

CHILDREN'S ACT 38 OF 2005

AS AMENDED BY THE CHILDREN'S AMENDMENT ACT 41 OF 2007



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social development

Department:
Social Development
REPUBLIC OF SOUTH AFRICA

CHILDREN'S ACT 38 OF 2005 AS AMENDED BY THE CHILDREN'S AMENDMENT ACT 41 OF 2007

1. INTRODUCTION

The Children's Act is a comprehensive piece of legislation that seeks to afford children the necessary care, protection and assistance so that they can develop to their full potential. Forty three sections of the Children's Act were put into operation on 01 July 2007 and further sections were promulgated on 01 April 2010 after the regulations were finalized.

2. CONTENT OF THE ACT

The Act has 22 chapters, which can be summarised as follows:

Chapter 1 deals with the interpretation, objects, application and implementation of the Act. Chapter 2 provides for children's rights and deals with issues such as the best interest of the child, child participation, social, cultural and religious practices, access to children's courts and the age of majority.

Chapter 3 deals with all matters pertaining to parental responsibilities and rights, parental responsibilities and rights agreements and the assignment of parental responsibilities and rights by order of court. This chapter also provides for the rights of fathers, presumption of paternity, parenting plans and the rights of children conceived by artificial fertilisation.

The functioning, powers and jurisdiction of children's courts, and the conduct of proceedings before the children's court form the subject matter of Chapter 4 of the Act.

Chapters 5, 6, 7, 8, 11, 12, 13 and 14, respectively, are in the Amendment Act. These chapters deal with provincial competencies regarding service delivery to children such as partial care, ECD, reporting of child abuse, neglect and exploitation, prevention and early intervention, foster care, child and youth care centres, and drop in centres.



Chapter 7 is a crucial part of the Act as it provides for the National Child Protection Register A and B and measures relating to the care, protection, health, consent to medical treatment, surgical operations and HIV testing of children.

Chapter 9 deals with the child in need of care and protection, provides for the identification of such children and provides for actions to be taken with regard to children in need of care and protection.

Chapter 10 deals with Contribution Orders.

Chapters 15 and 16, respectively, provide for adoption and inter-country adoption and give effect to the Hague Convention on Protection of Children and Co-operation in respect of Inter-Country Adoption. Chapter 17 gives effect to the Hague Convention on the Civil Aspects of International Child Abduction, while Chapter 18 similarly gives effect to the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.

Chapter 19 introduces new legislation into the South African legal system by formally providing for surrogate motherhood.

Chapters 20 provides for the enforcement of the Act through powers of inspection and the creation of offences.

Chapters 21 and 22 deal with general administrative issues and other miscellaneous matters such as regulations, delegation and assignment of functions, outsourcing of services and transitional measures.

3. OBJECTS OF THE ACT

The Children's Act sets out to bring to life and operationalise collective obligations:

To promote the preservation and strengthening of families.

To give effect to certain constitutional rights of children.

To give effect to the Republic's obligations concerning the well-being of children in terms of international instruments binding on the Republic.



To make provision for structures, services and means for promoting and monitoring the sound physical, psychological, intellectual, emotional and social development of children.

To strengthen and develop community structures which can assist in providing care and protection for children.

To protect children from discrimination, exploitation and any other physical, emotional or moral harm or hazards.

To provide care and protection for children who are in need of care and protection.

To recognise the special needs that children with disabilities may have.

Generally, to promote the protection, development and well-being of children.

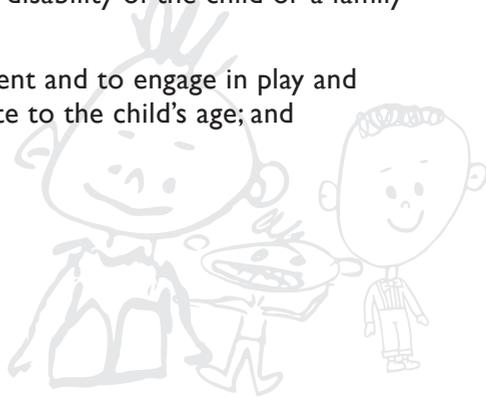
4. GENERAL PRINCIPLES

The general principles set out in the Act guide-

- a. the implementation of all legislation applicable to children, including this Act; and
- b. all proceedings, actions and decisions by any organ of state in any matter concerning a child or children in general.

