

**LEGALLY DEFINING PARENTAL ABANDONMENT
OF A CHILD: A COMPARISON BETWEEN SOUTH
AFRICAN AND CALIFORNIAN LAW**

BY

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DECLARATION

I, GERARD YOVAN VADIVALU, declare that

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DEDICATION

This dissertation is dedicated to my dear parents, Reuben and Sandra Vadivalu. You both are my eternal heroes, the best advisors and the greatest of role models. Thank you for your ceaseless love, care, support and encouragement, without which this academic journey would never have been possible. Like the wind behind a sailboat, you both have taken the utmost care in guiding me along this ocean of life. I am forever grateful. May the Almighty's Peace and Blessings be upon you both always.

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Om Sai Ram Om Nama Shivaya Om Shakthi Om

TABLE OF CONTENTS

Title Page	i
Declaration	ii
Dedication	iii
Acknowledgements	iv
Table of Contents	v
Abstract	viii
List of Abbreviations and Acronyms	ix
Chapter 1: Introduction	1
1.1. Introduction	1
1.2. Key Questions	4
1.3. Motivation for the Study	5
1.4. Aims and Objectives	6
1.5. Methodology	6
1.6. Overview of Chapters	8
Chapter 2: Law Pertaining to Parental Abandonment in South Africa	10
2.1. Introduction	10

2.2. Tracing the Development of Relevant Statutory Provisions	11
2.3. Substantive South African Statutory Provisions on Parental Abandonment	12
2.4. Statutory Definition and Regulations on Parental Abandonment	15
2.5. Judicial Interpretation of Section 150(1)(a) of the Children’s Act 38 of 2005 (Parental Abandonment Provision)	18
2.6. Conclusion	20

Chapter 3: Law Pertaining to Parental Abandonment in the State of California

3.1. Introduction	22
3.2. Structure of the US Legal System as compared with South Africa ...	24
3.3. Brief Overview of the Different Facets of Child Abandonment Law in the US	26
3.4. Defining Child Abandonment	29
3.5. Conclusion	41

Chapter 4: Standard of Proof and Other Aspects of Abandonment in California and the United States of America.....

4.1. Introduction	44
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4.2. Termination of Parental Rights and the Standard of Proof	44
4.3. Incarceration and Deportation of Parents	48
4.4. Infant Abandonment and Safe Haven Laws	55
4.5. The Crime of Child Abandonment	58
4.6. Conclusion	60
Chapter 5: Conclusion and Recommendations	63
5.1. Main Findings from the Comparative Analysis.....	63
5.2. Recommendations	74
Bibliography	82

ABSTRACT

This dissertation evaluates some selected legal provisions (local, international and foreign) relevant to the social ill of parental abandonment of children. Parental abandonment tends to have serious consequences and is classifiable as a severe form of child neglect and abuse, whereby parents withhold proper care and protection from their child/ren. International law is committed to preserving the parent-child relationship. On a national level, these international law provisions have been given effect to by the South African Constitution. The South African provisions on parental abandonment are contained in relevant parts of the Children's Act 38 of 2005. In particular, section 150(1)(a) accompanied by section 1 of the Children's Act expressly addresses parental abandonment of children. In this dissertation these provisions are evaluated and shown to be inadequate.

As a means of providing a comparative analysis and for purposes of recommending reforms of the South African law applicable to parental abandonment of children, this dissertation explores and discusses Californian statutory law, judicial decisions and the writings of authoritative commentators. Reference is also made to the laws of some of the other states of the US. Each of the 50 states that make up the US has enacted laws applicable to abandonment. It is shown that US law covering challenges raised by parental abandonment is far more comprehensive than South African law.

In the final part of the dissertation, proposals are made for improvements to the South African law covering parental abandonment. These proposals are offered in the form of additional wording which could be added to the Children's Act. Explanations and commentary is included with the recommended additional wording.

LIST OF ABBREVIATIONS AND ACRONYMS

ACRWC: African Charter on the Rights and Welfare of the Child, 1990.

Anon: Anonymous.

ASFA: Adoption and Safe Families Act, 1997.

Constitution: Constitution, Act 108 of 1996.

Children's Act: Children's Act 38 of 2005.

CRC: Convention on the Rights of the Child, 1989.

NM Case: *NM v Presiding Officer of Children's Court, Krugersdorp* 2013 (4) SA 379

SS Case: *SS v Presiding Officer, Children's Court, Krugersdorp* 2012 (6) SA 45

United Nations Guidelines on Alternative Care: United Nations Guidelines for the Alternative Care of Children, 15 June 2009.

United States / USA / US: United States of America.

CHAPTER 1: INTRODUCTION

1.1. Introduction

South African child law has, in the recent past, undergone profound transformation. This is largely due to the constitutionalisation of children's rights,¹ the ratification of international child instruments² and the promulgation of a comprehensive body of rules in the form of national legislation.³ Although the Judiciary has, through various judgments, given meaning and content to the constitutional rights of children,⁴ many important aspects still require clarification. This dissertation aims primarily to explore the issue of parental abandonment of children and the legal framework currently applicable to address this issue.

¹ Section 28 of the Constitution, Act 108 of 1996 (hereinafter referred to as the „Constitution“), commonly referred to as the “children's rights clause”, enshrines numerous justiciable rights specifically for children. Professor KM Norrie describes the South African interim and final Constitution as one of the world's great declarations of the rights of mankind (K M Norrie “The Children's Act in Scotland, England and Australia: Lessons for South Africa in Rhetoric and Reality” (119) *SALJ* (2002) 623 at 623).

² South Africa ratified the United Nations Convention on the Rights of the Child, 1989 (CRC) on 16th June 1995, and the African Charter on the Rights and Welfare of the Child, 1990 (ACRWC) on 7th January 2000. The ratification of an international instrument by a state is not an inconsequential act. As, in *Government of the Republic of South Africa and Others v Grootboom and Others* 2001(1) SA 46 (CC) at para 75, it was indicated that South Africa's ratification of the CRC resulted in the imposition of obligations upon the state to ensure the proper protection of children.

³ Relevant legislation includes the Children's Act 38 of 2005 (hereafter “Children's Act”), the Child Justice Act 75 of 2008, and the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 and Regulations thereto.

⁴ For example, the Constitutional Court, in *Government of the Republic of South Africa and Others v Grootboom and Others* 2001(1) SA 46 (CC) at para 77, interpreted the provisions of section 28(1) of the Final Constitution to mean that “the obligation to provide shelter in ss 1(c) is imposed primarily on the parents or family and only alternatively on the State”. For more cases see A Skelton “Constitutional Protection of Children's Rights” in T Boezaart, ed., *Child Law in South Africa* (Claremont: Juta, 2009) 265 at 275 – 289.

Parental abandonment (also referred to as “child abandonment”) is a severe form of child neglect and abuse, occurring in circumstances where parents withhold care from their children, which in many cases results in children being left alone to struggle for their own survival.⁵ Parental abandonment is of a universal nature and occurs globally.⁶ Within South Africa, an alarmingly high number of children are abandoned.⁷ Unemployment, poverty, unwanted pregnancies, HIV/Aids and ignorance of the remedial mechanisms available to assist parents are considered to be some of the factors that, to varying degrees, contribute to its occurrence.⁸ Labour migration, in which adults live away from home for prolonged periods of time to earn an income, is another contributory factor.⁹

⁵ K Gledenhuis „Child abuse prevention: Abandoned babies and children” (2012) *Servamus* 1 September 2012, page 30.

⁶ K Whetten et al “More Than the Loss of a Parent: Potentially Traumatic Events Among Orphaned and Abandoned Children” (24) 2 *Journal of Traumatic Stress* (2011) 174 at 174; H A Megahead “Family Foster Care for Abandoned Children in Egypt” (35) 2 *Journal of Sociology & Social Welfare* (2008) 29 at 31; K O’Donovan ““Real” Mothers for Abandoned Children” (36) 2 *Law & Society Review* (2002) 347 at 348; L Sherr et al “Abandoned Babies in the UK – A Review Utilizing Media Reports” (35) 3 *Child: Care, Health and Development* (2009) 419 at 420.

⁷ For instance, the National Council for Child and Family Welfare is reported to have indicated that approximately 10 025 children in South Africa are abandoned monthly (See C Lewis „Child abandonment cases on rise” (2004) *Sowetan* 23 July 2004, page 6). A more recent report indicates that in the provincial area of the Eastern Cape 10 236 children have been found to be neglected, abandoned, abused or orphaned (See K Ndabeni „Dumping of kids hits all-time high at Eastern Cape’s homes from hell” (2009) *The Herald* 7 December 2009, page 1). Further, another news report indicates that hundreds of babies are dumped every month in the Johannesburg area (See Anon „We need to change” (2012) *The Star* 3 May 2012, page 12).

⁸ K Geldenhuis (2012) op cit note 5. See also C Lewis (2004) op cit note 7. There are also reports that parents abandon their child once they receive their child’s child support grant from the state (See G Wilson „Social workers, cops foresee rise in child abandonment” (2008) *The Herald* 11 December 2008, page 7).

⁹ L Richter & R Morrell *BABA: Men and Fatherhood in South Africa* (Cape Town: HSRC Press, 2006) 27.

The law, however, has not remained silent. Children's rights activists and law-makers have jointly taken steps in addressing the issue. On an international level, there are a number of provisions in the United Nations Convention on the Rights of the Child, 1989 (CRC) and the African Charter on the Rights and Welfare of the Child, 1990 (ACRWC) which provide children with the right and entitlement to parental care.¹⁰ The need for children to receive their upbringing and development within the family unit is favoured and given particular importance.¹¹ Furthermore, the United Nations Guidelines for the Alternative Care Of Children¹² emphatically states that the family must be the natural environment to provide for the growth, well-being and protection of children.¹³ The Guidelines are aimed at enhancing the implementation of the provisions of the CRC and other international instruments relevant to the protection and well-being of children deprived of parental care or at risk of being so.¹⁴

Within South Africa, national law has been promulgated to give effect to the abovementioned provisions. Section 28(1)(b) of the Constitution gives every child the right to family or parental care. Where such care is not forthcoming, section 28(1)(b) provides children with the right to appropriate alternative care.¹⁵ As is common in

¹⁰ In respect of the ACRWC, article 19(1) provides that "Every child shall be entitled to the enjoyment of parental care and protection and shall, whenever possible, have the right to reside with his or her parents". Furthermore, article 20(1) indicates that it is parents who have the primary responsibility for the upbringing and development of the child. In respect of the CRC, article 7(1) indicates that a child shall have the right to know and be cared for by his or her parents. In addition, article 18(1) indicates that parents have the primary responsibility for the upbringing and development of the child.

¹¹ Article 18(1) of the ACRWC states that "the family shall be the natural unit and basis of society". The preamble to the CRC indicates that for a full and harmonious development of a child's personality, he or she "should grow up in a family environment, in an atmosphere of happiness, love and understanding".

¹² United Nations Guidelines for the Alternative Care of Children, 15 June 2009 (referred to in this chapter as the „United Nations Guidelines on Alternative Care“).

¹³ Ibid at article 3.

¹⁴ Ibid at article 1.

¹⁵ The state then bears the responsibility to provide alternative care for the child (see M Bekink "Child Divorce": A Break From Parental Responsibilities And Rights Due To The

many jurisdictions, the South African Constitution makes general provision for various human rights, each of which is then expounded upon and contained in comprehensive pieces of national legislation. The issue of parental abandonment of children is dealt with in Chapter 9 of the Children's Act.¹⁶ Section 150(1)(a) of the Children's Act indicates that a child is in need of care and protection where the child "has been abandoned or orphaned and is without any visible means of support". Section 1 does provide a definition, albeit deficient in certain respects, for the word "abandoned", and the Regulations to the Act¹⁷ seek to provide some further guidance to role-players tasked with implementing the Children's Act and addressing parental abandonment.

As will be shown in this dissertation, the Children's Act, in its current form, lacks sufficient detail and clarity.¹⁸ In abandonment cases, the law is required to adequately provide for a child's right to parental care, on the one hand, and to alternative care, on the other, when the former is not forthcoming. It must, in addition, protect and respect the rights of parents as primary caregivers of their children. To achieve an ideal balance of the rights of parents to care, protect and raise their children, against the rights of children to adequate parental care and protection, detailed and clear legislation is a fundamental necessity. Clarity of legislation receives even greater importance when the law takes a multi-disciplinary approach, as is the position in abandonment cases, which involve professionals from both legal and non-legal disciplines.¹⁹

1.2. Key Questions

This dissertation seeks to answer the following key questions:

Traditional Socio-Cultural Practices And Beliefs Of The Parents" (15) 1 *PER / PELJ* (2012) 178 at 188); Also article 5 of the United Nations Guidelines on Alternative Care.

¹⁶ Chapter 9 deals with children who are "in need of care and protection".

¹⁷ Regulation 56 of General Regulations Regarding Children (Department of Social Development) 2010.

¹⁸ This will be elaborated upon in Chapter 2.

¹⁹ For instance, in parental abandonment cases social workers and Child Welfare Agencies have a crucial role to play in protecting children.

- What is the South African legal framework that addresses parental abandonment of children?
- From a legal perspective, how has the state of California (USA) addressed the issue of parental abandonment of children?
- How does South Africa's approach compare with the approaches taken in the California?
- Can South Africa's approach be improved and, if so, how?

1.3. Motivation for the Study

This study provides a critical analysis of relevant provisions of the Children's Act 38 of 2005 applicable to the parental abandonment of children. There is a need to determine whether an appropriate balance is achieved by these legislative provisions in effectively ensuring, on the one hand, a child's right to parental care²⁰ and, on the other hand, a child's right to appropriate alternative care²¹ when the former is not forthcoming. A literature review has revealed that very little research has been undertaken on the South African statutory provisions applicable to children abandoned by their parents. Furthermore, very little case law is available on the topic. Much of this scarcity can be attributed to the fact that the Children's Act is still considered a relatively recent piece of national legislation.²²

There is a need to improve the care and protection currently extended by the law to children abandoned by their parents. This is because parental abandonment has serious consequences for abandoned children. Such children are robbed of parental love, care, support and the familial environment required for their proper growth and development. Furthermore, if the legal threshold to prove that a child has been abandoned by his/her parents is too low then there arises the danger of a child being too easily removed from his/her parents, who are primarily tasked to care for the child. With too low a threshold parents are at risk of losing their children, even in

²⁰ Section 28(1)(b) of the Constitution.

²¹ Ibid.

²² It was only in 2010 that all provisions of the Children's Act became fully operational.

circumstances where the reasons for the inadequate care are beyond their control.²³ Alternatively, should the requirements to prove parental abandonment be too high, children will again become vulnerable as they may not be found to be abandoned in circumstances where they ought to. Consequently, such children may, for instance, not be placed in foster care nor may they receive a foster care grant. An analysis of the Children's Act, therefore, is important in assessing its effectiveness in protecting children in parental abandonment cases.

Furthermore, aside from facilitating improved protection for children, the study seeks to add to the existing body of knowledge available on the topic of appropriate law governing parental abandonment.

1.4. Aims and Objectives

Through an analysis of relevant South African legal provisions on parental abandonment of children, the study aims to determine whether these provisions adequately address this issue. Specifically, the study strives to determine whether or not the Children's Act is suitably worded to provide sufficiently for the care and protection of parentally abandoned children.

The Objectives of the study are:

- To understand the legal approaches taken by South Africa and the state of California (USA) in addressing the issue of parental abandonment of children.
- To comparatively analyse the different approaches.
- To determine whether or not the South African approach can be improved.

1.5. Methodology

This dissertation is a print based study, involving a description and an in-depth analysis of both primary and secondary sources. International instruments and guidelines, national legislation, policy documents and court cases serve as primary sources. The writings of analytical commentators and newspaper articles are utilized

²³ For instance, in cases of poverty.

as secondary sources of information. As this study explores in detail the approaches taken in California, the abovementioned primary and secondary sources were drawn from both South African and American law. All 50 states that make up the United States of America contain legal provisions for the termination of parental rights on the ground of parental abandonment of a child.²⁴ The law generated in the US on child abandonment is, therefore, vast. The US state of California has been selected for this study as it is particularly well-developed in legislation and case interpretations and enables the researcher to keep the scope of the dissertation manageable. There will, however, be some reference to other US states and to legislation applicable to all 50 states (that is, federal law).

The theoretical framework forming the context within which the study is conducted is, more correctly, a conceptual framework. Relevant provisions from the CRC, United Nations Guidelines on Alternative Care, ACRWC and the South African Constitution form this conceptual framework which is used to test the adequacy of current South African law. In respect of the CRC, article 7(1) states *inter alia* that a child shall have “the right to know and be cared for by his or her parents”. In addition, article 18(1) indicates that parents have the primary responsibility for the upbringing and development of the child. In respect of the ACRWC, article 19(1) provides that “every child shall be entitled to the enjoyment of parental care and protection and shall, whenever possible, have the right to reside with his or her parents”. Article 20(1) indicates that parents have the primary responsibility for the upbringing and development of the child. Furthermore, the United Nations Guidelines on Alternative Care, in article 3, indicates that the family is the natural environment which provides for the growth, well-being and protection of children. Where, for instance, the removal of a child from family care is contemplated due to parental abandonment, article 13 of the United Nations Guidelines on Alternative Care becomes essential to consider. Article 13 provides that the “removal of a child from the care of the family should be seen as a measure of last resort and should be, whenever possible, temporary and for the shortest possible duration”. Finally, section 28(1)(b) of the Constitution gives every child the right “to family care or parental care, or to appropriate alternative care when removed from the family environment”.

²⁴ W Vesneski “State Law and the Termination of Parental Rights” (49) 2 *Family Court Review* (2011) 364 at 368).

