

IN THE HIGH COURT OF SOUTH AFRICA(CAPE OF GOOD HOPE PROVINCIAL DIVISION)CASE NO:

13967/2007

DATE:

12 MAY 2008

5 In the matter between:

JOHANNA WILHELMINA FLYNN

Applicant

and

LESLIE WALTER FARR N.O.1ST RespondentGERHARD BRITS N.O.2ND Respondent10 THE MASTER OF THE HIGH COURT3RD RespondentTHE MINISTER OF JUSTICE AND4TH RespondentCONSTITUTIONAL DEVELOPMENTLESLIE WALTER FARR5TH RespondentSHEILA BLANCHE LE COCK6TH Respondent15 KENNETH IVAN REED7TH RespondentDESMOND EDWARD REED8TH RespondentSHIRLEY ANNE SECOND9TH RespondentROBERT JOHN REED10TH RespondentELIZABETH BELINDA REED11TH Respondent20 LESLIE JACK REED12TH RespondentSYLVIA ANN MCCREADIE13TH RespondentILENE YVONNE ERASMUS14TH RespondentTREVOR EDWARD FARR15TH RespondentDEIDRE THERESE COETZEE16TH Respondent25 CATHERINE JANE LAW17TH RespondentBERNADETTE MARIA BREACH18TH Respondent

J U D G M E N T

DAVIS, J.:

[1] This is an application brought by the *executrix* of the estate of the late William Frederick Flynn (“Flynn”) wherein she seeks relief aimed at obtaining legal recognition of the relationship between Flynn and his stepfather, Edwin John Farr in the context of the law of intestate succession.

[2] The primary relief sought is either for an order declaring that the words “adopted child” in section 1(4)(e) of the Intestate Succession Act 81 of 1987 be interpreted to include both *de lege* adopted children as well as *de facto* adopted children; alternatively, that a definition of adopted child which reads as follows be inserted in section 1(4)(e) of the Act should read as follows:

“Adopted child shall include both *de facto* and *de lege* adopted children”.

There are further prayers (1) that the omissions in section 1(4)(e) of the Act of that definition be declared to be unconstitutional and invalid. (2) the Court declare Flynn to be the *de facto* adopted child of Farr and further, that Flynn be declared a descendant of Farr for the purpose of section 1(1)(b).

[3] A further declaration is sought that Flynn (or Flynn's deceased estate) inherit the intestate estate of Farr, that the first, second and third respondents give effect to the relief as sought.

5

[4] The relief has been expressly opposed by the first respondent in his capacity as executor of the intestate of the late Edward John Farr and by the fourth respondent ('the Minister').

10

The factual background

[5] This case has been made all the more difficult because of the poignant facts which underpin the present application. Flynn was the son of Mary Elizabeth Farr. She divorced Flynn's biological father and in 1964, when Flynn was 14 years old, she married Farr in community of property. There can be no doubt, from the evidence placed before this Court, that Farr was part of Flynn's life from the time the little boy was five years old. He was raised by his mother and Farr in a family home located in Plumstead, Cape Town. From all the evidence it appears that Flynn enjoyed a fine relationship with Farr.

20

[6] Flynn grew up to be one of the greatest actors who ever graced the South African stage. Throughout his career,

25

it appears that Farr afforded him the support and the affection which any father would have been credited for so exhibiting. However, Flynn was never legally adopted by Farr, ostensibly because Flynn's biological father would not grant his consent for such adoption to take place. Whatever the reason, a legal process of adoption was never formally initiated nor in any other way pursued.

10 [7] Flynn's mother died intestate in 1999. Farr was appointed the executor of her estate and assumed full responsibility for the winding up thereof. Her estate, with Farr as executor, was wound up exclusively in favour of Farr, notwithstanding provisions in the Act affording part
15 of the estate to Flynn. Farr died intestate in 2006. In terms of the Act, Flynn was not a descendant and therefore was not entitled to inherit from the estate of Farr.

20 [8] Flynn himself died suddenly in 2007, at a time when it was common cause that he was in the process of giving instructions to his attorneys to bring an application to have his rights to the estate of Farr legally recognised. The present application is being brought by his executor
25 on behalf of his deceased estate.

The legal framework: Adoption

5 [9] The Act regulating adoptions from the time Flynn's mother was married to Farr until approximately the time when Flynn attained the age of majority is to be found in the Children's Act, VII of 1966 ("the 1960 Children's Act"). Chapter 7 of the Children's Act regulated adoptions at the time. Adoptions had to be effected by the order of the Children's Court in the district in which
10 the child resided, upon application of the adoptive parents. Section 71(2) of the 1960 Childrens Act contained a number of peremptory requirements, including (1) consent to the adoption to be given by both parents; (2) if one parent had deserted the child, by the
15 other parent; (3) the child, if over the age of 10 years, consented to the adoption. The consent had to be in writing and signed in the presence of the Commissioner of Child Welfare (section 71(3) of the 1960 Childrens Act).

