

# THE Children's Act EXPLAINED

Booklet 1:  
Children and parents –  
rights and responsibilities



**social development**

Department:  
Social Development  
REPUBLIC OF SOUTH AFRICA

**unicef**   
unite for children

# TABLE OF CONTENTS



<b>HOW TO USE THIS BOOKLET</b>	<b>1</b>
<b>CHILDREN'S RIGHTS &amp; RESPONSIBILITIES</b>	<b>3</b>
Introduction	3
General principles	4
<b>PARENTAL RIGHTS &amp; RESPONSIBILITIES</b>	<b>11</b>
Introduction	11
Rights & responsibilities	13
Co-exercise of parental responsibilities	22
Parenting plans	24
Artificial fertilisation	26
Surrogacy	27
Adoption	28
<b>GLOSSARY</b>	<b>35</b>
<b>USEFUL CONTACT NUMBERS</b>	<b>40</b>

# HOW TO USE THIS BOOKLET

This booklet introduces you to the Children’s Act and talks about the general principles in the Act. In this booklet (Booklet 1) we try to explain, as simply as possible, the different rights and responsibilities that children and parents have. There are another two booklets in this series. Booklet 2 talks about prevention, early intervention and care, and Booklet 3 looks at the courts and how the Act can protect children. All three booklets are important and sometimes you will find that information is repeated in more than one booklet or you are told to look at another booklet to find out more about a specific topic.

To help you on your journey through each of the booklets there are three characters, two who are learners and one who is a teacher. Vusi, Mirasha and Ms Pandori will be there to discuss the Children’s Act with you.

This booklet has been written for children between the ages of 11 and 15 years. However, older children and grown-ups can also benefit by reading it and they may be able to help younger children understand the difficult bits.

The Children’s Act has many chapters and sections; a chapter gives the main headings in the Act and under each heading there are lots of sections; each of them numbered. You will notice that these booklets are also divided into chapters and sections for easy reference to the Act. The booklets do not look at every single chapter or section in the Children’s Act. Only the bits that speak directly to children (and also parents and other adults) are included in the booklets. Because of this you will notice that sometimes the numbers are not always in order and sometimes the numbers ‘jump’ around. We suggest that you have a copy of the Act when reading this guide.

At the back of the booklet there is a glossary that helps explain any difficult words in the Act. There is also a list of useful contact

numbers that you can call if you need help during times of trouble or if you just need some advice or information.

For easy reading we have used different symbols. These symbols will help you recognise certain types of information and look like this:

*When you see a note with a paperclip you will know this is an important point to remember.*



*A picture showing a pile of books will tell you this is a story about someone and it will give you an example of a situation relating to the information on those specific pages.*



*When you see a hand it means that this is something that is not allowed.*



# CHILDREN'S RIGHTS & RESPONSIBILITIES

## Introduction



"Hi. My name is Vusi –

"and mine is Mirasha – and we're here to tell you about the Children's Act.

The Children's Act is a legal document that was created to help protect children and make sure that your rights are respected."

The Children's Act is there to protect you and to make sure that you are taken care of, no matter who you are, where you live and who takes care of you."



The Act is there to help keep families together and make sure a child is cared for by family or parents, or is placed in alternative care when there is no family. The Act talks about protecting children from abuse, harm and neglect and to do this, many different services and resources need to be made available for children.

### Did you know?

*It is important to remember that the 'best interests of the child' come first. This is the ruler against which everything to do with a child is measured.*

## General principles (refers to Chapter 2 of the Children's Act)



"Hi. I am Ms Pandori, and I am going to be here to help explain some difficult terms in the Children's Act. To start with I'd like to tell you about the bigger picture and introduce you to some general principles. These are terms and concepts that come up time and again throughout the Act. An example of a general principle is the saying, 'the best interests of a child'. Even though it is used in different places throughout the Act, the way it is used never changes. You will find that the Act has many general principles and these will be explored in detail as we go on."

What the Act says is that when the government has to make a decision or do something that involves children it has to think about the legal and personal issues that will affect children.

The Act says that the state has to respect:

Did you know?

*Sometimes the government is also called the state.*

- **The rights of all children in South Africa.** These rights are contained in the Bill of Rights in the Constitution. The Constitution clearly states that children's rights must be promoted, protected and respected.
- **The dignity and worth of the child.** The state must make sure that all children are treated equally and are not discriminated against.
- **The child's need for development and growth.** A child needs to be able to play and engage in activities that suit the child's age and developmental capacity.
- **The right of children with disabilities to be encouraged and supported** whilst taking care of their special needs.

Another point that needs to be remembered when looking at children's issues is that the family and the child have a right to be heard. If it is in the 'best interests of the child' then the family will be given a chance to express their points of view even in times of conflict:

The right to be heard is so important that the Act gives examples of how families and children should be heard. The Act talks about the need to both hear and guide a family in conflict, to keep the parents informed of any decisions that are made about their child, and to listen to a child when decisions are being made that will affect the child.



### Best interests of the child (refers to Chapter 2, Section 7 of the Children's Act)



*Vusi says:* " 'The best interests of the child' are the first things to think about when making a decision that will affect the child. Sometimes when a child's best interests are ignored the child ends up in an even worse situation. The story about Susan will help illustrate this."

Susan lived in a home where the parents fought all the time. One day a social worker came and took Susan away and put her in foster care with a new family. Susan was very unhappy. She missed her mother and father every day and her sadness made her ill. Susan's best interests were not considered. If Susan was asked what she wanted she would have said that she loves her parents, and she just wants the fighting to stop.



*Mirasha says:* "The Act wants people to always think about what is best for the child. The Act is concerned about the child's personal relationships, the child's emotional and intellectual needs and any big changes in the child's life that would affect him or her."



The Act says that it is also important to look at the attitude that the parent has towards the child and the attitude the parent has about his or her duties as a parent.

Other factors that need to be considered are the age, the gender and the background of the child and whether the child has any disability, illness or any special needs.

All the above issues should be considered with care, but if a child is in need and faces the possible threat of physical or emotional harm then the child needs to be helped quickly, without exposing the child to any more harm.

