

**A CRITICAL ANALYSIS OF THE LAW RELATING TO FRAUD  
CASES IN ADOPTION PROCEEDINGS IN UGANDA. A CASE  
STUDY OF THE HIGH COURT FAMILY DIVISION**

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## DECLARATION


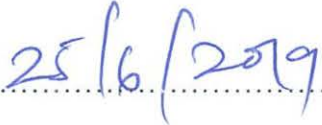
I declare that this thesis is the original work of **MUGISA PATRICK** alone except where due acknowledgement is made in the text. It does not include materials for which any other university degree or diploma has been awarded

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**MUGISA PATRICK**

## APPROVAL

This work has been submitted for examination with approval of my supervisor

Signature;.......... Date..........

Ms. Amina Wahab

## **DEDICATION**

With pleasure, I would like to pass my thanks to the Lord for having provided for me in all ways throughout my research and especially his guidance and directions which enabled me to produce this work MAY HIS NAME BE GLORIFIED FOREVER

I dedicate this research work to my parents; my father; Mr. Gamukama Patrick my loving mother Mrs. Nyakaisiki Oliver for the moral support. thank you mum for the motivation, encouragement and all the support you extended over to me. May God continue to favour and Bless You.

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Whereas a research report is an individual task, it is my sincere belief that it cannot be completed without support of any kind. I would therefore wish to extend my heartfelt acknowledgement to my supervisor **Ms. Amina Wahab** for her supreme guidance, support and encouraging practical advice that has enabled me to come up with such an encouraging piece of work and above all for her exceptional mentorship in research. I also acknowledge my entire family for giving me the undiluted love, inspiration, encouragement and moral support during the whole course.

To all my brothers, sisters and friends at Kampala International University for the moral, physical and emotional support they extended over to me during my study.

## LIST OF CASES

- 1) JVC---1970 (unreported)
- 2) Williamson vs. Williamson .....(1993) 4 KALR 160
- 3) In the matter of Elizabeth Ayee...Adoption cause number 130 of 2010 UGHC 66
- 4) In the matter of Mirembe Nansamba (Aminor)... adoption cause No. 110 of 2009
- 5) Re Edith ... cause no. 4 0797
- 6) In the matter of Sidney Stephen Harer, Wendy, Annette Harpper, Musinguzi Davies Alias Elijah David Harpe
- 7) Re Hassan Kaaya (child) ... Family cause no. 002 of 2018 (2018) UGHCFD 9 (16 October 2018)
- 8) In the matter of Peter Ssebulina Alias Namansa James (An infant) and in the matter of an Application for a writ of Habeas corpus Ad subcucendum ... miscellaneous cause no. 37 07 2009
- 9) In the matter of the petition for the Adoption of Birabwa Mutaka .. adoption cause no. 014 of 2018
- 10) Re Ethan Acaleri (an infant) (2012) UGHCFD 4 (7) Re Mason Buyinza Alias Silas Mason Harper Adoption Cause No. 000207 2018 UGHCFD 3
- 11) In the matter of a petition for adoption of Victoria Babirye.. adoption Cause No. 09 07 2017
- 12) In Re- Victoria Babirye Namutosi adoption cause NO.09 OF 2017 [2018] UGHCFD 1 (19 January 2018);
- 13) In the matter of Salem Mukiibi and Asafu Semakula... Family cause No. 55 of (2008).

## LIST OF STATUTES

The Constitution of Republic of Uganda 1995.

The Children Act.

The Adoption Rules in Uganda.

The Domestic Violence Act

The Prevention of Trafficking Act.

The Penal Code Act

The Local Government Act

Convention on the Rights of the child.

Hague Convention on Adoption 1993.

Additional Protocol to the Convention of the Rights of the Children.

United Nations Universal Declaration of Human Rights Charter the African Charter on the Rights and Welfare of a Child.

European Convention on the Adoption of Children.

Hague convention on the protection of a child, 1996.

## TABLE OF CONTENTS

DECLARATION .....	i
MUGISA PATRICK APPROVAL .....	i
APPROVAL .....	ii
DEDICATION .....	iii
ACKNOWLEDGEMENT .....	iv
LIST OF CASES .....	v
LIST OF STATUTES .....	vi
ABSTRACT .....	x
CHAPTER ONE .....	1
1.0 Introduction and Background .....	1
1.1 Statement of the Problem .....	3
1.2 Rationale of the research/general objective .....	4
1.3 Specific Objectives .....	4
1.4 Scope of the Study .....	4
1.5 Significance of the Study .....	5
1.6 Hypothesis .....	5
1.7 Methodology .....	5
1.8 Literature Review .....	6
CHAPTER TWO .....	18
THE CONSTITUTION OF REPUBLIC OF UGANDA .....	18
2.0 Introduction .....	18
2.1 Children Act .....	18
<p>If in the view of the court a child is able to understand the adoption proceedings, then his or her views must be taken into consideration In <b>Re Ethan Acaleri (an infant)</b> Court interviewed the infant who affectionately referred to Zane Mccourtney (who was the adopter) as ‘daddy’. He told court he goes to Horizon School. When asked if he wished to live with his uncle he gave an emphatic ‘no’ and asserted he wanted to live with ‘daddy’.. 24</p>	
<p>The registrar of births and deaths has to maintain adopted children register in which he has to register particulars of adoptions. <b>Re:In The Matter Of Salem Mukiibi And Asafu Semakula.</b>Judge Margaret C. Oguli Oumo stated that .....</p>	
2.1.1 The Adoption Rules in Uganda .....	28



2.1.2 Domestic Violence Act.....	32
2.1.3 The Prevention of Trafficking in Person Act .....	32
2.1.4 The Penal Code Act Cap 120.....	34
2.1.5 The Local Governments Act Chapter 243.....	34
CHAPTER THREE .....	35
3.0 Ministry of gender labour and social development.....	35
The children act provides the minister with a task to establish a National Rehabilitation Centre for Children and such other centres as he or she may deem necessary which each have to be a place for the detention, rehabilitation and retraining of children committed there.....	35
3.1 National Council for Children.....	35
This is governed by the National council for children act of 1996, the Act sets the objectives of the council which include, .....	35
3.1.1 The children approved homes .....	37
3.1.2 Uganda children centre.....	38
3.1.3 The National Social Protection Policy .....	38
3.1.4 Local authorities.....	39
3.1.5 Family and children court.....	42
3.1.6 Probation and social welfare officer .....	43
CHAPTER FOUR.....	49
THE INTERNATIONAL LAWS GOVERNING ADOPTION .....	49
4.0 Introduction .....	49
4.1 Convention on the Rights of the Child (CRC) .....	50
4.2 Additional Protocol to the Convention on the Rights of the Children .....	51
4.2.1 Hague Convention on Adoption OF 1993 .....	52
4.2.2 United Nations Universal Declaration of Human Rights Charter .....	55
4.2.3 The African Charter on the Rights and Welfare of a Child.....	55
4.2.4 European Convention on the Adoption of Children .....	55
4.2.5 Hague Convention on the Protection of a Child, 1996 .....	57
CHAPTER FIVE.....	60
CONCLUSION AND RECOMMENDATIONS .....	60
5.1 Conclusions .....	60

<b>5.2 Recommendations .....</b>	<b>61</b>
<b>REFERENCES .....</b>	<b>65</b>

## ABSTRACT

The research is majorly made to critically analyze the law relating to adoption of children in Uganda. Adoption refers to the vesting of parental rights and duties related to a child in the adopter on their application to the court vested with jurisdiction to grant an adoption order.

The major reasons for analyzing the law relating to adoption of children in Uganda are, the laws allow adoption to be made by those that are twenty-five years older than the children to be adopted but does not prescribe the maximum age of when a person should not adopt, equally, the law should provide for mechanisms of monitoring and supervising the adopted children so as to ensure that they are safe and that they are adequately catered for because some of the adopted children finally suffer after being adopted. The law is also to the effect that a child is only legally entitled to be shown his or her biological parents if at all he or she makes eighteen years old. Equally, the law does not put in place measures to follow up the adopted children among many others as shall be examined in the chapters of this thesis.

It's my humble submission therefore that the law relating to adoption leaves a lot to be desired, the provisions of the children Act are highly demanding and thus the law falls short of the current family life, social and economic aspects of Uganda and therefore there is need for amendment.

## CHAPTER ONE

### 1.0 Introduction and Background

Adoption is a process whereby a person assumes the parenting of another, usually a child, from that person's biological or legal parent and in so doing, permanently transfers all rights and responsibilities along with the filiation from the biological parent or parents.

Unlike guardianship or other systems designed for the care of the young, adoption is intended to effect a permanent change in status and such requires societal recognition, either through legal or religious section, however. like custodians and guardians, the adopting parents stand in law parentis to the child to whom they are not biologically related. Historically, before the enacting of adoption laws in Uganda there were several systems of providing and keeping children in Uganda. The most effective one of all was the child care system for the children who were deprived of their parents, however with the passing of time the traditional methods disappeared and guardians and parents began deserting their children and thus a risk to the lives of the children and the community at large since children could soon become criminals. The government became concerned and thus enacted laws relating to adoption.

The history of Uganda show that there were different modes of adoption in different regions of the country, in the central region, the death of the parents did not at all take away any right of property from the orphan child or children and this was because the widow and the children had a burden to stay on the land and keep the land and other property of the family. Children who could be born out of the wedlock had a number of options and they could thus stay at their mother's place or at the place of their father's birth or with close relatives or even friends. The needy children were provided for by the extended families.

In Eastern Uganda specifically with the Basoga, the responsibility of caring for the needy children fell among the extended family members, the Basoga were quite different in regards to the children borne out of wedlock, such children were equally provided as if they were born in the wedlock. Pregnancies before marriage would be

taken care of by the man who could have impregnated the girl or the family of the girl in case the man would be irresponsible. In case the man finally refused to marry the woman, a fine of a cow or a bull could be imposed, where the father failed to even pay the fine then the maternal relatives would shoulder the responsibility until adulthood.

On attaining adulthood, the grandparents or relatives would give him land to settle and would also be responsible for paying the bride price on his marriage.

In western Uganda, different tribes handled the issue of needy children differently. According to the Bachiga, provision was only for the children born in celebrated customary marriage and if a child lost the father, the family of the late provided for the children. The mother would be re married and the man who re married took over the responsibility and it was believed that all children belonged to the society. Bachiga were absolutely intolerable to the children borne out of the wedlock. It was a serious disgrace and therefore if any girl got pregnant before the official customary marriage would be considered a nuisance in the society and thus had to be thrown over the cliff to die.

On the other hand, according to Banyankole, provision for needy was through the extended families' system. However, the care was only for the children born in the wedlock. At this moment it's better to state that the laws on adoption that shaded away the traditional methods of catering for the needy children came from Britain and therefore it was made to suit the circumstances of the whites. In Europe, adoption of children is affiliated with the desire to nurture the children as though they were biological children of the adopter.

According to the traditional societies in Uganda, there was no adoption of a child whether motherless, orphan or even illegitimate unless there is some connection by blood between the children and the one now to assume the parental responsibility, thus, even if the laws which Uganda adopted from England are to the effect that the child is as good as the one borne by the one who adopted, this is still not quite easily understood in the minds of the society. This is because of the concept of adoption in the English sense which legally terminates the relationship of the child and the

biological parents but does not provide for the ground methods of integrating the children in the new family.

In Uganda, the law regarding adoption include some sections of the Children Act, the children statute of 1996 which repealed the adoption of children Act Cap 216. In the children act, section<sup>1</sup> provides for the law relating to adoption and it majorly provides for the application for the adoption which must be made to either to the magistrate or the high court.

The same Act<sup>2</sup> provides for the adoption made by citizen of Uganda as long as the conditions set there under are fulfilled which among others include the age of the party intending to adopt must at least be having a difference of twenty five years in relation to the child to be adopted.

Equally, it provides for inter country adoption and it's to the effect that a non-citizen can adopt a citizen of Uganda.

### **1.1 Statement of the Problem**

The topic critically examines the law relating to fraud cases in adoption in Uganda. The best situation would be that the members intending to adopt go through proper procedures as set out by the children Act for Ordinary and inter-country adoption and obtain the consent of the parents or of the guardians of the child and also treat the adopted children in the best of their interests like providing them with the basic needs of life, which include providing the children with food, clothes, good shelter and also education. However, this seems not to be the case on ground because some of the children adopted are soon turned into house maids, workers, wives and others are even sacrificed so as never to be heard of again for the entire life time. If the situation is not tackled, then the intention of the framers of the children Act which was to provide children in need with the avenues to be catered for and get better opportunities in life will remain unfulfilled and also the country will continue loosing large numbers of children to foreign self-seeking men and women.

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<sup>1</sup> section 45 to 55 of the children Act

<sup>2</sup> Section 45

## **1.2 Rationale of the research/general objective**

Just like any other third world country, Uganda is also a victim of high death rates as a result of numerous diseases like HIV/AIDS and other diseases like malaria, typhoid, cholera, hypertitis B and also political instabilities like the evasion by the LRA and Joseph Kony in the different parts of Uganda which all has increased the death rates thus leaving a number of children.

