

CHILDREN'S COURTS

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NOTE

In this publication, "Ministry" and "Minister" refer to the Ministry and Minister responsible for child protection, and "Guide" means this *Guide to the Child Care and Protection Act* (which is published in separate chapters).

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A children's court is a magistrate's court that is dealing with a case under the Child Care and Protection Act, or other laws relating to children. When a magistrate's court is functioning as a children's court, the magistrate is called a children's commissioner. The children's commissioner has a specific duty to promote and protect the best interests of any child who comes before the court. There are some special rules and procedures that apply to children's courts to help make the court experience more child-friendly, as well as some procedures designed to encourage resolution of disputes outside of court.

Children's Court = Magistrate's Court
Children's Commissioner = Magistrate

Organisation of this chapter of the *Guide*

This chapter does not follow the order of the provisions in the Child Care and Protection Act. It is organised along the lines of the order of proceedings in a children's court. It starts by identifying the relevant personnel. It then looks at who can bring cases in a children's court, mechanisms to resolve cases outside of court, children's court proceedings (including the special rules intended to make children's courts more child-friendly), and the orders that can be made at the conclusion of children's court cases.

Note that most of the regulations governing the general operation of children's courts are contained in the *Regulations relating to Children's Court Proceedings*. This is a different set of regulations from the *Child Care and Protection Regulations* referred to in the other chapters of this *Guide*.

1. Children's courts

Magistrates' courts as children's courts: A children's court is a magistrate's court that deals with cases arising under the Child Care and Protection Act, or other laws relating to children. When a magistrate's court is acting a children's court, the magistrate is referred to as a "children's commissioner".

Children's courts generally operate like regular magistrate's courts. However, there are some special rules and procedures for children's courts, to make the proceedings more comfortable for children.

All magistrates' courts can function as children's courts. It is also possible for a specific magistrate's court to function **only** as a children's court, if the volume of child-related cases is sufficient to warrant this.

As of 2019, there was a specialised children's court only in Windhoek. In other places in Namibia, the regular magistrate's court acts as a children's court when it has certain kinds of cases involving children. For example, children's courts make decisions about removing children from their homes and placing them in alternative care when this is necessary to protect them, and they make some kinds of decisions on custody, guardianship and parental access.

◆ Child Care and Protection Act, section 38(1)-(7)

Powers of Children's Courts: Like other magistrates' courts, children's courts are creatures of statute and have no inherent jurisdiction. This means that they have *only* the specific powers which are set out in the Act and other relevant statutes. In contrast, Namibia's higher courts have inherent powers which they can use in circumstances where the law does not cater for a particular situation, in order to advance the administration of justice.

- ◆ *Namibia Development Corporation v Aussenkehr Farms (Pty) Ltd* 2010 (2) NR 703 (HC), confirmed on appeal in 2012 (2) NR 671 (SC)
- ◆ *Naudé v Fraser* 1998 (4) SA 539 (SCA), page 551

Record-keeping by children's courts: A children's court is a "court of record", which means that the court must capture and preserve a record of its proceedings to be available for review or appeal.

There are two possible ways to keep a record of the court proceedings:

- (1) The children's commissioner can document the proceedings in handwriting.
- (2) The court proceedings can be recorded by mechanical means.

A children's court is "a civil court that has the same jurisdiction as a magistrate's court". However, the Act contains "provisions creating a more child-friendly atmosphere and attempting to give effect to the child's right to participate in proceedings and be heard".

◆ quoting Jaqui Gallinetti, "The children's court", in CJ Davel and AM Skelton (eds), *Commentary on the Children's Act*, Juta, 2007, updated in 2012, page 4-3 (discussing the similar children's court in South Africa)

If there is a review or an appeal, the record of the proceedings will include: (a) the handwritten record or mechanical recording; (b) any transcription of the handwritten record or mechanical recording that is certified to be a true record; and (c) any additional handwritten notes that the presiding officer made during the proceedings.

The court must keep records of the proceedings for five years. After five years have passed, the court must forward the records to the Ministry responsible for child welfare for archiving.

◆ Child Care and Protection Act, section 38(3)

◆ Regulations relating to Children's Court Proceedings, regulation 10

TECHNICAL NOTE: There is no definition of "Minister" or "Ministry" in the regulations, so the definition in the Act applies.

2. Children's court personnel

2.1 Children's commissioners

Appointment: A children's commissioner is a magistrate. All magistrates are appointed by the Minister of Justice, on the recommendation of the Magistrates Commission established by the Magistrates Act. The general qualifications for all magistrates apply to magistrates who are serving as children's commissioners.

Functions: A children's commissioner presides over a children's court. A children's commissioner must promote and protect the best interests of a child who comes before a children's court in terms of the Child Care and Protection Act or any other law.

Training: The Minister of Justice has a duty to ensure that children's commissioners receive training on the implementation of the Child Care and Protection Act and their specific duties and functions under the Act.

- ◆ Child Care and Protection Act, section 38(6)-(9) and (11)(a)
- ◆ Magistrates Act 3 of 2003

2.2 Children's court assistants

Appointment: Every prosecutor is automatically a children's court assistant for any children's court in the magisterial district where the prosecutor works. The Minister of Justice may also appoint dedicated children's court assistants for any children's court if this seems to be necessary, or designate any person with appropriate qualifications to act as a children's court assistant in specific proceedings before the court.

Children's court assistants can provide an alternative to representation by a legal practitioner which may be more affordable and realistic to achieve in some cases, as well as possibly minimising delays.

Utilising prosecutors to assist a children's court entails no extra cost to the State or the parties, and prosecutors are often available at the very same court building. On the other hand, it may be difficult to engage prosecutors because they are busy with their regular duties in criminal cases.

There are no prescribed qualifications for designating other persons to serve as children's court assistants. It is in the court's discretion to decide who is suitable to fulfil this function. For example, in South Africa, social workers often served as children's court assistants in the past. Court clerks were also sometimes utilised in this role. South African assessments found that social workers who were not otherwise involved in the case at hand often made better children's court assistants than prosecutors, because prosecutors were often unfamiliar with children's law, insufficiently child-oriented, and accustomed to operating in an aggressively adversarial style. (The most recent children's legislation in South Africa no longer provides for children's court assistants. In contrast, children's court assistants are still covered by the current children's legislation in Botswana and Zimbabwe.)

Functions: Children's court assistants can help children or other unrepresented parties before a children's court to understand the proceedings and to present their evidence effectively, so that the court gets a full picture of the situation before making a decision. They can also generally assist the court in the performance of its functions.

The children's court may order a children's court assistant to assist a child who has no legal representation. The children's commissioner may also require a children's court assistant to assist any other unrepresented party who is before the children's court.

The role of a children's court assistant is –

- (1) to identify and introduce relevant evidence to the court
- (2) to cross-examine any witness called by another party
- (3) to generally assist the court in the performance of its functions.

At the request of the children's commissioner, a children's court assistant must assist any unrepresented party –

- (1) to complete any relevant form (if the clerk of the children's court is unable to provide the necessary assistance)
- (2) to present any relevant evidence
- (3) to understand any legal requirements pertaining to the case at hand.

In order to make sure that relevant evidence is presented to the court, the children's court assistant can request the clerk of the children's court to summon any person to give evidence or produce any document or other material to the court.

A children's court assistant helps unrepresented children and other unrepresented parties by performing some of the basic tasks which a legal representative would normally carry out.

The help of a children's court assistant can be particularly important in remote areas where legal representation may be harder to source, or where arranging legal aid from the State could entail delays.

The assistance of a children's court assistant can help the presiding officer remain impartial, while also helping to ensure that the issue before the court is fully explored.

Although the presiding officer can play an inquisitorial role to a certain extent, it would be difficult for the presiding officer to give intensive assistance to an unrepresented child or other party while still being viewed as a neutral decision-maker.



- ◆ Child Care and Protection Act, sections 38(10), (11)(b) and (12), 58(3)(c) and (6), 59(1)(d)
- ◆ Regulations relating to Children's Court Proceedings, regulation 2



More Information

For more information on children's court assistants in South Africa, see:

- ◆ F Noel Zaal, "Children's Court Assistants: An Evaluation of the South Africa Experience" in Christina Jones-Pauly and Stefanie Elbern, eds, *Access to Justice: The Role of Court Administrators and Lay Adjudicators in the African and Islamic Contexts*, The Hague: Kluwer Law International, 2002.
- ◆ Frederick Noel Zaal, "Court Services for the Child in Need of Alternative Care: A Critical Evaluation of Selected Aspects of The South African System", PhD thesis, University of the Witwatersrand, 2008 <<https://core.ac.uk/download/pdf/39665799.pdf>>.

Increasing the role of children's court assistants in the future

The functions of a children's court assistant are prescribed by regulation. This means that it would not be difficult to expand the future role of children's court assistants to help children's courts run more smoothly and effectively, and to offer more help to parents and children who may not understand the law or the court processes. This issue could be re-assessed from time to time as Namibia acquires more experience with how the Act is working in practice.

◆ Child Care and Protection Act, section 38(12)

2.3 Clerks of children's courts

Appointment: The Minister of Justice may appoint or designate sufficient numbers of clerks of children's courts as needed. A single children's court may have more than one clerk, and a single clerk may assist more than one children's court.

If a children's court finds itself without a clerk for any reason (such as when the usual clerk is not available, or when there is a vacancy in the position), the children's commissioner may assign a competent staff member of the Ministry of Justice to act as a clerk temporarily. This temporary assignment must be made only after consultation with the Chief Magistrate.

Functions: Clerks of children's court have some specific duties under the Child Care and Protection Act, and they are also expected to generally assist the court in performing its functions. The specific duties of clerks in specific kinds of cases will be discussed in the *Guide* in connection with those topics. A clerk of a children's court also has some general functions which apply to all kinds of children's court cases.

Record-keeping: The clerk must keep a register of any matter brought before the children's court and open a numbered file in connection with every new matter. The clerk must mark the appropriate file number on every document received in connection with a matter, and place all documents in the correct file.

Information in court files

Each file opened at a children's court *must* include the following **information about every child involved**:

- ④ full name
- ④ date of birth
- ④ sex
- ④ residential address
- ④ contact details, including an e-mail address for the parent, care-giver or guardian of the child (if possible).

Each file *must* also contain **complete information about the case and the case outcome**:

- ④ file number
- ④ date of the hearing
- ④ outcome of the hearing
- ④ if there is an appeal or review:
 - the date it was lodged
 - the decision made.

◆ Regulations relating to Children's Court Proceedings, regulation 3(c)

Assistance to the public: The clerk must also, to the best of his or her ability, assist members of the public to complete forms and documents relating to children's court matters.

Transfers of files between courts: If a file must be transferred from one children's court to another, the clerk must keep certified copies of all documents in the file, and then send the file with all of the original documents to the other children's court by hand, courier or registered post.

Information to witnesses: The clerk must inform any witness who is summoned to court about the witness fees that are available, and help the witness claim those fees if necessary.

General civil court duties: The clerk must perform the usual duties of a clerk of a civil court as necessary to implement the Child Care and Protection Act.

Training: The Minister of Justice has a duty to ensure that clerks of the children's court receive training on the implementation of the Child Care and Protection Act and their specific duties and functions under the Act.

- ◆ Child Care and Protection Act, section 39
- ◆ Regulations relating to Children's Court Proceedings, regulation 3

2.4 Assessors

Appointment: Assessors are selected by a children's commissioner to assist in particular cases. There are no set qualifications, as the assistance which is needed may differ from case to case.

For example, the use of assessors allows children's courts to take advantage of specialised expertise, such as that of doctors, psychologists or educators. It also allows children's courts to make use of persons from the same language group or cultural group of the child, which can help the child feel more comfortable and ensure more effective child participation. An assessor must have knowledge and experience appropriate to the specific proceeding for which his or her assistance is required. It is typical for a court to use either one or two assessors in a specific case.

Functions: There are some cases where the assistance of assessors is compulsory. **A children's commissioner must involve at least one assessor in the following matters:**

- (1) a dispute about the alleged sexual abuse, sexual exploitation or psychological abuse of a child
- (2) a case involving a child with a physical or mental disability or other special needs
- (3) the issue of a warrant for the emergency removal of a child from the home environment
- (4) the issue of a warrant for the removal of an alleged offender from home or place where the affected child resides.

One or more assessors *may* also be utilised by the children's court whenever the children's commissioner believes that it is in the interest of the administration of justice to do so. This decision must be guided by the best interests of the child concerned along with any other relevant consideration.

Assessors can assist with findings of fact, but not questions of law. A finding of fact must be made by a majority of the children's commissioner and assessors. However, if the children's commissioner is assisted by only one assessor, the view of the children's commissioner prevails if there is a difference of opinion. The children's commissioner must decide any question of law on his or her own, without the assessor's input. The children's commissioner is also solely responsible for deciding whether a specific issue constitutes a question of law or a question of fact.

Before hearing any evidence in a case, an assessor must make an oath or an affirmation administered by the children's commissioner, in which he or she undertakes to assist the court in a truthful and honest manner, based on the evidence placed before the court.

Death or incapacity of assessor: If an assessor dies or, in the opinion of the children's commissioner, becomes incapable of continuing to act as an assessor (due to ill health or any other reason), the children's commissioner has discretion to decide how to proceed. There are two options:

- (1) The hearing can proceed before the remaining member or members of the court.
- (2) The hearing can begin afresh after the children's commissioner has summoned a new assessor to replace the one who is unavailable.

Allowances and reimbursement of expenses: Assessors who are **NOT full-time State employees** may claim from the State an allowance in respect of **expenses** they incur in connection with the trial **AND** an allowance for their **services** as assessors.

The Minister of Justice, with the concurrence of the Minister of Finance, is responsible for determining the allowances payable to these assessors.

Assessors who ARE full-time State employees are entitled to payment for **expenses** incurred in connection with their attendance at the trial.

- ◆ Child Care and Protection Act, section 40 (read with Criminal Procedure Act 51 of 1977, section 147)
- ◆ Regulations relating to Children's Court Proceedings, regulations 11-12



Allowances for assessors who are NOT State employees

The maximum amounts are contained in regulations which may be changed from time to time. As of 2019, the maximum amounts which could be claimed for costs were as follows:

- ⑨ "reasonable expenses" for accommodation
- ⑨ meals and incidentals = N\$200 per day
- ⑨ travel expenses = \$3.50 per kilometre for use of own vehicle (which requires presentation of proof of ownership) OR reimbursement of invoice for travel expenses

Air travel may be reimbursed if the Executive Director: Office of the Judiciary is satisfied that the use of the air transport is necessary in the circumstances and gave advance approval.

- ⑨ loss of earnings = up to N\$2 500 per day (paid on written request accompanied by satisfactory proof that the person has suffered loss of earnings and a recommendation by the children's commissioner)

The expenses must be claimed from the Executive Director: Office of the Judiciary. The amounts which can be claimed can be adjusted by the Executive Director: Office of the Judiciary, in response to a written request from the assessor, if the request is supported by proof which the Executive Director finds satisfactory.

- ◆ Regulations relating to Children's Court Proceedings, regulation 11

The Act refers to the "Permanent Secretary". Since the Act was passed, the designation "Permanent Secretary" has been changed to "Executive Director".

The concept of assessors is not new. Many other Namibian laws similarly make provision for assessors to assist courts and other decision-makers in specialised matters.



Regulation 11(6) provides for allowances for persons who are required to submit professional reports to the children's court. This would not seem to apply to assessors since they are themselves members of the children's court in respect of the cases they hear.

Regulation 11(7) refers to authority for deviations from the amounts specified in subsections (4) or (5) of regulation 11. This was probably intended to refer to subsections (3) or (5) instead, since subsection (4), which concerns air travel, does not specify an amount.

- ◆ Child Care and Protection Act, section 40(6)
- ◆ Regulations relating to Children's Court Proceedings, regulation 11(6)-(7)

3. Jurisdiction

Jurisdiction refers to the matters that a children's court can consider and decide on.

3.1 Subject matter jurisdiction

A children's court considers and decides on the matters covered by the Child Care and Protection Act. There is no specific provision which sets out the issues that a children's court can decide. There are references to the jurisdiction of a children's court throughout the Act.

Other Namibian laws mention children's courts, but (as of 2019) these references are all tied to issues that fall under the Child Care and Protection Act. It is possible that a future law might give a children's court jurisdiction over additional matters relating to children.

protective services
baby abandoned
police foster care
detention emergency aid
harmful grant
state clear children's home
proof of custody practice
kinship care adoption
medical intervention
parenting plan
HIV testing
guardianship
place of safety

For example, section 254 of the Criminal Procedure Act 51 of 1977 says that, where a criminal court believes that an accused person under age 18 may be a child in need of protective services, it can stop the criminal trial and refer the child to the children's court for an enquiry into this issue.

