

# WOMEN AND THE LAW



# CHILD AND MAINTENANCE AND ADOPTION

## INTRODUCTION

There are many couples who find that they are unable to have children. It is a problem which causes much heartache, humiliation, hurt, and sometimes the breakup of a marriage.

There is little which can be done to help couples with an infertility problem. The treatments are usually expensive and rarely successful. The test-tube baby idea has not yet become available in Swaziland, besides which it is very costly and has few results.

Infertility is a problem which can lie with either the man or the woman. The reasons why a person becomes infertile are many. There is no doubt however, that in Swaziland, much of the infertility is caused by untreated or frequently caught venereal diseases.

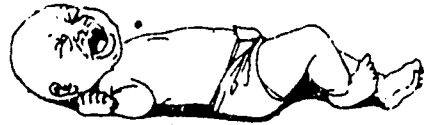
Whilst there are many couples who are unable to have children, there are also many women who find themselves with an unwanted pregnancy. Although in traditional times, an unwanted pregnancy was unheard of, nowadays things have changed and families are no longer always willing to absorb unlimited numbers of babies into the family when the cost of living is so high.

Adoption is a wonderful way of caring for a child and of filling that gap when you are unable to have your own. It is a simple, legal procedure which can easily be done here.

Another sad fact of life today, is that many women are having to raise children on their own facing enormous financial hardship. Maintaining one's children is a legal and moral responsibility. Help can be given.

We hope that this book answers some questions.

# MAINTENANCE



## WHAT IS MAINTENANCE?

- \* Maintenance, sometimes called child support, is the provision of the basic necessities of life: accomodation, food, clothing and medical attention in times of illness. No child should be without one or more of these necessities.
- \* Every child has a right to be maintained by its parents. This means that every parent has a legal and moral duty to maintain his/her child.
- \* The duty to support a child falls primarily on the father, just as the duty to support a wife falls primarily on the husband in the case of a married couple.
- \* This duty can be enforced at law but the method you choose for enforcement will depend upon whehter you are married to the father of your child or not.

## WHAT SHOULD I DO IF MY HUSBAND FAILS TO SUPPORT OUR CHILDREN?

- \* You can take him to the magistrate's court or the High Court and sue him in the usual way under the common law to enforce the duty of support. This will cost you some money in lawyer's fees.
- \* If you are married in community of property and he is wasting the joint assets on riotous living, or a mistress, you can get a court order separating the property or restraining him from administering it to the family's prejudice.

- \* Whether the marriage is in community or out, you always have the right to order goods or services (e.g. groceries, electrical repairs, plumbing etc.) in his name for yourself and the children. He is liable to pay these bills, if what you bought falls under the heading of "household necessities". The law gives you this right as "manageress of the joint household" and it therefore can be exercised only if you are actually living together.
- \* If you are living apart and the separation is due to his fault, you can still buy the bare necessities (food, accomodation, clothing medical attention) for yourself and the children on credit and have the bills sent to your husband. The law gives you this right, not as manageress (after all, there is no joint household in this case) but because your husband has the primary duty to support his family, he cannot get out of this duty by his own wrongdoing (e.g. by expelling you and the children from the house); and therefore he is legally liable to re-imburse third parties (for instance, shopkeepers) who supply you with the necessities he should have been supplying.
- \* Note that "necessaries" is a wider term than "necessities". When you are living in a joint household, repairs to the roof may be necessities and your husband may be liable to pay the builder who carried out the work; if you are apart such repairs may not be his responsibility, even though he may be liable for the rent of your accomodation.



- \* If non-support develops into, or is coupled with, an actual ground for divorce or judicial separation, it may be in your interest to sue for these remedies. Thus if he is actually living in adultery with a mistress, or beats you up, the court will grant you a divorce or a judicial separation. In either case, the court can make an order for maintenance for yourself and the children.
- \* You can also report to the Social Welfare Officer at the DC's Office so that proceedings against your husband can be instituted under the Maintenance Act of 1970 (more about the Act below).
- \* Remember too, that under Swazi law and custom, you can report your husband's conduct to your family and his so that the problem can be thrashed out and a conciliation attempted.

