



CHAPTER FIVE

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5. Conclusion and Recommendations

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5.1 Introduction

The concept of ‘childhood’ may be described most commonly with expressions, such as ‘innocent’, ‘happy’, ‘protected’, ‘care’, ‘schools’, ‘play’ and ‘parents’. Unfortunately, there are children whose childhood does not reflect the general images of childhood. Children living in child-headed households may be an example. In theory, the mere fact of being deprived of a family environment should not necessarily lead to a compromised childhood or deprivation of adequate care. Children’s rights instruments, such as the CRC and the ACRWC, aim to protect the idyllic image of childhood and to ensure that all children irrespective of their social and economic background have a fair chance in life.

Nonetheless, in reality, many children who are deprived of their family environment are also deprived of adequate care and experience a compromised childhood. As the CRC Committee pointed out on several occasions, in many African states, facilities to provide alternative care are limited in number and inadequate in their standards.¹ Furthermore, in many cases, the mechanisms to monitor and evaluate such facilities are not in place, making children vulnerable to maltreatment and violations of their rights in alternative care placements.²

¹ Concluding observations of the CRC: DRC (CRC/C/15/Add.153: 9 July 2001) para 36; Concluding observations of the CRC: Equatorial Guinea (CRC/C/15/Add.245: 3 Nov 2004) para 36; Concluding observations of the CRC: Gabon (CRC/C/15/Add.171: 3 April 2007) para 33; Concluding observations of the CRC: Lesotho (CRC/15/add.147: 21 Feb 2001) para 35; Concluding observation of the CRC: South Africa (CRC/15/Add.122: 22 Feb 2000) para 22; Concluding observation of the CRC: Rwanda (CRC/15/Add. 234) para 38 & 40; Concluding observations of CRC: Malawi (CRC/C/15/Add.174: 2 April 2002) para 35; Concluding observation of CRC: Botswana (CRC/C/15/Add.242: 3 Nov 2004) para 38; Concluding observations of CRC: Burundi (CRC/C/15/Add.133: 16 Oct 2000) para 46; Concluding observation of CRC: Central African Republic (CRC/C/15/Add.138: 18 Oct 2000) para 46; Concluding observation of CRC: Cape Verde (CRC/C/15/Add.168: 7 Nov 2001) para 37; Concluding observation of CRC: Mozambique (CRC/C/15/Add.172: 3 April 2002) para 40(a); Concluding observation of CRC: Niger (CRC/C/15/Add.179: 13 June 2002) para 36; Concluding observation of CRC: Sudan (CRC/C/15/Add.190: 9 Oct 2002) para 41; Concluding observation of CRC: Madagascar (CRC/C/15/Add.218: 27 Oct 2003) para 40.

² Equatorial Guinea (as above) para 38, although the Committee welcomes the existence of institutions to accommodate increasing number of children who are orphaned but it emphasises that institutionalised care should be a temporary measure of last resort; Concluding observation of the CRC: Eritrea (CRC/C/15/Add.204: 2 July 2003) para 35; Lesotho (as above) para 37; Gabon (as above) para 37; Concluding observations of the CRC: The Gambia (CRC/C/15/Add.165: The Gambia) para 36; Concluding observation of the CRC: Guinea Bissau (CRC/C/15/Add.177: 13 June 2002) para 32(a) & 32(b); Concluding observation of the CRC: Senegal (CRC/C/SEN/CO/2: 20 Oct 2006) para 32; Concluding observation of the CRC: Swaziland (CRC/C/SWZ/CO/1: 16 Oct 2006) para 40; South Africa (as above) para 25; Concluding observation on Rwanda (as above) para 40; Concluding observation of CRC:

The situation of children living in child-headed households is particularly precarious due to the fact that the absence of an adult caregiver adds to their general vulnerability as children deprived of their parental care.³ In order to address the particular vulnerabilities of children living in child-headed households, the CRC Committee recommended that states give special attention to children who are made vulnerable to HIV, including children in child-headed households and highlighted the importance of providing legal, policy and social protection to those children.⁴ UNICEF has further recommended child-headed households be legally recognised and urged states to develop a legal and policy framework to protect and assist such households.⁵