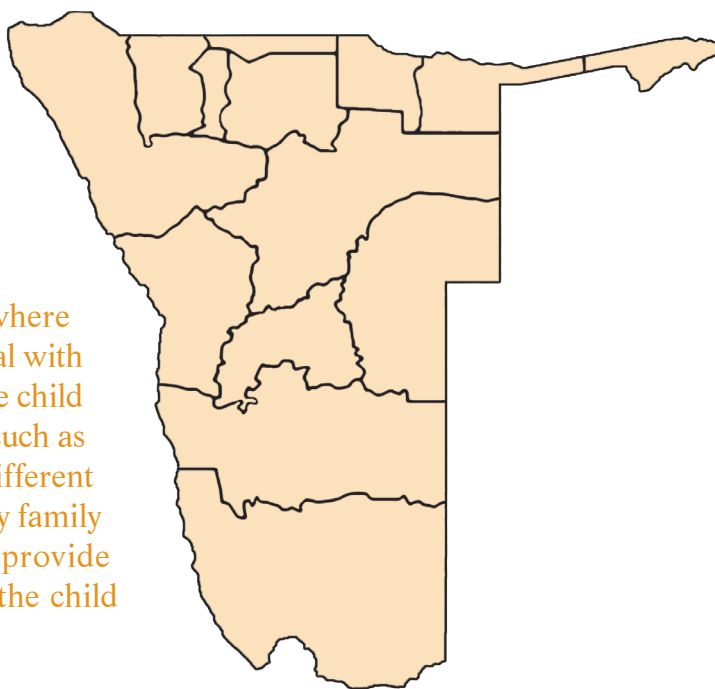
3.2 Geographical jurisdiction

Jurisdiction: Courts usually hear cases that arise in the place where the court operates. The Act takes a broad approach to the geographical jurisdiction of children's courts, to ensure that children's courts are accessible to children.

A children's court can deal with a case in any of these circumstances:

- (1) if the court covers the area where the **child** involved in the matter is **ordinarily resident**

The court closest to the place where the child normally lives could deal with a case about that child, even if the child is temporarily somewhere else – such as staying in a school hostel in a different place. It might be easier to get key family members to come to court to provide information in the place where the child normally lives.



- (2) if the court covers the area where the **child** involved in the matter **happens to be**

Suppose that a child went to stay with a relative in a different town to get away from family problems. The court closest to this town where the child is now staying could deal with the case. This approach is designed to be as convenient as possible for the child.

- (3) where the case involves **multiple children in different places**, if the court covers the area **where any of the children is ordinarily resident or happens to be**.

For example, suppose that a court is considering foster care for three siblings who lost their parents in a car accident. One child says with an aunt in Windhoek, one child is in a school hostel in Keetmanshoop and one child is staying with a friend's family in Swakopmund. The matter could be decided by a court in Windhoek, Keetmanshoop or Swakopmund.

In cases of doubt, a children's court will have jurisdiction over a child who is brought before it – in line with the principle of protecting the child above all.

Transfers: A matter can be transferred from one children's court to another children's court if this would be in the best interests of the child in question. In the case of a transfer, the clerk of the original court must keep certified copies of all documents in the case file, and then send the file with the original documents to the other children's court by hand, courier or registered post.

◇ Child Care and Protection Act, section 41

◇ Regulations relating to Children's Court Proceedings, regulation 3(h)



Jurisdiction and ordinary residence

In the 2016 case of *MW v Minister of Home Affairs*, which considered ordinary residence in connection with Namibian citizenship, the Namibian Supreme Court held that “ordinary residence” requires a regular habitual mode of life in a particular place for the time being, which exhibits some degree of continuity apart from temporary or occasional absences. It does not have to be permanent.

In the 2018 case of *NS v Presiding Officer of the Children's Court*, the South African High Court considered ordinary residence in the specific context of children's court jurisdiction. It held that “ordinarily resident” denotes something more prolonged than a mere temporary stay, but does not have to be permanent. “Ordinary residence” essentially means the place where the child or the child's family resides. The Court also noted that, in the event of uncertainty about where a child is ordinarily resident, the Act confers jurisdiction on the court before which the child is brought. The Court also noted that South Africa's Children's Act (like Namibia's Child Care and Protection Act) does NOT make citizenship or permanent residence a jurisdictional requirement. A child's immigration status is thus irrelevant to the question of jurisdiction. Whether the child is legally or illegally in the country is also irrelevant to the question of jurisdiction.

◇ *MW v Minister of Home Affairs* 2016 (3) NR 707 (SC) *NS and Others v Presiding Officer of the Children's Court* (2184/18) [2018] ZAGPJHC 59 (6 February 2018), paragraphs 18-23

4. How to bring a matter to a children's court

4.1 Who may approach a children's court?

The Act contains a long list of people who can bring a matter before a children's court. The right to bring a matter to court for a decision is called "standing". (Courts and lawyers also sometimes use the Latin phrase for standing, which is "*locus standi*".) Standing in cases involving child care and protection is broad to make it easier to protect the best interests of children.

A few provisions of the Act specify who can approach a children's court in specific proceedings. For example, there are specific lists of people who can approach the court on issues relating to custody, guardianship and parental access. However, if the Act does not specify specific people for a specific matter, then the general list applies.

The persons who may bring a matter to a children's court are as follows:

- (1) **a child** who is affected by or involved in the matter

Minor children can normally bring court proceedings only with assistance from a parent or guardian. The Act makes an exception to this rule, by allowing children to approach the children's court directly, on their own. This is important because the parent or guardian might be part of the problem that needs to be addressed.

- (2) **any person with parental responsibilities and rights** in respect of a child

This obviously includes parents. It could also include a guardian other than a parent, or someone with parental powers over the child due to the child's placement in their care by court order (including a foster parent, a kinship care-giver or the management of a residential child care facility).

- (3) the **care-giver** of a child

The Act defines a "care-giver" as "any person other than a parent or guardian, who takes primary responsibility for the day-to-day care of a child". This includes:

- (a) a **foster parent**
- (b) a **kinship care-giver** (a member of the child's family or extended family who is caring for a child with the express or implied consent of the child's parent or guardian, or because of a court order)

For purposes of the definition of "kinship care", a "**family member**" includes a grandparent, step-parent, brother, sister, uncle, aunt or cousin of the child. It also includes any person with whom the child has developed a significant relationship that resembles a family relationship. The test is the psychological or emotional attachment on the part of the child. For example, this might include a close family friend.

◆ Child Care and Protection Act, section 1 (definition of "family member")

- (c) a **primary caretaker** (a person other than the parent or other legal care-giver of a child, whether or not related to the child, who takes primary responsibility for the daily care of the child with the express or implied permission of the parent who has custody of the child)
- (d) a person who cares for a child while the child is in a **place of safety**
- (e) the person who is the **head of a facility** where a child has been placed (such as a children's home or a child detention centre)
- (f) the **child who is the head of a child-headed household**.

Some of the categories listed in the definition are overlapping. The idea is that the person who is actually caring for a child on a daily basis should be able to approach the children's court on issues involving the child.

(4) any person acting in the interest of a child;

It has been noted in South Africa, where the Children's Act uses this same phrase, that this category could include a wide range of persons such as social workers, teachers, doctors, neighbours, interested community members or people working for non-governmental organisations.

(5) any person acting on behalf of a child who cannot act in his or her own name

This category could include the same people as the previous one. It might also include a parent or guardian acting on behalf of a very young child.

(6) any person acting as a member of, or in the interest of, a group or class of children

This is a broad category that might include, for example, a non-governmental organisation, a child protection organisation or a staff member of a children's home acting in the interest of the children accommodated at that home.

(7) any person acting in the public interest, including the Minister or a staff member of the Ministry who is authorised by the Minister

This is another broad and flexible category that might include children's rights organisations or a child protection organisation, as well as a Ministry official or social worker.



(8) the **Children's Advocate**.

The Children's Advocate is an official in the Office of the Ombudsman who focuses on issues relating to children and can receive complaints from children about violations of their rights. (See Chapter 4 of this *Guide*.)

- ◆ Child Care and Protection Act, sections 1 (relevant definitions), 52, 149(1)
- ◆ *Centre for Child Law v Hoërskool Fochville* 2016 (2) SA 121 (SCA), paragraph 23; *S v V and Others* (439/2015) [2016] ZAECHMHC 12 (15 March 2016) (cases interpreting similar South African provision on who can bring a matter to a children's court)

“It would thus seem that the legislature intended to create wide and generous mechanisms for the protection and enforcement of children's rights beyond that available to them at common law.”

- ◆ *Centre for Child Law v Hoërskool Fochville* 2016 (2) SA 121 (SCA), paragraph 23 (commenting on the similar provision in the South African Children's Act 38 of 2005)

Examples from South African training materials

“Jonathan (15) lives with his mother. His parents were never married, but Jonathan has never met his father. His mother has always told him his father is not interested in him and does not want to know him. At an inter-school sports meeting Jonathan is approached by a younger boy named David who tells him that they are in fact half-brothers, and that his father has been trying to get to meet him for a number of years, but Jonathan's mother will not allow it. Jonathan confronts his mother, who admits the man is his father but says that she does not want Jonathan to have anything to do with him. Having failed to persuade her, Jonathan goes to the Legal Aid Board, where a lawyer is appointed for him. Acting on Jonathan's instructions, the lawyer brings an application to the children's court (in Jonathan's name) to have contact with his father. The court papers are served on his mother and his father. His mother opposes, but his father does not. The court, after considering all the information placed before it, finds that it would be in Jonathan's best interests to have contact with his father.”

“Childline hears about an illegal adoption where a mother ‘sold’ her baby to a couple, with no social work involvement. A ‘fly by night lawyer’ arranged the adoption, and drafted what he calls an ‘adoption contract’. The mother phones Childline and tells the story, but she does not reveal her name (though she does give the lawyer's name) and is not prepared to bring an application to court because she is afraid that if she does she will be in trouble. Childline successfully brings an urgent application in its own name on behalf of the baby (who has not yet been named), with the lawyer as the respondent. The court issues an interdict forcing the lawyer to reveal where the baby is, and causing the baby to be brought to a social worker so that care proceedings can be initiated. In this case, Childline is acting on behalf of a child that cannot act in his or her own name and is also acting in a child's interests. It could also be acting in the public interest – as the prevention of illegal adoption is important.”

- ◆ C Frank, J Gallinetti, D Kassan, J O Leary, B Mbambo, J Sloth-Nielsen and A Skelton, “Draft Training Materials on the Children's Act, Children's Amendment Act and Regulations, Intermediate Phase/Module 2”, 22 May 2009, page 50

4.2 How to approach a children's court

A person who wants to bring a matter before a children's court must file certain simple forms with the clerk of the court. The clerk of the children's court has a legal duty to help with the completion of the forms.

- (1) Many matters will be initiated by the completion of **Form 6**, which is appended to the **Child Care and Protection Regulations**. This Form is used when the matter involves custody, guardianship, access, complaints about guardianship or tutorship, parenting plans or kinship care:

Form 6: This Form sets out the issue and the persons involved.

When the clerk of the children's court receives Form 6, he or she will prepare **Form 7**:

Form 7: This Form gives notice of the application to affected persons or interested persons so that they can have an opportunity to make representations.

- (2) If the matter involves some other issue, the person approaching the court must complete two Forms appended to the **Regulations relating to Children's Court Proceedings**:

Form 1: This Form sets out the issue and the persons involved.

Form 3: This Form gives notice of the application to affected persons or interested persons so that they can have an opportunity to make representations. The person who is bringing the matter to the children's court may have names and contact details information which are relevant to this form. Otherwise, the clerk will assist.

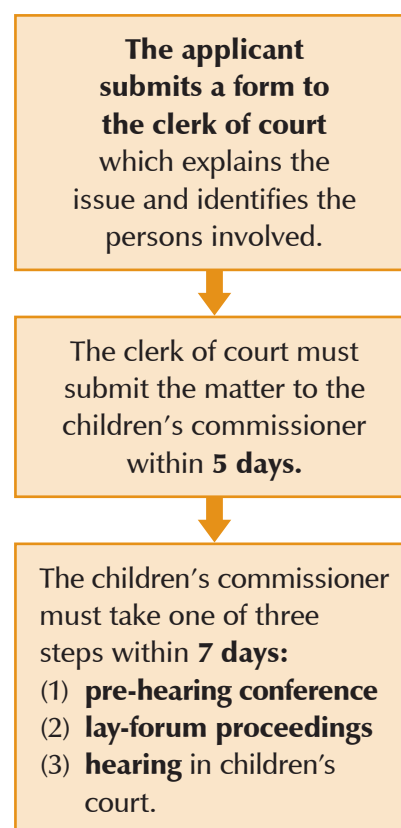
In either case, **the clerk of the children's court must refer the matter to the children's court** with all relevant documentation **within five days**, unless another timeframe is set in respect of a specific issue by the Act or the regulations.

The **children's commissioner** in charge of that children's court **must take the next step within seven days**. There are three possibilities:

- (1) set up a pre-hearing conference, if there are opposing parties who disagree
- (2) set up lay-forum proceedings in appropriate circumstances
- (3) schedule the matter to be heard and decided in the children's court.

Timeframes are set for each step to avoid administrative delays. Pre-hearing conferences and lay-forum proceedings are discussed in section 7 of this chapter.

- ◆ Child Care and Protection Act, section 52(1)
- ◆ Child Care and Protection Regulations, Forms 6 and 7
- ◆ Regulations relating to Children's Court Proceedings, regulations 3(f), 4(1)-(2), Forms 1 and 3



4.3 Parties in children's court proceedings

Any **child who is affected** by a matter which is before a children's court is ***automatically*** a **party** to the proceedings.

Regardless of who has approached the children's court in a specific matter, the following persons have a **right to be parties** to any children's court proceedings if they wish:

- (1) **the Minister**
- (2) **a staff member of the Ministry authorised by the Minister**
- (3) **the Children's Advocate.**

The ability to participate as a party is important, because parties have a right to be present at the proceedings and to receive all the relevant documentation, as well as the right to present their own evidence and input to the court. Parties also have a right to appeal decisions in a children's court case, where the Act provides for appeals.

The child is automatically a party to cement the principle of child participation. This ensures that the child or someone representing the child can participate fully in the matter.

The right to be a party allows Ministry staff and the Children's Advocate to play a monitoring role to help ensure that the Act is properly implemented. Furthermore, because the other parties who are directly involved with the matter may be part of the problem, the perspective of impartial experts like Ministry staff and the Children's Advocate may be helpful to the court.

The Act does not specify the procedure for enabling the Ministry or the Children's Advocate to exercise the right to be a party to any children's court proceedings. The Court could notify the Minister and the Children's Advocate of all children's court proceedings which are initiated, so that these officials can assert their rights to be parties if they wish. Alternatively, the court could make its docket of children's court proceedings public (without revealing the name or identity of any child involved), so that the burden is on the Ministry and the Children's Advocate to approach the court to intervene if they wish.

In the case of a child protection hearing, the parties to the case include **any person identified by the children's court as having an interest in the child protection hearing**. This identification must be made on written request, which could come from the person in question or from the designated social worker involved in the case. Interested persons can be extended family members or anyone else who has a close connection to the child. A person identified in this way becomes a party to the case and is thus entitled to receive notices about the proceedings along with other parties.

“ National human rights institutions should have the power to support children taking cases to court, including the power (a) to take cases concerning children's issues in the name of the national human rights institutions and (b) to intervene in court cases to inform the court about the human rights issues involved in the case. ”

◆ Committee on the Rights of the Child, *General Comment No. 2* (2002), paragraph 14 (acronym spelt out)

For example, an extended family member with an interest in the child protection hearing might be the child's grandparent, aunt, uncle or sibling. In some cases, a teacher, a friend or even a neighbour might be considered as having a close connection to the child and an interest in the child protection hearing.

◆ Child Care and Protection Act, sections 53, 143(2)-(3)

5. Legal representation

Right to engage own lawyer: Parties to a children's court proceeding can be represented by a legal practitioner of their choice, engaged at their own expense.

Court-ordered legal representation for a child: If a child involved in a matter in a children's court does not have legal representation, the children's court *must* order that legal representation be provided for the child in certain situations:

- (1) if the **child requests legal representation**, giving due regard to the child's age, level of maturity and stage of development and the reasonableness of the request
- (2) if a **social worker report recommends legal representation for the child**
- (3) if there is **evidence or allegations of sexual, physical or psychological abuse of the child**
- (4) if **any other party besides the child has legal representation**
- (5) in any other situation **where it appears that the child would benefit substantially from legal representation**, during the proceedings or in terms of achieving the best possible outcome for the child.

