RETHINKING THE GENERAL LAW OF GUARDIANSHIP AND ADOPTION IN LINE WITH THE SOCIO-ECONOMIC REALITIES OF DOUBLE ORPHANS IN ZIMBABWE

BY

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Abstract

This dissertation investigates what political, legal, cultural and economic factors have caused the growing number of double orphans in Zimbabwe (the most vulnerable victims of the HIV/AIDS pandemic) to remain outside the protection of the general law of adoption and guardianship. Before Zimbabwe's Independence from Britain in 1980, Rhodesian colonial legislation generally provided that the rights and affairs of Africans (and their children) fell under the jurisdiction of African customary law as opposed to general law which was generally reserved for application between Europeans. This research shows that the promise of equality for all races (which might have been anticipated by the repealing of such discriminatory legislation and making general law apply to all Zimbabwe's citizens) has not, in fact, materialised in this particular area of the law. This is because the general law does not recognise any of the beneficial and flexible customary law arrangements which have legitimately evolved out of the changing realities of care givers and their larger communities who (1) honestly but mistakenly believe that such arrangements are legally recognised (i.e., under the general law); (2) do not know the requirements for applying for adoption and guardianship which is required under the general law in order for them to be legally recognised; (3) do not have the legal ability or economic resources to make such formal applications or come under social or cultural pressures not do so; and (4) are required to make such applications within the context of an overstretched and under-resourced legal system (a product of the general law) which is serviced by poorly informed but costly lawyers and an inflexible Registrar General's Office. Disagreement between all the so-called legal experts within the system (including members of the Judiciary) over the interpretation and application of the unclear laws has, over time, given rise to practices which are inexplicable, contradictory and even illegal and contemptuous of court. The study is written by a lawyer who works for an NGO, Justice for Children, which offers vital free legal advice to prospective guardians and adoptive parents of orphans. She used several methodologies (especially the Human Rights Approach) to conduct her research, during which she scientifically collected and analysed material and relevant data starting with information from client files and interviews. Other data included relevant law and literature, information from court officials, civil servants, lawyers and members of other NGOs involved in children's rights. Having discovered the urgent need for reform, the writer finally suggests several short and long term interventions that the Zimbabwe government should make in compliance with its own laws and Constitution but, more importantly, with its commitment to binding/persuasive regional and international Human Rights Instruments concerning the rights of the child. The most important of these interventions is a complete overhaul of the law on adoption and guardianship which must be motivated by the best interests of children, including double orphans, and which can only be achieved by linking them directly to the entire lived social, cultural and economic realities of their care givers as well as the children themselves. This will necessarily include reforming the general law to begin recognising and legitimising certain successful customary law practices.

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Dedication

This work is dedicated to my two boys Kundi and Kim. It is my prayer day and night that God will take care of me and your dad so that we see you moving from childhood to adulthood. To all the boys and girls who have lost both parents our God of Justice will not fail you even though the courts of law are failing you today.

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List of Human Rights Instruments cited

United Nations Convention on the Rights of the Child (CRC)
African Charter on the Rights and Welfare of the Child (ACRWC)

List of National Legislation and Policies cited

The Constitution of Zimbabwe
The Children's Act, Chapter 5.06
The Guardianship of Minors Act, Chapter 5:08
The Child Protection and Adoption Act of 1929
African Tribunal Courts Act, Chapter 237
National Orphan Care Policy
National Aids Policy
National Action Plan for Orphans and Vulnerable Children

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CHAPTER 1

1.0 INTRODUCTION

1.0 Background

The inspiration to research this topic was derived from the cases that my organisation receives on a daily basis on the question of the guardianship or adoption of double orphans. I work for Justice for Children Trust (JCT), an organisation which provides free legal services to children in difficult circumstances in Zimbabwe. JCT also educates communities, child rights' organisations on the laws of child protection, and it participates in advocacy for the reform of laws which seek to protect children. It has increasingly found itself approached by families for support in their legally confusing and intimidating journey through the corridors of law and power which starts when they apply for the adoption or guardianship of double orphans. Having seen the positive effects of litigating families sharing their common experiences (especially encouraging each other not to give up their struggle for justice), JCT has begun to consider establishing support groups to facilitate this process. Because of my experiences, my colleagues and I are considering having support groups for families that litigate on behalf of double orphans. The story of Sophia Zhou[1] below epitomizes the stories of different people coming from different parts of the country dealing with the issue of guardianship or adoption. As a lawyer who handles these issues I ask myself whether I am making any difference.

1.1 The Story of Sophia Zhou

When I think of guardianship of double orphans, the story that comes to mind is the story of Sophia Zhou. Sophia is the paternal grandmother of Kudakwashe Murambiwa who was born on the 13th March 2003. When Sophia sought to apply for guardianship, Kudakwashe was eight years old and in Grade Three at Mavanga Primary School in Gokwe. Kudakwashe's mother died in 2003, just three months after his birth, and his father died in 2007, four years later. The child's

[1] JCG14/2011.

parents were police officers. When his mother died, her sisters took her death certificate. These sisters have since died and no one knows the whereabouts of the death certificate.

Kudakwashe's maternal relatives (who are still alive) were young when their sister died and they do not know the whereabouts of the death certificate or the exact day on which she died. Sophia Zhou, Kudakwashe's paternal grandmother, was referred to JCT by the Pensions Office who said that she must obtain guardianship of her grandchild in order for them, the Pension's Office, to process her daughter's-in-law pension. She has been facing difficulties finding her grandchild's maternal relatives. She has been the child's custodian since her daughter-in-law's death and she became his guardian upon his father's death. The JCT lawyer advised her of the requirements laid down by the Children's Court that have to be met for her application of guardianship to succeed and these are:

- Supply the death certificates of the child's late parents;
- Obtain four affidavits from the child's relatives (two from the maternal and two from the paternal side) supporting the guardianship application;
- Secure the attendance at court of the child's four relatives who must travel from Gokwe and Masvingo;
- Place advertisements in two newspapers, the Government Gazette and any other paper that circulates nationwide;
- Attend the hearing of the application by the Magistrate's Court which will be heard 30 working days after the day of the advertisements;
- Wait for the Magistrate's Court to grant the order and then wait for a High Court Judge to review the case and confirm the order.

After hearing all these requirements Sophia Zhou could not contain her tears. She started sobbing loudly and asked the JCT lawyer the following questions: “Where will I find the relatives of this child’s mother as I last saw them at the funeral in 2003? Did they collect the death certificate? My husband who once went to visit this family during the marriage ceremonies is now dead. Where will I find the money to pay for the transport costs for those people to come to Harare for the court hearing? Will they agree to come to court? Where will I live with all these people as the only person I know who has accommodation is my neighbour’s daughter and I am staying with her in-laws in their rented house? You said thirty days: during this time who will look after my other grandchildren? What do you mean by advertising and is it free?”

The lawyer explained to her the need to have the matter handled in Gokwe, which is the court where the child reside instead of Harare, though this did not make the situation easier for the elderly woman as she indicated that she still required assistance as they were no free lawyers in Gokwe. The JCT lawyer was moved by the elderly women’s plight. She explained that she had no choice but that she had to obtain the affidavits from her grandchild’s relatives and then had to deal with the issue of their accommodation at the hearing. She said, however, that the JCT team would find the funds for the advertising and the stamp duty.

Mrs Zhou came back in mid March with four affidavits and the father’s death certificate. The application was drafted and the adverts placed in the papers in accordance with court practice. The case was heard on 27th May and guardianship of Kudakwashe was granted to Mrs Zhou. It took another month for the record to be reviewed and confirmed by the High Court and for the guardianship certificate to be granted.

Other clients who come to JCT for help in their adoption or guardianship cases also relate their stories and challenges which are similar to those of Mrs Zhou. This situation has forced me to ask to ask whether this law is serving any role in protecting the rights of double orphans.

1.2 The Problem

In its study on the law of maintenance, WLSA (1991) argued that there is a general misunderstanding in this area of the law in that it has two distinct perspectives, namely, the law on paper or in the 'law books' and the law in action. The same may be said of the general law on guardianship and adoption in Zimbabwe: there is a complicated interplay of what the law says and how the law works in action. Often people do not use the laws or benefit from them due to the procedures to be followed and the requirements to be met.

Although Zimbabwe has a general law that addresses the issue of guardianship and adoption, this law is not being used for the benefit of children because of the complexities in pursuing the legal procedures and the socio-economic realities of orphans and families. These complexities have resulted in families and children resorting to the use of local customs and practices to protect children; the general law is only turned to as the last resort when all else has failed. Faced with an orphan crisis which has created a million orphans[2] in Zimbabwe, the question is whether the general law addresses the realities of Zimbabwean families with orphaned children.

1.3 Objectives of the Study

1. To investigate and analyse challenges that families and children face when they seek the protection of adoption and guardianship under the general law.

2. To investigate the strategies that communities use to cope with adoption and guardianship at community level.

3. To make recommendations to ensure that the rights of orphaned children are realized.

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[2] Zimbabwe National HIV and AIDS Estimates, 2009, (Ministry of Health and Child Welfare, AIDS and TB Unit).

1.4 Assumptions

1. The general law on guardianship and adoption is divorced from the realities of families and children's lives.

2. Communities and families do not see the need to regularize the status of orphaned children in terms of guardianship or adoption as they make arrangements for these children using their familiar customs and practices.

3. When communities and families follow their customs and practices, they assume that they have legally/properly dealt with the issues of guardianship or adoption.

4. Even though communities and families make their own guardianship and adoption arrangements, there are legal problems that arise if guardianship and adoption are not regularized in terms of the general law.

5. Those caring for orphaned children do not take steps to legalize guardianship and adoption of these children due to a lack of knowledge of the general law that govern these issues.

6. Those caring for orphaned children do not take steps to legalize guardianship and adoption of these children due to a lack of knowledge about the differences between custody, guardianship and adoption.

7. Even if they are aware of the law, their lack of access to the courts and legal services hampers those caring for children from regularizing guardianship and adoption.

8. The complexity of the court procedures to be followed in guardianship and adoption cases and the financial costs involved in the process discourage caregivers from participating in the processes.

1.5 Research Questions

1. Is the general law on guardianship and adoption divorced from the realities of the families and children's lives?

2. What arrangements do communities and families make for orphaned children in terms of their customs and practices?

3. Do the communities and families assume that they have properly/legally dealt with guardianship and adoption under the general law when they follow their customs and practices?

4. Do families and communities still face legal problems under the general law even though they have made adequate guardianship and adoption arrangements in terms of their customs and practices?

5. Do those who care for orphans and vulnerable children fail to take steps to formalize guardianship and adoption processes due to a lack of knowledge about them?

6. Do those caring for children fail to take steps to formalize guardianship and adoption cases due to a lack of knowledge about the differences between custody, guardianship and adoption?

7. Does a lack of access to the courts and the non-availability of legal services hamper those caring for children from regularizing guardianship and adoption?

8. Does the complexity of the court procedures and the costs involved deter caregivers from participating in the processes of guardianship and adoption under the general law?

CHAPTER 2

2.0 RESEARCH METHODOLOGIES AND RESEARCH METHODS

2.1 Research Methodologies

A number of methodological approaches were used in this study to investigate the assumptions and objectives of the study. I used several different but related methodologies in order to understand the problem under research as well as possible so that I could finally make recommendations that are practical to the lives of families and orphaned children. To this end, I implemented the following methodologies: grounded theory, actors and structures and legal pluralism. I also sought to see how the laws and their implementation practice measure up to Zimbabwe's obligations in terms of local, regional and international law.