20

[10] Section 72 of the 1960 Childrens Act provided that such consent may dispensed with in an application for adoption, where a child had been deserted a parent was deemed to have deserted the child whom he was legally
25 liable to maintain and has, while able to do so, failed to

provide him or her with adequate food, clothing, lodging and medical care.

[11] In terms of section 72(2) of the 1960 Childrens Act,
5 where application was made for an adoption of a child of a parent who has deserted such child, the Court shall not grant the application, unless if the place of residence or address of the parent was known to the Court such parent has been given reasonable opportunity to oppose
10 the application.

Succession law

[12] So much for the framework of adoption which is relevant to the dispute. I turn now to the law of intestate
15 succession. The South African law of intestate succession was based on the political ordinance of 1 April 1580, the Interpretation Ordinance of 13 May 1594 and a *placaat* of 18 December 1599 which enactments were decreed to be in force in the Cape by a charter
20 granted by the Estates General of the Netherlands on 10 January 1661, as confirmed by the Governor in Council on 19 June 1714.

[13] A right of succession was conferred on the intestacy on
25 the blood relations of a deceased person but none on a

surviving spouse. However, as marriage in community of property was the universal rule, such spouse *ipso facto* took half of the joint estate. The Succession Act 13 of 1934 was passed to protect the rights of spouses married out of community of property. In terms thereof, the surviving spouse, whether married in or out of community of property, was granted a right to a share in the intestate estate of the deceased's spouse.

10 [14] This Act was expanded upon and then repealed by the current Act which came into operation on 18 March 1988 (see Proclamation 42 of Government Gazette 11188 of 18 March 1988). Under section 74(2) of the 1960 Childrens Act, prior to its partial repeal by the Child Care Act, 15 provision was made that an adopted child shall, for all purposes be, deemed in law to be the legitimate child of the adoptive parent and shall not, by virtue of the adoption, become entitled to any property devolving on any child or his adoptive parent by virtue of any instrument executed prior to the date of the order of 20 adoption. Whether the adoption takes place *inter vivos* or *mortis causa*, unless the instrument clearly conveyed the intention that property shall devolve upon the adopted child, nor shall the adopted child inherit any property by

way of intestacy from any relative of his or her adoptive parent.

[15] Subsection (3) provides that an order of adoption shall
5 terminate all the rights and legal responsibilities which may exist between the child and his or her natural parents and their relatives, save for the right of the child to inherit from them by way of intestacy.

10 The categories of intestate heirs as provided in the Act can be summarised thus:

1. Surviving spouse in the absence of any descendant, inherits everything.
2. The descendant who, in the absence of a spouse, inherits everything.
- 15 3. For the surviving spouse to inherit the share of a single child, subject to a minimum if there is too little in the estate, if the deceased is survived by both the surviving spouses and descendants.
- 20 4. Parents who only inherit in the absence of the spouse or descendant and in the absence of any one parent, the descendants of that deceased parent will inherit his or her share.

5. In the absence of a spouse, descendant or parent, descendants of the deceased's mother who are related to the deceased through her only, as well as by descendants of the deceased's father who are related to the deceased, through him only or through both.
6. In the absence of a spouse, descendant, parent or descendant of a parent, the other blood relation or blood relations of the deceased who are related to him or her nearest in degree.

From this list, it is clear that, although not so defined, a descendant is for all intents and purposes "a child of the deceased" and in terms of section 1(4)(e), this includes an adopted child who, by virtue of the deeming provision, is deemed to be a descendant of his or her adoptive parent or parents and not to be a descendant of his or her natural parent or parents, save in the case of a natural parent who is also the adoptive parent of the child or was at the time of the adoption married to the adoptive parent of the child.

[16] Section 1(5) of the Act provides that, if an adopted child is deemed to be a descendant of his or her adoptive parent or is deemed not to be a descendant of his or her

natural parent, the adoptive parent concerned shall be deemed to be an ancestor of the child or shall be deemed not to be an ancestor of the child as the case may be. Viewed thus, the effect of section 1(4)(e) read together with section 1(5) of the Act is that a child may not be a descendant of his or her adoptive parents as well as his or her natural parents and that in turn both the adoptive and natural parents will not be regarded as ancestors to the child. A reciprocity exists between the parent and the child in respect of the relationship on intestacy.

