

The Best Interests of a Child in Alternative Care and Intercountry Adoption – A Model for a Uniform Approach

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SUMMARY

Where a child is orphaned or abandoned, an obligation rests on the State to provide appropriate alternative care for the child concerned. It is of fundamental importance that a child who is found to be struggling emotionally, economically, physically and psychologically be protected. Such children need, and have a legal right, to be cared for and protected. Governments have a legal obligation to respond. Both international and national law recognise the standard of the best interests of a child and the principle is fundamental when determining *inter alia* whether alternative care for the child concerned is the most appropriate option. However, the best-interests principle is a vague and indeterminate concept, allowing for decisions to be based on a subjective approach. A model is proposed in the article in an attempt to provide a uniform approach for reaching a decision regarding the placement of an orphaned or abandoned child in appropriate alternative care.

1 INTRODUCTION

It is generally accepted that the family forms the foundation of society.¹ The importance of the family unit is recognised in both international law and the national law of South Africa. While family reunification is prioritised, where this is not an option, an obligation falls on the State to provide a child with appropriate alternative care. Developments that include, *inter alia*, the global economic crisis, the consequences of the HIV/AIDS² pandemic and the Covid-19 pandemic³ on the numbers of children currently in need of

¹ Revised White Paper on Families in South Africa (31 March 2021) GN 586 in GG 44799 of 2021-07-02.

² Human Immunodeficiency Virus/Acquired Immunodeficiency Syndrome.

³ Davids "COVID-19 Orphanhood Is a 'Hidden Pandemic'" (16 August 2021) <https://www.news.uct.ac.za/article/-2021-08-16-covid-19-orphanhood-is-a-hidden-pandemic> (accessed 2021-12-08).

alternative care,⁴ urbanisation, and an increase in migration have impacted negatively on the current position of children in South Africa. Statistics indicate high numbers of children in need of alternative care in South Africa. While statistics showed a decline in the number of children orphaned between 2009 and 2017 (largely because of increased access to antiretroviral medication), this trend did not continue and between 2018 and 2020, there was an increase of 230 000 orphans. In 2020, statistics indicate there were 2.9 million orphans in South Africa.⁵ As a developing country with a multiracial and multicultural population, placing South African orphaned and abandoned children (OACs)⁶ in care that meets the best interests of the child concerned is a challenge to those charged with deciding what form of care is appropriate.

This determination becomes even more challenging because South Africa has the highest AIDS death rate.⁷ With 51 000 AIDS-related deaths and 5.5 million people on antiretroviral treatment in 2021, it is apparent that HIV remains a serious factor that has a negative impact on families in South Africa.

In 2008, the sector skills work plan of the Health and Welfare Sector Education and Training Authority acknowledged this by listing social work as a scarce skill.⁸ Current challenges faced by social workers include, *inter alia*, the fact that social workers receive poor salaries, work in poor conditions that include insufficient infrastructure and unsafe environments, lack necessary resources, have high caseloads and staffing characterised by

⁴ Defining the meaning of “alternative care” is challenging as the standards provided for in the Convention on the Rights of the Child (CRC) (UN General Assembly 1577 UNTS 3 (1989) Adopted: 20/11/1989; EIF: 02/09/1990) and the Guidelines for the Alternative Care of Children (the Guidelines) (UN General Assembly A/RES/64/142 Adopted 18/12/2009 <https://www.refworld.org/docid/4c3acd162.html> (accessed 2023-08-15)) respectively differ in a potentially significant way. Neither the CRC nor the Guidelines define “alternative care”, but art 18 of the CRC provides that the “parents, or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child”. Art 20 mandates that alternative care be provided when a child is “temporarily or permanently deprived of his or her family environment”. However, the Guidelines imply that a child’s right to alternative care arises when they are deprived of “parental care”. Art 20(2) of the CRC accords the right to “alternative care” to children temporarily or permanently deprived of their family environment, and to children who, in their own best interests, cannot be allowed to remain in that environment. States parties are required to ensure alternative care for such children in accordance with their national laws. Art 20(3) of the CRC provides that alternative care could include, *inter alia*, foster placement, *kafalah* of Islamic law, adoption, or if necessary, placement in suitable institutions for the care of children.

⁵ Hall “Children in South Africa” (July 2023) <http://childrencount.uct.ac.za/> (accessed 2023-09-11).

⁶ A child:

- (a) who has obviously been deserted by the parent, guardian or care-giver;
- (b) who has, for no apparent reason, not had contact with the parent guardian or care-giver for a period of at least three months; or
- (c) in respect of whom the whereabouts of the parents are unknown or who cannot be traced.

⁷ Be in the Know “At a Glance: HIV in South Africa: The Biggest HIV Epidemic in the World” (undated) <https://www.beintheknow.org/understanding-hiv-epidemic/data/glance-hiv-south-africa> (accessed 2021-07-28).

⁸ Bredell *A Work-Life Perspective on the Subjective Wellbeing of Social Workers* (dissertation University of Stellenbosch) 2022 ii.

high turnover.⁹ It is not uncommon for social workers to experience burnout. Furthermore, the fact that social workers often suffer from their own emotional and psychological suffering owing to the constant personal interaction with individuals who have experienced some form of trauma has a negative impact on their ability to function optimally. The well-being of every social worker is of utmost importance to ensure continued service delivery of a high quality.¹⁰ Lack of guidance and supervision of social workers further aggravates the quality of service from social workers.

The impact of overburdened social workers must also be considered in relation to the best interests of a child in making appropriate placements.

Adding to concern as to whether the best interests of an OAC are met where placement in alternative care is under consideration are the circumstances of social workers in Child and Youth Care Centres (CYCCs). These social workers must deal with multiple difficulties, including the necessity of fulfilling a multiplicity of roles (which may overlap), lack of adequate resources, personal safety and security concerns, and limited support, which cause strain, and compromise the core role of social workers in such CYCCs. The child-welfare system is already overstrained, and the fact that the grant system is potentially used by caregivers as a means of poverty alleviation, rather than to care for the child concerned, cannot be ignored.

It is apparent that making a determination of the placement of an OAC is fraught with potential problems. The following needs to be determined:

- What is the current position in South Africa regarding the provision of services by those making a determination in the best interests of a child to place an OAC in appropriate alternative care?
- To what extent is the South African legal framework consistent with international standards in placing a child in alternative care?
- Is South African legislation compliant with the constitutional imperative of serving a child's best interests in all matters?
- To what extent does the principle of subsidiarity impact a decision to place a South African child in national alternative care instead of opting for intercountry adoption?
- What role could intercountry adoption play in determining appropriate alternative care for an OAC in South Africa?

With these questions in mind, a model is proposed to assist in ensuring that the child's best interests are met in a determination of appropriate placement in care.

A consideration of the current South African context with respect to the reality of problems faced in providing good-quality service delivery to OACs follows.

⁹ Bredell *A Work-Life Perspective on the Subjective Wellbeing of Social Workers* 2–3.

¹⁰ Dimba-Ndaleni, Motloung and Kasiram "Social Workers' Experiences of Working with Children and Youths at Child and Youth Care Centres in Durban" 2022 58(1) *Social Work/Maatskaplike Werk* 61 67.

2 THE CURRENT SOUTH AFRICAN CONTEXT WITH RESPECT TO SERVICES PROVIDED AND MAKING A DETERMINATION OF PLACEMENT IN LINE WITH THE BEST INTERESTS OF THE CHILD

In a system that is burdened with unmanageable workloads, serious questions have been raised by children's rights organisations, social workers and legal academics as to how to ensure that the best-interests principle is complied with, and what the State must do to ensure that this concern be overcome and that due consideration be taken with respect to the rights of the child.¹¹

A consideration of children's rights in international instruments follows. It traces the shift in children's rights, the ongoing evolution of children's rights, and the positive duty placed on the State to ensure the promotion and protection of such rights.

3 CHILDREN'S RIGHTS AND INTERNATIONAL CONVENTIONS

During recent decades, there has been a significant shift in the approach to the rights of children. Internationally, children are no longer regarded as "objects" but as bearers of subjective rights. In accordance with the interest theory of rights,¹² an individual has a right if their interest is enough to place on others a *duty* to protect such right. The State's duty to protect rights is acknowledged in the Constitution of the Republic of South Africa, 1996 (Constitution).¹³ To fulfil its duty, it is submitted that the State must consider the evolution of children's rights as ongoing and should therefore take cognisance of the ongoing progressive development of fundamental human rights. This realisation is particularly important in respect of vulnerable children. Present international standards are contained in the Convention on the Rights of the Child (CRC),¹⁴ the African Charter on the Rights and Welfare of the Child (ACRWC),¹⁵ and the Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption (the Hague Convention).¹⁶ The CRC, the first comprehensive rights-based international treaty, was drafted in an era when intercountry adoption was not regulated,

¹¹ Sibanda and Lombard "Challenges Faced by Social Workers Working in Child Protection Services in Implementing the Children's Act 38 of 2005" 2015 51(3) *Social Work/Maatskaplike Werk* 332 336 and 343.

