

# Adoption in Botswana: does it serve the best interests of the child?\*

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## *Abstract*

Not every child has the opportunity to grow up as part of a family, which is regarded as the optimum form of child care. Adoption, however, provides a child with the opportunity to have a family. When adoption does occur, the most important aspect is that it should be in the best interests of the child. In this article I examine statutory adoption in Botswana and whether it serves the best interests of the child. I then offer possible solutions to problems that I believe need attention.

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## INTRODUCTION

I'm here because of biology, but I am who I am because of love... It's not blood that makes a family, it's love.<sup>1</sup>

The importance for children growing up in a stable family environment where they can form lasting psychological bonds with family members can hardly be over-emphasised.<sup>2</sup> The family unit is still a central organised

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<sup>1</sup> A statement by an adopted child as quoted by Zeelie in Kahn *Thicker than water* (2006) 123.

<sup>2</sup> Kruger 'The philosophical underpinning of children's rights theory' 2006 *THRHR* 452. Also known as emotional bonding, attachment is the strong, affectional tie shared by people who are close and bring each other comfort and pleasure by their nearness during times of stress – Berk *Child development* (6ed 2003) 417. It is regarded as one of the most important developmental needs of the child and is therefore vital for the child's best interests – see: Clark 'A "golden thread"? Some aspects of the application of the standard of the best interest of the child in South African family law' 2000 *Stell LR* 19; Patterson *Infancy & childhood* (2009) 227. This is also evident from the Preamble of the Convention on the Rights of the Child (hereafter 'the CRC'), which entered into force on 2 September 1990. Botswana acceded to this CRC on 13 April 1995. The Preamble states that the family is the fundamental group in society and the natural environment for the growth and well-being of all its members and particularly of children. According to Molokomme & Mokobi 'Custody and guardianship of children in Botswana' in Neube (ed) *Law, culture, tradition and children's rights in Eastern and Southern Africa* (1998) 182, ratification is a reflection of the country's commitment to the international

structure within society.<sup>3</sup> It is regarded as the primary institution within which a child should be reared.<sup>4</sup> In fact, an upbringing within a family is the optimum form of child care.<sup>5</sup> Not every child is fortunate enough to be born into a family environment. However, this can be achieved through adoption.<sup>6</sup>

The complex process of adoption is one of the most researched areas in child welfare.<sup>7</sup> While the reason for this could be debated at length, the drastic invasion in the life of a child caused by an adoption is reason enough, although most adoptees no matter their background, develop into well-adjusted, functioning adults.<sup>8</sup> In Botswana adoption is possible in terms either of custom<sup>9</sup> or statute. Statutory adoption<sup>10</sup> is the legal process by which

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minimum standards established for the protection and promotion of children's rights. Similarly, the Preamble of the African Charter on the Rights and Welfare of the Child (hereafter referred to as 'the Charter'), which entered into force on 29 November 1999, states that a child should grow up in a family environment in an atmosphere of happiness, love and understanding for the full and harmonious development of his/her personality. Botswana signed and ratified it on 10 July 2001.

<sup>3</sup> Mosikatsana 'The definitional exclusion of gays & lesbians from family status' 1996 *SAJHR* 549. The aim of this article is not to determine what 'family' means, but it should be mentioned that, in my view, family cannot have a fixed meaning. It should change as society changes. Family life has even been referred to as 'fluid' – see Clark 'Duties of support of living persons' in Van Heerden, Cockrell & Keightley (eds) *Boberg's law of persons and the family* (1999) 2 262.

<sup>4</sup> Robinson 'The child's right to parental and family care: some brief remarks' 1998 *Obiter* 333.

<sup>5</sup> Eekelaar *Family law and social policy* (1984) 2 190.

<sup>6</sup> Article 20(2) and (3) of the CRC support this statement. In *SW v F* 1997 1 SA 796 (O) at 802 the child's constitutional right to parental care was interpreted to include adoption.

<sup>7</sup> Katz 'Triangles of adoption: the geometry of complexity' in Treacher & Katz (eds) *The dynamics of adoption: social and personal perspectives* (2000) 227.

<sup>8</sup> Katz n 7 above 48 was not an adoption application, but an application to be appointed as joint guardians and to be awarded custody of a minor. The court held that emotional security is one of the most important factors in any child's psycho-social development. The importance of attachment in the development of a child's emotional security cannot be overlooked, and such emotional security can be obtained through adoption.

<sup>9</sup> According to Molokomme *Children of the fence: the maintenance of extra-marital children under law and practice in Botswana* (1991) 26–27, customary law covers a variety of rules, principles and usages of the different tribes. It is in a continuous process of change, and it is often difficult to say with certainty what the applicable rules are. There are no written rules or fixed procedures to be followed for the adoption of children in terms of customary law. Also see Sigweni *Adoption laws and procedures of Botswana: questioning their effectiveness and compliance with regional and international human rights standards* (unpublished LLM dissertation UCT 2008) 7.

