A CONSIDERATION OF SECTIONS 249, 250 AND 259 OF THE PROPOSED THIRD AMENDMENT BILL TO THE CHILDREN'S ACT IN LIGHT OF THE BEST INTERESTS PRINCIPLE

1 Introduction

When Nelson Mandela was elected as the President of the Republic of South Africa in 1994, no one doubted that he was concerned about the children of South Africa and especially those in need of care. He stated:

> "There can be no keener revelation of a society's soul than the way in which it treats its children'' (Abrahams and Matthews *Promoting Children's Rights in South Africa: A Handbook for Members of Parliament* (2011) 3)

With the promulgation of the Constitution in 1996, national legislative recognition was given to the principle that a child's best interests are of paramount importance in every matter concerning the child (s 28(2) of the Constitution of the Republic of South Africa, 1996). Section 28(1)*(b)* expressly provides for the right of a child to family care, parental care or appropriate alternative care. Based on economic and other factors, developing countries like South Africa experience difficulties in meeting the constitutional right of a child to have his or her best interests met and the placement of an orphaned or abandoned child (OAC) in appropriate alternative care is no exception. In light hereof, the current note considers whether the proposed amendments to the Children's Act (CA, Act 38 of 2005 as amended) introduced by the Third Amendment Bill (*GG* 42005 of 2019-02-25), with particular reference to sections 249, 250 and 259 comply with this constitutional right. These three sections are of particular relevance to placing a child in permanent care in the form of both national and intercountry adoption. In particular, section 249 makes provision that no consideration may be given in respect to adoption, section 250 limits the persons who are allowed to provide adoption services and section 259 makes provision for the accreditation for the provision of intercountry adoption services. All three sections are relevant to the adoption process of an OAC. Alternative care options available and the basis for determining which placement decided upon is deemed to be the most appropriate for the child concerned, are considered in light of the proposed amendments. A consideration of the current status of the child welfare system in South Africa as well as the statistics of the many children in need of alternative care, serves to provide a background in determining whether the proposed amendments meet and further the vulnerable OAC's best interests.

2 Current statistics and options

A reflection of current statistics of children in need of care in South Africa confirms that many children are in need of both permanent and temporary alternative care (s 150(1)*(a)* of the CA states that a child is "in need of care and protection" if the child "has been abandoned or orphaned and is without any visible means of support"). The vulnerability of parents, families and children has intensified by recent global, regional and national developments, including the global economic crisis, devastating consequences of the HIV/AIDS pandemic, widespread poverty (Smart *Children Affected by HIV/AIDS in South Africa: A Rapid Appraisal of Priorities, Policies and Practices* (2003) 3), unwanted pregnancies (Blackie *Sad Bad and Mad: Exploring Child Abandonment in South Africa* (*Unpublished doctoral thesis*, University of the Witwatersrand) 2015 19), child abandonment (Vorster "Abandoned Children: South Africa's Little Dirty Secret" (2015) *Daily Maverick* 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 estimate 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)), rapid urbanisation, and the increased migration of adults and children into and within South Africa in search of economic and political refuge (Department of Social Development *South Africa's Child Care and Protection Policy* (2018) https://www.sacssp.co.za/NDSD_CCPP_19_DECEMBER.docx 47 (accessed 2019-01-01)). In particular, the impact of the HIV pandemic on children in South Africa cannot be understated and with the largest percentage of HIV/AIDS-infected persons in the world, many children in South Africa are deprived of being nurtured in a family environment (Högbacka "Maternal Thinking in the Context of Stratified Reproduction: Perspectives of Birth Mothers from South Africa" in Gibbons and Rotabi (eds) *Intercountry Adoption* (2012) 147).

In 2015, Vorster (http://www.dailymaverick.co.za/) noted that approximately 3 500 children are abandoned annually in South Africa and the National Adoption Coalition estimates that about 3,000 children are abandoned each year (Holmes "A Helping Hand for the Young and Forsaken" (2019) https://www.usnews.com/news/best-countries/articles/2019-08-08/south-africa-struggles-to-care-for-abandoned-babies (accessed 2020-05-05)) and that while there are no statistics available, there is reason to believe that the number of abandoned children has increased (Wolfson Vorster Reach Out: The State of Adoption in South Africa http://www.adoptioncoalitionsa.org (accessed 2020-05-30)).

