

CHAPTER 28:01 ADOPTION OF CHILDREN

ARRANGEMENT OF SECTIONS

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Proc. 63, 1952,
Cap. 43, 1959, HMC.
Order 1, 1963,
Law 28, 1964,
L.N. 55, 1965,
L.N. 84, 1966,
L.N. 94, 1966,
Act 9, 2000.

An Act to provide for the adoption of children in Botswana, and for matters incidental thereto.

[Date of Commencement: 12th December, 1952]

1. Short title

This Act may be cited as the Adoption of Children Act.

2. Interpretation

In this Act, unless the context otherwise requires-

"adopted child" means a child adopted under this Act;

"adoptive parent" means a person who adopts or has adopted a child under this Act;

"**child**" means a person under the age of 19 years;

"**court**" means a magistrates' court established under the Magistrates' Courts Act.

3. Qualifications for adoption of children

(1) Subject to subsections (2) and (3) the following persons may adopt any child-

- (a) a husband and his wife jointly;
- (b) a widower or widow or unmarried or divorced person;
- (c) a married person whose spouse is at the time of the adoption, and has been for a continuous period of not less than seven years immediately preceding that time, mentally disordered or defective;
- (d) a married person who is separated from his or her spouse by judicial decree.

(2) No person under the age of 25 years shall (whether alone or jointly with his or her spouse) adopt any child and no person shall (whether alone or jointly with his or her spouse) adopt a child of the age of 16 years or more unless he or she is or both adoptive parents are at least 25 years older than that child:

Provided that-

- (i) a widower or widow or unmarried or divorced person may adopt a child born of him or her, which has previously been adopted by any person under this Act, whether or not he or she is under the age of 25 years or is less than 25 years older than the child;
- (ii) a husband and his wife jointly may adopt any child born of one of the spouses, even though one of them is or both of them are under the age of 25 years, or even though the child is of the age of 16 years or more and one of them is or both of them are less than 25 years older than the child, if the husband is at least 15 years older than such a child of his wife or if the wife is at least 10 years older than such a child of her husband.

(3) A person shall not adopt, otherwise than jointly with his or her spouse, a child less than 25 years younger than the said person, unless the child is of the same sex as that person or that person is a widower or widow or unmarried or divorced person and is a natural parent of the child.

4. Adoption orders

(1) The adoption of a child shall be effected by the order of the court of the district in which the adopted child resides, granted on the application of the adoptive parent or parents.

(2) A court to which application for an order of adoption is made shall not grant the application unless it is satisfied-

- (a) that the applicant is or that both applicants are qualified to adopt the child;
- (b) that the applicant is or that both applicants are of good repute and a person or persons

fit and proper to be entrusted with the custody of the child and possessed of adequate means to maintain and educate the child;

- (c) that the proposed adoption will serve the interests and conduce to the welfare of the child;
- (d) that consent to the adoption has been given-
 - (i) by both parents of the child or, if the child is illegitimate, by the mother of the child whether or not such mother is a minor or married woman and whether or not she is assisted by her parent, guardian or husband, as the case may be;
 - (ii) if both parents are dead, or in the case of an illegitimate child, if the mother is dead, by the guardian of the child;
 - (iii) if one parent is dead, by the surviving parent and by any guardian of the child who may have been appointed by the deceased parent;
 - (iv) if one parent has deserted the child, by the other parent; or
 - (v) by a guardian specially appointed under section 5; and
- (e) that the child, if over the age of 10 years, consents to the adoption.

(3) The consent mentioned in subsection (2)(d) and (e) shall be in writing and shall, if given within Botswana, be signed by the person or persons giving the consent, in the presence of a District Commissioner, who shall attest the consent, or if given outside Botswana, shall be signed and attested in the manner prescribed.

(4) Such consent shall be filed with the records of the application and the consent shall further set out the names of the proposed adoptive parents:

Provided that the court on application by them and on proof to its satisfaction that the parents or guardian of the child consent to the non-disclosure to them or him of the identity of the applicants and that the interests of the child will be served thereby may with the approval of the Minister admit as satisfying the requirements of subsection (2)(d) a consent which does not set out the names or any other particulars of the proposed adoptive parents.

(5) If the applicant for an order of adoption is such a person as is described in section 3(1)(c) or (d) the court shall not grant the order unless it is satisfied that the condition of mental disorder or defect of the applicant's spouse or the separation between the applicant and his spouse, as the case may be, is likely to be permanent.

(6) The court may take evidence on oath either by affidavit or *viva voce* concerning any matter as to which it is required by this section to satisfy itself, or concerning any other matter which may appear to it to be relevant.