<sup>10</sup> The purpose and structure of customary adoption are completely different to that of statutory adoption. This article will focus on statutory adoptions. This is not because statutory adoptions are considered more important, but because of the need, in the author's view, for the process to be reviewed and possibly even replaced by more current and relevant legislation. The aim is not to analyse the entire Act, but rather to focus on a few selected areas.

the parental rights of a child's biological parents are extinguished and replaced by a set of legal relations between the child and his/her adoptive parents.<sup>11</sup> In other words, it is an act whereby the relationship of parent and child is created between persons who are not necessarily biologically so related.<sup>12</sup> While the relationship between the child and its biological parents is legally terminated, a new legal relationship is created between the child and the adoption parents. After the adoption, the child is, for all purposes, treated as the legitimate child of his/her adoptive parents.<sup>13</sup> It is my opinion that no other legal scenario exists which has a greater impact on a child's life, than adoption.

In 2007, a draft Children's Bill, which, *inter alia*, dealt extensively with adoption<sup>14</sup> and would have replaced the *Adoption of Children Act*,<sup>15</sup> was prepared for presentation to the National Assembly.<sup>16</sup> However, by the time it was published,<sup>17</sup> and subsequently, when the Children's Bill was adopted,<sup>18</sup> the entire section that was to have regulated adoption had been removed.<sup>19</sup> The Children's Act<sup>20</sup> thus eventually came into effect without any changes being implemented with regard to adoption.<sup>21</sup> In this article, I shall consider current adoption legislation, highlight its shortcomings, the impact thereof on the best interests of the child, and offer possible solutions to these.

## THE ROLE OF THE CHILD'S BEST INTERESTS IN BOTSWANA ADOPTION LEGISLATION

### Introduction

The first, and always most important aspect dealing with children, is the best interests of the child.<sup>22</sup> It has become the standard against which decisions

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<sup>11</sup> Quansah *Introduction to family law in Botswana* (2006) 4 138.

<sup>12</sup> Kiggundu *Private international Law in Botswana: cases and materials* 2002 239.

<sup>13</sup> Section 6(2) of the *Adoption of Children Act* 28:01, which came into effect on 12 December 1952.

<sup>14</sup> Part XV – *Adoption*, cl 115–129.

<sup>15</sup> Cl 137 of the draft Bill.

<sup>16</sup> The Bill at that stage had no number. It will hereafter be referred to as the draft Bill.

<sup>17</sup> Published as the Children's Bill, 2008.

<sup>18</sup> Bill no 1 of 2009. It will hereafter be referred to as the Bill.

<sup>19</sup> The reason for his is unclear and, despite extensive research, could not be established.

<sup>20</sup> *Children's Act* 28:04, which came into effect on 16 June 2009.

<sup>21</sup> Section 118 repealed the *Children's Act* of 1987.

<sup>22</sup> The best interests of the child are protected in Botswana legislation as well as in international instruments. It will be discussed directly below.

affecting children are measured.<sup>23</sup> The principle of the best interests of the child was introduced into the law of Botswana by section 6 of the Customary Law Act<sup>24</sup> in 1969,<sup>25</sup> to apply specifically to cases involving custody.<sup>26</sup> The welfare of children has become part of the law of Botswana,<sup>27</sup> and it has become a guiding principle for all actions involving children. The courts have generally interpreted it to mean that, in all cases involving children, the welfare of the child should be the paramount consideration, irrespective of what law is being applied.<sup>28</sup>

### International instruments

The Convention on the Rights of the Child (CRC),<sup>29</sup> which has been hailed as a watershed in the history of children's rights,<sup>30</sup> is a comprehensive treaty on the rights of the child<sup>31</sup> and the most universally accepted human rights document in history.<sup>32</sup> It has, since its introduction, become the international standard against which legislation and policies are measured.<sup>33</sup> Its ratification by Botswana is a reflection of the country's commitment to the international minimum standards established for the protection and promotion of children's rights.<sup>34</sup> In terms of article 3(1) of the CRC the best interests of the

<sup>23</sup> Rwezaura 'Domestic application of international human rights norms protecting the rights of the girl-child in Eastern and Southern Africa' in Ncube (ed) (*Law, culture, tradition and children's rights in Eastern and Southern Africa*) 1998 41.

<sup>24</sup> *Customary Law Act* 16:01. The date of commencement is 22 August 1969.

<sup>25</sup> Molokomme & Mokobi n 2 above 184.

<sup>26</sup> *Id* at 189.

<sup>27</sup> Quansah n 11 above 132.

<sup>28</sup> Tabengwa, Khan & partners 'Law reform – the emerging protection of children in Botswana?' in Sloth-Nielsen & Du Toit (eds) *Trials and tribulations, trends and triumphs: developments in international, African and South African child and family law* (2008) 87. In terms of s 5 of the *Children's Act* the best interests of the child are the paramount consideration. The impact of the *Children's Act* will be discussed below under 'General legislation'. In 1996 a presidential task group was appointed to work on Vision 2016, a project of the Botswana National Vision Council – see <http://www.vision2016.co.bw/index.html> (last accessed 20 November 2008). It envisions a future where children are able to develop to their fullest potential, acknowledging the vital roles played by family life and parents in children's development, and the need to protect Botswana's vulnerable children. If this vision comes to fruition, it can only be beneficial to the best interests of the child.