### **Child participation (refers to Chapter 2, Section 10 of the Children's Act)**

Every child has the right to participate and to have a voice. This means that every child may take part in any matter that concerns the care and well-being of that child, depending on his or her age and maturity level.

*“Children participate when they are heard. When the qualities of their character are nurtured and affirmed this gives them the confidence to try the new and grow.” Nodi Ipp, Virtues Project.*



## Children living with a disability or chronic illness (refers to Chapter 2, Section 11 of the Children’s Act)

*Mirasha says:* “The Act says that children living with a disability or chronic illness have special needs and these should be recognised.”



What this means is that a child, who is living with a disability or is chronically ill, must be given every opportunity to take part in social, cultural, religious or educational activities. The Act places great importance on the people who are living with disabilities.

The right to dignity and self-worth is very important for all children living with a disability or a chronic illness. These children need to be encouraged to participate in their community and should be loved and cared for in a family environment.

*Even though a child may have a disability, he or she should be encouraged to live a life that is as full of possibility and growth as it can be.*

## Social, cultural & religious practices (refers to Chapter 2, Section 12 of the Children’s Act)

*Vusi says:* “Hello again! I’m here to tell you about how the Act wants to protect children from practices that can be harmful to their well-being and health. The Act protects all children so it does not matter what the child’s cultural or religious background is.”



There are many cultural practices that are seen as harmful to children and go against the rights of a child as set out in our Constitution and the United Nation’s Convention on the Rights of a Child. The Children’s Act tries to set down clear ground rules that must be followed by everyone in the country.



*Mirasha says:* "Children cannot be forced to marry and they cannot be allowed to marry if they are under-age. You may be surprised to find out that there are still some cultures in the world where young girls – as young as 12 years old – are being married to men who are much older than they are."

Children should have a right to play and enjoy their childhood whilst they are still young – marriage is a big responsibility for a child to bear.

The Act prohibits certain practices. Prohibit is a strong word meaning 'not allowed at all'. The Act makes it very clear that certain practices are not acceptable and people must stop using and abusing them.



*Vusi says:* "There are certain cultural and religious practices that are not allowed. They are prohibited. For example genital mutilation is prohibited. Virginity testing on children under 16 years of age is not allowed and a child under 16 can only be circumcised if it is for medical or religious reasons, or as long as the practice is part of the child's faith."

Virginity testing means that a young girl's genitals can be checked, by an older woman, to see if there has been any interference and to make sure that the young girl is still a virgin.

### Did you know?

*A child's body may not be marked after virginity testing and no-one can release the results of the test or force the child to disclose the results.*



### Practices that the Act allows (but with certain restrictions):

- Virginity testing of children older than 16 years, as long as the child understands what is happening, has agreed to the test and the testing follows an accepted approach. An accepted approach is one that follows a way that has been followed for many years – a recognised custom or tradition.
- Circumcision of male children over 16 years, as long as the child has an understanding of what will happen and has agreed to it. If a child does not want to be circumcised he has a right to say no.

### Children's responsibilities & age of majority (refers to Chapter 2, Section 16 & 17 of the Children's Act)

Children may have rights but they also have responsibilities. Rights are things that you are free to do and responsibilities are things you are expected to do. Therefore rights and responsibilities go hand in hand. If there are rights then there are responsibilities and you may not have one without the other. For example: a child has a right to be proud of his or her own culture but he or she also has a responsibility to respect the culture of others.

#### Did you know?

*A child has a responsibility to his or her family, the community and the state.*

*Mirasha says: "It could be said that children grow into their responsibilities. When you are a baby you need someone to take care of all your needs and a baby cannot have any responsibilities. When you grow older the responsibilities grow with you, until you reach the age of 18 and the law says you are now an adult. At 18 you have reached the 'age of majority' and you have all the rights and responsibilities of an adult."*



## Did you know?

An adult is sometimes called a major and a child is called a minor. That is why we call it the 'age of majority' because a child or minor moves on into adulthood and becomes a major.



*Mirasha adds:* "As children get older, they become more mature and are given more responsibilities. The law recognises that children change and it deals with children differently depending on their age. For example, the law understands that a very young child cannot always tell the difference between the real world and the imaginary world. Below is a true story about a very young child who did not understand that he had done something wrong."

A child of seven years old picked up his grandfather's gun while playing cops and robbers and he shot at his grandfather, killing him instantly. The child could not understand why his grandfather never got up again. The court decided that the child could not be found guilty of a crime because the child was too young to understand his actions. If the child was older the court would have decided differently.



*Vusi says:* "The duty of a parent or guardian to support their child ends when the child becomes an adult. What this means is that when a child reaches the age of 18 years, he or she becomes independent. There are exceptions to this, like when a child is still furthering his or her education, or the child is mentally or physically dependent on a parent, guardian or caregiver."



For all other children, once they reach the age of 18 years, and start earning a living and taking care of themselves, they have 'full legal capacity'. This means they can sue and be sued in a court of law, they can enter into contracts without the help of a guardian, they can choose to marry without their parents' or guardians' consent and many other rights that they are free to have without their parents' permission.

# PARENTAL RIGHTS & RESPONSIBILITIES

## Introduction



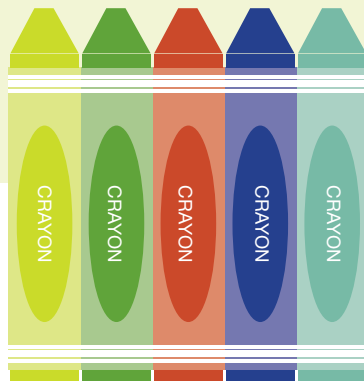
*Ms Pandori says:* “When a person has a child, he or she becomes a parent and the law says they have to take care of the child and are responsible for the child. The Act speaks about a parent’s ‘parental rights and responsibilities’. Parents have many rights and responsibilities but these are different for different people.

“There are mothers and fathers who are married and raising their children together. There are single mothers and single fathers. They may be single because they were never married or they got divorced. There are people who take care of children in the place of parents or people who take care of children for a short time. All these different families have rights and responsibilities for their children. They do not always have the same rights and responsibilities and the Act explains the differences.”



