

REPUBLIC OF SOUTH AFRICAIN THE GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES

(2) OF INTEREST TO OTHER JUDGES:

YES

(3) REVISED.

DATE 29/10/13

SIGNATURE

A handwritten signature in black ink, appearing to be 'Dhans', written over a horizontal line.

CASE NO: 21122/13

DATE: 30 October 2013

In the matter between:

CENTRE FOR CHILD LAW

Applicant

and

MINISTER OF SOCIAL DEVELOPMENT

Respondent

Summary: Declaratory order – s. 230(3) of the Children’s Act, 38 of 2005, does not preclude a child from being adoptable where the child has a guardian and person seeking to adopt the child is the spouse or life-partner of guardian - s. 242 of the Act does not automatically terminate all parental responsibilities and rights of guardian where such adoption order is granted.

JUDGMENT

J W LOUW, J

[1] The applicant is the Centre for Child Law established by the University of Pretoria and is registered as a law clinic with the Law Society of the Northern Provinces. I shall refer to the applicant as the CCL. It has brought the present application against the Minister of Social Development, who is the Minister responsible for the implementation and administration of the Children's Act, 38 of 2005 ("the Act"), for an order:

1. declaring that s. 230(3) of the Act does not preclude a child from being adoptable in instances where the child has a guardian and where the person seeking to adopt is the spouse or permanent life-partner of the guardian of the child;
2. declaring that s. 242 of the Act does not automatically terminate all the parental responsibilities and rights of the guardian of a child whose spouse or permanent domestic life-partner seeks to adopt the child;

alternatively to 1 and 2

3. that s. 230(3) of the Act is inconsistent with the Constitution and invalid to the extent that it precludes a child from being adoptable in instances where the person seeking to adopt is the spouse or the domestic life-partner of the guardian of the child;
4. that s. 242(1) of the Act is inconsistent with the Constitution to the extent that it automatically terminates all parental rights and

responsibilities of the guardian of a child whose spouse or permanent domestic life-partner seeks to adopt the child.

[2] The main objective of the CCL, in terms of its constitution, is to contribute within its means to establish and promote the best interests of children in the South African community, more particularly to use the law as an instrument to advance such interests. It submitted that it had the necessary *locus standi* in terms of s. 38 of the Constitution to bring the present application as it was an organisation dedicated to uphold and protect children's rights. There can be no doubt that it is in the public interest that bodies like the CCL exist and that they act, where necessary, to protect and promote the interests of the children of this country. I agree, therefore, that the CCL has standing to bring the application.¹ The Minister has not challenged the CCL's standing and also does not oppose the relief claimed by it. This was confirmed by Adv. Ramoshaba who appeared for the Minister.

[3] Ms Carina du Toit, who is an attorney employed by the CCL and who deposed to the CCL's founding affidavit, states that the matter arises out of numerous approaches over recent months by parents, step-parents and practitioners who have been turned away by the Children's Court when seeking to apply for adoption by a step-parent. Step-parent

¹ See: *Freedom under Law v. Acting Chairperson: Judicial Service Commission, and Others*, 2011 (3) SA 549 (SCA), paras. [21] - [23].

adoption refers to where a step-parent, who is married to the guardian of a child, wishes to adopt the child. She refers to two examples.²

[4] The first is the case of a child who is currently four years old, to whom I shall refer as J. J's mother was previously married to his biological father, but his mother moved out of the common home while she was still expecting J. She subsequently got divorced from J's father and later applied for sole guardianship of the child. The application was not opposed by the father. When J was 15 months old, she met her current husband and they got married some time thereafter. A daughter was recently born of the marriage. J's step-father wanted to secure J's position in the family and decided that he wished to adopt J. J's father consented to the adoption. After lodging the application for adoption with the Children's Court, J's mother and step-father were contacted by the clerk of the court who wanted to know whether they were aware that, in terms of s. 242 of the Act, the adoption would effectively terminate all parental rights and responsibilities. J's mother agreed to sign the s. 242 consent form because she believed that J would be more secure and protected if he was legally adopted by his step-father and because she felt that she could in that way protect J from his father, who she says was abusive. Immediately upon returning home, she started doubting whether she had done the right thing. She and J's step-father then

² The CCL joined the two children concerned as second and third applicants to the application, stating that it acts on their behalf. The children, of course, do not have the necessary *locus standi* to bring such an application and their joinder was also unnecessary. I will therefore disregard the fact that they have been joined.

approached the presiding officer of the court and tried to persuade him that sections 230 and 231 of the Act made it possible for a step-parent to adopt their spouse's child without terminating the spouse's rights and responsibilities in respect of the child. They were unsuccessful and they then approached the CCL for assistance.