<sup>29</sup> See n 2 above.

<sup>30</sup> Sloth-Nielsen 'Ratification of the United Nations Convention on the Rights of the Child: some implications for South African law' 1995 *SAJHR* 401.

<sup>31</sup> A child is defined in art 1 as 'every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier'.

<sup>32</sup> Todres 'Emerging limitations on the rights of the child: the UN convention on the rights of the child and its early case law' in Freeman (ed) *The international library of essays on rights: children's rights vol ii* 2004 146–147.

<sup>33</sup> *Brandt v S* [2005] 2 All SA 1 (SCA) at 7.

<sup>34</sup> Molokomme & Mokobi n 2 above 182.

child shall be ‘a primary consideration’ in all actions concerning children. This article seems to place the best interests standard at the heart of international children’s rights law.<sup>35</sup> Furthermore, article 21 of the CRC provides increased protection for and emphasis on the best interests of the child in the context of adoption, in which case the best interests of the child have to be ‘the paramount consideration’.<sup>36</sup> This increased protection, which is granted specifically and only for purposes of adoption, is indicative of the significant impact that adoption has on the life of a child.

After the CRC, the Charter<sup>37</sup> is globally the second, and regionally the first, binding instrument that identifies the child as a possessor of certain rights.<sup>38</sup> As with the CRC, it can be used by the Botswana courts in the interpretation of laws, especially when determining what is in the best interests of the child.<sup>39</sup> Article 4(1) of the Charter declares that in all actions concerning the child, the best interests of the child<sup>40</sup> shall be the primary consideration.

### **Laws of Botswana**

Until the enactment of the Constitution of Botswana,<sup>41</sup> the protection of human rights in Botswana was largely left to the common law and to statutory law.<sup>42</sup> Today the principal source of law governing human rights protection in Botswana is the Constitution, specifically the Bill of Rights in chapter 3. Even though it contains no explicit provision to that effect, the Constitution is the supreme law of Botswana.<sup>43</sup> Section 3 guarantees the protection and enjoyment of fundamental rights to every person in Botswana, and discrimination against persons is prohibited in section 15.<sup>44</sup> Unfortunately, the best interests of the child are not enshrined in the

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<sup>35</sup> Parker ‘The best interests of the child – principles and problems’ 1994 *International Journal of Law and the Family* 26.

<sup>36</sup> This wording clearly provides more comprehensive protection for the child.

<sup>37</sup> See n 2 above.

<sup>38</sup> Chirwa ‘The merits and demerits of the African charter on the rights and welfare of the child’ 2002 *International journal of children’s rights* 157.

<sup>39</sup> Tabengwa, Khan & partners n 28 above 85.

<sup>40</sup> Defined in art 2 as every human being below the age of 18 years.

<sup>41</sup> The *Constitution of Botswana*, which came into effect on 30 September 1966 (hereafter the *Constitution*).

<sup>42</sup> Fombad ‘The protection of human rights in Botswana: an overview of the regulatory framework’ in Fombad (ed) *Essays on the law of Botswana* (2007) 7.

<sup>43</sup> Nsereko *Constitutional law in Botswana* (2002) 9; *Attorney-General v Unity Dow* (2001) AHRLR 99 (BwCA 1992) par [16].

<sup>44</sup> Section 15(1) ‘... no law shall make any provision that is discriminatory either of itself or in its effect’.

Constitution, and it does not specifically provide for the protection of children or the family.

Although the provisions of the Children's Act<sup>45</sup> do not include adoption,<sup>46</sup> it is an Act to make provision for

the promotion and protection of the rights of the child; for the promotion of the physical, emotional, intellectual, and social development and general well-being of children; for the protection and care of children; for the establishment of structures to provide for the care, support, protection, and rehabilitation of children; and for matters connected therewith.<sup>47</sup>

The Children's Act includes a 'Bill of child rights',<sup>48</sup> in which the protection of the best interests of the child<sup>49</sup> is far more comprehensive than the protection granted by the Adoption of Children Act.<sup>50</sup> The Children's Act mandates a person or the court performing a function or exercising a power under it, to regard the best interests of the child as the paramount consideration.<sup>51</sup> It further provides that, in the event of conflict or inconsistency between the provisions of the Children's Act and any other legislation, the provisions of the Children's Act take precedence.<sup>52</sup> Therefore, in accordance with the basic rules of statutory interpretation in Botswana,<sup>53</sup> the provisions of the Children's Act that provide increased protection for the best interests of the child, apply to the Adoption of Children Act as well.

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<sup>45</sup> See n 20 above.

<sup>46</sup> See the discussion under 'INTRODUCTION' above.

<sup>47</sup> Preamble of the *Children's Act*.

<sup>48</sup> Part III – Bill of child rights (s 9–29).

<sup>49</sup> A child is defined in s 2 as any person who is below the age of eighteen years.

