

# The voice of the child in adoption in South Africa\*

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## OPSOMMING

### Die stem van die kind in aanneming in Suid-Afrika

Ingevolge artikel 28(1)(b) van die Grondwet van die Republiek van Suid-Afrika, 1996, het kinders die reg op gesinsorg of ouerlike sorg, of op gepaste alternatiewe sorg wanneer die kind uit die gesinsomgewing weggeneem word. Aanneming is 'n vorm van alternatiewe sorg wat aan kinders die geleentheid bied om deel van 'n gesin te wees en ouerlike sorg te beleef.

Oor die afgelope paar jaar is daar toenemend erkenning gegee aan die outonomie van kinders en hul reg om inspraak te hê in sake wat hulle welstand raak. Baie min aandag is egter nog geskenk aan kinderdeelname in die aannemingsproses. In hierdie artikel ondersoek ek kinderdeelname in die statutêre aannemingsproses in Suid-Afrika. Ek skenk eers- tens oorweging aan internasionale instrumente. Daarna word Suid-Afrikaanse wetgewing oorweeg en uitgelê. Laastens maak ek aanbevelings oor hoe ek van mening is huidige wetgewing uitgelê kan word, en verkieslik gewysig moet word, om kinderdeelname in die statutêre aannemingsproses in Suid-Afrika te verbeter.

## 1 INTRODUCTION

A stable family environment where children can form lasting psychological bonds with family members and experience parental care is widely recognised, and can hardly be over-emphasised.<sup>1</sup> A family is regarded as the primary institution within which the child must grow up.<sup>2</sup> The Preamble to the United Nations Convention on the Rights of the Child<sup>3</sup> states that the family is the fundamental

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1 Kruger "The philosophical underpinning of children's rights theory" 2006 *THRHR* 452. "Family" cannot have a fixed meaning. It should change as society changes.

2 Robinson "The child's right to parental and family care: Some brief remarks" 1998 *Obiter* 333.

3 South Africa became a signatory to the United Nations Convention on the Rights of the Child (hereafter "UNCRC") on 29 January 1993 and ratified it on 16 June 1995. New Zealand ratified it on 6 May 1993. Having ratified the UNCRC, both countries must comply with the obligations it imposes.

group in society and the natural environment for the growth and well-being of all its members and particularly of children. In terms of the Preamble to the African Charter on the Rights and Welfare of the Child,<sup>4</sup> children should grow up in a family environment in an atmosphere of happiness, love and understanding for the full and harmonious development of their personality.

In South Africa, section 28(1)(b) of the Constitution of the Republic of South Africa<sup>5</sup> grants children the right to family care, parental care, or to appropriate alternative care when removed from the family environment. Despite the obvious benefits of upbringing within a family, there are many children who are not fortunate enough to experience parental care within the family environment automatically. The purposes of adoption are to protect and nurture children by providing a safe, healthy environment with positive support, and to promote the goals of permanency planning by connecting children to other safe and nurturing family relationships intended to last a lifetime.<sup>6</sup> Adoption is thus a form of alternative care which grants children the opportunity to experience the family environment by growing up as part of a family and experiencing parental care,<sup>7</sup> which could afford children “the benefits of family life which might not otherwise be available to them”.<sup>8</sup>

Over the past few years, there has been growing recognition of the autonomy of children and their right to have a say in matters affecting their well-being.<sup>9</sup> This is an area of South African law that has received much attention.<sup>10</sup> However, very little attention has been given to child participation in the adoption process.

## 2 SECTION 233(1)(c): THE CONSENT CLAUSE

As child participation was a virtually unknown legal concept at the time, the Child Care Act,<sup>11</sup> the predecessor to the Children’s Act,<sup>12</sup> was remarkably progressive when it included child involvement in the adoption process. Section 18(4)(e) provided that children from the age of ten years had to consent to their adoption. In terms of this section, an application for the adoption of a child could

4 South Africa signed the African Charter on the Rights and Welfare of the Child (hereafter “ACRWC”) on 10 October 1997 and ratified it on 7 January 2000.