¹² McBride "Preserving the Interest Theory of Rights" 2020 26(1) *Legal Theory* 3; Buck *International Child Law* (2005) 13.

¹³ S 7(2) of the Constitution.

¹⁴ UN General Assembly *Convention on the Rights of the Child* (20 November 1989) 1577 UNTS 3 <https://www.refworld.org/docid/3ae6b38f0.html> (accessed 2023-08-15).

¹⁵ *African Charter on the Rights and Welfare of the Child (ACRWC)* (1990).

¹⁶ Hague Conference on Private International Law *Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Convention)* (Adopted: 29 May 1993; EIF: 01/05/1995) <https://www.refworld.org/docid/3ddcb1794.html> (accessed 2023-08-14) 33.

leaving the child adopted internationally at risk of abuse, including child trafficking and profiteering. The *travaux préparatoires* reveal that intercountry adoption is considered as a subsidiary means of alternative care, only to be considered when all other possibilities are exhausted.¹⁷ The drafters of the Hague Convention were mindful of the concerns associated with placing a child via intercountry adoption. Consequently, the focus of the Convention was on the need to define substantive safeguards and procedures to assist all authorities involved in placing a child by means of intercountry adoption.¹⁸ Article 29 of the CRC is testimony to this fact. In this regard, Para-Aranguren opines as follows:

“Article 29 substantially reproduces the text of the draft (article 4), with some amendments to specify the prohibition of contacts between the parties to the intercountry adoption, aiming to prevent trafficking and any other kind of practices that may be contrary to the purposes of the Convention, in particular, to avoid that the consents required for the granting of the adoption are induced by payment or compensation, as is expressly forbidden by Article 4.”¹⁹

The Hague Convention has provided for stringent standards and regulations aimed at protecting the child placed by intercountry adoption.²⁰ The exercise, standards and practice of placement that occurred before the Hague Convention are very different from the standards that currently regulate the placement of an OAC abroad. It is accordingly submitted that the CRC should be interpreted in light of the progressive safeguards of the Hague Convention. The CRC, the ACRWC and the Hague Convention all recognise the best-interests-of-a-child principle. However, there are discrepancies evident in the international standards contained in the three conventions relating to their approach to the principle. The CRC provides that the best-interests principle is a primary consideration and elevates this standard to the status of *paramount* interest with respect to the adoption of the child.²¹ The United Nations Committee on the Rights of the Child has taken the principle one step further, defining the best interests of the child as a “general principle” guiding the interpretation of the entire Convention. In the

¹⁷ Detrick *Commentary on the United Nations Convention on the Rights of the Child* (1999) 351.

¹⁸ The Hague Convention made provision to ensure that where a child was to be placed in terms of intercountry adoption, states involved were to establish safeguards to prevent abduction and profiteering in children by: protecting birth families from exploitation and undue pressure; ensuring only children in need of a family are adoptable and adopted; preventing improper financial gain and corruption; and regulating agencies and individuals involved in adoptions by accrediting them in accordance with Convention standards.

¹⁹ Para-Aranguren *Explanatory Report on the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption* (1993) par 495.

²⁰ Some commentators argue that the standards are too strict. See Bartholet “Intergenerational Justice for Children: Restructuring Adoption Reproduction & Child Welfare Policy” 2014 *Law and Ethics of Human Rights (Law & Ethics Hum Rts)* 103, 120 and 122.

²¹ A judicial process that conforms to statute, in which the legal obligations and rights of a child in relation to the biological parents are terminated, and new rights and obligations are created between child and adoptive parents. Adoption involves the creation of the parent-child relationship between individuals who are usually not naturally related. The adoptive family gives the adopted child the rights, privileges and duties of a child and heir. Under the Guidelines, adoption is understood as permanent care.

process of drafting the provisions of the CRC, there was much debate about the wording of article 3. The formulation of the article was extensively debated – as to whether to reflect the principle as “a” or “the” primary consideration. In the final drafting, “a” primary consideration was used in recognition that given the widened scope of article 3, situations would arise when other legitimate and competing interests could not be disregarded. The conclusion was thus to settle for the less decisive wording: “a primary consideration”. Thus, the best interests of the child cannot ordinarily be the only consideration but should be among the first aspects to be considered and should be given considerable weight in all decisions affecting children.

The concern that a decision may be made according to the subjective opinion of the person making such a decision is noted by Detrick,²² who states that the persistent criticism lodged against the best-interests principle is that the principle “will enable cultural considerations to be smuggled in by states into their implementation of the rights recognised in the CRC”.

The “weighting” of the best interests of the child within article 3 must be considered in light of the articles of the other relevant conventions. The basis of how the best interests are determined remains the principal problem in applying the principle. Article 3 remains vague and indeterminate, and problems related to the application of subjective criteria by decision-makers involved in determining what could be considered to be in the particular child’s best interests may plague the assessment of what is *de facto* in the best interests of the child. It is submitted that the model proposed takes this factor into account.

The year 2020 marked the 30th anniversary of the adoption of the ACRWC.²³ As a regional Charter, the provisions of the ACRWC reflect and are informed by African cultural values and heritage. The ACRWC differs from those of the CRC in respect of the best-interests principle in that it provides that the best interests of the child are *the* primary consideration in any decision affecting the child. It is apparent that the ACRWC applies a higher standard in respect of the principle of the best interests of the child, when compared to the CRC.

The primary aim of the Hague Convention is to guide/govern the placement of a child in a permanent family in terms of national or international adoption; the Convention emphasises the importance of the principle of the child’s best interests when placing a child by intercountry adoption, while respecting the child’s fundamental rights.²⁴ The Hague Convention makes provision for substantive safeguards and procedures when an intercountry adoption is processed. The aim is the protection and

²² Detrick *Commentary on the United Nations Convention on the Rights of the Child* 89. See too Akhtar, Nyamutata and Faulkner *International Child Law* 4ed (2020) 1.

²³ Mezmur “The African Children’s Charter @ 30: A Distinction Without a Difference?” 2020 28(4) *The International Journal of Children’s Rights* 693 706.

²⁴ The Hague Convention provides that it is mandatory that participating states consider domestic solutions as preferable to international solutions; ensure that the child is adoptable; evaluate thoroughly the prospective adoptive parents to determine whether they are eligible; match the child with a suitable family and impose additional safeguards where required.

safeguarding of the child concerned. Buck²⁵ opines that the family has been structurally weakened in certain countries. It is submitted that South Africa is one such country,²⁶ not least of all as a consequence of the impact that migrant work had on the extended family. The absence of many able-bodied men in the community had a direct impact on the functioning of the extended-family principle in such communities.²⁷ It is submitted that the rights of a child must be considered in light of the integrity of the family unit, as well as the approach of the State to support families and to provide appropriate alternative care to the vulnerable child where the family environment is not functioning properly.

With respect to the principle of subsidiarity, the CRC provides that intercountry adoption should be considered as a form of alternative care when no appropriate alternative care is available in the country of origin of the child concerned. Fenton-Glynn²⁸ opines that one of the main arguments in favour of placing a child by intercountry adoption is the assertion that OACs would otherwise be placed in CYCCs. She notes that while the CRC acknowledges various forms of alternative care,²⁹ the Preamble of the CRC expresses a preference for *family* care. Fenton-Glynn's³⁰ discussion in this regard is focused on considering whether institutional care could ever be deemed appropriate for a child who is adoptable. It is however submitted that the importance of placing an adoptable child in a family environment is as important when *all other* domestic solutions are considered. In all instances where a child is found to be adoptable, the importance of placing a child in a family environment cannot be overemphasised. Para-Aranguren confirms this position.³¹ The ACRWC expressly provides for the placement of the child as a measure of *last resort* only by intercountry adoption – that is, when no other suitable care is available in the child's country of origin. The ACRWC also recognises that it is a primary consideration that the child grows up in a *family* environment where such environment is found, nationally or internationally. The Hague Convention recognises that it is of primary importance that a child grows up in a family environment and that this is essential for the happiness and healthy development of the child. At the same time, the Hague Convention states that intercountry adoption may offer a child the advantage of a permanent family in the instance where a suitable family cannot be found in the country of origin.³² Where a child is

²⁵ Buck *International Child Law* 64.