<sup>50</sup> This Act will be discussed directly below.

<sup>51</sup> Section 5 'A person or the court performing a function or exercising a power under this Act shall regard the best interests of the child as the paramount consideration'. The *Adoption of Children Act* does not provide the same protection for the best interests of the child – see 'Adoption of Children Act' below.

<sup>52</sup> Section 3. An exception is where it would have the effect of harming the child's emotional, physical, psychological or moral well-being, or of prejudicing the exercise of the rights and freedoms of others, national security, the public interest, public safety, public order, public morality or public health. With regard to adoption, and in order to serve the best interests of the child, not following the provisions of the *Children's Act* might actually harm or prejudice the child.

<sup>53</sup> These rules are contained in the Interpretation Act 01:04, which came into effect on 20 July 1984. The basic rule of statutory interpretation in Botswana is that words have to be interpreted in their ordinary, literal or grammatical sense in their context – see [http://www2.accaglobal.com/pubs/students/acca/exams/f4/past\\_papers/bwa/f4bwa\\_2011\\_jun\\_a.pdf](http://www2.accaglobal.com/pubs/students/acca/exams/f4/past_papers/bwa/f4bwa_2011_jun_a.pdf), (last accessed on 19 August 2011).

### **Adoption of Children Act 28:01**

Statutory adoptions were introduced in Botswana by the Adoption of Children Act,<sup>54</sup> which has, since its promulgation in 1952, regulated adoption and remains the first and only piece of legislation regulating the statutory adoption of children in Botswana. According to Quansah,<sup>55</sup> this Act ensures that neither the adopting parents, nor the child who is being adopted, is taken advantage of or unnecessarily prejudiced, and that the rights of the parents<sup>56</sup> of the child who is being adopted are properly protected. I believe this should be the aim of any adoption legislation. However, as I shall point out, there are several aspects of the Adoption of Children Act which might fall short of this aim.<sup>57</sup>

The Act is fairly brief, consisting of sixteen sections. Adoptions are administered by magistrates' courts in accordance with the provisions of the Adoption of Children Act.<sup>58</sup> The court of the district in which the child<sup>59</sup> resides is the court which has jurisdiction to grant an adoption order on the application of the adoptive parent(s).<sup>60</sup> The aspects of this Act which, I believe, jeopardise the best interests of the child, will be highlighted next.

#### *Adoption orders*

An application for an adoption order cannot be granted unless the court is satisfied that the requirements in section 4(2) of the Adoption of Children

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<sup>54</sup> See n 13 above.

<sup>55</sup> Quansah n 11 above 138.

<sup>56</sup> It is not clear, but presumably these are the biological parents.

<sup>57</sup> Part XV of the draft Bill addressed some of these issues and went a long way towards improving adoption legislation and protecting the best interests of the child. Reference will be made to the relevant clauses throughout.

<sup>58</sup> In terms of s 2 'court' means a magistrates' court established under the *Magistrates' Courts Act* 04:04. Unfortunately there is no provision in the Act for the involvement of social workers in the adoption process.

<sup>59</sup> The *Adoption of Children Act* defines 'child' as a person under the age of nineteen years – s 2. In terms of the *Children's Act*, a child is a person below the age of eighteen years – see the discussion under 'General legislation' above. The provisions of the *Children's Act* now take precedence. This lower age of majority is welcomed and is in line with international instruments.

<sup>60</sup> Section 4(1).

Act have been complied with.<sup>61</sup> Some of these requirements need further consideration.

An adoption application may not be granted unless it serves the interests and welfare of the child.<sup>62</sup> Protection of the interests of a child as provided for in the Adoption of Children Act is certainly not the same as giving paramountcy to the best interests of the child. It would obviously be possible for a child's interests to be served, or for its welfare and interests to be promoted without necessarily protecting the best interests of the child. In other words, even when the interests and welfare of the child are served, paramountcy is not necessarily afforded to these.<sup>63</sup> Fortunately, section 5 of the Children's Act, which provides the utmost protection with regard to the best interests of the child, will in future have to be followed in adoption applications.<sup>64</sup> This emphasises the importance of the best interests of the child, and also places even greater pressure on the legislature to reconsider the contents of the Adoption of Children Act.

To comply with section 4(2)(b), the applicants must have adequate means to maintain and educate the child.<sup>65</sup> In my view, financial means should not be a prerequisite if a person would like to adopt a child.<sup>66</sup> This requirement

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<sup>61</sup> Section 4(2) 'A court to which application for an order of adoption is made shall not grant the application unless it is satisfied – (a) that the applicant is or that both applicants are qualified to adopt the child; (b) that the applicant is or that both applicants are of good repute and a person or persons fit and proper to be entrusted with the custody of the child and possessed of adequate means to maintain and educate the child; (c) that the proposed adoption will serve the interests and conduce to the welfare of the child; that consent to the adoption has been given (i) by both parents of the child or, if the child is illegitimate, by the mother of the child whether or not such mother is a minor or married woman and whether or not she is assisted by her parent, guardian or husband, as the case may be, (ii) if both parents are dead, or in the case of an illegitimate child, if the mother is dead, by the guardian of the child, (iii) if one parent is dead, by the surviving parent and by any guardian of the child who may have been appointed by the deceased parent, (iv) if one parent has deserted the child, by the other parent or (v) by a guardian specially appointed under section 5; and (d) that the child, if over the age of 10 years, consents to the adoption.'

