IN THE HIGH COURT OF SOUTH AFRICA
(WITWATERSRAND LOCAL DIVISION)

CASE NO: 05/25316

In the matter between: -

DG	First Applicant
DG	Second Applicant
and	
W	First Respondent
W	Second Respondent
ROODEPOORT CHILD AND FAMILY WELFARE SOCIETY	Third Respondent

JUDGMENT

GOLDBLATT J:

The applicants in this matter seek the following orders:

> "1. That the Sole Custody and Sole Guardianship of the minor child, RJW, a girl BORN ON 11 November 2004, be and is hereby awarded to the applicants.
> 2. That RJW be declared to have been abandoned.

3. That the foster order dated 11 January 2005 and issued out of the Children's Court for the District of Roodepoort under Case Number 14/1/-78/2004 be and is hereby discharged.

4. That the Applicants be authorised to leave South Africa with the minor child with a view to adopting her in the United States of America.

5. That the Applicants pay the cost of this Application, save that in the event of any of the Respondent(s) opposing the Application, such Respondent(s) as may oppose shall jointly and severally pay the costs of this Application.

6. For such further and/or alternative relief that this Honourable Court deems fit."

When the matter initially came before me I was concerned about the unusual order being sought and by the fact that the application was basically an ex parte application and I was unable to satisfy myself that the various allegations made in the founding papers correctly set out the position in regard to inter- country adoptions from the Republic of South Africa. I accordingly requested advocate AM Skelton of the Centre for Child Law at the Faculty of Law of the University of Pretoria to act as an amicus curiae. She agreed so to do and has furnished me with heads of argument and various affidavits to which I will refer later in this judgment. The amicus carefully researched the law in relation to this matter and presented me with very careful and lucid arguments in relation to this matter. Her assistance and efforts are much appreciated and

to a large extent my decision has been greatly influenced by her report. The report of the amicus curiae was made available to the applicants' attorney and she in turn furnished me with a lengthy affidavit and counter arguments all of which I have taken into account.

The basic facts in this matter are not in dispute.

The applicants are an American couple who reside in the State of Virginia in the United States of America. They both appear to be caring and decent persons who for purely altruistic purposes wish to adopt the child RJW who was found abandoned under a tree in the veld in the Roodepoort area on the 14th of November 2004. Whilst considerable efforts have been made to find the parents of this child they have not been successful and it appears clear that the child has been abandoned.

The child is presently in the foster care of the first and second respondent who support the application brought by the applicants.

The application is further supported by evidence that the applicants are suitable persons to adopt the child and that the probabilities are that if the child is brought to America they will be able to obtain an adoption order in that country. The applicants in their founding affidavit, paragraphs 123 to 154 of the founding affidavit, set out the basis upon which the applicants submit that it would be in the best interest of the minor child for this court to grant the order sought. The paragraphs read as follows:

"123. It would be an honour for the Second Applicant and I and our children to receive R into our family. We would also consider it a privilege to maintain our ongoing relationship with the First and Second Respondents in order that R might grow up knowing of the invaluable role the foster parents played in her life.

124. In the event of this Honourable Court granting sole custody and sole guardianship of R to us, the Second Applicant and I plan to return to the United States of America with her and KEDAR as soon as possible after the granting of this application.

125. After the hearing of this Application, we will need to obtain the necessary passport for R and to arrange for additional immigration medical examinations on an urgent basis. We are thereafter obliged to attend an exit interview at the Johannesburg United States Consular offices before proceeding to the United States of America.

126. Upon our return, and in the event of R accompanying us, she will be cared for during the day by me. In addition, the Second Applicant plans to take a two-week leave period to spend time assisting me in settling R into our family's routine.

127. I am privileged to home school our children and will therefore be able to be on hand for R at all times should she need me.

128. I look forward to tutoring R too, once she is old enough to commence schooling.

129. The Second Applicant and I are privileged to enjoy an extended family support group, and both our respective families have indicated their willingness to assist us with babysitting, should the need arise.

130. We are actively involved in our church community at Metro Morning Star and enjoy the friendship of many of our fellow congregants

131. Our families, our church and our community are in support of this application.

132. We are used to the demands of a large and growing family, and our daily routine and our home's facilities will accommodate an additional child.

133. We are most excited and continue to prepare ourselves for the arrival of R. I have purchased her the clothing and toys that she will need upon her arrival.

134. The Second Applicant and I own our home, which is a 4500 square foot home on a rural four acre plot bordering on the Blue Ridge Mountains. The house itself is comprised of three levels with 5 bedrooms and 3.5 bathrooms, as well as a dining room, family room, living room, office and a large eat-in kitchen.

135. We envisage that R will share a bedroom with Malia Faith and all the necessary arrangements have already been made for her personal space.

136. Our home is located in a rural community in close proximity to schools, medical facilities, recreational facilities, shops and airport.

137. Our children are aware of, and are very excited about the prospect of R joining our household. R has been a vital part of our everyday

family discussions and prayers.

138. To this end our children have helped prepare R'S bedroom, and have personally chosen some of the clothing and toys that await her. Our children have also been telling their class mates, teachers and friends all about their new sister-to-be.

