

# Step-parent adoption: to do, or not to do—that is the question

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## Abstract

Once a child has been adopted, he or she is regarded as the child of the adoptive parent for all purposes, and vice versa. Conversely, an adoption also terminates relationships that existed before the adoption. This article focuses on step-parent adoption. I point out that there is a difference between step-parent adoption and other forms of adoption. I then consider whether it is still appropriate and in the best interests of the child to legalise the relationship between a step-parent and stepchild through adoption, and so to terminate the child's legal relationship with a parent and/or family. In order to determine this, a comparative analysis is undertaken. Finally, I conclude that the time has come to consider alternative ways to formalise and protect the step-parent and stepchild relationship.

## INTRODUCTION

In *GT v CT*,<sup>1</sup> a man who had adopted his wife's two biological children successfully applied to the Gauteng local division of the High Court for the rescission of the adoption orders after his divorce from the children's mother, and more than six years after the adoptions had been granted. Despite the fact that the period within which a rescission application had to be lodged had long expired,<sup>2</sup> and despite all the requirements for rescission of the adoption orders not having been met,<sup>3</sup> the Court held that the adoptions had been forged on an unsound legal and moral foundation<sup>4</sup> and that the stepfather had rejected the children.<sup>5</sup> It therefore rescinded the adoption orders so that the 'formality of setting aside the adoption orders' would afford the mother, the father and the children 'an opportunity to strengthen their already existing parent-child relationship.'<sup>6</sup>

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<sup>1</sup> [2015] 3 All SA 31 (GJ) (hereinafter '*GT v CT*').

<sup>2</sup> In terms of s 243(2) of the Children's Act 38 of 2005 (hereinafter 'Children's Act'), an application for rescission of an adoption order must be lodged within a reasonable time, but not exceeding two years, from the date of the adoption.

<sup>3</sup> S 243(3) contains the requirements that have to be met before an adoption order may be rescinded.

<sup>4</sup> Paras 42–46.

<sup>5</sup> Para 58.

<sup>6</sup> Para 61.

The decision highlights the reality that, frequently, a step-parent no longer wishes to be part of the lives of the children he or she has adopted should his or her relationship with the children's parent fail.<sup>7</sup> It also points to the fact that step-parent adoption<sup>8</sup> is often pursued for all the wrong reasons and is often not in the best interests of the child or children.<sup>9</sup> Furthermore, the parties involved do not necessarily comprehend the implications and finality of such an adoption order.

The purposes of an adoption are to protect and nurture children by providing a safe, healthy environment with positive support, and to promote the goals of permanency planning by connecting children to other safe and nurturing family relationships that are intended to last a lifetime.<sup>10</sup> The question is whether adoption by a step-parent falls within these stated purposes. I briefly consider the current situation, after which a comparative analysis of three other countries is undertaken. Finally, some suggestions for the future are made.

## STEP-PARENT ADOPTION IN SOUTH AFRICA

### Adoption Legislation<sup>11</sup>

The right to adoptive care is guaranteed in the Constitution of the Republic of South Africa, 1996.<sup>12</sup> Every child has the right to family care or parental care, or to appropriate alternative care when removed from the family environment.<sup>13</sup> The best interests of a child are of paramount importance

<sup>7</sup> Unless otherwise indicated, any reference to 'parent' is to a biological parent of the child, any reference to 'mother' is to the biological mother of the child, and any reference to 'father' is to the biological father of the child.

<sup>8</sup> A step-parent is a married person whose spouse is the parent of the child, or a person whose permanent domestic life-partner is the parent of the child—Children's Act s 231(1)(c).

<sup>9</sup> The stepfather in *GT v CT* seemed to be motivated in his application by his unwillingness to continue paying maintenance (paras 32–33). The South African Law Commission, as it was then known (hereinafter 'Law Commission', now the South African Law Reform Commission) in Discussion Paper 103, *Review of the Child Care Act* (hereinafter '*Review of the CCA*') para 18.6.3 indicated that step-parent adoption is often used to sever the relationship between the child and the non-custodial parent. Also see JC Sonnekus, 'Kinderaanneming Dra Gevolge wat nie Ligtelik Afgelê Kan Word nie' (2015) TSAR 886 at 890; T Skosana and S Ferreira, 'Step-parent Adoption Gone Wrong: *GT v CT* [2015] 3 All SA 631 (GJ)' (2016) 19 PER 1–23. It was reported by N Mokati, 'Dad Wins Battle to Cancel Adoptions' *IOL News* (20 June 2015) <[www.iol.co.za/news/crime-courts/dad-wins-battle-to-cancel-adoptions-1874045](http://www.iol.co.za/news/crime-courts/dad-wins-battle-to-cancel-adoptions-1874045)> accessed 17 November 2016, that the stepfather had been 'free[d] of the burden of being a father'.

<sup>10</sup> Children's Act s 229.

<sup>11</sup> There are significant differences between common-law adoption and adoption in customary law. Customary-law adoptions are private arrangements involving only the two families and do not involve a judicial act: TW Bennett, *Customary Law in South Africa* (Juta 2004) 319–320. As a result, it will not form part of the discussion in this article.

<sup>12</sup> Hereinafter 'Constitution': s 28(1)(b).

<sup>13</sup> *ibid* Ch 15 of the Children's Act regulates adoption.

in every matter concerning the child,<sup>14</sup> including adoption.<sup>15</sup> As soon as an adoption order in favour of a step-parent has been granted, it confers full parental responsibilities and rights on the step-parent.<sup>16</sup> Except when provided otherwise in the adoption order or in a post-adoption agreement, it terminates all parental responsibilities and rights or claims to such contact with the child that a parent had in respect of the child, as well as all responsibilities and rights that the child had in respect of such parent immediately before the adoption.<sup>17</sup> The adopted child is, for all purposes, regarded as the child of the step-parent and vice versa.<sup>18</sup>

The predecessor to the Children's Act, the Child Care Act,<sup>19</sup> at least acknowledged the difference between a step-parent adoption and other adoptions by providing that the rights and obligations of a married person, whose spouse is the parent of the child, were not terminated by the adoption of a child by the step-parent.<sup>20</sup> This distinction is not found in the Children's Act. A step-parent may adopt the child of his or her spouse or permanent domestic life-partner,<sup>21</sup> but it has been necessary for the courts to interpret this section so that the parental responsibilities and rights of the married parent or the permanent domestic life-partner of the step-parent, are not terminated upon adoption of the child by the step-parent.<sup>22</sup>

During the review of the Child Care Act, the Law Commission recognised that step-parent adoption<sup>23</sup> was different to, and should be distinguished from, other forms of adoption. The Law Commission considered the possibility of a two-tier system where adoption by step-parents would be treated differently from adoption by non-family members. The Commission determined the issues to be whether the existing care arrangement should be transformed into an adoption, and whether provision should be made for a simpler and faster adoption process. However, it was decided that it was necessary to impose the same threshold on eligibility for step-parents as for other adoptees. As a result, the introduction of a parallel system for step-parent adoption was not recommended.<sup>24</sup>

<sup>14</sup> S 28(2) of the Constitution; also s 9 read with s 7 of the Children's Act.

