




Chapter 15

The Re-Appraisal of *De Facto* Adoption in the South African Law of Intestate Succession

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Abstract

The eve of the early 2000s signified the genesis of judicial disapproval of the under inclusiveness of the Intestate Succession Act 81 of 1987. *Flynn v Farr* 2009 1 SA 584 (C) is a notable exception. In that case, Davis J upheld the restrictive proposition that factually adopted children have no claim against the intestate estate of the factual adoptive parent (“the narrow approach”). The concept of factual adoption denotes an informal form of adoption where a child is adopted without observing the formal dictates of adoption. With the benefit of hindsight, this paper argues that investing in the narrow approach to adoption stands at odds with the right to equality, the development of new family structures and the best interests of the child. This paper illustrates how the mechanical preference for formal adoption and myopic exclusion of factual adoption prevents the contextual operation of the *de facto* doctrine and the best interests of the child in intestate succession. Furthermore, this paper argues that the narrow approach is too restrictive in the sense that it threatens the rights and emergence of constitutionally recognised family models. Additionally, this paper notes that the narrow approach may constitute unfair discrimination against factually adopted children on the grounds of birth (or analogous grounds of adoptive status). Against this background, this paper



highlights that a novel path of intestacy must be developed to enhance the protection of factually adopted children under *de facto* doctrine. The novel path of intestacy would require the intestate safeguard afforded to formally adopted children to be extended to factually adopted children on a case-to-case basis. Accordingly, this paper presents an approach for determining and protecting the existence of a qualifying *de facto* relationship in the law of intestate succession.

Introduction

Statistics SA has reported that nearly 3.7 million (19%) children do not live with their biological parents, whereas 8.9 million (45,4%) children live with only their mothers, with lone fathers accounting for only 4.2% (800 thousand) of the distribution.¹ Fewer than 6.2 million (31.5%) children live with both parents.² The precise number of factually adopted children is not readily ascertainable, but these figures reflect a sustained and patterned demographic representation of diverse childhood arrangements. To address this point, the prevailing international viewpoint is that the structural setting in South Africa has established a unique feature of parental absence in children's lives.³ Despite modern family dynamics, adoption remains a "grossly underutilised" process and continues to decline across the country,⁴ thereby leaving the sprout of informal family arrangements lurking at the expense of a stable culture of parental presence and patterned family structures. Be that as it may, intestate succession rules continue to hinge on the antiquated family model in denial of the social reality of

1 Statistics South Africa *General Household Survey 2023* (2024) 7 weighted to the United Nations Department of Economic and Social Affairs *World Population Prospects* (2024).

2 Statistics South Africa (n1) 7 weighted to the United Nations Department of Economic and Social Affairs (n1).

3 Hall and Sambu "Demography of South African Children" 2021 *South African Child Gauge* 216 217; Hall, Lake, Mokomane and Richter *South African Child Gauge* (2018) 39 attribute this phenomena to factors such as labour migration, poverty, non-marital childbearing, low marriage rates and cohabitation rates and the like.

4 Louw "Considering the continued viability of adoption as a form of substitute parental care for children" 2018 *THRHR* 26 27.

contemporary childhood. Accordingly, the rise of informal family structures compels the disentanglement of intestate competition between biological parenthood and the nature of existing relationships.

The following example illustrates the exigence of challenging the rigidity of form over redefining the current landscape in terms of substance and principle: A gives birth to B. Shortly after being discharged from the hospital, A and C (boyfriend) abandon B near a river. On her way home, D discovers the abandoned body of B on the edge of the river and rescues him. D and E (husband) raise him in all meaningful ways as their own child. Having given B a family, D and E omit formally adopting B. Fifteen years later, D and E die intestate in a car accident. The current intestate rules would disregard their socially constructed family and deprive B a claim against the intestate estate of his putative parents.⁵ Instead, his claim of intestacy would lie against parents (A and C) unknown to him.

The next section probes whether a child-centric approach favours the inheritance of factually adopted children from their putative parents. Thereafter, a brief discussion follows on whether the differentiation between factually and legally adopted children is constitutionally compatible with the edicts of the rights to equality. Finally, the compounding effect of these assessments leads to an outline of brief guidelines on how courts can determine and protect the existence of a *de facto* relationship in the law of intestate succession.

Indeterminacy, legal certainty and the position of the child

Brief synopsis of the paramountcy principle and the right to family care

S28(2) of the Constitution guarantees the best interests of the child as a standalone right with paramount importance in every

5 *Flynn v Farr* 2009 1 SA 584 (C).

matter concerning a child.⁶ The wording of the right is salient and seeks to entrench a high threshold of consideration in every matter concerning the child.⁷ However, the best interests of the child will not always thump other competing rights.⁸ It is a principle that may be used as a mechanism of legislative interpretation developed to protect and advance the interests of children.⁹ Its source of strength is in its contextual nature and inherent flexibility to adjust to the precise-life situation of the child concerned.¹⁰ As such, it renders it contrary to the best interests of the child to apply a predetermined formula in any area of law for the sake of certainty and determinacy of outcome.¹¹ Accordingly, the content of the paramountcy principle will differ depending on the individual circumstances of the case.

