INTERCOUNTRY1 ADOPTION:
LOCAL ALTERNATIVE CARE OR FOREIGN PARENTAL CARE?

Anne Louw, University of Pretoria, South Africa

Introduction

The law relating to children in South African is generally in a state of transformation. A comprehensive review of the child legislation in South Africa became necessary because of, inter alia, -

(a) the creation of a constitutional democracy in 1993, followed by the enactment of the final Constitution in 1996 (The Constitution of the Republic of South Africa, Act 108 of 1996, hereinafter referred to as the Constitution); and

(b) South Africa’s international obligations flowing from the ratification of various international instruments, most importantly the United Convention on the Rights of the Child (1989) on 16 June 1995 (UNCRC).

Through the efforts of the South African Law Commission (now the South African Law Reform Commission or SALRC2), a new comprehensive Children’s Bill has finally, nine years after it was first mooted, been approved by the National Assembly. Although the Bill is not yet law, the Social Development Minister Zola Skweyiya welcomed the approval, saying it created a new legislative foundation for the care and protection of children in South Africa. Existing legislation was, according to the Minister, hampering the ability of the government to respond to the “challenging social realities” facing children, families and communities in post-apartheid South Africa”.3 These social realities include dealing with the increasing multitude of South African children who are abandoned and orphaned because of poverty, the breakdown

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1 The preferred spelling of the term for purposes of this paper. The hyphenated version of the term (“inter-country” adoption) will only be used when quoting verbatim from other sources.
2 The name change was effected by the Judicial Matters Amendment Act, 2002. Although the name change only occurred after publication of the SALRC’s Discussion Paper and Report, the Commission will henceforth be referred to as the SALRC.
3 See “Children’s Bill gets the nod” (22/06/2005 20:54 – SA) on www.news24.com in which the Social Development Minister Zola Skweyiya is quoted.
of families and, more recently, predominantly because of the spiralling effect of the HIV/AIDS epidemic.\(^4\) Section 28(1)(b) of the South African Constitution guarantees every child “the right to family care or to parental care or to appropriate alternative care when removed from the family environment”. According to the Constitutional Court judgment in *Government of the RSA v Grootboom*,\(^5\) the right to alternative appropriate care in terms of section 28(1)(b) only arises when parental or family care is lacking. Intercountry adoption has only recently become an option for “alternative care” when the Constitutional Court abolished the citizen requirement for prospective adoptive parents in the judgment of *Fitzpatrick v Minister of Social Welfare and Pensions* in 2000.\(^6\) Since then intercountry adoption is dealt with on exactly the same basis as intracountry\(^7\) adoption and is thus regulated exclusively by the provisions of Chapter 4 of the Child Care Act 74 of 1983 (hereinafter referred to simply as the Child Care Act). Therefore, no special provisions apply for intercountry adoption despite the increased risks associated with the practice. Mosikatsana,\(^8\) indicates that intercountry adoption, as a general rule, not only places the child with adoptive parents of a different racial and socio-cultural background, but also separates the child from his or her country of origin. In the course of its investigation into the abuses of intercountry adoption, the SALRC reached the conclusion that –

“Children in countries such as South Africa, where legislative mechanisms governing the practice of inter-country adoption are non-existent, inadequate or filled with gaps and loopholes, tend to be at risk.”\(^9\)

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\(^4\) See “Protection and support for orphans and families affected by HIV/AIDS” available on www.unicef.org. UNICEF believes that whenever possible, children who are orphaned should remain in their communities to be raised by their extended families. According to statistical estimates provided by UNICEF, 19% of all children in South Africa will have been orphaned by 2010: See “Children on the Brink 2004” UNICEF July 2004. Also see Olsen LJ “Live or let die: Could intercountry adoption make the difference?” 2004 *Penn State International Law Review* 483 504, discussing the HIV/AIDS pandemic and its effect on intercountry adoption in Sub-Saharan Africa.

\(^5\) 2001 1 SA 46 (CC) 82A-B.

\(^6\) *Minister of Welfare and Populations Development v Fitzpatrick* 2000 3 SA 422 (CC).

\(^7\) Mosikatsana defines intracountry adoption as in-country or domestic adoption - a practice in which adoptive parents adopt a child of the same nationality and country of residence as theirs: See Mosikatsana T “Intercountry adoptions: Is there a need for new provisions in the Child Care Act?” 2000 *SAJHR* 46 fn 3.

\(^8\) “Intercountry adoptions: Is there a need for new provisions in the Child Care Act?” 2000 *SAJHR* 46 48.

\(^9\) See Mosikatsana T “Intercountry adoptions: Is there a need for new provisions in the Child Care Act?” 2000 *SAJHR* 46 52, who prepared the research paper for the SALRC, citing the abuses in the early 1990’s in Albania, Bulgaria, Latvia, and Poland because a lack of a legislative framework governing intercountry adoption, as examples.
The extent of these risks for South African children who are adopted internationally came under the spotlight in December 2004, and again in May 2005, when a US couple managed to acquire joint custody and guardianship of two South African children after following a route well advertised on the internet and then later on persisted in their battle to gain guardianship of two other siblings despite the fact that they had been reunited with their biological mother. While the court professed to be serving the best interests of the children involved in the particular proceedings, the case revealed a child care system sadly lacking in the most fundamental of ways. Only two of these defects will form the primary focus of this paper, ie –

(i) The existence of alternative adoption routes with which prospective adoptive parents can circumvent the prescribed adoption procedure through the children’s courts; and
(ii) the absence of mechanisms to ensure the application of, what is generally referred to as, the subsidiarity principle.

After indicating how intercountry adoption was introduced and is currently implemented in South Africa in Section A, Section B will provide the context within which the abovementioned defects were highlighted, by providing the facts in the unreported case of Weber & Weber Jnr v Kubeka and Others. Section C will proceed to discuss the nature and scope of the relevant defects and include an assessment of the possible impact of the new Children’s Act on these defects. The paper concludes with a few final remarks.

Section A: Intercountry Adoptions in South Africa

1. Legal position before Minister of Welfare and Population Development v

10 In the Sunday Independent of 19-12-2004 under the heading “Loophole lets foreigners ‘buy’ SA children”.
11 The case was covered in at least 3 newspapers across the country by Zelda Venter, a High Court reporter, on Monday 30 May 2005 under the following headings: “Inter-country adoption battle goes to court” (Pretoria News), “US couple in court over SA adoptions” (Mercury) and “US couple resume battle to adopt four SA children” (Cape Times).
13 Case No 30182/2004 in the Witwatersrand Local Division of the High Court of South Africa.
Until the judgment in *Fitzpatrick v Minister of Social Welfare and Pensions* in 2000, prospective adoptive parents wishing to adopt a South African child also had to satisfy the citizen requirement contained in section 18(4)(f) of the Child Care Act, by either being South African citizens resident in the Republic or otherwise by having the necessary residential qualifications for the grant of South African citizenship to them and have made application for such citizenship. Unless the applicant wishing to adopt was a spouse of the parent of the child, it was, therefore, impossible for a non-citizen to adopt a South African child. An intercountry adoption should, however, not be confused with an international adoption. While the latter refers to the practice in terms of which adoptive parents adopt a child of a nationality that is different from theirs, an intercountry adoption takes place whenever a child, habitually resident in one country is moved to another country after or for the purpose of his or her adoption by adoptive parents who are habitually resident in that other country. It is, therefore, more correct to say that South Africa prohibited international adoptions rather than intercountry adoptions – South African citizens living abroad have always been able to adopt a South African child living in South Africa.

2 The *Fitzpatrick*-cases

2.1 *Fitzpatrick v Minister of Social Welfare and Pensions 2000 3 SA 139 (C)*

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14 2000 3 SA 422 (CC).
16 Or one of the applicants being a South African citizen.
17 S 18(4)(f) of the Child Care Act reads as follows: “in the case of a child born of any person who is a South African citizen, that the applicant, except an applicant referred to in section 17(c), or one of the applicants is a South African citizen resident in the Republic, or the applicant has or the applicants have otherwise the necessary residential qualifications for the grant to him or them under the South African citizenship Act, 1949 (Act No. 44 of 1949), of a certificate or certificates of naturalisation as a South African citizen or South African citizens and has or have made application for such a certificate or certificates”.
18 See s 18(4)(f) quoted in fn 17 and s 17(c) of the Child Care Act in terms of which a child may be adopted “by a married person whose spouse is the parent of the child”.
19 Irrespective of whether or not they reside and continue to reside in the child’s country of habitual residence: See Mosikatsana T “Intercountry adoptions: Is there a need for new provisions in the Child Care Act?” 2000 SAJHR 46 fn 4.
20 Art 2(1) of the Hague Convention.
Mr and Mrs Fitzpatrick, both British citizens, lived in the state of Oklahoma in the United States of America for almost three years before coming to South Africa in 1997. The couple, who have four children of their own, fostered a number of infants during their stay in the United States. After their arrival in Cape Town, they applied and obtained approval to act as foster parents in South Africa. K, a baby of two-and-a-half-months at the time, was placed in the care of the Fitzpatricks in November 1997. K had been neglected and then abandoned by his biological parents soon after his birth. Four months later, in March 1998, K was moved to another foster home. The move was supported by the Fitzpatricks who believed that the citizen requirement contained in section 18(4)(f) would preclude them from adopting K. A month later K was returned to the respondents because he had not settled in his new foster home. Because of the strong family bond which had at that stage already been forged between the Fitzpatricks, their four children, and the child, the Fitzpatricks decided to take whatever steps were necessary to adopt K. They applied to the High Court for an order declaring section 18(4)(f), which contained the citizen requirement, inconsistent with the Constitution and, therefore, invalid. In the alternative they applied to be appointed as joint guardians and custodians of K. The matter became urgent when Mr Fitzpatrick was transferred back to the United States. What was originally an international adoption now also became an intercountry adoption.

