

Safeguarding the Rights of Children Living in Kinship Care in South Africa

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Abstract

By the early 2000s the practice of using the foster care system as a measure to subsidise the income of families who cared for the children of relatives was firmly entrenched in South Africa. This caused a rapid rise in the number of children receiving the foster child grant. By 2010 more than 500 000 foster child grants (FCGs) were in payment. The foster care system could not cope with this pressure, resulting in the lapsing of more than 110 000 foster child grants between April 2009 and March 2011. The High Court intervened at the request of the Centre for Child Law in Pretoria, placing a moratorium on the lapsing of foster care orders and giving the Department of Social Development (DSD) until December 2014 to come up with a "comprehensive legal solution" to solve the foster care crisis. The December 2014 deadline was extended four times, eventually until December 2022. The "comprehensive legal solution" that the North Gauteng High Court tasked the minister with in 2011 required amendments to both the *Social Assistance Act* 13 of 2004 and the *Children's Act* 38 of 2005. The first of these amendments, the *Social Assistance Amendment Act* 16 of 2020, came into effect on 30 May 2022 and the second, the *Children's Amendment Act* 17 of 2022, on 8 November 2023. This article considers the question whether the department's response to the so-called "foster care crisis" as contained in these Amendment Acts and their regulations complies with South Africa's obligations in terms of international law and the *Constitution of the Republic of South Africa*, 1996.

Keywords

Kinship care; family care; orphaned children; abandoned children; foster care crisis; child support grant; extended child support grant; foster child grant; children's socio-economic rights; social security; social services.

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1 Introduction

Kinship care is a common occurrence in South Africa. In terms of the latest *General Household Survey (GHS)*,¹ about one-fifth of children (18.8%) in South Africa lived with neither of their parents in 2021.² Not all children living in kinship care in South Africa are orphans.³ Regardless of whether or not they are orphans, many children live with family members such as grandparents or aunts.⁴ This conclusion is supported by the *GHS*: although only 11.6% of children in South Africa were classified as orphans in 2021 (2.2% of children were maternal orphans, 7.0% were paternal orphans, and 2.4% were double orphans),⁵ a larger number of children (18.8%) lived with neither of their parents.⁶

In the *United Nations Guidelines on the Alternative Care of Children (UN Guidelines)*⁷ kinship care is defined as "family-based care within the child's extended family or with close friends of the family known to the child, whether formal or informal in nature".⁸ In South Africa the most widely accepted definition of kinship care is care by a relative or family member of a child who is not the child's parent. This is the definition proposed by the SALC in the Draft Bill contained in the *Report on the Review of the Child Care Act*.⁹ It is also the definition used in the National Child Care and

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¹ Stats SA *GHS 2021* fig 3.7.

² This phenomenon was most prevalent in the Eastern Cape (32.3%), Free State (22.0%) and KwaZulu-Natal (21.6%) and least prevalent in the Western Cape (13.7%) and Gauteng (10.1%).

³ For the purposes of the *GHS*, orphans are defined as children younger than 18 years who have lost one or both parents (Stats SA *GHS 2021* 11). There are three categories of orphans: a child whose mother has died but whose father is alive (a maternal orphan), a child whose father has died but whose mother is alive (a paternal orphan) and a child whose mother and father have both died (a double orphan) (Tomlinson, Kleintjies and Lake *Child Gauge 2021/2022* 166). On the definition of "orphan" in the *Children's Act* 38 of 2005 (hereafter the *Children's Act*), see para 4.2.1 below.

⁴ Meintjies *et al Children "in Need of Care" or in Need of Cash?* 10.

⁵ Stats SA *GHS 2021* fig 3.6.

⁶ Stats SA *GHS 2021* fig 3.7.

⁷ *United Nations Guidelines on the Alternative Care of Children* UN Doc A/RES/64/142 (2010) (hereafter the *UN Guidelines*).

⁸ *UN Guidelines* para 29(c)(i).

⁹ SALC *Report on the Review of the Child Care Act* cl 1 (definition of "informal kinship care arrangement").

Protection Policy.¹⁰ The term is defined in neither the *Children's Act* nor the *Children's Amendment Act*. In this article the term "kinship care" is understood as care of a child by a family member who is not the child's parent. The term "family care" is an acceptable alternative term for "kinship care".

Kinship care in South Africa has some unique characteristics. When kinship care is examined through a gender lens, it emerges that grandmothers are the most common kinship caregivers both in South Africa and abroad, closely followed by aunts.¹¹ Another interesting fact is that not all children in kinship care are orphans or abandoned children. As was explained above, 18.8% of children live with neither of their parents. Of the number of children who do not live with either of their parents, 85% have at least one parent who is still alive but is living somewhere else.¹²

In 2002 the South African Law Commission (SALC), as it was then known, recommended the institution of an informal kinship care grant.¹³ By that time a well-established practice had developed to use the foster care system as a measure to subsidise the income of families who have the children of relatives in their care.¹⁴ This practice was further entrenched by the former Minister of Social Development, Dr Zola Skweyiya,¹⁵ in 2002 when he publicly encouraged persons taking care of the orphaned children of family members to apply for foster care and the foster child grant (FCG). Following this pronouncement the number of children accessing the FCG¹⁶ increased rapidly. By 2010 more than 500 000 children were FCG recipients.¹⁷

Understandably the foster care system was unable to handle these numbers. Over 110 000 FCGs expired between April 2009 and March 2011 because of delays in extending court orders.¹⁸ This necessitated High Court

¹⁰ GN 472 in GG 44363 of 28 May 2021 (National Child Care and Protection Policy 2019). For a detailed discussion of this policy see para 4.2.2 below.

¹¹ Dolbin-McNab and Yancura 2018 *International Journal of Aging and Human Development* 24; Community Agency for Social Security and Children's Institute *Comprehensive Review* 50. See also De Koker, De Waal and Vorster *Profile of Social Security Beneficiaries* para 11.10.3: from 2004 to 2006 41% of foster caregivers were grandmothers, and 30% were aunts.

¹² Hall 2022 <http://www.childrencount.uct.ac.za/indicator.php?domain=1&indicator=2#3>. See also Delany, Jehoma and Lake *Child Gauge* 2016 71.

¹³ SALC *Report on the Review of the Child Care Act* para 24.6. Also see cl 343 of the Draft Children's Bill attached to the report.

¹⁴ SALC *Discussion Paper 103* para 17.2.2.

¹⁵ Skweyiya "Keynote Address".

¹⁶ On the foster child grant see para 3.3.2 below.

¹⁷ Hall and Proudlock *Orphaning and the Foster Child Grant* 2.

¹⁸ Tomlinson, Kleintjies and Lake *Child Gauge* 2021/2022 174.

intervention at the request of the Centre for Child Law in Pretoria, which led to a settlement with DSD. This settlement, which was made an order of court,¹⁹ effectively placed a moratorium on the lapsing of foster care orders, giving the department time to implement a "comprehensive legal solution" to solve the crisis. Initially the department was given until December 2014 to solve the crisis, but this date was extended four times, most recently until December 2022.²⁰

The "comprehensive legal solution" that the North Gauteng High Court tasked the minister with in 2011 required amendments to both the *Social Assistance Act* 13 of 2004 and the *Children's Act* 38 of 2005 by December 2022. The first of these amendments came into effect on 30 May 2022,²¹ and the second on 8 November 2023.²² This article will consider whether the department's solution to the so-called "foster care crisis" is in line with international law and the *Constitution of the Republic of South Africa*, 1996. In the second part of this article South Africa's obligations in terms of international law and the *Constitution* will be explored. After providing a background on the social grants system in South Africa pertaining to children in part 3, this article will explore the foster care crisis and DSD's response to the crisis in part 4. This will be followed by the drawing of conclusions and the making of recommendations in part 5.