In 2017, South Africa had 1 728 000 paternal orphans, 530 000 maternal orphans, and 505 000 double-orphans (Hall "Children in South Africa" (2018) http://childrencount.uct.ac.za/indicator.php?domain=1&indicator=1#6/-28.692/24.698 (accessed 2020-04-24)). (A paternal orphan is a child whose father has died but whose mother is alive, a maternal orphan is a child whose mother has died but whose father is alive, and a double orphan is a child who has lost both mother and father. See also Hall "Children Count: Statistics on Children in South Africa" (2018) http://childrencount.uct.ac.za/indicator.php?domain=1&indicator=4 (accessed 2020-01-29)). Single-orphan children may have a parent who is able to care for them; double-orphaned children do not. While many of these children are absorbed into the extended family structure, a form of alternative care which is well established in South Africa, many OACs are still placed in state institutions (Blackie *Sad, Bad and Mad* 9). (Kinship care is family-based care in the child's extended family or with close family friends who are known to the child. An extended family is a multi-generational family that may or may not share the same household. It includes family members who share blood relations, relation by marriage, cohabitation and/or legal relations. Kinship care, which can be formal or informal in nature, is the care for children up to the age of 18, who are, by legal definition, children "in need of care". Kinship care is a form of alternative care of a child within the child's extended family or, in some instances, with close family friends who are known to the child. Kinship carers therefore may include relatives of the child, members of the tribe or clan into which the child is born, godparents, stepparents, or any adult who has a kinship bond with a child.) This approach to placement in alternative care in South Africa must be questioned in light of the internationally accepted best interests of a child principle and it is in this vein that we consider the proposed amendments to sections 249, 250 and 259 of the CA.

Provision is made for various forms of alternative care in the CA. These options can be considered in terms of permanent and impermanent care as follows:

Permanent care

(a) National adoption
(b) Intercountry Adoption
(c) Kinship care can be considered as relatively permanent in nature (Kinship care is extraordinary because, while it is recognised as a means of alternative care, it is generally not temporary in nature. In South Africa, care of an OAC by a relative, or relatives, is common and well established. Besides a few exceptional instances, this form of care is generally not court-ordered. Kinship care is, as a rule, permanent in nature and an important form of care in South Africa).

Impermanent (temporary) care

(a) Foster care, both formal and informal (Kinship care is generally a form of informal placement. The distinguishing characteristic between kinship care and foster care in the general sense is that, except in exceptional circumstances, kinship care is not court-ordered);
(b) Child and youth care centres (CYCC; s 46(1)(*a*)(ii));
(c) Temporary places of safety (s 46(1)(*a*)(iii));

(d) Child-headed households (CHH; s 46(1)(*b*));
(e) *Kafalah* (Adoption is not recognised in terms of Islamic principles. Instead, kafalah is exercised, meaning that a child is taken care of by a family other than his or her biological family, while familial ties to the biological family remain intact).

The concept that the family forms the foundation of our society is well-established in national and international law. The family unit provides a child with a sense of security and identity. Moreover, the family as a unit plays a pivotal role in the upbringing of children, enabling them to develop to their full potential. Children who have inadequate or no parental care are clearly at risk of being denied such a nurturing environment. Harden opines as follows:

> "[C]hild development can be understood as the physical, cognitive, social, and emotional maturation of human beings from conception to adulthood, a process that is influenced by interacting biological and environmental processes. Of the environmental influences, the family arguably has the most profound impact on child development." (Harden "Safety and Stability for Foster Children: A Developmental Perspective" 2004 14(1) *The Future of Children: Children, Families, and Foster Care* 33.)

Notwithstanding the benefits that permanent care offers and OAC, adoption is ostensibly under threat with the DSD's proposed amendments in its Third Bill. This is a disturbing factor when one considers the number of children in need of placement in South Africa, and where such placement must at all times be in the best interests of the child concerned.

The advantages offered by alternative care that is permanent in nature cannot be underestimated and national adoption undoubtedly remains a placement of priority as it ensures that, as far as is possible, the best interests of the children are met as the placement is permanent and as such, *inter alia* the stability and sense of belonging that comes with such permanence, allows the child to grow into his or her best self (Trow Van der Walt *Intercountry Adoption and Alternative Care: A Model for Determining Placement in the Best Interests of the Child* (LLD Nelson Mandela University) 2018 3).

