

CHILD PROTECTION AND WELFARE ACT 2012 SIMPLIFIED AND SUMMARISED

PART 1: INTRODUCTION ,DEFINITIONS AND PRINCIPLES OF THE ACT

Introduction

The Children's Protection and Welfare Act 2012 is a legal document that was created to protect children and make sure that their rights are respected. The Swazi government has enacted the Act 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 the rights of all children and the responsibilities of parents, guardians and **all** stakeholders involved in the care and welfare of children, including government departments, community leaders and community members, for protecting children from abuse, harm and neglect and to do this, many different services and resources need to be made available for children. The Act also talks about the responsibilities of children.

Definition of a child

A child is any person under the age of 18 years.

Best interest of the child

The protection and welfare of the child shall be the primary consideration in all actions (matters) involving children. Therefore when the government, parents, guardians, teachers or anybody has to make a decision or do something that involves children they have to think about the legal and personal issues that will affect children.

Child Abuse

Any form of harm or illtreatment inflicted on a child and including; assault, sexual abuse, exploitative labour, social, emotional, physical or psychological harm, physical or mental neglect or leaving a child without means of support.

A child is **physically abused** if there is any injury to their body as a result of the application of force or an agent that leaves a laceration, contusion, dislocation a sprain, burn, scald, the loss of consciousness or psychological functioning or loss of hair and teeth.

A child is **emotionally or psychologically injured** if there is damage to the child's mental or emotional function that shows through a mental or behavioural disorder, including anxiety, withdrawal, aggression or delayed development.

A child is **sexually abused** if he has taken any part in any activity which is sexual in nature for purposes of pornography, obscene or indecent material, photograph, recording, film, videotape or performance; or sexual exploitation by any person's sexual gratification or for commercial gain.

Non discrimination

The dignity and worth of each child must be respected at all times. All children must be treated equally and not be discriminated against.

KEY PROVISIONS AND TERMS EXPLAINED

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 assume parental responsibility over a child either in a will, by the Children's court, by the family, the Master of the High court or a chief.

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.

What is maintenance?

Maintenance is the provision of financial and other support for a child's living expenses, and may include the amount of money a parent pays to help with the care and support of a child even if he or she is not living with the mother/ father and the child. A Children's court can compel a parent or any person who has the duty to provide a child's necessities to pay a certain amount each month at the request of the child, a parent, guardian, relatives of the child, a chief or any other person who has contact with the child.

What is Paternity?

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

What is an approved school?

An approved school is one that is established in terms of the law for the education, training and detention of children who are above the age of thirteen (13) years and have been found to be guilty of an offence. A child cannot be sent to an approved school until a social worker has submitted a report to the court that shows that the parent or guardian of the child can no longer exercise or is incapable of exercising any proper control over him/her and the child is in need of institutional rehabilitation. A child shall not be kept at an approved school for more than three (3) years.

What is exploitative Labour?

Exploitative labour is work that deprives the child or hinders their access to health, education or development.

PART 2: THE RIGHTS OF CHILDREN

Name and nationality

Every child must be given a respectable name.

Birth Registration

Every child's birth shall be officially registered with the Births Marriages and Death department (under Ministry of Home Affairs) within three (3) months of their birth.

Right of OVC to vital registration

Orphaned and vulnerable children have a right to be registered with the Births Marriages and Death department (under Ministry of Home Affairs) and have their status known by the state.

Right to know and grow with parents

Every child has the right to know and live with both their parent(s) in a **safe, loving and caring** family environment unless it is proved that living with the parents would lead to harm to the child whether or not the parents are married. As long as the parents live together, they usually exercise the parental responsibility over their children jointly according to the law. However, if the parents divorce or split up, they need to decide how this responsibility will be exercised in the future. The parents may decide that the child shall live alternatively with both parents or with one parent. In the latter case, the other parent usually has a right to visit the child at certain times. The parents may decide these matters by a mutual agreement or by going to court.

When a court is used, it decides which parent shall have the custody rights over the child. The court may decide that both parents shall have custody over the child (joint custody) or that one of the parents shall have custody (single custody). The parent who has custody decides, among

other things, where the child shall live. When one of the parents is granted single custody, the other parent is often granted the right to see the child during certain periods (access rights or visiting rights).

Right to Education and well-being

Every child has the right to have their basic needs met, including education, health care, diet, clothing, shelter, medical attention, social and other services required for their development. This includes children living with disabilities.

Social Activity

The child's need for development and growth must be respected. A child needs to be able to play and engage in activities that suit the child's age and developmental capacity.

Rights of Children with Disabilities

Every child living with a disability has the right to benefit from special care and education regardless of the type and severity of the disability for a fuller life in society.

Right to be heard

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.

