

# ADOPTION

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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**doption is a useful way of affording children the benefits of family life which might not otherwise be available to them. The Child Care and Protection Act takes a child-centred approach to adoption with the best interests of the child as a guiding standard. It makes provision for inter-country adoption where there is no suitable long-term care option for a child inside Namibia. It should be noted that only a small number of Namibian children are adopted each year, while many children are in kinship care or foster care.

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## 1. New concepts

The Child Care and Protection Act contains some concepts and principles which were not part of the previous Namibian law on child protection. These are some of the most important new concepts relating to adoption.

“ It cannot be seriously disputed that ‘a family’ is the best vehicle for the upbringing of children. So much the better if the ‘family’ is made up of the biological parent(s) of the child. The next best thing to a biological family, in my view, is an adoptive family. It is the duty of society, therefore, to make possible, and not hinder or frustrate, a family for every child given up for adoption. ”

◆ *Detmold & Another v Minister of Health and Social Services & Others* 2004 NR 174 (HC), pages 181-182

**Best interests of the child:** The Child Care and Protection Act introduces the concept of the best interests of the child as the governing principle in adoptions.

**Adoption plans:** The Child Care and Protection Act introduces the concept of adoption plans whereby the birth parents and adoptive parents in a disclosed adoption (where the identities of birth and adoptive parents are known to each other) enter into an agreement covering issues such as the sharing of information and contact with the birth family. Adoption plans are optional. They are binding only if they are made into a court order at the time of the adoption.

**Inter-country adoptions:** The High Court of Namibia ruled in 2004 that it is unconstitutional to have a blanket rule preventing non-Namibians from adopting children born in Namibia, because such adoptions may sometimes provide the best family environment for a child. Since that ruling, Namibia has become a party to the **Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption**. The Child Care and Protection Act is designed to give practical effect to the Hague Convention in Namibia. It sets out the process and requirements that must be met in order for a child who is habitually resident in Namibia to be adopted by a person who is habitually resident outside Namibia. Inter-country adoption will only be considered where there are no suitable long-term care options for the child within Namibia. Namibia will make agreements with selected countries for purposes of inter-country adoption, and inter-country adoption will be arranged only with adoptive parents from those countries.

“**Habitual residence**” is not defined in the Hague Convention or in the Child Care and Protection Act. This is intentional, to preserve flexibility. Habitual residence has been described as an abode in a particular place or country which has been adopted voluntarily and for settled purposes as part of the regular order of a person’s life for the time being, whether of short or of long duration. It is not dependent on citizenship or permanent residence. “Habitual” implies a stable link with a place, which may be achieved through length of stay, or through evidence of a particularly close tie between the person and the place. The child’s view may be relevant to the determination of the child’s country of habitual residence.

◆ See *WS v LS* 2000 (4) SA 104 (C);  
*Senior Family Advocate, Cape Town & Another v Houtman* 2004 (6) SA 274 (C);  
*Central Authority (SA) v A* 2007 (5) SA 501 (W);  
*Central Authority v MR (LS Intervening)* 2011 (2) SA 428 (GNP);  
*Central Authority v TK* 2015 (5) SA 408 (GJ)

◆ See also *MW v Minister of Home Affairs* 2016 (3) NR 707 (SC) (“ordinarily resident”)

**Principle of subsidiarity:** The principle of subsidiarity means that inter-country adoption can take place only after possibilities for placement of a child in the child’s home country have been given due consideration. This does not always mean that an adoptive family for the child must be found in the home country. For example, a child with a severe disability might need specialised care that can only be provided by a children’s home with suitable facilities, meaning that long-term institutional care might be more appropriate for that child than adoption. In some cases, long-term kinship care in a child’s home country might be better for the child than adoption by a family in another country. The long-term care option which is in a child’s best interests must be considered on a case-by-case basis.

## Formal adoption versus informal adoption and adoption in terms of customary law

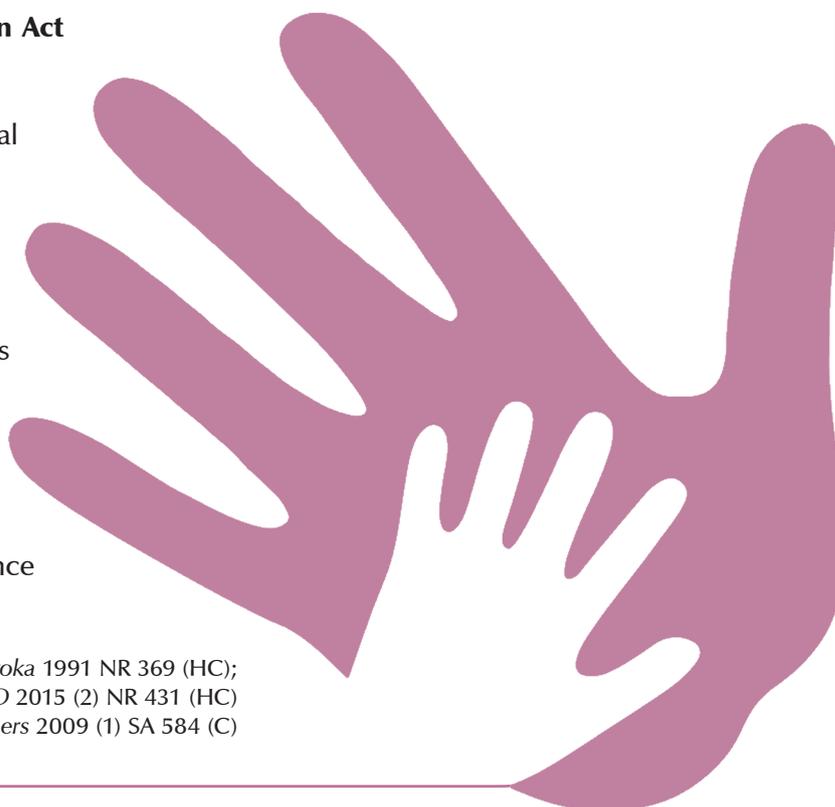
**The Child Care and Protection Act covers only formal adoptions.**

- ⦿ It does *not* apply to informal “adoptions” where a child is treated as a child of the family without a formal adoption process.
- ⦿ It does *not* apply to adoptions under customary law.

Only formal adoptions concluded under the Act will be recognised for purposes such as liability for maintenance and intestate succession.

◆ *S v Koyoka* 1991 NR 369 (HC);  
*Tjingaete v Lakay NO* 2015 (2) NR 431 (HC)

◆ See also *Flynn v Farr NO and Others* 2009 (1) SA 584 (C)



## 2. Constitutional and international framework

Article 14 of the **Namibian Constitution** affords special protection to the family, and adoption is a valuable way of affording children the benefits of family life which might not otherwise be available to them.

Both the **Convention on the Rights of the Child** and the **African Charter on the Rights and Welfare of the Child** emphasise the importance of ensuring that adoptions take place in accordance with applicable laws and procedures, on the basis of thorough and reliable information. They both stress the importance of ensuring that adoptions involve only children who are in need of being adopted, subject to the consent of all relevant persons. Both also note the importance of being particularly careful that inter-country adoptions are considered only if no suitable local options are available, and with careful safeguards to prevent abuses.

The **Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption** is designed to ensure that inter-country adoptions take place in the best interests of the child. It recognises that inter-country adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her country of origin, but it requires that possibilities for the placement of the child within the country of origin be considered first. The Convention establishes a system of co-operation between authorities in countries of origin and receiving countries, and provides safeguards against abuses such as abduction, exploitation, sale or trafficking of children. The Convention also guarantees recognition in all contracting states of adoptions made in accordance with the Convention.

### Namibian Constitution

#### Article 14(1)

The **family** is the natural and fundamental group unit of society and is entitled to protection by society and state.

### UN Convention on the Rights of the Child

#### Article 21

States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

- (a) Ensure that the adoption of a child is authorized only by **competent authorities** who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the **adoption is permissible** in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their **informed consent** to the adoption on the basis of such counselling as may be necessary;
- (b) Recognize that **inter-country adoption** may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;

- (c) Ensure that the child concerned by inter-country adoption enjoys **safeguards and standards** equivalent to those existing in the case of national adoption;
- (d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in **improper financial gain** for those involved in it;
- (e) Promote, where appropriate, the objectives of the present article by concluding **bilateral or multilateral arrangements or agreements**, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.

## African Charter on the Rights and Welfare of the Child

### Article 24: Adoption

States Parties which recognize the system of adoption shall ensure that the best interest of the child shall be the paramount consideration and they shall:

- (a) establish **competent authorities** to determine matters of adoption and ensure that the adoption is carried out in conformity with applicable laws and procedures and on the basis of all relevant and reliable information, that the **adoption is permissible** in view of the child's status concerning parents, relatives and guardians and that, if necessary, the appropriate persons concerned have given their **informed consent** to the adoption on the basis of appropriate counselling;
- (b) recognize that **inter-country adoption** in those States who have ratified or adhered to the International Convention on the Rights of the Child or this Charter, may, as the **last resort**, be considered as an alternative means of a child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;
- (c) ensure that the child affected by inter-country adoption enjoys **safeguards and standards** equivalent to those existing in the case of national adoption;
- (d) take all appropriate measures to ensure that in inter-country adoption, the placement does not result in **trafficking or improper financial gain** for those who try to adopt a child;
- (e) promote, where appropriate, the objectives of this Article by concluding **bilateral or multilateral arrangements or agreements**, and endeavour, within this framework to ensure that the placement of the child in another country is carried out by competent authorities or organs;
- (f) establish a machinery to **monitor the well-being of the adopted child**.

## Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption

### Article 4

An adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin –

- a) have established that the child is **adoptable**;
- b) have determined, after possibilities for placement of the child within the State of origin have been given due consideration, that an **intercountry adoption** is in the child's best interests;
- c) have ensured that –
  - (1) the persons, institutions and authorities whose **consent** is necessary for adoption, have been **counselled** as may be necessary and duly informed of the effects of their consent, in particular whether or not an adoption will result in the termination of the legal relationship between the child and his or her family of origin,
  - (2) such persons, institutions and authorities have **given their consent freely**, in the required legal form, and expressed or evidenced in writing,

- (3) the consents have not been induced by **payment or compensation** of any kind and have not been withdrawn, and
- (4) the **consent of the mother**, where required, has been given only **after the birth** of the child; and
- d) have ensured, having regard to the age and degree of maturity of **the child**, that –
  - (1) he or she has been **counselled** and duly informed of the effects of the adoption and of his or her consent to the adoption, where such consent is required,
  - (2) consideration has been given to the **child's wishes and opinions**,
  - (3) the **child's consent** to the adoption, where such consent is required, has been given freely, in the required legal form, and expressed or evidenced in writing, and
  - (4) such consent has not been induced by **payment or compensation** of any kind.

## 3. Domestic adoptions

### 3.1 When is a child eligible to be adopted?

Children in the following circumstances are eligible for adoption:

- ⊗ the child has **no parent AND** there is **no suitable guardian or care-giver** who is willing to care for the child
- ⊗ the **whereabouts of the child's parent or guardian cannot be established AND** there is **no suitable guardian or care-giver** who is willing to care for the child
  - There is some overlap between this aspect of adoptability and the definition of an “abandoned child”.
- ⊗ the child has been **abandoned**, which means –
  - the child has **obviously been deserted** by the parent, guardian or care-giver
  - the child has, for no apparent reason, **had no contact with the parent, guardian or care-giver for at least three months**
  - the child has been **left at a safe haven** and has not been claimed during the relevant waiting period
  - the **whereabouts of the parents are unknown** or the parents **cannot be traced**

Before an abandoned child can be adopted, the social worker must publish an advertisement in at least one national newspaper circulating in the area where the child was found and one radio station broadcasting in that area, to see if anyone claims responsibility for the child. If the child was left at a safe haven, there is 60-day period during which the child may be reclaimed. In other cases of apparent abandonment, there is a 30-day waiting period. The relevant facts must be supported by affidavit.
- ⊗ the child is to be adopted by a **step-parent**
- ⊗ the child is **in need of a permanent alternative placement**
  - Note that this does NOT apply if the child is in permanent foster care or stable kinship care. This caveat has been included in the law because some cultural groups in Namibia do not favour formal adoption.
- ⊗ the child's **parent or guardian has decided to give the child up for adoption.**

Eligibility for adoption must be assessed by a designated social worker. The Adoption Registrar must record the names of children who are eligible for adoption in the **Register of Adoptable Children and Prospective Adoptive Parents (RACAP)**.

If a child is assessed as being adoptable, the designated social worker must record the relevant information about the child on **Form 19B**, which is appended to the Child Care and Protection Regulations, and submit the form to the Minister so that the child's particulars can be entered into RACAP by the Adoption Registrar.

**A child is eligible to be adopted ONLY IF the child is listed in the Register of Adoptable Children and Prospective Adoptive Parents (RACAP).**

If a child listed in RACAP is adopted, the name and other identifying information of the child will remain in RACAP, and an entry must be added regarding the adoption.

- ◇ Child Care and Protection Act, sections 1 (definition of “abandoned”), 169, 171(3), 183(1), 227
- ◇ Child Care and Protection Regulations, regulations 61, 62(1)-(2), 70

**Birth certificates required for all adoptable children**

Note that the Ministry official designated as the Adoption Registrar is responsible for making sure that all children who are listed in RACAP as being eligible for adoption are registered with the Ministry responsible for home affairs and issued with birth certificates. It is possible to obtain a birth certificate even in the case of an abandoned child where there is no information about the identity of the parents. Birth registration of all children prior to adoption will help to prevent child trafficking and other improper practices.

- ◇ Child Care and Protection Act, section 183(3)(a)
- ◇ Child Care and Protection Regulations, regulation 70(1)(e)

*My mother remarried after my father died. My step-father is applying to adopt me so he and my mother will both be my legal parents.*



*I have been in foster care since I was very young because my parents died in a car accident and there were no extended family members who were able to care for me. I stayed with several different foster parents at first. Now my current foster parents want to adopt me so that I will have a stable and permanent home.*



*I was told that my mother decided to give me up for adoption when I was born. My adoptive mother told me that my birth mother was very young. She did not feel that she was ready to be a parent, so she thought that adoption would be best for me.*



# DOMESTIC ADOPTION PROCESS

## Step 1: The applicant is generally a suitable person to adopt a child.

### 1 APPLICATION FOR ASSESSMENT:

Applicant makes written application requesting assessment for suitability as a prospective adoptive parent

### 2 ASSESSMENT AND DECISION:

Social worker assesses applicant through home study and other investigation, and makes decision on application

### 3 LISTING IN RACAP: Prospective adoptive parent listed in RACAP

## Step 2: Adoption of a specific child by a specific adoptive parent is in the child's best interests.

### 4 APPLICATION TO ADOPT:

Prospective adoptive parent applies to adopt a child, after being matched with a specific child by a social worker

### 5 NOTICE:

Children's court sends notice to persons required to consent

### 6 CONSENT:

Persons whose consent is required give consent (unless court dispenses with consent or overrules unreasonable lack of consent)

**OPTIONAL 7 Adoption plans (optional)**  
The birth parent and the adoptive parent may decide to make an adoption plan governing things like contact and information-sharing.  
(This option is available only in respect of "disclosed" adoptions.)

### 8 ADOPTION ORDER:

If adoption is in child's best interests, court makes an adoption order (may be preceded by a provisional adoption order until the end of the cooling-off period for withdrawal of consent)

## Step 3: Record-keeping after the adoption order is issued.

### 9 ADOPTION REGISTER:

Adoption Registrar records basic information about the adoption in the Adoption Register. (The child has a right to access the information in the Adoption Register after reaching the age of majority.)

### 10 BIRTH RECORD:

Adoption order is copied to Ministry of Home Affairs and Immigration so that birth register can be altered to list the adoptive parent as the child's parent.

## 3.2 Who can adopt a child?

A foster parent, kinship care-giver or primary caretaker of a child who is eligible for adoption may adopt that child if he or she meets all the requirements for an adoptive parent.

**Marital status:** The following people can adopt a child –

- ⊙ spouses in a marriage acting jointly
- ⊙ a step-parent (a person married to one of the child’s parents)
- ⊙ a widow, widower, divorced or single person.