Guidelines on legal representation of children

Any legal practitioner representing a child should follow these guidelines.

- (1) The legal practitioner must attempt to gain the trust of the child, and be mindful of the fact that the child may be severely traumatised. The legal practitioner must approach the child with care and understanding.
- (2) The child is entitled to request a different legal practitioner if the children's commissioner finds that the child is not comfortable or satisfied with the appointed legal practitioner.
- (3) The legal practitioner must attempt to establish the level of understanding of the child and adjust the level of interaction with the child accordingly.
- (4) A child who has a sufficient level of understanding must be allowed to give independent instructions to his or her legal practitioner, free from any interference from a parent, guardian or care-giver.
- (5) The legal practitioner must explain the child's legal rights and any other issues related to the children's court proceedings in a manner appropriate to the age and level of understanding of the child.
- (6) The legal practitioner must uphold the highest standards of ethical and professional conduct.

◆ Regulations relating to Children's Court Proceedings, regulation 13

The court may order that legal representation be provided for a child in these circumstances in any of these three ways:

- (1) The court may **order one or more of the other parties to pay the costs of legal representation for the child.**
- (2) The court may **order that legal representation for the child must be provided by State legal aid, at State expense** – IF the court is satisfied that the child's parent, guardian or care-giver is unable to pay the costs of a legal practitioner AND that substantial injustice would occur if the child has no legal representation. In this case, the legal practitioner may be chosen from the roster kept by the Ministry of Justice for this purpose.
- (3) The court may **order that the child be assisted by a children's court assistant.**

The child's parent or guardian does NOT have to give consent to the provision of legal assistance for the child.

The child is entitled to consult privately with the legal practitioner or children's court assistant who is representing or assisting the child. This cannot be prevented by the child's parent, guardian or by any other person with physical control of the child.

This rule is important, because the case could involve abuse or mistreatment of the child by the parent or guardian.

Court-ordered legal representation for another party: The children's court may order that legal representation for any other party to the case must be provided by State legal aid, at State expense – IF the court is satisfied that the person in question is unable to pay the costs of a legal practitioner AND that substantial injustice would occur if that person has no legal representation.

Roster of lawyers specialising in children's matters: The Executive Director of the Ministry of Justice must make sure that the Directorate of Legal Aid keeps a roster of legal practitioners who specialise in matters relating to child care and child protection. This roster must contain details about each legal practitioner who is listed, including each legal practitioner's specific area of specialty (such as adoption, custody and guardianship or child exploitation).

A legal practitioner may apply to the Ministry of Justice to have his or her name included in the roster. The application must include:

- ⑨ a statement from the legal practitioner confirming that he or she is familiar with the Child Care and Protection Act and has knowledge or experience in matters relating to child care or child protection
- ⑨ certified copies of his or her qualifications.

The Executive Director must respond to each applicant in writing within 30 days of receiving the application as to whether or not that legal practitioner's name has been included in the roster. If the application to be listed on the roster has been refused, the Executive Director must give written reasons for the refusal.

The Executive Director must circulate an updated roster to children's courts at least once every six months. The roster must be available to children's commissioners and members of the public, so that they can find out what legal practitioners specialise in children's matters.

◇ Child Care and Protection Act, section 58

◇ Regulations relating to Children's Court Proceedings, regulation 13 (2)-(7)

NOTE: The Act refers to the "Permanent Secretary". Since the Act was passed, the designation "Permanent Secretary" has been changed to "Executive Director".

The importance of legal representation for a child

Sometimes parents argue over issues like child custody or access because they are angry with each other, resentful because their relationship came to an end, or jealous that the other parent has a new partner. In situations like these, a parent may lose sight of the child's best interests. In such cases, it may be necessary for the child to have a legal representative who can help put forward the child's views. A lawyer representing the child can bring witnesses or documents to court which will help the children's commissioner understand the child's views and what might be in the child's best interests. The child's lawyer can also question the parties to the case and any other witnesses. This can give the child a more effective voice in court.

I would like to go and live with my dad. My mommy often leaves us home alone without any food. Sometimes she brings home men that we don't know. Then we have to go and stay with the neighbour who lives next door. Her name is Auntie Felicity. I don't know her surname.



We need to give the court more information about this problem. We will go to your house, and you can take me to see this neighbour. We will ask her to come to court and talk about the times when she takes care of you.

Role of a child's legal practitioner

“ The legal practitioner stands squarely in the corner of the child and has the task of presenting and arguing the wishes and desires of that child. This task is not without certain inbuilt limitation. The legal practitioner does not only represent the perspective of the child concerned. The legal practitioner should also provide adult insight into those wishes and desires which have been confided and entrusted to him or her as well as apply legal knowledge and expertise to the child's perspective. The legal practitioner may provide the child with a voice but is not merely a mouthpiece. ”

◇ *Soller NO v G & Another* 2003 (5) SA 430 (W), paragraph 27

6. Curators

Whether or not a child has legal presentation, a children's court can appoint a *curator ad litem* for any child if the court believes that this would be in the best interests of the child.

A *curator ad litem* is a person appointed by the court to conduct litigation in the name and in the interests of the minor. *Curator ad litem* is a Latin phrase which can be translated as “a guardian for the lawsuit”. This *curator ad litem* will often be a close relative of the child, or it might be a legal practitioner who is appointed to act as a *curator* (rather than as a legal representative).

The test for the appointment of a *curator ad litem* is whether the court believes that this would be in the best interests of the child. Guidance for applying this test can be found in South African case law, which recognises four instances when a *curator ad litem* can be appointed: (1) where the minor has no parent or guardian; (2) where the interests of the minor clash with those of the parent or guardian, or where a possibility of such a clash exists; (3) where the parent or guardian of the minor cannot be found; or (4) where the minor's parent or guardian unreasonably refuses to assist the minor.

The High Court has long had the power to appoint a *curator ad litem* when this appears to be necessary, but this power is a new tool for the children's court.

Three types of curators in Namibian law

There are three types of curators in Namibian law who can act on behalf of a minor, or a person who is mentally incapacitated or for some other reason incapable of handling their own affairs:

- (1) *Curator ad litem* — a curator for litigation
- (2) *Curator bonis* — a curator of goods (appointed to handle the person's financial and property interests)
- (3) *Curator ad personam* — a curator for the person (appointed to look after the daily living needs of the person in question).

The Child Care and Protection Act provides *only*
for the appointment of a *curator ad litem*.

- ◆ Child Care and Protection Act, section 47(2)(f)
- ◆ *Brossy v Brossy* (602/11) [2012] ZASCA 151 (28 September 2012), paragraph 19
- ◆ *Legal Aid Board in re Four Children* (512/10) [2011] ZASCA 39 (29 March 2011), paragraph 12
- ◆ Committee on the Rights of the Child, *General Comment No. 12* (2009), paragraphs 35-37
- ◆ T Boezaart & DW de Bruin, “Section 14 of the [South African] Children's Act 38 of 2005 and the child's capacity to litigate”, *De Jure Law Journal*, Volume 44, Issue 2, 2011, pages 422-23
- ◆ Trynie Boezaart, “The role of a curator ad litem and children's access to the courts”, *De Jure Law Journal*, Volume 46, Issue 3, 2013

What is the difference between a curator and a legal representative?

The role of a curator is different from that of a legal representative.



A *curator ad litem* assists the court and the child by independently advancing the child's best interests. A *curator* does not have to follow the child's instructions.



A legal representative of a child takes instructions from the child as a client and represents the child's views — regardless of whether the legal representative believes that the child's stance is in the child's own best interests.

The Duties of a *Curator ad litem* for Children

“ The position of a *curator ad litem* is a responsible one because the court depends on his or her report. The child must be interviewed without delay, the child must be informed of the reason for the visit and the *curator* must make such further enquiries as he or she deems necessary. The *curator's* report should bring any facts or circumstances pertinent to the application to the court's attention. The *curator ad litem* represents the best interests of the child by advancing all arguments that can reasonably be put forward on the child's behalf. This denotes the real difference between a *curator ad litem* and a child's legal representative. The *curator ad litem*, while assisting the court and the child during the legal process, advances the child's best interests; the legal representative takes instructions from the child and represents the child's views. [...] Whether these different roles should be undertaken by the same person in a particular case by and large depends on the experience, skills and qualifications of the person concerned. It is also undesirable for a person to be both *curator* and legal representative if the earning of professional fees might create a conflict of interest. A *curator ad litem* may in his or her official capacity be substituted as a party in place of the child. The court may appoint a *curator ad litem* for a child without his or her knowledge and even against his or her will if it can be shown to the court that the appointment will be for the child's benefit and in his or her best interests. ”

◇ Trynie Boezaart, “The role of a *curator ad litem* and children's access to the courts”, *De Jure Law Journal*, Volume 46, Issue 3, 2013, section 5 (footnotes omitted)

The role of curators

Examples from South Africa

The cases listed here all involve the appointment of *curators ad litem* for minors by High Courts in South Africa. However, they give some idea of the range of functions that a *curator* can play. Note that children's courts in Namibia have authority to appoint a *curator ad litem* only "in respect of any particular child" (Child Care and Protection Act, section 47(2)(f)). This would not seem to prevent the appointment of curators to investigate the circumstances of a group of children which could be identified with particularity in respect of any children's court proceedings.

- ⑨ ***S v M (Centre for Child Law as Amicus Curiae) 2008 (3) SA 232 (CC)***: This case involved the criminal sentencing of the primary care-giver of young children. The Constitutional Court appointed a *curator ad litem* to investigate the circumstances of the children who were affected. A curator was appointed in a similar situation in *S v S (Centre for Child Law as Amicus Curiae) 2011 7 BCLR 740 (CC)*.
- ⑨ ***AD v DW 2008 (3) SA 148 (CC)***: The Constitutional Court appointed a *curator ad litem* to investigate, advise on and represent the interests of a baby, in a case where an American couple applied for sole guardianship in order to remove the baby from South Africa and adopt the baby in the United States.
- ⑨ ***S v J 2011 (3) SA 126 (SCA)***: The Supreme Court of Appeal appointed a *curator ad litem* to present argument on behalf of a four year-old child caught up in a dispute between her father and her maternal grandparents, even though the case was already at the appeal stage. The Court required up-to-date information about the circumstances of the child in order to establish what would be in the child's best interests.
- ⑨ ***Ex Parte MEC for Social Development, Women, Children and People with Disabilities, North West (For the Appointment of a curator ad litem), case no 18923/11, North Gauteng High Court***: The Court appointed a *curator ad litem* to investigate the circumstances surrounding the cases of 15 children, in a situation where a presiding officer in the children's court had made allegations that the adoption practices being followed by a care and protection organisation were tantamount to child trafficking.
- ⑨ ***Ex parte Centre for Child Law in re: six minor children, case no 11762/2012, KwaZulu-Natal High Court, Durban***: The Court appointed a *curator ad litem* to conduct an enquiry and report to the Court on the circumstances of the inter-country adoption of six children and to determine whether the legal rights of the children were infringed.
- ⑨ ***The MEC for Social Development, KwaZulu-Natal v Patricia Dawn Irons NO: KwaZulu-Natal, case no 5919/12, KwaZulu-Natal High Court, Pietermaritzburg***: The KwaZulu-Natal High Court appointed a *curator ad litem* to investigate the situation of children who were removed from a children's home that had been closed down by the government and moved to other places, and to advise on the best interests of these children.
- ⑨ ***The Amazing Grace Children's Home v The Minister for Social Development: Gauteng, case no 44443/2012, South Gauteng High Court***: The Court appointed a *curator ad litem* to protect the interests of the children living in a children's home that was being threatened with closure.

❖ summarised from information in Trynie Boezaart, "The role of a *curator ad litem* and children's access to the courts", *De Jure Law Journal*, Volume 46, Issue 3, 2013, section 6 (footnotes omitted)

7. Resolving disputes outside court

Alternative dispute resolution mechanisms are included in the Act to encourage parties to resolve problems by agreement between themselves, without formal court proceedings. This is often a good approach for children and their families because it can reduce conflict and confrontation, as well as being a very participatory method for dispute resolution. It can also take pressure off courts and social workers by reducing their caseloads.

There are two avenues which the court can use to get parties to attempt to resolve some or all of the issues in dispute before a court hearing takes place:

- (1) **Pre-hearing conferences**
- (2) **Lay forums**
 - (a) mediation
 - (b) a family meeting
 - (c) referral to a traditional authority.

The subsections below will examine each of these options in detail.

These avenues are not mutually exclusive. A children's commissioner could refer a matter to a lay forum in the hopes that it might be completely resolved. If that did not work, the parties could be referred to a pre-hearing conference to narrow the issues in dispute. Conversely, a pre-hearing conference might identify issues that appear to be ripe for settlement through mediation or some other lay-forum proceeding.

- ◆ Child Care and Protection Act, section 43(1)
- ◆ Regulations relating to Children's Court Proceedings, regulation 4(3)

7.1 Pre-hearing conferences

What is a pre-hearing conference? A pre-hearing conference is a meeting between the parties to a matter, to settle disputes as far as possible and narrow the issues to be decided by the court.

The pre-conference hearing might result in an agreement which means that there is no need to go to court at all. At the very least, it should reduce the number of issues in dispute. This can shorten court proceedings, and it may make them less conflictual. Pre-trial conferences are required in the High Court before all trials or hearings, but this is a new process for the children's court.

Court directives: When a children's court refers a matter for a pre-hearing conference, the court will decide –


- ⑨ **how** the conference will be set up
- ⑨ **who will conduct** the conference
- ⑨ **who must attend** the conference
- ⑨ the **timeframe** within which the conference must be completed
- ⑨ how a **record** will be kept of any agreement or settlement between the parties, or any fact emerging from the conference which ought to be brought to the court's attention.

Pre-hearing conference facilitator: The person identified by the children's court to conduct a pre-hearing conference must be either:

- (1) **a person with a mediation qualification:** a person with a degree, diploma or other recognised qualification in mediation
- (2) **a lawyer or paralegal with mediation training:** a legal practitioner or paralegal not otherwise involved in the case who has undergone training in mediation.

The clerk of the children's court must give certified copies of all documents relevant to the pre-hearing conference to the facilitator. The facilitator will determine the procedures to be followed at the pre-hearing conference.

Allowances for facilitators: A person other than a State employee who facilitates a pre-hearing conference at the direction of a children's court is entitled to an allowance.



Regulation 11(7) refers to authority for deviations from the amounts specified in subsections (4) or (5) of regulation 11. This was probably intended to refer to subsections (3) or (5) instead, since subsection (4), which concerns air travel, does not specify an amount.

- ❖ Child Care and Protection Act, section 40(6)
- ❖ Regulations relating to Children's Court Proceedings, regulation 11(6)-(7)

Child participation: The child involved in the matter has the right to participate in the pre-hearing conference unless the children's court specifically decides otherwise.

Suppose that the main issue in a dispute about custody concerns whether or not the current custodial parent is inviting multiple sexual partners into the home. The children's court might decide it would be in the child's best interests for discussion of this issue to take place without the child's involvement.

Allowances for assessors who are NOT State employees

The maximum amounts are contained in regulations which may be changed from time to time. As of 2019, the maximum amounts which could be claimed for costs were as follows:

- ⑤ "reasonable expenses" for accommodation
- ⑤ meals and incidentals = N\$200 per day
- ⑤ travel expenses = \$3.50 per kilometre for use of own vehicle (which requires presentation of proof of ownership) OR reimbursement of invoice for travel expenses

Air travel may be reimbursed if the Executive Director: Office of the Judiciary is satisfied that the use of the air transport is necessary in the circumstances and gave advance approval.

- ⑤ loss of earnings = up to N\$2 500 per day (paid on written request accompanied by satisfactory proof that the person has suffered loss of earnings and a recommendation by the children's commissioner)

The expenses must be claimed from the Executive Director: Office of the Judiciary. The amounts which can be claimed can be adjusted by the Executive Director: Office of the Judiciary, in response to a written request from the assessor, if the request is supported by proof which the Executive Director finds satisfactory.

- ❖ Regulations relating to Children's Court Proceedings, regulation 11

The Act refers to the "Permanent Secretary". Since the Act was passed, the designation "Permanent Secretary" has been changed to "Executive Director".

Court interpreter: The court may direct that a court interpreter must attend the pre-hearing conference to assist with interpretation.

Setting a date: Immediately after a children's court has ordered a pre-hearing conference, the clerk of the children's court must – after consulting the facilitator – assign a date for it. This date must be **within 14 days** after the court has ordered that a pre-hearing conference must take place.

If the pre-hearing conference fails to take place on the scheduled date, the clerk of the children's court must – again, after consulting the facilitator – arrange a new date. The clerk must also notify the children's court of the failure to conclude the pre-hearing conference and the reasons why it did not take place as planned.