*Mirasha says:* “Because the rights and responsibilities of parents, guardians and caregivers are different, it gets very confusing trying to explain who has a right and who does not. So, what if we say that the rights and responsibilities that a parent has are like crayons in a colouring box?”

In that way we can compare the different types of parents that a child can have, by just looking at the number of crayons in each box.”



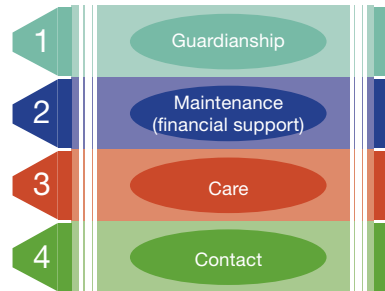


*Vusi says:* "I see what you mean. If a mother has full parental rights and responsibilities towards her child that would mean she has a full box of crayons, right?"

*Mirasha responds:* "Yes, and some parents will have fewer crayons than others. The number of crayons depends on the type of relationship a parent, guardian or caregiver has with the child and if the court gives a parent more rights – then they get more crayons in their box."



Later we will look at the number of crayons different types of parents will have in each of their boxes. But first it is important to understand the different words that are being used and also what the law says:



#### ***What is guardianship?***

This means the administrative part of taking care of a child. The biological parents who are married are both natural and legal guardians.

#### ***What is a legal guardian?***

A legal guardian is someone who is chosen to be a guardian either in a will or by a court (for more information see the section about the courts in Booklet 3).

#### ***What is a natural guardian?***

Sometimes the biological parents are called the natural guardians.

#### ***What does contact mean?***

This is about keeping in touch even though maybe the parent is not living in the same home. It is about talking and/or seeing the child often enough to develop a relationship.

#### ***What does care mean?***

Care means thinking about the child's daily needs such as providing a safe home, food, education and love. The child's development is part of care.



### Did you know?

Guardians are administrators. Carers are responsible for the day-to-day care of a child.

*Sometimes you will read words like 'care' and 'contact' in the Children's Act – the words 'custody' and 'access' mean the same things.*

## Rights & responsibilities (refers to Chapter 3 of the Children's Act)

### The Act says that parent/s must:

- Take care of their child.
- Maintain contact with the child.
- Be a guardian to the child.
- Make sure that the child has financial support. This means that both parents must provide for the child's needs. How they do this depends on how much money the parents have. This is often called maintenance.

*When a child is cared for they have a home, they are protected from harm and are fed and supported each day.*

*"My parents are too concerned about making money and they forget to take care of us or to spend time with us. We are left alone at home during the weekends and we just don't feel safe anymore." Interview held with child from Johannesburg.*

### Parents or guardians are expected to:

- Look after the property of a child and give or refuse consent if the child wants to sell property like a house.
- Act for the child when doing anything official like entering into a contract or when the child needs to go to court.
- Say yes or no if a child asks for permission to get married, be adopted, leave South Africa or get a passport.

### Did you know?

*The High Court is the Supreme Guardian of all children.*



*Ms Pandori tells this story: "Jenny's parents get a divorce and both Jenny's parents are her guardians and both take care of her. Jenny's mother wants to remarry and live in another country. Can Jenny's mother take her away without asking for permission from Jenny's father or even Jenny?"*

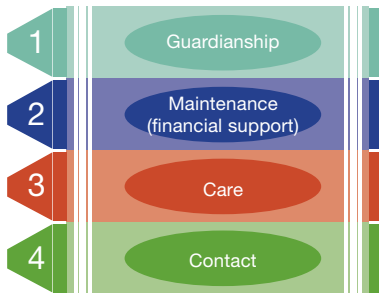
**"No! The Children's Act clearly says that both guardians need to agree to a child's removal to another country, and only a court can decide otherwise."**

### Did you know?

*Both parents have equal guardianship over children that have been born during the marriage.*



Earlier on we said that the Act speaks of many different types of parents.



**Let's look at those different families.**

All of the following have a full box of crayons:

- Married biological mother and father.
- Divorced mother and father.
- Unmarried biological mother.

*This depends on the court making a decision.*

**Did you know?**

*The mother of a child has 'full parental responsibilities and rights' for that child even if she is not married to the father.*



Unmarried biological fathers have crayons 2 and 4... and the court can grant crayons 1 and 3.

*Sometimes biological fathers are also called natural fathers.*



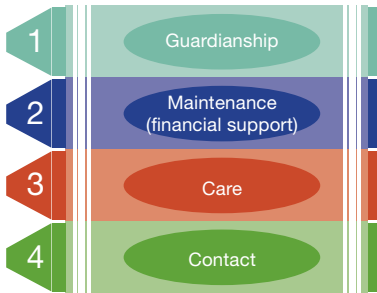
and/or



*This depends on a court decision and the relationship with the child.*

## Caregiver

The Act says a caregiver is someone other than the parent or guardian who is taking care of a child. It could be a foster parent, a community caregiver or even the head of a child-headed household.



## Adoption

*Full box of crayons shared by the adoptive parents.*

*Yusi says: "Sometimes a mother can also be the guardian of her unmarried child's children, in certain circumstances."*



Maria was Bonggi's mother. Her husband Mdu died when Bonggi was only five so Maria was a single mother. Life was not easy because there was not much money. When Bonggi went to high school she started to spend time with a group of friends who liked to drink and party and Bonggi became very rebellious. Maria was not surprised when Bonggi told her she was pregnant and the father was also at her high school. Bonggi was only 14 years old when she fell pregnant and the father was 16 years old. Maria became the guardian of Bonggi's child after he was born.



## Parental rights & responsibilities of unmarried fathers (refers to Chapter 3, Section 21 of the Children's Act)

Peter and Susan met at a party and started to go out together. Unfortunately they broke up soon after they met because they could not stop fighting. A few months after their break up Susan found out that she was pregnant. Susan decided to keep the baby and told Peter about her pregnancy. Peter said that he would help support her and her baby. After an easy pregnancy, a baby boy was born. Susan called her baby Paul. Peter was there for the baby and he helped pay the hospital bills. He also paid a sum of money into Susan's bank account because Susan had not worked for a few months after Paul was born. Peter told Susan that he wanted to be a father to baby Paul. However, Susan told Peter to leave them alone and then refused to let Peter see the baby.