Additionally, some parents lack the financial command to care for the children borne since the methods of birth control have not yet reached some illiterate members of remote societies and others are conservative to adopt the methods of birth control such that the birth rates tend to be higher than the financial capacities of the parents giving birth to such children.

In such circumstances, adoption becomes the only solution and thus the capable and intending members normally adopt the children in Uganda and therefore the correct procedures should rather be followed than fraudulent means.

## **1.3 Specific Objectives**

- 1) To examine the National laws that governs adoption in Uganda.
- 2) To examine National policies and institutions that concern children in Uganda.
- 3) To examine international law that governs children in Uganda.

## **1.4 Scope of the Study**

The law relating to fraud cases in adoption entails a vast area which cannot fully be addressed in this study. For this reason, the study will geographically focus on the legal frame work and the different ways of capping down the fraud in matters of adoption in Uganda but specifically considering a case study of the high court case. The researcher will however occasionally cite examples from other jurisdictions for comparative analysis.

### **1.5 Significance of the Study**

- a) This will point out the weaknesses of the law relating to adoption so that the government can refer to it and improvise so as to eliminate fraud in adoption matters.
- b) It will offer at large to the public in regards to the law relating to adoption in Uganda and the procedure together with the practice there to.
- c) It will basically and absolutely improve the research skills of the researcher for the current and future benefits.

### **1.6 Hypothesis**

The research was based on the following hypothesis;

- a) That the existing legal frame work does not provide enough to prevent the occurrence of fraud in adoption matters, however this can be changed by changing the law as set out in the children act and the regulations thereto.
- b) That the present law on adoption does not reflect the social economic standards of development in Uganda but this can be achieved by review of the law.
- c) That the law does not contain details in regard to the children situation after adoption but such can be achieved through amendment of the law.

### **1.7 Methodology**

This paper has drawn qualitative information analyzing the law relating to fraud cases in adoption and basically the materials used are secondary materials because of financial and time constraints at my disposal, thus, much of the work is from the library and these include text books for example the Bromiles family law text book, principals of family law text book, family law and practice, journals, newspapers, legislations, case law however restricting myself to only those parts that are relevant to the research at hand and putting into account the cases the High court has disposed and it continues to handle.



The use of these materials is highly preferred in this research because they show the exact position in the community for example the blood bond journal shows the discouragement of the inter country adoption because of the fraud tendencies associated with it. However, much of my concentration has based on the children Act and the regulations because it contains much of the law relating to adoption.

### **1.8 Literature Review**

According to Allen George<sup>3</sup> adoption exists in various forms throughout the world and dates back to antiquity childlessness, the wish for a heir and companion have all played their part in establishing it as an important social institution. In the past, it was regarded as a means of furthering the interests of the adopters. This has resulted from the greater awareness that the children who have suffered the loss of their parents' must be adequately compensated if their proper development is not to be jeopardized and has in turn led to more concern about how homeless and deprived children are cared for. Though this submission is true, the recent trend is quite different; attention now does not focus primarily on the child; this is because most people adopt because they have majorly failed to find children in their marriages or at times they hope that the children will grow and help them in future.

As noted by Campbell, Silverman and Patti (1991)<sup>4</sup> "it is not possible to systematically sample adoptees to identify a representative population of adoptees who have had reunions." Consequently, "caution must be used in generalizing from the results presented here to the whole population of adoptees, this position is good analysis but the adopted members are registered such that reference can be quickly made and estimate the numbers.

Triseliotis (1973)<sup>5</sup> studied 70 adoptees who had accessed their original birth certificate over a two-year period. Triseliotis found that 80% of adoptees who obtained information about their origins found the experience personally beneficial and had no regrets about obtaining the information. The remaining 20% indicated that they did not find the information useful and regretted having sought it. In my

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<sup>3</sup> Adoption policy and practice

<sup>4</sup> Principals of adoption

<sup>5</sup> Study on adoption

view, the study is in support of the conclusion that the disclosure of adoption information is not harmful to the adopted children.

**KADUSHINI**<sup>6</sup> states that foster care involves substituting another family for the child's own family. Such big change is more important when the child's own home presents serious deficiencies that it can't provide the child with minimally adequate social, emotional and physical care and in effect the child's own parents are incapable or unwilling to implement the essential aspects to their parental role so that the parents' surrogates needs to be assigned the status of the parent to this child and enact the role for him. it involves for a child not only temporally separation (except for visits) and adjustments for a new family but also change of location school and change of peer and sibling group which is equally challenging, this seems to be true however in Uganda, the tribes seem to have a lot in common and therefore the challenges of adapting to the new environment seem not to be a great problem.

In the **McRoy et al**,<sup>7</sup> it was found that contact between the mother and the child seemed to be very stressful for a number of birthmothers interviewed. These birthmothers reported that having to leave their children (after visiting) was extremely painful; seeing the adoptive parent as having complete control in their children's lives was distressful and sadness and grief often characterized the termination of their visits or receipt of updated information about their children. Several of these birthmothers expressed a hope that their children would want to come to live with them when they were older. In my opinion, though this might be true, I defer from this submission because the children who meet their parents get the happiness and develop a sense of belonging.

According to Sinclair and Wilson<sup>8</sup>, it is shown that children emphasized the need for a say in their 'careers in care' – whether they are fostered, adopted or live with another member of their family, In my opinion this is true because making a choice gives the child a sense of commitment and the placement is more likely to succeed.

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<sup>6</sup> Child welfare services

<sup>7</sup> 1988 study

<sup>8</sup> 2009 study

Additionally, the child can also avoid those intending adopters especially those who seem to be mistreating since before adoption there are moments shared between the children and the member intending to adopt so that the child can tell the character.

**In Re B (Adoption: Setting Aside)**<sup>9</sup>, Sir Thomas Bingham Mr. stated that "The act of adoption has always been regarded as possessing a peculiar finality. This is partly because it affects the status of the person adopted, and indeed adoption modifies the most fundamental of human relationships, that of parent and child. This decision is quite inapplicable in Uganda because the adoption might be achieved by fraud by the adopting party and thus if the decision of the court of the first instance is left to be final it can in the long run lead to irregularities.

There are five dominant narratives in the legal scholarship that have been advanced and they have a tendency of showing grounds as to why people adopt children<sup>10</sup> (1) the Humanitarian History Narrative; (2) the Rescue Narrative; (3) the Improved Life Chances Narrative; (4) the Invisible Birth Parents Narrative; and (5) the Natural "Market" for Inter-country Adoption Narrative.

### **The Humanitarian History Narrative<sup>11</sup>**

Legal scholars often tell an almost identical "history" regarding the beginnings of adoption, effort to rescue orphaned or abandoned children in the aftermath of War.

Three post-war periods are usually described simply and unequivocally as humanitarian actions involving adults from the United States and other Western nations reaching out to children from the developing world who were in need of parents. In a critical observation this may be challenged on ground that the World War and other wars in developing countries are basically brought about by the selfish interests of the developed countries for example U.S-support wars, which, in part, create the conditions that leave children orphaned or abandoned and their countries in disarray. An alternative explanation is that developed countries resort to activities of rescuing the children, not solely for humanitarian reasons, but also to atone for involvement in the wars and destruction of the native countries of these

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<sup>9</sup> (1995)1FLR 1

<sup>10</sup> Michigan journal of international adoption

<sup>11</sup>. Narrative One:

children. This counter explanation is supported by the fact that United States often started military initiatives that had the purpose of extracting children from their countries for example the involvement of USA in world war II.

### **The Rescue Narrative<sup>12</sup>.**

The second dominant narrative is the "rescue" narrative, in which children are conceptualized as children in dire need of being rescued from their immediate circumstances. Today, placement of children from war or disaster zones for the purpose of rescue is governed by international treaties on refugees. Children refugees is a placement option of last resort given that war and other disasters compromise the tracing of a child's origin and make the determination of orphanage difficult.

I do not entirely agree with the report of the Michigan journal because there are alternative explanations of why children need to be saved from developing countries. In contemporary, developing countries suffer conditions that are insurmountable in the short term, such as economic collapse, political instability, civil wars, disaster, disease, overpopulation, and widespread poverty. Millions of children in this world are left without families, homes, and care every year. The problem is not isolated to any developing country (Uganda inclusive), but exists primarily in countries where wars or natural disasters leave impoverished families and outcast mothers with no other choice but to relinquish their children out of need or shame, terrible circumstances and to be at severe risk of high developmental or physical damage. These narratives generate a sense of urgency to extract children from their home countries before they grow older and become ruined psychologically or physically by their environments.

Additionally, Institutional life in an orphanage can be extremely damaging to a child's physical and social well-being. Due in part to poor sanitation and pollution, and higher risk for such medical problems as asthma, "central nervous system pathologies, developmental delays, failure to thrive, anemia, rickets, fetal alcohol syndrome, malnutrition, parasites, exposure to syphilis, and tuberculosis," infectious

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<sup>12</sup> Narrative Two:

diseases, and motor problems, street begging and shining shoes, expose to sexual abuse, drug addiction, and terrible health conditions, and, if not on the streets, in delinquency homes or institutions and orphanages are even overcrowded.

I will basically point out two other basic loopholes from the above finding in the Michigan journal on international adoption, In third World countries like Uganda, international adoption is viewed as "imperialistic, self-serving, and a return to a form of colonialism." As such, the entire practice has not escaped the prejudices accompanying international adoption and is overshadowed by perceptions of national pride and a clash between the so-called "have" and "have-not" countries.

Several authors sustain this narrative by referencing two specific quotations that demonstrate that countries view inter-country adoption as a shameful admission of their incapacity or as an act of imperialism or colonialism. The quotation typically referenced in discussions of the "shame" experienced by sending countries is from Elizabeth Bartholet<sup>13</sup>: "[Inter-country adoption is a] shameful admission to the world of the government's inability to care for its own, the loss of a vital national asset, and perhaps the ultimate example of the exploitation by rich nations of the poor nations of the world." Similarly, to make the point that sending countries view inter country adoption as an act of imperialism or colonialism, law review articles typically reference by Howard Alstein & Rita Simon<sup>14</sup>: the West has generally viewed adoption as charitable, humane-even noble-behavior whereas developing countries have come to define it as imperialistic, self-serving, and a return to a form of colonialism in which whites exploit and steal natural resources. None of the law review articles explicitly consider a postcolonial critique; many, however, suggest that sending countries feel imposed on by wealthy Western countries through inter country adoption.

It can thus be said that Inter-country Adoption is exploitation because of its predatory nature. Today, inter-country adoption surges after regime collapses and natural disasters in developing countries, precisely when institutions for child placement-formal and informal-are at their weakest point. The focus of the

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<sup>13</sup> Intercountry adoption

<sup>14</sup> Introduction to intercountry adoption

developed countries on the hunger for foreign babies is currently trained with full force and the consequences of this are already being felt. Mothers are being exploited. Mass numbers of children are simply being sold to the highest bidder and fraudulent methods are being used to attain these children. The issue is how a poor and governmentally unstable country such as Uganda can defend itself from the rapacious needs of baby consumers from developed countries.

Therefore, inter-country adoption should be the option of last resort for children in Uganda. Little attention is paid in legal scholarship, for example, to the argument that industrialized countries are exploiting developing countries and stealing their national resources, i.e., their healthy children. Similarly, scholars do not often discuss how the rescue rhetoric might play into the psychological process for adoptive parents of cleansing the foreign child of "otherness" and redefining belonging and origin through citizenship. Legal scholars actively promote the notion that the younger children should be taken away from their country conditions as soon as possible, in order to avoid mental and physical problems that develop with age. This, in turn, creates an urgency to extract infants and number of older children.

As history shows, inter-country adoption is at its peak when world disasters, wars, and other economic or political changes occur because richer and more stable countries have families who want to try to rescue children from the plight of poverty and instability. These disasters and situations of turmoil make it extremely difficult for affected countries to support their children, thus forcing them to allow their children to be internationally adopted. This could also be characterized as the desire for a clean slate: a baby or young child unconditioned by his or her native environment. And, after a "quick extraction," most of the inter-country adoption bureaucracies allow the infant or child adoptee to gain expeditious citizenship for example the United States, which completes the process of "laundering" the child for the parents who may desire an unadulterated newborn child. This is why, in part, Stephanie Sue Padilla describes inter-country adoption as<sup>15</sup>. From this alternative perspective, the Rescue Narrative facilitates the "laundering" of children as infants, and their "rebirth," into an adoptive family. As noted above, when sending

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<sup>15</sup> This most intimate of our lives and rebirth of a child into a family.

governments oppose or restrict inter-country adoption, their actions are interpreted as responding to public shame and nationalistic pride. This description contrasts sharply with arguments that Inter country adoption is the logical, rational, or efficient solution to the "demand" for adoptable children by Western adults, or to the argument that these children are in need of being rescued. Another prevalent narrative is that sending countries place bans on inter country adoption that are unfounded; this narrative prevails despite the fact that sending countries and the well to do countries (at the same time receiving country) such as united states impose bans or moratoria on inter-country adoption due to serious incidents of child trafficking.