Venue: The Act and regulations are silent on the venue for a pre-hearing conference. It can presumably be held at any suitable place.

Notifying participants to attend: Once a date is set for the pre-hearing conference, the clerk of the children's court must notify everyone who is required to attend of the date, time and place of the conference. This notice must be sent on **Form 2**, which is appended to the **Regulations relating to Children's Court Proceedings**, using the standard methods for notification. If the pre-hearing conference is postponed, the clerk of the court must notify the participants of the new date in the same way.

Notices under the Regulations relating to Children's Court Proceedings

Note that this notice procedure is very similar – but not 100% identical – to the notice procedure set out in the “Child Care and Protection Regulations”. The procedure described in this box applies only where no notice procedure is set out in the Act or the “Child Care and Protection Regulations” for the child's court proceeding in question.

Unless otherwise provided for in the Act or the Child Care and Protection Regulations, notices from the court must be served by a member of the police, a messenger of the magistrate's court or a person authorised by the children's commissioner in the following manner:

- (1) The notice can be served **personally** on the person.
- (2) The notice can be given to the person's **legal practitioner**, if the legal practitioner's name and address have been provided to the court for purposes of proceedings under the Act.
- (3) The notice can be left at the person's **place of residence or business**, with anyone who appears to be at least 16 years of age and residing at the residence or working at the business.
- (4) The notice can be left at the person's **place of employment**, to anyone who appears to be at least 16 years of age, and employed at the same place or in charge of the place of employment.
- (5) In the case of a **legal person (such as an organisation)**, the notice can be left at its **registered office or main place of business**, with a director or a responsible employee.
- (6) The notice can be delivered in **any other manner directed by the children's commissioner**.
This option does not appear in the notice procedure described in the “Child Care and Protection Regulations”.

If a notice cannot be served in any of these ways, the member of the police, messenger of the magistrate's court or other person authorised by the children's commissioner must attempt notification in one or more of the following ways:

- (1) The person can be notified by **telephone**.
- (2) The person can be notified by **fax**.

- (3) The person can be notified by **e-mail**.
- (4) The person can be notified by **courier** or **registered post**.
- (5) The member of the police, messenger or other person can visit the last known residential address or place of business or employment of the person in question, to **attempt to discover the current contact details** of the person, and then try to use that contact information to serve the notice.

If all efforts to serve notice on the person in question fail, the member of the police, messenger of the magistrate's court or other person who attempted service must give the children's court **proof of the attempts made**.

Proceedings in a children's court may **begin or continue in the absence of a person who was notified, or attempted to be notified**, to attend the proceedings or to make representations – IF the children's court considers it to be in the **interests of justice** and in the **best interests of the child**.

The court must **postpone** the matter due to the **absence of a person who was notified to attend** in any one of these circumstances:

- ☉ The person who is not present at children's court proceedings is **likely to make a valuable contribution** regarding the best interests of the child in question.
- ☉ The court is of the opinion that the presence of the person is **necessary** for the purposes of the court proceeding.
- ☉ The person who is absent is the relevant child's **parent, guardian, custodian, care-giver or a person identified by the court or the relevant social worker as having an interest in the matter** (see section 56(3) of the Act).
- ☉ The person who is absent is the **investigating social worker** (see section 56(3) of the Act).

In such a case, the court can postpone the matter and arrange for the issue of a **subpoena** to the absent person on **Form 4**, which is appended to the **Regulations relating to Children's Court Proceedings**.

A person who fails to appear before the children's court without a reasonable cause after being issued with a notice or a subpoena commits a crime punishable by a fine of up to N\$5 000 or to imprisonment for up to one year or both.

A person is not subject to a penalty for non-attendance if the children's court decided to proceed in that person's absence.

◆ Regulations relating to Children's Court Proceedings, regulations 6(3)-(9), 7

If anyone notified to attend a pre-hearing conference **refuses or fails to attend without a good reason**, the facilitator may do one of three things:

- (1) **proceed with the pre-hearing conference** in the absence of this person;
- (2) **postpone the pre-hearing conference** and arrange for a **subpoena** to get this person to attend
- (3) **refer the matter to the children's court for a hearing**.

The option of postponing the pre-hearing conference and organising a subpoena should be used if the facilitator thinks that the absent person is likely to make a valuable contribution regarding the best interests of the child in question.

Report on pre-hearing conference: The facilitator is responsible for preparing a report on the pre-hearing conference in accordance with the court's directions. This report must be submitted to the children's court **within 10 days** after the conclusion of the pre-hearing conference. The report must identify any issues that have been settled between the parties and any issues that must still be adjudicated by the children's court.

The children's court will consider the report on the pre-hearing conference when the matter is heard. If the parties have been able to agree on some of the facts or issues in dispute, this could shorten and simplify the hearing.

For example, suppose that there is a case involving allegations of child abuse. The parties might agree about the extent of the child's injuries, but disagree on the cause of the injuries. This would mean that the hearing will not have to involve evidence on the factual question of whether the child was injured, but only evidence on the factual question of what caused the injuries.

As another example, suppose that a mother and a father are disagreeing about custody of their two children born outside marriage. They might agree that, no matter who gets custody, the two children should stay together. Agreement on this issue would reduce and simplify the issues which are in dispute.

- ◆ Child Care and Protection Act, section 43
- ◆ Regulations relating to Children's Court Proceedings, regulation 5 read with regulations 6 and 7

Nicolas and Naomi lived together for two years, and had a daughter, Nicole, during that time. Nicolas did not remain in touch with Nicole after the relationship broke down. But when Nicole reached age six, he wanted to begin exercising his rights to access by having her visit him on weekends and alternate holidays. At the beginning of the pre-hearing conference, several things are in dispute. Naomi says that Nicolas has no access rights because he has never paid maintenance, and that it is not safe for Nicole to spend time with him because he is addicted to drugs. Nicolas says he has automatic access rights and intends to start with weekend visits immediately, and to take Nicolas to see his extended family over the forthcoming Christmas holidays. By the end of the pre-hearing conference, which is facilitated by a social worker trained in mediation who knows the law well, the couple have agreed that payment of maintenance is not a pre-requisite for parental access, but a separate issue. Nicolas has also conceded that his demand to take Nicole out of town for the up-coming Christmas holidays is unreasonable. What remains in dispute is whether Nicolas is now drug-free and can safely have contact visits with Nicole, and if so, how contact will be phased in and whether it will be under supervision for a period of time.



7.2 Lay forums

What is a lay forum? The Act refers to three kinds of lay forums where the parties can attempt to settle the matter out of court. However, the wording of the Act makes it clear that these are not the only options. The three options referred to are:

- (1) mediation
- (2) a family meeting
- (3) referral to a traditional authority

Other lay forums might include the following:

Negotiation: This form of alternative dispute resolution is often overlooked because it is so obvious. In negotiation, there is no impartial third party to assist the parties in their negotiation. The parties simply work together on their own to come to a compromise. The parties may choose to be represented by their lawyers during negotiations.

Collaborative law: This is a form of negotiation between the parties, supported by their lawyers. It differs from negotiation in that it is based on a collaborative spirit which means that all parties must disclose all relevant information and work together towards a solution.

Expert determination: The issue is referred to an expert, chosen by the parties, who makes a determination on the issue. This form of alternative dispute resolution is most appropriate if the dispute between the parties involves a complex, technical issue. The parties can agree that the decision of the expert will be binding or non-binding.

IMPORTANT EXCLUSION: The court may **NOT** refer an issue to a lay forum if it involves allegations of abuse, or sexual abuse, of a child.

Advantages and disadvantages of lay-forum proceedings

“ The **advantages** of avoiding formal court proceedings include the consideration that in a less adversarial context, children and parties might feel less intimidated. Also, lay forums could provide access to inexpensive services. ”

Possible difficulties: “ [...] case studies have shown that while informal proceedings help some children, others feel completely vulnerable and unprotected from abusive adults in an informal setting. Where the resulting decision is to be given legally binding status, concerns may be raised as to how the result was reached. ”

◆ Jacqui Gallinetti, “The children’s court”,
in CJ Davel and AM Skelton (eds), *Commentary on the Children’s Act*,
Juta, 2007, updated in 2012, page 4-18
(discussing the similar South African Children’s Act 38 of 2005)

Factors to consider in lay-forum referrals: Not every case is appropriate for referral to a lay forum, even if the case does not involve child abuse. Before referring parties to a lay forum, the children's court must consider all relevant factors, including –

- ⑨ the **vulnerability of the child** concerned;
- ⑨ the **ability of the child to participate** in the proceedings;
- ⑨ the **power relationships within the family**; and
- ⑨ the **nature of any allegations made by the parties** to the matter.

For example, if two parents are disputing custody of a child, a lay forum would probably be inappropriate if there was a history of domestic violence by one partner against the other.

Furthermore, a children's court can refer a matter to a lay forum only if it is satisfied that **an appropriate cost-free option is available**, or that the parent, guardian or care-giver of the child concerned or any other person involved in the proceedings has the **financial ability to bear any costs involved**.

Three main types of lay forums: The three main types of lay forums are described here one by one.

(1) Mediation

Mediation is a process in which a neutral third party assists the participants to settle a dispute without making decisions on their behalf. The mediator does not decide who is right, or what is in the child's best interests. Instead, the mediator helps the participants to explain their points of view, to understand each other's positions and to explore possible options for resolving the dispute. Mediation is a process for reaching agreement through co-operation instead of confrontation.



Because mediation allows parties to play an active role in reaching decisions which they accept as being fair within their own particular cultural and moral frame of reference, they may be more likely to honour mediated agreements than court outcomes. Because mediation is not strictly limited to legal issues, it can allow parties to deal with facets of the dispute which a court hearing might not address.

Mediation may not work well where there are significant power imbalances between the parties, or if one party feels frightened or intimidated – such as where there is a background of abuse between the adult parties to the case. In such cases, the mediator must guard against allowing one party to bully the other into an agreement. Some worry that women may have less bargaining power than men in family mediations because of their general disadvantage in family and society. Successful mediation may also depend in part on the skills of the mediator, with some mediators struggling to remain neutral and unemotional.

How mediation works

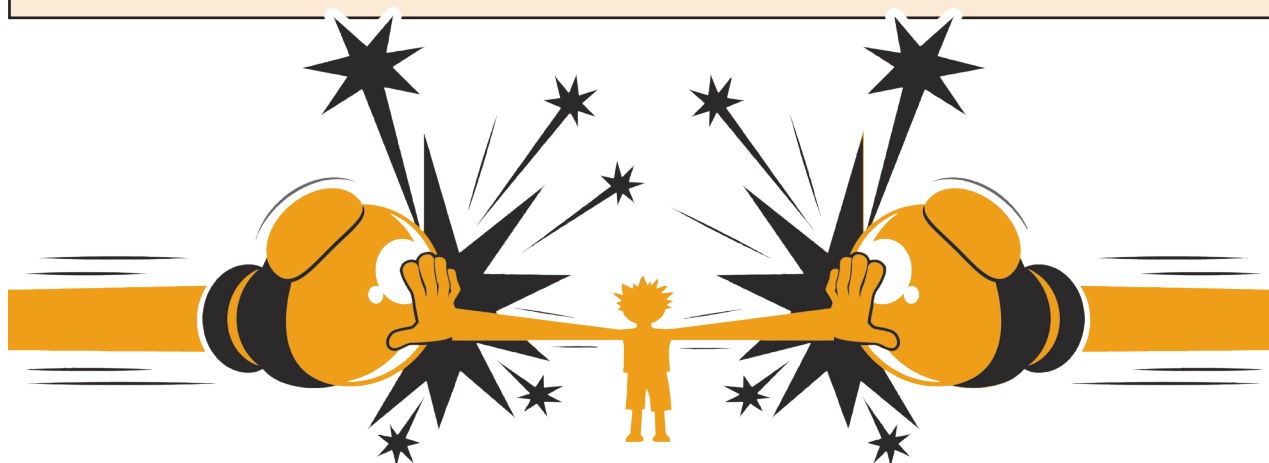
“Initially the mediator will explain to the participants how mediation works and will help them to agree what the ground rules of the meeting will be. Then each participant will have an opportunity to talk about how they see the dispute and express their views. The mediator will summarise what the participants say so that they know they have been heard and understood.

The mediator will ask questions to clarify what participants mean by a particular statement, and will also ask questions to check if there are aspects of the dispute which the participants may not have previously thought about. If there is a significant power imbalance between the participants, such as one party finding it easy to express in words what he or she feels or thinks but the other participant finds it very difficult to talk, then the mediator will assist the participant who struggles to communicate by, for example, affirming that it is safe for that person to speak and ensuring that the other participant does not interrupt or undermine the person speaking.

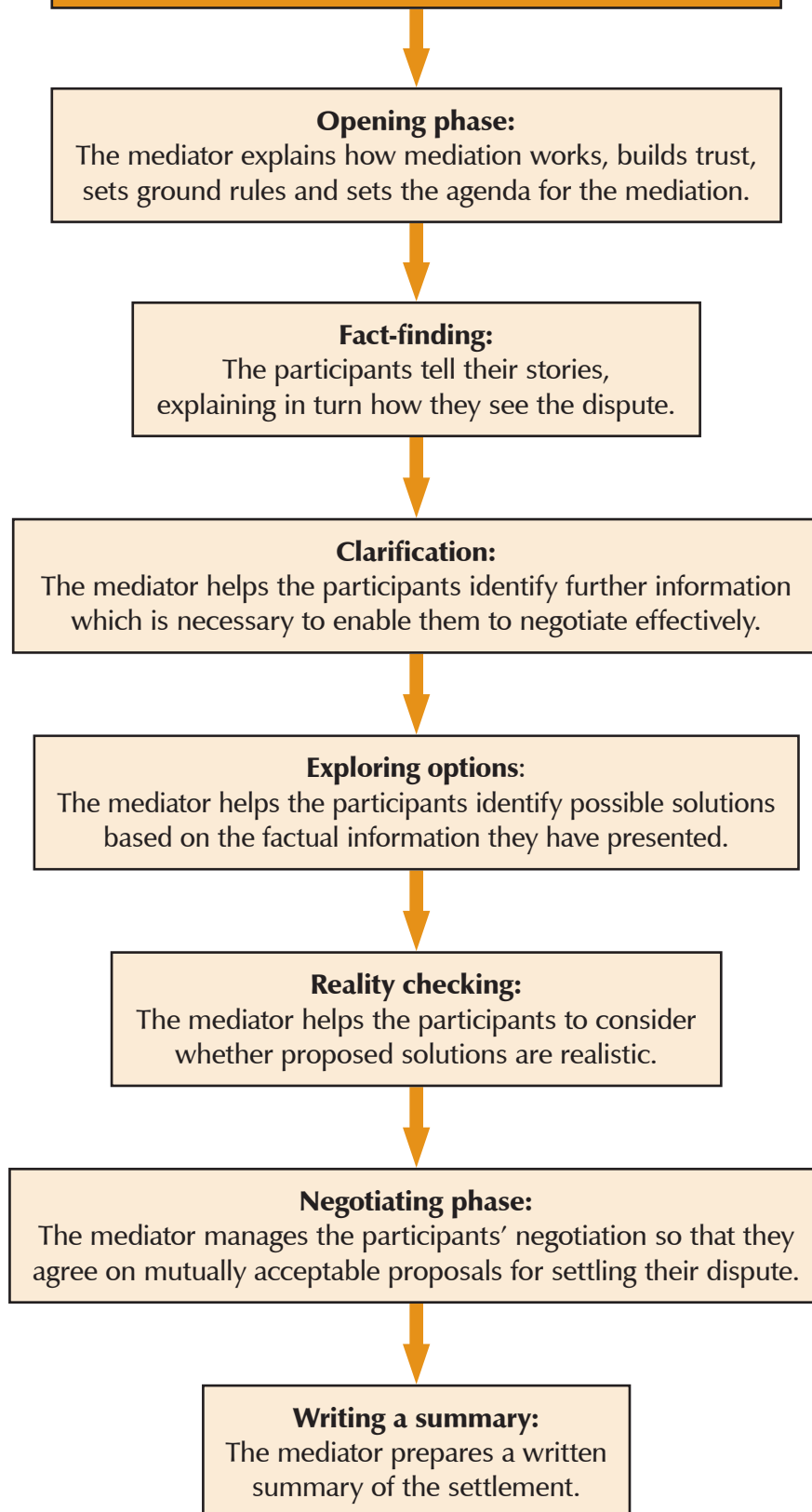
When the participants have explained their stories and are satisfied that they have been heard, the mediator will help them to identify possible information that may be needed to complete the picture. For example, in a dispute about schooling for a child it may be necessary to get input from a teacher, or get copies of progress reports so that each participant can base their negotiations on accurate information. Reality checking is an important tool and what this means is that the mediator will ask questions to check if something a participant says is realistic or accurate. The mediator does not do this in a confrontational style but rather in an exploratory way. It helps if the mediator has explained at the beginning of the process that this is what will be done, so participants expect it when it happens.

