

What is adoption?

Adoption is the process where a person applies in court to be considered as the parent of a child in terms of the Child Care and Protection Act 3 of 2015 .

Who may be adopted?

- Any child, who is defined as a person who has not attained the age of 1 years, may be adopted, where:
- the child does not have a parent and does not have a suitable guardian or care-giver willing to care for him or her
 - the whereabouts of the child's parent or guardian cannot be established and the child does not have a suitable guardian or care-giver willing to care for him or her;
 - the child has been abandoned;
 - the child is to be adopted by a step-parent;
 - the child is in need of a permanent alternative care; or
 - the child's parent or guardian has consented to the adoption.

Who can apply to adopt a child?

- The following persons may adopt a child:
- the spouses in a marriage, jointly;
 - the spouse of a parent of the child; or
 - a widower, widow, divorced or an unmarried person, including the foster parent, kinship care-giver or primary caretaker of the child.

But a prospective adoptive parent must be:

- fit and proper to fulfil parental responsibilities and rights; willing and able to exercise, undertake and maintain parental responsibilities and rights;
- living in circumstances which are suitable for the adoption of a child;
- 25 years of age and older, unless the applicant or applicants can show grounds why he, she or they are suitable to adopt a child at a younger age, but a child may be adopted by a married couple jointly where at least one of the spouses is 25 years of age or older;
- properly assessed by a designated social worker to determine that the prospective adoptive parent has complied with all the requirements and any proposed exception to the age limit;
- in possession of a valid police clearance certificate; and habitually resident in Namibia or if a married couple each of them must be habitually resident in Namibia.
- the social worker conducting the assessment, may require, if he or she considers it to be in the best interest of the child to be adopted, that other members of the household where the child is to live be in possession of a valid police clearance certificate.

- A prospective adoptive parent who is not a Namibian citizen but who is habitually resident in Namibia may only be registered as a prospective adoptive parent if the Minister is satisfied:
- that the country of which that person has citizenship recognises the adoption;
 - that the child may enter the country and remain there permanently.

A person who wishes to be approved as a prospective adoptive parent must make an application to a designated social worker for an assessment.

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

A person who has been convicted of an offence such as murder, rape, indecent assault, incest, kidnapping, any statutory sexual offence, any offence relating to the manufacture, distribution or possession of pornography; or any offence relating to human

trafficking, abduction, excluding the wrongful removal or retention of a child by a parent with parental responsibilities, whether domestic or as contemplated in the Hague Convention on International Child Abduction; or assault with intent to cause grievous bodily harm is not a fit and proper person to be an adoptive parent.

Who must give consent to an adoption?

The adoption order is granted by the children's court and the court must only make an adoption order, if consent for the adoption has been given by -

- each parent of the child regardless of whether the parents are married or not and regardless of whether the parent is a major or minor, but a minor parent who has a parent or guardian must be assisted by that parent or guardian, if available, unless the children's court dispenses with such assistance with due regard to the best interests of the minor parent and the child whose adoption is under consideration;
- any other person who holds guardianship in respect of the child to be adopted, excluding the guardian of a minor;
- the child to be adopted, if the child is 10 years of age or older; and
- the child to be adopted, if the child is under the age of 10 years, but of sufficient maturity and stage of development to understand the effect of giving consent

Before consent for the adoption of the child is granted, the designated social worker facilitating the adoption of the child must counsel the parents of the child and depending on the child's age, maturity and stage of development the child on the decision to make the child available for adoption.

Consent to the adoption of a child may not be given before the birth of the child.

- If the consent is given inside Namibia;
- It must be in writing and
 - signed by the person consenting in the presence of a children's commissioner;
 - verified by a children's commissioner; and
 - filed by the clerk of the children's court pending an application for the adoption of the child; or
- If the consent is given outside Namibia, it must be in writing and
- signed by the person consenting in the presence of a prescribed person;
 - verified in the prescribed manner and by the prescribed person; and
 - submitted to and filed by a clerk of the children's court pending an application for the adoption of the child.

