

## FAMILY

# She wants to home-school the children. What now?



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Let's set the scene: the parents are divorced and the ex-spouse (usually the mother) is the day-to-day custodial parent. In terms of the divorce order and settlement agreement that was made, both parents are joint holders of parental responsibilities and rights, and the children have been placed in public school. (What is discussed below can apply to any situation, married or not, where two parties are joint holders of parental responsibilities and rights.)

Your ex now informs you (due to the shocking state of our public schools and regular newspaper headlines such as *System gets an F for education, Gauteng schools dens of vice*, etc), that she has unilaterally taken the decision to home-school the children.

## WHAT ARE THE USUAL AREAS OF CONCERN?

Most clients have the same areas of concern:

1. Is she legally allowed to do this?
2. What about the children's socialisation with other children?
3. She is not a qualified teacher.

With regard to point 3, research shows (think back to the excellent teachers you had) that motivation and commitment are far more important than a teacher's technical ability, and generally a mother (or father) is far more committed and motivated (teaching a class of two or three) than an underpaid, overworked and demoralised teacher teaching a class of 40 who is preparing for the next strike.

## IS SHE LEGALLY ALLOWED TO DO THIS?

At the outset, it is important to note section 28(2) of the Constitution, which states that "a child's best interests are of paramount importance in every matter concerning a child". There is also the Children's Act 38 of 2005, specifically section 7, which deals with the best interests of the child, and section 2, which states that one of the objects of the Act is to ensure that the best interests of the child, in line with the Constitution, are of paramount importance "in every matter concerning a child".

Keeping the above in mind with regard to the state of our public schools and the poor standard of education (we are ranked 148th out of 148 countries in maths and science, behind Ruanda and Zimbabwe, by the World Economic Forum), it seems a no-brainer that home-schooling a child, should circumstances permit, would be in the child's best interests.

However, in terms of the above scenario, what the custodial parent is intending to do is against an existing order of court (ie even though she believes – and quite possibly correctly so – that it would be in her children's best interests if she educated them at home, she is now on a course of action that will ultimately place her in contempt of a court order).

This creates an untenable situation in which the non-custodial parent can (and usually does) take the mother to court, saying that



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she is in contempt, and the mother stating that she is acting in the children's best interests.

The normal process is that the matter ends up in the Regional Children's Court, which of late has taken the stance that such a matter needs to be adjudicated by the High Court. The High Court then preliminarily hears the matter and passes the buck to the Family Advocate to "investigate what the best interests of the child would be in these circumstances", and, after a lengthy delay, the matter is back in court with their legal teams, Family Advocate's Report, and each with their own expert and expert reports facing off on the matter, when it could have been sorted out differently.

What would have been ideal is if the parties would have communicated with each other before any unilateral decision was made, and kept the existing provisions of the Children's Act, specifically section 31, in mind, which states that "before a person holding parental responsibilities and rights in respect of a child takes any decision... they must give due consideration to any views and wishes expressed by any co-holder of parental rights and responsibilities in respect of the child", and section 33 (2), which states that "if the co-holders of parental responsibilities and rights are experiencing difficulties ..., before seeking the intervention of the court, they must first seek to agree on a parenting plan determining their ....respective responsibilities".

The above, read with section 33(5)(b), "mediation through a suitable qualified person", is ideally what should be sought prior to litigation.

## WHAT DOES THE ABOVE MEAN, IN PRACTICAL TERMS, FOR THE CUSTODIAL PARENT WHO WANTS TO HOME-SCHOOL THE CHILDREN?

1. Discuss it with the other parent and try to obtain their agree-

ment. If you reach agreement, approach the court with a varied parenting plan that makes provision for home schooling, and have it substitute the previous order of court.

2. If no agreement can be reached after reasonable consultation, approach a suitably qualified mediator and agree to attend at least three sessions to attempt to reach a solution.
3. If there is still no agreement, approach the court (via the parent seeking to amend the parenting plan to accommodate home schooling, with the other parent opposing it and their reasons), and ask it to task the Family Advocate to investigate the matter and prepare a report, and for the court to make an interim ruling pending finalisation.

