

THE MOVEMENT OF CHILDREN BETWEEN SEPARATED PARENTS DURING THE COVID-19 LOCKDOWN: AN UNDERSTANDING OF THE REGULATIONS AND THEIR NUMEROUS AMENDMENTS

Regulations issued in terms of Section 27(2) of the Disaster Management Act, Act 57 of 2002 and Directives issued by the Department of Social Development in terms of Regulation 10(5) of the Regulations made under Section 27(2) of the Disaster Management Act, have left many separated and/or divorced parents confused and in the dark as to whether or not they are permitted to move their children between their respective homes during the lockdown. The frequent amendment and revision of the regulations and then differing interpretations provided by members of the Ministerial task team, has resulted in even further confusion with the result that parents are unsure precisely how they are able to comply. Aside from the stress placed on the parents, their children are likewise impacted upon.

When the initial regulations were released on 25 March 2020, and possibly due to this issue not having been properly considered, there was no mention whatsoever of the movement of children between separated and/or divorced parents. That was well understood as it was very clear that there was to be no movement of any kind, therefore there could be no movement between households during the initial 21-day lockdown. What this then meant was that children would stay in the care of the parent whose household they were in from the moment the lockdown commenced. At that time, court orders, decrees of divorce, parenting plans or care and contact arrangements made no difference and would not be enforceable during the lockdown. The Department of Social Development confirmed this in its directive which was published on 30 March 2020 explicitly prohibiting the movement of children between households of parents or legal guardians with joint parental responsibilities. By all accounts the “best interests” of the child, as enshrined in Section 28(2) of the Constitution, were apparently not considered when these directives were issued.

However, on 7 April 2020, the Department of Social Development directives were amended, once again. By all accounts, the Minister of Social Development then became aware of the

issue and the grave concern the initial directive had caused. The amended directives still prohibit the movement of children between parents or other co-holders of parental rights and responsibilities except where there is a valid divorce order regulating the contact or where a parenting plan, which has already been registered with the Family Advocate, regulates care and contact arrangements. In practical terms, this meant that any time a parent was transporting their children to the other parent's home, they would need to carry one of these two documents on them to be produced on demand.

Of course, the above two exceptions remain subject to the proviso that no person known or reasonably suspected to have had contact with someone known or suspected to have contracted the Corona Virus in both the household where the child is travelling from as well as the home the child will be travelling to. As such, clarity was improved but not completely.

Although the amendments made it easier for some to move their children between their homes, it also made it far more confusing. The amended regulations did not specifically make mention of divorced parents? It left room for the following critical questions being raised: What does this mean for parents who are in the process of getting divorced and the divorce is not finalised? What does this mean for parents who are separated and living separately but have a plan in place for joint custody? What happens to parents who do not have a parenting plan which has been endorsed by the Family Advocate? What about parents who are divorced but have yet to receive their final decree of divorce?

On 16 April 2020, the Minister of Cooperative Governance and Traditional Affairs, Dr Nkosazana Dlamini Zuma, announced that the regulations were amended, for the third time. The amended regulations provided for a third exception to the initial prohibition. This means that separated and/or divorced parents will be allowed to move their children between households if they are in possession of a birth certificate or certified copy of a birth certificate of the child or children to prove a legitimate relationship between the co-holders of the parental rights and responsibilities.

Therefore, as of 16 April 2020 parents with joint parental rights and responsibilities may move their children between their homes provided they are in possession of a valid divorce order regulating the contact; or a parenting plan, which has already been registered with the Family Advocate, regulating care and contact arrangements ; or a valid birth certificate or certified copy of a birth certificate. Once again, this third exception is also subject to the same proviso that no person known or reasonably suspected to have had contact with someone known or suspected to have contracted the Corona Virus in both the household where the child is travelling from as well as the home the child will be travelling to.

It is important to note that the new amendments to the Regulations, at this stage, only apply to separated and/or divorced parents with joint parental rights and responsibilities. In the recent decision of *CD and Another v Department of Social Development* handed down in the Western Cape High Court, a divorced couple sought the leave of the High Court to collect their children who were staying with their elderly grandparents in Bloemfontein when the lockdown kicked in. In short, the Court did make an exception for this couple and allowed one of the parents to travel to Bloemfontein to collect the children and bring them back to Cape Town under very strict guidelines. While the court weighed and assessed the facts at hand with due regard to the regulations, it is clear that the reason the parents were allowed to move their children from their grandparents home to their home was because the grandparents were elderly and were not able to care for themselves and their grandchildren during the lockdown. The Court held that only in exceptional and urgent circumstances may a child be moved between the home of a grandparent and a parent.

Even though the lockdown may be diluted in the coming week by way of a partial lift or a further relaxation in relation to movements and otherwise, it can be expected that in doing so further confusion may arise impacting on separated parents and their children.

Knowles Husain Lindsay has the expertise in Family Law and is well-equipped to navigate any further changes in the regulations or the directives.

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