However, national adoption rates remain low (Gerrand and Stevens "Black South Africans' Perceptions and Experiences of the Legal Child Adoption Assessment Process" *Scielo* (2019) http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S0037-80542019000100005&lng=en&nrm=iso&tlng=en (accessed 2020-06-15)) as evidenced by the decline to only 1,033 adoptions registered adoptions in 2017 and 2018, as opposed to the 2,436 adoptions registered in the 2010 – 2011 recording period (Holmes https://www.usnews.com/news/best-countries/articles/2019-08-08/south-africastruggles-to-care-for-abandoned-babies). On the one hand social workers regard a rigorous time consuming assessment process as essential to ensure that adoption applicants are fit and proper to adopt, a factor not shared by prospective adoptive parents (Gerrand and Stevens http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S0037-80542019000100005&lng=en&nrm=iso&tlng=en). The rigorousness of the adoption assessment process is contentious and remains a hotly debated issue. A factor contributing to a low adoption rate is the cultural principle

against adopting a child outside one's clan (Ntongana and GroundUp Staff "Adoption and Race: We Unpack the Issues" (2014) *GroundUp* https://www.groundup.org.za/article/adoption-and-race-we-unpack-issues_2294/ (accessed 2020-05-19)). In many black cultures a child is seen as, belonging to and being guided by, the ancestors that carry the same clan name. Where such child is adopted, that order is disturbed (Ntongana and GroundUp Staff https://www.groundup.org.za/article/ adoption-and-race-we-unpack-issues_2294/). The status of the alternative form of permanent care available to an OAC in terms of the CA (s 254), namely intercountry adoption, is uncertain, not least of all following the publication of the proposed amendments to sections 249, 250 and 259 of the CA. (The National Adoption Coalition states that 153 intercountry adoptions were processed in South Africa from 2017–2018 http://www.adoptioncoalitionsa.org (accessed 2019-05-31)).

Since the advent of democracy in South Africa, the discourse on a child's rights has focused on the realisation of the child as a bearer of rights (South African Human Rights Commission "Twenty-five Years of Children's Rights" (2014) https://www.sahrc.org.za/index.php/sahrc-media/news/item/58-twenty-five-years-of-children-s-rights (accessed 2017-12-07)). South Africa's commitment to this approach is evident within *inter alia* the provisions of the Constitution (s 28) and the CA (Preamble of the CA) and it is with the above-mentioned statistics in mind and the duty that the state bears to protect the rights of the most vulnerable members of the South African society, that serious contemplation must be given to the proposed amendments provided for Third Amendment Bill (the Children's First Amendment and Second Amendment Bills were promulgated in January 2018).

What follows is a consideration of the current procedure followed prior to the publication of the proposed amendments followed by a reflection of the proposed amendments to the three sections of the CA. In conclusion, concerns are raised about the ultimate effect such amendments will have on effecting permanent placements for OACs in need of care in South Africa.

3 The proposed Third Amendment Bill

3 1 The procedure

The Department of Social Department (DSD) started the consultation process on the proposal of the amendments to the CA in 2016 (South African Government "Social Development on Proposed Removal of Adoption Fees in Children's Act Amendment" (2019) https://www.gov.za/speeches/ adoption-fees-10-jan-2019-0000 (accessed 2020-05-19)). Discussions of the proposed amendments at the National Child Care and Protection Forum (NCCPF) continued for a further two years (the Children's Amendment Bill and the Children's Second Amendment Bill were promulgated in January 2018 and are not the subject of the current note). The subsequent Child Care and Protection Policy (drafted by the DSD) led to the gazetting of the Third Amendment Bill (*GG* 42248 of 2019-02). The Bill proposes several substantial amendments to the CA, including *inter alia* amendments in relation to adoption. Several concerns have been raised in respect to the amendments, both substantively and with respect to the procedure followed