139. The Second Applicant and I have always shared the joys and responsibilities of parenthood, and we expect to continue to do so once R joins our family.

140. I respectfully submit that the Second Applicant and I are well-equipped to raise R, having successfully raised our children in a secure and happy extended family environment.

141. The Second Applicant and I plan to raise R as we have raised our own children.

142. I am 37 years of age and the Second Applicant is 40 years of age. We are both fit and well able to care for R, as we care for our own children

143. .We are financially stable and in a position to offer R opportunities that she would not have were she to continue living with the First and Second Respondents as part of BABY HAVEN.

144. There are no other adoptive families with whom R could be permanently placed.

145. Our financial ability to accommodate an adoptive child was investigated by the Adoption Agency before declaring us to be suitable

parents. In the report by Autumn Adoptions Inc. annexed hereto and marked “DG 11” MS JACKSON has confirmed that w have the financial ability to raise up to another two children.

146. In addition, we met the income standards set forth in the Affidavit of Support (Form 1-864) required by UCSIS before granting a visa to R, and the Virginian Department of Social Services has investigated our ability to assume financial responsibility for R.

147. In the circumstances, I respectfully submit that our lifestyle is comfortable, and that we will easily be able to afford to raise R and our older children.

148. Whilst the Second Applicant and I acknowledge that our return to the United States of America will geographically distance R from her cultural roots, we believe that this will be substantially counteracted by the ongoing contact that we will be maintaining with the First and Second Respondents as well as by the fact that we have visited South Africa’s cultural heritage.

149. We remain committed to maintaining R’S culture and traditions.

150. Several members of our church community are South African and will act as a resource for additional cultural information that we may not have yet gleaned from the written and electronic resources that we have accumulated.

151. We look forward as a family to learning more about R’S culture as we come alongside her and educate her about her homeland.

152. We are able to offer a secure financial future and good education for

R as well as to provide her with the basics of everyday life. In particular, we are able to provide R with the best medical care that she could possibly require. In addition, we have the emotional and physical capacity to nurture R to adulthood.

153. The Second Applicant and I are firmly of the view that it would be in the best interests of R if this Honourable Court were to award full guardianship and full custody for her to us."

Whilst prima facie it appears that if the child is in due course adopted by the applicants she will have a secure and nurturing home and accordingly it was strenuously argued by the applicants that I in my capacity as upper guardian of the child should grant the orders in that this would be in the best interest of the child. As will appear more fully hereunder I am of the view that it is not for this court to decide what is in the best interest of the child and that this should be done in accordance with the procedures set out in terms of the Child Care Act 74 of 1983,

In paragraph 144 of the founding affidavit it is alleged by the applicants that there are no other adoptive families with whom the child could be permanently placed. This statement is disputed in an affidavit by Pamela Wilson which was obtained by the amicus. As appears from paragraph 6 of this affidavit the Johannesburg Child Welfare Society has prospective local adoptive parents on the waiting list for female babies between the ages of birth and 5 years old. For the sake of completeness I set out hereunder the full contents of the affidavit deposed to by Pamela Wilson:

"1 .I am a registered social worker (Registration No. 10-06708) employed by the Johannesburg Child Welfare Society at 41 Fox Street, Johannesburg.

2. The contents of this affidavit are within by personal knowledge, save where the context indicates otherwise, and are as such true and correct.

3. I have been a part of the adoption team at Johannesburg Child Welfare Society for the past 23 years. During this time, I have been involved in all aspects of the adoption process and personally placed approximately (300) three hundred babies in adoption.

International adoptions

4. Johannesburg Child Welfare has been involved in inter-country adoption since 2001. From the beginning, we drew up an agency policy on our inter-country adoption in line with the principles and procedures laid down by the Hague Convention, of which South Africa is a signatory. We believe these principles to be sound, based on the experience of countries who were involved in inter-country adoption for many years before South Africa and a way of regulating the movement of children across borders as well as protecting children from being exploited for financial gain.

5. Since June 2001, our adoption team has placed 98 children in inter-country adoption, mainly to Finland, Belgium and Botswana. We have finalised all these adoptions through the Children's Court, Johannesburg. We have not required any involvement of lawyers in these adoptions. These adoptions have been successfully completed in the Children's Court and an adoption order issued. The adoption is then recognised in the receiving country. We have not only finalised adoptions to Hague Convention countries but also to non Hague Convention countries such as Botswana which have not signed the Hague Convention. We have also finalised three adoptions to the United States of America in the Johannesburg

Children's Court, in spite of the USA not being a signatory to the Hague Convention.

Local parents

6. Johannesburg Child Welfare Society has prospective local adoptive parents on the waiting list for female babies between the ages of birth – 5 years old. The majority of our adoptive parents are black and most of them prefer to adopt a girl. There are certain cultural beliefs behind the demand for girls rather than boys. There is therefore always a greater demand for girls and the adoptive parents will wait much longer if they especially want a girl. Over the past few years there has been an encouraging increase in the number of local black adopters approaching the agency and we always have people on the waiting list. We also have local applicants wishing to adopt trans-racially. It is for this reason that we usually only consider our older black boys (from 1 year upwards) for inter-country adoption. Johannesburg Child Welfare Society always has prospective adopters on its adoption waiting list, waiting for girls of all ages. There is no acceptable reason why a female baby should be placed out of the country when there is such a demand within the country.