Can consent be withdrawn?

- A person whose consent is required by law and who has consented to the adoption of the child may withdraw the consent within 60 days after having signed the consent.
- If the person fails to withdraw his or her consent within the 60 days, the consent is final.

Can an adoption order be granted if consent is not given or withheld?

- If a parent or person whose consent is required by law, withholds consent for the adoption of a child a children's court may, despite the absence of such consent, grant an order for the adoption of the child if the court finds that;
- consent has unreasonably been withheld; and
 - the adoption is in the best interests of the child.

When is consent not required?

The children's court may dispense with consent of a parent or guardian to an adoption, if the court is satisfied that the parent or guardian;

- is incompetent to give consent due to mental incapacity confirmed by a report from a suitably qualified person;
 - has abandoned the child;
 - cannot be found or identified by means of the prescribed procedure and period;
 - has abused or deliberately neglected the child or has allowed the child to be abused or deliberately neglected;
 - did not make an attempt to fulfil his or her parental responsibilities towards the child during the last 12 months;
 - has been divested by an order of court of the right to consent to the adoption of the child;
 - or has been convicted of any offence, committed in relation to the child to be adopted, such as A person who has been convicted of an offence such as murder, rape, indecent assault, incest, kidnapping, any statutory sexual offence, any offence relating to the manufacture, distribution or possession of pornography; or any offence relating to human trafficking, abduction, excluding the wrongful removal or retention of a child by a parent with parental responsibilities, whether domestic or as contemplated in the Hague Convention on International Child Abduction; or assault with intent to cause grievous bodily harm; or
 - the child is an orphan and does not have a guardian to care for or arrange for the care of the child and the court is provided with certified copies of the child's parent's or guardian's death certificate or such other documentation as may be required by the court.
- If the parent, whether married or not and whether a major or minor, is the biological father of the child, the consent of that parent to the adoption is not necessary if;
- that biological father is not married to the child's mother or was not married to her at the time of conception or at any time after conception and has not acknowledged paternity; or
 - the court, following an allegation by the mother of the child, finds on a balance of probabilities that the child was conceived as a result of the rape of the mother, provided that such finding does not constitute a conviction for the crime of rape.

What is the adoption procedure?

Any person who wishes to adopt a child is required to apply to a children's court in the district in which the child normally resides for an adoption order.

Before the making of an adoption order, but only after the required consents to the adoption have been given, the parties to the adoption may agree on an adoption plan.

If the children's court, in the course of approving an adoption, concludes that an adoption plan concluded after the adoption order is finalised would be in the best interests of the child concerned, it may direct the parties to attempt to conclude such an agreement, known as an adoption plan, and may order the parties to make use of mediation for this purpose.

An adoption plan is a plan agreed to by two or more of the parties to the adoption of a child that may include the making of arrangements for the exchange of information between the parties to the adoption in relation to any one or more of the following -

- the child's development and important events in the child's life;
- the means and nature of contact between the parties and the child; or
- any other matter relating to the child.

An adoption plan may include the manner in which the child is to be assisted to develop a healthy and positive cultural identity and to foster links with the child's cultural heritage.

An adoption plan -

- must be in writing;
- takes effect only if made an order of court;
- may be amended or terminated only by an order of court on application by -
- a party to the agreement; or
- the adopted child; and
- must contain the prescribed particulars.

An adoption plan may not be entered into without due consideration of the views of the child if the child is of an age, maturity and stage of development to understand the implications of such an agreement.

The designated social worker facilitating the adoption of the child must assist the parties to an adoption in preparing an adoption plan and counsel the parties on the implications of such an agreement.

A court may, when granting an application for the adoption of the child, confirm an adoption plan which is in the best interests of the child.

Application for adoption

After the consents have been obtained and the adoption plan has been finalised, the application for the adoption order may be submitted.

