



CONSENT TO ADOPTION BY FATHERS OF CHILDREN BORN OUTSIDE MARRIAGE

Formal adoption is a major step. Adoption completely extinguishes all parental rights and responsibilities. The adoptive parents step into the shoes of the biological parents and become the parents of the child in every way. This means that consent to adoption – or the process of overruling lack of consent – is a serious matter which no court would take lightly.

The rules on consent to adoption by the fathers of children who are born outside marriage are in a state of transition.

Before 2006, the fathers of children born outside marriage did not have to be consulted about the adoption at all. In terms of the *Children's Act 33 of 1960*, only the consent of the mother was required in this situation. This was probably because, at that time, there was no scientific test which could definitively prove paternity. Now DNA tests can prove paternity with great certainty. Moreover the Namibian Constitution forbids sex discrimination – meaning that excluding fathers from the consent process entirely would probably be unconstitutional.

The *Children's Status Act 6 of 2006* introduced new rules on consent to adoption by fathers of children born outside marriage. This law, which is currently still in force, requires the consent of both parents for the adoption of a child, with several exceptions which apply to both mothers and fathers: (1) No consent is required if the parent in question cannot be located after reasonable efforts. (2) No consent is required from a parent who is so mentally incapacitated that he or she is unable to give valid consent. (3) No consent is required from a parent who has deserted a child, which includes being convicted of mistreating or neglecting the child, or failing to contribute to the child's support while being financially able to do so. (4) The children's court has the power to decide that the consent requirement would not serve the best interests of the child. (5) The children's court also has the power to overrule lack of consent where consent is being unreasonably withheld – such as in a case where a parent was trying to block an adoption but had no desire for involvement with the child.

The rules on consent will be changed once again when the Child Care and Protection Act 3 of 2015 comes into force. The basic rule will still be that the consent of both parents is required before a child can be adopted. However, this forthcoming law will provide a longer list of exceptions to the consent of any parent.

Some of the exceptions are similar to those in the existing law. (1) As the case is now, no consent will be required if the parent cannot be located after reasonable efforts. (2) As now, no consent will be required from a parent who is so mentally incapacitated that he or she is unable to give valid consent, provided that this mental incapacity is confirmed by a suitably-qualified professional. (3) Similar to the current situation, no consent will be required from a parent who has abused or deliberately neglected a child, or allowed someone else to do this – with neglect being defined as the failure of a person who is taking care of a child to provide for the child's basic physical, intellectual, emotional or social needs. And, similar to the current situation, no consent will be required from a parent who has abandoned a child – which includes obvious desertion by the parent or failure by the parent, for no apparent reason, to have any contact with the child for a period of at least three months.

There will also be some additional exceptions to the consent requirement when the new law comes into force. (4) No consent will be required from a parent who has made no attempt to fulfil his

or her parental responsibilities towards the child during the previous 12 months – such as taking no responsibility for the child’s care or maintenance. This exception is designed to prevent uninterested, uninvolved parents from standing in the way of their children’s best interests. (5) No consent is required from a parent who has been convicted of a serious offence against the child in question – such as rape, incest, kidnapping or abduction, trafficking, a sexual offence, or a serious assault.

There are also two exceptions which will in future apply only to biological fathers: (6) No consent is required if the biological father is not married to the child’s mother and has not acknowledged paternity, either formally on the child’s birth certificate or informally by attempting to pay maintenance or by providing seduction damages under customary law. This exception means that the father cannot “have it both ways”, by failing to acknowledge that he is the child’s father and yet at the same time trying to stand in the way of an adoption. (7) No consent is required from a biological father if the children’s court finds that the child was conceived as a result of his rape of the mother.

Once the new law is in force, it will (as now) be possible for the children’s court to overrule lack of consent which is unreasonably withheld, if the adoption would be in the child’s best interests. In considering this step, the court will be required to consider the nature of the relationship between the child and the parent who is refusing consent during the last two years, and the prospects of a sound relationship developing between the child and this parent in the immediate future. A court will normally be guided by the social worker assessment which is required in the case of any proposed adoption.

The issue of consent sometimes arises in situations where a child’s parent has married another partner, and the new step-parent wishes to adopt the child who is living in their care. However, it is important to remember that a child in such circumstances can have a close and meaningful relationship with both the absent biological parent and the step-parent in the household, with or without a formal adoption. It is also important to remember that adoptions in step-parent situations would almost always be disclosed adoptions, where the identity of the father and the step-father would be known to each other - meaning that the step-parent, as the adoptive father, might give consent to the biological father to continue to visit and communicate with the child.

The key issue in any adoption is the best interests of the child and not the interests of the biological parents or the prospective adoptive parents. Everyone involved must always keep in mind that the child’s well-being comes first.

ProBono is a monthly column by the Legal Assistance Centre designed to inform the public about Namibian law on various topics. You can request information on a specific legal topic by sending an SMS to 081-600-0098. Note that we will not be able to give advice on specific cases in this column, only general legal information.