<sup>62</sup> Section 4(2)(c) – see n 61 directly above.

<sup>63</sup> An example would be where a child is cared for in an institution. The child's interests are protected because its physical needs are provided for. This situation would not be in the best interests of the child though.

<sup>64</sup> See the discussion about statutory interpretation in n 51 and 52 and the accompanying text above.

<sup>65</sup> See n 61 above.

<sup>66</sup> The draft Bill in cl 117(2)(d) included a similar provision. Although I believe that poverty should not be a bar to an adoption, it is of course also true that a child has certain basic needs and rights.



would exclude many Batswana<sup>67</sup> from adopting children, and is therefore discriminatory<sup>68</sup> and it possibly jeopardises the best interests of the child. I do not, of course, advocate that people who cannot adequately feed, clothe and educate a child should be allowed to adopt. However, as I explained above,<sup>69</sup> adoption allows a child to grow up in a family environment, which serves the best interests of the child, and I do believe that there is a way of overcoming the problem of the lack of financial security without making it a pre-requisite for adoption.

The payment of an adoption grant is an option worth considering, although such a grant could be open to abuse and would need to be carefully monitored. An alternative would be that, using a means-based test, the adopted child should have access to free education, medical services, transport to and from school, food packages at school, and counselling services, for example.

Section 4(2)(e) of the Adoption of Children Act<sup>70</sup> requires that a child, if over the age of ten years, must consent to an adoption, failing which an adoption order cannot be granted. Furthermore, the consent has to be in writing and, if the child who has to consent to the adoption gives such consent in Botswana, the consent must be signed by the person or persons giving the consent (*ie* the child) in the presence of a district commissioner, who has to attest to the consent. If the consent is given outside Botswana, it must be signed and attested in the manner prescribed.<sup>71</sup> The involvement of the child in the adoption process is welcomed. However, the nature of the process is, in my opinion, not above criticism.

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<sup>67</sup> The people living in Botswana are referred to as Batswana (previously they were also known as Bechuana). The singular is Motswana.

<sup>68</sup> The *Constitution* prohibits discrimination. In terms of s 15(1) the law may not make any provision that is discriminatory. Although equality is not directly protected in the *Constitution*, Nsereko n 43 above at 239 believes that the essence of the ban on discrimination implies that all inhabitants in the country should be treated equally. Strangely though, s 15(1) does not apply to any law that (*inter alia*) makes provision for adoption – s 15(4)(c). The reasoning behind this exclusion is not clear. There are no guidelines or limits as far as the exclusions are concerned. In other words, with respect to adoption no provision can be discriminatory, no matter how far-fetched or unequal. This does not make any sense and contravenes the non-discrimination clause in the CRC – Tabengwa, Khan & partners n 28 above 87. The interests and welfare of the child have to be protected in an adoption and could be at risk if the non-discrimination section of the *Constitution* does not apply.

<sup>69</sup> See **INTRODUCTION** above.

<sup>70</sup> See n 61 above.

<sup>71</sup> Section 4(3).

The restrictive nature of the participation by children is problematic. The section excludes children younger than ten years from participating in the adoption process, irrespective of their age, maturity, and level of understanding. The constitutional right to communicate one's ideas and information applies to children of any age.<sup>72</sup> This, in my opinion, means that the views of the child cannot be disregarded they are in the Adoption of Children Act,<sup>73</sup> as this would be unconstitutional and unacceptable. The Children's Act further provides that every child who is of an age, maturity and level of understanding so to be able to participate in decisions which have a significant impact on its life, shall have a right to do so.<sup>74</sup> These provisions must be interpreted to include adoption applications.<sup>75</sup> In future adoption applications, children of all ages, including children younger than ten years, thus must be allowed to participate in the adoption applications.<sup>76</sup> A child's maturity and level of understanding could be determined by a qualified social worker.

On the other hand, the compulsory participation of children over the age of ten years is equally disconcerting. These children cannot be adopted unless they consent to the adoption. There are children over the age of ten years who may not be able to consent, such as severely physically or mentally disabled children. There is no justification for excluding these children from the opportunity to be adopted and to be part of a family. Here, the Children's Act significantly improves the position. There is a difference between making consent a prerequisite for an adoption,<sup>77</sup> and giving a child the right

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<sup>72</sup> Section 12 of the *Constitution*. Article 12(1) of the CRC provides that state parties have to ensure that a child who is capable of forming his/her own views has the right to express those views freely in all matters affecting him/her, and to have those views given due weight in accordance with the age and maturity of the child. Freeman 'The future of children's rights' in Freeman (ed) *The international library of essays on rights: children's rights vol ii* 2004 300 says this is perhaps the most important provision in the CRC. Similarly, art 7 of the Charter provides that every child who is capable of forming his/her own views is assured the right to express his/her opinions freely in all matters and to disseminate his/her opinion subject to such restrictions as are prescribed by law.

