

# **CHILD SUPPORT GRANT VERSUS FOSTER CHILD GRANT**

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Submitted in partial fulfilment of the requirements for the degree

LLM – Child Law

In the Faculty of Law

University of Pretoria

April 2015

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## ACRONYMS

<b>ACRWC</b>	African Charter on the Rights and Welfare of the Child
<b>CC</b>	Constitutional Court
<b>CCL</b>	Centre for Child Law
<b>CDG</b>	Care Dependency Grant
<b>CERD</b>	Convention on the Elimination of All Forms of Racial Discrimination
<b>CRC</b>	United Nations Convention on the Rights of the Child
<b>CSG</b>	Child Support Grant
<b>CSOs</b>	Civil Society Organisations
<b>DSD</b>	Department of Social Development
<b>FCG</b>	Foster Child Grant
<b>HC</b>	High Court
<b>HIV AND AIDS</b>	Human immunodeficiency virus infection and acquired immune deficiency syndrome
<b>HSRC</b>	Human Sciences Research Council
<b>CESCR</b>	International Convention on Economic, Social and Cultural Rights
<b>LRC</b>	Legal Resources Centre
<b>MTCT</b>	Mother-To-Child Transmission
<b>RSA</b>	Republic of South Africa
<b>SASSA</b>	South African Social Security Agency
<b>SCA</b>	Supreme Court of Appeal
<b>SMG</b>	State Maintenance Grant
<b>SALRC</b>	South African Law Reform Commission
<b>TAC</b>	Treatment Action Campaign
<b>UCT</b>	University of Cape Town
<b>UDHR</b>	Universal Declaration of Human Rights
<b>UNICEF</b>	United Nations Children's Fund
<b>UP</b>	University of Pretoria

## ACKNOWLEDGEMENTS

I take this opportunity to thank my Almighty God in inspiring me to conduct this research during hard times of my transition to motherhood.

Professor Ann Skelton, my supervisor, is deservedly thanked and my words cannot adequately express her efforts in playing both supervisory and mentoring roles to guide me all the steps of the way until completion of my studies.

My husband, father, and daddy, Modimowabarwa, for your untiring efforts to babysit our recently born prestigious prince, Boitumelo “Thakgalo Klaas”, during times of my studies is indeed a blessing to have you around in the social and research circles.

Although I cannot explicitly acknowledge all the people involved in assisting me directly and indirectly to complete this dissertation, it is my singular wish and sincerity of heart to thank all of you to the absolute maximum.

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## CHAPTER ONE

### INTRODUCTION AND OVERVIEW

#### 1.1 Introduction

An important feature of the Constitution<sup>1</sup> is the express recognition of socio-economic rights in the justiciable Bill of Rights. It guarantees for children and their caregivers a range of socio-economic rights.<sup>2</sup> These include the right to basic education,<sup>3</sup> access to adequate housing,<sup>4</sup> adequate healthcare services,<sup>5</sup> the right to sufficient food and water,<sup>6</sup> and the right to social security.<sup>7</sup> Children also have the additional rights to basic nutrition, shelter, basic healthcare services, and social services.<sup>8</sup>

The socio-economic rights in the South African Constitution are closely related to the fundamental values of human dignity, equality, and freedom.<sup>9</sup> This view was fortified by the finding of Yacoob J in *Government of the Republic of South Africa and others v Grootboom and others*<sup>10</sup> “in that the Constitution obliges the state to act positively to ameliorate the plight of the hundreds of people living in deplorable conditions throughout the country. It must provide access to housing, healthcare, sufficient food and water, and social security to those who are unable to support themselves and their dependents.” Yacoob J further stressed that “all the rights in the Bill of Rights are interrelated and mutually supporting.”

With regard to the Constitutional requirement of legislative measures, Yacoob J opined that, “by themselves, they are not enough to achieve constitutional compliance. The

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<sup>1</sup>The Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the Constitution).

<sup>2</sup> Proudlock P “Children’s Socio-economic Rights” in Boezaart (ed) *Child Law in South Africa* (2009) 291.

<sup>3</sup> S29 (1)(a) of the Constitution.

<sup>4</sup> S26 (1) of the Constitution.

<sup>5</sup> S27 (1)(a) of the Constitution.

<sup>6</sup> S27 (1)(b) of the Constitution.

<sup>7</sup> S27 (1)(c) of the Constitution.

<sup>8</sup> S28 (1)(c) of the Constitution.

<sup>9</sup> S1 of the Constitution, referred to by Justice Mokgoro in *Khoza and others v Minister of social Development and Others* 2004 (6) SA 504 (CC) para 40.

<sup>10</sup> *Government of the Republic of South Africa and others v Grootboom and others* 2001(1) SA 46 (CC).

state must act to achieve the intended result. The legislative measures have to be supported by appropriate well-directed policies and programmes implemented by the executive arm of government. The programmes must be reasonably implemented.”<sup>11</sup>

Proudlock has observed that within the state’s overall plan for the realisation of each socio-economic right, the primary enabling law has a crucial role to play because:

- (a) “it places a statutory obligation to the executive arm of government to provide the services, programmes and infrastructure that is needed to give effect to the right;
- (b) the law creates a statutory entitlement to the relevant service;
- (c) the law plays a crucial role in clarifying the necessities of each role to be played by the spheres of government as the responsibility to deliver socio-economic goods and services is shared across all three spheres of government, and
- (d) the law provides for the regulation of services to ensure that service is of good quality.”<sup>12</sup>

Section 27(1)(c) of the Constitution entrenches the right of everyone to “have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance”. The right to social security is recognised as a human right by a variety of international, regional, and national instruments. The right to social security in South Africa is characterised by a distinction between “social insurance” and “social assistance.” With regard to social insurance, the government is obliged to regulate private insurance schemes, and to create and control public insurance schemes so that people can take out private insurance or benefit from public insurance funds if they are injured at work, become unemployed, need maternity benefits, or suffer injury in a road accident.<sup>13</sup> These are called “contributory schemes” because the employee and employer make a joint monthly contribution to the scheme.

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<sup>11</sup> *Government of the Republic of South Africa and others v Grootboom and others* 2001(1) SA 46 (CC).

<sup>12</sup> Proudlock (2009) 296-297.

<sup>13</sup> Horsten D *et al* “Socio-economic Rights” in Govindjee A *et al* (eds) *Introduction to Human Rights Law* (2009) 172-173; Olivier MP *et al* (eds) *Introduction to Social Security* (2004) 36-37.

Social assistance, however, is characterised by the State providing support directly to people to help them to provide for their needs, usually in the form of cash grants.<sup>14</sup> Social assistance schemes are normally “non-contributory” schemes inasmuch as the employee does not make any contribution to the scheme.<sup>15</sup> In terms of the right to social assistance, the government is obliged to support parents or caregivers to care for their children if they are not able to support them adequately due to poverty, or where children have special needs. The fundamental purpose of the right to social assistance is to ensure that persons living in poverty are able to access a minimum level of income which is sufficient to meet basic subsistence needs, so that they do not have to live below minimum acceptable standards.<sup>16</sup> “The express reference to both social security and social assistance in section 27 affirms that social security and social assistance are not only related but are interdependent, and, accordingly crucial to the realisation of socio-economic rights.”<sup>17</sup>

According to Triegaardt<sup>18</sup>:

“Social security has been accepted as policy throughout the developed and developing nations. There is agreement that social security is important for poverty prevention, it ensures a basic minimum standard of living for people, and contributes to achieving a more equitable income distribution in society. The conceptualisation of social security incorporates notions of experiences, traditions, political nuances and levels of development. Thus, the nature and scope of social security will

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<sup>14</sup> Olivier MP *et al* (eds) *Introduction to Social Security* (2004) 38; Kaseke, E, *The challenges of extending social security to the poor: an African perspective* (2000) Unpublished paper, International Council on Social Welfare Biennial Conference, Cape Town, South Africa. 23-27 October 2000.

<sup>15</sup> Olivier (2004) 38; Kaseke (2000).

<sup>16</sup> *Ibid*; Triegaardt J, *Accomplishment and Challenges for partnerships in development in the transformation of social security in South Africa*, DBSA. <http://www.dbsa.org/EN/About-Us/Publications/Documents/Accomplishments>, [Accessed on 20 November 2014].

<sup>17</sup> Currie I and De Waal J (eds) “Socio-Economic Rights: Housing, Healthcare, Food Water Social Security” (2005) *The Bill of Rights Handbook* (2005) 566-567.