<sup>15</sup> Children's Act s 230(1)(a).

<sup>16</sup> *ibid* s 242(2)(a).

<sup>17</sup> *ibid* s 242(1).

<sup>18</sup> *ibid* s 242(3).

<sup>19</sup> Act 74 of 1983, (hereinafter 'CCA').

<sup>20</sup> *ibid* s 20(1), read with s 17(c).

<sup>21</sup> Children's Act s 231(1)(c).

<sup>22</sup> See *Centre for Child Law v Minister of Social Development* 2014 (1) SA 468 (GNP) para 17.

<sup>23</sup> The discussion of the Law Commission also included adoption by other relatives. During the Review of the CCA, the chairperson of the National Adoptive Parents' Institute suggested that adoption is to be invoked where there is a lack of parental responsibility; see *Review of the CCA* (n 9) para 18.4.10. With step-parent adoption, there is no lack of parental authority.

<sup>24</sup> The recommendations in the *Review of the CCA* (n 9) para 18.6.3 were accepted in Project 110, *Report on the Review of the Child Care Act* (hereinafter 'SALC report') para 17.3.3.

The approach of the Law Commission has to be criticised. Each case must be considered individually. Making the process of step-parent adoption faster or easier was never going to serve the best interests of the child. The Law Commission failed to recognise that the focus should not be on equality for persons wishing to adopt, but on the best interests of the child. Under the appropriate circumstances, step-parent adoption undoubtedly serves the best interests of the child. However, terminating the relationship between the child and a parent, and the extended family, might not be in the best interests of the child.<sup>25</sup> In fact, the Children's Act is clear in this regard. As part of the best interests determination, the court must consider the need for the child to maintain a connection with his or her family, extended family, culture, tradition, or background.<sup>26</sup> The importance of this is also found in the adoption process. Even before an application for the adoption of a child is made, a parent or guardian may enter into a post-adoption agreement to provide for communication between the parent or guardian of the child, and for information about the child.<sup>27</sup> The reality is that adoption by a step-parent is distinct from other forms of adoption. Not only is the legal process different, but so are the reasons for considering adoption in the first place. These reasons are considered below.

### Reasons for and Effect of Step-parent Adoption

An adoption gives legal recognition to the existing *de facto* situation.<sup>28</sup> It also prevents problems if the parent<sup>29</sup> dies or is unable to fulfil his or her parental responsibilities. It allows the step-parent to make important decisions for and about the child.<sup>30</sup> An adoption creates family unity, stability, certainty and permanence. It provides emotional security, shows the step-parent's commitment to the relationship, shows love for the child, provides a psychological boost and gives the child a sense of belonging.<sup>31</sup>

However, instead of focusing on the needs of the child, the decision to adopt might be taken for the wrong reasons, such as love for a spouse; a

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<sup>25</sup> Upon adoption of the child by the step-parent, the parental responsibilities and rights of the other parent and the claims to contact by any family member are terminated—Children's Act s 242(1).

<sup>26</sup> Children's Act s 7(1)(f)(ii) and (g)(iii).

<sup>27</sup> Children's Act s 234(1).

<sup>28</sup> See the *Review of the CCA* (n 9) para 18.6.3; SF Koffman, 'Step-parent Adoption: A Comparative Analysis of Laws and Policies in England and the United States' (1984) 7(2) *Boston College International and Comparative LR* 469 at 477.

<sup>29</sup> This refers to the parent who is married to, or the permanent domestic life-partner of, the step-parent.

<sup>30</sup> Examples include consent to school excursions, medical treatment, marriage, application for a passport, assistance with legal matters and administration of a child's property.

<sup>31</sup> New Zealand Law Commission (Report 65, 2000) *Adoption and its Alternatives: A Different Approach and a New Framework* (hereinafter 'Report 65') para 77. Also see B Maddox, *The Half-parent: Living with Other People's Children* (A Deutsch 1975) 8–9 as cited in Koffman (n 28) 476.

desire to please the spouse; because it is the right thing to do; as a result of pressure from the spouse; to sever the relationship between the child and the non-resident parent;<sup>32</sup> or out of malice towards the non-resident parent.<sup>33</sup> The non-resident parent might agree to the adoption not because he or she considers it to be in the best interests of the child, but to escape his or her parental responsibilities, financial responsibilities, for convenience, or as a result of pressure from his or her ex-spouse.<sup>34</sup> If this is the case, an adoption inevitably ends up causing problems and heartache at a later stage.

Step-parent adoption has important and drastic personal, legal and emotional implications. It changes the identity of the child; legally it terminates the child's relationship and any claim to contact with his or her non-resident parent and/or family;<sup>35</sup> it terminates the child's right to maintenance from his or her non-resident parent or that parent's family;<sup>36</sup> it terminates the child's right to inherit intestate from the extended family;<sup>37</sup> and it is permanent.<sup>38</sup> On an emotional level, adoption could lead to feelings of guilt, loss, rejection and confusion about identity. It could also lead to ambivalent feelings where the non-resident parent, who consented to the adoption, is still in the child's life. The child may think he or she has to choose between parents, and may feel cut off from his or her past. Sooner or later, an adopted child may blame his or her parent or step-parent for the loss of the non-resident parent and/or family.<sup>39</sup>

It is important that the relationship between a step-parent and stepchild enjoys proper legal protection. However, adoption might not be the best way to protect the relationship.<sup>40</sup> It is not necessarily in the best interests of the child and could even be to his or her detriment. The issue is not whether the relationship between a step-parent and stepchild needs protection—

<sup>32</sup> Report 65 (n 31) para 365. The term 'non-resident parent' is used to refer to the parent who does not have care of the child or children.

<sup>33</sup> Sonnekus (n 9) 890–891.

<sup>34</sup> JN Turner, 'Adoption or Anti-adoption? Time for a National Review of Australian Law' (1995) James Cook University LR 44 at 52; see Koffman (n 28) 477. Also see *GT v CT* (n 1)

<sup>35</sup> These could include a parent, grandparents, aunts, uncles, nieces, nephews or even siblings. Also see the *Review of the CCA* (n 9) para 18.6.3; Report 65 (n 31) para 365. Contact with extended family members plays an important part in a child's development—*LH v LA* 2012 (6) SA 41 (ECG) para 13.

<sup>36</sup> As already mentioned, the parent might agree to an adoption simply to avoid further financial responsibilities. Also see the *Review of the CCA* (n 9) para 18.6.3.

<sup>37</sup> Except in the case of the spouse of a step-parent, an adopted child is deemed to be the descendant of the adoptive parents, not of the biological parents: Intestate Succession Act 81 of 1987 s 4(e).

<sup>38</sup> Permanency can be both a positive and a negative consequence of step-parent adoption. The marriage might not last, but the relationship with the adopted child, including maintenance for the child, does.

<sup>39</sup> In *Centre for Child Law v Minister of Social Development* (n 22) para 8 the Court held that a parent, who has consented to the adoption of his or her child by a step-parent, has abandoned the child; also see Report 65 (n 31) para 77.