**Age:** An adoptive parent must normally be at least 25 years old. Where the adoptive parents are a married couple, at least one of them must be 25 years old or older. Younger persons can adopt if they can show a good reason to make an exception to the usual rule. There is no maximum age for adopting.

**Habitual residence in Namibia:** The adoptive parent or parents must be habitually resident in Namibia to apply for a domestic adoption. If the prospective adoptive parent is not a Namibian citizen, he or she may only adopt if his or her country of citizenship would recognise the adoption and allow the child to enter and remain permanently in that country.

**Fitness:** The adoptive parent must be assessed by a social worker designated to facilitate adoptions. The adoptive parent must be –

- ⊙ fit to undertake parental responsibilities and rights
- ⊙ willing and able to undertake parental responsibilities and rights
- ⊙ living in circumstances that are suitable for the adoption of a child.

A person may not be disqualified from adopting a child on the basis of financial status, but a prospective adoptive parent must be able to provide for the adoptive child’s basic needs.

Past convictions for certain crimes will disqualify a person from adopting. The adoptive parent must provide a police clearance certificate to show that he or she has not been convicted of any of these crimes.

A person who is *not* habitually resident in Namibia, regardless of citizenship, must follow the procedures for **inter-country adoption** discussed in section 4 of this chapter of the *Guide*.

### Relevant crimes

- ▷ murder
- ▷ rape
- ▷ indecent assault
- ▷ incest
- ▷ kidnapping
- ▷ any statutory sexual offence
- ▷ any offence relating to the manufacture, distribution or possession of pornography
- ▷ any offence relating to human trafficking
- ▷ abduction, excluding the wrongful removal or retention of a child by a parent with parental responsibilities
- ▷ assault with intent to cause grievous bodily harm

◇ Child Care and Protection Act, section 238(8)

**A person is eligible to adopt a child ONLY IF the person has been approved as a prospective adoptive parent and listed in the Register of Adoptable Children and Prospective Adoptive Parents (RACAP).**

- ◆ Child Care and Protection Act, sections 170, 171(1)-(3)
- ◆ Child Care and Protection Regulations, regulation 82

## Frequently-asked questions

### **Can spouses in a customary marriage adopt a child jointly?**

**Yes.** Spouses in a “marriage” can adopt jointly, and marriage is defined to include “a marriage in terms of any law of Namibia”, including a marriage recognised in terms of any tradition, custom or religion of Namibia. This covers both civil and customary marriages.

### **Can same-sex partners adopt a child jointly?**

**No.** Only “spouses in a marriage” can adopt a child jointly. If same-sex partners were legally married in another country, it depends on whether the marriage “is recognised as a marriage under the laws of Namibia” – an issue which was set to be considered by the Namibian courts as of 2019. One same-sex partner could adopt a child as a single parent, but this would of course leave the other partner vulnerable in respect of the child if the relationship should break down. However, that partner might be able to use the provisions on custody and access in some circumstances

### **Can opposite-sex couples who are cohabiting without being married adopt a child jointly?**

**No.** Joint adoption is possible only for married spouses. But one cohabiting partner might be able to adopt a child as a single parent. As in the case of same-sex partners, this would leave the other partner vulnerable in respect of the child.

### **Is domestic adoption limited to Namibian citizens?**

**No.** A domestic adoption can take place in respect of any the adoptive parent who is habitually resident in Namibia. Anyone who is NOT habitually resident in Namibia – including even a Namibian citizen – is not eligible for a domestic adoption in Namibia.

- ◆ Child Care and Protection Act, sections 1 (definition of “marriage”), 170(1)(a) and (g)

## Step-parent adoption

The Act provides for adoption by a step-parent (adoption by “the spouse of a parent of the child”). There is no provision for joint adoption by the step-parent together with this biological parent, because the biological parent has no need to adopt.

The Act provides that the effect of an adoption order is to terminate all parental responsibilities and rights any person had in respect of the child immediately before the adoption, “except when provided otherwise in the adoption order”.

In the case of a step-parent adoption, the court would probably specify that the rights of the biological parent who is the step-parent’s spouse are *not* terminated by the adoption order. Then the biological parent and the step-parent who are married would share parental rights and responsibilities over the child.

What about the parental rights and responsibilities of the child’s other birth parent (the non-custodian parent)? It might be in the child’s best interests to terminate that parent’s parental rights and responsibilities. In other circumstances, it might be in the child’s best interests *not* to terminate the parental rights and responsibilities of *either* birth parent – so that parental rights and responsibilities are shared between the two birth parents and the step-parent. One South African case has suggested that this approach would probably be in the child’s best interests in most circumstances.

◆ Child Care and Protection Act, sections 170(1)(b) and 178(1)  
◆ *Centre for Child Law v Minister of Social Development* 2014 (1) SA 468 (GNP)

### 3.3 Adoption process

Step  
1

**The applicant is generally a suitable person to adopt a child.**

*The first step in adopting a child is to apply for assessment as a prospective adoptive parent. The initial assessment does not relate to the adoption of a specific child, but to the general suitability of the applicant. An applicant who has been found suitable to adopt will be listed as a prospective adoptive parent in RACAP. A social worker will then check to see if there is an adoptable child listed in RACAP whose needs could be met by that prospective adoptive parent. The needs of the child will come first.*

#### **(1) Application to be a prospective adoptive parent**

A person who would like to adopt must apply to be listed as a prospective adoptive parent.

The application must be made on **Form 17**, which is appended to the Child Care and Protection Regulations. The form must be given to a social worker who is designated to facilitate adoptions.

A “**designated social worker**” is a State or private social worker authorised by the Minister to carry out specific tasks.

◆ Child Care and Protection Act, section 33

The application form requires information that can help the social worker make sure that the environment will be safe for children who may be adopted. The application form also requests information that can guide appropriate matching between adoptable children and prospective adoptive parents.

The application form requires **basic information about the applicant**, including citizenship, residency status, marital status, religious affiliation, main languages spoken in the household and information about other adults and children in the household. Applicants must also give information about their financial position and health, to show that they are in a practical position to take good care of a child.

The applicants must also explain **why they would like to adopt**. They may indicate their **preferences regarding sex or age of an adoptive child**, or indicate that **adoption of a specific child is contemplated** (such as a child of a relative).

The application must also indicate whether the applicant is seeking a **“disclosed” or “non-disclosed” adoption**, and whether the applicant would be willing to allow **contact between the child and his or her biological family members** and other persons with an interest in the well-being and development of the child – IF such contact is in the best interests of the child AND regulated by a formal adoption plan. Note that it is possible to have a “disclosed” adoption without agreeing to contact with birth parents or other biological family members; disclosure and contact are separate matters.

Applicants must submit **police clearance certificates** for themselves and, if requested by the social worker doing the assessment, for any other person (adult or child) who resides in the household. This police clearance certificate will show that these persons have not been convicted of certain serious crimes. (These crimes listed in the box on page 9). Police clearance certificates are explained in detail in Chapter 27 of this *Guide*.

A **“disclosed” adoption** is one where the applicant is willing to allow his or her identity to be known to the child’s biological parents, and to allow the identity of the child’s biological parents to be known to the child.

In a **“non-disclosed” adoption**, this information is not revealed. But all adopted children have the right to access information about the identity of their birth parents from the Adoption Register when they reach the age of majority.

- ◆ Child Care and Protection Act, section 170(5)
- ◆ Child Care and Protection Regulations, regulation 59(1), Form 19A

## Special requirements for non-Namibian applicants who are habitually resident in Namibia

Non-Namibian citizens who are habitually resident in Namibia must provide the following additional information in their applications for assessment as prospective adoptive parents:

- ④ information about the laws on adoption in the applicant’s country or countries of citizenship
- ④ a letter from an appropriate authority in the applicant’s country or countries of citizenship, confirming that the adoptive child will be entitled to enter and remain in the country or countries in question
- ④ date of taking up residence in Namibia;
- ④ the intended duration of stay in Namibia
- ④ employment details
- ④ ownership of movable and immovable property in Namibia
- ④ a police clearance certificate from the country or countries of citizenship and from any other country where the applicant has resided during the last ten years (in addition to a police clearance certificate for Namibia).

The appropriate authority will be the central authority if the country in question is a party to the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (discussed in section 4 of this chapter). Otherwise, it will be the country’s embassy or consulate.



I have lived in Namibia for ten years, but I am a German citizen. I would like to adopt a Namibian child, so I need to make sure that Germany will recognise the adoption and allow my adopted child to live there permanently. This is important to know in case I leave Namibia and return to live in Germany someday.

◇ Child Care and Protection Regulations, regulation 59(2), Form 19A

## Summary of documents to include in an application to be a prospective adoptive parent

*If a married couple is applying to adopt a child jointly, they must **each** provide the documents listed.*

### Namibian applicants

- ⑨ certified copy of Namibian ID (or passport or other proof of Namibian citizenship)
- ⑨ police clearance certificate for applicant
- ⑨ police clearance certificate for other persons living in the household (if requested by the relevant social worker)
- ⑨ medical or psychological assessment report on health of applicant (as requested by the social worker).

### Non-Namibian applicants

- ⑨ documentation of legal residence in Namibia
- ⑨ medical or psychological assessment report on health of applicant (as requested by the social worker)
- ⑨ letter from the Central Authority or Embassy of the applicant's country or countries of citizenship confirming that the adoptive child will be entitled to enter and remain in that country

*If the applicant's country of citizenship is a party to the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, the letter **must** be from the country's Central Authority.*

- ⑨ Namibian police clearance certificate for applicant (see section 238(5) of the Act)
- ⑨ Namibian police clearance certificate for other persons living in the household (if requested by the relevant social worker)
- ⑨ police clearance certificate for applicant from the country or countries of citizenship
- ⑨ police clearance certificate for applicant from any other country where the applicant has resided during the last ten years.

**In both cases, the social worker might request additional information during the assessment. This might include:**

- ⑨ documentation of assets and liabilities (such as a bank statement)
- ⑨ documentation of employment
- ⑨ documentation of any property owned.

◇ Child Care and Protection Regulations, regulation 59(2), 60(2), Form 19A

## (2) Assessment and decision by social worker

**Assessment:** A social worker will assess the application to see if the applicant is suitable to be listed as a prospective adoptive parent.

*A married couple who apply jointly to be adoptive parents will be assessed together. They can adopt jointly only if **both** of them are approved as prospective adoptive parents.*

The social worker may conduct **any reasonable investigation** to determine if the criteria for prospective foster parents are satisfied. This *must* include referral of the applicant for **medical or psychological assessment** unless this would be impractical.

The social worker's **written assessment** must include:

- Ⓞ background information on the applicant
- Ⓞ information on the applicant's interpersonal relationships
- Ⓞ a discussion of relevant physical and psychological issues
- Ⓞ a discussion of relevant socio-cultural issues, including the applicant's religion
- Ⓞ a discussion of relevant housing and environmental issues
- Ⓞ the applicant's motive for requesting approval as a prospective adoptive parent
- Ⓞ the basis for concluding that the legal requirements for a prospective adoptive parent are, or are not, met.

The assessment of a prospective adoptive parent is similar (but not identical) to the assessment of a prospective foster parent. This is because foster care is in some cases a first step towards formal adoption.

- ◇ Child Care and Protection Act, section 170
- ◇ Child Care and Protection Regulations, regulation 60

### Criteria for assessment of prospective adoptive parents

*A social worker assessing an application from prospective foster parents must consider these criteria.*

- Ⓞ Is the applicant **fit and proper** to fulfil parental responsibilities and rights?
- Ⓞ Is the applicant **willing and able** to exercise, undertake and maintain parental responsibilities and rights?
- Ⓞ Is the applicant **living in circumstances which are suitable for the adoption of a child?**

*The answers to these three questions will be informed by the more detailed questions below.*

- Ⓞ Does the applicant have the capacity to provide a child with a **suitable place to live?**  
For example, the applicant must have space in his or her home for an adoptive child.

- ⑨ Does the applicant have the capacity to provide **living conditions that are appropriate to a child's health and well-being**? For example, the home must be a safe environment for a child.
- ⑨ Does the applicant have the **financial capacity to provide for a child's basic needs**? A person may not be disqualified from adopting a child by reason of financial status, but the prospective adoptive parent must be able to provide for the adoptive child's basic needs such as food, clothing and shelter.
- ⑨ Does the applicant have the capacity to accommodate various **special needs** that an adoptive child may have? For example, if the child has a disability, the adoptive parents must have the time and resources needed to properly care for the child. However, some prospective adoptive parents may indicate that they do not feel that they have the capacity to take in children with certain special needs.
- ⑨ Will the applicant ensure that any child of school-going age **attends school regularly**?
- ⑨ Will the applicant guide, direct and secure the **religious and cultural education and upbringing** of an adoptive child in a manner appropriate to the child's background, age, maturity and development?
- ⑨ Will the applicant **respect the views of an adoptive child**?
- ⑨ Will the applicant generally **promote an adoptive child's well-being, best interests and physical, emotional and social development**?
- ⑨ If applicable, will the applicant arrange for the adoptive child to **participate in early childhood development programmes**?
- ⑨ Will the applicant assist the adoptive child to maintain **links with his or her culture, language or religion**, if the child is from a different cultural, linguistic or religious background? An adopted child should be encouraged to remain familiar with his or her culture even if the adoptive parents do not share the same cultural background.
- ⑨ Will the applicant guide the behaviour of an adoptive child through **positive discipline**, and not impose any form of physical violence or punishment, or any other humiliating or degrading forms of discipline?
- ⑨ Will the applicant ensure that an adoptive child is **treated in a manner similar to other children in the household** (taking into account any special needs of the adoptive child or the other children)? For example, the adopted child should not be required to do chores that would not be expected of the family's biological children. However, it is permissible to give appropriate special treatment to an adoptive child with special needs, or to any other child in the household with special needs.
- ⑨ Is the applicant **age 25 or older**? If not:
  - Has the applicant provided a motivation for dispensing with this requirement which is assessed as being acceptable?
  - OR
  - Is the applicant applying jointly with a spouse who is age 25 or older?

- ⑨ Has the applicant provided a **police clearance certificate** showing that he or she has not been convicted of any of the specified crimes? *See the box on page 9 for a list of these crimes.*
- ⑨ If required by the social worker conducting the assessment, has the applicant provided **police clearance certificates for other members of the household** in respect of the relevant crimes? *See the box on page 9 for a list of these crimes.*
- ⑨ Is the applicant **habitually resident** in Namibia? *If the applicants are a married couple applying jointly, then each of them must be habitually resident in Namibia. A habitual resident of Namibia who is not a Namibian citizen must provide additional documentation and additional police certificates. See the box on page 12 on *Special requirements for non-Namibian applicants who are habitually resident in Namibia.**

- ◇ Child Care and Protection Act, section 170(2)-(8)
- ◇ Child Care and Protection Regulations, regulation 60(1)

**Decision:** The social worker must complete the assessment within **six months** after the application – if the applicant provided all the necessary supporting documentation on time.

The social worker must **notify the applicant** of the decision in writing. This notification must be delivered by hand, by courier or by registered post. If the application was *not* approved, the social worker must give the reasons for this decision.

*A person who is unhappy with the social worker’s decision could approach the High Court for an administrative review. The Court would consider whether the social worker followed the correct process and came to a reasonable conclusion on the basis of the information collected.*

- ◇ Child Care and Protection Regulations, regulation 60(5)-(6)

### **(3) Listing prospective adoptive parent in RACAP**

If the applicant is approved as a prospective adoptive parent, he or she will be listed in the Register of Adoptable Children and Prospective Adoptive Parents (RACAP). **Only persons who are listed in RACAP may apply to adopt a particular child.**

The initial listing in RACAP is valid for three years. Prospective adoptive parents must **renew** their registration in RACAP after this initial three-year period if they continue to seek to adopt a child. Renewals are valid for two years at a time.