2.1.1 Grounded Theory

I wanted to know what was happening on the ground and women's lived experiences in pursuing guardianship and adoption. The starting point for my research was an interview with the Justice for Children Trust officials. In interviews with the legal officers and graduate trainees I was able to obtain information of the sorts of guardianship and adoption cases handled by the organisation. As I questioned and interacted with the JCT staff and their clients and perused their records I started asking myself the following questions:

Does JCT have sufficient resources to give to clients who want to advertise for guardianship? Are all their clients prepared to travel the legal route to finality? Which relatives usually apply for guardianship or adoption? At what stage after the death of a parent do families think of adoption? Who is JCTs' main referral source? What makes or what legal challenges cause families to apply for guardianship or adoption? Do they have relatives who have refused to

attend court and how have they intervened or assisted? How is the whole process linked to the socio-economic and political realities of families and children?

This case study helped me to find the questions I needed to ask as I interviewed the clients and perused their documents at JCT. Using these questions I was able to ascertain the customs and processes that families use when dealing with adoption and guardianship. This set of questions was also linked to all my assumptions. I noted that in all the interviews that I carried out at JCT the person who approached the organisation in order to apply for guardianship was a *sarapavana* who had been appointed by the family. I then realized that I needed to attend and observe the process of choosing a *sarapavana*.

Interviews were done with court officials such as Magistrates, Clerks of Court, the Master of the High Court in order to understand the law as it is practised and the challenges associated with it. These interviews together with court observations helped me to appreciate why people are not using the general law and to discover some practical solutions which should make the law actually beneficial for children. The grounded approach helped me to see the laws of adoption and guardianship from the point of view of families, court officials and the communities. What was interesting was that the number of cases that come to court and were finalized were far less than the number of orphans in Zimbabwe. I also interviewed members of community-based organizations, child rights organizations and schools to find out if they were aware of the laws and to find out why those who did know them were not using them to adopt children.

Thus, the grounded approach helped me to analyze and interrogate some of the mechanisms that have been put in place by some administrative structures such as schools, hospitals and private companies in an effort to help people cope or deal with the guardianship and adoption of children. Another thing that I discovered as a result of the interviews with child rights organizations was the fact that administrative structures like the Registrar General's Office continue to enforce requirements that create problems for those involved in adoption and guardianship matters.

2.1.2 Legal Pluralism and Semi-Autonomous Social Fields

Some of my research assumptions required me to find out about the arrangements that communities and families have made for orphaned children, and whether families believe that their arrangements concerning guardianship and adoption in terms of their customs and practices satisfy the general law. Therefore, I used this approach to find out how the families using customary law approaches deal with these issues and also how the courts (based on their files/records) have treated JCT-assisted guardianship/adoption applications. It was interesting to note that in all cases that were handled by JCT (some of which had reached finality in court), the court recognised as guardian the person who had been appointed as *sarapavana* at the family level. I also came to understand the customary practices surrounding adoption and guardianship as a result of one-on-one interviews with parents and families and after having observed the proceedings of a ceremony involving the appointment of a *sarapavana*. The other thing that I was able to learn using this approach was that in a system where there is more than one way of dealing with an issue such as guardianship or adoption (i.e., the general law and local customs and practices), people usually choose the alternative that is flexible and convenient to them and they neglect or ignore those that are cumbersome.

In my research I also noticed that people also use other regulatory mechanisms outside the state law (or semi autonomous social fields) in which, for example, the family, churches, pension funds and employers play a part. In the research I found that each of these social fields tried to find ways of protecting children without using the general law. For example, the churches would use their church doctrine of love and brotherhood to accommodate children even those from outside the family; employers found ways of ensuring that in spite of the deaths of parents surviving children would continue to benefit or have a decent life without the difficulty of having to go through the courts. I found that these alternative methods which were governed by different rules and used both customary practices and the general law in order to ensure that innocent children are protected.

As a result of the interviews I had with players from these different fields I was able to see how the child protection issues of guardianship and adoption are dealt with by these different systems.

I found that when dealing with these issues at family level, families found themselves at the intersection of the different systems of laws and rules. In interviews with clients at JCT, I noted that the players who are usually at the centre stage of each case are members from paternal and maternal families, friends, the church and the employers. All these external bodies influence how families deal with the issues of guardianship and adoption of children. Bentzon (1989) had this to say:

> *"Some of the decisions may be based on practical considerations which provide common sense solutions. At other times, knowledge, often imperfect, of state laws, notions of human rights, political ideologies or religious norms…."*

In my research, I found that there are advantages as well as disadvantages in relying too much on these other bodies or systems.

2.1.3 Actors and Structures Approach

As far as my research was concerned, there were a number of structures and actors. The structures were at both the community level and the official level. At the community level was the family whilst at official level there are government departments, which include the courts, the Pension's Office, the Ministry of Education, Sports, Arts and Culture, schools and clinics. There were also private companies, which included the Commercial Bank of Zimbabwe, non-governmental organizations, and community-based organization. I interacted and interviewed the actors of different structures to see how they deal with the issues of guardianship and adoption of double orphans. What was interesting in the research was that the family was the most important structure and the key actors in the family being the maternal and paternal relatives of children. These people sit down together and come up with their own child protection mechanism at family level.

In order for a child to have a guardian or adoptive parent in terms of the general law there are key structures that the applicant has to interact with and these structures are at both the community level and the official level. This experience is supported by Stewart et al (2000) when she said:

> *"I needed to interrogate these players and their experiences. It was evident that it was not sufficient to look only at women's experiences, perceptions and understanding of the problems they experience".*

It became critical that I look at the family structure and the actors within them and then interrogate the cultural norms and beliefs of families on the subject and interview the gatekeepers of culture and religion in order to appreciate their attitudes on the issues of guardianship and adoption of children. Due to the socialization of our societies, the key decision makers on the issues are men and yet it is the women who play the key child-caring role. At the family level, there are different actors who exert pressures that determine the ultimate decision regarding the guardianship or adoption of children. The pressures usually come from one or more of the following points, including: the maternal or paternal family, the church, cultural and economic considerations and the knowledge and understanding of the laws of those involved in the process.

The courts being the major player in the implementation of general law were looked at as a structure and their officials were interviewed as the main actors. Interviews were held with Clerks of Court, Magistrates, lawyers, a Judge of the Family Court and the Master of the High Court. The interviews with these courts officials helped me to interrogate these players and their experiences. It helped me to assess the extent to which they understand the general law on guardianship and adoption and the manner in which they apply it. The approach was also useful to me in that it gave me insights into why some administrative structures such as the Registrar's Office still requires a person to become a guardian of a child before they can apply for a passport for that child even though there is a Supreme Court judgment in place to the effect that acquiring a passport is not a juristic act that requires a guardian. Interviews with officials from the Registrar General's office gave me an opportunity to ask why they were taking that stance and how it affected the rights of children who require enjoying their freedom of movement. This approach also helped me to see how some structures like the schools, hospitals and private companies are responding to the orphan crisis. They not only observe the general law of adoption and guardianship but they also lay down their own rules, e.g., they simply require that the person who is looking after the child should bring the child's parent's/s' death certificate/s as

proof of orphan hood whilst they use their own identity particulars to register children in schools or when they need to register them for medical attention.

2.1.4 Human Rights Based Approach

Since one of my objectives was to investigate the adequacy of the law relating to guardianship and adoption and its compliance with human rights instruments, I used different human rights instruments related to children to investigate the same. The instruments used were mainly the CRC and the ACRWC. This approach was useful to me as it gave me insights into what needs to be done to the laws of guardianship and adoption so that they protect the best interests of the child.

The above methodologies helped me to capture the views of the respondents in relation to the topic and to sift information into various categories of data that was useful in the formulation of chapters and contents of the research.

2.2 Research Methods

2.2.1 Introduction

Both qualitative and quantitative techniques were used in this study for data collection. Quantitative research methods were used to obtain statistical data whilst qualitative research methods were used throughout the research in collecting data from the respondents by engaging in one-on-one interviews, and key informants interviews.

2.2.2 Library Research

This method was used to study the literature that has been written and the statutory law instruments that address the issues under discussion. International, Regional and National Laws

were also looked at. This method of research helped me to analyze and establish that there has not been any literature directly linked to my area of study and it helped me to come up with a point of departure between legal theory and the practice on the ground.

2.2.3 Key Informants

These were chosen mainly because of their expert knowledge and the work experience in the different structures and institutions. I interviewed key informants from the Courts, Social Services, Schools, and Community-Based Organisations.

2.2.4 Case Studies

Case studies are a way of gaining deeper insight into the topic being researched as they allow for the pursuit of data around closely connected individuals, often family members who give varying perspectives on the same events or issues (Stewart et al 1997). I identified a few applicants who had encountered problems in using the general law in applying for guardianship or adoption of children. The categories of case studies used highlight different problems for example the Sophia Zhou case referred above gives insight in the social, financial and procedural aspects related to guardianship whilst some abandoned cases highlight that some protection for children still exist without using the general law. Two court cases from the High Court and Supreme Court were analyzed and these were *Ex Parte Ndhlovu Judgment No HB-116-04* wherein the issue of waiving the requirement of advertising by the children's court in guardianship due to poverty was challenged and *Margaret Dongo v The Registrar General and the Attorney General Judgement No SC10/2010* in which the Supreme Court noted that obtaining a passport for a child in Zimbabwe is not a juristic act and hence does not need the child's guardian consent to do this. Case studies helped me to see some of the gaps that existed in the legal theory and the practice of the law, the loopholes that exist in the laws and the areas that need urgent review or address. Using real people, their stories and the journeys that they have travelled also helped me to question whether this law is necessary or it needs a complete overhaul. These case studies also

enabled me to obtain empirical data in order to determine whether the laws that address adoption and guardianship are in line with the way people live their lives.

2.2.5 In-depth Interviews

These interviews were carried with officers of the courts, children, families, representatives of NGOS and these were useful as the informants gave the detailed accounts of the issues on the ground whilst those in strategic positions highlighted challenges and recommendations.

2.2.6 Observations

I observed two court sessions and the appointment of a *sarapavana* ceremony. The observation of the court session helped me to verify that the guardianship application is a technical one requiring lawyers conversant in the relevant law as those whose lawyers had not attended court on the day I was in court did not know or understand what was happening in court. The *sarapavana* ceremony helped me to get an insight of the cultural norms and practices of child protection.

2.2.7 Client Records

I perused 133 client records lodged with the JCT and found that some were pending, some finalised and others abandoned. I interviewed some of the clients themselves. The client records contained lawyer's (and also sometimes client's) notes, court papers and even court orders. I was able to assess the length of time it took for the cases of guardianship or adoption to be finalized.

2.2.8 Focus Group Discussions (FGDs)

I was able to conduct group discussions with six groups of people, one of which one was made up of lawyers from the Legal Aid Directorate whilst the other one was made up of JCT's community paralegals. I also took advantage of the NGOs workshops and meetings that I attended either as a participant or as a trainer to initiate the issues of adoption and guardianship of children. It is worth pointing out that in these meetings professional and ordinary members of the communities expressed a lack of knowledge about the relevant laws and those who knew the laws highlighted the challenges inherent in them.

2.2.9 Personal or Insider Knowledge

Lastly as someone working in the child rights sector with a specific focus on the laws of child protection, I used my own inside knowledge. Having worked in this sector for eight years as a lawyer who deals with cases and analyzes monthly reports which are produced by staff which highlight trends and emerging issues in this area, I had an existing insight into what really goes on and I used this knowledge to fill in some of the gaps that I identified in the research process. This knowledge helped me to formulate my research topic and to identify my respondents. Table 1 below gives information concerning the number of institutions and individuals who participated in the research as key informants, in focus group discussions, in in-depth interviews or in case studies.