7. With regard to this particular case, our agency has not received any requests for a local family for this baby.

Process used in current case

8. It is believed in the current case before this Court, the accepted process which is commonly used by all adoption agencies and social workers in undertaking an inter-country adoption has not been adhered to.

9. Given that South Africa has become a signatory to the Hague

Convention, an interim Authority has been established to regulate inter-country adoptions, which is starting to introduce policies, principles and procedures as laid down by the Hague Convention in order to regulate the practice of inter-country adoption from South Africa.

10. Admittedly, the Interim Central Authority, which is housed within the Department of Social Development, as well as the Department of Social Development, still have a long way to go to get a full-blown infrastructure in place. In the meantime, it is accepted social work practice to follow the requirements of the Interim Central Authority, as set out in a memorandum of the Authority, in placing children in inter-country adoptions. These include submitting a report for a child to leave the country in which it is clearly stated as to what steps have been taken to find an adoptive family within South Africa.

11. While it can be argued that there is at present no prescribed system as to what steps should be taken to actually find a local adoptive family and for how long this route should be pursued before considering an inter-country adoption, it is still one way of protecting South African children from being sent out of the country as a placement of first choice, rather than as the very last option.

12. National legislation on inter-country adoptions is awaiting the President's signature so as to make the current Interim Central Authority an established Central Authority. We believe strongly in the importance of having national guidelines, policies and procedures, regulating the practice of inter-country adoption. We do not believe in limiting the options for children who otherwise would not be adopted, be becoming too restrictive, but we also, as a country, need to make sure that our children are not exploited for

gain.

Failure to use the Children's Court

13. The accepted route for undertaking an inter-country adoption, by using the Children's Court, has not been used in this case. Instead, a guardianship and custody order has been applied for. It is therefore not intended that the children will be legally adopted in South Africa.

14. As an agency we are concerned about prospective adopters who have managed to privately commission a report on themselves and then either take these reports themselves or send their report as proof of suitability, to sending countries, without the involvement of an accredited local adoption agency.

15. As an agency, we have an adoption policy in place where it is stated that we will only negotiate with approved and recognised adoption agencies in overseas countries and this has worked very well. We have been very impressed with the high standards of practice in countries with whom we are presently working.

16. Given that South Africa is in the very early stages of being involved in inter-country adoptions, it is vitally important that South Africa should be doing everything possible to maintain high standards. We also need to guard against providing an adult centred service rather than child centred. Adopters should rather be approaching authorised or accredited adoption agencies that could offer them a professional adoption service, without the exorbitant fees involved."

A further affidavit was filed by the amicus curiae from Maria

Mabetoa. She is employed in the National Department of Social Development as the Chief Director: Children Youth and Family and had the following comments to make in relation to this application:

"1. ……

2. …..

3. I confirm that South Africa has acceded to the Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption (the Convention) in August 2003 and that the Convention entered into force for South Africa on 1 December 2003. The Department of Social Development was designated as the Central Authority to discharge the duties, which are imposed by the Convention upon authorities.

REASON FOR ACCEDING THE CONVENTION

1. Since the case of Fitzpatrick, where section 18(4)(f) of the Child Care Act 74 of 1983 (the current Act) was found to be inconsistent with the Constitutional Court and deleted in its entirety, South Africa received overwhelming interest from foreign countries and some foreigners even insisted to adopt from South Africa.

2. South Africa being mainly a sending country, has a tremendous responsibility towards the protection of children and to ensure that intercountry adoption, as a last solution for a child to have a family, be done in a responsible and protective manner.
3. The Convention provides mechanisms such as:

–Embraces certain principles and forces a country to comply with the rules.

-Insists on the establishment of a Central Authority in each country to monitor and evaluate intercountry adoptions.

-Ensures that the Central Authority has power.
-Prevents child trafficking by putting structures in place.
-Allows a system of accreditation.
-Prevents inappropriate financial gain to take place.
-Ensures that once an adoption order has been issued in one country, it will be recognized in the other country.

THE DEPARTMENT OF SOCIAL DEVELOPMENT IS STRIVING TO FOLLOW CERTAIN PRINCIPLES:

1. A child should, as far as possible, grow up with his/her own biological parents and if not possible, extended family should be considered. If no extended family exists, alternatives within the child's country must be explored, taking in account the child's background and culture.

2. As a priority, a child should be adopted within his own country and intercountry adoption should only be considered as an alternative after having ensured that a satisfactory solution could not be found within the state of origin.

3. The need of the child should be paramount and not the need of childless foreign couples. The purpose of adoption is to find a suitable home for a child and not a suitable child for a family. Foreigners should therefore not be allowed to visit children's homes for the purpose of bonding with a child with the idea of adopting that child.

