

ADOPTION IN SOUTH AFRICA

For some couples, having a baby is as easy as putting on some cool jazz, opening a bottle of bubbly, and ... well, you know how that story ends. Unfortunately Mother Nature isn't equally generous when she hands out the fruits of fertility, and many of the couples who can't have their own children try to adopt them instead. Adoption is also a route that many gay couples opt for.

But the route to adoption is often a long and frustrating one to follow. In many cases there's more red tape involved than if you were exporting a white rhino out of Africa. But adopting a child can be one of the most amazing and rewarding journey's of one's life.

Adoption and the law

The adoption process is regulated in South Africa by the Child Care Act. Adoption is the legal process whereby the existing parental authority a mother and/or father has over a child is terminated and awarded to the new adoptive parent/s. After the adoption process is complete, the adopted child is, for all legal purposes, the child of the adoptive parent.

Only the children's court in the district where the child lives has the power to grant an adoption order. It's important to understand that an informal agreement by a child's parents to place him or her in the custody of another person is not the same as an adoption.

Who can adopt?

The Child Care Act allows a child to be adopted by:

1. a husband and wife jointly
2. two members of a permanent same-sex life partnership jointly
3. a widower or widow or an unmarried or divorced person
4. the spouse of a person who has children from a previous relationship.

‘Marriage’ does not only mean marriages formalised according to South African civil law, but also includes customary marriage and marriage concluded in accordance with certain religious laws (for example Muslim marriages).

Since 2002 it has been possible for same-sex couples to jointly adopt children.

When a child is adopted by a parent’s spouse or same-sex life partner, it follows that the ‘original’ parent and the ‘new’ parent are then both the child’s legal parents.

The court’s considerations

Going through the adoption process can be very scary. You have visions of social workers interviewing your high school teachers to find out if you secretly smoked behind the school gym and if you were sociable enough. But the truth is that it doesn’t matter if you were a shining star or the class clown. At the end of the day, it’s all about the best interests of the child. This is the most important factor in granting an adoption order, so lay your fears to rest, and have a look at the following requirements:

1. The court must consider the religious and cultural background of the child and of his or her parents, and compare it with that of the person or couple who want to adopt the child. However, differences in religious or cultural background do not exclude the possibility of adoption. An exact correlation is not one of the requirements for adopting a child. The older the child, the more weight these factors carry, as the child is more likely to have identified with a particular religion or culture. Since the Child Care Act was amended in 1991, the race of the child and of the adoptive parents is no longer a factor to be considered.
2. The court must consider the recommendations set out in the social worker’s report. The social worker must be objective (so, no – they don’t accept bribes) and give a motivated recommendation in his or her report. The report has to include the following: 1. details of the religious and cultural background of the child, his or her parents, and the adoptive parents 2. an account of the suitability of the adoptive parents
3. details of the citizenship of the adoptive parents
4. details regarding consent by the child, the biological parents and/or foster parents (where relevant).
5. Information about any counseling that may have been given

6. A statement of all money paid by the person wanting to adopt, such as attorney fees and all other costs incurred with a view to the proposed adoption; this includes the cost of caring for the child, such as medical expenses, housing, food, clothing, travel expenses, and other costs.

Unless the adoptive parents consent to it, their identity and address may not be revealed in the social worker's report.

3. The court must be satisfied that the person who wants to adopt is qualified to do so in terms of the Act. The person must also have a good reputation, and be capable of looking after a child properly, seeing to his or her education, and giving financial support.

4. The court must be satisfied that the biological parents have given the necessary consent (where relevant).

5. The court must also be satisfied that, in the case of a child aged ten or over, the child has consented to the adoption.

6. Where applicable, the child's foster parent must have provided a statement confirming that he or she does not wish to adopt the child. (This can be done away with if the foster parent refuses to give the statement within one month after being called to do so.)

Who must consent to an adoption?

If a child is ten or older, his or her consent to adoption is required. It is the duty of the court to make sure that the child understands the nature and impact of giving consent. The child can withdraw the consent in writing at any time before the adoption order is granted.

Where a child is born from a marriage, both the biological mother and father must give their written consent before the child can be adopted by someone else.

If a child is born out of wedlock (meaning that the child's parents were not married to each other at the time of his or her conception or birth, or at any time thereafter), the mother needs to give her consent to the adoption. (Even if the mother is under the age of 21, she doesn't need to be assisted by one of her parents.) The exception to this is when the biological father has acknowledged in writing that he is the

father of the child, and has made his identity and whereabouts known. In such cases, the father's consent is also needed.

Where a second parent's consent is needed but he or she is not available to give it (or simply has not consented), or there are grounds for doing away with his or her consent, a legal notice will be served on him or her, provided that this parent's whereabouts are known. The notice informs the parent that consent has been given by the other parent, and that he or she now has the opportunity to give or withhold consent. The notice also tells the parent that he or she can give reasons as to why his or her consent should not be done away with.

