

## *It is My Adoption, But is Anyone Listening to Me?*

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*In South Africa, children have the right to family care or parental care, or to appropriate alternative care when removed from the family environment, which may be achieved through adoption. Children also have the right to participate in matters affecting their well-being, and this article considers child participation in statutory adoption proceedings in South Africa. The conclusion that is arrived at is that the importance of the involvement of children in adoption is recognised, but that more can be done in this regard. Suggestions to increase child participation in the statutory adoption process are also made.*

### **I Introduction**

The beneficial effect of 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 of the United Nations Convention on the Rights of the

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- 1 JM Kruger "The philosophical underpinning of children's rights theory" (2006) 69 THRHR 436 at 452. In my view, "family" cannot have a fixed meaning. It should change as society changes.
- 2 JA Robinson "The child's right to parental and family care: some brief remarks" (1998) 19 Obiter 329 at 333.

Child states that the family is the fundamental group in society and the natural environment for the growth and well-being of all its members and particularly of children,<sup>3</sup> and the Preamble of the African Charter on the Rights and Welfare of the Child states that 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.<sup>4</sup>

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. In South Africa, s 28(1)(b) of the Constitution of the Republic of South Africa (the Constitution)<sup>5</sup> grants children the right to family care or parental care, or to appropriate alternative care when removed from the family environment. Adoption, the purposes of which 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> is 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>

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>8</sup> This is an area of South African law that has received much attention.<sup>9</sup> Very little attention has, however, been given to child participation

3 United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990) [UNCRC]. South Africa became a signatory to the UNCRC on 29 January 1993 and ratified it on 16 June 1995. New Zealand ratified it on 6 April 1993. Having ratified the UNCRC both countries have to comply with the obligations it imposes.

4 African Charter on the Rights and Welfare of the Child OAU Doc CAB /LEG/24.9/49 (1990) (entered into force 29 November 1999) [ACRWC]. South Africa signed the ACRWC on 10 October 1997 and ratified it on 7 January 2000.

5 Constitution of the Republic of South Africa Act 1996 [Constitution].

6 Children’s Act 2005 (South Africa), s 229(b).

7 See UNCRC, art 20(2) and (3); and *SW v F* 1997 (1) SA 796 (O) at 802 (an English translation of this case is available in BG Morrison (ed) *Translations of the South African Law Reports: 1997(1) & (2) SA* (Juta & Co, Kenwyn, 1998) 51 at 53–54).

8 Julia Sloth-Nielsen “Ratification of the United Nations Convention on the Rights of the Child: Some Implications for South African Law” (1995) 11 SAJHR 401 at 403.

9 GN Barrie “Giving due consideration to views expressed by the child in family law proceedings: the Australian experience and lessons for South Africa” (2013) 1 TSAR 124 at 124–125.

in the adoption process. In this article, I shall consider child participation in statutory adoption proceedings<sup>10</sup> in South Africa and make some suggestions about how I believe legislation should be interpreted and preferably also amended to improve child participation in the adoption process.<sup>11</sup> In order to do this, I shall also consider relevant international instruments. Although I shall focus on child participation in adoption proceedings, some reference to child participation in general is necessary.

## II International Instruments

In terms of ss 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 United Nations Convention on the Rights of the Child (UNCRC) and the African Charter on the Rights and Welfare of the Child (ACRWC). The UNCRC and the ACRWC “are complementary and both provide the framework through which children and their welfare are increasingly discussed in Africa”.<sup>12</sup>

### A *The UNCRC*

The UNCRC, which came into effect on 2 September 1990, “has been hailed as a watershed in the history of children”.<sup>13</sup> It is “a comprehensive treaty on the rights of the child” and is the most universally accepted human rights

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10 The importance of customary adoption is not denied, but falls beyond the scope of this article. For the same reason, I shall also not focus on the manner in which the child may be heard.