All proceedings, actions or decisions in a matter concerning a child must-

- a. respect, protect, promote and fulfil the child's rights set out in the Bill of Rights, the best interests of the child standard set out in section 7 and the rights and principles set out in this Act, subject to any lawful limitation;
- b. Respect the child's inherent dignity;
- c. Treat the child fairly and equitably;
- d. Protect the child from unfair discrimination on any ground, including on the grounds of the health status or disability of the child or a family member of the child;
- e. Recognise a child's need for development and to engage in play and other recreational activities appropriate to the child's age; and



- f. Recognise a child's disability and create an enabling environment to respond to the special needs that the child has.

If it is in the best interests of the child, the child's family must be given the opportunity to express their views in any matter concerning the child.

In any matter concerning a child-

- a. An approach which is conducive to conciliation and problem-solving should be followed and a confrontational approach should be avoided; and
- b. A delay in any action or decision to be taken must be avoided as far as possible.

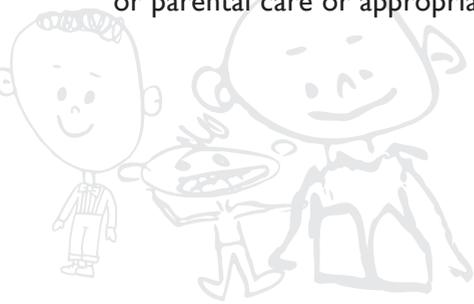
A child, having regard to his or her age, maturity and stage of development, and a person who has parental responsibilities and rights in respect of that child, where appropriate, must be informed of any action or decision taken in a matter concerning the child which significantly affects the child.

5. BEST INTERESTS OF THE CHILD

In all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied.

6. Protection of children's rights

- The Constitution provides for a society that is based on democratic values, social justice and fundamental human rights and seeks to improve the quality of life of all citizens and to free the potential of each person.
- Section 28 of the Constitution sets out the rights that every child should enjoy. The Children's Act gives effect to certain rights of children as contained in the Constitution. These include the right to family care or parental care or appropriate alternative care when removed from



the family environment, the right to social services and the right to be protected from maltreatment, neglect, abuse or degradation.

- The Children's Act recognises that protection of children's rights leads to a corresponding improvement in the lives of other sections of the community because it is neither desirable nor possible to protect children's rights in isolation from their families and communities.

7. Protection of children

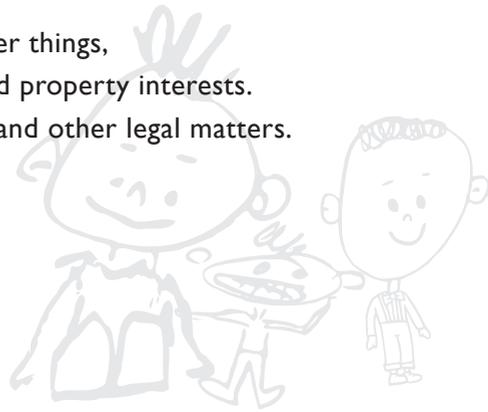
The Constitution and the Act recognise that the child's best interests are of paramount importance in every matter concerning the child.

It is necessary to afford children the necessary protection and assistance so that they can fully assume their responsibilities within the community.

It is important to note that families and communities are the primary agents in the care and protection of children. However the Children's Act provides further protection to the rights and wellbeing of children.

8. Age of majority

- The Constitution and various international conventions signed and ratified by government recognise a child as any person under the age of 18 years.
- To be in line with the Constitution, the Act lowers the age of majority from 21 to 18 years.
- In this period where many children find themselves without parents as a result of fatalities due to AIDS, this provision is very important to safeguard children against property grabbing by relatives or other people in the event of their parents' death.
- A person who is a major may among other things,
 - » Administer and safeguard property and property interests.
 - » Enter into administrative, contractual and other legal matters.



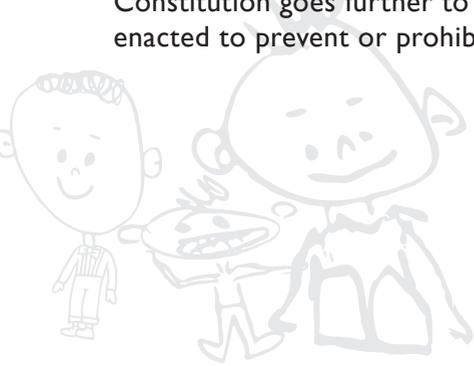
- » Give or refuse any consent required by law (Subject thereto another Act may stipulate a specific age).
- » Consent to the alienation or encumbrance of any immovable property.
- If any other Act refers to a “major” and a “minor” the change from 21 to 18 will be automatically applicable, but if that other Act refers to a specific age – such as the Firearms Control Act – the specific age will prevail.
- The lowering of the age of majority does not affect the extension of the period of placement of a child in alternative care beyond the age of 18 years.