In addition, the analysis of Californian law is intended to enable the researcher to critically compare the approaches taken by California and South Africa in the provision of care and protection to parentally abandoned children. Such comparison is intended to allow for the formulation of a set of recommendations to further improve the South African legal framework in respect of abandoned children. It is not the intention of the researcher to advocate for a harmonisation of the substantive laws of the USA, primarily California, and South Africa. Instead, the study provides a comparison which, according to Sutherland, is a “benign process” which entails looking at how a different legal system addresses a particular issue and thereafter considering whether the approaches taken could work better in one’s own jurisdiction.²⁵ It is conceded that moral, social, cultural, political and religious beliefs of societies vary according to each society’s history and development and, consequently, this might lead one to conclude that states cannot be compared meaningfully with one another.²⁶ However, Sutherland correctly points out that particularly problems relating to family life “arise out of the nature of human relationships, not out of nationality, domicile or place of residence”.²⁷ Therefore, Californian law is considered with a view to add value to South Africa’s legal framework. By analysing the approaches taken in California the researcher intends to formulate a set of recommendations in the form of draft legislation aimed at improving the protection afforded by the Children’s Act to children abandoned by their parents in South Africa.

1.6. Overview of Subsequent Chapters

This section provides readers with a brief overview of the content of subsequent chapters. It is intended to serve as an indication of the structure of the dissertation, thus, enabling readers to easily follow its progression.

²⁵ E E Sutherland “Imperatives and Challenges in Child and Family Law” in E E Sutherland, ed., *The Future of Child and Family Law: International Predictions* (2012) 1 at 2.

²⁶ Ibid at 1.

²⁷ Ibid at 1-2.

Chapter Two explores, in greater detail, South Africa's approach to the issue of parental abandonment of children. The relevant provisions of the Children's Act 38 of 2005, accompanying regulations, and other relevant legal provisions will be analysed to determine how and whether the current legal framework adequately addresses this issue. Chapter Three presents an analysis of the legal approach to parental abandonment taken in the state of California in the United States of America, with specific focus on the definition of abandonment and the applicable elements. The focus of this chapter is mainly on the relevant provisions of the Californian Family Code which has proved to be a useful example of abandonment legislation. There is also an abundance of Californian case law on topic, as the courts have played a critical role in analysing and interpreting the relevant statutory provisions. Chapter Four considers the standard of proof in abandonment cases in the USA, with reference to California, especially in cases involving petitions for the termination of parental rights. As will be discussed, parental incarceration and deportation are factors which impact significantly on abandonment. In addition, Californian Safe Haven laws, which legalise infant abandonment in certain circumstances, will be discussed. Chapter Five is the concluding chapter which summarises the main findings of the study. It also provides a set of recommendations for improved legislation within South Africa. As part of the recommendations, a draft proposal of improved legislation is included.

CHAPTER 2: LAW PERTAINING TO PARENTAL ABANDONMENT IN SOUTH AFRICA

2.1. Introduction

This chapter explores, in greater detail, the South African statutory provisions applicable to children who have been abandoned by their parents. The aim is to trace the development of our law to its current position, and highlight both its strengths and weaknesses. The weaknesses reveal gaps in our law, which will be addressed by the analysis of Californian law in subsequent chapters. Furthermore, it will be seen in the discussion below that the abandonment provisions of the repealed Child Care Act¹ contained wording that differs from that of the current Children's Act.² In addition to analysing the applicable statutory provisions, an analysis of relevant case law interpreting the statutory abandonment provisions is presented.

The conceptual framework introduced under the methodology sub-heading of chapter one will be used to test the adequacy of the relevant provisions of the Children's Act and the approaches taken by the courts in interpreting these provisions. As indicated in chapter one, the approach generally favoured in international authorities is to afford to children the opportunity to be raised within the family environment whilst receiving familial and parental care.³ The ideal that every child should be provided with the opportunity to grow and develop within his/her family is specifically expressed in the preambles to both the CRC⁴ and ACRWC⁵. These provisions highlight the ideal situation within which a child may grow. It is clear that the provisions of the South African Children's Act are aimed at achieving this ideal. However, an important fact to bear in mind is that ambiguous and deficient

¹ 74 of 1983.

² 38 of 2005.

³ See footnotes 10 - 13 of Chapter One. Also, section 28(1)(b) of the Final Constitution.

⁴ Which states that "... the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding".

⁵ Which states that "... for the full and harmonious development of his personality. [*sic*] the child should grow up in a family environment in an atmosphere of happiness, love and understanding".

legislation, notwithstanding its aim, poses the risk of undermining this ideal. It increases the likelihood of achieving a different option for abandoned children, that is alternative care, in circumstances where it ought not be the case. Detailed legislation, therefore, becomes vitally important. Whether the Children's Act is sufficiently worded or not, will be discussed below.

2.2. Tracing the Development of Relevant Statutory Provisions

Prior to the promulgation of the Children's Act, the issue of parental abandonment of children received attention to some extent from the relevant provisions of the Child Care Act.⁶

Described as an "apartheid era statute",⁷ the Child Care Act, which came into operation in 1987, was subsequently reviewed by a project committee established by the South African Law Commission.⁸ The Commission began its review process in 1997 with the aim of developing recommendations for "new, appropriate and far-reaching child legislation".⁹ Reform was undertaken due to various shortfalls found in the old Child Care Act. One of the greatest shortfalls was that the Act had become outdated. For instance, the Child Care Act was drafted and promulgated at a time prior to the establishment of the Constitution and ratification of the CRC and ACRWC. The Child Care Act was, therefore, out of touch with a child's constitutional right to parental care and alternative care as established in section 28(1)(b) of the Constitution, as well as similar provisions contained in international law. Another shortcoming was that the focus of the Child Care Act was on the unfitness of parents.¹⁰ The Children's Act, however, which subsequently replaced the Child Care

⁶ Section 14(4) of the Child Care Act.

⁷ C R Matthias & F N Zaal "Supporting Familial and Community Care for Children: Legislative Reform and Implementation Challenges in South Africa" (18) 3 *International Journal of Social Welfare* (2008) 291 at 292.

⁸ South African Law Commission *The Review of the Child Care Act* (Issue Paper 13: 1998) 26.

⁹ *Ibid* at 27.

¹⁰ H Bosman-Sadie & L Corrie *A Practical Approach to the Children's Act* (2010) 166.

Act, has its focus on protecting the child.¹¹ As a result, when one compares the abandonment provisions of the Child Care Act with those of the Children's Act, one would expect the latter to have improved the position for vulnerable children and, in so doing, be more in keeping with relevant constitutional and international law provisions. The abandonment provisions of the two statutes will be compared in the next subheading below.

2.3. Substantive South African Statutory Provisions on Parental Abandonment

The Children's Act contains the current applicable law expressly covering parental abandonment of children.¹² It is important to note, however, that the Children's Act does not contain a provision specific to the issue of abandonment alone. Instead, abandonment is dealt with under the general heading of "children in need of care and protection".¹³ This latter phrase is not a new phrase conjured up by the South African legislature. A portion of this phrase, that is, "care and protection," is used in Article 19 of the ACRWC. This Article provides, *inter alia*, for the child's right to be cared for and protected by his/her parent. The phrase is also found in foreign legal systems. For instance, in India, the Juvenile Justice (Care and Protection of Children) Act, 2000, addresses, *inter alia*, the issue of child abandonment under the heading "children in need of care and protection".¹⁴ Despite the rather broad approach taken by drafters of the Children's Act, section 150(1)(a) of the Act does narrow the issue down to some extent.

Section 150(1) sets out the grounds upon which a Children's Court may make a finding on whether a child is in need of care and protection. The abandonment provision (section 150(1)(a)) provides as follows:

¹¹ Ibid.

¹² This is contained in section 150(1)(a) read with section 1 of the Children's Act.

¹³ Chapter 9 of the Children's Act.

¹⁴ Juvenile Justice (Care and Protection of Children) Act, 2000 at section 1.

“(1) A child is in need of care and protection if, the child-

(a) has been abandoned or orphaned and is without any visible means of support;”

It is clear from this wording that abandonment is not addressed as a separate stand-alone issue. Instead, the legislature has couched it together with the issue of orphanage. This is unfortunate. Although there is similarity in the circumstances giving rise to both orphaned and abandoned children, there does remain the fundamental difference that with orphaned children the parent/s, due to death, are unable to care for their child, whereas with abandoned children their parent/s, although alive, fail to fulfil their legal obligation to care and protect their child. This fundamental difference creates a need for a separation of the provisions relating to orphaned and abandoned children. It will be shown that an approach in which the focus is on each issue individually will enable the legislature to deal more comprehensively with each and avoid confusion.

Section 150(1) of the Children’s Act is written in the present tense.¹⁵ On a practical level this means that a child cannot be found to be in need of care and protection if, in the past, he/she lived in circumstances covered by this section.¹⁶ It also means that a child will not be found to be in need of care and protection simply because a substantial likelihood exists that such child will have to, in the future, live under such conditions.¹⁷ Before a child can legally be considered to be in need of care and protection, the relevant ground¹⁸ must be sufficiently proved.¹⁹ Once this ground is proved, mandatory care and protection services are then imposed by the state.²⁰

Section 150(1)(a) of the Children’s Act stems from section 14(4) of the repealed Child Care Act. Section 14(4) provided that “the children’s court shall

¹⁵ H Bosman-Sadie & L Corrie (2010) op cit note 10 at 166.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ The relevant ground in abandonment cases is sub-paragraph (a) of subsection 150(1).

¹⁹ C J Davel & A M Skelton *Commentary on the Children’s Act* (2007) 9-4.

²⁰ Ibid.

determine whether the child before the court is a child in need of care in that – (aB) the child (i) has been abandoned or is without visible means of support”.²¹ Although the wording of the abandonment provisions of both statutes is similar, one essential difference remains. In respect of the wording contained in section 150(1)(a) of the Children’s Act, a child will be found to be in need of care and protection if it is proved that such child was, firstly, abandoned **and**, secondly, is without any visible means of support. The Children’s Act specifically includes the term “and”, thus, combining two separate requirements of, firstly, abandonment and, secondly, a lack of visible means of support, into one ground. The Child Care Act, however, used the term “or” instead of “and” which meant that a child could have been found to be in need of care on the one ground of „abandonment” **or** on another separate ground of „without visible means of support”. Thus, a comparison of these two statutes reveals that the drafters of the Children’s Act chose to require two conditions for a finding of abandonment. This means that, as a departure from the past, it is no longer sufficient to prove that a child has merely been abandoned. Zaal and Matthias regard this as a weakness in the new wording, as it “must be proved further that there is also an absence of means of support”.²²

In view of what was stated in the previous legislation, the use of the term “and” in section 150(1)(a) of the Children’s Act may raise some doubt, albeit tenuous, as to whether the term was printed as an error in place of the word “or”. However, this doubt was cleared by Saldulker J in *SS v Presiding Officer, Children’s Court Krugersdorp and Others*²³. At paragraph 6 of the judgment Saldulker J plainly states that the word “and” was carefully chosen by the legislature, “suggesting a careful deliberation to choose a language that is consistent with the intention of the Children’s Act”. The judge goes on to state that “the choice of the word „and” was not causal or arbitrary but intentional”.²⁴ The reasons, however, for the actual imposition of the additional requirement of “without visible means of support” were not explored by the court. What remains clear, however, from a comparison of both statutes is

²¹ Section 14(4) of the Child Care Act 74 of 1983.

²² C R Matthias & F N Zaal “The Child in Need of Care and Protection” in T Boezaart, ed., *Child Law in South Africa* (2009) 163 at 175.

²³ 2012 (6) SA 45. This case will be discussed in more detail *infra*.

²⁴ *Ibid* at para [6] E.

that in terms of section 150(1)(a) of the Children's Act there is no longer a separate ground of "without visible means of support". Zaal and Matthias regard this removal as appropriate, in that it is no longer possible to find a child in need of care and protection on the basis of poverty alone.²⁵ One other fundamental difference that presents itself from the comparison above is that the Child Care Act did not conflate the issue of orphanage with that of abandonment under one sub-section. It remains unclear as to why the drafters of the Children's Act have done so and, as suggested above, a separation of these issues is a preferred route.

2.4. Statutory Definition and Regulations on Parental Abandonment

Section 1 of the Children's Act²⁶ provides a definition for the term "abandoned", as follows:

"In relation to a child, means a child who-

- (a) has obviously been deserted by the parent, guardian or care-giver; or*
- (b) has, for no apparent reason, had no contact with the parent, guardian, or care-giver for a period of at least three months."*

The Children's Act does not elaborate on the meaning of the phrase "obviously been deserted". One is then left to avail him/herself of the ordinary grammatical meaning contained in a dictionary in respect of the term "deserted". The Oxford Dictionary of Current English²⁷ defines this term to mean to "leave without intending to return". The term that stands out from this definition and carrying immense weight is that of "intending". Intention is intrinsically linked to a parent's state of mind. In other words, the term "deserted" suggests that a parent appreciates that what he/she is doing amounts to abandoning his/her child and consequently depriving the child of essential care and protection, and then acts in accordance with that appreciation. The Children's Act, however, appears to be lacking in that it does not expressly require proof of intention to abandon one's child. More detail in the form of specific

²⁵ C R Matthias & F N Zaal (2009) op cit note 22 at 175.

²⁶ Which is headed "Interpretation, Objects, Application and Implementation of Act".

²⁷ D Thompson, ed., *The Oxford Dictionary of Current English* (1998) 232.

criteria ought to have been included to assist decision makers in determining whether a parent did, in fact, desert his/her child. This will result in more certainty. In addition, there is no time-limit as to how long a child must be deserted before such child may be considered to have been abandoned by his/her parents. The imposition of a time-limit will greatly assist social workers and particularly the courts in reaching more accurate and consistent decisions. As will be discussed below, there are two reported judgments in which the courts have interpreted section 150(1)(a).²⁸ However, as these cases concerned orphaned and not abandoned children, the relevance of both judgments in respect of abandonment is limited to some extent. Without much guidance from South African case law, one is obliged to have regard to the ordinary meaning assigned to the word in the dictionary.

Part (b) to the definition of “abandoned” quoted above also seems to be lacking in certain respects. Firstly, it is separated from part (a) by the term “or”, thus creating two separate definitions for the term abandoned. Secondly, the phrase “for no apparent reason” leaves one uncertain as to its meaning. In addition, the period of three months may be considered an arbitrary duration. Some may argue that three months is too short a period, whilst others may find it to be too long. For instance, a children’s organisation, comprising of representatives of the adoption fraternity in KwaZulu-Natal, is reported to have suggested that the time frame be reduced to 21 days.²⁹ Some argue that the period of three months (or 90 days) favours parental rights rather than those of children.³⁰

The Children’s Act, in particular the abandonment provisions, has received some aid from the Regulations published by the Department of Social Development.³¹ Regulation 56 places certain responsibilities on a social worker

²⁸ *SS v Presiding Officer, Children’s Court, Krugersdorp* 2012 (6) SA 45 (SS case) and *NM v Presiding Officer of Children’s Court, Krugersdorp* 2013 (4) SA 379 (NM case).

²⁹ Anon „Failing the abandoned” (2011) *Independent Online* 17 November 2011 at page 2 (Last accessed on 2nd May 2013 at <http://www.iol.co.za/mercury/failing-the-abandoned1.1180763?ot=inmsa.ArticlePrintPageLayout.ot>).

³⁰ *Ibid.*

³¹ Published as the “General Regulations Regarding Children” on 1 April 2010 under gazette reference GN R261 in GG 33076.

dealing with an abandonment case.³² It also provides a list which a presiding officer must have regard to when determining at court proceedings whether a child has been abandoned.³³ Regulation 56(1) provides as follows:

(1) If it appears to a designated social worker that a child has been abandoned or orphaned, whether for purposes of determining if such child is in need of care and protection or if such child can be made available for adoption, such social worker must cause an advertisement to be published in at least one local newspaper circulating in the area where the child has been found calling upon any person to claim responsibility for the child.

Regulation 56(1) places a great deal of responsibility on social workers tasked with abandonment cases. With regard to the relevant portions dealing with abandoned children, Regulation 56(2) provides as follows:

(2) In determining whether a child has been abandoned or orphaned for purposes of section 150(1)(a) of the Act, a presiding officer must-

(a) be satisfied that the child has been abandoned or orphaned;

(b) be furnished with a copy of the advertisement contemplated in subregulation (1) and be satisfied that, for purposes of-

(i) section 150(1)(a) of the Act, a period of at least one month has lapsed since the publication of the advertisement;

...; and

(d) have regard, in the case of an abandoned child, to an affidavit, setting out the steps taken to trace the child's parent, guardian or care-giver, by the social worker concerned to the effect that the child's parent, guardian or care-giver cannot be traced and an affidavit by any other person, if any, who can testify to the fact that the child has had no contact with his or her parent, guardian or care-giver for a period of at least three months.

Although Regulation 56 thus provides some further detail, its focus lies mainly on procedure. Both the Act and the Regulations provide very little in the way of

³² Regulation 56(1) of the General Regulations Regarding Children, 2010.

³³ Ibid at Regulation 56(2).

substantive requirements on determining a parent's actual state of mind. Although a parent's behaviour is important, it becomes equally, if not more, important to determine a parent's state of mind, that is, his/her intention to abandon his/her child. It must be concluded, therefore, that, in respect of the criteria for determining a parent's intention to abandon, the Children's Act and the Regulations are lacking.

2.5. Judicial Interpretation of Section 150(1)(a) of the Children's Act 38 of 2005 (The Parental Abandonment Provision)

As indicated above, there are currently two reported high court judgments that have interpreted section 150(1)(a).³⁴ Both judgments highlighted the fact that in practice confusion exists among presiding officers of children's courts in interpreting and applying the provisions of section 150(1)(a).³⁵ This provision has even lead to differing views at the high court level.³⁶ Both the *SS* and *NM* case dealt with orphaned children living with a relative, and involved the issue of whether a foster care order may be granted in respect of such children. Since as noted above provision is made for orphaned and abandoned children under the same sub-section (that is, section 150(1)(a) of the Children's Act), these two cases concerning orphans are relevant to parental abandonment, to a limited extent.