2 The international and constitutional framework

Both the *United Nations Convention on the Rights of the Child* (1989) (UNCRC)²³ and the *African Charter on the Rights and Welfare of the Child* (1990) (ACRWC)²⁴ direct state parties to ensure to the maximum extent possible the child's right to survival and development.²⁵ This right has been recognised as one of the "general principles" of the UNCRC by the Committee on the Rights of the Child. The committee directs state parties to interpret "development" as a holistic concept that encompasses the

¹⁹ *Centre for Child Law v Minister of Social Development* (GNP) unreported case number 21726/2011 of 19 July 2011 (published in GN 441 in GG 34303 of 20 May 2011).

²⁰ Tomlinson, Kleintjies and Lake *Child Gauge* 2021/2022 174.

²¹ *Social Assistance Amendment Act* 16 of 2020.

²² *Children's Amendment Act* 17 of 2022. Sections 1, 2, 3, 6, 7, 8(a)-(d), 9, 10, 13 and 14 of this Amendment Act came into operation on 8 November 2023. All the sections that are discussed in this article are therefore in force.

²³ *United Nations Convention on the Rights of the Child* (1989) (hereafter the UNCRC), ratified by South Africa on 16 June 1995.

²⁴ *African Charter on the Rights and Welfare of the Child* (1990) (hereafter the ACRWC), ratified by South Africa on 7 January 2000.

²⁵ UNCRC Art 6; ACRWC Art 5.

child's physical, mental, spiritual, moral, psychological and social development. Measures aimed at implementing this right should strive towards achieving optimal development for all children.²⁶ Another general principle recognised by the Committee on the Rights of the Child is the best interests of the child. In this regard the UNCRC provides that "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."²⁷ The ACRWC contains a similar provision, providing that "[i]n all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration."²⁸

Both treaties recognise that, for the full and harmonious development of his or her personality, a child should grow up in a family environment in an atmosphere of happiness, love and understanding.²⁹ The Committee on the Rights of the Child lists the preservation of the family environment as one of the elements to be considered when assessing the best interests of the child.³⁰ The Committee emphasises that the right to family life is protected under the UNCRC, and that "family" must be interpreted in "a broad sense to include biological, adoptive or foster parents or, where applicable, the members of the extended family or community as provided for by local custom."³¹ The importance of growing up in a family environment is strengthened in the *UN Guidelines*. Article 3 of these guidelines provides as follows:

The family being the fundamental group of society and the natural environment for the growth, well-being and protection of children, efforts should primarily be directed to enabling the child to remain in or return to the care of his/her parents or when appropriate, other close family members. The State should ensure that families have access to [all] forms of support in the caregiving role.

The UNCRC also directs state parties to implement "the right of every child to a standard of living adequate for the child's physical, mental, spiritual,

²⁶ Committee on the Rights of the Child *General Comment 5: General Measures of Implementation of the Convention on the Rights of the Child* UN Doc CRC/GC/2003/5 (2003) (hereafter *General Comment 5*) para 12.

²⁷ UNCRC Art 3(1).

²⁸ ACRWC Art 4(1).

²⁹ Preambles of the UNCRC and the ACRWC.

³⁰ Committee on the Rights of the Child *General Comment 14 on the Right of the Child to Have his or her Best Interests Taken as a Primary Consideration* UN Doc CRC/C/GC/14 (2013) (hereafter *General Comment 14*) paras [58]-[70].

³¹ *General Comment 14* para [5], with reference to Arts 16 and 5 of the UNCRC respectively.

moral and social development."³² The ACRWC does not contain a similar provision. Both treaties recognise that the primary responsibility to secure the living conditions necessary for the child's development, within their abilities and financial capacities, rests on parents or others responsible for the child.³³ State parties must take appropriate measures "in accordance with national conditions and within their means" to assist parents and others responsible for the child to implement this right.³⁴ In a case of need, this includes the obligation to "provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing."³⁵

In summary, South Africa is obliged to ensure that every child receives a standard of living adequate for the child's development.³⁶ The obligation to ensure these living conditions rests primarily on the child's parents and other responsible persons, within their abilities and financial capacities.³⁷ However, state parties must provide assistance that corresponds with national conditions and their means when the need arises.³⁸

The Bill of Rights in the *Constitution* contains several founding values and fundamental rights that should inform policy decisions affecting children. These include the founding values and rights to human dignity and equality.³⁹ Section 28, which entrenches the fundamental rights of children, affords every child the right to "family care or parental care, or to appropriate alternative care when removed from the family environment."⁴⁰ Children also have "the right ... to be protected from maltreatment, neglect, abuse or degradation."⁴¹ Finally, but not least importantly, "[a] child's best interests are of paramount importance in every matter concerning the child."⁴²

The *Constitution* also affords a range of socio-economic rights to children and the persons who care for them.⁴³ Every person has the right to have

³² UNCRC Art 27(1).

³³ UNCRC Art 27(2), read with Art 18(1) (which confirms that the parents or legal guardians have the primary responsibility for the upbringing and development of a child); ACRWC Art 20(1).

³⁴ UNCRC Art 27(3). See also ACRWC Art 20(2).

³⁵ UNCRC Art 27(3).

³⁶ UNCRC Art 27(1).

³⁷ UNCRC Art 27(2).

³⁸ UNCRC Art 27(3).

³⁹ *Constitution of the Republic of South Africa*, 1996 (hereafter the *Constitution*) ss 1(a), 7(1), 9 and 10.

⁴⁰ *Constitution* s 28(1)(b).

⁴¹ *Constitution* s 28(1)(d).

⁴² *Constitution* s 28(2).

⁴³ E.g. the right of everyone to basic education (s 29(1)(a) of the *Constitution*) and further education (s 29(1)(b)), the right to have access to health care services

"access to social security, including, if they are unable to support themselves and their dependents, appropriate social assistance."⁴⁴ Children have additional rights to "basic nutrition, shelter, basic health care services and social services."⁴⁵ In terms of the rights of everyone to social security, the state has an obligation to "take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation" of these rights.⁴⁶ Section 28(1)(c) does not contain the same limitation in respect of children's socio-economic rights.

The Constitutional Court has provided clear guidelines on how to interpret the socio-economic rights of everyone as entrenched in sections 26, 27 and 29. Two of these judgments included an indirect interpretation of the socio-economic rights of children in section 28(1)(c). In *Government of the Republic of South Africa v Grootboom*,⁴⁷ which dealt with the right to shelter, the court held that section 28(1)(b) and (c) must be read together. Section 28(1)(b) specifies the persons who are responsible for caring for children (parents, family or the state), whereas section 28(1)(c) underlines the components of that care ("basic nutrition, shelter, basic health care services and social services").⁴⁸ This means that if the child is being cared for by parents or family members, they are primarily responsible for meeting the child's basic needs. This primary responsibility to meet the child's basic needs shifts to the state if the child is removed from the family and is placed in alternative care (such as foster care).⁴⁹

The court made it clear that although section 28(1)(c) does not give parents with children the right to claim shelter from the state on demand, the state is still obliged to assist families to care for their children. This obligation would be fulfilled, for example, by assisting families with access to adequate housing in terms of section 25, and social security in terms of section 27:

(s 27(1)(a)), the right to have access to sufficient food and water (s 27(1)(b)), and the right to have access to adequate housing (s 26(1)).

⁴⁴ *Constitution* s 27(1)(c).

⁴⁵ *Constitution* s 28(1)(c).

⁴⁶ *Constitution* s 27(2).

⁴⁷ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) (hereafter *Grootboom*).

⁴⁸ *Grootboom* para [76].

⁴⁹ Community Agency for Social Security and Children's Institute *Comprehensive Review* 45. The High Court has confirmed that children in alternative care (as opposed to parental or family care) have directly enforceable entitlements to have their basic care needs met by the state (*Centre for Child Law v Minister of Home Affairs* 2005 6 SA 50 (T); *Centre for Child Law v MEC for Education* 2008 1 SA 223 (T)).