In South Africa, the need to consider reforming the alternative care system in the context of the HIV epidemic has been highlighted in the Consultative Paper on Children living with HIV/AIDS prepared for the South African Law Reform

Nigeria (CRC/C/15/Add.257: 13 April 2005) para 42; Concluding observation of CRC: Mali (CRC/C/MLI/CO/2: 3 May 2007) para 41; Malawi (as above) para 39; Concluding observation of CRC: Angola (CRC/C/15/Add.246: 3 Nov 2004) para 34; Concluding observation of CRC: Benin (CRC/C/BEN/CO/2: 20 Oct 2006) para 42; Central African Republic (as above) para 48; Concluding observation of CRC: Cameroon (CRC/C/15/Add.164: 6 Nov 2001) para 38; Concluding observation of CRC: Liberia (CRC/C/15/Add.236: 1 July 2004) para 40(a) & (b); Mozambique (as above) para 44(a) & (b); Niger (as above) para 40; Sudan (as above) para 41; Concluding observation of CRC: Uganda (CRC/C/UGA/CO/2: 23 Nov 2005) para 41; Concluding observations of CRC: Djibouti (CRC/C/15/Add.131: 28 June 2000) para 35.

³ The CRC Committee expressed its concern over the increasing number of child-headed households on numerous occasions: CRC Concluding Observation: South Africa (CRC/15/Add.122: 22 Feb 2000); Concluding observations of CRC: Burundi (CRC/C/15/Add.133: 16 Oct 2000); Concluding observations of the CRC: DRC (CRC/C/15/Add.153: 9 July 2001); Concluding observation of the CRC: Lesotho (CRC/15/Add.147: 21 Feb 2001); Concluding observation of the CRC: Lesotho (CRC/15/Add.147: 21 Feb 2001); Concluding observation of CRC: Zambia (CRC/C/15/Add.206: 2 July 2003); Concluding observation of CRC: Uganda (CRC/C/UGA/CO/2: 23 Nov 2005); Concluding observation of CRC: Ethiopia (CRC/C/ETH/CO/3); CRC CO: Swaziland (CRC/C/SWZ/CO/1: 16 Oct 2006); Concluding observation of CRC: Kenya (CRC/C/KEN/CO/2: 2007); Concluding observation of CRC: Eritrea (CRC/C/ERI/CO/3: 2008); Concluding observation of CRC: Malawi (CRC/C/MWI/CO/2: 2009); Concluding observation of CRC: Mauritania (CRC/C/MRT/CO/2: 2009); and Concluding observation of CRC: Mozambique (CRC/C/MOZ/CO/2: 2009). The CRC Committee urged the states to reduce and prevent the occurrence of child-headed households (South Africa) and recommended all necessary measures to assist such households (Lesotho, Zambia, Kenya, Uganda, Ethiopia, Swaziland, Mauritania and Eritrea).

⁴ CRC Committee, General Comment No 3 HIV/AIDS and the rights of the child (2003), para 31.

⁵ *Enhanced protection for children affected by AIDS: A companion paper to the protection, care and support of orphans and vulnerable children living in a world with HIV and AIDS*, UNICEF & UNAIDS (2007) 28; Committee on the Rights of the Child, General Comment No 3: HIV/AIDS and the rights of the child, CRC/GC/2003/3 (17 March 2003) paras 31-35.

Commission (SALRC) by Barret *et al.* in 1999.⁶ The paper highlighted the increasing number of children in need of alternative care and the limitations of the existing alternative care system. It also included alternative care options, such as independent living by children with supervision and cluster foster care.⁷ In 2002, the SALRC acknowledged that child-headed households would become a ‘familiar phenomenon’ and called for legal recognition of child-headed households.⁸ The Children’s Act⁹ as amended by the Children’s Amendment Act¹⁰ provided detailed provisions on care of children who are deprived of their family environment. The Act contains provisions that are relevant for child-headed households, such as section 137 of the Children’s Act, which regulates conditions in which a household can be recognised as a child-headed household, and articulates measures of protection and support for such households.¹¹

In chapter one, four main research questions were posed: 1) Is the extended African family capable of providing care to children who are deprived of their parental care?; 2) What is the state obligation under articles 20 of the CRC and 25 of the ACRWC as well as international guidelines and declarations?; 3) What is the position of international treaty law, guidelines and declaration on child-headed households?; 4) how does South African law recognise child-headed household?