by the DSD preceding the publication of the Bill. Whilst the DSD did consult with adoption practitioners about the amendments to the CA during 2018, sections 249, 250 and 259 remained unnoticed and were not discussed at the National Child Protection Forum meeting. In fact, those parties involved in the process first became aware of the submissions on the publishing of the Government Gazette in October 2019 and the first consultation about the three afore-mentioned provisions was on 21 November 2019 at the NCPF, just one week prior to the closing of public comments (*GG* 42248 of 2019-02). The late submission left very little time for a co-ordinated comeback from relevant parties in the adoption sector. Upon scrutiny of the documentation, it became apparent that the three sections were in fact included with the other amendments some three weeks prior to the NCPF meeting. Preceding the final additions to the Third Amendment Bill, interested parties had undergone intensive consultation with respect to the provisions proposed. However, despite allegations by the DSD to the contrary, no consultation was had with respect to the changes with respect to sections 249, 250 and 259 of the CA (Wolfson Vorster Adoption-Related Amendments to the Children's Act: The Arguments and the Elephants in the Room (2019) *Daily Maverick* https://www.dailymaverick.co.za/opinionista/2019-02-18-adoption-related-amendments-to-the-childrens-act-the-arguments-and-the-elephants-in-the-room/#gsc.tab=0 (accessed 2020-06-15)). The DSD made no effort to meaningfully engage with the adoption community regarding the implications of the proposed amendments and the impact on adoptions and adoptable children as a whole. This approach of the DSD has led to criticism, with the adoption community referring to the sudden and unexpected amendments as "an ambush" by Government (Wolfson Vorster https://www.dailymaverick.co.za/opinionista/2019-02-18-adoption-related-amendments-to-the-childrens-act-the-arguments-and-the-elephants-in-the-room/#gsc.tab=0). Criticism of the late submission has led to the suspicion by service providers that the DSD's aim was that these amendments be rushed through without the opportunity for co-ordinated opposition.

Should these amendments be promulgated, they will have a serious effect on those participating and ensuring an adoption process that meets the best interests of the child concerned. In effect, adoptions would effectively become the sole responsibility of the state's social workers. The charging of fees by professionals is already provided for in the DSD's *Child Care and Protection Policy* (https://www.dailymaverick.co.za/opinionista/2019-02-18-adoption-related-amendments-to-the-childrens-act-the-arguments-and-the-elephants-in-the-room/#gsc.tab=0). The role played by professionals in the effective process of adoption in South Africa at present, is vital and it is submitted that the proposed amendments will have a negative impact on adoptions in and from South Africa.

3 2 Proposed amendments

A consideration of these proposals forms the essence of this note, with respect to both the procedure followed as well as the substantive nature of the proposals. In response to civil society comments on the Bill, the DSD responded by stating that adoption is not a commercial transaction and that

the amendments did not bar private social workers or attorneys from provide the adoption service (Department of Social Development "DSD Response to Civil Society Comments on the Draft Children's Amendment Bill" https://www.smartstart.org.za/dsd-response-to-civil-society-comments-on-the-draft-childrens-amendment-bill/ (accessed 2020-06-02)). This has not halted speculation as to the true intention and objective of the DSD concerning these amendments not least of all, the proposed removal of the so-called adoption fee clause (Wolfson Vorster: Proposed New Law Could Do Irreparable Harm to SA's Most Vulnerable (2019) *Daily Maverick* https://www.dailymaverick.co.za/opinionista/2019-12-05-adoptions-proposed-new-law-could-do-Adoptionsirreparable-harm-to-sas-most-vulnerable/ (accessed 2020-05-19)).

3 2 1 Section 249

The existing section 249 provides for the giving and receiving of fees in respect of adoption services. This section provides:

"(1) No person may–
  (a) give or receive, or agree to give or receive, any consideration, in cash or in kind, for the adoption of a child in terms of Chapter 15 or Chapter 16; or
  (b) induce a person to give up a child for adoption in terms of Chapter 15 or Chapter 16.
(2) Subsection (1) does not apply to–
  (a) the biological mother of a child receiving compensation for–
    (i) reasonable medical expenses incurred in connection with her pregnancy, birth of the child and follow-up treatment;
    (ii) reasonable expenses incurred for counselling; or
    (iii) any other prescribed expenses;
  (b) a lawyer, psychologist or other professional person receiving fees and expenses for services provided in connection with an adoption;
  (c) the Central Authority of the Republic contemplated in section 257 receiving prescribed fees;
  (d) a child protection organisation accredited in terms of section 251 to provide adoption services, receiving the prescribed fees;
  (e) a child protection organisation accredited to provide intercountry adoption services receiving the prescribed fees;
  (f) an organ of state; or
  (g) any other prescribed persons."

Currently, adoption is administered by the DSD. Social workers in the department process adoptions and the DSD also accredits adoption organisations and private social workers. According to a statement made by Oliphant, spokesperson for the department, there are accredited 102 organisations that assist the 59 social workers processing adoptions (Reynolds "Debate Rages on About Law Change That Will Make It Illegal to Charge for Adoption Services (2019) *News24* https://www.news24.com/news24/SouthAfrica/News/debate-rages-on-about-law-change-that-will-make-it-illegal-to-charge-for-adoption-services-20190209 (accessed 2020-06-15)).