WHAT IF I AM UNMARRIED AND MY CHILD IS NEGLECTED BY ITS FATHER?

- \* Your illegitimate child is fully entitled to support from its natural father.
- \* You can sue the father in a magistrate's court or in the High Court for support. This will cost you some money in lawyer's fees.
- \* You can report him to the Social Welfare Officer at the DC's Office under the Maintenance Act. This will cost you nothing but may take some time because of pressure of cases.

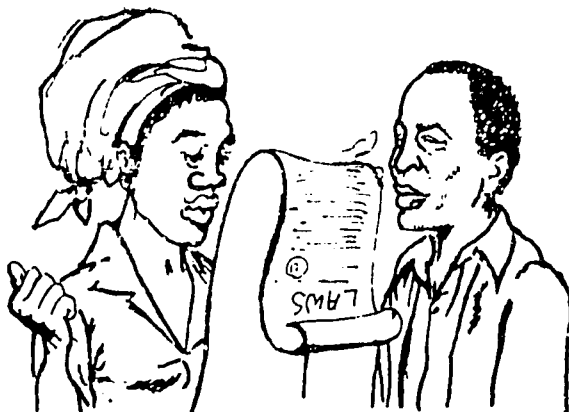
- \* Procedures under the Maintenance Act are as follows:
- Make a complaint under oath to the Social Welfare Officer. There is one at every DC's office.
  - The complaint can be against anyone who has a legal duty to support you or your child (husband, lover, ex-lover etc.).
  - The Social Worker will contact the father of your child by telephone or letter or through his employer, telling him to come to an investigation.
  - At this investigation the Social Worker will discuss with the father and yourself with a view to persuading him to keep up with his legal responsibilities. He will have an opportunity to explain why he is neglecting his child.
  - If the investigation fails to produce a maintenance agreement, or if the father refuses to attend the investigation, you swear an affidavit in which you fully state your case. This affidavit is used to prepare summons which are then sent to the Police.
  - The Police serve the summons on the father of the child. (Sometimes summons are served on the spot at the investigation if he shows a clear unwillingness to co-operate). This spells the initiation of court proceedings against him.
  - The court hears the matter, with you being represented by the Social Worker acting as a Maintenance Officer. If the court believes your story it will grant a maintenance order, instructing the father to pay a certain sum of money every month, either directly to you, or to the Social Welfare office where you can collect it.

- If he does not pay, the Social Welfare Officer takes the matter to the Police who open a docket and send it to the Director of Public Prosecutions. A criminal charge is then laid against the father of your child.
- If he is convicted, he may be fined E200 or imprisoned for 1 year, or both. He may also be simply sentenced to imprisonment for 1 year without the option of a fine.
- The court may also order the father's employer to subtract whatever amount is required for maintenance directly from his salary and pay it to the Clerk of Court. An employer who fails to do this may be liable to 6 months imprisonment or a fine of E100.

### MISCELLANEOUS

- \* Maintenance orders made by courts in Swaziland may be enforced in Botswana, Lesotho, South Africa, Malawi, Uganda, Kenya, Zambia, Zimbabwe and a dozen other countries. Similarly, orders issued in these countries can be enforced by our courts.
- \* The Maintenance Act protects every child and every mother in the country whether married by civil rites or by Swazi law and custom, or unmarried.
- \* If you are married, your husband's legal duty is to support both you and the children. If unmarried, his duty is to maintain his child.

- \* In neither case can he say he does not want to: his is a legal responsibility. Nor can he impose conditions not recognized by the law, e.g. "I will support the child if you give it to me".
- \* The mother has full rights of custody and guardianship of an illegitimate child under the common law. Under custom, these rights are vested in the mother's father. Your lover must maintain the child where it is, unless he has "bought" the child by Swazi law and custom.
- \* A legitimate child is under the guardianship of its father. But where custody has been awarded to the mother by a court on separation or where the child is with the mother informally, but as a result of the father's wrongful conduct - the child must still be supported where it is.
- \* It will be a defence for the father of your child to prove that he is incapable of earning a living (e.g. if he is crippled or mentally disordered). If he is healthy he must find a job. He cannot escape his responsibility by avoiding work - e.g. by deciding to be a student for ever.