In all the cases, it is not necessary to serve a notice if the parent's whereabouts are not known.

After giving written consent, a parent does have time to reconsider the decision: he or she can withdraw that consent within 60 days of giving it. No court order may be made during that period.

WHEN IS CONSENT NOT NEEDED?

There are several instances when the law can do away with the need for biological parents to consent to their child's adoption. This drastic measure can be taken when one of the following has happened:

1. The parent has failed to acknowledge that he is the child's natural father, or has failed to carry out his duties as a parent (for instance, has not paid maintenance).
2. The child was conceived in an incestuous relationship between the father and mother.
3. The father has been convicted of rape or assault of the mother, or has been found after a court enquiry to have probably raped or assaulted the mother.
4. The parent/s failed to respond within 14 days to a legal notice of adoption.
5. The parent/s abused the child physically, emotionally, or sexually.
6. The parent/s have caused or contributed to the abduction or sexual exploitations of the child.
7. The parent/s have deserted the child, or it is not known where they are.

8. A parent is certified as mentally ill.

9. Consent is being withheld unreasonably.

How does the adoption procedure work?

So now you have a child who you want to adopt ... what's next?

As we've said, only the children's court in the district where the child lives (where his or her address is) has the power to grant an adoption order. Every magistrate's court is also the children's court for its area.

If you want to adopt a child you must complete the relevant application form, which you can get from the clerk of the children's court. Your application must be accompanied by a certified copy of the child's birth certificate or identity document (ID), a copy of your ID, and a copy of the social worker's report stating that you are a suitable candidate. If there's a foster parent involved, a statement confirming that he or she does not wish to adopt the child is also required.

A widow, widower, or unmarried or divorced person who wants to adopt a child must apply in writing to the Minister of Welfare and Population Development for consent. The Minister's decision will be communicated to the court.

One cannot start the formal procedure of adopting a baby and becoming that baby's legal parent if the baby has not yet been born and identified, and you have not yet received the birth certificate to submit along with your application to adopt. The whole process of finding a suitable baby to adopt (before going to court to formally adopt the child) is an entirely separate issue, one that's not relevant to the discussion regarding the law when adopting a child. The agency through which you adopt your child will help you with this, and tell you exactly how their process works and when they will consider you.

THE TWO WAYS OF GRANTING AN ADOPTION ORDER Proceedings without a hearing

If the court is satisfied that all the requirements as set out above have been met, and no one has opposed the application, the adoption order is granted without a court hearing. The court's decision is based on the written application and the social worker's report. This is by far the most common procedure.

Proceedings with a hearing

A hearing is compulsory when someone opposes the adoption, or when the court cannot decide solely on the strength of the social worker's report. In such a case, the court will set a date for the hearing, and a notice will be served on each prospective adoptive parent, with an instruction to attend. A person who wishes to adopt has the same rights as a person in a civil case, and can examine witnesses, give evidence, and address the court. The natural parents are not entitled to attend the hearing unless the Commissioner has given special permission (which would be based on the best interests of the child).

AFTER THE HEARING

Once an adoption order has been issued (i.e. the court has agreed to the adoption in writing), it will be forwarded to the Registrar of Adoptions for registration. Records of the adoption proceedings must be kept by the clerk of the court as well as by the Registrar. The child will get the surname of the adoptive parents, and a new birth certificate can be issued. It is, however, possible for the child to keep his or her original surname. An appeal against the granting of the adoption order, or against a refusal to grant it can be brought to the High Court by a child's natural parent or parents, or by the parents wanting to adopt. If an adoption order is not granted, the child must be returned to the care of his or her parent or guardian, provided that this is in the child's interests.

Rescission (cancellation) of the adoption order

Biological parents or guardians of the child may apply for an adoption order to be revoked or cancelled, on the grounds that their consent to the adoption was not obtained as required by law. In such cases, the application must be made within six months of a parent or guardian becoming aware of the adoption order, but it must be no later than two years from the date of the order. An application to cancel can also be made on the grounds that the adoption is harmful to the child. In this case, the application can be made within two years of the date when the adoption order was given.

An adoptive parent may apply to have the adoption order cancelled on the grounds that the adoption was brought about by fraud or misrepresentation, or that the child is mentally ill and was mentally ill at the time of the order, or that the child suffered from a serious congenital disorder or injury at the time when the adoption order was made. (The adoptive parents must have been ignorant of this at the time of adoption). The application must be made within six months of the date when the applicant became aware of the grounds for cancellation.

All the people who are affected or involved must be informed about the application for the cancellation, and the court must see to it that the legal requirements (mentioned above) have been met. Anyone who is relevant to the case may be heard in court. After considering all the evidence, the court decides whether or not to cancel the adoption order. If the adoption is cancelled, the child will revert to the position in which he or she would have been if no order of adoption had been made in the first case.