5 Constitution of the Republic of South Africa, 1996 (hereafter “the Constitution”).

6 S 229(b) of the Children’s Act 38 of 2005.

7 See art 20(2) and (3) of the UNCRC and *SW v F* 1997 1 SA 796 (O) 802.

8 *Du Toit v Minister of Welfare and Population Development (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 2 SA 198 (CC) 206.

9 This is clear from decisions such as *French v French* 1971 4 SA 298 (W), *Manning v Manning* 1975 4 SA 659 (T) and *Märtens v Märtens* 1991 4 SA 287 (T). Children must be given the opportunity to express their views in relation to a decision which will affect them – Du Toit “Legal representation of children” in Boezaart (ed) *Child law in South Africa* (2009) 95. See also Sloth-Nielsen “Ratification of the United Nations Convention on the Rights of the Child: Some implications for South African law” 1995 *SAJHR* 403.

10 Barrie “Giving due consideration to views expressed by the child in family law proceedings: The Australian experience and lessons for South Africa” 2013 *TSAR* 124; Du Toit (above fn 9) 93; Sloth-Nielsen “Realising children’s rights to legal representation and to be heard in judicial proceedings: An update” 2008 *SAJHR* 495.

11 Act 74 of 1983.

12 Act 38 of 2005. Certain sections came into effect on 1 July 2007, while full implementation of the Act occurred on 1 April 2010.

not be granted unless the children's court was satisfied that the child, if over the age of ten years, consents to the adoption and understands the nature and import of such consent.<sup>13</sup>

When the Children's Act came into effect years later, the involvement of the child in the adoption process was extended, but also took a step backward.<sup>14</sup> In terms of section 233(1)(c)(i), a child may be adopted only if consent for the adoption has been given by the child, if the child is 10 years of age or older.<sup>15</sup> In terms of section 233(1)(c)(ii), a child under the age of ten years who is of an age, maturity and stage of development to understand the implications of such consent has to consent to an adoption before the adoption application can be considered.<sup>16</sup>

There are some important differences between section 18(4)(e) and section 233(1)(c). These are highlighted briefly below, but are discussed in more detail under "4.2 Interpretation of sections":

- (a) Age of consent:
  - (i) Section 18(4)(e) provided for consent of children aged ten years and older only.
  - (ii) Section 233(1)(c) makes provision for consent by children of all ages.<sup>17</sup> The extension of the age in the Children's Act is a positive step in the process.
- (b) Children aged ten years and older:
  - (i) Section 18(4)(e) specifically required children to *understand* the implications of giving consent.
  - (ii) Section 233(1)(c)(i) follows a purely age-based approach.<sup>18</sup> This rigid approach in the Children's Act cannot be supported.
- (c) Children younger than ten years:
  - (i) Section 18(4)(e) did not require consent by any children younger than ten years.

13 S 18(4)(e): "A children's court to which an application for an order of adoption is made . . . shall not grant the application unless it is satisfied . . . that the child, if over the age of ten years, consents to the adoption and understands the nature and import of such consent."

14 In terms of s 233(1)(c) of the Children's Act consent of a child over the age of 10 years is required, but understanding is no longer required, while a child under the age of ten years also now has to consent to an adoption if the child is of an age, maturity and stage of development to understand the implications of such consent. See also "4.2 Interpretation of sections" below.

15 S 233: "(1) A child may be adopted only if consent for the adoption has been given by . . . (c) The child, if the child is . . . (i) 10 years of age or older; or (ii) under the age of 10 years, but is of an age, maturity and stage of development to understand the implications of such consent."

16 S 233(1)(c)(ii), above fn 15.

17 Consent may be a prerequisite (s 233(1)(c)(i)) or may be dependent on certain conditions (s 233(1)(c)(ii)) – see "4.2 Interpretation of sections" below.