The applicant's case

[17] It is clear from this analysis that Flynn would stand to inherit by way of intestacy from the estate of the late Edward Farr if he was regarded as Farr's adopted child. Mr Hopkins, who appeared on behalf of the applicant, correctly noted that, as the law stands at present, a person is only regarded as the adopted child of a parent where that parent has legally adopted the child. As Flynn was never legally adopted by Farr, notwithstanding the fact that Farr may well have regarded him as his child and that he took him into his home, looked after him, raised him and treated him at all times as his own child.

[18] Mr Hopkins defined the two key issues with which the Court needs to deal as follows:

1. A legal question: Does the law of intestate succession which differentiates between a *de facto* and a *de lege facto* adopted child need to be reformed so as to bring it in line with what Mr Hopkins described as constitutional values, more generally and section 9 of the Republic of South Africa Constitution, Act 108 of 1996 (“the Constitution”) in particular.
2. A factual question: Assuming that the law should treat factually and legally adopted children in the same way, then was Flynn factually adopted by Farr?

15

The legal question

[19] I turn now to deal with the legal question, a positive determination for applicant which is crucial to his case.

The legal issues can be defined thus:

1. Are the words “adopted child” as employed in section 4(e) of the Act broad enough to include what Mr Hopkins categorised as *de facto* and *de lege* adoptions?
2. If the words “adopted child” as they are used in the Act are intended to refer only to legal

25

adoptions (*de lege*) and not to factual adoptions (*de facto*) does such a distinction render the provisions in the Act inconsistent with the equality protection as enshrined in section 9 of the Constitution which provides, *inter alia*, that everyone is equal before the law and that the law may not unfairly discriminate against any person.

10 [20] Mr Hopkins referred to section 20 of Act 74 of 1983 which deals with the effect of a legal adoption obtained by a Court order. Section 20(2) of that Act provides thus:

“An adopted child shall for all purposes whatever(sic) be deemed in law to be the legitimate child of the adoptive parent as if he was borne of that parent during the existence of a lawful marriage”.

In Mr Hopkins' view, on the basis of existing law, had Farr legally adopted Flynn and obtained a Court order to that effect, Flynn, for all purposes, would have been regarded as a descendant of Farr. That would have meant that as his descendant, Flynn would have inherited from the estate of the late Farr by way of intestacy. That conclusion is reached by virtue of the provisions of the

Act, together with the provisions of Act 74 of 1983 as I have set them out.

[21] The problem is that since the late Farr did not legally
5 adopt Flynn, he cannot be regarded as a descendant for the purposes of intestate succession. To that end he submitted that the current interpretation of an adopted child as that term is employed in the Act differentiates and/or discriminates between the factually adopted child
10 who receives nothing and the legally adopted child who does inherit by way of intestacy. The question, as Mr Hopkins defined it, is whether this discrimination is inconsistent with the Constitution. It is to this constitutional challenge that I must now turn.

15

The equality position

[22] The legal issue to be addressed is whether it can be said
to be unconstitutional to discriminate between children
who are factually adopted and those that are legally
20 adopted. To the extent that it is relevant, section 9 of the Constitution provides thus:

- (1) Everyone is equal before the law and has the right to equal protection benefit of the law.
- (2) Equality includes the full and equal enjoyment
25 of all rights and freedoms.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3).

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair”.

[23] Section 9 has been the subject of a number of Constitutional Court judgments in which the Court has developed and refined the jurisprudence of equality. For the purposes of this dispute, reference must be made to the decision in Harksen v Lane N.O. 1998(1) SA 300 (CC) at para 53 where the Court set out a series of stages for the constitutional enquiry, as to whether a law or conduct which is challenged, breaches the equality protection:

1. Does the challenged law or conduct differentiate between people or categories of

people? If so, does the differentiation bear a rational connection to a legitimate purpose? If it does not, then there is a violation of section 9(1). What this really means is: is there a good reason for treating X differently to Y?

2. Does the differentiation amount to discrimination that can be regarded as unfair?

This requires a two-stage analysis:

(a) Does the differentiation amount to discrimination? If the discrimination happens on the basis of a ground listed in section 9(3) it is presumed to be discrimination. If one of the listed grounds is not so implicated, then whether or not it is discrimination depends on whether objectively viewed, the differentiation is based on attributes and characteristics that have the potential to impair the fundamental human dignity of a person who has been treated differently;

(b) if the differentiation amounts to discrimination, the next question asked is whether or not the discrimination is unfair. If the discrimination occurs on a

ground listed in subsection (3), unfairness is presumed. If it occurs on a ground that has not been so listed, unfairness can still be established by examining the impact of the discrimination on the person affected by the law or conduct.