There is a variety of legally recognised adoptions. Consequently, the need for specialist adoption social worker service providers and professionals is

required to serve the best interests of the child in processing such adoptions. The professional services of *inter alia* lawyers, psychologists and medical practitioners have proved to be of great assistance in ensuring the rights of the child are promoted and protected.

This proposed amendment will prohibit those service providers from charging their fees and in doing so it will not serve the interest of the children. It is, in fact, highly impractical as there will be a restriction on accessing these services which the court may need in making a decision.

The adoption fee clause amendment provides that adoption is one of the designated child protection services as stipulated in section 105 (5) of the CA (s 105(5) provides that: "Designated child protection services include– (a) services aimed at supporting– (i) the proceedings of children's courts; and (ii) the implementation of court orders; (b) services relating to– (i) prevention services; (ii) early intervention services; (iii) the reunification of children in alternative care with their families; (iv) the integration of children into alternative care arrangements; (v) the placement of children in alternative care; and (vi) the adoption of children, including inter-country adoptions; (c) the carrying out of investigations and the making of assessments, in cases of suspected abuse, neglect or abandonment of children; (d) intervention and removal of children in appropriate cases; (e) the drawing up of individual development plans and permanency plans for children removed, or at risk of being removed, from their family; and (f) any other social work service as may be prescribed.") The proposed amendment provides that section 249 of the CA is amended by the deletion of subsection (2) paragraphs (b), (c), (d), (e), (f) and (g). The legal effect hereof is that all professionals involved in the assessing and processing of adoptions, both national and intercountry adoption, would be prohibited from charging *any* fees in the execution of their professional services. Where an attempt is made to charge for services rendered in the adoption process would be unlawful. Adoptions would effectively become the sole responsibility of the social workers employed by the state. The fact that social workers in the employ of the DSD have unreasonably high caseloads and the serious backlogs have received much attention and concern for the children, leading to a judgment by the Gauteng High Court in *Centre for Child Law v Minister of Social Development* (North Gauteng High Court) Case number 21726/11.It is evident that the role played by the relevant NGOs and the private sector take great strain away from the DSD as they competently process adoptions for those parties who elect to use accredited private services. The impact of the proposed amendment will have a serious effect on adoptions, not only slowing down adoptions but potentially stopping adoptions altogether. The rationale behind this thinking is questionable especially because the adoption service fees are often calculated on a sliding scale and are not a "revenue generator" but rather to provide handling the costs of a complex process of adoption. The government presently controls the process of adoption, including placements and fees charged. Pieterse, chairperson of the National Adoption Coalition of South Africa, an umbrella organisation with over 100 members, has stated that while the national department subsidises some adoption organisations, most funding" is not comprehensive" and a no-fee legal provision will force some of the organisations to close and cut social workers (Reynolds "Law Change

will Make it Illegal to Charge for Adoption Services" (2019) *Legislation News South Africa* https://www.bizcommunity.com/Article/ 196/717/187177.html (accessed 2020-06-15)).

The DSD avers that the proposed amendments are justified in that access to adoption processes will be made available to all, including those who are not in a position to pay the legislated professional fees incurred when professionals assist in the process. The justification for the amendment in principle is that "fees should not be charged for adoption because it is not a business but a child protection measure" (South African Government https://www.gov.za/speeches/adoption-fees-10-jan-2019-0000). The concern raised by the DSD that *exorbitant* fees were being charged by professionals involved in the adoption process is questionable (Wolfson Vorster https://www.dailymaverick.co.za/opinionista/2019-02-18-adoption-related-amendments-to-the-childrens-act-the-arguments-and-the-elephants-in-the-room/) specifically when considered in light of the promulgation of the Second Amendment Act (Children's Second Amendment Act, 2016) in terms of which social workers in the DSD are legally permitted to carry out adoptions as from 2017. In terms of the existing provisions of the CA, relevant professionals render their services at the capped rate as prescribed (Social and Associated Worker Act, 110 of 1978). While the state is not permitted to limit the fees charged by private social workers, all fees must be disclosed and justified at court before an adoption order can be granted (Wolfson Vorster https://www.dailymaverick.co.za/opinionista/2019-02-18-adoption-related-amendments-to-the-childrens-act-the-arguments-and-the-elephants-in-the-room/#gsc.tab=0.)

