CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 48/07
[2007] ZACC 27

AD[*]	First Applicant
DD	Second Applicant
versus	
DW	First Respondent
CW	Second Respondent
ROODEPOORT CHILD AND FAMILY WELFARE SOCIETY	Third Respondent
THE CENTRE FOR CHILD LAW	Amicus Curiae
THE DEPARTMENT OF SOCIAL DEVELOPMENT	Intervening Party

Heard on : 18 September 2007

Decided on : 7 December 2007

JUDGMENT

SACHS J:

Introduction

[*] On 27 August 2007 this Court ordered that the identity of the applicants, the first and second respondent and the child in this matter may not be revealed.

[1] On 14 November 2004 newly-born Baby R was found abandoned in a veld in Roodepoort. She was placed in the foster care of the first and second respondents, nationals of the United States of America resident in South Africa, who were the founders and managers of a sanctuary for children in need of care. The applicants, friends and former fellow congregants of the first and second respondents, are also citizens of the United States. On visiting the first and second respondents in South Africa, they met Baby R, established a relationship with her, and resolved to adopt her, if possible. This case stems from the legal difficulties they encountered in trying to effect an inter-country adoption.

[2] On seeking legal advice on what route to follow, they were informed that current policy of those responsible for administering adoptions in South Africa would effectively bar their adopting Baby R in the country. They were accordingly encouraged to apply to the Johannesburg High Court for an order granting them sole custody and sole guardianship. This order would enable them to take Baby R to the United States of America where they could then formally adopt her.

[3] When they applied to the High Court for an order of sole custody and sole guardianship, the High Court expressed concern about the need to ensure that the best interests of the child would be protected in the absence of any opposition to the application.[1] The High Court accordingly requested the Centre for Child Law at the University of Pretoria to assist it as amicus curiae. The Centre accepted this role and

[1] The judgment was reported as [*AD and Another v DW and Others*] 2006 (6) SA 51 (W).

filed extensive papers which advised against granting the application. Its principal contention was that it would not be in the best interests of Baby R in particular, and of children available for adoption in general, for sole custody and sole guardianship proceedings in the High Court to be used as a mechanism for by-passing proper adoption proceedings in the Children's Court.

[4] Basing its decision largely on the submissions made by the amicus, the High Court held that it was not for it to decide what was in the best interests of the child; this was something to be done by the Children's Court in accordance with the adoption procedures of the Child Care Act.[2] It therefore dismissed the application.

[5] The applicants were granted leave to appeal to the Supreme Court of Appeal.[3] The Centre for Child Law applied for and was granted leave to be admitted as amicus curiae, and again provided extensive information and argument in support of its opposition to the granting of the appeal.

[6] The Supreme Court of Appeal divided sharply, and by a majority of three to two, dismissed the appeal. Four judgments were written.

[7] Theron AJA, with whom Ponnan JA and Snyders AJA concurred, held that to grant the order sought by the applicants would result in sanctioning an alternative route to inter-country adoption under the guise of a sole custody and sole guardianship

[2] Act 74 of 1983.

[3] The judgment was reported as [*AD and Another v DW and Others*] 2007 (5) SA 184 (SCA).

application. This, she stated, was an unsavoury form of by-passing the Children's Court adoption system and jumping the queue. She held further that the appeal should in any event fail because of the principle of subsidiarity. In her view, unless it was established that suitable care could not be found in a child's country of origin, an inter-country adoption application would not lie, whatever other considerations there might be.

[8] In a separate concurring judgment, Ponnan JA held that even though the relevant provisions of the Children's Act[4] had not yet entered into force, regard had to be had to the fact that it envisaged that all applications for sole custody and sole guardianship of minor children by foreign nationals would be treated as inter-country adoptions. Supporting the need for the matter to go to the Children's Court, he held that a court should be slow to lend its stamp to a procedure which ignored the international safeguards and standards in the 1993 Hague Convention on the Protection of Children and Co-operation in Respect of Inter-country Adoption (the Hague Convention), even if these did not as yet form part of South African domestic law.

[9] Heher JA, with whom Hancke AJA concurred, viewed the matter quite differently. He held that as upper guardian of minors, the High Court was both empowered and obliged to enquire into all matters concerning the best interests of children. This empowers it to make an order for sole custody and sole guardianship.

[4] Act 38 of 2005.

It therefore had jurisdiction to hear the application. In the present matter the High Court should not have opted for a formalistic approach to procedure. Instead it should have investigated what was in Baby R's best interests. In his view the papers showed that it was overwhelmingly in her best interests for the order of sole custody and sole guardianship to be granted, since there was no evidence of the existence of other prospective adoptive parents for her in South Africa.

[10] In a separate judgment concurring in the judgment of Heher JA, Hancke AJA stated that unless the setting aside of the High Court's order was likely to result in a real benefit to Baby R, her best interests were merely being held to ransom for the sake of legal niceties. This was because an adoption in South Africa would confer no material advantage on Baby R which she could not obtain if she were adopted in the United States of America.

[11] The majority of the Supreme Court of Appeal therefore dismissed the appeal. On 22 June 2007 the applicants applied to this Court for leave to appeal. The Court set the matter down for hearing on 18 September 2007. The directions invited any interested party to apply to be admitted as amicus curiae; the Centre for Child Law did so and was admitted as amicus with the right to make both written and oral submissions. The Court requested the Johannesburg Bar to recommend a person to act as curator ad litem to represent the interests of Baby R;[5] the Bar proposed

[5] In *Du Toit and Another v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as* Amicus Curiae*)* 2003 (2) SA 198 (CC); 2002 (10) BCLR 1006 (CC) at para 3 it was stated:

> "In matters where the interests of children are at stake, it is important that their interests are fully aired before the Court so as to avoid substantial injustice to them and possibly others.

Advocate Melanie Feinstein, who was appointed as curatrix. Finally, the Court sent a letter to the Department of Social Development (the Department) informing it of the hearing and advising that if it desired to make representations it should intervene without delay; the Department responded by submitting affidavits and briefing counsel to oppose the application. The directions laid down a tight time-frame for the lodging of reports and written submissions, the last one coming in two court days before the hearing. I summarise them in the order they were submitted.

[12] The applicants sought an order setting aside and replacing the order of the Supreme Court of Appeal with an order awarding sole custody and sole guardianship of Baby R to the applicants; declaring her to have been abandoned; discharging the foster care order placing her in the custody of the first and second respondents; and authorising the applicants to leave South Africa with her with a view to their adopting her in the United States of America. They maintained that the High Court had inherent jurisdiction in respect of applications for sole custody and sole guardianship even if these applications were made with a view to secure an adoption abroad. They acknowledged that the principle of subsidiarity provided that ordinarily a child available for adoption should be placed in circumstances as close as possible to those of his or her own culture and upbringing. They submitted, however, that the principle was not intended to create an inflexible jurisdictional hierarchy which automatically

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Where there is a risk of injustice, a court is obliged to appoint a curator to represent the interests of children. This obligation flows from the provisions of s 28(1)(h) of the Constitution which provides that:
'Every child has the right—
. . .
(h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result.'"
(Footnote omitted.)

favoured placement in the child's country of origin. On the contrary, in order to comply with section 28(2) of the Constitution, the courts were obliged to adopt a flexible approach focused on what was in the best interests of the particular child in the particular situation.[6]

[13] The Centre for Child Law maintained its stance that it was impermissible for the High Court to grant foreigners a sole custody and sole guardianship order as an alternative to an adoption order. It contended that the Children's Court had sole jurisdiction to deal with the matter, and emphasised that the granting of sole custody and sole guardianship by the High Court would not provide protection for the child equivalent to the safeguards inherent in adoption proceedings undertaken in the Children's Court. It was accordingly in Baby R's best interests, and the best interests of children generally, for the Children's Court route to be followed.