[5] The second example is that of a girl who is currently fourteen years old. I shall refer to her as T. T's father deserted her and her mother when she was eleven months old and they have had no contact with him since. T lives with her mother and her mother's present husband. Although not expressly dealt with in the founding affidavit, I assume for purposes of the present application that T's parents were divorced and that her mother obtained sole guardianship over her or that, as provided for in s. 236(1)(b) of the Act, her father's consent to her adoption was not necessary because he abandoned T or because his whereabouts cannot be established. T informed Ms. Du Toit during a consultation that she considered her step-father as her father and that she had asked her mother and her step-father whether her step-father would adopt her. She told Ms du Toit that she wanted to "feel like she belongs" and thus would like to take her step-father's surname. They approached the Children's Court (not the same one as in J's case), where the officials refused to provide them with the necessary documentation to begin the adoption process. They were also informed that T's mother would lose

her parental responsibilities and rights if T was adopted by her step-father.

[6] Section 1 of the Act defines a child as a person under the age of eighteen years. Chapter 15 of the Act contains the substantive and procedural provisions which govern the adoption of children. The relevant provisions for purposes of the present application are the following:

229. Purposes of adoption. – *The purposes of adoption are to –*

- (a) protect and nurture children by providing a safe, healthy environment with positive support; and*
- (b) promote the goals of permanency planning by connecting children*

230. Child who may be adopted. – (1) *Any child may be adopted if –*

- (a) the adoption is in the best interests of the child;*
- (b) the child is adoptable;*
- (c) the provisions of this Chapter are complied with.*

(2)

(3) *A child is adoptable if –*

- (a) the child is an orphan and has no guardian or caregiver who is willing to adopt the child;*
- (b) the whereabouts of the child's parent or guardian cannot be established;*
- (c) the child has been abandoned;*

- (d) *the child's parent or guardian has abused or deliberately neglected the child, or has allowed the child to be abused or deliberately neglected;*
or
- (e) *the child is in need of a permanent alternative placement.*

231. Persons who may adopt child. – *A child may be adopted –*

- (a) *jointly by –*
 - (i) *a husband and wife;*
 - (ii) *partners in a permanent domestic life-partnership; or*
 - (iii) *other persons sharing a common household and forming a permanent family unit;*
- (b) *by a widower, widow, divorced or unmarried person;*
- (c) *by a married person whose spouse is the parent of the child or by a person whose permanent domestic life-partner is the parent of the child;*
- (d) *by the biological father of a child born out of wedlock;*
or
- (e) *by the foster parent of the child.*

242. Effect of adoption order. – (1) *Except when provided otherwise in the order or in a post-adoption agreement confirmed by the court an adoption order terminates –*

- (a) *all parental responsibilities and rights any person, including a parent, step-parent or partner in a domestic life-partnership, had in respect of the child immediately before the adoption*

.....

[7] It appears from the information received by Ms du Toit from parents, step-parents and practitioners that the basis upon which officials at the Children's Courts turn away prospective applicants for adoption in the above described circumstances, is that they consider the child not to be adoptable by reason of the provisions of s. 230(3) of the Act. The approach appears to be that a child who has a guardian does not fall within one of the categories of s. 230(3) and is therefore not adoptable. As a result, a child living safely with an adequate parent is excluded from being adopted by a step-parent to whom the child's parent is married or living with in a permanent domestic life-partnership .

[8] Such interpretation and application of s. 230(3) is, in my view, incorrect. Where a non-custodian parent has consented to an adoption of his or her child, as happened in the case of J, such parent must, in my view, be taken to have abandoned the child as contemplated in s. 230(3)(c). "*Abandoned*", in relation to a child, is defined in s. 1 of the Act to mean, *inter alia*, a child who has obviously been deserted by the parent, guardian or care-giver of the child. The definition does not require that the child must be abandoned by both parents. The primary meaning of the verb "*desert*" in the Shorter Oxford English Dictionary is "*give up, relinquish, leave*". A further meaning given is "*forsake, abandon*".

(a person or thing having a claim upon one)". These definitions clearly apply to the situation where a non-custodian parent consents to the adoption of his or her child by the spouse or a person who is the permanent domestic life-partner of the custodian parent of the child. It follows that in such circumstances, the child is adoptable within the meaning of s. 230(3)(c).

[9] In terms of the definition of "abandoned" in s. 1 of the Act, a child is also taken to have been abandoned where the child, for no apparent reason, has had no contact with the parent, guardian or care-giver for a period of at least three months. Again, the definition does not require that the child must have had no contact with both parents for the said period. It is also not required that the whereabouts of that parent cannot be established. If J therefore has, for no apparent reason, had no contact with his biological father for a period of not less than three months, he will, for that reason also, be adoptable.