*A prospective adoptive parent will be re-assessed at each renewal, in the same way as for an initial application.*

*The application for renewal must be made at least three months before the expiry of the current registration.*

The listing of a prospective adoptive parent could be **removed from RACAP** in the following ways:

- ⦿ A prospective adoptive parent may **withdraw** the listing.
- ⦿ The listing must obviously be removed if a prospective adoptive parent **dies**.
- ⦿ The listing can be **cancelled by the Minister** because a prospective adoptive parent **ceases to satisfy the requirements for eligibility to adopt** because he or she is no longer fit, willing and able to adopt.
- ⦿ The listing becomes invalid if a prospective adoptive parent is **convicted of one of the crimes** covered by the police clearance certificate.
- ⦿ The listing becomes invalid if any **child is removed from a prospective adoptive parent's care** on the basis of being in need of protective services.
- ⦿ The listing must be removed if a prospective adoptive parent has **concluded an adoption**.  
Once an adoption takes place, a person who wants to apply to adopt an additional child must re-apply for listing in RACAP.

- ⋄ Child Care and Protection Act, section 170(5)-(6), 171(1) and (5)
- ⋄ Child Care and Protection Regulations, regulations 62(1), 63

### Information to be included in RACAP

If a child listed in RACAP is adopted, the name and other identifying information of the child will remain in RACAP, and an entry must be added regarding the adoption.

#### Adoptable children:

- ⦿ name and other identifying information
- ⦿ entry indicating that child has been adopted (if this is the case).

#### Prospective adoptive parent:

- ⦿ name and other identifying information
- ⦿ citizenship and residency status.

- ⋄ Child Care and Protection Act, section 171(2)-(4)

### Training for prospective adoptive parents

Ideally, prospective adoptive parents should receive training after they have been approved as being eligible to adopt. The Act authorises the Minister to issue guidelines for the training of prospective adoptive parents.

- ⋄ Child Care and Protection Act, section 187(1)(h)



## Step 2

### Adoption of a specific child by a specific adoptive parent is in the child's best interests.

*Because adoption is child-centred, the starting point for an adoption must always be a child in need of adoption. The goal is to match the needs of an adoptable child with the capacity of a prospective adoptive parent who is suitable to give that child a permanent home. The best interests of the child are the primary concern, not the desire of the adoptive parents to adopt a child. Once the social worker identifies a potentially good match, the prospective adoptive parents can make an application to adopt the child in question. The second step focuses primarily on the suitability of the proposed match.*

#### Requirements for an adoption order

Before the court can make an adoption order, there must be

- ④ an **adoptable child listed in RACAP**
- ④ an **application from a prospective adoptive parent listed in RACAP**
- ④ a **copy of the social worker assessment** which preceded the listing in RACAP
- ④ a **social worker report** on the suitability of the adoption in the best interests of the child
- ④ **notice** of the adoption hearing to all persons who must give consent
- ④ **consent from each person required to give consent** which is not withdrawn during the cooling-off period (or a court ruling dispensing with a required consent)
- ④ **consent by the child** (if the child is sufficiently mature)
- ④ an **adoption plan** IF the birth parents and the adoptive parents have agreed to make one.

#### “Disclosed” and “non-disclosed” adoptions

Some adoptions are **“disclosed” adoptions** where the adoptive parent is willing to allow his or her identity to be known to the child's biological parents, and to allow the identity of the child's biological parents to be known to the child. Other adoptions are **“non-disclosed” adoptions**, where this information is not revealed. A preference for a “disclosed” or a “non-disclosed” adoption will be a factor in matching prospective adoptive parents with an adoptable child. (The Act does not use the terms “disclosed” and “non-disclosed” adoption, but this informal terminology is used in practice.)

**In both “disclosed” and “non-disclosed” adoptions, it is important to record the full names of both biological parents.** This information goes into RACAP, and all adoptive children have a right to access information about their birth parents from RACAP when they reach the age of majority. Failure to record the full details of a child's birth parents could undermine this right. Of course, there will be some adoptions where the identity of one or both birth parents is unknown – such as in the case of abandoned children. But full details should be carefully recorded where possible.

#### (4) Application to adopt

**Matching:** Once a prospective adoptive parent is listed in RACAP, a social worker will attempt to match the adoptive parent with an adoptable child listed in RACAP.

It may be the case that a birth parent names a particular adoptive parent as a condition of consent to adoption. It may be that the applicant wishes to adopt a specific child who is a relative, or who has been fostered by the prospective adoptive parent. In any of these cases, the adoptable child and the prospective adoptive parent must still be listed in RACAP and assessed as being a suitable match.

Private social workers are allowed to have access to information from RACAP for this purpose, although RACAP itself is accessible only to State social workers and the Minister. A private social worker who is engaged in arranging an adoption must complete **Form 20**, which is appended to the Child Care and Protection Regulations, requesting access to information from RACAP. The private social worker must be assisted by the Minister, or by a staff member of the Ministry designated by the Minister. Once a potential match has been identified, the social worker who is facilitating the adoption will need access to more detailed information about the adoptable child and the prospective adoptive parent.

- ◆ Child Care and Protection Act, sections 171(6), 172(4)-(5), 177(1)(d)
- ◆ Child Care and Protection Regulations, regulation 62

I want to give my baby up for adoption to my aunt and uncle.

Social workers try to respect the preferences of the birth parents if possible, but your uncle was once convicted of child rape. That disqualifies him to be an adoptive parent.



**Application procedure:** A prospective adoptive parent who is listed in RACAP may make an application to adopt a child at the children's court in the district in which the child normally resides. The application must be on **Form 22A**, which is appended to the Child Care and Protection Regulations.

The application must be accompanied by the following documentation:

- ① the **social worker assessment** from Step 1, which resulted in the listing in RACAP
- ① the **adoption plan** (if there is an one)
- ① an **adoption report** prepared by a designated social worker
- ① the **birth certificate** of the child to be adopted;
- ① **consent from each person who is required to provide consent**, or a motivation for dispensing with a required consent.
- ① certified copies of **identity documents** of applicant
- ① **marriage certificate** (if relevant)
- ① **police clearance certificates**.

Remember that a specific application to adopt follows on the previous approval of the applicant to be listed as a prospective adoptive parent. This means that fitness to adopt has already been established. The assessment at the time of a specific adoption application should thus focus on any changed circumstance since the initial assessment, and the suitability of the match between the prospective adoptive parent and the adoptable child.

- ◆ Child Care and Protection Act, section 175
- ◆ Child Care and Protection Regulations, regulation 67(1)-(2), Forms 22A and 22C

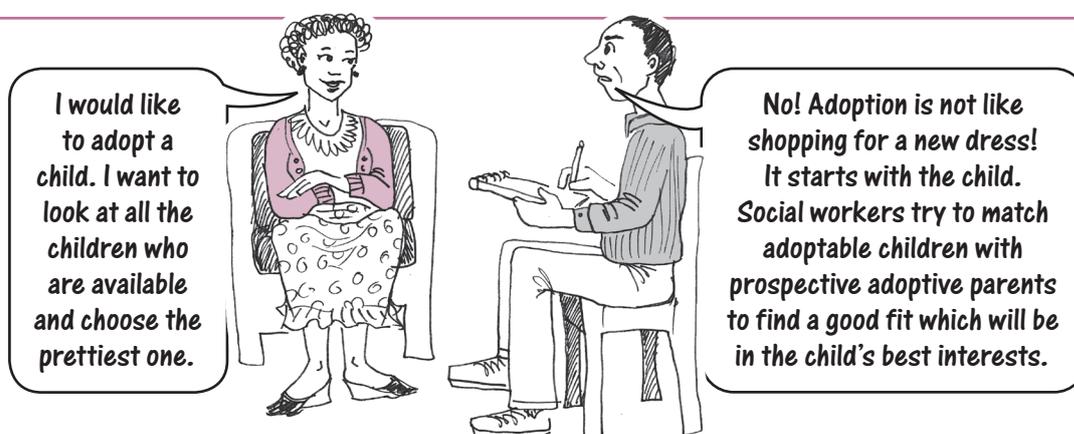
## Contents of adoption report by designated social worker

The adoption report which is submitted to the children's court along with the application for adoption should be made on **Form 22C**, which is appended to the Child Care and Protection Regulations. This report must contain the following:

- Ⓞ confirmation that the child in question is adoptable
- Ⓞ a recommendation that adoption of this child by this prospective parent would be in the **best interests** of the child
- Ⓞ **comprehensive details regarding the adoptable child**, including
  - details regarding the language, culture, race and religion of the child
  - a medical report on the health status of the child, including a description of any special needs of the child
  - information about the biological parents of the child, including –
    - a description of the counselling that the parents have received; and
    - an indication as to whether the parents have consented to the adoption
  - information regarding the siblings of the child, where applicable
  - the views of the child concerning the adoption, where the child is of sufficient maturity and stage of development to understand adoption.

The report must be accompanied by the initial application from the adoptive parents for listing in RACAP and the assessment that was done at that stage, the paperwork relating to the adoptable child's listing in RACAP, the application from the adoptive parents for adoption of the specific child and the relevant supporting documents.

- ◆ Child Care and Protection Act, section 175(1)(b)
- ◆ Child Care and Protection Regulations, regulation 68



“ The aim of adoption law is to provide a permanent, secure and healthy family life for children whose biological parents have died or are unable to provide them with the care they require. ”

- ◆ Tshepo Mosikatsana and Jackie Loffell, “Adoption” in CJ Davel and AM Skelton (eds), *Commentary on the Children’s Act*, Juta, 2007, updated in 2012 at page 15-2 (discussing adoption in terms of the South African Children’s Act 38 of 2005)

## Social worker adoption reports

### Effect of new two-step process

**Social worker reports in respect of individual adoptions should be streamlined now that there are separate assessments for listing in RACAP in advance of the adoption application.**

The listings in RACAP will require assessments of a child’s eligibility to be adopted and the suitability of the applicant as a prospective adoptive parent.

This means that adoption applications should be quicker to finalise than in the past. Social worker reports prepared for the application will supplement and update the existing assessments, and discuss the matching of the specific child and parent in question.

Because this new process should make social worker reports for adoption applications faster to finalise, the Act provides for provisional adoption orders if the process is concluded before the expiry of the 60-day cooling-off period for withdrawal of consent. Social workers may recommend placement with the adoptive parents during this period, particularly where they are confident that consent is unlikely to be withdrawn.

- ◆ Child Care and Protection Regulations, regulation 68, Form 22C

### Channelling of draft reports

Social worker reports in respect of adoption applications must be channelled through the Ministry before being submitted to the children’s court. This rule applies to all social worker reports which are required to be submitted to a children’s court. It is intended to provide quality control and to harmonise the work of state and private social workers.

A social worker who prepares a report intended for court must submit a signed copy of the report within two days of completing it to the channelling officer in the Ministry, by hand, fax or electronic mail. The channelling officer must examine the report and respond within five days of receiving it, unless the deadline for submission of the report to the court requires that the assessment of the report be done more quickly. The channelling officer may return the report with directions for improvement if necessary. If any improvements were required, 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.

**The channelling process applies to both private and State social workers.** The idea is to provide quality control so that the children’s court will receive thorough and useful reports.

- ◆ Child Care and Protection Regulations, regulation 7

## (5) Notice of adoption hearing

The clerk of the children's court which will consider the adoption must give **30 days' notice** of the application for adoption to the **Minister**.

This is particularly important in the case of adoptions facilitated by private social workers, as it enables the Ministry to confirm that the correct procedures have been followed.



The clerk of the children's court must also give **30 days' notice** of the application for adoption to **anyone whose consent is required for the adoption** (discussed below).

The children's court may also direct that **notice** of the application for adoption be given to **any other specified person**, if it appears to the court that this is necessary in the interests of justice.

◇ Child Care and Protection Act, section 176

◇ Child Care and Protection Regulations, regulation 67(3)

### Notice procedure

*The clerk of the children's court must make sure that all persons entitled to receive notice of the application are provided with a copy of the application and an official notice directing them to attend the children's court (using **Form 22B**, which is appended to the Child Care and Protection Regulations).*

*The notice should be personally served if possible. If this is not successful, the clerk of the children's court must attempt to notify the person in question by telephone, fax, email, courier or registered post – or by sending an official to his or her last known residential address or workplace to attempt to find out the current contact details. If the clerk of the court is still unable to contact the respondent by means of these alternative methods, the clerk must provide the court with proof of the attempts which were made.*

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 there.
- (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.

If the person to be served in any way **prevents the notice from reaching him or her**, it is sufficient service to **attach a copy of the notice to the outer door or security gate** of the relevant place.

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 person attempting notification 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 the notice fail, the person who attempted notification 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.*

◇ Child Care and Protection Regulations, regulations 67(3), 120

## (6) Consent

Consent to a child's adoption must generally be given by the child's **parents**, any other person who is a **legal guardian** of the child and **the child** (if the child has sufficient maturity). There are some grounds for making exceptions. The children's court can also overrule an unreasonable withholding of consent.

### (6.1) Who must give consent?

(a) **Consent of parents:** Consent to an adoption must normally be given by both parents, regardless of whether the parents are married.

◇ Child Care and Protection Act, section 172(1)(a)

#### Exceptions to parental consent requirements:

- (1) Consent of an **unmarried father** is required *only* where he has already voluntarily acknowledged paternity. This can be done by –
- Ⓞ voluntarily paying, or offering to pay, maintenance in respect of the child
  - Ⓞ paying damages in respect of the pregnancy in terms of customary law
  - Ⓞ being named as the father on the child's birth certificate.

#### Who is an unmarried father?

The exception to consent applies if the father was not married to the mother at the time of the child's conception or any time after that. The exception does *not* apply if the parents were married at the relevant time, but are now divorced. A divorced father must give consent (unless one of the other exceptions applies).

◇ Child Care and Protection Act, section 172(13)(a)

◇ Child Care and Protection Act, section 172(13)(a) and (14)

- (2) If the court finds that the **child was conceived through rape** by the child's biological father, the father's consent is not required to give the child up for adoption.

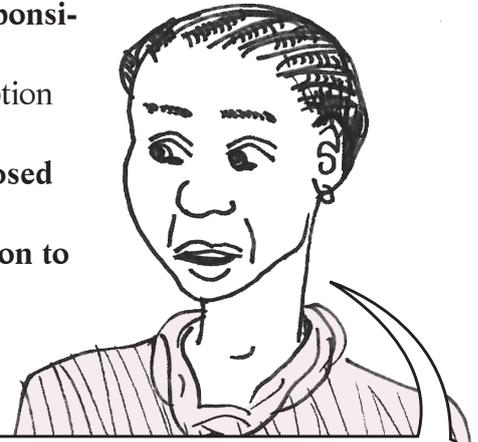
No conviction for rape is required, as the child conceived in the rape might be given up for adoption before the criminal trial has taken place. The finding that a rape took place for purposes of consent to adoption is not relevant to the criminal trial.

◇ Child Care and Protection Act, section 172(13)(b)

- (3) Consent is **not** required from a parent who:
- Ⓞ is **mentally incompetent** to give consent
  - Ⓞ has **abandoned** the child
  - Ⓞ **cannot be found or identified** after reasonable efforts
  - Ⓞ has **abused or neglected the child**, or allowed the child to be abused or neglected

- Ⓞ has **made no attempt to fulfil any parental responsibilities towards the child during the last year**
- Ⓞ has been divested of the right to consent to adoption by a **court order**
- Ⓞ has **failed to respond to a notice of the proposed adoption within 30 days** of receiving it
- Ⓞ has been **convicted of a serious crime in relation to the child.**

◇ Child Care and Protection Act, section 172(12)(a)



*My baby was conceived in a one-night stand with a guy I met at a club. I never knew his name. He said that he worked on a fishing boat. I can give up my child for adoption without his consent because he never voluntarily acknowledged paternity. In fact, he never even made any efforts to see if he had fathered a child at all. Where a child's parents are not married, the father's consent to adoption is required only if he has taken some responsibility for the child.*

(4) No parental consent is required if the child is an **orphan**.

◇ Child Care and Protection Act, section 172(12)(b)

### What if the child's parent is a minor?

Minors normally have to be “assisted” by a parent to do legal acts such as bringing court cases or signing contracts. This means that the parent must sign on behalf of the child. A minor parent who has a parent or guardian must be assisted to give consent by that parent or guardian, if the parent or guardian in question is available. Note that assistance by **one** parent (or legal guardian) is sufficient. BUT the children's court may dispense with such assistance if this is in the best interests of the minor parent and the child whose adoption is under consideration.