<sup>40</sup> See the *Review of the CCA* (n 9) para 18.6.3.

obviously it does.<sup>41</sup> The question is what this protection should entail. It is necessary to determine whether there are other ways to give legal recognition to the relationship between a step-parent and stepchild that would protect everyone affected by such a relationship and, more importantly, serve the best interests of the child. In order to do this, it is prudent to consider how other jurisdictions deal with step-parent and stepchild relationships.<sup>42</sup>

## ALTERNATIVES TO STEP-PARENT ADOPTION: A COMPARATIVE STUDY

### Australia<sup>43</sup>

Australia has recognised the reality that step-parent adoption is not the same as other forms of adoption.<sup>44</sup> The belief has been expressed that step-parent adoption should be discouraged, because of the effects on the child of severing pre-existing family relationships.<sup>45</sup> Although each state has its own legislation, the legislation essentially contains the same prerequisites. Adoption by a step-parent is not possible unless:

- the court is satisfied that an alternative order would not make adequate provision for the welfare and interests of the child;
- exceptional circumstances exist, which would warrant the making of an adoption order;
- an order for the child's adoption by the step-parent is clearly preferable, in the interests of the child, to any alternative order, and would better

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<sup>41</sup> Another important issue is the relationship between the child and the step-parent where the relationship with the spouse comes to an end. This is beyond the scope of this article.

<sup>42</sup> This comparative study is not intended to give a complete overview of foreign legislation. It will not focus on adoption, but on alternative ways to protect the step-parent and stepchild relationship. There are various ways in which parental responsibilities may be obtained by a step-parent. Only the ones that are specifically promoted as alternatives to step-parent adoption will be considered below.

<sup>43</sup> Although these were not specifically created to deal with step-parent and stepchild relationships, the following alternatives to adoption are also available: parents can safeguard the future of a child in their family by nominating a testamentary guardian for the child in their will. It takes effect upon the parent's death, but the courts have an overriding discretion to remove and/or appoint a different guardian where the court considers it to be in the best interests of the child, and it may also be challenged in court by a surviving parent or guardian. If there is another guardian, the testamentary guardian must exercise his/her powers jointly with this guardian. Provision may be made in the step-parent's will for the child to inherit.

<sup>44</sup> While the eligibility and assessment requirements for the states are very similar, Queensland has an additional assessment requirement specifically for step-parent adoption, namely that the chief executive must also have regard to the nature, closeness and quality of the child's relationship with the step-parent and the members of the step-parent's household: Adoption Act 29 of 2009 s 130(2).

<sup>45</sup> Commonwealth of Australia, Family Law Council, 'Annual Report 1995–96' (1996) <[www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Stepparent%20Adoption.pdf](http://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Stepparent%20Adoption.pdf)> accessed 3 November 2016 at 4.

promote the child's well-being or welfare and best interests than an alternative order.<sup>46</sup>

The alternative order, which is the main option where adoption orders would have been made in the past, is a parenting order.<sup>47</sup> It preserves the child's legal ties to both parents and their families, while acknowledging the child's new situation.<sup>48</sup> A parenting order does not take away or diminish any aspect of the parental responsibility of any person for the child.<sup>49</sup> Any person concerned with the care, welfare, or development of the child may apply to the family court for a parenting order.<sup>50</sup> It can, therefore, be made in favour of a step-parent.<sup>51</sup> The best interests of the child are the paramount consideration when making a parenting order.<sup>52</sup> It may deal with one or more of the following:<sup>53</sup>

- the person or persons with whom a child is to live;
- the time a child is to spend with another person or other persons;
- the allocation of parental responsibility for a child;

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<sup>46</sup> Adoption Act of 1988 (Tasmania) s 20(7): of an additional requirement is that special circumstances exist, which warrant the making of the adoption order; Adoption Act of 1994 (Western Australia) s 68(1)(fa); Adoption Act of 1984 (Victoria) s 11(6): an additional requirement is that the spouse is not married to another person at the time that the order is made; Adoption Act of 1988 (South Australia) s 10(1); Adoption Act of 2009 (Queensland) s 208(e) and (f); and Adoption Act of 2000 (New South Wales) s 30: additional requirements are that the child must be at least five years old and that the step-parent has lived with the parent for a continuous period of not less than three years immediately before the adoption application. Whereas state law governs adoption, alternative orders are dealt with in the Family Court of Australia, which is a federal court. See also the online booklet: Victorian Government, Department of Human Services, 'Stepchildren and Adoption: Information for Parents and Step-parents' (2009) 7 <[www.dhs.vic.gov.au/\\_data/assets/pdf\\_file/0006/572901/stepchild\\_adoption\\_dl\\_booklet.pdf](http://www.dhs.vic.gov.au/_data/assets/pdf_file/0006/572901/stepchild_adoption_dl_booklet.pdf)> accessed 14 November 2016 (hereinafter 'Stepchildren and Adoption Information').

<sup>47</sup> Parenting orders are provided for in part VII of the Family Law Act 53 of 1975 (hereinafter 'FLA') and in terms of s 64B(1), they deal with the matters mentioned in 64B(2). Parenting or consent orders do not deal with inheritance matters.

<sup>48</sup> A court will not make a parenting order unless the parties to the proceedings have attended family counselling. This requirement may be dispensed with if the court is satisfied that there is an urgent need for a parenting order, or if the order is made with the consent of all the parties: FLA s 65F(2) and (3).

<sup>49</sup> FLA s 61D(2). If a parenting order is granted through the family court, the child will not automatically inherit from the step-parent and will retain the automatic right of inheritance from their parents.

<sup>50</sup> FLA ss 20, 64C and 65C. Even though adoption by a step-parent is now a secondary option to an alternative order, provision is not specifically made for step-parents. They are included in the list of persons who may apply for a parenting order.

<sup>51</sup> A step-parent is defined in 54 of the FLA as a person who is not a parent of the child and is, or has been, married to, or is a de facto partner of a parent of the child, and treats the child as a member of the family formed with the parent.

<sup>52</sup> FLA ss 60CA and 65AA.

<sup>53</sup> A parenting order effectively gives a step-parent all the responsibilities of a parent, or it could cover specific issues.

- in the case where two or more persons are to share parental responsibility for a child, the form of consultations those persons are to have with one another on decisions to be made in the exercise of that responsibility;
- the communication a child is to have with another person or other persons;
- maintenance of a child;
- the steps to be taken before an application is made to a court for a variation of the order to take account of the changing needs or circumstances of a child to whom the order relates, or of the parties to the proceedings in which the order is made;
- the process to be used for resolving disputes about the terms or operation of the order; and
- any aspect of the care, welfare, or development of the child, or any other aspect of parental responsibility for a child.<sup>54</sup>

A parenting order does not automatically provide for maintenance of a child. A step-parent has a duty to maintain a child if, and only if, a court determines that it is proper for the step-parent to have that duty.<sup>55</sup> If a parenting order provides for maintenance, it is referred to as a child-maintenance order.<sup>56</sup> It is secondary to the duty of a parent and does not derogate from the duty of the parents to maintain the child.<sup>57</sup> Unlike an adoption order, it expires when the child turns eighteen, marries, or enters into a *de facto* relationship.<sup>58</sup>

### New Zealand<sup>59</sup>

In 1998, the New Zealand Law Commission was tasked with reviewing the legal framework for adoption in New Zealand, and with recommending whether and how it should be modified to better address contemporary

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<sup>54</sup> FLA s 64B(2).