PART 3: DUTIES AND RESPONSIBILITIES OF PARENTS AND GUARDIANS

“Parental responsibility” covers the duties and rights to take care of the child's person and property. It also includes the right to represent the child legally. The persons having parental responsibility of a child can be referred to as “holders of parental responsibility” . In most cases, the parents of the child have this responsibility. However, if the parents are deceased or no longer capable or authorised to take care of their child, a guardian can be appointed to represent the child. The guardian can be a relative, a third person or an institution.

Parental responsibility lasts until the child is 18 years old, after which it should only be exercised in a way, which is consistent with the child's evolving capacity and maturity. Having parental responsibility is legally different from being recognised as a child's mother or father, which can only be terminated by death.

- Parents and or guardians have to provide for their child's their welfare, whether or not they are married and whether or not they live together. This includes a responsibility to ensure that the child has shelter, food and clothes as well as a responsibility for the child's upbringing.

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- Parents and guardians have to protect children from all forms of abuse, neglect, discrimination, exploitation, exposure to physical and moral hazards and avoid putting the child in circumstances.
- Parents have a legal duty to support their children and must use their means to support the children. It includes the responsibility to look after the child's property, if any. Legal guardians have no such duty. They do not have to use their own means to support the children.
- Parents and guardians shall ensure that in their absence a child is cared for by a competent person.
- Parents and guardians, whether married or not, have the duties and rights to make decisions together 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.
- A Parent's responsibilities and rights can only be limited or stopped by a court.
- Every parent or guardian has the responsibility to register the birth of his or her children and to make sure that the names of both parents or that of the guardian shall appear on the birth certificate.

PART 4: DUTIES AND RESPONSIBILITIES OF CHILDREN

Children may have rights but they also have responsibilities. Rights are the entitlements of children to have their basic needs met and the things they are free to do and responsibilities are things children 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.

With due regard to their safety and subject to their age and abilities, children have the responsibility to:

- Respect all elders at all times and assist them in times of need;
- Work for the well being of the family;
- Serve the community with their skills and abilities; and
- A responsibility not to harm others and to uphold community values.

PART 5: PROTECTIONS FOR CHILDREN

Right to Protection from Exploitative Labour

No child shall be exposed to work that can harm them, their health, education or development.

Protection from harmful and degrading treatment

Every child has the right to be treated with dignity. Discipline must be for purposes of correcting a child according to their age, physical, emotional and mental well being and should not result in harm or injury to a child.

Right to refuse harmful cultural and religious practices

There are many cultural and religious practices that are seen as harmful to children and go against the rights of a child as set out in the Constitution. No child should be compelled to obey a custom or religious belief that is likely to be harmful and dangerous to their health, education, dignity, well being and development.

Protection from Harmful Substances

Every child has the right to be protected from the use, production, trafficking and distribution harmful drugs and substances, including but not limited to; alcohol, dagga, cigarettes, narcotics and other harmful substances.

Right to parental property

Every child has the right to inherit from and get provision from both of their parents, whether born in wedlock or not or orphaned.

Duty to report child abuse

Every person, family member, medical officer, child care provider or member of the community, has a duty to report to the police, a social worker or chief if they suspect that a child is being abused, ill-treated or neglected. Failure to report is a serious offence punishable by law.

PROTECTIVE 5.1 MEASURES RELATED TO THE HEALTH OF CHILDREN

Consent to medical treatment or surgical operation

- A child may consent to medical treatment with the assistance of a parent or guardian if they are above twelve (12) years of age or have the maturity and mental capacity to understand the benefits, risks, social and other implications of the treatment or operation.
- No parent, guardian or child caregiver may refuse a child medical treatment or surgical operation on the basis only of religious, cultural or other belief unless they can show that there is a medically accepted alternative to the medical treatment or surgical operation concerned.

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- A child has a right to get permission from the Children's court to do the operation and treatment where the child is abandoned or the parent, guardian or caregiver unreasonably refuses consent.

HIV Testing

- No person may test a child for HIV except where it is for the best interests of the child and a child above twelve(12) years old has given consent.

Confidentiality of information on HIV & AIDS status of Children

- No person may disclose the HIV status of a child unless required by the law or after explaining to the child why disclosure is important the child, of twelve years or above, has given consent.

Access to Reproductive Health information and protective devices and technologies

- No person may refuse to give a child reproductive health information, sell or provide any reproductive health devices or technologies for free where such are provided or distributed freely.
- A child may request any reproductive health devices or technologies without a parent or guardian's consent where proper medical advice is given to the child and the child has been medically examined to determine the suitability of such device or technology.
- Reproductive health protective devices and technologies shall be given **confidentially** to a child.

Emergency Contraceptives for child survivors of sexual abuse

- A child who survives sexual abuse and exploitation shall be provided with emergency contraceptives as soon as possible.