18 This refers to an approach where age alone determines a child's capacity to consent – Kassan and Mahery *Special child protective measures in the Children's Act* in Boezaart (ed) *Child law in South Africa* (2009) 212 fn 130.

- (ii) Section 233(1)(c)(ii) provides that children under the age of ten years have to consent, provided they are of an age, maturity, stage of development and understanding to be able to consent.

This enlightened approach in the Children's Act is commendable.

In this article, I consider child participation in statutory adoption proceedings<sup>19</sup> in South Africa and make some suggestions about how legislation should be interpreted and preferably also amended to improve consent by the child in the adoption process. In order to do this, I consider relevant international instruments and domestic legislation. Although I focus on child participation in adoption proceedings, some reference to child participation in general is necessary.

### 3 INTERNATIONAL INSTRUMENTS

In terms of section 39(1)(b) and (c) of the Constitution a court, tribunal or forum must consider international law and may consider foreign law in its deliberations. In the context of the involvement of a child in the adoption process, two international instruments are relevant. They are the UNCRC and the ACRWC. The UNCRC and the ACRWC are complementary and both of them provide the framework through which children and their welfare are increasingly discussed in Africa.<sup>20</sup>

#### 3.1 The UNCRC

The UNCRC, which came into effect on 2 September 1990, has been hailed as a watershed in the history of children.<sup>21</sup> It is a comprehensive treaty on the rights of the child and is the most universally accepted human rights document in history.<sup>22</sup> Article 12(1) gives children the right to express their views in all matters affecting them. It states that "the child who is capable of forming his or her own views has the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child".<sup>23</sup>

This is a significant development in children's rights law, as it "recognises the child as a full human being, with integrity and personality, and with the ability to participate fully in society".<sup>24</sup> The UNCRC recognises the growing autonomy of children in article 12, which gives children a say in matters affecting their well-being.<sup>25</sup> It emphasises the need to allow children to participate<sup>26</sup> in any decisions

19 Any further reference to adoption is thus to statutory adoption in South Africa. The importance of customary adoption is not denied, but falls beyond the scope of this article. For the same reason, I also do not focus on the manner in which the child may be heard.

20 Olowu "Protecting children's rights in Africa: A critique of the African Charter on the Rights and Welfare of the Child" 2002 *The Int F of Children's Rights* 128.

21 Sloth-Nielsen (above fn 9) 401.

22 Todres "Emerging limitations on the rights of the child: The UN Convention on the Rights of the Child and its early case law" in Freeman (ed) *The international library of essays on rights: Children's rights* Vol ii (2004) 147.

23 In terms of a 1, a child "means every human being below the age of eighteen years".

24 Freeman "Introduction: Children as persons" in Freeman (ed) *Children's Rights: A comparative perspective* (1996) 3.

25 Sloth-Nielsen (above fn 9) 403.

26 Boezaart "General principles" in Davel and Skelton (eds) *Commentary on the Children's Act* (2007 – revision service 5 2012) 2-15 explains that participation refers to all the rules that allow the child to be heard directly.

affecting them where they are able to do so. The approach is correct for two reasons:

- (a) Child participation is not linked to a specific age, but rather to age together with maturity, thus taking into account the circumstances of the individual child.
- (b) The article is not too prescriptive about the manner in which the child's views will be considered, but rather leaves it up to the circumstances of each case.

There is no doubt that where appropriate the views of the child have to be taken into account. Article 12, however, does not give children an unequivocal right to be heard. The right is restricted to children who are capable of forming their own views.<sup>27</sup> The article does not make the participation of a child subject to a specific age, but rather relies on the age *and maturity* of the child. Also, the best interests of children<sup>28</sup> are a primary consideration which has to be determined by adult decision-makers.<sup>29</sup> There is thus a necessity for the involvement of parents and other relevant adults, who have to act objectively and in the interests of children when needed. The approach in article 12(1) to child involvement in any matters affecting them is balanced, but it is also limited by the involvement of adults in the process.