<sup>18</sup> Triegaardt J, <http://www.dbsa.org/EN/About-Us/Publications/Documents/Accomplishments> [Accessed on 20 November 2014].

accommodate these ranges of social, political and economic experiences at a national level.”

The legal framework governing social security in South Africa includes International Law, the Constitution, the Social Security Act, and the White Paper for Social Welfare 1997; hence the next sections that provide clear exposition about these legal and policy frameworks.

## 1.2 International Law

There are international instruments ratified by South Africa that protect and promote the right to social security. These include:

- the United Nations Convention on the Rights of the Child (CRC);<sup>19</sup>
- the African Charter on the Rights and Welfare of the Child (ACRWC);<sup>20</sup>
- The Universal Declaration of Human Rights (UDHR);<sup>21</sup>
- the International Covenant on Economic, Social, and Cultural Rights (CESCR), and<sup>22</sup>
- the Convention on the Elimination of All Forms of Racial Discrimination (CERD).

The CRC contains a set of rights which are to be enjoyed by all children. As a reference point, article 26 of the CRC urges all states parties to recognise the right of every child to benefit from social security and to take necessary measures to achieve the full realisation of these rights.<sup>23</sup> As such, the benefit should be granted by taking into

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<sup>19</sup> The CRC was adopted by General Assembly Resolution 44 of 20 November 1988; entered into force on 2 September 1990. South Africa signed the document on 29 January 1993 and ratified it on 15 December 1995.

<sup>20</sup> The ACRWC was ratified by South Africa on 7 January 2000.

<sup>21</sup> United Nations Universal Declaration of Human Rights, Adopted and proclaimed by General Assembly resolution 217 A(III) of 10 December 1948 On December 10, 1948 the General Assembly of the United Nations adopted and proclaimed the Universal Declaration of Human Rights. Following this historic act the Assembly called upon all Member countries to publicise the text of the Declaration and “to cause it to be disseminated, displayed, read, and expounded principally in schools and other educational institutions, without distinction based on the political status of countries or territories.

<sup>22</sup> The CESCR was ratified by South Africa on 12 January 2015.

<sup>23</sup> Article 26(1) of the CRC.

account the resources and the circumstances of the child and the person having responsibilities for the maintenance of the child, as well as any other considerations relevant to an application for the benefit made by or on behalf of the child.<sup>24</sup> The reason for granting social security benefits to the parent or the guardian and not to the child is the fact that the parent or guardian is responsible for the maintenance and care of the child.

While the ACRWC does not expressly guarantee the right to social security, reference is made to the aforementioned right in terms of rights that are regarded as specific contingencies of social security, and are illustrated in articles 16,<sup>25</sup> 17,<sup>26</sup> and, 18(1).<sup>27</sup> Articles 22 and 25 of the UDHR refer to social security. Article 22 provides that “everyone, as a member of society, has the right to social security and is entitled to realisation of the economic, social, and cultural rights indispensable for his dignity and the free development of his personality.”<sup>28</sup> This is to be achieved through national efforts and international co-operation and in accordance with the organisation and resources of each state. Furthermore, article 25 provides that:

- a) “Everyone has the right to a standard of living adequate for the health and wellbeing of himself and of his family, including food, clothing, and housing, including medical care, necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age, or other lack of livelihood in circumstances beyond his control;
- b) Motherhood and childhood are entitled to special care and assistance; all children, whether born in or out of wedlock, shall enjoy the same social protection.”

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<sup>24</sup> Article 26(2) of the CRC.

<sup>25</sup> Article 16(2) of ACRWC provides that protective measures under this article shall include effective procedures for the establishment of special monitoring units to provide necessary support for the child and for those who have the care of the child as well as other forms of prevention and identification, reporting referral, investigation, treatment, and follow-up of instances of child abuse and neglect.

<sup>26</sup> Article 17 of the ACRWC.

<sup>27</sup> Article 18(1) of the ACRWC provides that the family shall be the natural unit and the basis of society. It shall enjoy the protection and support of the State for its establishment and development.

<sup>28</sup> Article 22 of the UDHR.

In addition, article 9 of the CESCR also recognises the right of everyone to social security as instrumental to the realisation of family protection,<sup>29</sup> an adequate standard of living,<sup>30</sup> and access to healthcare.<sup>31</sup> There are several General Comments by the Committee on Economic, Social, and Cultural Rights that give authoritative guidelines on the meaning of the CESCR's provisions on social security.<sup>32</sup> General Comment 19 specifically addresses the right to social security.<sup>33</sup> According to the Committee, the implementation of article 9 of the CESCR on social security is to be achieved "within the limits of available resources" which may be interpreted as the progressive realisation of this right.<sup>34</sup>

The CERD puts an obligation on the State to afford everyone the right to social security and prohibits racial discrimination in all its forms.<sup>35</sup> The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) also advocates the elimination of discrimination against women especially in as far as social security is concerned.<sup>36</sup>

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<sup>29</sup> Article 10 ICESCR.

<sup>30</sup> Article 11 of the ICESCR.

<sup>31</sup> Article 12 of the ICESCR. See Vandenhole WP "Article 26; the right to be benefit from social security" in Alen A *et al* (eds) *A commentary on the United Nations Convention on the Right of the Child* (2007).

<sup>32</sup> General Comment No 5: persons with disabilities E/1995/28 (1994), para 28. General Comment No 6: The Economic Social and Cultural Rights of old persons E/1996/22 (1995), para 3, 26. General Comment No 10: The role of national human rights institutions in the protection of economic, social and cultural rights E/1992/22 (1998). General Comment No 28: The equality of rights between men and woman (2000) para 31.

<sup>33</sup> General Comment No 19 The Rights to Social Security E/C. 12/GC/19 (2008).

<sup>34</sup> General Comment No. 19 The Right to Social Security E/C.12/GC/19 (2008), para 18.

<sup>35</sup> Article 5(e)(iv) of the Convention on the Elimination of all Forms of Racial Discrimination provides that State Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to Right to Social Security, Social Assistance.

<sup>36</sup> Article 11(1)(e) of the Convention on the Elimination of all Forms of Discrimination Against Women provides that State Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular the right to social security, particularly in cases of retirement, unemployment, sickness, invalidity, and old age and other incapacity to work, as well as the right to have paid leave.

### 1.3 Constitution

Section 2 of the Constitution determines that the Constitution is the supreme law of the Republic and any law or conduct inconsistent with it is invalid. As such, the duties imposed by the Constitution must be performed. Section 27(2) imposes a constitutional duty on the state by determining that the state must take reasonable legislative and other measures within its available resources to achieve the progressive realisation of each of these rights. According to Proudlock and Hall, what this means is that “the State must have a clear plan to achieve the progressive realisation of the right. This plan must include a policy, a legal framework, and various programmes aimed at giving effect to the right. It must be designed and implemented reasonably. Most importantly, it must not leave out a significant proportion of the population, especially not those people who are vulnerable and in desperate need.”<sup>37</sup> “When section 27(2) is read in conjunction with section 2 of the Constitution, the assumption can be made that the fundamental right to social security is 'enforceable, because section 2 of the Constitution explicitly states that duties imposed by the constitution must be performed.”<sup>38</sup>

Section 27 of the Constitution provides that “everyone has the right to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.”<sup>39</sup> The government is constitutionally obliged to provide social assistance to everyone who is unable to support themselves, and it should continue to progressively realise this right for all, including children. Therefore, the state is under legal obligation to take ‘reasonable legislative and other measures “within its available resources” to achieve “progressive realisation” of this right. It is required of the state to respect, protect, promote and fulfil the rights in the Bill of Rights.<sup>40</sup>

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<sup>37</sup> Proudlock P and Hall K (2014) “Statistics on Children in South Africa: Income and social grants-children right to social security and social assistance”, Children’s Institute University of Cape Town.

<sup>38</sup> Olivier M and Van Rensburg L J “*Protection and enforcement of the Right to Social Security*” (2009) Sabinet.

<sup>39</sup> S27 (1)(c) of the Constitution.

<sup>40</sup> S27(2) of the Constitution.