Presumably in the light of the Minister’s acceptance of the unconstitutionality of the citizen requirement, the High Court’s judgment gives no consideration to the grounds upon which section 18(4)(f) could be considered inconsistent with the Constitution. Foxcroft J simply confirmed in his order that the impugned section is inconsistent with the Constitution and, therefore, invalid “to the extent that it constitutes an absolute proscription of the adoption of a child born of a South African citizen by persons who are not South African citizens”. On the advice of the Minister, the Court also suspended the declaration of invalidity giving parliament a period of two

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21 Viviers, an intercountry adoption social worker with the Department of Welfare, interviewed by Mosikatsana in June 1999, quite rightly, considered it an anomaly that the Child Care Act at that stage permitted foreigners to foster South African children but precluded them from adopting the same children: See Mosikatsana T “Intercountry adoptions: Is there a need for new provisions in the Child Care Act?” 2000 SAJHR 46 66.

22 Ranging between the ages of 5 and 12 years.

23 See Fitzpatrick v Minister of Social Welfare and Pensions 2000 3 SA 139 (C) 141-4; Minister of Welfare and Population Development v Fitzpatrick 2000 3 SA 422 (CC) 427.

24 Fitzpatrick v Minister of Social Welfare and Pensions 2000 3 SA 139 (C) 144.
years within which to correct the defect. In the meantime the Fitzpatricks were
granted joint guardianship and custody of K, pending their adoption application, once
that became possible.

2.2 Minister of Welfare and Population Development25 v Fitzpatrick 2000 3 SA 422 (CC)

As is required with every declaration of invalidity by the High Court, the
Constitutional Court was approached for confirmation of the order in terms of the
provisions of sections 167(5) and 172(2)(a) of the Constitution.26 The Constitutional
Court unanimously confirmed the order of invalidity but refused to suspend the order
of invalidity, making it possible for the Fitzpatricks to adopt K without further
delay.27

The court reached its decision by considering the invalidity of the citizen requirement
and the suspension of the invalidity separately. The same will be done here.

2.2.1 The constitutionality of the citizen requirement contained in section 18(4)(f)
of the Child Care Act

Since this issue was not considered in the High Court judgment at all,28 the
Constitutional Court felt bound to do so in specific terms. The attack on the citizen
requirement was based on the following arguments:

(a) The citizen requirement discriminates directly against prospective adoptive
parents and indirectly against the children concerned and as such is
inconsistent with the equality clause contained in section 9 of the
Constitution;29

(b) The fact that non-citizen prospective adoptive parents are denied the right to
adopt a South African child is considered an infringement of their right to

25 The Department of Social Welfare and Pensions underwent a name change in the period before the
Constitutional Court judgment – hence the seemingly different applicant.
26 Ss 167(5) and 172(2)(a) and (d) of the Constitution.
27 Minister of Welfare and Population Development v Fitzpatrick 2000 3 SA 422 (CC) 435A.
28 See para 2.1.
29 More specifically the Bill of Rights in Ch 2 of the Constitution.
dignity as guaranteed in section 10 of the Constitution; and lastly

(c) Where it is clearly in the best interests of the child to be adopted by a non-South African citizen, as in this case, it is impossible to give paramountcy to the best interests of the child and as such the citizen requirement is inconsistent with the provisions of section 28(2) of the Constitution.

Once section 18(4)(f) was found to be inconsistent with section 28(2) as explained in (c), the Constitutional Court felt it unnecessary to consider the inconsistency based on the other arguments set out in (a) and (b) above. While no fault can be found with the court’s conclusion, the basis upon which it is founded can be criticized. A critical evaluation of the case is, however, considered beyond the scope of this paper since it would involve arguments relevant only within the field of Constitutional Law.

2.2.2 The suspension of the order of invalidity.

The Constitutional Court refused to suspend the order of invalidity for 2 years as ordered by the High Court concluding that –

“if non-South African citizens apply for the adoption of a child born to a South African citizen, the provisions of the [Child Care] Act enable the children’s court to prevent the abuses and meet the concerns expressed by the Minister and the amicus curiae”.

The concerns expressed by the Minister included the following:

(a) the inability of the Department of Welfare and Population Development (now called the Department of Social Development) to facilitate thorough background investigations of non-citizens;
(b) insufficient legislative protection against trafficking in children; and
(c) inadequate provision to give effect to the principle of subsidiarity.31

30 See Minister of Welfare and Population Development v Fitzpatrick 2000 3 SA 422 (CC) 430D.
31 The principle of subsidiarity refers to the principle that intercountry adoption should be considered strictly as an alternative to the placement of a child with adoptive parents who reside in the child’s country of birth.
While the Minister was convinced that all these concerns and abuses could be addressed by the Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption of 1993 (hereinafter referred to as the Hague Convention), the Constitutional Court\textsuperscript{32} held that it was unnecessary to wait for the Hague Convention to be introduced into domestic law because -

“until the amended legislation,\textsuperscript{33} administrative infrastructure and international agreements envisaged by the Minister are in place, foreign applicants will have a greater burden in meeting the requirements of the Act than they will have thereafter. They will have to rely on their own efforts and resources in placing all relevant information before the children’s court”.\textsuperscript{34}

Goldstone J justified the court’s confidence in the Child Care Act by explaining\textsuperscript{35} that the Commissioners of Child Welfare, presiding in the children’s courts are “trained judicial officers” who are the “sole authority empowered” to grant orders of adoption. In addition, no adoption order may be granted before the consideration of a prescribed report from a social worker.\textsuperscript{36} The court held that the provisions of Section 40 of the Child Care Act, in terms of which the children’s court is obliged to “have regard to the religious and cultural background of the child and his [or her] parents as against that of the adoptive parent or parents, meet the concerns that underlie the subsidiarity principle. A children’s court may, in addition, not grant an adoption order unless it is satisfied, \textit{inter alia}, that:

(i) the applicants are possessed of adequate means to maintain and educate the child,\textsuperscript{37}

\begin{footnotesize}
\begin{enumerate}
\item See \textit{Minister of Welfare and Population Development v Fitzpatrick 2000 3 SA 422 (CC) 430D.}
\item The new Children’s Act, as proposed by the SALRC.
\item \textit{Minister of Welfare and Population Development v Fitzpatrick 2000 3 SA 422 (CC) 433G-434A.}
\item \textit{Minister of Welfare and Population Development v Fitzpatrick 2000 3 SA 422 (CC) 431H-433B.}
\item So-called “private adoptions” are, therefore, impossible.
\item S 18(4)(a) of the Child Care Act. See Mosikatsana T “Adoption” in \textit{Van Heerden et al (eds) Boberg’s Law of Persons and the Family} (2\textsuperscript{nd} ed) 1999 Juta & Co Ltd 448 fn 64, who is of the opinion that this section is consistent with the provisions of art 27 of the UNCRC which recognises every child’s right to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development. But the author is supportive of a state grant to indigent prospective adoptive parents to assist them to meet the adoptive child’s needs as provided for in art 27(3) of the UNCRC read with s 28(1)(c) of the Constitution. The SALRC in its Report on the \textit{Review of the Child Care Act} para 17.7 also concluded that an adoption grant would encourage foster parents to adopt children in their care and
\end{enumerate}
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(ii) the applicant is or applicants are of good repute and a person or persons fit and proper to be entrusted with the custody of the child; \(^{38}\)

(iii) that the proposed adoption will serve the interests and conduce to the welfare of the child; \(^{39}\)

(iv) subject to the exceptions contained in section 19, that the consent to the adoption has been given voluntarily by the parents of the child. \(^{40}\)

Section 24 of the Child Care Act is, according to the court, designed to deter the practice of child trafficking by making the exchange of consideration in an adoption a criminal offence. \(^{41}\) In determining whether the proposed adoption “will serve the interests and conduce to the welfare of the child,” \(^{42}\) the Commissioner of Child Welfare \(^{43}\) must be satisfied that the prospective adoptive parents are suitable and that all other requirements as set out in the Child Care Act \(^{44}\) have been complied with. These include, most importantly, compliance with the consent requirement \(^{45}\) and submission of a prescribed report from a social worker, \(^{46}\) either in the service of the state, a prescribed welfare organization or a social worker in private practice who has

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\(^{38}\) S 18(4)(b) of the Child Care Act.