**Vusi says:** "When a biological father is not married to the mother he loses his parental responsibilities and rights but he must still pay half of the maintenance for his child. Some unmarried fathers want to have a relationship with their child and the law says these fathers can claim some rights but they need to prove some things first."



*'Proof' is something physical that can be used to show that the father has been helping to provide for his child. The father can show any shopping receipts, or bank statements to prove that he has sent money or bought things for his child.*

### Did you know?

*Maintenance is the amount of money a parent pays to help with the care and support of a child even if he is not living with the mother and child. Sometimes the court orders the parent to pay a certain amount each month.*

#### **A biological father must prove that he:**

- was living with the child's mother in a serious, long term relationship at the time of the child's birth,
- wants to claim paternity of the child,
- chooses to pay customary law damages,
- contributes to the child's upbringing, or
- contributes or tries to contribute to the maintenance of the child.

*'Customary law damages' – this is a traditional practice. The unmarried father must pay the unmarried mother's parents compensation for having sex with their daughter outside of a marriage and making her pregnant.*

When an unmarried father of a child wants to claim paternity it means he wants everyone to know that he is the child's father even if he and the child's mother do not have a relationship.

### Did you know?

*Paternity means that this man fathered the child with the child's mother. Paternity can be proved using a blood test.*

## Person claiming paternity (refers to Chapter 3, Section 26 of the Children's Act)

Every child who is born in South Africa is registered in terms of the Births and Deaths Registration Act. If a mother is not married to the father then she can leave out the father's name in the registration.



*Ms Pandori says: "A father who wants to claim paternity may ask the mother for permission to be identified as the father on the Birth Registration. The mother may refuse to give her permission and then the father will have to go to court and ask for an order showing that he is the father. The father can also go and ask the court for permission if the mother is mentally ill, or she has passed away or she cannot be found anywhere."*

Some people are excluded from claiming paternity. This means that sometimes a person is not allowed to claim that he is the father of a child when the child has been conceived because of:

- a rape of or incest with the mother of the child, or
- the person is biologically related to a child because of artificial fertilisation.

If an unmarried father wants to be the child's guardian, he must apply to the High Court. It is then up to the High Court to decide if it is in the child's best interests to give the father guardianship rights.

### Did you know?

*If a man and woman are going out together – like a girlfriend and boyfriend – and the woman falls pregnant, it is assumed that her boyfriend is the biological father. The boyfriend will then need to give proof that he is the father if he wants to claim paternity.*

**Assignment of contact, care or guardianship by the court to interested persons (refers to Chapter 3, Section 23 & 24 of the Children's Act)**

*Yusi says:* "The Act says any person who is interested in the well-being, care and development of a child may go to the High Court, a divorce court, or the Children's Court to ask for permission to be part of a child's life. The court will make sure that some very strict conditions are met before giving this permission to anyone. This is to make sure that children are protected from being put into the care of someone who may not take proper care of them. You can also find more information about the courts in Booklet 3."



**Did you know?**

*The High Court is the only court that can give someone permission to become a guardian. The divorce court and the Children's Court can give a person permission to take care of a child or just for visiting a child.*

*Mirasha says:* "Remember we spoke about how important it is to make sure the children's interests come first? Well the court has to look at many things when making a decision but firstly it will make sure that the decision is in the best interests of the child."



*Yusi says:* "It is also important to look at the relationship the child has with the person who has asked the court for permission – for contact, care or guardianship – and the court will ask if that person has ever given any money to help with the expenses of the birth and maintenance of the child."

**Did you know?**

*The Act also allows non-South African citizens to apply for guardianship as long as certain international standards are followed.*

## Assignment of guardianship (refers to Chapter 3, Section 27 of the Children's Act)

Natural guardians have a legal duty to support their children and must use their money to support the children. Legal guardians have no such duty. They do not have to use their own money to support the children.



There are two ways in which a person can become a child's guardian, if she or he is not the parent of the child:

- by a decision of the High Court acting as the 'supreme guardian' of all minors, or
- in a will that was written by a sole parent or sole caregiver who passed away. The person named in the will must be a fit and proper person.

*A will is a legal document that explains how someone wants his or her property to be shared out after they have died.*

*A fit and proper person is a person who is law abiding and able to take care of a child.*

The person who is named as a guardian in a will can only become a guardian after the death of the parent and if he or she accepts the new responsibility.

### Did you know?

*When the High Court is asked to choose a guardian for a child it does not have to be the child's parent as long as the choice is in the best interests of the child. The High Court will look at the relationship between the child and this person and also at the relationship the child has with the previous guardian.*

## Termination, extension, suspension or restriction of parental responsibilities & rights (refers to Chapter 3, Section 28 of the Children's Act)

*A High Court, a divorce court or a Children's Court.*

Certain people can ask the court to put aside a person's parental rights and responsibilities for a short time. They can even ask the court to stop some, or all, of a parent's rights and responsibilities.

*Vusi says:* "When we say 'certain people', we are talking about different types of people like someone who is a co-holder of parental rights and responsibilities (see the following section for more information) or someone who is interested in the child's well-being, or a family advocate."



## Co-exercise of parental responsibilities (refers to Chapter 3, Section 30 of the Children's Act)

*Vusi says:* "More than one person can have parental responsibilities and rights for the same child. When people share these duties they are called co-holders and they have the power to make independent decisions about the care of the child. It is important to remember that anyone, who has parental responsibilities and rights, must listen to the views and wishes of the child before they make a decision that will affect the child."





*Children are expected to obey the 'reasonable' orders or requests of their parents.*

Co-holders of parental duties and rights can make decisions about the care, contact, maintenance and guardianship of a child. They can also make a decision that will affect the child's living conditions, education, health, personal relationships or the child's well-being.