Although the UNCRC does not explicitly require the consent of a child to an adoption, it is implied. Article 21(a) provides that:

“States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration . . . and that, if required, *the persons concerned* have given their informed consent to the adoption on the basis of such counselling as may be necessary.”<sup>30</sup>

There is no indication of who these persons are, but *persons* obviously include children.<sup>31</sup>

The UNCRC thus takes a very sensible view of child participation in the adoption process, requiring the child's consent under certain circumstances. The approach in article 21 to child participation in adoption proceedings better promotes the interests of the child than article 12(1) does. Not only are the views of the child considered, as in article 12, but where appropriate informed *consent*<sup>32</sup> by the child is required. This section is well-balanced.

### 3 2 The ACRWC

The UNCRC was an inspiration for another international instrument<sup>33</sup> that deals with the best interests of the child, namely the ACRWC, which entered into force on 29 November 1999. After the UNCRC, it is the second global and the first

<sup>27</sup> A 12(1).

<sup>28</sup> As provided for in a 3 of the UNCRC.

<sup>29</sup> Barratt “The best interest of the child: Where is the child's voice?” in Burman (ed) *The fate of the child: Legal decisions on children in the new South Africa* (2003) 150; Jamieson “Children's rights to participate in social dialogue” in Jamieson *et al* (eds) *South African child gauge 2010/2011* (2011) 23.

<sup>30</sup> Emphasis added.

<sup>31</sup> A child is defined in the Children's Act as “a person under the age of 18 years”.

<sup>32</sup> Informed consent is a common-law requirement.

<sup>33</sup> Davel “The African Charter on the rights and welfare of the child, family law and children's rights” 2002 *De Jure* 282.

regional binding instrument that identifies the child as a possessor of certain rights.<sup>34</sup> In fact, Africa is the only continent with a region-specific child rights instrument which highlights issues of special importance in the African context.<sup>35</sup>

The ACRWC makes the best interests of the child the primary consideration.<sup>36</sup> Article 4(2) provides that in all judicial or administrative proceedings affecting a child, the child who is capable of communicating his or her own views has to be heard, and those views shall be taken into consideration by the relevant authority, while article 7 provides that every child who is capable of communicating his or her own views shall be assured the rights to express his or her opinions freely. Each case will therefore be judged on its own merit, and the views of the child will be taken into account if the child's age and maturity allow this.

There are important differences between the UNCRC and the ACRWC with regard to child participation. According to Du Toit<sup>37</sup> a child's right to participation in the ACRWC is weaker than its equivalent in the UNCRC, because the weight attached to the views of the child are not conditional upon the child's age, maturity and stage of development.<sup>38</sup> To this I can add a strength of the ACRWC, in that the UNCRC, to an extent, restricts child participation in article 12 by making adult involvement a requirement, while the ACRWC allows for child participation in any circumstances where such participation is appropriate. Similar to article 12, though, participation is provided for without consent being required.

In terms of article 24(a) of the ACRWC, States Parties that recognise the system of adoption have to ensure that the best interest of the child is the paramount consideration and that, if necessary, *the appropriate persons concerned* have given their informed consent to the adoption on the basis of appropriate counselling. The wording of this section is therefore very similar to that of article 21(a) of the UNCRC. There is no specific indication of who the appropriate persons are and, again, these surely include children if they are of an age and maturity to be able to give consent.

As with the UNCRC, the ACRWC's approach to child participation in the adoption process is supported. Both instruments take a very balanced approach when it comes to children's age and their involvement in decisions that affect them by not only allowing for child participation in the adoption process, but also consent. Next I consider relevant domestic legislation.

#### 4 LEGAL FRAMEWORK IN SOUTH AFRICA

The Children's Act currently sets out the legal framework for matters related to children in South Africa. It is a comprehensive document and there are several

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34 Chirwa "The merits and demerits of the African Charter on the Rights and Welfare of the Child" 2002 *The Int J of Children's Rights* 157.