²⁶ Green Paper on Families: Promoting Family Life and Strengthening Families in South Africa GN 756 of 2011 in GG 34657 of 2011-10-03 5.

²⁷ Mhlungu "The Damaged Family Structure in African Societies Is a Result of Lack of Land" (23 March 2018) <https://www.news24.com/citypress/voices/the-damaged-family-structure-in-african-societies-is-a-result-of-lack-of-land-20180323> (accessed 2021-06-01).

²⁸ Fenton-Glynn *Children's Rights in Intercountry Adoption: A European Perspective* (2017) 35. A Child and Youth Care Centre is a facility for the provision of residential care to more than six children outside the child's family environment ordered by the Children's Court in accordance with a residential care programme.

²⁹ Art 20 of the CRC.

³⁰ Fenton-Glynn *Children's Rights in Intercountry Adoption: A European Perspective* 35.

³¹ Para-Aranguren *Explanatory Report on the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption* 46.

³² Vité and Boéchat ("A Commentary on the United Nations Convention on the Rights of the Child, Article 21: Adoption" in Alen, Vande Lanotte, Verhellen, Ang, Berghmans and Verheyde (eds) *A Commentary on the United Nations Convention on the Rights of the Child*

found to be adoptable, it is submitted that in recognition of the important role a family plays in nurturing a child and allowing such a child to develop to their full potential, placing such child in a *family* environment is of utmost importance for their future. Such care must meet the best interests of the child.

4 NATIONAL LEGISLATION

In recent years, the South African legislature has increasingly recognised children's rights, promoting and protecting these rights, and ensuring the safeguarding of its children. The provisions of the Children's Act (CA),³³ the Constitution and the Social Assistance Act (SAA)³⁴ recognise the well-established principle that the best interests of a child are of paramount importance in any matter involving a child. South Africa is a multicultural society where customary law and common law coexist.³⁵ There are thus two legal systems that run in parallel under the supremacy of the Constitution.³⁶ Notwithstanding any challenges with the coexistence of the two systems,³⁷ the crucial role that a family plays in a child's life is recognised and accepted by both systems. Unless factors mitigate against it being in a child's best interests – for example, where there is evidence of abuse – family reunification must be prioritised.³⁸ It is submitted that this is an important factor that cannot be overlooked when considering which form of alternative care is deemed most appropriate for the child concerned.

Moreover, the South African state has shown its commitment to recognising, promoting, protecting and safeguarding children's rights, both through the enactment of the CA, which incorporates the Hague Convention and (by implication) the CRC, and through ratification of the ACRWC. When deciding to place a child in adoption (be it national or intercountry adoption), the Constitution further ensures the protection of children by providing that a child's best interests are of paramount importance in all matters. Accordingly, only where it can be said to be in the particular child's best interests will adoption, in South Africa or abroad, be considered a potential solution. International standards are subject to the provisions of the

21 (2008) 16) note that a distinction must be drawn in national law between simple adoption (where filial ties are not broken with the family of origin, and adoption is revocable) and full adoption (implying full integration of the child into the adoptive family and all legal ties with the family of origin are severed). In terms of art 27(1) of the Hague Convention: "Where an adoption granted in the State of origin does not have the effect of terminating a pre-existing legal parent-child relationship, it may, in the receiving State which recognizes the adoption under the Convention, be converted into an adoption having such an effect – a) if the law of the receiving State so permits; and b) if the consents ... have been or are given for the purpose of such an adoption".

³³ 38 of 2005.

³⁴ 13 of 2004.

³⁵ *Gumede v The President of the Republic of South Africa* 2009 (3) SA 152 (CC) par 21–22.

³⁶ S 8 of the *Constitution of the Republic of South Africa*, 1996 (Constitution).

³⁷ Boezaart "Building Bridges: African Customary Family Law and Children's Rights" 2013 6 *International Journal of Private Law* 395.

³⁸ UNICEF "The Right of the Child to Family Reunification" (May 2016) https://www.unicef.org/eca/sites/unicef.org/eca/files/ADVOCACY_BRIEF_Family_Reunification_13_10_15.pdf (accessed 2024-11-12) 1.

Constitution, and any decision to place a child must be taken in light of section 28 thereof.³⁹

Following ratification of the Hague Convention by South Africa, all South African courts, tribunals and forums must comply with its provisions (if not also its practices, procedures and guidelines). Section 39(1)(b) of the Constitution states that a court, tribunal or forum must consider international law and may consider foreign law in deliberations. It is accordingly evident that international instruments play a very important role in the interpretation of the Constitution. Section 28(2) of the Constitution is evidence that South Africa's constitutional values are in keeping with international standards. By ratifying conventions such as the CRC and the ACRWC, South Africa has confirmed its commitment to international human rights.⁴⁰ The phrase "must consider international law" (author's emphasis) in section 39(1)(b) imposes and obliges courts to refer to and use all legal principles under the Hague Convention when performing their interpretive task.

5 ALTERNATIVE CARE

Concerns have been raised with the fact that national adoption rates are low, the foster-care system is overburdened, and social workers involved in the process of foster care have high caseloads; in this context, whether a child's best interests have been met when placed in a form of care that experiences the difficulties mentioned is questioned.⁴¹ For example, although the placement of a child in a CYCC might meet the physical needs of the child, it is clear that "care" of a child goes far beyond physical needs. Such needs include, *inter alia*, emotional and psychological care.

It is submitted that the needs of an OAC are met when the OAC is placed in a permanent and stable family environment. However, in South Africa, it is apparent that the family unit frequently faces a fundamental crisis. The impact of HIV/AIDS, widespread poverty,⁴² unwanted pregnancies,⁴³ child abandonment,⁴⁴ rapid urbanisation, and the increased migration of adults and children into and within South Africa in search of economic and political refuge⁴⁵ has devastated families and communities, leaving an ever-

³⁹ *C v Minister of Health and Welfare* 2012 (2) SA 208 (CC) 30.

⁴⁰ Pretorius *Inter-Country Adoptions and the Best Interests of the Child* (LLM dissertation North-West University) 2012 34–35.

⁴¹ Van der Walt *Intercountry Adoption and Alternative Care: A Model for Determining Placement in the Best Interests of the Child* (LLD thesis Nelson Mandela University) 2019 177.

⁴² Smart *Children Affected by HIV/AIDS in South Africa: A Rapid Appraisal of Priorities, Policies and Practices* (2003) 3.

⁴³ Blackie Sad, *Bad and Mad: Exploring Child Abandonment in South Africa* (master's dissertation, University of the Witwatersrand) 2014 19.

⁴⁴ Vorster "Abandoned Children: South Africa's Little Dirty Secret" 2015 <http://www.dailymaverick.co.za/> (accessed 2017-05-31). Vorster refers to the fact that, as of 2015, approximately 3 500 children are abandoned annually in South Africa. The National Adoption Coalition estimates that while there are no statistics available, there is reason to believe that the number of abandoned children has increased <http://www.adoptioncoalitionsa.org> (accessed 2017-05-31).

⁴⁵ Department of Social Development "South Africa's Child Care and Protection Policy" (2018) https://www.sacssp.co.za/NDSO_CCPP_19_DECEMBER.docx (accessed 2019-01-01) 47.

increasing number of OACs in its wake.⁴⁶ Traditional methods of caring for a child such as kinship care are no longer necessarily readily available for children in need of care.⁴⁷ When making a decision to place an OAC in appropriate alternative care, it is of utmost importance that attention be paid to the current status of the child-welfare system within the country, before any determination can be made regarding such placement.⁴⁸ The decision made concerning such placement must be appropriate for the child concerned and must meet the best interests of such child.

6 THE PRINCIPLE OF THE BEST INTERESTS OF THE CHILD

Viable solutions to fulfil the standard of a child's best interests must be sought and effected.⁴⁹ The flexibility of the criterion of the best interests of a child is necessarily indeterminate since current factors need to be considered at the time a decision is made; factors relevant to the particular child need to be weighed and balanced to ensure compliance with the standard of paramountcy of the child's best interests. Several factors reflected above have led to the current position in which many children in South Africa find themselves. It was highlighted that the principle of a child's best interests is well established in both national and international law. However, concerns have been raised about the indeterminacy of the principle and which forum is best placed to ensure that these interests are met. OACs are vulnerable. Placing a child in an institution is generally considered to be detrimental to a child, but it is accepted that in certain instances the circumstances may be such that a particular child's best interests are served when placed in such care.⁵⁰ The nature of institutional care in South Africa is representative and illustrative of the fact that this form of care does not provide a nurturing, caring environment in which a child can develop to their full potential. While state institutions might have a certain role to play in caring for children, evidence of the negative long-term impact of growing up in such care is well documented by different disciplines.⁵¹ All

⁴⁶ Van der Walt *Intercountry Adoption and Alternative Care: A Model for Determining Placement in the Best Interests of the Child* 2.