[14] In similar vein the Department contended that the procedural route followed by the applicants had been unlawful and repugnant because it contravened the provisions of the Child Care Act, the rule of law and South Africa's international obligations. It stated that the procedure was contrary to the best interests of South African children in general and those of Baby R in particular. The Department submitted that there were in fact potential South African adoptive parents for Baby R. The question therefore was whether her best interests would be served by her being adopted by the applicants as opposed to her being adopted by South Africans. It requested that a Children's

[6] Section 28(2) reads: "A child's best interests are of paramount importance in every matter concerning the child." The applicants also relied on section 39(1)(b) of the Constitution which reads: "When interpreting the Bill of Rights, a court, tribunal or forum must consider international law".

Court enquiry be conducted to examine how the principle of subsidiarity should be applied to Baby R's circumstances.

[15] The curatrix submitted a comprehensive report[7] and followed up with written submissions. In her view the circumstances of Baby R were unique. Her report stated that of the five South African couples mentioned as prospective adoptive parents by the Director-General, three were unsuitable, the suitability of another was speculative, and placement with the remaining couple was problematic, since Baby R, who was accustomed to a large foster family, would be their only child. She added that with no manifestly suitable local family placement having been identified after all this time, Baby R's chances of local adoption had become remote. Baby R was now older and more entrenched in an American culture, and it was clearly in her best interests to be placed permanently with the applicants. The curatrix submitted that giving effect to Baby R's best interests was a matter that could and should be separated from the broader legal and procedural issues raised before this Court.

[16] She accordingly recommended that the case be referred to the Children's Court, on the understanding that in substance the requirements of the Child Care Act had been fully complied with. There were three social workers' reports already before this Court, and it was neither necessary nor in Baby R's best interests that the application for adoption be started from the beginning again. The Children's Court should

[7] The report, filed seven court days before the hearing, was the product of interviews with various stakeholders, including senior officials in the Department of Social Development.

therefore decide the matter on the papers to be placed before it so as to secure Baby R's best interests without delay.

[17] Shortly after the hearing commenced the Chief Justice enquired from the applicants and the Department whether in the light of the curatrix's report there was a possibility of their reaching an agreement on how the matters should be resolved. The Court then adjourned and the parties later indicated that they had indeed reached agreement. As a result they asked for the following terms to be made an order of court by consent:

> "1. RW is declared to have been abandoned.
> 2. The Children's Court for the district of Johannesburg is directed to hear on an expedited basis the application for adoption of RW by the applicants, within 30 days of today's date. The Children's Court is requested in its deliberations to consider the reports of the social workers Hanekom and Jackson and the report to this Court by the curatrix ad litem, Advocate M Feinstein in relation to the requirements of section 18(1)(b) of the Child Care Act 74 of 1983.
> 3. It is recorded that given the exceptional circumstances of this case, and in the light of the evidence before this Court, the parties agree that it is in the best interests of RW to be adopted by the applicants and that the principle of subsidiarity is not a bar to the adoption.
> 4. The Department of Social Development and the amicus curiae record that they express no opposition to such adoption, and the Department undertakes to sign all documentation necessary to facilitate the adoption.
> 5. The adoption, once finalised, shall be registered by the Department.
> 6. The appointment of Advocate M Feinstein as curatrix to RW is extended to enable her to act on behalf of RW in the adoption proceedings."

The Court acceded to their request and made the agreement an order of court by consent. As this agreement did not resolve the underlying issues, the Court indicated

that judgment on those issues would be given in due course. In dealing with these issues I will also furnish reasons why the Court made the agreement an order of court.

The application for leave to appeal

[18] Two interrelated constitutional issues are raised. The first concerns the jurisdiction of the High Court to hear an application for sole custody and sole guardianship where the ultimate purpose is for the child to be adopted in another country. The second is how section 28(2) of the Constitution should be interpreted in the context of a proposed inter-country adoption.

[19] A more difficult question is whether it is in the interests of justice for leave to appeal to be granted now that the agreement between the parties has been made an order of court. In my view, although the determination of the best interests of Baby R is no longer a live issue before this Court, there are strong reasons for dealing with other issues raised in the application for leave to appeal.

[20] In the first place, the Supreme Court of Appeal divided sharply on the question whether a High Court has jurisdiction to hear an application for sole custody and sole guardianship with a view to facilitating an adoption in a foreign country. The issue could well arise again, and it is appropriate that this Court resolve the matter. Secondly, the role of the subsidiarity principle in respect of inter-country adoptions was forcefully raised in the majority judgment in the Supreme Court of Appeal, and provided the subtext for most of the questions debated in both the High Court and

Supreme Court of Appeal. It is a key concept for regulating inter-country adoption, and it is in the interests of the many children whose future will be at stake in days to come that more clarity be given on the significance of the principle for South African law.

[21] I accordingly hold that it is in the interests of justice that these issues be dealt with. Leave to appeal should therefore be granted.

[22] I will deal first with the question of the jurisdiction of the High Court to grant a sole custody and sole guardianship order as a step towards adoption in a foreign country. I will then consider the significance of the subsidiarity principle for inter-country adoption in South Africa.

The jurisdiction of the High Court

[23] Until 2000 the matter of inter-country adoption was dealt with definitively and explicitly by statute. Section 18(4)(f) of the Child Care Act stated that an adoption of a child born of any person who was a South African citizen, could only be made if the applicant, or one of the applicants, was a South African citizen resident in the Republic.[8] The effect of this provision was that no court would be permitted to facilitate the adoption of a South African child by a person who was not a South

[8] The only exceptions allowed were an application made by a married person whose spouse was the child's biological parent and an application made by an applicant who possessed the necessary residential qualifications to obtain a certificate of naturalisation and had applied for such a certificate.

African citizen. Then in *Fitzpatrick*[9] this Court declared the provision to be unconstitutional.

[24] Dealing with the question of whether the declaration of invalidity should be suspended to allow Parliament time to remedy the defect, Goldstone J stated that Children's Courts were the sole authority with power to grant orders of adoption. The Children's Courts would oversee the well-being of children and examine the qualifications of applicants for adoption. In his view the Child Care Act established a coherent policy of child and family welfare, which, if conscientiously applied, guarded against the dangers inherent in inter-country adoption. In these circumstances no suspension of the order of invalidity was necessary.[10]

[25] If in the present matter the Children's Court was available to handle the proposed adoption of Baby R, why did the applicants not go there directly? The answer lies in the fact that they felt that instructions issued by the Department would block them as citizens of the United States of America from adopting Baby R, independently of what her best interests might be. In particular, they were advised

[9] *Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 (3) SA 422 (CC); 2000 (7) BCLR 713 (CC). In that case British citizens permanently resident in South Africa, who expected to be transferred to the United States of America, wished to adopt a South African-born child, Baby K. To make this possible they applied to the Cape High Court for an order declaring section 18(4)(f) of the Child Care Act constitutionally invalid. The High Court granted the order, but suspended it for two years to allow Parliament to correct the defect. The order of invalidity was then referred to this Court for confirmation, in terms of sections 167(5) and 172(2)(a) of the Constitution. Writing for a unanimous Court, Goldstone J held that although the substance of the "best interests" principle had not been given exhaustive content in South African, foreign or international jurisprudence, it was necessary that the standard be flexible because individual circumstances determined which factors ensured the best interests of a particular child. Since in certain circumstances the best interests of a South African child could well be served by granting an order of adoption in favour of non-nationals, the provision was unconstitutional. He therefore confirmed the order of invalidity.