CURRENT PROCEDURES WITH INTERCOUNTRY ADOPTIONS

These procedures are currently used in classical intercountry adoptions. Classical intercountry adoptions refer to adoptions where a child is being adopted by foreigners unrelated to the child.

-Only organizations/private social workers that have registered a speciality in

adoptions, who have a working agreement in place with a foreign accredited organization, can do intercountry adoptions. Organizations and social workers do therefore not work randomly with any country, but with a country they know well and where procedures were spelt out in the working agreement. A social worker therefore never deals directly with the prospective adoptive parents. This ensures that a social worker does not get harassed, manipulated and even bribed by foreigners.

-Most of the working agreements currently in place are with other Hague countries that have also ratified the Convention. The only exception is a working agreement between Johannesburg Child Welfare and Botswana. This agreement was supported by the Department of Social Development for the following reason: Although the culture of the population in Botswana differs from the population in South Africa, it is not as radical as other countries.

-The establishment of new working agreements and the decision as to which country to approach depends on and is determined only by the needs of the children.

-A profile on every child that cannot be placed locally, including the efforts undertaken to place the child, must be submitted to the Department of Social Development. Only after the Department agreed in writing, an intercoutry adoption can be considered.

-The Department of Social Development reports relevant cases to the national missing person register of the South African Police Services to ensure that a child considered for an intercountry adoption is not a missing child.

-The intercountry adoptions are done via the Children's Court and according to provisions prescribed in Chapter 4 of the current Act.

-The rules as prescribed in the Convention are followed as both Central Authorities in the countries agree to the adoption.

-The intercountry adoption gets registered by the Registrar of Adoptions also situated at the Department of Social Development. Documentation is preserved and can be used for future enquiries as prescribed in the current Act.

-The Department of Social Development issues a certificate of conformity as prescribed by the Convention to ensure that the adoption is recognized in the foreign country.

-The adoption gets registered at the Department of Home Affairs.

-All the working agreements make provision for after care services and reports are being received from all the receiving countries to monitor the

progress of the children.

PROCEDURES THAT WILL HAVE TO BE IMPLEMENTED ONCE THE BILL COMES INTO OPERATION

-Every working agreement with another country will have to be approved by the Central Authority.
-Only a child protection organization can be accredited to provide intercountry adoption services,
-A national register of children available for adoption and prospective adoptive parents (RACAP) will have to be established by the Department of Social Development. No child can be considered for an intercountry adoption unless the child has been on the register for 60 days and no fit and proper parents could be found within the country.
-The Central Authority will have the responsibility to decide on the recognition of an adoption order issued in a foreign country.
-When an application is made for guardianship by a non-South African citizen for guardianship of the child, the application must be regarded as an intercountry adoption for the purposes of the Convention.

CONCERNS REGARDING THE USE OF GUARDIANSHIP ORDERS

-This Department has major concerns regarding the use of guardianship and custody orders via the high court with the ultimate idea of an adoption in another country, especially in a case of classical adoption. The effect of an adoption order and a guardianship order differ. An adoption order terminates all rights between a child and the parents he/she had before the adoption including heritage rights, while a guardianship order does not have such a drastic effect. It is clear that the intention of the prospective adoptive parents of the child is to adopt the child. It is of concern that the order issued in South Africa will therefore not have the same effect as the order eventually issued in the other country.
-This Department is of the opinion that when working with a non-Hague country, such as the United States of America, one must be careful with procedures and responsibilities as the Convention does not apply and therefore the necessary safeguards do not exist.
-Commissioners of Child Welfare are usually experts in adoption matters.

The fact that the case never went through a Children's Court is of great concern. All the provisions made in the current Act regarding procedures such as obtaining all the necessary consents and finding the child to be adoptable, will not take place. What if the child is a missing child or the biological mother did not want to give her child up for adoption?
-The guardianship orders issued, do not get registered in South Africa, neither with the Department of Social Development, nor with the Department of Home Affairs. We are not sure what happens to the documentation regarding the placement and we are also not sure where this adoptee will be able to obtain information regarding his/her roots. In the case of an adoption, the Registrar of adoptions as well as the organizations is bound by law to keep all records containing an adoption.
-The accredibility of the organization that screened the adoptive parents is questionable. Was it an organization that specializes in intercountry adoptions and were the adoptive parents properly prepared to raise a child of another culture and race?
-We are not sure whether or not after care services will be rendered.

CONCLUSION

There are may foreigners that want to adopt South African children and some even with an obsession to do so. The emphasis should never lie on the need of foreigners, but on the need of children. As a sending country, South Africa has a responsibility to use safeguards, created to protect children in intercountry adoptions".

It seems to me that I would be doing an injustice to the amicus curiae if I attempted to summarise her closely reasoned argument and I accordingly do not intend to do so and quote in extenso hereunder from the arguments presented by her:

"**REASON FOR AND PURPOSE OF INTERVENTION**

1. The Centre for Child Law (hereafter "the Centre") is and unincorporated juristic person not for gain which was established in terms of a constitution. The relevant sections thereof are annexed hereto as **annexure A.** The main objective of the Centre 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.

