

**Category      Testate Succession**

**Adopted children: Meaning of section 2D(1)(a)**

**What are the meaning of the exceptions made in section 2D(1)(a) of the Wills Act?**

Section 2D(1)(a) provides:

*“2D Interpretation of wills*

*(1) In the interpretation of a will, unless the context otherwise indicates-*

*(a) an adopted child shall be regarded as being born from his adoptive parent or parents and, in determining his relationship to the testator or another person for the purposes of a will, as the child of his adoptive parent or parents and not as the child of his natural parent or parents or any previous adoptive parent or parents, except in the case of a natural parent who is also the adoptive parent of the child concerned or who was married to the adoptive parent of the child concerned at the time of the adoption;”*

**The effect of this section is that if a person refers to his or her "children" in a will, the word "children" will include adopted children, unless a contrary intention is clearly evident from the will.**

Adoption forms a bond between the adoptive parents and the adopted child, but at the same time the bond between the biological parents and the child is broken. This means that a child that is adopted will in future form part of the adoptive family and will no longer form part of his or her biological family.

The phrase starting with "except in the case of ..." refers to two situations where the bond between the child and his or her biological parent is **not** broken, namely

(1) where the biological parent adopts the child and

(2) where the person married to the biological parent adopts the child.

The second exception is to make provision for the situation where a mother/father remarries and the second spouse wants to adopt the children of the mother/father. In such a case it stands to reason that the bond between the biological parent and the child should not be broken.

The first exception refers to a situation where a biological parent adopts his child. This is possible in the case of a **unmarried father**. In terms of section 231(1) of the Children’s Act 38 of 2005, a child may be adopted-

*"...(d) by the biological father of a child born out of wedlock..."*

Before 2007 the father of a child born out of wedlock did not automatically receive

parental rights to the child, and such fathers had to adopt the child in order to receive parental rights.

However, on 1 July 2007 section 21 of the Child Care Act, 2005 came into force. In terms of this section unmarried fathers will have parental rights and responsibilities in certain circumstances.

It provides the following:

**21 Parental responsibilities and rights of unmarried fathers**

(1) The biological father of a child who does not have parental responsibilities and rights in respect of the child in terms of section 20, acquires full parental responsibilities and rights in respect of the child-

(a) if at the time of the child's birth he is living with the mother in a permanent life-partnership; or

(b) if he, regardless of whether he has lived or is living with the mother-

(i) consents to be identified or successfully applies in terms of section 26 to be identified as the child's father or pays damages in terms of customary law;

(ii) contributes or has attempted in good faith to contribute to the child's upbringing for a reasonable period; and

(iii) contributes or has attempted in good faith to contribute towards expenses in connection with the maintenance of the child for a reasonable period.

(2) This section does not affect the duty of a father to contribute towards the maintenance of the child.