In analysing section 150(1)(a), the South Gauteng High Court confirmed in *NM* that when applying it a two-stage inquiry exists.³⁷ However, as a departure from the finding in the *SS* case, the court in *NM* held that, when interpreting section 150(1)(a), no difference exists between caregivers who owe children a duty of support and those who do not.³⁸ The first stage of the inquiry involves the determination of whether a child is orphaned or abandoned as defined in section 1 of

³⁴ *SS* case and *NM* case op cit note 28.

³⁵ *NM* case ibid at page 380, para [4] A and [7] I; and *SS* case ibid at page 50, para [12] D.

³⁶ The court in the *NM* case distinguished itself from the findings in the *SS* case in certain respects in which the former has found the latter to have erred.

³⁷ *NM* case op cit note 28 at page 383, para [20] E and *SS* op cit note 28 case at pages 54-55, paras [29] I-J – [30] B.

³⁸ *NM* case ibid at page 385, para [28] G.

the Children's Act.³⁹ The court pointed out that this involves a factual inquiry into the minor child's situation.⁴⁰ Further, this inquiry relies particularly upon a social worker's investigation into the current living arrangements of the child, the identity of the present and prospective caregivers, and the status of their relationship to the child, whether familial or otherwise.⁴¹ The second stage of the inquiry involves a determination of whether or not the child is without visible means of support.⁴² This entails looking into the financial resources of the child and determining whether or not the child has the means to support him/herself.⁴³

The second stage of the inquiry, as indicated above, may be of relevance in respect of orphaned children whose parents are deceased. However, it does not have any bearing in the determination of whether a child should ultimately be found to have been abandoned or not. In parental abandonment cases, the requirement that a child lack visible means of support is irrelevant. It is, therefore, suggested that this requirement should be removed. The reason for such a suggestion is that the requirement creates confusion, the likelihood of reaching anomalous results and neither serves the best interests of the child nor the interests of the parent. In applying section 150(1)(a), as it currently stands, the possibility exists that a child may be found to be abandoned under the first stage of the inquiry, but, in respect of the second stage as required in *NM* not lack visible means of support due to, for example, having been left an inheritance of money by his/her grandparents. The fact that a child has the financial means to support him/herself does not mean that he/she cannot and should not ever be found to be abandoned. Financial resources cannot replace the love, support and encouragement that come from a parent and that are essential for the proper growth and development of a child.⁴⁴ Therefore, in

³⁹ Ibid at page 383, para E-I.

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Ibid at page 386, para [30] A-B.

⁴³ Ibid. The court provided the examples of an inheritance or insurance policy as possible financial resources.

⁴⁴ See notes 4-5 *supra* which indicates the ideal circumstances within which a child may be raised. The absence of a parent and the accompanying care and protection is central to the

circumstances where a child meets the first stage of the inquiry, but not the second stage, section 150(1)(a) will not have been met, and such a child will not be found to be abandoned. A further consequence is that such a child, due to not being “in need of care and protection”, will not be eligible for alternative care remedies.⁴⁵

2.6. Conclusion

As indicated above, the Children’s Act contains the most specific current South African statutory provisions in respect of parental abandonment of children. Although the Children’s Act has gone further than the common law and Child Care Act, in that it has provided a definition for the term “abandoned” and is supplemented by Regulation 56, it has created confusion. The inclusion of both orphaned and abandoned children under the same sub-section has conflated issues and is not in the best interests of either children or their parents. In addition, the inclusion of the requirement of “without visible means of support” is unnecessary and does not assist a court in determining whether a child is abandoned or not. This additional requirement has the potential to lead to anomalous results, and is therefore contrary to the Constitution and international law. As suggested above, the issues of orphaned and abandoned children should be separated, and the additional requirement be removed in respect of determining if a child has been abandoned or not.

Although section 1 of the Children’s Act is helpful because it contains a definition for the term “abandoned”, as has been shown, the definition is unfortunately lacking in certain respects. Some additional specific criteria to assist a social worker and/or court in understanding what actually constitutes abandonment are needed. Regulation 56 supplements section 150(1)(a); however, its focus lies more on procedure and less on substantively determining if a parent has abandoned his/her child.

issue of abandonment. The financial resources of the child and his/her means to take care of him/herself is irrelevant to the question of whether a parent has abandoned his/her child.

⁴⁵ This is inconsistent with section 28(1)(b) of the Constitution.

Both the *SS* and *NM* cases dealt with orphaned, and not abandoned, children. As a result they have interpreted section 150(1)(a) bearing such children in mind. The courts' findings, are unfortunately of little assistance to abandoned children. A serious weakness thus remains in South African law governing parental abandonment, namely, that of children being inappropriately found to have been abandoned by parents who had no intention to do so.

CHAPTER 3: LAW PERTAINING TO PARENTAL ABANDONMENT IN THE STATE OF CALIFORNIA

3.1. Introduction

As indicated in Chapter 1, parental abandonment of children is a global occurrence. Children in the United States of America,¹ therefore, are not exempt from this form of child neglect and also find themselves in the unfortunate set of circumstances where parents fail to fulfil their parental obligations imposed by law. The approach taken by the United States is a broad one, taking into account the various facets into which child abandonment unfolds. The fact that the United States has 73.6 million children between the ages 0-17 years², 20.6 million more persons than the total South African population³, supports the likelihood of child abandonment occurring on a larger scale and in a variety of forms. The larger population together with the fact that the United States of America is made up of 50 different states underpins the multiple approaches adopted to address this social ill and protect the rights of both children and parents.

This chapter discusses parental abandonment of children with reference primarily to Californian statutory law, judicial decisions and authoritative commentators. The discussion seeks to provide an analysis of selected laws of a foreign jurisdiction, which has taken comprehensive steps to address this issue. It further serves as a means to draw comparisons between the South African approach and that of California. It is from this comparison that the effectiveness of the South African legal provisions can be assessed. This in turn highlights the areas in our law where possible amendments may be contemplated and enacted, with the ultimate aim of creating certainty in the relevant legal requirements and provide for the protection of rights. As noted in the previous chapters, the wording of child

¹ Also referred to as the “United States” or “US”.

² This is indicated in a paper entitled “At a Glance for 2014: America’s Children: Key National Indicators of Well-Being” on the following website: ChildStats.gov:Forum on Child and Family Statistics. (www.childstats.gov/pubs/ Last accessed on 20 September 2014).

³ Stats South Africa “Mid-year Population Estimates 2013” (14 May 2013) (www.statssa.gov.za Last accessed on 21 September 2014). The above is a rounded-off figure. The exact total population estimate is 52 982 000 persons.

abandonment statutes is vitally important and must be strictly adhered to in determining whether the facts of a particular case support a finding of abandonment.

Whereas South African law contains its child abandonment provisions in a single statute⁴, statutory definitions of abandonment in the United States vary from state to state and the relevant provisions are often contained in different statutes to cater for the specific form it takes in each particular case. Each of the 50 states that make up the United States has enacted laws applicable to this issue.⁵ The focus of chapter three will be on defining abandonment of a child by a parent, with specific reference to Californian law. There are, however, several other related instances in which the parent-child relationship is brought into question. These will be discussed in chapter four and include Californian Safe Haven laws⁶, parental incarceration, parental deportation, involuntary adoption proceedings, the termination of parental rights as well as the criminal aspect concerning the crime of parental abandonment of one's child. These and other issues shape the Californian legal provisions on child abandonment.

Chapter three begins with a brief description of the structure of the legal system of the United States and thereafter an in-depth analysis of the legal definition of child abandonment in the State of California. It is interesting to note at this point that abandonment, couched alongside abuse and neglect, is a ground for the termination of parental rights in *all* states of the US.⁷ The statutory requirements, however, tend to vary slightly from one state to the other.⁸ Despite this, there are common features amongst the various state laws which include: the lack of parental presence, withholding care and support as well as the requirement that parental conduct be intentional.

⁴ Children's Act 38 of 2005.

⁵ W Vesneski "State Law and the Termination of Parental Rights" (49) 2 *Family Court Review* (2011) 364 at 368.

⁶ Which deal with the lawful abandonment of infants.

⁷ V S Sankaran "The Telltale Termination Case" (31) *Family Advocate* (2009) 13 at 13.

⁸ J Okun "Termination of Parental Rights" (6) *The Georgetown Journal Of Gender And The Law* (2005) 761 at 764.

Another important aspect which an assessment of American law highlights is the standard of proof that has become firmly established in child abandonment proceedings, particularly under the sub-heading of termination of parental rights. As a departure from the usual standard of a balance of probabilities in civil proceedings, the United States has adopted a higher standard of “clear and convincing evidence”.⁹ This will be discussed in Chapter four.

In order to provide a context for understanding Californian law on parental abandonment, the next sub-heading provides a brief description of the structure of the legal system of the United States of America and provides an overview of the different facets of child abandonment.

3.2. Structure of the US Legal System as compared with South Africa

The beginning of the United States of America is traced back to the “first English settlement at Jamestown, Virginia in 1607”.¹⁰ With the passage of time the 13 colonies emerged and following the signing of the Declaration of Independence there developed the 50 states that currently make up the US.¹¹ The United States Constitution, however, signed and accepted in 1788, initially omitted the guarantee of basic human rights.¹² This soon changed when, in 1789, the first ten amendments were made to the Constitution.¹³ These Amendments became known as the Bill of Rights.¹⁴ An important point to note, however, is that despite containing a Bill of Rights, the US Constitution fails to make mention of the words “parent” or “child”.¹⁵

⁹ *Santosky v Kramer* 455 US 745 (1982) at 748.

¹⁰ E A Farnsworth *An Introduction to the Legal System of the United States* (2010) 3.

¹¹ *Ibid.*

¹² *Ibid* at 6.

¹³ *Ibid.*

¹⁴ *Ibid* at 7.

¹⁵ M Guggenheim *What's Wrong with Children's Rights* (2005) at 18.

This is in contrast to the South African Constitution which devotes various sections to children and exclusively the parent-child relationship.¹⁶

Another difference between the US and South Africa revolves around the ratification of international child instruments, in particular, the United Nations Convention on the Rights of the Child, 1989. As indicated in the previous chapter, South Africa ratified the CRC in 1995.¹⁷ The US, however, has not yet ratified the CRC, despite having “played a significant role in the drafting of the Convention”.¹⁸ Nevertheless, children’s rights are recognised and constitutionally protected in the United States.¹⁹ So too are the rights of parents in relation to their children.²⁰ The US Supreme Court in the case of *Stanley v Illinois* emphasised the importance of family and stated that “the custody, care and nurture of the child reside first in the parents”.²¹ It further held that the right to raise one’s children is far more precious than property rights.²²

Guggenheim points out that there have been “two principal children’s movements in American history”.²³ With the passage of time there developed a shift from the well-being of children being the natural responsibility of parents (the first movement) to that of government and policy makers (the second movement).²⁴ This latter movement, which first developed in the 1960’s, is considered the start of the children’s rights movement in the United States.²⁵ One of the mechanisms for

¹⁶ Various provisions of the Bill of Rights are applicable to Children. Section 28 is specific to children’s rights and the parent-child relationship.

¹⁷ Chapter 1 at note 2, *supra*.

¹⁸ P Mahery “The United Nations Convention on the Rights of the Child: Maintaining its Value in International and South African Child Law” in T Boezaart, ed., *Child Law in South Africa* (2009) at 311.

¹⁹ M Guggenheim (2005) *op cit* note 15 at 7.

²⁰ *Ibid* at 18.

²¹ 405 US 645 (1972) at 651.

²² *Ibid*. The court has further stated that “the integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment” of the US Constitution.

²³ M Guggenheim (2005) *op cit* note 15 at 1.

²⁴ *Ibid* at 2-3.

²⁵ *Ibid* at 5.

protecting the rights of children is the creation by the courts of procedural safeguards and a child's right to have them observed.²⁶ It appears that the rights of children are interwoven with those of a parent.

Despite the differences in the constitutional structure of children's rights and the varied commitment to the ratification of international child instruments, the US legal system is somewhat similar to that of South Africa in the following respects. Firstly, both states are based on a constitution, which provides all persons with basic human rights. Secondly, the constitutions are considered the supreme law of each respective land. Thirdly, the courts of each state play an active role in interpreting, shaping and upholding the rights of parents and children. Lastly, there exists a separation of powers between the different branches of government in each state. These fundamental similarities rendered the US, and in particular the state of California, a useful jurisdiction for comparative study from a South African perspective.

3.3. Brief Overview of the Different Facets of Child Abandonment Law in the US

The United States appears to have adopted a multi-level approach to address child abandonment, having regard to the varied nature of this social problem and the circumstances in which it arises. This section provides a basic outline of the nature and extent of the child abandonment laws primarily in the State of California.

In respect of abandoned infants, "safely surrendered baby laws" have been enacted in the US to protect newborns and ensure that they are not left to fend for themselves on street corners, in the trunks of vehicles, in motel rooms, public toilets or trash bins.²⁷ Numerous states have promulgated such laws.²⁸ For example, the

²⁶ Ibid at 7. A significant procedural safeguard created by the US Supreme Court is the "clear and convincing evidence" standard formulated in *Santosky v Kramer* 455 US 745 (1982). This case will be discussed in detail infra.

²⁷ There has been prolific reporting on children abandoned shortly after birth in the US within the last two decades. See S Stewart "Surrendered and Abused: An Inquiry into the

state of California enacted a Safe Haven law in 2001 which provides mothers with an opportunity to safely give up their child without fear of prosecution.²⁹ However, the pardon is not an absolute one. In cases where an infant is found to have drugs and/or alcohol in his/her system the safe haven law is considered to have been violated and the mother is then prosecuted under an accompanying statute.³⁰ These legal provisions have the effect of legalising child abandonment under certain limited circumstances. The impetus, however, resides in the need to protect the lives and physical integrity of unwanted newborn children.

Another important aspect is that of undocumented children. There are large numbers of children who are born in foreign countries and who travel to the United States unaccompanied, for the purposes of fleeing their home and escaping poverty, violence and persecution.³¹ There are also many children who have been accompanied into the US and later abandoned by their parents.³² Stephanie Scott notes that 16% (1.8 million) of the total undocumented population in the US are children.³³ These unaccompanied and undocumented children are particularly vulnerable to harm and exploitation.³⁴ Recognition of this has led to the establishment of a form of relief referred to as “Special Immigrant Juvenile Status”.³⁵ This was initially established in 1990 by the US Congress when amendments were

Inclusiveness of California’s Safe Surrender Law” (10) *Whittier Journal of Child And Family Advocacy* (2011) 291 at 291.

²⁸ Ibid.

²⁹ Ibid at 292.

³⁰ Section 300(a) or (b) of the California Welfare and Institutions Code. Ibid.

³¹ A Junck “Special Immigrant Juvenile Status: Relief for Neglected, Abused, and Abandoned Undocumented Children” (63) 1 *Juvenile And Family Court Journal* (2012) 48 at 49.

³² Ibid.

³³ S H Scott “Executive Summary: Resilience in Undocumented, Unaccompanied Children: Perceptions of the Past and Future Outlook” (Unpublished Ph.D dissertation on file with the National Catholic School of Social Service, 2009) as cited in A Junck “Special Immigrant Juvenile Status: Relief for Neglected, Abused and Abandoned Undocumented Children” (63) 1 *Juvenile and Family Court Journal* (2012) at 49 note 3.

³⁴ Ibid.

³⁵ Ibid at 50.

made to the Immigration and Nationality Act. Once the statutory requirements for special immigrant juvenile status are met, undocumented abandoned children are then able to remain legally in the United States, including the state of California.³⁶ In addition, it eliminates barriers to education, allows an abandoned child access to specified public benefits, enables a child to later lawfully secure a job and removes the fear of deportation.³⁷

As alluded to above, American society is becoming increasingly diverse. In such circumstances, maintaining appropriate care and custody of children becomes a more pressing concern.³⁸ The deportation of an immigrant parent frequently results in the child being left behind and threatens the integrity of the family unit.³⁹ Ferguson indicates that children who are left behind usually find their way into the foster care system.⁴⁰ Their stay may be short-lived in cases where the child is nearing 18 years of age or is adopted and provided with a permanent home.⁴¹ In many cases, parents who are forced to leave the country have their parental rights terminated.⁴²

Aside from deportation of foreign parents, another factor relevant to child abandonment is the termination of parental of rights. The parent-child relationship is given the utmost respect in US law and the termination of parental rights is considered the “greatest interference that the State can impose on the fundamental right of parents to raise their children”.⁴³ Family law issues lie squarely within the realm of state law and state courts.⁴⁴ The US Supreme Court, however, has created certain procedural safeguards to avoid undue deprivations of parental rights.⁴⁵ There

³⁶ Ibid.

³⁷ Ibid.

³⁸ S A Ferguson “Not Without My Daughter: Deportation and the Termination of Parental Rights” (22) *Georgetown Immigration Law Journal* (2007) 85 at 85.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Ibid at 88.

⁴³ C E Hall “Where Are My Children...And My Rights? Parental Rights Termination as a Consequence of Deportation” (60) *Duke Law Journal* (2011) 1459 at 1464.

⁴⁴ Ibid at 1463.