Disclosure of information

The records of adoption proceedings can be viewed at the office of the Registrar of Adoptions. This can be done by an adoptive parent from the date on which the adopted child reaches the age of 18, and by the adopted child from the date on which he or she turns 21. The records can also be seen by a biological parent or a previous adoptive parent, provided there is written consent from the adoptive parent and the adopted child; this is allowed from the date on which the child reaches the age of 21. The Registrar may, for good reasons, refuse a person access to the adoption records. If a request to view the records is refused, an appeal can be made to the Minister for Welfare and Population Development.

Infertility is on the increase. The inability of potential parents to conceive a child of their own often leaves couples disheartened and discouraged, especially when artificial fertilization is not a viable option for them. As in last issue's segment, we explore another option available to prospective parents who are not able to conceive or choose not to, and that is adoption.

Apart from the reasons why parents would choose to adopt a child, the real objective of adoption is the benefit to the child. The purposes of adoption, as provided for in national legislation, are to protect and nurture children by providing a safe, healthy environment with positive support, and to promote the goals of permanency planning by connecting children to safe and nurturing family relationships.

South Africa has compiled comprehensive legislation regarding the care and protection of children, including the Child Care Act 74 of 1983, the Children's Act 38 of 2005 and the Constitution of the Republic of South Africa, Act 108 of 1996. South Africa also subscribes to the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. These affirm that every child has the right to a family, parental care and appropriate alternative care.

The Department of Social Development recognizes adoption as the traditional method of care in the field of child welfare and adoption has for many years been regarded as the most effective means of providing a permanent and stable family life for vulnerable children, children in distress and orphans. Its goal is to

place as many children as possible in homes and with families to implement these ideals. Sadly, the number of adoptions in our country is very low in comparison to the number of children in need of care and permanent homes. Currently the number of children in the country who have become orphaned and vulnerable is estimated to be 1.5 million.

According to the adoption register held by the Director-General, which is a record of all registered adoptions as well as information pertaining to the details of the parties and is created by virtue of legislation and only 1 913 adoptions were registered during the period 2007-2008. It is clear that orphaned or abandoned children are not being placed with appropriate care and families. Many children are placed in foster care, a temporary arrangement where the responsibility of the child remains with the state.

Adoption is a permanent solution for children in need of care. Adopted children usually remain in the family long after reaching the age of majority. Adoption provides stability, long-term family relationships and gives a child a sense of belonging.

Adoptive parents assume full parental responsibilities and rights towards the child as the adoption court order terminates any relationship and contact the child had with its biological parent, any family member, guardian or primary caregiver. Inherently, this is a final severance of all ties the child has with the natural parents. However, each adoption relationship is different and it will be up to the adoptive parents and the natural parents whether or not a relationship between them can or will ensue.

Often, an agreement can be reached between the parties to allow contact between the biological parent and the child as well as to share birth information about the child. An agreement along these lines is referred to as a "post-adoption" agreement. Parties wishing to enter into such an agreement should consult the adoption social worker facilitating the adoption to prepare the agreement and to ensure it conforms to the format prescribed by the Children's Act. The agreement, to be enforceable, should then be made an order of court.

In terms of the Children's Act, any child may be adopted if the child is eligible for adoption and the provisions of Children's Act have been complied with. Children are eligible for adoption if:

- the child is an orphan and has no guardian or caregiver, who is willing to adopt the child;
- the whereabouts of the child's parent or guardian cannot be established;
- the child has been abandoned;
- the child's parent or guardian has abused or deliberately neglected the child, or has allowed the child to

be abused or deliberately neglected and efforts to provide rehabilitative services to the parent or guardian have not succeeded;

- the child is in need of a permanent alternative placement.

A prospective adoptive parent must be of majority age, and is required to be assessed by an adoption social worker to establish whether or not the individual is suitable to be entrusted with such parental rights and responsibilities. In the assessment, an adoption social worker may take the cultural and community diversity of the adoptable child and prospective adoptive parent into consideration.

Incidentally, a person's financial status may not preclude them from adopting a child; however, it is important that prospective adoptive parents are able to provide for the adopted child. In this regard, the Department of Social Services offers a child support grant to families who require it.

The Children's Act provides a list of persons eligible to adopt a child. This list includes:

- Single persons
- Partners in domestic life partnerships
- The biological father of a child born out of wedlock
- Foster parents
- Stepparents of a child.

It is, however, important to emphasize that any decision will be based on the best interests of the child and the circumstances of the prospective parent. Individuals considering adoption may do so not only because of an inability to conceive a child, but often because of a desire to enrich a child's life by providing a home and family that a child would not have had. Adoption services are only rendered by child protection organizations and social workers in private practice. Some organizations also receive subsidies from the Department of Social Development. Individuals can approach any children's court for assistance with an adoption. Every area will have a magistrate's court which will have its own "children's court" and therefore these courts are easily accessible.

Disclaimer: While every effort has been made to ensure the accuracy of this publication, it is not intended to provide legal advice as individual situations will differ and should be discussed with an expert and/or lawyer. For specific technical or legal advice on the information provided and related topics, please contact the author.

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