

BOEKE

**CHILD LAW IN SOUTH AFRICA
DOMESTIC AND INTERNATIONAL PERSPECTIVES**

by LAWRENCE SCHÄFER

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This is a comprehensive book, divided into eight parts, that mainly covers the whole of the Children's Act 38 of 2005. Part I deals with children in the context of South African law and the focus is on the status of children. Part II includes the sources of child law and this part includes a very valuable contribution on international child law. Authors on children's rights usually refer only to the two major children's rights conventions, namely the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child when dealing with children's issues. In addition to these, the author elaborates on other major United Nations and African human rights conventions. In doing so he successfully illustrates which principles of international law have become an integral part of the fabric of contemporary child law. The third part deals with children's rights and their autonomy. Part IV dwells on the legal relationship between parents and/or other care-givers and children. Part V covers state-supported parenting and includes partial care, drop-in centres, early childhood development and child-headed households. Part VI is dedicated to child protection and elaborates on a variety of issues including the various child protection registers, prevention and early intervention services and children in need of care and protection. Part VII investigates alternative care options for children and includes foster care, temporary safe care and child and youth care centres. It is meaningful to discuss the three forms of alternative care in one section because these placement options share various common characteristics, such as the fact that the placements are mandatory, non-consensual and subject to continuing judicial oversight. In the last part (Part VIII) on children and private international law, inter-country adoption and international child abduction are discussed. Child trafficking is also included in this part although trafficking is now dealt with in terms of the Prevention and Combating of Trafficking in Persons Act 7 of 2013 which repeals Chapter 18 of the Children's Act completely (see s 48 of Act 7 of 2013, read with the Schedule of the Act).

The publication under discussion has many remarkable features. The "Foreword" by Justice Edwin Cameron (v-vi) sets the tone for unlocking and discovering some. First of all, it is a single-authored publication, which is a very rare occurrence in this vast field that is restricted neither to private nor to public law. Secondly, and this is perhaps this publication's biggest contribution to the existing body of scholarship in child law, is the way that it broadens the horizon

in drawing contemporary international law and comparative law (see eg 216–217) into the debate on children’s issues. Thirdly the author truly involves and explores the Regulations, which are of vital importance when dealing with the Children’s Act. He explains in the “Preface” that the two sets of Regulations pertaining to the Children’s Act will be explored (ie the General Regulations Regarding Children 2010 and Regulations Relating to Children’s Courts and International Child Abduction 2010, published under GN R250 in GG 33067 of 31 March 2010), but his quest to integrate the relevant Regulations goes much further than this. A few examples should suffice: The Criminal Law (Sexual Offences and Related Matters) Regulations 2008 are discussed in the context of the National Register for Sex Offenders (407ff) and the Regulations (Social Assistance Regulations 2008, reg 8(b)) are drawn into the debate (178) due to the fact that they specify the financial criteria that a care-giver has to satisfy in order to be eligible for a care dependency grant. Fourthly, much can be learnt from the arguments put forward by the author. It is to be hoped that the author’s views are being considered in the amendment of the Children’s Act, a process currently under way. It is on the author’s critical analysis of the Act that I would like to elaborate.

Throughout this publication the author puts forward properly substantiated, well-founded, valid arguments. Whether one agrees with him that the move to “care” and “contact” instead of “custody” and “access” was not the best option (219–220), you have to admit that it rids us of certain undesirable terms, such as “control”. Over the years the courts were unsuccessful in eradicating these undesirable terms. I fully agree with the author that child-headed households may be a creative departure from past orthodoxy (388), but it is a “second best” alternative to a proper child welfare system and perhaps incompatible with section 28(1)(b) and (c) of the Constitution (390). One could perhaps add that child-headed households become more indefensible in the light of state funding for luxuries. Sometimes the author’s well-grounded reasoning (eg 503) has since publication been “confirmed” in recent case law (*Jonker v The Manager, Gali Thembani/JJ Serfontein School* unreported case no 94/2011 [2012] ZAECGHC 19 March 2012).

Most of the time the author’s analytical evaluation and statutory interpretation of the Children’s Act evolve into suggestions for law reform that cannot be disputed. It is trusted that the author’s views, of which I mention only a few examples, will be taken into consideration in the amendments to the Children’s Act:

- The factual issues that family group conferences could be convened for (in s 70 of the Children’s Act) should be limited (327).
- Some of the sections on adoption need revision. The author makes a very valid point when indicating that the wording in section 228 is inappropriate and the uncertainty regarding the effect of section 242 of the Children’s Act needs to be resolved (305).
- The definition of people “unsuitable to work with children” in Part B of the National Child Protection Register needs the drafters’ urgent attention (397–399).
- The lack of clarity (in s 126(1)) as to who specifically bears the obligation, in respect of a designated child protection organisation or the South African Police Service, to ensure that the names of new employees do not appear in Part B of

the National Child Protection Register is crucial, particularly given that failure to comply is a criminal offence (405).