An important part of the task of the mediator is to help the participants to identify possible solutions to their dispute. Here the mediator must be careful not to suggest solutions but rather to ask the participants questions which help them to think of possible solutions themselves. Once a number of proposals have been identified, then the mediator helps the participants to examine the proposals critically and decide for themselves which proposal best suits them. In this way the mediator helps the participants to negotiate a resolution of their dispute without imposing a solution on them.”

◇ C Frank, J Gallinetti, D Kassan, J O Leary, B Mbambo, J Sloth-Nielsen and A Skelton, “Draft Training Materials on the Children’s Act, Children’s Amendment Act and Regulations, Intermediate Phase/Module 2”, 22 May 2009, pages 143-144



STEPS IN THE MEDIATION PROCESS



◆ based on C Frank, J Gallinetti, D Kassan, J O Leary, B Mbambo, J Sloth-Nielsen and A Skelton, "Draft Training Materials on the Children's Act, Children's Amendment Act and Regulations, Intermediate Phase/Module 2", 22 May 2009, box at page 144

Western mediation versus African mediation

“**Western mediation** as it is currently practised in South Africa is a service profession, but has also been established as an academic discipline. Mediators need to be accredited by a professional body, and mediation generally occurs in a formal setting. Usually the person who is the mediator has no prior relationship with the disputants. There is generally a mediation agreement that states the “ground rules” for the mediation process, and sets out the roles and responsibilities of the parties to the mediation. There are recognisable stages that occur during the mediation process. The objective of Western mediation is that consensus is reached and that this gives rise to a settlement agreement.

Three mediator roles are generally found in Western-style divorce and family mediation:

- ⑨ Firstly, there are individual mediators who do not have a prior relationship with the parties and help the parties to settle their disputes on grounds that are mutually acceptable to the disputing parties. This model of individual mediators is found most often in Western-style divorce and family mediation in South Africa.
- ⑨ Secondly, authoritative mediators are persons who are in authority over the disputing parties, for example managers.
- ⑨ Thirdly, there are social network mediators. These are mediators who have existing relationships with the parties, and are usually respected members of the community. They are not “neutral” but are seen as being fair. These mediators are concerned with maintaining long-term social relations and may even participate in the implementation of the agreement. Peer or social pressure may be used to enforce the agreement.

Factors that could strongly influence the accessibility of mediation are whether the necessary infrastructure exists, the availability of mediators, language and cultural barriers, and the cost of mediators.

In **African mediation**, conflicts are seen in their social context, not as isolated events; all relevant background information is covered during mediation. During mediation, not only the consequences for the parties are looked at but also the consequences for other people in the respective families. Family ties and community networks are respected, maintained and strengthened. Africans’ emphasis on relationships may be regarded as unique. The traditional objectives of African mediation are to soothe hurt feelings and to reach a compromise that can improve future relationships. The values that are upheld in African mediation are African humanistic values.

The African model can only be fully understood within the context of Ubuntu or Botho, or any of the other names for this concept in various African languages. Ubuntu is generally understood as the African rationale for humaneness, and is central to the African ethical system. Personhood is expressed in the solidarity of reciprocal relationships with others, such as “a person is a person through other people”. The ultimate objective of mediation then is to restore social equilibrium.

In family disputes, the assistance of an uncle or a respected person in the family or an elder in the community fulfils the role and function of a mediator.

In brief, the Western approach assumes a confrontational model of dispute resolution, whereas the African harmony model presupposes social harmony, which needs to be restored when disrupted by conflict and dispute.”

◇ South African Law Reform Commission, “Family Dispute Resolution: Care of and Contact with Children”, Issue Paper 31, December 2015, pages 216-218 (footnotes omitted)



More Information

For more information about family mediation, see:

- ♦ South African Law Reform Commission, “Family Dispute Resolution: Care of and Contact with Children”, Issue Paper 31, December 2015, pages 216-218
- ♦ C Frank, J Gallinetti, D Kassan, J O Leary, B Mbambo, J Sloth-Nielsen and A Skelton, “Draft Training Materials on the Children’s Act, Children’s Amendment Act and Regulations, Intermediate Phase/ Module 2”, 22 May 2009, pages 143-144

(2) Family meeting

A “family meeting” means a structured meeting of family members convened and presided over by a skilled facilitator, where the family members attempt to find solutions to a problem involving the care or protection of a child. A family meeting must include an opportunity for private discussion amongst the family members in the absence of the facilitator, with due regard to the principles on child participation. The facilitator is usually a social worker, but can be anyone the family feels will help them in making a plan – such as a pastor or a health worker.

Family meetings – often referred to in other countries as “family group conferences” – are used in family matters in many other countries, including New Zealand, the United States, England and South Africa. Building on Maori culture and tradition, New Zealand pioneered the concept of “family group conferences” which has become an international model.

In South Africa, the family group conference has been described as a process for bringing together the people affected by a conflict in a facilitated meeting where they try to resolve the current problem and come up with solutions that will prevent future problems. The focus is to enable people to take responsibility for mistakes they have made and to come up with plans for avoiding similar problems in the future.

The concept is characterised by its broad notion of “family”, which includes the child who is of concern, other children in the family, parents, extended family members and even significant friends and neighbours who are not related by blood. The child may be supported by someone who can help the child express his or her views. It is up to the parents or other persons with parental responsibility, together with the facilitator and the child, to decide who to include.

This group of people are given ‘private’ time, in the absence of facilitators and lawyers, to reach a plan to facilitate the safe care and protection of the affected children. The facilitator is involved in information-giving at the beginning of the process, and in the assessment of the plan following a decision. The facilitator sets the framework for the discussions, by pointing out what should be resolved, what must be included in the plan and what cannot be included. In the end, however, it is the family who decides on the way forward; the essence of the process is that it is essentially family-driven.

Internationally, the following principles underpin the family meeting process:

- ⑨ The child's interests are paramount.
- ⑨ The child should have the resources needed to make his or her voice to be heard.
- ⑨ The child's views, feelings and solutions are as valid as those of the adults participating in the process.
- ⑨ Children are generally best-looked after within their families, so this should be promoted where possible.
- ⑨ Working in partnership with families is beneficial for children.
- ⑨ Families have the ability to make rational and sound decisions about their future and the future of the children involved.
- ⑨ Given the right environment and the correct information, families instinctively know what is best for their children.

Some say that a family meeting can have an empowering impact on children and their families, because it enables family participation and shifts decision-making power to the family – which can increase family support for the child. This approach can have positive results for the child, because the plan is made by those who know the child and his or her situation best.

On the other hand, much of the success of the process depends on the strength of the child's social network. The responsibility for drawing up the plan and implementing it lies solely with the family group, which might overburden them. Allowing the family group to decide the way forward may also open the door to manipulation and undue pressure on the more vulnerable members of the group.

Family meetings may work better in some cultural contexts than others. African approaches to family issues, which tend to focus on including the broader family and community, may be a good context for successful family meetings.





More Information

For more information about family meetings, see:

- ◆ J McGrath, “The Background to Family Group Conferences”, NetCare 2005
- ◆ C Frank, J Gallinetti, D Kassan, J O Leary, B Mbambo, J Sloth-Nielsen & A Skelton, “Draft Training Materials on the Children’s Act, Children’s Amendment Act and Regulations, Intermediate Phase/ Module 2”, 22 May 2009, page 56
- ◆ UK Family Rights Group, “What is a family group conference?”, 2018
- ◆ R Metze, N. Abma and T. Kwekkeboom, “Family group conferencing: A theoretical underpinning”, 23 (2) *Health Care Analysis* 2015
- ◆ N Frost, F Abram & H Burgess, “Family group conferences: context, process and ways forward” (Part 1) and “Family group conferences: evidence, outcomes and future research” (Part 2), 19 (4) *Child & Family Social Work* 2013
- ◆ RH Nygård & M Saus, “Is family group conferencing a culturally adequate method outside the origin of New Zealand? A systematic review”, 20 (1) *Social Work and Social Sciences Review* 2019.

(3) Traditional authorities: The children’s court may refer a dispute to a traditional authority, if the child resides in that traditional authority’s area of jurisdiction and is subject to that system of traditional leadership. The intent here is to link customary ways of resolving disputes with the children’s court procedures.

The advantages of this approach is that it may facilitate a community-based solution that is likely to be accepted by all parties. Traditional authorities will be more familiar to some people than courts, and they are more likely to understand the cultural background to the dispute. They are often experienced problem-solvers in a particular community.

On the other hand, traditional authorities may be used to acting as decision-makers under customary law, and not as negotiators. They may not be accustomed to applying the concept of the best interests of the child. There may also be certain biases against women on the part of some traditional authorities.

Traditional leaders may be well-placed to help settle disputes because they are trusted by the parties. Furthermore, there could be some issues in dispute which are particularly within the competence of a traditional leader. Consider this example, which is adapted from training materials published in South Africa:

Theo is 14 years old. He was raised by his mother at the home of her parents (his grandparents). His mother has recently died, and he continues to live with his grandparents. Their house is close to his school. Theo’s father wants Theo to come and live with him. He claims that the child belongs to his family, because he completed lobolo payments years before – but then met another woman and decided to marry her. Theo does not want to live with his father. His grandparents also feel that Theo should stay with them. They dispute that the lobolo was fully paid. The children’s court refers the matter to the headman for the area. After the parties meet with the headman, the headman reports to the children’s court that everyone is now agreed that lobolo was fully paid, but that there is no agreement on where Theo should now live.

The court considers the report and asks Theo what his views are. Theo says that, whilst he is prepared to have contact with his father, he prefers to continue living with his grandparents. He is not comfortable at his father's house because he does not have a good relationship with his father's wife. Also, his father's house is farther away from his school which would make it harder for him to carry on with the school sports programme. The court listens to the other parties and then makes an order giving custody to Theo's grandparents, with defined access rights for Theo's father.

There is no obligation to reach agreement in a lay forum.

The court told my husband and I that we must discuss Joseph's situation with our headman. We tried that, but I did not feel happy with what the headman suggested.



That is fine. The referral is designed to see if agreement is possible. If not, you are free to continue the court process.

IMPORTANT: Lay forums are mechanisms for assisting parties to reach agreement **IF POSSIBLE**. None of the lay forums described here have decision-making powers on matters under the Child Care and Protection Act. There is no obligation on anyone to reach agreement in a lay-forum proceeding, and the children's court should make it clear to everyone involved that they are free to insist on having the dispute decided by the court if they are unable to reach an agreement that they find satisfactory.

Rules and procedures for all lay-forum proceedings

Court directives: When a children's court refers a matter for lay-forum proceedings, the court will decide –

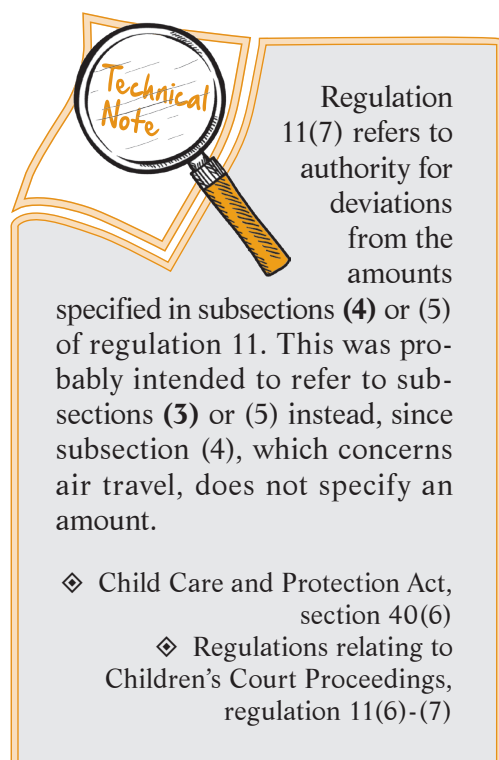
- ⑨ **how** the lay-forum proceeding will be set up
- ⑨ **who will conduct** the proceeding
- ⑨ **who must attend** the lay-forum proceeding
- ⑨ the **timeframe** within which the lay-forum proceeding must be completed
- ⑨ how a **record** will be kept of any agreement or settlement between the parties, or any fact emerging from the lay-forum proceeding which ought to be brought to the court's attention

Lay-forum facilitators: The person nominated by the children's court to conduct a lay forum must be –

- (1) a social worker who has undergone training in mediation skills
- (2) a traditional leader who has undergone training in mediation
- (3) a pastor or other religious leader with a theology degree who has undergone training in mediation.

The clerk of the children's court must give certified copies of all documents relevant to the lay-forum proceeding to the facilitator. The facilitator will determine the procedures to be followed at the lay-forum proceeding.

Allowances for facilitators: A person other than a State employee who facilitates a lay forum at the direction of a children's court is entitled to an allowance.



Child participation: The child involved in the matter has the right to participate in the lay-forum proceeding unless the children's court specifically decides otherwise.

Court interpreter: The court may direct that a court interpreter must attend the lay-forum proceeding to assist with interpretation.

Setting a date: Immediately after a children's court has ordered a lay-forum proceeding, the clerk of the children's court must – after consulting the facilitator – assign a date for it. This date must be **within 14 days** after the court ordered that a pre-hearing conference must take place.

If the lay-forum proceeding fails to take place on the scheduled date, the clerk of the children's court must – again, after consulting the facilitator – arrange a new date. The clerk must also notify the children's court of the failure to conclude the lay-forum proceeding and the reasons why it did not take place as planned.

Venue: The Act and regulations are silent on the venue for a lay-forum proceeding. It can presumably be held at any suitable place.

Allowances for assessors who are NOT State employees

The maximum amounts are contained in regulations which may be changed from time to time. As of 2019, the maximum amounts which could be claimed for costs were as follows:

- ⑨ "reasonable expenses" for accommodation
- ⑨ meals and incidentals = N\$200 per day
- ⑨ travel expenses = \$3.50 per kilometre for use of own vehicle (which requires presentation of proof of ownership) OR reimbursement of invoice for travel expenses

Air travel may be reimbursed if the Executive Director: Office of the Judiciary is satisfied that the use of the air transport is necessary in the circumstances and gave advance approval.

- ⑨ loss of earnings = up to N\$2 500 per day (paid on written request accompanied by satisfactory proof that the person has suffered loss of earnings and a recommendation by the children's commissioner)

The expenses must be claimed from the Executive Director: Office of the Judiciary. The amounts which can be claimed can be adjusted by the Executive Director: Office of the Judiciary, in response to a written request from the assessor, if the request is supported by proof which the Executive Director finds satisfactory.

- ◆ Regulations relating to Children's Court Proceedings, regulation 11

The Act refers to the "Permanent Secretary". Since the Act was passed, the designation "Permanent Secretary" has been changed to "Executive Director".

Family meetings should ideally take place in a neutral yet comfortable place, which is not the family's house or the facilitator's office.

Notifying participants to attend: Once a date is set for the lay-forum proceeding, the clerk of the children's court must notify everyone who is required to attend of the date, place and time of the conference. This notice must be sent on **Form 2**, which is appended to the **Regulations relating to Children's Court Proceedings**, using the standard methods for notification. If the lay-forum proceeding is postponed, the clerk of the court must notify the participants of the new date in the same way.

Notices to attend a lay forum must be served in the same way as notices to attend a pre-hearing conference. See the box on pages 25-26 above.

If anyone notified to attend a lay-forum proceeding **refuses or fails to attend without a good reason**, the person conducting the proceeding may do one of three things:

- (1) **proceed with lay-forum proceeding** in the absence of this person;
- (2) **postpone the lay-forum proceeding** and arrange for a **subpoena** to get this person to attend
- (3) **refer the matter to the children's court for a hearing**.

The option of postponing the lay-forum proceeding and organising a subpoena should be used if the facilitator thinks that the absent person is likely to make a valuable contribution regarding the best interests of the child in question.

Report on lay-forum proceedings: The facilitator is responsible for preparing a report on the lay-forum proceeding in accordance with the court's directions. This report must be submitted to the children's court **within 10 days** after the conclusion of the lay-forum proceeding. The report must record any agreement or settlement that the parties may have reached in respect of the matter, and any fact emerging from the lay-forum proceedings which ought to be brought to the notice of the children's court.

Settling matters out of court: If a matter is settled out of court in a lay-forum proceeding and the settlement is accepted by all parties involved in the matter, the clerk of the children's court must submit the settlement to the children's court for confirmation or rejection. The court must consider the settlement and decide whether or not to confirm it.