(7) Before dealing with an application for an adoption order, the court to which the application is made, may direct that the applicant deposit with the clerk of the court a sum of money sufficient to cover all the expenses incurred in securing the attendance of witnesses, whether

they were subpoenaed by the applicant or by the court, and such allowances as would have been payable to such witnesses if they had been subpoenaed to give evidence in criminal proceedings before the court.

5. Appointment of guardian for purposes of adoption

(1) If the application has been made for an order for the adoption of a child-

- (a) whose parents are dead and over whom no guardian has been appointed;
- (b) whose parents have deserted the child; or
- (c) whose parents are, or one of whose parents is, incapable by reason of mental disorder or defect of consenting to the adoption,

the Minister may appoint any suitable person to be guardian of the child for the purpose of proceedings under this Act:

Provided that the appointment of a guardian by reason of the incapacity of one parent shall not affect or diminish the rights of the other parent, whose consent to the adoption shall, subject to section 4(2)(d)(iv) be required in addition to that of the guardian so appointed.

(2) The Minister may at any time remove any guardian so appointed by him and may appoint another guardian in his stead.

(3) The Minister shall notify the court concerned of any appointment or removal of a guardian under this section.

(4) Any person appointed under subsection (1) as guardian of a child may visit and inspect the child at any time while proceedings for its adoption are pending and, if an order for its adoption is made, during a period of two years as from the date of that order.

(5) For the purposes of this Act a father shall be presumed (but subject to rebuttal) to have deserted his child if he is living apart from the child and does not provide or contribute to the provision of lodging, food and clothing for the child.

6. Effect of adoption

(1) An order of adoption shall, unless otherwise thereby provided, confer the surname of the adoptive parent on the adopted child.

(2) Subject to section 14, an adopted child shall for all purposes whatsoever be deemed in law to be the legitimate child of the adoptive parent:

Provided that an adopted child shall not by virtue of the adoption-

- (i) become entitled to any property devolving on any child of his adoptive parent by virtue of any instrument executed prior to the date of the order of adoption (whether the instrument takes effect *inter vivos* or *mortis causa*), unless the instrument clearly conveys the intention that that property shall devolve upon the adopted child;

(ii) inherit any property *ab intestato* from any relative of his adoptive parent.

(3) An order of adoption shall terminate all the rights and legal responsibilities existing between the child and his natural parents and their relatives, except the right of the child to inherit from them *ab intestato*.

7. Court may permit parent or guardian to visit adopted child during two years after adoption

The court may at the time of making an order of adoption or at any time thereafter direct that a parent or the guardian of the child (other than a parent or guardian whose consent to the non-disclosure to him of the identity of the adoptive parents has been accepted under section 4(3)) shall during a period not exceeding two years as from the date of adoption have access to the child at such times and places and under such conditions as the court may determine and may at any time on the application either of the parent or guardian or of the adoptive parents or parent of the child, after due notice to any other party affected by the direction, rescind it or vary it in regard to the times, places and conditions of access:

Provided that the court shall not make such a direction if it will probably be to the disadvantage of the child.

8. Rescission of order of adoption

(1) A parent of a child for whose adoption an order has been made under this Act, or the person who was at the time of the making of the order the guardian of the child (whether by virtue of his appointment under section 5 or under any other law) or the adoptive parent or parents of such a child, or the Minister may apply to the court by which the order was made for the rescission thereof on one or more of the following grounds, namely-

- (a) if the applicant is the parent of the child, that he did not consent to the adoption and that the order of adoption should not have been made without his consent;
- (b) if the applicant is an adoptive parent, that his adoption of the child was induced by fraud, misrepresentation or *justus error*, or that the child is a mentally disordered or defective person, and that the mental disorder or defect existed at the time of the making of the order of adoption; or
- (c) that for reasons set out in the application the adoption is to the detriment of the child:

Provided that-

- (i) if the application is made on the ground mentioned in paragraph (a), it is made within a period of six months as from the date upon which the applicant became aware of the fact that an order for the adoption of his child had been made and not later than five years as from the date upon which that order was made;
- (ii) if the application is made upon the ground mentioned in paragraph (b), it is made within six months as from the date upon which the applicant became aware of that ground;
- (iii) if the application is made on the ground mentioned in paragraph (c), it is made within a

period of two years as from the date upon which the order of adoption was made; and

- (iv) if the application is made on the ground that the child is a mentally disordered or defective person, the applicant was, or if husband and wife jointly adopted the child in question they were both at the time of the making of the order of adoption ignorant of the mental disorder or defect of the child and that this ignorance was not due to failure of the adoptive parent or parents to exercise reasonable care in examining the child or causing it to be examined.

(2) If the application is made by a parent of the child, he shall give due notice of the application to the adoptive parent or parents.

(3) If the application is made by an adoptive parent, he shall give such notice to the Minister and to the parent or parents or the person who was prior to the adoption the guardian of the adopted child, if he or they can be found.