<sup>55</sup> FLA s 66D(1).

<sup>56</sup> FLA s 64B(5).

<sup>57</sup> FLA s 66D(2).

<sup>58</sup> FLA s 65H(2). Provision must also be made for the child in the step-parent's will, as a parenting order does not deal with inheritance matters.

<sup>59</sup> Although these were not specifically created to deal with step-parent and stepchild relationships, the Care of Children Act of 2004 includes the following alternatives to adoption: a parenting order, which determines the time or times when a person has the role of providing day-to-day care for, or may have contact with, a child (s 47(2)(a)). It is available to any eligible person, which includes a spouse or partner of a parent of the child (s 47(1)(c)); and may specify any of the following: the nature of that contact; the duration and timing of that contact; any arrangements that are necessary or desirable to facilitate that contact (s 48(3)). The Child Support Act of 1991 provides that child support may be sought from any person who is a parent (s 6(1)(a)), of and a person, who has been declared to be a step-parent by a family court, is a parent of the child (s 7(1)(h)). A parent may appoint a step-parent as a testamentary guardian in a will. The person appointed automatically becomes a testamentary guardian when the parent dies. He or she becomes a joint guardian with any other guardian (s 26). A step-parent can make provision for a child to inherit in his or her will.

social needs.<sup>60</sup> Report 65, which was published in September 2000, kept the best interests of the child at the centre of the process as the paramount consideration.<sup>61</sup> The Report proposed an Act to consolidate legislation relating to parenting and care of children; to deal coherently with child-placement issues; to incorporate adoption as one of a number of options for the care of a child; and to reform the entire adoption process.<sup>62</sup> Thirty-one of the thirty-two participants who had commented on step-parent adoption, submitted that there should be a presumption that a step-parent may only adopt where this is clearly preferable to being appointed as an additional guardian.<sup>63</sup>

This submission was not included in the recommendations, but the New Zealand Law Commission did, however, recognise the difference between step-parent adoption and other adoptions. It also recognised the reality that step-parent adoption is not necessarily in the best interests of a child. It warned that the law should be cautious about severing the parent-and-child relationship, and that family law generally favours maintaining links between children, their parents and their extended family members.<sup>64</sup> It proposed that the courts should not encourage step-parent adoption, that people should come to terms with the reality of their family situation, and that the court should not encourage the reshuffling and dealing out of a

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<sup>60</sup> The drive to reform New Zealand's adoption law has been ongoing for years. There have been numerous attempts and recommendations over the years to reform the Adoption Act of 1955. Also see *B v G* [2002] NZFLR 961 at 964; M Henaghan, 'Adoption—Time for Changes' (2006) New Zealand Family LJ 131. It does not specifically provide for step-parent adoption, although adoption by a parent together with his or her spouse is possible—Adoption Act of 1955, ss 3(3) and 4(1)(c). One of the terms of reference that the Commission had to consider, was who should be permitted to adopt, including whether there should be any restrictions on step-parent or inter-family adoptions. The Commission described adoption as a traumatic event that is not necessarily in the best interests of a child, is likely to have serious repercussions for the birth family, and is often used to sever the relationship between the child and non-custodial parent (38, 139 and 234). Even though Report 65 recommended (appendix A at 221) that a parent, whose spouse or partner is applying to adopt that parent's child, need not personally apply for an adoption order, adoption by a step-parent has to be done jointly with the parent.

<sup>61</sup> Report 65 (n 31) 66, 70 and 216.

<sup>62</sup> *ibid* xv, xx, 4 and 42. It suggested that the Act should be referred to as the Care of Children Act.

<sup>63</sup> *ibid* para 371. Additional guardianship is discussed below.

<sup>64</sup> *ibid* para 368.

so-called new family.<sup>65</sup> It proposed the inclusion of a new, enhanced form of guardianship.<sup>66</sup> This form of guardianship was envisaged as possibly being preferable to adoption in situations where responsibility for a child has been partially or totally assumed by a step-parent.<sup>67</sup> It would provide a means of legally adding an adult relationship to a child's life, rather than substituting a parent.<sup>68</sup> A family judge would be required to consider whether it would be more appropriate than adoption in regulating the status of a child in relation to a step-parent.<sup>69</sup>

The purpose of the Care of Children Act of 2004,<sup>70</sup> is to: promote children's welfare and their best interests, to facilitate their development by helping to ensure that appropriate arrangements are in place for their guardianship and care; and to recognise certain of their rights. This Act came into effect on 1 July 2005. Even though reform of adoption legislation is necessary and long overdue, the Care of Children Act did not repeal the Adoption Act of 1955, but the legislature took cognisance of the Commission's recommendations and included certain of them. The welfare and best interests of the child must be the initial and paramount considerations in proceedings under the Act.<sup>71</sup>

The Care of Children Act makes provision for a legal alternative to adoption that is exclusively available to a step-parent.<sup>72</sup> An eligible spouse

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<sup>65</sup> *ibid* para 373. It recommended that a judge must consider the following when faced with an application for step-parent adoption: the degree of contact that a child has with the other birth parent and that birth parent's extended family, and the effect that granting the adoption order might have on these relationships and degree of contact; whether enduring guardianship or guardianship would be a more appropriate option than adoption to regulate the status of the child in relation to a step-parent; and whether the step-parent has lived with the child for not less than three years preceding the adoption application (para 375, appendix A at 221). It further recommended that in all step-parent adoptions a social worker's report should be called for.

<sup>66</sup> The term proposed was 'enduring guardianship', because the status of an enduring guardian would not automatically expire, but it would be terminable by court order. The appointment of an additional guardian, as provided for in the Care of Children Act, does come to an end.

<sup>67</sup> The recommendation was also aimed at family members.

<sup>68</sup> Report 65 (n 31) para 117.

<sup>69</sup> *ibid* appendix A at 221.

<sup>70</sup> Hereinafter 'Care of Children Act'.

<sup>71</sup> Care of Children Act s 4(1).

<sup>72</sup> *ibid* s 23. The Care of Children Act provides for this through additional guardianship and not enduring guardianship as recommended by the Law Commission. Even though this alternative is not necessarily preferable to adoption, its importance is signified by the inclusion of an alternative order specifically for step-parents.

or partner of a parent<sup>73</sup> may be appointed if the parent or parents<sup>74</sup> are making the appointment, and:

- the eligible spouse or partner shares responsibility for the child's day-to-day care, and has done so for not less than one year; and
- the eligible spouse or partner is not, and has never been, involved in proceedings concerning a child under this Act, a former Act corresponding to this Act, or Part 2 of the Children, Young Persons, and Their Families Act of 1989; and
- the eligible spouse or partner is not, and has never been, either a respondent or an associated respondent in proceedings under the Domestic Violence Act of 1995; and
- the eligible spouse or partner has never been convicted of an offence involving harm to a child, including an offence involving violence (that is, physical or sexual abuse), ill-treatment, abuse, neglect, or deprivation in relation to a child; or of an offence involving a child pornography publication in terms of the Films, Videos and Publications Classification Act of 1993.<sup>75</sup>

The person or persons making the appointment and the proposed additional guardian must agree to the appointment in writing and must take any reasonable steps to ascertain and consider any views expressed by the child on the appointment.<sup>76</sup> The appointment only takes effect upon approval by the Registrar of a family court.<sup>77</sup> If both parents cannot agree on the appointment of a step-parent as additional guardian, or if the step-parent cannot be appointed because of any of the restrictions, they can apply to the

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<sup>73</sup> A spouse or partner of a parent is a person who is or has been married to, or is in a civil union or de facto relationship with a parent of the child and who shares responsibility for the child's day-to-day care with the parent (s 8). These persons will be referred to as 'step-parents'. In terms of s 47(1)(c), a spouse or partner of a parent of the child is an eligible person.