*It would not be possible for a parent or a guardian to force a minor parent to give up child for adoption, unless the children's court found that the minor parent's refusal to consent to the adoption was unreasonable.*

◇ Child Care and Protection Act, section 172(1)(a)



*I had a baby when I was 17 years old. My mother has been dead for many years, and I hid the pregnancy from my father because he threatened to kill me if I got pregnant. The social worker found out from my school guidance counsellor that my father has beaten me badly before. The court allowed me to give my baby up for adoption without my father's involvement. This was best for me and my baby.*

“ In our view, it is good practice, where possible, for the guardian of a young parent to be involved in the process surrounding adoption, as he or she may be an essential source of emotional and practical support and can provide much-needed help after the decision has been made whether or not to consent to adoption. However, making the involvement of a guardian mandatory could cause grave problems in some cases, for example where the guardian has died or is missing; where the young parent, usually the mother, has left home due to abuse and is adamant that her parent should not be contacted; or where the guardian is exerting undue pressure on the young parent to give or withhold consent to adoption. ”

◇ Tshepo Mosikatsana and Jackie Loffell, “Adoption” in CJ Davel and AM Skelton (eds), *Commentary on the Children’s Act*, Juta, 2007, updated in 2012 at page 15-13 (discussing adoption in terms of the South African Children’s Act 38 of 2005)

**(b) Consent of guardian:** A legal guardian other than a parent is also normally required to give consent.

A person other than a parent could be named as a child’s legal guardian by the High Court, in terms of a written will, or in terms of the provisions of the Child Care and Protection Act on guardianship. The court would want to see documentation confirming guardianship.

◇ Child Care and Protection Act, section 172(1)(b)

**Exceptions to legal guardian consent requirements:** Consent is *not* required from a legal guardian who:

- Ⓞ is **mentally incompetent** to give consent
- Ⓞ has **abandoned** the child
- Ⓞ **cannot be found or identified** after reasonable efforts
- Ⓞ has **abused or neglected the child**, or allowed the child to be abused or neglected
- Ⓞ has **made no attempt to fulfil any parental responsibilities towards the child during the last year**
- Ⓞ has been divested of the right to consent to adoption by a **court order**
- Ⓞ has **failed to respond to a notice of the proposed adoption within 30 days** of receiving it
- Ⓞ has been **convicted of a serious crime in relation to the child**.

◇ Child Care and Protection Act, section 172(12)(a)

**(c) Consent of child:** The child being adopted must consent to the adoption if the child is **over age 10 OR under age 10 but mature enough to understand the implications of adoption**.

◇ Child Care and Protection Act, section 172(1)(c)-(d)

## Child's competence to give consent

Minors usually need adult assistance for legal actions. But consent to adoption is about the right of children to participate in decisions that affect them. The consent of a child to an adoption must come from the child himself or herself. No adult assistance is required.

## Standard of proof for exceptions to consent

A children's court which is deciding whether any of the exceptions to the consent requirements are present will make this finding on a "**balance of probabilities**". This means that, after considering the evidence, the court must find that it is more likely than not that the basis for the exception exists. This is the standard of proof that applies in most civil matters. It is less strict than the criminal standard of proof, which is "beyond a reasonable doubt".

◆ Child Care and Protection Act, section 172(15)

## Consent to adoption by unmarried fathers: Examples from South Africa

*Sadly, unmarried fathers are often uninvolved in the lives of their children. However, a blanket denial of the right of consent to adoption for all unmarried fathers would likely violate the constitutional prohibitions on sex discrimination in Article 10(2) and possibly also Article 15(1) of the Constitution which gives children, as far as possible, the right to know and be cared for by their parents.*

### ***Fraser v Children's Court, Pretoria North, and Others 1997 (2) SA 261 (CC)***

In this South African case, an unmarried father brought a constitutional challenge to a provision of the South African Child Care Act that required the consent of both parents of a child for an order of adoption, but only the consent of the mother if the child was "illegitimate". The mother in this case decided that it would be in the best interests of the unborn child that he be put up for adoption. When this became known to the unmarried father, he resisted the proposed adoption and sought to intervene in the adoption proceedings before the children's court. He alleged that it was unconstitutional not to require the consent of unmarried fathers.

The Constitutional Court agreed that the impugned provision of the Child Care Act was unconstitutional on the basis that it impermissibly discriminated between the rights of a father in certain unions and those in other unions. For example, Muslim unions were not recognised as marriages under civil law at that stage because they encompass polygamy – meaning that the father of a child born pursuant to such a religious union would not have the same rights as the mother in adoption proceedings. On the other hand, customary marriages were recognised. Fathers of children born from customary unions would therefore have greater rights than similarly-placed fathers of children born from Muslim marriages or other polygamous religious marriages. This was a clear breach of the equality right in the Constitution that could not be justified.

Further, the Court held that there was also a strong argument that the consent provision discriminated unfairly against the fathers of certain children on the basis of their gender or marital status. Every mother was given an automatic right to withhold her consent to the adoption of the child, but this right was denied to every unmarried father, regardless of the age of the child or the circumstances. Similarly, every married father was given an automatic right to withhold consent to the adoption of the child but this right was denied to every unmarried father. The Court held that gender and marital status do not necessarily predict the relationship between a parent and child.

The Court held that adequate judicial and legislative responses to adoption procedures for extramarital children should be nuanced, having regard to the duration of the relationship between the parents, the age of the child, the bonds between the father and the child, the legitimate needs of the parents and the best interests of the child – without going so far as to hold that the consent of unmarried fathers should be required in all circumstances. The Court suspended its declaration of invalidity to allow Parliament to formulate what it considered to be an appropriate statutory formulation which would meet the constitutional requirements.

### ***T v C and Another 2003 (2) SA 298 (W)***

Another angle on this issue was considered in a 2003 South African case where an unmarried father was not notified of a step-parent adoption and the court was required to consider whether this was a basis to rescind the adoption.

The child was born outside marriage at a time when the relationship between the parents had already ended. The relationship between them became increasingly acrimonious and so no relationship developed between the father and son. The mother and father subsequently married other people and had children with their new partners. When the child in question was 10 years old, the mother's new partner launched proceedings to adopt him. The father was not notified of the proceedings, nor was his consent obtained. He discovered that an adoption order had been made in respect of the child only when he instituted proceedings seeking access to the child. The commissioner who made the adoption order had been under the impression that the child's father was unknown. Indeed, the child's birth certificate reflected the natural father as "unknown".

The father applied to have the adoption order rescinded but his application was dismissed on the basis that it would not have been in the best interests of the child that the order be rescinded. He appealed that decision.

The appeal court held that because of the serious consequences which flowed from adoption, the applicant for an adoption order – or the consenting parent, where only one parent had given consent – is required to observe the utmost good faith in placing material before the court. This includes providing details regarding the identity and whereabouts of the other parent, where such details are known. The court is absolved of the duty of notifying the natural father only where his identity or whereabouts cannot be established. In this case, the mother and step-father allowed the court to be misled about the natural father's identity. That tainted the adoption process. Nonetheless, the Court concluded that the adoption order should not be rescinded as this would not be in the child's best interests.

## (6.2) How must consent be given?

**Notice to persons whose consent is required:** The clerk of the children’s court which will consider the adoption must give **30 days’ notice** of the application for an adoption order to **each person whose consent to the adoption is required**.

In many cases, the social worker who is handling the adoption will be able to provide the clerk of the children’s court with the names and addresses of the persons who must give consent.

The clerk will send out a notice on **Form 22B**. This notice must inform the person concerned of the proposed adoption of the child and request them to indicate whether they give consent for the adoption.

- ◇ Child Care and Protection Act, section 176(1)(a) and (3)
- ◇ Child Care and Protection Regulations, regulation 67(3)

**Identifying and locating persons whose consent is required:** If the **identity or location of a parent or guardian of the child is unknown**, the social worker must place an **advertisement** in a national newspaper and arrange a **broadcast** on a radio station serving the area most likely to reach the person in question.

If the child to be adopted is an **abandoned child**, then a social worker will have already placed a newspaper advertisement and a radio broadcast before listing the child in RACAP as being eligible for adoption. It is not clear from the relevant regulation if this will suffice, or if the process must be repeated at the time of the adoption application.

If the **identity or location** of a parent or guardian remains unknown after the advertisements have been placed – AND it appears to the social worker that there is a “reasonable prospect” that the person in question may be located – the social worker must obtain an **affidavit** from any person who may have information about the parent or guardian.

For example, the affidavit could be made by persons with information about the parent or guardian’s extended family, their current or previous employment or their last known contact details.

The social worker may also employ a **tracing agency** to assist.

- ◇ Child Care and Protection Regulations, regulation 65(1)-(3)

**Failure to locate:** If a person whose consent for adoption is required **cannot be identified or located within a period of 30 days** after the required measures have been carried out – AND the children’s commissioner is satisfied that reasonable efforts to identify and locate the person in question have been made – then the consent of that person will be dispensed with.

- ◇ Child Care and Protection Regulations, regulation 65(4)

**Failure to respond:** If a notice regarding consent has been served on a person whose consent is required and **no response is received within 30 days**, the court will assume that the person in question has consented to the adoption.

◇ Child Care and Protection Act, section 176(4)

**Counselling prior to consent:** The social worker handling the adoption must counsel the parents and the child about the meaning of adoption before they give their consents.

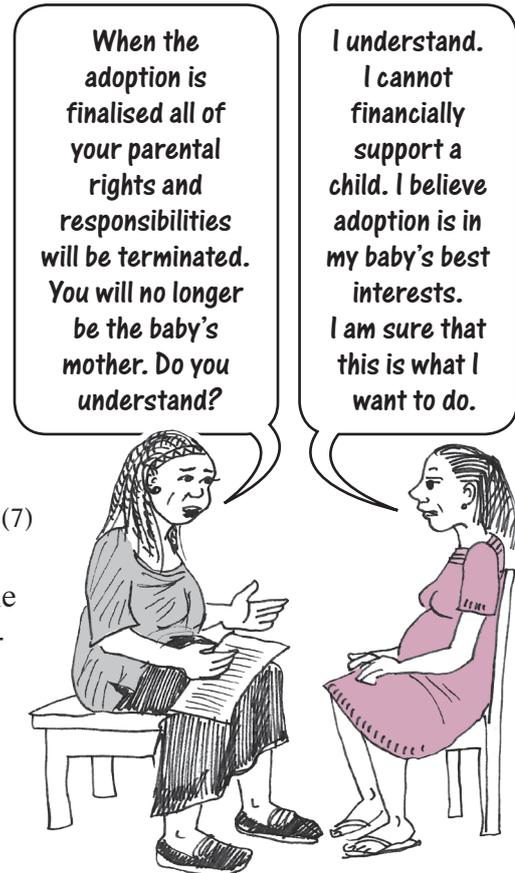
◇ Child Care and Protection Act, section 172(3)

**Consent only after birth of child:** No final consents can be given before the child is born.

◇ Child Care and Protection Act, section 172(7)

**Consent before consideration of application:** The consent must be given *in advance* of the court's consideration of the application for adoption. The clerk of the relevant children's court will file the consent if necessary until the adoption application is considered.

◇ Child Care and Protection Act, section 172(8)(a)(iii) and (b)(iii)



**Signing consent form in front of children's commissioner:** Consent must be in writing and signed in the presence of a children's commissioner.

A parent or guardian uses **Form 21A** for consent. A child uses **Form 21B**. Both forms are appended to the Child Care and Protection Regulations.

The form must be signed in front of a children's commissioner, but this does not have to be the same children's commissioner who is handling the adoption. The person giving consent can sign the form in front of a children's commissioner nearest to where he or she lives. This is helpful since parents who do not share a household might live far apart.

The children's commissioner must verify the identity of the person giving consent against an identity document or passport. In the case of a child who does not have an identity document, identity can be verified by means of the child's birth certificate.

The children's commissioner must confirm that the parents and the child have been counselled on the decision to consent to the adoption, with regard to the age, maturity and stage of development of the child.

The children's commissioner must personally inform the person giving consent of the effect of an adoption order, and the right to withdraw the consent within 60 days after having signed the consent form.

If necessary, the children's commissioner must ensure that the original forms are transmitted to the children's court that will consider the adoption.

- ◆ Child Care and Protection Act, section 172(8)(a)
- ◆ Child Care and Protection Regulations, regulation 64(1)-(2)

**Giving consent outside Namibia:** Consent from a parent or guardian can be given outside Namibia by signing **Form 21A** in the presence of an officer in a Namibian diplomatic or consular mission, or a judge, magistrate, justice of the peace or other judicial officer of the country concerned.

The relevant official must verify the identity of the person giving consent against an identity document or passport.

The signed form must be submitted to the clerk of the relevant children's court, where it must be filed until it is required.

The children's court may condone a situation where a consent given outside Namibia was not signed in the presence of one of the listed persons, or not verified in the specified manner, if good cause is shown for the deficiency in procedure.

- ◆ Child Care and Protection Act, section 172(8)(b) and (10)
- ◆ Child Care and Protection Regulations, regulation 64(3)

**Consent to adoption only by specific person:** If the parent or guardian of a child wishes the child to be adopted by a particular person, that parent or guardian must state this in the consent. However, the person who is identified in this way must be eligible to adopt in the same way as for any other adoption in Namibia.

The children's commissioner must also be satisfied that this expression of wishes on the part of the birth parent or guardian did not result from undue pressure or inducement.

If the person named is not habitually resident in Namibia, then the requirements and procedures for inter-country adoption must be followed. (See section 4 of this chapter.)

- ◆ Child Care and Protection Act, section 172(4)-(6)

“ A trend that has developed in recent decades is ‘open adoption’, in which a biological parent is provided with substantial information about prospective adopters who are available for his or her child, and may be given an opportunity to choose between them. The thinking here is that this not only assists the biological parent in coming to terms with the process of giving up the child but will also, in due course, promote the wellbeing of the adoptee through the knowledge that his or her biological mother and/or father has been actively involved in the decisions surrounding the placement. The fact that the biological and adoptive parents have been working together from the beginning to promote his or her best interests is likely to reduce the conflicts and anxieties which can be experienced by the adoptee. Such a process can also promote greater respect in the adopters for the biological parents, and this will make for fewer identity and self-esteem problems in the adoptee as he or she grows up. ”

◆ Tshupo Mosikatsana and Jackie Loffell, “Adoption” in CJ Davel and AM Skelton (eds), *Commentary on the Children's Act*, Juta, 2007, updated in 2012, page 15-15 (discussing the South African Children's Act 38 of 2005)

**Adoptive parent to be named in consent:** The signed consent to an adoption must include the name of the prospective adoptive parent or parents UNLESS the person giving the consent chooses the option of a non-disclosed adoption. This choice must be indicated on the consent form.

◆ Child Care and Protection Act, section 172(9)

### (6.3) Overruling unreasonable refusal of consent

The children's court can overrule a refusal of consent if the adoption would be in the child's best interests AND consent is being unreasonably withheld. Before making this decision, the court must take into account the relationship between the parent and the child over the last two years and their potential for a good future relationship.

These criteria are designed to ensure that a parent who is unwilling to get involved in a child's life does not try to obstruct an adoption only to be spiteful or uncooperative.

◆ Child Care and Protection Act, section 173

### Example of unreasonable withholding of consent

A 1997 South African case concerned a young child who was placed in foster care while the mother was in prison. The mother had sufficient opportunity after her release from prison to establish a bond with the child, but she failed to do so over a period of three years. The foster parents wanted to adopt the child, and it was in the child's best interests to get finality in respect of his circumstances. The mother faced challenges with regard to accommodation, employment and transport after her release from prison, but she had definitely not gone out of her way to try and win her child's trust and affection. The children's court was therefore justified in finding that it was unlikely that the mother would establish a meaningful bond with the child in future, and deciding that consent to the adoption was being unreasonably withheld.