⁴⁵ Ibid. *Santosky v Kramer* 455 US 745 (1982).

are other issues that are interrelated with that of termination of parental rights. For instance, the federal statute abbreviated and referred to as ASFA⁴⁶ contains criteria for the involuntary adoption of an abandoned child.⁴⁷ Parental rights may be terminated via the application of the ASFA requirements in cases which involve parental deportation or incarceration.⁴⁸ In respect of the latter, parents who commit criminal acts and who are caught, convicted and sentenced to imprisonment, may permanently lose their children on the ground of abandonment.⁴⁹ Under these circumstances, the critical aspect of abandonment becomes the failure to have any contact with one's child for a significant period of time.⁵⁰

Apart from the civil aspect of child abandonment, it is a crime in many states of the US to abandon one's child.⁵¹ The definition of the crime, however, differs in wording from state to state. Nevertheless, this creation of a statutory crime of child abandonment is a significant feature of US child law and is in contrast to that of South Africa.

3.4. Defining Child Abandonment

Each of the 50 US states has enacted laws applicable to child abandonment. It will be beyond this paper to analyse or even refer to the applicable law of each state. Instead, reference will be made to a selected state, that is, California. The aim of this is to highlight the typical US definitions of abandonment and their key

⁴⁶ Adoption and Safe Families Act, 1997. This statute is applicable to all states due to its federal nature, whereas, state legislation is binding within the exclusive jurisdiction of the state that enacts it.

⁴⁷ S Sherry "When Jail Fails: Amending the ASFA to Reduce its Negative Impact on Children of Incarcerated Parents" (48) 2 *Family Court Review* (2010) 380 at 382.

⁴⁸ Ibid at 384.

⁴⁹ Ibid at 385.

⁵⁰ V S Sankaran (2009) op cit note 7 at 13.

⁵¹ For example, a Wisconsin state statute provides that, "Whoever, with intent to abandon the child, leaves any child in a place where the child may suffer because of neglect is guilty of a class G felony" (WI Stat section 948.20 Act 45 of 2012).

features. Reference will be made to cases that have interpreted the relevant statutory provisions and shaped the definition of abandonment.

Wirgler, writing on Californian law, indicates that “abandonment” has a well defined legal meaning.⁵² It requires “actual desertion” by a parent together with “an intention, express or implied,” to completely sever the parent-child relationship.⁵³ Child abandonment is an old occurrence in the United States and is referred to in American jurisprudence dating back to the early 1900’s and even earlier. For Instance, in *In re Cordy* the court defined the term “abandonment” to mean:

*"To relinquish or give up with the intent of never again resuming or claiming one`s rights or interests in; to give up absolutely; to forsake entirely; to renounce utterly; to relinquish all connection with or concern in; to desert, as a person to whom one is bound by a special relation of allegiance or fidelity; to quit; to forsake."*⁵⁴

Within the state of California, the relevant statutory provision is section 7822 of the California Family Code, 1994.⁵⁵ This section takes into account different situations and their effect on a child.⁵⁶ Section 7822(a) provides”

“A proceeding under this part may be brought if any of the following occur:

(1) ...

⁵² K M Wirgler “Abandonment as a Ground for Termination of Parental Rights” (16) *The Journal of Contemporary Legal Issues* (2007) 333 at 333.

⁵³ Ibid.

⁵⁴ 169 Cal 150 (1915) at 153.

⁵⁵ Section 7820 indicates that a child is a person “under the age of 18 years”. Section 7822 replaced section 232(a)(1) of the former Civil Code which “originated before the beginning of the 20th Century”. Wirgler further points out that section 7822 changed the Civil Code’s organisation but not its substance. (K M Wirgler (2007) op cit 52 at 333).

⁵⁶ That is, between a *parent* and child as well as between a child and *another person*. The South African provisions also extend beyond the parent-child relationship by making provision for a “parent, guardian or caregiver” (Section 1 of the Children’s Act 38 of 2005). The US provisions, however, take into account the effect on the child of the different relationships and have structured the abandonment provisions accordingly, particularly in respect of time limits.

- (2) *The child has been left by both parents or the sole parent in the care and custody of another person for a period of six months without any provision for the child's support, or without communication from the parent or parents, with the intent on the part of the parent or parents to abandon the child.*
- (3) *One parent has left the child in the care and custody of the other parent for a period of one year without any provision for the child's support, or without communication from the parent, with the intent on the part of the parent to abandon the child."*

The following elements are extracted from the abovementioned provisions: a parent has, firstly, left the child in the care and custody of another for, secondly, a "specified minimum period of time", thirdly, without any communication with or provision for the child's support and, lastly, with the intention to abandon the child.⁵⁷ Both sub-sections (2) and (3) envisage a parent leaving his/her child in the care of another. With sub-section (2) the focus is on "another person", while with sub-section (3) the focus is on "the other parent". This distinction is significant, in that, a parent cannot escape an abandonment petition by simply relying on the fact that his/her spouse (that is, the other parent) is caring for the child.

The first element dealing with a child being *left* with another has been analysed and interpreted by the California judiciary. In the case of *In re Cattalini*⁵⁸ the Californian Appeals Court stated the following:

*„According to Webster's International Dictionary, "leave" means "to put, deposit, deliver, or the like, so as to allow to remain;--with a sense of withdrawing oneself from; as leave your hat in the hall; we left our cards." Thus the term appears to connote voluntary action. Therefore, it may not be said that appellant left his children in the care and custody of the respondent when, by an order of the court, they were taken from the joint control of their parents and placed in the sole care and custody of the mother.*⁵⁹

⁵⁷ K M Wirgler (2007) op cit note 52 at 334.

⁵⁸ 72 Cal App 2d 662 (1946).

⁵⁹ Ibid at 665.

What becomes important from the court's judgement is the rule that the leaving of a child with another must be a voluntary action by the abandoning parent. A court order placing a child in the sole custody of another parent or person may undermine the voluntary requirement of the first element. However, Wirgler notes that the mere presence of such a court order "does not preclude the finding of a „leaving“" in instances where the order "requires support or permits visitation and the non-custodial parent fails to provide support or to communicate with the child".⁶⁰ In support of her point, the author cites the case of *In re Conrich*⁶¹ in which the Californian Appeal Court stated that:

*"The fact that a judicial decree has placed custody of the child away from the parents does not, however, necessarily prevent or destroy the element of "leaving" because nonaction of the parents may convert into a leaving (and, the other elements present, into an abandonment) that which initially could not be regarded so."*⁶²

The second element in the California Family Code as quoted above is concerned with a specified minimum period of time. This requirement is also found in South Africa's Children's Act 38 of 2005, which as noted above requires a minimum period of 3 months in respect of a parent, guardian or care-giver.⁶³ The abovementioned Californian statutory provisions, however, contain a distinct time period for parents,⁶⁴ on the one hand, and a separate period for all other persons,⁶⁵ on the other. What is also apparent is that the South African child abandonment law contains a significantly shorter time frame than this example from the state of California. In California in respect of the calculation of time, before an abandonment petition can be filed to terminate parental rights, the abandonment must have continued uninterrupted for the specified period. This minimum time period must be proved uninterrupted and independently of the other elements.⁶⁶ The Californian Court of Appeals has indicated that the time will run uninterrupted provided the

⁶⁰ K M Wirgler (2007) op cit note 52 at 336.

⁶¹ 221 Cal App 2d 662 (1963).

⁶² Ibid at 666.

⁶³ Section 1, definition of the term "abandoned".

⁶⁴ That is, 1 year.

⁶⁵ That is, 6 months.

⁶⁶ K M Wirgler (2007) op cit note 52 at 337.

parent is continually “physically absent from the child”.⁶⁷ In *In re Justin* a mother and child lived in the same household during the specified minimum time period. Despite the mother’s intention to abandon the child⁶⁸ the appeal court reversed the trial court’s declaration of abandonment on the basis that physical absence was required.⁶⁹ Although the two specified time periods represent the least amount of time required, once the minimum statutory period has elapsed it is unlikely that an abandonment petition will be defeated by a parent who wishes to renew their interest in or communication with the child.⁷⁰ The imposition of time limits appears to be aimed at guarding against parents who change their behaviour and begin or resume communication or the provision of support with their child shortly after a petition is filed to terminate their parental rights on the grounds of abandonment. Without time limits in the governing law a parent might act only after petitions are filed and consequently prevent their child from ever finding a stable and permanent home.

The third element of the California child abandonment statutory provision is a failure of a parent to provide support to or communicate with the child. This element is linked to the intention to abandon element. For instance, section 7822(b) provides as follows:

“(b) The failure to provide identification, failure to provide support, or failure to communicate is presumptive evidence of the intent to abandon.”

At this point it is important to compare the equivalent South African provision and distinguish it from the California Family Code abandonment provision. As will be remembered section 150(1)(a) of the South African Children’s Act makes mention of

⁶⁷ *In re Justin G* 151 Cal App 3d 526 (1984) at 529.

⁶⁸ *Ibid* at 529, “We agree that the able trial court’s finding of intent to abandon in June 1980 is supported by clear and convincing evidence.”.

⁶⁹ *Ibid*, “We conclude that the statute requires as an element of abandonment that the parent be physically absent from the child.”.

⁷⁰ *In re JF* 487 Pa 115 (1979) at 124 where the Supreme Court of Pennsylvania stated that, “It is well established that once the six month statutory period of abandonment has passed, mere renewal of interest and expression of desire for the return of a discarded child do not negate the abandonment.”.

a child being “without any visible means of support”.⁷¹ It has been pointed out that this support element was judicially interpreted to require looking into the financial resources of the child and determining whether or not the child has the means to support him/herself.⁷² This is different in focus from the Californian section 7822 which focuses specifically on the actions of the parent and whether there was an effort made by the parent to support and/or communicate with his/her child. In California, the actions of the parent, therefore, become important in abandonment cases. It is submitted that this is the correct approach, as the primary responsibility and duty rests on parents to communicate with and support their children, and a lack of effort on a parent’s part is central to the occurrence of child abandonment.

In some US jurisdictions, including California, the lack of financial support requirement is dependent on a parent’s ability to provide support. Thus, in the case of *In re Susan M*⁷³ an abandonment finding was reversed on appeal due to the appellant, the mother, being found to be financially unable to support her baby.⁷⁴ However, the mere fact that a parent is in a bad place financially does not automatically exempt him/her from a finding of abandonment. A good illustration of this is found in the case of *In Interest of Kelly*.⁷⁵ This case involved a divorce between parents who entered into a marriage at ages 17 and 16. Approximately four months into the marriage the couple had a daughter, named Kathy. The marriage was unstable and three months later the couple divorced. The child, however, was placed in foster care pursuant to the social services department finding her to be a neglected child. At a court hearing, the father was, *inter alia*, ordered to pay \$110 as child support. The father, however, failed to make any payment on the basis that “he was unable to pay the full amount of support ordered”.⁷⁶ In subsequently affirming that the father had abandoned his child, the appeal court held that the father:

⁷¹ Section 150(1)(a) of Children’s Act 38 of 2005. See Subheading 2.3 of chapter 2 supra.

⁷² *NM v Presiding Officer of Children’s Court, Krugersdorp* 2013 (4) SA 379 at 386, para [30] A-B. See also sub-heading 2.5 of chapter 2 supra.

⁷³ 53 Cal App 3d 300 (1975).

⁷⁴ *Ibid* at 308. However, despite the mother’s financial state, the court pointed out that she “always made some form of inquiry at least every six months”. (*Ibid* at 308-309).

⁷⁵ 262 NW 2d 781 (1978).

⁷⁶ *Ibid* at 785.

*“was financially able to contribute some amount toward Kathy's support, but he voluntarily chose not to do so. Even though his earnings may have been insufficient at times to enable him to pay the full amount ordered, they were almost always sufficient to enable him to pay something”.*⁷⁷

Therefore, it is not an absolute rule that a parent who is unable to provide sufficient financial support to his/her child is pardoned. The two abovementioned cases illustrate that some effort must be made by the parent to support his/her child. Another important point to take note of is that the support provided by a parent must be done voluntarily for the welfare of the child and not for an ulterior purpose. In the case of *Matter of Adoption of Gotvaslee*⁷⁸ a father was ordered, as per a divorce order, to pay \$100 a month as child support for his two children. Between October 1977 to January 1979 the father failed to make any payments. During that period, however, adoption proceedings were initiated and the father was aware of these. The father was also found in contempt of the divorce order and was further ordered to make the \$100 payments together with an additional \$50 a month to meet the arrear child support amounting to \$1550. It was put to the father that, should he fall into arrears again, he would be taken into custody to serve a six month sentence. He subsequently began paying support. However, at the termination hearing, the father was found to have abandoned his children. In respect of the support, the court found that the payments “were not voluntarily made but, rather, were made under compulsion of the court’s orders”.⁷⁹

In relation to the aspect of communication with children, it becomes necessary to provide some indication of what may amount to communication. Section 7822 of the California Family Code does not list specific examples; instead, case law provides some indication. In the case of *In re TMR*⁸⁰ the California Appeal Court indicated that letters and birthday cards may be sufficient to amount to adequate

⁷⁷ Ibid.

⁷⁸ 312 NW 2d 308 (1981).

⁷⁹ Ibid at 314. The court also noted that the fathers visits were “motivated by a desire more to continue a combative relationship” with his wife “than by a desire to enjoy the company of his children” (Ibid at 312).

⁸⁰ 41 Cal App 3d 694 (1974).

communication.⁸¹ In this case a mother was separated from her children due to her incarceration and then communicated with her children via letters and birthday cards. The court found that the mother had “utilized the only means of communication available to her by writing to them twice a month”.⁸² It further held that “her letters frequently contained pictures suitable for young children”.⁸³ In overcoming the hurdle of her young children being illiterate due to their tender age, the court held that “the fact that defendant's children were themselves unable to read her letters is of no particular importance, since their foster mother was able to read the letters aloud to them”.⁸⁴ This case illustrates that communication may extend beyond verbal or face-to-face communication. In light of modern technology it may also be possible for a parent and child to communicate across electronic online mediums, through live streaming or instant messaging. It is suggested that these means are a possible form of communication; however, it will depend on the circumstances of each particular case. The important point is whether a parent maintained a degree of communication which was reasonable, given the parent's circumstances.

The individual facts of each case become particularly important in circumstances where a parent is prevented, by the other parent, from financially supporting or communicating with his/her child. The US courts have recognised this occurrence and have even overturned a parental termination ruling, finding parental interference or obstruction as the basis. For instance, the case of *GRM v WMS*⁸⁵ dealt with a mother of two children who had divorced her husband and attempted to have his parental rights terminated for purposes of adoption. In the termination petition she cited the father's abandonment and failure to provide child support as the main reasons. The trial court found in favour of the mother's petition and terminated the father's parental rights. On appeal, however, the court overturned the trial court's finding on the basis that, although the father “did not support his children for some three years and did not even see them for over four years, we believe that

⁸¹ Ibid at 699.

⁸² Ibid.

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ 618 SW 2d 181 (1981).

this was due in great part to the actions and attitude of the appellee, his ex-wife”.⁸⁶ The appeal court accepted the evidence that the father was unable to locate his wife, that she was unwilling to talk to him or let him see the children, and further, that she did not accept any child support.⁸⁷ The court made an interesting comment in passing on the purpose behind child abandonment statutes. With focus on a Kentucky abandonment statute, the court noted:

*“...the true spirit and intent of this statute, which is to sever relations between innocent children and a deadbeat, disinterested parent.”*⁸⁸

In returning to section 7822 of the California Family Code, the third element is elaborated upon under sub-paragraph 7822(b). It provides some indication of the nature and extent of the support or communication required. Section 7822(b) provides that:

“If a parent or parents have made only token efforts to support or communicate with the child, the court may declare the child abandoned by the parent or parents.”

This is a significant statutory provision because it takes into account the reality of the circumstances surrounding child abandonment. Disinterested parents may not always be those parents who completely fail to communicate with or support their children. Instead, sporadic and tenuous attempts to support or communicate with a child will have little impact on the care and well-being of a child and will be insufficient in discharging the obligation placed on parents to properly care for their children. Wirgler points out that what section 7822(b) requires is that a court, when analysing a parent’s conduct, must distinguish between genuine and token efforts.⁸⁹ A genuine effort to support or communicate with one’s child is what is required. In respect of token communication, the Californian Appeal Court in the case of *Adoption of Oukes*⁹⁰ interpreted the wording of section 7822(b) to mean that where the efforts made by a parent are token only, the presumption that the parent

⁸⁶ Ibid at 184.

⁸⁷ Ibid at 183.

⁸⁸ Ibid at 184.

⁸⁹ K M Wirgler (2007) op cit note 52 at 341.

⁹⁰ 14 Cal App 3d 459 (1971).

intended to abandon the child remains intact.⁹¹ The appeal court confirmed the finding of the trial court that a parent had abandoned her two children. The children resided with their aunt who wished to adopt the children. The court found that the “three communications during that span of over one year therefore constituted only token communications”.⁹² Further, the court noted that “the only time appellant manifested any interest in the welfare of the infants during the span of over a year (February 1968 to March 1969) was when she was threatened by legal action”.⁹³ The court also considered that a greater weight must be attached to a failure to communicate, as opposed to the financial support requirement. It stated that:

*“Financial inability may excuse the failure to send any funds for support of the children ..., but the failure to communicate for the requisite statutory period of time is adequate ground under the statute to adjudicate an abandonment by the non-communicating parent.”*⁹⁴

By comparison, the South African abandonment provisions, as indicated in chapter 2 above, make mention of the word “deserted”.⁹⁵ However, what exactly amounts to desertion is not provided in the Children’s Act, nor in the accompanying regulations to the Act. South African case law is also silent on its legal meaning.

As a clarification of what desertion means, in the California Family Code the fourth element to be considered by courts is whether a parent intended to abandon his/her child. As indicated above, this is linked to the third element of financial support and communication. However, although linked, intention to abandon must be proved independently of the other elements. Section 7822(b), however, provides a presumption in law to assist courts in making their determination. For the sake of convenience this provision will be quoted again below:

“(b) The failure to provide identification, failure to provide support, or failure to communicate is presumptive evidence of the intent to abandon.”