*Maintenance is an amount of money paid by a parent who does not live with child. It is paid to help with the upkeep of the child. A court may order a parent to pay maintenance.*

### **Did you know?**

*A caregiver who takes care of a child occasionally or for a period of time, may not have any parental responsibilities over the child but he or she should still safeguard the child's health, well-being and development. The caregiver should also protect the child from maltreatment, abuse, neglect, filth, discrimination, exploitation and any other physical, emotional or mental harm.*

*Parental responsibilities and rights can be limited or even stopped by a court.*

## Parenting plans

Content of parenting plans (refers to Chapter 3, Section 33 of the Children's Act)



*Yusi says: "Co-holders of parental responsibilities and rights may agree on a parenting plan. A parenting plan sets out their duties towards a child. They should agree on a parenting plan and try to avoid going to court if there is a disagreement."*

The parenting plan below is just an example of a basic parenting plan:

*This is the parenting plan for Henry Pitter*

1. Describe where and with whom the child will stay.

*Henry Pitter lives with Mrs Pitter, ID Number 5002150544090, at 25 Owl Corner, Castle Road, Muldersdrift.*

2. Describe how the maintenance of the child will be taken care of.

*A sum of R5,000 each month will be paid towards Henry Pitter's care by John Bloggs, who is the natural father of the child.*

3. Describe how the contact between the child and any other person will be controlled.

*The child will be in the custody of Mrs Pitter. Mr Bloggs has periodic right of access subject to certain conditions.*

4. Describe how the schooling and religious upbringing of the child will be taken care of.

*The child, Henry Pitter, will be raised in the faith of Mrs Pitter who is a Roman Catholic.*

*Signed on this day \_\_\_\_\_ of the month \_\_\_\_\_ in the year \_\_\_\_\_*

*Signature: \_\_\_\_\_*

*Witness: \_\_\_\_\_*

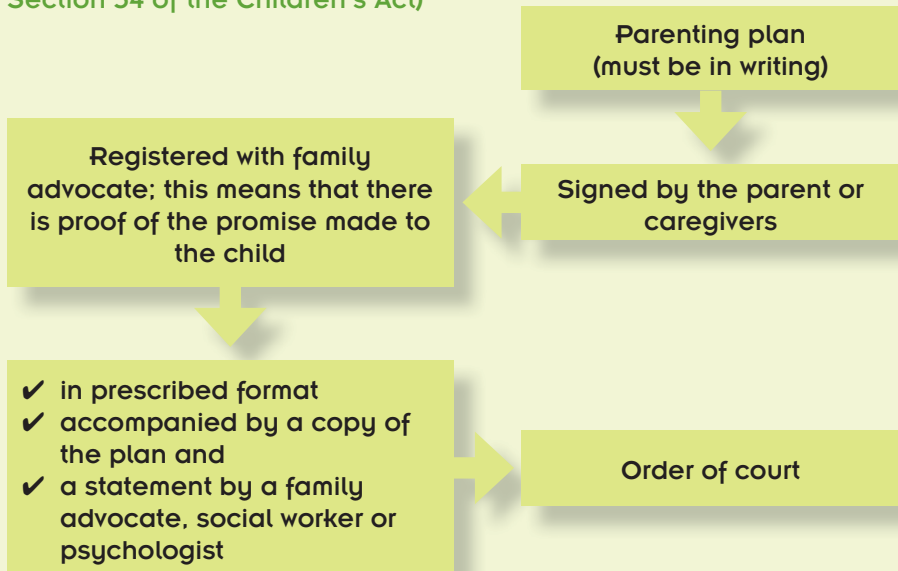
*Witness: \_\_\_\_\_*

*Vusi says:* "The co-holders of parental responsibilities can ask certain people to help with preparing a parenting plan. They are the family advocate, a social worker or psychologist, or suitably qualified people who can help mediate."



*A parenting plan must comply with the 'best interests of the child'.*

### Formalities for making a parenting plan (refers to Chapter 3, Section 34 of the Children's Act)



### Refusal of access (refers to Chapter 3, Section 35 of the Children's Act)

*Ms Pandori says:* "Even though a person has care and custody of a child, he or she cannot ignore a court order and cannot stop someone who has parental responsibilities and rights from exercising his or her rights to the child. If the person who has custody prevents someone from exercising his or her rights, then that person could be fined or even sent to prison for nearly a year."



## Artificial fertilisation (refers to Chapter 3, Section 40 of the Children's Act)

A lesbian couple, Fatimah and Anna, lived together for many years and got married recently in terms of the new law. Both Fatimah and Anna longed for children and it was decided that Fatimah would go through a medical procedure called *in vitro* fertilisation. This means that the ovum of one of the women is fertilised with donor sperm. The fertilised ovum was then successfully implanted into Fatimah's uterus and nine months later she gave birth to twin girls. The couple wanted to have the twins registered as their legitimate children. When the Director-General of Home Affairs refused to do this, they took the matter to court. The High Court declared the decision of the Director-General as unconstitutional because same-sex life partners have a right to marry, have a child and raise a family.



*Ms Pandori says:* "Where a couple, in a marriage, decide to have a child through artificial insemination the child that is born is seen as being the couple's biological child. This is the situation even if the child of a married couple was conceived with the gamete or gametes of another person, outside of the marriage."

*A gamete is a human cell that starts a baby growing in the womb.*

### Did you know?

*The Act insists that both parents must agree to the artificial fertilisation.*



*Mirasha asks:* "What will happen if a child conceived through artificial insemination has inherited an illness from his or her genetic parent? How will the doctor or the child's guardians know?"

*Vusi answers:* "The Act says that the child or the child's guardian can have access to medical information about the genetic parents even though the identity of the genetic parents can be withheld."



## Surrogacy (refers to Chapter 19 of the Children's Act)

Fatimah eventually leaves Anna and the twins because they no longer get along and Anna wants to keep the twins with her. Fatimah is now alone and struggling to make ends meet, so she decides to answer an advert in the paper asking for surrogate mothers to please step forward and help a couple who cannot have children of their own.



A surrogate mother is someone who carries a child, in her womb, for another person. The surrogate mother is not going to take the child for herself she is simply providing her body to help grow the baby. When the baby is born the surrogate mother leaves and has nothing more to do with the child. The child is then given to the family who wanted him or her and asked the surrogate mother for her help.