Table 1: List of Respondents

Respondents	Number
Lawyers	10
Magistrates	3
Probation officers	2
Judges	1
Master of the High Court	1
Companies	3
NGOs	10
Clerk of Magistrate's Court	3
Registrar's Office	1
Focus Group Discussions	6
Clients and Clients' records	132
Schools	5
Families	32
Court observations	2
Double orphans	11
Observation of appointment of *sarapavana*	1

2.3 Limitations of the Study

The study was conducted in Harare. I encountered some difficulties during my research. The study was initiated in October 2011 and this was the time when schools usually start to focus heavily on students' revision for their final external examinations which they thereafter write before the schools close at the end of the year. This made it difficult for me to conduct my interviews in the schools. Therefore, the interviews were however handled in the year 2012, during the new school term.

Some government departments for example Social Services and the Pension's office were inaccessible due to their internal policies and it was difficult to get information from them. I managed to interview two probation officers who referred me to another very senior officer. When he learnt that besides being a student I also work for JCT he refused to cooperate. At that

time JCT was not yet registered as a Private Voluntary Organisation so he did not want to speak to me.

CHAPTER 3

3.0 THE STRUGGLES OF DOUBLE ORPHANS IN CONNEXION WITH GUARDIANSHIP AND ADOPTION: THE APPROACH OF FAMILIES AND COMMUNITIES

3.0 Introduction

This Chapter examines the general law concepts of adoption, guardianship. It then looks at the situation of children in Zimbabwe in particular double orphans who are defined by Rose L (2005) as those children who have lost both parents with a view to analyzing if these two concepts can play a role in addressing child protection issues that arise as a result of orphanhood. The chapter will also interrogate ways in which families and communities are addressing the issue of guardianship and adoption and the problems that they face when they make arrangements outside the general law.

3.1 The Concepts of Guardianship and Adoption

According to Davel (2000 p33) *guardianship* entails the capacity to act on behalf of a child, to administer his/her property and to supplement any deficiencies in his or her judicial capacities. According to Rose L (2005), the concept of guardianship has meant different things across generations in Africa, although it usually refers to a person who is legally responsible for the care and management of an incompetent person, such as an orphan, and his or her property. An orphan does not necessarily reside with his or her guardian. Rose further argues that the roles assumed by guardians in Africa vary according to national, local and individual contexts. Thus under ideal circumstances an orphan's guardian is expected to ensure that his or her physical and material needs including nutrition, shelter, clothing and schooling are met whilst in some national settings the guardian only act as the legal representative of the orphan.

Adoption according to Bobergy (1977) is the legal process through which the existing legal relationship between a child and his/her birth parents is terminated and a new legal parental relationship is created between the adoptive parent(s) and the adopted child. Unlike guardianship, adoption is intended to effect a permanent change in status. The concept of custody even though not key to the study, has been confused with these two concepts, but according to Van Schalkwk, *custody* refers to the control of the person of the child and it involves the following aspects or duties connected with the provision of the necessities of life, for example, shelter, food and clothing, medical care, the education of the child and other related rights and duties.

Even though practices similar to those of guardianship and adoption under general law are known to African culture, the law of guardianship and adoption gained their entry into Zimbabwe's general law via the common (or judge-made) law; hence their application is premised on the principles of common law rather than in the indigenous social, economic and political realities of her people. In Zimbabwe the concept of guardianship has also changed in view of the social, economic and political realities of children and families. Even though families have disintegrated due to different causes, the care and protection of innocent children remains a major priority for communities which are constantly adapting to cope with the orphan crisis in the country. What is emerging is that the existing laws seem to be out of sync with the community-accepted child protection mechanisms.

3.2 The Historical Background of Adoption and Guardianship

According to Bennet T.W (2006), the main purpose of adoption under the common law was to place children without parents in suitable families. He further states that the customary institution is more akin to the early Roman law concept of *adoptio,* the purpose of which was simply to perpetuate the adopter's bloodline. Under customary law, adoption also refers to the appointment of an heir by a man who has no sons or natural heir of his own. In such a case, he would announce that he would appoint a nephew, a son born out of wedlock or a close male relative as his successor. The same arrangement could be made by the head of a polygamous household

who has the right to appoint a son from one household to be heir of another. The child so moved will become a member of the adoptive family or house and loses any link within his natal family. Bennet further states that adoption under customary law was a private but significant arrangement involving only the families concerned and required some formality. The child's natural father and the adoptive parent would enter into an agreement and they had to publish the event by notifying their traditional ruler. The adoptive father would call a meeting of the family at which he would appoint the child as his successor. A simple agreement between the families would suffice and the orphaned children would be easily absorbed into the immediate or extended family in the event of the deaths of their parents.

Like adoption, the concept of guardianship has been part of our customs and practices and children have always been cared for and supported within the extended family. The concept of inheritance was premised on ensuring that the family of the deceased especially children will continue to be provided for. This role would be exercised by the deceased's younger or older brother.

3.3 The Situation of Children in Zimbabwe, especially, Double Orphans

Zimbabwe like most of the countries in Southern African has been ravaged by the HIV and AIDS pandemic. Even though the prevalence rate decreased from 27,2% to 14,3%, the country continues to experience some of the worst effects of HIV and Aids in the world.[3] The number of annual infections continues to increase and it is estimated that 182 Zimbabweans were infected with HIV and AIDS daily in 2009 as compared with 173 in 2007[4]. Further projections into the future based on current HIV prevalence, population growth and Antiretroviral Therapy (ART) utilization indicate that the number of newly infected adults will continue to grow. In addition, it is established that more than 1,270 people are dying of AIDS every week while 9,400 children succumb to AIDS every year[5]. According to the Ministry of Health and Child Welfare, it is as a result of the gravity of the pandemic that about 1 million children in Zimbabwe have lost one or

[3] Zimbabwe National HIV and AIDS Estimates, 2009.
[4] Zimbabwe National HIV and AIDS Strategic Plan (2011-2015) ZNSP11.
[5] Zimbabwe National HIV and AIDS Estimate, 2009.

both parents due to HIV and AIDS and related causes.[6] This ongoing catastrophe creates children who require protection and care and this burden has fallen up members of their extended families, including aunts and uncles, or even households headed by other orphaned children.

These orphaned children especially double orphans are also targets of all forms of abuse including forced sex in adolescence[7]. The lives of children whose parents have worked hard all their lives change overnight with the deaths of both parents as they are too young to fend for themselves and almost always fail to provide for their own basic needs, such as education, food and shelter. It is as a result of the impact of these harsh realities on the lives of children that this study seeks to interrogate the laws of guardianship and adoption to see whether they really do what they are supposed to do: to protect children and their childhood. This research also attempts to analyse just how the various communities in which such unfortunate children are living are coping with the orphan crisis. Many orphans are denied their inheritance rights and have to fend for themselves from a young age. They are generally without skills or capital and have to rely on lowly paid casual jobs. Because of their low incomes, they cannot invest in productive enterprises or training and are thus locked into a vicious cycle of poverty[8].

3.4 The Traditional Approach to Caring for Double Orphans

According to Powell (1994), traditionally orphans in Africa have been relatively easily adopted by other family members due to kinship-based family system which provided for the welfare of its members. In view of HIV and AIDS, these extended family members are mostly widows who may themselves be ill, elderly grand parents or siblings running child-headed households. Many guardians are too old or too young to properly care for the orphaned children's material and emotional needs. Powell gives an example in Uganda where six out of ten caretakers are females. Sources of stress for these women include lack of legal rights, lack of education, lack of

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[6] Zimbabwe National HIV and AIDS Estimate, 2009.

[7] HIV infection and Reproductive health in teenage women orphaned and made Vulnerable by AIDS in Zimbabwe Gregson S (2005).

[8] Ministry of Labour and Social Services Zimbabwe :National Plan of Action for Orphans and Vulnerable Children Phase 2 (2011).

ownership of property, lack of access to cash and poor access to health resources. Chiedza Children's Care Centre (2010) notes that relatives in traditional extended family were supposed to control parents if they abused or neglected their children. She further notes that, in urban environments especially, mechanisms for protecting children without parents tend to take the form of institutions, foster care, and adoption rather than the customary forms of care within the extended family.

Chiedza Children's Care further notes that in Zimbabwe there is a culture of collective responsibility for children with the result that the term children-parent relationships does not always mean a child's relationship with his or her biological parents, but may also encompass children's relationships with their extended family, adults looking after children or even the state in cases where children are in state care or custody, and the community at large.

According to Boudillon, (1993) in Zimbabwe both general law and customary practices recognize the rights, duties and responsibilities of parents and guardians to provide parental guidance to children. In the past children were always protected and guided within the family and the community at large. However with the disintegration of traditional family forms, and increasing emphasis on the nuclear family, the protection of children and parental guidance like most rights and duties exercised within a family have also disintegrated (Boudillon, 1991). (SANASO, 1994). Community care was traditionally as important as family care and formed the context in which the reciprocal obligations of parenthood and childhood were exercised and regulated. The community and extended family also provided for children whose biological parents could not or would not take care of them. Traditionally orphans in Zimbabwe were relatively easily adopted by other family members, due to the kinship systems that provided for the welfare of their members.

Powell et al, 1994 is of the view that owing to the socio-economic challenges that Zimbabwe went through, there is a general feeling that communities and extended families cannot cope with orphaned children. The problem is exacerbated by the AIDS pandemic, whereby the number of orphans is projected to increase. Through this study, I was able to see that even though Zimbabwe has gone through trying times economically, socially and politically, the different

communities and families have set up child protection mechanisms with the result that orphaned children do enjoy the benefit of safety nets in one form or another.

3.5 How have Families and Communities responded to the Orphan Crisis in Zimbabwe

Having to care for its current one million or so orphan population which number is steadily rising, Zimbabwe has come up with responses that address the orphan crisis and these occur at various levels of the society including the Government, churches, Non Governmental Organisations and within individual families. The majority of these responses ensure that children are under the care of adults. The responses range from the establishment of children's homes which usually accommodate a small number of children, some children are in the care of relatives whilst they receive support from NGOs, others are being cared for by their extended family without any support from the NGOS whilst others are being looked after by non relatives in informal foster care arrangements. All these strategies have been developed by communities to ensure that children have guardians. What was interesting was that all these arrangements resulted in a guardianship or adoption arrangement which is accepted and respected at community level although it may not accord with the general law.

3.6 Family and Community Practices relating to Adoption and Guardianship

In view of the number of children who have lost parents, there still remains a small number of cases that are brought to court to regularize the adoption and guardianship of children. In interviews with the clerk of court, she indicated that they handle 6-7 cases per month though the number of enquiries is higher than actual cases that are eventually brought to court. As far as adoption is concerned, they handle between 5 and 10 cases per quarter. One magistrate indicated that they can go for a month or two without dealing with a case of adoption.

In an effort to investigate why this is so, I found that families and communities have their own ways of dealing with child protection issues when a child has lost both parents. In terms of

custom and practices when a child loses their guardian whether born in or out of wedlock, families have solutions. If the child was born in wedlock the child's relatives will deal with the issue of appointing someone who will look after the interests of the child and it is usually done in consultation with maternal and paternal relatives. The person so appointed will look after the welfare of the children and in cases where they are minors he or she will have to be in their custody and this person is a *sarapavana*. Depending on their ethnicity, some families will choose a mother and father for the child in which the mother figures takes on the role of the child's carer while the father figure will make major decisions such as acquiring a passport for the child and if the child has inherited property from his/her deceased parents, the father figure will manage those. In some families only one person (male or female) is appointed and he/she will perform all these roles for the child.