⁹¹ Ibid at 466.

⁹² Ibid at 467.

⁹³ Ibid at 466.

⁹⁴ Ibid at 467.

⁹⁵ Section 1 of Children’s Act 38 of 2005. See sub-heading 2.4 of chapter 2 supra.

Intention speaks to the state of mind of a parent. It then becomes important to explore whether an objective or subjective standard is to be adopted in determining intention. In a Utah case⁹⁶, the rights of a father were terminated due to him abandoning his children. He was found to have provided no financial support and to have had little or no contact with them since their birth.⁹⁷ In its judgement the court indicated that the favoured approach is the objective standard, which involves determining a parent's intention from drawing inferences from his/her conduct "rather than from mere oral protestation".⁹⁸ In explaining the objective standard the court stated:

*"Whether or not there has been an abandonment within the meaning of the statute is to be determined objectively, taking into account not only the verbal expressions of the natural parents but their conduct as parents as well. The subjective intent standard often focuses too much attention on the parent's wishful thoughts and hopes for the child and too little on the more important element of how well the parents have discharged their parental responsibility"*⁹⁹

The actions of parents, therefore, carry greater weight than their words. Although conduct is the crucial factor, a parent must still have the mental capacity to form the intention to abandon. In the case of *Petition of DLM*¹⁰⁰ a father was charged with the murder of a child. He was found not guilty due to insanity and was confined to a state hospital. The father, had another child, and a petition was filed against him to terminate his rights in respect of the surviving child, based on abandonment. In resisting the petition, the father raised his mental incapacity as an impediment to the petition. The court held in favour of the father that:

*"A parent's abandonment of a child is a question of intent, and lack of mental capacity may be cause for the failure to provide support."*¹⁰¹

⁹⁶ *State in Interest of Summers Children v Wulffenstein* 560 P 2d 331 (1977).

⁹⁷ *Ibid* at 332.

⁹⁸ *Ibid* at 333-334.

⁹⁹ *Ibid*.

¹⁰⁰ 703 P 2d 1330 (1985).

¹⁰¹ *Ibid* at 1332.

The court further noted as relevant that the stepfather, who had initiated the termination proceedings, failed to furnish evidence that the father had the necessary mental capacity in respect of the abandonment and support.¹⁰²

The intention of a parent to abandon his/her child need not necessarily be of a permanent nature. In the case of *In re Daniel M*¹⁰³ the court, in referring to an old Californian abandonment statute, held that:

*“By using the general term “abandon” ... in conjunction with a specific period of time..., it appears the Legislature meant that an intent to abandon the child during that period of time, rather than an intent to abandon the child permanently, is sufficient to satisfy the statute.”*¹⁰⁴

The further court further noted that:

*“... a child's need for a permanent and stable home cannot be postponed for an indefinite period merely because the absent parent may envision renewing contact with the child sometime in the distant future.”*¹⁰⁵

Therefore, what is required is that it be shown that a parent intended to abandon his/her child for the minimum statutory period, and not necessarily forever.

In respect of the presumption of abandonment contained in section 7822(b), Wirgler notes that once it is presumed that a parent has abandoned his/her child, the parent then becomes responsible for rebutting the presumption.¹⁰⁶ What is required of the parent is the exhibiting of evidence sufficient to rebut the presumption.¹⁰⁷ Thus, the presumption has the effect of shifting, upon the parent, the burden of producing evidence and not the burden of proof.¹⁰⁸ The burden of proof remains with the petitioner.

¹⁰² Ibid.

¹⁰³ 16 Cal App 4th 878 (1993).

¹⁰⁴ Ibid at 883.

¹⁰⁵ Ibid at 884.

¹⁰⁶ K M Wirgler (2007) op cit note 52 at 339.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.

Section 7822 of the California Family Code also addresses guardianship and adoption within the realm of child abandonment.¹⁰⁹ For instance, the appointment of a guardian does not preclude a finding of parental abandonment of one's child. The US legislative provisions also make provision in the way of procedure. Section 7822(c) provides specific time periods within which a termination petition may be filed and heard in circumstances where the whereabouts of the parents are unknown.

3.5. Conclusion

Despite the non-ratification of the Convention on the Rights of the Child, 1989, on the part of the United States, Californian law, as illustrated in legislative provisions and judicial decisions, is in keeping with many of the provisions of the Convention. The US, and particularly California, has developed detailed law covering the fundamental right of parents to care, protect and provide for the development of their children. It, further, places a responsibility on parents to ensure that their children are provided with a stable and permanent home under the enjoyment of parental care and protection. Legislative provisions have been enacted in California to ensure that parents abide by this responsibility. Where a parent exhibits a complete disinterest in his/her child and fails, for a sustained period of time, to genuinely perform the responsibilities and obligations of a parent, Californian law makes provision for the alternative care of such a child, with the aim of providing a stable and permanent home and parent/s.

Child abandonment is a huge social problem in the United States and, as the case law indicates, there has been considerable experience in dealing with this problem for a very long period of time. The aim of this chapter was to unpack some of the useful detail of primarily Californian statutory provisions and case law. Although the US Constitution does not contain specific children's rights provisions like the South African Constitution, the Californian legislative provisions are clear and comprehensive and are aided by a substantial body of judicial interpretation.

¹⁰⁹ Section 7822 (b) and (d).

Section 7822 of the California Family Code has been focused on because it is a particularly useful example of abandonment legislation. As has been shown, the elements extracted from section 7822 in this chapter are crucial to assisting courts in providing certainty with respect to the legal meaning of child abandonment and, as a whole, providing for the best interests of the child. Californian courts have played a critical role in analysing and interpreting section 7822 and have consequently added to the meaning and understanding of the statutory provision. This level of judicial interpretation by the California courts is unfortunately absent in South Africa for the time being, thus adding to the need for more detailed South African legislation.

Further, unlike the South African legislation, the Californian law serves as an example of legislation which makes specific mention of a parent's intention to abandon his/her child. In addition, it goes on to assist presiding officers with the provision of a presumption of such intention where communication and support is lacking. In respect of the latter two aspects, California has another valuable feature, in that the California Family Code specifically draws a distinction between genuine and token efforts made parents in caring for their child. As has been shown, the courts have unpacked the crucial intention element and have indicated that the standard for determining intention is an objective one, with a focus on the conduct of parents. Further, this element is linked to the specific time periods stipulated in the Code. As has been noted above, a parent is granted a longer period than in the South African provision, within which to genuinely communicate and/or support his/her child. Although it is obviously important for a child to be provided with proper care and protection all the time, longer time periods help to prevent children being inappropriately found to have been abandoned by parents who had no intention to do so. They allow parents who are in difficulty the opportunity to rectify their circumstances. They promote recognition of the fundamental right of parents to care for their children, and that of children to be cared for by their parents. They also assist the court in distinguishing genuine from token efforts.

The next chapter explores and analyses some further useful detail in the law governing parental abandonment. It evaluates the Californian Safe Haven legislation. It explains and discusses examples of the evidentiary standards adopted in parental abandonment cases. It also elaborates on some of the different causes of abandonment in the United States and the legal responses to these. For instance,

although the termination of parental rights in abandonment cases was touched on in this chapter, it will be discussed in more detail in chapter 4.

CHAPTER 4: STANDARD OF PROOF AND OTHER ASPECTS OF ABANDONMENT IN CALIFORNIA AND THE UNITED STATES OF AMERICA

4.1. Introduction

This chapter builds on the discussion and analysis of chapter 3. The aim is to, firstly, highlight some procedural aspects of parental abandonment proceedings. In particular, the evidentiary standard of proof will be explored in detail. In this regard, the US Supreme court has played a significant role, and in the landmark decision of *Santosky v Kramer*¹ the standard of proof was permanently altered.

Secondly, as indicated in chapter 3, different causes of abandonment have been addressed under US law. Some of the most important of these will be discussed in this chapter. As will be seen, parental deportation and incarceration have become important issues that have impacted significantly on the parent-child relationship. Case law, in relation to these issues, also offers meaningful insight into the approach taken by the different states in the US.

Lastly, an innovative feature of the United States' child abandonment laws is the legalisation of parental abandonment of children in limited circumstances. This will be discussed under sub-heading 4.4 which focuses on the abandonment of infants and particularly the Californian Safe Haven laws. Finally the chapter will discuss the US approach to the criminalisation of child abandonment, in circumstances where safe haven laws are not applicable.

4.2. Termination of Parental Rights and the Standard of Proof

As alluded to in chapter 3, when a parent is found to have abandoned his/her child, a likely legal consequence of that is to have the child removed. The child is typically placed in foster care and the parent then faces child abandonment proceedings. Provided the statutory elements are met, these proceedings take the form of a termination of parental rights petition filed by social services. The filing of such a petition is a significant step and threatens to terminate the parent-child

¹ 455 US 745 (1982).

relationship permanently. It is in these circumstances that the principle established in *Santosky v Kramer* finds particular importance. This will be discussed below.

Termination proceedings, of course, call into question the manner in which a parent has raised his/her child, if at all. The parent-child relationship, however, is generally in the US, including the state of California, given the utmost importance and cannot be easily dissolved. The US Supreme Court has recognised “the fundamental liberty interest of natural parents in the care, custody, and management of their child ...”.² It has further stated that “even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life”.³ Thus, deference is shown towards parents in respect of the manner in which they raise their children.⁴

At the same time, however, the state has an interest in ensuring that children are provided with proper and sufficient parental care and protection. Parental rights, therefore, are not absolute. Stark notes that “with parental rights come parental responsibilities, and when a parent fails to fulfil these responsibilities, the rights and interests of both the child and the state must be considered”.⁵ What is sought then, is a balance between a parent’s right to care and protect his/her child against the rights of a child to proper parental care and protection.⁶

² Ibid at 753.

³ Ibid.

⁴ In this regard, the Supreme Court has stated that it has historically recognised “that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment” (Ibid). In an earlier case, *Moore v City of East Cleveland* 431 US 494 (1977) at 503-504, the Supreme Court stated that “... the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation’s history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.”.

⁵ S W Stark “Abandonment v Adoption: Terminating Parental Rights and the Need for Distinct Legal Inquiries” (7) *Alaska Law Review* (1990) 247 at 249.

⁶ In *Matter of SD Jr* 549 P 2d 1190 (1976) at 1201, the court stated that “the parents” constitutional right to the care and custody of their children must be balanced against the rights of their children to an adequate home and education”. The court went on to quote with approval a passage from *DM v State* 515 P 2d 1234 (1973) at 1237, where the court stated

In respect of the dissolution of the parent-child relationship, every state in the United States, including that of California, has promulgated a statute that makes provision for the termination of parental rights on the grounds of abandonment of a child.⁷ The consequence of such termination is of a most severe nature. In the case of *Lassiter v Department of Social Services of Durham County* the US Supreme Court stated that:

*“... the State’s aim is not simply to influence the parent-child relationship but to extinguish it. A termination of parental rights is both total and irrevocable. Unlike other custody proceedings, it leaves the parent with no right to visit or communicate with the child, to participate in, or even to know about, any important decision affecting the child’s religious, educational, emotional, or physical development”.*⁸

Vesneski adds that termination extends to the loss of intestate inheritance rights by parents in respect of the estates of their kin.⁹ Further, that the rights of extended family members to visit and contact abandoned children are dissolved.¹⁰

Having regard to the severity of a termination ruling, the US Supreme Court has introduced certain procedural safeguards. The first step taken is found in the *Lassiter* case where the court indicated that state intervention to terminate the parent-child relationship “must be accomplished by procedures meeting the requisites of the Due Process Clause”.¹¹ In respect of what was meant by due process, the court stated that “for all its consequence „due process” has never been,

that “we acknowledge that parental rights are of serious and substantial import. We note, however, that in recent years the courts have become increasingly aware of the rights of children.”.

⁷ W Vesneski “State Law and the Termination of Parental Rights” (49) 2 *Family Court Review* (2011) 364 at 367. For an extensive list of each of the 50 state’s statutory provisions see J Okun “Termination of Parental Rights” (6) *The Georgetown Journal of Gender and the Law* (2005) 761 at 764, footnote 23.

⁸ 452 US 18 (1981) at 39-40.

⁹ W Vesneski (2011) op cit note 7 at 364.

¹⁰ Ibid.

¹¹ Op cit note 8 at 37.

and perhaps can never be, precisely defined”.¹² The court went on to state that “the phrase expresses the requirement of „fundamental fairness” ...”.¹³ In the later case of *Santosky v Kramer* the Supreme Court went on to provide that due process required that, in termination of parental rights proceedings, an intermediate standard of clear and convincing evidence be applied.¹⁴ This is referred to as an intermediate standard, in that, it is a higher standard than a fair preponderance, yet, lower than the beyond a reasonable doubt standard.¹⁵ The court indicated that this standard was required because:

“in parental rights termination proceedings, the private interest affected is commanding; the risk of error from using a preponderance standard is substantial; and the countervailing governmental interest favoring that standard is comparatively slight”.¹⁶

The court further pointed out that the clear and convincing evidence standard of proof strikes a fair balance between the rights of parents and the legitimate concerns of the state.¹⁷

The *Santosky* decision is binding upon all states by virtue of being a decision of the Supreme Court of the United States. However, all states, except California, apply the clear and convincing evidentiary burden in termination of parental rights proceedings.¹⁸ When *Santosky* was decided, California was already applying such a

¹² Ibid at 24.

¹³ Ibid.

¹⁴ *Santosky v Kramer* op cit note 1 at 756.

¹⁵ This „clear and convincing standard” is also referred to as the highest standard of civil proof (see V Lilburn “Abandonment as Grounds for the Termination of Parental Rights” (5) *Connecticut Probate Law Journal* (1991) 263 at 284).

¹⁶ *Santosky v Kramer* op cit note 1 at 758.

¹⁷ Ibid at 769. In supporting the clear and convincing evidence standard the court further indicated that a state’s ability to assemble its case dwarfs a parent’s ability to mount a defence, and the witnesses at the hearing are a petitioner’s own case workers empowered by the state to investigate the family’s situation and also testify against a parent (Ibid at 763).

¹⁸ K S Lee & M I Thue “Unpacking the Package Theory: Why California’s Statutory Scheme for Terminating Parental Rights in Dependent Child Proceedings Violates the Due Process Rights of Parents as Defined by the United States Supreme Court in *Santosky v Kramer*”

standard.¹⁹ It subsequently amended this standard and applied the lower burden of proof.²⁰ Therefore, in cases concerning parental abandonment, which most often also involve the termination of parental rights, US law, except for the state of California, requires that clear and convincing evidence be furnished. Although this approach *prima facie* appears to favour parents over children, it in fact aims to achieve certainty so as to prevent the improper dissolution of the parent-child relationship.²¹

4.3. Incarceration and Deportation of Parents

Parental rights may also be terminated in circumstances where the federal statute, ASFA, requires it.²² One of the grounds for such termination is the abandonment of one's child.²³ Its provisions become particularly relevant to parents who are incarcerated. In addition, the United States is a nation with a population including many immigrants. In cases where parents are unlawfully present in the US and face deportation, they bear the risk of having their parental rights terminated. Incarceration and deportation will be discussed in turn, having regard to the statutory provisions of ASFA.

ASFA is a federal statute and is, therefore, binding upon all states in the US, including California. Although states may promulgate their own statutory provisions which provide for termination, the ASFA provisions are also applicable and remain as an additional statute in terms of which parental rights may be terminated.

(13) *UC Davis Journal of Juvenile Law & Policy* (2009) 143 at 157. See footnote 70 for a list of all relevant state statutes.

¹⁹ *Ibid* at 146.

²⁰ *Ibid*.

²¹ The other procedural safeguard set out by the US Supreme Court in termination cases is the right of a parent to a hearing. In *Stanley v Illinois* 405 US 645 (1972) at 658 the court stated that "... parents are constitutionally entitled to a hearing on their fitness before their children are removed from their custody."

²² Adoption and Safe Families Act, 1997 (ASFA).

²³ *W Vesneski* (2011) *op cit* note 7 at 367.

Vesneski notes that ASFA contains a total of eight criteria for such termination.²⁴ State laws, however, tend to include far more criteria and have a more extensive rules.²⁵ Nevertheless, the aim behind the promulgation of ASFA was to address the nation's problems in respect of foster care.²⁶ It was found that, on average, children spent approximately 3 years in foster care.²⁷ Therefore, in an effort to avoid prolonged stays in foster care and increase the number adoptions, so as to provide children with a permanent home, ASFA requires that states initiate or join a petition to terminate parental rights in respect of children who have resided in foster care for 15 out of the previous 22 months.²⁸ ASFA places this obligation on states even in cases involving "an abandoned infant (as defined under State law)".²⁹ This obligation on states has serious implications for the rights of incarcerated and deported parents.

Sherry notes that about 1.7 million US children have a parent in prison serving sentences for non-violent crimes that average approximately 51.6 months.³⁰ Where an incarcerated parent is a single parent, usually the child is taken into foster care by social service agencies. A claim by the state of abandonment of one's child due to incarceration then becomes a very real possibility. As Travis et al note, great distances generally separate children from their incarcerated parents, which serve as one of the barriers to prison visits.³¹ Maintaining contact with children through phone calls and/or letters is also often problematic, due to the limit placed on such activities

²⁴ Ibid at 366.

²⁵ Ibid at 373.

²⁶ S Sherry "When Jail Fails: Amending the ASFA to Reduce its Negative Impact on Child of Incarcerated Parents" (48) 2 *Family Court Review* (2010) 380 at 382.

²⁷ Ibid.

²⁸ Ibid. Section 103(a)(3)(E) of Adoption and Safe Families Act (ASFA) of 1997.

²⁹ Ibid.