*Vusi says:* "The Act has some very strict requirements that need to be followed:

- There must be a legal agreement that is confirmed by the court.
- At least one of the parents wanting the baby must have contributed either an ovum or sperm. This is to make sure the child born has a biological relationship with the parent.
- There must be a medical reason why the future parents cannot have a child of their own.
- The agreement between the surrogate mother and the future parent/s is not based on financial gain.
- The parents can offer the baby a good, stable home.
- The surrogate mother will not have any relationship with the child after its birth, unless there is an agreement."



## Adoption (refers to Chapter 15 of the Children's Act)



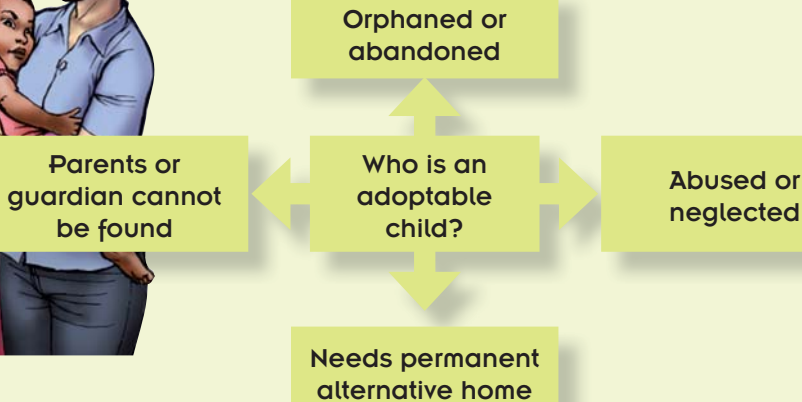
*Mirasha asks: "What does it mean for a child to be adopted?"*

When a child is adopted it means that the court agrees to give the child permanently to other parent/s who are able to take care of the child. The child who is adopted may be regarded as the natural child of the adoptive parent/s.

The purpose of adoption is to protect and nurture children by giving them a safe and healthy living place. Because adoption is permanent, it aims to connect the adopted child to his or her adoptive family. The adoptive parents become the child's legal guardians.



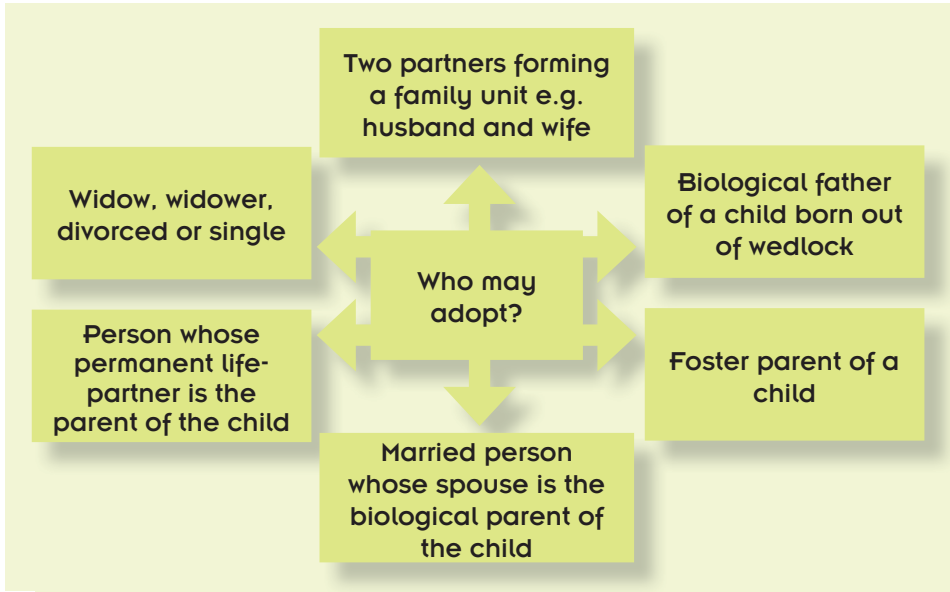
**When can a child be adopted? (refers to Chapter 15, Section 230 of the Children's Act)**



### Did you know?

*The court will only allow a child to be adopted if the adoption is in the best interests of the child. A social worker must make sure that the child can be adopted and that the adoption will be in the child's best interests.*

Who can adopt? (refers to Chapter 15, Section 231 of the Children's Act)



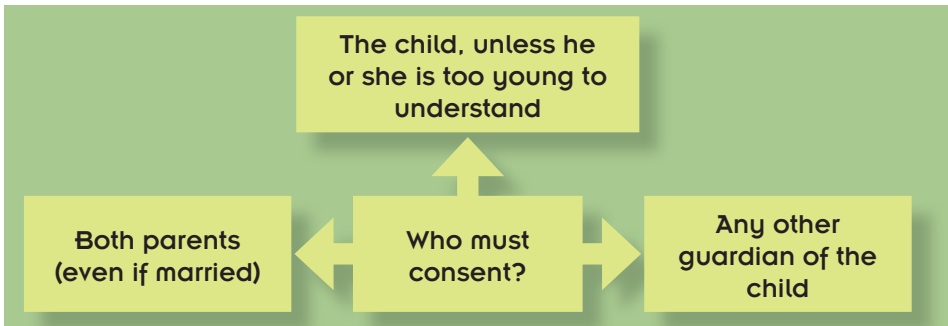
Thandi and Themba approach you as a social worker. They are interested in adopting a child. As the social worker you are required to assess whether or not Thandi and Themba will make good adoptive parents. What should the court be looking for?

*Mirasha answers:* "The court should look for parents who are fit and proper parents, over 18 years of age and who are willing and able to be parents. If the potential parents are not financially well off they cannot be discriminated against and they may apply for a social grant."



## Consent to adoption (refers to Chapter 15, Section 233 of the Children's Act)

Many people need to agree to the adoption. See below:



### Did you know?

*It is often a very difficult decision for a parent to give a child away. The law says that the social worker must explain everything carefully to the parents of the child. The law also says that the child needs to participate in making important decisions that affect him or her, so the social worker must talk to the child to see how the child feels about the adoption.*

## When consent is not required (refers to Chapter 15, Section 236 of the Children's Act)

Sometimes it is not possible to get everyone's consent. The law has therefore said that there are some exceptions to the rule that 'everyone must consent'. The consent of a parent or guardian will not be required if:

- the parent is mentally ill,
- the parent has abandoned the child, or it is impossible to find the parent/s,
- the identity of the parent or guardian is not known,
- the parent deliberately neglected or abused the child or allowed the abuse to happen,
- the parent has failed to exercise any parental duties for one year,
- the parent has not responded to a notice of the proposed adoption within 30 days, or
- the parent has received a court order that he or she may not consent.