- The wording of section 155(8) regarding the court's finding that a child is not in need of care and protection should be improved (448).
- The oversight in not providing, in either the Act or its Regulations, the "prescribed requirements" referred to in section 259(1)(b) regarding accreditation to provide inter-country adoption services, should be addressed (523).
- The deficiencies of *inter alia* sections 261 and 262 of the Children's Act should urge the drafters of the amendments to thoroughly revise these provisions regarding inter-country adoption (529–539).

Opinions will always differ, but there is one (recurring) viewpoint expressed in this book, with which I strongly disagree. The author's persistence in referring to children of unmarried parent(s) as "illegitimate" (viii 11 25–29 30), is in my opinion wrong (and this while he admits that "almost all" the legal disabilities attached to "illegitimate" birth have been abolished: 25). This viewpoint undermines one of the greatest achievements of the Children's Act, namely, doing away with the discrimination against so many children, of which discrimination based on the parent's/parents' marital status is a very important category. South African child (and family law) has come such a long way to rid itself of this type of labelling of children. Another form of stigmatisation (and discrimination) that the Children's Act abolished was the abandoning of industrial schools, reform schools and other secure care facilities for children and replacing all similar institutions with child and youth care centres. This concerted effort to break away from all forms of labelling is not restricted to the Children's Act. It is also evident in the criminal law relating to children where the term "juvenile" has been replaced by "child offender" and "juvenile justice" by "child justice" of which the author seems unfortunately unaware (82 fn 102 490).

Another view with which I cannot associate myself, is the stance that the central concern of child law lies in identifying and formulating children's legal responsibilities (3). I would much rather support the view that the central concern lies in the desirability and assistance to keep families intact and avoid institutional care (4 54). While I agree with the statement that child law today enjoys a higher political priority than previously (7), politics (or perhaps culture in this case, or both) sometimes still influences our perception, for instance in the death of so many boys as a result of circumcision and initiation practices. It has been reported in the media (O' Connor "Besnydenis eis 33: Niemand vervolg" *Beeld* 27 August 2013 2) that at least 300 boys have died as a result of these practices during the past five years; that the number of deaths has increased yearly since 2008–2009; and that prosecutions are lagging behind. Is the time not ripe to identify the killing and maiming of children as a result of harmful traditional practices as a factor that impacts on the welfare of South Africa's children (37 para 3.2)? Other minor issues that caught the eye are the fact that the author prefers referencing the *Introduction to child law in South Africa* rather than *Child law in South Africa* (eg 16 fn 50 94 199 203 292 fn 119 and 125). The view that Presiding Officers (or Commissioners of Child Welfare, as they were previously known) do not or did not receive specialised training (315) is not entirely true. In fact I know that training was provided by the Justice College as early as November 2007 and continued training is now conducted by the South African Judicial Education Institute. The wishes of one child will not "inevitably" affect the decision made about siblings (567). *Central Authority for the*

Republic of South Africa v De Wet and Another (Intervening Party) and Centre for Child Law as Amicus Curiae (unreported case no. 2006/2028 (W) paras 39–42) provides proof to the contrary. While I really appreciate the comparative research on international child abduction, the contribution of Woodrow and Du Toit (in *Commentary on the Children's Act* 17–27) could perhaps have been mentioned. Their view on the role of the legal representative appearing on behalf of very young children has met with approval in *B v G* 2012 2 SA 329 (GSJ) and in *Central Authority v B* 2012 2 SA 296 (GSJ). I have to concede that the judgments were both reported after publication of this book.

Concerning the more technical issues, it should be mentioned that the referencing of unreported judgments is very useful (129). The editing is impeccable. The missing verb here and there (425 and 427) or the wrong font size (for fn 76 in the text on 458) is absolutely trivial in a publication of this magnitude. Very comprehensive tables (including cases, statutes, international conventions and an index) immediately directing the reader to the applicable page add to the immense value of this prestigious publication.

It is unfortunate that the editor of this journal received the complimentary copy of *Child law in South Africa domestic and international perspectives* for review purposes only in June 2013. In a sense it defeats the purpose of a book review as this review could have promoted the book amongst the experts in this particular field. Two years after publication is too late to achieve this aim. Luckily the book under discussion is not the usual run-of-the-mill publication and will promote itself. It is in fact a very valuable scholarly publication that adds to the existing research outputs on South African child law. It is therefore still fitting to make a few remarks on the contribution made by this publication.

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