

STEP-PARENT ADOPTION

Centre for Child Law v Minister of Social Development
2014 1 SA 468 (GNP)*

1 INTRODUCTION

Adoption in South Africa takes various forms, including step-parent adoption (Ferreira *Interracial and intercultural adoption: A South African legal perspective* (2010) 2). Chapter 15 of the Children's Act 38 of 2005 (the Act), which regulates adoption, infuses a democratic and child-centred ethos into South African adoption law (Mosikatsana and Loffell in Davel and Skelton (eds) *Commentary on the Children's Act* (2007 revised 2012) 15-2). As with any newly implemented Act though, it also comes with its own challenges and problems. Unfortunately adoption in terms of the Act is an area that has not been explored much, and there is a complete dearth of authority when it comes to step-parent adoption. The application brought in *Centre for Child Law v Minister of Social Development* was thus welcome not only because it had the objective of achieving clarity for the parties to the particular dispute, but also because it offered an opportunity to achieve certainty regarding the manner in which the relevant sections of the Act should be interpreted.

2 FACTS AND DECISION**2.1 Legislative background**

Section 230(1) of the Act provides that any child may be adopted if the adoption is in the best interests of the child, the child is *adoptable*, and the provisions of chapter 15 of the Act are complied with. To determine whether a child is adoptable, the provisions of section 230(3) have to be applied. In terms of this section, a child is adoptable if the child is an orphan and has no guardian or caregiver who is willing to adopt the child (s 230(3)(a)); the whereabouts of the child's parent or guardian cannot be established (s 230(3)(b)); the child has been abandoned (s 230(3)(c)); the child's parent or guardian has abused or deliberately neglected the child, or has allowed the child to be abused or deliberately neglected (s 230(3)(d)); or the child is in need of a permanent alternative placement (s 230(3)(e)).

Section 231 of the Act provides a list of persons who may adopt a child. A child may, *inter alia*, be adopted by a married person whose spouse is the parent of the child or by a person whose permanent domestic life-partner is the parent of the child (s 231(1)(c); hereafter referred to as step-parent adoption). Section 242(1)(a) provides that the effect of an adoption order is that it terminates all parental responsibilities and rights that any person, including a parent, step-parent or partner in a domestic life partnership had in respect of the child immediately before the adoption, except when provided otherwise in the order or in a post-adoption agreement confirmed by the court.

* The author would like to thank Prof J Heaton for her valuable comments and suggestions.

2.2 Facts

The applicant, the Centre for Child Law (CCL), brought an application for a declaratory order against the Minister of Social Development, the Minister responsible for the implementation and administration of the Act, because several step-parents who had attempted to adopt their stepchildren since implementation of the Act had been turned away by officials at the Children's Court. According to the CCL, the view of the officials was that a child who has a guardian does not fall within the ambit of section 230(3) and is therefore not adoptable (para 7). Apparently the officials also advised prospective applicants that, in terms of section 242, the granting of a step-parent adoption would automatically terminate all the parental responsibilities and rights of the parent in respect of the child (para 14). The applicant referred to two examples.

In the first example, the mother of a four-year-old boy, J, was divorced from J's biological father and had sole guardianship of the child. J's stepfather wanted to adopt J with the consent of his biological father. After being advised by the clerk of the Children's Court to do so, J's mother signed a consent form terminating all her parental responsibilities and rights in respect of J. However, she had second thoughts and she and J's stepfather approached the presiding officer of the Children's Court to attempt to persuade him to allow the adoption without terminating her parental responsibilities and rights. They were unsuccessful in their attempt (para 4).

The second example was that of a fourteen-year-old girl, T, whose father had deserted her and her mother when she was eleven months old. T had had no contact with her father since then. T wanted to be adopted by her stepfather, but her mother and stepfather were informed (by officials at a different Children's Court) that T's mother would lose her parental responsibilities and rights if T's stepfather adopted her (para 5).

The applicant sought an order declaring:

- 1 that section 230(3) of the Act does not preclude a child from being adoptable in instances where the child has a guardian and the person seeking to adopt the child is the spouse or permanent life-partner of the guardian of the child;
- 2 that section 242 of the Act does not automatically terminate all the parental responsibilities and rights of the guardian of a child whose spouse or permanent domestic life-partner seeks to adopt the child;
- 3 alternatively to 1 and 2, that section 230(3) of the Act is inconsistent with the Constitution and invalid to the extent that it precludes a child from being adoptable in instances where the person seeking to adopt the child is the spouse or the domestic life-partner of the guardian of the child;
- 4 that section 242(1) of the Act is inconsistent with the Constitution to the extent that it automatically terminates all parental responsibilities and rights of the guardian of a child whose spouse or permanent domestic life-partner seeks to adopt the child (para 1).