The word “everyone” in section 27 of the Constitution includes children. Children, like adults, have the right of access to social security. The Constitution also affords children the right to social services. The right is entrenched in a cluster of other child economic and social rights found in section 28(1)(c) of the Constitution. This section guarantees “every child the right to social services, which includes services such as basic nutrition, shelter, basic healthcare, education, social security and social welfare services and to family care or alternative care when removed from the family environment.”<sup>41</sup> The White Paper for Social Welfare provides that “social security covers a wide variety of public and private measures that provide cash or in kind benefits or both.”<sup>42</sup>

It is important to distinguish between “qualified socio-economic rights” and “unqualified basic socio-economic rights”. “Examples of qualified socio-economic rights are the rights to access housing,<sup>43</sup> healthcare, water, food, social security and social assistance, right to social security and social assistance.<sup>44</sup> Each of these rights is qualified by the fact that the state is only compelled to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of the right.<sup>45</sup> These rights are therefore said to have internal limitations. In contrast, unqualified socio-economic rights contain no internal limitations and are phrased as a “right to” as opposed to a right “to have access to”.<sup>46</sup> For example, during the drafting of the final Constitution the Panel of Constitutional Experts, when asked the difference between children’s socio-economic rights in section 28(1)(c) and the socio-economic rights of everyone in section 26 and 27, answered as follows:

“The international instruments dealing with children’s rights do not limit the rights of children by requiring reasonable and progressive steps

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<sup>41</sup> S28 (1)(b) and (c) of the Constitution.

<sup>42</sup> White Paper on South African Social Welfare Policy 1997 chapter 7.

<sup>43</sup> S26 (1) of the Constitution.

<sup>44</sup> S27 (1) of the Constitution,

<sup>45</sup> Proudlock P “Children’s Socio-economic Rights” in Boezaart T (ed) *Child Law in South Africa* (2009); Horsten D *et al* “Socio-economic Rights” in Govindjee A *et al* (eds) *Introduction to Human Rights Law* (2009) 159.

<sup>46</sup> Proudlock (2009) 294; Liebenberg S (ed) “Adjudicating Socio-economic Rights under a transformative Constitution” (2010).

because of the view that it is inappropriate for children's rights to be qualified on account of their unreasonable demands on the state."<sup>47</sup>

Therefore, it is important to note that the rights in section 27 of the Constitution are qualified socio-economic rights because the state is only compelled to take "reasonable measures" within its available resources to realise the right progressively.<sup>48</sup> This right may be subjected to limitations under section 36 of the Constitution.<sup>49</sup> "In certifying the 1996 Constitution, the Constitutional Court acknowledged that socio-economic rights are in fact enforceable even if they give rise to budgetary considerations.<sup>50</sup> Consequently, section 27 of the Constitution must be read in conjunction with section 36 to determine to what extent the right to access to social security can be limited."<sup>51</sup>

Section 36(1) determines that "the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom; taking into account all relevant factors, including the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose."<sup>52</sup>

Sections 26(2) and 27(2) refer to the "right to have access to" and not purely to the "right to". In *Grootboom*, the court acknowledged that "one of the ways in which the state would meet its section 27 obligation would be through a social welfare programme

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<sup>47</sup> Panel of Constitutional Experts *Memorandum on Children* in Proudlock (2009) 294-295.

<sup>48</sup> S27 (2) and 26 (2).

<sup>49</sup> S36 of the Constitution provides that the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors.

<sup>50</sup> Olivier M and Van Rensburg L J "Protection and enforcement of the Right to Social Security" (2009) Sabinet.

<sup>51</sup> Olivier M and Van Rensburg L J (2009); Kaseke 2000 Unpublished paper.

<sup>52</sup> S36(1) (a)-(e).

providing maintenance grants and other material assistance to needy families in need in defined circumstances.”<sup>53</sup>

#### 1.4 White paper on Social welfare

According to the White Paper, “the domains of Social Security are seen as poverty alleviation, social compensation and income distribution.”<sup>54</sup> The term refers to social security, social services and related social development programmes as investments which lead to tangible economic gains and in turn lead to economic growth.<sup>55</sup> Social security’s target is for disadvantaged or poor families and their children so that they can enjoy other rights such as education, adequate standard of living, and family care. The White Paper further defines social security as policies which ensure that all people have adequate economic and social protection during unemployment, ill health, maternity, child rearing, widowhood, disability, and old age by means of contributory and non-contributory schemes for providing for their basic needs.

In terms of the White Paper, the social security system in South Africa is based on four fundamental and inter-related elements,<sup>56</sup> namely:

- a) private savings;
- b) social insurance;
- c) social assistance, and
- d) Social relief.

Private savings means that people voluntarily save for unexpected contingencies such as disability, retirement and chronic diseases. Social insurance is the joint contribution made by the employers and employees to pension or provident funds. The government

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<sup>53</sup> *Government of the RSA and Others v Grootboom* 2000 (11) BCLR (CC) para78.

<sup>54</sup> Chapter 7, The White Paper for Social Welfare, para 1. Murugi-Mukundi G “Reaffirming the social security rights of children in south Africa with particular reference to Child Support Grant” Vol 1 11 no 1 of 2010.

<sup>55</sup> Chapter 1, White Paper for Social Welfare 1997 para 8.

<sup>56</sup> Chapter 7, The White Paper for Social Welfare para 1.

may also contribute to social insurance covering accidents at work. Social assistance consists of non-contributory and means-tested<sup>57</sup> benefits provided by the state to people with disabilities, elderly people, and children.<sup>58</sup> Social relief, by contrast is a short-term measure to protect people over a particular individual or community crisis; it is non-contributory and is also means-tested.

## 1.5 Social Assistance Act

In conformity with its constitutional obligation, the state promulgated the Social Assistance Act, No 13 of 2004, which provides a range of social grants for vulnerable groups of people, namely the aged, children, and people with disabilities, children in need of foster care, and people in social distress.<sup>59</sup> It provides the legislative framework for the realisation of the right to social security and stipulates eligibility criteria and procedures for access to social grants for the elderly. The objectives of the Act are “to provide the administration of social assistance, determine the qualification requirements thereof, and to ensure that minimum norms and standards are prescribed for the delivery of social assistance.”<sup>60</sup> In terms of section 5 of the Social Assistance Act, “a person is entitled to the appropriate social assistance if he or she is eligible in terms of sections 6, 7, 8, 9, 10.”<sup>61</sup> The South African Social Security Agency (SASSA) was established by the South African Social Security Agency Act 9 of 2004,<sup>62</sup> to ensure the efficient and effective management, administration and payment of social assistance. The Social Assistance Act assigns to the Agency a duty to make available, out of monies appropriated by Parliament, a child support grant; a care dependency grant; a

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<sup>57</sup> Although most social security benefits are means tested, not all are- e.g. the foster child grant is not.

<sup>58</sup> There is also social security for war veterans

<sup>59</sup> S6, 7, 8, 9 and 10 of the Social Assistance Act 13 of 2004.

<sup>60</sup> S3 of the Act 13 of 2004

<sup>61</sup> S6 provides that a person is, subject to section 5, eligible for a Child Support Grant if he or she is the primary care giver of that child; s7(a) A person is, subject to section 5, eligible for a care dependency grant if he or she is a parent, primary care giver or foster parent of a child who requires and receives permanent care or support services due to his or her physical or mental disability. (b) A person contemplated in paragraph (a) is not eligible for such a grant if he child is cared for on a 24 hour basis for a period exceeding six months in an institution that is funded by the State; s8 A foster parent is, subject to section 5, eligible for a foster child grant for a child for as long as that child needs such care if (a) the foster child is in need of care.

<sup>62</sup> S2 of the South African Security Agency Act 9 of 2004.

foster child grant; a disability grant; an older persons grant; a war veterans grant; and a grant in aid.<sup>63</sup>

South Africa has developed a social assistance model for the realisation of the right to social security for children, which is in the form of a grant payable in cash on a monthly basis. Those include the Child Support Grant (CSG), Foster Child Grant (FCG), and Care Dependency Grant (CDG)<sup>64</sup>. The payment of these grants is implemented by the Department of Social Development (DSD) through the South African Social Security Agency (SASSA).<sup>65</sup>

The focus of this research is on the CSG and FCG as the means of providing social assistance for the progressive realisation of the right to social security of children. As will be explained in this dissertation, while the CSG has had the highest uptake, with over 11,655,042 million<sup>66</sup> child recipients, the number of FCGs being paid out also rose dramatically over the previous two decades. The two grants will be studied and analysed based on an analysis of the relevant case law.

## **1.6 Research problem**

Since the introduction of CSG and FCG, there has been a general concern about the differential amounts payable via each of these grants and such difference leaves poor families taking care of the children who are not biologically their own seeking regularisation of their child care arrangements through the foster care system. Therefore, it may be posited that there is a migration from CSG to FCG by the beneficiaries for obvious reasons that a higher amount is paid out in the FCG than CSG, yet the procedure is lengthy and tedious to access FCG. The migration overburdens social workers with work, causing administrative backlogs and time lags in processing the grant payments which ultimately frustrates the beneficiaries who are at the receiving

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<sup>63</sup> S4 of Act 13 of 2004.