Trafficking occurs when children who would otherwise not be adoptable, are bought, sold, stolen, or purposefully lost into the limbo of middlemen and institutions that facilitate inter country adoption. Reports of child trafficking from sending countries are often qualified in law review articles as "rumors of," "scandals of," "tales of," and at times are explicitly described as misrepresentations or exaggerations by the media of sending countries that hurt children who need adoption." The terms used in law review articles.

The global scope of trafficking was perhaps best illuminated by Ethica<sup>16</sup>, a non-profit organization promoting ethical adoption practices. Ethica reported that, of the forty nations that had made the top twenty list of nations sending children to the United States for adoption within the previous fifteen years, 43% were temporarily or effectively closed to inter-country adoption. Most of these closures, Ethica suggested, were prompted by concerns on the part of sending or receiving nations, or both, related to abduction, trafficking, and corruption.

While it may be true that illegal practices are difficult to trace, and that bans on inter-country adoption may adversely affect some children, denying the existence of pervasive tactics of child trafficking is a narrative that is not nuanced enough to reflect reality. There are only a few legal scholars who articulate positive counter narratives about sending governments. One can rightfully argue that Uganda is

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<sup>16</sup> 2003 report.

deliberately sending children for inter country adoption because of population growth and therefore it's done to suit its national interest.

### **Improved Life Chances Narrative<sup>17</sup>**

Related to the Rescue Narrative is the Improved Life Chances Narrative. Invariably, legal scholars describe the opportunities for adoptive children as improved in the developed countries after inter country adoption, and in doing so, imply the superiority of upper- and middle-class parents to poor birth parents. It is argued<sup>18</sup> that inter-country adoption advocates would do best to accept that illegal practices are occurring, since ignoring child trafficking for adoption is a main reason for the shutting down of inter-country adoption by major sending countries.

Advocates of inter-country adoption ignore the incidence of systemic trafficking and displacement of domestic adoption occurring during the past decade at their peril. Exposure of systemic trafficking and displacement problems in countries such as Uganda bring inter-country adoption into disrepute, fuel the arguments of those who are simply opposed to inter-country adoption on political or philosophical grounds, and spur new moratoria by both sending and receiving nations.

Scholars routinely explain that inter-country adoption offers hope to children of improving their life chances, often of escaping a life "marred by poverty," and provides them with increased educational and employment opportunities. Similarly, scholars routinely contrast, either explicitly or implicitly, the lack of opportunity in developing countries with the abundant opportunity in already developed countries like England, United States, which is reflected in modern conveniences, better educational institutions, and Western medicine.

Obviously, it's true that there are children who, if not adopted, would have a very bleak life and few opportunities in their countries. But, the report tend to describe all sending countries as being poor, impoverished and all parents and caregivers from these countries as unable to care for their children. In my view, the reality is more nuanced than this report suggests. It should be mentioned that Uganda is not

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<sup>17</sup> Narrative Three:

<sup>18</sup> Blair



exclusively impoverished, thus such members (adopted) can as well grow from her just like all of us have grown.

Equally, these children are deprived of opportunities like the lack of a known bloodline, these children are without the strong personal identity of a family group and are denied the benefits of a family name in seeking education, employment opportunities, and marriage and even inheritance.

In fact, little attention is paid to the fact that when these children are taken, they are made to suffer and become servants of the rich men and women, which they would even not be subjected if they stayed in their countries. In contrast, I believe that Legal resolutions can be employed by discouraging inter-country adoption and encouraging in country adoption. This has been applied and it has become successful in Brazil, she (Brazil) was fourth among the countries from which children were adopted by U.S. parents by the end of the 1970s. However by 1994, inter-country adoption had slowed to a "trickle." Scholars have attributed this slow-down to the legal reforms, creative ways in which to evade interventionist adoption policies and to continue to employ local practices and customs for child care.

### **The Invisible Birth Parents Narrative<sup>19</sup>**

Another contemporary narrative derives from the failure to acknowledge birth parents. If birth parents are acknowledged in the literature at all, references typically contextualize them as dead, sick, impoverished, desperate, neglectful, addicted to drugs and alcohol, or shamed into abandoning their children. Legal scholars<sup>20</sup> introduced the following narrative to describe birth parents themselves as utterly helpless:

Imagine being 12 years old, pregnant, unmarried, and living in impoverished conditions in the isolated countryside. Western adoptive parents are often generously described as loving, humanitarian, wealthy, and resourceful caregivers, ready to travel to the ends of the world to save a child. It's my Submission without prejudice that too few legal scholars take on the challenge of seeing inter-country adoption

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<sup>19</sup> Narrative Four:

<sup>20</sup> Laura Beth Daly

from the perspective of poor birth parents, it's not that they are neglectful or careless or drunkards as normally alleged but they are enticed and coerced by the circumstances of lack of resources and thus they have no other viable option besides surrendering their dear children to be taken away from them.

Different arguments are further advanced under this narrative, that it's because adults in developing countries are disinterested, incapable, or too impoverished to adopt children<sup>21</sup>. It's also asserted that the incentives for trading human life have become too high for some biological parents to forego<sup>22</sup>. An observation is also made that birth parents are "dead" or have abandoned their children and that if they are alive, they are "unable to care for their children because they are involved with drugs, alcohol, prostitution, are unemployed, imprisoned, or institutionalized in a mental asylum,"<sup>23</sup> the birth parents are vulnerable to traffickers due to being poor, uneducated, ignorant, and desperate,<sup>24</sup> it's also because of the negligence and abandonment<sup>25</sup>.

However much these arguments seem to be true, parents are tricked into relinquishing birth rights for a few bucks. Narratives of deliberate relinquishment of a child create a morally ambiguous universe, which has the effect of portraying birth parents as selfish, while at the same time failing to address how a mother who loves her child could bear to part from him. In contrast, very few argue in favor of supporting birth families as a better option for children over Inter country adoption. Few recognize that there are children in poor countries who may benefit most from staying with their families, within their communities and their culture, rather than being uprooted in order to satisfy the desires and imaginations of Western adults: the black market prevails in the international adoption arena, and many birth parents feel pressured into selling their children for a better life without fully understanding the consequences.

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<sup>21</sup> Katz at 112

<sup>22</sup> Calsberg at 12

<sup>23</sup> Chadick at 118

<sup>24</sup> Hubing and Wittner (603 to 606)

<sup>25</sup> Bogard at 572

No matter the circumstance, a mother who gives away her child is unthinkable. She gives the child away because she loves it so much, however the story and its accompanying image imply that If she really loved the child, how could she bear to part from it? It is no less powerful a message in a moral economy in which becoming a woman is inseparable from the work of motherhood and the assumptions about nurturance this implies.

The better solution here would be to give support to parents and extended family to enable them to care for their child before resorting to inter-country adoption in desire to protect parental rights, keep the healthiest and the brightest children within their countries of origin, avoid a potential loss of identity to Western society, and protect against child trafficking.

### **The Natural "Market"<sup>26</sup>**

War-orphan rescue rhetoric has been substituted for a more general narrative about rescuing children from the developing world. These new inter-country adoption narratives observe a rising supply of orphans in developing countries since the 1970s. I place the word "orphans" in quotation marks here because any child living without an ideal family environment in developing countries has come to be identified as an orphan in these narratives. Law review articles create this narrative by freely interchanging the word "orphan" with "abandoned," "street," "homeless," and "needy." The dominant narrative in law review articles suggests that an expanding discourse of who is adoptable has broadened the conception of who is adoptable. For many years, in fact, there has been a requirement that potential adoptees be classified as orphans under some countries<sup>27</sup> even when the sending country has defined that child as an adoptable child. Notwithstanding the fact that some authors maintain that ethical adoption only involves genuine orphans, most proponents of inter-country adoption have criticized the government's very restrictive definition of "orphan" as limited and harmful to children's best interests. In fact, "the best interest of the child" has been taken by many scholars as a favored standard to reframe the question of who is adoptable. Similarly, the 1993 Hague Convention on Inter-country Adoption" is widely promoted by law review articles.

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<sup>26</sup> Narrative Five:

<sup>27</sup> United states immigration law.

notwithstanding the fact that the Convention favors placement out of a child's home country even if there are established care giving networks in-country." Pursuant to the favored Hague Convention, if a family does not adopt a child domestically, Inter-country adoption is favored as the next option over domestic solutions for placement in orphanages, group homes, other institutions, or other care giving networks that may not meet a civilized definition of family. The vast majority of scholars propose reforms to domestic and international law in order to streamline or facilitate inter country adoption. Similarly, most authors advocate ratifying, implementing, or improving the Hague Convention. Only a handful of law review articles provide alternative narratives to dominant narratives regarding Inter country adoption.

Personally, I argue against Inter country adoption and propose alternative solutions that seek to address underlying issues and causes of child displacement, advocate for increased criminalization of child trafficking, focus on the coercion of birth parents for purposes of Inter country adoption.

## CHAPTER TWO

### THE CONSTITUTION OF REPUBLIC OF UGANDA

#### 2.0 Introduction

The constitution<sup>28</sup> defines a "child" to mean a person under the age of eighteen years. The same law<sup>29</sup> provides that Subject to laws enacted in their best interests, children shall have the right to know and be cared for by their parents or those entitled by law to bring them up. Additionally,<sup>30</sup> it is provided that the Law shall accord special protection to orphans and other vulnerable children.

#### 2.1 Children Act

The guiding principles<sup>31</sup> when determining whether to grant adoption or not is welfare principles and the children's rights set out in the First Schedule to this Act. Whenever the State, a court, a local authority or any person determines any question with respect to the upbringing of a child; or the administration of a child's property or the application of any income arising from it, the child's welfare shall be of the paramount consideration<sup>32</sup>

Lord McDermott in **J v. C**<sup>33</sup> held that welfare connotes:

"a process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed. the course to be followed will be that which is most in the interests of the child's welfare as that term has now to be understood.

"Paramount consideration", as Lord Mac Dermott continued, means a consideration which determines the course to be followed".

This is called the guiding principal when dealing with children matters. In **Williamson v Williamson**<sup>34</sup> the paramount consideration in any issue involving a child is the welfare of the child at hand.

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<sup>28</sup> Article 257(1)c

<sup>29</sup> article 34(1).

<sup>30</sup> Article 34(7)

<sup>31</sup> Section 3 of the children Act

<sup>32</sup> Rule 1 of the first schedule

<sup>33</sup> (1970)

<sup>34</sup> (1993)4KALR 160.

In all matters relating to a child, whether before a court of law or before any other person, regard shall be had to the general principle that any delay in determining the question is likely to be prejudicial to the welfare of the child<sup>35</sup>.

This rule makes time of essence when dealing with children affairs. This is because children who are suffering serious neglect or abuse in the care of their parents and are experiencing or likely to experience significant harm have to be acted upon so as to save them.

In determining any question relating to children, the court or any other person shall have regard in particular to the ascertainable wishes and feelings of the child concerned considered in the light of his or her age and understanding<sup>36</sup>; the child's physical, emotional and educational needs<sup>37</sup>; the likely effects of any changes in the child's circumstances<sup>38</sup>; the child's age, sex, background and any other circumstances relevant in the matter<sup>39</sup>; any harm that the child has suffered or is at the risk of suffering<sup>40</sup>; where relevant, the capacity of the child's parents, guardians or others involved in the care of the child in meeting his or her needs<sup>41</sup>.

This basically provides the court with the criteria for decisions

A child shall have the right<sup>42</sup>

To leisure which is not morally harmful and the right to participate in sports and positive cultural and artistic activities<sup>43</sup>;

To a just call on any social amenities or other resources available in any situation of armed conflict or natural or man-made disasters<sup>44</sup>;

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<sup>35</sup> Rule 2 ibid

<sup>36</sup> 2(a) ibid

<sup>37</sup> 2(b) ibid

<sup>38</sup> 2(c) ibid

<sup>39</sup> 2(d) ibid

<sup>40</sup> 2(e) ibid

<sup>41</sup> 2(f) ibid

<sup>42</sup> Rule 4 ibid

<sup>43</sup> 4(a) ibid

<sup>44</sup> 4(b) ibid

To exercise, in addition to all the rights stated in this Schedule and this Act, all the rights set out in the United Nations Convention on the Rights of the Child and the Organization for African Unity Charter on the Rights and Welfare of the African Child with appropriate modifications to suit the circumstances in Uganda, that are not specifically mentioned in this Act.

The Act sets the jurisdiction for members intending to adopt<sup>45</sup>.

An application for an adoption order may be made

To a chief magistrate's court within the jurisdiction of which the applicant or the child resides where both the child and the applicant are citizens of Uganda;

To the High Court where the child or the applicant is not a citizen of Uganda, and the court may, subject to this Act, grant the application.