- (1) The court can **confirm the settlement and make it an order of court if it is in the best interests of the child concerned**. Before deciding whether to confirm or reject the settlement, the court may refer the issue back to the parties for reconsideration of specific issues.
- (2) The court must **reject the settlement if it is not in the best interests of the child**. In that case, the court will order that the matter be brought before the children's court for a decision.

The requirement that the court must approve a settlement agreement is designed to make sure that the agreement protects the rights and best interests of any children involved.

- ◇ Child Care and Protection Act, section 1 ("family meeting"), section 44
- ◇ Regulations relating to Children's Court Proceedings, regulation 5 read with regulations 6 and 7
 - ◇ C Frank, J Gallinetti, D Kassan, J O Leary, B Mbambo, J Sloth-Nielsen and A Skelton, "Draft Training Materials on the Children's Act, Children's Amendment Act and Regulations, Intermediate Phase/Module 2", 22 May 2009

8. Children's court proceedings

8.1 Setting a date for court proceedings

When a matter is brought to a children's court, the court may decide to refer it to a pre-hearing conference or a lay-forum proceeding. If the matter is not entirely resolved outside court, it will come back to the court at the end of the mandated process for a hearing.

If the matter was *not* referred for one of these processes, then it will come straight to the court for hearing and decision.

The children's commissioner must **set a date** for the court proceedings which is **within 30 days** from the date of the **original submission of the matter to the children's commissioner** OR the **referral back to the children's commissioner after the pre-hearing conference or lay-forum proceeding**.

◇ Regulations relating to Children's Court Proceedings, regulation 6(1)-(2)

8.2 Notice to parties and other interested persons

Who must get notice: Once a date is set for the court proceedings, the clerk of the children's court must give **notice** of the date, place and time to all parties to the case and anyone else who is required to be notified to attend court for the matter. The children's commissioner will direct the clerk of court on who must be notified to attend the proceedings.

The affected child: Any child who is affected by a matter to be adjudicated in the children's court is automatically a party to the proceedings in question. The person with physical control of the child concerned must ensure that the child attends the proceedings of the children's court, unless the clerk of the children's court or the court directs otherwise. This could be a parent, a guardian, a foster parent, a kinship carer or the person in charge of a facility or a place of safety. Even if the child is an infant who cannot participate in the court proceedings, it may be useful to observe the child to see if the child appears to be clean, well-nourished and free from any obvious signs of abuse.

Other parties: The other parties may include the Minister, a staff member of the Ministry who is authorised by the Minister and the Children's Advocate, all of whom have the right to be parties to any case under the Act. In the case of a child protection hearing, the parties to the case include any person identified by the children's court as having an interest in the child protection hearing. As discussed above, this identification must be made on written request, which could come from the person in question or from the designated social worker involved in the case. Interested persons can be extended family members or anyone else who has a close connection to the child. A person identified in this way becomes a party to the case and is thus entitled to receive notices about the proceedings along with other parties.

Other persons required to be notified to attend: This includes the relevant child's parents, guardian, custodian, care-giver or any person identified by the court or the relevant social worker as having an interest in the matter before the court, including the investigating social worker concerned.

Method of notice: Unless the Act or regulations give other instructions in respect of a specific type of matter, the clerk must notify the relevant persons on **Form 4**, which is appended to the **Regulations relating to Children’s Court Proceedings**, using the standard methods for notification. This notice should go out as soon as possible, but not later than **14 days before the date of the court hearing**.

A children’s court may proceed to consider a matter only if it is satisfied that the relevant parties have received notice of the court proceedings, or that reasonable attempts have been made to notify them.

- ◆ Child Care and Protection Act, sections 53, 56(3), (4) and (7), read together with section 143(2)-(4)
- ◆ Regulations relating to Children’s Court Proceedings, regulations 6(3) and (7)

Notices under the Regulations relating to Children’s Court Proceedings

Note that this notice procedure is very similar – but not 100% identical – to the notice procedure set out in the “Child Care and Protection Regulations”. The procedure described in this box applies only where no notice procedure is set out in the Act or the “Child Care and Protection Regulations” for the child’s court proceeding in question.

Unless otherwise provided for in the Act or the Child Care and Protection Regulations, notices from the court must be served by a member of the police, a messenger of the magistrate’s court or a person authorised by the children’s commissioner in the following manner:

- (1) The notice can be served **personally** on the person.
- (2) The notice can be given to the person’s **legal practitioner**, if the legal practitioner’s name and address have been provided to the court for purposes of proceedings under the Act.
- (3) The notice can be left at the person’s **place of residence or business**, with anyone who appears to be at least 16 years of age and residing at the residence or working at the business.
- (4) The notice can be left at the person’s **place of employment**, to anyone who appears to be at least 16 years of age, and employed at the same place or in charge of the place of employment.
- (5) In the case of a **legal person (such as an organisation)**, the notice can be left at its **registered office or main place of business**, with a director or a responsible employee.
- (6) The notice can be delivered in **any other manner directed by the children’s commissioner**. *This option does not appear in the notice procedure described in the “Child Care and Protection Regulations”.*

If a notice cannot be served in any of these ways, the member of the police, messenger of the magistrate’s court or other person authorised by the children’s commissioner must attempt notification in one or more of the following ways:

- (1) The person can be notified by **telephone**.
- (2) The person can be notified by **fax**.
- (3) The person can be notified by **e-mail**.
- (4) The person can be notified by **courier or registered post**.
- (5) The member of the police, messenger or other person can visit the last known residential address or place of business or employment of the person in question, to **attempt to discover the current contact details** of the person, and then try to use that contact information to serve the notice.

If all efforts to serve notice on the person in question fail, the member of the police, messenger of the magistrate’s court or other person who attempted service must give the children’s court **proof of the attempts made**.

Proceedings in a children's court may **begin or continue in the absence of a person who was notified, or attempted to be notified**, to attend the proceedings or to make representations – IF the children's court considers it to be in the **interests of justice** and in the **best interests of the child**.

The court must **postpone** the matter due to the **absence of a person who was notified to attend** in any one of these circumstances:

- ⑨ The person who is not present at children's court proceedings is **likely to make a valuable contribution** regarding the best interests of the child in question.
- ⑨ The court is of the opinion that the presence of the person is **necessary** for the purposes of the court proceeding.
- ⑨ The person who is absent is the relevant child's **parent, guardian, custodian, care-giver or a person identified by the court or the relevant social worker as having an interest in the matter** (see section 56(3) of the Act).
- ⑨ The person who is absent is the **investigating social worker** (see section 56(3) of the Act).

In such a case, the court can postpone the matter and arrange for the issue of a **subpoena** to the absent person on **Form 4**, which is appended to the **Regulations relating to Children's Court Proceedings**.

A person who fails to appear before the children's court without a reasonable cause after being issued with a notice or a subpoena commits a crime punishable by a fine of up to N\$5 000 or to imprisonment for up to one year or both.

A person is not subject to a penalty for non-attendance if the children's court decided to proceed in that person's absence.

◆ Regulations relating to Children's Court Proceedings, regulations 6(3)-(9), 7

8.3 Conduct of proceedings

Informality: Children's court proceedings must be conducted in an informal manner and, as far as possible, in a relaxed and non-adversarial atmosphere which is conducive to the co-operation and participation of everyone involved.

Basic rules: The normal rules of magistrates' court apply to many aspects of children's courts:

- ⑨ appointment and functions of staff members and officers of the court;
- ⑨ issue and service of process
- ⑨ appearance in court of legal practitioners
- ⑨ conduct of proceedings
- ⑨ execution of judgements
- ⑨ imposition of penalties for non-compliance with orders of court, obstructing execution of judgments and contempt of court.

Physical court environment: Children's court hearings must, as far as practicable, be held in a room furnished and designed in a manner aimed at putting children at ease. The venue should be conducive to the informality of the proceedings and the active participation of all persons involved, without compromising the dignity of the court. The venue used for children's court hearings should not be one that is ordinarily used for criminal trials. It should be accessible to disabled persons and persons with special needs (where this is relevant).

Children's court hearings have, for instance, sometimes been held in the chambers of the presiding officer rather than in the courtroom itself. However, the need for electronic recording of the proceedings, the technology or equipment required for vulnerable witnesses, or the number of parties involved may require that some hearings be held in a courtroom.

The Act does not talk about court attire, but in some countries the presiding officer and lawyers do not wear court gowns at children's court hearings.

Closed court: Children's court proceedings are not open to the public, but only to the people who are directly involved. They may be attended only by the following persons:

- (1) the child involved
- (2) any other party
- (3) a person who has been notified to attend the proceedings
- (4) the legal practitioner of the child or any other party
- (5) a person who has obtained permission from the children's commissioner to be present
- (6) a person performing official duties in connection with the work of the court
- (7) anyone else whose presence is otherwise necessary for the proceedings
- (8) the designated social worker involved with the case.

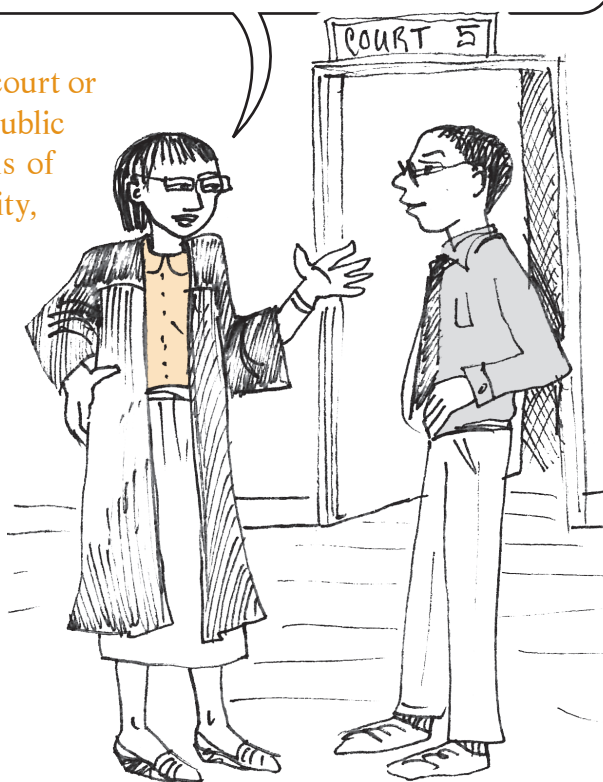
Persons whose presence would be necessary might include a *curator ad litem* appointed for the child, witnesses and intermediaries. Persons who might be given permission to remain could include a friend or support person who makes the child feel more comfortable.

Article 12(1) of the Namibian Constitution states that all persons are entitled to "a fair and public hearing" in the determination of their civil rights and obligations, or any criminal charges against them, but a court or tribunal may exclude the press and/or the public from all or any part of the trial for reasons of morals, the public order or national security, as is necessary in a democratic society. Internationally, it is common for court proceedings involving children to be closed to the public.

Considering issues in the absence of the child:

The children's court may at any point order that all or part of the children's court proceedings must take place in the absence of the child, if it is in the best interests of the child. The reasons for a decision to consider some matters in the absence of the child must be recorded.

I have never before heard parents say such horrible things about each other! I am going to ask the children to wait outside during this part of the enquiry because it is not good for them to hear the things their parents are saying about each other.



Control of proceedings: The children’s commissioner who is presiding is responsible for controlling the proceedings. Because parties are often unrepresented, the children’s commissioner can play an active role if necessary. The children’s commissioner may also involve a children’s court assistant, particularly in a case where there are unrepresented parties, or assessors.

In the children’s court, the children’s commissioner is expected to play an active role, to be sure that the parties present all relevant information. The children’s commissioner might ask the clerk of the court to call someone as a witness, or ask witnesses questions to make sure that they have shared all relevant information with the court. Children’s commissioners must remain neutral, but they can still help parties present the important facts when they do not have lawyers to guide them. This approach helps make the courts accessible to everyone, including people who cannot afford lawyers. The children’s commissioner may ask a children’s court assistant to help present evidence and question witnesses in order to maintain complete impartiality.

Children’s court assistants and assessors are discussed in sections 2.2 and 2.4 of this chapter of the *Guide*.

Role of a presiding officer

“ Ideally, presiding officers should direct court proceedings in a way that is child-friendly and promotes family unity where appropriate. At the same time, presiding officers [...] have to be able to enforce procedural formalities to the extent that these are appropriately protective of persons involved. They need to have sufficient experience, authority and discretion to avoid and prevent an overly technical use of procedures and formalities where such an approach would be inappropriately damaging to the best interests of a child or other vulnerable person. Therefore, it is appropriate that the basic mode of functioning in the children court is inquisitorial as opposed to accusatorial. ”

◆ Jacqui Gallinetti, “The children’s court”,
in CJ Davel and AM Skelton (eds), *Commentary on the Children’s Act*, Juta, 2007,
updated in 2012, page 4-22 (discussing the similar South African Children’s Act 38 of 2005)

Clear and simple explanation of the proceedings: The children’s commissioner who is presiding must explain to the child and any other person present at the proceedings the nature and significance of the proceedings, in simple terms that can be understood by the child or the other persons. This will help to ensure full participation on the part of the child and others.

Witnesses: Any person likely to be affected by an order made by a children’s court can ask the clerk of the children’s court to summon a witness to give evidence, or to produce a document, photograph or other material (including digital or electronic material). This request can be made directly or through the person’s legal representative. A **children’s court assistant** can also request the clerk to summon witnesses.

The **children’s commissioner** may also call on any person to give evidence or to produce a document, photograph or other material (including digital or electronic material), and request the clerk to summon a witness for this purpose.

The clerk must summon any witness if requested to do so. A **summons** must be served on witnesses and persons asked to produce documents, in the same way as a summons to give evidence or to produce documents at a criminal trial in a magistrate's court.

If the children's commissioner has called on anyone to give evidence, the children's commissioner may **question or cross-examine** that person directly, or allow that person to be questioned to the extent necessary to resolve any relevant factual dispute by any of these persons:

- ⑨ the child involved in the matter
- ⑨ the parent of the child
- ⑨ any other person who has parental responsibilities and rights in respect of the child
- ⑨ the child's care-giver
- ⑨ any person whose rights may be affected by an order that may be made by the court in the proceedings
- ⑨ the legal practitioner of any person involved in the proceedings.

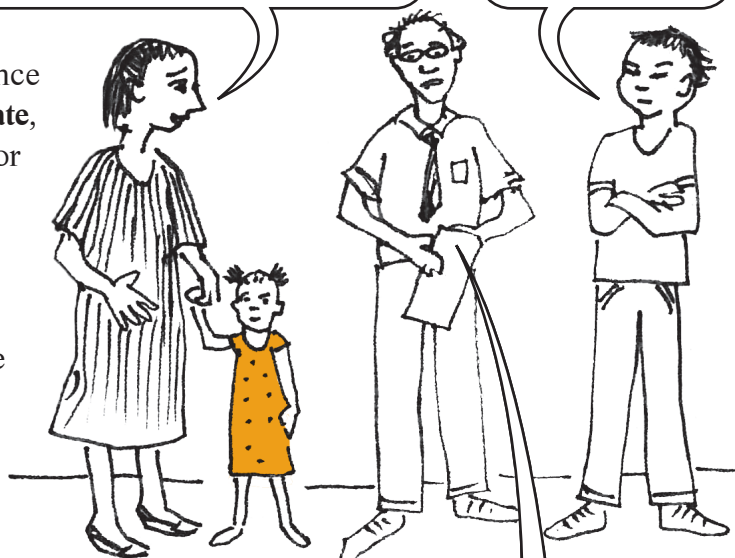
The children's court can make special arrangements for vulnerable witnesses. These are discussed in section 12 of this chapter.

A person who has been summoned to give evidence in a children's court, or otherwise required by the presiding children's commissioner to give evidence, commits a **crime** if he or she fails to comply and there is no reasonable possibility that that failure was not due to his or her fault. The punishment is a fine of up to N\$4 000 or imprisonment for up to 12 months.

If a witness is in attendance but refuses to be sworn or to make an affirmation, or to answer questions or produce documents, the court can enquire into this in a summary proceeding and, in the absence of a just excuse for the **refusal to cooperate**, sentence the witness to imprisonment for up to two years. (A just excuse might be, for example, that the documents the witness is asked to produce were not specified in the summons and he or she has not brought them with in court.) The court can repeat this procedure if the witness serves the sentence imposed and still refuses to cooperate without just cause.

The father abused this child when she visited him. I had to take her to hospital for treatment.

That is a lie! She is making up the whole thing.



There are no witnesses in court to give more information. I am going to summon the doctor who examined the child to come to court and describe the injuries so that I can decide if there really was abuse.