<sup>74</sup> If both parents of the child are guardians of the child, the appointment must be made by both of them. If the mother of the child is the sole guardian of the child because she was not married to or living in a de facto relationship with the father, the appointment must be made by the mother and the father of the child. If a parent of the child is the sole guardian of the child because the other parent of the child is dead, or because of the application of Part 2 of the Status of Children Act of 1969, the appointment must be made by the parent. If, before dying, a parent of the child appointed a testamentary guardian of the child under s 26(1) of the Care of Children Act, and the non-resident parent of the child is alive and is the child's guardian jointly with the testamentary guardian, the appointment must be made by the surviving parent and the testamentary guardian (s 21 read with s 17(2) and (3) of the Care of Children Act).

<sup>75</sup> Care of Children Act s 23(2).

<sup>76</sup> *ibid* s 23(4). If the child already has a testamentary guardian, a court-appointed guardian, or if another additional guardian has been appointed, or if the child is or has been involved in care- and protection proceedings or if an applicant, has been the subject of a protection order under the Domestic Violence Act, no appointment of an additional guardian may be made; (s 22).

<sup>77</sup> *ibid* s 25(1).

family court, in which case it will be left to the judge to decide whether the appointment will be made.<sup>78</sup>

Appointment as additional guardian gives the step-parent all the duties, powers, rights and responsibilities that a parent of the child has in relation to the upbringing of the child.<sup>79</sup> These duties include:

- having the role of providing day-to-day care for the child; and
- contributing to the child's intellectual, emotional, physical, social, cultural and other personal development; and
- determining for or with the child, or helping the child to determine, questions about important matters affecting the child.<sup>80</sup>

The guardianship comes to an end when the child turns eighteen, marries or enters into a civil union, has a *de facto* partner, or if the guardian is removed by the court.<sup>81</sup>

### United Kingdom<sup>82</sup>

Although it is not a requirement that an alternative order must be sought before adoption by a step-parent may be considered,<sup>83</sup> the paramount consideration of the court when it determines any question with regard to the upbringing of a child—including an adoption application—must be the child's welfare.<sup>84</sup> The court considering the adoption application must have regard to the child's relationship with relatives<sup>85</sup> and the likely effect on the child ceasing to be a member of its original family.<sup>86</sup> Unless the contrary is shown, the court is to presume that the involvement of each parent in the

<sup>78</sup> *ibid* s 27.

<sup>79</sup> *ibid* s 15(a).

<sup>80</sup> *ibid* s 16(1). Important matters include the child's name, changes to the child's place of residence, medical treatment for the child, where and how the child is to be educated, as well as the child's culture, language and religious denomination and practice; (s 16(2)). The court may also provide for maintenance of the child.

<sup>81</sup> *ibid* s 28(1).

<sup>82</sup> A family court may also grant a child arrangements order in favour of a step-parent, which regulates arrangements relating not only to with whom the child is to live, spend time with or otherwise have contact with, but also to when; (s 8 of the Children Act 1989). For someone who does not qualify for a parental responsibility order or agreement (such as co-habitants), this is a way of obtaining parental responsibility. A parent with parental responsibility can, in their will, name a person to be a guardian for a child in the event of the parent's death. It will take effect upon the death of the parent, unless the child has a parent with parental responsibility, in which case it will take effect when the child no longer has a parent with parental responsibility for him or her. The guardian will get parental responsibility for the child, but not residence (Children Act 1989, s 5). If a stepchild was treated as a child of the family by a married step-parent, and there is either no or inadequate provision on the death of the step-parent, s/he can make an application for payment to the court (s 1(1)(d) of the Inheritance (Provision for Family and Dependents) Act 1975).

<sup>83</sup> Adoption and Children Act, 2002 (c 38) allows for step-parent adoption in s 51(2).

<sup>84</sup> Children Act 1989 s 1(1)(a); Adoption and Children Act s 1(2).

<sup>85</sup> Adoption and Children Act, 2002 (c 38) s 1(4)(f).

<sup>86</sup> *ibid* s 1(4)(c).

life of that child will further the child's welfare.<sup>87</sup> Usually, family courts wish to encourage children to maintain links with their birth relatives, wherever possible. This is important for the child's sense of identity as he or she is growing up.<sup>88</sup> These provisions clearly indicate that options other than adoption might be preferable in the case of a step-parent and stepchild relationship.

In 2002, a section was incorporated into the Children Act 1989, to provide exclusively for the acquisition of parental responsibility by a step-parent.<sup>89</sup> Parental responsibility includes all the rights, duties, powers, responsibilities and authority, that a parent or guardian of a child has by law in relation to the child and his or her property.<sup>90</sup> Unlike adoption, the legal relationship between the child and his or her birth family is not terminated, as the acquisition of parental responsibility by a step-parent does not affect the rights and responsibilities of the non-resident parents with parental responsibility.<sup>91</sup>

Parental responsibility may be acquired either by agreement or through an order of a family court. A parent, or both parents if they both have parental responsibility for the child, may, by agreement with the step-parent, provide for the step-parent to take parental responsibility for a child.<sup>92</sup> This document, which is known as a parental responsibility agreement,<sup>93</sup> needs to be signed by all the parties and must then be registered with the court.<sup>94</sup> If they cannot agree, the court may, on application by the step-parent, order that the step-parent shall have parental responsibility over the child.<sup>95</sup> This order is called a parental responsibility order. It grants the step-parent the same duties and responsibilities as a parent and allows him or her to share parental responsibility with any parent who already has parental responsibility.<sup>96</sup>

<sup>87</sup> Children Act 1989, s 1(2A).

<sup>88</sup> Hampshire County Council, Children's Services Department (Adoption), 'Step-parent Adoption—Is it the Right Choice for Your Family?' (2011) <[www3.hants.gov.uk/step-parent-adoption-nov2011.pdf](http://www3.hants.gov.uk/step-parent-adoption-nov2011.pdf)> accessed 26 October 2016.

<sup>89</sup> Section 4A was inserted into the Children Act 1989 by s 112 of the Adoption and Children Act 2002. In terms of s 4A(1) of the Children Act 1989, a step-parent is someone who is married to or is a civil partner of a child's parent and who has parental responsibility for the child. This is similar to the position in New Zealand. The acquisition of parental responsibility by a step-parent is not necessarily preferable to adoption, but a dedicated section provides the step-parent with this alternative.

<sup>90</sup> Children Act 1989, s 3(1).

