

Considering the continued viability of adoption as a form of substitute parental care for children*

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OPSOMMING

'n Oorweging van die voortgesette lewensvatbaarheid van aanneming as 'n vorm van plaasvervangende ouerlike sorg vir kinders

Aanneming word oor die algemeen beskou as die voordeligste en mees koste-effektiewe maatreël vir sorgbehoewende kinders. Nie alleen voorsien dit vir die aangenome kind substitueer ouerlike sorg op 'n permanente grondslag nie, maar plaas dit ook die kind juridies in dieselfde posisie as 'n natuurlike kind van die aannemende ouers. Ondanks al hierdie voordele is daar 'n kommerwekkende onderbenutting van aanneming as 'n alternatief vir kinders wat 'n behoefte het aan plaasvervangende ouerlike sorg. Die invoering van die Kinderwet en 'n strategie om aanneming aan te moedig het dus duidelik nie die gewenste resultate opgelewer nie. Die artikel ondersoek die wyses waarop die bepalings in die Kinderwet bedoel was om aanneming te fasiliteer. Daarbenewens word die hoewe se uitleg van die relevante artikels, die nuwe probleme wat geïdentifiseer is en die wysigings vir insluiting in die voorgestelde wysigingswet ook aangespreek en uitgewys. Redes vir die onderbenutting van aanneming en ander moontlikhede om standvastigheid te bied vir kinders vir wie aanneming nie 'n moontlikheid is nie, word ondersoek. Uiteindelik word uitgewys dat alhoewel aanneming steeds die voordeligste vir sekere kinders sal wees, bykomende opsies geskep moet word om die unieke uitdagings van sorgbehoewende kinders in Suid-Afrika aan te spreek.

1 INTRODUCTION

The formal adoption procedure in the Children's Act¹ is intended to protect the interests of all the parties in the adoption triad – it protects the rights of the child's parents by requiring their informed consent to the adoption, it confers full parental responsibilities and rights on the adoptive parents that can only be rescinded or revoked in exceptional circumstances, and it makes the best interests of the child the paramount consideration in determining whether the adoption order should be granted. Adoption generally is regarded as the most sound and cost-effective approach to the care of children who are without families of their own, those who are abused or neglected with no prospect of reunification with

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1 38 of 2005. Unless otherwise indicated, any further reference to the Children's Act is to this Act.

their biological families and children who are in need of permanent alternative placement.² Despite its many advantages for the child, adoption is grossly under-utilised in South Africa.³ The reasons for the under-utilisation of adoption are varied and complex.⁴ The Children's Act has sought to address the legislative hurdles which have frustrated adoptions in the past. In a further attempt to promote adoption, the Department of Social Development (DSD), in conjunction with USAID/Southern Africa, commissioned the drafting of an Adoption Strategy for South Africa.⁵ All these efforts seem to have come to nought as the number of adoptions has continued to decline. According to DSD, 2 236 adoptions were registered between 1 April 2010 and 31 March 2011.⁶ This number had dwindled to a paltry 978 adoptions by the year ending on 31 March 2016. Based on statistics of children in foster care, as well as that of children deprived of parental care (including orphans), children living in child-headed households and children in residential care, the Human Research Council (HSRC) estimated the number of adoptable children in 2010 at between 1,5 and 2 million.⁷ The disparity between the number of adoptions and this number, that has undoubtedly since increased, has been raised as a cause for serious concern.⁸ In an attempt to address these latest concerns, amendments to some of the adoption provisions were included in the first round of legislative amendments in 2017.⁹ Other amendments are being considered for inclusion in a Third Amendment Act.¹⁰

At the outset, the article briefly illustrates some of the ways in which the Children's Act was intended to facilitate the adoption process. Reference is made to

2 *Final adoption strategy* prepared for USAID/Southern Africa and the Department of Social Development (DSD) by Business Enterprises at the University of Pretoria (Pty) Ltd and the Centre for Child Law, University of Pretoria (30 October 2009) (hereafter *Final adoption strategy* (2009)) 22.

3 *Final adoption strategy* (2009) 6. Human Sciences Research Council "Study report on the perceptions, understanding and beliefs of people towards adoption and blockages which prevent communities from adopting children in South Africa" compiled and produced for the Directorate of Adoptions and International Social Services, National Department of Social Development by the Child, Youth Family and Social Development Programme at the at the Human Sciences Research Council (January 2010), available at www.hsrc.ac.za (hereafter the *HSRC Adoption study report* (2010)) (vii).

4 *Final adoption strategy* (2009) 11–16; *HSRC Adoption study report* (2010) 33.

5 *Final adoption strategy* (2009).

6 DSD presentation entitled "A government perspective: An overview of developments, trends and challenges in adoptions in SA since 2010" presented at a conference held by the National Adoption Coalition of South Africa (NACSA) with the theme "Adoption 2016 & beyond" on 2 November 2016 (DSD at NACSA conference (2016)).

7 *HSRC Adoption study report* (2010) 20.

8 See, eg, *HSRC Adoption study report* (2010) (vii); *Final adoption strategy* (2009) 6; Wolfson Vorster "Sounding the death knell for adoption?" *Daily Maverick* 2016-11-15, available at <http://bit.ly/2htknry> (accessed on 28 May 2017).

9 The Children's Amendment Act 17 of 2016 and the Children's Amendment Act 18 of 2016, published respectively in *GG* 40564 and *GG* 40565 of 19 January 2017. The Amendment Acts are not yet in operation.

10 See Molobi "3rd Children's Amendment Bill" on behalf of DSD presentation at Miller du Toit & Cloete 17th Annual Family Law Conference, Cape Town 13–14 March 2014, available at <http://bit.ly/2u6hSxf>; Du Toit "Legal road bumps in adoption" on behalf of Centre for Child Law presentation at National Adoption Coalition Conference 2014 with the theme "Adoption and Culture", available at <http://bit.ly/2u6PPOb> (accessed on 28 May 2017).

the way in which these adoption provisions have been interpreted by the courts, the new problems that have been identified, as well as the proposed amendments to be included in the Third Amendment Act. The article concludes by reconsidering the relevance and continued viability of adoption as a form of permanent care in light of the steep decline in the number of adoptions. Reasons for the decline and other means of providing permanency and stability for children who cannot access adoption will be investigated. Ultimately, it will be shown that while adoption will remain the most preferred form of care for certain children, additional measures should be introduced to cater for the unique needs of displaced children in South Africa.

2 PROMOTION OF ADOPTION IN THE CURRENT LEGAL FRAMEWORK

2.1 Creating an integrated method of screening and matching adoptable children with prospective adoptive parents

The Register on Adoptable Children and Prospective Adoptive Parents (RACAP) was one of the most important innovations introduced by the Children's Act to facilitate domestic adoptions.¹¹ The aim of RACAP, according to section 232 of the Act, is to keep a record of adoptable children and fit and proper adoptive parents. While the main Act¹² seems to make registration in RACAP optional, regulation 98 compels a social worker to register a suitable prospective adoptive parent and an adoptable child in RACAP. Registration in RACAP is nevertheless not a qualifying prerequisite for applicants who wish to adopt in terms of the main Act.¹³ Where the child has a guardian or caregiver¹⁴ who is willing to adopt the child, the child is not adoptable within the meaning of section 230(3)¹⁵ and, therefore, need not be registered in RACAP. The RACAP *Guidelines* drafted by DSD make it clear that registration in RACAP is not permitted where, for example, the child is to be adopted by a stepparent, foster parent or other known relative or the child has already been matched with suitable adoptive parents.¹⁶ A child may also not be registered in RACAP before the lapse of 60 days from the signing of the consent to the adoption or, if abandoned, within the lapse of a period of three months from the date of the publication calling upon someone to

11 See also Mosikatsana and Loffell in *Commentary on the Children's Act RS 5 (2012)* 15-11.

12 S 232(2).

13 S 231 makes no mention of RACAP.

14 The hyphenated form of the of the word is defined in the Children's Act (s 1(1) *sv* "caregiver") as "any person other than a parent or guardian, who factually cares for a child and includes – a foster parent; a person who cares for a child with the . . . consent of a parent or guardian of the child; a person who cares for a child whilst the child is in temporary safe care; the person at the head of a child and youth care centre where a child has been placed; the person at the head of a shelter; a child and youth care worker who cares for a child who is without appropriate family care in the community; and the child at the head of a child-headed household".