It follows from this judgment that ss 25 and 27 require the State to provide access on a programmatic and coordinated basis, subject to available resources. One of the ways in which the State would meet its s 27 obligations would be through a social welfare program providing maintenance grants and other material assistance to families in need in defined circumstances.⁵⁰

In *Minister of Health v Treatment Action Campaign (No 2)*,⁵¹ the court deviated from its previous view in *Grootboom* that the state's direct obligation to provide for children's socio-economic needs is activated only when children are separated from their families. In this case the court was tasked to decide on the rights of children born to mothers who were dependent on state health care facilities for medical care. The court held that the protection in section 28 is afforded to children "when the implementation of the right to parental or family care is lacking."⁵² However, the court interpreted this positive duty to provide health care services (in this case the antiretroviral drug Nevirapine) to children "through the lens of section 27(1)(c) and, consequently, through the application of the reasonableness test."⁵³ Therefore, the court's decision was not based on an unqualified, direct claim to provide health care services. In contrast, the court concluded that it was unreasonable to deny children the right to basic health care services because a particularly vulnerable group would be prejudiced by this denial.⁵⁴

Liebenberg⁵⁵ highlights the "discomfort with interpreting the socio-economic rights provisions in the *Constitution* to confer a directly enforceable entitlement to social ... services", arguing that the Constitutional Court prefers to apply a model of reasonableness review rather than finding that the socio-economic rights provisions in the *Constitution* place positive obligations on the state. She correctly points out that this position is unsatisfactory as it disregards the state's direct obligation to support families living in poverty to fulfil the basic needs of the children in their care.⁵⁶ In *Governing Body of the Juma Masjid Primary School v Essay*⁵⁷ the court held that the right to a basic education in section 29(1)(a) of the *Constitution* is an "immediately realisable" right, as there is no internal limitation making the right conditional upon progressive realisation within available

⁵⁰ *Grootboom* para [78].

⁵¹ *Minister of Health v Treatment Action Campaign (No 2)* 2002 5 SA 721 (CC) (hereafter *TAC*).

⁵² *TAC* para [79].

⁵³ Proudlock "Children's Socio-Economic Rights" 372.

⁵⁴ *TAC* paras [77]-[80].

⁵⁵ Liebenberg *Socio-Economic Rights Adjudication* 238.

⁵⁶ Liebenberg *Socio-Economic Rights Adjudication* 241.

⁵⁷ *Governing Body of the Juma Masjid Primary School v Essay* 2011 8 BCLR 761 (CC).

resources.⁵⁸ Section 29(1)(a) (the right to a basic education) and section 28(1)(c) (which protects the socio-economic rights of children) are comparable as none of these provisions contains an internal limitation. However, the Constitutional Court has interpreted these provisions differently, affording stronger protection to the right to a basic education.⁵⁹ Proudlock⁶⁰ offers possible explanations for these different approaches, most notably the fact that the *Juma Masjid* case will not place a significant burden on the resources of the state, unlike the *Grootboom* and *TAC* cases.

In summary, when children are cared for by parents or family members, these parents or family members are primarily responsible for meeting the child's basic needs, which include basic nutrition, shelter, basic health care services and social services.⁶¹ The state is obliged to assist families to care for the children in their care, for example by providing social security.⁶² This duty exists even if it is not viewed as the result of a direct claim against the state in terms of section 28(1)(c),⁶³ but as a result of the obligation in terms of section 27(1)(c) to provide appropriate social assistance to all persons and their dependents who are unable to support themselves.⁶⁴

3 The social grants system in South Africa as it pertains to children

3.1 Introduction

As indicated above,⁶⁵ both the *Constitution* and international law protect the right of children to receive support. The obligation to provide support to children is primarily placed on parents and family members, and on the state only if they are unable to provide the required support. The state fulfils this obligation by means of the system of social grants provided for in the *Social Assistance Act*.

3.2 A brief history of the social grants system in South Africa

When the first democratic government took office in 1994, only a small number of older persons, persons with disabilities, parents and children

⁵⁸ *Governing Body of the Juma Masjid Primary School v Essay* 2011 8 BCLR 761 (CC) para [37].

⁵⁹ Proudlock "Children's Socio-Economic Rights" 373.

⁶⁰ Proudlock "Children's Socio-Economic Rights" 373.

⁶¹ *Constitution* ss 28(1)(b) and 28(1)(c). Also see *Grootboom* para [76].

⁶² *Grootboom* para [78].

⁶³ See further para 4.2.3 below in this regard.

⁶⁴ *TAC* paras [77]-[80].

⁶⁵ See para 2 above.

were eligible for social grants. Children placed in foster care by the children's court qualified for the FCG, persons who cared for children with disabilities requiring permanent care received the care dependency grant (CDG), and single parents of minor children were eligible for the state maintenance grant (SMG). In the early 1990s the SMG reached 200 000 women and children, making up only 12% of South Africa's total expenditure on social assistance.⁶⁶

The unequal racial and geographical distribution of the SMG was a point of criticism.⁶⁷ In 1990 only 2 out of every 1000 African children received the grant.⁶⁸ Children who lived in rural areas were often excluded from the grant because their caregivers were either not aware of the grant or had difficulties travelling to government offices or accessing the relevant supporting documents. Moreover, as the grant had been designed for nuclear families with fathers as primary breadwinners, it was out of touch with the changing concept of family life in South Africa.⁶⁹

In 1996 the then Minister for Welfare appointed the Lund Committee for Child and Family Support to advise policymakers on appropriate alternatives. The Lund Committee reviewed several grant options in terms of their potential to progressively realise the constitutional and international rights of children within the relevant budget restrictions and recommended the retention of the FCG and the CDG, the introduction of the child support grant (CSG) and the discontinuation of the SMG.⁷⁰

When the means-tested CSG was implemented in 1998 it was valued at R100 per child per month. Primary caregivers of children younger than seven were eligible. The age limit for receiving the grant was gradually raised. Children younger than 14 years were included from 2003 to 2005, children younger than 15 years in 2009, and finally children younger than 18 years from 2010 to 2012. As a result of this expansion, the number of CSG recipients increased from just over 150 000 in 1999/2000 to almost 13 million in 2021/2022.⁷¹ The CSG is acknowledged as an effective and

⁶⁶ Lund *Changing Social Policy* 15-16. Also see Delany, Jehoma and Lake *Child Gauge* 2016 39.

⁶⁷ Lund *Changing Social Policy* 16.

⁶⁸ Lund *Changing Social Policy* 17, fig 1.2.

⁶⁹ Lund *Changing Social Policy* 16; Delany, Jehoma and Lake *Child Gauge* 2016 39.

⁷⁰ Lund *Changing Social Policy* ix, 131-132.

⁷¹ Delany, Jehoma and Lake *Child Gauge* 2016 40; Tomlinson, Kleintjies and Lake *Child Gauge* 2021/2022 172.

successful poverty reduction programme both in South Africa and more generally in the Global South.⁷²

3.3 Child grants in South Africa

3.3.1 The child support grant

The CSG is available to primary caregivers of children⁷³ and children who head child-headed households in terms of section 137 of the *Children's Act*.⁷⁴ The primary caregiver must be 16 years or older.⁷⁵ At the time when this article was written, the value of the CSG was R510 per month.⁷⁶ The primary caregiver must meet the income threshold, which is ten times the grant amount, in other words R5 100 per month for a single caregiver, and R10 200 per month for the joint income of the caregiver and spouse, if the caregiver is married.⁷⁷ The means test makes sense in view of the purpose of the CSG, namely poverty alleviation.⁷⁸

There is no limit on the number of biological children for whom an individual caregiver can receive a CSG. Where the children are not the caregiver's biological or legally adopted children, the caregiver is entitled to CSGs for a maximum of six children.⁷⁹ The CSG is payable for children who are South African citizens, permanent residents or refugees residing in South Africa.⁸⁰ In 2022 12.92 million CSGs were in payment. This figure represented a decrease of 80 000 from March 2021 and the first overall decline in the number of CSGs since 2014.⁸¹

The South African Social Security Agency (SASSA) is tasked with administering the CSG. The application procedure is a simple, once-off

⁷² Patel "Child Support Grants" 262-284.