\(^{39}\) Echoing the paramountcy of the best interests of the child standard found in s 28(2) of the Constitution.

\(^{40}\) S 18(4)(d) and (e) of the Child Care Act. Both parents of a legitimate child must consent to the adoption, while the mother and the natural father’s consent is required in the case of a child born out of wedlock, provided the latter has acknowledged paternity and has made his identity and whereabouts known. S 19 contains circumstances under which the required parental consent can be dispensed with, eg where the parent is mentally ill or has abused the child or where the natural father has been convicted of the crime of rape or assault of the mother of the child.

\(^{41}\) Save for certain exceptions provided for in s 24, no person “may give, undertake to give, receive or contract to receive any consideration, in cash or kind, in respect of the adoption of a child”. A contravention of this provision is a criminal offence.

\(^{42}\) In terms of s 18(4)(c) of the Child Care Act, echoing the best interests standard found in s 28(2) of the Constitution.

\(^{43}\) As the presiding officer in the children’s court is called. Every magistrate is ex officio also a Commissioner of Child Welfare into s 6 of the Child Care Act, and will, therefore, preside as a Commissioner of Child Welfare whenever necessary to perform the functions assigned to him or her in terms of the said Child Care Act including the granting of an adoption order or the placement of a child in need of care. Only a few permanent Commissioners are appointed in the larger jurisdictions.

\(^{44}\) S 18 of the Child Care Act.

\(^{45}\) As provided for in ss 18(4)(d), (e) and (g), 18(5)-(9), 19 and 19A of the Child Care Act.

\(^{46}\) In terms of Reg 21(1)(b) to the Child Care Act, the report must be a proficient and objective document including details regarding any counseling provided in respect of the proposed adoption, a statement itemising all moneys paid for services rendered in respect of the adoption or for the care of the child, a motivated recommendation and such other matters as the court concerned may require.
registered a speciality in adoption services.\footnote{S 1 of the Child Care Act. The accreditation is deemed necessary to ensure strict adherence to ethical norms and objectivity as well as an attempt to prevent “independent” social workers from asking exorbitant fees for adoption services.}

The court dealt with the problem surrounding the verification of background information\footnote{Minister of Welfare and Population Development v Fitzpatrick 2000 3 SA 422 (CC) 433C.} on the basis that should the children’s court not be satisfied with the verification, the application would necessarily have to be denied. Although the court agreed that post-adoption monitoring in respect of intercountry adoptions would not be effective without bilateral agreements between South Africa and the foreign State, Goldstone J did not think that it was a justification for suspending the order of invalidity because, firstly, the same problem exists in the case of South African adoptive parents who emigrate, and secondly, it could take years to negotiate bilateral agreements with all the relevant foreign governments.

The court directed that the judgment be brought to the attention of all Commissioners of Child Welfare and social workers engaged in adoption matters to alert them to the problems articulated by the Minister and \textit{amicus curiae} and the way in which these problems can be dealt with in terms of the provisions of the Child Care Act, as indicated by the court.

3. Current practice in anticipation of new legislation

Intercountry adoption of South African children has aptly been described as being in a state of “legal limbo”.\footnote{Phrase coined by Roelf W, author of “International adoptions in legal limbo” Mail & Guardian dd 14-04-2005.} Although South Africa has ratified the Hague Convention\footnote{On 21 August 2003. The ratification came into force on 1 December 2003: See Status table on www.hcch.net. According to Mosikatsana T “Adoption as substitute family care” Research paper prepared for the Project Committee on the Review of the Child Care Act 71, the delay in signing the Hague Convention was due to the controversy in South Africa on the issue of intracountry transracial adoptions.} and is, as a signatory, bound to act in accordance with its obligations, the Hague Convention has as yet not been formally incorporated into domestic law, making its provisions unenforceable in our courts.\footnote{See s 231 of the Constitution.} An interim Central Authority in the Chief
Directorate: Children, Youth and Families\textsuperscript{52} in the Department of Social Development has, however, been established for purposes of implementing the Hague Convention despite the fact that it has not become part of our law\textsuperscript{53}. It seems as though the interim Central Authority is only prepared to approve intercountry adoption of South African children to Hague countries or through accredited organizations to countries with whom South Africa has an intercountry adoption agreement, such as Sweden, Finland, Norway, Belgium and Germany.\textsuperscript{54} This probably explains why non-citizens from countries such as the US, where the Hague Convention has also as yet not been implemented, have been using alternative routes to adopt South African children.\textsuperscript{55}

The delay in incorporating the Hague Convention can be attributed to difficulties encountered in finalizing the incorporating statute – the new comprehensive Children’s Act\textsuperscript{56} designed to ultimately regulate all aspects relating to children.\textsuperscript{57}

\textsuperscript{52} The Chief Director of the particular Directorate is Me Maria Mabetoa.
\textsuperscript{53} Consequently reducing it to a toothless entity. The anomaly has not escaped the press: See “International adoptions in legal limbo” Mail & Guardian dd 14-04-2005.
\textsuperscript{54} See “International adoptions in legal limbo” Mail & Guardian dd 14-04-2005. On the Door of Hope website, AFM ABBA Adoption, a registered adoption unit of the Executive Welfare Council, indicate that they cannot facilitate intercountry adoptions other than in terms of an already existing working agreement with the following organizations in the following countries: Sweden – Adoption Centre; Netherlands – Wêreldkinderen; Belgium – Interadoptie and Kind & Gezin; Germany – Evangelischer Verein; Denmark – Dan Adopt; Norway – Children of the World and Finland – Interpedia.
\textsuperscript{55} Cognisance has, however, been taken of the fact that the USA is in the process of implementing the provisions of the Hague Convention: Kales AG “The Intercountry Adoption Act of 2000: Are its laudable goals worth its potential impact on small adoption agencies, independent intercountry adoptions, and ethical independent adoption professionals?” 2004\textit{George Washington International Law Review} 477. Also see Olsen LJ “Live or let die: Could intercountry adoption make the difference?” 2004\textit{Penn State International Law Review} 483 489, who refers to a report by the US Government Accounting Office finding that adoptive parents choose intercountry adoption because they believed it could be completed in less time an would be easier than domestic adoption.
\textsuperscript{57} The Children’s Bill was accepted in the National Assembly and passed on 22 June 2005. The Bill now has to be referred to the National Council of Provinces (NCOP) for acceptance. If the NCOP passes the Bill without amendments, as widely anticipated, it must go to the President for his assent and signature and the Bill then becomes law. The Act is then published in the Government Gazette and comes into effect on a date determined by the President. The “current Bill”, however, contains only part of the original “consolidated” Children’s Bill proposed by the SALRC in its Report on the\textit{Review of the Child Care Act} Project 110 published in December 2002. The Children’s Bill is attached as Annexure “A” to the Report. The Bill, which was initially submitted to parliament, dealt with the full spectrum of protection of children in both national and provincial spheres and was to be dealt with in terms of section 76 of the Constitution (functional area of concurrent national and provincial legislative competence). Due to its “mixed” character, including elements to be handled in terms of both section 75 (functional area of only national legislative competence) and section 76, the “consolidated” Bill was split and the provisions which will apply to the provincial government was removed. The current Children’s Bill has accordingly been accepted as a section 75-Bill by the National Assembly. An amendment Bill, containing the matters which apply to the provincial government only, will be introduced only after the current Bill has been passed by the NCOP. The amendment Bill will ultimately complete the current Bill by inserting the provisions which deal with welfare services – or
4. **Future practice in terms of Chapter 17 of the new Children’s Act**

The purposes of Chapter 17 of the new Children’s Act will be to give effect to the Hague Convention and to certain bilateral arrangements for intercountry adoption and generally to regulate intercountry adoptions.

In case of a conflict between the ordinary law of South Africa and the Hague Convention, the Hague Convention will apply. The Hague Convention will in its entirety be incorporated into the Act in terms of Schedule I to the Act. Insofar as it is relevant to the present discussion, suffice it to say that the objects of the Hague Convention include the establishment of safeguards to ensure that intercountry adoptions take place in the best interests of the child and the establishment of a system of co-operation amongst Contracting States to ensure that those safeguards are respected and thereby, most importantly, prevent the abduction, the sale of, or traffic in children. In order to ensure that its objects are fulfilled, the Hague Convention contains detailed legal, administrative and procedural provisions which include, insofar as they are relevant in the present context, that the competent authorities of the State of origin have established that the child is adoptable and have determined, after otherwise considered to have budgetary implications. Only after both the current and amendment Bills have been passed by parliament, will regulations be published to facilitate the implementation of the Children’s Act, as it will be called: See the memorandum on the objects of the Children’s Bill, 2003, published with the section 75-Bill in GG 25346 of 13 August 2003. See also “Children’s Bill gets the nod” (22/06/2005 20:54 – SA) on www.news24.com in which the approval by the National Assembly is confirmed.