15 S 230(3)(a) makes it clear that a child is adoptable if the child is an orphan "and has no guardian or caregiver who is willing to adopt the child".

16 See Directorate Adoptions & ISS National Department of Social Development *The Implementation Guidelines of the Register on Adoptable Children and Prospective Adoptive Parents (RACAP)* (undated), available at <http://bit.ly/2htw3dO> (accessed on 28 May 2017) (hereafter RACAP *Guidelines*) 12.

claim responsibility for the child.¹⁷ The proposed Amendment Act will, hopefully, clarify whether or not placement on RACAP is mandatory in order to resolve the apparent conflict between the principle Act and subsidiary legislation in this regard.

As regards the implementation of RACAP, DSD has claimed that an average number of 500 adoptable children and 200 prospective adoptive parents have been registered on RACAP each year since 2010.¹⁸ A review of RACAP, conducted by the National Adoption Coalition of South Africa (NACSA) as part of a research project on child abandonment in South Africa,¹⁹ provides a rare glimpse into the demography of prospective adopters and adoptable children in South Africa. According to this review, there were a total of 297 unmatched parents registered on RACAP as at November 2013. Of these, 14 were African, 190 white and 43 Indian – the remainder being unspecified. Most of these applicants were seeking a child, preferably girls where gender was specified, of their own race. Fifty of the applicants would consider a child with special needs (HIV or with physical or mental disabilities). The same review found 428 children were still unmatched at the time. Of those children available for adoption, 398 were African, three White and nine termed “mixed race”, the remainder being unspecified. Sixty per cent of these children had been abandoned and in less than 40% of the cases, parents or family members had formally consented to the child being put up for adoption. A total of 38 children were HIV positive, 22 born premature and 53 had other special needs challenges. According to South Africa’s Second Country Report to the African Union’s Committee of Experts on the Rights and Welfare of the Child on the ACRWC covering the period May 2013 to May 2016,²⁰ there were 561 adoptable children and 373 prospective adoptive parents registered in RACAP in May 2016.²¹

2.2 Expanding the categories of persons who may adopt

While there is no doubt that RACAP streamlines the screening and matching process and places it on a more scientific level, the system’s effectiveness is largely dependent on finding persons willing to adopt a child. The expansion of the categories of persons eligible to adopt was considered an important step towards removing any remaining disqualifications in this regard.

Section 231 of the Children’s Act has extended the possibility of adopting a child jointly beyond the confines of marriage.²² A child may now be adopted

17 See discussion in 2.3.1 below.

18 DSD at NACSA conference (2016).

19 See Blackie “Fact Sheet on Child Abandonment Research in South Africa” 20 May 2014, available at <http://www.adoptioncoalitionsa.org> (accessed on 28 May 2017).

20 Para 264.

21 Based on entries in the Adoption Register, the HSRC *Adoption study report* (2010) (viii)–(ix) showed that babies younger than one year, White children and children born out of wedlock are more likely to be adopted; prospective adoptive parents typically have no child sex preference. Adoptive and prospective adoptive parents were shown to more likely be White, single, employed and childless. In terms of age the study showed a clear racial discrepancy: among Whites it is usually younger people while among Blacks it is usually older persons. A large number of single people adopt children in SA, and this according to the study may reflect low marriage rates, more than adoptive family composition *per se*.

22 S 231(1)(a)(i) of the Children’s Act makes provision for the joint adoption by a “husband and wife”. These terms must now be read as including a reference to a civil union partner:

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jointly by “partners in a permanent domestic life-partnership” and by a person whose permanent domestic life-partner is the parent of the child.²³ The new provision²⁴ furthermore allows “other persons sharing a common household and forming a permanent family unit” to adopt a child jointly. Creating the possibility for a child to be adopted by more than two persons is rather revolutionary. Anticipating the potential loss of both parents due to the HIV epidemic, it was intended as a measure to secure the future responsibility for a child. In a customary setting it could furthermore make sense, for example, to allow a husband (as the head of the kraal) and his three or four wives to adopt a child jointly.²⁵

2.3 Making more children available for adoption sooner

The Children’s Act, whether by design or not, contains various measures that may ensure that more children are adopted sooner.

2.3.1 Defining “adoptable child”

Any child that is adoptable may be adopted if the adoption is in the best interests of the child and the other requirements of the Act are complied with.²⁶ To overcome the uncertainty that existed under the Child Care Act, the Children’s Act introduced objective criteria to determine the earliest moment at which a child could become available for adoption. Before the latest amendment, only the following children were deemed adoptable in terms of section 230(3):

- (a) a child who is an orphan and has no guardian or care-giver who is willing to adopt the child;
- (b) a child whose parents or guardian cannot be traced;
- (c) a child who has been abandoned;
- (d) a child whose parent or guardian has abused or deliberately neglected the child, or has allowed the child to be abused or deliberately neglected; or
- (e) a child who is in need of a permanent alternative placement.

The adoption social worker²⁷ has to make the assessment of whether the child is adoptable.²⁸ The Children’s Act defines “orphan”,²⁹ “abandoned”,³⁰ “abuse”³¹

s 13(2)(b) of the Civil Union Act 17 of 2006. The effect of the latter provision is that spouses and civil union partners of the same or opposite sex may adopt a child jointly.

23 S 231(1)(c). The provision clearly remedies the discriminatory effect of the previous Child Care Act (s 17) which was recognised in *Du Toit v Minister of Welfare and Population Development (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 2 SA 198 (CC) by providing for the joint adoption by same-sex life partners. The provision also eliminates the possible discrimination against heterosexual life partners to adopt jointly.

24 S 231(1)(a)(iii).

25 *SALC discussion paper* (2001) 136.

26 S 230(1).

27 The definition of “adoption social worker” has been amended: see para 2.7 below.

28 S 230(2).

29 “Orphan” means a child who has no surviving parent caring for him or her: s 1(1) of the Children’s Act *sv* “orphan”.

30 “Abandoned”, in relation to a child, means a child who (a) has obviously been deserted by the parent, guardian or care-giver; or (b) has, for no apparent reason, had no contact with the parent, guardian, or care-giver for a period of at least three months: s 1(1) of the Children’s Act *sv* “abandoned”.

and “neglect”³² in much clearer terms. Regulation 56, moreover, provides specific guidelines for the social worker to establish or confirm whether or not the child has been abandoned or orphaned.³³ Despite the inclusion of these provisions, social workers in practice still sometimes seem to find it difficult to convince the presiding officer of the child’s adoptability.³⁴ In case of doubt, it may be advisable to have the Children’s Court formally declare the orphaned or abandoned child in need of care and protection in terms of section 150 of the Act – especially before the placement of such a child with prospective adoptive parents.³⁵ In cases where it is difficult to prove the adoptability of an abused or deliberately neglected child or that the child is in need of a permanent alternative placement, it may similarly expedite matters if a section 150 order coupled with an order terminating the parental responsibilities and rights of the parents³⁶ is obtained before the adoption application is processed.³⁷ The introduction of a special adoptability order has been proposed as a possible solution to ensure that the child is made available for adoption at the earliest possible time.³⁸

Despite its intention to create an exhaustive list of children who would be adoptable, the provision originally did not include a child who is to be adopted by the spouse or life partner of the child’s parent or a child whose parents have consented to the child’s adoption. Following complaints that officials at the children’s courts were refusing to entertain applications for step-parent adoptions because step-children did not qualify as “adoptable” within the meaning of the provision, the Centre for Child Law (CCL) sought a declaratory order from the High Court to clarify the position under the Act. An order finding the provision unconstitutional on the basis that it precluded step-children from being adopted in their best interests was sought in the alternative. The same relief was sought in respect of section 242(1), which implied that such an adoption would automatically terminate all the responsibilities and rights of the child’s biological parent. The court in *Centre for Child Law v Minister of Social Development*³⁹ concluded that section 230(3) does not exclude a step-child from being adoptable.⁴⁰ The court argued that when a non-custodian parent consents to the adoption of his or

31 “Abuse”, in relation to a child, means any form of harm or ill-treatment deliberately inflicted on a child, and includes (a) assaulting a child or inflicting any other form of deliberate injury to a child; (b) sexually abusing a child or allowing a child to be sexually abused; (c) bullying by another child; (d) a labour practice that exploits a child; or (e) exposing or subjecting a child to behaviour that may harm the child psychologically or emotionally: s 1(1) of the Children’s Act *sv* “abuse”.