⁷³ "Child" is defined as a person under the age of 18 years (*Social Assistance Act* 13 of 2004 (hereafter the *Social Assistance Act*) s 1).

⁷⁴ *Social Assistance Act* s 6.

⁷⁵ *Social Assistance Act* s 1; *Children's Act* s 137(1)(c).

⁷⁶ GN R3208 in GG 48321 of 28 March 2023.

⁷⁷ GN R2119 in GG 46459 of 31 May 2022 (Regulations Relating to the Application for and Payment of Social Assistance and the Requirements or Conditions in respect of Eligibility for Social Assistance) (hereafter the *Social Assistance Regulations*) reg 7(1)(b) read with regs 20, 21 and Annexure B.

⁷⁸ Hall and Proudlock *Orphaning and the Foster Child Grant* 1.

⁷⁹ *Social Assistance Regulations* regs 7(1)(a) and 7(2).

⁸⁰ *Social Assistance Regulations* reg 7(1)(f).

⁸¹ Tomlinson, Kleintjies and Lake *Child Gauge 2021/2022* 172.

process handled by administrative staff. The application is processed within three working days, and the grant is paid from the date of application.⁸²

3.3.2 *The foster child grant*

After the children's court has found a child to be "in need of care and protection" and made an order placing the child in the care of foster parents, the foster parents are entitled to an FCG.⁸³ When this article was written, the FCG was valued at R1 130 per month.⁸⁴ Given the purpose of the FCG to protect children and not to alleviate poverty, the FCG is not dependent upon a means test as is the case with the CSG.⁸⁵ This is also the reason why the FCG is valued much higher than the CSG. Whereas the purpose of the CSG is poverty alleviation, the FCG was intended to defray expenses in respect of a child who would have been in the care of the state in different circumstances.⁸⁶ Foster care is connected with a "basket of services", which includes monitoring and social services for both the child and the foster parents, treatment and therapeutic services, and family reunification services.⁸⁷ Some link the higher grant amount of the FCG to the state's direct constitutional obligation to provide support for foster children as "wards of the state", whereas the state is obliged to provide support for children in kinship care only where the family is unable to do so.⁸⁸

A foster parent is eligible for an FCG if he or she is a South African citizen, a permanent resident or a refugee, and resides in South Africa.⁸⁹ A foster parent is not eligible for an FCG for more than six children, "except where the children are siblings or blood relations or the court considers this for any reason to be in the best interests of all the children."⁹⁰ An FCG lapses when the child turns 18, but it can be extended until the child turns 21 if the child is still dependent on the foster parents.⁹¹ In 2022, 285 106 FCGs were in payment, compared to 536 747 in 2012.⁹²

⁸² Hall and Proudlock *Orphaning and the Foster Child Grant* 1. Also see Social Assistance Regulations reg 14.

⁸³ *Social Assistance Act* s 8.

⁸⁴ GN R3208 in GG 48321 of 28 March 2023.

⁸⁵ Also see Social Assistance Regulations reg 21(1); Hall and Proudlock *Orphaning and the Foster Child Grant* 1.

⁸⁶ Delany, Jehoma and Lake *Child Gauge* 2016 68.

⁸⁷ Delany, Jehoma and Lake *Child Gauge* 2016 69.

⁸⁸ SALC *Report on the Review of the Child Care Act* para 24.6; Community Agency for Social Security and Children's Institute *Comprehensive Review* 5.

⁸⁹ Social Assistance Regulations reg 9(1)(a).

⁹⁰ Social Assistance Regulations reg 9(2) read with *Children's Act* s 185(1).

⁹¹ Social Assistance Regulations reg 31(5).

⁹² Tomlinson, Kleintjies and Lake *Child Gauge* 2021/2022 175.

When children are placed in foster care with persons that are not family members, the placement must normally be reviewed every two years.⁹³ However, the *Children's Act* allows the children's court to rule that the order will subsist until the child turns 18, and that no further social worker supervision or reports are required for the placement. This can happen only after two years have expired and after the court has considered the need for stability in the child's life.⁹⁴

In the case of placements with family members, the children's court may, having considered the need for creating stability in a child's life, place the child in foster care with a family member and order that the placement subsists until the child turns 18.⁹⁵ This can be done if "(a) the child has been abandoned by the biological parents; or (b) the child's biological parents are deceased; or (c) there is for any other reason no purpose in attempting reunification between the child and the child's biological parents; and (d) it is in the best interest of the child."⁹⁶ These long-term placements (both with family members and non-family members) must be monitored and evaluated by social service professionals at least once a year.⁹⁷

In contrast to the CSG, an FCG application is a complex statutory process which is onerous for both the applicants and the state institutions. Before a caregiver can apply for an FCG, the child must be placed in his or her care by a children's court. This requires an assessment by a social worker, followed by a written report and finally a children's court order.⁹⁸ Although the process is intended to take 90 days, backlogs can cause considerable delays.⁹⁹ Foster care orders usually expire after two years and require review and extension for the FCG to remain in place. Before the foster care order can be extended, the placement must be reviewed by a social worker. This requires a home visit by a social worker, who must submit a written report to the children's court where the order is extended.¹⁰⁰ In contrast to

⁹³ *Children's Act* s 159(1)(a).

⁹⁴ *Children's Act* s 186(1).

⁹⁵ *Children's Act* s 186(2). This section was amended by the *Children's Amendment Act* 17 of 2022, which came into operation on 8 November 2023.

⁹⁶ *Children's Act* s 186(2). This subsection was amended by the *Children's Amendment Act* 17 of 2022, which came into operation on 8 November 2023.

⁹⁷ *Children's Act* s 186(3). This subsection was replaced by the *Children's Amendment Act* 17 of 2022, which came into operation on 8 November 2023.

⁹⁸ *Children's Act* ss 155(2), 155(9) and 156(1)(e)(i) read with GN R261 in GG 33076 of 1 April 2010 (General Regulations Regarding Children 2010) reg 55.

⁹⁹ Delany, Jehoma and Lake *Child Gauge* 2016 68. Also see para 4.1 below.

¹⁰⁰ *Children's Act* s 159 (1).

the CSG, which is paid from the date of the application, an FCG is paid from the date of the court order.¹⁰¹

3.3.3 *The care dependency grant*

The CDG is available to caregivers of a child younger than 18 "who requires and receives permanent care or support services due to his or her physical or mental disability". The grant is not available to children who are "cared for on a 24-hour basis for a period exceeding six months in an institution that is funded by the State."¹⁰² When this article was written, the value of the grant was R2 090 per month.¹⁰³ Foster parents of children who are severely physically or mentally disabled are entitled to receive both the FCG and the CDG. The caregiver must meet the income threshold, which is ten times the grant amount, in other words R20 900 per month for a single caregiver, and R41 800 per month for the joint income of the caregiver and spouse, if the caregiver is married. The means test does not apply to caregivers who are foster parents.¹⁰⁴ In 2022 just over 151 000 children received the CDG.¹⁰⁵

4 The foster care crisis in South Africa

4.1 *The causes of the crisis*

The foster care crisis in South Africa arose from the practice of using the foster care system as an income support mechanism for families who care for relatives.¹⁰⁶ As highlighted above,¹⁰⁷ this practice had already been well-established in the early 2000s and was further entrenched when the then Minister of Social Development publicly encouraged these family members to apply for the FCG in 2002.