Lastly as free adoptions are currently available through the DSD thereby contradicting the argument forwarded. One is thus left questioning the true intention of the proposed new amendment. It is noted that few adoptions have been processed by the DSD.

One cannot consider the impact of the proposal without having regard to the current realities faced by social workers in South Africa, who would now be faced with the task of assessing and processing *all* applications for the adoption or otherwise of a child in need of care, without any form of "outside" assistance in achieving the goal of placing a child in appropriate care. Given that all amendments are expected to give effect to the best interests' principle, one has reason to be concerned. Social workers employed by the DSD and involved in the process of determining and monitoring alternative care placements have long found themselves in the unfortunate position of having large unusually high caseloads (Parliamentary Monitoring Group Foster Care System Backlog: Progress Report (2019) https://pmg.org.za/committee-meeting/28808/ (accessed 2020-05-05)). Organisational challenges have been identified as the cause for ineffectiveness among social workers currently employed by the DSD. Included in these causes are *inter alia* insufficient training, lack of role clarity, inadequate leadership, unrealistic expectations by the DSD, lack of resources or funding and low salaries (Nhedzi and Makofane "The Experiences of Social Workers in the Provision of Family Preservation Services" 2015 51(1) *Social Work/Maatskaplike Werk* 357).

It is submitted that external professionals play a positive role in ensuring that adoptions (national or abroad) are professionally and timeously

processed. In light of the difficulties social workers employed the state face, the effective removal of the external professionals by the propose amendment raises a serious concern and the proposed amendment should be questioned.

3 2 2 Section 250

This section in the proposed Bill concerns those who may or may not provide adoption services in South Africa. Section 250 of the CA currently provides that:

> "(1) No person may provide adoption services except–
> (a) a child protection organisation accredited in terms of section 251 to provide adoption services;
> (b) an adoption social worker;
> (c) the Central Authority in the case of intercountry adoptions; or
> (d) a child protection organisation accredited in terms of section 259 to provide intercountry adoption services.
> (2) Subsection (1) does not prohibit the rendering of professional services in connection with the adoption of a child by a lawyer, psychologist or a member of any other profession."

The proposed amendment to section 250 provides that certain additions and deletions to the article's subsections must be affected. The effect of the proposed deletion of subsection 3 of section 250 prohibits the involvement of any professionals other than social workers in the adoption process. This follows the promulgation of the Second Amendment Act in terms of which social workers from the DSD are now legally permitted to perform adoptions (Children's Second Amendment Act 18 of 2016).

The reality remains that social workers are currently and understaffed in South Africa and the high caseloads that social workers carry at present, seems to make the objective of the state implausible. Few adoptions have been processed by the social workers employed by the DSD since the Second Amendment Act came into operation in 2017 (See also Wolfson Vorster https://www.dailymaverick.co.za/opinionista/2019-02-18-adoption-related-amendments-to-the-childrens-act-the-arguments-and-the-elephants-in-the-room/). This failure to process adoptions is not due to any question of legality regarding the process, but rather to the inability of already overburdened social workers to further stretch their work load. Although the CA aims to ensure the protection of children's rights and ensure that informed decisions are made in their best interests, the number of social workers employed by the DSD is inadequate to keep abreast with the constant demands they face (Trow Van der Walt *Intercountry Adoption and Alternative Care in South Africa: A Model for Determining Placement in the Best Interests of the Child*). This quandary is aggravated by the fact that many social workers in the DSD lack the necessary specialisation to process adoptions.

3 2 3 Section 259

Section 259 outlines those who are able to perform international adoptions and provides:

> "(1) The Central Authority may, on application by a child protection organisation–
> (a) accredit such organisation to provide inter-country adoption services; and
> (b) approve adoption working agreements contemplated in section 260, as long as the prescribed requirements are met.
> (2) The Central Authority may accredit a child protection organisation to provide inter-country adoption services for such period and on such conditions as may be prescribed.
> (3) A child protection organisation accredited in terms of this section to provide inter-country adoption services–
> (a) may receive the prescribed fees and make the necessary payments in respect of inter-country adoptions; and
> (b) must annually submit audited financial statements to the Central Authority of fees received and payments made.
> (4) Subsection (1) does not prohibit the rendering of professional services in connection with the adoption of a child by a lawyer, psychologist or a member of another profession."