In the event that a child is born out of wedlock and his/her guardian, namely his/her mother has died in childbirth, the orphan's maternal relatives who are naturally responsible for that child will appoint a *sarapavana* for that child. In interviews that I carried with 32 families that are looking after orphans in the community and the 11 orphaned children that I interviewed in the communities the person known as a *sarapavana* was understood, explained and accepted; this is a person whom families appoint 'like a combined mother and a father' to look after the children of the deceased. In the 133 records that I perused at JCT the person who was taking steps to apply for guardianship of an orphan was the person who had already been chosen as the *sarapavana* at the family level after the children's parents had died. The position was confirmed by the interviews I carried out with magistrates during which they indicated that in most of the cases that they adjudicate they confirm as the child's guardian the person who has already been chosen at family level, i.e., the *sarapavana.* This concept has been viewed at two levels, there is the ceremonial *sarapavana* who just looks out for children even when they are majors; as a result of the HIV and AIDS epidemic, however, they are now being appointed to look after minor children as well. Whilst in earlier times the *sarapavana* could be someone who did have custody of orphans, nowadays *sarapavanas* are actually taking custody of orphans where there is no one else to look after them.

During the research period, I had occasion to attend the inheritance ceremony for my late aunt. She left behind both minor and major children and after relatives had distributed all her personal belongings the elders of the family then gathered to strategize on who would be responsible for the care and support of the children. They looked at the deceased brother's daughters and it was noted that one of them had not been allocated a family. What was interesting was that the person who was chosen was one who attends a Pentecostal Church and she together with her husband are usually not involved when the customs issues are being looked into. They usually take a back seat when there are family gatherings like *kurova guva* or anything to do with culture as they believe these clash with their church doctrine which says "you shall not worship any other God besides me". The belief in the *vadzimus* would be tantamount to another religion which is not acceptable to the teachings of Christianity. The person in question had actually attended this particular function because there was no traditional beer involved and also no formalities of communicating with the family's dead ancestors had been involved.

When the news broke that she had been appointed, she phoned her husband. I could see that he did not agree to the arrangement and the elders who were present ordered that the head of the family who is 'a Nyamapfene father' talk to him. Even though it was clear that she was not comfortable with the arrangement, she was reminded that all the other girls in the family were looking after relatives within the extended family; they also said that she ought to accept the role because according to our customs any woman in the family is capable of taking on the role of a mother to a child whose parents can die at any time. As the new mother of these children, she was told to choose what was easiest for her. She was either to leave the children with their older siblings (who she would supervise regularly) or to take the young children into her personal care. The reality for the *sarapavana* is that they will choose an option that ensures that the children are well looked after. I was surprised to learn that she now wants to take the children and is just waiting for schools to close so that she can move into her care.

It was also worth noting that the elders of the family who decide who will be the *sarapavana* is a group dominated by men and a few elderly women who are well placed to make this decision because they are familiar with all the relationships and important considerations subsisting in an extended family. From my assessment of how the decision was communicated, the nominated

woman cannot say “no” because she is afraid of what lies ahead. Looking at all the facts it appears that this was done under duress. Some of the people I interviewed who are looking after orphans indicated that there is usually no option once you have been chosen; the understanding is that one day your own children may require the same support from other elderly relatives in the family.

In the 133 JCT cases and files I perused it was evident that at each funeral the families choose a *sarapavana* who becomes the person who applies for guardianship. Out of these 133 files at JCT all the people who applied for guardianship had been custodians of the children for some time. In only two cases did the non-custodian of the orphan apply for guardianship and in both applications it was clear that the custodians were old and could not cope with the difficulties of going to court. The JCT files show that when communities and families tackle the problem of double orphans in this traditional manner they honestly believe that they have dealt properly, i.e., legally, with the issue. Based on the cases contained in the JCT records, the formal application for guardianship under the general law processes had started more than a year after the last parent’s death and only when problems had emerged. From the statistics, 10 cases were handled within a year whilst the other 10 within two years. 16 cases were handled within three years, 18 within four years and 40 within 5 years whilst the rest took more than 5 years. It was confirmed during interviews with lawyers and magistrates that formal procedures under the general law usually done several years after the death of the parents and when this occurs the litigants simply confirm what had been agreed at family level.

SOS is commonly known for its villages which accommodate children in need of care including orphans. These institutions have been popular in most countries as they provide the necessary support for children to reach their potential. As a result of the orphan crisis, it became too expensive for SOS to take all deserving orphans into their care. In order to address the pressing need to protect orphans who remained in the custody of their extended families, SOS initiated its Social Centre Program. The SOS Waterfalls Program in Harare (Zimbabwe’s capital) is dealing with 1201 families in Glen View, Glen Norah and Budiriro and these families are acting as guardians of orphans without any legal arrangements. The same situation is prevailing at

Chiedza Child Care Centre where they are looking after 1,556 children at community level and these are also being cared for by relatives without any legal arrangements.

The records of these organisations reveal that different relatives and non-relatives take a role in the guardianship or adoption of the children. In terms of the SOS statistics, 182 families are sibling-headed, 501 are grandparents-headed, 492 are headed by uncles and aunts; 26 are being cared for by non-relatives and they could be their late parents' friends or went to the same church as the orphan's late parents. Whilst the statistics of SOS and Chiedza Child Care Centre are not disaggregated in terms of the gender of the people who are caring for the children, out of the 133 records that I perused at JCT, three quarters of the children have female relatives as their guardians. These can be maternal or paternal aunts or grandmothers. What was sad was that when these care givers consider to applying for guardianship of the orphans in their care in terms of the general law they first of all seek the permission and authority of the male figures of their families. One JCT paralegal who has custody of an orphan within her family told me that she could not take any steps to regularise the arrangement under the general law without her brother's consent because if she did so she would have to make all the decisions about the child on her own, including dealing with important issues of the child's possible marriage, death, etc.

In the 6 focus groups discussions I had with care givers of orphans they all agreed that culturally a child is not considered as having one mother and one father; therefore if you are a woman and your sister passes away you have to organize with your other sisters to coordinate and arrange who will take the orphaned children. In cases where someone displays no interest in caring for the children, the appointment of *sarapavana* can actually be imposed on the person who is ordinarily supposed to take that role. In the cultural set up, other family members monitor how the *sarapavana* performs. One JCT client had this to say:

> "Once you have been awarded the children the community will measure your child protection skills by comparing the schools that you send your biological children and the schools where you send the children you have been given to look after. In terms of custom and norms one is even put under pressure to handle the orphans better than the way they handle their own children."

One official from SOS Social Centre said:

> "Once you take over a child whose parents have died, you have to treat them the way you treat the other children within the homestead as if you fail to do that your other children will ask or bring you to task over the treatment of children."

3.7 The Legal Problems that arise when Adoption and Guardianship Practices have not been regularized in terms of the General Law

From the case studies in my research, families rarely use the general law when dealing with issues of guardianship and adoption. This becomes necessary and is resorted to if there are problems that cannot be solved by the use of customs and practices. In all the 133 files that I had access to at JCT, the applicants had a legal problem that had led them to seek the application of the general law. From those records, 23 children required passports, 7 required medical care, 15 children were involved in inheritance matters, 27 children had educational needs, 50 children were involved in pension matters; and only 6 cases involved guardianship. In interviews with probation officers, relatives who looking after orphans in terms of customs and practices in one area apply for their adoption when they intend to take the child to live with them in another jurisdiction which does not recognise the existing customary arrangement.

Some of the legal challenges that I highlighted above arise as a result of the lack of appreciation by our administrative offices and our courts to implement existing laws. In the case of passports, the Zimbabwe Supreme Court (in the case of *Margret Dongo vs The Registrar General and the Attorney General SC Judgment No 6 of 2010*) considered the question of whether obtaining a passport in Zimbabwe is a juristic act which was required to be made by a child's guardian. It was held that a Zimbabwean passport is a document that simply enables holders to travel outside the country and that it is issued to citizens only to enable them to travel beyond the borders of the country. As a result, the Court came to the conclusion that the act of applying for a passport is not a juristic act and that the exclusive assistance of a minor child's guardian is not a legal requirement. Based on that judgment, the Registrar General's office should now be allowing the custodian of children to apply for a passport without the condition of first obtaining a

guardianship certificate. This area remains a problem for people looking after orphaned children simply because the responsible administrative office apparently refuses to comply with the law of the country.

CHAPTER 4

4.0 FINDINGS ON AND ANALYSIS OF THE LEGAL FRAMEWORK ON ADOPTION AND GUARDIANSHIP

4.1 Introduction

This chapter will examine and analyse the interplay between customary practices, the theoretical aspects of the law and the procedures of the courts. It will focus on analyzing the frustrations, bottlenecks and challenges which confront caregivers who wish to adopt or to ensure that they are appointed guardians of orphans who have lost both their parents.

The chapter will also examine the overall social, economic and political context in which the above laws operate and how it poses specific barriers to their reception. Tove Stang Dahl (1987:14) argued that the key problem confronting legislative innovations is that the law sometimes runs ahead of the thinking of society and, as a result, a gap emerges between reality and the legal rule. This occurs in the realm of the laws of guardianship and adoption. The discussions and analysis that will be covered in this chapter will raise the question of whether the laws of adoption or guardianship are ahead of or behind the thinking of society.

4.2 International Framework

4.2.1 The Convention on the Rights of the Child (CRC)

The Convention on the Rights of the Child (CRC) was adopted by the General Assembly in November 1989 and this instrument provided an opportunity to make respect for children's rights and welfare truly universal. The Government of Zimbabwe signed and ratified the CRC in 1990. By ratifying this international instrument, Zimbabwe declared itself bound to observe these provisions and becomes answerable to the international community if it fails to comply with them. The Committee on the Rights of the Child has identified the following articles in the

Convention which are basic to the implementation of all the rights in the CRC and these are: a child’s right to be protected from discrimination (Article 2); the best interests of the child (Article 3); the right to life survival, and development (Article 6) and respect of the views of the child (Article 12).

Article 20 of the CRC obliges the state to provide special protection for a child deprived of a family environment and to ensure that appropriate family care or institutional placement is available. Such care could includes, *inter alia*, foster care placement, adoption or, if necessary, placement in suitable institutions for the care of children. The article goes further to state that when considering solutions, due regard should be paid to the desirability of continuity in the child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

Article 21 of the CRC permits adoption and calls upon the states that permit the system of adoption to ensure that the best interest of the child shall be of paramount consideration and that the adoption shall be authorized only by competent authorities who determine in accordance with applicable law and procedures on the basis of all pertinent and reliable information.

4.2.2 The African Charter on the Rights and Welfare of the Child (ACRWC)

The ACRWC reiterates the need to uphold the principle of non-discrimination, the best interest of the child, life, survival and development and child participation in articles 3, 4 and 5 of this instrument. Article 24 allows the states that recognize adoption to establish competent authorities to determine matters of adoption and ensure that the adoption is carried out in conformity with applicable laws and procedures and on the basis of reliable information. Article 25 obliges states to ensure that a child who is parentless or who is temporarily or permanently deprived of his or her family environment is provided with alternative family care which could include among others foster placement, or placement in suitable institutions for the care of the child.

Even though these international instruments have set the tone and guidelines for child protection laws, Zimbabwe has not domesticated or implemented them fully. For example, the issue of

providing alternative shelter to children without families has not been prioritized by our government. As a result, some double orphans have fallen victim to all forms of abuse.