5

[24] Applicant's invocation of the equality clause can be summarised thus: Current law treats *de facto* and *de lege* adopted children differently. Therefore the question must be asked: does the differentiation of the treatment of these children amount to discrimination? Manifestly it cannot be presumed that this differentiation amounts to discrimination, because it is not predicated on a ground listed in subsection (3). Critically the issue is whether the differentiation may be said to unreasonably impair the human dignity of that person affected by this differentiation.

15

20

[25] According to Mr Hopkins, the evidence indicated that Flynn suffered adverse feelings that support this particular conclusion, as a clear consequence of the law failing to recognise that Farr was his father. In this

connection the following letter of Flynn to his attorney is instructive:

5 “A few days ago my dad’s lawyer (Farr) has informed of the very distressing news – due to my dad’s own intestacy, the law dictates that he and mom’s combined estate, including our family home and everything in it (all valued around three to four million rand) will automatically be passed on to his nearest surviving relatives – namely his elder
10 brother and younger sister, their offspring, as well as the offspring of his deceased brothers and sisters, of which there are dozens.

According to these lawyers who handled various affairs for my dad over the years, as a stepson who
15 was never legally adopted I have no rights or say in the matter whatsoever – something my dad and I were totally unaware of. Had he known this I have no doubt that he would have immediately created a will – however brief it might have been. When my
20 mom died without a will he appointed himself as executor and handled the entire matter himself at the age of 73, opening a can of worms process which took him years to complete – and it took his toll on his health and his wellbeing.

He vowed to me and his lawyers that he would make a will – so that I would be spared having to go through a similar process. Unfortunately throughout his life my dad was a great “putter-off” of things – and so it transpired that his ill-health caught up with him and he died rather suddenly – and intestate.

I now find myself in the very painful situation of having to accept that the 50 years he and my mom and I spent together as a very close-knit family have been simply wiped out as though those years and that very specific relationship between us never existed. I am being most sincere when I say that I am not speaking about any money I or my son or my mom's side of the family may have inherited – I

would trade ten times that amount just to have them both still alive and with us. My outrage and dismay is aimed at the law which decrees that any verbal post-life issues my parents had – and there were several – not only to do with my son and I but with various charities of church and my mom's sister and her family who have been struggling financially for years. These wishes of my parents have now been consigned to the scrap heap by a law which in situations like these should be flexible and open to

interpretation – if the facts and history of the family concerned warrant it – as I believe they do”.

5 [26] Even if this kind of evidence is sufficiently supportive of a conclusion that the legal treatment of Flynn impacted upon his dignity, that is not the end of the enquiry. The second question that has to be asked is whether, on the assumption that the differentiation is discrimination, it is fair discrimination that ought to be accepted by this Court, or whether it is unfair discrimination which no court can sanction. Unfair discrimination is clearly unconstitutional and accordingly unlawful. The fairness of the discrimination primarily focuses on the impact that the discrimination may have on the affected person.

10 According to Mr Hopkins, based on the kind of evidence of which I have cited, Flynn was adversely affected by the discrimination in a manner which impacted harshly, onerously and unfairly on him.

15 [27] Mr Hopkins submitted that, in regard to differentiation, a state operating in a constitutional democracy is expected to act in a rational manner. It should not regulate the lives of its citizens in an arbitrary manner or exhibit manifest “naked preferences” that can serve no legitimate purpose. Such conduct would be inconsistent

20 [27] Mr Hopkins submitted that, in regard to differentiation, a state operating in a constitutional democracy is expected to act in a rational manner. It should not regulate the lives of its citizens in an arbitrary manner or exhibit manifest “naked preferences” that can serve no legitimate purpose. Such conduct would be inconsistent

25

with the rule of law and the very fundamental premises upon which a constitutional state is predicated. A significant purpose of the equality clause was to ensure that the state was bound to function in a rational manner.

5 Accordingly, it could not be said that mere differentiation infringes the equality clause in the Constitution. But where there was no rational relationship between the differentiation in question and any purpose proclaimed by government to validate the action, such differentiation would unquestionably infringe the protections afforded by
10 the equality clause.

[28] The question which now must be asked and which was critical to this case was the following: is there a rational
15 reason for only allowing *de lege* adopted children to inherit and not extending the same benefits to *de facto* adopted children? In this connection Mr Hopkins referred to the decision of the Constitutional Court in Daniels v Campbell N.O. Others 2004(5) SA 331 (CC) which also
20 dealt with section 1 the Act.

[29] In terms of section 1(a) of the Act, where a person dies intestate but is survived by a spouse, such spouse shall
25 inherit the intestate estate. The courts have traditionally regarded "a spouse" to mean someone to whom one is

legally married. The law for a long was recognized that marriage is only legally valid if it is a monogamous union. Potentially polygamous unions, such as Muslim marriages and those which may have been conducted under African customary law, because they are potentially polygamous, have not been regarded as legal marriages. For this reason spouses in these “non-recognised” unions were not regarded as spouses for the purpose of intestate succession.