To address these questions, the thesis explored the impact of the HIV epidemic on African families and communities, which weakens the capacities of the families and communities to provide adequate care to the growing number of children who are deprived of their parental care. Furthermore, the thesis examined the situation of children living in child-headed households in the context of the HIV epidemic in Africa. As noted in chapter three, there is a growing trend of recognising and including child-headed households in the legislative framework. For instance, the

⁶ C Barret *et al.*, ‘Consultative Paper on Children living with HIV/AIDS’, SALRC (January 1999).

⁷ C Barret *et al.*, 1999 (as above) 26.

⁸ See *Project 110, Review of the Child Care Act*, South African Law Reform Commission (December 2002).

⁹ Children’s Act (No 38 of 2005).

¹⁰ Children’s Amendment Act (No 41 of 2007).

¹¹ Sec 137 of the Children’s Act as amended by the Children’s Amendment Act.

thesis highlighted the examples of Southern Sudan, Uganda and Namibia and the relevant provisions are discussed in the light of the standard developed in the UN Guidelines for the Alternative Care of Children in the chapter. Child-headed households are also specifically mentioned in various national frameworks on orphans and vulnerable children. Chapter four provided a detailed analysis of the South African legal framework recognising child-headed households. The thesis addressed children's rights implications of legally recognising child-headed households in a view to contribute to the development of legal and policy framework in other African states following the South African suit. In what follows in this chapter, the main issues, which are discussed throughout the thesis, are revisited. Section 5.2 recaptures the most fundamental aspects of a rights-based approach – who is responsible for the realisation of children's rights? By doing so, the section revisits the scope and purpose of the right to alternative care, and special protection and assistance. Section 5.3 provides a conclusion to the thesis. Based on the outcomes of the previous chapters, general and specific recommendations are made to states who are considering following the South African path of legally recognising child-headed households.

5.2 Children's rights and well-being: Whose responsibility?

5.2.1 Family as a primary duty-bearer

The fundamental importance of 'family' in children's lives has been noted on numerous occasions.¹² The CRC recognises the family 'as the fundamental group of society'.¹³ It affirms that the family is 'the natural environment for the growth and well-being of all its members and particularly children'.¹⁴ The CRC further states that for the 'full and harmonious development', a child should grow up in a happy, loving and understanding family environment.¹⁵ The ACRWC also echoes the similar sentiment.¹⁶ For instance, article 7 of the CRC protects children's right to be cared for by their parents. Article 20 of the ACRWC also provides a detailed right of children

¹² See Sec 3.2 for a detailed discussion on the concept of 'family' and 'family environment'.

¹³ Preamble of the Convention on the Rights of the Child.

¹⁴ Preamble of the CRC.

¹⁵ Preamble of the CRC.

¹⁶ Preamble of the ACRWC, OAU Doc. CAB/LEG/24.9/49 (1990), entered into force on 29 November 1999.

to be cared for by their parents and the right to reside with their parents whenever possible. Also, it is the family with whom the primary responsibility to realise children's rights rests. The CRC and the ACRWC place the primary responsibility to protect and realise the rights of children on the parents or legal guardians of children.¹⁷ When the parents or legal guardians of children are unable to adequately care for their children, the CRC and the ACRWC require states to render appropriate support to the parents and others who are responsible for the children. The strong emphasis on the protection of family and 'keeping children in their family environment' is based on the idea that children's rights are best respected and realised in their own family environment.¹⁸ The recent UN Guidelines for the Alternative Care of Children also emphasise the role of the family as the fundamental group of society and place a strong emphasis on the preventing the need for alternative care by promoting parental care through appropriate support measures.¹⁹