4.3 National Framework

4.3.1 Constitution of Zimbabwe

One major problem with the Constitution of Zimbabwe is that it does not have any provision that specifically promotes or protects children's rights. Rather, since by implication children are 'persons', their rights are protected by the general provisions which protect every person's human rights in terms of the Constitution's Bill of Rights. For example, Section 18(1) and (1a) of the Constitution states that:

> *"Subject to the provisions of this constitution, every person is entitled to the protection of the Law and every public officer has a duty towards every person in Zimbabwe to exercise his/her functions as a public officer in accordance with the law and to observe and uphold the rule of law."*

The above provisions have been used as a ground to ensure that everyone who uses the law for protection, be it in civil and criminal matters, should be afforded that protection. The Preamble to the Declaration on Human Rights sets out this right as one of the most fundamental rights. Hence, officers of court should discharge their duties in order to protect citizens. If upon researching the matter it is discovered that the procedures and administrative processes involved in securing a guardian or adoptive parent for a child are found to violate as opposed to fulfil the very ideals of child protection which they are meant to uphold, then it may be properly held that the child's human right to the protection of the law as envisioned in terms of section 18 of the Constitution of Zimbabwe will have been breached.

4.3.2 The Guardianship of Minors Act, Chapter 5:08 and the Children's Act, Chapter 5:06

The guardianship of double orphans and their adoption in terms of general law is governed by the Guardianship of Minors Act, Chapter 5:08 and the Children's Act, Chapter 5:06 which was formerly the Child Protection and Adoption Act. These Acts set out the legal framework and the procedures to follow when one applies for either guardianship or adoption of children.

4.4 The Background to the General Law on Adoption and Guardianship of Double Orphans

According to Ncube, W. (1987), Roman Dutch common law did not recognize adoption of children as a legal institution even though adoption had been part of Roman law. As a result, the institution of adoption did not become part of Zimbabwean law until it was introduced by the Children Protection and Adoption Act, 1929 (No 22 of 1929). In South Africa it was brought into the general law by Act 25 of 1923 and it is presently controlled by the Children's Act.

Section 2(2) of the Children's Protection and Adoption Act 155 of 1939 directed that the provisions of the Act did not apply to Africans. Hence, the institution of adoption was not available to Africans until 1972 when the provision was repealed. The current Children's Act applies equally to Africans and non-Africans alike. Children in Zimbabwe can only be adopted in terms of this Act and any purported adoption executed outside of this framework is not enforceable.

The applicability of the Guardianship of Minors Act to Africans was dependent on the type of marriage subsisting between the children's parents. According to Ncube, W., the customary law of guardianship generally applied to all children born to African parents married in terms of the African Marriages Act and in terms of customary law. The application of the Guardianship of Minors Act to Africans was determined by Section 2 of the African Tribal Courts Act Chapter 237 which operated during the colonial era and which provided that:

> *'nothing in any enactment relating to …. the guardianship of children … shall affect the application of customary law, except in as far as such enactment has been specifically applied to Africans by that or any other enactment.'*

Section 3(1)(a) of the Act deemed customary law to apply to any case between Africans which related to the custody and guardianship of children.

The above provisions prevented the application of the Guardianship of Minors to Africans during the colonial period and with their repeal, the Act began to apply to Africans and non-Africans alike.

4.4.1 The General Law of Adoption and Guardianship Versus Cultural Norms and Practices

The above discussion helps us to see that the laws of adoption and guardianship as they stand in Zimbabwe were developed for people who were not Africans and these were the Indians Coloureds, the whites who had come to settle in the country. When these laws were eventually liberalized so that they could apply to Africans the only provision that was repealed was the restrictive clause. Little or no consideration was given to the effect that this had on the reality of the arrangements which had already been entered into according to African customary law prior to the repeal. What is clear is that the Africans had their own ways of transferring a child permanently from one family to another and it had its formalities of ensuring that the family members, namely the extended family and other kinsman, including the head of the clan, were sensitized about the arrangement and there was a formal acceptance of the child by the adoptive parents' family. If one looks at the African method of adoption which is based on African customs and procedures it becomes clear that when the general law started to apply to Africans no effort was made by the legislators or otherwise to ensure that the protective aspects of the general law were linked to the protective aspects of the African customary method of adoption. In fact, it appears that the general law has never appeared to recognise the vital protective aspects of the African method of adoption. While the latter method has constantly evolved in response to the changing needs of African society (e.g., the emergence of conditions giving rise to double

orphans), the persistent demands of the unchanging and insensitive requirements of the general law have actually harmed the interests of those involved in successful adoptive and similar arrangements under African customary law.

4.5 The Adoption of Children in terms of the Children's Act, Chapter 5.06

Part VII of the Children's Act deals with the issues of adoption of children and this same section also deals with the adoption of double orphans. In terms of Section 57 of the Act, the court that has jurisdiction to deal with adoption is the Children's Court[9] of the area where either the applicant or the minor resides at the date of the application for the adoption order. In view of the fact that the psychological and sociological aspects of adoption are as important as its legal aspects, the Act requires that a probation officer be appointed as guardian *ad litem* of the minor upon the hearing of the application whose duty it is to safeguard the interests of the minor before the court.[10] In terms of Section 57(3), an application for adoption shall be held in private and no persons other than those permitted by the court shall be present at any proceedings relating to such application.

Section 59 of the Children's Act makes restrictions on making adoption orders. The circumstances where these restrictions apply are where the Minister has not given consent; where the applicant is under the age of twenty five years or where the applicant is less than twenty one years older than the minor in respect of whom the application is made. The court may grant an adoption order notwithstanding that the applicant is less than twenty-one years older than the minor is where the applicant and the minor are related to each other within the prohibited degree of consanguinity.

The Act prohibits a person from adopting a minor who is less than twenty-five years younger than the said person unless the person is the same sex as the minor or if the applicant is a widower.

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[9] The Children's Court is established in terms of Section 3 of the Children's Act.
[10] Section 57(2) of the Children's Act.

The Act further prohibits any male from adopting a female minor unless the court is satisfied that there are special circumstances that justify as an exceptional measure the making of an adoption order.

Section 59(3) requires that any adoption should be done with the consent of the minor's parents or in the case of double orphans there should be the consent of the legal guardian (this requirement may be dispensed with where the child has been abandoned). The same section requires that an order of adoption should not be done upon the application of one spouse without the consent of the other spouse, unless the other cannot be located or there is a valid reason.

The Children's Act further prohibits an adoption order being made in favour of an applicant who is not a resident or domiciled in Zimbabwe or in respect of a minor who is not resident unless the applicant and the minor are related. An adoption order shall not be made unless the minor has been medically examined and a copy of the medical report relating to such examination has been furnished to the court.

Section 61 states that before making an adoption order, where the consent of any person other than the parent is necessary in terms of this Act, and has not been dispensed with, that such person has consented to and understands the nature and effect of the adoption order of which the application is made; and that this order has been made to benefit the welfare of the child after hearing the wishes of the minor depending on their age and that the applicant or any other person involved has not been given any reward of adoption.

In terms of Section 64 of the Children's Act, an adoption shall confer the surname of the adopter on the adopted child and in the event that the adopter dies his property shall devolve in all respects as if the adopted person was the child of the adopter born in lawful wedlock and were not the child of any other person and all obligations of that child's care and support will go onto the adopter.

4.5.1 An Assessment of Adoption under Customary Law and Adoption under General Law

If one compares adoption in terms of the customary practices as highlighted above, and adoption in terms of the general law one is bound to agree with Bennet (2006) when he said the common law requires a judicial procedure for adoption to be done as the courts are believed to be the best guarantee of protecting the interests of the child. The procedure is therefore regulated by the Children's Act in this case. He went further to point that customary law may contradict the statutory requirements in three aspects. Firstly, it is a private arrangement that may not necessarily coincide with the child's best interest. Secondly, the adoptive father may make a payment to the child's natural parents which may give an impression of trafficking. Customary law is not concerned with the interests of the mother, whereas the Children's Act requires consent of both natural parents. Comparing the above and the provisions of the Children's Act as pointed out above the requirements of the Act are more protective of the interest of the child as required by the CRC, whilst the traditional method is more protective of the applicant's interests.

4.5.2 Assessing the Interpretation of the Provisions of the Children's Act

The section of the Children's Act which requires a married applicant to have the consent of their spouse has been interpreted by the courts to mean that the married applicant is required to produce a marriage certificate and to have been married for at least two years (according to the interview I had with the probation officer). The question that arises is whether the requirement of a marriage certificate is in line with our African customs and besides, the generality of Zimbabwean marriages are done in terms of the customary and practices and these are not always registered. To require a marriage certificate is tantamount to preventing couples whose marriage is not registered from becoming adoptive parents.

One needs to prove their suitability as a prospective adoptive parent and has to undergo a screening process which includes an orientation meeting, psychological evaluation, interviews, a full medical examination, a marriage assessment, references from friends and churches and a home visit. What is interesting is that during the home visit they expect to see the bedroom for

the intended adopted child. I wonder how many families are able to afford to have a bedroom for each of their existing children, let alone a separate one for an intended adopted child? In any event according to African culture boys usually sleep in the same room as girls because the reality on the ground is that most families have two bedrooms: one for the parents and the other for all their children, boys and girls. This model in my view of requiring a bedroom for the child is based on the Eurocentric way of raising children which is not applicable to the Zimbabwean context. Requirements such as this shows that the law as it stands is at loggerheads with the African way of life thirty two years after Zimbabwe's Independence from its colonial master, Great Britain.

The requirements of a police clearance, medical reports and home visits appear to act as safeguards where an adoption is done between people who do not know each other. This also raises other issues in terms of our customary norms and practices. In the interviews carried out by professionals who work in the justice system, they all expressed reservations about adoptions between families who do not know each other. It was confirmed that the few adoptions that have been successfully conducted by people outside the child's family are within non-African communities. A family law Lecturer at the University of Zimbabwe and a Director of a women's organization had this to say about adoption:

> "It's difficult to accept a foreign child in any family as in that family there could be orphans requiring support as well. The easier way would be to adopt from one's kinship. Bringing in a foreign child is an uphill task as there are issues of totem and *chidawu* and the fact that the child needs to be accepted not only by the immediate family but the extended family (as well)."

It should be noted that according to the customary practice of adopting, a child was adopted from a family known to the adopter and there were ceremonies that were done which involved the clan head and if the child was coming from another family or was born out of wedlock, cleansing ceremonies would be done and all this was done so that the child would be accepted by everyone in the new family.

4.5.3 The Process and Procedures

The adoption of children is done in terms of the Children's Act, and that Act gives the power to the children's court to deal with the issues. The Act also allows the court to appoint a probation officer who will be the guardian *ad litem*. The challenge is that there are very few probation officers. Their hands are already full performing other functions as well as adoption cases. In Harare alone, there are 6 probation officers for the whole province and these officers are under resourced to the extent that they still rely on their partners in civil society for services such as typing. In interviews with 20 court officials, it was confirmed that due to the fact that all the important work and investigations regarding orphans in adoptions are done by probation officers. They are overwhelmed by their heavy workload and adoption cases may take up to 2 years to be finalized. This undue delay can deter prospective adopters as people have many other life commitments and responsibilities.

The issue of adoption of double orphans is complicated by the fact that the child's guardian is required to consent to it and due to the issues of culture and customs, no guardian is ever eager to authorize the transfer of a child to another family. Consequently, only those double orphans who have been abandoned and are in institutions have been adopted by people outside their family. Adoption outside the family remains very important as some children have lost families and they require protection. In view of the challenges and bottlenecks around adoption which are linked to the process which is done by probation officers who are understaffed and already overwhelmed, adoptions outside the family have been limited with the majority of their being done within the family by relatives who are staying in other countries. What was encouraging was that these types of adoptions are easy and they are the ones that constitute the 15-20 adoptions that the probation officer and clerk of court confirmed are usually done per quarter.