32 “Neglect” in relation to a child, means a failure in the exercise of parental responsibilities to provide for the child’s basic physical, intellectual, emotional or social needs: s 1(1) of the Children’s Act *sv* “neglect”.

33 Reg 56 provides for certain express requirements (such as the placement of an advertisement in a local newspaper, the procurement of death certificates of the parents and an affidavit by a person testifying to the abandonment of the child) to be complied with before a child may be considered orphaned or abandoned.

34 Du Toit at NACSA conference (2014). Regarding the need to address the growing social crisis of child abandonment and declining adoption rates, see Blackie (2014).

35 *Ibid.*

36 S 135.

37 See Du Toit at NACSA conference (2014).

38 See Du Toit at NACSA conference (2014).

39 2014 1 SA 468 (GNP).

40 Para 17.

her child, where the whereabouts of such a parent cannot be established or where the child has had no contact with the parent for a period of at least three months, the parent must be taken to have abandoned the child.⁴¹ Even if this interpretation was found wanting, the provisions of section 231(1)(c) expressly providing for the adoption by the spouse or permanent life partner of a child's biological parent, in the court's view, made it abundantly clear that step-children could be adopted.⁴² The court furthermore argued that the constitutional rights of the child to family and parental care, coupled with the obligation to give paramountcy to a child's best interests, support such an interpretation of the Children's Act.⁴³ The court also held that given the powers of the court to provide otherwise in the order, section 242(1) should not be read to imply that such an adoption order would automatically terminate all the responsibilities and rights of the biological parent.⁴⁴ The court held that except where there are sound reasons not to do so, the children's court granting an adoption order in favour of a step-parent should specifically "order otherwise" by stating in the order that it will not terminate the responsibilities and rights of the child's parent or other guardian.⁴⁵ To make the order generally known, the DSD was ordered to publish the court's order in the *Government Gazette*.⁴⁶ The judgment has subsequently been criticised as "shortsighted" and its reasoning "questionable".⁴⁷ The contrived interpretation of "abandoned" may perhaps have been prompted by the court's overzealous attempt to avoid a declaration of unconstitutional invalidity of the impugned provision. Whatever the case may be, the amendment in terms of the Children's Amendment Act⁴⁸ should avoid any further uncertainty in this regard. In terms of this amendment, the definition of "adoptable child" is in express terms extended to include step-children and children whose parents have consented to their child being adopted.

Following its amendment, the provision is probably now as comprehensive as originally intended and will certainly help to prevent an adoptable child from unnecessarily languishing in unsuitable care that does not promote stability in the child's life. As such, it could contribute greatly to the possibility of making children available for adoption sooner.

2.3.2 Freeing orders

Before the Children's Act created the possibility of freeing orders, the biological mother and, where applicable, the father of the child to be adopted remained the guardian of the child until such time as the adoption order was made. This meant that despite having "signed off" his or her child for purposes of adoption, the biological parent still had to be approached for consent if the child, for instance, required surgery. A parent would, moreover, have remained responsible for the child's maintenance until the adoption order made it the responsibility of the

41 Para 8.

42 Para 11.

43 Para 12.

44 Para 17.

45 Para 14.

46 Para 17.

47 Ferreira "Step-parent adoption – *Centre for Child Law v Minister of Social Development* 2014 1 SA 468 (GNP)" 2015 *THRHR* 140 143.

48 17 of 2016 s 9.

adoptive parents.⁴⁹ It was argued that the continued involvement of a parent who had already released his or her child for adoption could be disruptive and “a source of insecurity and stress for all concerned”.⁵⁰ For this purpose, section 235 now authorises the court to issue an order freeing a parent or person from parental responsibilities and rights in respect of the child pending the adoption of the child. The freeing order can only be issued in favour of a parent or person whose consent to the adoption of the child is required.⁵¹

The *Final adoption strategy*⁵² recommends the drafting of guidelines to assist social workers to identify situations in which freeing orders could be employed. It was also recommended that the guidelines include a screening process to establish whether consent to a freeing order is given with the aim of avoiding financial responsibilities.⁵³ It is not known how often this provision has been utilised in practice, if at all.

2.3.3 Consent requirements and exceptions

Since consent is seen as one of the most important conditions for the adoption of a child,⁵⁴ the provisions regulating the granting and manner of consent may play a central role in facilitating the adoption process.⁵⁵ Various problems relating to the consent provisions under the Child Care Act were identified by the SALC.⁵⁶ The inconsistent application of the consent requirements in the case of a child born out of wedlock was identified as one of the major factors impeding the speedy finalisation of an adoption process.⁵⁷ The consent provisions in the Children’s Act seem to have clarified at least some of these uncertainties by simply requiring the consent of “each parent of the child” regardless of their marital status.⁵⁸

It is important to note that the Children’s Act specifically assigns the duty to gather information regarding the names and addresses of each person whose consent to the adoption is required to the clerk of the children’s court.⁵⁹

49 See *Burgess v Benatar* 1975 1 SA 782 (R) 783H.

50 Mosikatsana and Loffell 15–17.

51 For criticism of this section, see Louw in Boezaart (ed) *Child law in South Africa* 2ed (forthcoming).

52 Para 27.

53 *Final adoption strategy* (2009) 27–28.

54 S 233(1).

55 See, in general, Louw *The acquisition of parental responsibilities and rights* (LLD thesis UP 2009) 420–428 (hereafter “Louw Thesis”).

56 SALC *discussion paper* (2001) para 18.4.7.

57 See also Louw “Consent to adoption: Some perspectives” 1999 *De Jure* 124 126–128 who refers, *inter alia*, to the problems relating to the interpretation of s 19A.

58 S 233(1). For a detailed discussion of the interpretation of the consent provisions, see Louw in Boezaart (ed) *Child law in South Africa* 2ed (forthcoming).

59 S 237(1). A person who has consented to the adoption of a child and who wants the court to dispense with any other person’s consent must submit a statement to that effect to the clerk of the children’s court: s 237(2). Clerks have no special training and generally assist the courts in the performance of their functions: Gallinetti “The children’s court” in Davel and Skelton (eds) *Commentary on the Children’s Act* RS 5 (2012) 4–35. As was the case under s 19A(4) of the Child Care Act, the clerk of the court may request the Director-General of Home Affairs to disclose any information contained in the registration of birth of a child, including the identity and other particulars of a person who has acknowledged being the father or the mother of the child (s 237(3)). Reg 104 outlines the steps to be taken by the clerk to establish the names of the person who must consent to the adoption.

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The provision is to be welcomed and may in no inconsiderable way facilitate the speedy finalisation of the adoption process.⁶⁰

2.4 Providing a mechanism for allowing significant relationships to continue after adoption

Section 234 of the Children's Act provides an opportunity for the parents of a child to enter into a post-adoption agreement with the prospective adoptive parents to provide for communication and the provision of information after the adoption order is granted.