<sup>91</sup> *ibid* s 2(6); a person who has parental responsibility for a child at any time shall not cease to have that responsibility solely because some other person subsequently acquires parental responsibility for the child.

<sup>92</sup> *ibid* s 4A(1)(a).

<sup>93</sup> *ibid* s 4A(2).

<sup>94</sup> The step-parent parental responsibility agreement, available in Form C (PRA2).

<sup>95</sup> Children Act 1989, s 4A(1)(b).

<sup>96</sup> In terms of s 2(5) of the Children Act 1989, more than one person may have parental responsibility for the same child at the same time.

When considering a parental responsibility agreement or a parental responsibility order, the court will have regard to all of the following:

- the best interests of the child;
- the step-parent's connection with the child;
- the risk of disruption; and
- the consent or position of any other person who has parental responsibility.<sup>97</sup>

A parental responsibility agreement or order does not include liability for maintenance,<sup>98</sup> although an order for maintenance may be made.<sup>99</sup> It remains in force until the child reaches the age of eighteen years,<sup>100</sup> but may be terminated by the court on application of any person who has parental responsibility for the child, or, with permission of the court, the child him- or herself.<sup>101</sup>

### BACK TO SOUTH AFRICA: THE NEXT STEP

Foreign jurisdictions have realised the need for alternative ways to protect the relationship between a step-parent and stepchild that would benefit and protect all parties involved, and have made the necessary changes to their legislation to provide for this. The approach in Australia is the most progressive. A step-parent has no choice—where adoption orders would have been made in the past, an alternative order is the first choice, and the onus will be on the step-parent to show why adoption is preferable to an alternative order. Adoption legislation in New Zealand is archaic and in desperate need of reform, but despite this, the legislator has also recognised the need to distinguish between adoption by strangers and adoption by step-parents, by singling out step-parents and providing them with an alternative

<sup>97</sup> The Children Act 1989 does not specify the factors that the court will consider, but these are available in C Fusco, 'Step-parents—Family Member or Legal Stranger?' (*Anthony Gold Solicitors*, Blog, 13 September 2013) <<http://anthonygold.co.uk/latest/legal-insight/step-parents-family-or-legal-strangers>> accessed 22 November 2016.

<sup>98</sup> Children Act 1989, s 3(4)(a)—whether or not a parent has parental responsibility for a child does not affect any obligation in relation to the child, such as the statutory duty to maintain him or her.

<sup>99</sup> If the relationship between a step-parent and a parent breaks down, it is possible for the step-parent to apply for a child arrangements order, (Children Act 1989, s 10(1), (2), (3), (4)(a), (5)(a) and (aa)). In terms of the Matrimonial Causes Act, 1973 (c 18), a step-parent may be required to make financial provision for a child where the child has been treated as a 'child of the family'. In determining whether such an order should be made, the court must take into account various factors, including the financial needs of the child; any physical or mental disability; whether the step-parent has assumed any responsibility for the child's maintenance; whether in doing so they knew that the child was not their own; and the liability of any other person to maintain the child (s 25(1), (3) and (4)).

<sup>100</sup> Children Act 1989, s 91(7) and (8).

<sup>101</sup> Children Act 1989, s 4A(3) and (4).

to adoption that was specifically created for step-parents. Similar provision is made in the United Kingdom.

Currently, South African legislation lags behind. Even though there are clear differences,<sup>102</sup> the Children's Act does not recognise the need to distinguish step-parent adoption from other forms of adoption,<sup>103</sup> and there is no express provision for the acquisition of parental responsibilities and rights by a step-parent, other than through adoption. However, this does not mean that alternative options do not exist or should not be pursued.<sup>104</sup> Although not explicitly stated, provision is made in the Children's Act for these alternatives, either by entering into an agreement<sup>105</sup> or by applying to court.<sup>106</sup>

### Parental Responsibilities and Rights Agreements<sup>107</sup>

A mother, or other person who has parental responsibilities and rights in respect of a child, may enter into an agreement providing for the acquisition of parental responsibilities and rights in respect of the child with any person

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<sup>102</sup> These differences are found in the reasons for wanting to adopt, as well as in the legal consequences; see 'Step-parent Adoption in South Africa' above.

<sup>103</sup> Although the Children's Act provides for step-parent adoption, a requirement is adoptability (s 230(1)(b)). The list does not make provision for the adoption of a stepchild (s 230(3)). Even though the court in *Centre for Child Law v Minister of Social Development* (n 22) para 17 held that the list does not preclude a child from being adoptable by a step-parent, the judgment does not provide a solution for all step-parent adoptions.

<sup>104</sup> If an alternative order is granted, the right of the child to inherit intestate from the step-parent will not be protected. However, the step-parent should be encouraged to make provision for the child in his or her will. Furthermore, the child's right to inherit from the non-resident parent and/or family is not terminated, which is obviously in the best interests of the child. Another way to protect the best interests of the child is for a parent to appoint a guardian for a child in the event of his or her death (Children's Act s 27). A parent who is the sole guardian of a child may, in his or her will, appoint a fit and proper person, either as guardian of the child, or to be vested with care of the child in the event of the death of a parent. This will come into effect upon the death of the parent and upon express or implied acceptance of the appointment. An adoption automatically confers the surname of the adoptive parent on a child. This will not happen in the case of any of the alternative orders, but in terms of s 25 of the Births and Deaths Registration Act 51 of 1992, a child's surname may be changed with the written consent of the stepfather, as well as the father, if he has guardianship. Psychologically it is usually important for a child to have the same surname as the family that it is part of. If the decision is taken to give the child a double-barrelled surname consisting of the surname of the non-resident parent and the step-parent, it acknowledges the reality that they are both part of the child's life and reduces any confusion and stress for the child.

<sup>105</sup> S 22(1); parental responsibilities and rights may be provided through agreement. If agreement can be reached, it will be less stressful for the child.

<sup>106</sup> Ss 23 and 24; the court may assign contact and care or guardianship.

<sup>107</sup> This is not intended as a complete discussion of parental responsibilities and rights agreements. For a comprehensive discussion, see J Heaton, 'Parental Responsibilities and Rights' in CJ Davel and AM Skelton (eds), *Commentary on the Children's Act* (rev serv 7 2015) 3-15-3-19.

having an interest in the care, well-being and development of the child.<sup>108</sup> This section reflects recognition of different family forms and the variety of care arrangements that are a reality in South Africa.<sup>109</sup> A step-parent might qualify as a person who has an interest in the care, well-being and development of the child.<sup>110</sup> All or some parental responsibilities and rights may be conferred, but only those parental responsibilities and rights, that the mother or other person has in respect of the child.<sup>111</sup> The circumstances of each case will determine whether all or some parental responsibilities and rights are acquired by the step-parent.<sup>112</sup>

Save where the agreement relates to guardianship of a child,<sup>113</sup> the parties have a choice to register the agreement with the family advocate, or to have it made an order of court, and it takes effect only once this has been done.<sup>114</sup> The only requirement before registering the agreement or making it an order of court, is that it must be in the best interests of the child.<sup>115</sup> Fortunately, the factors that have to be taken into account when considering the best interests of the child<sup>116</sup> are comprehensive and include the following:

- the nature of the personal relationship between the child and the step-parent;<sup>117</sup>
- the capacity of the step-parent to provide for the needs of the child;<sup>118</sup>
- the child's age, maturity, stage of development, gender, background and any other relevant characteristics;<sup>119</sup>
- the need for the child to be brought up within a stable family environment;<sup>120</sup>

<sup>108</sup> S 22. In terms of s 18(2), parental responsibilities and rights include the responsibility and right to care for the child, to maintain contact with the child, to act as guardian of the child, and to contribute to the maintenance of the child. The application is made by completing form 4 (general requirements regarding parental responsibilities and rights agreement) of the consolidated forms in terms of the regulations under the Children's Act, and by applying for it to be made an order of court.