35 <http://bit.ly/NFjesk>, accessed on 15 February 2013.

36 A 4(1).

37 Above fn 9 95. The author points out other strengths and weaknesses of these international instruments in regard to the child's right to participation, but as they are not relevant for purposes of this article, they have not been referred to here.

38 Du Toit (above fn 9) 95. Boezaart (above fn 26) 2-16 also points out differences between these two instruments with regard to the right of the child to be heard.

relevant sections that have to be considered in respect of child participation in adoption. These are discussed below.

#### 4 1 Relevant provisions

Section 7(1) contains a list of factors that need to be taken into account when determining the best interests of a child. One of these factors is the age, maturity and stage of development of a child.<sup>39</sup>

Section 10,<sup>40</sup> which incorporates the provisions of article 12(1) of the UNCRC into South Africa's domestic law, thereby complying with South Africa's obligations in that regard,<sup>41</sup> provides that every child who is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child *must be given* due consideration.<sup>42</sup>

Together with section 10, section 233(1)(c)<sup>43</sup> provides for child participation in the adoption process. In terms of section 233(4), the social worker facilitating the adoption of a child must, where applicable, counsel the child before consent to an adoption is granted.<sup>44</sup>

#### 4 2 Interpretation of sections

The involvement of the child in the adoption process is supported. However, legislation allowing for the involvement is flawed. Section 233(1)(c)(i) as it currently reads is not in the best interests of the child, and the best interests of the child could even be compromised by the way the section is phrased.

In terms of the Children's Act, children aged ten years or older *have to* consent to their adoption.<sup>45</sup> The subsection is phrased in such a way that consent cannot be dispensed with even if it is found that the child does not understand the nature and import of such consent. As long as the child is ten years of age or older, consent by the child is imperative. If such consent is not given, the result seems to be that the adoption cannot proceed and such a child cannot be adopted

39 S 7(1)(g)(i): "Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely . . . the child's . . . (i) age, maturity and stage of development."

40 S 10: "Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration."

41 Boezaart (above fn 26) 2-16.

42 In the Review of the Child Care Act, the South African Law Commission in Discussion Paper 103 (hereafter referred to as "SALC discussion paper") 143-144, was of the opinion that the views of the child, where a child has the ability to express such views, must always be considered. Barrie (above fn 10) 137 is of the view that it may be necessary for the South African legislature to elaborate on s 10 and spell out what is meant by "appropriate" participation and how to give "due consideration" to the views of the child in family law proceedings.

43 Above fn 15.

44 S 233: "(4) Before consent for the adoption of the child is granted in terms of subsection (1), the adoption social worker facilitating the adoption of the child must counsel . . . where applicable, the child on the decision to make the child available for adoption." Although the focus of this article is on the consent requirement in s 233, counselling as provided for in this section is included in my suggestions (see "5 Suggestions and conclusion") below.

45 S 233(1)(c)(i), above fn 15.

at all, for the Act does not provide for an adoption to go ahead if the child does not consent.

#### 4.2.1 Age-based approach

Linking the child's consent to a set age does not take into account the individual circumstances of the child and of the particular case. This age-based approach is not in line with child participation as provided for in international instruments.<sup>46</sup> Classifying children as mature or immature based on arbitrary age limits appears to unduly restrict their autonomy.<sup>47</sup> Age alone should not be assumed to be the determinate for the mental development and maturity of the child, for mental development and maturity are determined by many factors.<sup>48</sup> A child aged ten years may have a much younger mental age.<sup>49</sup> Where, for example, the child is older than ten years but suffers from some mental illness, consent might be inappropriate. Maturity develops at different times for different children, and age and maturity do not always cohere.<sup>50</sup> It is also quite possible that a child of ten years might not be mature enough, or be able, to be involved in an adoption process.