10

[30] In Daniels, *supra*, the applicant could not inherit from the estate of her late husband because she married him in terms of Muslim law and was therefore not in law regarded as a spouse. When the matter came before the High Court, it found the provision to be unconstitutional on the basis that it violated section 9 of the Constitution: that is the interpretation of the word “spouse” in this narrow manner. The High Court then made the following order:

20

“1. The omission in section 1 of the Intestate Succession Act of 1987 of the following definition is declared to be unconstitutional and invalid “spouse shall include a husband or wife married in accordance with the Muslim rights in a *de facto* monogamous union”.

25

2. Section 1 of the Intestate Succession Act 81 of 1987 is to be read as though it included the following paragraph:

"Spouse shall include a husband or wife married in accordance with Muslim rights in a *de facto* monogamous union."

That decision was taken on appeal to the Constitutional Court. When the matter was decided, Sachs, J., on behalf of the Court, held that the word "spouse" in its ordinary meaning includes parties to a Muslim marriage. Such a reading is not linguistically strained. On the contrary, Sachs, J. held that it corresponded with the way that the word was generally understood and employed. Linguistically it was far more awkward to exclude parties to a Muslim marriage from the word "spouse" than to include them. Both in intent and in impact the restrictive interpretation of the word "spouse" was discriminatory and such discriminatory interpretation was deeply injurious to those who were negatively affected by them.

[31] Judge Sachs then went on to formulate the central question in cases such as Daniels, not as whether the wife was lawfully married to the deceased, but rather whether the protection that the Act intended for wives

should be withheld from a relationship such as the one in the case. Expressed differently, Judge Sachs framed the question thus: it is not whether it had been open to the applicant to solemnise a marriage under the Marriage Act, but whether in terms of common sense and justice and the values of the Constitution, the objectives of the legislation would best be furthered by including or excluding her from the protection so provided.

10 [32] Judge Sachs concluded that it would be correct, in such a case, to include women married in terms of Muslim rights within the definition of “a spouse”. Not only would this be a fair and just conclusion but it would accord with the common linguistic interpretation of the word “spouse”.

15

[33] Applied to the present case, Mr Hopkins submitted that this approach meant that it was competent for this Court to adopt a similar approach to the word ‘adopted’ so as to include not only legally adopted but factually adopted children. No good reason existed in his view for excluding *de facto* adopted children from the benefits conferred upon other children in terms of the Act. Further, the purpose of section 4(e) of the Act was to

20

ensure that all adopted children inherited from an intestate estate of their deceased parents.

[34] The facts, as gleaned from the affidavits deposed in this case, indicated that Flynn was a person who was intended to be covered by these provisions. The law had unfairly discriminated against him because it did not allow him the same benefits as would have been the case had he been legally adopted.

10

Respondents case

[35] Both Mr Kirkpatrick on behalf of the first and second respondents, and Ms Bawa who appeared together with Ms Mayosi for the fourth respondent, contended that the legislature's purpose in so differentiating between biologically adopted children on the one hand and stepchildren on the other is neither arbitrary nor irrational. In short, their argument was that, while Flynn may well have been a stepchild, he was not an adopted child and that the distinction which was maintained in the law could not be set aside on the grounds of caprice, arbitrariness or irrationality. In their view, the purpose of the differentiation which was attacked by Mr Hopkins was directed at bringing certainty and predictability to the law of intestate succession.

25

[36] By limiting the definition of a child in the Act, multiple difficulties which may have given rise to uncertainty were avoided such as:

1. What would the minimum length of time be during which the person concerned would have acted as a step-parent.
2. Would all the stepchildren have rights upon intestacy of the step-parent.
3. What would the position be where a child's natural parents had multiple marriages.
4. Would a stepchild retain entitlement to claim under the intestacy of his nature substitute parent. If so this would then allow for multiple rights of inheritance known as "double dipping" with clearly unsatisfactory consequences.

Within the context of these problems, the Supreme Court of British Columbia in McCrea v Barrett et al (2004) BCLR (4th) 103 rejected a similar challenge. In justifying its conclusion, the Court said the following:

"Can it be said that failure of the Act to recognise *de facto* adoptees violates a central human dignity and freedom through the imposition of disadvantaged, stereotyping or political or social prejudice? Does the Act, in purpose or effect,

threaten s15(1)'s purpose of ensuring laws which conform to a society in which all person enjoy equal recognition as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect of consideration?