<sup>64</sup> S4 of Act 13 of 2004.

<sup>65</sup> Act 13 of 2004.

<sup>66</sup> SASSA Fact Sheet: Issue no2 of 2015-28 February 2015.

end. Furthermore, the backlogs also negatively affect other children in the foster care systems that are really in need of care and protection due to abandonment, abuse, or neglect.

Since 2012, the Courts have started to discuss this issue, firstly in the case of *SS v Presiding Officer of the Children’s Court, District Krugersdorp and Others*,<sup>67</sup> secondly, in the case of *NM v Presiding Officer of the Children’s Court, District of Krugersdorp and Others*.<sup>68</sup> These cases both focused on whether children living in the care of extended family members are in fact children in need of care and protection, thus requiring placement in foster care and eligibility for the FCG, or whether they are in informal care with caregivers who should simply receive the CSG.

Overall, this study extensively reviews these two judgments, and determines whether they provide meaningful answers to the problem.

## **1.7 Research questions**

The following research question will be interrogated and addressed by this research:

Have the courts provided sustainable answers to whether foster care is a suitable means to deliver social assistance to children living in the care of extended family members, and if not, what other alternative solutions may be proposed?

Subsidiary questions that will be discussed are:

- a) What was the original intention of the CSG and how well has it achieved its purpose?

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<sup>67</sup> *SS v Presiding Officer of the Children’s Court, District Krugersdorp and Others* 2012 (6) SA 45 (GSJ).

<sup>68</sup> *MN v Presiding Officer of the Children’s Court, District of Krugersdorp and Others* 2013 (4) SA 379 (GSJ).

- b) What was the original intention of the FCG and has it been subverted from its purpose?
- c) Does the coexistence of these two mechanisms for accessing social grants create inequality?
- d) What negative effects are caused by the reliance on the FCG?
- e) How is section 150(1)(a) to be interpreted in the light of the SS and M cases?
- f) What will the long term effects of these decisions be?
- g) What alternative solutions have been or might be proposed?

## 1.8 Assumptions

The following assumptions are made which needed to be scientifically tested by this research:

- a) Foster care is part of the care and protection system, although a social grant attaches to it;
- b) The CSG is not part of the care and protection system, but is a form of social security which may be accessed without going through the care and protection system;
- c) People caring for children who are not their own should be provided with the maximum amount of social assistance that is affordable, and
- d) There are financial limitations on what may be proposed, but this dissertation focuses on legal options without any detailed assessment on the financial ramifications.

## 1.9 Research Approach

Research methodology<sup>69</sup> is a corpus of knowledge production that enables researchers to explain and analyse methods, indicating their limitations and resources, identifying their presuppositions and consequences, and relating their potentialities to research

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<sup>69</sup> Miller D *Handbook of research design and social measurement* (1983), New York: Longman Inc. 41.

advances. This research will pursue a desk top study drawing on legal analysis of case law, already existing primary data, and published academic writings. To be more specific, the research is a desk stop study of legislation, policy, litigation, reported cases, articles, books, conference papers, and newspaper reports among other materials. These legal sources are conventionally analysed with a view to answering the research question.

### **1.10 Chapter Outline**

Chapter one provides an introduction to and overview of the study;

Chapter two sets out the history of the CSG;

Chapter three provides the history of the CSG and the FCG;

Chapter four presents the analysis of the case law;

Chapter five draws the study to an end by providing compelling conclusions and recommendations.

### **1.11 Conclusion**

This introductory chapter outlined how the study unfolds in the ensuing chapters. The legislative framework was foregrounded emphasising the focus of the CSG and the FCG to be pursued in this study. This chapter poses the relevant research questions in terms of these grants, and posits the assumptions which are to be tested against them throughout this study.

## CHAPTER TWO

### HISTORY OF CHILD SUPPORT GRANT

#### 2.1 Introduction

The Child Support Grant (CSG) is the state's largest social assistance programme in terms of the volume of beneficiaries. The primary objective of the grant is to ensure that caregivers of young children living who are in extreme poverty are able to access financial assistance in the form of a cash transfers to supplement, rather than replace, household income. The CSG reaches over 10 million South African children each month.<sup>70</sup> Since its introduction, it has since been progressively increased both in terms of the amount and the eligibility age range and is now payable in relation to all children under the age of 18 years.<sup>71</sup> The CSG was introduced as a replacement grant to the State Maintenance Grant (SMG) which offered larger amount, but did not benefit the majority of children in need.

It is acknowledged that South Africa's social security assistance programme is the single most important driver of poverty eradication. The CSG is one of the means of realising this right for children and it enables them to access many of their other constitutionally guaranteed rights.

This chapter provides a historical account of how the CSG has evolved since its inception. The chapter also underscores the value proposition of the CSG by emphasising the developmental impact of the grant on the lives of the affected children.

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<sup>70</sup> The South African Child Support Grant impact Assessment: Evidence from a survey of children, adolescents and their households May 2012.

<sup>71</sup> Skelton A (2011) "Kinship care and cash grants: In search of sustainable solutions for children living with members of their extended families in South Africa" *The International Survey of Family Law* 333.

## 2.2 Historical context

The CSG is a social grant that was introduced in 1998 with the central purpose of alleviating poverty and helping children to acquire basic sustenance.<sup>72</sup> Prior to the CSG, there was the State Maintenance Grant (SMG) which provided support for mothers and their children where the spouse was no longer present.

The SMG was introduced in the 1930s to protect white, coloured, and Indian people. There were two parts to the SMG allowance; namely “the parental allowance of R430 per month and the child allowance of R135 per month (for maximum of two children).”<sup>73</sup> “This grant was available to mothers or guardians under the following conditions: that the parent or guardian would be living with a child under the age of 18 years, provided that the parent or guardian was unmarried, widowed, separated, or had been abandoned by the spouse for more than six months, had a spouse who received a social grant, or has been declared unfit to work for more than six months.”<sup>74</sup> This grant was only applicable to family structures which conformed to the maternal primary caregiver.

As a result of the apartheid era divide and rule policy, the SMG was mainly accessible to white, Indian, and coloured families. Africans were mostly excluded due to the discriminatory apartheid policy.<sup>75</sup> In 1995 there was a need to extend the grant to all race groups and that raised a serious concern about the financial implications of such an extension on the grant. That concern prompted the committee of the Minister of Welfare and the Provincial Members of the Executive Council (Welfare MINMEC) to

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<sup>72</sup> United Nations Children’s Fund (UNICEF) and Department of Social Development South Africa *Review of the Child Support Grant: Uses, implementation and obstacles* (2008) 7.

<sup>73</sup> Lund F *Changing Social Policy: The Child Support Grant in South Africa* (2008) HSRC press 15; Haarman D “From state maintenance grant to a new child support system: Building a policy for poverty alleviation with special reference to the financial, social, and developmental impacts” Unpublished Thesis (1998) 142.

<sup>74</sup> Lund F *Changing Social Policy: The Child Support Grant in South Africa* (2008) HSRC press 15; Haarman D “From state maintenance grant to a new child support system: Building a policy for poverty alleviation with special reference to the financial, social, and developmental impacts” Unpublished Thesis (1998) 9.

<sup>75</sup> Haarman D “From state maintenance grant to a new child support system: Building a policy for poverty alleviation with special reference to the financial, social, and developmental impacts” Unpublished Thesis (1998) 142.

establish the Lund Committee on Child and Family support. Its role was “to investigate the future affordability of the SMG system and to explore alternative policy options such as whether the parent grant portion of the SMG should be phased out or lowered.”<sup>76</sup>

According to Dirk Haarman, “the SMG was not suitable for poverty alleviation as it was designed as a back-up system for white families with children in a crisis and thus discriminated against almost about half of the poorest children.”<sup>77</sup> Francie Lund also emphasises that “the SMG was not sustainable or appropriate, not only in terms of affordability, but also in terms of its ability to accommodate changed family forms.”<sup>78</sup> Both Haarman and Lund agree that the SMG was designed for a nuclear family with a formal marriage where fathers are the main breadwinners and employed in the labour market whereas the roles of the wives and mothers are homemaking and child-rearing.<sup>79</sup>

As such, the Lund Committee’s recommendation was “to move away from a family-based benefit to a child-focused one, following the child rather than the household.”<sup>80</sup> This would accommodate the mobility of children moving between different households. The SMG was applied in a discriminatory manner and reached only a fraction of the population of children in need and was therefore, replaced by the CSG. The conceptual difference between the SMG and the CSG lies in the payment to the “primary caregiver”, instead of making payment to a single parent only. The underlying idea was that the person who actually takes care of the child whether a biological parent or not can claim the grant on the child’s behalf, and this was a fundamental shift.