2. The Centre has knowledge and interest in the law relating to inter-country adoptions and its application within the South African context.

3. On 21 November 2005 the Centre received a written request from Mr. Justice Goldblatt to assist the court as *amicus curiae* in this matter.

4. The purpose of the Centre's intervention as *amicus curiae* is to assist the court in defining the current statutory and legal obligations applicable to inter-country adoptions, as well as the practice and procedure currently in place in relation to such adoptions, and to comment ion the practice of applications being made for sole custody and guardianship with a view to concluding an adoption in a foreign country. In particular, the Centre seeks to argue that:

4.1 Given that South Africa has ratified the United Nations Convention on the Rights of the Child (hereafter the UNCRC) and has acceded to the Hague Convention on the Protection of Children and Co-operation in Respect of Inter-country Adoption (hereafter the Hague Convention), South Africa is bound to act in accordance with its obligations in terms of such Conventions:

4.2 By granting an application for sole guardianship and custody over South African children, South Africa's obligations under the UNCRC and the Hague Convention are overlooked and the

constitutional rights of the children my be prejudiced;

4.3 That the granting of sole guardianship and custody to foreign couples over South African children bypasses the practice and procedure widely being adhered to – even by potential adopters from non-Hague Convention countries:

4.4 That the practice of utilising the route of sole guardianship and custody orders in the place of the adoption procedures in terms of the Child Care Act 74 of 1983 (hereafter the Child Care Act) is contrary to the intention of the Constitutional Court in the case of **Minister of Welfare and Population Development v Fitzpatrick and others 2000 (3) SA 422 (CC)** (hereafter **Fitzpatrick**).

4.5 That once the **Fitzpatrick** case had found that inter-country adoption procedures would be sufficiently protective of children if carried out in terms of the Child Care Act 74 of 1984 (hereafter the Child Care Act), the procedures set out in that Act for local adoptions within South Africa are also applicable to inter-country adoptions, in keeping with Article (e) of the UNCRC;

4.6 By failing to proceed in terms of the Child Care Act, the Children's Court is bypassed and South African children are removed from this country without a formal adoption having been sanctioned by the relevant local authorities. This places the children in a

potentially vulnerable position, having left South Africa in terms of a guardianship and custody order granted in favour of potential foreign adoptive parents.

4.7 That once such a child has been removed from South Africa the South African court loses its authority as upper guardian of that child. The courts have no further authority or power to deal with the matter, the child is thus left in legal limbo, entirely dependant on the goodwill of the prospective adopters. For this reason, the ideal situation would be to conclude the adoption in South Africa. It will be argued that the High Court should at the very least require a process of reporting back to the Central Authority for Inter-Country Adoptions, namely the Director-General of Social Development in South Africa, once the adoption is concluded.

4.8 Where an adoption is concluded in the children's court, such adoption is registered with the "interim" Central Authority. This allows for the archiving of information so that both children and biological families can trace one another at some later date.

Where guardianship orders are finalised by the High Court, no such information is centrally recorded, an no information is archived in South Africa.

4.9 If a Court finds that there are instances where the best interests of the child dictate the use of a sole guardianship and custody order to achieve the aim of adoption at a future time, it is argued that the decision made must be guided by the principles set out in international law. as well as the protective provisions of the Child Care Act.

CONSTITUTIONAL PROVISIONS PERTAINING TO THE RIGHTS OF THE CHILD

5. Of critical importance to the relief sought by the Applicant is section 28(2) of the Constitution which provides:

> "A child's best interests are of paramount importance in every matter concerning the child."

6. Section 28(1)(b) provides that every child has the right "to family care or parental care, or to appropriate alternative care when removed from the family environment."

7. These constitutional provisions create a positive duty upon this Honourable Court to protect the child's best interests and her right to family car or parental care (or to appropriate alternative care.)

8. It is the submission of the Centre that this Honourable Court is required, in terms of the Constitution, as well as by virtue of its common law position as upper guardian of all minor children, to make a determination on the following:

8.1 whether it is in the best interests of the minor child involved to grant sole custody and guardianship over the child to a foreign couple whose intention is to remove her from South Africa;

8.2 whether the rights of the child in terms of section 28(1)(b) of the Constitution would be violated if the relief sought by the Applicants is granted in this matter;

8.3 if the Court finds that there are exceptional circumstances in this case that indicate that it is in the child's best interests that she be placed in the sole custody and guardianship of the Applicants, to make a declaration regarding the principles according to which such decision should be made, bearing in mind the applicable international and constitutional obligations.

FITZPATRICK CASE

9 .Prior to the case of **Fitzpatrick** inter-country adoptions were not

lawful in South Africa, due to section 18(4)(f) of the Child Care Act which prohibited a non South African citizen from adopting a South African children. The Constitutional Court declared the section to be inconsistent with the Constitution, with such order of invalidity to be of immediate effect.

10. The Minister and the *amicus curiae* in that matter had argued that the order of individuality should be suspended due to the fact that there would be inadequate regulation and infrastructure for inter-country adoptions, in particular they were concerned about the inability of the Department to facilitate thorough background investigations into non- citizens, insufficient legislative protection against trafficking in children; and inadequate provision to give effect to the principle of subsidiarity.