In my study, I was also surprised by the lack of awareness of the adoption process by the lawyers interviewed, the magistrates and even the clerks of court. Interestingly when I read the section of the Children's Act which deals with the issue of adoption, the more I read it, the more confused I got and the process only began to make sense to me after I interviewed probation officers about the procedures and practice. Thus I pondered whether the people who adjudicate and the lawyers

who advise are clear about the process and if they also suffer from confusion similar to my own, then who may be considered a reliable source of information upon which families considering adoption proceedings might rely? In my view, these could be some of the bottlenecks around why this law is not used often by families. One lawyer who has been a regional magistrate, a practising lawyer and now working for civil society had this to say about adoption process and procedure:

> "The concept of adoption is a mystery – it is a mystery to lawyers, magistrates and anyone who want to use it for child protection. It seems as long as there is illiteracy and ignorance on the concept it will remain a white paper concept. Sadly, the Act seems to dwell on the formalities rather than clarifying issues. The big question is if it confuses the learned profession what about social services? This coupled with lack of resources on the part of social services could be the cause of why there are very few cases finalized by the courts on the subject.''

4.5.4 Are the Restrictions imposed by the Children's Act on Adoption Necessary?

The Children's Act prohibits adoption if the applicant is under the age of 25 years or is less than 21 years older than the minor unless there is consent of the Minister or when the adopted and adopter are related. This restriction might have been effective before the HIV and AIDS pandemic when adults had an average life expectancy of more that 39 years[11]. In light of HIV and AIDS crisis, this provision is a serious barrier to the protection of children and even though adoptions can be done with the consent of the Minister, the whole section may deter would-be adopters because they foresee possible delays in the process.

The reality on the ground is that people who are caring for orphans are aunts and uncles who do not meet the age requirements set by the law. With the exception of those children who are being looked after by grandparents, children are generally under the care of people who are less than 21 years older than they are. The provision appears to have been designed to prevent sexual abuse of the adopted child. The Section goes on to say that this age difference may be acceptable

[11] National HIV and Aids statistics 2009.

in cases where in the adopter and the adopted are of the same sex. In view of the way children are being abused by people of the same sex, however, this could lead to abuse as well.

The Children's Act, Section 59(2) prohibits a male from adopting a female minor unless the court is satisfied that there are special conditions which justify the arrangement. Women are not barred from adopting children of any sex and this raises a lot of questions. On the face of it, one could say that this could mean that the legislature believes that the role of women is to care for children and families and, based solely on that premise, they are capable of caring for children of either sex and are incapable of harming them. Whereas this provision could have been put in place in order to protect the girl child from sexual exploitation, it overlooks a common reality faced by double orphans. The fact is that it is their father's brother who will naturally assume the duty of protecting and caring for both male and female orphans, sometimes without any assistance from female relatives. Such men often put off marriage and raise double orphans single-handedly until they are older and mature enough to make caring for them less burdensome to a prospective wife. The situation wherein children are being looked after by uncles and aunts is made clear in the SOS Social Centre records. Out of the 1201 families that are caring for orphans in informal arrangements, 402 are being looked after by uncles and aunts even though the statistics do not show how many of these uncles are married and how many are not.

It will benefit child protection in Zimbabwe if some of these prohibitions are removed as with the level of awareness about adoption laws on the part of our lawyers, magistrates and probation officers that I noted during the research, people may be discouraged from seeking the consent of the Minister even when circumstances permit such an adoption.

4.6 The Guardianship of Double Orphans

This section will look at guardianship of double orphans that are committed to an institution on the basis that they require care and support and those who are staying in communities with families.

4.6.1 Guardianship of Orphans in Institutions

Double orphans who have been committed to institutions in terms of section 14 of the Children's Act as a result of the fact that they are in need of care are placed under the custody of the director of the institution that is supporting them whilst their guardianship is with the Director of Social Services.

4.6.2 Guardianship of Orphans outside Institutions

The appointment of the guardian for a double orphan which is governed by Section 9(1) of the Guardianship of Minors Act, state that the Children's Court may on application appoint 'a fit and proper person' to be the guardian of a minor who has no natural guardian or tutor testamentary. Section 9(2) provides that this application can be made by a relative who has custody of the minor or the probation officer. In terms of Section 9(3) this application should be published in the Government Gazette calling upon anyone with an interest in the matter to appear in court and this shall not be less than seven days or more than 30 days after the publication in the Government Gazette and the newspaper circulating in the area where the minor resides. If the above aspects have been met, Section 9 (4) of the Act authorizes the Court to make an inquiry into the issue of guardianship having regard to the interests of the minor and may appoint a person it thinks fit to be guardian of the minor. Once the court has made its inquiry the record of proceedings shall within a period of seven days be send before a High Court Judge for review in terms of Section 9(6) of the Guardianship of Minors Act.

4.6.3 The Assessment of Guardianship of Children in Institutions

The children who are sent to an institution for safety have their custody awarded to the director of the institution even though he/she is not given the guardianship roles. This means that if such a child has an emergency medical condition that may require a passport or authority to go outside the country, the institution has to engage the Director of Social Services to represent the minor in

his/her capacity as guardian. What is sad is that the Director of Social Services is based in Harare and yet there are children's homes situated all over the country. If a double orphan requires the assistance of his/her guardian, he/she has to travel to Harare from wherever he/she is in Zimbabwe in order to seek the authority of the Director. In interviews with SOS Village, it was noted that this arrangement has cost some orphans lifetime opportunities (e.g., in taking part in sporting events or securing scholarships) as it has taken between one to three months to secure the co-operation of the Director in order to obtain passports on an urgent basis. The case of *Dongo v The Registrar General and The Attorney General* clarified this position even though the Registrar General's office still does not follow the ruling (see above para 2.2.4).

4.6.4 The Interpretation of 'guardianship' in terms of Section 9 of the Guardianship of Minors Act

The practice of applying for guardianship in terms of Section 9 of the Guardianship of Minors Act has also made the process of ensuring that a child has a legal guardian problematic. In terms of the Act, there should be an application which should be supported by affidavits. Even though the Act does not state the number of affidavits required, the magistrate courts require that there be at least 6 affidavits according to the clerks of court version and 4 affidavits according to the magistrates and lawyer's version and half of these should be from the child's maternal relatives whilst the other half should be from his/her paternal side. The confusion between the requirements of the clerks of court which is the first port of call for receiving clients and the magistrates is clear testimony that the issue of requirement can confuse litigants and they quit the process even before starting it.

Even though the Guardianship of Minors Act requires that the application be handled by the court in the area where the minor resides, in practice, litigants go to the Clerk of the Magistrates' Court in Harare to apply for guardianship after being referred there by the Pension Office, the Registrar's Office and other service providers. When they go to court they expect to get the guardianship certificate in one day only to be told by the clerk of court that the litigants need to seek legal assistance from lawyers. Because the majority of people who make inquiries about these issues are old and poor and come from the rural areas, they prefer securing legal advice in

Harare where they may obtain the free legal services of JCT. Even though JCT's support may mean that they will not drown in the process, that decision has its own implications in terms of costs. They will still have to have affidavits signed by relatives and that these relatives are also required to come to court in order to confirm their affidavits as highlighted in the Sophia Zhou case (above para 1.1). The applicant will ordinarily have to meet the transport and other costs involved. Some litigants abandon the process at the enquiry stage. Others might afford the cost but there can be other social realities that can make the process difficult. For example, contacts between the child's paternal and maternal relatives could have terminated at a funeral and sometimes there will not be any contacts at all as in the Sophia Zhou story. If the applicant is from the paternal side, there could be issues of *lobola* (bride price) that was not paid by the deceased and his in-laws may refuse to cooperate until a time when the *lobola* has been paid. In cases of HIV and Aids, there could be a dispute between the maternal and paternal relatives about who was responsible for the death. If sour relations still subsist at the time the application for guardianship process commences, the custodian relative may abandon the process rather than have to re-initiate communication with relatives with whom there is still silent enmity. In the 133 client records that I had access to at JCT, 37 cases were just abandoned after initial enquiries were made and for some it was clear they could not locate or contact the child's maternal relatives.

In terms of the Guardianship of Minors Act, the applicant will have to advertise their notice to apply for guardianship in two newspapers, the Government Gazette and the newspaper circulating in the child's locality. The cost of advertising this notice in both papers is USD60. Paying this amount is usually out of the reach of people working in town and city centres, let alone relatives in the rural areas who often have other orphaned children to look after in addition to the child in question. The Clerk of Court also requires that the applicant pay stamp duty of USD5 as they lodge the application and others have struggled to raise even this money. About 80% of the 133 client records and clients who were interviewed at JCT received client assistance in the form of advertising costs. In an interview with the JCT officers, I enquired whether they could pay for clients' advertising costs, they indicated that being a donor funded organization, the availability of such money depends on whether or not the donor makes provision for it in JCT's budget. If the implementers of the law namely the magistrate, judges, the lawyers and

clerk of courts had an opportunity to review the implementation of the law they would be aware of the hardship caused to applicant's who are poor and, yet, are still forced to pay the expensive advertising costs. These professionals could recommend to the powers that be that something should be done to alleviate their plight. Ultimately, this would be in the best interest of all children, including double orphans.

What was even more surprising was that not all the 10 lawyers except for JCT officers, the three magistrates, and the judge of the family court were aware of the cost of advertising and when I told them, they questioned the rationale of putting the adverts in two newspapers. One magistrate after hearing the costs then promptly responded that there should be changes in the law and she said:

> "Looking at it analytically, and in real terms this advertising is not very important especially where the child's relatives are available and can come to court. Come to think of it, it all the cases of guardianship that I handled in my five years at this court, I have not met anyone who has objected to the application. It could be ideal to consider that advertising be done only when the child's relatives cannot be located."

In an interview with a family court judge, when she heard the cost of advertising she ended up saying maybe there is need to consider just advertising in one paper and not in the Government Gazette. These professionals are surprised that the cost is high but in all the time they have been dealing with them, they have been postponing or dismissing cases for lack of advertising without being aware of what it means in financial terms to pay for this especially when an applicant has other children to look after in addition to the double orphan.

Whilst the professionals I interviewed above were sympathetic with the plight of the applicant and were recommending that the issue of advertising be scrapped, I noted that there was a Zimbabwean (Bulawayo) High Court judgment of *Ex parte Ndhlovu HB-116-04* in which the applicant had applied for the sole guardianship of his sibling brother after the death of their parents. The Provincial Magistrate operating as a children's court dispensed with the requirement to advertise because of the poverty of the applicant. It was held by High Court Judge Ndou that the advertisement was mandatory under Section 9(3) of the Guardianship of Minors

Act and non-compliance with the Act frustrated or defeated the intention of the legislation. The judge highlighted that appointment of a guardian is a major change in the status of the minor and the intention of the legislature is to make sure that it is done in the best interest of the minor. The Judge held that the application should have been advertised despite the applicant's poverty.

These sentiments of the judge are a clear sign that there are judicial officers who are not aware of the social, economic and political realities of orphaned children. It was at this juncture that I also paused to ask myself if lawyers, the judiciary and the administrators ever reflect on how the laws are being implemented. I noted the need for laws to be supported by policies which could be used to monitor the bottlenecks, successes and challenges of implementing a particular piece of legislation which should be used to measure its applicability in relation to people that it is supposed to protect.

On the related issue of inheritance the Deputy Master of the High Court wondered why the issue of guardianship should be looked at separately from inheritance as the issues could be handled once and for all when all who have an interest in the matter come for the edict meeting which is attended usually by one's maternal and paternal relatives. This could be an ideal forum to deal with the guardianship issue as well. The Deputy Master had this to say:

> "I wonder who else will be interested in the guardianship of the children to the extent that they need notice through news papers. If these people exist, I wonder why they would not have participated in the edict meeting."

These sentiments were raised as a result of the cost that one meets when advertising the guardianship application yet these issues can be handled at one and the same time when the inheritance issues are being handled at court. This would have the positive effect of reducing the costs for the litigants. In view of the difficulties that litigants have in trying to meet advertising fees, the Master's suggestion appears to solve a very real problem faced by prospective guardians.