³⁰ L E Glaze & L M Maruschak "Parents in Prison and Their Minor Children" *US Department of Justice* (2008) as cited in S Sherry "When Jail Fails: Amending the ASFA to Reduce its Negative Impact on Child of Incarcerated Parents" (48) 2 *Family Court Review* (2010) 380 at note 6.

³¹ J Travis et al "Families Left Behind: The Hidden Costs of Incarceration and Reentry" *Urban Institute Justice Policy Center* (2005) 1 at 1.

through correctional policy as well as the high cost of collect calls.³² It is also possible that incarcerated parents may not have knowledge of the foster care centre/family that their child is placed in or even its contact details. There are very few prisons which have programs that help incarcerated parents maintain contact with their children.³³ Travis points out that a Tennessee prison for women opened a Child Visitation Unit in 2002.³⁴ This unit allows children aged between 3 months to 6 years old to spend weekends with their incarcerated mothers, apart from the rest of the prisoners.³⁵ Most incarcerated parents, however, are at risk of being found to have abandoned their children due to their incarceration.

What then remains to be determined is whether or not incarceration per se amounts to parental abandonment. US case law provides some insight into this issue. The Supreme Court of Nevada, in the case of *In the Matter of the Parental Rights as to QLR*,³⁶ reversed a district court's decision to terminate a father's parental rights due to his imprisonment. The Supreme Court found that the district court "relied on the rationale that by committing a crime Roger intended to go to prison and, therefore, to abandon Q.L.R".³⁷ The issue that the Supreme court had to address on appeal was whether "incarceration, as a matter of law, supports a determination that a parent intended to abandon his or her minor child?".³⁸ The appeal court disagreed with the reasoning of the court a quo and held that "voluntary conduct resulting in incarceration does not alone establish an intent to abandon a minor child".³⁹

There are, however, other cases which provide an indication of what weight, if any, should be attached to a parent's incarceration during a termination hearing. The finding in the abovementioned case seems to suggest that a parent's incarceration

³² Ibid.

³³ S Sherry (2010) op cit note 26 at 385.

³⁴ J Travis (2005) op cit note 31 at 6.

³⁵ Ibid.

³⁶ 54 P 3d 56 (2002).

³⁷ Ibid at 58. Roger is the name of the father whose rights were terminated by the district court.

³⁸ Ibid at 56.

³⁹ Ibid at 58.

can almost prevent a finding of parental abandonment. This, however, is not the rule typically applied in subsequent cases. In a later case, *BLL v WDC*,⁴⁰ the Supreme Court of North Dakota held that a "... parent's incarceration is not alone a defense to abandonment, and abandonment may rest upon the parent's confinement coupled with other factors such as parental neglect, absence of contact, failure to support, and disregard for the child's general welfare."⁴¹ It seems, therefore, that incarceration is not a complete bar to a finding of abandonment, nor can it be the sole basis upon which to terminate parental rights. Rather, parental incarceration is one of various factors that a court is entitled to consider in determining whether or not a child has been abandoned. In this particular case, the father was found to have made very little effort to care for the child "both during and prior to his incarceration".⁴² A parent's conduct towards caring for the child, especially before incarceration, serves as a strong indication of the parent's intention regarding abandonment. Other states in the US have also reasoned in the same manner. For instance, the Supreme Court of Nebraska, in *In re Interest of LV*,⁴³ held that "although parental rights may not be terminated solely for a parent's incarceration, parental incarceration is a factor which may be considered in determining whether parental rights should be terminated".⁴⁴ The court further stated that, "the nature of the crime committed, as well as the person against whom the criminal act was perpetrated are all relevant to the issue of parental fitness and child welfare, as [is] the parent's conduct prior to imprisonment and during the period of incarceration".⁴⁵

In further analysing ASFA, the federal Act does contain 3 exceptions in respect of its termination proceedings. Hall notes that these include circumstances where, firstly, the child is being cared for by a relative.⁴⁶ Secondly, the state agency has noted a compelling reason that the filing of a termination petition will not be in

⁴⁰ 750 NW 2d 466 (2008).

⁴¹ *Ibid* at 469.

⁴² *Ibid* at 470-471.

⁴³ 482 NW 2d 250 (2002).

⁴⁴ *Ibid* at 259.

⁴⁵ *Ibid* at 260-261.

⁴⁶ C E Hall "Where are My Children ... and My Rights? Parental Rights Termination as a Consequence of Deportation" (60) *Duke Law Journal* (2011) 1459 at 1468.

the best interests of the child.⁴⁷ Thirdly the state agency has not provided reasonable and necessary services to the child's family.⁴⁸ In respect of the first exception, section 103(a)(3)(E) of ASFA states that:

"In the case of a child who has been in foster care under the responsibility of the State for 15 of the most recent 22 months ... , the State shall file a petition to terminate the parental rights of the child's parents ... , unless - (i) at the option of the State, the child is being cared by a relative;"

What is required is state-supervised care by a relative.⁴⁹ This provision has significant implications for incarcerated and deported parents. Incarcerated parents who leave their children in non-relative foster care or with a relative without state approval are not aided by the ASFA exception and face the possibility of losing their parental rights. Similarly, with regard to illegal immigrants facing deportation proceedings, availing themselves of the exception may prove near impossible. Hall notes that this is the case where illegal immigrant parents are incarcerated or in circumstances where the only relative available to care for the immigrant parent's child is him/herself illegally present in the United States.⁵⁰ In these circumstances, it is unlikely that the state would sanction the child's placement with such relatives.⁵¹

US case law on deportation has produced differing outcomes. For instance, in the case of *Perez-Velasquez v Culpeper County Department of Social Services*,⁵² the Court of Appeals of Virginia terminated the parental rights of a father on the basis that he had abandoned his children by failing to maintain contact with them. In part, the father's deportation was the basis for the termination. The father was an illegal immigrant from Guatemala who, together with his immigrant wife, had three children in the US.⁵³ The father was imprisoned for the commission of a serious crime and was subsequently deported. The court, in terminating his parental rights, reasoned

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ C E Hall (2011) op cit note 46 at 1468.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Record No. 0360-09-4 (2009).

⁵³ Ibid.

that “his incarceration and deportation affected his ability to contact his children and participate in the foster care proceedings”.⁵⁴

There are, however, other cases that have dealt somewhat differently with the termination of parental rights and deportation proceedings. In the case of *In re Interest of Angelica L*⁵⁵ the Supreme Court of Nebraska overturned the court a quo’s termination of an illegal immigrant mother’s parental rights. The mother was from Guatemala.⁵⁶ She had been arrested and deported.⁵⁷ The state had petitioned the termination of her parental rights due to her failure to communicate with her children who had been in foster care for more than 15 of the most recent 22 months.⁵⁸ The appeal court had to determine whether the state proved by clear and convincing evidence that the termination of the mother’s parental rights were in the children’s best interests.⁵⁹ The appeal court analysed the constitutional rights of parents in the United States. It held that “the interest of parents in the care, custody and control of their children is perhaps the oldest of the fundamental liberty interests recognized by the U.S Supreme Court”.⁶⁰ It went on to state that “before the State attempts to force a breakup of a natural family, over the objections of the parents and their children, the State must prove parental unfitness”.⁶¹ Further, “[U]ntil the State proves parental unfitness, the child and his [or her] parents share a vital interest in preventing erroneous termination of their natural relationship”.⁶² The court overturned the termination of the mother’s parental rights on the basis that the state had failed to consider her constitutional rights and further failed to show her parental unfitness. The mother was deported and wished to take her children back with her to Guatemala. The appeal court allowed this and reasoned that “whether living in Guatemala or the United States is more comfortable for the children is not

⁵⁴ Ibid.

⁵⁵ 767 NW 2d 74 (2009).

⁵⁶ Ibid at 80.

⁵⁷ Ibid.

⁵⁸ Ibid at 84.

⁵⁹ Ibid at 91.

⁶⁰ Ibid at 92.

⁶¹ Ibid.

⁶² Ibid.

determinative of the children's best interests".⁶³ The mother was found not to have forfeited her parental rights simply because she was deported.⁶⁴ Further, the appeal court found that she had established a home in Guatemala that made adequate provision for the children and their necessities.⁶⁵ Amongst other things, the case seems to illustrate how the imposition of a high burden of proof on the state helps protect against inappropriate findings of abandonment.

The provisions of ASFA as well as the cases mentioned above provide some insight into wider social problems that may result in parental abandonment of children in the United States. Since causation may result from factors beyond the control or original expectation of parents, it becomes particularly important then to ensure that the statutory provisions contain clear elements to assist courts in determining whether a child has, in fact, been intentionally abandoned by his/her parent. This will ensure consistency in decision-making and all round fairness. In addition, ensuring that courts uphold the constitutional protections afforded to parents and their children is significantly important. Hall notes that incarceration and deportation present significant challenges to parents who face allegations of abandonment and, consequently, the termination of their parental rights.⁶⁶ One of the challenges to correct decision making is cultural bias on the part of certain judges in cases involving illegal immigrants.⁶⁷ Cultural bias entails expressing a preference for the American culture over those of illegal immigrants.⁶⁸ This also negatively impacts on the question of parental fitness in abandonment cases.⁶⁹ It is a consideration relevant in South Africa, which also has a large immigrant population. Another challenge is the barriers created by incarceration and deportation to parent-child communication.⁷⁰

⁶³ Ibid at 94.

⁶⁴ Ibid.

⁶⁵ Ibid at 95.

⁶⁶ C E Hall (2011) op cit note 46 at 1486.

⁶⁷ Ibid at 1481.

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ Ibid at 1486.

The next sub-heading discusses briefly the approach taken in the United States, particularly the state of California, in respect of infant abandonment.

4.4. Infant Abandonment and Safe Haven Laws

As noted earlier, Safe Haven laws in the US are an innovative feature of their child abandonment laws. The aim of these laws is to protect and save the lives of newborns.⁷¹ They do this by designating specific locations as safe haven sites where parents may surrender their newborn child with immunity from prosecution.⁷² In essence, these laws provide for the legalisation of child abandonment, albeit limited to newborn children. Stewart notes that, as of 2008, all fifty states in the US have passed safe haven laws.⁷³ The Safe Haven laws enacted in the state of California serve as a useful example for detailed analysis.

In the state of California, three pieces of legislation govern safe havens.⁷⁴ They set out a clear procedure for the safe surrender of a newly born child. Safe surrender sites may include public or private hospitals,⁷⁵ as well as fire stations or

⁷¹ As indicated in sub-heading 3.3 of chapter 3 *infra*, there have been a number of instances where newborns have been abandoned on street corners, in the trunks of vehicles, in motel rooms, public toilets and trash bins (See S Stewart "Surrendered and Abused: An Inquiry into the Inclusiveness of California's Safe Surrender Law" (10) *Whittier Journal of Child And Family Advocacy* (2011) 291 at 291).

⁷² *Ibid* at 294. This immunity from prosecution afforded to parents is not without exception, particularly in circumstances where the child has been harmed with drugs and/or alcohol.

⁷³ *Ibid* at 312. Stewart points out that although the names and substance of these laws may differ, the objective of each is that same, that is, to protect newborns from being abandoned.

⁷⁴ California Penal Code Annotated; California Health and Safety Code Annotated; California Welfare and Institutions Code Annotated (See S Stewart (2011) *op cit* note 71 at 294). Examples of legislation from other states include the Illinois Abandoned Newborn Infant Protection Act of 2001 (Illinois), the Arizona Revised Statute Annotated of 2011, section 13-3623.01 (Arizona), and the Florida Statute Annotated of 2010, section 383.50 (Florida).

⁷⁵ Section 1255.7 (a)(B) of the California Health and Safety Code Annotated.

police stations.⁷⁶ Within California, section 271.5 (a) of the California Penal Code states that:

“(a) No parent or other individual having lawful custody of a minor child 72 hours old or younger may be prosecuted ... if he or she voluntarily surrenders physical custody of the child to personnel on duty at a safe surrender site.”

An important point to note from this provision is, firstly, that the scope for surrendering a child is not limited to parents alone. Individuals, other than a newborn’s parents, having lawful custody of the child, may also surrender the newborn. Secondly, the children that may be surrendered lawfully under these provisions of California’s Penal Code are those who are 72 hours of age or younger. Although California’s Safe Haven law is restricted to children who are 3 days old or younger, section 1255.7 (h) of the California Health and Safety Code suggests that children who are older may also be surrendered.⁷⁷ The other interesting feature of section 271.5 (a) of the California Penal Code is the immunity from prosecution afforded to parents and those individuals with lawful custody who surrender the child. This immunity is aimed at encouraging the safe surrender of infants. The immunity, however, is not an absolute one. Stewart notes that in circumstances where an infant is found to have drugs or alcohol in his/her system, the safe surrender law is considered to have been violated, and a dependency petition is then filed against the parent pursuant to the California Welfare and Institutions Code.⁷⁸ A further step in the way of encouraging the safe surrender of infants is the provision of immunity from liability for individuals who assist in the surrendering of an infant. Section 1255.7 (i) of the California Health and Safety Code states that:

⁷⁶ S Bosak “Statistically Speaking: Is the Illinois Abandoned Newborn Infant Protection Act Working?” (26) *Children’s Legal Rights Journal* (2006) 96 at 97.

⁷⁷ Section 1255.7 (h) states that “A safe-surrender site, or personnel of the safe-surrender site, that accepts custody of a surrendered child pursuant to this section shall not be subject to civil, criminal, or administrative liability for accepting the child and caring for the child in the good faith belief that action is required ..., including, but not limited to, instances where the child is older than 72 hours ...”.

⁷⁸ S Stewart (2011) op cit note 71 at 293.

“... no person who, without compensation and in good faith, provides assistance for the purpose of effecting the safe surrender of a minor 72 hours old or younger shall be civilly liable for injury to or death of the minor child as a result of his or her acts or omission.”

According to the abovementioned Code, assistance means transporting the child, or transporting or accompanying a parent with the child to a safe surrender site.⁷⁹ Another aspect that encourages parents to come forward and safely surrender their child is the confidentiality extended to such parents.⁸⁰ The public is not provided with any identifying information of the surrendering parent.

When an infant is presented at a safe surrender site the first step in respect of procedure is to have a coded and confidential ankle bracelet placed on the child.⁸¹ Secondly, a copy of this unique coded bracelet is given to the surrendering parent to facilitate the possible reclaiming of the child.⁸² A medical information questionnaire is then provided to the surrendering parent, to voluntarily fill out, so that important medical information of the child is available to the safe surrender site personnel and others who will care for the child.⁸³ In addition, a medical screening examination of the child is mandatory and any necessary care must be provided.⁸⁴ In this regard, it is important to note that the Code specifically provides that “the consent of the parent or other relative shall not be required to provide that care to the minor child”.⁸⁵ Within 48 hours of the surrendering of the child, the safe surrender site personnel must notify the relevant child protective services.⁸⁶

The drafters of California’s Safe Haven laws have also taken into account the state of confusion and mixed feelings that parents who surrender their infant may experience. The California Health and Safety Code, therefore, makes provision for

⁷⁹ Section 1255.7 (i)(2) of the California Health and Safety Code.

⁸⁰ Ibid at section 1255.7 (d)(2).

⁸¹ Ibid at section 1255.7 (b).

⁸² Ibid.

⁸³ Ibid.

⁸⁴ Section 1255.7 (c) of the California Health and Safety Code.

⁸⁵ Ibid.

⁸⁶ Ibid at section 1255.7 (d)(1).

the return of a child to a parent within 14 days of the surrender. Section 1255.7 (g) of this Code provides that:

“... if within 14 days of the voluntary surrender described in this section, the parent or individual who surrendered custody returns to claim physical custody of the child, the child welfare agency shall verify the identity of the parent or individual, conduct an assessment of his or her circumstances and ability to parent, and request that the juvenile court dismiss the petition for dependency and order the release of the child ...”

Some commentators point out that Safe Haven laws, such as those of California, provide an “easy way out” for parents who do not wish to raise and care for their child or in circumstances where they might otherwise have given their child to a relative or made use of the adoption process.⁸⁷ It can also be argued that these laws encourage irresponsible sexual behaviour, as the consequences of such behaviour, that is, pregnancy and the duty to raise a child, can easily be thwarted by surrendering the child at a Safe Haven site. Nevertheless, it remains an unfortunate fact that every year there are cases of newborn children who are abandoned by their parents, often resulting in the death of the child. As indicated in chapter 1,⁸⁸ this social ill also occurs in South Africa. Despite the criticism levelled at Safe Haven laws, such laws have saved the lives of many infants who may otherwise have been unlawfully abandoned.⁸⁹ It is submitted, therefore, that Safe Haven laws, similar to those of California, could have a positive impact on South African newborn children.

4.5. The Crime of Child Abandonment

The United States has another innovative feature in respect of its child abandonment laws, that is, the criminal aspect. It is a specific offence in many states of the US for a parent to abandon his/her child.⁹⁰ For instance, the state of Alabama

⁸⁷ S Bosak (2006) op cit note 76 at 97.

⁸⁸ See chapter 1, note 7.

⁸⁹ S Bosak (2006) op cit note 76 at 97.

⁹⁰ It cannot be a crime where a child is abandoned in accordance with the provisions of an applicable safe haven law.

considers the abandonment of a child as Class A misdemeanour.⁹¹ Section 13A-13-5 (a) of the Alabama Code states that:

“(a) A man or woman commits the crime of abandonment of a child when, being a parent, guardian or other person legally charged with the care or custody of a child less than 18 years old, he or she deserts such child in any place with intent wholly to abandon it.”

