by a statement from a family advocate, social worker, psychologist or other suitably qualified person to the effect that the agreement was prepared after consultation with such person;
- should contain a provision that the parents, as co-holders of parental responsibilities and rights, may revise the parenting plan at a future date. Both parties have to agree in writing to the change(s), and, if the parenting plan was previously made an order of court, an application may be brought to court in order to make the amendment(s) to the agreement an order of court.

The Children's Act stipulates that due consideration should be given to the views expressed by a minor child in matters concerning him or her, including major decisions with regard to the child, bearing in mind the child's age, maturity and stage of development. Taking these factors into consideration, the mediator will consider the child's participation in the mediation process, as well as informing the child of relevant information contained in the parenting plan.

1.3 Advantages of a parenting plan

1.3.1 One of the most important indicators of the general welfare of a child after his or her parents' divorce or separation is the level of conflict that may be present or may persist. During the mediation process, both parents are given the opportunity to accustom themselves with the post-separation/divorce period while considering the best interests of their child(ren). This can significantly limit future conflict regarding the child(ren), and the accompanying negative emotions that such conflict evokes.

1.3.2 An objective third party with the necessary expertise regarding children's developmental needs assists parents to explore co-parenting issues and to participate in compiling a parenting plan that provides for the child(ren)'s needs as well as a day to day schedule.

1.3.3 The mediation process creates an opportunity for parents to reaffirm their parenting and to redefine their future roles as co-parents but no longer as spouses or a couple.

1.3.4 A parenting plan gives structure to the ongoing involvement of both parents with the child(ren) and impresses on the child(ren) and others the commitment of both parents to the child(ren)'s welfare – despite the fact that one of the parents may in future spend more time with the child(ren) on a daily basis.

1.3.5 A flexible agreement that makes provision for mutually agreed revisions offers a concrete record of decisions taken jointly by the parents in the best interests of the minor child(ren) and facilitates collaborative co-parenting.

1.3.6 A parenting plan precludes one parent from making changes to the plan unilaterally. It also stipulates what procedures should be followed to deal with future differences without necessarily approaching the court.

1.3.7. When the parents deviate from the parenting plan and a dispute arises as a result of the deviation, the parenting plan agreement will form the basis for action until such time as the dispute is resolved.

1.3.8 The mediation process, while not psycho-therapy, may provide therapeutic benefits to all parties to the divorce/ separation.

2. Mediation process

Parents are helped to seek solutions and to come to informed decisions that will be in the best interests of their child(ren) after considering all relevant information.

The mediation process is

- **non-prescriptive** - the parents are partners in decision making – also in the future;
- **goal and future orientated** – the focus is on the future lives of both the parents and the child(ren) and not on the past or reasons for the divorce/separation;
- **empowering** – the parties have the opportunity to state their needs and to give their views on relevant issues.

2.1 Mediation sessions and the registration of a parenting plan

- In order to draw up a parenting plan, the parents themselves can decide on a mediator who is qualified in divorce and family mediation; the parents can be referred for mediation by the Family Advocate's Office or their legal representatives; or the parents can be ordered by the court to participate in mediation. In terms of the Family and Child Mediation (FCM) model, each parent attends an individual session with the mediator after which it is determined whether the parents will be able to co-operate to the extent that a parenting plan can be drawn up. If necessary, recommendations will be made with regard to assessments/assistance, after which mediation will again be considered.

- If it seems that the mediation process can continue, a decision is taken as to whether a particular child's views can be considered in the decision making regarding the items to be included in the parenting plan, bearing in mind the child's age, maturity and stage of development.

- It takes approximately 3-4 joint sessions of 90 minutes each to cover topics such as guidance in drawing up the parenting plan; discussions on co-parenting after the divorce/separation; and the practical arrangements for meeting needs of the child(ren). Depending largely on the co-operation between the parents and the level of conflict between them, more or fewer sessions may be necessary.

- After finalising the parenting plan and putting it in writing, the agreement is signed by both parties as well as the mediator.

- If the parenting plan forms an addendum to a divorce/separation settlement agreement, four original, signed copies of the plan, together with the declaration of the mediator who compiled the plan, are handed in at the Office of the Family Advocate for registration (usually by the legal representative of the applicant). At the same time, the settlement agreement is endorsed by the Office of the Family Advocate. An original copy of the parenting plan is filed with the Family Advocate's Office, while the other three copies are collected. The second

copy is placed on the court's file, together with the settlement agreement, and the third and fourth original, certified copies are handed to the parents. When the divorce case is heard in court, and the divorce is granted, the provisions of the settlement agreement, as well as those of the parenting plan, are made an order of court. (These are the requirements of the Family Advocate's Office* in Pretoria and might differ from requirements in other districts. It is recommended that the Office in the relevant district be contacted for their particular requirements.)

2.2 Refusal by a parent to participate in mediation

- If a parent experiences difficulty with the other parent in exercising their responsibilities and/or rights, they should first approach the other parent to request them to participate in a mediation process with the aim of drawing up a parenting plan. If their attempt to get the cooperation of the other parent is unsuccessful, the parent experiencing difficulty (or their legal representative), should then approach a mediator (qualified in terms of the Children's Act) to assist and invite the other parent to participate in mediation.
- The mediator will inform both parents of the requirements of the Children's Act concerning the drafting of a parenting plan, including their obligations with regard to the best interests of their child(ren).
- Should the other parent continue to refuse to participate in mediation; or agrees, but frustrates the process, e.g. fails to keep appointments, the mediator may provide a statement declaring the reasons why the mediation is unsuccessful.
- By presenting the court directly or through a legal representative with the mediator's statement, the parent experiencing difficulty will be able to demonstrate that they have attempted to fulfil the requirements of Section 33(2) of the Children's Act. The court may either order both parents to participate in a mediation process with the aim of drawing up a parenting plan, or hear the case.

Please note: It is always in the best interests of the child(ren), as well as of the parents themselves, to voluntarily have a parenting plan drawn up rather than for one of the parents to have no other option but to follow the court route.

3. Additional information for unmarried parents

- If parents who are not legally married decide to separate, and a settlement agreement is not applicable, they can still decide to have a parenting plan drawn up. In this plan both parents can feature as guardians as well as holders of full parental responsibilities and rights with regard to their minor child(ren).
- An unmarried father only acquires full parental responsibilities and rights in respect of a child if the father qualifies under the terms of Section 21(1) of the Children's Act. If such a father experiences difficulty determining and/or exercising his responsibilities and/or rights, he would follow the same mediation steps as described in paragraph 2.1 with the aim to draw up a parenting plan. Paragraph 2.2 is applicable when either of the unmarried parents (or other holder of parental responsibilities and rights with regard to his child(ren), e.g. a grandparent) refuses to participate in mediation.
- Where a parenting plan does not form part of a divorce process, it may still be registered with the Family Advocate's Office and/or made an order of court. It is strongly advised that both steps should be taken.
- If any uncertainty exists with regards to requirements or the correct procedures that have to be followed, it is advisable to contact the relevant Family Advocate's Office*.

* Office of the Family Advocate: Pretoria Tel. 012 323-0760 Durban Tel. 031 310-6500
Johannesburg Tel. 011 333-3724 Cape Town Tel. 021 467-1700

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