59 The new Children’s Code is still a Bill as it has not become law yet. The provisions of the Bill should, therefore, strictly speaking be referred to as clauses and not sections. However, for ease of reference the provisions will be referred to as sections. For a detailed explanation of the legislative procedure in South Africa see fn 57.

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59 S 281 of the Children’s Act.

60 See s 282 of the Children’s Act.


62 Art 1(a) of the Hague Convention. In addition the safeguards are also meant to ensure that the child’s fundamental rights as recognised in international law will be respected.

63 Art 1(b) of the Hague Convention.

64 Contained in Ch IV (Arts 14 – 22) of the Hague Convention.
consideration, that an intercountry adoption is in the child’s best interests\(^\text{65}\) and the requirement that the Contracting State designate a “Central Authority” through which all intercountry adoptions must be channeled.\(^\text{66}\)

Chapter 17 will provide the framework within which the Hague Convention will operate in South Africa. Section 256(1)(b) by implication will confirm the already designated Chief Directorate: Children, Youth and Families in the Department of Social Development as the Central Authority for South Africa, as the office designated by the convention country under article 6 of the Hague Convention. The Central Authority will be able to delegate its powers and duties in terms of articles 15 to 21 of the Hague Convention to another organ of state or a designated child protection organization that has duly been accredited in terms of section 259 of the Act.

The Children’s Act will cater for two specific intercountry adoption scenarios:

(a) Adoption of a child to or from a convention country (Hague Convention adoptions); and

(b) Adoption of a child to or from a non-convention country (non-convention adoptions). The latter type adoption will presumably include the adoption of a child to or from a country with whom a bilateral or multilateral agreement has been concluded (agreement type adoptions), as envisaged by the South African Law Commission.\(^\text{67}\)

South Africa is primarily a sending country and since problems mainly arise when South African children are adopted by parents of non-convention countries, such as the USA,\(^\text{68}\) with which South Africa has not concluded an intercountry adoption-agreement, further discussion will focus on the requirements for and effects of this

\(^{65}\) Art 4 of the Hague Convention.

\(^{66}\) Ch III (Arts 6-13) of the Hague Convention.

\(^{67}\) In cl 289 and 290 of the originally proposed Bill published as Annexure “A” to the Report on the Review of the Child Care Act Project 110 published in December 2002.

\(^{68}\) Cognisance has, however, been taken of the fact that the US is in the process of implementing the provisions of the Hague Convention: Kales AG “The Intercountry Adoption Act of 2000: Are its laudable goals worth its potential impact on small adoption agencies, independent intercountry adoptions, and ethical independent adoption professionals?” 2004 George Washington International Law Review 477.
type of intercountry adoption, ie a so-called non convention adoption of children from the Republic.

Only the Central Authority or a designated child protection organization accredited in terms of section 258 will be able to provide intercountry adoption services. Such an accredited organization, which ostensibly will exclude individuals, will be allowed to receive the prescribed fees and make the necessary payments in respect of intercountry adoptions and will be obliged to annually submit audited financial statements to the Central Authority of fees received and payments made.

In terms of section 261(1) a person resident in a non-convention country who wishes to adopt a child habitually resident in the Republic will have to apply to the competent authority of the non-convention country concerned. “Competent authority” is not defined for purposes of the Children’s Act. If the competent authority of the non-convention country concerned is satisfied that the applicant is eligible and suitable to adopt, it must prepare a report on that person in accordance with the prescribed requirements and transmit the report to the Central Authority in the Republic. In terms of article 15 of the Hague Convention the report must include information about their identity, eligibility and suitability to adopt, background, family and medical history, social environment, reasons for adoption, ability to undertake an intercountry adoption as well as the characteristics of the children for whom they would be qualified to care. If a suitable child is available for adoption, and the Central Authority is satisfied that the child is adoptable it must prepare a report on the child including information about his or her identity, adoptability, background, social environment, family history, medical history including that of the child's family, and any special needs of the child. The report must also give due consideration to the child's upbringing and to his or her ethnic, religious and cultural background and ensure that consents have been obtained in accordance with article 4. 

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69 S 250 read with s 258(1) of the Children’s Act.
70 S 261(2) of the Children’s Act.
71 In terms of Art 4 of the Hague Convention an adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin - (a) have established that the child is adoptable; (b) have determined, after possibilities for placement of the child within the State of origin have been given due consideration, that an intercountry adoption is in the child's best interests; (c) have ensured that (1) the persons, institutions and authorities whose consent is necessary for adoption, have been counseled as may be necessary and duly informed of the effects of their consent, in particular whether or not an adoption will result in the termination of the legal relationship between the child and
Authority must determine, on the basis in particular of the reports relating to the child and the prospective adoptive parents, whether the envisaged placement is in the best interests of the child and transmit it to the competent authority in the non-convention country concerned.\textsuperscript{72}

If the Central Authority and competent authority both agree on the adoption, the Central Authority will refer the application\textsuperscript{73} to the children’s court for consideration in terms of section 238\textsuperscript{74}. The court may then make an order for the adoption of the child if the requirements of section 231\textsuperscript{75} regarding persons who may adopt are complied with, the application has been considered in terms of section 238 and the court is satisfied that -

(i) the child is in the Republic;

(ii) the child is not prevented from leaving the Republic either under a law of the Republic or because of a court order issued by a South African court;

(iii) the arrangements for the adoption of the child are in accordance with the prescribed requirements; and

his or her family of origin, (2) such persons, institutions and authorities have given their consent freely, in the required legal form, and expressed or evidenced in writing, (3) the consents have not been induced by payment or compensation of any kind and have not been withdrawn, and (4) the consent of the mother, where required, has been given only after the birth of the child; and (d) have ensured, having regard to the age and degree of maturity of the child, that (1) he or she has been counseled and duly informed of the effects of the adoption and of his or her consent to the adoption, where such consent is required, (2) consideration has been given to the child's wishes and opinions, (3) the child's consent to the adoption, where such consent is required, has been given freely, in the required legal form, and expressed or evidenced in writing, and (4) such consent has not been induced by payment or compensation of any kind.

\textsuperscript{72} See art 16 of the Hague Convention and s 261(3) of the Children’s Act.

\textsuperscript{73} Supported by the necessary documents and reports: S 261(4) of the Children’s Act.

\textsuperscript{74} In terms s 238(1) when considering an application for the adoption of a child, the court must take into account all relevant factors, including—(a) the religious and cultural background of—(i) the child; (ii) the child’s parent or parents; and (iii) the prospective adoptive parent or parents; (b) all reasonable preferences expressed by a parent and stated in the consent; and (c) a report in a format prescribed by regulation on the proposed adoption by an adoption social worker. S 238(2) provides that a children’s court considering an application may make an order for the adoption of a child only if—(a) the adoption would be in the best interest of the child; (b) the prospective adoptive parent or parents comply with section 231; (c) consent for the adoption has been given; and (e) section 231(6) has been complied with, in the case of an application for the adoption of a child in foster care or kinship care by a person or persons other than the child’s foster parent or kinship care-giver.

\textsuperscript{75} In terms of s 231(1) a child may be adopted—(a) jointly by—(i) a husband and wife; (ii) partners in a permanent domestic conjugal life-partnership; or (iii) other persons sharing a common household and forming a family unit; (b) by a widower, widow, divorced or unmarried person; (c) by a married person whose spouse is the parent of the child or by a person whose permanent domestic conjugal life-partner is the parent of the child; (d) by the biological father of a child born out of wedlock; (e) by the foster parent or parents of the child; or (f) by the kinship care-giver of the child.
(iv) the Central Authority as well as the competent authority of the non-convention country concerned has agreed to the adoption of the child.

Where the South African child is to be adopted by a family member or a stepparent who will become an adoptive parent jointly with the biological parent, the abovementioned requirements need not be complied with.\(^76\)

Once the children’s court has approved the adoption, the Central Authority has the discretion to issue an adoption compliance certificate.\(^77\) The Children’s Act will also regulate the recognition of intercountry adoption of children from both convention and non-convention countries\(^78\) as well as access to information regarding an intercountry adoption to a child so adopted.\(^79\)

**Section B: Weber & Weber Jnr v Kubeka and Others Unreported Case No 30182/2004\(^80\)**

Mrs Weber and her husband, Weber Junior, both US citizens, were introduced to children in a Johannesburg street children’s shelter\(^81\) and a place of safety\(^82\) through their church while on a visit to South Africa in December 2004. After apparently immediately falling in love with the children, they approached the High Court four days later with the intention of acquiring sole custody and guardianship in respect of four of these children. They were led to believe that the children were either abandoned or orphaned. The couple was quite open about the fact that they wanted to

\(^76\) The exception is created into s 261(6) of the Children’s Act. The exception also applies in the case of a convention type adoption from the Republic: See s 260(6).