## WHAT ARE THE LEGAL FORMALITIES REGARDING HOME SCHOOLING?

If there is no objection from any holder of parental responsibilities and rights in respect of a child, will you be falling foul of some law or bylaw should you take your child out of public school and into home schooling?

There are some administrative formalities. Before a child can be removed from mainstream schooling to home schooling, the learner has to be registered as a home-schooler with the Provincial Department of Basic Education, by the parent filling in the form entitled *Application for Registration of a Learner for Education at Home*, taking along the following documentation:

1. Certified copies of the parents' and child's identity documents;
2. Last copy of the child's school report and immunisation card;
3. Weekly timetable, which includes contact times per day;
4. Breakdowns of terms per year;
5. Learning programme; and
6. Certified copy of the child's birth certificate.

Items 3, 4 and 5 may seem daunt-

ing, but fear not; home schooling has become such an industry that all of the above, plus Internet links to the best textbooks, best teachers, as well as Internet and phone contact with specialist tutors (for the parent who will be teaching), are now all part of the secondary industries mushrooming around home schooling, along with social activities (dances and outings) and even sports teams/coaches for home-schoolers.

Note that it should not take more than 30 days for the application to be processed and it's free. Without the application you are not allowed to home-school and/or remove the child from formal schooling.

## WHAT IS THE LEGAL BASIS FOR HOME SCHOOLING?

Leendert van Oostrum and Andre Williams have written an excellent piece on this, entitled *The legal basis for home education in South Africa* (on behalf of a home-schooling lobby group called the Pestalozzi Trust); the following is a paraphrase of their work.

The right to education is a core component of the right to dignity, one of the human rights from which most other human rights flow, and is essential for the autonomy of an individual.

It is important to keep in mind at all times that human rights are not granted by the Constitution or the state, and that humans have them by virtue of being human; it is the duty of the state to "respect, protect, promote and fulfil" them.

Human rights are indivisible and cannot be ranked one above the other (hence the right to dignity cannot be ranked above the right to education, and both flow into and from one another); the fulfilment of one may not violate another, and the right that a person has against the state is a positive one, in that the state has an obligation to make it possible for an individual to freely exercise the right.

A legal nuance that needs to be noted is that compulsory education is not a fulfilment of the right to education, but rather a limitation on the free exercising of a person's right to education, as the fulfilment of a positive right cannot be achieved by compulsion, as this would be in violation of an individual's free exercise of such a right.

The correct view is that compulsory education would be subject to the limitation imposed by section 36 of the Constitution, in that the rights may only be limited "in terms of the law of general application to the extent that the limitation is reasonably justifiable".

Furthermore, in terms of section 29(1) of the Constitution, the right to education is not a children's right, but a universal right: "everyone has the right to a basic education...". The Constitution makes neither education nor school attendance compulsory, and hence any compulsion is then subject to the section 36 limitations as discussed above.

A good definition of education is found in the United Nations Convention on the Rights of the Child (UNCRC), to which South Africa is a signatory. An extract from this definition reads: "The development of the child's personality, talents, mental and physical abilities to their fullest potential", and "The development of respect for the child's parents, their own cultural identity, language and values...", and so on.

What is clear from the above is that "education" that fails in regard to the above fails to fulfil the Constitutional right to education.

Coupled with the above is section 28(1)(b) of the Constitution, which states: "Every child has the right... to family and parental care, or to appropriate alternative care when removed from the family environment..."

The state may not interfere with a child's right to parental care, except as provided for in section 36 of the Constitution or where it is required that, in the child's best interests, they be removed to a place of safety to be protected from maltreatment, neglect, abuse or degradation.

The definition of "parental care", and indeed "care", is in section 1(a)-(j) of the Children's Act. Section 1(e) states: "guiding, directing and securing a child's education and upbringing".

All of the above, of course, falls under the ambit of that, in all matters concerning children, the child's best interests are paramount.

## CONCLUSION

The child's right to education is a human right and part of the right to human dignity. The child has a right to parental care, which includes having his or her education guided and directed by his or her parents.

Our public school system is failing our children and failing to deliver on their right to education. Should a parent have the means to home-school a child, as opposed to having the child attend public school (and it is by no means a cheaper option), and does not, there is a strong argument to be made that that parent is failing to act in the child's best interests.

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