The foregoing provisions confirm that only the courts of law have the mandate to grant adoption orders, therefore any adoption without a court order is illegal.

The Act also sets the prerequisites for adoption<sup>46</sup>

An adoption order may be granted to a sole applicant or jointly to spouses where the applicant or at least one of the joint applicants has attained the age of twenty-five years and is at least twenty-one years older than the child;

The rationale seems to be that a person who is at least twenty-five years and above are generally believed and considered to be able to uphold the welfare of the child to be adopted. In the matter of **Elizabeth Ayee**<sup>47</sup> an adoption order was granted to the applicants because both of them were at least twenty five years and above. This section is however criticized because though it prescribes the minimum age at which one is eligible to adopt, it remains silent about the maximum age when one should not be allowed to adopt a child. My opinion is that the maximum age of adoption

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<sup>45</sup> Section 44

<sup>46</sup> Section 45

<sup>47</sup> Adoption cause number 130 of 2010UGHC 66

should be forty to fifty years basically because the adopter should be around and still existing as the child is growing; my reasoning is based on the fact that most Uganda's do not exceed seventy years and even those who exceed such, they are always in such conditions that are vulnerable and cannot therefore do one or more things which are necessary for the proper upbringing of the child.

In the case of an application by one of the spouses, the other has consented to the adoption. The rationale behind requiring the consent of the other spouse after one has applied for the adoption of the child is the desire to protect the adopted child from being mistreated by the spouse who could not have wished the adoption to be made, credit should go to the legislature for contemplating such a loophole in the adoption of children and also covering it in advance. However, in Uganda there are high numbers of children who seem to be in desperate need of being saved, my submission is that once it can be proved that the best interests of a child are to be served then the requirement that the other spouse must first append his signature of consent can be dispensed with simply because the chances of children to be adopted are ruined by this strict requirement which seem no to be serving a correspondent purpose.

An adoption order cannot be made in favor of a sole male applicant in respect of a female child, or in favor of a sole female applicant in respect of a male child, unless the court is satisfied that there are special circumstances that justify, as an exceptional measure, the making of an adoption order.

This is basically a move to stop the later interests of marriage that may arise from the adopter and the adopted, however, if exceptional circumstances can be shown then the court can go ahead and allow such adoption. **In The Matter of Mirembe Nansamba Clare (A Minor)**<sup>48</sup> where the petitioner was a male applicant intending to adopt a female child, court stated that the man had fulfilled the exceptional circumstances by showing that has been catering the child for the past six years and also that the wife had allowed the adoption of the child to occur thus the order was granted.

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<sup>48</sup> adoption cause no. 110 of 2009



The application cannot be considered unless the applicant has fostered the child for a period of not less than twelve months under the supervision of a probation and social welfare officer.

This provision is based on the rationale that as a child grows, he or she tends to link in love and therefore if a child does not develop such love in the twelve months provided then the adoption should not occur as it will now be clear that the child cannot stay comfortably with the party intending to adopt. In **Re Edith Nasazi**<sup>49</sup>, court stated that the applicant had fostered the child for over 36 months which are required and therefore was eligible to apply for adoption.

The probation and social welfare officer is required to submit a report to assist the court in considering the application; and the court may, in addition, require some other person or the local authority to make a report in respect of the adoption application.

The Children Act<sup>50</sup> provides for Inter-country adoption.

A person who is not a citizen of Uganda may in exceptional circumstances adopt a Ugandan child, if he or she has stayed in Uganda for twelve months, has fostered the child for at least twelve months under the supervision of a probation and social welfare officer, does not have a criminal record; has a recommendation concerning his or her suitability to adopt a child from his or her country's probation and welfare office or other competent authority; and has satisfied the court that his or her country of origin will respect and recognize the adoption order.

For children who cannot be raised by their own families, an appropriate alternative family environment should be sought in preference to institutional care which should be used only as a last resort and as a temporary measure. Inter-country adoption is one of a range of care options which may be open to children, and for individual children who cannot be placed in a permanent family setting in their countries of origin, it may indeed be the best solution. In **The Matter of Sidney Stephen Harper, Wendy Annette Harrper, Musinguzi Davis Alias Elijah David Harpe**.

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<sup>49</sup> cause no 4 of 97

<sup>50</sup> Section 46

This was a petition by which the petitioners were jointly seeking an order of adoption in respect of a child, Musinguzi Davis alias Elijah David Harper, below the age of five years. The petitioners were husband and wife. Both applicants were citizens of the United States of America currently working as missionaries in Uganda with an organization known as Youth with a Mission (YWAM) within Arua District, with which they had been working since 15<sup>th</sup> March, 2015. They had stayed in Uganda for more than three years, had fostered the child for more than three years, Interpol confirmed that they had no criminal record and the report from the probation officer approved them to be eligible. An order was granted to them for adoption.

The probation and social welfare officer is required to submit a report to assist the court in considering the application; and the court may, in addition, require some other person or authority to make a report in respect of the application. In **Re Hassan Kaaya (child)**<sup>51</sup>, the probation officer confirmed in his report made in December 2017 that Kaaya was currently attending Kira Junior Prep School and was thriving in his educational environment. He was healthy and emotionally stable in the safe, secure and loving environment that the petitioner has provided. That the petitioner held Kaaya's education in high esteem and had in addition executed all financial, social and spiritual responsibilities towards Kaaya satisfactorily. She was instructed and understood the conditions and circumstances arising from taking up legal adoption and the need to maintain a good balance to prevent Kaaya from feeling stigmatized as a result of his adoptive status. The probation officer recommended that the petitioner be appointed the legal adoptive parent of Kaaya.

The children Act<sup>52</sup> provides that the consent of the parents of the child, if known, is necessary for the adoption order to be made; but the consent may be revoked at any time before the pronouncement of the adoption order. In **The Matter Of Peter Ssebuliba Alias Namansa James (An Infant) and in The Matter of an Application for a Writ of Habeas Corpus Ad Subjucendum By Susan Nayiga (Mother) in Respect of the Said Infant**<sup>53</sup> where the adoption order that had been

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<sup>51</sup>Family cause no. 002 of 2018 [2018] ughcfd 9 (16 October 2018)

<sup>52</sup> Section 47

<sup>53</sup>miscellaneous cause no. 37 of 2009

made by the chief magistrate was set aside because there was no consent of the parent. It is allowed by the Children Act to dispense with the consent if the parents are incapable of giving it.

**In The Matter of the Petition for the Adoption of Birabwa Mutaka By Jonathan Patrick Mcleod And Mary Frances Chrisman** the whereabouts of the mother were not known and the court dispensed with her consent.<sup>54</sup>

While an application for an adoption order is pending in the court, a parent who has given his or her consent to the adoption is not entitled, except with the leave of the court, to remove the child from the care and custody of the applicant.

The court may refuse to grant leave to remove the child from the care and custody of the applicant if it considers it significantly harmful to the welfare of the child.

If in the view of the court a child is able to understand the adoption proceedings, then his or her views must be taken into consideration In **Re Ethan Acaleri (an infant)**<sup>55</sup> Court interviewed the infant who affectionately referred to Zane Mccourtney (who was the adopter) as 'daddy'. He told court he goes to Horizon School. When asked if he wished to live with his uncle he gave an emphatic 'no' and asserted he wanted to live with 'daddy'.

If the child is at least fourteen years of age, his or her consent to the adoption must be obtained unless it is impossible for him or her to express his or her wishes.

Where it appears to the court that any person who is not the parent of the child has any rights or obligations in respect of the child under any order of the court or agreement or under customary law or otherwise, the court can require the consent of that person before the adoption order is made.

The court may also request a probation and social welfare officer to prepare a report to assist it to determine whether any person who is not a parent of the child has any

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<sup>54</sup> adoption cause no. 014 of 2018

<sup>55</sup> adoption cause no. hct-02-cv-ma-0130 of 2012, [2013] ughcf 4 (18 March 2013);

rights or obligations in respect of the child and whether that person's consent ought to be obtained before the making of the adoption order.

The children Act<sup>56</sup> provides for the functions of the court.

The court has before making an adoption order to be satisfied that every person whose consent is required and is not dispensed with has consented and understands the nature and effects of the adoption, namely, that it will permanently deprive that person of parental rights over the adopted child, the order if made will be for the welfare of the child, due consideration being given to the wishes of the child having regard to his or her age and understanding In **Re Mason Buyinza Alias Silas Mason Harper**<sup>57</sup> where **Hon Justice Stephen Mubiru** stated that

*"The paramount consideration in making decisions concerning children is the welfare Principle. Having considered the submissions of Counsel for the petitioner as well as the pleadings and other documents in support of the petition and having seen and observed the petitioners and the child in court, this court is satisfied that all the statutory requirements set by The Children Act have been met by the petitioners. The court is satisfied that both petitioners are fit and proper persons to be appointed to adopt the child, Mason Buyinza alias Silas Mason Harper, given the fact that they have been living and supporting him, he is closely related to them, and they have sufficient means economic and otherwise, to provide for the child and the rest of their other children".*

The applicant has not received or agreed to receive, and that no person has made or agreed to make to the applicant, any payment or other reward in consideration of the adoption; and the applicant or any person on behalf of the applicant has not paid or agreed to pay money or anything in place of money to the parent, guardian or any person in charge of the child in consideration of the adoption of the child.

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<sup>56</sup> Section 48

<sup>57</sup> adoption cause no. 0002 of 2018) [2018] UGHCFD 3 (22 March 2018);

The court may, in an adoption order, include such terms and conditions as it deems fit. The children Act<sup>58</sup> provides for appeals where any person aggrieved by any decision of a chief magistrate's court or the High Court concerning adoption can in the case of a decision of a chief magistrate's court, appeal to the High Court against the decision and in the case of a decision of the High Court, appeal to the Court of Appeal and thereafter the Supreme Court against the decision. For the avoidance of doubt, a person aggrieved by a decision of the High Court on an appeal from the chief magistrate's court, may appeal against the decision to the Court of Appeal and thereafter to the Supreme Court.

The children Act<sup>59</sup> provides for the effect of an adoption order. Upon an adoption order being made, all rights, duties, obligations and liabilities of the parents and guardians in relation to the future custody, maintenance and education of the child, including all rights to appoint a guardian and to consent or give notice of consent to marriage, are extinguished; There vests in, and be exercised by, and enforceable against the adopter all such rights, duties, obligations and liabilities in relation to the future custody, maintenance and education of the child as would vest in him or her if the child were the natural child of the adopter born to him or her in lawful wedlock .

**In the matter of a petition for the adoption of Victoria Babirye Namutosi by Johny Walters Jr and Cheryl Ann Walters, Hon. Lady Justice Margaret Mutonyi<sup>60</sup> stated that** For avoidance of doubt, the parental rights of having exclusive care, custody, and control of the child Victoria and parental Responsibilities for her maintenance, education, medical care previously with the biological parents is extinguished and vested in the adoptive parents..

The children Act<sup>61</sup> provides for the devolution of property. Where an adopter dies intestate, his or her property shall devolve in all respects as if the adopted child were the natural child of the adopter. In the case of **Re Victoria Babirye Namutosi**<sup>62</sup> Judge **Margaret Mutonyi commented that** Johnny Walters Jr and Cheryl Ann Walters are appointed the adoptive parents of the child Babirye Victoria Namutosi

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<sup>58</sup> Section 50

<sup>59</sup> Section 51

<sup>60</sup> Adoption cause no.09 of 2017

<sup>61</sup> Section 52

<sup>62</sup> Supra

and the relationship of parents is hereby established with all rights and privileges incident thereto including the right of inheritance of the property of the adoptive parents”.

If it appears to the High Court on a claim made, that the disposition of property devolving on intestacy has been exercised unfairly against an adopted child, the court may order such provision as the court thinks equitable to be made for him or her out of the property devolving on the intestacy in accordance with the law.

Where in any testamentary disposition of property, whether or not in writing, made after the date of an adoption order, any reference, whether expressed or implied, to the child or children of the adopter is construed as including a reference to the adopted child.

Where any disposition made by the adopter prior to the adoption order makes no provision for the adopted child, the adopted child can apply to the court to vary the disposition by ordering such provision as the court thinks equitable to be made for him or her. For the avoidance of doubt, an adopted person cannot be entitled to inherit from or through his or her natural parents if they die intestate.

The children Act provides for the register of Adopted children<sup>63</sup>

The registrar of births and deaths has to maintain adopted children register in which he has to register particulars of adoptions. **Re:In The Matter Of Salem Mukiibi And Asafu Semakula**<sup>64</sup>. Judge Margaret C. Oguli Oumo stated that

*“The petitioners are directed to register the order with the Registrar of Documents Uganda Registration Services Bureau. Ministry of Justice and Constitutional Affairs, Kampala”.*

The person who adopts a child has the duty of disclosure of adoption to the adopted child, this is done where a child has attained the age of eighteen years, or, at an earlier age, on the child’s own request or at the discretion of the adopter<sup>65</sup>.

The adopter parent has to inform the child that he or she is adopted as soon as the child is of an age of understanding.