The Committee members were of the opinion that the introduction of CSG in the short term holds a greater potential for the protection of more children over the medium and

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<sup>76</sup> Haarman D “From state maintenance grant to a new child support system: Building a policy for poverty alleviation with special reference to the financial, social, and developmental impacts” Unpublished Thesis (1998) 142.

<sup>77</sup> Haarman (1998) 142.

<sup>78</sup> Lund F *Changing Social Policy: The Child Support Grant in South Africa* (2008) HSRC press 51.

<sup>79</sup> Haarman (1998) 142; Lund F *Changing Social Policy: The Child Support Grant in South Africa* (2008) HSRC press 51

<sup>80</sup> Lund F *Changing Social Policy: The Child Support Grant in South Africa* (2008) HSRC press 51-52.

longer term.<sup>81</sup> In order to qualify for the CSG, an applicant must meet certain eligibility criteria. Firstly, “the CSG is available to a primary caregiver of a child.” A caregiver applying for the CSG does not have to go through a court process, but simply has to show that s/he is the primary caregiver.<sup>82</sup> A “primary caregiver” includes the biological parent and relatives, or a non-related person who takes the main responsibility for the child.<sup>83</sup> “Introduced in 1998 with a value of R75, the CSG has become the single biggest programme for alleviating child poverty in South Africa. A take-up of the CSG has increased dramatically over the past decade and, at the end of March 2014, a monthly CSG of R300 was paid to over 11.1 million children aged between 0 and 17 years.”<sup>84</sup>

When it was introduced, its main target was for the poorest and youngest children (aged up to 7 years), but it has increased progressively both in terms of money and age parameters as it is now payable to all children under the age of 18 years.<sup>85</sup>

The CSG is currently a cash grant at the value of R330 per month as from 1 April 2015 for a maximum of six children per household. The amount, however, is inadequate to meet the basic needs of a child. Thus the grant does not adequately discharge its obligation, as it is not sufficient. This is demonstrated in a practical way by the caregivers gravitating from the CSG to the FCG as the latter is higher than the former in monetary value. On this basis, with the increasing number of AIDS orphans, recognition and support should be given to caregivers, usually extended family members, who take on the care of additional children.<sup>86</sup>

Initially, the CSG was available to South African citizens only. However that was challenged in the *Khosa and Mahlaule* cases<sup>87</sup> which were both brought by applicants

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<sup>81</sup> Lund Committee Report, 1997.

<sup>82</sup> Section 6 of Act 13 of 2004.

<sup>83</sup> Section 1 of Act 13 of 2004.

<sup>84</sup> South African Child Gauge 2014.

<sup>85</sup> Skelton A “Girls’ socio-economic rights in South Africa” 2010 (26) SAJHR158; Skelton A “Kinship care and cash grants: In search of sustainable solutions for children living with members of their extended families in South Africa.”

<sup>86</sup> Guthrie T “Children/Family” in Olivier M P *et al Introduction to Social Security* (2004) 343-356.

<sup>87</sup> *Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development and Others* 2004 (6) BCLR 569 (CC).

who were permanent residents in South Africa. The applicant in *Khosa* challenged section 3(c) of the Social Assistance Act 59 of 1992 because it reserved older person's grants for South African citizens only and excluded permanent residents. In *Mahlaule*, sections 4(b)(ii) and 4B (b)(ii) of the Social Assistance Act were challenged because they reserved CSGs and care dependency grants for South African citizens only. The applicants in both matters would have qualified for social assistance but could not because they did not meet the citizenship requirement. The cases were consolidated and heard together in the Constitutional Court. The applicants referred to the wording of section 27(1)(c) of the Constitution, which expressly states that "everyone has the right to access social security and social assistance,"<sup>88</sup> and not "every citizen". Thereby arguing that excluding non-citizens infringed on their rights to access to social security and assistance [section 27(1)(c), equality (section 9), life (section 11) and dignity (section 10)].<sup>89</sup> They argued that, in addition, their children's rights under section 28 had been infringed.<sup>90</sup> The Court referred to the foundational values in the Constitution, namely human dignity, equality, and freedom<sup>91</sup> and recognised that all rights are interdependent, mutually related and equally important. The Court remarked that, when the state argues that it cannot afford to pay benefits to everyone entitled in terms of section 27(1)(c), the criteria for excluding a specific group, i.e. permanent residents, must be consistent with the Bill of Rights as a whole.<sup>92</sup>

The Constitutional Court found these provisions to be unconstitutional, emphasising the fact that permanent residents are a vulnerable group and they need special constitutional protection. Because of the urgency of the matter, the Court decided to use the purposive approach to ascertain the meaning of "everyone" in section 27(1) and came to a conclusion that the term includes "all people in our country" The Court further reasoned that it might be reasonable to exclude citizens from other countries who are visitors or illegal residents, but permanent residents, who have made South Africa their

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<sup>88</sup> *Mahlaule and Another v Minister of Social Development and Others* 2004 (6) BCLR 569 (CC) para11.

<sup>89</sup> *Ibid* para

<sup>90</sup> *Ibid* para 38-39.

<sup>91</sup> *Ibid* para 40.

<sup>92</sup> *Ibid* para 45.

home, and in most cases, whose children are being born here, should be included.<sup>93</sup> As a result thereof, the Court has granted access to any social grant in South Africa to permanent residents. Given the *Khosa* case, the CSG is currently available to the child and primary caregiver who is a South African citizen or permanent residents residing in South Africa. This is not only the victory to the applicants, but also to all permanent residents who have vulnerable children in their care.

### 2.3 CSG means test and age threshold

The CSG is a means-tested social grant. In a means test information on household income is collected to decide whether the person qualifies for the grant or not. “Both the age criteria and the cash value of the grant have been raised since the CSG was introduced, but the means test requirement has remained the same since the introduction of the grant.”<sup>94</sup> The means test (which is 10 times the value of the grant), is the income threshold that determines if an applicant is poor enough to qualify for the grant. However, there was “a misinformation or a misunderstanding which was prevalent among the public, employers, and some SASSA staff with regard to means test and eligibility requirements.”<sup>95</sup> They believed that “any person receiving an income other than a grant, regardless of its source and whether or not it falls under the prescribed income threshold is automatically disqualified from CSG.”<sup>96</sup> This misconception about means test criteria and income threshold have let to the exclusion of a number of eligible caregivers from applying for and obtaining the CSG.<sup>97</sup>

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<sup>93</sup> *Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development and Others* 2004 (6) BCLR 569 (CC) para 59.

<sup>94</sup> United Nations Children’s Fund “Review of the Child Support Grant: Uses, Implementation and Obstacles” June 2008.

<sup>95</sup> Martin P “Children’s right to social assistance: A review of South African’s Child Support Grant” in Proudlock P (ed) *South Africa’s Progress in Realising Children’s Rights: A Law Review* (2014) 68.

<sup>96</sup> *Ibid*; De Koker C, De Waal and Voster J (2006) *A Profile of Social Security Beneficiaries in South Africa*. Department of Sociology and Social Anthropology, Stellenbosch University; Vorster J and De Waal L (2008) “Beneficiaries of the Child Support Grant: Findings from National survey”. *The Social Work Practitioner- Researcher*, 20(2) 233-248.

<sup>97</sup> Preventing Exclusion from the Child Support Grant: A study of exclusive errors in accessing CSG benefit, SASSA and UNICEF 2013 P6.

During 2005 and 2008, the Child Support Grant was only available to children aged 0-13 years. From 2009, the grant was extended to include children aged 14 years. From 2012, the CSG has been available to children until they turn 18 years. The current SASSA statistics on the CSG for children indicate that the total grant is disbursed on a monthly basis to 11,480,576 children through their primary caregivers.<sup>98</sup> In addition, a person receiving a CSG cannot qualify for another grant if s/he is already in receipt of a grant in respect of the child.<sup>99</sup> The child must be resident in South Africa<sup>100</sup> and the child cannot be cared for in a state institution.<sup>101</sup>

Furthermore, in terms of documentation, the child's valid birth certificate is required as well as the caregiver's/applicant's identity document. The issue of documentation, particularly birth certificates, has been one of the most formidable challenges to accessing the CSG. This is evident in remote villages and towns where the nearest Home Affairs Office is far away and it is therefore difficult to obtain the required documents. The issue of documentation was challenged in a High Court application where the Court ordered the Department of Social Development (DSD) to implement the use of alternative forms of identity and to give a detailed statistical report in November 2008 on its progress in giving CSG to children and caregivers without identity documents.<sup>102</sup>

Lastly, the child must be under the age of 18 years. Initially, the age threshold was up to 7 years and consequently 14 years and later extended from 14 to 17.<sup>103</sup> The recent extension of the grant to children under 18 years of age means that more children will benefit from the grant and this is the greatest milestone and a step in the right direction as it now concurs with the constitutional imperative of an adult of 18 years limitation.