PART 5.2 CHILD IN NEED OF CARE AND PROTECTION

A child is in need of care and protection if the child:

- a) Has been or is at risk of being physically, psychologically or emotionally injured or sexually abused by their parent, guardian, member of the family or any person;
- b) Has been abused or injured or, is likely to be abused and injured, and the parent, guardian or any other person knowing of such abuse has not protected or is unlikely to protect the child from such abuse or injury;
- c) Or, the parent or guardian of the child is unfit or has neglected and is unable to exercise proper supervision and control over the child;
- d) The parent or guardian has neglected or is unwilling to provide for the child's adequate care, food, clothing, shelter, education and health;
- e) The child has been abandoned and no suitable person is unwilling and able to care for the child;
- f) The child needs to be examined and treated and the parents or guardian refuses, neglects or refuses to have the child so examined, investigated or treated;

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- g) The child behaves in a manner likely to cause them harm and the parent is unwilling or unable to take necessary measures to control the child.
- h) Where relations between the child and parent or family are seriously disrupted such as to cause the child emotional injury;
- i) The child is in the custody of a person who has been convicted of physically or sexually abusing the child;
- j) The child keeps or is kept in the company of immoral persons and is likely to be seduced or induced into a lifestyle of corruption or prostitution.
- k) The child is caused to be on a street or other place for purposes of begging or receiving alms or carrying out illegal gambling or other activity detrimental to the health , welfare or education of the child;
- l) The child is affected or infected by HIV and AIDS and other life threatening conditions;
- m) The child is below 15 years and engaged in regular economic activity detrimental to his health, education and development.

The state shall take all reasonable measures to ensure that all children are protected and that the needs of vulnerable children are met. Children who have been abused or neglected should receive special help to restore their dignity.

Taking a child into a place of Safety

Any community member, chief, social worker or police office who is satisfied that a child is in need of care and protection may take a child into a place of safety with the permission of the Children's court or the nearest Magistrate's court. Any person or the affected child in need of care and protection may apply for admission into a place of safety.

PART 5.3: Child In Need Of Rehabilitation

- A child is in need of urgent rehabilitation and protection if they live in or frequent brothels, are a victim of sexual violence or living in an environment which may lead to sexual abuse, labour exploitation, is a habitual substance abuser or denied access to education.
- Any community member, chief, social worker or police office who is satisfied that a child is in need of rehabilitation and protection may take a child into a place of safety with the permission of the Children's court or the nearest Magistrate's court.

Child In Need Of Urgent Protection

A child is in need of urgent protection if there is reasonable cause to believe that:

- The child is being coerced or forced into prostitution and sexual immorality;
- The child is being force to marry;
- The child is pregnant and suicidal or rejected by the family due to the pregnancy;
- The child is forced to undergo cultural or spiritual rituals;

- The child is compelled to leave school;
- Or the child is confined or detained by another person unlawfully.

Any community member, chief, social worker or police officer who is satisfied that a child is in need of urgent protection, or the child himself, may take a child into a place of safety with the permission of the Children's court or the nearest Magistrate's court.

PART 6 : ADMINISTRATION OF THE PROPERTY OF CHILDREN BY THE MASTER OF THE HIGH COURT

Duty to report estate to the Master's office

When a parent dies leaving minor children the surviving parent, guardian, family members and members of the community have the responsibility to report the estate to the master of the high court within two (2) months after the death.

Death certificate

Every child has a right to their parent's death certificate.

Master's permission to dispose off estate property

Surviving parents, guardians, relatives or community members shall seek the permission of the Master of the high court to sell, mortgage, disposing or alienating children's property.

Duties of a chief in the administration of the Property of Children

Chiefs have a duty to make sure that minor children are not unduly disposed of their deceased parents' property and shall also make sure that all children's names appear in all documents submitted to the office of the Master of the high court.

Duty of Employer in relation to property belonging to children

After the death of an employee an employer shall have the duty to send all benefits to the office of the master for due administration in terms of the law. Failure to comply is a serious offence punishable by law.

PART 7. OFFENCES IN RELATION TO HEALTH AND WELFARE OF CHILDREN

Illtreatment, Neglect, Abandonment or exposure of children to abuse

Abusing, neglecting, abandoning or in any way exposing a child in any manner likely to result in abuse is a serious offence punishable by up to 5 years.

Children not to be used for begging

A person taking care of a child shall not use the child for begging or carrying out illegal hawking, gambling or other illegal activities detrimental to their health and development.

Leaving a child without supervision and care

A child shall not be left without supervision. A person responsible for caring for a child commits an offence if s/he leaves the child unsupervised for an unreasonably long period.

Failure to provide maintenance

A parent, guardian or person with the responsibility of maintaining a child who fails, refuses or neglects to provide adequate food, clothing, medical treatment, lodging, care guidance and protection to the child shall commit a serious offence.