An amendment to section 259 proposes that the CA be amended to ensure that only state social workers, who are already inundated with cases and untrained in adoptions, would be able to facilitate adoptions.

As regards the effect the amendments will have on the placement of OACs in alternative care, the state referred to section 22 of the Constitution of the Republic of South Africa, maintaining that the proposed amendments do not prohibit private social workers and social workers at Child Protection Organisations from providing adoptions but rather only prohibits them from charging fees as provided for in the principal Act. It is submitted that the consequence will be the same as no organisation can exist without income. The importance of professional and cautious screening of prospective adoptive parents is of utmost importance.

4 Constitution

The Constitution provides for the robust protection of children's rights. Section 28 of the Constitution ensures that the "best interests of the child" are paramount in any matter concerning the child. The Constitution expressly provides for a child's right to family and parental care, and to protection of such rights (s 28(1)(*b*)). Adoption has been recognised as a means of providing the child with care and protection that is unsurpassed by any other form of permanent placement. Louw confirms this approach stating that

> "[adoption], more so than any other placement option, must thus in a given case be the best way of securing stability in that particular child's life". (Louw "Intercountry Adoption" in Boezaart (ed) *Child Law in South Africa* (2017) 184)

The Courts have confirmed that a child's right to family care or parental care as provided for in the Constitution includes the right to be adopted

(*Fletcher v Fletcher* 1948 (1) SA 130 (A) 143. See also *Fraser v Naude* 1999 (1) SA 1 (CC) 5B–C,1998 11 BCLR 1357 (CC); *Jackson v Jackson* 2002 (2) SA 303 (SCA) 317 par F). In the constitutional decision of the *Minister for Welfare and Population Development v Fitzpatrick* (s 259), considered the right of a child to be adopted by a non-South African citizen. Given that the best interests of a child are paramount in all matters concerning a child, Goldstone stated that section 28(1) of the Constitution did not constitute an exhaustive list of children's rights (par 17), and that the provision for the best interests' principle in section 28(2) created a right of a child that had to be interpreted beyond the reach of the provisions in section 28(1). This includes the subjective right of and OAC to be adopted.

5 International law

International policy and national legislation have recognised adoption as a preferred solution where natural parents or guardians are unable or unwilling to provide a home for the child concerned (UNGA *Guidelines for the Alternative Care of Children adopted by the General Assembly* (24 February 2010) A/RES/64/142. The South African Children's Act 38 of 2005 recognises the right of a child to grow up in a family environment and in an atmosphere of love, happiness and understanding. The Hague Convention recognises the right a child has to family care and further provides that intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be founds in his or her state of origin. See South African Law Commission *Discussion Paper 103 Project Review of the Child Care Act* (2002) 1181). International policy (and national legislation) recognises adoption as a preferred solution where natural parents or guardians are unable or unwilling to provide a home for the child concerned. The placement of a child is an obligation that rests on the state and the Constitution guarantees that when growing up in a family environment is not a viable option, appropriate placement of such child must be sought. The primary aim of adoption is to provide a child who cannot be cared for by his or her own parents with a permanent family. The Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children with special reference to Foster Placement and Adoption Nationally and Internationally (1986 Declaration) envisages that the first measure of alternative care should resemble, as far as is possible, a "typical" family environment, and, only when such an environment is unavailable, should regard be had to other "so-considered" less desirable options. This is reflected in all international Declarations and Conventions, which include *inter alia*, The Convention on the Rights of the Child (ratified by South Africa in 1995), The African Charter on the Rights and Welfare of the Child (ratified by South Africa in 2000) and The Hague Convention on the Protection of Children and Co-operation in respect of Inter-country Adoption (ratified by South Africa in 2003).