9. Parental responsibilities and rights

- The parental responsibilities and rights that a person may have in respect of a child include the responsibility and the right to care for the child; to maintain contact with the child; to act as a guardian of the child; and to contribute to the maintenance of the child.
- It is not always possible for a child to be with both parents; hence the Act recognises that parents need to fulfill their rights and responsibilities even when their children are in the care of others.

10. Adoption

- According to the Constitution, everyone is equal before the law and has the right to equal protection and benefit of the law. The state may not unfairly discriminate against anyone on the ground of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. The Constitution goes further to state that National Legislation must be enacted to prevent or prohibit unfair discrimination.



- The Children’s Act therefore makes provision for a child to be adopted, among others, by partners in a permanent domestic life–partnership. However every adoption should be aimed to protect and nurture the child by providing a safe, healthy environment with positive support and it should be in the best interest of the child.

11. ORPHANS AND VULNERABLE CHILDREN

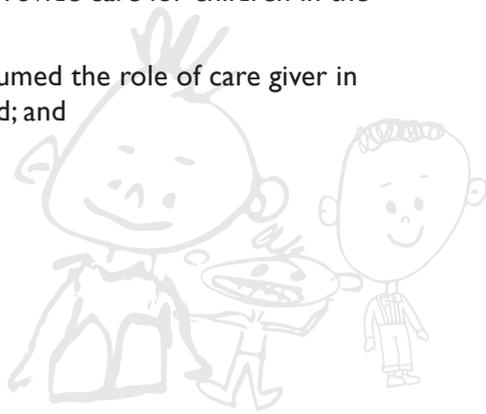
Vulnerable children include amongst others:

- Orphaned children (Children whose parents are deceased)
- Children with physical disabilities and chronic illnesses
- Children infected and affected by HIV and AIDS
- Children from dysfunctional families
- Children in homes headed by other children.
- Children in poor households and communities
- Children living and working on the streets

CHILD HEADED HOUSEHOLD (CHH)

Vulnerable Children include children in CHH. Section 137 of the Children’s Act makes provision for recognition of CHH if:–

- a. the parent, guardian or caregiver of the household is terminally ill, has died or has abandoned the children in the households;
- b. no adult family member is available to provide care for children in the household;
- c. a child over the age of 16 years has assumed the role of care giver in respect of the children in the household; and



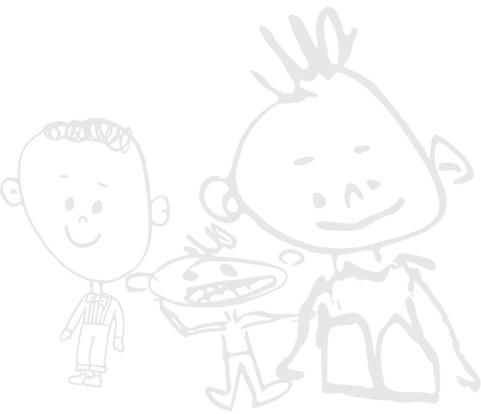
d. it is in the best interest of the children in the household.

This section also makes provision for a CHH to function under the general supervision of an adult designated by a children's court; or an organ of state or a non-governmental organisation determined by the provincial head of social development.

A person unsuitable to work with children is not a fit and proper person to supervise a child-headed household.

12. CONCLUSION

The care and protection of children in South Africa is everybody's business. The Children's Act requires a wide range of services to be provided to children and their families. It is therefore important for government, civil society organizations, parents, caregivers and the public at large to work together to ensure the safety, care and protection of all children.



USEFUL CONTACT NUMBERS

Childline:	080 005 5555
Child Welfare South Africa:	011 492 2884
South African Police Service Emergency Number:	10 111
Crime Stop:	086 001 0111
South African Human Rights Commission:	011 484 8300
Department Of Labour (Pretoria Head Office):	012 320 2059
Street Law (National Office):	031 260 1291

PROVINCIAL DEPARTMENTS OF SOCIAL DEVELOPMENT

Gauteng	011 355 7843/ 355 7823
KwaZulu-Natal	033 264 2089/2091
Northern Cape	053 874 9100
Western Cape	021 4834153
North West	018 388 2021
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Mpumalanga	013 7663120/3082
Free State	051 409 0590
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