⁴⁷ Mhlungu <https://www.news24.com/citypress/voices/the-damaged-family-structure-in-african-societies-is-a-result-of-lack-of-land-20180323>; Williamson "Caring for Orphans: A Child's Place Is in a Family. Children First" 2002 6(44) *Social Work/Maatskaplike Werk* 24–25. See also, Foster and Williamson "A Review of Current Literature on the Impact of HIV/AIDS on Children in Sub-Saharan Africa" 2000 14(3) *AIDS* S275–S284; Roby "Children in Informal Alternative Care" 2011 *UNICEF* 41.

⁴⁸ Van der Walt *Intercountry Adoption and Alternative Care: A Model for Determining Placement in the Best Interests of the Child* 178–179.

⁴⁹ Davel "Intercountry Adoption from an African Perspective" in Sloth-Nielsen (ed) *Children's Rights in Africa – A Legal Perspective* (2000) 264.

⁵⁰ Dozier, Zeanah, Wallin and Shauffer "Institutional Care for Young Children: Review of Literature and Policy Implications" 2012 *Review of Literature and Policy Implications Social Issues and Policy Review* 1 19.

⁵¹ Wolfson Vorster "Is Government Ignoring the Impact on Our Children of Growing Up in Children's Homes?" (19 December 2019) <https://www.dailymaverick.co.za/opinionista/2019-12-19-is-government-ignoring-the-impact-on-our-children-of-growing-up-in-childrens-homes> (accessed 2022-05-10); Yorke *The Experience of Caregivers in Registered Child*

reach the same conclusion: placement of a child in care in an institution, must at all times be considered only where absolutely necessary and as a measure of last resort.

Given the globalisation of the placement of children by intercountry adoption, the Hague Convention recognises the practice as an international phenomenon. Provision is made in the Convention for the creation of a system of cooperation between states, to ensure the safeguarding of children's rights, granting children protection against exploitation of their rights, and providing a permanent solution for a child in need of alternative care.⁵² While the potential for atrocities exists, it is submitted that following the enactment of the Hague Convention, strict rules, regulations, safeguards and procedures have been put in place to guard against any attempt to exploit children.⁵³

Where, following a weighing and balancing of all relevant factors, the authorities concerned agree that intercountry adoption meets a child's best interests, such an adoption will be processed and monitored in terms of the provisions of the Hague Convention. These provisions, when properly regulated and monitored, should serve to allay the fears and concerns that might arise when considering the placement of a child abroad. The banning of intercountry adoptions or placing a moratorium on such placements where it becomes apparent that irregularities have occurred in the process can serve to protect children from trafficking, where it is clear that the process has not been effected in terms of the provisions of the Hague Convention protections. However, as is the instance in Kenya, placing an indefinite moratorium on intercountry adoptions, should not be used under the guise of protecting children's interests where it is evident that registered and unregistered institutions are mushrooming to accommodate the children left without any other form of care.⁵⁴ The relevant authorities must guard against the same occurring in South Africa.

This is clearly in contradiction to the recognition, development, and protection of children's rights in international law. In light hereof, it is evident that the South African legislature and judiciary, and all other relevant authorities, are obliged to ensure that all steps must be taken to ensure that the standard of the best interests of a child are met. It is submitted that a model of best-interests determination will be an aid in ensuring and protecting children when they are placed abroad. The following recommendations, in the form of a model, are based on a strictly regulated system, with accredited bodies that are subject to monitoring. Furthermore, where the placement is in terms of intercountry adoption, the provisions of the Hague Convention set a minimum standard that must be adhered to before, during and after the placement of a child abroad.

and Youth Care Centres in Gauteng, South Africa, During the First 21 Years of Democracy (dissertation, University of Pretoria) 2016 9 and 15.

⁵² Louw "Adoption of Children" in Boezaart *Child Law in South Africa* (2018) 485; Davel in Sloth-Nielsen *Children's Rights in Africa* 262; Baird "Stuck in the Pipeline: An Analysis of the Hague Convention and Its Effects on Those in the Process of International Adoptions" 2012 *Journal on International and Comparative Law* 216 222.

⁵³ Louw in Boezaart *Child Law in South Africa* 507.

⁵⁴ Van der Walt *Intercountry Adoption and Alternative Care: A Model for Determining Placement in the Best Interests of the Child* 343.

While the State is aware of the failings of the system of child welfare in South Africa, little has been done to provide a solution to the problem.⁵⁵ It is also well established that adoption is on the decline in South Africa.⁵⁶ The CA has done little to clarify the position of intercountry adoption as a form of alternative care.⁵⁷ Like the relevant conventions on alternative care and the Hague Convention, little effort has been made to clarify and resolve the ambiguous place of intercountry adoption *vis-à-vis* national options for alternative care.

7 PROPOSED MODEL TO DETERMINE THE BEST INTERESTS OF A CHILD IN SOUTH AFRICA IN THE CONTEXT OF PLACING SUCH CHILD IN ALTERNATIVE CARE

Currently, decisions to place a South African OAC in alternative care are guided by the best-interests principle in determining the most appropriate placement. This approach has inherent difficulties, and the author submits that the current position, which includes staffing concerns within the Department of Social Welfare and the indeterminacy of the best-interests principle, indicates a system in South Africa that is failing to determine what placement best meets the needs of the child concerned. In this penultimate section, the model or framework referred to above is presented. This framework embraces a holistic approach to the best-interests-of-the-child principle and incorporates lessons learned from the current position in South Africa. The South African courts and legislature have rightly endorsed the notion of the best interests of the child being paramount does not mean that they are not subject to reasonable limitations.⁵⁸ In light hereof, it is submitted that an adequate theory of family law in South Africa is one that views an individual both as a distinct individual and as a person fundamentally involved in relationships of dependence, care and responsibility with other family members. It is the weight and importance attached to the factors in the case under consideration that will determine the outcome in any particular case.

A worldwide lack of parental care is a common occurrence of the twenty-first century, especially in developing countries. It cannot be disputed that the future of vulnerable children worldwide, as in South Africa, hangs in the balance. The devastating impact of the HIV pandemic has led to a dramatic rise in the number of vulnerable children, with developing nations showing

⁵⁵ Schmid "Responding to the South African Child Welfare Crisis" 2006 23(1/2) *Canadian Social Work Review* 111–127 <https://www.jstor.org/stable/i40078576> (accessed 2022-05-10).

⁵⁶ In November 2013, a review of the Registry of Adoptable Children and Parents indicated that there were a mere 297 unmatched parents for the 428 unmatched children available for adoption. Customary beliefs that reject adoption of a child keeps adoption statistics low in South Africa. Child protection statistics note that 1 033 children in South Africa were adopted nationally between 1 April 2017 and 31 March 2018.

⁵⁷ 38 of 2005.

⁵⁸ Moyo "Reconceptualising the 'Paramountcy Principle': Beyond the Individualistic Construction of the Best Interest of the Child" 2012 *African Human Rights Law Journal (AHLJ)* 142.

the highest statistics of children left without parental care.⁵⁹ Unprecedented numbers of children in South Africa are orphaned or abandoned as a consequence of AIDS, leaving the relevant authorities struggling to find appropriate alternative care placements that serve the concerned children's best interests. Chirwa highlights that,

"[a]s more and more children become orphans or lack parental care, states have not established sufficient alternative care options to accommodate the needs of these children."⁶⁰

Despite efforts in the international and domestic arena to enact legal means to ensure that the best interests of the child are served in all actions concerning a child who is the subject of placement in alternative care, not all placements of South Africa's OACs are meeting the needs of such children. A model or framework is proposed as a means of assessing the placement of an OAC that best serves such a child's interests. The model provides guidelines when considering placement by intercountry adoption in light of alternative care options. In this context, it is important to examine whether the current interpretation of subsidiarity serves a child's best interests. When properly regulated and executed, intercountry adoption may provide the only appropriate alternative to institutionalisation in circumstances where domestic country adoption is not feasible. Emphasising the abuses rather than the benefit of intercountry adoption amounts to scapegoating the process for lack of effort on the regulatory plane. The propriety and integrity of adoption should be the ultimate guide in all legislative efforts. However, a total ban or suspension of intercountry adoptions amounts to an abdication that negatively impacts the best interests of otherwise adoptable children – in many instances, adoptable children who have no real chance of being adopted in their own country owing to their age and/or medical conditions will remain in CYCCs.

