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REPUBLIC OF SOUTH AFRICA**

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TO ALL NATIONAL AND PROVINCIAL DEPARTMENTS

GUIDE FOR PUBLIC SERVANTS ON LEGAL ADOPTIONS

BACKGROUND

- 1 A new collective agreement on pensions in the Public Service was concluded on 29 November 2002 (Resolution 12 of 2002). This agreement expands, amongst others, the benefit structure of the Government Employees Pension Fund (herein after referred as the GEPF) to include an orphan's pension and a funeral benefit.
- 2 The orphan's pension is now payable on the death of a member and pensioners who retired on or after 1 December 2002, where there is no surviving parent, natural or adopted. The funeral benefit is payable on the death of members, pensioners who retired on or after 1 December 2002 as well as on the death of registered spouses and eligible children of members and pensioners who retired on or after 1 December 2002.

3. In order to access the above benefits, a child of a deceased member or pensioner will have to comply with the definition of “**eligible child**” as defined by the Rules of the Fund. The Rules of the GEPF (as agreed to in terms of Resolution 12 of 2002) defines an “**eligible child**” as:

“...the natural or **adopted (as meant in the Child Care Act, Act 74 of 1983 as amended)** child of a member or pensioner or deceased member or pensioner who:

- is alive and under the age of 18; or
 - is under the age of 22 and is in the opinion of the Board a full time student; or
 - is a child over the age of 18 and who, in the opinion of the Board, is disabled and was factually dependent on the member or pensioner immediately before the death of such member or pensioner.”
4. The inclusion of the above definition of “eligible child” as far as the payment of the orphan’s pension and funeral benefit are concerned, makes it appropriate for the employer as a party to the agreement to provide members with information on the legal adoption process in South Africa.
 5. The purpose of this circular is to provide information on the legal adoption process to GEPF members with kinship children to ensure that their children would be able to access the orphans’ pension and also to ensure that members would be able to access the funeral benefit upon the death of an eligible child.
 6. The contents of this circular must be brought to the attention of **every** employee in your department.

DEFINITION

7. Adoption can be defined as:

“A means of providing some children with security and meeting their developmental needs by legally transferring ongoing parental responsibilities from their birth parents to their adoptive parents, recognizing that in so doing we have created a new kinship network that forever links those two families together through the child, who is shared by both”.

LEGAL FRAMEWORK

8. In our law, adoption is regulated by the Child Care Act, 74 of 1983, as amended. Chapter 4 of this Act deals, amongst others, with the following topics:
- Persons who qualify to adopt children.
 - Procedure to be followed during adoption.
 - Consent of the parent prior to the adoption of the child.
 - Instances where the consent of the parent may be dispensed with during the adoption process.
 - Effect of Adoption.
9. The Child Care Act is currently in the process of amendment through the ***Children's Bill of 2002*** to align it to our Constitution and recent developments in our case law.

PERSONS WHO QUALIFY TO ADOPT CHILDREN

10. According to the Child Care Act 74 of 1983, as amended, a child may be adopted by-
- a husband and wife jointly,
 - a widower or widow,
 - an unmarried person or a divorced person, and
 - a married person whose spouse is the parent of the child.
11. In the case of **Du Toit vs the Minister of Welfare, Population and Development 2001(12) BLLR 1225(T)** our courts extended the right to adoption to same sex couples.
12. Once the above-mentioned Children's Bill is enacted as law, adoption will be formally extended to a wide range of groups of persons in our country. These groups will include:
- (a) parties to a domestic relationship,
 - (b) persons sharing a common household and forming a family unit,
 - (c) biological fathers of children born out of wedlock,
 - (d) foster parent(s), and
 - (e) kinship care givers.

13. Any person(s) mentioned in paragraph 10 above may adopt any child under the age of 18 provided that such a person complies with the provisions of the Child Care Act, 1983. The children's court will only allow such an adoption if it is in the best interest of the said child. In this regard, section 28(2) of the South African Constitution provides that the **best interest** of the child should be given paramountcy in all matters affecting children.

PROCEDURE TO BE FOLLOWED DURING ADOPTION AND CONSENT OF THE PARENT PRIOR TO THE ADOPTION OF THE CHILD

14. If you are a prospective parent who wishes to adopt a child, you need to approach your local/provincial branch of the Department of Social Development. They will refer you to an accredited adoption social worker who will assist you on a variety of issues concerning the adoption process such as;
 - the legal requirements involved,
 - counseling of the biological parents of the child,
 - assessment and, where applicable, counseling of the child,
 - recruitment, assessment and preparation of the adopters and after-care services to the adoptive parent or family, and
 - management of queries and interpretation of issues regarding descent and origin accompanied by counseling of all parties concerned during this phase.
15. In our legal system only the children's court of the district in which the child resides is competent to grant an adoption order. The children's court only grants an adoption order after it has considered the report of a social worker or an accredited social worker who was involved during the adoption phase. The court also considers the religious and cultural background of the child concerned and that of his or her parents as against those of the prospective adoptive parent.
16. Any prospective adoptive parent would be able to adopt a child if:
 - (a) He or she is within those groups of persons who qualify to adopt children and possesses adequate means to maintain and educate the child;

- (b) he or she is of good repute and is a fit and proper person to be entrusted with the custody of the child;
 - (c) the proposed adoption will be in the best interest of the child involved and will be conducive to the welfare of the child;
 - (d) he or she has obtained-
 - (i) in addition to the consent of the mother, the consent of the natural father of a child born out of wedlock in instances where the natural father has acknowledged himself in writing to be the father of the child and has made his identity and whereabouts known,
 - (ii) the consent of both parents of the child, in the case of married persons; or
 - (iii) the consent of the child if the child involved is over the age of 10 years.
17. Any parent who has consented to the adoption of his or her child has the right to withdraw such consent within 60 days from the date the consent was given.

NB: Any consent mentioned in paragraphs 16(d)(i), (ii) or (iii) above must be in writing and signed by the persons or persons giving the consent in the presence of a commissioner of child welfare, who must attest the consent.

INSTANCES WHERE CONSENT MAY BE DISPENSED WITH

18. The above-mentioned legislative framework does not require any consent for the adoption of any child whose parents are deceased and for whom no guardian has been appointed or from any parent who is withholding his or her consent unreasonably.
19. In certain instances the consent of the natural father of a child born out of wedlock may also be dispensed with. Those instances include:
- Where the natural father has failed to acknowledge himself as the father of the child; or
 - where the child was conceived as a result of an incestuous relationship between the natural father and the mother, or

- where the natural father was convicted of rape or assault of the mother of the child; or
 - where the children's court found on a balance of probabilities that the natural father had raped or assaulted the mother; or
 - where the natural father failed to respond within the required time limit specified by the Act to a notice of adoption, which was served upon him.
20. The consent of the natural father or mother of a child born out of wedlock is also not required if such parent, without good cause, has failed to discharge his parental duties with regard to the child.

EFFECT OF ADOPTION

21. Once the children's court grants an adoption order, all rights and obligations existing between the child and any person who was the parent of that child (excluding a parent who is married to the adoptive parent) immediately prior to the adoption, and that of the parent's relatives are terminated.
22. The adopted child is deemed in law to be the legitimate child of the adoptive parent.

FURTHER INFORMATION

23. More information on the adoption process can be obtained from the following website: www.gov.za. Please look under "Services for People" and then under "*Being a parent*".
24. For information on the calculation of the orphans' and funeral benefit, the GEPF Membership Booklet is available from the following website: www.gepf.co.za. Please look under "*Documentation*".


DIRECTOR-GENERAL