In 2001 the SALC acknowledged informal kinship care as a suitable solution to the foster care crisis, as it circumvents the cumbersome statutory process associated with foster care.¹⁰⁸ The SALC recommended that a non-means tested grant should facilitate this informal care by relatives.¹⁰⁹ In 2002 the

¹⁰¹ Social Assistance Regulations reg 14.

¹⁰² *Social Assistance Act* s 7.

¹⁰³ GN R3208 in GG 48321 of 28 March 2023.

¹⁰⁴ Social Assistance Regulations reg 7(1)(b) read with regs 20, 21 and Annexure B.

¹⁰⁵ Tomlinson, Kleintjies and Lake *Child Gauge 2021/2022* 176.

¹⁰⁶ SALC *Discussion Paper 103* para 17.2.2; Delany, Jehoma and Lake *Child Gauge 2016* 68.

¹⁰⁷ See para 1 above.

¹⁰⁸ SALC *Discussion Paper 103* para 17.2.2.

¹⁰⁹ SALC *Discussion Paper 103* para 17.11.4.

SALC repeated this recommendation in its *Report on the Review of the Child Care Act*,¹¹⁰ and in the Draft Children's Bill that formed part of the report.¹¹¹ Unfortunately DSD did not include this proposal in the Children's Bill that was tabled in Parliament.¹¹²

By 2010 the number of FCGs in payment had increased to over 500 000, placing the foster care system under immense pressure. This pressure was a direct result of the reliance on the foster care system as a means to alleviate poverty.¹¹³ Earlier this article highlighted the involvement of social workers in the complicated and time-consuming process of obtaining foster care placements and having lapsed foster care orders extended.¹¹⁴ This has an impact on the capacity of social workers to provide necessary social welfare services to the abused, neglected and exploited children originally targeted by the foster care system and constitutes an inappropriate use of limited resources.¹¹⁵

As could be expected, due to backlogs in the extensions of foster care orders, more than 110 000 FCGs lapsed between April 2009 and March 2011.¹¹⁶ DSD admitted that it did not have the number of social workers required to extend all expired foster care orders. As a result of this, the Minister of Social Development and the Centre for Child Law in Pretoria reached a court-ordered settlement in 2011. In terms of this settlement, foster care orders that had expired (or were going to expire in the following two years) were regarded as having been extended for two years, effectively placing a moratorium on the lapsing of foster care orders. As an interim solution, foster care orders could be extended administratively until December 2014, giving DSD time to come up with a "comprehensive legal solution" to solve the crisis.¹¹⁷ When a policy solution had not been implemented by 2014, the department secured urgent court orders

¹¹⁰ SALC *Report on the Review of the Child Care Act* para 24.6.

¹¹¹ SALC *Report on the Review of the Child Care Act* ch 23.

¹¹² Children's Institute *Civil Society Briefing on Foster Care* 3.

¹¹³ Tomlinson, Kleintjies and Lake *Child Gauge 2021/2022* 174; SALC *Discussion Paper 103* para 17.2.1

¹¹⁴ See para 3.3.2 above.

¹¹⁵ Community Agency for Social Security and Children's Institute *Comprehensive Review* 5, 12 and 14; Delany, Jehoma and Lake *Child Gauge 2016* 71; Jamieson, Berry and Lake *Child Gauge 2017* 14.

¹¹⁶ Tomlinson, Kleintjies and Lake *Child Gauge 2021/2022* 174.

¹¹⁷ *Centre for Child Law v Minister of Social Development* (GNP) unreported case number 21726/2011 of 19 July 2011 (published in GN 441 in GG 34303 of 20 May 2011).

extending the date four times, most recently until the end of November 2022.¹¹⁸

4.2 The Department of Social Development's response to the foster care crisis

4.2.1 The introduction of the extended CSG

As highlighted above,¹¹⁹ the required "comprehensive legal solution" to the foster care crisis required an amendment to both the *Social Assistance Act* and the *Children's Act*.¹²⁰ The purpose of the amendment to the *Social Assistance Act* and its regulations was to provide for the institution and operationalisation of an extended CSG for orphans and abandoned children in the care of relatives. The purpose of the amendment to the *Children's Act* was to amend section 150(1)(a) and related sections to ensure that relatives caring for orphans and abandoned children are identified and encouraged to apply for the CSG Top-Up, and to ensure that caregivers already receiving FCGs for children in their care are retained in the foster care system.¹²¹

The first leg of the response, the *Social Assistance Amendment Act 16 of 2020*, came into operation in 2022. This Amendment Act empowers the Minister to introduce a higher CSG (the CSG Top-Up) for family members caring for orphaned children.¹²² A person who is a relative of an orphan qualifies for an additional amount linked to a CSG which is already received or to be received for an orphan in his or her care. The relative must provide proof that the child is an orphan by producing certified copies of the death certificates of the child's parents.¹²³ Where the death certificate of one of the parents cannot be obtained, a certified copy of the death certificate of one parent must be submitted, accompanied by an affidavit stating that the child's other parent is unknown.¹²⁴

When this article was written, the CSG Top-Up was valued at R760 per month: the basic CSG of R500 plus an additional R260.¹²⁵ The primary caregiver must meet the income threshold, which is ten times the grant

¹¹⁸ Tomlinson, Kleintjies and Lake *Child Gauge 2021/2022* 174.

¹¹⁹ See para 1 above.

¹²⁰ Proudlock "Children's Socio-Economic Rights" 391-392. Also see Memorandum on the Objects of the Children's Amendment Bill [B18-2020].

¹²¹ Delany, Jehoma and Lake *Child Gauge 2016* 72.

¹²² *Social Assistance Act* s 12A read with Social Assistance Regulations reg 8.

¹²³ Social Assistance Regulations reg 8(1).

¹²⁴ Social Assistance Regulations reg 8(2).

¹²⁵ GN R3208 in GG 48321 of 28 March 2023.

amount, in other words R7 600 per month for a single caregiver, and R15 200 per month for the joint income of the caregiver and spouse, if the caregiver is married.¹²⁶ Although the SALC had initially recommended a non-means tested grant,¹²⁷ the requirement of a means test is appropriate given the purpose of the grant to provide income support for caregivers of orphaned or abandoned family members.¹²⁸

At R760 per month, the value of the CSG Top-Up is roughly midway between the values of the CSG and the FCG. Although the grant is higher than the CSG, it is below both the lower bound poverty line of R945 per month and the upper bound poverty line of R1 417 per month.¹²⁹ Another challenge is that the CSG Top-Up could create inequalities between different categories of children experiencing similar levels of poverty.¹³⁰ This could even happen in the same household: for example, the caregivers' own children could receive the CSG, while the orphaned or abandoned children in the household receive the CSG Top-Up. There could even be children in the household that receive the FCG, if they started receiving the grant before the amendments to the *Social Assistance Act* and *Children's Act* discussed here.

Closely related to this issue is the question whether orphans living with relatives are "poorer" than non-orphans living with relatives and should therefore receive larger grants by reason of their orphan status.¹³¹ It would seem that the entire rationale for an extended CSG hinges on the answer to this question. After all, if orphans are in the same financial position as their non-orphan counterparts, there is no justification for this income inequality. In a report based on an in-depth analysis of the Living Conditions Survey conducted in 2015, Statistics South Africa concluded that multidimensional poverty¹³² is more prevalent amongst double orphans,

¹²⁶ Social Assistance Regulations reg 8 read with regs 20, 21 and Annexure B.

¹²⁷ SALC *Discussion Paper 103* para 17.11.4.

¹²⁸ Hall and Proudlock *Orphaning and the Foster Child Grant* 1.