If the parent referred to above is the biological father then his consent is not necessary if:

- he is or was not married to the mother and he has not claimed paternity of the child,
- the child was born because of an incestuous relationship, or
- the court believes that the child was conceived as a result of rape.

If a child is an orphan the court will need proof that the child has no parents. The parent or parent's death certificates must be shown.

### Consideration of adoption application (refers to Chapter 15, Section 240 of the Children's Act)



Rajan and Reshma have five children, and find it difficult to feed them all. They are a very religious Hindu family and they fast and pray to their deities, hoping for God's help. After months of worrying, they decide to give up their youngest child, three-year-old Rani, for adoption.

*Ms Pandori says:* "Adoption is a very serious decision that affects everyone. The court must be careful and has to look at a lot of important factors, including:

- the religious and cultural background of all the parties involved (the child, the child's parent/s and the prospective adoptive parents),
- any reasonable preferences that the parent/s may have included in their consent, and
- the social worker's report on the ability of the child to be adopted, the child's best interests and the child's medical information."



### Effect of adoption order (refers to Chapter 15, Section 242 of the Children's Act)



*Ms Pandori says:* "Before anyone decides to adopt a child or give a child up for adoption they really must think about it. If a child is adopted, all ties with the biological family *must* be cut. This means the biological parents and their family members have absolutely no rights or responsibilities over the adopted child. The adoptive parents will have full parental rights and responsibilities over the adopted child."

*Mirasha asks:* "What if the biological parent or the guardian of a child tells the child he or she must keep in touch with them. Can they make the adoptive parents agree to this?"



*Vusi says:* "No, they cannot make this a condition of the adoption. If the child would like to stay in contact with his or her natural parents after being adopted, and it will be in the child's best interests, then the child can keep in touch with the parents. The same can go for the parents."

### Did you know?

*The adoption order does not terminate any property rights the child had before the adoption and the adopted child cannot marry anyone related from the biological or the adoptive family.*

### Cancellation of adoption order (refers to Chapter 15, Section 243 of the Children's Act)

The court can cancel an adoption order if an application is brought to the court by the adopted child, a biological parent or a person who was the guardian of the child before the adoption. However, this application must be brought before the court not more than two years from the date of the adoption.

An adoption order can only be cancelled if:

- it will be in the child's best interests,
- the applicant is a parent whose consent was required but his or her consent was not obtained, or
- at the time of the adoption order, the adoptive parent did not qualify to be an adoptive parent.



## Did you know?

*The effects of cancelling the adoption order are that everything goes back to the way it was before the adoption.*

Simon and Sherry-Ann are a wealthy couple who have been married for 12 years and they have no children. After many years they finally decided to adopt a baby and went to an adoption agency. The agency told them about a teenage girl who was eight months pregnant and uncertain about giving up her baby. The agent also warned the couple that adopting a baby takes a long time. Simon and Sherry-Ann were impatient for a child and they said they could not wait any longer. They decided to offer the agency a large donation if the adoption process could be sped up. They also offered the young girl R40 000 for her baby when it is born and they also said they would pay for all her medical expenses.



**Vusi says:** "The law does not like it when people use money to force other people to do something for them. This is like bribing someone for their baby. Because adoption is a complicated process the law must be followed. This means that people cannot cheat or abuse the system. In the story above, Simon and Sherry-Ann tried to speed up the adoption process and it is against the law and will not be allowed."

## Did you know?

*The law will allow Simon and Sherry-Ann to contribute to the care of the pregnant person and the medical costs but it will not allow bribery.*

## Inter-country adoption (refers to Chapter 16 of the Children's Act)



*Ms Pandori explains:* " 'Inter-country adoption' talks about the situation where the parents who want to adopt live in a different country to the child. The Act tries to regulate and recognise inter-country adoptions to ensure that international standards for fit and proper adoptive parents are kept."

Because of the nature of inter-country adoptions, it is important for South Africa to have a good relationship with other countries. The Children's Act gives the President of South Africa the power to make agreements with other countries about these adoptions. The agreements have to follow what the Hague Convention says and Parliament must also agree.

The Hague Convention is a very important document because South Africa has agreed to follow it and make it into law in South Africa. This means that if South Africa makes a law about inter-country adoption that is not the same as in the Hague Convention then the South African law will be thrown out and the Convention will apply.

*The Act sets out a number of strict procedures and requirements that must be followed in inter-country adoptions! This is also not a decision that the court will take lightly, and the best interests of the child will always be the most important factor.*

## GLOSSARY

Act	A statute passed by parliament or a law made by parliament. Also means conduct, deed, something that is done, to perform a function.
Advocate	A lawyer who can appear in any court except the Small Claims Court. Advocates do not deal directly with the public. They are instructed by attorneys on behalf of their clients.
Age of majority	When a child moves on into adulthood, that means he or she turns 18 and now becomes a major.
Annul (annulled)	To legally cancel or end a specific arrangement, for example a marriage.
Adoption	Adoption is a legal way for an adult or adults, who for example are unable to give birth to a child or want to bring another child into the family, to become the legal parents of a child. When you adopt a child, the child becomes yours as though born of you.
Adoption (inter-country)	A situation where the parents who want to adopt a child live in a different country to the child.
Adoptive child	This means a child that can be adopted by parents who are not his or her biological parents, because the child has either been abandoned, orphaned, abused, neglected, or because his or her parents cannot be found or are unable to care for the child.
Adoptive parents	Parents who are legally appointed to permanently look after and care for a child or children that are not their biological children.
Artificial fertilisation	Where the egg from a woman's ovary is fertilised with sperm without sexual contact.
Biological father or mother	The father and mother who brought the child into the world; this means they biologically created the child.
Convention	In international law, convention refers to formal statements adopted by international bodies such as

the United Nations. It can also be seen as a set of standards, norms or criteria, often taking the form of a custom.