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<sup>98</sup> SASSA Fact Sheet: Issue no 9 of 2014 – 30 September 2014.

<sup>99</sup> S4(2)(e) Regulation 162, 22 February 2005, Social Assistance Act 13 of 2004.

<sup>100</sup> S4 (2)(f) Regulation 162, 22 February 2005, Social Assistance Act 13 of 2004.

<sup>101</sup> S4 (2)(d), Section 4, section 10(3)(b), Regulation 162, 22 February 2005, Social Assistance Act 13 of 2004.

<sup>102</sup> *Alliance for Children's Entitlement to Social Security v Minister of Social Development* case no 5251/2005 Transvaal Provincial Division of the High Court (unreported).

<sup>103</sup> Hall K Income, poverty, unemployment and social grants South African Child Gauge, 2013.

However, the Minister of Social Development, Bathabile Dlamini has recently publically announced the intention to raise CSG from 18 years of age to 23 years.<sup>104</sup>

## 2.4 The developmental impact of the CSG

The CSG is the most important instrument of social protection for children in South Africa. The fact that the CSG reaches 11,480,576<sup>105</sup> South African children each month is important evidence that CSG plays a huge role as an investment in human capabilities<sup>106</sup>. According to a survey conducted by the DSD in partnership with SASSA and UNICEF,<sup>107</sup> the CSG has a crucial impact on schooling and cognitive skills of a child. There is growing evidence that social assistance has a positive impact on the lives of children in poor households in South Africa. Access to adequate nutrition for young children is of particular concern, as nutritional deprivation and malnutrition in the formative years have long-term negative consequences on physical and cognitive development. Therefore, cash transfers such as the CSG play an important role in enabling caregivers to access food of sufficient nutritional quality and variety to meet the child's needs. However, the impact assessment report on CSG strongly suggests that early and regular access to the CSG is required to have an effective and sustained impact on children's nutritional status lower levels of education and therefore lower levels of access to employment or income generation activities than those who were not eligible.<sup>108</sup>

The analysis of grade attainment indicates that children who are enrolled in the CSG at birth attain higher scores on maths tests and also accomplish more grades of schooling than children who were enrolled at the age of six.<sup>109</sup> Moreover, the grant plays a

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<sup>104</sup> City Press 11 January 2015.

<sup>105</sup> SASSA Fact Sheet: Issue no 9 of 2014 – 30 September 2014

<sup>106</sup> Department of Social Development, South African Social Security Agency & UNICEF (2012) *The South African Child Support Grant Impact Assessment: Evidence from a Survey of Children, Adolescents and their Households*. Pretoria: UNICEF South Africa; SASSA fact sheet: Issue no 9 of 2014 – 30 September 2014.

<sup>107</sup> Department of Social Development, South African Social Security Agency & UNICEF (2012).

<sup>108</sup> Department of Social Development, South African Social Security Agency & UNICEF (2012) p4-5; Budlender D & Woolard I (2006) *The Impact of the South African Child Support and Old Age Grants on Children's Schooling and Work*. Geneva: International Labour Office.

<sup>109</sup> Department of Social Development, South African Social Security Agency & UNICEF (2012) p5.

compensatory role for children with less educated mothers and thus narrows the schooling gap between children whose mothers have more or less education. Furthermore, the CSG encourages human capital development, improves gender outcomes and helps to reduce the historical legacy of inequality.<sup>110</sup>

In addition, “it also has a serious impact on the schooling outcomes of the adolescents because it reduces adolescents from being absent from school even when the particular household does not receive the grant specifically for the adolescent, but rather for another child or children in the family.”<sup>111</sup> It is evident that the receipt of the CSG by adolescents generates a range of positive and protective impacts by reducing their risky behaviour such as sexual activity, alcohol consumption, use of drugs, and participation in criminal activities.<sup>112</sup> However, prior to the extension of the CSG to adolescents, school dropout rates were a concern. According to Professor Ann Skelton, “there was speculation that teenage girls are likely to be induced by the grant to have children and that the grant will lead to teenage pregnancies and child farming, however, that speculation was disputed by the research undertaken by the Human Sciences Research Council (HSRC) which found out that contrary to the widespread public perception, there was no evidence that the CSG was the cause of an increase in teenage pregnancies. In fact, the CSG makes a positive difference in the lives of teenage mothers and their children.”<sup>113</sup>

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<sup>110</sup> Department of Social Development, South African Social Security Agency & UNICEF (2012) p4-5.

<sup>111</sup> Department of Social Development, South African Social Security Agency & UNICEF (2012) *The South African Child Support Grant Impact Assessment: Evidence from a Survey of Children, Adolescents and their Households*. Pretoria: UNICEF South Africa.

<sup>112</sup> Martin P “Children’s right to social assistance: A review of South African’s Child Support Grant” in Proudlock P (ed) *South Africa’s Progress in Realising Children’s Rights: A Law Review* (2014) 62

<sup>113</sup> Skelton A “Girls’ socio-economic rights in South Africa” 2010 (26) SAJHR 158-159; M Makiwane and E Udjo “Is the Child Support Grant Associated with an Increase in Teenage Fertility in South Africa? Evidence from National Surveys and Administrative Data” (2007) 5(1) *HSRC Review* 6; Komana T “An analysis of the Impact of Child Support Grant on Teenage Fertility Rates in South Africa” (2008) unpublished Thesis, University of Stellenbosch.

## 2.5 Use of the CSG within the Household

The level of household income was lower in rural or informal urban areas than formal urban areas.<sup>114</sup> Where income is limited and *per capita* income is low, any grant money coming into the household, such as that from the CSG, is likely to be pooled to cover general household expenses rather than being spent solely to maintain the targeted child. The CSG therefore acts as a lifeline for many households at the coalface of high levels of unemployment and limited opportunities for economic development. Food formed the largest category of expenditure across all groups, but was higher among those eligible for the grant.<sup>115</sup> CSG recipients were most likely to report increased spending on food since receiving the grant, with school fees, uniforms, and electricity also being mentioned. This is in accordance with the growing body of evidence that the CSG is used for essentials such as food, basic services and education-related costs.<sup>116</sup> Cash transfers alone are not sufficient to reduce poverty, and must be accompanied by other poverty alleviation programmes and developmental initiatives. Such initiatives in South Africa include access to free basic healthcare for children, access to no-fee schools, and school nutrition programmes to mention but a few.

## 2.3 Conclusion

The historical origin and evolution of the CSG from the SMG has proved to be a vital social security vehicle to progressively realize socio-economic rights of the most vulnerable children. This chapter explored the value proposition of the CSG; especially the impact of the CSG on children in rural and informal settlement, the positive development in extending the grant to benefit children up to the age under 18 years which is well received, as is the increase in value of the CSG although it is still

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<sup>114</sup> Review of the Child Support Grant: Uses, Implementation and Obstacles. United Nations Children's Fund June 2008 p1.

<sup>115</sup> Guthrie T "Assessing the Impact of the Child Support Grant on the Well – Being of Children in South Africa: A summary of available evidence" (2002) Children's Institute University of Cape Town 4-5.

<sup>116</sup> Delany A, Ismail Z, Graham L and Ramkissoo Y (2008) *Review of the Child Support Grant: Uses, Implementation and Obstacles*. Pretoria: Department of Social Development, Community Agency for Social Enquiry, South African Social Security Agency and UNICEF; Guthrie T "Assessing the Impact of the Child Support Grant on the Well – Being of Children in South Africa: A summary of available evidence" (2002) Children's Institute University of Cape Town pp4-5 and 15-18.

inadequate given the increasing poverty gap and HIV Aids pandemic which continues to increase the number of orphans in the country.

To this end, there is substantial evidence that grants, including the CSG, are being spent on food, education, and basic goods and services. This evidence shows that the grant not only helps to realise children's right to social assistance, but is also associated with improved nutritional, health and education outcomes and should therefore be increased in amount to manage efficacy in the face of the inflation rate. Given the positive and cumulative effects of the CSG, it is important to underscore the need for caregivers to access the grant for their children from as early as possible to be able to enjoy its benefits and thereby make an indelible impact on the lives of their children.

