

**MISINTERPRETATION OF CONSTITUTIONAL COURT JUDGMENT ON BIRTH  
REGISTRATION BY UNMARRIED FATHERS**

**FOR IMMEDIATE RELEASE:**

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On 22 September 2021, the Constitutional Court handed down a judgment in which is declared section 10 of the Births and Deaths Registration Act 51 of 1992 (BDRA) invalid and not in line with the Constitution. The section did not make provision for a child to receive their father's surname or details of their father on their birth certificate without the mother's involvement in cases where the mother is deceased, has absconded, is undocumented herself or cannot be located.

Since then the CCL and LHR have noted a misinterpretation of the judgment. It seems that the judgment has been interpreted to mean that a child's name can be changed if they have already been registered and have a birth certificate (alteration of details on a birth certificate). This is not what the case and the judgment are about.

Notification of birth of children born out of wedlock: *Centre for Child Law v Director General: Department of Home Affairs and Others (CCT 101/20) [2021] ZACC 31 (22 September 2021)*

The Constitutional Court judgment declared section 10 of the BDRA unconstitutional because it did not allow unmarried fathers to register the births of their children in their name when the mother could not do so or was unwilling to do so.

This left children without birth certificates.

The declaration of section 10 being unconstitutional, and its severance from the Act, ensures that when a mother is not able or willing to register the birth of a child the unmarried father will still be able to do so. This is different from altering or changing the details on an already existing birth certificate a process that is provided for in separate sections of the BDRA.

Insertion of unmarried biological father's particulars in birth register of child born out of wedlock

If an unmarried father wants their details to be inserted in an already existing birth certificate they will have to follow the process set out in section 11(4) and Regulation 14 of the BDRA. Section 11(4) states that the father must, with the consent of the mother, apply to the Department of Home Affairs for such information to be inserted in the Birth Certificate. The Department will, after reviewing the application, amend the

registration of the birth of the child by recording that the applicant acknowledges that they are the father if the child and by entering the prescribed particulars of such person in the registration of the birth of such child.

The purpose of these provisions is to accommodate unmarried fathers who, for whatever reason, did not participate in the initial notification of birth process in order to be identified and acknowledged as fathers but still wish to be so. Post-notification and the issuance of an official birth certificate, an unmarried father may still apply to the Director-General of Home Affairs in order to have himself recognised on the registration of the child(ren)'s official birth certificate and to have the National Population Register updated to reflect such amendment. If the mother refuses to consent, the unmarried father may still seek relief from the High Court, which is the upper guardian for children.

#### Alteration of surname of minor

If the intention is to alter the surname of the child, then section 25 of the Births and Deaths Registration Act, read with Regulation 17, will apply. Section 25(2) of the BDRA of 1992 provides that any parent or any guardian of a child whose birth has been included under a specified surname in the population register, may apply to the Department of Home Affairs for the alteration of the surname of the child. The Director-General of the Department may, on submission of a good and sufficient reason given the contemplated alteration of the surname, alter the original surname.

The parent requesting a change in their child(ren)'s surname must do so in good faith. Given the potentially disastrous consequences of a surname change, the child's best interests are of paramount importance. If a dispute arises the High Court may be approached for relief.

It is important to remember that birth registration is about the child and furthering s 28(1)(a) of the Constitution, which states that the best interests of the child are of paramount importance.

#### Position of the Centre for Child Law and Lawyers for Human Rights

1. Birth registration is a fundamental constitutional right of a child and a child's interests are of paramount importance in all matters concerning the child.
2. The African Committee of Experts on the Rights and Welfare of the Child in its General Comment on article 6 of the African Charter on the Rights and Welfare of the Child stated: *Registration of birth is a fundamental right of a child. Birth registration is the act of recording the birth of a child by an administrative authority. It establishes the existence in law of a child, and sets the foundation*



*for the recognition of the child as a legal persona. A child who is not registered does not legally exist and runs a substantial risk of falling outside of the reach of government's protective actions towards the realization of child rights.*

3. The Constitutional Court has clarified that registration of birth is a fundamental right of a child, regardless of which parent gives the notification. The CCL and LHR believe that the insertion of an unmarried father's details in birth register of child born out of wedlock and alteration of the child's surname have been adequately addressed. The provisions set out in the BDRA and Regulations are not prohibitive or burdensome because a child would already have an official birth certificate at that point. The provisions take effect only after the notification of birth has been made and an official birth certificate has been issued.
4. For the sake of the children, birth registration is a process that should begin as soon as a child is born, with a notification to the Department of Home Affairs, to declare the birth and apply for an official birth certificate. In the event that a dispute arises, the CCL and LHR encourage parents to settle their differences amicably and not lose sight of the importance of documentation, which ensures that a child is accounted for in the National Population Register. The application of various provisions in the BDRA may be used to resolve issues relating to the details contained in the birth certificate. Section 9(2) of the BDRA as amended by Act 1 of 2002 provides that, the notice of birth referred to in subsection (1) of this section shall be given under the surname of either the father or the mother of the child concerned or the surnames of both the father and mother joined together as a double-barrelled surname.

**Ends.**

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