[10] The declaration of invalidity accordingly had immediate effect, and, following the normal procedure for adoption in the Children's Court, within a month Baby K and the Fitzpatricks became the first non-nationals to benefit.

that the subsidiarity principle would be applied by the Children's Court in such a way that they could not become adoptive parents even if the facts showed that it was in Baby R's best interests to go to the United States with them as their adopted child.[11]

[26] The applicants explained that their recourse to the High Court for a sole custody and sole guardianship order was not a disguised attempt to by-pass the Children's Court, but an openly-declared effort to secure the adoption by means of the only judicial mechanism open to them. They asserted that their experienced professional advisors had made numerous and varied attempts to communicate constructively with the Department, and responses from both officials in the Department and Commissioners of Child Welfare had confirmed that in practice the Children's Court route would be a cul de sac for them.

[27] Only in documents filed in this Court shortly before the hearing did it become clear that much of what had been conveyed to the applicants' attorneys was an inaccurate reflection of the true content and status of the departmental policy.[12] The Director-General acknowledged that the Department had no right to "veto" an inter-country adoption application. Nor was a letter of no objection from the Department a jurisdictional requirement before a Children's Court could grant the order

[11] In her affidavit the applicants' attorney stated that during the course of the litigation in the High Court she contacted the Johannesburg Commissioner of Child Welfare and was informed that the Johannesburg Children's Court had a policy not to allow adoptions to citizens of the United States unless the interim Central Authority authorised it to do so. This was confirmed by a senior official in the Department designated to act as interim Central Authority, who indicated that since no working agreement between South Africa and the United States existed, it was not possible for citizens of the United States to adopt a South African child.

[12] Not only the applicants' attorneys, but also academic commentary has interpreted the departmental policy as barring inter-country adoptions to States with which no working agreement has been established. See Louw "Intercountry Adoptions in South Africa" (2006) *De Jure* 503 at 511.

concerned.[13] The Department is at present limited to exercising an advisory and monitoring role. The Director-General added that the Department did not have a policy prohibiting inter-country adoptions by United States nationals, and that to the extent that such a perception prevailed amongst adoption practitioners and departmental officials, it was unfortunate.

[28] These facts were regrettably not made known by the Department to the litigants or the High Court, nor were they later furnished to the Supreme Court of Appeal. Had they been communicated earlier the case might have taken a different course. The High Court undoubtedly acted correctly when it requested that the Centre for Child Law participate as amicus. Its participation ensured that the Court would receive dependable and well-researched information and hear argument on the legal and welfare context in which the application had to be considered. Yet, valuable though the participation by the Centre proved to be, on its own it was insufficient.[14] While the Centre for Child Law was able to produce extremely helpful materials on departmental policy, there were limits to the degree to which it could act as a surrogate for the Department. In my view, then, the High Court should have invited the Department to intervene directly and clarify its position in relation to inter-country adoption.

[13] This, he states, will only be the case in terms of the Children's Act once it comes into force. He points out that when that happens section 261(5)(e) will provide that the Children's Court must be satisfied that the Central Authority has consented to the specific inter-country adoption before granting the order.

[14] It did not make the appointment of a curator ad litem redundant, as the High Court felt it would. A curator should have been appointed to represent the interests of Baby R. An independent curator would have had a degree of access to the parties and the child that the amicus could not have had. The curator's task, moreover, would have been to investigate and advise on the specific interests of the child, and not simply or even primarily to deal generally with the processes and principles involved.

[29] With or without the necessary information, the High Court was correct in holding that the appropriate route for the proposed inter-country adoption was to bring proceedings for adoption in the Children's Court and not to pursue a sole custody and sole guardianship order in the High Court. On the facts of this case the decision of the High Court to decline the application for sole custody and sole guardianship cannot be faulted. If after applying to the Children's Court, the applicants were later to feel that departmental policy as understood and applied by the presiding officer at the Children's Court had resulted in a violation of Baby R's best interests as protected by section 28(2) of the Constitution, their remedy would have been to take the matter on review to the High Court. In this way the departmental policy could have been challenged rather than avoided. In the event, forbidding though the prospects of a protracted legal battle might have been, the result could not have been more arduous than the forensic journey that actually was to follow.

[30] By the time the matter finally came to be dealt with in the Supreme Court of Appeal the situation had changed in one important respect.[15] Baby R had by then passed her second birthday, and had become deeply embedded in her foster family. A factor favouring her adoption by the applicants had become stronger. In matters of this nature the interests of minor children will always be paramount. To this extent

[15] The chronology of the matter has been as follows. On 11 November 2004 Baby R was born, three days thereafter she was found abandoned and another two days after that the Children's Court ordered her placement in foster care with the first and second respondents. On 14 October 2005 the application in the High Court for the sole custody and sole guardianship order was brought, and judgment was handed down on 21 April 2006. On 9 May 2007 the Supreme Court of Appeal heard the matter and delivered judgment on 1 June 2007. The application for leave to appeal to this Court was brought on 22 June 2007. On 18 September 2007 the matter was heard, and the consent order was made the next day.

the approach of the minority in the Supreme Court of Appeal was correct in its insistence that Baby R's best interests should not be mechanically sacrificed on the altar of jurisdictional formalism.

[31] In its capacity as upper guardian of all minor children, the High Court had not been dispossessed of its jurisdiction to make such an order, even if the ultimate objective was adoption in the United States of America. The Child Care Act should not be interpreted as creating by implication an inflexible jurisdictional bar to a High Court granting sole custody and sole guardianship orders to foreigners desirous of effecting an adoption in a foreign jurisdiction.[16]

[32] Yet, this was not one of those exceptional cases where it could be said that to follow the Children's Court route would not have been in the child's best interests. Thus the majority of the Supreme Court of Appeal were right in deciding that the granting of a sole custody and sole guardianship order, either by the High Court or by itself, would not have been the appropriate judicial response.

[33] In the present matter it was clearly in Baby R's best interests that the process pre-figured in *Fitzpatrick* for inter-country adoption be followed. Referring the matter to the Children's Court would have ensured that there would be safeguards and

[16] Nor is this possibility excluded by the Hague Convention (see below paras 44-51), which in fact provides little guidance on this issue. It leaves it to national legislators to decide on the identity or nature of the forum or institution tasked with approving the adoption, hence it may be a higher or lower court or even an administrative body. The Convention similarly does not express itself on whether the adoption should be finalised in either the sending or the receiving State. See Duncan "The Hague Convention on the Protection of Children and Co-Operation in Respect of Intercountry Adoption 1993: Some Issues of Special Relevance to Sending Countries" in Jaffe (ed) *Intercountry Adoptions: Laws and Perspectives of "Sending" Countries* (Martinus Nijhoff Publishers, Dordrecht 1995) at 222-3.

appropriate procedures to protect her, something that a sole custody and sole guardianship order could not achieve. Furthermore, the presiding officer at the Children's Court would in all probability be well-positioned to apply the applicable law pertaining to the rights of the child.[17] The High Court could not have provided a similar legal infrastructure, nor could it have guaranteed that the adoption order in the United States of America would have been sought and granted.