Before the creation of this possibility, access to or contact with an adopted child by his or her natural parents or other family members was only possible on an informal basis and then only if the adoptive parents agreed.⁶¹

The possibility of ensuring contact with a child after adoption may significantly improve the chances of a parent making a child available for adoption.⁶² Post-adoption agreements may be beneficial especially for the older adopted child, by giving recognition to the valuable ties that a child may have developed with people by virtue of his/her birth and the fact that such ties should not be eradicated.⁶³ Creating the possibility of a post-adoption agreement is in line with the international trend towards more openness in adoption proceedings.⁶⁴ However, the

The social worker must transmit information already obtained regarding the identity and whereabouts of persons who must consent to the clerk of the children's court (s 237(4)). The presiding officer must without delay cause the sheriff to serve a notice on each person whose consent to the adoption is required in terms of s 238.

⁶⁰ The provision may also make it easier for the prejudiced parent to seek compensation where the clerk failed in his duties, see Louw "Adoption rights of natural fathers with reference to *T v C* 2003 2 SA 298 (W)" 2004 *THRHR* 102 110–112 for an outline of possible remedies available to such a parent.

⁶¹ See *Re J (An Infant)* 1981 2 SA 330 (Z) 335H and Heaton "Post-adoption access to a child by his natural family" 1989 (30) *Codicillus* 8 9. The High Court could, of course, always order that contact be retained between the adopted child and his or her natural parents or other persons, provided that in the light of the adoption this was considered to be in the child's best interests. For such an order, see *Haskins v Wildgoose* [1996] 3 All SA 446 (SE).

⁶² See Louw "Open adoptions: Panacea or Pandora's box?" 2003 *De Jure* 252 262ff who discusses the benefits of creating post-adoption contact with a natural father, a natural mother, birth parents, "significant others" and foster parents. The article also discusses the possible benefits that post-adoption contact may have for the adoptive parents, surrogate mothers, adopted children generally and trans-racially adopted children, in particular.

⁶³ *SALC discussion paper* (2001) para 18.6.1. Insofar as these valuable ties could create a family life, comparable to that protected under Art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) (1950), Lowe and Douglas *Bromley's Family law* (2007) 821 foresee the possibility that "the adopted child and possibly other members of the birth family, particularly siblings and grandparents, could claim a breach of their Art 8 rights by the severance of the legal ties with the whole family resulting from the adoption". Lowe and Douglas 821 do not regard it as "beyond argument" that the complete severance of legal ties with the whole family is a disproportionate effect of adoption. It is therefore important to note that post-adoption agreements may make provision for communication with significant persons other than the child's parents: s 234(1)(a). For an overview of the constitutionality of the adoption provisions in the Children's Act, see Louw *Thesis* 445–447.

⁶⁴ Especially in the UK and the USA. See, eg, Jones "Openness in adoption: Challenging the narrative of historical progress" 2016 (21) *Child & Family Social Work* 85, available at <http://bit.ly/2wcs16f> (accessed on 28 May 2017).

provision in the Children's Act has been criticised as being too restrictive insofar as it only allows a parent or a guardian to apply for such an agreement and requires that the agreement be entered into before the application for adoption is made. In terms of the proposed amendments, the opportunity for entering into such agreements will be expanded and will allow the presiding officer to consider a post-adoption agreement during the course of the adoption proceedings. There is currently no indication whether or to what extent post-adoption agreements are utilised.

2.5 Devising the best way of securing stability in a child's life

2.5.1 Consideration of other placement options

Before ordering the removal of a child from the care of the child's parent, the children's court must in terms of section 157 consider a permanency plan proposed by the social worker with regard to the child and, in addition, consider the best way of securing stability in the child's life.⁶⁵ The permanency plan, in terms of the regulations⁶⁶ must explore the following options stated expressly in order of the most desirable to the least desirable:

- (a) if the child cannot be left with his or her parent, the possibility of placing the child in foster care with relatives or non-relatives as geographically close to the parent or care-giver as possible to encourage reunification;
- (b) the possibility of adoption by relatives of the child;
- (c) the possibility of a relative obtaining guardianship of the child;
- (d) the possibility of adoption by non-relatives, preferably of similar ethnic, cultural and religious backgrounds; or
- (e) the possibility of placing the child in permanent foster care with relatives or non-relatives or with a cluster foster care scheme.⁶⁷

It is clear from the hierarchy of options that adoption can only be pursued once reunification proves to be unsuccessful. Apart from adoption there are only two other options mentioned in the regulation that may achieve a comparable degree of stability in the life of the child, namely, appointing a relative as guardian over the child and long-term foster care. The appointment of a guardian will necessitate an application to the High Court, either in terms of its inherent jurisdiction or the provisions of section 24 of the Children's Act. This option may be appropriate

⁶⁵ S 157(1)(b). Permanency plans must give priority to enabling the child to remain with or be restored to his or her own family, while also providing for other permanent solutions such as adoption, foster care or independent living arrangements should this not be achieved, despite genuine efforts to provide the necessary services to achieve permanent placement within the child's own family: see the National Norms and Standards for Child Protection in Annexure B of the General Regulations regarding Children (2010) Part III (9)(d).

⁶⁶ Reg 55(2) of the General Regulations regarding Children, 2010 published in GN R261 GG 33076 of 1 April 2010.

⁶⁷ Under the Child Care Act, the children's court had the option to order the return of a child found to be in need of care in terms of s 14(4) to his or her family under the supervision of a social worker or, where this was not possible, to place the child temporarily in foster care or residential care, ie send the child to a children's home or a school of industries (s 15(1)(a)–(d)). Reg 15 of that Act introduced the requirement of a permanency plan in a rudimentary form where children had to be placed in alternative care. Adoption was the only long-term solution.

where the child does not have a guardian. However, if the child already has a guardian and the applicant wants sole guardianship,⁶⁸ the applicant, like a father applying for guardianship, will have to provide reasons why the child's existing guardian is not suitable to exercise guardianship in respect of the child or, otherwise, why the applicant is not applying for the adoption of the child.⁶⁹ This option may thus not only be expensive, but may in some cases place the applicant in the unenviable position of having to attack the suitability of a close relative to act as guardian of the child.

For purposes of creating stability in a child's life, a children's court may place a child in foster care with a family member for more than two years or until the child turns 18, if the child has been abandoned or orphaned, if there is for any other reason no purpose in attempting reunification and it is in the best interests of the child.⁷⁰ Long-term foster care will provide the child with a degree of stability as far as his or her care is concerned but will not solve the problem of who should exercise guardianship in respect of the child. Long-term foster care will, however, ensure access to the foster-care grant, which will currently still be forfeited upon adoption.⁷¹

In addition to these options, a child may also be placed in a child-headed household under the supervision of an adult person designated by the court⁷² to ensure stability in the child's life. While this possibility will ensure that the household remains intact,⁷³ it will also leave the exercise of guardianship uncertain. The adult under whose supervision the household must function may, apart from collecting and administering any social security grant, only take the day-to-day decisions relating to the household and the children of the household.⁷⁴

Therefore, although adoption may be the best way of securing stability in a child's life, it is not the only way. Adoption, more so than any other placement option, must thus in a given case be the best way of securing stability in that particular child's life. Although other placement options will not provide the child with the same degree of permanency and stability as adoption, the particular circumstances of the child may favour another placement option.

68 Although s 24(3) refers to any application for guardianship, the court in *CM v NG* 2012 4 SA 452 (WCC) para 58 held that such reasons would only be required when the applicant applies for exclusive or so-called "sole" guardianship.

69 S 24(3).

70 S 186(2).

71 See discussion in para 2 6 below.

72 S 46(1)(b) of the Children's Act. S 137 gives the provincial head of social development the discretion to recognise a household as a child-headed household if (a) the parent, guardian or care-giver of the household is terminally ill, has died or has abandoned the children in the household; (b) no adult family member is available to provide care for the children in the household; (c) a child over the age of 16 years has assumed the role of care-giver in respect of the children in the household; and (d) it is in the best interests of the children in the household.