2.3 Judgment

2.3.1 Approach to first order sought

In the North Gauteng High Court (the court), Louw J held that the approach of the Children's Court in terms of which a child who has a guardian does not fall within the ambit of section 230(3) and is therefore not adoptable was incorrect

(paras 7–8). The court reached this conclusion with reference to paragraphs (b) (the whereabouts of the parent or guardian cannot be established) and (c) (the child has been abandoned) of section 230(3).

The court held that where a biological parent or guardian has not consented to an adoption by a step-parent because the whereabouts of the parent or guardian cannot be established, the child is adoptable in terms of paragraph (b), and that it is not necessary that the whereabouts of both parents cannot be established (para 10). It further held that where a non-custodian parent has consented to the adoption of his or her child, or the child has for no apparent reason had no contact with the parent, guardian or caregiver for a period of at least three months, the child must be taken to have been abandoned as contemplated in paragraph (c), and that the child is therefore adoptable (paras 8–9).

In reaching his decision with regard to paragraph (c), Louw J considered the definition of the word “abandoned”. Section 1 of the Act defines an abandoned child as a child who “has obviously been deserted by the parent, guardian or care-giver” or “has, for no apparent reason, had no contact with the parent, guardian, or care-giver for a period of at least three months”. There are two parts to this definition. With regard to the first part (a child who has obviously been deserted by his or her parent, guardian or caregiver), the court considered the meaning of “desert” in the *Shorter Oxford English dictionary*. The primary meaning is to “give up, relinquish, leave”, and further to “forsake, abandon (a person or thing having a claim upon one)”. Without giving reasons for its view, the court stated that the definition in section 1 does not require that the child must be abandoned by both parents. It held that where a non-custodian parent consents to the adoption of his or her child by a step-parent, the parent must be taken to have abandoned the child, with the result that the child is adoptable (para 8). Louw J also considered the second part of the definition of “abandoned” (a child who has, for no apparent reason, had no contact with his or her parent, guardian or caregiver for a period of at least three months). He indicated that the definition does not require that the child must not have had contact with both parents. It is also not required that the whereabouts of the parent with whom the child has had no contact cannot be established. The court held that if J has, for no apparent reason, had no contact with his biological father for a period of no less than three months, he will for that reason also be adoptable (para 9).

The court then referred to section 233(1)(a), in terms of which a child may only be adopted if both parents have consented to the adoption, regardless of whether the parents are married or not. Explaining why consent by both parents was not necessary, Louw J reiterated that a child will be adoptable in terms of section 230(3)(b) of the Act if, in the case of step-parent adoption, consent was not given by a parent because his or her whereabouts cannot be established, or in terms of section 230(3)(c) of the Act (in para 10 the court refers to section 230(3)(a), but this has to be an error as paragraph (a) deals with a child who is an orphan and has no guardian or caregiver who is willing to adopt the child), if the child has, for no apparent reason, had no contact with the parent or guardian who did not give consent for a period of no less than three months.

In the court’s view, the interpretation of section 230(3)(b) and (c) finds support in section 231(1)(c), which expressly permits the adoption of a child by a step-parent and does not contain a limitation that a step-parent may only adopt a child if the child’s non-custodian parent is no longer alive.

The court agreed with the applicant's submission that, should there be any doubt about the correctness of the above interpretation of section 230(3)(b) and (c), the provisions of the Constitution of the Republic of South Africa, 1996, our supreme law (hereafter "the Constitution") favour a conclusion that step-parent adoption in the mentioned circumstances is permissible under the Act. It proceeded to refer to section 28(1)(b) of the Constitution, in terms of which every child has the right to family care or parental care, or to appropriate alternative care when removed from the family environment. Louw J indicated that this constitutional right is promoted by an interpretation which permits the adoption by step-parents in the circumstances mentioned. He also referred to section 28(2) of the Constitution, in terms of which the best interests of the child are of paramount importance in all matters concerning the child (para 12).

Louw J concluded that section 230(3) of the Act does not preclude a child from being adoptable merely because the child has a parent or guardian who cares for the child and the person seeking to adopt the child is the spouse or permanent domestic life-partner of the child's parent or guardian (para 13).