◆ *SW v F* 1997 (1) SA 796 (O)

“ This provision is aimed at preventing those circumstances where the parent withholding consent does not have an abiding interest in the child's welfare but only withholds consent with a view to retaining abusive control over the child or the other parent, or has no prospects of being able to meet the needs of the child within a reasonable period of time. ”

◆ Tshepo Mosikatsana and Jackie Loffell, "Adoption" in CJ Davel and AM Skelton (eds), *Commentary on the Children's Act*, Juta, 2007, updated in 2012, page 15-23 (discussing a similar provision in the South African Children's Act 38 of 2005)

#### (6.4) Withdrawal of consent during cooling-off period

Deciding to put a child up for adoption is a difficult decision, so there is a 60-day “cooling-off period” when consent can be withdrawn by anyone whose consent was required. The 60-day period is counted from the date when the consent was signed. After 60 days, the consent becomes final and irrevocable.

The child will normally live with the adoptive parents during this time. However, the child could be placed in foster care or a place of safety instead, if the social worker thinks this would be preferable. If consent to the adoption is withdrawn, the child will be returned to the birth parents.

*The social worker may base a recommendation on interim arrangements on the likelihood that consent may be withdrawn.*

The court may grant a provisional adoption order before the end of the cooling-off period if this would be in the child’s best interests.

A final adoption order may be granted only after the end of the cooling-off period in respect of all persons required to give consent.

*For example, a provisional adoption order might be useful if the adoptive parents needed to travel outside Namibia with the child, or if the child needed medical attention.*

◆ Child Care and Protection Act, sections 172(11), 176 (2)

“ The decision to give up a child for adoption is difficult and needs careful consideration on the part of the consenting party. The 60 days is a cooling-off period which gives the consenting party an opportunity to fully reflect on the decision before it becomes final. It also offers a safeguard against any form of pressure which may have been brought to bear on the consenting party, and may have led to an ill-informed or premature decision to give up the child for adoption. ”

◆ Tshepo Mosikatsana and Jackie Loffell, “Adoption” in CJ Davel and AM Skelton (eds), *Commentary on the Children’s Act*, Juta, 2007, updated in 2012, page 15-14 (discussing a similar provision in the South African Children’s Act 38 of 2005)



## (7) Adoption plans (*optional*)

In a “disclosed adoption”, the birth parents and the adoptive parents may decide to make an adoption plan covering issues such as information-sharing or contact with the birth family. **Adoption plans are optional and voluntary.** An adoption plan takes effect only if it is made into a court order.

**Who:** In a “disclosed” adoption, the birth parents and the adoptive parents may decide to make an adoption plan.

Adoption plans are optional and voluntary. An adoption plan might be particularly useful when a child is adopted by extended family members

**What:** An adoption plan might include an agreement about –

- ⦿ sharing information on the child’s medical background or condition
- ⦿ sharing information on milestones in the child’s development
- ⦿ communication about important events in the child’s life
- ⦿ contact between the birth family and the child
- ⦿ any other matter relating to the child
- ⦿ how to ensure that the child develops a healthy and positive cultural identity and maintains links with his or her cultural heritage.

The parties to the adoption plan are free to include as much or as little as they wish.

**When:** An adoption plan must be made **before** the court issues an adoption order. However, it can be concluded only **after** the required consents to the adoption have been given.

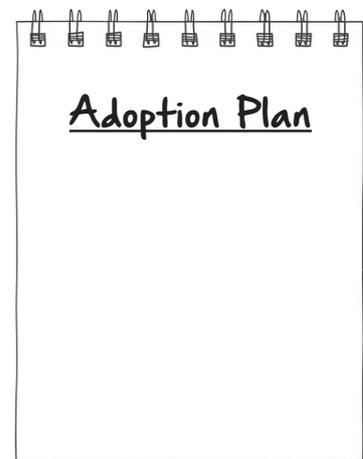
**How:** The social worker facilitating the adoption will assist with an adoption plan if the parties want one. The child must be consulted about the adoption plan if the child of a sufficient age, maturity and stage of development to understand it.

If the children’s court, in the course of approving an adoption, concludes that an adoption plan would be in the best interests of the child concerned, it may direct the parties to attempt to conclude such an agreement. It may direct them to make use of mediation for this purpose.

The court is authorised to direct the parties to **try** to reach agreement. But the attempts to agree on a plan may still fail. The court cannot **force** the parties to make an adoption plan.

An adoption plan must be in writing, but there is no official form for such plans.

An adoption plan has binding force only if it is made into a court order. The children’s court which is dealing with the adoption application will make the adoption plan into a court order at the same time as it makes the adoption order.



**Amending or cancelling an adoption plan:** Once an adoption plan is made into an order of court, it can be amended or cancelled only by an order of court. Any party to the agreement or the adopted child can apply to the court to change or cancel the plan, in which case notice must go to the other parties to the adoption plan in the same manner as notice of an adoption application. See the box on pages 22-23.

**Change of contact details:** A party to an adoption plan has a legal duty to inform all other parties to the plan of any change in contact details within 14 days of the change.

- ◆ Child Care and Protection Act, section 174
- ◆ Child Care and Protection Regulations, regulation 66

“ An innovation... is provision for agreements to an exchange of information and photographs between the adopters and the biological parent(s) at specified intervals. Face-to-face contact between the biological and adoptive parents, and/or the biological parents and the child, may be part of such a scenario, although this is seldom the case. Where an older child is placed in adoption, ongoing contact with a biological parent or other significant person would be more likely than in the case of an infant or very young child. ”

- ◆ Tshepo Mosikatsana and Jackie Loffell, “Adoption” in CJ Davel and AM Skelton (eds), *Commentary on the Children’s Act*, Juta, 2007, updated in 2012, page 15-16 (discussing a similar provision in the South African Children’s Act 38 of 2005)

## (8) Adoption order

*A children’s court will make an adoption order, after considering all the circumstances of the case, if this would be in the child’s best interests and if the requirements set out in the Act have been followed. Once an adoption order is issued, the adopted child is regarded as the child of the adoptive parent and the adoptive parent is regarded as the parent of the adopted child.*



### **Court consideration of adoption application:**

- (1) When the court is considering an application for the adoption of a child, the paramount issue is the **best interests of the child**.

Other relevant considerations include:

- ⊗ the desirability of preserving the child’s identity, language, culture and religious ties

This could include by placing the child with an adoptive parent of the same language, culture or religion, or with an adoptive parent who is willing to take active steps to connect the child with the child’s birth culture.

- ⊗ the views of the child if that child is mature enough to be consulted

The court must make sure that the child is able to express his or her views on the adoption freely. The child's views must be given due weight in light of the child's stage of development and the circumstances.

- ⊗ any reasonable preferences expressed by the parent or guardian who is giving the child up for adoption

For example, this could include a preference that the child be adopted by a family in the same community or by a particular extended family member.

- ⊗ the social worker's report and recommendation on the adoption application

The court might also want to have regard to the social worker's assessment of the eligibility of the child for adoption and the social worker's assessment of the suitability of the adoptive parents to adopt a child.

- ⊗ an adoption plan, if the parties have agreed on a plan.

(2) The children's court must also be satisfied that the **requirements of the Act** have been met:

- ⊗ All the relevant consents are in place and have not been withdrawn during the cooling-off period.
- ⊗ A parent or guardian of the child who has consented to the adoption understands that the effect of the adoption order means permanent deprivation of parental rights.
- ⊗ All other requirements of the Act have been met (such as eligibility of the child to be adopted and suitability of the adoptive parents to adopt).

(3) Finally, the children's court must generally consider **all the circumstances of the case**.

◇ Child Care and Protection Act, section 177(1)-(2)

**Adoption order:** After considering these issues, the children's court may make an adoption order.

A domestic adoption order must be made on **Form 22D**, which is appended to the Child Care and Protection Regulations.

The adoption order may include directions regarding the monitoring of the well-being of the adopted child by a designated social worker or another suitably qualified person.

◇ Child Care and Protection Act, section 177(3)  
◇ Child Care and Protection Regulations, regulation 69

**Effect of an adoption order:** A child who is adopted becomes the child of the adoptive parent in every way. The adopted child's birth certificate will be altered to list the adoptive parent

(or parents) as the child's parent (or parents), and the child will be given the surname of the adoptive parent or a surname chosen by the adoptive parent (unless the adoption order provides otherwise).

Unless the adoption order – or an adoption plan made into an order of court – says otherwise:

- ⊙ all rights and responsibilities of the birth parents and their family members towards the child are terminated; and
- ⊙ all rights and responsibilities which the child had toward birth parents and their family members are also terminated.

This includes all claims to contact with the child by the birth parents and their family members.

### Exceptions to the termination of parental rights and responsibilities

The law allows for exceptions to the termination of parental rights and responsibilities, which might be relevant in cases such as **step-parent adoptions**. The court would not usually terminate the parental rights and responsibilities of the birth parent who is married to the step-parent, so that the effect of the adoption would be that they become the child's joint parents. In some cases, the court would terminate the parental rights and responsibilities of the child's other non-custodian birth parent. In other circumstances, it might be in the child's best interests *not* to terminate the parental rights and responsibilities of *either* birth parent. In fact, one South African case has suggested that this approach would be in the child's best interests in step-parent adoptions, save in exceptional circumstances. (*Centre for Child Law v Minister of Social Development* 2014 (1) SA 468 (GNP))

An adoption order also automatically terminates any alternative placement which applied to the child prior to the adoption – such as placement in a place of safety, foster care, or a children's home.

An adoption order does NOT affect any rights to property the child had before the adoption. For example this might include property that the child inherited from a biological parent before the adoption took place.

Once a child is formally adopted, that child will no longer inherit from a **biological parent** in the absence of a will. However, a biological parent can leave assets to anyone, including a child who has been given up for adoption, by means of an appropriately-worded written will.

The adopted child WILL inherit from an **adoptive parent** in the absence of a will. An adoptive child will also inherit from an adoptive parent by means of a written will of the adoptive parent which refers to children of the deceased in general terms. The adoptive child is a child of the adoptive parent in every way.

An adoption order does NOT permit any marriage or sexual intercourse between the child and any other person which would have been prohibited had the child not been adopted.

In other words sexual intercourse between a child who has been adopted and that child's birth parent or biological sibling would still be incest. Sexual intercourse between the child and the child's adoptive parents or siblings would also be incest.

◆ Child Care and Protection Act, section 178

“ An adoption order terminates all the parental ties that any person, including a parent, step-parent or partner in a domestic relationship, had in respect of the child prior to the adoption, and it confers full parental responsibilities and rights in respect of the child, unless the adoption order or a post-adoption agreement confirmed by the court provides otherwise. ”

◆ Tshepo Mosikatsana and Jackie Loffell, “Adoption” in CJ Davel and AM Skelton (eds), *Commentary on the Children’s Act*, Juta, 2007, updated in 2012, page 15-23 (discussing a similar provision in the South African Children’s Act 38 of 2005)

**Appeals:** A party who is unhappy with the decision of a children’s court on an application for adoption may appeal to the High Court. The child’s best interests will be the key issue.

Rescission is also possible in certain circumstances where an adoption order was granted, subject to the child’s best interests. (See section 3.11 below.)

◆ Child Care and Protection Act, section 46

### Is there a special state grant for adopted children?

**No.** An adopted child steps into the shoes of a biological child once an adoption order is issued. This means that grants such as State maintenance grants and child disability grants are available to the child of an adoptive parent in the same way as to a child of any other parent.

#### Step 3

#### Record-keeping after the adoption order is issued.

#### (9) Adoption Register

*The Ministry must keep a record of all adoptions in the Adoption Register. An official known as the Adoption Registrar is responsible for recording adoptions in this register.*

The clerk of the children’s court must keep a record of all adoption cases considered by the court, and all adoption orders issued by the court. As soon as an adoption order is issued, the clerk must forward the adoption order and a copy of the record of the adoption enquiry to the Adoption Registrar, and must also send originals of certain documents to the Adoption Registrar:

- Ⓞ the application for adoption
- Ⓞ the social worker report on the adoption application which was submitted to the court
- Ⓞ all consents to the adoption
- Ⓞ a notation regarding any consents that the court dispensed with
- Ⓞ an explanation of any circumstance where a consent was not required
- Ⓞ the original order of adoption
- Ⓞ the adopted child’s birth certificate.

The Adoption Registrar must keep copies of all the documents relating to a specific adoption for 10 years, and make sure that the documents are archived after that period.

- ◇ Child Care and Protection Act, sections 183(2)
- ◇ Child Care and Protection Regulations, regulation 70(1)-(3)

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## Information in the Adoption Register

- ⑨ the registration number of the record of the adoption case
- ⑨ the personal details and medical history of the adopted child and the birth parents
- ⑨ particulars of any successful appeal against an adoption order
- ⑨ particulars of any rescission of an adoption order
- ⑨ the name of any person who gave consent for the adoption
- ⑨ the name of any parent or guardian whose consent was dispensed with.

- ◇ Child Care and Protection Act, section 183(1)
- ◇ Child Care and Protection Regulations, regulation 70(2)

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### (10) Birth record

*Both the clerk of the children's court and the Adoption Registrar have a duty to notify the Ministry of Home Affairs and Immigration of an adoption order. These steps are intended to ensure the alteration of the child's birth record, so that the birth parents are replaced by the adoptive parents.*

The **clerk of the children's court** must submit notice of an adoption to the Minister of Home Affairs and Immigration on **Form 22E**, which is appended to the Child Care and Protection Regulations, along with the **adoption order** and the adopted child's **birth certificate**.

- ◇ Child Care and Protection Act, sections 181-182
- ◇ Child Care and Protection Regulations, regulation 71

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## Alteration of birth record and issue of new birth certificate

When the Minister of Home Affairs and Immigration receives the notice of an adoption from the clerk of the court, that Minister must –

- ⑨ cause the child's birth record to be altered in accordance with the adoption
- ⑨ issue a new full birth certificate reflecting the adoptive parent or parents as the parent or parents of the child
- ⑨ provide the original of the new birth certificate to the adoptive parent or parents
- ⑨ provide a copy of the new birth certificate to the Adoption Registrar.

- ◇ Child Care and Protection Regulations, regulation 71(2)

The **Adoption Registrar** is also responsible for notifying the Minister of Home Affairs and Immigration by sending a **certified copy of the adoption order**.

The Adoption Registrar may also provide information to birth registration authorities in other countries on request, where a child born in Namibia is adopted by citizens of another country.

◇ Child Care and Protection Act, sections 183(3) and (4)

If the name or surname of the adopted child is changed by the adoptive parents, **the adoptive parents must provide the Minister with a copy of the new birth certificate of the child** and the new name or surname of the child must be recorded in the Adoption Register.

◇ Child Care and Protection Act, sections 183(4)

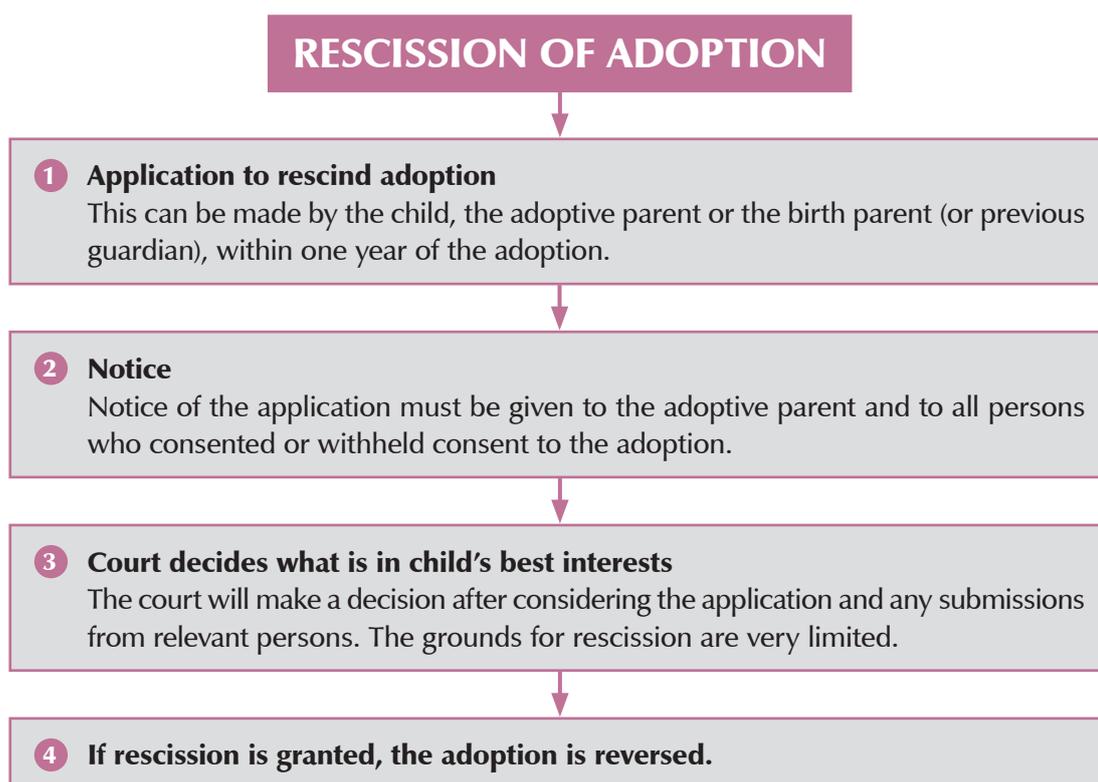


There is some confusion in the relevant provisions of the Act and the regulations on when a submission to the Minister of Home Affairs and Immigration involves the original adoption order or a copy of the order. The clerk is directed to send the original order to the Adoption Registrar (section 183(2)(b), regulation 70(1)) and also to the Minister of Home Affairs and Immigration (sections 181(1) and (2)(a), 182(1)). There are also some overlapping duties regarding the record of the adoption in Namibia's civil registration system, but this can serve as a safeguard to ensure that updating the birth record of an adopted child is not neglected.