11 In New Zealand, the Adoption Act 1955 requires in s 11(b) that the court in an adoption application has to give “due consideration ... to the wishes of the child, having regard to the age and understanding of the child”, but does not require any consent by a child. My suggestions in this article are specifically made with regard to the position in South Africa, but it is hoped that these may be of some value to New Zealand as well.

12 Dejo Olowu “Protecting children’s rights in Africa: A critique of the African Charter on the Rights and Welfare of the Child” (2002) 10 *The International Journal of Children’s Rights* 127 at 128.

13 Sloth-Nielsen, above n 8, at 401.

document in history.<sup>14</sup> Article 12(1) gives children the right to express their views in all matters affecting them. It states that:<sup>15</sup>

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.

This is a significant development in children's rights law, as it "recognizes the child as a full human being, with integrity and personality, and with the ability to participate fully in society".<sup>16</sup> The UNCRC recognises the growing autonomy of children in art 12, which gives children a say in matters affecting their well-being.<sup>17</sup> It emphasises the need to allow children to participate in any decisions affecting them where they are able to do so. I believe the approach is correct for two reasons:

- 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.
- It 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>18</sup> The article does not make the consent 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>19</sup> are a primary consideration which has to be determined by adult decision-makers.<sup>20</sup> There is thus a necessity for the involvement of parents and other relevant adults, who have

14 Jonathan Todres "Emerging Limitations on the Rights of the Child: The UN Convention on the Rights of the Child and its Early Case Law" (1998–1999) 30 *Colum Hum Rts L Rev* 159 at 166–167 (reprinted in Michael Freeman (ed) *Children's rights: the international library of essays on rights* (Ashgate, Aldershot, 2004) vol ii, 139 at 146–147).

15 UNCRC, art 12(1). In terms of art 1 a child "means every human being below the age of eighteen years".

16 Michael Freeman "Introduction: Children as Persons" in Michael Freeman (ed) *Children's Rights: A Comparative Perspective* (Dartmouth Publishing, Aldershot, 1996) 1 at 3.

17 Sloth-Nielsen, above n 8, at 403.

18 Art 12(1).

19 As provided for in art 3 of the UNCRC.

20 Amanda Barratt "The best interest of the child: where is the child's voice?" in Sandra

to act objectively and in the interests of children when needed. The approach in art 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 it does not explicitly require the consent of a child to an adoption, art 21 of the UNCRC provides that:<sup>21</sup>

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 ... :

- a. ... 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.

There is no indication of who these persons are and I believe that *persons concerned* include the child.

In my view the UNCRC thus takes a very sensible view of child participation in the adoption process, requiring the child's consent under certain circumstances. I believe that the approach in art 21 to child participation better promotes the interests of the child than art 12(1) does. Not only are the views of the child considered, as in art 12, but where appropriate *consent* by the child is required. If my interpretation of this article is correct, I believe that this section is well balanced.

## B *The ACRWC*

The UNCRC was an inspiration for another international instrument that deals with the best interests of the child,<sup>22</sup> namely the ACRWC, which entered into force on 29 November 1999. After the UNCRC, "it is [the] second global and the first regional binding instrument that identifies the child as a possessor of certain rights"<sup>23</sup> and confirms the best interests of the child as the primary consideration.<sup>24</sup> In fact, Africa is the only continent with

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Burman (ed) *The Fate of the Child: Legal Decisions on Children in the New South Africa* (Juta, Lansdowne, 2003) 145 at 150.

21 Emphasis added.

22 T Davel "The African Charter on the rights and welfare of the child, family law and children's rights" (2002) 1 De Jure 281 at 282.

23 Danwood Chirwa "The merits and demerits of the African Charter on the Rights and Welfare of the Child" (2002) 10 The International Journal of Children's Rights 157 at 157 (footnotes omitted).

24 Art 4(1).

a region-specific child rights instrument, which highlights issues of special importance in the African context.<sup>25</sup>

Article 4(2) provides that in all judicial or administrative proceedings affecting a child, the child who is capable of communicating his/her own views has to be heard, and those views shall be taken into consideration by the relevant authority, while art 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. In my view, the difference between the UNCRC and the ACRWC is that the UNCRC, to an extent, restricts child participation in art 12 by making adult involvement a requirement, while the ACRWC allows for child participation in any circumstances where such participation is appropriate. Similar to art 12 of the UNCRC, though, participation is provided for in the ACRWC without consent being required.