6 Conclusion

Pro-amendment contenders have stated that the amendments related to child adoption aim to make adoption a free service for all South

Africans. The proposed national legislation can only make it more difficult for potential adoptive parents to adopt an OAC. Consequently, the most vulnerable children in our society are denied an opportunity to enjoy a better life. The best interest principle appears to have received little if no attention of the drafters of the amendments. The best-interests principle has been known and used since the nineteenth century (Caufmann, Shulman, Bechtold and Steinberg "Children and the Law" in Bornstein, Leventhal and Lerner (eds) *Handbook of Child Psychology and Developmental Science Vol. 4: Ecological Settings and Processes in Developmental* Systems 7ed (2015) 616 653). The best interests of the child should be protected in every decision concerning a child's placement. It is submitted that the principle itself, albeit not the sole concern, should moderate any mechanical application of conflicting legal rules. The concept that the family forms the foundation of our society is well established in national and international law (Department of Social Development Republic of South Africa *Green Paper on Families: Promoting Family Life and Strengthening Families in South Africa* (2011) 73. See also Department of Social Development Republic of South Africa *White Paper on Families in South Africa* (2013) 3). The family unit provides a child with a sense of security and identity (Moyo *The Relevance of Culture and Religion to the Understanding of Children's Rights in South Africa* (LLM dissertation, University of Cape Town) 2014 15; Amoateng, Richter, Makiwane and Rama *Describing the Structure and Needs of Families in South Africa: Towards the Development of a National Policy Framework for Families* (2004) 4). Moreover, the family as a unit plays a pivotal role in the upbringing of children, enabling them to develop to their full potential (Amoateng *et al Describing the Structure and Needs of Families* 4), opine when referring to the importance of a "family" as follows: "Families are the primary source of individual development and they constitute the building blocks of communities"). The plight of large numbers of children needing family, parental or alternative care is characteristically common in poorer nations. Promoting adoption as a means of permanent placement for a child could play a pivotal role in connecting a child to a safe and nurturing family relationship to last a lifetime. Within the range of options considered to be appropriate alternative care, national adoption is generally the first choice, an approach which is founded on the principle that the child concerned is granted the opportunity to develop in a secure and permanent family environment within the child's country of origin (Kinship care is well established in South Africa and is akin to traditional family/parental care in that the child concerned is raised within a family environment characterised by the stability found in permanent care).

National adoption and international adoption may be viable placement options for children left without parental care. Statistics indicate that a significant number of South African orphans fall into this category, and it is apparent that policies and laws must be set in place to afford such children necessary protection and care. The overall approach of the legislature in South Africa in the past decade has changed from a parent-centred approach to a child-centred approach and judicial decisions have confirmed the paramountcy of a child's best interests as an accepted principle of South African law.

The proposed amendments result in the further burdening of already overworked social workers employed by the DSD and the proposed

amendments to sections 249, 250 and 259 appear to go in the face of the duty of the state to ensure that it does everything in its capacity to safeguard a child's rights and guarantee that these rights are protected and promoted. This includes the right to family or parental care where possible. The proposed amendment allegedly aims to make adoptions more accessible to those wishing to adopt an OAC, but the consequential reality is rather the total shut down of all adoptions in South Africa.

With respect to adoption services, the DSD opined that

> "[a]doption service should not be commodified but be viewed as a means of protecting the best interests of children by placing them with *permanent and suitable families*".

The recognition of the importance of placing children in a permanent family environment if further confirmed in section 229 of the CA, which provides the purposes of adoption as being:

> "to protect and nurture children by providing a safe, healthy environment with positive support; and to promote the goals of *permanency planning* by connecting children to other safe and nurturing *family* relationships intended to last a lifetime." (South African Government https://www.gov.za/speeches/adoption-fees-10-jan-2019-0000)

No one could debate the importance of the benefit of placing an OAC in an environment of permanence. It is submitted with respect that the proposed amendments are not achieving this aim. The importance of permanence in creating a sense of stability and of belonging in an OAC child's life cannot be underestimated, and it is submitted that where no appropriate alternative care can be found in the child's country of origin, namely South Africa, seeking a permanent placement for a child is a priority.

The proposed national legislation will make it more difficult for potential adoptive parents to adopt a South African OAC and it is apparent that the proposed amendments would bring an end, or at least seriously decrease adoption and more specifically intercountry adoption. Such a policy denies the most vulnerable children in our society of an opportunity to enjoy a better life. When considering the placement of a South African child by intercountry adoption, one must question when, and to what extent, the "best interests of a child" principle can play a role in giving more children the chance to enjoy a permanent family life within a family environment. To be effective, the stringent rules involved in the processing of intercountry adoptions is at present largely reliant on the assistance of professional services. It appears the state has chosen to overlook the potential placement of a child abroad, even although such placement could potentially serve the best interests of the child concerned. The proposed amendments will curtail, if not cease, these services. In effect the rights of children to permanent alternative care through adoption will cease.

Glynis van der Walt
Nelson Mandela University