Does the law in purpose or effect perpetuate the view that *de facto* adoptees are less capable or less worthy of recognition or value as human beings or as members of Canadian society?

10

...

It is clear that the Child Welfare Act does not stereotype, devalue or oppress *de facto* adoptees in purpose or effect in a manner which conflicts with the fundamental purpose of s15(1).

15

...

There is nothing pejorative about such terms as adopted or chosen or *de facto* in common parlance. Certainly not in the sense of requiring constitutional protection against historical or current disadvantage, stereotyping, political or social prejudice. As indicated above, there may have been in the past a stigma or disadvantage respecting people born out of wedlock or children of divorce, but any such still present finds little public acceptance. Indeed, education and laws such as

20

25

those heretofore referred have eradicated or reduced the status for its adverse effects in most instances.

But even if one can postulate a theory of disadvantage for persons not adopted, can the disadvantage be attributed to the failure of the Child Welfare Act to treat *de facto* adoptees in the same way as *de iure* adoptees?

Indeed, if the respondent has suffered a disadvantage by virtue of being a non-adopted person, surely the cause lies not with the Child Welfare Act but with the failure of Julia Gregory to adopt the respondent by availing herself of the provisions of the legislation.

It is not necessary in order to find conflict between the impugned legislation and the purpose of the s15(1) for there to exist daily, endemic or palpable discrimination; or that there must be a large class of individuals affected before a breach is legitimate.

Here, however, there is difficulty finding any conflict between the Act and the dignity concerns of non-adoptees as required in Law v Canada's...statement of the purpose of s15(1).

It follows that the respondent fails part two of the tripartite test in Law v Canada (*supra*) for

establishing protection under analogous ground. Not only do *de facto* adoptees not suffer the kind of societal prejudice or differential treatment contemplated by such phrases as “stereotypical application of a presumed group or personal characteristics” or “the view that the individual is less capable or less worthy of recognition or value as a human beings” but it is noted that the very purpose of the Child Welfare Act in its deeming provisions is ameliorative”.
(at paras 53-57)

[37] The similar argument that was put up by respondents was the fact that the Act did not grant a stepchild a right to inherit upon intestacy of a step-parent and was thus neither unreasonable nor unjustifiable. In addition, a person always had the option of adopting the step-child should he or she so desire. Section 17(d) of the Child Care Act specifically provides that a child may be adopted “by a married person whose spouse is the parent of the child”. Section 231(1)(c) of the 1960 Childrens Act provided that a child may be adopted “by a married person whose spouse is the parent of a child or by a person whose permanent life partner is the parent of a child”.

[38] Furthermore, the legislation specifically provided that the consent of the other biological parent to the adoption which would ordinarily be required could be dispensed with under certain circumstances. Section 19(b)(iv) of the Child Care Act provided that such consent may be dispensed with from any parent "who is withholding his consent unreasonably". Furthermore, the step-parent was able to bestow benefits upon a stepchild by making a suitable will.

10

[39] The approach articulated by the respondents finds analogous support in the approach adopted by the majority of the Constitutional Court in Volks N.O. v Robinson & Others 2005(5) BCLR 446 (CC). Because this case is important in the present dispute, the facts require some description. The proceedings had been initiated by Mrs Robinson who had been a partner in a permanent life partnership with Mr Shandling from 1985 until his death in 2001. The couple had not been married, although there was no legal obstacle to their marriage. Following the death of Shandling, Robinson submitted a claim for maintenance against the deceased estate. The executor of the estate, Volks, rejected her claim because she was not "a survivor" as contemplated by the Act.

25

[40] Robinson applied to the Court for an order declaring that she was entitled to lodge a claim for maintenance in the estate, alternatively declaring that the Act was unconstitutional and invalid and this unconstitutionality should be cured by a directive that section 1 thereof be read as if certain provisions and definitions were included in it. In particular, she contended its provisions needed to be read as though “survivor” were intended to include “the surviving partner of the life partnership”, that “spouse” for the purpose of the Act should be read to include a person in a permanent life partnership, that “marriage” for the purpose of the Act should be read to include a permanent life partnership and that the omission of the necessary words in the definition of these particular words should be declared unconstitutional and invalid.

[41] Of relevance to the present dispute is the majority finding of Skweyiya, J who upheld the appeal and thus found the existing provisions to be constitutional. In this connection the learned Judge said thus at paras 55-56:

“Mrs Robinson never married the late Mr Shandling. There is a fundamental difference between her position and spouses or survivors who were

predeceased by their husbands. Her relationship with Mr Shandling is one in which each is free to continue or not and from which each is free to withdraw at will without obligation and without legal or other formalities.