In terms of art 24 of the ACRWC, States Parties which recognize the system of adoption have to:<sup>26</sup>

ensure that the best interest of the child [is] the paramount consideration  
... :

- a. ... 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 article is therefore very similar to that of art 21(a) of the UNCRC. There is no specific indication of who the appropriate persons are and, again in my opinion, these surely include children who, if they are of an age and maturity to be able to give consent, are included in this requirement.

As with the UNCRC, I therefore believe that the ACRWC's approach to child participation in the adoption process is correct. 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 shall consider relevant legislation.

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25 "The Charter" African Committee of Experts on the Rights and Welfare of the Child <[www.acerwc.org](http://www.acerwc.org)>.

26 Emphasis added.

### III The Legal Framework in South Africa

The Children's Act 2005<sup>27</sup> currently sets out the legal framework for matters related to children in South Africa. It is a comprehensive document and there are several relevant sections that have to be considered in respect of child participation in adoption.<sup>28</sup>

#### *A 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 is that the age, maturity and stage of development of a child need to be taken into account where relevant.<sup>29</sup>

Section 10, which incorporates the provisions of art 12(1) of the UNCRC into South Africa's domestic law, thereby complying with South Africa's obligations in that regard,<sup>30</sup> provides that:<sup>31</sup>

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.

Section 233(1)(c) deals with consent by a child in the case of an adoption.<sup>32</sup> This section, together with s 10, provides for child participation

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

28 I shall discuss this document in a little more detail because the focus of the article is on South Africa.

29 Section 7(1)(g)(i).

30 T Davel in CJ Davel and AM Skelton (eds) *Commentary on the Children's Act* (Juta, Cape Town, 2007) at 2–14.

31 Barrie, above n 9, at 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.

32 Section 233 provides:

(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.

in the adoption process in terms of this Act. There are two parts to this section.

In terms of s 233(1)(c)(i), children aged 10 years or older *have to* consent to their adoption. It 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 10 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 at all, for the Act does not provide for dispensing with the child's consent.

There is a second part to this section, namely s 233(1)(c)(ii). It requires that a child under the age of 10 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.

In terms of s 233(4), the social worker facilitating the adoption of a child must, where applicable, counsel the child before consent to an adoption is granted.

## B *Interpretation of sections*

The involvement of the child in the adoption process is supported, but it is my opinion that s 233(1)(c)(i) as it currently reads is not in the best interests of the child, and that the best interests of the child could even be compromised by the way the section is phrased. 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 is not in line with child participation as provided for in international instruments.<sup>33</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>34</sup> A child aged 10 years may have a much younger mental age.<sup>35</sup> Where, for example, the child is older than 10 years but suffers from some mental illness, requiring consent might be inappropriate. Maturity develops at different times for different children, and "[a]ge and ... maturity do not always cohere".<sup>36</sup> It is quite possible that a child of 10 years might not be mature enough, or be able, to be involved in an adoption process.

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

34 Martin Strous "Post-divorce relocation: In the best interests of the child?" (2007) 37 *South African Journal of Psychology* 223 at 235.

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

36 Strous, above n 34, at 235.

When we consider s 233(1)(c)(ii) it cannot escape criticism but, in my opinion, it is more in line with international instruments and serves the interests of children better than paragraph (i). The requirement in s 233(1)(c)(ii) at least takes into consideration the maturity and stage of development of the child, and whether he or she understands the implications of the consent. It seems as if the protection granted in the case of younger children is more comprehensive than that provided to children over the age of 10 years. There is no justification for this differentiation. All children should be protected equally.

A concern is that paragraph (ii) does not indicate what it is that children need to understand — 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. A requirement of 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 to this effect would ensure that the consent is meaningful, and further that an adoption may proceed even where consent is not possible or not appropriate.