The proposed model or framework is designed to assist all those involved in making a decision to place an OAC in appropriate alternative care, and those involved in the processing of such placement. It is accepted that all decisions are based on the determination as to what constitutes the best interests of a particular child, given all circumstances relevant to such child. The model distinguishes between substantive factors and procedural factors and safeguards.

7 1 Substantive factors

The best-interests principle forms a foundation for establishing the rights of any child in South Africa (and elsewhere in terms of international law).⁶¹ Both

⁵⁹ Elflein ("HIV/AIDS Worldwide – Statistics & Facts" (18 December 2023) <https://www.statista.com/topics/773/hiv-aids-worldwide/#topicOverview> (accessed 2024-12-11) reports that South Africa has the highest death rate in the world from AIDS.

⁶⁰ Chirwa "Children's Rights, Domestic Alternative Care Frameworks and Judicial Responses to Restrictions on Inter-Country Adoption: A Case Study of Malawi and Uganda" 2016 *AHRLJ* 117 119.

⁶¹ *S v M* 2008 (3) SA 232 (CC) par 12 and 14; Liebenberg "Human Development and Human Rights South African Country Study" (2000) <http://hdr.undp.org/sites/default/files/sandraliebenberg.pdf> (accessed 2020-08-20).

the South African Constitution and the CA are in line with the international-law provisions regarding the importance of guaranteeing that the best-interests principle will be applied whenever a decision is to be taken concerning a child. Ratification of relevant international instruments, as discussed in the research, places an obligation to incorporate the international provisions into national law, something that South Africa has adhered to with the enactment of the CA and the Constitution. In terms of the domestic promulgation, an obligation arose to put in place mechanisms that will facilitate consideration of the best interests of the child and legislative provisions specify measures to ensure that those with the authority to make decisions regarding children consider the “best interests” rule as a matter of procedure. However, much has been written on the indeterminacy of the principle itself, some seeing the flexibility⁶² of the principle as its strength, and others criticising the potential and inherent dangers of leaving decisions to the subjective determination of the authority concerned.

The CA made provision for a list of factors to be taken into consideration. To ensure that all children in need of care are placed in alternative care after careful consideration is indeed given to relevant factors by the authorities involved, the following is proposed.

7 1 1 Approach to determining the best interests of a child

- Each case must be considered on an *ad hoc* basis, taking into consideration all the factors and circumstances of that particular case.⁶³
- Children are bearers of rights, and as such their rights must be respected, promoted, safeguarded and ensured.⁶⁴
- The child’s best interests are considered to be of paramount importance in any matter concerning a child.⁶⁵

⁶² Skiveness “The Child’s Best Interest Principle Across Child Protection Jurisdictions” (31 August 2018) https://link.springer.com/chapter/10.1007/978-3-319-94800-3_4#auth-Marit-Skivenes (accessed 2024-11-12) 62.

⁶³ *Minister of Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC); *S v M supra* par 24; United Nations Children’s Fund (UNICEF) and Government of Kenya *Guidelines for the Alternative Family Care of Children in Kenya* (2014) 16.

⁶⁴ Sloth-Nielsen “Ratification of the United Nations Convention on the Rights of the Child: Some Implications for South African Law” 1994 *SAJHR* 401 405; Robinson “The Right of Child Victims of Armed Conflict to Reintegration and Recovery” 2012 *Potchefstroomse Elektroniese Regsblad/ Potchefstroom Electronic Law Journal (PER/PELJ)* 46 150; Bekink “‘Child Divorce’: A Break from Parental Responsibilities and Rights Due to the Traditional Socio-Cultural Practices and Beliefs of the Parents” 2012 *PER/PELJ* 178 178; Louw *Acquisition of Parental Responsibilities and Rights* (LLD thesis, University of Pretoria) 2009 15; Mezmur “Inter-country Adoption as a Measure of Last Resort in Africa: Advancing the Rights of a Child Rather Than the Right to a Child” 2009 *Sur Revista Internacional de Direitos Humanos* 82 88; Zermatten “The Best Interests of the Child: Literal Analysis, Function and Implementation Working Report” 2010 *International Journal of Children’s Rights (Int’l J Child Rts)* 369 370.

⁶⁵ *S v M supra* par 25 and 42; Moyo 2012 *AHRLJ* 164–165; Mezmur 2009 *Sur Revista Internacional de Direitos Humanos* 92.

7 1 2 *Measures to ensure that the best interests are met*

- Legislative, judicial and administrative measures must be put into place to ensure that the best interests of a child are met.⁶⁶
- Consideration must be given to providing national legislative guidelines listing factors that must be considered when making a determination.⁶⁷
- In all determinations regarding placing a child in alternative care, it is the principle of a child's best interests that must be considered first and foremost.⁶⁸

⁶⁶ Moyo 2012 *AHRLJ* 153.

⁶⁷ S 7 of the CA provides that the following factors must be taken into consideration:

- “(a) the nature of the personal relationship between–
- (i) the child and the parents, or any specific parent; and
 - (ii) the child and any other care-giver or person relevant in those circumstances;
- (b) the attitude of the parents, or any specific parent, towards–
- (i) the child; and
 - (ii) the exercise of parental responsibilities and rights in respect of the child;
- (c) the capacity of the parents, or any specific parent, or of any other care-giver or person, to provide for the needs of the child, including emotional and intellectual needs;
- (d) the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from–
- (i) both or either of the parents; or
 - (ii) any brother or sister or other child, or any other care-giver or person, with whom the child has been living;
- (e) the practical difficulties and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis;
- (f) the need for the child–
- (i) to remain in the care of his or her parent, family and extended family; and
 - (ii) to maintain a connection with his or her family, extended family, culture or tradition;
- (g) the child's–
- (i) age, maturity and stage of development;
 - (ii) gender;
 - (iii) background; and
 - (iv) any other relevant characteristics of the child;
- (h) the child's physical and emotional security and his or her intellectual, emotional, social and cultural development;
- (i) any disability that a child may have;
- (j) any chronic illness from which a child may suffer;
- (k) the need for a child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment;
- (l) the need to protect the child from any physical or psychological harm that may be caused by–
- (i) subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour; or
 - (ii) exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person;
- (m) any family violence involving the child or a family member of the child; and
- (n) which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child.”

⁶⁸ Mezmur 2009 *Sur Revista Internacional de Direitos Humanos* 86.

- A holistic, all-inclusive approach must be adopted to determine what is in the particular child's best interests.

7 1 3 *The role that the child and State play in the determination*

- The child has the right to be heard. As the child matures, their capacities develop, and consideration of their personal wishes, views and preferences must be taken into consideration.⁶⁹
- Every child has the right to family and parental care; where such care is not an option, the State must ensure that the child is placed in appropriate alternative care.⁷⁰
- Steps must be taken to ensure that the determination of what constitutes appropriate alternative care is made timeously.
- All rules, policies, and systems for determining a child's best interests must be child-centred and family-focused.⁷¹

The importance of being raised in a family environment cannot be underestimated.

7 1 4 *The importance of a family environment*

- The importance of family integrity and a preference for avoiding the removal of the child from their home must be supported.⁷²
- The importance of being raised in a family environment must be considered.⁷³
- Where it is in the child's best interests, the OAC should be placed within the extended family environment.⁷⁴
- Decision-makers should determine whether the extended family played any role in the OAC's life before their need for placement and, if so, whether such extended family would be in a position to ensure that the

⁶⁹ Perumal and Kasiram "Living in Foster Care and in a Children's Home: Voices of Children and Their Caregivers" 2008 *Social Work/Maatskaplike Werk* 163; Moyo 2012 *AHRLJ* 165.

⁶⁹ Moyo 2012 *AHRLJ* 165 and 172; United Nations Children's Fund (UNICEF) and the Government of Kenya *Guidelines for the Alternative Family Care of Children in Kenya* 30.

⁷⁰ Mezmur 2009 *Sur Revista Internacional de Direitos Humanos* 84.

⁷¹ Reyneke "Realising the Child's Best Interests: Lessons From Child Justice Act to Improve the South African Schools Act" 2016 19 *PER/PELJ* 3–4. See also Mezmur 2009 *Sur. Revista Internacional de Direitos Humanos* 98.

⁷² Moyo 2012 *AHRLJ* 159; Mezmur 2009 *Sur Revista Internacional de Direitos Humanos* 86.

⁷³ Assim *In the Best Interest of Children Deprived of a Family Environment: A Focus on Islamic Kafalah as an Alternative Care Option* (LLM dissertation, University of Western Cape) 2013 5.