There are a wide range of legal privileges and obligations that are triggered by the contract of marriage. In a marriage, the spouse's rights are largely fixed by law and not by agreement, unlike in the case of parties who cohabit without being married. The distinction between married and unmarried people cannot be said to be unfair when considered in the larger context of the rights and obligations uniquely attached to marriage. While there is a reciprocal duty of support between married persons, no duty of support arises by operation of law in the case of unmarried cohabitants. The maintenance benefit of section 2(1) of the Act falls within the scope of the maintenance support obligation attached to marriage. The Act applies to persons in respect of whom the deceased person (spouse) would have remained legally liable for maintenance by operation of law had he or she not died".

Turning to the argument that Mrs Robinson's dignity had been infringed by the allegation of differentiation and hence that discrimination was present, Skweyiya, J concluded:

5 "I do not agree that the right to dignity has been infringed. Mrs Robinson has not been told that her dignity is worth less than that of someone who is married. She is simply told that there is a fundamental difference between her relationship and a marriage relationship in relation to maintenance. It is that people in a marriage are obliged to maintain each other by operation of law and without further agreement or formalities. People in the class of relationships to which she belongs are not in that position. In the circumstances, it is not appropriate that an obligation that did not exist before death be posthumously imposed". (para 62)

10

15

20 [42] In Daniels, on which judgment Mr Hopkins so heavily relied, the central question was whether the applicant who married her now deceased husband by Muslim rights, should be treated as a "spouse" for the purposes of the Intestate Succession Act. Sachs, J expressed the problem as follows:

25

“The central question is not whether the applicant was lawfully married to the deceased but whether the protection which the Act intended widows to enjoy should be withheld from relationships such as hers. Put another way, it is not whether it had been open to the applicant to solemnise her marriage under the Marriage Act, but whether in terms of ‘common sense and justice’ and the values of our Constitution, the objectives of the Act would best be furthered by including or excluding her from the protection provided. The answer, as in Amod, must be in favour of the interpretation which is consistent with the ordinary meaning of the word ‘spouse’ aligns itself with the spirit of the Constitution and furthers the objectives of the Act.

It is important to underline the limited effect of such an inclusive interpretation. As in Amod it eliminates a discriminatory application of particular statutes without implying a general recognition of the consequences of Muslim marriages for other purposes. Accordingly, the recognition which it accords to the dignity and status of Muslim marriages for a particular statutory purpose does not have any implications for the wider question of

what legislative processes must be followed before aspects of the shariah may be recognised as an enforceable source under South African law". (paras 25-26)

5

[43] In Daniels, the parties were "married in terms of the legal system". The failure to employ the ordinary meaning of spouse emanated from a linguistically strained use of the word flowing from a culturally and racially hegemonic appropriation the need (see Daniels at para 19). This present a significant distinction from the case of Flynn, who was a stepchild of Farr but where the latter could, but did not, institute legal proceedings to adopt him. In this sense, the underlying premises of the majority judgment in Robinson are far closer to this dispute than is the factual matrix set out by Sachs, J in Daniels, supra.

15

[44] Mr Hopkins, in his well researched argument, referred to a case which had been heard in the High Court of American Samoa Estate of Tuinano Fuinaono (deceased) which was heard on 10 November 19992. The headnote to the report of this case reads:

20

"An equitable virtual or *de facto* adoption for inheritance purposes exists when a descendant

25

performs parental duties towards a child in his household and that child performs filial obligations *in rerum* exactly equivalent to a formally adopted child.

5

The facts of the case here. Ato was the deceased's *de facto* son. The deceased never legally adopted him. The deceased was married to Ato's biological mother. Ato was 46 years old. From his early childhood until the death of the deceased, he was nurtured, reared by and lived with both mother and the deceased. They constituted a coherent family unit. Ato was the deceased's *de facto* son and the deceased publicly acknowledged Ato as his child. There were legal documents which gave recognition to this fact, including those where the deceased exercised parental power in respect of Ato. There were also other indications that gave recognition to the practical day to day "father and son" relationship that existed between the two.

20

The High Court of American Samoa found that an equitable adoption exists when a child has 'stood from an age of tender years in the position exactly equivalent to a formally adopted child'. The Court

25

went on to find, from the evidence as set out, that, in its view, there was more than sufficient evidence to infer that the deceased intended Ato to become his son. The fact that he never actually went as far as to legally adopt Ato was of no consequence to the inheritance by Ato of the estate from his late father by way of intestacy.

[45] Mr Hopkins submitted that the significance of this decision was obvious. Not only were the facts similar to that of the present case, but the approach adopted by the Court was premised on the logic that had been postulated by applicant in this case. In his view, if ever there was a case which demanded of a Court that it consider foreign law within the enquiry mandated by section 39(1)(c) of the Constitution, this was such a case. This is, of course, a related argument: should a court interpret the equality guarantee in the light of this foreign law. That in turn compels an examination of the evidence and the concomitant need for such an approach.