[34] I conclude therefore that from start to finish the forum most conducive to protecting the best interests of the child had been the Children's Court. Although the jurisdiction of the High Court to hear the application for sole custody and sole guardianship had not been ousted as a matter of law, this was not one of those very exceptional cases where by-passing the Children's Court procedure could have been justified. It follows that the question of the best interests of Baby R in relation to adoption was not one to be considered by the High Court, nor at a later stage by the Supreme Court of Appeal, but a matter to be evaluated by the Children's Court. The question was not strictly one of the High Court's jurisdiction, but of how its jurisdiction should have been exercised.

[35] I now consider whether the majority in the Supreme Court of Appeal was right in holding that the principle of subsidiarity without more barred the granting of an adoption order in favour of the applicant.

[17] Under section 7(2) of the Child Care Act the Minister of Justice and Constitutional Development may appoint Children's Court assistants to support that court in performing its functions. Under section 7(3) the Children's Court may designate any competent officer in the Public Service to act as a Children's Court assistant. Under section 42(3) of the Children's Act the Minister may appoint a Magistrate or an additional Magistrate as a dedicated presiding officer of the Children's Court.

The principle of subsidiarity[18]

[36] A direct consequence of the decision in *Fitzpatrick* was that while foreigners were not barred from adopting South African children, no clear statutory regime existed to deal with the many specific problems inherent in inter-country adoption. Thus, although the Children's Court procedures were designed to ensure proper enquiries into the suitability of all potential adoptive parents, nationals and non-nationals alike, the only guidance as far as regulating inter-country adoption was concerned came from section 40 of the Child Care Act, which required that regard be had to achieving a religious and cultural match between the child and the adoptive parents. Because of the paucity of statutory guidance, it therefore fell largely to international law, and more specifically to the principle of subsidiarity, to fill the lacuna.

[37] The subsidiarity principle in relation to inter-country adoption was first articulated internationally in article 17 of the United Nations Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special

[18] As L'Heureux-Dubé pointed out in *Canada Ltée (Spraytech, Société d'arrosage) and Another v Town of Hudson and Others* [2001] 2 SCR 241 at 249, the principle of subsidiarity is used in constitutional law generally to denote the notion that "law-making and implementation are often best achieved at a level of government that is not only effective, but also closest to the citizens affected". In the context of children's rights, however, it has a specialised meaning. Unfortunately for our purposes very little guidance on the topic exists in the form of foreign and international jurisprudence. We were not referred to any case law directly in point. See, however, *Pini and Others v Romania* (2005) 40 EHRR 13 at para O-IV9 and *J (AL) v M (SJ); ALJ v SJM and Others* (1994) 98 BCLR (2d) 237 at paras 82-104 where respectively the European Court of Human Rights and the British Columbian Supreme Court marginally touched upon this principle.

Reference to Foster Placement and Adoption Nationally and Internationally.[19] It reads:

> "If a child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the country of origin, intercountry adoption may be considered as an alternative means of providing the child with a family."

[38] The issue which dominated the litigation in this matter was how to interpret and apply this principle to Baby R's situation. In *Fitzpatrick* Goldstone J pointed out that the principle required that inter-country adoption should be considered strictly as an alternative to the placement of a child with adoptive parents who reside in the child's country of birth. He emphasised that regardless of the fact that it was not expressly provided for in our law, the subsidiarity principle had to be respected. It was enshrined in article 21(b) of the United Nations Convention on the Rights of the Child (the CRC),[20] which, according to section 39(1)(b) of the Constitution had to be considered when interpreting the Bill of Rights.

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[19] Adopted by the General Assembly on 3 December 1986.

[20] The CRC (ratified by South Africa on 16 July 1995) and the African Charter on the Rights and Welfare of the Child (acceded to by South Africa on 7 January 2000) require States parties to give effect to the principles of the best interests of the child, subsidiarity and non-discrimination, and to establish safeguards to prevent child trafficking and comity between States. They also contain provisions recognising and protecting a child's right to a name, nationality and identity. Article 21(b) of the CRC provides:

> "States parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall recognise that inter-country adoption may be considered as an alternative means of a child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin".

Article 24(b) of the African Charter states:

> "States Parties which recognize the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall recognize that inter-country adoption in those States who have ratified or adhered to the International Convention on the Rights of the Child or this Charter, may, *as the last resort*, be considered as an alternative means of a child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin". (Emphasis added.)

[39] It is important to note that in *Fitzpatrick* the question of subsidiarity was raised only in relation to remedy. In the present matter, however, it has been central. It is the mediating principle for adoption across political and cultural borders which, as Volkman has vividly put it, is seen as being simultaneously "an act of love, an excruciating rupture and a generous incorporation, an appropriation of valued resources and a constitution of personal ties."[21] The application of the subsidiarity principle to this emotion-laden subject has fluctuated with changing attitudes towards inter-country adoption over the decades.

The history of inter-country adoption

[40] Inter-country adoptions were initially spurred on by the socio-economic and welfare decrepitude caused by World War II.[22] Many countries were left with war orphans for whom they did not have the resources to provide alternative care within the country. Witnessing this tragedy, individuals from unaffected and lesser affected countries who wished to alleviate the plight of these children did so through adoption.

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[21] Volkman "Introduction: New Geographies of Kinship" in Volkman (ed) *Cultures of Transnational Adoption* (2005) at 4 quoted by McKinney "International Adoption and the Hague Convention: Does Implementation of the Convention Protect the Best Interests of Children?" (2007) 6 *Whittier Journal of Child and Family Advocacy* 361 at 366. See too Saclier "Children and Adoption: Which Rights and Whose?" in UNICEF "Intercountry Adoption" 4 *Innocenti Digest* at 12:

> "At present, speaking of children's rights when talking about inter-country adoption forces us to confront a highly uncomfortable situation. In the name of the child, everyone raises his or her banner and simplifies the issues to the extreme, whereas, in this field, the rights of the children concerned are not always so clear-cut and obvious. The passions the topic unleashes, in both countries of origin and receiving countries, distort information, confuse people's thinking and make action difficult and risky. Often there is a tendency to consider only one aspect of the problem, filtered through the prism of the side of the planet on which one lives. Everyone defends his or her personal convictions or interests, forgetting that at stake are the lives of human beings, and young and particularly vulnerable ones at that."

[22] Liu "International Adoptions: An Overview" (1994) 8 *Temple International and Comparative Law Journal* 187 at 191; McKinney above n 21 at 371.