# ADOPTION

- \* Adoption serves to find a home for a needy child and sometimes a child for a needy parent. The laws of adoption aim at protecting the interests of all the parties involved (the natural parents, the adoptive parents, and the child), but more particularly those of the child.
- \* An adoption is an order made by a court of law and before granting the application the court will want to be satisfied that:
  1. the natural parents of the child have consented (agreed) to the adoption
  2. the adoptive parents are suitable people to bring up a child, and
  3. the adoption is genuinely in the interests of the child.
- \* The following procedures were designed to help the court satisfy itself on these matters:

## WHO MAY ADOPT?



You may adopt a child JOINTLY as -

1. A husband and wife, or SINGLY as --
2. A married person whose spouse is mentally defective
3. A married person who is judicially separated from his/her spouse
4. A widow
5. A widower
6. A divorced person
7. An unmarried person (i.e. never married)

## AGE IS IMPORTANT!

- \* To adopt, you MUST be over 25 years of age
- \* To be adopted, a child MUST be under 16 years of age

However -

- \* You CAN adopt a person of 16 years of more, IF you are older than that person by 25 years or more. If you are adopting jointly you both must be at least 25 years older than the adopted person (i.e. to adopt a 16 year-old you must be at least 41).
- \* If you are SINGLY adopting your own child, (previously adopted by somebody else), you can do so even if you are under 25; you can also adopt your own 16 year-old child (or older) even if you are less than 25 years older than such child.
- \* If you are JOINTLY adopting a child belonging to one of you, you can do so even if you (alone or both) are less than 25 years older than he is, PROVIDED that your husband is at least 15 years older than any child of yours or that you are at least 10 years older than any child of your husband's which you are jointly adopting.
- \* You cannot SINGLY adopt a person less than 25 years younger than you are, unless:
  - (a) it is your own child, or
  - (b) the child is the same sex as you are

## WHO MUST AGREE (CONSENT) TO AN ADOPTION?

The following are the people who have the legal right to consent to the adoption of a child. The court will not grant your application for an adoption until it is satisfied that the required consent has been given by the appropriate person.

1. Both parents of the child, if the child is legitimate and the parents are both available.
2. The mother, if the child is illegitimate. It does not matter if the mother is over 21 years or under, married or unmarried.
3. The guardian of a legitimate child, if both both parents are dead.
4. The guardian of an illegitimate child, if the mother is dead.
5. The remaining parent, if one parent is dead, or any other guardian who may have been directly appointed by the deceased.
6. The remaining parent, if one parent has deserted the child.
7. A special guardian appointed by the court.
8. In addition to the above, the child himself, if he is over 10 years old.

\* We can thus see that there is no problem with the adoption of abandoned children. The court simply appoints a special guardian (usually the Social Worker dealing with the application) to provide the necessary consent.

## HOW DO I GO ABOUT APPLYING FOR AN ADOPTION?

- \* See the Social Welfare Officer at your local DC's office or contact the Family Life Association of Swaziland. You may be placed on a waiting list, whilst the Social Worker prepares a report on your suitability and tries to find a needy child.
- \* When a child becomes available it may be given to you to foster (live with) for 1 to 3 months. During this time the Social Worker will visit your home periodically to see how the arrangement is working out, discuss problems with you, etc. All of her findings will go into the report.
- \* In the case of an abandoned child, the Minister will appoint the Social Worker as guardian of the child, after a full investigation to try and find the parents.
- \* A date for the court hearing will then be set. With non-abandoned children (i.e. voluntary adoptions), the parents or guardians who have the right to give consent must appear in court as well.
- \* If the court is satisfied, it will grant the application and the child becomes legally yours.