Evaluation

[46] I accept that Flynn regarded Farr as his father. As he concluded, in a lengthy letter to his attorney, on 18 May 2007:

“If all that I said does not bear testimony to the fact that Edward was my father and that he regarded Ryan and I as his heirs, then nothing ever will”.
However, the question remains as to whether the alleged differentiation has a rational purpose.

10 In her affidavit, Ms Maria Mebetoa, the chief director of the National Department of Social Development (“DSD”) provides a number of compelling reasons for the insistence upon a process of legal adoption:

15 [A] System of factual adoptions is not reconcilable with keeping track of all adoptions, and secondly by its very nature there would be no record or information in the public domain of such adoptions and it would not be conducive to a system of information recordal which, should a child wish in later life to find out who they are and where they came from, the DSD would not be able to assist...

20 Of primary concern to the DSD is the lack of regulation of the category of “*de facto*” adopted children in circumstances, where rights and

25

obligations flow from such a relationship in a manner sought by Applicant.

The DSD is alive to the reality that in the South African context, the HIV-Aids pandemic has resulted in an increase of the number of children being raised outside the traditional family nucleus and who are in the care of family members, or even concerned community members without any formal legal adoption process having been followed. This has been exacerbated by increasing drug use among parents, teen pregnancy, divorce, the rapid rise of single parent households, mental and physical illnesses, crime, child abuse and neglect and incarceration being but a few of the most common explanations.

In some contexts there is an intention to adopt the children but no steps are taken to actually do so. In others, children are absorbed into households simply because they need care and protection and there is no intention that they be adopted. In customary law circumstances there may well be instances where a family may take in a child with not intention to adopt, e.g. if a brother passes away and leaves behind children, those children often are take in to a surviving brother's household without

him ever intending that they become his children through official adoption. In addition, an increasing number of grandparents raising their young grandchildren because the children's parents are ill, disabled, imprisoned or otherwise unable to care for them".

[47] Ms Mabetoa points to other factors which justifies the present legal dispensation. For example, inter-country adoptions, both inward and outward, require to be monitored. There would be "increasing difficult in ensuring that children are protected, especially from drug and child trafficking, were his to be extended to categories of factually adopted children across the border whereas the legal adoption within the statutory framework provides certainty to the child and provides proof that the child is indeed yours on adoption.

She then continues:

"Another consequence of adoption is the determination of a reciprocal relationship between the child and biological parent's rights and obligations. The Children's Act also contemplates 'open adoptions' and the biological parent may still have some contact with the child through an access

agreement hereby encouraging legal adoptions to take place with due regard to any relationship with a biological parent. To do so in the absence of a legal adoption would place the adoptive parents in a precarious legal position and may result in them being discouraged from adopting a child in the first instance. It would also not result in the termination of the legal relationship between parent and child when it comes to matters where consent is required by a parent".

[48] On the evidence, there is no sustainable legal basis by which to conclude that Mrs Robinson's dignity, in that case, was offended any less than that of Flynn. Therefore, the central holding of Robinson, *supra*, must be applicable to the present dispute. Regarding the point of the relationship between a biological parent and adoptive parent where the child is factually adopted, the papers in the present case do reveal some, even if it is rare, contact between Flynn and his biological father.

[49] In my view, on the papers which form the basis of the application, particularly the DSD affidavit to which I have made copious reference, there is justification for the present legal dispensation which is manifestly rational

and connected to a legitimate purpose. If this conclusion then leads to a residual enquiry as to whether form discrimination can still be found, the rationality of the measure notwithstanding, one is forced to examine the implications of the Robinson case.

[50] I am not insensitive to the sadness of this particular case. Unquestionably, the three central parties in this dispute lived happily together but hard cases make bad law and that must surely be the case in a constitutional dispute where, as in the present case, the implications go further than simply an individual dispute based upon the present legal dispensation.

[51] Mr Hopkins was able to find the case of the High Court of American Samoa to content that there is some precedent in favour of his line of argument, but there is also the compelling precedent from British Columbia which goes the other way. Even were one inclined, therefore, to take more seriously the American Samoa case, for reasons which were never advanced cogently, the evidence as put up to justify any differentiation that is shown to exist, is sufficient to justify the conclusion that section 9 of the Constitution cannot be applied in this case. Once the

legal question is determined against the applicant, there is no necessity to examine the factual questions.

[52] I do not consider that in this case, any costs order would be appropriate. Accordingly the application is dismissed with no award as to costs.



DAVIS.