**Every child deserves a family.**

## 3.4 Rescission of an adoption



**Application for rescission:** Rescissions of adoptions are very rare and difficult to obtain. A children's court may rescind an adoption order only within the first year after the adoption, and only in very limited circumstances:

- (1) An **application** for rescission of an adoption may be made only by –
  - ⊗ the child
  - ⊗ the adoptive parent
  - ⊗ a person who was a parent or guardian of the child immediately before the adoption.

An application for rescission is made on **Form 22F**, which is appended to the Child Care and Protection Regulations. The form must be submitted to the clerk of the children's court which issued the adoption order.

- (2) The *only* **grounds** for rescission are that –
  - ⊗ a parent or guardian's consent to the adoption was required but not obtained OR
  - ⊗ the adoptive parent was not actually qualified to adopt the child in terms of the law when the adoption order was made.
- (3) The rescission must be in the **best interests** of the child.

**Notice of application for rescission:** Notice of an application for rescission must be given to the adoptive parent and to all persons who consented or withheld consent to the adoption – although the person applying for rescission obviously does not have to receive notice of it. Notice must also go to the Minister and any other person who in the opinion of the court has a sufficient interest in the matter.

The clerk of the court must serve a notice of the rescission proceedings on **Form 22G**, which is appended to the Child Care and Protection Regulations, accompanied by a copy of the application for rescission, on each of the relevant persons. This notice must be served at least 30 days before the hearing of the application for rescission, in the same manner as the notice of the original application for adoption. See the box on pages 22-23.

The court will consider any **submissions** on the application for rescission and consider whether the proposed rescission would be in the child's **best interests**.

**Effect of rescission:** If an adoption order is rescinded, all rights and responsibilities in respect of the child that were terminated by the adoption are restored, and the adoptive parent no longer has any rights and responsibilities for the adopted child. The court will decide where the child should live immediately after a rescission.

The court might place the child in a place of safety or in an appropriate alternative placement, depending on the circumstances.

- ◆ Child Care and Protection Act, section 179-180
- ◆ Child Care and Protection Regulations, regulation 72-74



I wanted to apply for rescission of the adoption because it turns out that the baby I adopted has a heart murmur. But the social worker reminded me of my pre-adoption training, where we learned that there are no guarantees about the health of a child you adopt – just as there are no guarantees about the health of a child who is born to you. Health concerns or behaviour problems are not grounds for rescinding an adoption.

### Rescission subject to child's best interests

There are no reported cases in Namibia dealing with adoption rescissions as of July 2019. In South Africa, the courts have consistently applied the principle that the best interests of the child are paramount when dealing with the rescission of adoption orders made in the absence of parental consent (or appeals against such orders), giving particular weight to the amount of time which the child has spent with the adoptive family and the disruption that would be involved in rescinding an adoption.

- ◆ *AS v Vorster NO & Others* 2009 (4) SA 108 (SE)
- ◆ *T v C & Another* 2003 (2) SA 298 (W)
- ◆ *Belo v Commissioner of Child Welfare, Johannesburg & Others*;
- ◆ *Belo v Chapelle & Another* [2002] 3 All SA 286 (W)
- ◆ *Fraser v Naude & Others* 1999 (1) SA 1 (CC)

## 3.5 Access to information about adoption

The information about adoptions in the Adoption Register is generally confidential. However, an adopted child is entitled to access information about his or her birth parents at age 18. This is true even if the adoption was a “non-disclosed adoption”.

The adoptive parent also has a right to information about the birth parent's identity at this stage, if this was previously unknown.

If the adoptive parent and the child consent, the birth parent may also learn of the adoptive parent's identity at this point.

Vital medical information (such as information about an inherited condition) can be revealed before the child turns 18 if this is relevant to the child's health.

◇ Child Care and Protection Act, section 184

### Other routes to disclosure of information from the Adoption Register

Information from the Adoption Register can be disclosed for **official purposes**, subject to conditions determined by the Minister, or for **research purposes**, provided that no identifying information about individuals is revealed. For example, the Ministry might compile and reveal information about the number of adoptions which took place per year, or compile statistics on details such as the sexes and ages of adopted children.

A **court order** can direct disclosure of specific information from the Adoption Register if a court has found this to be in the best interests of the child concerned.

For example, a child who had a terminal illness and was not expected to reach age 18 might obtain a court order permitting access to information about the birth parents at an earlier age.

◇ Child Care and Protection Act, section 184(1)(d)-(f)

### Counselling before disclosure

The Minister may require a person to receive counselling before disclosing any information in the Adoption Register about an adoption involving that person.

◇ Child Care and Protection Act, section 184(2)

## 4. Inter-country adoptions

*This section gives an overview of the process for inter-country adoption, which is a very specialised area. Persons who are interested in inter-country adoption should contact the Ministry for more information.*

### 4.1 History of inter-country adoption

Inter-country adoption became common after World War II when many countries were left with war orphans but lacked the resources to care for them within the country. Inter-country adoptions became increasingly popular in the 1970s and 1980s, as a way to provide children to couples who could not have their own children. The increased demand to adopt children led to some problems, such as child trafficking and baby selling. This inspired greater international efforts to make sure that adoptions are child-centred, and to establish mechanisms to prevent abuses of the adoption process.

Inter-country adoption can be a way of providing for the best interests of orphans in situations where the extended family is broken down or overstretched. This is particularly true in light of the HIV/AIDS epidemic which has had a severe effect on many countries, particularly in Africa.

In Namibia, the **High Court** ruled in 2004 that it is unconstitutional to have a blanket rule preventing foreigners from adopting Namibian children, because such adoptions may sometimes provide the best family environment for a child.

Both the **Convention of the Rights of the Child** and the **African Charter on the Rights and Welfare of the Child** state that inter-country adoption may be considered as an alternative means of providing care for the child – *if* the child cannot be cared for in the country of origin in any suitable manner. The African Charter calls inter-country adoption a “last resort”.

Both agreements require governments to take measures (a) to ensure that the safeguards and standards for inter-country adoption are equivalent to those for domestic adoption; (b) to ensure that placement in inter-country adoption does not result in trafficking or improper financial gain for anyone involved; and (c) to promote bilateral or multilateral arrangements to regulate inter-country adoption.

The Register of Adoptable Children and Prospective Adoptive Parents (RACAP) is an important mechanism for the proper use of inter-country adoption. Having a central national register of all adoptable children and prospective adoptive parents makes it possible for social workers who are arranging adoptions to see if options for adoption within Namibia are available. The fact that *all* adoptions must be channelled through RACAP, whether facilitated by State or private social workers, ensures that inter-country adoption is not utilised for gain or to “supply” children to childless parents from other countries instead of for the best interests of the child.

## **Blanket ban on adoption of Namibian children by non-Namibians ruled unconstitutional**

### ***Detmold v Minister of Health and Social Services 2004 NR 174 (HC)***

In the 2004 *Detmold* case, the High Court found that the prohibition in the Children’s Act on the adoption of children born to Namibian citizens by non-Namibian citizens was unconstitutional. In this case, the applicants were German citizens and permanent residents of Namibia who were applying to adopt a child who had already been in their foster care for several years. They had been found suitable to be adoptive parents, and the child’s biological mother had consented to the adoption. The only obstacle to the adoption was their citizenship.

The Court found that the rule on citizenship violated Article 10 of the Namibian Constitution, which guarantees the equality of all persons before the law, and Article 14, which protects the family. The Court found that a family is “the best vehicle for bringing up children”, and that the next best thing to a biological family is an adoptive family, saying that it is therefore society’s duty “to make possible, and not hinder or frustrate, a family for every child given up for adoption”. It found that the strict prohibition on adoption by non-Namibian citizens was unconstitutional because it could deprive a child of the possibility of being adopted into a secure and stable family that might not otherwise be available to the child.

“ The need of a child should be paramount and not the need of childless foreign couples. The purpose of adoption is to find a suitable home for a child and not a suitable child for a family. This is a compelling factor that adoption agencies must carefully consider before they allow foreigners to adopt, especially foreigners from different nationalities. ”

◇ *NS v RH* 2011 (2) NR 486 (HC), paragraph 162

## 4.2 Hague Convention on Intercountry Adoption

Concerns about inter-country adoption led to the **Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption**, which is widely viewed as being the best mechanism for preventing abuses in respect of inter-country adoption. It provides procedures aimed at preventing abuses like abduction, exploitation, sale or trafficking of children.

The Hague Convention does not encourage inter-country adoption – quite the contrary, it says that inter-country adoption should take place only if authorities have determined that this would be in the child’s best interests, and after possibilities for placement of the child within the country of origin have been given due consideration. This is called the “**principle of subsidiarity**”.

The Hague Convention provides mechanisms to ensure that an inter-country adoption will be recognised in the country to which the child is going, so that the adopted child does not end up stateless in a foreign country. It also provides for cooperation between authorities in both the sending and receiving countries, to provide for proper monitoring and control.

**Namibia joined the Hague Convention on 21 September 2015, and it became operational in Namibia on 1 January 2016.** The Convention has the force of law in Namibia from that date.

### Principle of subsidiarity

“Subsidiarity’ in the Convention means that Contracting States recognise that a child should be raised by his or her birth family or extended family whenever possible. If that is not possible or practicable, other forms of permanent care in the State of origin should be considered. Only after due consideration has been given to national solutions should inter-country adoption be considered, and then only if it is in the child’s best interests. As a general rule, institutional care should be considered as a last resort for a child in need of a family.”

◇ *The 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption INFORMATION BROCHURE*, published by the Hague Conference on Private International Law, November 2012, page 5

The Child Care and Protection Act is designed to give practical effect to the provisions of the Hague Convention, by providing a framework for inter-country adoption which protects the best interests of Namibian children.

Joining the Convention does *not* mean that Namibia must entertain requests from anyone in the world who wants to adopt a Namibian child. If there are adoptable children in Namibia for whom no suitable adoptive parents can be found, Namibia can allow inter-country adoptions from a limited number of other Hague signatory countries with which Namibia has made agreements.

◇ Child Care and Protection Act, sections 188-189

## Habitual residence as the key factor

**The Hague Convention's definition of inter-country adoption does NOT depend on citizenship.** It defines an inter-country adoption as any adoption where parents who are *habitually resident* in one country want to adopt a child who is *habitually resident* in another country. The relevant point is whether the child will be moved from one country to another. This is when extra safeguards are needed.

“For many years the broad stance of developing countries was to discourage inter-country adoptions, regarding them as ‘exporting’ their children to developed countries, as a blemish on a country’s perceived ability to care for its citizens, and as exploitation of developing countries by developed ones. A major shift came about, however, as a result of the adoption and application of the Hague Convention. It is now largely accepted that most countries from both the receiving and sending sides of the world earnestly seek only to provide good alternative family care for ill-fated children. The standardisation and universalisation of criteria and controls have produced a situation where embracing the institution of inter-country adoption is increasingly less seen as a sign of weakness or the acceptance of ‘international charity’, or even a dereliction of a social welfare duty resting on a State. The emphasis has shifted to acknowledging that onerous duties are imposed on a sending State to apply diligently its discretion on whether an inter-country adoption would serve the best interests of the particular child involved.”

◆ *AD & Another v DW & Others (Centre for Child Law as Amicus Curiae; Department for Social Development as Intervening Party)*  
2008 (3) SA 183 (CC), paragraph 43 (footnotes omitted)

**This is true. I have a case where an orphaned child could be placed with his aunt outside Namibia, or with an unrelated family inside Namibia. If he stays inside Namibia, he can continue his education at the same school and maintain his cultural ties. I would not like to uproot him from his home country. But adoption by his aunt would be the only way that he can stay with a member of his birth family.**

It is not always easy to figure out how to apply the principle of subsidiary or to figure out what is in a child's best interests.



Cases like this are not easy. It is not possible to apply general rules. The circumstances of each case must be considered individually, with due consideration to the views of the child if the child is mature enough to express an opinion.

“...[The Hague Convention] addressed various objectives. Firstly, it sought to create legally binding standards in inter-country adoption. Secondly, it introduced a system of supervision that would ensure the observation of these legal standards, including prevention of adoptions that were not in the best interests of the child, and that would protect children from adoptions that occurred through duress, fraud or for monetary reward. Thirdly, it established communication channels between authorities in sending and receiving countries. Fourthly, it furthered cooperation between sending and receiving countries to promote confidence between those countries. What is clear is that the Convention seeks to regulate inter-country adoptions, not to facilitate them. ...”

◇ *AD & Another v DW & Others (Centre for Child Law as Amicus Curiae; Department for Social Development as Intervening Party) 2008 (3) SA 183 (CC), paragraphs 45-46 (footnotes omitted)*

## 4.3 Central Authority and accredited child protection organisations

**Who may provide inter-country adoption services in Namibia?:** In Namibia, inter-country adoption services can be provided by the Minister (or a staff member of the Ministry or an organ of state delegated by the Minister) or by accredited child protection organisations.

◇ Child Care and Protection Act, sections 190-191

**Central Authorities:** Every country which joins the Hague Convention identifies a Central Authority to handle inter-country adoptions. In Namibia, the “Central Authority” is the Minister responsible for child welfare. The Minister may delegate the powers or functions of a Central Authority to a staff member of the Ministry or to an organ of state, insofar as this is permitted by the Convention.

An inter-country adoption is arranged between the Central Authority of the “state of origin” (the country where the *child* is habitually resident, also sometimes called the “**sending state**”) and the Central Authority of the “**receiving state**” (the country where the *adoptive parent* is habitually resident). *An inter-country adoption can take place only by agreement between the Central Authorities of both countries.*

Namibia could be a sending state or a receiving state.

◇ Child Care and Protection Act, sections 190-191

**Accreditation of Namibian child protection organisations:** Namibian child protection organisations which are already authorised to perform domestic adoption services may apply to the Minister for accreditation to perform inter-country adoption services. The functions of a Central Authority in terms of the Hague Convention may be performed by public authorities or by accredited bodies, insofar as the laws of the relevant country permit this.

An application for accreditation must be made on **Form 23A**, which is appended to the Child Care and Protection Regulations, and submitted to the Minister. It must be accompanied by:

- evidence of expertise or knowledge relevant to inter-country adoption services
- a certificate of designation to facilitate domestic adoptions

- a list of social workers in the employment of the applicant who are designated to facilitate domestic adoptions
- the organisations' most recent audited financial statements
- any other information that the Minister may request.

If the application for accreditation is granted, the Minister will issue a certificate of accreditation on **Form 23B**. If the application is refused, the Minister must inform the applicant and provide written reasons. In either case, the communication will be delivered to the applicant by hand, courier or registered post.