It is interesting to note that even an individual other than a parent, but, who is caring for the child, may be found guilty of this offence. With this definition, the term “deserts” and the phrase “with intent wholly to abandon” are important elements that must be proved. In this regard, case law will play a meaningful role in informing the courts. Although the Alabama Code refers to children below 18 years of age, this age limit is not always the case. In the state of Hawaii, for example, the age of 14 is used. Section 709-902 (1) of the Hawaii Penal Code, 2013 provides that:

“(1) A person commits the offense of abandonment of a child if, being a parent, guardian, or other person legally charged with the care or custody of a child less than fourteen years old, the person deserts the child in any place with intent to abandon it.”

Aside from the difference in age, the Hawaii Penal Code is very similar to the Alabama Code in wording. The state of California also criminalises the abandonment of one’s child. The relevant provision is section 271 of the California Penal Code, which states that:

“Every parent of any child under the age of 14 years, and every person to whom any such child has been confided for nurture, or education, who deserts such child in any place whatever with intent to abandon it, is punishable by imprisonment pursuant to subdivision (h) of Section 1170 or in the county jail not exceeding one year or by fine not exceeding one thousand dollars (\$1,000) or by both.”

The criminalisation of child abandonment is a welcome feature of the US abandonment laws, as it serves as a deterrent against child abandonment. It encourages parents to make use of other available options, for example, adoption or

⁹¹ Section 13A-13-5 (b) of the Code of Alabama, 2013.

safe havens, and, therefore, protects the lives of children. This aspect, together with Safe Haven laws, provides a positive indication of the direction into which South Africa's child abandonment laws can develop, so as to add to the protection currently afforded to its children.

4.6. Conclusion

This chapter explored some further legal aspects relevant to parental abandonment of children. From a procedural perspective, where a parent is faced with a parental rights termination petition based on the abandonment of his/her child, the standard of proof was appropriately established by the United States Supreme Court in *Santosky v Kramer*,⁹² when it held that a clear and convincing evidence standard must be observed. This is a higher standard than the ordinary standard in civil proceedings, namely, the balance of probabilities. The imposition of such a higher standard is based on the recognition that parents hold a fundamental right, responsibility and interest in the care, custody and management of their children and in the family unit as a whole. In addition, the clear and convincing standard becomes particularly important when one has regard to the severe consequences of termination hearings, that is, the complete severance of the parent-child relationship. This procedural safeguard is an important feature of US child abandonment law and serves as a useful consideration in the South African context. In the absence of judicial precedent at the present time, the standard of proof in child abandonment cases in South Africa is the usual civil standard of a balance of probabilities. Within the South African Children's Act, 38 of 2005 it is relatively easy for parental rights to be terminated where a child is held to be abandoned and then found to be in need of care and protection.⁹³ The US standard of clear and convincing evidence is an intermediate standard which guards against the erroneous termination of parental rights. South African law also recognises and attaches weight to the responsibility of parents to care for and raise their children.⁹⁴ This duty and right is also well

⁹² *Santosky v Kramer* op cit note 1.

⁹³ Section 156.

⁹⁴ Section 28 of the South African Constitution.

established in international law.⁹⁵ The discussion of the standard of proof adopted in the United States in abandonment cases, therefore, offers useful insights into possible area where South African child abandonment law may develop.

It has been shown that in the United States the termination of parental rights is, in addition to state legislation, provided for in the federal statute referred to as ASFA. ASFA seeks to ensure that children have a permanent home and are provided with adequate and proper care. One of the grounds upon which ASFA makes provision for the termination of parental rights is the abandonment of one's child. Within the purview of this federal statute, issues relating to a parent's incarceration or deportation become central to termination petitions based on abandonment. ASFA serves as added protection on the care of children in the US in addressing parental abandonment of children.

An innovative feature of the Californian child abandonment legal framework is the Safe Haven laws which, in limited circumstances, legalise the parental abandonment of children. As has been discussed above, these laws are aimed at protecting the lives of infants. They do this by establishing designated Safe Haven sites where parents may surrender their newborn child who is younger than 72 hours. It has been noted that even older children can be covered. The Californian Safe Haven statutory provisions are usefully detailed and provide a specific procedure that must be adhered to in each case. They take into account the reality of the frequently difficult circumstances revolving around the surrendering of a child. As has been shown, they do so by providing immunity from prosecution to both parents and those who assist them in the surrendering of the child, as well as in making provision for a grace period within which a child may returned to a parent. The unlawful abandonment of an infant is also an occurrence in the South Africa context.⁹⁶ The discussion of Safe Haven laws above, therefore, provides insights into a possible solution that may be adopted in South Africa to reduce the number of deaths associated with the unlawful abandonment of infants.

It is significant that the United States has also criminalised the abandonment of one's child by making it a specific offence. This serves as a deterrent against the

⁹⁵ Articles 7(1) and 18(1) of the United Nations Convention on the Rights of the Child, 1989.

⁹⁶ See chapter one, note 7 *infra*.

abandonment of children and encourages parents to make use of other available options, for example, adoption or safe havens, thus, protecting children. This is another feature of US child law which offers valuable information on possible areas into which South African child law can develop.

CHAPTER 5: CONCLUSION & RECOMMENDATIONS

Part 5.1 of this concluding chapter provides a summary of the main findings of this dissertation. It highlights the main weaknesses in South African law as well as the strengths in American law, having regard primarily to Californian abandonment law, as has been discovered from the comparative analysis undertaken. Part 5.2 provides a list of recommendations for improving the current South African law on child abandonment. It includes proposed amendments to sections 150(1)(a) and 1 of the Children's Act in the form of draft legislation.

5.1. MAIN FINDINGS FROM THE COMPARATIVE ANALYSIS

This dissertation evaluated some selected legal provisions (local, international and foreign) relevant to the social ill of parental abandonment of children. As has been indicated in the preceding chapters, parental abandonment tends to have serious consequences and is classifiable as a severe form of child neglect and abuse, whereby parents withhold proper care and protection from their child/ren.

On an international level, it has been shown that international law is committed to preserving the parent-child relationship. Both the CRC and the ACRWC, although not expressly addressing parental abandonment, emphatically uphold the right and entitlement of every child to know his/her parents and to be provided with adequate parental care and protection.¹ Immense weight is, therefore, attached to these rights as these instruments regard the family unit as the natural unit and basis of society and place the primary responsibility for the upbringing and development of the child on parents. Article 3 of the United Nations Guidelines on Alternative Care, which is aimed at enhancing the implementation of the CRC, further provides that the removal of a child from the care of his/her family must be as a measure of last resort.² On a national level, it has been shown that these

¹ See chapter 1 at part 1.1, note 10-11.

² Ibid, note 13.

international law provisions have been given effect to by the South African Constitution.³ In particular, section 28(1)(b) of the Constitution entrenches the right of every child to family or parental care and, where such care is not forthcoming, to appropriate alternative care.

What becomes clear from the abovementioned international law and constitutional provisions is the utmost importance that South African law attaches to the provision of parental care and protection of children. It places a significant responsibility on parents to ensure that they fulfil their parental obligations. The law, however, takes into account the unfortunate reality that there are many parents who, for various reasons, do not and will not fulfil their parental obligations. It is for this reason that the provision of alternative care is recognised by the South African Constitution. Whether alternative care will be an appropriate remedy in child abandonment cases will depend on the circumstances of each case. In this regard, the role of judicial officers becomes a significant one. In order to assist the courts in reaching correct and consistent decisions in the best interests of children, clear and comprehensive legislation is necessary in child abandonment cases. This will help to ensure that parents are not inappropriately deprived of their parental rights and responsibilities in circumstances where they genuinely cared for their child in the best possible way that they could. Detailed legislation will also assist in reducing the number of children who receive inadequate parental care and protection.

The abovementioned international law and constitutional provisions formed the conceptual framework in this dissertation and were used to test the adequacy of the South African legal provisions on parental abandonment. As has been shown the South African provisions are contained in relevant parts of the Children's Act 38 of 2005. In particular, section 150(1)(a) accompanied by section 1 of the Children's Act expressly addresses parental abandonment of children.⁴ The Children's Act is a successor to the Child Care Act 74 of 1983, which was seen as out of touch with international law and the Constitution. In particular, it has been noted that section 150(1)(a) of the Children's Act stems from section 14(4) of the Child Care Act. Having been promulgated with full regard being had to international law and section

³ Ibid.

⁴ See chapter 2 at parts 2.3 and 2.4.

28 of the Constitution, the Children's Act is expected to provide sufficient detail and clarity on the issue of child abandonment, which impacts significantly on the rights of children to proper care and protection and simultaneously on the responsibilities and rights of parents.

Unfortunately, from the analysis contained in chapter 2, it is clear that, when comparing section 150(1)(a) with the former section 14(4), a major weakness exists in the Children's Act, in that, it does not address child abandonment as a separate stand-alone issue. Instead, drafters of the Children's Act chose to couch together under one sub-section two issues, namely, child abandonment and that of orphanage.⁵ The current relevant section, that is, section 150(1)(a), forms one of the grounds under which a child may be found to be in need of care and protection. Once a child is found to be in need of care and protection, there are various decisions that the court may make, including the provision of alternative care to such child. As has been indicated earlier, the Children's Act, by addressing abandonment and orphanage under one ground, has conflated these issues.⁶ Although there may be some similarity in the circumstances of orphaned and abandoned children, there remains the fundamental difference that children are orphaned due to the death of their parents, whereas with abandoned children their parents, although alive, fail to fulfil their parental responsibilities to provide genuine and sufficient care and protection. This fundamental difference creates a need for a separation in South African law of the issue of child abandonment from that of orphaned children under section 150(1)(a). It is suggested that an approach in which the focus is on each issue individually will enable the legislature to deal more comprehensively with each and avoid possible confusion.

The conflation of issues, found in section 150(1)(a), is exacerbated by the imposition of another requirement for finding that a child is in need of care and protection. This is the requirement that, in addition to finding a child abandoned or orphaned, the court must also find that such child is without any visible means of support. This additional requirement has frequently resulted in the confusion of presiding officers tasked with the interpretation and implementation of section

⁵ See chapter 2 at part 2.3.

⁶ See chapter 2 at parts 2.3 and 2.6.

150(1)(a).⁷ It is also important to note that this *additional* requirement was not contained in section 14(4) of the Child Care Act. There are currently only two reported judgments that have interpreted section 150(1)(a) of the Children's Act.⁸ In the *SS* case the court indicated that this additional requirement was intentional and not arbitrary. This case dealt with orphaned children, but because orphaned and abandoned children are couched together under one sub-section, the court's judgment has also had implications on the legal provisions applicable to parental abandonment. The court in the *NM* case, which also dealt with orphaned children, indicated that a two-stage inquiry exists under section 150(1)(a). The first stage involves the determination of whether a child is orphaned or abandoned as defined in section 1 of the Children's Act.⁹ This involves a factual inquiry into the minor child's situation. A social worker's investigation and report becomes very significant at this point.¹⁰ The second stage of the inquiry involves the determination of whether or not the child is without visible means of support. This entails looking into the financial resources of the child and determining whether or not the child has the means to support him/herself.¹¹ The interpretation offered in respect of the second stage is problematic because of the current weakness in South Africa's child abandonment law.

What is central in parental abandonment cases is a lack of sufficient effort on the part of parents to properly care for their child. The state is obliged to respect the rights of parents in relation to their children. Parents, however, also bear responsibilities. In addition, the state is required to act in the best interests of children and ensure that children receive adequate parental care and protection. An appropriate balance between the rights of parents and those of children is, therefore, sought to be achieved by the state. The second stage enquiry as required in the *NM* case is problematic because in parental abandonment cases, the financial resources of either the child or the parents become wholly irrelevant. The central inquiry in

⁷ See chapter 2 at part 2.5, note 35.

⁸ *SS v Presiding Officer, Children's Court, Krugersdorp* 2012 (6) SA 45 and *NM v Presiding Officer of Children's Court, Krugersdorp* 2013 (4) SA 379.

⁹ See chapter 2 at part 2.5.

¹⁰ *Ibid.*

¹¹ *Ibid.*, note 43.

abandonment cases must rather involve an assessment of the nature and extent of the parental care extended to the child. In this regard, the facts of each case will be important, and the conduct of the parents in relation to their children becomes the decisive factor, not the financial resources of the child. The child's financial resources is relevant in abandonment cases only insofar as it may serve as an indication of the support that a parent has provided to his/her child. However, a child may also receive financial resources from a person other than a parent, including grandparents and other relatives. In addition, the support that a parent provides to his/her child need not necessarily be of a financial nature in order for it to be deemed adequate. Even parents living in poverty can provide adequate care to their children in the form of, inter alia, love, encouragement or psychological, mental and physical support. The procedural directive in the *NM* case is thus not helpful and in fact renders inadequate legislation even more confusing for children's court's presiding officers who need to make determinations on whether the children have been legally abandoned.

Section 1 of the Children's Act provides a definition for the term "abandoned". As indicated in previously,¹² this definition is lacking in detail in certain respects.

Section 1 defines the term "abandoned", as follows:

"In relation to a child, means a child who-

- (a) has obviously been deserted by the parent, guardian or care-giver; or*
- (b) has, for no apparent reason, had no contact with the parent, guardian, or care-giver for a period of at least three months."*

As has been shown sub-paragraph (a) of the definition focuses on the desertion of a child by his/her parent. The Children's Act, however, fails to define the word "deserted".¹³ There is also a dearth of case law currently available to offer any assistance. The lack of an express reference to intention to abandon serves as a gap in this part of the definition in the Children's Act and does not assist the courts or social workers. The analysis of sub-paragraph (a) of the definition contained in section 1 further reveals that there is no time-limit as to how long a child must be

¹² See chapter 2 at part 2.4.

¹³ Ibid.

deserted before such child may be considered to have been abandoned by his/her parents. The imposition of a time-limit will greatly assist social workers and particularly the courts in reaching more accurate and consistent decisions. Sub-paragraph (b) regards a child as being abandoned where a parent has had “no contact” with the child for a period of at least 3 months. As highlighted earlier, in contrast to sub-paragraph (a), part (b) does add a time limit to assist courts in their determination of whether a child has been abandoned or not.¹⁴ This period of 3 months, however, was shown to be problematic.¹⁵ In this part of the definition, there is also an absence of any reference to an intention requirement on the part of parents.

Regulation 56 of the Regulations published by the Department of Social Development serves as an aid to the application of the abandonment provisions of the Children’s Act and provides some assistance to presiding officers. However, as was shown in part 2.4 above a shortcoming in the regulation is that its assistance lies mainly on procedure and very little is offered in the way of substantive requirements in determining a parent’s state of mind or whether or not the parent has purposely abandoned his/her child.

As a means of providing a comparative analysis of the legal provisions applicable to parental abandonment of children, this dissertation explored and discussed Californian statutory law, judicial decisions and the writings of authoritative commentators. Reference was also made to the laws of some of the other states of the US. It was pointed out that each of the 50 states that make up the US has enacted laws applicable to abandonment.¹⁶

A relevant provision of Californian law was section 7822 of the California Family Code, 1994. It was pointed out that section 7822 usefully distinguishes between children left in the custody of *another parent* from children left in the custody of *another person*. Where a child is left alone, without being in the custody of any individual, the California Safe Haven Laws become applicable, provided the child is younger than 72 hours old. Where the child is older, however, it appears that the

¹⁴ Ibid.

¹⁵ Ibid, note 29.

¹⁶ See chapter 3 at part 3.1, note 5.

Californian Law is lacking to some extent. The reference to “deserted” in the definition of “abandoned” contained in the South African Children’s Act then becomes very relevant as it envisages circumstances where the child is left alone to care for him/herself. However, inclusion of more elements, in addition to “deserted”, are necessary to provide for the ideal definition of abandonment in South Africa. As has been pointed out section 7822(a) of the California Family Code usefully includes all of the following elements in defining parental abandonment:¹⁷

- (1) A parent has left his/her child in the care and custody of another person;
- (2) for a specified minimum period of time;
- (3) without any communication with or provision for the child’s support; and
- (4) with the intention to abandon the child.

The first striking feature of this provision is that it contains a much more comprehensive definition than that found in the South African Children’s Act. As has been explained in part 3.4, the third and fourth elements listed above are linked, although each element must be proved independently of the other. Further, section 7822(b) contains another positive feature in that it contains a presumption that a failure on the part of a parent to provide support or communicate with his/her child is evidence of intent to abandon. This is a valuable aspect of the Californian definition, as it assists the courts in their assessment in abandonment cases. It also shifts the burden to adduce evidence rightfully onto the parents to illustrate how they have supported, communicated or made contact with their child.

It has been shown in chapter 3 that the California judiciary has also played a significant role in adding meaning to section 7822 as there is an abundance of case law in which the courts have interpreted the four elements listed above. With regard to the first element, the courts have indicated that “leaving” requires voluntary action by the abandoning parent.¹⁸ In respect of the second element, there are separate time-periods applicable for leaving a child with another parent (i.e. 12 months) and other persons (i.e. 6 months). The different time-periods take into account the nature of the different relationships.

¹⁷ See chapter 3 at part 3.4.

¹⁸ Ibid.

In contrast, the South African Children's Act contains a time-period only in respect of sub-paragraph (b) of the definition of abandonment, namely, 3 months. In addition, sub-paragraph (b) of definition in the Children's Act contains a significantly shorter time-frame than California. It has been shown that in the California Family Code, the imposition of time-limits is aimed at guarding against parents who change their behaviour and begin to communicate with or support their child shortly after a termination petition is filed or once they receive information that such a petition will be instituted in the near future.¹⁹ Without time-limits, a neglectful parent may only act as a reaction to or in anticipation of the petition and consequently prevent the child from ever finding a stable and permanent home. Thus, the absence of a time-limit in part (a) of the definition of "abandoned" in the Children's Act creates difficulty for the South African courts in determining whether a child has been deserted or not. The US courts further provide that abandonment must have continued uninterrupted for the specified time-period.