The importance of a family environment to children does not imply that all children who are in their own family environments are adequately cared for or their rights are fully respected and realised. Unfortunately, there are cases where parents or others who are legally responsible for children are unable to provide adequate care. There are even cases where the most severe forms of child abuse take place within the family environment. There are also instances where children who lost their parental care through the death of their parents and are unable to be cared for by other family members. When children are deprived of their family environment, states assume the primary responsibility to protect and realise those children's rights through appropriate measures of protection and assistance. Under articles 20 of the CRC and 25 of the ACRWC, children who are deprived of their parental care and their family environment have the right to alternative care, and special protection and assistance from states.

¹⁷ Art 19 of the CRC and Art 20 of the ACRWC.

¹⁸ The preambles of the CRC and the ACRWC emphasise the importance of the family for the harmonious development of children.

¹⁹ Paras 3 & 32 of the UN Guidelines for the Alternative Care of Children, A/RES/64/142 (24 February, 2010).

Traditionally, in many parts of Africa, children who are deprived of their parental care have been absorbed into an extended family network.²⁰ As explored in chapter two, the reliable and mutual informal social safety provided by strong extended family ties rendered the notion of formal alternative care provided by states irrelevant in Africa.²¹ Unfortunately, the right to alternative care, and special protection and assistance is increasingly important in the continent as more and more children are being deprived of their parental care and family environment. Chapter two further explored the social changes such as rapid urbanisation, industrialisation and labour migration that led to gradual weakening of extended family ties. Most importantly, due to the impact of the HIV epidemic in Africa that continues to deplete human and material resources of families and communities, the traditional family network is increasingly unable to provide adequate care to children who are deprived of parental care. Considering the growing number of children who are deprived of their parental care and family environment in many parts of Africa, the right to alternative care, and special protection and assistance should be given the much needed attention it deserves.

5.2.2 When children are deprived of their family environment

The purpose of the right to alternative care, and special protection and assistance is to ensure that children who are deprived of their family environment are adequately cared for through means that are alternative to their own parental care and family care. Despite the importance of the right, as discussed in chapter four, the examination of the concluding observations by the CRC Committee on state reports suggests that in many parts of the continent, the right to alternative care, and special protection and assistance has not been effectively implemented. The CRC Committee pointed out the general lack of facilities that provide alternative care; the inadequate quality of existing facilities; and the absence of effective monitoring mechanisms of those facilities. Most alarmingly, it also pointed out that in many countries, there is a lack of reliable data on children who are deprived of their family environment.

²⁰ See chapter 2 for further discussion on the traditional family network in Africa.

²¹ H H Semkiwa, et.al, *HIV/AIDS and child labour in the United Republic of Tanzania : a rapid assessment*, No 3, International Labour Organisation (2003) 7; J Kaliyati *et al.*, *HIV/AIDS and child labour in Zimbabwe*, No 2, International Labour Organisation (2002) 16.

There are many reasons for such dire failure to implement the right to alternative care, and special protection and assistance. Limited financial and qualified human resources could be one of them. The lack of political will to prioritise children who are deprived of their family environment may be another reason. The social convention that ‘social orphans do not exist in Africa’ may have also contributed to the lack of political will to fully implement the right to alternative care, and special protection and assistance.²² No matter what the reasons are, the reality is undeniable that the number of children deprived of their parental care and family environment is increasing in many African states, especially where HIV has most dramatically left its mark.

The responsibility of states towards children in respect of the provision of care has three dimensions: prevention, active monitoring and protection. First of all, states should prevent children from being deprived of their family environment. Under article 18(2) of the CRC and article 20(2) of the ACRWC, states should provide appropriate assistance to parents and others who are legally responsible for the child so that they are able to perform their child rearing responsibilities. The UN Guidelines for the Alternative Care of Children also require states to direct their efforts primarily towards enabling children to remain in their own family environment.²³ Secondly, states have the responsibility to ‘take all appropriate legislative, administrative, social and educational measures’ to protect children from all forms of maltreatment and abuse in and out of their family environment.²⁴ After the identification of children at risk of abuses and maltreatment in their family environment and it is deemed that the children should not remain in their own family environment, states have an obligation to provide them with special protection and assistance.²⁵ The right to alternative care, and special protection and assistance is applicable to all children who are deprived of their family environment for whatever the reasons. Therefore, thirdly, the needs of the children should be assessed individually in order to tailor the measures of protection and assistance provided to these needs.