I furthermore do not comprehend or support the removal of understanding or maturity<sup>51</sup> as a requirement. It is crucial that the children concerned understand what they are consenting to before such consent can be taken into account or deemed appropriate. Consent should not be dependent on a specific age, but rather on the development and maturity of the particular child<sup>52</sup> as well as the circumstances of the case. The important issue for participation of a child in any matter concerning the child, which obviously includes adoption, is not the age of the child *per se*, but *all* relevant factors, which could include the age of the child. If consent is based on age alone and other factors such as maturity, understanding, or personal circumstances are not taken into consideration, the child's consent may be inappropriate.

The SALC discussion paper in fact recommended that the age requirement of ten years be done away with altogether in the Children's Act and be substituted with the requirement that "the child must consent to being adopted if he or she is of sufficient maturity to understand the implications of being adopted and giving consent to such adoption".<sup>53</sup> Why this recommendation was ignored when section 233(1)(c) was drafted, is not clear, especially when we consider the requirement of consent by the child in other areas of the law, such as medical treatment. In terms of section 129(2)<sup>54</sup> of the Children's Act, consent is subject to age,

46 See aa 12(1) and 21(a) of the UNCRC and aa 4(2) and 24(a) of the ACRWC.

47 Kassan and Mahery (above fn 18) 214.

48 Strous "Post-divorce relocation: In the best interests of the child?" 2007 *SA J of Psychology* 235. This will not be an easy task – see Kassan and Mahery (above fn 18) 212.

49 Mental development is not the same for all children, and can be influenced by many factors.

50 Strous (above fn 48) 235.

51 Maturity refers to the ability to understand and assess the implications of a particular matter – UNCRC Committee on the rights of the child, general comment 12 (2009) 8.

52 See *French v French* 1971 4 SA 298 (W), *Manning v Manning* 1975 4 SA 659 (T); *Märtens v Märtens* 1991 4 SA 287 (T) and *Lubbe v du Plessis* 2001 (4) SA 57 (C).

53 143–144.

54 S 129: "(2) A child may consent to his or her own medical treatment or to the medical treatment of his or her child if (a) the child is over the age of 12 years; and (b) the child is of sufficient maturity and has the mental capacity to understand the benefits, risks, social

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mental capacity *and* maturity, which is a welcome improvement on section 39(4) of the Child Care Act,<sup>55</sup> in terms of which consent to medical treatment and surgical operations were linked to age alone.

#### 4.2.2 *A more open-minded approach*

Section 233(1)(c)(ii) cannot escape criticism, but it is less rigid, more in line with international instruments, and serves the interests of children better than subsection (i).<sup>56</sup> Consent is not dependent on a specific age, but rather on the maturity and stage of development of children, and whether they understand the implications of the consent.

A concern is that this subsection does not indicate what it is that children need to understand, in other words, it is unclear whether children need to understand the implications of consenting to adoption in general, or whether they need to understand the implications of consenting to adoption in their specific case. They may understand the nature and import of an adoption, but may not understand that there are issues in their particular adoption that could have an even greater impact on them than adoption ordinarily has. An example would be where a child may be adopted by parents of a different religion or culture.

Consent should not be linked to a specific age and should require children to understand exactly what it is that they are consenting to. It should also not be a barrier to the adoption of children who are incapable of understanding the nature and impact of consent. Amending the legislation would ensure that the consent is meaningful, and further that an adoption may proceed even where consent is not possible or not appropriate. Section 233(1)(c) does not comply with the provisions of section 7(1)(g)(i).<sup>57</sup> In line with the UNCRC and the ACRWC and the best interests of the child, a better approach would have been to base the decision about the involvement of children in both the giving of consent and the child's best interests in general in adoption proceedings for children of all ages on section 10,<sup>58</sup> read together with section 7(1)(g)(i),<sup>59</sup> of the Children's Act. Section 233(1)(c) should include age, maturity and stage of development of a child as requirements.