## CHAPTER THREE

### HISTORY OF FOSTER CHILD GRANT

#### 3.1 Introduction

Section 28(1)(b) of the Constitution provides that “every child has a right to family care or parental care or to appropriate alternative care when removed from the family environment”. Foster care has been regarded as the preferred form of care for children who are unable to live with their own parents and for whom adoption is not possible in order to enable them to live as part of a family. According to Loffell and Gallinetti, “foster care” is defined to mean the care of a child as described in section 180(1) of the Children’s Act, and that includes foster care in a registered cluster foster care scheme<sup>117</sup>. This section provides that “a child is in foster care if the child has been placed in the care of a person who is not the parent or guardian of the child.” The amount of time a child will spend in foster care depends on the specific case of the child. The standard period is two years, although a children’s court can set a shorter period. In certain circumstances, a child can be placed in foster care for a longer period, even up until the age of 18 years.<sup>118</sup> Children are placed in foster care for obvious reasons.

The term “foster care” was first included in the law in the Children’s Act of 1960. Foster care as introduced at that time was, for the most part, a “classical” foster care model in which children’s court placed children were found to be in need of care into foster care with foster parents who were not related to them. Such foster parents received the foster child grant.

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<sup>117</sup> Loffell J and Gallinetti J “Foster Care” in Davel CJ and Skelton AM (eds) *Commentary on the Children’s Act (2007)* Juta 12-5; s 180(1) of the Children’s Act.

<sup>118</sup> S186 (2) of the Children’s Act provides that “a children’s court may having considered the need for creating stability in the child’s life, place a child in foster care with family members for more than two years, extend such an order for more than two years at a time or order that the foster care placement subsists until the child turns 18 years, if – (a) The child has been abandoned by the biological parents; or the biological parents are deceased.”

The purposes of foster care are *inter alia* “to protect and nurture the children by providing a safe, healthy environment with positive support; promote the goals of permanency planning, first towards family reunification, or by connecting children to other safe nurturing family relationships intended to last a lifetime, and to respect the individual and family by demonstrating a respect for cultural, ethnic, and community diversity.”<sup>119</sup>

Overall, foster care aims to keep children in a safe and positive environment. The Foster Child Grant (FCG) is a cash grant which was introduced much earlier than the CSG to support the child protection system.

This chapter therefore provides the historical contextualisation and overview of how the FCG has evolved over time, since its inception as a grant to support foster care for children who have neither care nor protection. The chapter also underscores the value proposition of the FCG by emphasising the developmental impact of the grant on the lives of the affected children.

### **3.2 Historical context**

According to section 156(1)(e) of the Children’s Act, “if a court finds that a child is in need of care and protection, the court may make an order which is in the best interest of the child, which may be, or including, an order – (e) if the child has no parent or caregiver or has parent or caregiver but that person is unable or unsuitable to care for the child, that the child be placed in – (i) foster care with suitable parent.”<sup>120</sup> Furthermore, the purposes of foster care according to section 181 of the Children’s Act are to protect and nurture children by providing a safe, healthy environment with positive support.

Foster care is a child-centred service to children in difficult circumstances which is regulated by the Children’s Act, the basic instrument of the protection of children in need of care. Section 155(2) places the child’s best interest at the forefront when the

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<sup>119</sup> S181(a)-(c) of the Children’s Act.

<sup>120</sup> S156(1)(e).

court has to decide whether a child is in need of care and protection. The section provides that “before the child is brought before the children’s court, a designated social worker must investigate the matter and within 90 days compile a report in the prescribed manner on whether the child is in need of care and protection”. Furthermore, in sections 156(1)(e) and 46(1)(a) of the Children’s Act,<sup>121</sup> the children’s court is empowered to make an alternative care order by placing a child who has been found to be in need of care and protection in the care of the person designated to be a foster parent of the child.

Section 150 of the Children’s Act provides a list of grounds on which a child can be found to be in need of care and protection and that is a prerequisite for placing a child in foster care. A child is found to be in need of care and protection in terms of section 150(1) and (2) of the Children’s Act when s/he:

- (a) “has been abandoned or orphaned and is without any visible means of support ;
- (b) is displaying behaviour which cannot be controlled by the parent or caregiver;
- (c) lives or works on the streets, or begs for a living;
- (d) is addicted to a dependence-producing substance and is without any support to obtain treatment for such dependency;
- (e) has been exploited or lives in circumstances that expose the child to exploitation;
- (f) lives in or is exposed to circumstances which may seriously harm that child’s physical, mental or social well-being;
- (g) may be at risk if returned to the custody of his/her parent, guardian or caregiver as there is reason to believe that s/he will live in or be exposed to

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<sup>121</sup> S56(1)(e) states that if a children’s court finds that a child is in need of care and protection the court may make any order which is in the best interest of the child, which may be or include an order – if the child has no parent or caregiver or has a parent or caregiver but that person is unable or unsuitable to care for the child, that the child be placed in foster care with suitable foster parent. Whereas s46(1)(a) provides that a children’s court may make the following orders: (a) an alternative order, which includes an order placing a child in the care of a person designated by the court to be the foster parent of the child.

circumstances which may seriously harm his/her physical, mental or social well-being;

(h) is in a state of physical or mental neglect;

(i) is being maltreated, abused, deliberately neglected or degraded by a parent, a caregiver, a person who has parental responsibilities and rights or a family member or by a person under whose control s/he is a victim of child labour.”

Section 150(1)(a) is the first in the list of grounds on which a child can be found to be in need of care and protection and states that “a child must be abandoned or orphaned and without visible means of support”. The Parliamentary Portfolio Committee on Social Development made a decision to delete the word “or” that appeared before “is without visible means of support” in the Children’s Bill and replaced it with the word “and”.<sup>122</sup> This change in wording has been interpreted differently by children’s courts. Some presiding officers of the children’s courts were of the view that a child who is already being cared for by an extended family member has a “visible means of support”, that no foster care order should be made and such family member can only access the CSG even if such child may be “orphaned or abandoned”. A decision of this nature was taken by the Presiding Officer in Krugersdorp Children’s Court<sup>123</sup> where a boy who was cared for by the extended family members was not found to be “in need of care and protection” despite the fact that he was an orphan. (This case is discussed in detail in chapter four).

Unlike the CSG, the FCG was introduced to support the child protection system after court ordered placement in cases where the government had removed children from their family environments, and the children are found to be in need of care and protection.<sup>124</sup> The grant was initially intended as financial support for children removed from their families and placed in foster care for protection in situations of abuse or neglect. However, it is increasingly used to provide financial support to caregivers of

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<sup>122</sup> Skelton A (2011) “Kinship care and cash grants: In search of sustainable solutions for children living with members of the extended families in South Africa” *The International Survey of Family Law* 333.

<sup>123</sup> *SS v Presiding Officer of the Children’s Court, District Krugersdorp and Others* 2012 (6) SA 45 (GSJ).

<sup>124</sup> Hall K and Proudlock P (2011) “Orphaning and Foster Child Grant: a Return to the ‘care or cash’ debate” Children’s Institute University of Cape Town.

children who are orphaned. The appropriateness and effectiveness of this approach have been questioned.<sup>125</sup> The FCG is not directly intended as a poverty alleviation grant, but rather government assistance to persons caring for children who are not their own, who have been placed with them through the formal care and protection system.<sup>126</sup> There are large numbers of children being cared for by members of their extended families. Some of these are primary caregivers receiving the CSG, but over the years increasing numbers of these caregivers have migrated to the foster care system, hence they are receiving the FCG.

The FCG has become the preferable grant because it is higher than the CSG in monetary value of R860 as from 1 April 2015. Furthermore, the disparity in value between the CSG and the FCG renders the social grant system unfair to poor children whose primary caregivers do not qualify to be foster carers. It also entices extended families that are providing informal care for orphans to apply for the FCG despite its lengthy and complex procedure.<sup>127</sup> A further problem is that the social work and court processes regarding foster care are burdensome and thus the large number of foster care applications places stress on the care and protection system due to social workers' time being mostly occupied by large number of foster care placements, leaving them little time to deal with the core business of cases of abuse and neglect.

Skelton<sup>128</sup> has observed that foster care was utilised in a stable manner over a number of decades from 1960 onwards and the number of children in foster care were never above 40 000, but that drastically changed since 2000 to 2012 as the number of

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<sup>125</sup>Meintjes H, Budlender D, Giese S & Johnson L (2003) "Children 'in Need of Care' or in Need of Cash? Questioning Social Security Provisions for Orphans in the Context of the South African AIDS Pandemic". *Joint working paper of the Children's Institute & the Centre for Actuarial Research, UCT*.