The third useful element found in section 7822 (a) of the California Family Code is concerned with the failure of parents to provide support to or communicate with their child.²⁰ It has been shown that a positive feature of this element is that the focus here is appropriately on the conduct of the parents and the effort made by them to support and communicate with their child. In contrast, the "support" aspect in section 150(1)(a) of the South African Children's Act, as per judicial interpretation, focuses on a child being without visible means of support, which is exclusively concerned with the financial resources of the child. It is submitted that the approach taken in the California Family Code, which focuses on the conduct of the parents, is a much better approach. The Californian courts have indicated that the requirement of support or communication may take the form of voluntary financial support (provided the parent is financially able to make some contribution) or letters, birthday cards or telephone calls. Child abandonment arises as a direct result of a parent's failure to fulfil parental responsibilities. As such, parental abandonment legislation in South Africa must be developed to provide proper guidance for children's court presiding officers and social workers. In doing so, the legislation must expressly require an assessment of a parent's effort to support and communicate with his/her

¹⁹ Ibid.

²⁰ Ibid.

child. The focus, therefore, must be on the conduct of parents (within the context of the circumstances of the parent) and not on the financial resources of the child as was directed in the *NM* judgement.

It has been shown that yet another important feature of section 7822 of the California Family Code is section 7822(b) which elaborates on the nature and extent of the support and communication required.²¹ It provides that where parents make only token efforts to support or communicate with their child, a court may find that such a child has nevertheless been abandoned. This is a very useful feature of the Californian abandonment law and aids courts in the central enquiry of abandonment cases, which entails focusing on the conduct and efforts of the parents in relation to their child. Sporadic or tenuous attempts to support or communicate with one's child will have little impact on the care and well-being of the child and will be insufficient in discharging the obligation placed on parents to properly care for and protect their child. US case law has also alluded to the greater weight to be attached to failure to communicate with one's child, as opposed to the support requirement. It is far easier to communicate with one's child, particularly in circumstances where parents are in financial difficulty. Once again, these aspects need to be expressly incorporated into South African legislation. It might be argued that, in South Africa just as in California, it can be left up to the courts to fill out legislation with the necessary detail. However, the overwhelming majority of parents involved in care and protection matters lack financial resources to take matters on appeal from children's courts to higher courts. Thus, for the foreseeable future, these courts will obtain very few opportunities to provide detailed guidance on how the South African abandonment provision should be interpreted.

As indicated above, intention to abandon (the fourth element) is linked to the failure to communicate with and provide support (the third element) by the use of a presumption in law in the California Family Code.²² Failure by parents to provide appropriate support and communication creates a presumption of an intention to neglect. It is an important feature of the California abandonment law to expressly require intention to abandon on the part of parents linked to the presumption in order

²¹ Ibid.

²² Ibid.

to assist court determinations. This helps to ensure that parents who genuinely care for their child and who wish to do so in the future are not erroneously deprived of their opportunity to do so. In California, an objective approach is used in determining intention, which involves drawing inferences from a parent's conduct and not only having regard to their verbal expressions.²³ The objective approach is a preferred one as the conduct of parents will distinguish a genuine parent from a disinterested one. A parent, however, must have the capacity to form the intention to abandon. The intention need not be permanent. All that is required is that it be shown that the parent intended to abandon his/her child for the minimum statutory period. These are also positive features of the intention element found in California's child abandonment provisions.

The Californian abandonment statutory provisions are, in comparison to the South African Children's Act, far more comprehensive and detailed. They contain better features, such as, intention to abandon, a presumption of intention to abandon, the requirement of parental support, communication. They expressly distinguish between token and genuine efforts in respect of support and communication. By comparison, these useful features are all absent in the South African Children's Act and accompanying regulations. The incorporation of these features into the Children's Act 38 of 2005 would greatly benefit South African child law on parental abandonment and will provide significant assistance to the courts and other personnel involved in parental abandonment cases. Furthermore, such inclusion would provide much better protection for children from erroneous removal from parental custody. It would also provide much more certainty on the circumstances in which children should be provided with alternative care.

There are, in addition, two further features of American law that are both innovative and of value in considering how to improve South African child abandonment law. These are the Safe Haven laws and the criminalisation of child abandonment. As has been explained, Safe Haven Laws are aimed at protecting the lives of newborns who may otherwise have been abandoned shortly after birth.²⁴ This dissertation primarily focused on the relevant laws of the state of California. It

²³ Ibid.

²⁴ See chapter 4 at part 4.4.

has been noted that California contains three pieces of Safe Haven legislation, each of which provides for a different aspect of infant abandonment. The California Penal Code designates specific sites where newborns may be surrendered. It requires that the child be 72 hours old or younger, however, older children are not turned away. The Safe Haven laws usefully set out detailed procedures that must be observed when a child is presented at a designated site. For instance, personnel at these sites who receive a child must provide the necessary medical and other care required for the safety and well-being of the infant. Medical information is also uplifted from parents; however, this is not obligatory. An important feature is that, as a means of encouraging the safe surrender of children, parents and those who assist in surrendering a child are rendered immune from prosecution, provided the child does not contain drugs or alcohol in his/her system. In addition, all information of the surrendering parent is kept confidential. Provision is also made in Californian law for the return of a child to a surrendering parent within a specific time-period and in accordance with stipulated procedures. Although the California Safe Haven laws legalise parental abandonment of children, they take into account the reality that many children are abandoned shortly after birth, which in many cases results in fatalities as the child is too young to fend for him/herself. The California Safe Haven laws are, therefore, aimed at saving the lives of infants who may otherwise have been unlawfully abandoned. South Africa has not enacted such laws, despite the fact that many South African infants are abandoned each year. It is submitted that the promulgation of such a law has the potential to save the lives of many infants in South Africa. All of the features that have been identified in this study as useful attributes of the California safe haven laws should be expressly included in a future South African version.

As has been noted, California and other US states also provide for the criminalisation of parental abandonment of children.²⁵ Where Safe Haven laws are not applicable or adhered to parents may, in addition to facing the termination of their parental rights, also face prosecution for abandonment. It is a specific offence in many states of the US to abandon one's child. It is interesting to note that even an individual other than a parent who is caring for a child, may be found guilty of this offence. The criminalisation of child abandonment is a welcome feature of US

²⁵ See chapter 4 at part 4.

abandonment laws, as it serves as a deterrent against child abandonment. It encourages parents and other caregivers to make use of other available options, for example, adoption or safe havens, in circumstances where they are having difficulty caring for their child and, therefore, protects the lives of children. The express criminalisation of child abandonment would therefore also be a valuable addition to South Africa's child abandonment laws.

It has been shown that a significant procedural feature of American child abandonment law is that with most cases of abandonment, judicial proceedings involve a petition to terminate parental rights. Every state in the US makes provision for such termination, which is both total and irrevocable. With such severe consequences at stake, the US Supreme Court introduced an important procedural safeguard aimed at adding greater protection to the parent-child relationship. This requires that, in termination of parental rights petitions based on the ground of parental abandonment, a court must make use of the highest civil standard, that is, that clear and convincing evidence be furnished to prove that a parent has abandoned his/her child. This standard of proof is higher than the ordinary civil standard. Although this approach *prima facie* appears to favour parents over children, it aims to achieve certainty so as to prevent the improper dissolution of the parent-child relationship and the family unit.

5.2. RECOMMENDATIONS

A fundamental aim of this dissertation was to evaluate the adequacy of the law covering parental abandonment in South Africa contained in Children's Act. The research process followed an exploration of relevant legislative provisions of a foreign legal system, the United States of America, and particularly California, so as to provide for a comparative analysis between the approaches of both jurisdictions. The aim of this analysis was to highlight differences and similarities of the relevant legal provisions of both countries and allow for the formulation of a set of recommendations for possible improvement to the current South African legal framework. The analysis culminated in a draft set of proposed legislative provisions, which seek to supplement sections 150(1)(a) and 1 of the Children's Act. Having summarised the findings of this dissertation in part 5.1 above and highlighted the

weaknesses in South African law as well as the strengths in Californian law, the following recommendations are made:

- (1) As a starting point in respect of section 150(1)(a), abandonment and orphanage should be separated and made into two distinct alternative grounds under which a child may be found to be in need of care and protection. This will enable the legislature to deal more comprehensively with each issue and avoid confusion in judicial proceedings.

- (2) Secondly, the additional requirement in section 150(1)(a) that the child must be “without any visible means of support” should not be included in the proposed new ground specifically addressing abandonment. It has been noted as unfortunate that the High Court in the *NM* case interpreted this requirement to relate to the financial resources of the child to support him/herself. It is submitted that in the determination of whether a child has been abandoned, the financial resources of the child are irrelevant. Instead, the correct approach that should be directed in improved South African legislation is one that focuses on the conduct and intention of a child’s parents. This is the recommended approach as the central cause for a finding of abandonment must be failure on the part of parents to adequately care for and protect their child.

- (3) The proposed separation of orphaned and abandoned children and the removal of the visible means requirement should result in the creation of an entirely separate ground under which an abandoned child may be found to be in need of care and protection. The amended section 150(1)(a) should then in relevant part read as follows:

***“(1) A child is in need of care and protection if, the child-
(a) has been abandoned,”***

- (4) As a consequence of the above recommendations, it then becomes necessary to supplement the definition of “abandoned” as presently contained in section 1 of the Children’s Act. This definition was, through the analysis above,

shown to be lacking in detail. The analysis of relevant law from the US has revealed useful additional elements that are absent in the Children's Act and which ought to be incorporated into the definition of "abandoned" so as to provide a more comprehensive provision. This would provide better assistance to the courts and social workers, as well as offering greater protection to children and the parent-child relationship. The additional elements which need to be included are the following:

- (a) Intention on the part of the parent/s to abandon his/her child for the duration of the statutory period;
- (b) an absence of parental support or communication for the duration of the statutory period;
- (c) the presumption of intention to abandon where a parent fails to provide support to or communicate with his/her child for the duration of the statutory period;
- (d) the declaration of a child to be abandoned where the parent (taking into account his/her circumstances) has made only token efforts to support or communicate with his/her child.

(5) The current definition of "abandoned" as per present wording in section 1 of the Children's Act actually creates two definitions. Although appearing odd, it attempts to cater for the different circumstances in which children may be abandoned. That is, firstly in circumstances where a child is left alone to fend for him/herself (i.e. "deserted") as per sub-paragraph (a) of the definition. Secondly, in circumstances where a child is abandoned by leaving the child with another person and failing to maintain contact with the child for a period of three months as per sub-paragraph (b) of section 1. Sub-paragraph (a) is, as noted above, a positive feature of the definition. However, as was pointed out in chapter 2, it is lacking in that it does not make mention of a minimum statutory time period. The inclusion of a time period will allow for more certainty in the judicial determination of whether or not the child was deserted by his/her parents. In addition to the inclusion of a time period, what should also be added is an express reference to the essential requirement that the parent intended to abandon his/her child. The

amended sub-paragraph (a) of the definition of “abandoned” could, therefore, read as follows:

“Abandoned, in relation to a child means-

(a) the child has been deserted by his/her parent, guardian or caregiver for a period of at least two weeks, with the intent on the part of the parent, guardian or caregiver to abandon the child; or”

The time-period of two weeks proposed here for inclusion in an improved version of sub-paragraph (a), although it may seem very short, is justified in that when a child is deserted he/she is frequently not left in the care or custody of another person. Instead, the child may be forced to care for him/herself. This is in contravention of international law and constitutional provisions which as has been shown place the primary responsibility for the care and upbringing of the child on parents.²⁶ The recommended short time-period is also justified when one has regard to the severe consequences of leaving a child to fend for him/herself, that is, possible fatality.

Although it is recommended that the longer existing three month time period in the current wording of sub-paragraph (b) be retained, sub-paragraph (b) must be amended to expressly cater for the other less immediately serious circumstances besides complete desertion in which a child may be abandoned, that is, by leaving the child with another person, which may include the other parent. The amended sub-paragraph (b) should, therefore, read as follows:

“Abandoned, in relation to a child means-

(a) ... ; or

(b) A child who has been left by a parent, guardian or caregiver in the care and custody of another person for a period of three months without any sufficient appropriate contact with or support for the child for the period of three months, with intent on the part of the parent, guardian or caregiver to abandon the child. Sufficient appropriate contact must be assessed by taking into account the needs of the child, and the

²⁶ See chapter 1 at part 1.1.

circumstances of and resources available to the parent and any other person having care of the child.”

As can be seen, sub-paragraph (b) in this new proposed form now provides an alternative definition for an abandoned child, and caters for circumstances where the child is not entirely deserted, but rather left in the care and custody of another person. This sub-paragraph retains the original time-period of three months chosen by drafters of the Children’s Act. It also retains the failure to “contact” requirement. As per the definition of the term “contact” found in section 1 of the Children’s Act, contact relates to maintaining a personal relationship with the child and communicating with the child. The existing definition does not refer to the provision of support to a child. The “support” aspect is, therefore, added to the recommended sub-paragraph (b) as it was absent in the original section 1 of the Children’s Act. The amended sub-paragraph (b) also provides for the crucial element of intention of a parent to abandon his/her child.

- (6) It is further recommended that there must also be an additional sub-paragraph added to the definition of abandonment on section 1 of the Children’s Act. This could take the form of a sub-paragraph (c) which should be applicable to both sub-paragraphs (a) and (b). It should provide for a presumption of intent on the part of parents to abandon their child. The inclusion of such a presumption is important so as to shift the burden of adducing evidence onto the parents in question, so that such parents may show the efforts made on their part to support or communicate with their child. Without such a presumption, it may be very difficult to discern what was in the mind of a parent in order to prove intention to abandon a child. The recommended additional sub-paragraph (c) would, therefore, read as follows:

“Abandoned, in relation to a child means-

(a) ... ; or

(b)

(c) In respect of sub-paragraphs (a) and (b) above, a failure to provide support, or failure to contact the child for the duration of the statutory period is presumptive evidence of the intent to abandon.”

It should be noted that in terms of the proposed wording the failure to provide support or failure to contact the child will give rise to the presumption. Parents or other caregivers should be entitled to rebut the presumption if they are able to prove that they were unable to provide support or to communicate due to circumstances beyond their control, for instance, in cases of incarceration. The “communicate” requirement in sub-paragraph (c) should be read with the existing definition of “contact” in section 1 of the Children’s Act.

- (7) It is recommended that there must also be a distinction made between token and genuine efforts by the parents to support or contact their child. The simplest and clearest way to do this would be by stating expressly that a child may be found to be abandoned where only token efforts are made. An additional sub-paragraph should, therefore, be added to the existing definition of abandonment in section 1 of the Children’s Act to cater for this important aspect. It is proposed that the additional sub-paragraph (d) should read as follows:

“Abandoned, in relation to a child means-

(a) ... ;

(b)

(c)

(d) If a parent, guardian or caregiver has made only token efforts to support or contact the child, the court may declare the child abandoned by the parent, guardian or caregiver.”

- (8) The proposed amended and expanded definition of “abandoned” in section 1 of the Children’s Act, as indicated above, would serve as a more comprehensive definition. It would enable the courts to address parental abandonment of children

more adequately. The complete proposed definition of “abandoned” in section 1 of the Children’s Act is as follows:

“Abandoned, in relation to a child means-

- (a) the child has been deserted by his/her parent, guardian or caregiver for a period of at least 2 weeks, with the intent on the part of the parent, guardian or caregiver to abandon the child; or***
- (b) a child who has been left by a parent, guardian or caregiver in the care and custody of another person for a period of 3 months without any contact with or support for the child for the period of 3 months, with intent on the part of the parent, guardian or caregiver to abandon the child.***
- (c) In respect of sub-paragraphs (a) and (b) above, a failure to provide support, or failure to contact the child for the duration of the statutory period, is presumptive evidence of the intent to abandon.***
- (d) If a parent, guardian or caregiver has made only token efforts to support or contact the child, the court may declare the child abandoned by the parent, guardian or caregiver.”***

(9) A further recommendation is for the enactment of Safe Haven legislation and the consequent establishment of Safe Haven sites in South Africa where children, particularly infants, may be surrendered. There should be immunity offered to the surrendering parent, provided the child is found without drugs or alcohol in his/her system. This proposed legislation is aimed at saving the lives of newborns who may otherwise be unlawfully abandoned, potentially resulting in fatal consequences.²⁷ Based on the positive experience in California, a Safe Haven law should be adopted in South Africa.

(10) A further recommendation is for the criminalisation of child abandonment when it falls outside the scope of a safe haven as explained above. As indicated earlier, the enactment of such legislation serves as a deterrent against child

²⁷ See chapter 4, part 4.4.

abandonment. It will encourage parents to make use of other available options, for example, adoption or foster care, in circumstances where parents are experiencing difficulty in caring for their child. Similar to Safe Haven laws, the criminalisation of abandonment is aimed at protecting the lives of children.

(11) A final recommendation is the consideration of using a higher standard of proof in circumstances where a parent's rights and responsibilities in relation to his/her child are to be terminated, based on abandonment. This higher standard would entail a court making use of a new higher civil standard, that is, that clear and convincing evidence, to be furnished to prove that a parent has abandoned his/her child. Although such standard has not been used previously in South African law, it can be motivated as a form of protection for both children and parents in situations where the State wishes to separate them. Both the drastic consequences resulting from such separation, and the lack of resources experienced by parents typically involved (resulting frequently in an inability to appeal court decisions), serve to buttress an argument in favour of using a standard of evidence which falls between "balance of probabilities" and "beyond reasonable doubt".

In final conclusion, it has been shown in this dissertation that the currently inadequate South African law on parental abandonment could be considerably improved through promulgation of a relatively short addition to the Children's Act. It may be suggested that such a reform is well worthwhile, given the serious harm to both children and parents which results whenever an incorrect finding of abandonment is made by a court.

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