The paramountcy principle complements and strengthens the right to family or parental care.¹² The formulation of the right to family care envisages multiple manifestations of family lives and changing social practices for different people.¹³ It incorporates the right to be cared for by extended family¹⁴ and exemplifies the long-standing and growing practice of many South African children who do not live with both or either parent(s).¹⁵ While parental absence does not mean a lack of parental involvement; labour migration, poverty, non-marital

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- 6 The Constitutional of the Republic of South Africa, 1996.
 7 *Centre for Child Law v Director of Public Prosecutions, Johannesburg* 2022 2 SACR 629 (CC) par 44; Skelton “Too much of a good thing? Best interests of a child in South African jurisprudence” 2019 *De Jure* 557 558-559.
 8 *S v M* 2007 2 SACR 539 (CC) par 26; *De Reuck v Director of Public Prosecutions* 2003 2 SACR 445 (CC) par 55; *Sonderup v Tondelli* 2001 1 SA 1171 (CC) par 29.
 9 UNCRC General comment NO. 14, on the right of the child to have his or her best interests taken as a primary consideration 2013 (Art 3, para 1) I(A)(b); the S case (n8) par 15.
 10 *AD v DW* 2008 3 SA 183 (CC) par 50; the S case (n8) par 24.
 11 the S case (n8) par 25.
 12 *Wilkinson v Crawford* 2021 4 SA 323 (CC) par 91; *Boezaart Child Law in South Africa* (2017) 280-281; s28(1) of the Constitution of the Republic of South Africa, 1996.
 13 *Du Toit v The Minister for Welfare and Population Development* 2003 2 SA 198 (CC) par 19.
 14 Currie and de Waal *The Bill of Rights Handbook* (2013) 606.
 15 South African Law Commission *Review of the Child Care Act Project* 103 (2001).

childbearing, low marriage rates, and the like compound the rise of different family units.¹⁶ It has been correctly noted that parenthood is not merely a matter of biology, as there are many forms of parenthood (including *de facto* parenthood).¹⁷ As a result, care must be taken not to sacrifice different forms of family units at the expense of others.¹⁸

Evaluation

The emergence of diverse family units must be understood in line with the non-prescription of a pre-set legal formula intended to circumscribe the contextual determination of the child's situational arrangements. The current intestate regime undermines the role of the paramountcy principle and completely disregards the existence of nominal biological links between children and parents. By doing so, it overlooks the significance of assessing a *de facto* relationship on an individual basis within existing and established family structures in intestate succession. Thus, a paradoxical disconnect is created between the evolution of constitutionally protected family structures and the precision of outcomes in intestate succession. In the process, the social function of *de facto* adoption, which could favour the inheritance of a factual adoptee in certain instances, is limited by legal short-sightedness. By extension, the paramountcy principle, which knots the fabric of child law, is accorded no substantive value in intestate succession.

It seems that the one-dimensional and forethought outcome of intestacy creates a gap between paper law and reality. However, the mechanical application of intestate principles is mainly based on legal certainty and predictability. However, a principled judicial determination of *de facto* adoption may protect the demands of legal certainty and evade the risk of legislative miscalculation of forethought individualisation and evolving forms of family identity. Once there is constitutional recognition for the social existence of diverse family functions, the capacity

16 Hall *et al* (n3) 39.

17 *Wilsnach NO v TM* 2021 3 SA 568 (GP) par 40-41.

18 *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) par 31.

to inherit by way of intestacy should not routinely protect only formally adopted children. At the time of writing, it is declared (and unfortunate) that it can never be in the best interest of a *child* to inherit from the putative parent. A contrary argument requires the family to be understood in terms of the functions it performs rather than traditional categorisation.¹⁹ Thus, it seems prudent to conclude that the paramountcy principle and the right to family care strongly reject the disenfranchisement of factual adoptees on intestacy.

Brief Evaluation of the Intestate Differentiation Between Factual and Formal Adoptees

The Constitution prohibits mere differentiation and unfair discrimination based on a listed ground.²⁰ Unfair discrimination based on a listed ground is presumptively unfair and must be compellingly justifiable in accordance with the limitation clause.²¹ The intestate regime differentiates between factually and legally adopted children. In *Wilkinson*, the constitutional court found that discrimination on the basis that one is not born of one's adoptive parents is based on the ground of birth (or similar ground of adoptive status).²² Citing academic literature with approval, the court noted that the grounds of birth may include fostered or adopted children, especially where a child's birth status restricts him from benefits.²³ It is arguable that the constitutional court's recognition of the expansive variations of the ground of birth encompasses the protection of factually adopted children, particularly in light of that court's appreciation of different sizes and shapes of family.²⁴ The social generalisation

19 Goldblatt "Regulating domestic relationships – a necessary step in the development of South African family law" 2003 *SALJ* 610 616-617.

20 S9(1) and (3) of the Constitution of the Republic of South Africa, 1996.

21 *Harksen v Lane* 1998 1 SA 300(CC) par 53; S9(5) and 36 of the Constitution of the Republic of South Africa, 1996.