73 The National Norms and Standards for Child Protection ((11)(a)) relating to child-headed households *inter alia* recommend that siblings in a child-headed household should, as far as possible, remain together, the right to family life of any child-headed household should be promoted and support to such households should be aimed at enhancing the capacity of the children living in the household to function as a family.

74 S 137(7). Reg 50 outlines the duties of the supervising adult in relation to a child-headed household and reg 51 determines the extent of the accountability of the supervising adult in relation to the administration of the money of the household.

2 5 2 Rescission of adoption orders

The possibility of the children's court rescinding an adoption order could jeopardise the stability and permanency that adoption would generally bring to the adopted child's life. The provisions allowing for the rescission of an adoption order thus should be interpreted strictly. Section 243 has simplified the grounds upon which, and the time frames within which an adoption order can be rescinded.⁷⁵ Apart from a parent or other person who had guardianship in respect of the child immediately before the adoption or the adoptive parent of the child, an application for the rescission of the adoption order may be made by the adopted child himself or herself⁷⁶ – an option that was considered lacking in the equivalent provision under the Child Care Act.⁷⁷

It is clear from the provisions of section 243(3) that the adoption order can only be rescinded if the order of rescission is deemed in the best interests of the child and the adoption order was made without the required parental consent or the prospective adoptive parents did not qualify to adopt in terms of section 231. As was the case in *T v C*,⁷⁸ the court in *AS v Vorster*⁷⁹ refused to rescind the adoption order despite the absence of parental consent (in this case, the mother had withdrawn her consent), finding that it would not be in the best interests of the child to grant the rescission.

These judgments⁸⁰ clearly illustrate the importance of maintaining stability in the adopted child's life,⁸¹ even at the expense of condoning the absence of parental consent to the adoption – generally deemed to be one of the most basic requirements for adoption.⁸² The rights of the parents (and persons vested with guardianship) whose consent is required for the adoption are thus clearly only enforceable insofar as they do not conflict with what the court considers to be in the best interests of the child.⁸³ Evidently, the permanency of the adoption placement will be given more weight than the rights of the parents, especially when some time has lapsed since the granting of the adoption order and the child has bonded with the adoptive parents.⁸⁴

75 Cf in this regard s 21 of the Child Care Act.

76 According to Mosikatsana and Loffell 15–25, this makes the provision “child-centred” in contrast to s 21 of the Child Care Act that was “parent-centred”.

77 S 21. As was the case under the Children Act 31 of 1937, s 243(3)(b) of the Children's Act does not give a guardian of a minor parent the right to apply for the rescission of the adoption order. It is now generally accepted that a presiding officer has *locus standi* to approach the High Court in its capacity as upper guardian to set aside an adoption order, provided that all interested parties consent to such proceedings or are at least given due notice: *Kommissaris van Kindersorg, Krugersdorp, Ex parte: In re JB Ex parte Kommissaris van Kindersorg, Oberholzer: In re AGF* 1973 2 SA 699 (T) 709D–E.

78 2003 2 SA 298 (W) 302C.

79 2009 4 SA 108 (SE) 122I.

80 Including the judgments in *Fraser v Naude* 1999 1 SA 1 (CC) and *Belo v Commissioner of Child Welfare, Johannesburg: Belo v Chapelle* [2002] 3 All SA 286 (W), as discussed by the court in *AS v Vorster* 18D–G.

81 The judgments are also excellent examples of the application of the best interests standard in terms of s 28(2) of the Constitution.

82 Louw *Thesis* 418.

83 Louw 2004 *THRHR* 102 110. The same can be said for the rights of prospective parents as far as their eligibility to adopt in terms of s 231 is concerned.

84 See *Fraser v Naude* 1999 1 SA 1 (CC) paras 8 9.

In *GT v CT*,⁸⁵ however, the court upset this trend by ordering the rescission of an adoption order more than six years after it was granted. The High Court dismissed the contention that it did not have jurisdiction to consider the application for rescission after the lapse of the maximum two-year period prescribed in section 243(2).⁸⁶ Mokgoathheng J declared that the constitutional principle of “the supremacy of the principle of the best interests of the children in every matter concerning children”⁸⁷ “trump[s] the prescriptive peremptory injunction” of section 243(2).⁸⁸ The provisions in the section, in his opinion, are consequently not only “superseded by and subservient to”⁸⁹ sections 2, 28(1) and 28(2) of the Constitution, but are also “not mutually destructive of or immutably inconsistent with”⁹⁰ the same constitutional provisions. In this case, the step-father had legally adopted his wife’s two children from her previous marriage.⁹¹ After the breakdown of their marriage two years later, “custody” was awarded to the mother in terms of the divorce order.⁹² She obstructed, and eventually completely prevented, any contact between the children and their adopted father on the basis that he was not their biological father.⁹³ She fostered and saw to it that the parent-child relationship between the children and their biological father was re-established at the expense of their relationship with their adopted father.⁹⁴ In terms of his legal obligations as the adopted father, she nevertheless expected him to keep on maintaining the children.⁹⁵ Finding the situation “intolerable and untenable”,⁹⁶ the adopted father applied for the rescission of the adoption orders to reinstate the biological parents as the legal parents of the children.⁹⁷ Apart from questioning whether it would be in the best interests of the children, DSD objected to the granting of the rescission order claiming that it was “impermissible for the applicant to sever his adoptive parental responsibilities because of financial considerations”.⁹⁸

The court considered the circumstances in the case “extraordinarily peculiar and exceptional”,⁹⁹ stating that the adoption of the two children “was forged on an unsound legal and moral foundation” as the “analysis of the dichotomy of the purported lawful adoption” indicated. The court considered the adoption of the children “in essence an abstract circumstantial fictional adoption”.¹⁰⁰ The court argued that although the biological father had legally consented to the adoptions, “*de facto* he never relinquished his parental rights, obligations and

85 [2015] 3 All SA 631 (GJ) para 19.

86 Para 7.

87 Para 15.

88 Para 14.

89 Para 16.

90 Para 18.

91 Para 20.

92 Para 21.

93 Paras 23–30.

94 *Ibid.*

95 Para 29.

96 Para 31.

97 *Ibid.*

98 Para 33.

99 Para 42.

100 Para 43.

responsibilities . . . as decreed by section 242(2)(a) of the Act”.¹⁰¹ The court argued that the adoptions were “not predicated on any of the statutory legal requirements prescribed by section 230(3) of the Act” since the children did not qualify as adoptable within the meaning of that section.¹⁰² Declaring the biological parents able to meet the financial needs of the children, the court granted the order of rescission “to strengthen their already existing parent-child relationship” and to lawfully formalise the *de facto* family unit.¹⁰³ The judgment has rightfully been criticised on various fronts.¹⁰⁴ The court confused the supremacy of the Constitution in terms of section 2 with the “supremacy” afforded to the best interests of children in terms of section 28(2). The children’s interests, despite proclamations to the contrary, were not actually investigated or considered at all, nor was any distinction made between the clearly differing relationships with their adoptive father. The court seemed surprisingly ignorant of the consequences of a legal adoption. Relegating a perfectly legal adoption to a fiction seems unconscionable. What is even more disturbing is that an application by DSD for leave to appeal has apparently been refused.¹⁰⁵ The precedent will thus stand unchallenged with its misconstrued interpretation of the law and faulty deductions. The correct approach would clearly have been to refuse an application for rescission and to direct the biological father to apply for the adoption of his two biological children in the manner prescribed by law.¹⁰⁶ In this way, the adoption social worker would have had to reassess the position and interests of the children in the appropriate manner.