Like s 233(1)(c)(i), previous legislation also included the age of 10 years as the minimum age at which children had to consent to an adoption, but unlike s 233(1)(c)(i), it specifically also required children to understand the implications of giving such consent.<sup>37</sup> I do not comprehend or support the removal of understanding as a requirement. It is crucial that the children concerned understand what they are consenting to before such consent can be taken into account. The requirement of consent should not be dependent on a specific age, but rather on the development and maturity of the particular child 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 the age of the child together with *all* other relevant factors. I would suggest that it would be more in line with international instruments and the best interests of the child if s 233(1)(c) took into account age, maturity and stage of development of a child with regard to the nature and import of consent under the specific circumstances. In the case of children who are not of an age, maturity and

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37 Child Care Act 1983 (South Africa), s 18(4)(e).

stage of development to understand the nature and import of consent to their specific adoption, their consent should be dispensed with.

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. It is submitted that the validity of consent should be determined on a case-by-case basis. It is my view that if consent is based on age alone and other factors such as maturity or personal circumstances are not taken into consideration, the child's consent may be inappropriate.

In my opinion s 233(1)(c) does not comply with the provisions of s 7(1)(g)(i).<sup>38</sup> In line with the UNCRC and the ACRWC a better approach, in my view, would have been to base the decisions both about the involvement of a child in the giving of consent and about the child's best interests in general in adoption proceedings for children of **all** ages on s 10,<sup>39</sup> read with s 7(1)(g)(i), of the Children's Act.

The requirement of counselling that is referred to in s 233(4) is a positive step in the process, and it is in line with art 21(a) of the UNCRC and art 24(a) of the ACRWC.<sup>40</sup> The Children's Act thus 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:

- 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.
- 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 I believe 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. I believe 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.

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38 See above, text at n 29.

39 See above, quote at n 31.

40 Both these articles include counselling where necessary or appropriate.

In my opinion, adding another subsection to s 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, 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>41</sup> about the ability of the child to understand and consent to the adoption or not. Such understanding and consent also have to be related to the specific adoption and not just relate 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.

#### **IV Suggestions and Conclusion**

Until such a time as amendments are made to the Children's Act, or if no amendments are made to this Act, there is a way to overcome the problem of a child having to consent to his or her adoption<sup>42</sup> where such consent is not possible or appropriate. Section 236(5) of the Children's Act provides that a parent *or person* can be excluded from giving consent to an adoption if grounds for such exclusion exist.<sup>43</sup> 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, the courts should interpret this section in such a way that the requirement with regard to the consent of the child can be dispensed with where appropriate.

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41 An adoption application is heard in the Children's Court: s 239(1)(a) of the Children's Act.

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

43 Section 236(5) provides: "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."

A child is a *person*,<sup>44</sup> which means that the Children's Court may make a finding that the child is excluded from giving consent for the adoption. In other words, I submit that by using s 236(5) the court should be able to dispense with the consent of a child over the age of 10 years and to allow an adoption to proceed without the child's consent where appropriate.

The interpretation I suggest is only a partial solution. It is my view that, in the best interests of the child, the better solution is the removal of the requirement of the age of 10 years from the Children's Act in so far as it relates to child participation. If this is not done, it is suggested that at the very least a list should be added that sets out those circumstances in which the child's consent may be dispensed with. The Children's Act makes provision for dispensing with the consent of the parent of the child who is to be adopted.<sup>45</sup> 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 if such consent is inappropriate. Where the child is incapable of consenting, or consent was acquired in an unacceptable or inappropriate manner (for example, where undue pressure was placed on the child to consent), the consent of the child should not be a requirement.

Ideally, s 233(1)(c) has to be amended. It could be amended to disregard the age of the child when it comes to consent.<sup>46</sup> However, I have another suggestion. In my opinion, and 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. I believe that s 233(1)(c) should be amended so that the section would read as follows:

A child may be adopted only if consent for the adoption has been given by—

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

45 Section 236(5).

46 It 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.

- (c) 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.