[41] However, from its origins as a sequel to international political turmoil, it mutated into a measure aimed at alleviating the plight of couples unable to conceive.[23] Thus, already during the 1980s adoption was regarded internationally as serving the interests of prospective adoptive parents rather than those of the child in question, as it is better viewed today.[24] Combined with the effects of contraception, legalised abortion, lowering birth rates and improved social welfare benefits for single mothers in developed countries, to which can be added the effects of armed conflict and natural disasters in the developing world, this adult-centred approach led to an increased interest in inter-country adoptions.[25]

[42] Much of the initial humanitarian optimism over inter-country adoption was shed, however, as reports of child trafficking, "child markets" and "baby farms" spawned over the last four decades.[26] As a result some of the so-called "sending States"[27] either prohibited or strictly regulated such adoptions.[28] Other countries[29]

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[23] UNICEF above n 21 at 2. Already by mid-1990 the number of children adopted from developing States by American, Australian, Canadian and European nationals has been estimated at 20 000 per year, and this number has grown consistently ever since. Wardle "Parentlessness: Adoption Problems, Paradigms, Policies, and Parameters" (2005) 4 *Whittier Journal of Child and Family Advocacy* 323 at 343.

[24] Van Bueren *The International Law on the Rights of the Child* (Martinus Nijhoff Publishers, London 1998) at 95.

[25] Id at 96; UNICEF above n 21 at 2-3; Jaffe "Cooperative Global Adoptions: A New East-West Partnership" in Jaffe (ed) *Intercountry Adoptions: Laws and Perspectives of "Sending" Countries* (Martinus Nijhoff Publishers, Dordrecht 1995) at 1-2.

[26] Van Bueren above n 24 at 96.

[27] These are States from which children are adopted by foreigners, typically developing countries. The Hague Convention refers to these countries as "States of origin".

[28] See Marx "Whose Best Interests Does it Really Serve? A Critical Examination of Romania's Recent Self-Serving International Adoption Policies" (2007) 21 *Emory International Law Review* 373 at 410 citing Cambodia, Thailand and Ukraine as examples. See also Jaffe above n 25 at 8 stating:

> "Some [of the sending countries] do not relish foreign adoptions as an alternative [to parental or institutional care], and are fearful of exploitation and illegal traffic in their native children.

which experienced exceptional exigencies placed moratoria on inter-country adoptions pending an overhaul of national legislation in order to align it with international standards,[30] while yet other countries did nothing at all. The global result was a disarray of national policies in sending countries, described by Van Bueren as "a confusion which often operates against the best interests of the child."[31]

[43] For many years the broad stance of developing countries was to discourage inter-country adoptions, regarding them as "exporting" their children to developed countries, as a blemish on a country's perceived ability to care for its citizens, and as exploitation of developing countries by developed ones.[32] A major shift came about, however, as a result of the adoption and application of the Hague Convention. It is now largely accepted that most countries from both the receiving and sending sides of the world earnestly seek only to provide good alternative family care for ill-fated children.[33] The standardisation and universalisation of criteria and controls has

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> These countries have very bad memories of exploitation by foreign, western countries, including selling of children, and they are rightly concerned about ending these practices. Yet their concern for abandoned and homeless children had enabled them, over the past decades, to work with foreign, professional adoption agencies which operate approved branches in their (foreign) countries in order thus to find acceptable adoptive families abroad, and adhere to the laws of both the local and foreign countries."

[29] For example Albania, Bolivia, El Salvador, Guatemala, Paraguay, Peru and Romania. See McKinney above n 21 at 394; UNICEF above n 21 at 4.

[30] As the Director-General points out in his founding affidavit, a most recent example is the moratorium on inter-country adoptions by South East Asian countries in the aftermath of the Asian tsunami in 2004. Despite the acute need that the tsunami had presented, affected countries took the view that the risk of abuse was so great that they had to halt all inter-country adoptions until they could be sure that the best interests of the children would be secured in such adoption processes.

[31] Van Bueren above n 24 at 96.

[32] Freundlich "Window to the World: Families Without Borders - I" (1999) *UN Chronicle* vol 36 no 2 at 88-9 read in Sargent "Suspended Animation: The Implementation of The Hague Convention on Intercountry Adoption in the United States and Romania" (2003-2004) 10 *Texas Wesleyan Law Review* 351 at 361.

[33] Jaffe above n 25 at 8. This is in line with the current understanding of adoption as a means "providing a child with a family, not a family with a child". See for example *Fretté v France* (2004) 38 EHRR 21 at para 42.

produced a situation where embracing the institution of inter-country adoption is increasingly less seen as a sign of weakness or the acceptance of "international charity", or even a dereliction of a social welfare duty resting on a State. The emphasis has shifted to acknowledging that onerous duties are imposed on a sending State to apply diligently its discretion on whether an inter-country adoption would serve the best interests of the particular child involved.[34]

The Hague Convention

[44] The history of inter-country adoption made it clear that a specialist convention was needed to regulate such adoptions specifically. Propelled by the demand for inter-country adoptions which had been proceeding on a steady upward trajectory since the 1970s,[35] the international community filled the hiatus by concluding the Hague Convention. Its inception on 1 May 1995 heralded a nascent global approach to inter-country adoption, acknowledging that—

> "the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding . . . [and that] each State should take, as a matter of priority, appropriate measures to enable the child to remain in the care of his or her family of origin . . . [and recognise] the necessity to take measures to ensure that intercountry

[34] It has been contended that the position the subsidiarity principle assumes is an in itself subsidiary one — one subservient to the best interests of the child. See Nicholson "The Hague Convention on the Protection of Children and Co-operation in Respect of Inter-country Adoption 1993" in Davel (ed) *Introduction to Child Law in South Africa* (Juta & Co Ltd, Lansdowne 2000) at 248.

[35] As often happens with the creation of multi-lateral treaties, the very process of elaboration of the Convention was to foster international goodwill through widespread participation and give-and-take of views. Building on the experience gained during the 1970s and 1980s, more than 60 States representing both sending and receiving countries and approximately 10 international NGOs co-operated extensively to establish a specialist convention to regulate inter-country adoptions comprehensively, if not exhaustively. UNICEF above n 21 at 2 and 5.

> adoptions are made in the best interests of the child and with respect for his or her fundamental rights, and to prevent the abduction, the sale of, or traffic in children".[36]

[45] In line with this recognition the Convention addressed various objectives. Firstly, it sought to create legally binding standards in inter-country adoption. Secondly, it introduced a system of supervision that would ensure the observation of these legal standards, including prevention of adoptions that were not in the best interests of the child, and that would protect children from adoptions that occurred through duress, fraud or for monetary reward. Thirdly, it established communication channels between authorities in sending and receiving countries. Fourthly, it furthered co-operation between sending and receiving countries to promote confidence between those countries.[37]

[46] What is clear is that the Convention seeks to regulate inter-country adoptions, not to facilitate them.[38] It sets out detailed legal, administrative and procedural provisions[39] to ensure that its objects are fulfilled.[40]

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[36] Preamble to the Hague Convention.

[37] Parra-Aranguren, *Explanatory Report on the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption* (1994) http://hcch.e-vision.nl/upload/expl33e.pdf, accessed on 1 December 2007, at para 7.

[38] See Nicholson above n 34 at 248; UNICEF above n 21 at 5.