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<sup>63</sup> Section 54

<sup>64</sup> Family Cause No.35 Of 2008) ((Family Cause No.35 Of 2008)) [2009] UGHC 164 (19 October 2009);

<sup>65</sup> Section 55

### 2.1.1 The Adoption Rules in Uganda

#### Application by petition<sup>66</sup>

When the petitioner or petitioners and the child are all Uganda citizens the application for an adoption order has to be made by petition to the Chief Magistrate's Court as per Form A of the schedule.

When a petitioner or the child is a non-Uganda citizen the application for an adoption order has to be made to the High Court in Form B in the Schedule to the Rules.

The petitioner or petitioners has to present the petition ex parte in person or by advocate to a Judge or Chief Magistrate sitting in chambers and the Judge or Chief Magistrate has to give such directions as to service, appointment of guardian ad litem, any further consents as may be required and otherwise as may be necessary.

The Probation and Social Welfare Officer under whose supervision the child has been fostered by the petitioner or petitioner's has to be present at the ex-parte hearing; and has to attend all subsequent proceedings as directed by the Court, in order to advise the Court.

#### Persons to be served<sup>67</sup>

The petition has to be served on the parent or parents of the child, if any or if none; the guardian or guardians of the child or if none; the person or persons having the actual custody of the child or if none; the person or persons liable to contribute to the support of the child; and the child, if of the age of fourteen years or above.

The Judge or Chief Magistrate may dispense with the service on any of those persons listed in sub-rule of this rule and may order the petition to be served on any other person or persons.

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<sup>66</sup> Rule 3

<sup>67</sup> Rule 5

#### Mode of service<sup>68</sup>

Every petition, notice or document has to, unless the Judge or Chief Magistrate otherwise directs, be served by an officer of the Court, by delivering or tendering a copy of it signed by the registrar or the Chief Magistrate and sealed with the seal of the court to the person to be served.

The service of every petition, has to be verified by affidavit, unless the Judge or Chief Magistrate otherwise directs.

#### Verification by affidavit<sup>69</sup>

The statements contained in the petition has to be verified by affidavit to which must be annexed certificates and other documents proper for proving the allegations in the petition.

#### Form of consent<sup>70</sup>

A consent required by the Statute has to be given in Form C in the Schedule to these Rules, except that a consent required by the Statute from a child over the age of fourteen years has to be given in Form D in the Schedule.

All consents have to be sworn before a Commissioner for Oaths and must be submitted together with the affidavit of verification with the petition or accompanied by a separate affidavit of verification.

#### Age of child<sup>71</sup>

The age of the child has to be proved to the satisfaction of the Court which may admit documentary or other evidence to determine the age. A certified copy of an entry in a Birth's Register Book issued in Uganda by a registrar appointed under the Births and Deaths Registration Act, 1970 in respect of the child is *prima facie* evidence of the facts contained in it. The Court may itself enquire into the age of the child and may make an order for the medical examination of the child in Form E in the Schedule to these Rules, in accordance with section 108 of the Statute. A certificate signed by a medical officer as to the age of the child shall be evidence of that age.

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<sup>68</sup> Rule 6

<sup>69</sup> Rule 7

<sup>70</sup> Rule 8

<sup>71</sup> Rule 9



## Reports<sup>72</sup>

The court then requires the Probation and Social Welfare Officer to prepare a report for the court to help determine whether the adoption order will be for the welfare and best interests of the child.

Reports must be covering the period of the fostering and must include among other matters, the child's relationships with the foster parent or parents and details of any guidance or correction required; other members of the foster family; neighbors and other persons outside the child's foster family; any other person who is not a parent of the child who may have rights or obligations under any order of the Court or agreement or under customary law or otherwise, the medical record and current state of health of the child and the foster family, the educational standard of the child with details of schools attended and progress made during the fostering, the views and wishes of the child if ascertainable; the nature and type of the residential home or homes lived in during the fostering, the past, current and likely future economic status of the foster family, the character of the foster family including any criminal proceedings taken against members of that family during the fostering and the officer's opinion as to whether that should prevent the adoption, a summary of the involvement of the Probation and Social Welfare Officer during the fostering, and the assessment of the discharge of their duties by the foster parents, during the statutory period, and the verification of the statements made by the applicant in the adoption application concerning the character of the applicant and the position of his or her country of origin relating to the adoption. a summary of the involvement of the Secretary for Children's Affairs of the Local Council Committee (1) (if any). a recommendation to the Court of the course or courses of action most likely to advance the best interests and welfare of the child.

## Response to petition<sup>73</sup>

The guardian ad litem or the persons whose consent is required by the Statute may file an affidavit in response to the petition.

## Fixture of hearing<sup>74</sup>

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<sup>72</sup> Rule 10

<sup>73</sup> Rule 11

When all documents have been filed and served to the satisfaction of the Court, the Court shall fix a date for a hearing and give notice to all parties in Form F set out in the Schedule to these Rules.

#### Form of hearing<sup>75</sup>

The Judge or Chief Magistrate can sit in camera and cannot interpose any other matters during the hearing of the adoption proceedings.

#### Secrecy<sup>76</sup>

All documents filed in the Court have to be confidential, and must be kept secret by the Registrar or Chief Magistrate.

#### No copies of orders to be served on others<sup>77</sup>

No copy or duplicate of any order made by the Judge or Chief Magistrate has to be given to or served upon any person other than the petitioner, the Probation and Social Welfare Officer and the Registrar-General, unless the Judge or Chief Magistrate otherwise directs.

#### Costs<sup>78</sup>

The Judge or Chief Magistrate may make such orders as to costs as he or she thinks fit. The Judge or Chief Magistrate may direct that all the costs of a petition including any fee in connection with the reports be borne and paid by the petitioner.

#### Transfer between courts<sup>79</sup>

The Judge or Chief Magistrate may order a petition to be transferred to the appropriate court if the petition has been lodged in error, and may make such order as to costs as he or she shall think fit. Revocation<sup>80</sup>

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<sup>74</sup> Rule 12

<sup>75</sup> Rule 13

<sup>76</sup> Rule 14

<sup>77</sup> Rule 15

<sup>78</sup> Rule 16

<sup>79</sup> Rule 18

<sup>80</sup> Rule 19

### 2.1.2 Domestic Violence Act

The Local Council Court can refer the case in writing to the police or Magistrate where:

- The perpetrator has committed domestic violence before,
- Is likely to harm the victim
- They think the police should be involved

In all cases of domestic violence the LC must find out whether there are children involved<sup>81</sup>.

Where children are involved, the LC must refer the case to the PSWO for advice

### 2.1.3 The Prevention of Trafficking in Person Act

The offence of trafficking in persons<sup>82</sup>:

The offence of trafficking is committed by, any persons involved in executing a trafficking offence. This includes any person who: recruits, transports, transfers, hires, confines, keeps or receives another person for purposes of exploitation.

The offence of child trafficking<sup>83</sup>.

Child trafficking includes the recruitment, transportation, transfer, keeping or receiving a child for purposes of exploitation

Consent to trafficking

- There is no defense to the offence of trafficking.
- It is not a defense that no force, threat, coercion, fraud, abduction or deception were used.
- Consent of the child or guardians of the child or the victim to trafficking is not a defense<sup>84</sup>.

Aggravated trafficking in persons<sup>85</sup>

Aggravated trafficking occurs where:

- A child is trafficked
- Adoption or fostering orders are got for purposes of exploitation
- The offence is of a large scale

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<sup>81</sup> S 5(1) Domestic violence Act

<sup>82</sup> (s.3)

<sup>83</sup> S 3(3) Prevention of trafficking in person Act

<sup>84</sup> S 3(4) of the domestic violence Act

<sup>85</sup> (s. 4)

- The offender is an organization involved with child protection
- The offender is the ringleader in organizing trafficking
- The offender is a close relative or person having parental care, authority or control of the child
- The offender is a public officer
- Where the offender is a military personnel or law enforcement officer
- Where the offence is done for purposes of harmful rituals, human sacrifice, removal of organ or tissue
- Where the victim dies or becomes mad, is mutilated, infected with HIV/AIDs or other threatening illness;

#### Aggravated trafficking in children<sup>86</sup>

Trafficking in children involves:

- Using a child in armed conflict
- Removing an organ or part of a child for human sacrifice
- Using a child to commit an offence
- Abandoning a child outside the country
- Using a child or any body part in witchcraft

Any person who knowingly engages the labour of a victim of trafficking commits an offence that is punishable with ten years imprisonment<sup>87</sup>

#### Promoting Trafficking in Persons<sup>88</sup>

- Unlawfully recruits, transfers, keeps or receives a child without the authority of the parent or guardian
- Abandons a child in situations that may cause fear, injury, pain or harm

Punishment for the offence of trafficking

- The offence of promoting trafficking in persons is punished by a fine of five years imprisonment
- Any person who repeats the offence of promoting trafficking in persons is punished by seven years' imprisonment without the option of paying a fine

#### Offences related to trafficking in persons<sup>89</sup>

- Adopts or helps in the adoption of a person for illegal purposes

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<sup>86</sup> section 5

<sup>87</sup> section 6

<sup>88</sup> section 7

<sup>89</sup> section 8

#### **2.1.4 The Penal Code Act Cap 120**

Child abduction<sup>90</sup>:

- It is an offence to take a person under the age of 18 years, out of the custody of any of their parents or a person in charge of them.
- On conviction the offender is liable to imprisonment for seven years.

Desertion of Children<sup>91</sup>

It is unlawful for a parent or guardian or a person in charge of a child under 14 years, (who has the ability to maintain the child), to desert the child and to leave him or her without means of support.

Neglecting to provide food e.t.c for children <sup>92</sup>

It is unlawful for a parent or guardian or a person in charge of a child of tender years, (who has the ability to maintain the child), to refuse or neglect to provide sufficient food, clothes, beddings and other necessities for such child, so as thereby to injure the health of the child. Child

Child Stealing<sup>93</sup>

It is unlawful for a person with the intent of depriving a parent, guardian or anyone in lawful custody of a child of below 14 years to:

- Forcibly or fraudulently take away or detain the child.
- Receive or harbor the child knowing it to have been so taken or detained
- The offender commits a felony and is liable to 7 years in prison.

#### **2.1.5 The Local Governments Act Chapter 243**

Duty to Protect and Promote the welfare of children<sup>94</sup>

- Local governments must make efforts to re-unite children who become separated from their parents and guardians

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<sup>90</sup> Section 127

<sup>91</sup> section 156

<sup>92</sup> section 157

<sup>93</sup> section 159

<sup>94</sup> section 10

## **CHAPTER THREE**

### **TO EXAMINE NATIONAL POLICIES AND INSTITUTIONS THAT CONCERN CHILDREN IN UGANDA**

#### **3.0 Ministry of Gender Labour and Social Development**

This is the ministry that is concerned with the children affairs in Uganda. The Ministry came into being by a constitutional requirement of the 1995 Constitution. Chapters 4 and 16 which mandates government to: “empower communities to harness their potential through skills development, Labour productivity and cultural growth.” The constitution advocates for protection and promotion of fundamental rights of the poor and other vulnerable groups as well as institutions of traditional or cultural leaders. The minister has a number of responsibilities assigned to him under the children Act.

The children act<sup>95</sup> provides the minister with a task to establish a National Rehabilitation Centre for Children and such other centres as he or she may deem necessary which each have to be a place for the detention, rehabilitation and retraining of children committed there.

#### **3.1 National Council for Children.**

This is governed by the National council for children act of 1996, the Act sets the objectives of the council<sup>96</sup> which include,

To act as a body through which the needs and problems of children can be communicated to the Government and other decision-making institutions and agencies in Uganda;

To coordinate and provide direction to all persons involved in child-based activities in Uganda in order to minimise duplication of effort and wastage of resources and maximise multisectoral and integrated approaches to meeting the needs of children and solving their problems; to promote the adoption and utilization of the

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<sup>95</sup> Section 96

<sup>96</sup> Section 3

programme of action by the Government, nongovernmental organisations and external support agencies through participation in their planning detention, rehabilitation and retraining of children committed there and resource allocation exercises to support the development of district plans of action and the creation of district monitoring systems

To monitor the achievement of the goals set in the programme of action and the activities planned and undertaken by the Government, nongovernmental organisations and other agencies to achieve those goals;

To maintain a database on the situation of children and activities relating to children in Uganda;

To support the continuing analysis of the changing needs of children and promote discussion of emerging priorities.

The Act also provides for the Functions of the council<sup>97</sup>.

For the attainment of its objects under section 3, the council shall have the following functions—

to advise and promote policy and programmes regarding the survival, development and protection of children in Uganda;

To ensure proper planning and coordination of all child-based programmes within the broad guidelines of the programme of action's

To regularly review and identify obstacles to the implementation of the programme of action and To advise on feasible solutions to overcome them

To monitor and evaluate programmes and activities of the programme of action;

To mobilise and evaluate programmes and activities of the programme of action;

To advise on programmes and budgets for the implementation of the programme of action;

To act as a clearinghouse for information and data on the situation of children and activities designed to benefit children in Uganda;

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<sup>97</sup> Section 4

To disseminate research and development findings on the needs and problems of children through seminars, workshops, publications and other means of communication;

To work in close cooperation with and to coordinate the activities of all persons, institutions, sectors and organisations, involved in child-based activities;

To do all other things incidental or conducive to the efficient carrying out of the provisions of this Act as the Minister may direct and, by statutory instrument, prescribe.