2 3 2 Approach to second order sought

The court then turned its attention to the wording of section 242(1)(a) of the Act. In terms of this section, an adoption order will automatically terminate all parental responsibilities and rights any person had in respect of a child immediately before the adoption, except when provided otherwise in the order or in a post-adoption agreement confirmed by the court. Louw J held that officials who advised prospective applicants that a step-parent adoption would automatically terminate all parental responsibilities and rights of the parent to whom the step-parent was married, ignored the exception provided for in the preamble to the section ("[e]xcept when provided otherwise in the order"), which affords a discretion to the court to order that the usual consequences of an adoption order would not apply (para 14). The Children's Court is obliged to function in a manner which in each case promotes the best interests of the child, and should make an order that the granting of an adoption order in favour of a step-parent will not terminate the responsibilities and rights of the child's parent or other guardian, except where there are sound reasons not to do so. Such an order clearly, save in exceptional circumstances, would be in the best interests of the child.

2 3 3 Order

The court made the following order (par 17):

- 1 Section 230(3) of the Act does not preclude a child from being adoptable in instances where the child has a guardian and the person seeking to adopt the child is the spouse or permanent domestic life-partner of that guardian.
- 2 Having regard to the discretion which section 242 affords the court to order otherwise, section 242 of the Act does not automatically terminate all the parental responsibilities and rights of the guardian of a child when an adoption is granted in favour of the guardian's spouse or permanent domestic life-partner.

3 EVALUATION

3 1 Introduction

The decision of the court means that many step-parent adoptions can go ahead. Although the decision is welcomed, the judgment is somewhat short-sighted and the reasoning behind some of the *dicta* is questionable.

3 2 Best interests of the child

In terms of section 230(1)(a) of the Act, a child may be adopted if the adoption is in the best interests of the child. This section complies with section 28(1)(b) and 28(2) of the Constitution. These sections were, quite correctly, taken into account by Louw J. However, he did not refer to section 7 of the Act (which contains a list of factors that must be taken into consideration when the best interests of the child standard is applied) or section 9 of the Act (in terms of which the standard that the child's best interest is of paramount importance must be applied in all matters concerning the care, protection and well-being of a child). This is both curious and unfortunate. Louw J approved of the submission by the applicant that the provisions of the Constitution favour a conclusion that step-parent adoption in the aforementioned circumstances is permissible under the Act, but completely failed to take into account the provisions of the Act with regard to the best interests of the child. Furthermore, the Act sets out the legal framework for matters related to children and adoption in South Africa. Before the commencement of the Act, South African legislation did not provide any list of factors to guide a court that had to consider a child's best interests. This *lacuna* was criticised, as the subjective opinions of decision makers could get in the way of objective judgment (Boezaart in Davel and Skelton (eds) *Commentary on the Children's Act* (2007 revised 2012) 2–8). Taking cognisance of the list could only validate the court's decision and support the best interests of the child. Be that as it may, section 230(1)(a) becomes obsolete if section 230(3) (adoptability of the child) is not complied with. Proper and correct interpretation of section 230(3) is imperative, for otherwise the best interests of the child could be jeopardised. Therefore, the first part of the judgment that requires further exposition is the court's interpretation of section 230(3).

3 3 Section 230(3): Is a child who has a guardian adoptable by a step-parent?

Although section 231(1)(c) of the Act makes provision for adoption by a step-parent, the court observed that officials at the Children's Court incorrectly interpreted the Act. They considered children who have a guardian not to be adoptable by their step-parent because they do not fall within any of the categories of adoptability in section 230(3) (paras 7–8). This *dictum* by the court is welcomed. However, the rationale behind the *dictum* has to be evaluated.

Just like the Act, its predecessor (the Child Care Act 74 of 1983 (CCA)) specifically made provision for adoption by a step-parent of a child. In terms of section 17(c) of the CCA, a child could be adopted by a married person whose spouse was the parent of the child. Section 18(4) of the CCA contained the requirements that had to be met before a Children's Court could grant an adoption application. However, unlike the Act, it did not contain a requirement with regard to adoptability of a child. Therefore, the court in *Centre for Child Law v Minister of Social Development* did not have any earlier judgments on adoptability it could consult or rely on. Louw J thought it fit to consider only two paragraphs of section 230(3) relevant with regard to the children's adoptability – paragraphs (b) and (c). At first blush, the decision of the court with regard to section 230(3)(b) seems to be worthy of support. Where the whereabouts of a child's parent or guardian cannot be established, there can be no justification for denying the child the opportunity to be adopted if the adoption would serve the best interests of the child. However, it is a pity that the court did not elaborate on

the content of the requirement in section 230(3)(b). It has been suggested (Bosman-Sadie and Corrie *A practical guide to the Children's Act* (2010) 248) that the section should not be implemented unless *some time* has elapsed. Clear guidelines on the criteria which should be employed to determine whether the whereabouts of the parent or guardian cannot be established would have been welcome. The court was approached to obtain clarity for step-parent adoptions in general, but Louw J focused on the example of T, and simply assumed that the whereabouts of the father could not be established (para 5). In T's case, approximately thirteen years had passed, but what would the position have been if that period had been a few years or a few months?