[39] For example, it requires that a Contracting State designate a Central Authority tasked with fulfilling the duties imposed by the Convention, and prescribes at what moment a child becomes adoptable and who is eligible to adopt. It establishes a regime of mutual aid between States ensuring that an adoption only takes place through the co-operation of the receiving State, whose role it is to ensure that certain requirements have been met by the prospective adoptive parents, and obliges receiving States to afford a minimum standard of local involvement by following up on the well-being of the child after the adoption. See articles 4, 5, 6, 14, 15, 17 and 20. Provision is also made subject to safeguards for the accreditation by Contracting States of non-governmental organisations to assist in achieving the objects of the Convention. See articles 8-11. Article 6 establishes Central Authorities, whose duties, from a sending-country perspective, includes: establishing the adoptability of a child; matching the child with the adoptive parents; deciding whether to place the child with the prospective adoptive parents; procuring an adoption in the country of origin, if one is to be procured before transferring the child to the receiving country; transferring the child to the receiving State; and, if it did not procure an adoption in the country of origin, recognising one procured in the receiving country. Article 7 further provides that it is the

[47] Rigorous procedural mechanisms are put in place to reduce possible abuse. In these circumstances the framers appear to have felt it would be permissible to reduce the relatively autonomous effect of the subsidiarity principle as expressed in the CRC and the African Charter on the Rights and Welfare of the Child (the African Charter),[41] and bring it into closer alignment with the best interests of the child principle.[42] Thus, using language notably less peremptory, article 4(b) of the Convention provides:

> "An adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin have determined, *after possibilities for placement of the child within the State of origin have been given due consideration,* that an inter-country adoption is in the child's best interests". (Emphasis added.)

[48] The Convention seems to accept the notion that "[e]nsuring that a child grows up in a loving, permanent home is the ultimate form of care a country can bestow upon a child",[43] even if that result is achieved through an inter-country adoption. It

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responsibility of Central Authorities of States parties to see to the application of the Convention and ensure smooth co-operation between sending and receiving States. See further Duncan above n 16 at 227.

[40] These extensive regulations impart onerous obligations on sending States, which come at a time when the number of requests from receiving States is relatively high. Accordingly, successful implementation of the now pervasive child-centred approach to inter-country adoption is a high aspiration, especially since seeking suitable parents for adoptable children requires a level of regulation which numerous States are still striving to achieve.

[41] See above n 20.

[42] See Bhabha "Moving Babies: Globalization, Markets, and Transnational Adoption" (2004) 28 *Fletcher Forum of World Affairs* 181 at 192-3. See also Wallace "International adoption: The most logical solution to the disparity between the numbers of orphaned and abandoned children in some countries and families and individuals wishing to adopt in others?" (2003) 20 *Arizona Journal of International and Comparative Law* 689 at 702.

[43] Marx above n 28 at 379.

follows that children's need for a permanent home and family can in certain circumstances be greater than their need to remain in the country of their birth.[44]

[49] However, the intricacies consequent upon an inter-country adoption must serve as confirmation that the principle of subsidiarity should be adhered to as a core factor governing inter-country adoptions.[45] This is not to say that the principle of subsidiarity is the ultimate governing factor in inter-country adoptions. As *Fitzpatrick* emphasised,[46] our Constitution requires us in all cases, including inter-country adoption, to ensure that the best interests of the child will be paramount.[47] Indeed, the

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[44] Id at 403; Wallace above n 42 at 702. In similar vein, Duncan above n 16 at 221-2 states:

> "The principle of subsidiarity, while of central importance, should not be applied in an inflexible manner. There will sometimes occur cases where, in the interests of the child, a placement with parents from abroad may be more appropriate than with prospective adopters in the country where the child is resident, as for example where the child's roots are in fact in that foreign country. Also it would be unfortunate if the principle were operated in a way which led to excessive delay in the placement of a child, as for example by the adoption of rigid administrative practices such as the imposition of quotas for foreign adoptions on placing agencies. It is important that the idea of subsidiarity be always interpreted and applied in the context of the 'best interests' principle." (Footnote omitted.)

The International Social Service "Intercountry Adoption: The Principle of Subsidiarity" *Fact sheet No 36* (April, 2007) has pointed out that every matter—

> "should be studied individually, so as to devise a permanency plan, in line with the principle of the child's best interests. Only a careful examination of each case, carried out preferably by a group of professionals with varied training . . . should make it possible to take the appropriate course of action."

Furthermore, sociological studies have shown that inter-country adoptions are largely successful and that children who are adopted to foreign countries "remain proud of their ethnic, racial and national origins, happy in their adoptive families and countries — and proud of themselves" and that they adjust well to their new circumstances. Liu above n 22 at 193 fn 60 referring to a study conducted by Prof Rita James Simon. See also Strong "Children's Rights in Intercountry Adoption: Towards a New Goal" (1995) 13 *Boston University International Law Journal* 163 at 172.

[45] The intricacies further go to show that it is unrealistically simplistic to regard the interests of a child as being served better by being adopted by nationals of a materially rich country. See UNICEF above n 21 at 6.

[46] *Fitzpatrick* above n 9 at para 19. For the importance generally of the paramountcy principle in our law, see *M v The State* [2007] ZACC 18, 26 September 2007, as yet unreported.

[47] Article 3 of the CRC reads "the best interests of the child shall be *a* primary consideration" (emphasis added) and article 4 of the African Charter provides that "the best interests of the child shall be the *primary* consideration" (emphasis added). However, both these conventions (the CRC in article 21 and the African Charter in article 24) provide that in the case of adoption the best interests of the child shall be "the" paramount consideration. See above n 20. Clearly a higher status is attributed to the best interests principle in the sphere of adoption than in relation to other matters concerning the child.

preamble to the Hague Convention suggests that there will be circumstances in which an inter-country adoption will be preferable for a child over institutional care in the country of birth.[48]

[50] Determining the best interests of the child cannot be circumscribed by mechanical legal formulae or through rigid hierarchical rankings of care options. As was stated in *M*:

> "A truly principled child-centred approach requires a close and individualised examination of the precise real-life situation of the particular child involved. To apply a pre-determined formula for the sake of certainty, irrespective of the circumstances, would in fact be contrary to the best interests of the child concerned."[49]

In practice this requires that a contextualised case-by-case enquiry be conducted by child protection practitioners and judicial officers versed in the principles involved in order to find the solution best adjusted to the child, taking into account his or her individual emotional wants, and the perils innate to each potential solution.[50]

[51] On a pragmatic level, the successful application of the principle will depend heavily on the ability of placing agencies in the country of origin to investigate adequately the viability of local placement for the child in question.[51] It is one of the

[48] Duncan above n 16 at 221. Duncan adds, however, that it is for the State of origin to determine what amounts to satisfactory prospects of placement in that country, and what form due consideration of alternative placement options must take.

[49] *M* above n 46 at para 24.

[50] See International Social Service above n 44.

[51] Duncan above n 16 at 222.

basic premises of the Hague Convention that adoption is not a private affair but a State responsibility requiring the involvement of government agencies of both sending and receiving countries.[52] Accordingly, collaboration between the government and child welfare agencies in the country of origin is conducive to success in inter-country adoptions.[53] Conversely, flouting the established regulatory institutions is to be discouraged. The debate has accordingly shifted away from implacable abstract positions in favour or against inter-country adoption. It now focuses more on how best to put dependable institutions in place to ensure that:

- High priority is given to finding suitable local placement wherever possible;
- where, however, it would be in the best interests of a particular child to be adopted by non-nationals, a properly-regulated inter-country adoption will be permissible; and
- sending and receiving States co-operate through appropriate public machinery to prevent abuses and to ensure adequate follow-up when inter-country adoptions take place.