### **3.1.1 The children approved homes**

This is governed by the children approved home rules of 2013.

The purpose of an approved home is to act as a substitute family care for a child until such a time as the parents of the child are able to provide adequate care to meet his or her other basic needs or until the child completes three years in the home or attains the age of eighteen years, whichever is earlier<sup>98</sup>.

The **rules**<sup>99</sup> prohibit a person from acting as a home to care for children without the approval of the minister.

The said rules<sup>100</sup> provide for the requirements that need to be met before approval to act as a home,

The applicant must be a body corporate with perpetual succession and a common seal or a nongovernmental organization.

One must produce a report of the district probation and social welfare officer satisfying that the home is in conformity with the required standards.

The admission of the children to an approved home can only be done in case there is an emergency situation from a police officer or a probational and social welfare officer for a minimum of forty eight hours before the production of the child to the court<sup>101</sup>

It is a mandatory<sup>102</sup> requirement to submit a report after every six months concerning the situation in the approved home

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<sup>98</sup> Rule 3

<sup>99</sup> Rule 4

<sup>100</sup> Rule 5

<sup>101</sup> Rule 8

<sup>102</sup> Rule 14



The homes have to be inspected by the authorities after every six month<sup>103</sup>

The rules allow contact between the child in the approved home and the parents as well as other relatives<sup>104</sup>

### **3.1.2 Uganda children centre**

To empower vulnerable children and young people with skills, knowledge and the right attitude through training, psychosocial support and advocacy on child rights for sustainable development.

The objectives of the organization are;

To facilitate the development of youth through training in relevant skills and education.

To advocate for, promote and protect the rights and welfare of orphans and other vulnerable children and adolescents through initiating projects to equip them with skills and knowledge.

To work with other partners in child welfare activities in a bid to protect child rights in Uganda.

To minimize the prevalence and incidence of STD/STI/HIV and AIDS among both the in and out of school children and adolescents.

### **3.1.3 The National Social Protection Policy**

The Constitution of the Republic of Uganda under the National Objectives and Directive Principles of State Policy<sup>105</sup> stipulates as follows“ All Ugandans shall enjoy rights and opportunities and access to education, health services, clean and safe water, work, decent shelter, adequate clothing, food security and pension and retirement benefits”.

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<sup>103</sup> Rule 15

<sup>104</sup> Rule 24

<sup>105</sup>Objective XIV (b):

Chapter four of the Constitution provides for the protection and promotion of fundamental human rights and freedoms.

In particular, the Constitution enjoins the State to take affirmative action in favour of marginalized groups, protect the rights of children, persons with disabilities, among others.

The Children Act (Cap 59) gives a legal framework for the rights and duties of parents, protection of children's rights, protection from harmful customary practices and harmful employment. It emphasizes the right of a child with a disability to have early diagnosis, treatment and rehabilitation.

The Uganda Vision 2040 recognizes the need to provide assistance to people who are vulnerable and social assistance to children.

The National Development Plan (NDP) also highlights Social protection as one of the key strategies for transforming Uganda from a peasant society to a modern and prosperous Country.

#### **3.1.4 Local authorities<sup>106</sup>.**

The Local councils have a duty to safeguard children and promote reconciliation between parents and children.

It is the general duty of every local government council from the village to the district level to safeguard and promote the welfare of children within its area: and to designate one of its members to be the person responsible for the welfare of children; and this person shall be referred to as the secretary for children's affairs.

The secretary for children's affairs shall, in the exercise of his or her functions in relation to the welfare of children, be assisted by such officers of the local government council as the local government council may determine.

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<sup>106</sup> Section 10 of the children act

In particular, every local government council has to mediate in any situation where the rights of a child are infringed and especially with regard to the protection of a child, the child's right to succeed the property of his or her parents and all the rights accorded to a child in under the children Act.

The power given to the local government council to protect the property of a child does not include any powers of distribution of the property by the local government council. A local government council has to keep a register of disabled children within its area of jurisdiction and give assistance to them whenever possible in order to enable those children to grow up with dignity among other children and develop their potential and self-reliance.

Each local government council has to provide assistance and accommodation for any child in need within its area of jurisdiction who appears to the committee to require assistance and accommodation as a result of his or her having been lost or abandoned or seeking refuge.

Each local government council has to make every effort, including publication through the mass media, to trace the parents or guardians of any lost or abandoned child or to return the child to the place where he or she ordinarily resides; and where the committee does not succeed, it shall refer the matter to a probation and social welfare officer or to the police.

Duty to report infringement of child's rights<sup>107</sup>.

Any member of the community who has evidence that a child's rights are being infringed or that a parent, a guardian or any person having custody of a child is able to but refuses or neglects to provide the child with adequate food, shelter, clothing, medical care or education shall report the matter to the local government council of the area.

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<sup>107</sup> Section 11

The secretary for children's affairs may, upon receiving the report, summon the person against whom the report was made to discuss the matter; and a decision has to be made by the secretary for children's affairs in the best interests of the child.

Where the person against whom the report was made refuses to comply with the decision made, the secretary of children's affairs can refer the matter to the village executive committee court which has to adjudicate the matter and may give any relief or order allowed by the law; and in the case of a parent, in addition to the reliefs or orders given, order the parent to execute a bond to exercise proper care and guardianship by signing an undertaking to provide the child with any or all of the requirements of the child.

#### Appeals<sup>108</sup>.

The executive committee court at village level is the court of first instance and appeals from that court goes to a parish and sub-county executive committee court, sub-county executive committee court to a family and children court; a family and children court to a chief magistrate's court a chief magistrate's court to the High Court the High Court to the Court of Appeal the Court of Appeal to the Supreme Court.

The children Act provides for the role of executive committee courts<sup>109</sup> and it's to the effect that all causes and matters of a civil nature concerning children have to be dealt with by the village executive committee court where the child resides or where the cause of action arises.

A village executive committee court is the court of first instance in respect of the criminal offences involving children.

A village executive committee court may make an order for any of the reliefs in respect of a child against whom the offence is proved reconciliation, compensation, restitution, apology, caution.

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<sup>108</sup> Section 12

<sup>109</sup> Section 93

In addition, the court may make a guidance order under which the child can be required to submit himself or herself to the guidance, supervision, advice and assistance of a person designated by the court.

A guidance order has to be for a maximum period of six months.

However, an executive committee court has no power to make an order remanding a child in custody in respect of any child appearing before the court.

### **3.1.5 Family and children court.**

The Family and children court is established by the children Act<sup>110</sup> which is to the effect that there shall be a court to be known as the family and children court in every district, and any other lower government unit designated by the Chief Justice by notice in the Gazette.

A magistrate not below the grade of magistrate grade II shall be assigned to preside over the family and children court.

The jurisdiction of the court<sup>111</sup> is also provided to include power to hear and determine criminal charges against a child.

Criminal jurisdiction of family and children court<sup>112</sup>.

A family and children court has jurisdiction to hear and determine all criminal charges against a child except any offence punishable by death; any offence for which a child is jointly charged with a person over eighteen years of age.

Orders of family and children court<sup>113</sup>.

A family and children court has the power to make any orders where the charges have been admitted or proved against a child which include absolute discharge, caution, conditional discharge for not more than twelve months, binding the child over to be of good behavior for a maximum of twelve months, compensation, restitution or fine, taking into consideration the means of the child so far as they are known to the court; but an order of detention cannot be made in default of payment of a fine a probation order in accordance with the Probation Act for not more than twelve months, with such conditions as may be included as recommended by the

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<sup>110</sup> Section 13

<sup>111</sup> Section 14

<sup>112</sup> Section 93

<sup>113</sup> Section 94

probation and social welfare officer; but a probation order cannot require a child to reside in a remand home, detention for a maximum of three months for a child under sixteen years of age and a maximum of twelve months for a child above sixteen years of age and in the case of an offence punishable by death, three years in respect of any child

The court can also exercise any other jurisdiction conferred on it by any other written law.

Venue of the family and children court<sup>114</sup>.

A family and children court has, whenever possible, to sit in a different building from the one normally used by other courts.

Procedure in family and children court<sup>115</sup>.

The procedure of the family and children court in all matters is in accordance with rules of court made by the Rules Committee for the purpose and subject to, the court sitting as often as necessary, proceedings being held in camera, proceedings have to be as informal as possible and by inquiry rather than by exposing the child to adversarial procedures, parents or guardians of the child have to be present whenever possible, the child has a right to legal representation, the right to appeal have to be explained to the child.

Apart from members and officers of the court, only the parties to the case before the court, their advocates, witnesses and other persons directly concerned in the case, parents or guardians of the child before the court, a probation and social welfare officer and any other person whom the court authorises to be present.

### **3.1.6 Probation and social welfare officer**

The children Act<sup>116</sup> gives the probation and social welfare officer authority to make an application to the family and children court for a supervision or interim supervision order placing a child under the supervision of a probation and social welfare officer while leaving the child in the custody of his or her parents or

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<sup>114</sup> Section 15

<sup>115</sup> Section 16

<sup>116</sup> Section 19

relatives or a care order or interim care order, placing a child in the care of the warden of an approved home or with an approved foster parent.

It is the duty of the probation and social welfare officer to prepare a welfare report, and also to comply with the request of a family and children court whenever required to produce a welfare report<sup>117</sup>

The probation and social welfare officer have to make a home visit and interview the parents of the child concerned before making a welfare report.

In case the local government councils from village to sub-county level where the child resides have dealt with the matter of supervision without success and it is shown that there is need for continuous supervision enforced by a court order, the probation and social welfare officer has a duty to apply to court for such order<sup>118</sup>

The Probation and social welfare officer has the duty and mandate to enforce orders concerning supervision of the children<sup>119</sup>

The probation and social welfare officer has a duty to review the care order at least once in each year who may make recommendations as to steps to be taken<sup>120</sup>

The children Act<sup>121</sup> provides the probation and social welfare officer with the duty to enforce the care order who applies or having regard to the outcome of the review.

The Act<sup>122</sup> gives the probation and social welfare officer with special duties in relation to care order and these are;

Before and after the termination of the care order, work with the parents, guardians or relatives, to whom the child is expected to return after the termination of the care order.

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<sup>117</sup>section 20(2)

<sup>118</sup> Section 22

<sup>119</sup> Section 25

<sup>120</sup> Section 29(2)

<sup>121</sup> Section 30

<sup>122</sup> Section 32

Do child and family counseling, before, during and after the child's return and gaining the assistance of those in the community who can help in the process of resolving the problems which caused the care order to be made.

When a child is placed with a foster family, it is the responsibility of the probation and social welfare officer to communicate with the guardians or parents of the child, to inform them of the progress of the child and to arrange a trial period for the child to be at home as soon as it is appropriate.

The probation and social welfare officer has to visit the child during the trial period at home and make plans for the future of the child in consultation with the foster parents.

Before a family and children court makes an interim supervision order or an interim care order in respect of the child, it must first hear information on oath by a probation and social welfare officer that a child is suffering or is likely to suffer significant harm.

The children Act gives the probation and welfare officer the mandate to proceed on behalf of the State against any offender who breaches an exclusion order<sup>123</sup>

It is the probation and social welfare officer that carries out search by entering any premises specified in the court order to search for and remove any child whom the probation and social welfare officer believes or suspects is suffering or is likely to suffer significant harm<sup>124</sup>.

A probation and social welfare officer who has reasonable grounds for believing that a child in his or her area is suffering or is likely to suffer significant harm, after notifying the secretary for children's affairs of the local government council in writing, may take the child and place him or her under emergency protection in a place of safety for a maximum period of forty-eight hours.

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<sup>123</sup> Section 35

<sup>124</sup> Section 36



Where a probation and social welfare officer is informed or has reasonable cause to believe that a child who lives or is found in his or her district is suffering or is likely to suffer significant harm, he or she has to make inquiries to decide whether to act to safeguard or promote the child's welfare<sup>125</sup>

Where a child has been committed to an approved home under a care order, the district probation and social welfare officer, in conjunction with the warden of the approved home have to place the child with a person who is willing to undertake the care and maintenance of the child.

Equally, an application to foster a child is made to the district probation and social welfare officer, except that a relative of a child without a parent or guardian may foster the child without first applying to the district probation and social welfare officer.

The probation and social welfare officer has a task to submit a report to assist the court in considering the application for adoption and the court may, in addition, require some other person or the local authority to make a report in respect of the adoption application<sup>126</sup>

For the purposes of inter-country adoption, the probation and social welfare officer has to submit a report to assist the court in considering the application; and the court may, in addition, require some other person or authority to make a report in respect of the application<sup>127</sup>.