⁷⁴ Perumal and Kasiram 2008 *Social Work/Maatskaplike Werk* 162; Moyo 2012 *AHRLJ* 170; Myers "Preserving the Best Interests of the World's Children: Implementing the Hague Treaty on Intercountry Adoption Through Public-Private Partnerships" 2009 *Spring Rutgers Journal of Law and Public Policy* 780 783–784; Assim *In the Best Interest of Children Deprived of a Family Environment: A Focus on Islamic Kafalah as an Alternative Care Option* 24; Mezmur 2009 *Sur Revista Internacional de Direitos Humanos* 97.

child is nurtured in the secure family-like environment to which the child has a constitutional right.⁷⁵

- An environment where the child can feel consistently loved and safe, with a sense of belonging and self-worth, must be sought for the child.⁷⁶
- Where possible, priority must be given to finding a long-term family environment that meets the needs of the child concerned, based on the child's own circumstances.⁷⁷

All cases must be considered on an *ad hoc* basis. A consideration of the various factors that play a role in making a determination follows.

7 1 5 *The weight attached to factors varies according to particular circumstances*

- The weight ascribed to factors such as race, culture, ethnicity and language must be considered.⁷⁸
- Continuity is a factor to be considered when determining the placement of a child in alternative care. Due regard must be given to the child's ethnic, religious or linguistic background in this regard.⁷⁹
- Section 9 of the Constitution embraces the principle of non-discrimination and the right to equality. As a child is granted the same rights and protection as everyone else, section 9 is of particular importance when considering the impact of the child's race and culture on any placement insofar as serving the best interests of the child is concerned.⁸⁰

⁷⁵ Mthombeni *Factors in the Family System Causing Children to Live in the Streets: A Comparative Study of Parents' and Children's Perspectives* (master's dissertation, University of Pretoria) 2010 38; Lim *Legally Recognising Child-Headed Households Through a Rights-Based Approach: The Case of South Africa* (LLD thesis, University of Pretoria) 2009 128; Motaung *The Difficulties Experienced by Caregivers of Aids Orphans* (master's dissertation, North-West University) 2007 4.

⁷⁶ Berry and Malek "Caring for Children: Relationships Matter" in Jamieson, Berry and Lake (eds) *South African Child Gauge* (2017) 51.

⁷⁷ Assim *In the Best Interest of Children Deprived of a Family Environment* 3 and 22; Mezmur 2009 *Sur Revista Internacional de Direitos Humanos* 86.

⁷⁸ Moyo 2012 *AHRLJ* 153; Pretorius *Inter-Country Adoptions and the Best Interests of the Child* 40; Mezmur 2009 *Sur Revista Internacional de Direitos Humanos* 88 and 92.

⁷⁹ Assim *In the Best Interest of Children Deprived of a Family Environment* 22.

⁸⁰ S 9 of the Constitution provides as follows:

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

- Diverse factors and competing interests must be balanced to determine the child's best interests.⁸¹
- The age of the child plays a pivotal role in determining what is in their particular best interests.⁸² Considering the same factors for two different children might well result in a different conclusion being reached for each child, on the basis that what is in the best interests of a very young child, for example, might not be appropriate for an older child.⁸³
- Assurance must be given that a child removed from their home will be given care, treatment and guidance that will assist the child in developing into a self-sufficient adult.⁸⁴

The principle of subsidiarity is well established and recognised in international and national law. A consideration of its application follows.

7 1 6 The principle of subsidiarity as a factor in determining a child's best interests

- The principle of subsidiarity must be considered but is subordinate to the principle of a child's best interests and must be seen as a factor in determining a child's best interests in a given circumstance.⁸⁵
- The following are generally recognised as serving the best interests of a child:
 - a) family-based solutions are generally preferred to institutional placements;⁸⁶
 - b) permanent solutions are generally preferable to inherently temporary ones;⁸⁷ and
 - c) national solutions are generally preferable to those involving another country.⁸⁸
- Temporary care should only be considered when permanent care is not an option.⁸⁹
- Where placement by intercountry adoption is considered, the age of the child is a factor in determining whether such placement is in the child's best interests.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

⁸¹ Pretorius *Inter-Country Adoptions and the Best Interests of the Child* 42.

⁸² Moyo 2012 *AHRLJ* 165 and 172.

⁸³ Schwartz "Religious Matching for Adoption: Unraveling the Interests Behind the 'Best Interests' Standard" 1991 *Family Law Quarterly* 184. See also Pretorius *Inter-Country Adoptions and the Best Interests of the Child* 69.

⁸⁴ Moyo 2012 *AHRLJ* 152; Carter and Van Breda "The Design of a Protocol for Assessing Prospective Foster Parents in South Africa" 2016 *Social Work/Maatskaplike Werk* 217.

⁸⁵ Pretorius *Inter-Country Adoptions and the Best Interests of the Child* 10–11; Mezmur 2009 *Sur Revista Internacional de Derechos Humanos* 92.

⁸⁶ Pretorius *Inter-Country Adoptions and the Best Interests of the Child* 64. It must be noted that this cannot be said to be a hard-and-fast rule applicable in all instances.

⁸⁷ Mezmur 2009 *Sur Revista Internacional de Derechos Humanos* 87.

⁸⁸ Mezmur 2009 *Sur Revista Internacional de Derechos Humanos* 86–87 and 98.

⁸⁹ OVC Support "Alternative Care for Children" (2016) <https://ovcsupport.org/resource/alternative-care-for-children/> (accessed 2020-08-15).

- Any placement of an OAC in a CYCC must be considered in light of the best-interests principle.⁹⁰
- When assessing domestic placements other than adoption in South Africa, consideration should be given to whether the current status of such systems serves the best interests of the child.

7 1 7 *Evaluation of appropriate care*

- Consideration must be given to the impact of the HIV/AIDS pandemic on the home environment of the potential caregivers:⁹¹
 - a) Are the caregivers infected?
 - b) What impact does this have on their ability to provide nurturing care and stability?
- Continuity of the relationship between caregiver and child must be sought and promoted.⁹² The potential of the child to have secure attachments with a person or persons in the placement should be determined.⁹³ Permanency planning must include:
 - a) the facilitation of opportunities for the child concerned to develop positive attachments to the caregiver;⁹⁴
 - b) the maintenance of positive connections and social support systems that the child can rely on throughout their life;
 - c) the maintenance and strengthening of the cultural and racial identity of the child, depending on the age of the child concerned; and
 - d) the facilitation of those relational, physical or legal arrangements that may be needed for children who are being prepared for independent living.
- Consideration must be given to whether the proposed caregivers have a serious and earnest intention to care for the child, as opposed to the intention to use such a caring role as a guise to access social assistance as poverty alleviation for the caregiver.⁹⁵
- A multidisciplinary approach is needed to ensure that a particular decision is in fact in a child's best interests. A continuum of differentiated combinations of effective integrated care and support services must be in place and available to a child in need thereof.

The fundamental rights of the child must be met. These include the right of children to health care, safety and education.

⁹⁰ Assim *In the Best Interest of Children Deprived of a Family Environment* 28; Mezmur 2009 *Sur Revista Internacional de Direitos Humanos* 95.

⁹¹ Motaung *The Difficulties Experienced by Caregivers of AIDS Orphans* 45.

⁹² Myers 2009 *Spring Rutgers Journal of Law and Public Policy* 816.

⁹³ Marais and Van der Merwe "Relationship Building During the Initial Phase of Social Work Interventions With Child Clients in a Rural Area" 2015 *Social Work/Maatskaplike Werk* 147; Berry and Malek in Jamieson *et al South African Child Gauge* 51 and 53; Assim *In the Best Interest of Children Deprived of a Family Environment* 18; UNICEF and the Government of Kenya *Guidelines for the Alternative Family Care of Children in Kenya* 20.

⁹⁴ Berry and Malek in Jamieson *et al South African Child Gauge* 55.

⁹⁵ Carter and Van Breda 2016 *Social Work/Maatskaplike Werk* 217.

7 1 8 *Right of access to health care, safety and education*

- A child has the right to health care, safety and/or protection. These rights include, but are not limited to:
 - a) the mental and physical health needs of the child; and⁹⁶
 - b) the mental and physical health of the parents.
- Vulnerabilities caused by different underlying risks need to be determined before a decision is reached: each child, depending on their level of vulnerability, will require different levels or intensities of support and services to mitigate the risks, and every attempt must be made by the multidisciplinary task team to mitigate their impact on the child.
- The child must have access to social security.⁹⁷
- The determination must recognise the child's right to access education.⁹⁸

The effectiveness of the child-welfare system plays an important role in ensuring a determination that is in the best interests of the child in a given instance.