²² See D Skinner *et al.*, *Defining orphaned and vulnerable children*, Human Science Research Council of South Africa (2004).

²³ Para 3 of the UN Guidelines for the Alternative Care of Children.

²⁴ Art 19(2) of the CRC; Art 16(2) of the ACRWC.

²⁵ Art 20 of the CRC; Article 25 of the ACRWC.

Although the needs of children are different and the measures of special protection and assistance should be designed to meet the specific needs of children, it is often assumed that the special protection and assistance are provided only through alternative care placements, such as foster care or institutionalised care. The dilemma arises when children are deprived of their parental care but the application of conventional alternative care placement does not necessarily reflect their best interests.

As explored in chapter two, the number of children who are deprived of their parental care is increasing rapidly in the midst of the HIV epidemic in southern Africa. Unfortunately, the traditional way of absorbing such children is not working as effectively as it once did due to a combination of various factors, such as the number of children in need of alternative care, an increasing level of poverty and a decreasing number of people who are able to provide a level of adequate care. As a result, many children who are deprived of their parental care are left to form child-headed households.

In the following section, a number of important points to be considered when legally recognise child-headed households are noted and recommendations on the legally recognising child-headed households are made.

5.3 Protecting the rights of children in child-headed households

The issue of child-headed households has gained interests and importance both internationally and domestically in many parts of Africa. The CRC Committee mentioned the vulnerable situation of child-headed households in 2003 in its General Comment and the UN Guidelines for the Alternative Care of Children specifically require states to provide all necessary measures to protect and support children in child-headed households.²⁶ Domestically, child-headed households are increasingly incorporated into the domestic legal and policy frameworks in Africa, and in this thesis, Namibia, South Africa, Southern Sudan and Uganda have been highlighted.

²⁶ Para 37 of the UN Guidelines for the Alternative Care of Children.

Especially, in South Africa, the issue of the increasing number of child-headed household has been discussed since 1999 in a consultative paper addressing the HIV epidemic and the rights of the children.²⁷ Following the consultative paper, while recognising the increasing number of children in child-headed households, the SALRC further recommended that child-headed households be legally recognised in order to provide stronger support and protection.²⁸ Mindful of the challenges of legally recognising child-headed households, the SALRC maintained the importance of legally recognising child-headed households as ‘the formal placement options for children in need of care and protection are inadequate to cater for the massive number of children orphaned by AIDS’.²⁹ It further argued that child-headed households had an advantage of keeping siblings together.³⁰ Finally, the Children’s Act as amended by the Children’s Amendment Act legally recognised child-headed households as a form of protective measure.

Although providing legal and policy protection to child-headed households has been supported by the CRC Committee, UNICEF and in the UN Guidelines for the Alternative Care of Children,³¹ as Cantwell and Holzscheiter pointed out, the implications of legally recognising child-headed households for children’s rights, especially in relation to the right to alternative care, and special protection and assistance, remain uncertain.³² While recognising that there are certain cases where the best interests of the child is protected better in child-headed households, it further argued that in order to provide strong protection and assistance, recognising child-headed households as ‘family environment’ was not advisable. If child-headed households are recognised as ‘family environment’, children in such households may not be entitled to the protections and assistance under article 20 of the CRC.³³ The

²⁷ C Barret *et al.*, (n 6 above).

²⁸ SALRC, 2002 (n 8 above) 169.

²⁹ As above 172.

³⁰ As above 172.

³¹ UNICEF & UNAIDS, 2007 (n 5 above).

³² N Canwell & A Holzscheiter, *A commentary on the United Nations Convention on the Rights of the Child: article 20 children deprived of their family environment*, Martinus Nijhoff (2008) para 87.

thesis recommended that child-headed households should be recognised as special units of society that are entitled to special protection and assistance.