Inter-country adoption in South Africa

[52] UNICEF above n 21 at 5. Certainly the mere fact that some parts of the world are materially richer than others should not be seen as in itself justifying the transport of children to those countries. At the same time one has to take account of the fact that war, famine, natural disasters and endemic diseases frequently place unbearable burdens on countries with scant resources. Each case has to be looked at in the light of its own particular circumstances. To achieve a proper balance of all the considerations involved requires a maturity of vision on the part of all of those involved, as well as the creation of specialised regulatory machinery. Absolutist positions and mutual recriminations can only undermine the very principle at stake, namely, ensuring that the best interests of the child are respected.

[53] Jaffe above n 25 at 9.

[52] Since *Fitzpatrick* the Department has made significant progress towards putting in place all the necessary structures for inter-country adoptions. It has sought simultaneously to ensure that the best interests of all children are safeguarded and that the State adheres to its various obligations in terms of international law.[54]

[53] After South Africa's accession to the Hague Convention,[55] Chapter 16 of the Children's Act was passed to give effect to the Convention.[56] The Act has been signed by the President, but has not yet entered into force in its entirety.[57] In the interregnum, the Child Care Act continues to govern both national and inter-country adoptions. In order to prepare the way for bringing the Children's Act fully into force, the Department has accordingly concluded working agreements with numerous

[54] The Department indicated in its founding affidavit that following on the adoption of Baby K, a total of 1 362 further inter-country adoptions have taken place to date, 54 of which were to the United States of America, which is the country responsible for receiving by far the largest number of children through inter-country adoption. The total of 1 362 comprise 28 inter-country adoptions in the year 2000; 73 in 2001; 159 in 2002; 210 in 2003; 239 in 2004; 248 in 2005; 256 in 2006; and 150 in 2007 up to 16 August 2007. Of these adoptions 292 were to the Netherlands; 274 to Sweden; 208 to Germany; 159 to Denmark; 125 to Finland; 65 to Belgium; 54 to the United States of America; 50 to Austria; 43 to Norway; 42 to Luxembourg; and 23 to Canada. A small number of inter-country adoptions have also been concluded with a range of other countries including Botswana, Kenya, Mauritius, Namibia, Nigeria, Tanzania, the United Kingdom and Zimbabwe.

[55] Effectively from 1 December 2003.

[56] The requirement that each country designate a Central Authority to deal with inter-country adoptions is fundamental to the Hague Convention regime. Because the relevant Chapter of the Children's Act has yet to come into force, no Central Authority has been established for South Africa. Nevertheless, pursuant to the pressure placed on South Africa by various foreign countries desirous of fostering a partnership, the Department set up an interim Central Authority in 2003. This was to counter serious concerns over the adequacy of safeguards protecting the best interests of the children involved, and of compliance with the principle of subsidiarity.

[57] Section 315 of the Children's Act provides for a progressive implementation of the Act, with different provisions of the Act coming into force on a date indicated by the President by proclamation in the Government Gazette. By Proclamation 13 in Government Gazette 30030 on 29 June 2007 the President established 1 July 2007 as the date on which sections 1-11, 13-21, 27, 30, 31, 35-40, 130-134, 305(1)(b), 305(1)(c), 305(3)-(7), 307-311, 313-315, and the second, third, fifth, seventh and ninth items of Schedule 4 to the Act become operative. The remainder of the Act, including the parts relevant to adoption and sole custody and sole guardianship orders, has not yet entered into operation. We were told from the bar that it was expected to do so during 2008.

countries and established an interim Central Authority.[58] Since Central Authorities are essential to the operation of inter-country adoption under the Hague Convention regime, it is clear that the absence of a duly incorporated Central Authority in South Africa leaves a major gap.[59] The embryonic interim Central Authority established by the Director-General does not have the legal or structural capacity to fill the void effectively, nor can the current working agreements established between South Africa and some other countries completely fill the lacuna.

The treatment of subsidiarity by the Supreme Court of Appeal

[54] It is against the above background that I now turn to answer the question raised by the assertion in the majority judgment in the Supreme Court of Appeal that the principle of subsidiarity acted as an additional insurmountable bar to the granting by the High Court of an order of sole custody and sole guardianship in favour of the applicants. In my view, the proposition was stated in terms that were too bald. Like

[58] In addition, the Department has assisted local adoption organisations to conclude working agreements for inter-country adoptions with organisations in various countries. Working agreements have thus far been concluded with organisations in Belgium, Canada, Denmark, Finland, Germany, Luxembourg, the Netherlands, Norway, Sweden, Botswana and India. All of these countries, except Botswana, are States parties to the Hague Convention. With the exception of India, in respect of all of these countries, South Africa is the sending country. Inter-country adoptions have also been concluded with other countries that are not yet party to the Hague Convention, for example Namibia and the United States of America.

[59] Although in papers before this Court the Department expressly disavowed having ever placed a moratorium on inter-country adoptions to the United States of America, it pointed out that it does not generally encourage inter-country adoptions to that country, because it is not a party to the Hague Convention and there is no working agreement in place between the United States and South Africa. The United States signed the Hague Convention on 31 March 1994 and passed implementing legislation, the Intercountry Adoption Act, which was signed into law on 6 October 2000. However, the final rules governing the accreditation of adoption agencies were only issued on 15 February 2006, hence the Act was expected to come into force during this year. The Department claims that these factors make it more difficult to ensure safeguards against the risks that inter-country adoptions hold. The Department's attitude toward inter-country adoptions to the United States is that such adoptions can in fact take place via the ordinary mechanism of the Children's Court, but that they should only take place with departmental oversight and only in exceptional circumstances. The examples are where the child has special needs, where the child is particularly hard to place within South Africa, where there is a long-standing pre-existing relationship between the adoptive parents and the child, or where the child is related to the adoptive parents.

other questions it was a matter to be decided in all the circumstances by the Children's Court.

[55] Child law is an area that abhors maximalist legal propositions that preclude or diminish the possibilities of looking at and evaluating the specific circumstances of the case. The starting-off point and overall guiding principle must always be that there are powerful considerations favouring adopted children growing up in the country and community of their birth. At the same time the subsidiarity principle itself must be seen as subsidiary to the paramountcy principle. This means that each child must be looked at as an individual, not as an abstraction. It also means that unduly rigid adherence to technical matters such as who bears the onus of proof, should play a relatively diminished role; the courts are essentially guarding the best interests of a child, not simply settling a dispute between litigants. In this context a particularly important role will be given to the involvement of public mechanisms created by the law to deal with inter-country adoption.[60]

[56] In light of the above, I accordingly hold that the Supreme Court of Appeal was basically correct in deciding that even at that late stage the matter should have been pursued in the Children's Court. Yet it should not simply have dismissed the appeal, leaving Baby R in a legal limbo. Rather, in taking account of the new situation created by her being much older, the Supreme Court of Appeal should pro-actively itself have made an order, similar to the one issued in this Court, referring the matter

[60] This is an area where religious and other civil society bodies have traditionally been active, and their contribution can also be invaluable.

to the Children's Court for speedy resolution. This would have enabled the question of subsidiarity to be looked at not in an isolated way by the Supreme Court of Appeal, but by the Children's Court in the overall context of determining where the best interests of Baby R lay.[61]

[57] Before concluding this judgment it is necessary to give the reasons which led this Court to make the agreement between the parties an order of court.