## WHAT IS MEANT BY "LEGALLY MINE"?

- \* An adopted child is entitled to your surname.
  - \* An adopted child becomes, in the eyes of the law, your own legitimate child, except that he/she may NOT -
    - (a) inherit from a will already in existence unless he is included specifically by name
    - (b) inherit as a next of kin from any of your relatives who die intestate (i.e. without leaving a will)
  - \* With regard to marriage, an adoption does not change too many things. An adopted child can marry your relatives if such marriage is not prohibited under any other law; similarly an adopted child can have sexual intercourse with your relatives if such contact would not have been incest under any other law. (In other words, actions that were legal before the adoption are not rendered illegal by the adoption). EXCEPT that the law prohibits any marriage between an adoptive parent and an adoptive child.
- \*\*\* NOTE: These rules are to be found in the statute governing adoptions in Swaziland. They do not reflect the philosophy of Swazi law and custom relating to family relationships. A Swazi family is thus much more likely to observe the cultural rules rather than those of the statute.

## IS AN ADOPTION ORDER FINAL?

The order can be cancelled or withdrawn by the court if one of the following people applies for its cancellation:

- the natural parent (s) of the child
- the guardian of the child
- the adoptive parent (s) of the child
- the Minister of Interior

' A parent or guardian may apply for cancellation if their consent was not obtained. This must be done within 5 years from the date of the adoption order.

\* An adoptive parent may apply for cancellation if he/she adopted the child by mistake - a genuine mistake, or one resulting from fraud or deceit by others. E.g. if it was known that the child was mentally ill but nobody told the adoptive parent. The application must be lodged not later than 6 months after the mistake is discovered.

\* In addition, any of the above people may apply for cancellation if they think the adoption is no longer serving the best interests of the child. An application under this heading must be lodged not later than 2 years after the date of the adoption order.

\* Any person applying for the cancellation of an adoption order must PROVE his/her allegations. The court will not lightly deprive the adoptive parents of their child, without strong reasons, for instance dishonesty, fraud or that the adoption is clearly prejudicial to the physical, emotional and moral well-being of the child.

- \* For these reasons, an adoption order, though reversible, is a very strong right. It aims to create new families and if everything is normal and above-board the law will protect your new family with all the power at its disposal. For example a deserting natural father cannot come back after 10 years to claim his child just because you have educated the child: the child is now your child.

### WHAT MORE DO I NEED TO KNOW ABOUT ADOPTION?

- \* The parents or guardian of the child do not have to know your identity as the prospective adoptive parent. By agreement, their consent to the adoption can be given without your identity being disclosed.
- \* An adopted child may not be removed from Swaziland within 12 months after the date of the adoption order. In appropriate cases the Minister may waive this regulation.
- \* No money may change hands in respect of an adoption, except as directed by the court. Adoptions are free: be suspicious if the natural parent, guardian or go-between expects you to pay.
- \* The law regards the father as having deserted his child (and therefore having no right to be consulted for consent to the child's adoption) if he is living apart from the child and does not provide accommodation, food and clothing or contribute to the provision of these necessities for the child.

- \* Adoption is a convenient way of legitimating an illegitimate child. IF you are married you can jointly adopt any child either of you had prior to the marriage, thus making him legitimate for all purposes.

## FOSTERSHIP

- \* You can be entrusted by a court of law with the responsibility for the accomodation, care and upbringing of a child who is in need. You are then known as a "foster-parent" and the fostership will last for as long as the court determines, in accordance with the needs of the child.
- \* Children in need of fostership are those who may be destitute, homeless or abandoned, or suffering abuse or ill-treatment, or living in the care of an unfit person (whether parent or not) or in conditions which are physically or morally harmful to the child.
- \* Fostership is not adoption: the child is liable to be released from your custody when it is felt to be safe to do so. However, fostership may be an excellent preliminary to adoption, particularly if the child is truly abandoned or if the parents (where they are known) agree that the adoption will be in the best interests of their child.
- \* Some people prefer to foster several children at a time, releasing them when the itme is ripe, and bringing in another group. When the circumstances warrant it, you may receive financial assistance from the Ministry for this service.



\* If you are interested in giving a temporary home to a destitute child, contact the Social Welfare Office at your local DC's office or the Ministry of Interior or the Family Life Association of Swaziland:

P.O. Box 1051  
MANZINI

P.O. Box 1286  
MBABANE

Tel: 53586

Tel: 46680

Any other enquiries concerning adoption should also be addressed to the above.