2.6 Financial considerations in relation to adoption

In terms of the Children’s Act, a person may not be disqualified from adopting a child by virtue of his or her financial status.¹⁰⁷ Section 231(5) additionally makes it possible for a person who adopts a child to “apply for means-tested social assistance where applicable”.¹⁰⁸ The intention was to provide state assistance for poor but otherwise suitable prospective adoptive parents to adopt and raise a child. No such grant has been introduced as yet. The introduction of a fixed adoption grant could have promoted adoption amongst foster parents who would then not have lost the foster care grant when the foster child is adopted – one of the main reasons why foster parents were unwilling to adopt their foster child.¹⁰⁹

101 Para 48. In terms of this provision, an adoption order “confers full parental responsibilities and rights in respect of the adopted child on the adoptive parent”.

102 Para 49.

103 Para 61.

104 See Skosana and Ferreira “Step-parent adoption gone wrong: *GT v CT* [2015] 3 All SA 631 (GJ)” 2016(19) *PER/PELJ*, available at <http://bit.ly/2vvyGBE31> (accessed on 28 May 2017); Sonnekus “Kinderaanneming dra gevolge wat nie ligtelik afgelê kan word nie – *Turner v Turner* saak no 13040/2013 (ongerapporteur) 19-6-2015 (GJ)” 2015 *TSAR* 886.

105 As per Prof Skelton, the Director of the Centre for Child Law.

106 Because of the considerable lapse of time, review proceedings would arguably have been impossible: see Louw “Rescission of adoption orders” 2010 *De Jure* 328 336.

107 S 231(4). See Sloth-Nielsen & Van Heerden “Proposed amendments to the Child Care Act and regulations in the context of constitutional and international law developments in South Africa” 1996 *SAJHR* 247 255.

108 For a discussion of the initial proposals for and ultimate exclusion of social security measures in the Children’s Act, see Mosikatsana and Loffell 15-9–15-10.

109 The loss of the foster care grant is seen as a major impediment to adoption: *Final adoption strategy* (2009) 16; *HSRC Adoption study report* (2010) 40.

It is clear from the *Final adoption strategy* that the introduction of an adoption grant is imperative.¹¹⁰ In comparison to a foster child and a biological child whose parent can respectively access the Foster Care Grant or the Child Support Grant, an adopted child is placed at a greater risk of poverty if the adoptive parent cannot access a grant.¹¹¹ As such, the non-provision of an adoption grant may amount to unfair discrimination against adopted children and be considered unconstitutional. The *Final adoption strategy* also indicates that there was no reason to suspect that an adoptive parent would be more likely than the beneficiary of any other grant to misuse the grant and intimated that it would be discriminatory to impose a monitoring system on the use of such a grant when the same does not exist for any other grant.¹¹²

However, as the position currently stands, indigent parents may adopt a child even though they have no access to a grant that could supplement their means. This state of affairs may arguably pose serious risks for the welfare of the child adopted by such parents – even if they are otherwise perfectly suitable to care for the child.

2.7 Regulating the provision of adoption services¹¹³

Adoption is a highly specialised field of practice and only persons who have the required skill should be able to provide adoption services. The proper regulation of the provision of adoption services is vital if adoption in general is to be promoted. The fragmented and inadequate provision of adoption services has proved to be one of the greatest impediments to adoption in the past.¹¹⁴ The Children's Act and its Regulations provide considerably more guidance in this regard. The accepted norm is that adoption should be dealt with by expert adoption social workers functioning within a statutory-accredited adoption system.¹¹⁵ To ensure such expertise, section 250(1) makes it clear that only an accredited child protection organisation and an adoption social worker in the employ of such an organisation may provide domestic adoption services.¹¹⁶ To counter the pressure on existing human resources, the Second Children's Amendment Act¹¹⁷ extends the definition of "adoption social worker" to include

"a social worker in the employ of the Department or a provincial department of social development, including a social worker employed as such on a part-time or contract basis, who has a specialty in adoption services and is registered in terms of the Social Services Professions Act, 1978 (Act No. 110 of 1978)".¹¹⁸

110 *Final adoption strategy* (2009) 137–147.

111 *Idem* 137.

112 *Idem* 138.

113 According to s 1(1) of the Children's Act, "adoption service" includes (a) counselling of the parent of the child and, where applicable, the child; (b) an assessment of a child by an adoption social worker to determine whether the child is adoptable; (c) an assessment of a prospective adoptive parent by an adoption social worker as being suitable to adopt; (d) the gathering of information for proposed adoptions; and (e) a report by an adoption social worker recommending the adoption.

114 *Final adoption strategy* (2009) 11–12 48–49; HSRC *Adoption study report* (2010) 54.

115 National Norms and Standards for Child Protection pertaining to adoption services (Annexure B) 8.

116 S 1(1) *sv* "adoption social worker" read with ss 250 and 251 and reg 108.

117 18 of 2016.

118 The amendment was first recommended in the *Final adoption strategy* (2009) 59.

Perhaps as a result of an oversight, the definition of “adoption services” does not make reference to the procurement of a letter from the provincial head of DSD recommending the adoption – a new requirement inserted in the Children’s Act. This letter is a compulsory accompaniment to the application for adoption in terms of section 239(1)(d). Bosman-Sadie and Curie¹¹⁹ suggest the measure was introduced for quality control and to channel the reports of social workers in private practice. The court in *In re XN*¹²⁰ thought the requirement had a more lofty purpose in furthering the best interests of children “within our borders and those leaving them”.¹²¹ By formalising the requirement, the legislature involved oversight by public officials in the social worker’s assessment process which, in the court’s view, was a commendable process.¹²² The requirement was deemed one of the “stringent provisions” which encompassed “protective mechanisms” which are clearly aimed at preventing “what is becoming a reality that children are being used for human trafficking, as well as for illegal purposes”.¹²³ Notwithstanding the peremptory nature of the requirement,¹²⁴ in a special review from the Children’s Court, the High Court condoned the non-compliance with the provision in granting an adoption order in favour of the child’s step-father. The presiding officer (incorrectly referred to as the Child Commissioner¹²⁵ in the judgment) justified the granting of the adoption order on the basis that as a letter of recommendation, the court was not bound by the section 239(1) letter and could overrule it should it be necessary.¹²⁶ The presiding officer therefore failed to see why “this letter should hijack the finalisation of the adoption proceedings”.¹²⁷ She consequently utilised her additional powers to grant auxiliary relief in terms of section 48(a) of the Children’s Act to condone the non-filing of the section 239(1)(d) letter. The High Court upheld her decision, concluding that it was clearly in the best interests of the child and the exigencies of the situation had demanded that she grant the adoption.¹²⁸ The family was relocating to Trinidad and any delay in the adoption proceedings, in the court’s view, would have caused “incalculable emotional distress to the family”.¹²⁹ The court was, however, at pains to stress that presiding officers did not have *carte blanche* to condone non-compliance with the provisions of the Act and that this “can only be done if the circumstances are exceptional and warrant it, as in this case”.¹³⁰ With reference to the judgment in *AD v DW (Centre for Child Law as Amicus Curiae; Department for Social Development as Interested Party)*,¹³¹ the court also indicated that prospective

119 *Practical approach to the Children's Act* (2013).

120 2013 6 SA 153 (GSJ).

121 Para 14.

122 *Ibid.*

123 *Ibid.*

124 *Ibid.*

125 S 1(1) of the Children’s Act states categorically that the presiding officer of the children’s court is called the “presiding officer” and not the commissioner of child welfare as was the case under the Child Care Act (s 7).