(4) If the application is made by the Minister, he shall give notice to the parent or parents, to the adoptive parent or parents, and to the said guardian, if he or they can be found.

(5) The court to which the application is made shall, after having satisfied itself that the applicant has complied with subsection (2), (3) or (4) and after having afforded any person interested in the application, an opportunity to be heard and after having considered any relevant evidence, whether oral or in the form of an affidavit, which was tendered in support of or in opposition to the application, rescind or confirm the order of adoption:

Provided that the court shall not rescind an order of adoption on the application of a parent of the adopted child if it is satisfied that the applicant is unfit to have the custody of the child and that it is in the interest of the child that the order of adoption be confirmed.

(6) On the rescission of an order of adoption the child shall for all purposes be restored to the position in which it would have been if no order of adoption had been made:

Provided that the rescission shall not affect anything lawfully done while the order of adoption was in force.

9. Appeal from order of adoption or from rescission of adoption or from refusal to rescind

(1) An order of adoption and a rescission of an order of adoption and the refusal of an application for the rescission of an order of adoption shall be subject to an appeal to the High Court as if the order, rescission or refusal were a judgment of a magistrate's court.

(2) An appeal against an order of adoption may be brought by the parent or guardian of the adopted child.

(3) An appeal against the rescission of an order of adoption may be brought by a parent, guardian or adoptive parent, of the child in question who did not apply for the rescission.

(4) An appeal against a refusal of an application for the rescission of an order of adoption

may be brought by the applicant concerned.

(5) In such an appeal brought by a parent or guardian, the adoptive parent of the child in question shall be cited as respondent, and in such an appeal brought by an adoptive parent, the parent or guardian (if any) of the child in question shall be cited as respondent, unless, in either case, the appeal is brought against a rescission granted upon the application of the Minister, in which event the Minister shall be cited as respondent.

(6) In an appeal brought by the Minister against the refusal of an application made by him for the rescission of an order of adoption, the persons mentioned in section 8(4) shall be cited as respondents.

(7) In this section "guardian" means the person who was at the time of making of the order of adoption the guardian of the child in question whether by virtue of his appointment under section 5, or under any other law.

10. Adopted child may not be removed from Botswana within 12 months after adoption

Any person who, without the consent in writing of the Minister, removes an adopted child from Botswana before the expiration of a period of 12 months as from the date of the order for its adoption shall be guilty of an offence.

11. Adoption of adopted child

(a) An adopted child shall be capable of adoption, and upon the making of an order for the adoption of a previously adopted child all the legal consequences of the earlier adoption shall determine, except in so far as the adopted child has acquired any property by virtue of the earlier adoption.

(2) For the purposes of any proceedings for the adoption of a child who has been previously adopted, the adoptive parents shall have the rights and be subject to the obligations conferred and imposed upon parents by any provisions of this Act; and the terms "parent" and "parents" shall in any such provision be construed for such purposes as meaning respectively an adoptive parent and adoptive parents.

12. No consideration in connection with adoption is permissible

If any person who has obtained or applied for an order of adoption of a child gives or undertakes to give or, except with the consent of the court which made the order or to which application for the order is made, receives or contracts to receive any consideration in respect of the adoption, or if any parent or guardian of a child receives or contracts to receive or, except with such consent as aforesaid, gives or undertakes to give any consideration in respect of the adoption of that child, he shall be guilty of an offence.

13. Alteration of births register as a result of adoption

When an order has been made for the adoption of a child whose birth has been registered in Botswana, the Registrar of Births, Marriages and Deaths shall on the application of the adoptive parent and on production of the order of adoption or of a certified copy thereof and on payment

of the prescribed fee, cause the fact of adoption and a statement whether the name of the adoptive parent was or was not conferred upon the child by virtue of the adoption, to be recorded on the original birth information form filed in his office and against the entry of the birth in the births register of the district Registrar of Births and Deaths in which the birth was recorded.

14. Effect of adoption on marriage

The adoption of a person-

- (a) shall not prohibit or permit a marriage between that person and any other person, which would not have been prohibited or permitted if the adoption had not taken place:

Provided that no marriage shall be contracted between an adopted person who is under the age of 21 years and his adoptive parent;

- (b) shall not prohibit under criminal sanction any carnal intercourse between that person and any other person, which would not have been so prohibited if the adoption had not taken place; and
- (c) shall not exempt from criminal sanction any carnal intercourse between that person and any other person, which would have been prohibited under criminal sanction if the adoption had not taken place.

15. Offences

Any person guilty of any offence under this Act shall be liable to a fine not exceeding P100 or, in default of payment, to imprisonment for a term not exceeding three months.

16. Act not to affect customary law

Nothing in this Act shall be construed as preventing or affecting the adoption in accordance with customary law of a child who is subject to customary law by a person who is also subject to customary law.