\(^77\) S 262 of the Children’s Act. “Adoption compliance certificate” is defined in s 1(a) in relation to a convention country, as a certificate issued in terms of art 23 of the Hague Convention or (b) in relation to a prescribed foreign jurisdiction, as a similar certificate prescribed in the relevant bilateral or multilateral agreement.

\(^78\) Ss 265 and 267 of the Children’s Act.

\(^79\) Once the adopted child is older than 18 years: S 271.

\(^80\) Because the case has not been reported, the facts of the case were gathered from (a) the Centre for Child Law at the University of Pretoria who assisted the Johannesburg Child Welfare Society, who intervened in the case as amicus curiae (b) the newspaper reports which appeared, inter alia, in the Pretoria News on 30 May 2005 and the “Beeld” on 2 June 2005, and (c) personal interviews with both the owner of the shelter where three of the children had been staying and the attorney (Debbie Wybrow) and senior council who appeared for the applicants, on the day of the hearing at the High Court in Johannesburg on 31 May 2005.

\(^81\) The Agape Street Children’s Shelter.

\(^82\) The Baby Haven Place of Safety.
obtain guardianship in order to take the children back to the US where they intended pursuing adoption. The court granted the couple guardianship over all four of the children – a baby of 11 months from the place of safety and three children, aged 4, 6 and 7 years, from the shelter. It was only when the biological mother of two of the children, the 4-year-old and the 7-year-old, contacted the shelter shortly afterwards that she was informed that the children were on their way to the US. The mother and her children had earlier resided in Witbank (close to Johannesburg) where her husband was a wealthy taxi owner and driver. However, after her husband’s death in 2000 she was ejected from their home by her husband’s family and left to fend for herself. Without money or a means of income she left her children with a family member in Johannesburg. When the mother had not returned two weeks later, the aunt contacted the Child Protection Unit of the South African Police, who placed the children in the shelter. The mother claims that the placement in the shelter was a temporary arrangement, necessitated by her dire circumstances at the time and that she always hoped to care for her children again one day. The mother’s plight was taken up by the Legal Resources Centre and a judge temporarily halted the guardianship of all four children and ordered a curator ad litem to investigate the whole matter.

Another judge, however, gave the Webers the go-ahead to take the other two children, the baby and the 6-year old, back to the US. The order for guardianship and custody in respect of the siblings seemed inadvisable and highly unusual as the couple already had five children in the US (excluding the two South African children that were placed in their care), of whom two are adopted.

With the proceedings stayed, the shelter decided to “accelerate” reunification and returned the siblings to the care of their mother, who now had a new job and a place to stay. The children are still in the care of their mother where they are currently attending school. Despite these developments the Webers are pursuing their battle to gain responsibility of the children. Because of the mother’s history of abandonment and neglect with regard to her children, the Webers perceive their actions to be in the best interests of the children. They are convinced that they are saving the children from a lifetime in institutional care. The proceedings in the Johannesburg High Court on 31 May 2005 were postponed to 26 July 2005 to give the curator time to complete
his report. The Webers have indicated that they will once again return to South Africa for the final hearing. According to the curator’s report, which has already been made available to the concerned parties, the biological mother is competent to care for her children. The chances of Mr and Mrs Weber succeeding with their application are, therefore, remote.

Section C: Defects highlighted by Weber-case

Although, as already pointed out, the Weber-case revealed many shortcomings in the practice of intercountry adoption from South Africa, only two of these will be dealt with in this paper:

1. Circumventing adoption procedures

Before intercountry adoption formally became an option for South African children, adoption practitioners used various methods to cross the legislative barrier. The South African Law Reform Commission refers to two of these:

(a) In terms of section 52 of the Child Care Act it is an offence to remove a foster child without ministerial approval from the Republic. Since non-citizens can act as foster parents in South Africa, a South African child can be placed in foster care with a foreign couple. Once this has been accomplished, ministerial approval is sought for the removal of the child by the foster parents

83 Including the Johannesburg Child Welfare Society, acting as amicus curiae in the case. The amicus is assisted by the Centre for Child Law at the University of Pretoria, through which access to the report was gained.

84 The case eg raised familiar suspicions about the possibility of “buying” favourable assessments for purposes of intercountry adoption. The Webers managed to privately commission a report on themselves without any involvement of an accredited local adoption agency. See Sloth Nielsen J & Van Heerden B “The Child Care Amendment Act 1996: Does it improve children’s rights in South Africa?” 1996 S Afr J HR 649 651, who contend that as long as social workers in private practice are allowed to render adoption services and receive remuneration from prospective adoptive parents, the problem will remain. Another very disturbing aspect of the case concerned the question of the competency of a legal professional (advocate in this case) to determine the suitability of the mother to care for her children without being assisted by, eg a social worker or mental health professional.

85 Discussion Paper 103 Project 110 Review of the Child Care Act Vol 5 para 22.2.3.

86 This is one of four orders that the children’s court is empowered to make after finding that the child qualifies as a child in need of care: See s 15 of the Child Care Act. A child is considered in need of care if it is found that the child is or has been, eg abandoned or abused as set out in s 14(4) of the Child Care Act.
to their country of origin. On their arrival in that country the adoption of the child is finalized.

(b) Consent to an adoption is obtained from the biological parents of the child in terms of section 18(4)(d) of the Child Care Act. Prior to the expiration of the 60-day “cooling off” period in which consent may be withdrawn, the South African biological parents apply for a South African passport on behalf of the child concerned and consent to the child leaving the Republic in the company of the prospective adoptive parents. As soon as the consent becomes irrevocable the child is considered abandoned and becomes a child in need of care. The foreign couple then approaches the High Court as upper guardian to appoint them as curators personae of the child on the basis of a home study done in the foreign country to show their eligibility. After curatorship has been awarded to the non-citizen applicants they apply for a visa on behalf of the child with the aim of adopting the child in their country.

The method used by the Webers is advertised on the internet as “the only option left for families from countries which have not adopted the Hague Convention or fully implemented it”. According to this route, non-citizens approach the High Court to gain sole guardianship and custody of a South African child. Upon assuming guardianship, the adoption is finalized when the family returns to their home country. If the child has been abandoned or orphaned, the best interests of the child will usually be served by placing him or her in the care and under the guardianship of willing and suitable persons, even if they are non-citizens. This would be

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87 www.africasangels.org.
88 Such as the USA.
89 Under common law the High Court of South Africa, as upper guardian of all minors, has an inherent jurisdiction to make any order it deems necessary in the best interest of the child concerned. As such, the High Court may award sole custody and guardianship in respect of a child to a third party or parties (including non-citizens) but only in exceptional circumstances such as those arising where a parent’s conduct endangers the life, health or morals of a child. But these are certainly not the only grounds upon which the court may act and each case should be considered on its merits in determining whether “good cause” for interference with the parental power has been shown. See Peteren v Kruger 1975 4 SA 171 (C) and the other cases listed as authority in fn 23 of Van Heerden B “Judicial Interference with the Parental Power; the Protection of Children” in Van Heerden et al (eds) Boberg’s Law of Persons and the Family (2nd ed) 1999 Juta & Co Ltd 504.
90 The practice of awarding guardianship and custody to non-citizens seems to be far more widespread than originally anticipated. Julyan JA, Senior Council, acting mainly in the Natal Provincial Division and in the Durban and Coast Local Division, has provided me with copies of 4 such orders granted in those jurisdictions before the Fitzpatrick-case was decided in 2000 (Case no 1260/99, Case no 3980/99, Case no 3981/99 and Case no 1092/00). The age of the children involved in these proceedings ranged between 6 months and 2 years and in two of the four cases the children had already become known
particularly true if the child has been in the care of the (foreign) applicants for some time and has had the opportunity to bond with them as foster parents\textsuperscript{91} or otherwise.\textsuperscript{92}

The troubling fact about this procedure is it removes the child from the protective ambit of the adoption procedure provided for in the Child Care Act. Skelton\textsuperscript{93} holds the view that--

“This there is nothing inherently bad about inter-country adoption, but because of

under the surname of their caretakers. It is also interesting to note that the Commissioner of Child Welfare is cited as the first respondent in all four cases, indicating that all the children had been channeled through the children’s court and were subject to alternative placement orders as provided for in s 15 of the Child Care Act 74 of 1983 at the time the orders were made. Without the supporting affidavits it is, however, not possible to indicate whether the children had been placed in foster care or in the care of a children’s home or school of industries (s 15(a) –(d)). It is, of course, a possibility (albeit remote) that these children were being cared for by their parents under supervision as provided for in s 15(a) when the orders were made. The allocation of guardianship and custody to third parties under such circumstances would, however, in my opinion be highly irregular and is consequently not entertained as an option.