¹²⁹ Stats SA *National Poverty Lines* 3. The lower-bound poverty line refers to the food poverty line (i.e. the amount of money an individual needs in order to afford the minimum required daily intake, set at R663) plus the average amount derived from non-food items of households whose total expenditure is equal to the food poverty line. The upper-bound poverty line refers to the food poverty line plus the average amount derived from non-food items of households whose food expenditure is equal to the food poverty line.

¹³⁰ Delany, Jehoma and Lake *Child Gauge 2016* 71; Jamieson, Berry and Lake *Child Gauge 2017* 109.

¹³¹ Delany, Jehoma and Lake *Child Gauge 2016* 69, 71.

¹³² The study uses UNICEF's Multiple Overlapping Deprivation Analysis (MODA) methodology to measure multidimensional child poverty. In terms of this methodology, child rights and life cycle approaches are used to consider children's

paternal orphans and maternal orphans (77.3%, 75% and 67.7% respectively) than among non-orphans (59.5%).¹³³ It therefore stands to reason that the income inequality between orphans and non-orphans is justified.

The *Children's Amendment Act 17 of 2022* contains the second leg of the response to the foster care crisis. This Amendment Act spells out which orphaned and abandoned children should be absorbed into the formal care and protection system (i.e. foster care) and which are already in the care of their families and only need the CSG Top-Up and support services.¹³⁴

Section 150(1)(a) of the *Children's Act* plays an important role in making this distinction. When the *Children's Act* was initially promulgated, section 150(1)(a) provided that one of the classes of children in need of care and protection is children who have been "abandoned or orphaned and [are] without any visible means of support". This prevented care interventions such as the removal of children from being based on the poverty of the child's caregivers.¹³⁵ In 2018 the *Children's Amendment Act 17 of 2016* replaced the phrase "is without any visible means of support" with "does not have the ability to support himself or herself and such inability is readily apparent."

This amendment was the result of the interpretation of the phrase "without any visible means of support" by the South Gauteng High Court in *SS v The Presiding Officer of the Children's court: District of Krugersdorp*¹³⁶ and *NM v The Presiding Officer of the Children's Court, Krugersdorp*.¹³⁷ In the *SS* case the children's court had refused to grant a foster care order in respect of a 12-year-old orphan living with his aunt because the child was not without "visible means of support" and therefore not in need of care and protection.¹³⁸ The High Court overturned the children's court order, warning that a "a rigid, overly formalistic approach to the interpretation of section

basic needs across several dimensions and at different stages in their lives. The dimensions of child well-being are nutrition, health, child development, education, child protection, WASH (water, sanitation and hygiene), housing and information. If a child is deprived in at least three of these dimensions, he or she is considered multidimensionally poor (Stat SA *Child Poverty in South Africa* xiv).

¹³³ Stats SA *Child Poverty in South Africa* fig 4.1.7.

¹³⁴ May, Witten and Lake *Child Gauge 2020* 12.

¹³⁵ Röhrs "The Child in Need of Care and Protection" 207; Community Agency for Social Security and Children's Institute *Comprehensive Review* 25.

¹³⁶ *SS v The Presiding Officer of the Children's Court: District of Krugersdorp* 2012 6 SA 45 (GSJ) (hereafter *SS*).

¹³⁷ *NM v The Presiding Officer of the Children's Court, Krugersdorp* 2013 4 SA 379 (GSJ) (hereafter *NM*).

¹³⁸ *SS* para [38].

150(1)(a)" would not be in the best interests of the child.¹³⁹ The phrase "without visible means of support" should be considered with reference to the child, and not the means of the caregiver.¹⁴⁰ The court concluded that the child was in need of care and protection, placed him in foster care with his aunt and uncle and ordered that an FCG should be paid to them.¹⁴¹ *NM* differed from *SS* in that the orphaned children in *NM* were in the care of their grandmother, who owed the children a common-law duty of support, whereas the child in *SS* was in the care of his aunt, who did not owe him a common-law duty of support. Despite this distinction, the court held that differentiating between persons who do and do not owe a legal duty of support in respect of children would amount to unfair discrimination and be contrary to the best interests of the children.¹⁴² As a result, the court ordered that the children be placed in foster care with their grandmother, and that she should receive an FCG.¹⁴³

Röhrs¹⁴⁴ contends that both these judgments sought to further the best interests of the children by placing them into foster care with their family members so that they could qualify for FCGs. She correctly argues that the judgments and the resulting amendment of section 150(1)(a) are problematic from a policy perspective, as they promote the notion that the foster care system can be used as a measure to alleviate poverty.

Against this background, the further amendment of section 150(1)(a) by the *Children's Amendment Act* is welcomed. The relevant subsection provides that a child is in need of care and protection if he or she "has been abandoned or orphaned and has no family member who is able and suitable to care for that child." As a result, abandoned or orphaned children in kinship care (i.e. those in the care of relatives) will no longer be eligible to be placed in foster care and receive FCGs.

This amendment will be strengthened further by the amendment of the definitions of "orphan" and "abandoned child". Previously, an "orphan" was defined as "a child who has no surviving parent caring for him or her".¹⁴⁵ The *Children's Amendment Act* now defines "orphan" as "a child whose parent or both parents are deceased". This amendment will make it clear

¹³⁹ *SS* para [39].

¹⁴⁰ *SS* para [40].

¹⁴¹ *SS* para [44].

¹⁴² *NM* paras [24] and [28].

¹⁴³ *NM* para [33].

¹⁴⁴ Röhrs "The Child in Need of Care and Protection" 209.

¹⁴⁵ *Children's Act* s 1.

that the definition also includes single orphans whose other biological parent is not present or actively involved.¹⁴⁶

"Abandoned child" was previously defined as a child who "has obviously been deserted by the parent, guardian or caregiver; or has, for no apparent reason, had no contact with the parent, guardian or caregiver for a period of at least three months." The Amendment Act retained these two subsections (except that the word "obviously" in subsection (a) was deleted), but added a third subsection, linked to the other two subsections by the conjunction "or". It provides that an abandoned child includes a child who "has, if applicable, no knowledge as to the whereabouts of the parent, guardian or care-giver and such information cannot be ascertained by the relevant authorities." This expanded definition of "abandoned child" will add an additional way of proving abandonment.

Section 159 of the *Children's Act*, which deals with the duration and extension of children's court orders made in terms of section 156, was amended by the insertion of section 159(2A) and (2B). Section 159(2A) enables the court to "extend an alternative care order that has lapsed or make an interim order for a period not exceeding six months on good cause shown." Section 159(2B) provides that, "[n]otwithstanding the amendment to section 150(1)(a), an order placing an orphaned or abandoned child in foster care with a family member in terms of section 156 before or on the date of this Amendment Act, may be extended by the court in terms of section 159(2) or section 186(2)." This amendment confirms that the position of orphaned or abandoned children placed in foster care with family members before the commencement of the Amendment Act remains unchanged.

The amendment of the *Social Assistance Act* to introduce an extended CSG for children cared for by family members is welcomed. The extended CSG will assist family members to provide for the basic needs of children in their care, which includes basic nutrition, shelter and basic health care services. This duty stems from the rights of children to "family care" and to "basic nutrition, shelter, basic health care services and social services".¹⁴⁷ The amendment will also assist family members to provide the children in their care with the living conditions necessary for their development, as required by international law.¹⁴⁸ The means test will assist to determine whether the family members who care for the child are primarily responsible to care for

¹⁴⁶ May, Witten and Lake *Child Gauge 2020* 12.

¹⁴⁷ *Constitution* ss 28(1)(b) and 28(1)(c). Also see *Grootboom* para [76].