<sup>73</sup> Section 4(2)(e), which only grants this right to children over ten years.

<sup>74</sup> Section 8(1) 'Every child who is of such age, maturity and level of understanding as to be able to participate in decisions which have a significant impact on that child's life shall have a right to do so.'

<sup>75</sup> See n 51 and 52, as well as the accompanying text above. Clause 117(2)(h) of the draft Bill provided that the views of the child have to be *taken into consideration* in adoption applications, subject to the child's age, maturity and level of understanding. Section 8(1) as it reads is a significant improvement on this clause.

<sup>76</sup> This is of course subject to the provisions of s 3 of the *Children's Act*.

<sup>77</sup> As required by the *Adoption of Children Act*.

to participate in decisions which have a significant impact on his/her life.<sup>78</sup> There is, in my view, conflict between the two provisions and I believe the provisions of the Children's Act will have to be applied in future.

Although some form of tangible proof of the consent of a child is understandable, why the consent must be in writing and signed is unclear. There is always the possibility that a child who needs to consent to an adoption is illiterate.<sup>79</sup> In such a case, an alternative form of consent should be considered. It is regrettable, too, that the section does not require the commissioner to ask questions and discuss the consequences of consent with the child, rather than requiring a signature.<sup>80</sup> Such a discussion would certainly offer more protection to the best interests of the child, who may not have consented voluntarily, or, who may not be fully aware of what the consent entails. The consent requirement contained in the section can actually end up working against the best interests of the child.

There is a way of overcoming or circumventing the problems that have been highlighted with regard to consent to or participation in adoption. A social worker should be appointed where circumstances require it. Such a person will act in the best interests of the child and could even give the required consent on behalf of the child if so required.<sup>81</sup>

#### *Qualifications for adoption of children*

The categories of persons who may apply to adopt a child are set out in section 3.<sup>82</sup> This list is outdated, discriminatory, and unconstitutional and in

<sup>78</sup> As provided for in the *Children's Act* – also see n 74 above.

<sup>79</sup> A national literacy survey was undertaken for the first time in Botswana in 1993 by the Central Statistics Office to establish the rate of adult literacy and the extent of inadequate literacy among the adult population of Botswana. Unfortunately the target population for the survey was citizens aged twelve to sixty-five years of age who had never attended school or left school before completing standard five – Commeyras & Chilisa 'Assessing Botswana's first national survey on literacy with Wagner's proposed schema for surveying literacy in the "third world"' 2001 *International journal of educational development* 434–435. It is therefore not possible to know what the literacy rate of children in Botswana is, but it can be assumed that among younger children especially there has to be some measure of illiteracy.

<sup>80</sup> There are no regulations under the *Adoption of Children Act*.

<sup>81</sup> The section at the moment requires the person giving the consent to sign it.

<sup>82</sup> Section 3(1) 'Subject to subss (2) and (3) the following persons may adopt any child– (a) husband and wife jointly; (b) a widow or widower, or an unmarried or divorced person; (c) a married person whose spouse is at the time of the adoption, and has been for a continuous period of not less than seven years immediately preceding that time, mentally disordered or defective; (d) a married person who is separated from his or her spouse by judicial decree.' Subsections (2) and (3) are not relevant for purposes of this article.

severe need of revision. It excludes many people from being able to adopt. Both homosexual and heterosexual partners in a permanent life-partnership should be allowed to adopt jointly,<sup>83</sup> and special provision must be made for the biological father of a child born out of wedlock to adopt.<sup>84</sup> The section needs to be reconsidered and extended to bring it in line with the best interests of the child and the Constitution.<sup>85</sup>

*Permission to visit an adopted child*

At the time of making an adoption order, or at any time thereafter, the court may direct that a biological parent<sup>86</sup> or a guardian of the child, will have access to the child for a period not exceeding two years from the date of adoption. The court will, however, not make such an order if access is likely to be to the disadvantage of the child.<sup>87</sup> In my opinion this section does not serve the best interests of the child. At first glance this appears to advocate to be an open adoption.<sup>88</sup> It is important that, where possible and in the best interests of a child, the biological parents remain part of the child's life after an adoption order has been made. Post-adoptive contact, in whatever form, between the child and the biological parents is generally in the best interests of the child.<sup>89</sup> Once it has been established that post-adoption contact

<sup>83</sup> In this regard it is also worth noting that the *Marriage Act 29:01*, which came into effect on 28 December 2001, does not allow for same sex marriages, and the legality of same sex relationships has not yet been decided upon by the courts in Botswana – Quansah n 11 above 16.

<sup>84</sup> Currently joint adoption is only possible if the applicants are married. The draft Bill extended the categories of persons who could adopt to include the biological father of a child who is not ordinarily resident with the child (cl 116(1)(b)), and a person who has fostered a child for a continuous period of three months or more, and is at least thirty years old (cl 116(1)(e)).