In the case of children who are not of an age, maturity and stage of development to understand the nature and import of consent to their specific adoption,

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and other implications of the treatment. (3) A child may consent to the performance of a surgical operation on him or her or his or her child if (a) the child is over the age of 12 years; and (b) the child is of sufficient maturity and has the mental capacity to understand the benefits, risks, social and other implications of the surgical operation; and (c) the child is duly assisted by his or her parent or guardian."

55 S 39(4): "Notwithstanding any rule of law to the contrary. (a) any person over the age of 18 years shall be competent to consent, without the assistance of his parent or guardian, to the performance of any operation upon himself; and (b) any person over the age of 14 years shall be competent to consent, without the assistance of his parent or guardian, to the performance of any medical treatment of himself or his child."

56 Mosikatsana and Lofell "Adoption" in Davel and Skelton (eds) *Commentary on the Children's Act* (2007 – revision service 5 2012) 15-13 are also of the view that extending the right to participation by children in decisions concerning them to a child younger than ten who has the capacity to appreciate the implications of being adopted, is a step forward.

57 Above fn 39.

58 Above fn 40.

59 Above fn 39.

their consent should not be required at all. Furthermore, even where children are capable of and mature enough to give consent, other factors such as abuse, fear, financial issues, or the desire to get out of a children's home at any cost, may influence such consent and make it unsuitable, inappropriate or undesirable. The court may dispense with the consent of a parent or guardian under certain circumstances.<sup>60</sup> To serve the best interests of the child, this should also be possible with regard to consent by the child. It would therefore be for the court to determine, on a case-by-case basis, whether the consent of a child should be a requirement before an adoption application could be considered.

#### 4 2 3 *Counselling before adoption*

The requirement of counselling that is referred to in section 233(4)<sup>61</sup> is a positive step in the adoption process, and it is in line with article 21(a) of the UNCRC and article 24(a) of the ACRWC.<sup>62</sup> The Children's Act takes the participation process by the child one step further than the international instruments allow for, by also indicating who is responsible for the counselling. However, there are two issues that need to be addressed:

- (a) Counselling of the child is only required *where applicable*. There is no indication when counselling will be applicable or who will decide whether it is applicable.
- (b) The section only requires counselling, nothing more. The child then has to decide whether to consent to the adoption or not. The decision whether or not to consent is not affected by the counselling. Surely, counselling by a properly trained adoption social worker will be in the best interests of the child, but this section should be extended. The trained adoption social worker should ensure that the child understands the meaning of giving consent to the *specific* adoption, and not just to adoption in general. It should also require the social worker to determine whether the child is then capable of giving the requisite consent and, if necessary, to counsel the child about this issue. The adoption social worker should be trained to determine whether the child is mature enough to understand the consent and to have an input with regard to the child's ability to consent to adoption.

Adding another subsection to section 233(4) will serve the best interests of the child better. My suggestion is that this subsection should read as follows:

- “Before consent for the adoption of the child is granted in terms of subsection (1),
- (ii) the adoption social worker facilitating the adoption is tasked with determining whether the child is able to consent to the adoption, taking into account the personal circumstances of the child as well as the age, maturity and stage of development of the child, and making a recommendation to the court.”

Proper training of adoption social workers will be very important. An adoption social worker who is competent to make such a recommendation should, if necessary, make a recommendation to the presiding officer of the children's court<sup>63</sup> about the ability of the child to understand and consent to the adoption or not.

<sup>60</sup> See s 236(1).

<sup>61</sup> Above fn 44.

<sup>62</sup> Both these articles include counselling where necessary or appropriate.

<sup>63</sup> An adoption application is heard in the children's court – s 239(1)(a) of the Children's Act 38 of 2005.

Such understanding and consent also have to be related to the specific adoption and not just to adoption in general. Although I do not believe that the court ought to be bound by the decision of the social worker, the social worker should guide the court in this regard so that the presiding officer of the children's court could make a more informed decision.