126 Para 13.

127 *Ibid.*

128 Para 15.

129 *Ibid.*

130 Para 19.

131 2008 3 SA 183 (CC).

adoptive parents “could not be faulted for pursuing high court proceedings” in exceptional cases such as this to uphold the best interests of the child.¹³²

2 8 Effect of adoption orders

The effect of an adoption order granted in terms of the Children’s Act is the same as it has always been – it terminates all parental responsibilities and rights in existence at the time of the child’s adoption.¹³³ Before its amendment, section 242(1)(a) implied that an adoption would automatically also terminate all the responsibilities and rights of the child’s biological parent in the case of a step-parent adoption. The judgment in *Centre for Child Law v Minister of Social Development*¹³⁴ required a court granting such an adoption expressly to order this not to be the case. The position has fortunately been resolved by the amendment included in section 10 of the Children’s Amendment Act.¹³⁵ In terms of the amendment, the parent of the child is excluded from the operation of the provision in the case where the adoption order is granted in favour of the spouse or permanent domestic life-partner of that parent.¹³⁶

At the same time as terminating all the existing parental responsibilities and rights in respect of the child, the adoptive parents become the parents of the adopted child for all purposes in law.¹³⁷ An adoption order extinguishes the adopted child’s right to inherit intestate from blood relatives¹³⁸ and will generally also terminate the duty of support between the adopted child and his or her natural parents.

In *JT v Road Accident Fund*,¹³⁹ however, the court held that by assuming an obligation to support his child after her adoption, the biological father of the child had conferred on her an enforceable right in respect of a duty of support. As such, the RAF was obliged to compensate the adopted child for the loss she incurred as the “dependant” of her deceased biological father.¹⁴⁰ The court made much of the possibility of altering the consequences of an adoption order. Sutherland J interpreted the proviso in section 242(1) allowing a court to provide otherwise as creating a “wide scope for judicial discretion in the allocation of parental rights and responsibilities”.¹⁴¹ In his opinion, the effect of an adoption order

“is therefore not a fixed and immutable bundle of unchangeable rights and duties but rather s 242(1) merely sets out a default position that may be varied in accordance with an order, tailored ad hoc to a specific child”.¹⁴²

132 Para 21.

133 S 242(1).

134 2014 1 SA 468 (GNP) para 14.

135 17 of 2016.

136 In terms of s 13 of the Civil Union Act 17 of 2006 “spouse” includes a civil union partner.

137 S 242(3).

138 The Intestate Succession Act 81 of 1987 (s 1(4)(e)) expressly states that an adopted child is deemed a descendant of his or her adoptive parents and not his or her natural parents. Before the Child Care Act, a child retained the right to inherit intestate from his biological family after being adopted (see Children’s Act 33 of 1960 s 74(2)), a practice referred to as “double dipping” by the court in *Flynn v Farr* 2009 1 SA 584 (C) para 36.

139 2015 1 SA 609 (GJ) para 31.

140 *Ibid.*

141 Para 11.

142 *Ibid.*

With reference to case law, the court then attempted to illustrate how the common law has been developed to recognise the creation of a duty of support where one person had assumed a binding duty of support in favour of another.¹⁴³ Moreover, in the court's view, the recognition of a duty of support in such circumstances was in harmony with a "culturally embedded notion of 'family'", derived from the Roman-Dutch tradition, but also the African tradition as exemplified by the spirit of *Ubuntu*.¹⁴⁴

Even if the common law should be extended as proposed by the court, the reasoning in the judgment is questionable.¹⁴⁵ The judgment is based on provisions that were not applicable since the adoption order in this case had been granted in 2009, before the Children's Act had come into operation. The Child Care Act¹⁴⁶ did not provide the court with the same latitude to alter the default consequences of an adoption order. The court's statement that the mere creation of the possibility to alter the default position "is illustrative of what can be sanctioned by law in acknowledgement of the existence of given relationships"¹⁴⁷ is irrelevant as the adoption order that was granted in this case did not exclude or alter the default consequences of the adoption.

3 CONTINUED VIABILITY OF ADOPTION AS A FORM OF PERMANENT CARE

In response to various submissions calling for the abolition of adoption,¹⁴⁸ the SALC considered the desirability of retaining adoption as a form of substitute family care in the course of reviewing the Child Care Act in 2001.¹⁴⁹ The Commission ultimately rejected the calls for abolition, *inter alia*, based on the fact that there was no other form of permanent placement that has demonstrated that it can be more beneficial than the established system of adoption.¹⁵⁰ However, despite its potential, adoption remains one of the least popular care options in South Africa – even after the implementation of the newly-revised legislative

143 Para 26.

144 *Ibid.*

145 See Heaton "Duty of support" 2015 *JQR Family* para 2.2.

146 S 20.

147 Para 28.

148 According to the SALC, the abolitionists argue that the concept of adoption is so fundamentally flawed that no statutory amendments to the Child Care Act could overcome these essential faults, including the fact that (a) the legal fiction about the adopted child's parentage is gradually being eroded by developments regarding openness in adoption; (b) in order to promote the legal fiction that the adoptive parents are the child's only parents, children have been denied access to information about family origins and the circumstances of their birth and denies birth parents any relationship with their child; (c) since the traditional concept of adoption has already been greatly compromised by developments such as "open adoption", increased access to information and the declining numbers of adoptions, the abolition of adoption would represent a culmination of these trends rather than a radical departure from it; (d) medium or long-term care-givers of children can be given the powers and responsibilities of biological parents without any need to pretend that they are the biological parents of the child and that the child's birth family has ceased to exist: *SALC discussion paper* (2001) 119.

149 *Idem* 117–122.

150 Quoted from para 3.5 of the new South Wales Law Reform Commission Discussion Paper 34 *Review of the Adoption of Children Act 1965* (NSW) (Apr 1994): *SALC discussion paper* (2001) 117.

provisions.¹⁵¹ A study commissioned by DSD conducted under the auspices of the Human Sciences Research Council (HSRC) that explores current perceptions, understanding and attitudes of South Africans towards adoption, provides valuable insight into the reasons for this unsatisfactory state of affairs.¹⁵²

According to the study, the common barriers to adoption in countries with a low adoption rate can be divided into three broad categories, namely, service-provider obstacles; resource-allocation obstacles; and knowledge-based factors.¹⁵³ The study, however, found that in South Africa an additional category relating to socio-cultural obstacles should be explored.¹⁵⁴ In the service context, the study found an apparent lack of consistency and uniformity in the interpretation and implementation of the Children's Act and key legislation relating to adoption in the country by different stakeholders. Other barriers include a shortage of critical human resources such as specially-trained adoption social workers and magistrates.¹⁵⁵ As far as resource allocation was concerned, the study found that inadequate financial and other resources were allocated to adoption services and that the absence of an adoption subsidy seems to be a disincentive for many people, particularly foster parents, to consider adoption.¹⁵⁶ In the knowledge context, misperceptions about the process of adoption and stereotypes about eligibility appeared to be common inhibitors to adopting.¹⁵⁷ The key findings regarding socio-cultural factors influencing the decision to adopt are considered important enough to reproduce here:

- “Specific cultural factors were highlighted in this research, in particular the severing of ties between the child and the family of origin was seen as a disincentive for adoption.
- Concerns exist that the process of adoption and in particular name changes and geographic moves in the case of non-kin adoptions would create problems with ancestral belief systems, and as such the process of idea of adoption was counter intuitive to African family culture.
- The notion that children should be formally adopted by extended family also seemed redundant and time consuming given that the permanence of the care structure and responsibilities were so clearly defined by cultural systems.
- Cultural and social practices around the movement of children viewed the lack of permanency in the care of children as an advantage rather than a disadvantage requiring an intervention – as children were moved to access more resources and care rather than less.”¹⁵⁸

The study concludes by making recommendations that have heretofore remained largely ineffective and unachievable¹⁵⁹ – a national awareness campaign,

151 HSRC *Adoption study report* (2010) 11.

152 *Idem* 52. See also the article based on this study by Rochat, Mokomane and Mitchell “Public perceptions, beliefs and experiences of fostering and adoptions: A national qualitative study in South Africa” 2016 *Children and Society* 120–131.

153 HSRC *Adoption study report* (2010) 33.

154 *Ibid.*

155 *Idem* 54.