¹⁴⁸ UNCRC Art 27(2).

the children, or whether the state must provide assistance. Determining who is responsible for providing the necessary care is important in terms of both international law and the *Constitution*. The UNCRC places the primary responsibility to secure the living conditions necessary for the child's development on parents and other persons responsible for the child "within their abilities and financial capacities."¹⁴⁹ State parties must take appropriate measures to assist responsible persons to implement this right by providing material assistance and support programmes "in case of need".¹⁵⁰ In terms of the *Constitution*, the state is obliged to provide appropriate social assistance to all persons and their dependents who are unable to support themselves.¹⁵¹

It could be argued that the low value of the CSG Top-Up falls foul of South Africa's international obligation to ensure to the maximum extent possible the child's right to survival and development,¹⁵² given the view of the Committee on the Rights of the Child that "development" should be seen as a holistic concept and that measures aimed at implementing this right should be aimed at achieving *optimal development for all children*.¹⁵³ However, it should be borne in mind that this obligation is subject to the "national conditions and ... means" of the state in terms of the UNCRC,¹⁵⁴ and the "available resources" of the state in terms of the *Constitution*.¹⁵⁵ Against this background, it can be argued that South Africa indeed fulfils its obligation to ensure to the maximum extent possible the survival and development of children living in kinship care.

4.2.2 *Parental responsibilities and rights in respect of children in informal kinship care*

The response to the foster care crisis is largely focussed on financial aspects, even though various recommendations were made on the issue of parental responsibilities and rights in respect of children in informal kinship care. In *Discussion Paper 103* the SALC proposed that there should be a simple procedure in terms of which parental responsibilities and rights can be conferred on caregivers of abandoned or orphaned children. This includes, for example, the responsibility and right to consent to medical

¹⁴⁹ UNCRC Art 27(2).

¹⁵⁰ UNCRC Art 27(3).

¹⁵¹ *Constitution* s 27(1)(c).

¹⁵² UNCRC Art 6; ACRWC Art 5.

¹⁵³ *General Comment 5* para 12 (emphasis added). Also see para 2 above.

¹⁵⁴ UNCRC Art 27(3).

¹⁵⁵ *Constitution* s 27(2).

treatment for, or an operation on the child.¹⁵⁶ However, in the *Report on the Review of the Child Care Act* the notion of a procedure in terms of which parental responsibilities and rights are conferred on the caregiver was abandoned. Instead, the Draft Children's Bill contained in the report merely provides that "[a] relative caring for a child in terms of an informal kinship care arrangement ... has the parental responsibilities and rights in respect of a child as provided for in section 44" (the current section 32 of the Children's Act). This includes *inter alia* the responsibility and right to "consent to medical treatment of or an operation on the child."¹⁵⁷

When it was promulgated, the *Children's Act* did not incorporate a provision similar to clause 207 of the Draft Bill. However, section 32 of the *Children's Act* is clearly applicable to caregivers of children in informal kinship care. Contrary to the recommendation of the SALC, these caregivers are not automatically afforded parental responsibilities and rights. Instead, section 32(1) provides as follows:

A person who has no parental responsibilities and rights in respect of a child but who voluntarily cares for the child either indefinitely, temporarily or partially, including a care-giver who otherwise has no parental responsibilities and rights in respect of a child, must, whilst the child is in that person's care ... safeguard the child's health, well-being and development; and ... protect the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation, and any other physical, emotional or mental harm or hazards.

This person may exercise those "parental responsibilities and rights reasonably necessary to comply with subsection (1), including the right to consent to any medical examination or treatment of the child if such consent cannot reasonably be obtained from the parent or guardian of the child."¹⁵⁸

In 2021 the National Child Care and Protection Policy was published.¹⁵⁹ In the foreword to this policy, the Minister of Social Development sets out the purpose of the policy, namely to provide "a national road map for the provision of a continuum of child care and protection programmes and services that are necessary to advance the National Development Plan (NDP) and Sustainable Development Goals and discharge our international, regional and national child-rights responsibilities." To comply with the NDP, this policy in the first instance focusses on the prevention of risks and the promotion of the development of children, and not on the protection of

¹⁵⁶ SALC *Discussion Paper 103* para 17.2.5.

¹⁵⁷ SALC *Discussion Paper 103* Draft Children's Bill cl 207.

¹⁵⁸ *Children's Act* s 32(2).

¹⁵⁹ GN 472 in GG 44363 of 28 May 2021 (National Child Care and Protection Policy 2019).

children that were already exposed to harm. Against this background, the policy can be seen as South Africa's "national developmental child care and protection vision".¹⁶⁰

The policy recognises that kinship care is a legitimate care arrangement. Although the policy acknowledges that most orphans in the care of family members do not require formal protection services due to neglect, abuse or exploitation, DSD nevertheless believes that these children are more vulnerable than those who are in the care of their biological parents.¹⁶¹ As a result, the policy recommends that these caregivers and their children should present themselves to DSD for an assessment, or to court to apply for a parental responsibilities and rights order. A "letter of recognition" recognising them as caregivers with parental responsibilities and rights should be issued to caregivers who successfully complete this assessment. The assessment process will also be used to flag children who need prevention and intervention services (such as a parenting skills programme). If abuse, neglect or exploitation is detected, a designated social worker will be requested to conduct a formal enquiry. The policy also proposes a formal judicial procedure in terms of which a kinship carer can be recognised as a guardian: any kinship carer should be able to apply for a guardianship order in the children's court or High Court.¹⁶² Given the fact that kinship care is not defined in the *Children's Act*,¹⁶³ the policy is pivotal in providing a framework and guidance for dealing with children in kinship care.

When the so-called "Third Children's Amendment Bill" was drafted, two amendment options for recognising kinship carers were circulated by DSD. In terms of the first option, a voluntary application for a declaratory order should be made to the children's court.¹⁶⁴ The second option involved the screening of kinship carers by social workers, followed by the issuing of a "recognition notice" by DSD.¹⁶⁵ The Draft Bill that was published for public comment indicated that the second option would be prescribed in

¹⁶⁰ National Child Care and Protection Policy para 1.1.

¹⁶¹ National Child Care and Protection Policy para 5.5.7.

¹⁶² National Child Care and Protection Policy para 5.5.7.1.

¹⁶³ See para 2 above.

¹⁶⁴ Draft Children's Amendment Bill: s 32 version (April 2018). Also see Hall *et al Child Gauge 2018* 18.

¹⁶⁵ Draft Children's Amendment Bill: s 137A version (April 2018). Also see Hall *et al Child Gauge 2018* 18.

regulations.¹⁶⁶ It was met with criticism due to the increased workload it would place on social workers.¹⁶⁷

No provision dealing with the recognition of kinship carers is included in the *Children's Amendment Act*. The only provision in the Amendment Act dealing with parental responsibilities and rights is the amendment of section 24(1) of the *Children's Act* to allow the children's court, along with the High Court, to hear applications for the guardianship of children by persons with an interest in the care, wellbeing and development of the children.¹⁶⁸ It will therefore be much easier and cheaper for family members caring for orphaned and abandoned children to obtain the guardianship of the children.

A kinship carer may also approach the children's court or High Court for an order granting him or her care of the child in terms of section 23 of the Children's Act. In view of the proposed amendments to the definitions of "orphan" and "abandoned child", and to the definition of "child in need of care and protection" in section 150(1)(a), a kinship carer will not be able to enter into a parental responsibilities and rights agreement in terms of section 22 of the *Children's Act*. The reason for this is that this agreement must be entered into with the child's "mother ... or other person who has parental responsibilities and rights" in respect of the child.

The absence of a "letter of recognition" or similar documentation process for children in informal kinship care in the *Children's Amendment Act* and Draft Amendment Regulations¹⁶⁹ conflicts with the recommendations in the National Child Care and Protection Policy. It also contravenes the right to "family care or parental care, or to appropriate alternative care when removed from the family environment", entrenched in section 28(1)(b) of the *Constitution*. Although these kinship carers can approach the children's court or High Court for an order assigning them care or guardianship in respect of the child, this is a cumbersome and time-consuming process. A simple administrative process such as the one proposed in the National Child Care and Protection Policy is preferred. This process is aligned with the procedure proposed by the SALC in *Discussion Paper 103*.¹⁷⁰ This

¹⁶⁶ GN 1185 in GG 42005 of 29 October 2018 (Draft Children's Amendment Bill, 2018).