91 The impediment against adoption by non-citizens has never applied in the case of fostering. Non-citizens resident in South Africa often act as caretakers in terms of the Child Care Act, either as foster parents (for a maximum period of 2 years at a time) or in cases of emergency as temporary caretakers of children found to be in immediate need of care (in which case their home would function as a place of safety into s 1 of the Child Care Act 74 of 1983). The Fitzpatricks, in the case of Fitzpatrick v Minister of Social Welfare and Pensions 2000 3 SA 139 (C), approached the High Court for a declaration of invalidity of the citizen requirement in their capacity as foster parents.

92 Although not directly relevant on the issue of granting custody and guardianship orders to non-citizens, Hurt J in P v P 2002 6 SA 105 (N) 107-8, gave a good description of the context in which such orders are generally made. In this case the court had to consider the desirability of granting an order for custody and guardianship to the uncle and aunt of a 10 year old girl, who had been living with them (in South Africa) for a continuous period of four years, with the aim of allowing her to travel to the US with them. Hurt J emphasized that s 28(1) of the Constitution, in terms of which a child, \textit{inter alia}, has the right to family care or to parental care or to appropriate alternative care when removed from the family environment, defines the rights of the child and not those of the parent and that: “In law the existence of a right is tantamount to the creation on the part of another of a duty to fulfill that right. Guardianship and custody should not be viewed as rights vesting in the parent, but as duties imposed upon the parent. The section in the Constitution (and the common law, for many years) has required those duties to be exercised in the interests of the child. In considering what is in the best interests of the child, the courts have, since Roman times, regarded the biological bond between the child and its parents as almost sacrosanct only to be disrupted or affected by the intervention of the Court in its capacity as the upper guardian where the interests of the child, and not those of the parents so dictate.” The applicants in \textit{P v P} did not intend to adopt their niece. In fact, they took great pains to maintain contact between the child and her parents despite the acrimony that had developed between them and the applicants over time. Hurt J found the attitude of the applicants in this regard laudable and stated that “[n]otwithstanding the attacks which have been launched against them, and notwithstanding the plight in which the defendants [the parents of the child] find themselves, the plaintiffs have both stated in evidence that they are prepared to give such undertakings as will be necessary to protect the bond between G and her parents and also to make provision for the question of guardianship of G to be reviewed, if necessary, when they return from the United States”: \textit{P v P} 2002 6 SA 105 (N) 110 11.

93 Advocate of the Centre for Child Law at the University of Pretoria, quoted in the press. See fn 11.
certain obvious dangers\textsuperscript{94} (child trafficking, organ trafficking, child labour, child pornography, child rings\textsuperscript{95}) there is a need to be very careful about the process followed”.\textsuperscript{96}

A further problem relates to the recognition and enforcement of the South African High Court order in the foreign country within whose jurisdiction the child eventually finds itself. Would the South African guardianship/curatorship order have to be rescinded before the adoption in the foreign country can be finalized? What would happen if the child is not found “adoptable” in that country? South African law provides no clear answer to these questions.\textsuperscript{97}

It is somewhat of an anomaly that an order of adoption, which has the legal effect of permanently terminating all the rights and obligations existing between the child and his (or her) parents,\textsuperscript{98} must be granted by a children’s court, a specialized lower court, while the reallocation of parental responsibility, which merely suspends the parental power of the parents until a further order is made in that regard by the court, falls exclusively within the jurisdiction of the High Court. Nevertheless, only the

\textsuperscript{94}These dangers can include violations of the most basic rights of the child. The fact that the violations are often perpetrated under the guise of the supposedly humanitarian aim of the act and “justified” by the simplistic view that a child will somehow be “better off” in a materially rich country or with wealthy parents, make the detection of the abuses more difficult: See the SALRC Discussion Paper 103 Project 110 Review of the Child Care Act Vol 5 para 22.2.2.

\textsuperscript{95}According to the SALRC Discussion Paper 103 Project 110 Review of the Child Care Act Vol 5 para 22.2.2, these illegal acts and malpractices also include criminal networks, intermediaries of all kinds and couples prepared to carry out, be accomplice to, tolerate or simply ignore abuses in order to secure an adoption. The diversity of the methods used, and the wide range of actors that may play a role, demonstrate the vastness of the task of protecting the rights of the child in intercountry adoption. The challenge is all the more greater in that, in many if not most cases, te resulting adoption bears the hallmarks of a perfectly legal procedure.

\textsuperscript{96}See “Inter-country adoption battle goes to court” published in the Pretoria News on 30 May 2005. Bhabha J “Moving Babies: Globalization, markets and transnational Adoption” 2004 Fletcher Forum of World Affairs 181 182, agrees with this sentiment: “Given the potentially positive outcome of transnational adoption for both adopter and birth mother, and particularly given the stakes involved for adoptees facing lives of destitution, the policy imperative is to regulate, not eliminate the market.”

\textsuperscript{97}According to Forsyth CF Private International Law 3\textsuperscript{rd} Ed Kenwyn Juta (1996) 391, South African courts have accepted the Privy Council decision in McKee v McKee [1951] 1 All ER 942 in which it was decided that the welfare and well-being of the child should be considered first and foremost an could override any other principle applying to recognition and enforcement. See Eiselen GTS “Children and Young Persons in Private International Law” in Robinson JA (ed) The Law of Children and Young Persons in South Africa 227 and Van Heerden B “Judicial Interference with the Parental Power; the Protection of Children” in Van Heerden et al (eds) Boberg’s Law of Persons and the Family (2nd edition) 1999 Juta & Co Ltd 569-70, with regard to the recognition and enforcement of custody orders. The same concern was raised by the Johannesburg Child Welfare Society, acting as the second respondent in the Weber-case, in an affidavit submitted to the High Court for purposes of the proceedings that took place on 31 May 2005.

\textsuperscript{98}Including the parent’ relatives: S 20(1) of the Child Care Act.
children’s court is competent to grant an adoption order in terms of its delegated powers as prescribed by the Child Care Act. The assurance by Goldstone J in *Minister of Welfare and Population Development v Fitzpatrick* that the Child Care Act “if appropriately and conscientiously” applied can “prevent the abuses and meet the concerns” expressed by the Minister, presuppose that the adoption application is channeled through the children’s court. Where an alternate route for intercountry adoption is used, the assurance, however dubious, would obviously not apply.

Skelton thinks this alternative adoption route (via the High Court) will open the floodgates for foreigners to find children in South Africa to adopt. The local press fuelled this fear by intimating that the actor, Brad Pitt, was thinking of adopting an HIV/AIDS-orphan from South Africa.

However, once the Hague Convention becomes enforceable, it will apply

“where a child habitually resident in one Contracting State (‘the State of origin’) has been, is being, or is to be moved to another Contracting State (‘the receiving State’) either after his or her adoption in the State of origin by spouses or a person habitually resident in the receiving State, *or for the purposes of such an adoption in the receiving State* (own italics) or in the State of origin”.

This means that the Hague Convention will also be applicable when prospective adoptive parents apply for guardianship or curatorship with the aim of removing the child from South Africa to be adopted elsewhere. In terms of section 24 of the Children’s Act –

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99 S 18.
100 2000 3 SA 422 (CC) 431 H.
101 See Sunday weekly paper Rapport of 29 May 2005 in which an article by Sonja Carstens entitled: “Brad Pitt ‘kan een Afrika-wesie se lewe verander’”, appeared (translated it means Brad Pitt can change the life of one African orphan). According to the article Angelina Jolie, with whom the actor has been romantically linked, adopted an orphan from Cambodia, one of the most popular sending countries as far as international adoptions in the USA is concerned. See also Thompson NS “Hague is enough?: A call for more protective, uniform law guiding international adoptions” 2004 *Wisconsin International Law Journal* 441 443.
102 Art 2 of the Hague Convention.
“When application is made in terms of section 23(1) by a non-South African citizen for the assignment of full parental responsibilities and rights in respect of a child or to act as guardian of a child, the application must be regarded as an inter-country adoption for the purposes of the Hague Convention on Inter-country Adoption and Chapter 17 of this Act”.

On the face of it these provisions should effectively close the loopholes which currently exist.