<sup>109</sup> A Skelton, 'Parental Responsibilities and Rights' in T Boezaart (ed), *Child Law in South Africa* (Juta 2009) 80. She also suggests that it would be useful where a parent shares responsibilities with another family member, such as a grandparent.

<sup>110</sup> Heaton (n 107) suggests that the section includes the permanent life-partner of a parent.

<sup>111</sup> Children's Act s 22(2).

<sup>112</sup> In terms of s 22(1), the agreement sets out which parental responsibilities and rights will be acquired. Also see Heaton (n 107) 3-17.

<sup>113</sup> In terms of s 22(7), only a high court may confirm, amend or terminate an agreement that relates to the guardianship of a child.

<sup>114</sup> *ibid* s 22(4).

<sup>115</sup> *ibid* s 22(5). Also see ss 7, 9, 29(3).

<sup>116</sup> *ibid* s 7.

<sup>117</sup> *ibid* s 7(1)(a)(ii).

<sup>118</sup> *ibid* s 7(1)(c).

<sup>119</sup> *ibid* s 7(1)(g).

<sup>120</sup> *ibid* s 7(1)(k).

- the need to protect the child from any physical or psychological harm;<sup>121</sup> and
- any family violence involving the child or a family member of the child.<sup>122</sup>

Unfortunately, the list of factors is not open-ended, which might limit the aspects that the court could consider when making a decision. However, it has been suggested that judicial officers can and should use their inherent discretion to consider other factors, where relevant.<sup>123</sup>

Maintenance forms part of parental responsibilities and rights.<sup>124</sup> Should a parental responsibilities and rights agreement be entered into, the step-parent will have a duty to contribute to the maintenance of the child. This is definitely in the best interests of the stepchild<sup>125</sup> and eliminates the need for further court procedures.<sup>126</sup> Whereas adoption by a step-parent results in the non-resident parent no longer being responsible for maintenance, the child whose step-parent has been awarded parental responsibilities and rights is entitled to maintenance from both parents<sup>127</sup> and from the step-parent. A parental responsibilities and rights agreement may be amended or terminated by a person who has parental responsibilities and rights, by the child with leave of the court, or by any other person acting with the leave of the court.<sup>128</sup>

During the review of the Child Care Act, the suggestion was made that a parental responsibilities and rights agreement be included to allow a father who does not have parental responsibilities and rights to enter into an agreement with the mother to acquire these responsibilities and rights. The Law Commission specifically decided that it should not be possible for any person other than the father to acquire parental responsibilities and rights in this way.<sup>129</sup> Fortunately, when section 22 was enacted, provision

<sup>121</sup> *ibid* s 7(1)(l).

<sup>122</sup> *ibid* s 7(1)(m).

<sup>123</sup> T Boezaart, 'General Principles' in Davel and Skelton (eds), (n 107) 2-9.

<sup>124</sup> Children's Act s 18(2)(d).

<sup>125</sup> In Australia, a parenting order does not automatically provide for maintenance of a child; in New Zealand, it is for the court to decide whether the duties of an additional guardian should provide for maintenance; and in the United Kingdom, parental responsibility for a step-parent does not include maintenance.

<sup>126</sup> A stepfather has a duty to pay maintenance for a stepchild, but the extent will depend on the circumstances. See *MB v NB* 2010 (3) SA 220 (GSJ) paras 17-21; *Heystek v Heystek* 2002 (2) SA 754 (T) 757.

<sup>127</sup> The duty to pay maintenance is a common-law duty of a parent—see Maintenance Act 99 of 1998 s 15(1). Also see Heaton (n 107); N van Schalkwyk, 'Maintenance for Children' in Boezaart (ed), (n 10) 42.

<sup>128</sup> Children's Act s 22(6). Should this become necessary, amendment or termination will be less traumatic for the child than the rescission of an adoption.

<sup>129</sup> During the review process of the CCA, the Law Commission decided not to make it possible for any person to acquire parental rights and responsibilities by concluding an agreement with the mother, but recommended to allow only the child's father who does not have parental rights and responsibilities to enter into such an agreement with the mother; (n 24) para 7.5.

was made for any other person who has an interest in the care, well-being, and development of the child to become a co-holder of parental responsibilities and rights.<sup>130</sup> However, neither the section<sup>131</sup> nor the form that must be completed<sup>132</sup> makes provision for more than one person to confer parental responsibilities and rights. As a result, if both parents have parental responsibilities and rights, it will not be possible for them to enter into an agreement with the step-parent, even if they both agree to do so. Furthermore, if both parents have parental responsibilities and rights, but they do not agree to confer parental responsibilities and rights on the step-parent, the step-parent will not be able to acquire parental responsibilities and rights through a parental responsibilities and rights agreement. Where both parents have parental responsibilities and rights, it appears that, irrespective of whether or not they agree about conferring these responsibilities and rights on a step-parent, the only way for him or her to acquire such responsibilities and rights, is through an application to court.<sup>133</sup>

#### **Assignment of Contact, Care, or Guardianship by Order of Court<sup>134</sup>**

Contact or care may, on application by any person having an interest in the care, well-being, or development of a child, be awarded to the applicant by the High Court, the Divorce Court, or the Children's Court.<sup>135</sup> The court may include any conditions it deems necessary<sup>136</sup> and, in terms of section 23(2) of the Children's Act, it must take into account:

- the best interests of the child;
- the relationship between the applicant and the child, as well as any other relevant person and the child;

<sup>130</sup> After enactment, the section still refers to the mother of the child, not to the father.

<sup>131</sup> Sub-s (1) refers to an agreement between the mother of a child (or other person who has parental responsibilities and rights) and any other person having an interest in the care, well-being and development of the child. The reference is to one person only.

<sup>132</sup> Consolidated forms in terms of the regulations under the Children's Act (form 4). The particulars of the mother or other person have to be filled out on form 4, but no provision is made for a second person with parental responsibilities and rights to complete the form.

<sup>133</sup> In terms of s 28 of the Children's Act, the parent may apply to a court for the termination of the parental responsibilities and rights of the non-resident parent. The court must take into account the best interests of the child; the relationship between the child and the non-resident parent; the degree of commitment of the non-resident parent towards the child; and any other fact that should, in the opinion of the court, be taken into account.

<sup>134</sup> The advantage of this is that a step-parent may, if it would serve the best interests of the child, acquire responsibilities and rights without the termination of the parental responsibilities and rights of the parent who does not want to consent. Skelton (n 109) at 84 suggests the possibility of guardianship instead of adoption where parents are still alive and do not wish to make their children available for adoption.