The court may also request a probation and social welfare officer has to prepare a report to assist the court in determination of whether any person who is not a parent of the child has any rights or obligations in respect of the child and whether that person's consent ought to be obtained before the making of the adoption order<sup>128</sup>.

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<sup>125</sup> Section 40

<sup>126</sup> Section 45(5)

<sup>127</sup> Section 46

<sup>128</sup> Section 47(8)

An approved home has only to receive children either in an emergency situation from a police officer, a probation and social welfare officer or any other person for a maximum period of forty-eight hours pending production of the child in court<sup>129</sup>;

It is the responsibility of the staff of the approved home, the probation and social welfare officer to assist the child to become reunited with his or her parents or guardians.

After a child has been returned home from an approved home, the probation and social welfare officer has to keep in regular contact with the child and his or her family until the completion of the order or its discharge.

Where a child is unable to return to his or her parents or to go to foster parents or has no parent, nor a foster parent, he or she has to be encouraged and assisted by the approved home and the probation and social welfare officer to become independent and self-reliant<sup>130</sup>

The children Act<sup>131</sup> provides the probation and social welfare officer with the duty to maintain contact with the parents or relatives of a child in the home as well as maintain contact between the child and the parents or relatives of the child.

Where the child escapes from the approved home or foster parent, the child must be interviewed by the probation and social welfare officer or an authorized person who also interviews the warden of the home or the person in whose care the child had been placed.

The child may then be returned to where he or she had been placed or, if that is not in the child's best interests, he or she may be moved by the probation and social welfare officer under a care order or otherwise returned to court for variation or discharge of the order<sup>132</sup>

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<sup>129</sup> Section 57

<sup>130</sup> Section 58

<sup>131</sup> Section 60

<sup>132</sup> Section 64

The appointment of a custodian may be made on the application of a probation and social welfare officer or of the person having custody of the child or of the person against whom the maintenance order is made<sup>133</sup>.

The children Act<sup>134</sup> provides the probation and socials welfare officer with a task to not if the Family and children Court with information that the parent who has custody of the child is willfully neglecting or mistreating the child, so that custody can be granted to the other parent.

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<sup>133</sup> Section 80

<sup>134</sup> Section 85

## CHAPTER FOUR

### THE INTERNATIONAL LAWS GOVERNING ADOPTION

#### 4.0 Introduction

International adoption involves the transfer of children for parenting purposes from one nation to another. It presents an extreme form of what is often known as “stranger” adoption, by contrast to relative adoption. Relative adoption refers to situations in which a stepparent adopts the child of his or her spouse, or a member of a child’s extended biological family adopts the child whose parents have died or become unable or unwilling to parent. Such adoptions are largely uncontroversial. Children stay within the traditional biological family network, and the adoptive parents are generally thought of as acting in a generous, caring manner by taking on the responsibility for these children.

By contrast, in international adoption adoptive parents and children meet across lines of difference involving not just biology, but also socio-economic class, race, ethnic and cultural heritage, and nationality. Typically, the adoptive parents are relatively privileged white people from one of the richer countries of the world, and typically they will be adopting a child born to a desperately poor birth mother belonging to one of the less privileged racial and ethnic groups in one of the poorer countries of the world. International adoption is characterized by controversy.

International adoption has grown significantly over the last few decades, with many thousands of children now crossing national borders for adoption each year. International law as well as domestic laws within the United States have become generally more sympathetic to international adoption than they have been in the past. But the controversy surrounding such adoption continues, and makes its future uncertain.

In this regard, different laws have come up to govern international adoption as clearly analyzed below;

#### 4.1 Convention on the Rights of the Child (CRC)

The convention entered into force in September 1990 and as of January 2007, 193 countries were parties to the convention. However, some of the ratifying states have entered reservations to the articles regarding adoption for example Egypt, Jordan, Kuwait, the Syrian Arab republic and the United Arab Emirates because they do not include adoption among the ways and means of protecting and caring for children. A child is defined as a person below the age of 18<sup>135</sup>. The law also allows the country to define a child according to their specific laws.

The Best interest of the child is the key consideration in issues affecting children<sup>136</sup>. Right to preserve an identity, nationality, name and family relations without unlawful interference<sup>137</sup>. A child shall not be separated from his or her parents against their will except by court order where the parents abuse or neglect a child or where the parents are separated that there is need to decide where the child stays<sup>138</sup>. In determining the separation of a child from his or her parents the following applies:

All parties have to participate in the decision, a child who is separated from one or both parents shall maintain personal relations and direct contact with that parent, except if it violates the child's best interest, where such separation results from detention, imprisonment, exile, deportation or death the child has the right to information concerning the absent member(s) of the family.

A child whose parents reside in different States shall have the right to maintain on a regular basis personal relations and direct contacts with both parents<sup>139</sup>.

Government has a duty to combat the illegal transfer and non-return of children abroad<sup>140</sup>.

A child capable of forming his or her own views has a right to express those views and to be heard in any matter that affects their lives<sup>141</sup>.

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<sup>135</sup>(Art 1)

<sup>136</sup> (Art 3)

<sup>137</sup> (Art 8)

<sup>138</sup> (Art 9)

<sup>139</sup>(Art 10).

<sup>140</sup> (Art 11).

<sup>141</sup> (Art 12);

Both parents have common responsibilities for the upbringing and development of the child <sup>142</sup>

Government must offer appropriate assistance to parents and legal guardians to perform their duties;

Right to freedom of expression and to seek, receive and impart information of the child's choice <sup>143</sup>

A child removed from the family environment is entitled to alternative care, such as foster placement, Kafalah of Islamic law, adoption or suitable institutions <sup>144</sup>

In the adoption of children by competent authorities the child's best interest shall be paramount <sup>145</sup>

#### **4.2 Additional Protocol to the Convention on the Rights of the Children**

The optional protocols to the convention on the rights of the child was adopted at the fifty fourth session of the General Assembly of the United Nations. The optional protocols entered into force in January 2002 and by January 2007, it had been ratified by 117 states.

The protocol prohibits Sale of children and therefore where any person transfers a child to another person or group in exchange for money or other consideration. Child prostitution, using a child in paid sexual activities whether payment is in the form of money or other forms, Child pornography, any representation which shows or depicts a child as being engaged in any sexual activity, whether such representation is real or simulated and any representation or depiction of a child's sexual parts for sexual purposes. <sup>146</sup>

The protocol imposes a duty on the state parties to ensure that children adopted through inter-country procedures enjoy the same safeguard and standards as children adopted domestically <sup>147</sup>.

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<sup>142</sup>(Art 18).

<sup>143</sup> (Art 13).

<sup>144</sup>(Art 20);

<sup>145</sup> (Art 21).

<sup>146</sup>(Art 2)

<sup>147</sup> Article 21(1)

The convention also recognizes the principle of subsidiary<sup>148</sup> and indicates that state parties should take all appropriate measures to ensure that, in the case of inter-country adoptions, placements does not result in improper financial gains for those involved<sup>149</sup>.The convention, similarly to the UN declaration on social and legal principles relating to the protection and welfare of children, with special reference to foster placements and adoption nationally and internationally recognizes that the best interests of a child should be the paramount consideration.

Member states are called upon to ensure that coercive adoption is fully covered under their penal or criminal laws, regardless of whether such an offence is committed on an individual or organized basis<sup>150</sup>.

Specifically, the Article criminalizes the act of improperly inducing consent, as an intermediary, for adoption of a child <sup>151</sup>, furthermore state parties have to take all appropriate legal and administrative measures to ensure that all persons involved in the adoption act do so in conformity with the applicable international legal instruments.

Some countries have advanced reservations to some of the paragraphs of the provisions relevant to adoption, Argentina for instance, stated that it “has not signed international instruments on international adoption of minors.....because it does not permit international adoption of children domiciled in their jurisdiction”, “The government of the republic of Korea specified that it understands the convention<sup>152</sup> to be applicable only to states that are parties to the convention on protection of children and cooperation in respect to inter country adoption.

#### **4.2.1 Hague Convention on Adoption OF 1993**

The Hague Adoption Convention was adopted by The Hague Conference on Private International Law in 1993. It entered into force on 1 May 1995, having been ratified by three states and signed by 14 states. It has so far been ratified by about 75 states.

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<sup>148</sup> (art 21(b)

<sup>149</sup> (art 21(d))

<sup>150</sup> Article 3)(2r) 1(a)

<sup>151</sup>(art 3(2r) (1)(1)

<sup>152</sup> article 3

The convention is designed in such a way that it puts into action the principals laid out in the Convention on the rights of a child it aims at establishing safeguards to ensure that inter-country adoptions take place in the best interest of the child and with respect for his or her fundamental rights as recognized in international law<sup>153</sup>, establishing a system of cooperation among contracting states to ensure that those safeguards are respected and thereby prevent abduction, the sale of, or trafficking in children<sup>154</sup> and, ensuring the recognition in contracting states of adoptions made in accordance with the convention<sup>155</sup>

The preamble of the convention is to the effect that for a child to attain full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding.

Just like the children Act of Uganda, the Hague convention also emphasizes the best interest of the child as a paramount consideration and that the views of the child must also be considered according to their age and maturity<sup>156</sup>.

The Hague Adoption Convention addresses important aspects relating to children, such as exposing and eliminating abuses in inter-country adoptions by establishing certain minimum safeguards and promoting cooperation and communication between states. This regulates inter-country adoptions by deterring abductions and sale or trafficking<sup>157</sup>

The Hague Adoption Convention sets up a mechanism for international cooperation to give practical effect to the provisions of the CRC relating to inter-country adoptions<sup>158</sup>, provides for responsibilities to be shared between the states of origin and the receiving states while respecting organizational diversities and national legislation<sup>159</sup>

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<sup>153</sup> Art 1 para (a)

<sup>154</sup> Art 1 para (b)

<sup>155</sup> Art 1 para (c)

<sup>156</sup> Hague Adoption Convention, preambular para. 4.

<sup>157</sup> Silberman, N46

<sup>158</sup> Article I (b).

<sup>159</sup> Articles 4 and 5.



It sees adoption as a social and legal measure for the protection of the child rather than an individual affair to be left exclusively to child's birth parents and prospective adopters. Consequently procedures for inter-country adoption should ultimately be the responsibility of the states involved, which must guarantee that adoption corresponds to the best interests of the child and respects his or her fundamental rights<sup>160</sup>

The Hague Adoption Convention expressly requires the applications for inter-country adoption to be made through Central Authorities established by Contracting States<sup>161</sup> This controls and minimizes the risks encountered with private inter-country adoptions.

By allocating responsibilities between sending state<sup>162</sup> and the receiving states<sup>163</sup> and instituting formal mechanism for cooperation<sup>164</sup> the Hague Adoption Convention seeks to avoid duplication of processes and conflicts, and also to protect both the adopted child and the adoptive parents from being subjects of illegal adoptions in their different countries. Consent to adoption is an important factor

Consent to adoption has to be obtained after due counseling and information as to the nature and effect of such consent and concerning the termination of the legal relationship between the child and the family of origin, and particularly that the child is leaving the country to settle with a new family in another country<sup>165</sup>

The convention further makes provision for the recognition of foreign adoption orders by operation of law<sup>166</sup> This basically entails the recognition of the legal parent-child relationship created by adoption between the child and his or her adoptive parents, parental responsibility of the adoptive parent for the child, the termination of preexisting legal relationship between the child and the natural parents, depending on whether the adoption has such effect in the contracting state

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<sup>160</sup> UNICEF Innocent Digest, N227.

<sup>161</sup> Article 6

<sup>162</sup> Hague Adoption Convention, Article 4.

<sup>163</sup> Article 5.

<sup>164</sup> Article 7.

<sup>165</sup> Article 4

<sup>166</sup> Article 23

where it was made, and gives the child the right to enjoy all rights and benefits arising from the adoption<sup>167</sup>

#### **4.2.2 United Nations Universal Declaration of Human Rights Charter**

The convention provides that Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, have to enjoy the same social protection<sup>168</sup>.

Parents have a prior right to choose the kind of education that shall be given to their children.

#### **4.2.3 The African Charter on the Rights and Welfare of a Child.**

Children should, whenever possible, have the right to live with their parents. No child should be separated from his or her parents against his or her will, except when authorities believe it would be in the child's best interest<sup>169</sup>.

Parents or other persons responsible for the child should always act in the best interest of the child.

Children who are separated from their parents should get special protection and should be provided with alternative family care. States should also take all possible steps to trace and re-unite children with parents.

If children can voice their opinions, then those opinions should be heard and taken into consideration during legal and administrative proceedings.

#### **4.2.4 European Convention on the Adoption of Children**

The convention was developed with the purpose of harmonizing adoption laws among member states of the council of Europe. The convention calls for common principles and aims to harmonize some of the principles governing adoption, the procedures affecting it and its legal consequences. The convention only applies to legally adopted children and unmarried minors<sup>170</sup>.