An accredited child protection organisation may render inter-country adoption services and charge fees which are within the maximum rates specified in Annexure 2 of the regulations. It must submit an audited financial statement to the Minister every year, showing the financial position of the organisation, including fees received and payments made.

The cap on fees and the requirement to provide regular financial information are aimed at ensuring that the inter-country adoption process is not corrupted by persons who are willing to provide huge amounts of money in order to adopt a child. As of 2019, the maximum fee for an intercountry adoption services was set at N\$ 1 500 per adoption.

The period of accreditation is a maximum of two years at a time. The child protection organisation can apply for renewal of accreditation in the same way as it applied for the initial accreditation.

An application for renewal of accreditation must be submitted to the Minister at least three months before the current accreditation expires if the organisation wishes to continue offering inter-country adoption services.

The Minister may cancel an accreditation at any time if the child protection organisation is not complying with the requirements of the Act.

The Minister must inform the child protection organisation of an intention to cancel its accreditation at least seven days in advance, specifying the reasons. The Minister must give the child protection organisation an opportunity to make representations on the matter before making a final decision.

- ◇ Hague Convention, Article 22
- ◇ Child Care and Protection Act, sections 196
- ◇ Child Care and Protection Regulations, regulation 77

**Accreditation of foreign agencies to work in Namibia:** A body accredited in another country which is party to the Hague Convention may also apply to the Minister for authorisation to provide inter-country adoption services in Namibia.

The application must specify the applicant's relevant experience, It must also include proof of accreditation in the other country. If this application is approved, the Minister will issue a certificate of authorisation on **Form 23C**, which is appended to the Child Care and Protection Regulations.

- ◇ Child Care and Protection Act, sections 197
- ◇ Child Care and Protection Regulations, regulation 78

## Adoption working agreements between accredited bodies

An accredited child protection organisation may enter into an adoption working agreement with an accredited body from another country which is authorised to act in Namibia, if the Central Authority of Namibia approves the agreement. The Namibian child protection organisation must provide the Central Authority of Namibia with –

- ④ a certified copy of the proposed adoption working agreement
- ④ a certified copy of the accreditation of the foreign agency to provide inter-country adoption services in a country which is a party to the Hague Convention
- ④ the overseas body's certificate of authorisation to render inter-country adoption services in Namibia.

The two bodies may work together in terms of the adoption working agreement only after the agreement has been approved by the Central Authority of Namibia.

◇ Child Care and Protection Regulations, regulation 79

## 4.4 Inter-country adoption process

**Rules for domestic adoptions apply:** All of the rules and processes that apply to domestic adoptions also apply to inter-country adoptions, unless any of the rules are inconsistent with the Convention. However, there are some additional safeguards and processes that apply only to inter-country adoptions.

- ◇ Child Care and Protection Act, section 194
- ◇ Child Care and Protection Regulations, regulation 76

**International cooperation:** The procedure described in this chapter focuses on the situation where a child who is habitually resident in Namibia (the “state of origin” or the “sending state”) is adopted by a person or persons who are habitually resident in a country other than Namibia (the “receiving state”). In this situation, the Central Authority of Namibia will report on the child, and the Central Authority of the receiving state will report on the adoptive parent. An inter-country adoption can take place only if both Central Authorities are in agreement that it should proceed.

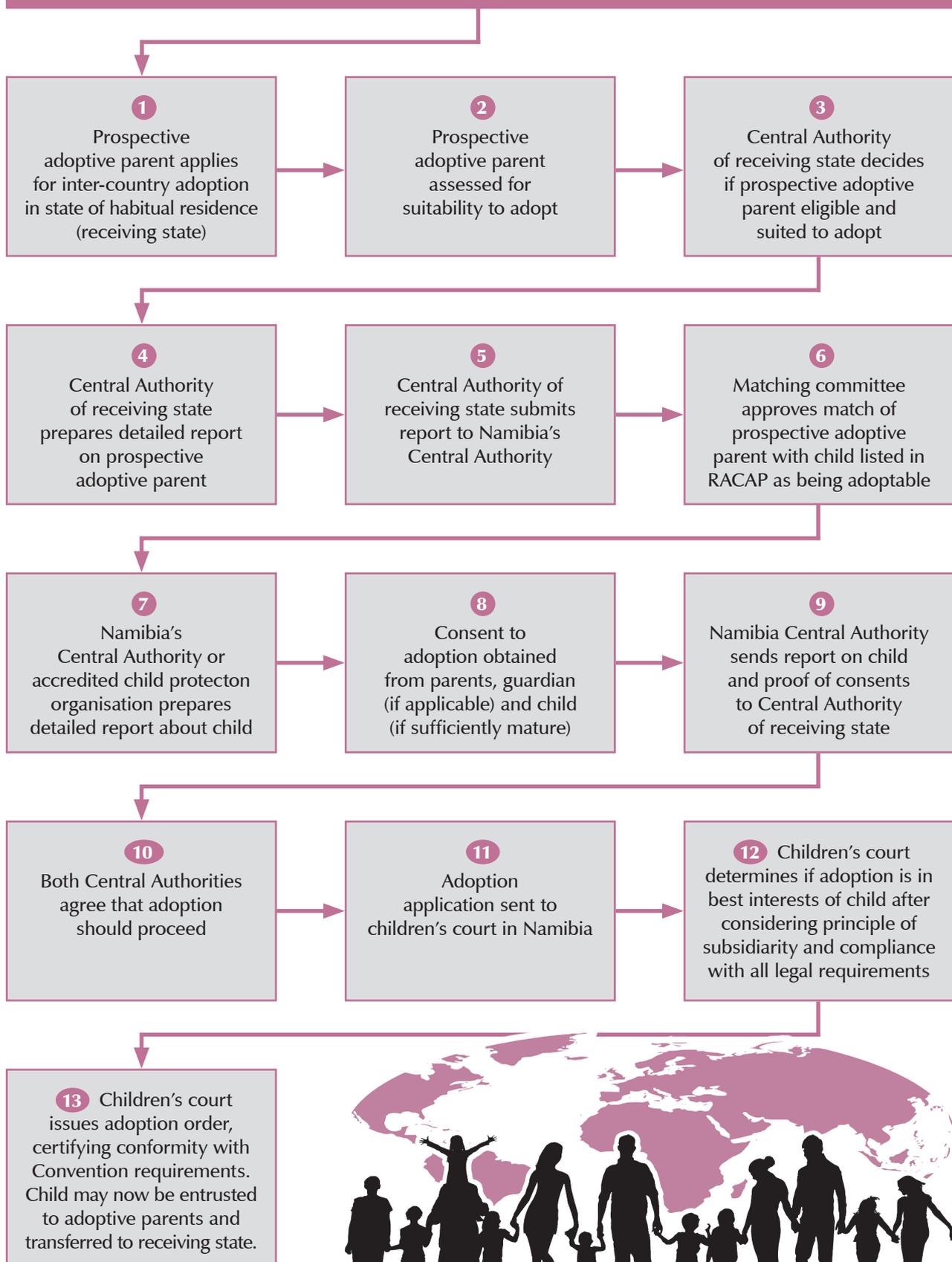
◇ Hague Convention, Article 17



**Where does an intercountry adoption take place – in the sending state or the receiving state?**

According to the Hague Convention, an inter-country adoption can take place either in the state of origin or the receiving state. (See Articles 2(1) and 28.) However, the Child Care and Protection Act contemplates that the adoption order for a child habitually resident in Namibia will be issued in Namibia as the state of origin. Section 168 of the Act says that the adoption of a child “is effected by an order of the children’s court of the district in which the adopted child resides”, and section 194 says that Part 1 of the chapter on adoption (which includes section 168) applies to the making of an adoption order under the Convention. Furthermore, section 198 prohibits the practice whereby a prospective adoptive parent obtains custody or guardianship of a child who is habitually resident and takes or send the child out of Namibia without first concluding an inter-country adoption.

## INTER-COUNTRY ADOPTION PROCESS for adoption of a child habitually resident in Namibia



**Application by prospective adoptive parents:** A person habitually resident outside Namibia who wishes to adopt a child habitually resident in Namibia (the “sending state”) must apply to the Central Authority of their own state of residence (the “receiving state”).

◇ Hague Convention, Article 17

**Report on prospective adoptive parents:** If the Central Authority of the receiving state is satisfied that the prospective adoptive parent is eligible and suitable to adopt, it must prepare a report which is similar to the social worker assessment in domestic adoptions. However, the requirements of the inter-country adoption report are even more comprehensive. The Hague Convention requires that this report must include information about –

- Ⓞ the applicant’s identity
- Ⓞ the applicant’s eligibility and suitability to adopt
- Ⓞ the applicant’s background
- Ⓞ the applicant’s family
- Ⓞ the applicant’s medical history
- Ⓞ the applicant’s social environment
- Ⓞ the applicant’s reasons for wanting to adopt
- Ⓞ the applicant’s ability to undertake an inter-country adoption.

The report must also discuss the characteristics of children that the applicant would be qualified to care for (age, sex, special needs, etc).

The Child Care and Protection Regulations contain more detail. They require that the report must include comprehensive information about –

- Ⓞ the applicant’s ethnic, religious and cultural background
- Ⓞ the applicant’s childhood
- Ⓞ the applicant’s immediate family members and the members of the applicant’s household
- Ⓞ the applicant’s character
- Ⓞ the attitude of the applicant’s immediate family members towards the inter-country adoption
- Ⓞ the plan for integration with siblings, where applicable
- Ⓞ the plan for relocation of the child from Namibia to the place where the applicant resides
- Ⓞ a description of the adoption counselling that has been received by the applicant
- Ⓞ an assessment of the suitability of the applicant to adopt the child in question by a body recognised to deal with inter-country adoption in the receiving State
- Ⓞ the ability of the applicant to undertake inter-country adoption
- Ⓞ the reasons why the applicant wishes to adopt.

The report must be accompanied by the following documentation:

- Ⓞ a certified copy of the identity document or passport of the applicant;
- Ⓞ a medical report on the health status of the applicant;
- Ⓞ the marriage certificate of an applicant who is married;
- Ⓞ a police clearance certificate indicating that the applicant has no previous criminal record relating to child neglect or abuse, drug trafficking, any law relating to the protection of children or any of the offences listed in section 238 of the Act (see the box on page 9);
- Ⓞ proof of citizenship, permanent residence or domicile in the receiving State.

This report must be transmitted to the Central Authority of Namibia, which is the sending state.

Where two persons intend to adopt a child jointly, the required information must be provided in respect of each of them.

- ◆ Hague Convention, Article 15
- ◆ Child Care and Protection Regulations, regulation 82

**Matching of prospective adoptive parents and adoptable children for inter-country adoption:** The prospective adoptive parents will be matched with a child listed in RACAP as an adoptable child. This will be done by a committee consisting of at least three social workers identified by the Minister, at least one of whom must be a staff member of the Ministry of Health and Social Services who is nominated by that Ministry. The committee will determine whether an envisaged placement will be in the best interests of the adoptable child.

- ◆ Child Care and Protection Regulations, regulation 83

**Applying the principle of subsidiarity:** Inter-country adoption may take place only after possibilities for placement of the child within Namibia have been given due consideration, and the inter-country adoption appears to be in the child's best interests. Inter-country adoption will not be considered if a family member or relative of either of the child's parents –

- Ⓞ is habitually resident in Namibia
  - Ⓞ is willing to adopt the child
  - Ⓞ has been approved as a prospective adoptive parent
- AND
- Ⓞ is suitable to care for the child in question (taking into account any special needs of the child).

A child who is in permanent foster or stable kinship care within Namibia is *not* considered to be in need of permanent alternative placement, and so would not for that reason alone be listed in RACAP as being adoptable.

- ◆ Child Care and Protection Act, section 169(3)
- ◆ Child Care and Protection Regulations, regulation 80

**Report on adoptable child:** After the matching takes place, the Namibian Central Authority must prepare a report on the child. This report must contain all of the information which would be required in a social worker report for a domestic adoption, including information about –

- Ⓞ the child's identity
- Ⓞ the child's adoptability
- Ⓞ the child's background
- Ⓞ the child's social environment
- Ⓞ the child's family history
- Ⓞ the medical history of the child and the child's family
- Ⓞ any special needs of the child
- Ⓞ comprehensive information regarding the efforts that have been made to provide suitable alternative or permanent care in Namibia.



**Matching is ideally done by a team rather than being the responsibility of a single individual. It is one of most important steps in securing the best interests of the child in the adoption process and should be carried out by competent persons with appropriate expertise and experience.**

◆ *The Implementation and Operation of the 1993 Hague Intercountry Adoption Convention: Guide to Good Practice No 1*, Hague Conference on Private International Law, 2008, paragraphs 357, 362

The Namibian Central Authority must also ensure that the required consents have been obtained, and that the proposed placement would be in the best interests of the child, giving due consideration to the child's upbringing and to his or her ethnic, religious and cultural background. It will send the report and the associated documentation to the Central Authority of the receiving state, taking care not to reveal the identity of the child's biological parents if they have requested a non-disclosed adoption.

◇ Hague Convention, Article 16

◇ Child Care and Protection Regulations, regulation 81

### Subsidiarity and best interests

“ 51. The principle of subsidiarity should be interpreted in the light of the principle of the best interests of the child. For example:

- ⑨ It is true that maintaining a child in his or her family of origin is important, but it is not more important than protecting a child from harm or abuse.
- ⑨ Permanent care by an extended family member may be preferable, but not if the carers are wrongly motivated, unsuitable, or unable to meet the needs (including the medical needs) of the particular child.
- ⑨ National adoption or other permanent family care is generally preferable, but if there is a lack of suitable national adoptive families or carers, it is, as a general rule, not preferable to keep children waiting in institutions when the possibility exists of a suitable permanent family placement abroad.
- ⑨ Finding a home for a child in the country of origin is a positive step, but a temporary home in the country of origin in most cases is not preferable to a permanent home elsewhere.

Institutionalisation as an option for permanent care, while appropriate in special circumstances, is not as a general rule in the best interests of the child. ”

◇ *The Implementation and Operation of the 1993 Hague Inter-country Adoption Convention: Guide to Good Practice No 1*, Hague Conference on Private International Law, 2008, paragraph 51 (footnote omitted)

**Referral to children's court for decision:** An application for an inter-country adoption must be submitted to the Central Authority of Namibia on **Form 22A**, which is appended to the Child Care and Protection Regulations. The application must be submitted together with the report from the Central Authority of the receiving State on the prospective adoptive parents.

*Form 22A is the same application form which is used for domestic adoptions.*

The Central Authority may refer an inter-country adoption to a children's court for decision **ONLY IF** –

- ⑨ the Central Authorities of both States are in agreement that adoption may proceed
- ⑨ the Central Authority of Namibia has confirmed that –
  - the prospective adoptive parents are eligible and suited to adopt
  - the prospective adoptive parents have been counselled as necessary and agreed to the adoption
  - the child will be authorised to enter and reside permanently in the receiving State
  - all applicable consents have been given
  - all other requirements of the Act have been complied with.

Once it is satisfied on these points, the Central Authority of Namibia must refer the application to the children's court, together with the report from the Central Authority of Namibia on

the adoptable child and the report from the Central Authority of the receiving State on the prospective adoptive parents.

The children's court may make an inter-country adoption order ONLY IF it is satisfied that all the requirements for a domestic adoption have been met. In addition:

- (1) The children's court must be satisfied that the requirements for referral to the children's court by the Central Authority have indeed been met.
- (2) The children's court must be satisfied that an inter-country adoption appears to be in the best interests of the child, and that possibilities for placement of the child within Namibia were given due consideration.
- (3) The children's court must be satisfied that the arrangements for the inter-country adoption comply with the requirements of the Hague Convention.

The children's court must issue an order for inter-country adoption on **Form 23D**, which is appended to the Child Care and Protection Regulations.

- ◆ Child Care and Protection Act, sections 192-194
- ◆ Child Care and Protection Regulations, regulation 84
- ◆ Hague Convention, Articles 14-20

**Transfer of child:** The physical transfer of the child must take place in secure circumstances and if possible in the company of the adoptive parents.

