What are the rights of the natural father of a child born out of wedlock?

Some of you might recall the well-publicised case of Fraser v Children's Court. Fraser put up a big fight in our Courts when the mother of their child who was born out of wedlock, wanted to put up the child for adoption without Fraser's consent. The Constitutional Court held in the Fraser case that the requirement of the consent of the mother only, and not of the father, was needed in the case of children born out of wedlock for the purposes of adoption, discriminated unfairly against the father. The Court therefore held that said requirement violated the father's right to equality which right is guaranteed in our constitution. The Court therefore declared Section 18(d) of the Child's Care Act 74 of 1983 unconstitutional and invalid to the extent that it unfairly discriminated against unmarried fathers in all circumstances. The decision of the Fraser-case ultimately led to the amendment of the Child's Care Act 74 of 1983 so as to provide rights for natural fathers where the adoption of their children born out of wedlock and also to allow for adoption by natural fathers of children born out of wedlock.

In the case of T v C and Another 2003 (2) SA 298 (WLD) another father of a child born out of wedlock was once again compelled to lodge an appeal to the High Court after the mother of the child instituted adoption proceedings which resulted in her new husband adopting the child.

The facts of the case are that Cameron was born out of wedlock in 1990. At the time of his birth the relationship between his mother and the natural father had already ended and they were not living together. The couple was engaged for about a year and had lived together during this period. The relationship, however, became increasingly acrimonious and the natural father left the common home. Subsequently, there had been very little contact between the couple and as a result no father-son relationship was established. Cameron is, however, aware of his natural father and has had sporadic contact with him in the past.

During 1999 the mother obtained a maintenance order against the natural father in terms of which order the father had to make maintenance payment in respect

of Cameron. Although the father did made some payments during that year, he later stopped and has not made any payments since. The natural father married another woman in 1991 and had three children with her. Cameron's mother also got married in February 2002 and they have one child. Her husband then launched adoption proceedings so that he could adopt Cameron. No notice of the proceedings was, however, given to the natural father nor was his consent obtained.

The adoption order was granted in February 2000, and during March 2000 the natural father, unaware of the adoption order, instituted proceedings against Cameron's mother in order to gain access to Cameron.

The natural father was, however, informed by his attorney that it had come to his knowledge that an adoption order had been made in respect of Cameron. The natural father was taken by surprise and asked his attorney to investigate the matter further. Pursuant to this investigation the Registrar of Adoptions informed his attorney that from the record of the adoption proceedings it appeared that the natural father had not been notified of the proceedings and he had no say in the decision. It also appeared that the Commissioner who had made the order, was under the impression at the time that the natural father was unknown. Indeed, Cameron's birth certificate incorrectly reflected the natural father as "unknown".

The natural father then launched an application in the Children's Court for the rescission of the order. After considering the evidence the Commissioner found that the natural father had failed in his duty to enter his particulars in the registration of birth of the child. As result the Commissioner who granted the adoption order had therefore been under no duty to notify him of the adoption proceedings. The Commissioner also found that it would not be in the best interest of the child for the order to be rescinded.

The natural father then appealed at the Commissioner's findings.

In its decision the Appeal Court found that the Child's Care Act now recognises that both the parents of the child born out of wedlock have a right to participate in any decision concerning the adoption of the child. The Court held that for the right to be exercised effectively, a parent who is unavailable to consent at the time of the other parent's consent, is entitled to receive notice of any adoption proceedings except in cases where the identity or whereabouts of such a parent

can not be established. The Court also held that it is the responsibility of the Commissioner of the Children's Court to cause such notice to be served upon the parent who has not consented to the adoption. The Court further held that where the details of the parent who has not consented to the adoption are not available, the Court must ascertain what steps have been taken to establish them.

The Court found that in this case no notice of consent was served on the natural father. He was therefore not afforded the opportunity to participate in the decision of the adoption and to decide whether or not he wished to consent to the adoption. The Court held that Cameron's mother deliberately misled the Court by informing the Commissioner that Cameron's father's details of the whereabouts were unknown to her. the Court held that the adoptive father was also clearly aware of the natural father's personal details.

The Court therefore held that the fact that the natural father had not entered his particulars in the registration of the birth of the child, was not good enough reason not to be given notice of the adoption proceedings. It was therefore held that the Commissioner's finding that the failure by the natural father to enter his particulars in the registration of the birth of his child, does entitle him to be given notice was incorrect.

The Court held that although the conduct of Cameron's mother and her husband was reprehensible and although the failure to give notice to the natural father tainted the adoption process, in deciding whether the adoption order should be rescinded or not, the child's best interest must be the deciding factor.

The Court indicated that our constitution enjoins the Courts to accord paramount importance to the child's best interest in every matter concerning the child. In deciding therefore whether the adoption order should be rescinded or not, the Court must give primacy to this principle.

The Court therefore held that Cameron lived with his mother and little sister, enjoyed a stable and emotional secure family life, was happy at his school and had good friends. Further that he identified with his mother and adoptive father and assumed his adopted father's surname. The Court also held that even if the proceedings were to be re-opened, there was no likelihood that the Children's Court would make any other order in so far as the best interest of the child is concerned.

For these reasons therefore the Court was of the opinion that the adoption order should not be rescinded as it would not be in the best interest of the child.

Although the Court therefore did not agree with the Commissioner's finding that the natural father should not be given notice, the Court agreed with the Commissioner that the rescission of the adoption order would not be in the best interest of the child.

Adoption has very serious consequences because it does not only terminate all rights and obligations between the child and natural parent(s), but it also terminates the rights and obligations of such parent's relatives. The adoptive parents therefore step into the shoes of the erstwhile parent and the child also assumes the name of the adoptive parents.

Because of the serious consequences, which flow from an adoption, it is imperative that both parents must consent to adoption.