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<sup>167</sup> Article 26

<sup>168</sup> Article 25(2)

<sup>169</sup> Article 19:

<sup>170</sup> Art 3

The convention entered into force in April 1968 and as of January 2002, had been ratified by 18 of the 46 member states of the council of Europe, while three member states were signatories but had not yet ratified it.

Some of the countries that ratified the convention made reservations to specific articles or paragraphs. Countries such as Roman Republic of Macedonia for instance declared that instead of the age requirement set out by the convention<sup>171</sup> paragraph 1 of the convention, they would apply the age established in their own legislation.

The convention contains a core of essential provisions which each state party undertakes to incorporate into its legislation as well as a list of supplementary provisions which state parties are free to adopt or not. Among its essential provisions, adoption must be granted by a competent judicial or administrative authority<sup>172</sup>. The birth parents must freely consent to the adoption<sup>173</sup> and the adoption must be in the best interest of the child<sup>174</sup>

The convention requires state parties to make provisions to prohibit any improper financial advantage arising from any the adoption of a child<sup>175</sup>

The convention requires prospective adoptive parents to be between 21 and 35 years of age and limits joint adoption to married couples<sup>176</sup> some procedural rules are also outlined among the essential provisions of the convention. One of such requirement is that competent authorities conduct a series of enquiries to ensure the suitability of the prospective adoptive parents<sup>177</sup>. The convention also addresses a procedure for revoking or annulling an adoption and for sharing the information collected through the enquiries<sup>178</sup>

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<sup>171</sup> Article 7,

<sup>172</sup> (Art 4),

<sup>173</sup> (Art5)

<sup>174</sup> (Art 8)

<sup>175</sup> Article 15

<sup>176</sup> (Art6),

<sup>177</sup> (Art 8 and 9)

<sup>178</sup> (Art 14)

With respect to the legal ramifications of adoption, the convention<sup>179</sup> recognizes that adoption terminates all rights and obligations between the adopted person and his or her birth parents and that the adopted persons have the same rights to inheritance. With regard to the acquisition of the adoptive parent's name, the convention stipulates that as general rule, the adopted child should acquire the surname of the adoptive parents either in substitution or in addition to his or her own name. It equally recognizes that<sup>180</sup>, where a person does not have the same nationality as the adoptive parents, the acquisition of nationality of the adoptive parents, should be facilitated and only eventual loss of nationality resulting from an adoption should be conditional upon the possession or acquisition of another nationality.

Among the supplementary provisions, the convention calls on member states to ensure that adoption is completed without disclosing the identity of the adoptive parents to the child's birth family and to enable adoption proceedings to take place *in camera*<sup>181</sup>

#### **4.2.5 Hague Convention on the Protection of a Child, 1996**

By way of exception to the general rules of jurisdiction, The convention<sup>182</sup> provide mechanisms by which jurisdiction to take measures directed to the protection of the person and property of the child can be transferred from authorities of Contracting States which have general jurisdiction under the Convention, to authorities of Contracting States which do not. Jurisdiction will only be transferred where certain conditions are satisfied and only to authorities in another Contracting State with which the child has a particular connection<sup>183</sup>.

It should be noted that under the Convention jurisdiction can only be transferred between authorities of Contracting States and cannot be transferred to the authorities of non-Contracting States.

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<sup>179</sup> article 10

<sup>180</sup> Article 11

<sup>181</sup> (Art 20).

<sup>182</sup> Articles 8 and 9

<sup>183</sup> Art. 8(2).

A request to transfer jurisdiction can arise in two ways:

- an authority having general jurisdiction under the Convention, if it considers that another authority without jurisdiction would be better placed in the particular case to assess the best interests of the child, can request to transfer jurisdiction to that authority<sup>184</sup>
- an authority which does not have jurisdiction but believes that it is better placed in the particular case to assess the child's best interests can request that it be allowed to exercise jurisdiction<sup>185</sup>

These articles permit a transfer of jurisdiction when the authority that has jurisdiction is not the best placed to assess the best interests of the child. The best interests of the child should be assessed “in the particular case”, i.e., “at the moment when [the] need for protection is being felt, and for the purpose of responding to [that] need”<sup>186</sup>.

The transfer of jurisdiction can be for an entire case or for a specific part of a case. However, the Convention does not expressly state that jurisdiction for a specific part of a case can be transferred.

Once the transfer has been agreed to by both authorities, the authorities from which jurisdiction was transferred cannot exercise jurisdiction in the particular matter which was the subject of the transfer. They must wait until the decision by the other authorities becomes final and enforceable<sup>187</sup>.

The transfer does not, however, institute a permanent transfer of jurisdiction as nothing in the convention allows it to be decided in advance that under future circumstances the authority which has jurisdiction might not be better placed to decide in the best interests of the child.”<sup>188</sup>

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<sup>184</sup> Article 8

<sup>185</sup> Article 9

<sup>186</sup> Explanatory Report, para. 56

<sup>187</sup> practical handbook on the operation of the 1996 Hague child protection convention

<sup>188</sup> Explanatory Report, para. 56.

Once it has been decided that a request can and should be made, there are two options provided for in the Convention for the making of the request:

- the first one is that the request is made by the authorities themselves to the competent authorities of the other Contracting State (this can be done directly or with the assistance of the Central Authorities);<sup>189</sup> or
- the parties to the proceedings can be invited to make the request before the competent authorities of the other Contracting State<sup>190</sup>.

These two possibilities are placed on an equal footing and the choice between them is left to the authority making the request in the individual case.

The issue would be how an authority wishing to use the transfer provisions find out to which competent authority in the other Contracting State it should address its request, to this effect there are two routes through which the authorities may be able to obtain assistance. The first is the Central Authority of the other Contracting State, which the authorities can contact directly or through their own Central Authority. The second is the International Hague Network of Judges, if members have been appointed from both States. Members of this Network are contact points within their jurisdiction and can provide information on various aspects of the law and procedure in their jurisdiction, including assisting with locating the competent authority<sup>191</sup>.

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<sup>189</sup> Art. 8(1), first indent, and Art. 9(1), first indent

<sup>190</sup> Art. 8(1), second indent, and Art. 9(1), second indent

<sup>191</sup> practical handbook on the operation of the 1996 Hague child protection convention

## CHAPTER FIVE

### CONCLUSION AND RECOMMENDATIONS

#### 5.1 Conclusions

Adoption presupposes a complete and total separation of a child from his or her natural family to that of the adopter through the effect of the law. Adoption did not exist in the traditional African society because children who were subject to adoption that is most especially the orphaned were easily absorbed in the society because caring for children during that time was a collective responsibility of society. In addition to that such instances like abandoning children were very rare and illegitimate children were something unheard of in many if not all African traditional societies

However, a different course was taken from the second half of the nineteenth century. This was the period when Africa was interfered with by outsiders through colonialism. During colonialism various changes took place in African traditional societies, among these was the direct importation of foreign law and for Uganda's case, British law since Britain was Uganda's colonial master.

Other changes resulting from colonialism were the introduction of a market economy and urbanization. Monetized economy was introduced and urbanization, these all led to individualism of the society. Every family now minded its own business as there was total disintegration of society. So this meant that any child who could not be looked after by his or her immediate family could not be easily absorbed and taken most especially by the relatives. Worst of all aspects which did not exist in the traditional Africa was illegitimacy which was introduced by the law whose roots are in foreign law. In addition to these, given Uganda's past history it was not an accident that the state came up with a number of adoption laws like the adoption act of 1943. Since then the number of children who needed substitute childcare greatly increased as many children became orphans and others were abandoned especially due to a number of wars that Uganda was experiencing.

Thus to solve the problem of deprived children the legislature came up with the adoption law as provided for in the children statute 1996.

It should be noted that if the above problems of the deprived children were to be solved, the law relating to adoption ought to be coherent, consistent and should have conformed to the social economic situation of Uganda today. However, from the analysis of the law relating to adoption in Uganda, what is noted is that the law tries to ensure that the adopted child is protected and catered for. The law as it stands leaves much to be desired as various aspects which are very important at the same time were not put into consideration. Various provisions were omitted and even those which were included are not perfect in nature. Thus the law has to a large extent failed to conform to the social economic needs of Uganda. It is highly doubted whether the law relating to adoption will live up to expectation of the parliament. If no immediate changes are made and effected, Uganda is most likely to have an escalated increase in the number of children in home care units, babies' homes and worst of all many ending on streets. So if the law is to solve the problems of Uganda's deprived children the above measures, amendments and provisions as discussed should be apprehended.

## **5.2 Recommendations**

The law relating of adoption should not be general when it comes to treating different categories of deprived children. Children who are completely abandoned and orphaned should be treated differently from those who are illegitimate and those who still have their natural parents but cannot adequately cater for them. The difference in treatment should be in respect to the provisions relating to the effects of adoption, devolution of property and matters relating to this. It is really unfair for example to deny an adopted child inheriting property from his or her deceased parent who did not make a will.

Adoption laws should also expressly provide for the measures that have to be taken when in the due course of adoption, the adopter fails to adequately cater for the adopted child. It should provide for the child to be either taken back to a home care unit or to be given to another intending adopter.

Adoption laws should also have a special provision specifically catering for the doubly unfortunate children. By doubly unfortunate children I mean children handicapped and at the same time lack the necessary and adequate family care and



protection. It should be noted that among the handicapped children we have both the physically handicapped and the mentally handicapped. These require special care and attention.

This will go a long way in helping such children to the extent that parents who may not have had interest in adopting such children since they are burdensome as they require special care now be collective responsibility that is of the adopter and the state to look after such children.

Further still the law should provide for a mechanism of monitoring and ensuring that adopted children are safe, in good condition and care adequately catered for. This is basically for protecting children from ill-intentioned adopters who may after getting the child turn him or her into say a houseboy or house girl or even into any other bad hidden motive, the law should not only protect the child up to the time of granting of an adoption order but also during the period after an adoption order is made.

The law further looks as if it provides only for adoption of children who have been placed in home care units. What about children who are on the streets. Street children are a serious problem in Uganda today. Thus the law should provide for an easy way of adopting these children and absorbing them into society. If these children and absorbing them into society, they are most likely to become a liability to society if they are not yet one.

Further still where the law provides that a child not be adopted by two people at the same time save for spouses, this provision should not be so absolute like this. It should put circumstances of the case into consideration. If such adoption means collective responsibility and given the circumstances it is in the interest of the child and his or her welfare is not jeopardized, then such adoption order should be granted.

In as far as a procedure followed when selecting a prospective adoptive parent is concerned, it should also be flexible in order not to discourage adoption. If deemed

necessary and considered to be in the best interest of the child and that the welfare of the child will not be jeopardized such factors like religion, tribe may be ignored.

There is also a need to introduce courts which specifically deal with adoption in the Uganda judiciary system. The division in the high court which deals with family matters is burdened with not only adoption but other family matters as well for example family violence, conflicts of maintenance of the children, guardianship among others. Children who are always in desperate need to be adopted and be saved from the bad experiences that they are always going through are therefore not given enough attention and they continue to suffer for some time. In the same place, because of handling several matters by the same division, there is at times backlog of cases which all acts in the negative interests of the child who needs adoption.

The adoptee has a personal need to know where they came from, to understand the circumstances of the adoption, or often times the child will grow up feeling abandoned and will always feel inadequate. It is a true psychological problem for adoptees not to know the background information of their adoption, therefore, giving reason to why the child deserves the option to see their adoption record and also to seek out their birth parent to ask questions. There are many things the birth parents know that the papers will never tell, leaving the child feeling empty without having a chance to contact their birth parents.

When a birth parent is young, important medical history such as alcoholism and cancer may not be known. With a predisposition to either of those, an adopted child may choose to change their lifestyle accordingly. However, for adoptees with no medical history, they do not have the knowledge and therefore do not have a chance to change their lifestyle. Also, some biological diseases only appear every few generations and the adoptee may be a carrier. The adoptee needs their family medical history in order to better assess whether or not they are a carrier of a disease or are predisposed to certain diseases, both of which affect them as well as their future children and families. It is hardly reasonable to think that a birth mother's right to privacy is more important than the health of the adoptee or their future children. Therefore, the requirement that the adopted child be informed of the

information concerning his or her adoption should be mandatory even before he or she makes eighteen years because it is of advantage to such a person.

The law should provide the maximum age beyond which one should not adopt a child, a good example can be one where a person of ninety years intends to adopt a child. The maximum age of parents for adoption should be at most not be above 45 years. The reason being that the adopting parent should not only be a live but also should have vigor and power to ensure the efficient development of the child both physically and psychologically as the child is growing.

Lastly, though not directly connected to adoption, the ignorance of the law has greatly contributed to the unpopularity of adoption in Uganda. There is general lack of legal awareness of majority Ugandans and this also partly explains why adoption is not so popular in Uganda. Some legal awareness policies especially relating to the matter at hand that is adoption should be undertaken. These may include such measures like seminars, public lectures, press release and any other system that can effectively lead to legal awareness among the majority Ugandan. However, these measures should not be in form of advertising children for adoption.

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