Reasons for making the agreement between the parties an order of court

[58] The fact that the applicants, the Department and the curatrix had reached accord on how the interests of Baby R should best be served, could not in itself be decisive as to whether the agreement should be made an order of court. To accede to the request of the protagonists would clearly have been in keeping with growing recognition worldwide "of 'settlement' as an approved, privileged objective of civil justice" and that "courts have come to present themselves not just as agencies offering judgment but also as sponsors of negotiated agreement".[62] Yet, as Mokgoro J pointed out in the context of confirmation proceedings in this Court:

> "An offer to settle the dispute made by one litigant to the other, even if accepted, cannot cure the ensuing legal uncertainty or dispose of the confirmation proceedings. Even if the applicants had accepted the offer it would have settled the dispute only between these litigants. The impact of the settlement would have been too limited

[61] Furthermore, the Supreme Court of Appeal should have seen to it that a curator ad litem was appointed to ensure that the specific interests of Baby R were fully protected while the broad issues of principle were being considered.

[62] Roberts and Palmer *Dispute Processes: ADR and the Primary Forms of Decision-Making* (Cambridge University Press, Cambridge 2005) at 243.

> and would not resolve the unconstitutionality of the impugned provisions and the impact that they have on the broader group of permanent residents who qualify in all other respects for social grants. An important purpose of confirmation proceedings is to ensure legal certainty. If parties were permitted to reach agreements that would remove this Court's power to hear confirmation proceedings in relation to an order of invalidity, that purpose would be defeated."[63] (Reference omitted.)

And, as Owen Fiss observed more generally, the job of the courts "is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them. This duty is not discharged when the parties settle."[64]

[59] In this respect this Court had to bear in mind that inter-country adoption has a strong public as well as a private dimension. Both the sending and the receiving States have an obligation to establish appropriate regulatory machinery to minimise the possibilities of abuse. It is not simply the risk of trafficking in children for nefarious purposes, or developing a trade in babies, that needs to be guarded against. The dignity of the sending country can be affected if it appears that it is failing to find appropriate resources to look after its children. Courts need at all times to be sensitive to these matters. Thus, while giving due weight to the fact that the parties had come to an agreement, the Court had to ensure that its terms were neither against Baby R's

[63] *Khosa and Others v Minister of Social Development and Others; Mahlaule and Others v Minister of Social Development and Others* 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) at para 35.

[64] Fiss "Against Settlement" (1984) *Yale Law Journal* 1073 at 1085.

best interests[65] nor in broad terms likely to be incompatible with the country's international obligations.

[60] It would, of course, not have been appropriate for this Court itself to have attempted to pre-judge in any way whether the applicants would be suitable adoptive parents for Baby R. This was a matter pre-eminently to be left to the Children's Court. Yet a limited but important responsibility fell to the Court, namely, to ensure that it was in Baby R's best interests to facilitate an expedited hearing in the Children's Court, while satisfying itself that there was nothing on the face of the agreement which appeared to militate against her best interests.[66]

[61] The report of the curatrix was particularly helpful in regard to establishing the ripeness of the matter for an expedited hearing.[67] On the correct basis[68] that it was Baby R's current circumstances that needed to be considered, and not her hypothetical

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[65] See *Girdwood v Girdwood* 1995 (4) SA 698 (C) at 708J-709A:

> "As upper guardian of all dependent and minor children this Court has an inalienable right and authority to establish what is in the best interests of children and to make corresponding orders to ensure that such interests are effectively served and safeguarded. No agreement between the parties can encroach on this authority."

This statement was quoted with approval in *Du Toit* above n 5 at para 36 fn 37.

[66] See *Fitzpatrick* above n 9 at para 6.

[67] Apart from the interviews with various senior officials in the Department, the report draws on direct observations of Baby R and telephone interviews with the applicants. It pointed out that the applicants had a large family comparable to Baby R's foster family; they were clearly concerned with imbuing in her the respect they themselves had for what they regarded as their African roots; and they shared the religion, language and culture of her foster parents. Three comprehensive reports prepared by experienced social workers had supported the view that they were an appropriate match for Baby R, and recommended permanent placement with them. Furthermore, they had been screened by an accredited agency in their State of residence, and the affidavit of Ms Law, a practising attorney in the State of Virginia where Baby R was to be adopted, had established that appropriate after-placement monitoring services would be carried out by a State-accredited adoption agency.

[68] *Fraser v Naude and Others* 1999 (1) SA 1 (CC); 1998 (11) BCLR 1357 (CC) at paras 8-10. See also *Pini* above n 18 at para O-IV8; *Fretté* above n 33.

position had the matter followed a different course, she pointed out that Baby R was now almost three years old and at a particularly significant stage in her emotional, cultural and ethical development, and her ability to adapt to change.[69] A speedy resolution was imperative and a considerable body of reliable information had been gathered for use by the Children's Court.

[62] We were satisfied, then, that the terms of the agreement were calculated to serve Baby R's best interests. Safeguards would be in place. The Department had indicated that it had no objection to the adoption on the ground of subsidiarity or otherwise, and would facilitate the administrative process. Finally, the curatrix, whose diligence and sensitivity had been of great assistance to the Court — and for whose assistance the Court is grateful — would continue to act on behalf of Baby R in the Children's Court proceedings. In the result, it would not be the High Court, nor the Supreme Court of Appeal, nor the Constitutional Court, but the Children's Court that would have the last word.[70]

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[69] The curatrix had produced substantive material to enable the Children's Court to deal swiftly with the matter. She had gained a very favourable impression of the applicants. Her report indicated that Baby R already spoke with a distinct American accent. The curatrix had added that the applicants had started making preparations for Baby R's arrival and had been devastated when the application in the High Court had been refused. Subsequently they had been in contact with Baby R through frequent telephone conversations. As in *Fitzpatrick*, the presence of the bond established between the applicants and Baby R weighed heavily in favour of their being considered worthy as adoptive parents. The applicants were paradoxically a closer match to her in terms of culture and religion than a local family would have been. The report by the curatrix had also established that the reliance placed by the Department on alternative permanent family placement in South Africa had been somewhat misplaced. As the amicus pointed out, however, child-care policy generally discourages any pre-adoption bonding, which could be used as a device to favour certain would-be adoptive parents, presenting child-care practitioners with a fait accompli. The circumstances in the present matter, however, were rather special.

[70] On 11 October 2007 *The Cape Times* reported the decision of the Children's Court as follows:

> "There was only one pair of dry eyes in the court when it granted the adoption of Baby R by the United States couple who had fought long and hard to make her part of their family — and they were the toddler's. . . . The 25-minute hearing on Wednesday marked the end of a two-year legal battle in which the African-American couple sought to secure guardianship of Baby R so they could adopt her in the US."

Order

[63] The following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the Supreme Court of Appeal is set aside and replaced by the consent order set out in paragraph 17 of this judgment.
4. No costs order is made.

Langa CJ, Moseneke DCJ, Madala J, Mpati AJ, Ngcobo J, Nkabinde J, Skweyiya J, Van der Westhuizen J and Yacoob J concur in the judgment of Sachs J.

For the Applicants:	Advocate JJ Gauntlett SC and Advocate A Annandale instructed by Wybrow Oliver Attorneys.
For the Amicus Curiae:	Advocate AM Skelton instructed by the Centre for Child Law.
For the Intervening Party:	Advocate S Budlender and Advocate M du Plessis instructed by The State Attorney, Pretoria.
Curatrix ad Litem:	Advocate M Feinstein.