156 *Ibid.*

157 *Ibid.* See also Rochat *et al* 2016 *Children and Society* 120 125.

158 *Ibid.* See also also *Final adoption strategy* (2009) 14–15 and Rochat *et al* 2016 *Children and Society* 120 124.

159 The *Final adoption strategy* (2009) made the same recommendations: awareness campaigns (43); social assistance (43–47), human resources and training (53–54); and cultural beliefs (38).

introducing an adoption grant, creating more resources and making the adoption process less cumbersome and more culturally-sensitive.¹⁶⁰

These pursuits, in my opinion, can only have limited success, since the adoption procedure will not easily be “Africanised”.¹⁶¹ It is by its very nature a formal bureaucratic process. The question is why are caregivers not going to the trouble of actually adopting the child in their care if it is the best thing they can do for the child? If the caregiver is the foster parent of the child, the answer must surely be sought in the prospect of losing the foster care grant – unless the foster parent, for example, is a grandmother who would not want to adopt her grandchild for fear of disturbing the generational relationship.¹⁶² The introduction of an orphan or adoption grant appears to be viable¹⁶³ and should be non-negotiable if the state is serious about improving stability in the lives of so many South African children.

The state should also recognise that in giving caregivers such extensive rights, it itself has created a disincentive to adopt. Persons who care voluntarily for a child, either indefinitely, temporarily or partially may in terms of section 32 of the Children’s Act, exercise “any parental responsibilities and rights reasonably necessary” to safeguard the child’s health and protect the child against abuse and neglect. This includes the right to consent to any medical examination or treatment.¹⁶⁴ Primary caregivers may claim a Child Support Grant and a Care Dependency Grant.¹⁶⁵ Any person having charge of a child or a person requested to do so by the child’s parents may register the birth of the child.¹⁶⁶ Although the courts do not recognise intestate succession rights for *de facto* adopted children,¹⁶⁷ the courts have recognised a maintenance obligation between a child and his or her *de facto* caregiver.¹⁶⁸

Informal caregivers, however, do not have guardianship. The practical importance of guardianship in caring and protecting children must therefore be considered. Only a natural parent or court-appointed guardian can register the child at school¹⁶⁹ and can consent to the child’s marriage, adoption, application for a passport, departure or removal from South Africa and sale of immovable property.¹⁷⁰ The child’s citizenship would generally also be determined by the child’s

160 HSRC *Adoption study report* (2010) 57–59.

161 A recommendation made by the HSRC *Adoption study report* (2010) 59.

162 See *Final adoption strategy* (2009) 47.

163 See *idem* 44–47, outlining the principles that should underpin an adoption grant in South Africa and a base proposal containing the recommended features of such a grant.

164 S 32(2).

165 The primary caregiver must, however, provide proof that he or she is the child’s primary caregiver through an affidavit from a police official, a social worker’s report, an affidavit from the biological parent or a letter from the principal of the school attended by the child. The caregiver must also be a South African citizen or permanent resident: see <http://bit.ly/2uq6fQX> (accessed on 28 May 2017).

166 Birth and Deaths Registration Act 51 of 1992 s 9. The Department of Home Affairs, however, requires a person legally responsible for the child to complete the necessary birth registration Form BI-24. See instructions at <http://bit.ly/2ua3g3N> (accessed on 28 May 2017).

167 See *Flynn v Farr* 2009 1 SA 584 (C) para 21.

168 See, eg, *MB v NB* 2010 3 SA 220 (GSJ) para 21 and *JT v Road Accident Fund* 2015 1 SA 609 (GJ) paras 20–26.

169 See reg 6(1)(c) of the Regulations for Admission of Learners to Public Schools in *Provincial Gazette Extraordinary* No 127 of 9 May 2012.

170 S 18(3) of the Children’s Act.

parents or natural guardians.¹⁷¹ Many of the legal acts requiring the parent or guardian's consent will only become relevant later in the child's life, while other acts would simply never materialise since most children will not have the means to travel beyond the borders of South Africa or have assets to sell. Even if a caregiver considers guardianship important, acquiring guardianship has been made onerous and costly as it requires an application to the High Court.¹⁷² The proposed amendment to the Children's Act, giving children's courts concurrent jurisdiction to confer guardianship on a caregiver, in my view, may be far more beneficial to children than trying to make the adoption system more accessible.¹⁷³

In addition to the abovementioned factors, the dual recognition of customary adoptions may also contribute to the erosion of formal adoptions. While customary law adoptions have been recognised for purposes of creating a legally-enforceable duty of support in the past,¹⁷⁴ in *Maneli v Maneli*¹⁷⁵ the court effectively equated the status of a child adopted in terms of Xhosa law with a child adopted in terms of the Children's Act. The court in this case directed the Director-General of the Department of Home Affairs to register the child as the adopted child of the parties in terms of the Births and Deaths Registration Act.¹⁷⁶ However, even if the *Maneli* judgment is accepted, it is important to note that because there is no uniform adoption procedure in terms of customary law, a court order

171 South African Citizenship Act 88 of 1995 s 3.

172 S 24 of the Children's Act, read with s 45(3).

173 In reviewing the Child Care Act and the continued viability of adoption, the South African Law Commission (*SALC discussion paper* (2001) 120) referred to a proposal in terms of which "the role of non-parental care-givers could be recognised by giving the new Child and Family Court ample powers to make orders about some or all the matters now associated with adoption, including the issuing of a new birth certificate and changes in support obligations and inheritance rights. The argument was that, instead of making a single inflexible order for adoption, the court would be able to assemble a package of legal orders which would be designed to suit members, and the fact that many South African children experience a variety of other family forms. This would include recognition of modern families in a multicultural society". The creation of a guardianship grant or "subsidised guardianship" was mooted in the *Final adoption strategy* (2009) 47. The recommendation was that a research team should investigate the possibility of introducing such a grant since there was insufficient data to make a definitive decision in this regard. It is interesting to note that the HSRC *Adoption study report* (2010) 54–55 acknowledged that their findings "also raise the possibility that an alternative approach to formalisation of care arrangements might alleviate the cultural conflicts with the concept of adoption. In this sense the goals of securing safe, consistent and appropriate care for children who are at risk, should perhaps be separated from the goal of increased adoption. This is particularly so if more culturally appropriate approaches are available".

174 See *Kewana v Santam Insurance Co Ltd* 1993 4 SA 771 (TkA); *Thibela v Minister van Wet en Orde* 1995 3 SA 147 (T); *Metiso v Padongelukkefonds* 2001 3 SA 1142 (T); and *Fosi v Road Accident Fund* 2008 3 SA 560 (C).

175 2010 7 BCLR 703 (GSJ).

176 51 of 1992. The judgment mistakenly directed the Director-General to register the adoption in terms of s 2 of the said Act. S 2 merely provides for the scope of the application of the Act, ie to SA citizens and non-citizens who sojourn temporarily or permanently in the Republic for whatever reason. The reference should presumably have been to s 3 which places the administration of the Act in the charge of the Director-General of Home Affairs and/or s 7 that provides *inter alia* for the rectification of particulars, more specifically s 7(2).

will still be required to scrutinise adherence to the applicable customs before endowing the “adoptive parents” with parental status.

4 CONCLUSION

Given its many advantages, adoption should remain the most preferred form of care for adoptable children in suitable circumstances. An adoption grant should, however, be introduced without further delay to extend the advantage of adoption to as many other children as possible – especially and at least those in non-relative foster care. The exclusive jurisdiction of the High Courts to grant guardianship orders should be removed to facilitate such orders. Although a guardianship order would not automatically confer succession rights on a child, it would certainly go a long way to ensure the protection of children not in the care of their parents by creating a legally-recognised parent-child relationship – at least until the child acquires the status of a major.¹⁷⁷

¹⁷⁷ For a comparison between adoption orders and sole care and guardianship orders, see Louw *Thesis* 397–398.