Witness fees and allowances: Any witness who complies with a summons sent out at the request of the children's commissioner or a children's court assistant is entitled to the witness fees and allowances payable to witnesses in criminal proceedings in a magistrate's court, to be paid out of State funds.

Anyone summoned by the clerk of the children's court at the request of anyone else is NOT entitled to a witness allowance from State funds, UNLESS the presiding children's commissioner orders that a witness allowance be paid.

This prevents the State from having to pay for multiple witnesses who are not really relevant to the case. Parties are welcome to bring witnesses who are prepared to come voluntarily, without any fees or allowances, or to pay the costs of expert witnesses privately.

Deviation from time periods: The children's court may allow a deviation from any time period specified in the regulations, if the court considers this to be in the interest of justice and in the best interests of the child. This can be done only if a party to the proceedings, a party's legal practitioner or a social worker has requested a deviation in writing, with a motivation for the request and relevant supporting documentation.

Before making a decision on the request, the court must take into account any objections raised by any party to the proceedings and any prejudice that a party to the proceedings might suffer (even if that party did not raise an objection).

Adjournments: The proceedings of a children's court may be adjourned only if good cause is shown, taking into account the best interests of the child.

- ⌚ Child protection hearings may be adjourned for a period of no longer than **14 days** at a time.
- ⌚ A children's court matter OTHER THAN child protection proceedings may be adjourned for a period of no longer than **30 days** at a time.

A children's commissioner may excuse any person who has been notified to appear before the children's court from appearing at proceedings held only to consider an adjournment.

For example, it would make no sense for a school-going child to be required to miss school to attend a court session being held only to adjourn the case to a new date.

- ⬢ Child Care and Protection Act, sections 47(1), 50, 54, 55(1), 56(1), (2), (5) and (6), 59, 60, 144(1), read with Criminal Procedure Act 51 of 1977, sections 188, 189
- ⬢ Regulations relating to Children's Court Proceedings, regulation 14

9. Expert reports

Court orders for expert reports: A children's court may order a designated social worker, medical practitioner, psychologist, educational practitioner or any other expert to carry out an investigation into the circumstances of a child and compile a written report on any matter, as the court directs.

For example, the court might want a medical examination to check for signs of child abuse, a psychological report addressing the child's level of understanding so as to accurately determine the consideration to be given to the views expressed by the child, a social worker report on guardianship or custody, or a medical or psychological report on a disability of the child.

Supplementary information: The expert who is compiling a report in response to a court order may obtain supplementary evidence or reports from other suitably qualified persons.

Testifying in person: The court may require the expert who prepared the report to present the findings of the investigation by testifying before the court in person.

This would give the parties an opportunity to question the expert about his or her findings. Since parties and other persons likely to be affected by a children's court order can ask the court to subpoena relevant witnesses, they could request the court to subpoena the expert even if the children's commissioner does not direct that the report be presented by way of personal testimony. Also, as explained below, any person whose rights are affected by an expert report has a right to question or cross-examine the expert who wrote the report and challenge any adverse statements.

Compensation: Any expert ordered by the court to compile a written report must be compensated for his or her services from State funds, if that expert is not in the full-time employment of the State or a designated child protection organisation. The tariffs for such services must be set by the Minister of Justice with the concurrence of the Minister of Finance.

The current tariffs for compensation were set by the Regulations relating to Children's Court Proceedings issued by the Minister of Justice in 2019. An expert can charge a maximum of N\$500 for each session involved in the evaluation or assessment of a person or his or her circumstances, up to a total of five sessions, and a maximum of N\$1000 for compiling the report. The amount paid for compiling the report must be determined by the clerk of the children's court and approved by the Executive Director of the Office of the Judiciary. An expert who prepares a report at the direction of the court may also claim compensation for expenses incurred, under the same rules as those which apply to assessors. See section 2.4 of this chapter of the *Guide*.

Annexure 2 of the Child Care and Protection Regulations limits the fee for a court report compiled by a private social worker or a child protection organisation to N\$500 per report.

Timeframe: Any expert report must be submitted to the court **within five court days** after the order was made, unless the court has approved a longer time period for purposes of practicality.

For example, the court might want a detailed psychological evaluation of the child which could be prepared only after meeting with the child in several sessions over a longer time period.

Provision of expert report to parties: Any expert report ordered by the court must be immediately provided to the other parties to the case.

Channelling of draft social worker reports

It should be noted that social worker reports must be channelled through the staff member designated by the Minister before being submitted to the children's court. This rule is intended to provide quality control and to harmonise the work of State and private social workers. This Ministry official may return the report with directions for improvement if necessary. If so, the social worker in question must re-submit the revised report to the channelling officer for final approval before it is submitted to the court.

- ◆ Child Care and Protection Act, section 33(7)-(8)
- ◆ Child Care and Protection Regulations, regulation 8
 - ◆ See Chapter 5 of this *Guide* for more details on the channelling procedure.

In the case of a child protection hearing, the parties to the case may include extended family members or anyone else who has a close connection to the child, and who has been designated by the children's court as having an interest in the case.

Service would presumably take place in the same manner as notice to attend the court proceedings, since service of expert court reports is not specifically covered in the regulations.

Written reports as evidence of facts: Any written report compiled and signed by a medical practitioner, psychologist, designated social worker or other professional, which on the face of it forms an authoritative opinion in respect of a child or the circumstances of a child involved in a matter before a children's court, or in respect of another person involved in the matter, is admissible as evidence of the facts stated in the report – unless the presiding children's commissioner rules otherwise. This applies to professional reports requested by the court AND to professional reports offered by any of the parties to the case.

A professional report is admissible as evidence even if it contains hearsay, but a report containing hearsay is not admissible as evidence in any criminal matter where the report might be relevant.

A written report can be evidence of **facts** on its own, but **opinions** in the report must be presented by personal testimony to be admissible.

Opportunity to challenge expert reports: If a person's rights are affected or prejudiced by an expert report the court must give that person a chance to challenge the report – even if the person is not a party to the matter. The children's court must notify the person in question to attend the court and give that person an opportunity –

- ⑨ to question or cross-examine the expert
- ⑨ to question any other person who has made a statement in the report which is prejudicial
- ⑨ to dispute any statement contained in the report.

Reports are likely to be challenged when there are disputing parties, but there may be situations where an expert report is accepted without opposition – such as in a case where a baby is abandoned.

- ◆ Child Care and Protection Act, sections 47(2)(g), 48, 49, read together with sections 120 and 143(2)-(3)
- ◆ Regulations relating to Children's Court Proceedings, regulation 11

10. Estimating the age of a child

The children's court may be required to estimate the age of a person who appears to be a child for the purposes of the Act.

For the purpose of estimating age, the children's court may request any relevant document, evidence or statement from any person, body or institution.

For example, the court might want to see the birth record from a hospital or clinic, immunisation records, or the person's baptism certificate or school records.

The court may also refer the person to a State medical practitioner for a report estimating the age of the person. This medical practitioner must report back to the court on **Form 5**, which is appended to the **Regulations relating to Children’s Court Proceedings**.

The children’s court must assess the available evidence and then make an estimation of the age of the person. The children’s commissioner must enter into the court record the estimated age and a date of birth which corresponds to the estimated age. This will then be deemed to be the actual age and date of birth of the person in question.

The clerk of the children’s court must transmit this information to the Executive Director of the Ministry of Home Affairs and Immigration to be registered as the date of birth of the person in question.

The children’s court can also order the Ministry of Home Affairs and Immigration to issue a birth certificate to the child on the basis of this information.

- ◆ Child Care and Protection Act, sections 47(2)(h) and (3)
- ◆ Regulations relating to Children’s Court Proceedings, regulation 9

11. Child participation and non-participation

Right to participate or not participate: The right to child participation has been discussed in detail in Chapter 2 of this *Guide*, as it is one of the guiding principles of the Act. In brief, **any child who is of sufficient “age, maturity and stage of development” to be able to participate in a children’s court proceeding has a right to participate in an appropriate way.** The views expressed by the child, verbally or non-verbally, must be given **due consideration** by the children’s court.

Every child has a corresponding **right to choose NOT to participate** in a matter, after being given sufficient information about the matter to enable the child to make a decision on participation which is in his or her best interests.

Five Principles of Child Participation

The Act contains five principles to guide child participation. They also apply to cases where the child chooses *not* to participate, as some of them help to ensure that this decision is a free choice on the part of the child.

- (1) **Information about context:** Children must be informed of the circumstances under which they will be asked to express their views and the impact of their views on the issue at stake. They must also be informed about services that are potentially available to them.
- (2) **Protection against victimisation:** Children must be protected against being punished or victimised for expressing their views. A child who is invited to express an opinion should be informed of the protections which are in place.

- (3) **Information about outcome:** Children must be informed of any decision which affects them — whether or not they chose to participate in the process.
- (4) **Opportunity to complain:** Children must be given an opportunity to complain if they feel that their right to participate is not being respected. In practice, this means that children should be informed about who to talk to if they experience problems with the process, and asked if they have any concerns.
- (5) **Special measures to overcome barriers:** Some children may experience specific barriers in respect of participation — such as language barriers, disabilities or some form of discrimination. In such cases, there may be a need to take special measures to promote child participation.

See section 3 of Chapter 2 of this Guide for more information.

◇ Child Care and Protection Act, section 4(3)



The children's court must give each child's view due consideration in light of the child's age, maturity and stage of development. In the example illustrated here, the court would listen to both children, but it would give more weight to the view of the child who shows a good understanding of the issue under discussion. The children's commissioner might ask the younger child some questions to see if she has other things to say that might be more helpful to the court.

Reasons for non-participation: If a child is **unable or unwilling to participate** in children's court proceedings, the presiding children's commissioner must **record the relevant reasons**. These will be the reasons for the finding by the court that the child is unable to participate OR the reasons given by the child for being unwilling to express a view or preference in the matter.

Considering issues in the absence of the child: As noted above, the children's court may at any point order that all or part of the children's court proceedings must take place in the **absence of the child**, if it is in the **best interests** of the child. The **reasons** for a decision to consider some matters in the absence of the child **must be recorded**.

◇ Child Care and Protection Act, sections 4, 57

12. Special protections for children and vulnerable witnesses

The children's court has several powers which it can exercise to protect children in any children's court matter. It can apply any of the techniques described below to reduce the trauma of a court appearance for children or other vulnerable witnesses, on their own or in combination.

- (1) **Removal of any person:** The children's court can order the removal of any person from the court after noting the reason for the removal on the court record.

This power could be useful in instances where someone is attempting to obstruct the proceedings or to intimidate the child or other parties. It might also be used to remove someone whose mere presence is upsetting a child involved in the matter..

◇ Child Care and Protection Act, section 55(2)(a),
read together with section 47(2)(e)

- (2) **Apply any special arrangements available to vulnerable witnesses in criminal trials:** The children's court can apply any of the special arrangements for vulnerable witnesses from the Criminal Procedure Act 51 of 1977, with appropriate adaptations, to any children's court proceeding.

In 2004, the **Criminal Procedure Act 51 of 1977** was amended to provide special arrangements to make involvement in criminal trials less traumatic for "vulnerable witnesses". "Vulnerable witnesses" were defined to include anyone under age 18, any victim of a sexual offence or an offence involving domestic violence, persons with a mental or physical disability that creates special needs, any witness who may be intimidated by the accused or any other person involved in the trial (such as in a case involving family members or members of a criminal gang), any person who may suffer undue stress while testifying and any other person who needs special arrangements to give full and proper evidence.

The children's court can apply any of these special arrangement to any of its proceedings, (a) at the request of any party (b) at the request of the child concerned in the matter or (c) on the court's own motion. The factors to be considered in respect of any special arrangement are:

- ⑨ the interest of the state in getting complete and accurate evidence
- ⑨ the interests and well-being of the witness concerned
- ⑨ the availability of the necessary equipment and venues
- ⑨ the interests of justice in general.

Venue: The testimony of a vulnerable witness can be heard in an alternative venue which will be less formal and less intimidating than a courtroom.

For example, a child might feel more comfortable testifying in the magistrate's office. A separate provision of the Child Care and Protection Act, discussed above in section 8.3 of this chapter, notes that children's court hearings must be held in an informal

venue that puts children at ease, without compromising the dignity of the court – as far as practical.

The venue for children’s court hearings should not be one that is ordinarily used for criminal trials, and it should be accessible to disabled persons and persons with special needs (where this is relevant).

The caveat about practicality takes into account the fact that the need for electronic recording of the proceedings, the technology or equipment required for vulnerable witnesses, or the number of parties involved may require that some hearings be held in a courtroom. A children’s court without victim-friendly facilities might also arrange to move the proceeding to another court which has such facilities.

Arrangement of venue: Where the hearing takes place in a courtroom, the furniture in the courtroom can be re-arranged or changed, or people can be directed to sit or stand in places different from what is usual.

For example, a young child may be too short to see and be seen properly while sitting in the usual witness box.

Testimony behind a screen or via closed circuit: A witness may be allowed to testify behind a screen or a one-way mirror, by means of closed-circuit television, or with the use of any other device or method that allows for other parties, their legal representatives and the presiding officer to hear and observe the witness.

Screens and closed circuit arrangements can allow a child to give evidence without having to see anyone involved in the matter who might make the child uncomfortable, while the child is still visible to the children’s commissioner and the other parties or their legal representatives. Some Namibian courts – such as some courts in Windhoek, Keetmanshoop, Oshakati and Walvis Bay – have been equipped with victim-friendly facilities. In other courts, creative makeshift arrangements can be employed.

In the 2017 Namibian case of *Haimbodi v S*, which was a criminal appeal, the High Court observed that the trial court had acted correctly when it provided special arrangements for two vulnerable witnesses to ensure that they could testify without fear of the accused. The two witnesses struggled to testify freely in his presence, but were able “to narrate their testimonies with more ease” when special arrangements were made and the appellant was out of sight.

Support person: A support person can accompany witnesses while they are testifying. The court can grant permission to any appropriate person to act as a support person.

For example, a young child could speak to the court while sitting on the lap of a support person who is family member or a teacher (as long as that support person is not going to be giving further testimony in the same case).

The support person can stand or sit near the witness and give physical comfort to the witness as necessary. The support person can also interrupt the proceedings to alert

the presiding officer to the fact that the witness is experiencing undue distress. The presiding officer can then take appropriate steps, such as calling a short recess.

The support person may not help the witness answer questions or instruct the witness on what to say. The presiding officer can instruct the support person not to communicate with the witness, to refrain from doing anything which might interfere with the evidence, or to take such actions as the court considers necessary.

Other steps: The presiding officer may authorise any other steps that it thinks “expedient and desirable” to facilitate the giving of evidence by a vulnerable witness.

For example, the presiding officer might call for frequent recesses to make sure that a young child does not become too over-tired while giving evidence.

◆ Child Care and Protection Act, section 55(2)(b),
read together with Criminal Procedure Act 51 of 1977, section 158A
◆ *Haimbodi v S* (CA 87/2016) [2017] NAHCMD 263 (8 September 2017)

- (3) **Court control of questioning and use of intermediaries:** The children’s court can intervene in the questioning or cross-examination of a child and place reasonable limits on the cross-examination of any witness. Child witnesses under age 13 must be cross-examined *only* through the children’s commissioner or an intermediary.

Intervention in questioning or cross-examination of a child: The children’s commissioner can intervene in the questioning or cross-examination of a child if the court finds that this would be in the child’s best interests.

Legal practitioners who are unaccustomed to questioning children may come across as inappropriately hostile or aggressive. The court may also observe that a child is becoming agitated or upset and needs a break. The children’s commissioner has a duty to monitor the situation to protect the child’s best interests.

Limits on protracted cross-examination: If it appears to the court that the cross-examination of any witness is unreasonably lengthy and thereby causing the proceedings to be unreasonably delayed, the court may request the cross-examiner to explain the relevance of the line of questioning. The court may impose reasonable limits on the length of the cross-examination, or on a particular line of questioning. (The discussion of the relevance of the cross-examination for this purpose may take place in the absence of the witness.)

This power is designed to allow the court to stop unnecessary badgering of a witness, which might be particularly relevant in respect of a child witness.

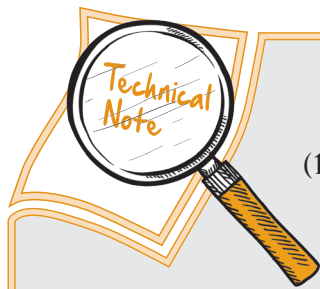
Cross-examination of children under age 13: Cross-examination of any witness UNDER AGE 13 *must* take place through the presiding officer or through an intermediary. An intermediary is a person who has the qualifications gazetted by the Minister of Justice for this purpose. (For example, the Minister might approve social workers or psychologists as intermediaries.) The intermediary must be available right away, to prevent postponements. The presiding officer or the intermediary may restate the questions, simplifying them or

re-phrasing them if necessary – but the essential meaning of the question must not be changed.