The application for the adoption of a child must -

- be made in the prescribed manner to a children's court in the district in which the child normally resides;
- be accompanied by a report, in the prescribed format, by a designated social worker containing
- information on whether the child is adoptable as contemplated in section 169;
- information on whether the adoption is in the best interests of the child; and
- prescribed medical information in relation to the child;
- be accompanied by an assessment by a by a designated social worker to determine that the prospective adoptive parent has complied with all the requirements and any proposed exception to the age limit;
- be accompanied by an adoption plan if any; and
- contain such particulars as may be prescribed.

Notice of application to parties

The children's court may not make an adoption order unless 30 days' notice of the application for the adoption order has been given by clerk of the children's court to -

- each person whose consent to the adoption is required and
- the Minister.

An adoption order may be granted provisionally before the withdrawal of the consent by any person who has given his or her consent within 60 days after having signed the consent, if the children's court considers it to be in the best interests of the child concerned to do so, and may, irrespective of whether a provisional order has been granted, be made final.

The notice must;

- inform any person whose consent is required and the Minister of the proposed adoption of the child; and
- request any person whose consent is required to consent or withhold consent for the adoption.

If a person on whom a notice has been served fails to comply with a request contained in the notice within 30 days, that person must be regarded as having consented to the adoption.

The court may direct that notice of an application for an adoption order be given to any specified person, if it appears to the court that this is necessary in the interests of justice.

What must the court consider when considering an adoption application?

When considering an application for the adoption of a child, the court must take into account all relevant factors, including the following:

- the best interests of the child;
- the preservation of the child's identity, language, culture and religious ties;
- the need to allow a child who is able to form his or her own views on a matter concerning his or her adoption to express those views freely;
- any reasonable preferences expressed by a parent or guardian and stated in that parent or guardian's consent;
- a report by a designated social worker; and
- an adoption plan, if any.

A children's court considering an application may not make an order for the adoption of a child unless -

- consent for the adoption has been given and the court is satisfied that the parent or guardian of the child understands that the effect of the adoption order means permanent deprivation of parental rights; and
- consent has not been withdrawn.

If an application for an adoption order is filed and all the applicable requirements of the law have been complied with, a children's court may, having regard to all the circumstances of the case, make an order for the adoption of a child and may give such directions regarding the monitoring of the well-being of the adopted child by a designated social worker or other suitably qualified person as the court considers appropriate.

How is the adoption order recorded and registered?

After an adoption order has been made by a children's court in respect of a child whose birth has been registered in Namibia, the clerk of court must transmit the adoption order to the minister responsible for home affairs, who must alter the birth register accordingly.

The notice to the Minister must be accompanied by:

- the relevant adoption order as registered by the adoption registrar;
- the birth certificate of the child, if any; and
- the prescribed application to note an adoption.

After an adoption order has been made by a children's court in respect of a child whose birth has been registered outside Namibia but whose parents are resident in Namibia, the clerk of the children's court must transmit the adoption order to the minister responsible for home affairs to register the birth of the child and to record the adoption of the child in the birth register.

An application for the registration must be accompanied by;

- the relevant adoption order as registered by the adoption registrar; the birth certificate of the adopted child or if the birth certificate is not available;
- other documentary evidence relating to the date of birth of the child; or
- a certificate signed by a children's commissioner specifying the age or estimated age of the child;
- the prescribed application to note an adoption, completed and signed by the adoptive parent; and
- a fee prescribed in terms of any applicable law, if any.

What are the consequences of adoption?

The adoption of a child is effected by an order of the children's court of the district in which the child resides after an application has been submitted.

An adoption order terminates:

- all parental responsibilities and rights any person had in respect of the child immediately before the adoption;
- all claims to contact with the child by any family member of a parent or guardian of the child
- all rights and responsibilities the child had in respect of a parent or guardian or immediately before the adoption; and
- any previous order made in respect of the placement of the child.

An adoption order;

- confers full parental responsibilities and rights in respect of the adopted child on the adoptive parent;
- confers the surname of the adoptive parent, or such other surname as may be decided upon by the adoptive parent, on the adopted child, except when otherwise provided in the 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; and
- does not affect any rights to property acquired by the child before the adoption.