The thesis further examined the case of South Africa from a rights-based perspective. It argued that legally recognising child-headed households is a bold step towards applying a rights-based approach to supporting and protecting children in child-headed households. Such recognition sends the important message that child-headed households exist and that children in child-headed households are legally entitled to appropriate support and protection from states.

However, it is a step that should not be taken hastily or symbolically. As Sloth-Nielsen warned, legally recognising child-headed households should not be a way for states to negate their responsibilities to protect and provide for the children in such households.³⁴ There should be adequate and effective measures put in place to support and protect such households so that they may properly function independently. Legally recognising child-headed households is not an end in itself but a means to an end, which is to enable children in child-headed households to fulfil their potentials and rights as children while they eventually prepare themselves for a fulfilling and well-adjusted adulthood. Furthermore, to prevent the very existence of child-headed households, legally recognising child-headed households should not overshadow the importance of strengthening extended families and communities.

5.4 Recommendations

A few recommendations are directed to states who are considering following South Africa in legally recognising child-headed households.

The general recommendations regarding children deprived of their family environment are the following:

³³ Cantwell and Holzscheiter mentioned similar arguments concerning children who are looked after informally by relatives. States do not have an obligation to find alternative care for such children as they are not deprived of their family environment. N Cantwell & A Holzscheiter, 2008 (as above) paras 70 & 88.

³⁴ J Sloth-Nielsen, 'Of newborns and nubile: Some critical challenges to children's rights in Africa in the era of HIV/Aids' (2005) 13 *The International Journal of Children's Rights* 80.

First of all, the process of placing children who are deprived of their family environment to alternative care placement should be guided by a rights-based approach. The starting point of a rights-based approach is to recognise that children who are deprived of their family environment have the right to special protection and assistance. It is a legal duty of states to protect and realise the rights of children in child-headed households through various measures of protection and assistance. The designing and implementation of the measures of protection and assistance should be based on the fundamental principles of a rights-based approach: the right to non-discrimination; the right to participation and inclusion; respect for the best interests of the child; the right to survival and development of the child; and respect for the rule of law. In the case of children in child-headed household, it should be borne in mind that the rights of all children in the household should be respected. Importantly, the eldest child's rights as a child should be as fully respected and realised as his or her rights as a head of a household.

Secondly, as emphasised above and also in previous chapters, the responsibility of states towards children who are deprived of their family environment goes beyond providing alternative care, and special protection and assistance. Foremost, states have a responsibility to assist people who are responsible for children to be able to effectively perform their child rearing responsibilities. Article 18(2) of the CRC and article 20(2) of the ACRWC oblige states to render all appropriate support and assistance, including material support, to parents and others who are responsible for the well-being and development of children. In other words, states have the responsibility to prevent children from being deprived of their family environment.

Finally, states should strengthen monitoring and regulatory mechanisms to ensure the quality of care in both informal and formal care placements. Under article 19(1) of the CRC, states have a legal obligation to protect children from all forms of maltreatments and abuses while in the care of 'parent(s), legal guardian(s) or any other person who has the care of the child.'³⁵ In case of abuses or maltreatment of a child is identified, article 19(2) requires states to take an appropriate follow-up step

³⁵ Art 16(1) of the ACRWC is similarly worded but art 16(2) does not specifically mention 'judicial involvement'.

including ‘judicial involvement’. It is an extremely important provision as it acknowledges the existence of ‘deliberate violence to children by parents and other caregivers.’³⁶ It is particularly important in Africa in the context of the HIV epidemic. As the CRC Committee observed, a wide-spread practice of unregulated and monitored informal foster care or informal adoption in many parts of Africa could put children at risk of abuses and maltreatment while they are in ‘their family environment.’³⁷

A number of specific recommendations with regards to recognition and protection of children in child-headed households are also made:

First, the term, ‘child-headed household’ should be defined broadly to include not only unaccompanied child-headed households but also accompanied child-headed households.³⁸ As mentioned in chapter four, the South African definition of ‘child-headed household’ also includes a household containing terminally ill parents or legal guardians. It is commendable because the inclusive definition reflects the reality that many children are assuming the role of a primary caregiver even before the death of their parents. Nonetheless, it is recommended that the definition should also include the instances where a child has assumed a role of *de facto* head of household due to factors other than the illness of parents or legal guardians. Importantly, it should be reminded that not all ‘child-headed households’ are homogenous and their needs may be very different. For instance, an accompanied child-headed household, where a child is looking after a terminally ill parent as well as younger siblings, may require a different type of support and intervention compared to children in unaccompanied child-headed households.

Secondly, the age limit of a child heading a household should be a guideline but not a hard and fast rule. In South Africa, a child over 16 can legally assume a role of a head of household. It is beyond argument that children under a certain age should not be expected to carry out the responsibility of a head of a household. However, an

³⁶ R Hodgkin & P Newell, *Implementation handbook for the Convention on the Rights of the Child*, UNICEF (2002) 257.

³⁷ See Sec 3.2 for the detailed discussion.

³⁸ The terms are taken from *Reversed Roles and Stressed Souls: child-headed households in Ethiopia*, African Policy Forum (2008), See Sec 1.5 for definitions of the terms.

inflexible age limit might be unrealistic to apply when a child-headed household is an accompanied child-headed household. There may be cases where children younger than 16 to have assume the responsibilities as a primary caregiver to their terminally ill parents or ailing grandparents. The age limit may exclude such households whose needs are similar to other ‘recognised’ child-headed households. When all the other criteria are met, such as the absence of an available and suitable adult family member, and, most importantly, the best interests of the children and the wishes of the children, the household should be recognised as a child-headed household and provided with the level and type of protection and assistance needed. One of the ways would be to link such a household with an organisation providing home-based care in order to relieve the child from physical care of the ill parents or guardians.

Thirdly, there should be overall legislative reform to accommodate the reality that a minor may head a household. The two main purposes of such legislative review is: (a) to respect the rights and responsibilities of children heading households as a head of a household, and therefore, assisting and enabling them to perform their responsibilities as a primary caregiver to younger siblings; and (b) it is also to protect their rights as children, and therefore, to accommodate their needs and rights as children while they perform their responsibilities as a head of a household. For instance, the legislative reform should include revising the labour law to provide a stronger protection to children who are allowed to work legally including, but not limited to, provisions on the fair wage and reasonable working hours. The labour laws should also protect the children’s right to education and need to be flexible enough to accommodate the educational needs and schedule of the working children.

Other good examples of laws that respect the evolving capacity of the children are sections 129 and 130 of the Children’s Act. Sections 129 and 130 of the Children’s Act enable a child over 12 years old who has enough maturity and mental capacity to understand the implications of the decision to give consent to medical treatment and surgical operations, and consent to HIV testing respectively. Although the provisions may not have been included with a view to accommodate the needs of children in child-headed household, it nevertheless enables children who are heading a household and having responsibilities as a primary caregiver to their younger siblings to make important decisions affecting their lives. The legislative review should aim to achieve

full respect for children's evolving capacity and autonomy. Nevertheless, children should not be given the responsibility to make decisions on issues which they do not fully understand without sufficient and appropriate assistance. It is important to note that 'allowing' children over 12 years old to make important decisions regarding health and medical treatment does not mean leaving them to their own devices to make such vital decisions. In other words, only a child is over 12 years old who is of sufficient maturity and has the mental capacity to understand all the implications of his or her decision may consent to their medical treatment.³⁹ In case where the child lacks the sufficient maturity or the mental capacity to fully comprehend the implications of his or her decision, the person who is responsible for the child to provide appropriate assistance to make decisions.⁴⁰