11. The subsidiarity principle is enshrined in article 21(b) of the UNCRC. Provides that the "inter-country adoption my be considered as an alternative means of the 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.

Goldstone J also linked the importance of preserving the child's language, culture and religion to the principle of subsidiarity.

12. It should be noted that in the case of **Fitzpatrick,** Goldstone J clearly envisaged that inter-country adoptions would be undertaken under the Child Care Act, and subject to the protections it offers, including the subsidiarity principle.

13. The granting of sole custody and guardianship over South African children therefore amounts to a circumvention of the

decision of the Constitutional Court in **Fitzpatrick** and the provisions of the Child Care Act pertaining to adoptions.

PROTECTION OFFERED BY THE CHILD CARE ACT

14. The relevant protections offered by the Child Care Act were recorded by Goldstone J in **Fitzpatrick** as the following:

14.1 The Child Care Act provides that every magistrate is a commissioner of child welfare. These trained judicial officers preside over the children's courts which are the sole authority empowered to grant orders of adoption.

14.2 No adoption order may be made before the consideration of a prescribed report from a social worker. In considering any application for adoption, the children's court must consider the religious and cultural background of the child "and his or her parents as against that of the adoptive parent or parents."

14.3 In terms of section 18(4) a children's court may not grant an adoption unless it is satisfied, *inter alia,* that the applicants are possessed of adequate means to maintain and educate the child, that the applicants are of good repute and fit and proper persons to be entrusted with the custody of the child, the proposed adoption will serve the interests and conduce to the welfare of the child. The parents of the child must also give consent to the adoption of the child, subject to certain exceptions set out in section 19, one of which is where a child is deserted, as is the case with the child in this matter.

THE CHILDREN'S BILL AS AN INDICATION OF GEVERNMENT POLICY

15. A comprehensive Children's Bill was drafted by the South African Law Reform Commission. The state law advisors divided the Bill into two separate Bills, which is referred to as the "section 75" Bill (dealing with matters of national import), and a second, which is referred to as the "section 76" Bill (dealing with provincial competency matters).

16. The "section 75" Bill has been passed by both the National Assembly and the National Council of Provinces. Its passage through parliament was concluded on 13 December 2005 and it now awaits the President's signature.

17. It will take some time before the Children's Act comes into operation, as the "section 76" Bill still needs to be passed (expected to occur during 2006) and then regulations will need to be drafted and published. It is likely therefore that the new law will only become operational during 2007.

18. The Bill is annexed hereto as **annexure B.** This is the final version as passed by both the National Assembly and NCOP, as described in para 16 above.

19. Relevant portions of the "section 75" Bill are referred to below as a reflection of the most reliable and recent statement of government policy:

19.1 Chapter 16 of the Bill deals with inter-country adoptions. The Chapter further aims to ensure that in the future such adoptions should only be carried out by accredited organisations.

19.2 The Bill gives effect to the Hague Convention and establishes in law that the Director-General of the Department of Social Development is the Central Authority in relation to inter-country adoptions. The Hague Convention is set out in full as schedule 1 to the Bill.

19.3 The Chapter on Children's Courts make it clear that in future all inter –

country adoptions will be dealt with in the Children's Court.

19.4 Clause 25 of the Bill has direct relevance to the matter before this court. The clause provides the following:

"When application is made in terms of section 24 by a non-South African citizen for guardianship of a child, the application must be regarded as an inter-country adoption for the purposes of the Hague Convention on Inter-Country Adoption and chapter 16 of this Act."

19.5 Clause 25 is thus a very clear indicator of the government's approach – there is an intention to close the avenue of High Court applications for guardianship of South African children by non-South African parents, and an intention that in future all inter-country adoptions should proceed via the children's court.

INTERNATIONAL LAW

20. In interpreting the Bill of Rights in accordance with the values of *"human dignity,* terms of section 39(1) of the Constitution a court must consider international law and may consider foreign law. A court must furthermore *equality and freedom".*

21. Further, the provisions of section 233 of the Constitution provide that when interpreting any legislation, courts must give preference to any rational interpretation of the legislation that is consistent with international law.

22. The Constitutional Court has affirmed that both binding and non-binding international instruments may be referred to when interpreting the provisions of the Bill of Rights.

Grootboom v Oostenburg Municipality and Others 2000 (3) BCLR 277(C)

S v Makwanyane 1995 (6) BCLR 656 (CC)

23. The United Nations Convention on the Rights of the Child

(hereafter "UNCRC") is the most widely ratified treaty in the world, with the United States of America and Somalia the only states that have not yet ratified it. South Africa's ratification took place in 1995, and since that time numerous reported judgments have made reference to the Convention, in addition to **Fitzpatrick** as already described:

Grootboom v Oostenburg Municipality and Others 2000 (3) BCLR 277 (C)

Jooste and Botha 2000 (2) BCLR 187 (SCA)
Kirsch v Kirsch 1999 (4) SA 691 (C)
S v Howells [1999] AllSA 234 (C)
S v J and Others 2000 (3) SACR 310 (C)

24. Article 21 of the UNCRC provides that:

State parties that recognise and/or permit the system of adoption shall ensure that the best interest of the child shall be the paramount consideration and they shall:

Ensure that the adoption of a child is authorised only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of al pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;

Recognise that inter-country adoption may be considered as an alternative means of child-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; and

Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption.

Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;

Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangement or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.

25. The United States has not ratified the UNCRC. As this convention is not a multi lateral treaty, the failure of the US to ratify the UNCRC in no way affects South Africa's obligations.

26. The United States of America, like South Africa, has acceded to the Hague Convention and has passed an Act called the Inter-country Adoption Act of 2000. The Act has not yet come into operation, as federal regulations are being developed for its operation.

27. In the Report and Conclusions of the Special Commission on the Practical Operation of the Hague Convention, the following recommendation was unanimously accepted in Working Document No 8, regarding the application of the Hague Convention to non-Convention States, and reads as follows:

Recognising that the Convention of 193 is founded on universally accepted principles and that States Parties are "convinced of the necessity to take measures to ensure that inter-country 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", the Special

Commission recommends that State Parties, as far as practicable, apply the standards and safeguards of the Convention to the arrangements for inter-country adoption which they make in respect of non-Contracting States. States Parties should also encourage such States without delay to take all necessary steps, possibly including the enactment of legislation and the creation of a Central Authority, so as to enable them to accede to or ratify the Convention.

USING GUARDIANSHIP AND CUSTODY ORDERS RATHER THAN ADOPTION PROCEDURES IN SOUTH AFRICA

28. The current application before this Court seeks to obtain an order granting to the Applicants, both citizens of the United States of America, sole guardianship and custody of a South African minor child, RJW.

29. It accordingly and for the reasons stated above circumvents South African adoption law and procedure. The practice is not ideal because it could very well be used by unscrupulous foreign nationals and place South African children at risk.

CURRENT SITUATION

30. Currently many inter-country adoptions are carried out through the Children's Court, which applies the processes elaborated on by Pamela Wilson of the Johannesburg Child Welfare Society in her affidavit (annexure C).

31. It is clear from the affidavit of Pamela Wilson, if compared with report by Ms Amanda Du Toit of Roodepoort Child and Family Welfare Society, that there is no clear system relating to establishing whether there are any prospective South African adopters, which raises concerns about the extent to which the

subsidiarity principle is being adhered to, and it is evident that the Department of Social Development will need to establish clear procedures in this regard.

32. The affidavit by Dr Maria Mabetoa (annexure D) sheds further light on the current situation, Dr Mabetoa is the Chief Director: Children, Youth and Families in the national Department of Social Development. In her affidavit she stresses the principles that the Department is striving to follow in their approach to and management of inter-country adoptions. She describes the current procedures pertaining to inter-country adoptions and outlines the procedures that will have to be implemented once the Children's Bill comes into operation. She also sets out the Department's concerns about the use of guardianship orders being used as an alternative route by non-South Africans adopting South African children.

CONCLUSION

33. The Child Care Act and Children's Court adoption procedures are available and provide the appropriate safeguards in adoption cases, including inter-country adoptions. These procedures should be viewed as the standard, accepted procedure by way of which South African children are to be adopted, including inter-country adoptions, in accordance with **Fitzpatrick.**

34. The High Court does of course have inherent powers as the upper guardian of all children in South Africa, which it applies in accordance with the best interest principle.

35. If the High Court does find, in an exceptional case, that it is in the best interests of a child that a guardianship and custody order be issued with a view to an adoption being concluded in another

country, then such an order should be made in accordance with the following principles, which are gleaned from the international instruments and protective provisions of the domestic law;

35.1 The court should be satisfied that all the requirements relating to consent to adoption (and the exceptions thereto) as set out in domestic legislation have been adhered to;

35.2 In cases where children being adopted have capacity to express an opinion, his or her wishes should be considered by the court;

35.3 The applicants must be possessed of adequate means to maintain and educate the child, are of good repute and are fit and proper persons to be entrusted with the custody of the child;

35.4 That the issues relating to the religious and cultural background of the child and his or her parents as against that of the adoptive parent or parents are duly considered;

35.5 There must be evidence before the court that the subsidiarity principle has been complied with; namely, that substantial efforts have been made to place the child in foster care or adoption in South Africa before the option of an inter-country adoption is considered.

36. Where such a guardianship and custody order is granted, the court should order the applicants:

36.1 to provide a copy of such order and supporting documentation to the Director –General of the National Department of Social Development, and

36.2 provide written notification, with supporting documentation, to the Director General of Social Development when the adoption has been concluded in the foreign country within 30 days of that order being granted, provided that if the adoptions is not concluded within one year of the South African High Court order having been issued, the applicants must report on progress towards the conclusion of adoption annually to the Director General until such time as the adoption has been concluded.

37. In the premises, if the court does grant the relief as prayed for in the notice of motion it should only do so if it finds exceptional circumstances in this case, and then only on the basis of the principles set out in para 35 above, with the additional requirements proposed in 36."