An adopted child is for all purposes regarded as the child of the adoptive parent and an adoptive parent is for all purposes regarded as the parent of the adopted child.

Rescission of adoption order

A children's court may rescind an adoption order on application in the prescribed form by:

- the adopted child;
- a parent of the adopted child or other person who had guardianship in respect of the child immediately before the adoption; or
- the adoptive parent of the child.

An application for a rescission of an adoption order must be lodged within a reasonable time but not exceeding one year from the date of the adoption.

An adoption order may be rescinded only if rescission of the order is in the best interest of the child and

- the applicant is a parent or guardian of the child whose consent was required for the adoption order to be made, but whose consent was not obtained; or
- at the time of making the adoption order the adoptive parent did not qualify to become a prospective adoptive parent.
Notice of an application for rescission of an adoption order must be given to:
- the adoptive parent of that child, if any other person brings the application;
- all persons who have consented to the adoption; or
- who have withheld consent to the adoption, if the child or the adoptive parent brings the application;
- the Minister and the competent authority responsible for adoptions in the other country, in the case of an inter-country adoption; and
- any other person whom the court finds has a sufficient interest in the matter.

Effect of Rescission order

As from the date on which the rescission of an adoption order takes effect:

- all the consequences of the adoption order, indicated earlier, no longer apply in respect of the child concerned; and
- all parental responsibilities, rights terminated by the adoption order in respect of the child are restored.

Offences in respect of adoption services

It is an offence for any person to:

- provide adoption services or facilitate an adoption, unless such person is a social worker who is designated by the Minister to provide adoption services or to facilitate an adoption.
- give or receive or agree to give or receive, any consideration, in cash or in kind, for the adoption of a child; or
- by any means induce another person to give up a child for adoption.

However, the following may receive a consideration for services provided:

- the care-giver or biological parent of a child receiving compensation for prescribed expenses;
- a legal practitioner, psychologist or other professional person receiving prescribed fees for services provided in connection with an adoption;
- an organ of state; or
- any other prescribed persons.

How can LegalWise assist you?

Call Windhoek 061 236 585

Oshakati 083 330 7707

Walvis Bay 083 330 0288

Glossary of terms:

ABANDONED: in relation to a child, means a child who has obviously been deserted by the parent, guardian or care-giver; who has for no apparent reason, had no contact with the parent, guardian or care-giver for a period of at least three months; who has been left at the premises of a hospital, police station, fire station, school, place of safety , children's home and not been claimed after the expiry of 60 days of the date on which such child was abandoned; or in respect of whom the whereabouts of the parents are unknown or the parents cannot be traced.

ADOPTION ORDER: means an adoption order issued by the children's court after considering an application made for the adoption of a child.

ADOPTION PLAN: An adoption plan is a plan agreed to by two or more of the parties to the adoption of a child that may include the making of arrangements for the exchange of information between the parties to the adoption.

CHILD: means a person who has not attained the age of 18 years.

CHILDREN'S COMMISSIONER: means a magistrate assigned by the Magistrate's Commission as dedicated children's commissioner for a specific children's court or for more than one children's court.

CHILDREN'S COURT: a magistrate's court sits as a children's court.

DESIGNATED SOCIAL WORKER: means a social worker in the employment of the State or a social worker in private practice appointed or designated by the Minister for a specific purpose or purposes or a social worker in the employment of a child protection organisation designated by the Minister for a specific purpose or purposes.

DESIGNATED CHILD PROTECTION ORGANISATION: means a child protection organisation designated by the Minister.

KINSHIP CARE: means care of a child by a member of the child's family or extended family.

KINSHIP CARE-GIVER: means a person who has kinship care of a child.

PRIMARY CARETAKER: means a person other than the parent or other legal care-giver of a child, whether or not related to the child, who takes primary responsibility for the daily care of the child with the express or implied permission of the person who is the custodian of the child.

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