<sup>85</sup> See the discussion about discrimination and n 44 above.

<sup>86</sup> The Act does not specify, but 'parent' in this context obviously refers to the biological parent.

<sup>87</sup> Section 7 'The court may at the time of making an order of adoption or at any time thereafter direct that a parent or the guardian of the child (other than a parent or guardian whose consent to the non-disclosure to him of the identity of the adoptive parents has been accepted under section 4(3)) shall during a period not exceeding two years as from the date of adoption have access to the child at such times and places and under such conditions as the court may determine and may at any time on the application either of the parent or guardian or of the adoptive parents or parent of the child, after due notice to any other party affected by the direction, rescind it or vary it in regard to the times, places and conditions of access: provided that the court shall not make such a direction if it will probably be to the disadvantage of the child.

<sup>88</sup> Also known as adoption contact, this is where contact is maintained between the adopted child and the biological parents or family, which is usually considered to be in the best interests of the child. As far as open adoption goes, any further references to biological parents also include biological family.

<sup>89</sup> There are, of course, exceptions.

between a child and its biological parents is in the best interests of the child, there can be no justification for terminating that relationship after a period (two years) – if the cardinal consideration is the best interests and welfare of the child. The only reason I can think of for the enactment of such a limiting provision, is that it gives the biological parents the opportunity to ensure that the child is happy and well cared for. However, if this is the case, a social worker could fulfill this task.<sup>90</sup> The biological parents should be part of the child's life. Such involvement, however, should not be limited but should continue for as long as it is in the best interests of the child. Limiting this contact to a period of no more than two years after the adoption is, again, not in the best interests of the child.<sup>91</sup>

*The effect of adoption*

An adopted child shall for all purposes<sup>92</sup> whatsoever, be deemed in law to be the legitimate child of the adoptive parent.<sup>93</sup> However, this 'legitimacy' is subject to certain limitations. The adopted child's right to testate inheritance from the adoptive parent,<sup>94</sup> as well as the right to inherit intestate from the relatives of the adoptive parent,<sup>95</sup> is restricted. Furthermore, the adopted child has the right to inherit intestate from the biological parents and their relatives.<sup>96</sup> My submission is that this creates the impression that the child is not considered to be a descendant of the adoptive parents (who by law are

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<sup>90</sup> A social worker will in any case be in a better position to assess the situation, as he or she is trained for this.

<sup>91</sup> In line with the principles of adoption contact, the draft Bill provided that the court should not make any order prohibiting an adopted child from maintaining contact with his/her biological parents, unless it would be in the best interests of the child to do so – cl 122. Furthermore, the Bill provided that an adoptive parent had to give an undertaking, in writing, that he/she would inform the child that the child is adopted, and of the whereabouts of the child's biological or other parents, if they were still alive – cl 120. This provision in the draft Bill embraced the principle of adoption contact.

<sup>92</sup> This is subject to s 14, which deals with the effect of adoption on marriage.

<sup>93</sup> S 6 (2) 'Subject to section 14, an adopted child shall for all purposes whatsoever be deemed in law to be the legitimate child of the adoptive parent: provided that an adopted child shall not by virtue of the adoption– (i) become entitled to any property devolving on any child of his adoptive parent by virtue of any instrument executed prior to the date of the order of adoption ..., unless the instrument clearly conveys the intention that the property shall devolve upon the adopted child; (ii) inherit any property *ab intestato* from any relative of his adoptive parent; (ii) an order of adoption shall terminate all the rights and legal responsibilities existing between the child and his natural parents and their relatives, except the right of the child to inherit from them *ab intestato*.'

<sup>94</sup> Testate inheritance before the date of the adoption is only possible where it is clearly conveyed in an instrument – s 6(2)(I).

<sup>95</sup> An adopted child may not by virtue of the adoption inherit any property intestate from a relative of the adoptive parent – s 6(2)(ii). This provision is discriminatory.

<sup>96</sup> Such right continues, despite the termination of all rights and responsibilities between the child and the biological parents and relatives – s 6(3).

now the only parents that the child has), but of the biological parents. This most definitely cannot be in the best interests of the child.

*Non-removal of adopted child from Botswana*

An adopted child may not, without the consent in writing of the Minister of Local Government, be removed from Botswana within twelve months from the date of the adoption order.<sup>97</sup> The reasoning behind this section is not clear, but presumably the intention is to protect the child. If this is the case, there are other ways of doing this – such as involving a social worker before, during, and after the adoption process. After all, once the adoption has gone through, the child is deemed to be the legitimate child of the adoptive parent,<sup>98</sup> whether that child remains in Botswana or not. This section, I believe, therefore does not protect the best interests of the child (this should be attended to before the adoption order is granted), but actually might dissuade many people from adopting. Prospective adoptive parents might be hesitant to adopt because of this highly restrictive provision and thus act contrary to the best interests of the child.<sup>99</sup> This could ultimately result in a child not being given the opportunity to grow up in a family.<sup>100</sup>

<sup>97</sup> Section 10 ‘An adopted child may not be removed from Botswana within 12 months after adoption.’ The draft Bill extended this period, in cl 125, to 24 months.