22 the *Wilkinson* case (n12) par 78.

23 the *Wilkinson* case (n12) par 81.

24 *Bwanya v Master of the High Court* par 53 and 98-99, where the court poses the question of the extent to which the creation of unconventional family structures must be legally protected.

of intestate rules ascribes a fictional identity of reality to factual adoptees owing to their factual adoptive status. As such, the enfranchisement of formal adoptees at the cost of total extinction of intestate rights for factual adoptees presumptively indicates unfair discrimination.²⁵

However, current intestate rules maintain certainty in applying established principles of intestate succession.²⁶ *De facto* adoption not only frustrates legal certainty but also complicates the difficulty of protecting factually adopted children from child exploitation, such as drug and child trafficking.²⁷ The latter view reflects an *ante-facto* assessment of the posthumous role of *de facto* adoption and fails to underscore the limited effect of *de facto* adoption.²⁸ The limited recognition of *de facto* adoption for intestate purposes will not undermine the integrity and fabric of the formal adoption procedure. On the other hand, the synonym for the rationalisation and contextualisation of factual adoption is not always legal certainty. In fact, legal certainty may receive adequate oversight from a structured and normative *de facto* approach to putative enfranchisement. Conversely, the elevation of legal certainty to declare fiction on social reality threatens the child's support system for the sake of hard-line legislative ends. This portrays a vulnerable social group as a mere case number, worthy of reduction into meaningless abstraction and definition by imaginary circumstance. Accordingly, it is arguable that the social and legal classification of factually adopted children after intestacy is not reasonable and justifiable in an open and democratic society based on freedom, equality and dignity.

25 The different intestate treatment between a formal and factual adoptee is discriminatory in effect and character, considering that the manner in which they differ is not relevant for purposes of intestate succession.

26 the *Flynn* case (n5) par 35--36.

27 the *Flynn* case (n5) par 47.

28 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) par 77-78, where the constitutional court highlights that the state should not sit idle at implementing enforcement mechanisms designed to protect children from various forms of abuse.

Cracking the Code: How to Determine a Legally Recognised *de Facto* Relationship?

Although the intestate rights enjoyed by legally adopted children should be extended to factually adopted children, there is still an evidentiary hurdle. The legal issue central to the *Paixao* judgement offers apt guidance on how to overcome this hurdle.²⁹ *Paixao* instructs the case-to-case determination of whether the facts support the equitable intestate inheritance arising from a *de facto* relationship akin to formal adoption. As a question of degree and matter of fact, the answer ought to put the child in reality as the adopted child of the deceased parent. The next discussion is brief and does not pretend to be conclusive in setting out the preferred approach to the determination of a qualifying *de facto* relationship.

There are no hard or fast rules for determining factual adoption. However, a diverse range of factors relative to each case contributes to a value judgement exercised by a judge in each case. It is common for judges to weigh a synergy of competing factors and make a value judgement of the respective weights. The oft-celebrated factors developed in the *National Coalition* are instructive and sufficiently flexible to apply to matters of *de facto* adoption.³⁰ A parent who has sheltered a child, treated her as his own and represented her to the world as such with a demonstrable intention to adopt may be said to have factually adopted that child.³¹ The role of biology must be limited to focus on the function rather than the form of the relationship between

29 *Paixao v Road Accident Fund* 2012 6 SA 377 (SCA) par 39, in extending the dependents action to cover an unmarried heterosexual couple who had undertaken a reciprocal duty of support, Cachalia JA crafted a creative question by asking “whether the facts establish a legally enforceable duty of support arising out of a relationship akin to marriage?”

30 *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC) par 88.

31 *Road Accident Fund v Mohohlo* 2018 (2) SA 65 (SCA) par 8, 14; 19; In *Maswanganye v Baloyi* 62122/2014 (GNP) (unreported) par 13-14, the court held customary law requires that the intention to adopt be publicised in the form of a symbolic ceremony; *MB v NB* 2010 3 SA 220 (GSJ) par 18-20, where the stepfather of the *de facto* son was said to have performed the duties and functions of a father to his son and placed himself *in loco parentis* during the subsistence of the *de facto* relationship.

the child and parent.³² In the event, the process of legal adoption, if undertaken, would be of such a nature that it would change nothing in the nature of the relationship other than granting formal recognition. Therefore, the right to bring a claim against the intestate estate of the deceased should arise from the fact-specific circumstances of a proven *de facto* relationship.

Concluding Remarks

The time has come to move from the blanket disenfranchisement of factual adoptees to the individual *de facto* assessment of adoption in the law of intestate succession. At the time of writing, the intestate dispensation seeks to abstract if not deny the complexity of the modern family rather than concretise the accepted order of family relations. This approach is visibly out of touch with evolving family dynamics and contemporary social developments. Thus, it is open to a constitutional challenge on the basis of the paramountcy principle and the right to equality. Ultimately, the functionary approach to existing factual relationships should effectively determine the child's entitlement to inherit intestate from the factual parent.

32 the *Wilsnach* case (n17) par 42.