7 1 9 *The need for an effective child-welfare system*

- A childcare system must offer effective and trained⁹⁹ care and support services, which must be readily available to a child who requires such support in light of the specific risks, age and developmental stage of each child. An effective system includes, but is not restricted to the following:
 - a) a sufficient number of social workers employed by the DSD;¹⁰⁰
 - b) regular post-placement calls to allow the social worker concerned to properly assess the success (or otherwise) of the placement;
 - c) continuity of staff as far as is reasonably possible to allow for relationship-building potential between the social worker, the foster child and the foster caregiver;
 - d) ability and capacity to assess foster caregivers;¹⁰¹
 - e) full assessment of foster caregivers as prospective foster care parents to a specific child;¹⁰² and

⁹⁶ *Ibid.*

⁹⁷ UNICEF and the Government of Kenya *Guidelines for the Alternative Family Care of Children in Kenya* 30.

⁹⁸ Sarumi *The Protection of the Rights of Children Affected by HIV/AIDS in South Africa and Botswana: A Critical Analysis of the Legal and Policy Responses* (LLD thesis University of KwaZulu-Natal) 2013 13 and 20; Pretorius *Inter-Country Adoptions and the Best Interests of the Child* 65; Carter and Van Breda 2016 *Social Work/Maatskaplike Werk* 217.

⁹⁹ Cantwell *The Principle of Best Interests of the Child in Intercountry Adoption* (2014) 23; National Adoption Coalition Submission to the Parliamentary Portfolio Committee Children's Second Amendment Bill: [B 14B–2015] (2015) 5.

¹⁰⁰ Dhludhlu and Lombard "Challenges of Statutory Social Workers in Linking Foster Care Services with Socio-Economic Development Programmes" 2017 *Social Work/Maatskaplike Werk* 165; Carter and Van Breda 2016 *Social Work/Maatskaplike Werk* 210.

¹⁰¹ Carter and Van Breda 2016 *Social Work/Maatskaplike Werk* 210.

- f) social workers who have a concrete understanding of foster care. (Given the ever-increasing number of children placed in foster care, assessment and placement of children in foster care have become an important aspect of a social worker's function. To be effective, such social workers require a concrete understanding of foster care, an ability to assess the parties concerned and conduct a post-placement assessment. As such, the training of social workers on a tertiary level must be of a standard to ensure social workers are fully equipped professionally to enter a career where assessments for foster-care placements play such a large role. This will enable social workers to:
- i. accurately select foster parents;¹⁰³
 - ii. provide appropriate support to foster parents and foster children; and
 - iii. train foster parents to fulfil the important role they play in the foster children's lives, including but not limited to emotional support.¹⁰⁴
- Where a child is to be placed in foster care, the foster caregivers and the child concerned must be properly prepared before such placement takes place.
 - Role-players from different professional sectors must be accessible to the child concerned, to ensure a coordinated and holistic response to a child who requires these services.¹⁰⁵
 - Determining appropriate alternative care must be made timeously.¹⁰⁶

7 2 Procedure

Whenever a decision is to be taken that will affect a child needing care, the process must carefully consider the possible impacts (positive and negative) of the decision on the child concerned and must give such impact primary consideration when weighing the different interests at stake. However, this is simply a procedural rule. Article 3(1) of the CRC imposes the introduction of this step in the decision-making process but does not impose a particular outcome. It is incumbent on the legislature to provide measures to ensure that those having authority to make decisions regarding the placement of a child must consider the best-interests rule as part of the peremptory procedure. Measures should also ensure that these persons are sufficiently trained to apply this nuanced principle in exercising discretion or making recommendations or decisions. Important aspects of the procedure are considered below.

7 2 1 *The procedure must be transparent and verifiable*

¹⁰² *Ibid.*

¹⁰³ Carter and Van Breda 2016 *Social Work/Maatskaplike Werk* 218.

¹⁰⁴ Carter and Van Breda 2016 *Social Work/Maatskaplike Werk* 216–217.

¹⁰⁵ Marais and Van der Merwe 2016 *Social Work/Maatskaplike Werk* 155.

¹⁰⁶ Berry and Malek in Jamieson *et al South African Child Gauge* 52.

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- The process of determining a child's best interests in placing them in alternative care must at all times be transparent.
 - All determinations made must be verifiable.
 - A multidisciplinary approach must be taken to ensure that a particular decision is in fact in the child's best interests.
 - Where the father of the child concerned is an unmarried father who is deemed "fit and proper" to adopt his child, or alternatively where other family members are deemed fit to adopt the child, notification must be given that he or they have thirty days from the date of serving of such notification, to apply to adopt the child concerned.
 - The various authorities must all be quite clear on the role they play in ensuring that the best interests of the child are not compromised during the determination and process of the placement of the child.

7 2 2 The procedure must ensure that the provisions of the CA are met with respect to determining that the child is adoptable, that informed consent of the parent or parents is acquired, and that standards as determined by the CA are met

- A procedure must be in place for the identification of children who lack parental care.
- Where a child is to be adopted, it is incumbent on the authorities to determine if the parent or parents have given informed consent to the adoption of their child.

7 2 3 A register on adoptable children and prospective adoptive parents

In terms of the provisions of the Hague Convention, as incorporated into the CA, a register must be opened at the DSD¹⁰⁷ that includes the following:

- a) a record of any child who has been considered to be adoptable in terms of the CA;
- b) a record of prospective adoptive parents who meet the requirements of the CA as "fit and proper" adoptive parents;
- c) when a child has been adopted, removal of their name from the register; and
- d) maintenance of the register with due diligence by the Director-General of Social Welfare.

7 3 Intercountry adoption and the best interests of the child

¹⁰⁷ The Department of Social Development is the South African government department responsible for actions aimed at supporting family life and the strengthening of families in the country.

The model above provides a recommended framework to be applied when any determination is made regarding the placement of an OAC in alternative care. Following exposition of the dire circumstances to which OACs are exposed, it would be remiss not to consider the solution that intercountry adoption has to offer a child in need of care. Domestic adoptions are low in number and on the decline, and conditions in alternative care of a temporary nature, do not, on the whole, comply with serving a child's best interests. While the debate continues concerning the role that intercountry adoption has to play in ensuring that the best interests of an OAC are met, it is submitted that consideration must be given to the current capacity and facilities available in a child's country of origin, before reaching a conclusion on intercountry adoption as an option for placement. Such a decision cannot be made theoretically. The reality of current conditions in the country of origin is a major factor to be considered when determining what serves the child's best interests. It is submitted that South Africa would be failing its children by not considering intercountry adoption as a viable option for alternative care. However, private intercountry adoptions are not recommended. It is contended further that real and serious concerns regarding abuse, child trafficking and profiteering can be allayed, provided that the substantive and procedural provisions of the model above and below are strictly adhered to. Stringent regulation in terms of the provisions of the Hague Convention on placements abroad creates potential for the safe international placement of children in need.

Safeguards that have been implemented are discussed below.

7 3 1 The role of the Central Authority

Section 257(1)(a) of the Children's Act provides that the Central Authority in South Africa is the Director-General of the Department of Social Welfare. The functions of the Central Authority are based on provisions of the Hague Convention as incorporated nationally in the CA and its regulations. The core obligations of the Central Authority include communication, cooperation and sharing of information with other relevant central authorities. In carrying out these obligations, certain standards must be met to ensure the protection and promotion of a child's best interests. The following safeguards and principles apply:

- The Central Authority is the designated supervising body tasked with ensuring that all possible measures are taken to protect the rights and best interests of a child who is to be placed abroad.
- Where either state is a non-Hague-Convention country, the regulatory provisions and standards of the Hague Convention must be adhered to.
- Adoption must be finalised in the sending country where a child is to be placed abroad in intercountry adoption.
- The process of placing the child in alternative care must take place timeously.¹⁰⁸
- The authority must also take into consideration the express wishes and opinions of the child, where applicable.

¹⁰⁸ Myers 2009 *Spring Rutgers Journal of Law & Public Policy* 803.