Another serious stumbling block in the application for guardianship process is the fact that it is quite a technical document which needs to be drafted by a lawyer. All lawyers and magistrates interviewed indicated that generally a layperson is incapable of making such an application. This means that those who cannot afford a lawyer or do not have access to free legal services are therefore barred from making such an application.

4.6.5 The Gap between the written Law and Practice

The Guardianship of Minors Act requires that the application for guardianship be handled within 7 to 30 days but in practice, the magistrate's court requires that the court handle the application within 30 working days after the advert in the Government Gazette and the newspapers circulating in the area. If this is looked at in practical terms, it means that this application cannot be concluded in one month but from a month and half onwards. In the story of Sophia Zhou, her application took close to 3 months. After the application has been handled by the magistrate court, the record has to be send to the High Court for review. In terms of the Guardianship of Minors Act this is supposed to be done within seven days. In practice the files can take a month or more to be reviewed. The Harare Civil magistrate's court is less than 500 meters from the High Court but files take a long time to be reviewed there. The Clerk of Court indicated that due to the inconveniences caused to the parents or guardians resulting from the delays from the High Court they were no longer sending the files for review. This does not make sense, as review by the High Court is a mandatory requirement in the application for guardianship process. When I interviewed the judge of the Family Court and when I questioned why the High Court has been taking a long time to review cases, she indicated that when the files are sent for review, they are bundled together with other cases that have to go on review to the High Court and this compromises the urgency of family law issues.

She however indicated that with effect from 2012, the Family Court has directed that family law cases should be separated and sent to the Family Court so it was her hope that this would ease the problem. The approach and response of the Clerk of Court that they no longer refer the files for review due to the delays begs the question of whether she is aware that a record can only be

finalised as a result of a review by the High Court in terms of Section 9(7) of the Guardianship of Minors Act.

4.6.6 The Guardianship of Children born out of wedlock

Another disturbing area in the application of the guardianship laws and procedures is in matters involving children born out of wedlock. In interviews with the clerk of court and magistrates, they indicated that in cases where the child is born out of wedlock and the child's birth certificate contains a blank space in relation to the father's particulars, the matter is referred to the High Court for guardianship, as the magistrate court has no jurisdiction. The Clerk of Court argued that the fact that the father's particulars are not filled in does not mean that he does not exist and, as such, the matter is referred to the High Court. In terms of Zimbabwean law, the guardian of a child born out of wedlock is the mother and this position is confirmed by the case of *Katedza v Chunga and Anor HH-50-03*. In the event of the mother dying the child will not have a guardian and hence Section 9 of the Guardianship of Minors Act applies. The stance being taken by the magistrate court clearly shows that the presiding officers are not aware of the laws and their referring the matter to the High Court is tantamount to denying litigants justice. In addition, the High Court is very intimidating, too formal, and expensive for most applicants. In interviews with the judges on this issue, they were surprised by the fact that the magistrates were failing to apply a very clear principle of law.

4.7 Lack of Knowledge of the General Law

One of the things that became glaring as I carried out the research was the level of people's awareness on the general laws of adoption and guardianship. Throughout the interaction that I had with government departments, NGO officials and communities, it became apparent that people do not know our laws.

In the interviews that I had with court officials (i.e., 10 lawyers, 3 magistrates, 3 Clerks of Court and 2 probation officers), it was evident that those in the justice system were clear about the laws

of guardianship save for the area of guardianship of children born out of wedlock where there was confusion at the Magistrates Court. The two probation officers were not clear about the laws of guardianship and what was surprising was that they thought that they did not have any role to play in guardianship yet the Guardianship of Minors Act is clear and, in view of the key role they are supposed to play in the implementation of this law, this position is disturbing.

The situation was made even worse when I discovered that the only piece of legislation that they had on the topic under discussion was the repealed Child Protection and Adoption Act. This seriously compromised their understanding of the laws on the subject. When it comes to the laws of adoption, the probation officers seemed to be on the correct track; the magistrates and lawyers simply said that these matters are usually handled by probation officers and hence referred these matters to them. The legal profession's knowledge of the subject of adoption has an impact on how conversant members of the public are about the same law. One lawyer interviewed referred the law of adoption, as *"that law is a mystery to all the players."* In interviews and focus groups discussions with members, partners and volunteers of NGOs, there was generally no knowledge of the general laws. The table below shows the extent of knowledge of the laws of adoption and guardianship held by people other than those within the justice system.

Table 2: Extent of knowledge of laws about adoption and guardianship held by people outside the justice system

RESPONDENTS	NUMBER	STATUS OF LEGAL KNOWLEDGE
NGOs and Community Based organisations	10	Only 3 of these organisations had any knowledge and they had strong legal backgrounds and concentrated on legal work.
Client interviews and records (JCT)	133	All completely lacked knowledge and, therefore, had approached JCT for support.
Community members	30	Had no idea of the laws.
Children	11	Had no idea of the laws.
Focus group discussion	6 with an average of 20 people	Only one group containing 6 JCT paralegals had any appreciation of the law.

Of all the interviews carried out with NGO officials, only three legal organizations appreciated the laws as shown in the table above. What was sad was that even children had not heard about these laws. In one meeting at Dzivarasekwa High 2, they invited JCT to come and educate the children and teachers on the subjects of guardianship and adoption. An official from SOS when being interviewed had this to say about the legal issues for children:

> "Why is it that legal issues remain a preserve for lawyers and those who are rich who can afford such services. Can't legal issues be publicized the way the people who do voter education come to sensitize about voting?"

The fact that those in civil society who usually disseminate human rights information do not know the laws affects the level of awareness on these issues. In addition to the lack of knowledge on the laws of adoption and guardianship, the other issue that stood out was that there is generally confusion about the differences between custody, adoption and guardianship. The groups in the table were also not clear about these differences. Those who were told to apply for guardianship became upset believing that they did not have to do so since they had had custody of the relevant child/children for so many years. The majority of the respondents in the above table save for the ones in the legal organisations, assumed that they were already guardians of children because they were the children's custodians; as a result they had not yet applied to regularise the process or had taken a long time to start doing so. In some of the interviews with the communities, it was sad to learn that they were not aware that those children whose parents were working could have pension benefits which needed to be claimed.

The other reason why communities failed to differentiate the terms is because the cultural practice of *sarapavana* gives the person so appointed both roles and this was clear when I observed the ceremony. In view of the HIV/AIDS pandemic when one takes over double orphans they will end up being ones children permanently as in most cases there would be no other relative to take them save for the parent so appointed. In addition, what has emerged is that they will take the parents home as permanent home even when they are grownups they will always treat the place as their own.

4.8 Lack of Accessibility to the Courts and Legal Services

The issue of accessibility of the courts is very critical in guardianship and adoption. It is generally believed that the magistrate courts in Zimbabwe are very accessible as they are found in every province and if one takes this position one would say that the children's courts used to apply for adoption and guardianship are closer to the people. The question that should be looked at in terms of accessibility is to ascertain how good the transport network is to access the provincial courts and for rural folks, can they afford the transport to go to the courts. The situation of guardianship and adoption is compromised in terms of accessibility in that even where one is close to the magistrates' court the application for guardianship is a technical one which requires a lawyer and besides those offering free legal services, lawyers are beyond the reach of many.

The other option of free legal services is the Legal Resources Foundation which is at community level but the challenge is that at that level they have paralegals who besides not having right of audience in court, lacks the skill to prepare such an application. In the case of Justice for Children, their offices are in Harare, Bulawayo and Mutare thus they do not reach other areas. It is as a result of this that some people who come from Masvingo or Gokwe have their matters handled in Harare because they are seeking free legal service to avoid drowning in the system

In issues of adoption the complexity could be that even when there is a nearby magistrate court at community level, there could be a challenge on the accessibility of the probation officer as sometimes they are far from the people. Looking at the lack of knowledge on the issues of adoption by the learned people who were interviewed there is need for substantial support from a probation officer in handling adoption matters.

4.9 National Commitments and Policies

Zimbabwe has three main national policies on the protection and care of children and these are the National Orphan Care Policy, The National Aids Policy and the National Plan of Action for

Orphans and Vulnerable Children. These policies were developed through broad-based consultations reflecting Zimbabwe's strengths and weakness and through collaboration between Government and civil society. Zimbabwe's National Orphan Care Policy identifies opportunities to provide care and support for vulnerable children that are based on the country's laws, the cultural tradition of caring and the collaborative approach which exists between the Government and civic society. The partners collaborate and network to monitor the situation of children, advocate on their behalf and respond to their needs through child protection committees which were supposed to act at the level of the village. It recognizes the traditional leader’s role in the case of orphans and the support of their programs such as the Zunde Ramambo/ insimu yeNkosi.

Another key policy is the National Plan of Action for Orphans and Vulnerable Children (NAP) whose vision under its phase 1 was to reach out to all orphans and vulnerable children in Zimbabwe with basic services that will possibly impact on their lives. It sought by December 2010 to develop a national institutional capacity to identify all orphans and vulnerable children in the country.

Whereas the national policies show the government commitment to child protection, these have remained on paper with very few of their aspects being implemented due to the fact that they have not been resourced by Government to enable partners to implement them. An example of a good policy that has suffered as a result of lack of funding is the National Plan for Orphans and Vulnerable Children which started operating in 2008 after being resourced by international donors. Through the funding various programs were initiated for child protection but these came to a standstill in December 2010 when the donor funding was stopped. Such arrangements have had a serious negative impact on child protection.

4.10 The ways in which Communities and Organisations are using their common sense to respond to the challenges of the General Law

While the demand for protection for orphans and double orphans continues to grow in the face of the government’s failure to improve the implementation of the general law of adoption and

guardianship, several institutions have developed common-sense driven administrative approaches which are designed to help these affected children and their care givers.

For example, while schools used to demand proof of guardianship from an adult wishing to enrol an orphan, all that is now required are the parents' death certificates and the caregiver's particulars.

In an interview with a Guidance and Counselling teacher at Dzivarasekwa, she indicated that now they are even enrolling orphans without birth certificates as long as their caregivers come to explain the situation and bring the death certificates of parents.

Besides schools, institutions that provide support for orphaned children, such as Basic Education Assistance Module (BEAM) Capernaum Trust, now simply accept the parents' death certificates as proof of orphanhood and the guardian's credentials in order to assist children. They noted that if they insist on a guardianship certificate, the children would get no support at all in view of the huge difficulties in trying to obtain it. Organisations like SOS Social Centre (which provide support to orphaned children who are staying with care givers in their communities) have even gone further and said that in cases where a caregiver does not have the child's parent's death certificate, they will even accept an affidavit from the police explaining their circumstances.

Hospitals and clinics that are giving antiretroviral drugs to children for free have also become flexible. They are prepared to accept the child's parents death certificate and the guardian's credentials in order to enrol the child for treatment. In some cases, if the child is referred to them by an organization they will use the information from the referring institution as proof of orphan hood.

Private companies have also liberalized the process of disbursing the children's late parents' pensions and benefits in that they require relatives from the children's maternal and paternal side who assist them in appointing a 'guardian' who will receive the children's benefits.

The problem however with most of these initiatives is that they do not have any follow-up mechanisms to see if the children are indeed benefiting from the assistance they are meant to be receiving. In interviews with personnel at Altfin Insurance Company, I discovered that even though they have no clear follow up mechanism, they do have an open door policy so that children who feel that they are being deprived of their benefits are encouraged to report the issue to them so that other arrangements can be put in place to protect their interests and these include changing the guardian or giving the benefits to the children directly when they attain the legal status to receive them.