## 5 SUGGESTIONS AND CONCLUSION

Until such time as amendments are made to the Children's Act, or even if no amendments are made to this Act, there is a way to deal with the situation where a child's consent to an adoption is peremptory,<sup>64</sup> but such consent is not possible or appropriate. Section 236(5) of the Children's Act<sup>65</sup> provides that a parent *or person* can be excluded from giving consent to an adoption if grounds for such exclusion exist. Unfortunately there is no indication in the Act of what would amount to "a ground on which a parent or person is excluded" from giving consent to the adoption of a child. This of course complicates matters, as presiding officers in adoption applications have to use their own discretion, which could give rise to subjectivity and many different interpretations of what these grounds are. Be that as it may, a child is a *person*,<sup>66</sup> and the courts should interpret this section in such a way that the consent of the child can be dispensed with where appropriate.<sup>67</sup> This would mean that the consent of the child is not a requirement when an adoption application is considered.

The interpretation I suggest is only a partial solution. It is suggested that at the very least a list should be added to section 233(1)(c) that sets out those circumstances in which the child's consent may be dispensed with. The Children's Act makes provision<sup>68</sup> for when the consent of the parent or guardian of the child who is to be adopted is not necessary. Such consent could be dispensed with because the parent is dead, missing, mentally ill, has abandoned the child or has abused the child, to name but a few. There is no reason why this section cannot be extended to make provision for circumstances where the consent of the *child* could be dispensed with. Where the child is incapable of consenting, or consent was obtained in an unacceptable or inappropriate manner,<sup>69</sup> the consent of the child should not be a requirement.

The better solution, which also promotes the best interests of the child, is the removal of the requirement of the age<sup>70</sup> of ten years from the Children's Act in so far as it relates to child participation in adoption. Section 233(1)(c) should

64 As required by s 233(1)(c)(i).

65 S 236: "(5) A children's court may on a balance of probabilities make a finding as to the existence of a ground on which a parent or person is excluded in terms of this subsection from giving consent to the adoption of a child."

66 In s 1(1) of the Children's Act 38 of 2005 "child" is defined as a *person* under the age of 18 years.

67 As in the case of a parent, this will not be an easy task, but that is no reason for not including the option in legislation.

68 S 236(5), above fn 65.

69 Any undue influence could also be taken into account by the court when assessing the best interests of the child, which, in the case of a parent or guardian, might even lead to the consent of the parent or guardian being dispensed with in terms of s 236(5).

70 According to Kassan and Mahery (above fn 18) 224, the same results could be achieved if the arbitrary age limit approach was abandoned.

then be amended to disregard the specific age of the child when it comes to consent.<sup>71</sup>

However, in order to comply with both international and South African guidelines regarding the best interests of the child, I believe that an entirely different approach should be followed. What I advocate is a shift in emphasis so that the child should as far as possible be involved in the adoption process and should always consent to an adoption, unless this is not possible. Section 233 (1)(c) should be amended to read as follows:

“A child may be adopted only if consent for the adoption has been given by the child, unless the child is not of such an age, maturity and stage of development as to be able to consent to the adoption and understand the implications of such consent with regard to his or her adoption.”

It is also suggested that a further subsection should then be added:

“Even if the child is of an age, maturity and stage of development as to be able to consent to an adoption and understand the implications of such consent, consent by a child may be dispensed with if, in the opinion of the court, such consent would be inappropriate. Such consent may be inappropriate if the child was forced or coerced into giving consent, if the child consented due to fear or abuse, or for whatever other reason the court deems appropriate.”

The benefits of children growing up in a stable adoptive family can only be enhanced if the child’s consent is obtained, unless circumstances are such that consent is not possible or appropriate. South Africa has certainly taken account of the importance of giving the child a voice in adoption proceedings. This has to be commended. There is, however, more that can be done.

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71 This is also the view of Kassan and Mahery (above fn 18) 214. The section could be amended as follows: “A child may be adopted only if consent for the adoption has been given by . . . (c) the child, if the child is of such an age, maturity and stage of development as to be able to consent to the adoption and understand the implications of such consent with regard to his or her adoption.”