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- Where placement by intercountry adoption takes place, all such placements must be made in accordance with the strict regulatory provisions of the Hague Convention. No concessions should be considered.¹⁰⁹
 - The Central Authority of both the sending and the receiving state must:
 - a) collect, preserve and exchange information pertaining to a child and prospective adoptive parents;
 - b) determine who is a fit and proper adoptive parent for an adoptable child;
 - c) promote the development of adoption counselling;
 - d) provide efficient procedures for the management of adoption, including but not limited to:
 - i. recognition of certain foreign adoptions; and
 - ii. general regulation of intercountry adoption; and
 - e) provide evaluation reports regarding experiences with intercountry adoptions.
 - Where one state is not a Hague Convention State Party, it is incumbent on the Central Authority of the state that is a State Party to ensure that steps are taken to ensure the safety and protection of the child in the form of bilateral or multilateral treaties and agreed follow-up procedures. All procedures, standards and safeguards of the Hague Convention must be adhered to.
 - The Central Authority must maintain and promote relationships, cooperation and communication between the competent authorities with regard to intercountry adoptions within the state, to protect children and to achieve the objectives of the Hague Convention.¹¹⁰
 - Internal monitoring is required, obliging the competent authority within each state to notify the Central Authority if it is concerned that an aspect of the Hague Convention has not been adhered to, or, alternatively, where there is a potential that an aspect of the Hague Convention will not be adhered to.
 - Certified copies of all adoption working agreements concluded must be submitted to the Central Authority for approval.
 - Annual audited financial statements must be submitted to the Central Authority, reflecting fees received and payments made in respect of intercountry adoptions.
 - Before submitting the report, the Central Authority must determine whether intercountry adoption is in the best interests of the minor child concerned. In addition, the court must be able to conclude that:
 - a) the central authorities of the receiving state and South Africa have agreed to the adoption;¹¹¹
 - b) the child is not prevented from leaving South Africa;¹¹²

¹⁰⁹ Bojorge "Intercountry Adoptions: In the Best Interests of the Child?" 2002 *QUTLJJ* 269.

¹¹⁰ Pretorius *Inter-Country Adoptions and the Best Interests of the Child* 7.

¹¹¹ S 261(4) of the CA.

¹¹² S 261(5)(c) of the CA.

- c) the child's name has been listed in the RACAP¹¹³ for at least 60 days; and¹¹⁴
- d) a fit and proper adoptive parent is not available in South Africa.¹¹⁵

Thereafter, the court may grant the adoption order, or not.¹¹⁶

7 3 2 The correct forum must determine whether placement by intercountry adoption is in the best interests of the child

- The Children's Court, which has jurisdiction to hear adoption applications in South Africa, must consider and balance all factors and information obtained in making a determination on how best to secure stability in a child's life by means of adoption or placement in alternative care.
- Checks and balances that disperse authority among different government offices and public/private partnerships should be used to protect against exploitation and fraudulent activities when placing a child abroad.¹¹⁷

8 CONSIDERATIONS IN CURRENT-DAY SOUTH AFRICA

When considering alternative care for an OAC in present-day South Africa, the concerns with the existing childcare system in South Africa cannot be ignored. Careful regard must be had to the current interpretation of subsidiarity. One cannot ignore the large numbers of children placed in crowded state institutions, nor the ever-increasing number of OACs in temporary foster care in South Africa. One must take cognisance of conflicting views about the desirability of intercountry adoption, as well as the serious challenges faced by childcare services in developing countries. The problem identified herein is that serving an OAC's best interests' risks being thwarted by the importance given to the principle of subsidiarity in international instruments, national legislation, prevailing debate and the practical administration of alternative-care decisions. With this in mind, it is submitted that it is impossible to overemphasise the role and impact that the current political, economic and social climate in South Africa has on any debate concerning the role that intercountry adoption could have in providing a secure and stable environment for a child in need thereof. Following research on the relationship between the two sometimes-competing principles of subsidiarity and best interests of the child, it is apparent that in current-day South Africa, enforcing a local hierarchical placement on the basis of subsidiarity, before considering intercountry adoption as a viable option, can in no way be said to meet the universally accepted standard that

¹¹³ Register on Adoptable Children and Prospective Adoptive Parents.

¹¹⁴ S 261(5)(g) of the CA

¹¹⁵ *Ibid.*

¹¹⁶ S 261(5) of the CA.

¹¹⁷ Myers 2009 *Spring Rutgers Journal of Law and Public Policy* 814 and 817.

a child's best interests are paramount. To place undue emphasis on keeping a child in South Africa at all costs, especially at the cost of the child's welfare, is, it is submitted, ideological. A South African court cannot simply disregard or give "lip service" to the Hague Convention but should refer to, analyse and assess its principles when dealing with cases resembling or directly related to intercountry adoption. Moreover, its principles should be used by the courts to inform the development of the common law with regard to prospective intercountry adopters acting in contravention of the international law to which South Africa is bound. Given the flexibility in the interpretation of what constitutes a child's best interests, a model is proposed as a means of assessing whether a particular placement of an OAC best serves the child's interests. The model proposes guidelines to assist those involved in deciding to place a child while ensuring that their best interests are met.

It is recommended that placing an OAC in a permanent, stable family environment would be beneficial to the nurturing of the child and would, at the same time, create an opportunity for the child to reach their full potential. Following consideration of the current status of available alternative care in South Africa, one can only conclude that prevention or discouragement of the permanent placement of a child, whether locally or by intercountry adoption, amounts to failure to secure care for the child that meets their best interests.

The CA and its amendments and regulations have incorporated and made provision for the strict regulation of alternative care of children in South Africa. The three main conventions regulating alternative care have been considered, as has the current status of alternative care in South Africa. The authorities in South Africa are struggling to place the ever-increasing numbers of OACs, especially as a result of the HIV/AIDS pandemic and the consequent high death rate of persons. One particular form of alternative care appears to remain contentious and receives little attention when making a determination to place children in need of care – namely, intercountry adoption. It is submitted in this article that intercountry adoption must be considered as part of a potential solution that serves the best interests of a vulnerable child, on the following grounds.

- International conventions and covenants recognise a child as a bearer of rights and provide that their best interests must be a priority when a decision is made to place a child in appropriate alternative. However, the rights and culture of the community as a whole may also be considered relevant when such a determination is made. Opponents of intercountry adoption often consider themselves defenders of children's human rights.
- The question of whether certain alternative care is deemed appropriate for a given child in the long term must be considered against the backdrop of existing and prevailing conditions in the South African alternative care system, as well as in light of concerns about child trafficking and profiteering that are raised when considering placing a child abroad. It is generally accepted that when it has been determined that there is no hope of family reunification for a child under consideration, it is the duty of the relevant authorities to make a

determination in the child's long-term best interests. The authorities who are involved with processing applications to adopt a child abroad have a very important role to play in determining and ensuring the promotion, protection and safeguarding of the fundamental rights of an OAC – both pre- and post-placement of the child abroad.

- It is incumbent upon the State, through its appointed authorities, to be vigilant and to ensure that all safeguards (both substantive and procedural) against child trafficking and profiteering are in place. There can be no room for error, and where any irregularity is found, stringent sanctions must be considered. Where the body responsible for such violation is an accredited body, the accreditation of such body must be carefully revised and potentially revoked. The important role played by authorities does not come to an end once a placement has been made. Following the finalisation of an adoption, be it domestic or intercountry, regular follow-up visits by the relevant authorities to the adoptive family and child are imperative and in the child's interests. Consistency is of utmost importance.
- No placement should be considered until the authorities have determined what requirements must be met to ensure compliance with the safe processing of a placement abroad, and what measures must be put in place to ensure the safeguarding of the child concerned. This needs to include post-placement assurances. The procedures have a substantive function, and, if followed carefully, negate some of the most significant criticism against intercountry adoption.

When interpreting the meaning of "last resort", reference must be made to the model and *all the factors* that must be considered when making a decision to place an OAC. What is *de facto* "last resort" must also be considered in the context of the application of the best-interests-of-the-child principle.

The article concludes that it is of fundamental importance that OACs who are struggling emotionally, economically, physically and psychologically be protected. Opponents of intercountry adoption risk failing the child who then finds themselves in an environment that is not capable of providing the care they need and to which they have a right. When considering the right of the child to parental and family care in a developing country that is unable to cope with current conditions, it cannot be said that intercountry adoption must be discouraged and seen as a measure of last resort. The decision maker is charged with making a determination that adheres to the best-interests-of-the-child principle.

To repeat the words of the late former President of South Africa, Mr Nelson Rolihlahla Mandela:

"There can be no keener revelation of a society's soul than the way in which it *treats* its children."¹¹⁸

¹¹⁸ Address by President Nelson Mandela at the launch of the Nelson Mandela Children's Fund, Pretoria 1995 http://www.mandela.gov.za/mandela_speeches/1995/950508_nmcf.htm (accessed 2024-04-19).

In the context of alternative care for an OAC in South Africa, the substantive and procedural guidelines proposed need to be followed using a multistakeholder approach to determine the best interests of a child on a case-by-case basis.