4.11 Concerns about Child Protection in light of the Orphan Crisis

In all the interviews that I carried with the court officials I questioned why they enforced some of the more rigorous (yet apparently unnecessary) procedures such as the requirement to bring the maternal and paternal relatives to court to confirm their supporting affidavits. They said that during their being cross-examined in court it could be discovered whether they were genuine or non-relatives simply selected by unscrupulous guardians who were interested in trafficking the orphans or collecting their pension benefits and then dumping them.

As for the Registrar General Office, its insistence on a guardianship certificate before granting a guardian a passport on behalf of his/her ward seems ridiculous. Its argument is that its staff fear that the child may be trafficked. The fact is that the Registrar's Office has the national database of all the people who are registered. Therefore, instead of asking caregivers to go through the rigorous process of applying for guardianship before giving an orphan a passport, they should use this database to trace if the person who is claiming to be the guardian of a child and acquiring a passport on his/her behalf, is indeed a relative through checking the child's family tree based on their records. This could even help ensuring that the right people acquire passports for children.

I also checked with these Courts, Social Services and The Registrar's office to see if after they have issued a guardianship certificate, adoption papers and passports they follow up to see if the

relevant children are in safe hands. Not one of the offices carry out that role. They only come into contact with that child if a problem occurs and the authorities are approached or hear of a particular problem. The child protection issues in my view could be secured if administrative offices like these develop follow-up mechanisms to guarantee the security of children.

Looking at the challenges that guardians and would be adopters of children in Zimbabwe face, we have noted instances where some cases are abandoned or pension benefits are lying idle because litigants have failed to meet the theoretical requirements or what the courts practice demand. This has created thousands of families (for example the SOS Social Centre Programme which has 1201 child care models of families in communities) which are not regulated by the law. Chiedza Childcare Centre Programme has 1 556 children who are being cared for in the community but without legal arrangement. All these are signs and symptoms of a country where child protection is not provided in line with human rights ideals of the best interest of the child, non-discrimination, life, survival and development of children. One can say double orphans in Zimbabwe are discriminated against as they are not protected by the laws of adoption and guardianship and this is basically not in the interest of the children. Using the words of one principal lawyer from the Legal Aid Directorate:

> "(The) lack of (a) guardian places a double orphan under legal disability which can only be lifted upon a minor attaining majority status at 18 years."

Through no fault of their own double orphans find themselves legally disabled as a result of the laws of adoption and guardianship being so out of sync with their lived realities and those of their care givers, if any. It is vital that the state makes urgent interventions to improve this unacceptable situation in order to ensure that all children are treated equally, irrespective of whether they are orphans or not.

CHAPTER 5

5.0 DISCUSSION AND RECOMMENDATIONS

5.1. What is the Real Problem?

Having started with a topic entitled, ‘Guardianship and adoption: What shall we do with double orphans?’, I changed the title of my to the current one after having started my research and realizing that the problem is not simply about applying for guardianship or adoption when we are looking at Zimbabwe’s orphan crisis. As the research unfolded, I noted that, although the number of the orphans has increased (most of them being cared for by families within their communities), relatively few of their carers apply to adopt them or become their guardians according to the general law. This prompted me to investigate what communities are doing to ensure that their orphans have guardians or adoptive parents. Consequently, my topic had to change to the current one but my assumptions remained the same and held up. Throughout the research, I realized that when we are looking at the solutions to orphans especially in the area of guardianship, the problem that emerges lies with the general law which is found to be divorced from the social, economic realities of Africans and the lack of child protection mechanisms. I am however glad to note that some of my informants have also noted the problems and hence would be prepared to work with me to advocate for the review of a general law of adoption and guardianship that is in line with the lived realities of families so that they would be protected by it.

Findings on the ground have revealed that the general law of adoption and guardianship as it currently stands was initially developed for the colonialists who were non-Africans and whose lifestyles were different from the African way of life. When the Guardianship of Minors Act and the Children’s Act were initially introduced they contained restrictive clauses which prevented them from applying to Africans. This meant that while non-Africans were subject to these pieces of legislation, Zimbabweans were using their African Customary laws to govern issues of adoption and guardianship. The general law started to apply to Africans when these restrictive

clauses were repealed but no effort was made to ensure that the laws were aligned with or linked to the way in which Africans had already been dealing and, in all good faith, were continuing to deal with these issues. Families and communities who now find themselves having to comply with the general law find it out of touch with their realities, rigorous and very expensive. Different officials were of the view that the process of adoption and guardianship need to be linked to all the other accepted social arrangements in the community because if they are divorced from them communities will shun them.

5.2. The issue of the misunderstanding of the law, its interpretation and practices by the Courts

Linked to the issue of the law (that is divorced from the realities of the families and communities), there has been a problem in the interpretation of the law of guardianship whilst laws of adoption and their procedures are not clearly understood by the lawyers, magistrates and worse the litigants. As l was carrying out the research, l noted that at the courts there were different versions of the requirements of an application for guardianship; for example, the Clerk of Court (who is usually a litigant's first port of call) was of the view that 6 affidavits are needed to support the application whilst the lawyers and the magistrates said they should be four affidavits. The Guardianship of Minors Act however does not state the number of affidavits required. When it comes to the time frame for the application to be handled, the Guardianship of Minors Act says it should be done within 7 to 30 days after publishing a notice in the paper, whilst the Magistrates Court says the application for guardianship should be heard in 30 working days after the notice in the paper. In terms of the Guardianship of Minors Act, probation officers or relatives staying with an orphan should apply for their guardianship. It was sad that the probation officers interviewed were not aware of their role and they did not even have a copy of the Guardianship of Minors Act. The Magistrates and the Clerk of Court were not clear on the issue of guardianship of children born out of wedlock and whose birth certificates did not have the details of their fathers. They took the approach that absence of these details does not mean that the child has no father and that they had to refer such cases to the High Court because, they believe, the Magistrates Court does not have jurisdiction to deal with them.

On the issue of adoption, the Magistrates, the Clerks of Court and lawyers were not very clear about the procedures and requirements. Most interviews ended with legal personnel saying cases are mostly handled by probation officers. It turned out that these officers have a deep insight into the procedure as they are the ones who do the investigations and the magistrate will simply confirm their findings and order. The questions that I began asking myself were: "How can Magistrates make orders that are meant to protect a child if they do not fully understand the procedure? How can they honestly and objectively verify and check whether the interests of the child have been protected if they rely solely on the probation officers?" The difficulties surrounding the laws of adoption are compounded by the fact that lawyers are not fully aware of these laws and the issues of checks and balances to ensure that the child is fully protected tend to be overlooked with probation officers having the final say in them.

The above state of affairs as regards understanding of the law, interpretation and court procedure is dangerous when dealing with a group that is generally vulnerable in the society that depends on adults for protection. The above issues can deter would-be applicants from using the justice system although it will seriously affect the child. There is therefore need for the training of officers of the courts on the various pieces of legislation and this could be supported by continuous legal education. The situation for the children of Zimbabwe is aggravated by the fact that there is no training on child law, which is offered to lawyers at law school.

5.3 Who bears the burden of all this?

The people who are affected by the misunderstanding of the law by the judicial officers, the problems of the interpretation of the law and the procedures are the caregivers who are looking after the orphans and the orphans themselves who are supposed to benefit from the protection. The situation is worse for those caregivers coming from poor families who cannot afford lawyers who will support them as they go through the process. My findings are that when applicants fail to fulfil the requirements of the general law they well resort to using informal arrangements with and between members of the community in which they and/or the child lives. It is against this background that some children have failed to claim their parent's pension especially those whose

parents were civil servants. Some children have therefore dropped out of school, as the guardians would have failed to raise their fees. Because the adoption process is long and cumbersome, some prospective adopters have ended up abandoning it. My findings are that there are more informal guardianship and adoption arrangements in the community and these can be risky to the child because there is no formal record of these arrangements and the children can face various forms of abuse, including sexual abuse and child trafficking.

5.4 Human Rights Implications

The status of the laws and procedures of adoption and guardianship as highlighted above have resulted in some prospective adopters and guardians abandoning the process or failing to initiate it. This, linked with problems of misunderstanding of the laws by court officials, has resulted in some litigants failing to use the justice system to protect children due to lack of correct information of the laws in question. The above state of affairs is in contravention of section 18(1) of the Constitution of Zimbabwe, which requires every person to be protected by the law, and that every public officer has a duty to observe and uphold the rule of law. The failure by the court officials to understand the laws and the procedures of guardianship and adoption has resulted in some families failing to use these laws for the protection of children thus failing to use the law to protect children. Article 21 of the Convention on the Rights of the Child calls upon the states that permit adoption to ensure that they shall be authorized by competent authorities who determine in accordance with applicable law and procedures on the basis of pertinent and reliable information. In view of the level of knowledge that our judicial officers and lawyers have about the procedures of adoption the question that arises are whether our officials are competent and whether they use reliable information especially when the findings of the research highlighted that Magistrates are not clear about the procedure and rely entirely on probation officers. In view of what the CRC and the Constitution of Zimbabwe say, our courts might be abusing rather than protecting the rights of children who are undergoing adoption or guardianship. This exposes the children and caregivers to danger. There is therefore need for the justice system to improve this state of affairs.

5.5 Recommendations

5.5.1 Introduction

In view of the findings, analysis and discussion the following practical solutions are being recommended to the government of Zimbabwe and the civic society. The solutions can be implemented some in the short term and others in the long term:

5.5.2 Short Term Recommendations

There is a need to train and sensitize court officials including probation officers on the current general law provisions that deal with adoption and guardianship and this will eliminate the problems of misunderstanding of the laws whilst helping to ensure that court practice is uniform. There is also need to train them on children's rights.

Consider linking guardianship process with the inheritance processes so that the litigants can manage the issue of costs. In an interview with the Master of the High Court he indicated that they use this approach where an estate has a will and this same approach could also be adopted where an estate has no will.

There is need to train and sensitize members of the community and civic society organisations on the importance of regularizing guardianship and adoption of children and the benefits to the child.

The Registrar General's office can help alleviate the problems of orphans who want to access the pension's benefits but have not yet been appointed a guardian or adoptive parent/s under the general law. The office can access its national database to link a child to its relatives and that information can be used to verify the details of prospective guardians/adoptive parents.

The concept of *sarapavanas* should be linked to the existing laws of guardianship and adoption in that what will have been agreed at family level on adoption, village heads can certify guardianship, and these processes should be the basis upon which a guardianship certificate can be based.

The Ministry of Justice and Parliamentary Affairs should develop a monitoring and evaluation system that determines whether or not the laws are being implemented and, if not, why not.

5.5.3 Long Term Solutions

To review the laws of adoption and guardianship so that they are in line with the socio economic realities of families. This will result in the elimination of situations wherein orphaned children are not being regulated by laws as this creates opportunity for abuse and violation of children's rights. Zimbabwe could consider following the approach in Uganda, which in terms of their Children's Act of 2000 anyone who looks after children in any social arrangements become a *de facto* guardian who has a duty to protect the child. The same Act introduced legal regulation in the area of upbringing of children. The Act has taken an integrated approach to customary practices through a variety of ways and with this approach any person who has custody of a child has a duty to protect the child from discrimination, violence, neglect and abuse.

A policy framework, which will guide their implementation, should support the amended laws of adoption and guardianship; it will also set periods for review of these laws with a view to strengthening them.

Zimbabwe should ensure that its new Constitution would have a section that protects children designed to eliminate some of the abuses to which they are exposed.

Zimbabwe should consider coming up with a Children's Act, which consolidates all laws of child protection (including adoption and guardianship) so as currently the issues are covered in different pieces of legislation.

Devise and implement a continuous education and training programme for court officials.

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