Fourthly, legally recognising child-headed households is not a uniform solution to a complicated challenge. The decision whether to legally recognise a certain household as a child-headed household and allow children to remain by themselves should be made after a thorough investigation and consultation with all interested persons, including the children themselves. There are several criteria on which a household can be recognised as a child-headed household, but the most important criteria are the best interests of the children and the preference of the children. When the wishes of the children come into conflict with what is considered to be the best interests of the children, the solution should accommodate both sides as much as possible. For instance, there might be a case where children prefer to remain as a child-headed household while it is considered that the best interests of the children would be a placement in foster care. In such cases, it is important to understand the rationale behind the wishes of the children, which could include the wishes to remain together or the fear of mistreatment in foster homes, and the reasons favouring a placement in foster homes, such as immaturity of the eldest child or the difficulty of combining educational needs of children and care responsibilities. The solution does not need necessarily be either the one or the other. The solution could be keeping children together in cluster foster care or intensifying the role of a supervisor. The decisions on

³⁹ Sec 129(2)(a)(b) and Sec 129(3)(a)(b) of the Children's Act. Under Sec 130, the consent to HIV testing can be given by a child over 12 years of age. Sec 130 does not contain qualifications such as maturity.

⁴⁰ Sec 129(4) of the Children's Act.

care arrangements or appropriate support and protection measures should be based on individual assessments.

Finally, legally recognising child-headed households is not a costless panacea without complications. Children in child-headed households are entitled to special protection and assistance from states. Special protection and assistance includes measures to realise the right to adequate standard of living. Article 27 of the CRC protects children's right to an adequate standard of living. Although the wordings of articles 27(2) and 27(3) of the CRC suggest that the right to an adequate standard of living is not directly conferred on children but on their parents or guardians. States are responsible to assist the parents or whoever has the responsibility for the child to provide an adequate standard of living.

However, reading it together with article 26 of the CRC, which ensures a child's right to directly benefit from social security and considering the consequence of legally recognising child-headed households, the right to an adequate standard of living should be directly applicable to children who are responsible for younger siblings. The purpose of article 27 of the CRC is to ensure an 'adequate' standard of living for the full development of the children. Simply providing access to social grants or other services might not be enough to meet the level of state obligation unless through such social services, children can enjoy an adequate standard of living. As Hodgkin and Newell pointed out, article 27 qualifies the extent of state obligations by 'in accordance with national conditions and within their means'.⁴¹ Nevertheless, reading it together with article 4, which requires states to use their available resources to a 'maximum extent possible' to realise children's socio-economic rights, the qualifications on article 27 cannot be used as an excuse for failure to meet the core minimum of the right and also the failure to improve continuously the living conditions of children.⁴²

⁴¹ R Hodgkin & P Newell, 2002 (n 21 above) 393.

⁴² As above 393.

Legally recognising child-headed household does not mean an end to the challenges of care. It might even be the opening of a Pandora's Box,⁴³ raising more questions than providing answers. However, considering the current situations in many parts of Africa, the opening of the Box might be a necessary risk to take. The question is how well one should be prepared for the adventure. As the myth goes, the last thing remaining in the Box was hope. Legally recognising child-headed households, despite all the difficulties and questions, which arise at the initial stage, may pave the way to providing better protection and assistance to children in child-headed households.

This thesis favoured giving legal recognition to child-headed households if and only if the legal recognition is firmly grounded on a rights-based approach. The fundamental element of a rights-based approach is the recognition of children's status as rights-holders. Children in child-headed households have the right to special protection and assistance, which should enable them to enjoy their rights as children as well as members of an independent household. States have a legal obligation under international human rights instruments and domestic laws to provide 'special protection and assistance' to children in child-headed households. The measures of special protection and assistance should be adequate to enable children to realise fully their potentials and rights. Deprivation of their family environment should not lead to the deprivation of either their childhood or their harmonious physical, mental and spiritual development. Legally recognising child-headed households is not an end but a means to an end – stronger legal protection for children in child-headed households through a legal recognition of their status and rights.

⁴³ The expression was taken from P M Eba, 'Pandora's Box: The criminalisation of HIV transmission or exposure in SADC countries' in F Viljoen & S Precious (eds) *Human rights under threat: Four perspectives on HIV, AIDS and the law in southern Africa*, PULP (2007) 13.