<sup>135</sup> Children's Act s 23(1).

<sup>136</sup> *ibid* s 23(1). In the case of step-parents, these conditions may include communication or time spent with the non-resident parent, counselling for the parties, or any aspect of the care, welfare or development of the child that the court deems necessary to include.

- the degree of commitment that the applicant has shown towards the child;
- the extent to which the applicant has contributed towards expenses in connection with the birth and maintenance of the child;<sup>137</sup> and
- any other factor that should, in the opinion of the court, be taken into account.<sup>138</sup>

Any person having an interest in the care, well-being and development of a child may also apply to the High Court for an order granting guardianship of his or her child to the applicant.<sup>139</sup> When considering an application for guardianship, section 24(2) of the Children's Act provides that the court must take into account:

- the best interests of the child;
- the relationship between the applicant as well as the child, as well as any other relevant person and the child; and
- any other factor that should, in the opinion of the court, be taken into account.

The factors that need to be considered for both contact and care or guardianship correlate, to a large extent, with those in foreign jurisdictions as far as their alternative orders for step-parents are concerned. Furthermore, the list is open-ended, thus providing comprehensive protection and allowing court officials to consider any factors they deem relevant.<sup>140</sup>

As things stand, the relationship between the step-parent and stepchild can be protected in such a way that any existing relationship of the child with the non-resident parent and his or her extended family, can be maintained. If a parental responsibilities and rights agreement can be entered into, the protection will be comprehensive, but if not, full parental responsibilities and rights<sup>141</sup> cannot be awarded by the court granting contact and care or guardianship, in which case the court order should also make provision for maintenance.

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<sup>137</sup> This is clearly aimed at a father.

<sup>138</sup> The requirements are similar to those for alternative orders in foreign jurisdictions.

<sup>139</sup> Children's Act s 24(1). Only a High Court may award guardianship. When a court application is brought for guardianship of a child in terms of s 24, there is a concern that it may be an attempt to circumvent adoption—Children's Act ss 25 and 29(2). Where guardianship is acquired by a step-parent, this will not be a concern, as at least one other parent also has guardianship. For the child's adoption, or his/her removal or departure from the Republic, the consent of all persons with guardianship is necessary (Children's Act s 18(3)(c)(ii),(iii) read with s 18(5)).

<sup>140</sup> Aspects that should also be considered before an agreement is entered into or before an order in favour of a step-parent is granted, are the length of time that the step-parent has shared responsibility for the child's day-to-day care, as well as the criminal record of the step-parent. These requirements are found in the Children's Act s 23(2).

<sup>141</sup> Full parental responsibilities and rights include the responsibility to contribute to the maintenance of the child.

## CONCLUSION

Adoption is often described as the best way of securing stability in a child's life.<sup>142</sup> However, step-parent adoption has aims that are different from adoption by a stranger<sup>143</sup> and these differences must be recognised. The aim of adoption law is to provide a permanent, secure and healthy family life for children whose parents have died or are unable to provide them with the care they require.<sup>144</sup> In the case of step-parent adoption, the child is not in need of family or parental care, or of appropriate alternative care; it has not been removed from the family environment;<sup>145</sup> and there is not a lack of parental responsibility. There is at least one parent who is part of the child's life. Often there is also a parent whose legal ties to the child will be terminated by an adoption.<sup>146</sup> Unlike other forms of adoption, all the parties are known to each other and the step-parent is not selected by an agency after a screening process.<sup>147</sup>

In *GT v CT*, it was clear that, after the adoption, the parties still regarded the father as the children's 'real' father.<sup>148</sup> This is certainly not an isolated case—parents and step-parents do not always realise the legal implications and permanency of adoption, and that the relationship with the stepchild does not come to an end when the marriage ends.<sup>149</sup> Ultimately, just as in foreign jurisdictions, and as suggested by the Law Commission so many years ago, the difference between other adoptions and step-parent adoptions has to be recognised by the legislature. Ideally, the Children's Act should be amended to include an alternative to adoption that specifically provides ways, other than adoption, of protecting the step-family relationship and, most importantly, the best interests of the child. A children's court would then make an order for the adoption of the child, only if it would better promote the best interests of the child and if it is preferable to an alternative order where the applicant is a married person whose spouse or permanent domestic life-partner is the parent of the child.<sup>150</sup> Until then, a married person or permanent domestic life-partner, whose spouse is the parent of

<sup>142</sup> A Louw, 'Adoption of Children' in Boezaart (ed), (n 109) 153–154.

<sup>143</sup> See 'Introduction'.

<sup>144</sup> T Mosikatsana and J Loffell, 'Adoption' in Davel and Skelton (eds) (n 107) 15–2. This correlates to the views of the National Adoptive Parents' Institute and the Law Commission during the review of the Child Care Act—see 'Introduction' above.

<sup>145</sup> S 28(1)(b) of the Constitution.

<sup>146</sup> The termination is not the result of this parent not being suitable, but a result of the adoption order. Often this parent is still involved in the child's life.

<sup>147</sup> Although there is no automatic right to adoption, and a social-worker report is prepared, adoptive parents other than the step-parent are not considered.

<sup>148</sup> These included the stepfather, the mother, the father, the children and the court, (paras 22, 24, 28, 45 and 48). The parents still wanted the stepfather to be responsible for maintenance, though (para 29).

<sup>149</sup> Children's Act s 242(3)—once a child has been adopted, he or she is, for all purposes, regarded as the child of the adoptive parent, and vice versa.

<sup>150</sup> A further subsection will then have to be added to s 240(2) of the Children's Act.

a child, needs to be made aware of the alternatives to adoption currently available,<sup>151</sup> of the need to consider these alternatives and of the reasons why they might be preferable to adoption.<sup>152</sup>

What I advocate here is a shift in emphasis. The relationship between a step-parent and a stepchild definitely warrants protection, but not necessarily in the form of adoption. It is necessary to acknowledge that an adult relationship is being added to a child's life, and that a parent is not being substituted.<sup>153</sup> The time has come to reconsider our legislation and to find ways of protecting and formalising the step-parent and stepchild relationship, while acknowledging that there are also existing relationships that might deserve protection and should not necessarily be severed. Ultimately, the relationship between a step-parent and a stepchild must be protected in a way that serves the best interests of the child, not those of the parents or step-parent.

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<sup>151</sup> Social workers, family advocates and court officials have to be informed about the need to explain to prospective adoptive step-parents the importance and benefits of considering alternatives to adoption as a first step. If parental responsibilities and rights have been conferred upon, or contact and care or guardianship has been assigned to a step-parent, it does not mean that adoption is no longer possible. It could be considered at any stage. Where a step-parent applies to adopt a child, the onus should be on him or her to show why an alternative order was not sought or, if an alternative order is in place, why the adoption application has been launched.

<sup>152</sup> The relationship has to be scrutinised before any decision is taken. Even where the spouse or permanent domestic life-partner of the step-parent is the only parent in the child's life, it might still be preferable for the step-parent not to adopt the child, depending on the circumstances of the case.

<sup>153</sup> See Report 65 (n 31) para 117.