Moreover, the section seems to require more than just the passing of a period of time. The section requires that "the whereabouts of the child's parent or guardian *cannot be established*" (my emphasis). The issue of how it should be determined that the person's whereabouts cannot be established was not touched on by Louw J at all. The section seems to necessitate at least some or another unsuccessful attempt to find out where the absent parent is. What would be accepted as sufficient indication that a person's whereabouts cannot be established? There is also no indication of who is obliged to attempt to establish the person's whereabouts.

With regard to section 230(3)(c), the court's conclusion that the children in the examples had been abandoned cannot be supported. It appears that the court did not take note of General Regulation 56 issued in terms of the Act (the regulation) when considering the meaning of "abandoned". The regulation is very specific: If it appears, for purposes of adoption, that a child has been abandoned, the designated social worker must cause an advertisement to be published in at least one local newspaper circulating in the area where the child has been found, calling on any person to claim responsibility for the child. Two parts of the regulation have to be highlighted. First, abandonment cannot be found to have occurred if there has been no advertisement. The regulation does not make it clear whether proof of such advertisement has to be provided, but it can be assumed that a finding of abandonment cannot be made unless there is at least some evidence or indication that the advertisement was published as required by the regulation, for otherwise the requirement would be worthless. There is no evidence in *Centre for Child Law v Minister of Social Development* that any attempt was made to advertise. Secondly, the regulation requires abandonment by both parents ("circulating in the area where the child has been *found*" (my emphasis)). "Find" means to "[d]iscover or perceive by chance or unexpectedly", or "after a deliberate search" (<http://www.oxforddictionaries.com>). A step-parent who wishes to adopt a child is married to, or the permanent domestic life-partner of, the parent of the child. Under these circumstances the child clearly does not need to be found. His or her whereabouts are known by all parties involved in the adoption. This is contrary to the finding by the court, which came to the conclusion that it is not required that the child must be abandoned by both parents (para 8).

It seems that the judgment of the court was based solely on the facts of the two examples, which is why it only considered paragraphs (b) and (c). It is regrettable that the court did not take cognisance of the other paragraphs of section 230(3) or deal with other circumstances in which a step-parent might wish to seek to adopt his or her stepchild. The importance of this judgment is not denied, but unfortunately its application and impact are limited because it leaves many

questions unanswered. For example, what would the position be if a father died without having abandoned his child or without his whereabouts being unknown, and the mother remarried or entered into a permanent domestic life-partnership with a person who wished to adopt the child? In these circumstances the whereabouts of the deceased parent would not be unknown, and the child would clearly not have been abandoned (even on the court's interpretation of section 230). Is such a child adoptable? The list in section 230(3) is not open-ended, and in the circumstances of the abovementioned example the only paragraph that might be considered is (a) in terms of which a child is adoptable if he or she is an orphan and has no guardian or caretaker who is willing to adopt the child. Section 1 of the Act defines an orphan as "a child who has *no* surviving parent caring for him or her" (my emphasis). A child who has one living and one deceased parent is clearly not an orphan in terms of the definition in section 1. Nor does the child fall within the ambit of section 230(3)(a) because the child has a guardian or caretaker (the living parent). Consequently, the child would not be adoptable. If the *rationes* in *Centre for Child Law v Minister of Social Development* were applied to the example, a child who has a living biological father would be adoptable by his or her step-parent, but a child whose biological father is deceased would not. This anomaly could certainly not have been the intention of the legislature.

It is submitted that the alternative order sought by the applicant (a declaration that section 230(3) is inconsistent with the Constitution and invalid to the extent that it precludes a child from being adoptable in instances where the person seeking to adopt is the spouse or the domestic life-partner of the guardian of the child) might have been the better order. An adoption application cannot proceed if a child is found not to be adoptable. The current categories of circumstances in section 230(3) which render a child adoptable are too restrictive. An open-ended list would be preferable, as the current list limits the adoptability of a child. It is suggested that a further paragraph should be inserted into subsection (3), namely, that a child is adoptable if the adoption is in the best interests of the child. This may seem like a duplication of section 230(1)(a), in terms of which any child may be adopted if the adoption is in the best interests of the child, and/or section 240(2)(a), in terms of which a Children's Court may make an order for the adoption of a child only if the adoption is in the best interests of the child. However, section 230(1)(a) does not stand alone. The paragraphs in section 230(1) are cumulative, and a child may only be adopted if such a child is adoptable (s 230(1)(b)). If a child is not adoptable, in other words if section 230(3) is not complied with, the adoption application cannot proceed. The result is that the best interests of the child as provided for in section 240(2)(a) will never be considered. As the best interests of the child are always paramount in all matters concerning the child, this is unacceptable.