- ◆ Hague Convention, Article 19

**Limits on contact:** The Hague Convention is clear that there can be no contact between the prospective adoptive parents and the child's birth parent or care-giver until it has been determined that the adoptive parents are eligible and suitable to adopt, the child is adoptable, the necessary consents have been given and it has been determined that inter-country adoption is in the best interests of the child.

This rule is designed to prevent improper inducements or pressures. There are **exceptions** to the rule where the adoption takes place within a family, or where the contact is in compliance with conditions established by a competent authority in the sending state.

- ◆ Hague Convention, Article 29



### **Certification that the inter-country adoption was made in conformity with the Hague Convention**

Article 23 of the Hague Convention requires that an inter-country adoption must be certified by the competent authority of the State where the adoption took place as having been made in accordance with the Convention, in order for the adoption to be recognized in other countries which are parties to the Hague Convention.

Form 23D which is the template for a children's court order for inter-country adoption in Namibia, was designed to serve as a certificate of compliance for this purpose, as it makes reference to Article 23 of the Hague Convention.

However, there is a problem with this approach. Regulation 84(2) requires that the Central Authority of Namibia must refer an application for inter-country adoption to the children's court of the district where the child resides. But, according to section 192 of the Act, only certain children's courts are competent to certify that an adoption has been made in accordance with the Convention for the purposes of Article 23 of the Convention. This must be done by a children's court designated by the Minister of Justice with the concurrence of the Minister responsible for child welfare (Namibia's Central Authority) and the Magistrate's Commission.

The Hague Convention Guide to Good Practice provides a model form for Article 23 certification and gives the following guidance:

#### **Issuing the Article 23 certificate of conformity**

383. The Article 23 certificate of conformity with Convention requirements must be issued by a competent authority after the adoption is finalised. It should be issued promptly, and the adoptive parents should receive the original certificate, and a copy should be sent to the Central Authorities of both countries. The authority competent to issue the certificate must be notified to the Permanent Bureau, in accordance with Article 23(2)...

384. There has been some uncertainty, arising from variations in practice, as to the mandatory nature of the certificate under Article 23 of the Convention: in some States a certificate is given automatically or very easily while in other States adoptive parents have to apply for it. The absence of a certificate causes difficulties for recognising the adoption and for according the child the nationality of the receiving State.

385. A model form for the certificate of conformity is a recommended form, not a mandatory form. Therefore, States may choose the manner in which they certify conformity with the Convention, provided all the relevant information is included in the certifying document. However the benefits of using the form are that it covers all the relevant details, it is easily understood and it is becoming more widely used. (footnotes omitted)

The issue of Article 23 certification in Namibia needs clarification.

- ◆ Child Care and Protection Act, section 192
- ◆ Child Care and Protection Regulations, regulation 84
  - ◆ Hague Convention, Article 23
- ◆ *The Implementation and Operation of the 1993 Hague Inter-country Adoption Convention: Guide to Good Practice No 1*, Hague Conference on Private International Law, 2008, section 7.2.12

## **4.5 Exceptional cases of inter-country adoption**

**Family members resident in other Hague countries:** Inter-country adoption of a child who is habitually resident in Namibia by a family member who is resident in a country that is a party to the Hague Convention will work in the same way as any other inter-country adoption, except that priority over other applicants must be given to –

- ⊙ a person married to the biological parent of the child or
- ⊙ a family member with close ties to the child or a pre-existing relationship with the child.

All of requirements for inter-country adoption must be met by the person in question, but some of the formalities for inter-country adoptions may be relaxed in cases of adoption by a step-parent or a family member who already has a relationship with the child. As always, the best interests of the child is the key factor.

- ◆ Child Care and Protection Act, section 195(1)
- ◆ Child Care and Protection Regulations, regulation 85(1)

## In-family inter-country adoptions: Subsidiary and best interests

“516. A question may arise concerning the application of the principle of subsidiarity to in-family intercountry adoptions: would that not mean that one would first have to try finding an adoptive family in the State of origin? In most cases, such a family could be found and the family abroad would not be able to adopt the child. However, the overarching principle of the Convention is the best interest principle, not the subsidiarity principle. While it is important to look for a home in the country of origin, a permanent home in another country would be preferable to a temporary home in the country of origin. It is necessary to consider all the relevant factors to decide which is the better family for the child and where is the best permanent home for that child.

517. An adoption by a family member abroad would be preferable to a national adoption if the former was in the child’s best interest. For example, if the non-relative prospective adopters in the country of origin, and the relative prospective adopters abroad, were equally well qualified to care for the child, preference might be given to the relative adopters in order to preserve the family bond. It is necessary to examine, on a case-by-case basis, if an in-family intercountry adoption is in the best interest of the child.”

◇ *The Implementation and Operation of the 1993 Hague Intercountry Adoption Convention: Guide to Good Practice No 1*, Hague Conference on Private International Law, 2008, section 8.6.4 (bracketed references omitted).

Adoptions will be allowed *outside the framework of the Hague Convention*, where the adoptive parent is habitually resident in a country that is *not* a party to the Hague Convention, **ONLY** in certain special circumstances:

- (1) adoption by family members of the child
- (2) adoption by a person with a pre-existing relationship with the child
- (3) where the child has some special need which can only be catered for in the country of habitual residence of the prospective adoptive parent (such as an unusual medical issue or learning disability).

However, even in these rare circumstances, safeguards will apply:

- ⊙ The prospective adoptive parent must have been assessed for eligibility to adopt.
- ⊙ The adoption must be recognised in the country of habitual residence of the adoptive parent.
- ⊙ It must be clear that the child would be allowed to enter and remain permanently in the adoptive parent’s country of habitual residence
- ⊙ The standards applied to the adoption must accord with those in the Hague Convention, even though the Convention is not directly applicable.

Such an adoption must proceed, as far as possible, in the same manner as an inter-country adoption covered by the Hague Convention, through direct liaison with the relevant authority dealing with adoption in the adoptive parent’s country of habitual residence. It must be remembered that abuses can and do take place in adoptions by family members.

- ◇ Child Care and Protection Act, section 195(2)
- ◇ Child Care and Protection Regulations, regulation 85(2)

## 4.6 No circumvention of inter-country adoption

The Child Care and Protection Act closed a loophole which has been exploited in South Africa to circumvent inter-country adoption.

A person who is not habitually resident in Namibia may not avoid the safeguards applicable to inter-country adoption by becoming a child's legal custodian or guardian (by means of a court order or in any other way) with a view to removing the child from Namibia in order to complete the adoption process elsewhere. In such a case, the child may not be removed from Namibia until an inter-country adoption has been concluded.

Violation of this rule is a crime punishable by a fine of up to N\$50 000 or imprisonment for up to ten years or both.

If application is made to the High Court for custody or guardianship of a child who is habitually resident in Namibia by a person who is not habitually resident in Namibia, the High Court must refer the case to an appropriate children's court for treatment as an inter-country adoption.

- ◆ Child Care and Protection Act, section 198
- ◆ *AD & Another v DW & Others (Centre for Child Law as Amicus Curiae)* 2007 (5) SA 184 (SCA), partly confirmed and partly reversed on appeal in
- ◆ *AD & Another v DW & Others (Centre for Child Law as Amicus Curiae; Department for Social Development as Intervening Party)* 2008 (3) SA 183 (CC)

### The right to arrange inter-country adoptions only with selected countries

***“Is a country of origin obliged to make intercountry adoption arrangements with all receiving countries which are Parties to the Convention?”***

450. The fundamental point is that a State's obligations under the Convention should be viewed in the light of the principle of the child's best interests. The Convention does not oblige a State to engage in any intercountry adoption arrangements where these are not seen to be in the best interests of the individual child. Considerations of children's best interests may lead to a preference by a country of origin for placements in particular receiving countries. Moreover, limited capacity and scarce resources in the country of origin may also be a good reason for limiting the number of countries, or accredited bodies, with which a country of origin can realistically enter into effective, well-managed and properly supervised co-operative arrangements. Indeed, attempting to deal with too many receiving countries, or too many accredited bodies, may constitute bad practice if its effect is to dilute to an unsatisfactory level the control which a country of origin must necessarily exercise over the intercountry adoption process.

451. At the same time, the more general obligation of co-operation under the Convention does require that Contracting States generally should deal with each other in an open and responsive manner. This includes countries of origin being ready to explain when and why certain policies may have to be maintained. Equally, receiving countries should be sensitive to the difficulties that countries of origin may have in developing a well-managed system of alternative child care when they are subjected to excessive pressures from receiving countries.”

- ◆ *The Implementation and Operation of the 1993 Hague Intercountry Adoption Convention: Guide to Good Practice No 1*, Hague Conference on Private International Law, 2008, section 8.6.4 (bracketed references omitted).

## UNICEF Statement on Inter-Country Adoption, 2015

Since the 1960s, there has been an increase in the number of intercountry adoptions. Concurrent with this trend, there have been growing international efforts to ensure that adoptions are carried out in a transparent, non-exploitative, legal manner to the benefit of the children and families concerned. In some cases, however, adoptions have not been carried out in ways that served the best interest of the children – when the requirements and procedures in place were insufficient to prevent unethical practices, such as the sale and abduction of children, coercion or manipulation of birth parents, falsification of documents and bribery.

The Convention on the Rights of the Child, which guides UNICEF’s work, clearly states that every child has the right to grow up in a family environment, to know and be cared for by her or his own family, whenever possible. Recognising this, and the value and importance of families in children’s lives, families needing assistance to care for their children have a right to receive it. When, despite this assistance, a child’s family is unavailable, unable or unwilling to care for her/him, then appropriate and stable family-based solutions should be sought to enable the child to grow up in a loving, caring and supportive environment.

Intercountry adoption is among the range of stable care options. For individual children who cannot be cared for in a family setting in their country of origin, intercountry adoption may be the best permanent solution.

UNICEF supports intercountry adoption, when pursued in conformity with the standards and principles of the 1993 Hague Convention on Protection of Children and Co-operation in Respect of intercountry Adoptions – currently ratified by 95 countries. This Convention is an important development for children, birth families and prospective foreign adopters. It sets out obligations for the authorities of countries from which children leave for adoption, and those that are receiving these children. The Convention is designed to ensure ethical and transparent processes. This international legislation gives paramount consideration to the best interests of the child and provides the framework for the practical application of the principles regarding inter-country adoption contained in the Convention on the Rights of the Child. These include ensuring that adoptions are authorised only by competent authorities, guided by informed consent of all concerned, that intercountry adoption enjoys the same safeguards and standards which apply in national adoptions, and that intercountry adoption does not result in improper financial gain for those involved in it. These provisions are meant first and foremost to protect children, but also have the positive effect of safeguarding the rights of their birth parents and providing assurance to prospective adoptive parents that their child has not been the subject of illegal practices.

The case of children separated from their families and communities during war or natural disasters merits special mention. Family tracing should be the first priority and intercountry adoption should only be envisaged for a child once these tracing efforts have proved fruitless, and stable in-country solutions are not available. This position is shared by UNICEF, UNHCR, the UN Committee on the Rights of the Child, the Hague Conference on Private International Law, the International Committee of the Red Cross, and international NGOs such as the Save the Children Alliance and International Social Service.

UNICEF offices around the world support the strengthening of child protection systems. We work with governments, UN partners and civil society to protect vulnerable families, to ensure that robust legal and policy frameworks are in place and to build capacity of the social welfare, justice and law enforcement sectors.

Most importantly, UNICEF focuses on preventing the underlying causes of child abuse, exploitation and violence.

◆ “Intercountry adoption”, UNICEF website:  
<[www.unicef.org/media/intercountry-adoption](http://www.unicef.org/media/intercountry-adoption)>, 26 June 2015

## 5. Crimes

People who are desperate to adopt children are often willing to pay huge amounts of money to birth parents or to social workers who arrange adoptions. This can take place in respect of both domestic and inter-country adoptions. But children should not be for sale. There are a number of crimes aimed at preventing improper practices in respect of adoptions.

### **Unauthorised facilitation of adoption:**

It is a crime for anyone to provide adoption services or facilitate an adoption without being properly authorised to do so. The penalty for these crimes is a fine of up to N\$20 000, or imprisonment up to five years, or both.

◆ Child Care and Protection Act, section 185(1) and (6)

### **Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption**

#### **“ Article 32**

- (1) No one shall derive improper financial or other gain from an activity related to an inter-country adoption.
- (2) Only costs and expenses, including reasonable professional fees of persons involved in the adoption, may be charged or paid.
- (3) The directors, administrators and employees of bodies involved in an adoption shall not receive remuneration which is unreasonably high in relation to services rendered. ”

**Payments in connection with adoption:** It is a crime to give or receive cash or any other form of compensation in connection with the adoption of a child, except for a small list of permitted payments. It is also a crime to use any means to induce another person to give up a child for adoption. The penalty for these crimes is a fine of up to N\$20 000, or imprisonment up to five years, or both.

◆ Child Care and Protection Act, section 185(2)-(3) and (6)

### **Permitted payments**

- (1) Where a biological parent intends to give up a baby for adoption by a specific adoptive parent, the prospective adoptive parent may pay certain expenses incurred by the child's birth parent:
  - Ⓞ accommodation immediately before or after the child's birth, where the birth mother does not live in reasonably close proximity to a suitable or preferred health facility
  - Ⓞ any pregnancy- and birth-related costs incurred at a public or private health care facility
  - Ⓞ travelling to and from a health facility
  - Ⓞ food, water and vitamin supplements during pregnancy
  - Ⓞ pre-natal courses to prepare for birth
  - Ⓞ professional counselling services.These payments may NOT be made directly to the birth parent. They MUST be arranged through a designated social worker OR paid directly to the medical institution or other service provider in question.
- (2) Payment of prescribed fees to a legal practitioner, psychologist or other professional person for services provided in connection with an adoption.
- (3) Payments made by or to an organ of state in connection with an adoption.

Any permitted expenses are NOT refundable if the adoption fails to take place due to the death of the child or for any other good faith reason. Requiring re-payment could place unfair hardship on the birth parent.

- ◆ Child Care and Protection Act, section 185(2)-(6)
- ◆ Child Care and Protection Regulations, regulation 73

**Advertisements about adoptions:** Advertisements about adoptions are also strictly regulated. Only general announcements, such as information about the need for adoptive parents, are allowed. It is a crime to arrange or to publish by any means an advertisement dealing with the placement or adoption of a specific child or soliciting anyone to be a surrogate mother. The penalty for these crimes is a fine of up to N\$20 000, or imprisonment up to five years, or both.

- ◆ Child Care and Protection Act, section 186(1)-(3)

I heard that it is illegal to pay the birth mother for giving her child up for adoption, so I am going to give her an expensive diamond ring.



## Permitted advertisements

- (1) Publication of a court order or a notice in terms of the Act
- (2) Advertisements by the Ministry for purposes of recruiting prospective adoptive parents for inclusion in RACAP
- (3) Advertisements by a social worker authorised to provide adoption services for the purpose of recruiting prospective adoptive parents, placed in a newspaper widely circulating in Namibia – as long as such advertisements are not placed more than once every four months.

- ◆ Child Care and Protection Act, section 186(2)
- ◆ Child Care and Protection Regulations, regulation 74

That is also illegal. It is against the law to provide any form of compensation or inducement to the birth mother to get her to give up her baby. That kind of thing could lead to “baby-farming”, where people conceive children to be adopted as a way to earn money. We do not want to encourage such a thing in Namibia!

“Country reports and Committee observations highlight the **widespread concern about the trafficking of children for adoption**. While payments by adoptive couples may be made in good faith and without harm to the child, **a system that puts a price on a child’s head is likely to encourage criminality, corruption and exploitation**. Article 35 of the Convention on the Rights of the Child requires States Parties to take measures to prevent the sale of children for any purpose... The Optional Protocol on the sale of children, child prostitution and child pornography... obliges States Parties to criminalize any improper financial gain from the adoption of a child as an extraditable offence... The Committee’s concerns in this area are primarily because of the danger of children being trafficked. However, it has also signalled its **disapproval of any form of profiteering from inter-country adoption**.”

- ◆ *Implementation Handbook for the Convention on the Rights of the Child*, UNICEF, 3<sup>rd</sup> edition, 2007, page 299 (emphasis added)