Chronic illness	This means an illness (sickness) or condition that will last a long time (usually longer than three months). Sometimes there is no cure for a chronic illness (for example HIV/AIDS). Examples of chronic illnesses or conditions are high blood pressure, diabetes, asthma and tuberculosis.
Circumcision	To cut off the skin (called the foreskin) at the end of the penis of a man or boy or to cut off the clitoris or outer sexual organs of a woman or girl. Circumcision is an important rite (practice) in some religions.
Co-exercise	Where more than one person is responsible for taking care of or performing a specific function, for example where both the father and mother of a child are responsible for taking care of the child.
Consent	To agree, accept or approve what is planned or done by another.
Constitution	Sets out the basic rules according to which a country is governed. A Constitution may be unwritten (in which case it is found in different statutes) or written (in which case it is found in a single document, like the South African Constitution).
Court order	An official order by a judge telling someone to do something or to stop doing something.
Custody, by parents	When parents exercise care and control over their children.
Disability	A condition either physical or mental (of the body or the mind) where someone is unable to function in a normal way due to a lack of ability, power, or fitness to do a certain action, for example where a person cannot walk because their spine was damaged in an accident and now their legs no longer work properly.

Divorce	A legal act to end a marriage that can only be done in the High Court.
Fertilisation (or conception)	The joining together of the male sperm (seed) and female ovum (egg) marking the beginning of a new life.
Gamete	A mature sex cell that usually has half of the normal number of chromosomes and is capable of uniting with a gamete from a member of the opposite sex to begin the formation of a new individual.
Genes (genetic)	These determine or carry our inborn characteristics and are the basic building blocks of the body. The genes are made of special proteins called nucleic acids. The genes are found in the middle (nucleus) of every cell in our body. We all have millions of genes.
Gestation	The carrying of a child in the uterus (mother's womb).
Grant	Assistance (sometimes financial) given for a particular purpose; for example, a grant is paid by the government to help poor parents who cannot afford to pay for their children's upkeep.
Guardian	A person or persons who have been legally appointed to protect and take care of a child or children.
High Court	A court in which a judge sits to hear and decide cases.
Immovable property	Property which cannot be moved, such as land and buildings.
Heredity	This refers to a person's inborn characteristics or traits. These are the characteristics that we inherit from both our biological parents, for example the colour of our eyes.
Incest	Sexual intercourse between persons so closely related that they are forbidden by law to marry. For example, a father and daughter should not have sex.

<i>In vitro</i> fertilisation	Where the egg from a woman's ovary is fertilised with the male's sperm outside the living body and in an artificial environment (see "artificial fertilisation" above).
Law	A set of rules used to control the behaviour of people in society.
Maintenance	Money paid to a parent or children for their support, usually by a divorced or separated spouse, or the father of a child whose parents are not married.
Marriage (civil)	A registered marriage that took place in front of a magistrate or a minister of certain religions.
Marriage (common law)	Living together without being legally married.
Mutilation	To make imperfect by cutting or destroying a necessary part, for example, a limb.
Orphan	A child whose parents have died.
Ovum	An egg from the female (mother).
Paramount	Very important and superior to anything else.
Paternity	The state of being a father or originating from the father.
Prohibit	To order someone not to use or do something.
Psychologist	A specialist in psychology; psychology is the science or study of the mind and the particular ways in which an individual or group thinks or behaves.
Sibling (siblings)	One of two or more individuals having the same parents or sometimes only one parent in common, for example a brother and sister are considered each other's siblings.
Social worker	A trained person who is able to help troubled families by providing counselling and advice in order to promote social well-being.
Spouse	Someone who is married; a husband or wife.
Sue	To use a legal process (and the court of law) to force a person, company, or organisation that has



treated you unfairly or hurt you in some way to give you something or to do something.

Surrogacy	This means when a woman bears a child for another person, either through artificial insemination or by carrying until birth another woman's surgically implanted fertilised egg.
Virginity testing	Checking a young girl's genitals to see if there has been any interference and to make sure that the young girl is still a virgin.
Voidable	To make void, that is to have no legal force or validity (see "annul" above).
Voidable marriage	Sometimes a child is born into a marriage that has not met the proper legal requirements. If the marriage is ended, the child's rights will not be affected.
Wedlock	The state of being married.

### References:

Web-based dictionaries were used as references for the glossary; these include:

Merriam-Webster's Word Central (<http://www.wordcentral.com>)

The Yahoo! Kids Dictionary (<http://kids.yahoo.com/reference/dictionary/english>)

## USEFUL CONTACT NUMBERS

If something unpleasant has happened to you and you need some help or you want to find out more information about a topic mentioned in this booklet try to talk to your parent or parents first. Also try talking to your teacher or a close adult family member. If none of these people can help try to contact the telephone numbers given below:

Childline:	080 005 5555
Child Welfare South Africa:	011 492 2884
South African Police Service emergency number:	10111
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 7843/7823
KwaZulu-Natal	033 264 2068
Northern Cape	053 874 9100
Western Cape	021 483 4153
North West	018 388 2021
Limpopo	015 293 6000/6331
Mpumalanga	013 766 3156/3120
Free State	051 409 0590
Eastern Cape	040 609 5303/4/5 or 608 5810

## Acknowledgements:

Material prepared and written by *Desia Colgan*, Lecturer in Law, University of the Witwatersrand, Johannesburg and Street Law Coordinator.

Contributions by *Jobst Bodenstein*, Professor, Rhodes University Legal Aid Clinic; *Lloyd Lotz*, Lecturer in Law, University of KwaZulu-Natal, Durban and Street Law South Africa Director; *Lorayne Excell*, Coordinator of Early Childhood Development, University of the Witwatersrand, Johannesburg; *Karmini Pillay*, Lecturer in Law, University of the Witwatersrand, Johannesburg; and *Sonia Brooks*, Projects Coordinator, Wits Commercial Enterprise.

Design by *Handmade Communications*.

Illustrations by *Tinus de Bruyn*.