The purpose of this provision is to make sure that lawyers do not try to intimidate or confuse a child witness with a hostile tone of voice or complicated questions.

An intermediary who is not in the full time employ of the State is entitled to the same allowance that is provided to witnesses for the State in terms of the Criminal Procedure Act.

◆ Child Care and Protection Act, section 55(2)(c) and (g)
read together with Criminal Procedure Act 51 of 1977, sections 166(3)-(6)



Intermediaries

- (1) Section 166(4)-(5) of the Criminal Procedure Act covers the cross-examination of child witnesses under age 13. Subsection (5), which deals with intermediaries, contains an erroneous cross-reference to “subsection (3)” which was obviously intended to read “subsection (4)”.
- (2) Section 166(5) of the Criminal Procedure Act requires that intermediaries must have the qualifications determined by the Minister of Justice by notice in the *Government Gazette*. As of July 2019, no such qualifications had been gazetted, which appears to prevent the use of intermediaries. This is unfortunate, as the purpose of using an intermediary is to allow a child to convey his or her experience to a person skilled in dealing with children, who knows how to communicate with a child in a manner that is neither intimidating nor upsetting to the child.
- (3) It has been observed in South Africa in the case of *Director of Public Prosecution, Transvaal v Minister of Justice & Constitutional Development & Others* that the use of intermediaries for child witnesses “not only protects child complainants from unnecessary trauma, it helps to ensure that the trial court receives evidence that is more freely presented, more likely to be true and better understood by the court. Given the special vulnerability of the child witness, the fairness of the trial accordingly stands to be enhanced rather than impeded by the use of these procedures. [...] [T]hese special procedures should not be seen as justifiable limitations on the right to a fair trial, but as measures conducive to a trial that is fair to all.”

◆ Criminal Procedure Act 51 of 1977, section 166(4)-(5)
◆ *Director of Public Prosecution, Transvaal v Minister of Justice & Constitutional Development & Others* 2009 (4) SA 222 (CC) at paragraphs 96 and 116 (commenting on the use of intermediaries in South Africa, which follows a different procedure but is aimed at the same purpose)

- (4) **Previous statements of children under age 14:** The children’s court can admit into evidence previous statements by children under age 14, in order to prove any fact alleged in that statement, in two situations: (a) the child who made the statement is unable to testify in person, or (b) the statement seems reliable in light of the circumstances in which it was made.

It must be proved that the child who is giving evidence made the previous statement in question, in order for the statement to be admissible as evidence of any fact alleged in the statement.

The child's previous statement can be provided to the court in the following forms:

- ⑨ a video or audiotape, if the person to whom the statement was made gives evidence about how the statement was taken
- ⑨ a written statement, if the person to whom the statement was made gives evidence about its authenticity
- ⑨ oral evidence of a previous statement made by the child, given by the person to whom the previous statement was made, if it is not possible to give evidence in the form of a video or audiotape or written record.

The purpose of this provision is to prevent the child from having to repeatedly recount the details of a traumatic or upsetting experience.

◆ Child Care and Protection Act, section 55(2)(d),
read together with Criminal Procedure Act 51 of 1977, section 216A

- (5) **Participation without being present in court:** The children's court can allow a party to the proceedings to give an opinion or to participate without being present in court, in the manner determined by the children's commissioner.

Someone who is not available to attend in person might have information which is informative about the child's background or needs. Most children's court proceedings do not involve criminal issues, but are more in the nature of enquiries into what would be in the child's best interests. For example, the children's commissioner might allow factual information from an absent party to be presented by affidavit, or allow an opinion about the matter to be communicated by means of a letter. To prevent any unfairness, a party can always ask for a person with relevant information to be summoned for cross-examination.

◆ Child Care and Protection Act,
section 55(2)(e)

- (6) **Private communication with the child:**
The children's commissioner may consult in private with the child concerned in the matter, at the request of such child or on the court's own initiative.

This might be important if the child is feeling intimidated, or reluctant to speak openly in front of one of the parents or other parties.

◆ Child Care and Protection Act,
section 55(2)(f)



You shouldn't be afraid, we can ask the court to have the hearing somewhere else where you will feel more comfortable, or to rearrange the room to make it look more friendly. You can also have a support person with you in court, to stand or sit next to you and even hold your hand if you like.

13. Children's court orders

13.1 General orders

Orders which can be made by the children's court in respect of specific issues (such as alternative care, adoption and custody or guardianship of children outside marriage) will be discussed in other chapters. However, in addition to such specialised orders, a children's court also has the power to make a number of general orders:

- (1) A children's court can grant **interdicts and auxiliary relief** in respect of any matter covered by the Act.

An **interdict** is an order that requires someone to do something or to refrain from doing something. For example, an order ordering someone to stay away from a child is an interdict. The power to grant interdicts generally lies with the High Court. The Act gives children's courts this power in relation to the issues it covers.

Auxiliary relief is relief that is linked to the main relief that is being asked. For example, if there is a reasonable suspicion that a child has been abused by his father during a contact visit, the court could order that contact between the child and his father be temporarily stopped while a professional assessment of the child is carried out. Then, on the return date (the date to which the case was postponed), the court can consider the report which has been submitted and the father can argue why contact with the child should be resumed.

- (2) A children's court can **extend, withdraw, suspend, vary or monitor** any of its orders.

These powers provide useful flexibility to the court. The court's power to monitor its own orders, to see whether they are being properly carried out and having the desired effect, allows for useful oversight by the court and should enhance child protection. This power allows the court, for example, to set a date on which the relevant persons must report back to the court on the implementation of a previous court order. The monitoring of court orders is discussed in more detail in section 13.3 below.

- (3) A children's court can **impose or vary timelines** with respect to any of its orders.

This allows the court to set and alter set timelines for aspects of its order. For example, the court might order that a parent with a drinking problem must complete a rehabilitation programme within three months. The court also has the power to vary this deadline – for example if the parent in question had to wait for a vacancy in the only available rehabilitation programme, the court might extend the deadline to make it possible for the parent to comply.

- (4) A children's court can make appropriate **orders on costs** in matters before the court.

The possibility of being ordered to pay the costs of the other party's lawyers is intended to discourage frivolous litigation or litigation where there is no reasonable prospect of

success. This possibility may also encourage parties to try and settle matters out of court. Costs are discussed in more detail in section 15 below.

- (5) A children's court can **order the removal of a person from the court**, after noting the reason for the removal on the court record.

As noted above, this power can be used to remove someone who is attempting to obstruct the proceedings or to intimidate the child or other parties, or someone whose mere presence is upsetting to a child involved in the proceedings.

- (6) A children's court can **appoint a curator ad litem** in respect of any particular child

The use of curators is discussed in section 6 of this chapter of the *Guide*.

- (7) A children's court can **order an appropriate professional or expert to carry out a further investigation into the circumstances of a child and compile a written report** for the court.

Reports of this kind are discussed in section 9 of this chapter of the *Guide*.

- ◆ Child Care and Protection Act, section 47(2)(a)-(g)
- ◆ examples based on C Frank, J Gallinetti, D Kassan, J O Leary, B Mbambo, J Sloth-Nielsen and A Skelton, "Draft Training Materials on the Children's Act, Children's Amendment Act and Regulations, Intermediate Phase/Module 2", 22 May 2009, page 46

13.2 Order to issue birth certificate

The children's court can order the Ministry of Home Affairs and Immigration to issue a birth certificate in respect of a particular child, despite any inability on the part of that child or his or her parent, guardian or care-giver to comply with any of the requirements of that Ministry.

The idea here is to avoid duplication of effort. The children's court might have information in a case before it about a child who has been abandoned, or proof of parentage of a particular child. The court can order the issue of a birth certificate containing this information.



Such an order might also be appropriate after the children's court has made a formal determination of the estimated age of a child, as described in section 10 of this chapter of the *Guide*.

This power also helps to protect the child's rights to a name and to acquire a nationality under Article 15(1) of the Namibian Constitution.

- ◆ Child Care and Protection Act, section 47(2)(h)

13.3 Monitoring of court orders

A children's court may monitor compliance with an order made by it in any matter, or the circumstances of a child following an order made by the court.

Monitoring powers of children's court: For the purpose of such monitoring, the court can use the following techniques:

- ⑨ When the court makes an order, it may **direct that any person involved in the matter must appear before the court at any future date to report on progress.**
- ⑨ When the court makes an order, it may **require that reports by a designated social worker be submitted to the court** at a specified time, or from time to time as directed in the court order.
- ⑨ At any time after making an order, the **court can call or recall any person involved in the matter to appear before it.** This can be at the court's own initiative, or in response to a report of non-compliance.

When a person re-appears at the court for the purpose of monitoring, the court may enquire into the issue of compliance or non-compliance, including an exploration of any reasons for non-compliance. The court can confirm, vary or withdraw the original order, or enforce compliance with the original order, if necessary by referring the matter to the Prosecutor-General for a decision on a criminal prosecution.

Reports of non-compliance: Any person may report alleged non-compliance with an order of a children's court, or concerns about the circumstances of a child following a court order, to the clerk of the children's court. The clerk who receives such a report must refer the matter to a children's commissioner for a decision on possible further action.

A person who makes such a report to the clerk is not subject to civil liability (such as a defamation claim), as long as the report was not intentionally false or misleading.

For example, suppose that the court ordered that a child be placed in kinship care with the child's grandmother due to problems at home. The child keeps running back to the parent's home, where he is being exposed to an environment characterised by drugs and drinking. The grandmother or even a neighbour could report to the clerk that the order is not being followed. The children's commissioner might ask the parents, the child and/or the grandmother to come to court to discuss the situation.

◆ Child Care and Protection Act, section 51

13.4 Power to correct obvious errors

The children's court has the power to correct any obvious errors in a decision it has made if no appeal against that decision has been lodged. The court can do this on the application of any person affected by the decision, or on its own initiative.

For example, suppose that the children's court reversed the names of a boy and a girl who were covered by a court order, in a situation where the details given about each child made

it clear what the court intended. The court could correct the error if the court discovered it, or if one of the parents called the court's attention to the mistake.

◇ Regulations relating to Children's Court Proceedings, regulation 8

14. Appeals

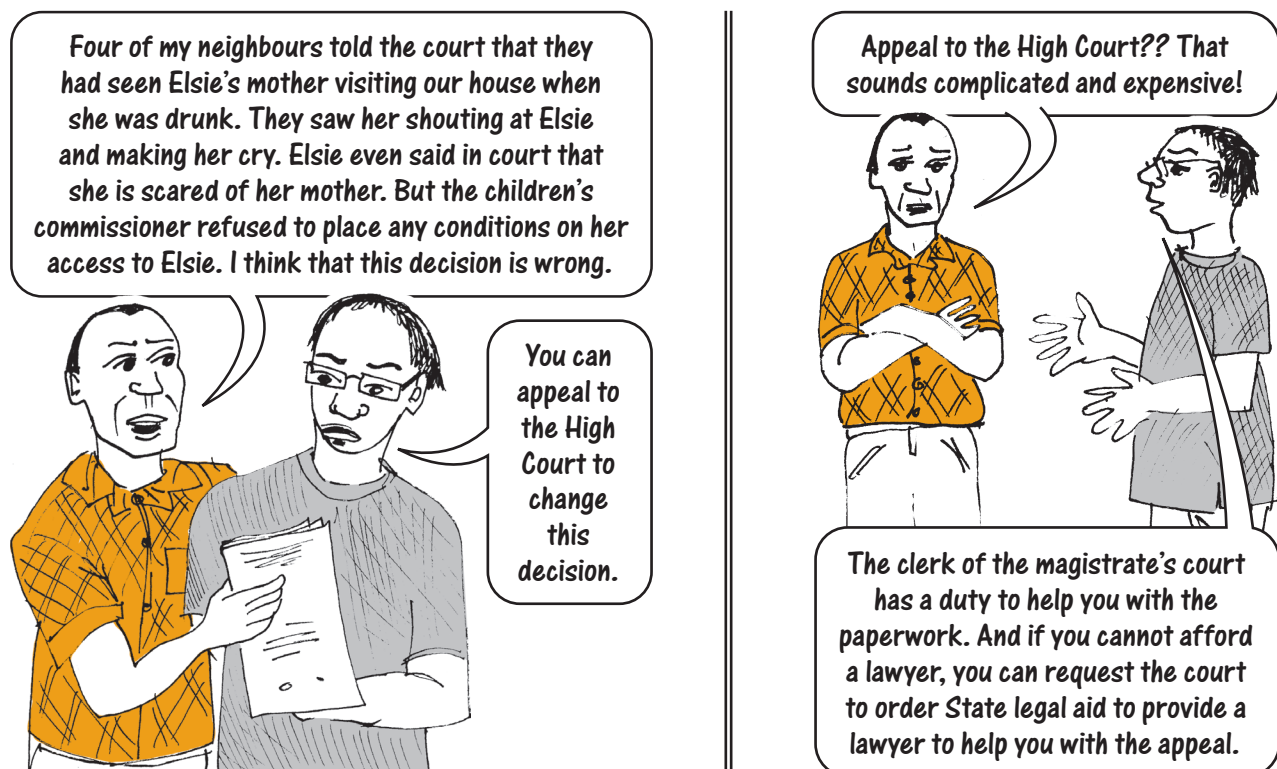
Any party involved in a matter before a children's court may **appeal to the High Court** against the decision of the children's court. This includes a right to appeal –

- ⑨ the court's decision to make an order
- ⑨ the court's refusal to make an order
- ⑨ the court's decision on the variation, suspension or rescission of any order.

The procedure for appeals from the children's court is the same as the procedure for appeals against civil judgments of a magistrate's court.

It is important to remember that the parties to the case always include the child, and may include the Minister, someone the Minister has authorised (such as a social worker) or the Children's Advocate. This broadens the pool of people who may appeal the case outcome.

The clerk of the children's court has a duty, to the best of his or her ability, to assist any person to complete any document relating to a matter before children's court – which would seem to include documents relating to an appeal.



- ◇ Child Care and Protection Act, sections 46, 53, 58(2)-(4) (legal representation)
- ◇ Regulations relating to Children's Court Proceedings, regulation 3(f) (duty of clerk to assist with completion of documents)

15. Costs

Costs of case: The children's court may order that any costs for anything done in terms of the Act must be paid by **one party** or **shared between multiple parties** – BUT the court may not order that the child who is the subject of the proceedings must bear any costs. If the party in question is not able to afford the costs, the court may order that the costs must be **paid by the State**.

Expert costs: The children's court may order that costs must be **paid by the State** where a State-employed social worker considers it to be in the best interests of a child to engage the **services of a psychologist, occupational therapist or other professional person** to do one of the following:

- ⑨ to **implement a children's court order**
- ⑨ to make sure that the children's court has sufficient **evidence** in a case
- ⑨ to **investigate** the circumstances of the child.

The social worker must give the court a **written motivation** for engaging the professional services in question, and the court must be satisfied that the engagement of such services is in the **best interests** of the child.

Budget: Where such costs are borne by the State, they must be paid from the budget of the **Office of the Judiciary**.

- ◆ Child Care and Protection Act, sections 47(2)(d), 63(1)(i)
- ◆ Regulations relating to Children's Court Proceedings, regulation 15

16. Privacy and confidentiality

Closed court: As noted above (in section 8 of this chapter of the *Guide*), children's court proceedings are **closed to the public**. Only people who are directly involved in the case and people who are performing official duties for the court may attend, or people who have permission from the children's commissioner to be present.

This means that the media would not normally be able to attend a children's court proceeding unless they have permission from the children's commissioner to be present.

Privacy of child's identity: No one may publish or disclose in any manner any information relating to the proceedings of a children's court that may reveal the name or identity of a child who was a party OR a witness in the proceedings. This includes any image, picture or similar material. The only **exception** is where the children's commissioner has given permission for the publication or disclosure in question, in the interests of justice. Violating this rule is a **crime** punishable by a fine of up to N\$100 000 or imprisonment for up to five years or both.

Confidentiality of children's court records: Records of the proceedings of a children's court are **confidential** and may be disclosed only in certain circumstances:

- (1) for the purpose of performing **official duties** in terms of the Act
- (2) in terms of a **court order**, if the court finds that disclosure is compatible with the best interests of the child

- (3) for the purpose of **review or appeal**
- (4) for the purpose of **investigation by the Children's Advocate**
- (5) for the purposes of **research** carried out on behalf of or authorised by the Minister, the Children's Advocate or the National Advisory Council on Children.

◆ Child Care and Protection Act, sections 55(1), 61, 62