The applicant in answer to all these various contentions and submissions made submitted that they had complied with all the recommendations made by the amicus and that it was clearly in the best interest of this abandoned child that she be given the opportunity to be removed to America where she would be adopted and where she would be brought up by an African-American family in secure and reasonably affluent circumstances. This argument has caused me concern in that the picture painted is an extremely attractive picture when one considers the possible future life of the child. However if this was the main consideration this would result in affluent foreigners always taking precedence in relation to adoptions over less affluent citizens of this country. This clearly is not something to be desired. Further as I have already indicated I am of the view that the High Court should not be placed in the position of having to fulfil the functions of a commissioner for child welfare who is better trained and more experienced in matters of this sort than High Court judges. Finally it seems to me that I am bound by what was said by Goldstone J in Fitzpatrick (supra) at paragraphs 30 to 34 of the judgment which read as follows –

"[30] In terms of the Act every magistrate is a commissioner of child welfare (commissioner) and every additional and assistant magistrate is an assistant commissioner. These trained judicial officers preside over children's courts which are the sole authority empowered to grant orders of adoption. No adoption order may be made before the consideration of a prescribed report from a social worker. In

considering any application for adoption, the children's court is obliged to have regard to the religious and cultural background of the child 'and of his [or her] parents as against that of' the adoptive parent or parents. A children's court may not grant an adoption unless it is satisfied, *inter alia,* that:

(a) the applicants are possessed of adequate means to maintain and educate the child;

(b) the applicant or applicants are of good repute and a person or persons fit and proper to be entrusted with the custody of the child;

(c) that the proposed adoption will serve the interests and conduce to the welfare of the child;

(d) subject to the exceptions contained in s 19 and in s 18(4)(d), that the consent to the adoption has been given by the parents of the child.

Save for the exceptions not now relevant, no person may 'give, undertake to give, receive or contract to receive any consideration, in cash or kind, in respect of the adoption of a child'. A contravention of this provision is a criminal offence.

[31] According to the Act, it is the children's courts that are charged with overseeing the well-being of children, examining the qualifications of applicants for adoption and granting adoption orders. The provisions of the Act creating children's courts and establishing overall guidelines advancing the welfare of the child offer a coherent policy of child and family welfare. If appropriately and conscientiously applied by children's courts the main provisions of the Act would meet the most serious of the concerns of the Minister and the *amicus curiae.* The provisions of s24 of the Act are designed to deter the practice of child trafficking, making the exchange of consideration in an adoption a criminal offence. Until the safeguards and standards envisaged by the Minister are introduced, children's courts are able to prevent the feared abuses in the cases of citizens and non-citizens alike.

[32] The concerns that underlie the principle of subsidiarity are met by the requirement in s 40 of the Act that courts are to take into consideration the religious and cultural background of the child, on the one hand, and the adoptive parents, on the other.

[33] Finally the other provisions of the Act address the problems surrounding the verification of background information from foreign applicants for adoption. A social worker unable to verify facts relating to the foreign

applicant's background would be required to bring that to the attention of the children's court. Consequently, if the children's court is not satisfied with the verification of any information relevant to the adoption, the application would necessarily have to be denied. In that event the court would not be able to satisfy itself on the matters referred to in para [30] above and, in terms of s 18 of the Act, would be obliged to refuse the order. A related concern is that without bilateral agreements between South Africa and the foreign State there could not be effective post-adoption monitoring in respect of intercountry adoptions. This may be correct but, again, that state of affairs exists even with s 18(4)(f) when South African adoptive parents emigrate. Furthermore, it could take may years to negotiate bilateral agreements with all of the relevant foreign governments. The absence alone of such agreements, in my opinion, is not a justification for suspending the order of invalidity.

[34] It follows, in my opinion, that, if non-South African citizens apply for the adoption of a child born to a South African citizen, the provisions of the Act enable the children's court to prevent the abuses and meet the concerns expressed by the Minister and the *amicus curiae.* The fact that they have been so fully and helpfully canvassed in this Court and the terms of this judgment will effectively alert the judicial officers concerned with applications for adoption to these matters. This judgment and especially paras [30] – [33] should be brought to the attention of all commissioners and assistant commissioners of the children's courts and all social workers engaged in adoption matters. In effect, until the amended legislation, administrative infrastructure and international agreements envisaged by the Minister are in place, foreign applicants will have a greater burden in meeting the requirements of the Act than they will have thereafter. They will have to rely on their own efforts and resources in placing all relevant information before the children's court."

I am in full agreement with the views expressed by the amicus and further am bound by the judgment in Franklin (supra).

My attention was drawn to a large number of cases both in Natal and in this division where orders were granted similar to the order sought in this matter. None of those orders were supported by reasons and accordingly were not even of persuasive authority and in my view seem to have been incorrectly granted.

I accordingly make the following order:

The application is dismissed.

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LI GOLDBLATT
JUDGE OF THE HIGH COURT

Date of Judgment : 21st April 2006

Appearing on behalf of applicants: Adv BL Skinner
Instructed by: Wybrow-Oliver Attorneys

Amicus curiae: Adv A Skelton