2. Subsidiarity principle

In terms of Article 21(b) of the UNCRC, States Parties shall –

“[r]ecognize that inter-country adoption may be considered as an alternative means of child’s care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child’s country of origin”

In the preamble to the Hague Convention recognition is given to the fact that “inter-country adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin”, while Article 4, *inter alia*, provides that -

“adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin—
(a) have established that the child is adoptable;
(b) have determined, after possibilities for placement of the child within the State of origin have been given due consideration, that an inter-country adoption is in the child’s best interests”.
According to Pfund\textsuperscript{103} the language of Article 21(b) of the UNCRC has been interpreted as placing intercountry adoption at the end of the list of possible methods of care for children without families – after adoption in its country of origin or foster care or other suitable care (deemed to include institutional care) in that country. The preamble of the Hague convention, on the other hand, clearly provides that intercountry adoption should immediately follow adoption in the child’s country of origin and should precede foster care and other suitable care in that country in the ranking of care aimed at the child’s best interests. Bhabha\textsuperscript{104} is of the opinion that the emphasis on the primacy of domestic placement in the UNCRC is replaced by a weaker reference to the unavailability of a “suitable family” in the home country and the obligation to merely give “due consideration” to adoption within the state of origin.\textsuperscript{105} Bhabha\textsuperscript{106} feels that the latter approach has in practice paved the way for the widespread perception of equivalence in domestic and international placement destinations. Wallace\textsuperscript{107} concludes that the hierarchy of preferred situations in terms of the Hague Convention implies that the child’s need to grow up in a family environment and to form attachment relationships is greater than his or her need to remain in the country of origin.

It is doubtful, as held by Goldstone J in \textit{Minister of Welfare and Population Development v Fitzpatrick}\textsuperscript{108} that section 40 of the Child Care Act would give effect to the subsidiarity principle. In terms of section 18(3) of the Child Care Act the Children’s Court must have regard to the matters mentioned in section 40 when considering an application for adoption. In terms of section 40 the Children’s Court must consider differences in the cultural and religious background of the adopted child and his or her parents as against that of the prospective adoptive parents with a view to determine whether the adoption is in the best interests of the child. The provisions of section 40 will in most cases only have a limited impact on the choice of

\textsuperscript{103} PH “Intercountry Adoption: The Hague Convention: Its purpose, implementation, and promise” 1994 \textit{Family Law Quarterly} 53 56

\textsuperscript{104} Bhabha J “Moving babies: Globalization, markets and transnational adoption” 2004 \textit{Fletcher Forum of World Affairs} 181 187.

\textsuperscript{105} See art 4(b) of the Hague Convention.

\textsuperscript{106} Bhabha J “Moving babies: Globalization, markets and transnational adoption” 2004 \textit{Fletcher Forum of World Affairs} 181 187.

\textsuperscript{107} “International adoption: The most logical solution to the disparity between the numbers of orphaned and abandoned children in some countries and families and individuals wishing to adopt in others?” 2003 \textit{Arizona Journal of International and Comparative Law} 689 723.

\textsuperscript{108} 2000 3 SA 422 (CC) 433B.
alternative care for the child concerned. It is a well known fact that South Africa currently has an oversupply of black adoptable babies and that there are too few black families willing and able to adopt. Section 40 would, therefore, be of no assistance in deciding between the desirability of an intracountry transracial adoption and an intercountry transracial adoption. With regard to the judgment in Minister of Welfare and Population Development v Fitzpatrick\(^\text{109}\) itself, it is, furthermore, debatable whether the subsidiarity principle found any application at all in the case. Apart from the month in which K was placed unsuccessfully with other (presumably South African) parents, the judgment does not give an indication of any other local placement options having been considered. Once the bond between K and the Fitzpatricks was established, the preservation of that bond (family life) became the primary concern. Any other placement (locally or otherwise) thereafter would simply not have been considered in the best interests of the child. In the absence of clear guidelines as to how effect should be given to the subsidiarity principle, it is reasonable to assume that, in the majority of cases, it will fly in the face of an already existing “family life”.\(^\text{110}\)

Mosikatsana, who prepared the research paper on adoption\(^\text{111}\) for the SALRC’s Review of the Child Care Act,\(^\text{112}\) concluded that intercountry adoption is generally not in the best interests of the child considering the legal and psycho-social effect of disrupting the continuity in the child’s upbringing, culture and language, family and national ties.\(^\text{113}\) According to this author, a strong policy for supporting intracountry adoption should be encouraged by promoting the concept of adoption in all communities. Incentives, particularly to indigent adoptive families (which would include providing grants for education, health care as well as tax rebates) should also be accorded. Law reform measures should only introduce intercountry adoption as a

\(^{109}\) 2000 3 SA 422 (CC) 433B.

\(^{110}\) The Constitution does not expressly protect a right to “family life” as do several international human rights instruments, such as found in the preamble to the UNCRC and art 8 of the European Convention on Human Rights. Bekink B & Brand D “Constitutional Protection of Children” in Davel CJ (ed) Introduction to Child Law in South Africa 2000 Juta & Co Ltd 186-7, however, submit that “the possibility that a right to family life could be read to be one of the implied entitlements of the right to family or parental care (ito s 28(1)(b) of the constitution) remains open”.

\(^{111}\) The full research topic was “Adoption as substitute family care”.

\(^{112}\) Published as “Intercountry adoptions: Is there a need for new provisions in the Child Care Act?” 2000 SAJHR 46.

\(^{113}\) “Intercountry adoptions: Is there a need for new provisions in the Child Care Act?” 2000 SAJHR 46 69. Prof Mosikatsana is supported in this view by UNICEF, see fn 4.
very last option and encourage open adoption, making it possible for a South African child adopted in another country to maintain links with extended family members and with his or her cultural roots.\footnote{Mosikatsana T “Intercountry adoptions: Is there a need for new provisions in the Child Care Act?” 2000 \textit{SAJHR} 46 69-70.}

The children who became the subject of the proceedings in the \textit{Weber}-case were ostensibly simply “chosen” by the applicants and then “processed” in order to be adopted. No effort was made to try and place them locally. In fact, in the case of the siblings, the shelter even failed to trace the mother of the children, despite being well aware of her existence.\footnote{The shelter was, however, not aware of the mother’s whereabouts.} This raises another related problem - when should a child be considered orphaned or abandoned and how should such children be protected? The Special Commission on the practical operation of the Hague Convention reported\footnote{See Report and Conclusions of the Special Commission on the Practical Operation of the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in respect of Intercountry Adoption 28 November-1 December 2000 drawn up by the Permanent Bureau.} that the principle of subsidiarity\footnote{See para 24 p 22 of the Report.} “implies that the intercountry adoption system within the country of origin should have the capacity to explore national alternatives for the child”. The Commission submitted that “[i]t may be that the principle of subsidiarity …imposes certain positive obligations with regard to the development of domestic family support and child care services within the countries of origin”.\footnote{Mosikatsana T “Intercountry adoptions: Is there a need for new provisions in the Child Care Act?” 2000 \textit{SAJHR} 46 52, is of the opinion that the circumvention of child welfare norm governing intercountry adoptions tends to be more common “in countries without a coherent child and family welfare policy which promotes maintaining the child in his or her family of origin or providing material support for families where appropriate”.}

In terms of existing South African law, children who are abandoned by their parents or orphaned, \textit{inter alia}, because of HIV/AIDS, are considered children “in need of care.”\footnote{In terms of s 14(4) of the Child Care Act.} Such children can formally be placed in foster care or a children’s home or a school of industries by an order of the Children’s Court.\footnote{In terms of s 15 of the Child Care Act. The Children’s Court is, as already mentioned, a creature of statute, deriving its powers exclusively from the provisions of the Child Care Act.} The placement in alternative care is meant to be temporary, lasting a maximum period of 2 years at a
time, until the child can eventually be reunified with its parents.\textsuperscript{121} The alternative caretaker or institution is only given custody of the child in question,\textsuperscript{122} that is the responsibility to make decisions regarding the person of the child including the child’s place of residence, religious instruction, education, etc. Parents retain guardianship in respect of their children throughout the operation of the order. As already pointed out, only a formal adoption order granted in terms of the Child Care Act can permanently divest parents of their parental responsibility.\textsuperscript{123} In terms of the regulations to the Child Care Act, the social worker designated to monitor the placement in alternative care, must draw up a plan of reunification showing how reunification will be accomplished in the particular circumstances.\textsuperscript{124} In the case of abandoned or orphaned children, where reunification is impossible, alternative placement in a foster home or institution unfortunately often acquires a permanency it was not intended to have,\textsuperscript{125} lasting until the child reaches the age of 18 or even 21 years in exceptional cases.\textsuperscript{126} The only way in which an abandoned or orphaned child can “escape” permanent institutional care is through adoption, either locally or

\textsuperscript{121} “Family reunification services” is only defined in the regulations to the Child Care Act, published in \textit{GG} 10546 of Dec 1986 as amended by GN R416 of March 1998, GN R119 of 3 Feb 1999 and GN R923 of 27 Jun 2003. In terms of the definition in reg 1, it means “a service whereby a social worker and where applicable in consultation with the child and youth care worker renders a service for the purpose of empowering and supporting parents, the family and children in alternative care, which aims at enabling those children to be reunited with their family and community of origin in the shortest possible period of time, in a manner consistent with the best interests of the child and subject to a provisional maximum time frame of two years or such extended period and ‘family reunification’ has a corresponding meaning”. The regulations also contain a definition of “permanency planning” in reg 1 although it is not referred to anywhere else in the regulations, leaving it standing in a vacuum: See SALC Report para 6.5.3. According to the definition it means “giving a child the opportunity to grow up in his or her own family and where this is not possible or not to his or her best interests, to have a time-limited plan which works towards life-long relationships in a family or community setting”.