<sup>98</sup> Section 6(2).

<sup>99</sup> The residency requirement is also criticised by B Mezmur ‘*As painful as giving birth*’: *a reflection on the Madonna adoption saga* (2009) 41/3 *CILSA* 393. He also believes that any such laws need to be flexible and promote the best interests of the child.

<sup>100</sup> A similarly disconcerting provision is found in the *Citizenship Act* 01:01, which came into operation on 24 April 1998. S 7 states that an adopted child who is not a citizen of Botswana will only become a citizen if the adopter (or adopters) is at the date of the adoption a citizen and the child is no older than three years. Citizenship thus automatically follows an adoption under these circumstances. However, s 8 provides that the minister (the Interpretation Act, s 49, provides that this is the minister for the time being responsible for the matter in question) may register a child over the age of three years adopted by a citizen of Botswana as a citizen upon application by the adoptive parent or parents, provided that a child shall not be registered as a citizen if the minister is satisfied that the child, ‘being sufficiently mature to have formed a character, is not of good character’. This distinction with regard to citizenship based on the age of the child is discriminatory and could have some (possibly) unintended consequences. If a child is adopted but cannot become a citizen of Botswana, it could lead to a situation where prospective adoptive parents are less likely to choose a child older than three years. Granted, it is not necessarily in the best interests of the child to lose his/her biological or current citizenship, but knowing that the adopted child might retain a foreign citizenship could sway prospective adoptive parents to rather choose a younger child who will automatically become a citizen of Botswana upon adoption. Such a situation could undoubtedly work against the best interest of the child. Another question that comes to mind is how it will be determined whether a young child has a ‘good character’. It could be that the minister will wait until he/she is satisfied that the child is mature enough to have formed a character to make a decision about citizenship, which might never happen, or the minister might decide that the child is not ‘of good character’. This

*Appointment of social worker*

The Adoption of Children Act makes no provision for the involvement of a social worker, or similarly trained welfare official, in the adoption process. Without such a person, it is not certain how much protection there is for the child and its best interests in the adoption process. It is, of course, possible for the best interests of the child to be protected even without the involvement of a social worker or welfare official, but there is nothing in the Adoption of Children Act to indicate what this possible protection is. If a social worker were involved in the process, there would be at least some measure of certainty that there was someone to look out for the best interests of the child. Many instances were highlighted above<sup>101</sup> where the involvement of a social worker in the adoption process that could, and probably would, serve the best interests of the child.

There is only example in the Adoption of Children Act which might be interpreted as a reference to the appointment of a social worker, and that is section 5(1), which provides that if an application has been made for an order for the adoption of a child, the minister may under certain circumstances appoint a suitable person as a guardian for the child for the purpose of proceedings under the Act.<sup>102</sup> Although the section stipulates that a 'suitable person' may be appointed, there are no guidelines as to who this person should be, or whether he/she should have any specific attributes or qualifications. The reason for including such a provision in the Act is surely to protect the best interests of a child who does not have parents to protect it in any proceedings under the Act. However, this section is due for a re-drafting, as its wording is too vague. Today, a social worker who has been trained to recognise what the best interests of a child require in the case of an adoption, should be the responsible person for ensuring that the best interests of the child are protected under these circumstances.<sup>103</sup> The section

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would lead to tremendous uncertainty for the child and would not be in the best interests of the child. It seems to me as if the concern here is not in the child's best interests.

<sup>101</sup> See 'Adoption orders', 'Permission to visit adopted child', 'Non-removal of adopted child from Botswana' and 'Appointment of social worker' above.

<sup>102</sup> Section 5(1) 'If the application has been made for an order for the adoption of a child—*(a)* Whose parents are dead and over whom no guardian has been appointed; *(b)* Whose parents have deserted the child; or *(c)* Whose parents are, or one of whose parents is, incapable by reason of mental disorder or defect of consenting to the adoption, the Minister may appoint any suitable person to be guardian of the child for the purpose of proceedings under this Act'.

<sup>103</sup> Also see my remarks above under this heading about the need to include social workers in the adoption process in all cases.

should be worded in such a way that there can be no doubt about the involvement of a social worker.

### **CONCLUSION AND REFORM OF LEGISLATION**

Adoption is a complicated and important matter which impacts greatly on the life of a child. There are numerous issues that have to be considered before, during, and after an adoption application. The most important aspect is that this procedure must have the best interests of the child as its point of departure. This article has provided sufficient evidence that current statutory adoption procedures do not necessarily serve the best interests of the child. It is my submission that the Adoption of Children Act needs to be reconsidered and perhaps rewritten. The Botswana legislation on adoption has not kept pace with the times. In order to protect the best interests of the child, there are many aspects of current statutory adoption which need urgent attention in order to be more in line with this principle, failing which future adoptions might well result in the further disregard of the best interests of the child.