¹⁶⁷ Hall *et al Child Gauge* 2018 18.

¹⁶⁸ Also see the following related amendments to s 45 of the *Children's Act*: the insertion of s 45(1)(bA), the insertion of s 45(3A) and (3B), and the amendment of s 157.

¹⁶⁹ See para 4.2.3 below.

¹⁷⁰ SALC *Discussion Paper 103* para 17.2.5.

assessment process has the added benefit of enabling DSD officials to flag children in need of prevention and intervention services.¹⁷¹

4.2.3 *Protection services for children in informal kinship care*

The question whether orphans living with relatives automatically need state protection services is an important one. Answering this question in the affirmative and placing all orphans living with relatives in the child protection system would place an undue burden on the child protection services. In fact, this is exactly what led to the foster care crisis.¹⁷² The National Child Care and Protection Policy recognises that orphaned or abandoned children are vulnerable and in need of support and services. The policy provides that once they are identified vulnerable children, including orphans or abandoned children in kinship care, should be screened by social services practitioners and assisted to access preventative services.¹⁷³ There is no trace of a special screening procedure for these children in the Children's Amendment Act. In contrast, the Amendment Act makes it clear that orphaned or abandoned children in kinship care are not in need of care and protection.¹⁷⁴

Draft Amendment Regulations were recently published for comment.¹⁷⁵ These draft regulations envisage a screening process for children who "are found to be in need of care and protection as contemplated in section 32 read with section 150 of the Act (as amended)."¹⁷⁶ As mentioned previously,¹⁷⁷ section 32 deals with indefinite, temporary or partial voluntary care of children by persons who have no parental responsibilities and rights in respect of the child, whereas section 150(1)(a) (as amended) deals with children who are in need of care and protection because they have been abandoned or orphaned and have no family members who are able and suitable to care for them. This envisaged screening process is therefore arguably not aimed at children who fall outside the ambit of section 150(1)(a) as amended, in other words children in informal kinship care.

The absence of a screening procedure for orphaned and abandoned children in informal kinship care in the Amendment Act and Draft

¹⁷¹ See para 4.2.3 below.

¹⁷² See para 4.1 above.

¹⁷³ National Child Care and Protection Policy paras 4.4.1, 5.5.7 and 5.5.7.1. Also see para 4.2.2 above.

¹⁷⁴ *Children's Act* s 150(1)(a), as amended by the *Children's Amendment Act* 17 of 2022.

¹⁷⁵ GN 3608 in GG 48853 of 27 June 2023 (Draft Amendment Regulations Regarding Children).

¹⁷⁶ Draft Amendment Regulations Regarding Children draft reg 8.

¹⁷⁷ See para 4.2.2 above.

Amendment Regulations is not only contrary to the National Child Care and Protection Policy,¹⁷⁸ but also infringes section 28(1)(c) of the *Constitution*, which affords every child the right to basic social services. As section 28(1)(c) is not linked to an internal limitation rendering the right dependent upon progressive realisation within available resources, it could be argued that children have an immediately realisable right to social services against the state. It is widely held that the absence of an internal limitation in section 28(1)(c) suggests that the state is obliged to ensure that all children are given immediate and effective access to a basic level of these socio-economic rights.¹⁷⁹ In terms of this interpretation, a failure to meet the basic socio-economic rights of children would be justifiable only under the general limitations clause.¹⁸⁰ In the *Juma Masjid* case the Constitutional Court held this view in respect of the right to a basic education in section 29(1)(a) of the *Constitution*, which is comparable to section 28(1)(c) due to its lack of an internal limitation.¹⁸¹

5 Conclusion and recommendations

The extended CSG for children in informal kinship care is welcomed. Its speedy implementation and operationalisation will go a long way towards ending the foster care crisis in South Africa. The full implementation of the CSG Top-Up will require the finalisation of the Amendment Regulations Regarding Children. Proper implementation will logically also require extensive training for DSD and SASSA officials, along with public awareness campaigns.

The amended definition of "child in need of care" in section 150(1)(a) will mean that orphaned or abandoned children with family members who are able and suitable to care for them will no longer be regarded as children in need of care. Instead, these children will qualify for the CSG Top-Up. The amendment of the definition of "orphan", read with the amendment of the definition of "abandoned child", will enable both double orphans and single orphans whose surviving parents are uninvolved or have disappeared to qualify for the CSG Top-Up if they are in the care of family members. If no

¹⁷⁸ See para 4.2.2 above.

¹⁷⁹ See e.g. Van Bueren 1999 SAJHR 57; Pieterse 2003 TSAR 5; Stewart 2008 SAJHR 493-494. See also *Centre for Child Law v Minister of Home Affairs* 2005 6 SA 50 (T) para [17]; *Centre for Child Law v MEC for Education* 2008 1 SA 223 (T) 227I-J; Sloth-Nielsen 2001 SAJHR 220; Liebenberg *Socio-Economic Rights Adjudication* 234.

¹⁸⁰ *Constitution* s 36. Also see Liebenberg *Socio-Economic Rights Adjudication* 234.

¹⁸¹ *Governing Body of the Juma Masjid Primary School v Essay* 2011 8 BCLR 761 (CC) para [37]. Also see para 2 above; Proudlock "Children's Socio-Economic Rights" 373.

such family members are available to care for the child, the child will be regarded as a child in need of care and protection and channelled to the child protection system. These provisions comply with South Africa's obligations in terms of international law and the *Constitution*.¹⁸²

To ensure that the rights of this vulnerable group of children are adequately protected, it is recommended¹⁸³ that a screening process similar to the one proposed in the National Child Care and Protection Policy be included in the Amendment Regulations Regarding Children.¹⁸⁴ Informal kinship caregivers should present themselves and their children to DSD for an assessment. Caregivers who successfully complete this assessment should be issued with a document recognising them as caregivers with parental responsibilities and rights. This assessment procedure will be ideally suited to identify children in need of prevention and intervention services. If abuse, neglect or exploitation is detected or suspected, a social worker should be requested to conduct a formal investigation. If kinship caregivers are unable to approach the children's court or High Court for an order granting them care and/or guardianship in respect of the child, this informal assessment process will offer them an alternative, less cumbersome option. Apart from complying with the National Child Care and Protection Policy,¹⁸⁵ this informal assessment procedure and the resulting document confirming the parental responsibilities and rights of kinship carers will ensure the protection of children's rights to both family care¹⁸⁶ and social services.¹⁸⁷

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¹⁸² See para 4.2.1 above.

¹⁸³ A document based on these recommendations was drafted by the author and forwarded to DSD on 8 August 2023.

¹⁸⁴ See para 4.2.3 above.

¹⁸⁵ See para 4.2.2 above.

¹⁸⁶ *Constitution* s 28(1)(b). See also para 4.2.2 above.

¹⁸⁷ *Constitution* s 28(1)(c). See also para 4.2.3 above.

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List of Abbreviations

ACRWC	African Charter on the Rights and Welfare of the Child
CDG	care dependency grant
CSG	child support grant
DSD	Department of Social Development
FCG	foster child grant
GHS	General Household Survey
NDP	National Development Plan
SAJHR	South African Journal on Human Rights
SALC	South African Law Commission
SASSA	South African Social Security Agency
SMG	state maintenance grant
Stats SA	Statistics South Africa

TSAR Tydskrif vir die Suid-Afrikaanse Reg /
Journal of South African Law

UNCRC United Nations Convention on the Rights of
the Child