[10] In terms of s. 233(1)(a) of the Act, a child may only be adopted if both parents have consented to the adoption, regardless of whether the parents are married or not. In a case where a child's biological parent or guardian has not consented to the adoption of the child by a step-parent because his or her whereabouts cannot be established, as in the case of

T, such a child will be adoptable in terms of s. 230(3)(b) of the Act. The section does not require that the whereabouts of both parents or guardians cannot be established. Such a child will further be adoptable in terms of s. 230(3)(a) if the child has, for no apparent reason, had no contact with that parent or guardian for a period of not less than three months.

[11] The foregoing interpretation of s. 230(3)(b) and (c) finds support in s. 231(1)(c), which expressly permits the adoption of a child by a step-parent. The section does not contain a limitation that a step-parent may only adopt a child if the child's non-custodian parent is no longer alive. It is therefore in order for a step-parent to adopt a child if the non-custodian parent has consented to the adoption of the child or if the child has, for no apparent reason, had no contact with the non-custodian parent for at least three months, or if the whereabouts of the non-custodian parent cannot be established.

[12] Adv. Courtenay, who appeared for the CCL, submitted that, should there be any doubt about the correctness of the above interpretation of ss. 230(3)(b) and (c), the provisions of the Constitution favour a conclusion that step-parent adoption in the aforementioned circumstances is permissible under the Children's Act. I agree with the submission.

Section 28(1)(b) of the Constitution provides that every child has the right to family care or parental care, or to appropriate alternative care when removed from the family environment. An interpretation of the aforesaid sections of the Act in a way which permits the adoption by step-parents in the circumstances mentioned, promotes this constitutional right. Section 28(2) of the Constitution further provides that a child's best interests are of paramount importance in all matters concerning the child. In *S v. M (Centre for Child Law as amicus curiae)*³ the Constitutional court said the following:

"The comprehensive and emphatic language of s 28 of the Constitution indicates that just as law enforcement must always be gender-sensitive, so must it always be child-sensitive; that statutes must be interpreted and the common law developed in a manner which favours protecting and advancing the interests of children; and that courts must function in a manner which at all times shows due respect for children's rights."

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

³ 2008 (3) SA 232 (CC) par. [15]

[14] The advice allegedly given by officials of the Children's Court to prospective applicants for adoption that, in terms of s. 242 of the Act, the granting of an application for adoption by a step-parent will automatically terminate all rights and responsibilities of the parent in respect of the child, ignores the exception provided for in the preamble of s. 242. In terms thereof, an adoption order terminates those rights "*except when provided otherwise in the order*". The Children's Court therefore has a discretion to order that the rights and responsibilities of a child's parent or guardian will not terminate upon the grant of an adoption order in favour of the step-parent. It will, save in exceptional circumstances, clearly be in the best interests of the child that such an order be made. The Children's Court is obliged to function in a manner which in each case promotes the best interests of the child and should, except where there are sound reasons not to do so, make an order that the granting of an adoption order in favour of a step-parent will not terminate the responsibilities and rights of the child's parent or other guardian.

[15] In view of the foregoing, it is not necessary to consider the alternative relief sought by the CCL regarding the constitutionality of ss. 230(3) and 242(1) of the Act.

[16] The parties were agreed that, in the event of an order being granted in terms of prayers 1 and 2 of the notice of motion, the Minister should be ordered to publish the order in the *Government Gazette*.

[17] In the result, I grant the following order:

1. It is declared that section 230(3) of the Children's Act, 38 of 2005, does not preclude a child from being adoptable in instances where the child has a guardian and the person seeking to adopt the child is the spouse or permanent domestic life-partner of that guardian.
2. It is declared that section 242 of the Children's Act, 38 of 2005, does not automatically terminate all the parental responsibilities and rights of the guardian of a child when an adoption order is granted in favour of the spouse or permanent domestic life-partner of that guardian, having regard to the discretion which section 242 affords the court to order otherwise.
3. The Minister of Social Development is ordered to publish this order in the *Government Gazette*.

J.W.LOUW

JUDGE OF THE GAUTENG DIVISION OF THE HIGH COURT

HEARD ON: 1 October 2013

FOR THE APPELLANT: Adv. R.M. Courtenay

INSTRUCTED BY: The Child Law Centre, University of Pretoria

FOR THE RESPONDENT: Adv. Ramushaba

INSTRUCTED BY: The State Attorney