Sale, Harboursing and Abduction Of Children

Any person who sells, harbours or abducts a child for money or takes a child without consent from lawful custody, commits a very serious offence punishable by up to twenty years in prison.

Taking a child without appropriate consent

A parent, family member or any person who removes a child from someone with lawful custody without their permission commits a serious offence punishable by up to five years, E15 000 or both.

Employment Of Children

- Children below the age of fifteen (15) cannot be admitted to formal employment.
- Children shall not be made to do exploitative labour which is dangerous or might harm their morals, health, education and development.
- Children shall not be engaged in night work (between 6.00pm and 6.00am) until the age of sixteen(16) or work in industrial undertakings until age eighteen (18).
- Children shall not be engaged to do industrial work which is potentially harmful. An industrial undertaking includes mines, quarries and other works of the extraction of minerals as well as undertakings for the manufacturing or otherwise dealing with electricity or emotive power of any kind.
- Any person can report to the Minister of Labour where they suspect that a child is engaged in such industrial work.

PART 6: ADOPTION AND FOSTER CARE

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.

Unlike guardianship, adoption is intended to effect a permanent change in status and as such a child is adopted if the child has been placed in the permanent care of that person in following a decision of the court to do so.

Fostering a child

Fostering is a way of providing a stable family life for children and young people who are unable to live with their parents for a specified or short term period. This allows children the chance to thrive in a safe, secure, loving and caring home environment.

PART 7: CHILDREN IN CONFLICT WITH THE LAW

Age of criminal responsibility and prosecution

- The minimum age of criminal responsibility is the age at which children are deemed to be responsible for their actions and can be arrested, prosecuted and detained in prisons. Children below the age of twelve (12) cannot be charged with criminal offences as they are considered too young and incapable of committing criminal offences.
- Where such a child has been found to be in conflict with the law, an enquiry, **not** a trial, will be held to determine what alternative measures can be taken with that child and the conditions for the release of the child to their parents, guardians or place of safety.
- Children between the ages twelve and fourteen (12-14) years cannot be prosecuted unless it can be proved that the child has the capacity to appreciate the difference between right and wrong.¹

¹ It is bad for a child to be kept in a prison with seasoned criminals. Sending a child to jail at a very young age is unlikely to lead to a better understanding of right and wrong. Instead, a child who does not understand the wrongfulness of what they have done may feel unjustly treated or simply accept the label of being criminal and resign themselves to it. Children who are labelled criminals are also likely to be treated worse by those around them, such as teachers or other parents, separating them from society. In addition, those sent to prison or young offender institutes are cut off from their friends and family and develop friendships with other criminals, possibly even sharing ideas about crimes. All of these reactions are likely to make the child's situation worse and increase the chance of future criminal behaviour.

RESTORATIVE JUSTICE AND DIVERSION

Restorative justice is an approach to justice that focuses on the needs of the victims and offenders as well as the community involved instead of sending offenders to do time in prison. Victims take an active role in the process while offenders are encouraged to take responsibility for their actions, to repair the harm they have caused. It provides help for the offender in order to avoid future offences.

Diversion refers to the removal of offending children from the official criminal justice system, with or without special conditions into community based programmes aimed at developing their lifeskills as an alternative to spending time in prison.

In all cases the Children's court shall make referral's in appropriate cases to the restorative justice processes which will include family-group conference, victim-offender mediation and any other restorative justice process.

Umphakatsi Child Justice Committee

Every umphakatsi should establish a committee known as umphakatsi child justice committee responsible for promoting reconciliation between a child and the persons affected by the harm caused, empowering communities to address children at risk of offending without resorting to criminal justice and encourage restitution.

Bail And Detention Pending Trial

Every child has the right to bail pending trial. This includes the right to release a child to their parent, guardian or other institution on any condition without the payment of bail (own cognisance).

Children's Court

Every Magistrate's court shall be a children's court empowered to hear all matters related to children. Therefore children's matters should be taken before the nearest Magistrate.

Legal Representation

A child has a right to be represented by any person of their choice in any legal proceedings. Where the child is remanded in custody or the child will be charged with committing a serious offence and faces the penalty of a residential sentence the state will make sure that such child has a legal representative, at its own cost. The officer presiding over the case involving the child will make sure of it.

Sentencing

Prison sentences for children should only be used for the most serious offences and as a last resort. No court can pass a prison sentence for a child without a social worker's assessment report. Children shall not be sentenced to corporal punishment, life imprisonment, death or any

other form of cruel and inhumane treatment. The maximum sentence for a child offender shall be a maximum of five (5) years for children above 16 years old.

Children At Risk Of Offending

The children's court may, after a hearing, order a child to be temporarily detained in an approved school, probation hostel, or centre where parent or guardian of a child has made such request to the court on the grounds that the parent or guardian is unable to exercise proper control over the child and the court finds that it is necessary to do so.