\textsuperscript{122} See s 53 of the Child Care Act.

\textsuperscript{123} The legal consequences of an adoption are explained in s 20(1) of the Child Care Act: “An order of adoption shall terminate all the rights and obligations existing between the child and any person who was his parent (other than a spouse contemplated in section 17(c)) immediately prior to such adoption, and that person’s relatives”.

\textsuperscript{124} Reg 2(4)(f) of the regulations to the Child Care Act.

\textsuperscript{125} See SALRC Discussion Paper 103 Project 110 \textit{Review of the Child Care Act} para 10.4.5. According to the Discussion Paper, there is, \textit{inter alia}, no clear definition of and no guidelines associated with, abandonment. Commissioners as a result set their own procedures for the management of such cases. These are at times incompatible with the developmental needs of the children. As an example the SALRC states that some Commissioners refuse to free abandoned infants for (domestic) adoption until a lengthy (and in practice usually fictional) “police search” has been carried out for the parents. By the time this is over, the child’s development has been compromised and the chance of adoption may be reduced. This, in conjunction with a lack of permanency orientation among social workers, may result in infants being institutionalized and “drifting in care” for years.

\textsuperscript{126} See reg 15 and, more specifically, reg 15(9) as well as s 16(2) and (3) of the Child Care Act.
internationally. Because foster parents risk losing their state subsidized foster grant after adopting their foster child, many foster parents prefer not to initiate adoption proceedings despite the fact that they may be perfectly suitable adoptive parents and that the permanency of an adoption may be infinitely more advantageous to the child.

The vast majority of children currently being abandoned and orphaned in South Africa are black. Although interracial adoptions are now a common occurrence in South Africa and many more Black families are opening up to the idea of adopting another child, most of the abandoned and orphaned babies and young children remain in institutional care. The problem is exacerbated by the fact that not all children “in need of care” are placed in alternative care through the Children’s Court. It is believed (although no statistics are available) that the majority of abandoned or orphaned children are simply absorbed into the extended family system or cared for in informal care facilities, most of which are run by non-governmental organizations (NGO’s), some of which are registered as “shelters” or “places of care” in terms of the Child Care Act.

Without proper regulation of the control and management of not only these facilities, but also those residential care facilities under the auspices of the state, human rights abuses are widespread and it is, therefore, not surprising that the child and youth care system in South Africa as a whole has been described as being “in crisis”.

The children in the Weber-case were evidently not channeled through the Children’s Court.

129 In terms of the Child Care Act (Ch 5), no child may be received in any children’s home or place of care (other than a children’s home or place of care maintained and controlled by the State) or a shelter unless the children’s home, place of care or shelter has been registered in terms of s 30 of the Child Care Act. A contravention of this section is a criminal offence. The regulations to the Child Care Act contain detailed provisions regarding the care of children in these institutions: Reg 30A forbids certain behaviour management practices in places of care, reg 31 ensures that children’s homes and shelters make proper arrangement for the care, protection and development of each child in the institution in line with the established minimum standards and ensures that children who are of school-going age attend school, reg 31A enunciates the rights of children in institutions, reg 32 regulates the control, maintenance of good order and behaviour of children in institutions and regs 33 and 34 oblige institutions to keep detailed records of each child in the institution. Institutions are also subject to inspection into s 31 of the Child Care Act.
130 A report to the South African Cabinet by the Inter-Ministerial committee on Young people at Risk (In Whose Best Interests? Report on Places of Safety, Schools of Industry and Reform Schools, July 1996), revealed the shocking state of affairs in many state-controlled children’s care facilities. The abuse of children in residential care settings is, of course, not unique to South Africa.
Court as children “in need of care”. They ended up in the shelter by accident. Although the shelter has submitted an application to be registered in terms of the Child Care Act, the Department of Social Development has unofficially placed a moratorium on any further registrations. However committed to the appropriate and loving care of the children, the shelter might have failed the siblings insofar as the reunification with their mother is concerned. The fact is that if the biological mother had made her appearance a month later she would have been divested of her parental responsibility, most probably without recourse to a South African court. Although she would still have retained a right of access to her children, such a right would have been impracticable if the children had been removed to the US.

The problem concerning the definition and protection of abandoned and orphaned children for purposes of intercountry adoption is an international concern. The Children’s Act will attempt to integrate the provisions pertaining to the registration and monitoring of places of care in South Africa. The Act contains a variety of protective measures to ensure that abandoned and orphaned children are not necessarily institutionalized. Some of these provisions include the possibility of “kinship” care, child-headed households and the possibility of multiple persons being granted parental responsibility in respect of the same child. In terms of section 253 of the Children’s Act the Minister would have the authority (by way of regulation) to prescribe procedures for determining -

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132 S 30 of the Child Care Act. The owner of the shelter insisted that it is registered.

133 In terms of reg 31A children in a shelter shall have the right, inter alia, to “a plan and programme of care and development, which includes a plan for reunification, security and life-long relationships”.

134 See Bogard HE “Who are the orphans? Defining orphan status and the need for an international convention on intercountry adoption” 1991 Emory International Law Review 571; Wallace SR “International adoption: the most logical solution to the disparity between the numbers of orphaned and abandoned children in some countries and families and individuals wishing to adopt in others?” 2003 Arizona Journal of International and Comparative Law 689; Thompson NS “Hague is enough?: A call for more protective, uniform law guiding international adoptions” 2004 Wisconsin International Law Journal 441 463, criticizing the “vague Hague” for not providing definitions of key terms such as “orphan” and “adoption” and Olsen LJ “Live or let die: Could intercountry adoption make the difference?” 2004 Penn State International Law Review 483.

135 S 30 of the Children’s Act. “Care-giver” is defined in the Children’s Act as “any person other than the biological or adoptive parent who factually cares for a child, whether or not that person has parental responsibilities or rights in respect of the child, and includes— (a) a foster parent; (b) a kinship care-giver; (c) a family member who cares for a child in terms of an informal kinship care arrangement; (d) a person who cares for a child whilst the child is in temporary safe care; (e) a primary care-giver who is not the biological or adoptive parent of the child; or (f) the child at the head of a child-headed household to the extent that that child has assumed the role of primary care-giver.
Section D: Conclusion

It should be evident from the above discussion that South Africa cannot tolerate any further delays in enacting the new Children’s Act. In its current state of transition, South Africa is simply a breeding ground for abuse as far as intercountry adoption is concerned. Although it is acknowledged that legislation can never be regarded as a panacea for any problem, specifically one as wide in scope as intercountry adoption, the new Children’s Act is considered an essential first step in addressing this thorny issue. With the increasing numbers of abandoned and orphaned babies in South Africa, intercountry adoption is sure to become more widespread. In anticipation of the Children’s Act and the incorporation of the Hague Convention, applications for intercountry adoption of South African children should be channelled through the children’s court. Despite its flaws, this procedure provides, at least in form if not in substance, the most acceptable degree of protection currently available to children who become the subject of such proceedings. Any deviation or exploitation of the current transitory legal framework should, without exception, be considered with the utmost degree of circumspection and suspicion.

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136 Mosikatsana T “Intercountry adoptions: Is there a need for new provisions in the Child Care Act?” 2000 SAJHR 46 52. Wallace SR “International adoption: The most logical solution to the disparity between the numbers of orphaned and abandoned children in some countries and families and individuals wishing to adopt in others?” 2003 Arizona Journal of International and Comparative Law 689 692, argues that while intercountry adoption, as practiced under the Hague Convention, may be the most logical solution to the immediate problems it is purported to remedy, it is not the best long-term solution to the underlying causes of high numbers of orphaned and abandoned children in some countries.

137 Bhabha J “Moving babies: Globalization, markets and transnational adoption” 2004 Fletcher Forum of World Affairs 181 182-4, however, indicates that “[l]ike trafficking, transnational adoption is driven by demand, not supply”, and “[I]t is clear that the child’s urgent need is not the primary factor driving transnational adoption. The low rate of adoption for the huge and rapidly growing population of babies and children orphaned by the AIDS pandemic in Africa is the clearest indication of this” and quoting from The New York Times “Though it is not explicitly U.S. policy to exclude HIV positive children …the immigration paperwork is more complicated, and few families step forward for these youngsters”.