3 4 Section 242(1)(a): Do all parental responsibilities and rights of a guardian automatically terminate when the child is adopted by his or her step-parent?

In terms of section 20(1) of the CCA, the rights and obligations which existed between a child and any person who was his or her parent immediately before an adoption were terminated by the adoption, except in the case of a step-parent adoption. In contrast, the Act does not explicitly provide for the consequences of step-parent adoptions in so far as the parental responsibilities and rights of the child's parent are concerned. This difference in the legislation might be the

reason for the view of the officials of the Children's Court that the legislature intended all parental responsibilities and rights of the parent of a child to be terminated in the case of a step-parent adoption. This view seems to be shared by some authors (Schäfer *Child Law in South Africa: Domestic and international perspectives* (2011) 305, but he concedes that this view is at odds with the purpose of step-parent adoptions; Carnelley in Kruger and Skelton (eds) *The law of persons in South Africa* (2012) 106). I do not agree with this view. Invariable termination of parental responsibilities and rights in the case of a step-parent adoption was clearly not the intention of the legislature. The exception provided for in the preamble to section 242 places the court in a position to consider the circumstances of every case and make an order that would be in the best interests of the child. This complies with the best interests of the child principle, as provided for in the Constitution and the Act. Louw J concluded in *Centre for Child Law v Minister of Social Development* (para 14) that the court should make an order that parental responsibilities and rights of a parent (or guardian) are not terminated in the case of a step-parent adoption, except if such an order is not in the best interests of the child. This shifts the emphasis and tips the balance in favour of maintaining parental responsibilities and rights, and is strongly supported.

Furthermore, the wording of section 242(1)(a) of the Act is preferable to the wording of section 20(1) of the CCA. On the one hand, section 20(1) of the CCA was clear and unambiguous. However, it was also very restrictive – step-parent adoption was the only exception to the termination of the rights and obligations existing between the child and any person who was his parent immediately prior to an adoption. In contrast, the wording of section 242(1)(a) of the Act gives the court a discretion. In the case of any adoption the court may order that the parental responsibilities and rights of a person would not be terminated. This discretion is welcomed as it will surely serve the best interests of the child better.

3 5 Assessment to determine adoptability of a child

The CCL indicated that applicants in step-parent adoptions were being turned away by the Children's Court (para 3). It seems that officials of the Children's Court are making decisions as to children's adoptability (para 7). If this is so, it is problematic because section 230(2) of the Act places the duty to assess a child's adoptability on the adoption social worker, not on the officials of the Children's Court. There is no indication in *Centre for Child Law v Minister of Social Development* whether adoption social workers were at all involved in the decisions as to the adoptability of the particular children or of similarly-situated children in general. The court should have investigated this issue, and should have shown its displeasure if the task of the adoption social workers had been usurped by the officials of the Children's Court.

3 6 Consent to adoption

In terms of section 233(1)(a) of the Act, a child may only be adopted if consent for the adoption was given by both parents, regardless of whether the parents are married or not. The court took cognisance of section 233(1)(a) and concluded that consent does not have to be given by both parents by relying on section 230(3)(b) and (c) (para 10). I support the finding that both parents do not have to consent to the adoption. However, it is curious that Louw J chose to rely on section 230(3), instead of section 236 of the Act, in this regard. Section 230(3) deals with the adoptability of a child, and not with consent. In terms of

section 236, the consent of a parent to the adoption of a child can *inter alia* be dispensed with if that parent has abandoned the child or the whereabouts of that parent cannot be established (s 236(1)(b)), or if that parent has consistently failed to fulfil his or her parental responsibilities towards the child during the last 12 months (s 236(1)(d)).

4 CONCLUSION

Not much time has passed since the commencement of chapter 15 of the Act on 1 April 2010. The practical implementation of the Act is still in its infancy, and must be developed further. The judgment in *Centre for Child Law v Minister of Social Development* leaves one with mixed feelings. For many prospective adoptive parents it is a beacon of hope. This was the first case to explore step-parent adoptions after the implementation of the Act. It was the ideal vehicle to provide clear guidelines for step-parent adoptions and, to some extent, adoptions in general, but the court failed to fully grasp the opportunity for achieving legal certainty. It is regrettable that the court did not use this opportunity better, as the judgment could have provided much guidance in an area of the law where there is none.

SANDRA FERREIRA
University of South Africa