<sup>126</sup> Skelton A (2011) "Kinship care and cash grants: In search of sustainable solutions for children living with member of their extended families in South Africa" *The International Survey of Family Law* 333; Gallinetti J and Loffell J "Foster Care" in CJ Davel and AM Skelton (eds) *Commentary on the Children's Act* Juta 12-2.

<sup>127</sup> Hall K and Proudlock P (2011) "Orphaning and Foster Child Grant: a Return to the 'care or cash' debate" *Children's Institute University of Cape Town*, Skelton A (2011) "Kinship care and cash grants: In search for sustainable solutions for children living with members of their extended families in South Africa" *The International Survey of Family Law* 333.

<sup>128</sup>Skelton A (2011).

children to be fostered increased drastically and resulted in system crises. This view was also reiterated by Proudlock and Hall stating that:

“The number of FCGs remained stable for many years while foster care was applicable only to children in the traditional child protection system. Its rapid expansion since 2003 coincides with the rise in HIV-related orphaning and an implied policy change by the Department of Social Development, which from 2003 started encouraging family members (particularly grandmothers) caring for orphaned children to apply for foster care and the associated grant. Over the following five years, the numbers of FCGs increased by over 50,000 per year as orphans were brought into the foster care system. The increases were greatest in provinces with large numbers of orphaned children: the Eastern Cape, KwaZulu-Natal, Limpopo, and Mpumalanga.”<sup>129</sup>

According to Black Sash<sup>130</sup> the foster care system was designed to cope with approximately 50,000 children at risk of abuse, neglect or exploitation; not millions of children in need of income support. The sudden increase in the number of children being fostered was through the impact of HIV/AIDS pandemic that has struck South Africa and that has caused a rise in number of orphans. The then Minister of Social Development, Zola Skweyiya’s, speech from May 2002, offers another explanation for the increase in foster care where he stated that “the FCG would be made available to relatives caring for orphaned children.”<sup>131</sup> The minister’s address led to the increase in the uptake of foster care in order to access the FCG.<sup>132</sup> However, by 2009 the foster care system itself was struggling to keep pace with the number of applications due to

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<sup>129</sup> Proudlock P and Hall K (2014) *Statistics on Children in South Africa: Income and Social Grants-Children right to social security and social assistance*. Cape Town: Children’s Institute, UCT.

<sup>130</sup> Black Sash, Making Human Rights Real fact sheet July 2012.

<sup>131</sup> Hall K and Proudlock P (2011) “Orphaning and Foster Child Grant: a Return to the ‘care or cash’ debate” Children’s Institute University of Cape Town.

<sup>132</sup> Skelton A (2011) “Kinship care and cash grants: In search for sustainable solutions for children living with members of their extended families in South Africa” *The International Survey of Family Law* 333. Hall K and Proudlock P (2011) “Orphaning and Foster Child Grant: a Return to the ‘care or cash’ debate” Children’s Institute University of Cape Town.

the required initial investigations and reports by social workers, court-ordered placements through a children's court, and additional two-yearly social worker reviews and court-ordered extensions.<sup>133</sup> In addition, foster care orders lapsed due to a change in the procedure to be followed when such orders are to be extended, which posed a serious risk that the FCGs linked to those orders would lapse. However, Proudlock and Hall have noted that the dropping off of the system started even before the new Children's Act came into operation and this shows that the system was already hopelessly over-burdened.<sup>134</sup> The Child Care Act allowed social workers to extend foster care placements every two years through an administrative process. But the Children's Act repealed the Child Care Act and it is was a requirement under the new law that all care and protection orders, including foster care orders, must be extended by the Children's Court. Over 110,000 FCGs lapsed in the two years between April 2009 and March 2011 as a result of backlogs in the extensions of court orders, some of which might have caused by the lapsing of court orders.<sup>135</sup>

In 2011, for example, the Department of Social Development (DSD) made a public announcement that 123,000 children had "dropped off" the foster care system due to social workers and court officials being unable to manage to keep up with the demand to process new applications and renew the two year court orders. This "drop off" from the grant left foster families stranded and eventually led alarmed Civil Society Organisations (CSOs) to approach Centre for Child Law (CCL) in Pretoria about their plight.

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<sup>133</sup> Hall K and Proudlock P (2011) "Orphaning and Foster Child Grant: a Return to the 'care or cash' debate" Children's Institute University of Cape Town.

<sup>134</sup> Hall K & Proudlock P (2011) "Orphaning and the Foster Child Grant: A Return to the 'care or cash' Debate" Children Count brief, July 2011. Cape Town: Children's Institute, UCT.

<sup>135</sup> *Ibid*; Proudlock P (2012) "The Case of Child SS and 1.1 Million Others like Him – Orphan Children in Need of Social Assistance" Paper presented at *Towards Carnegie3: Strategies to Overcome Poverty & Inequality conference*, 3 -7 September 2012, UCT; Skelton A (2012) "The story of 110 000 foster child grants that stopped being paid in 2010/20" Paper presented at *Towards Carnegie3: Strategies to Overcome Poverty & Inequality conference*, 3-7 September 2012, UCT.

In *Centre for Child Law v Minister of Social Development and Others*<sup>136</sup> the CCL brought an urgent application to high court in an attempt to solve the crises and prevent any further children from dropping off FCG in five years. One of the reasons for the crisis was that the Children's Act requires most foster care orders to be renewed and extended by the courts every two years, while the Social Assistance Act requires the South African Social Security Agency (SASSA) to stop a grant payment if the extended court order is not submitted to SASSA in time. This constituted a serious violation of these children's constitutional rights to social assistance, nutrition, social services, healthcare services, and education.

The CCL and the DSD reached a settlement agreement that became an order of court. The High Court which ordered that foster care orders that had lapsed and were due to lapse were dealt with using an administrative procedure until 31 December 2014 or until the Children's Act was amended to provide for a more comprehensive legal solution, whichever came first. It also extended, all foster care orders that had already expired for a period of two years, and held that those orders should be considered not to have lapsed. As a result, approximately 80,000 lapsed grants were reinstated between 1 January and 30 November 2011.<sup>137</sup> More grants are likely to have been reinstated since then. However, the settlement applies only to foster care orders granted between 1 April 2009 and 1 April 2010. Orders granted after this date, the majority of which expired in 2012, all had to go back to court to be extended.

Taking into account the temporary nature of the settlement and its application only to some foster care orders, the parties agreed in the settlement that the Minister of Social Development must design and implement a comprehensive solution to address the foster care crisis by December 2014. However, the DSD rushed to court on 12 December 2014 to obtain yet another extension of the court order which was granted until December 2017, but the CCL succeeded to get the new order to include a

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<sup>136</sup> *Centre for Child Law v Minister of Social Development and Others*, North Gauteng High Court case no 21726/11.

<sup>137</sup> *Centre for Child Law v Minister of Social Development and Others*, North Gauteng High Court case no 21726/11.

reporting provision to the court and the centre every six months of the progress made<sup>138</sup>.

Although the crisis around the “dropping off” led to the court application described above, Proudlock and Hall have pointed out that the dropping off of the system was predated even before the new Children’s Act came into operation and this shows that the system was already hopelessly over-burdened. In the Molteno case,<sup>139</sup> for example, the CCL on behalf of 93 children from Molteno in the Eastern Cape took the Minister of Social Development and the MEC for Social Development in the Eastern Cape to court for failing to extend the foster orders made by the Children’s Court. The Minister has failed to make determination on whether or not the foster order should be renewed. Consequently the SASSA, which has been paying foster care grants to the children’s foster parents, stopped making payment in July 2009. It is on this basis that foster care orders lapsed after a period of two years.

The lapsing of the grants made it difficult for the vulnerable foster care parents in poverty situation to care for the children. It should be stated in no uncertain terms that these foster care orders had lapsed more than a year before the Children’s Act came into operation.

### **3.3 Conclusion**

The historical origin and evolution of the FCG have proven to be important pathways used to provide financial support system to caregivers of children who are orphaned or abandoned and also for children who are removed from their families and placed in foster care for protection in situation of abuse or neglect. The cumulative effect of increasing the value of FCG to R830 was well received by the beneficiaries even though it is still inadequate given the standard of living and number of orphans in the country. However, the drop off of the grant, especially the lapses foster care orders even before

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<sup>138</sup> Court Order was granted on 12 December 2014.

<sup>139</sup> Centre for Child Law “Strategic Impact Litigation for Children’s Rights” Report on Selected Cases 2004-2011 October 2011 p19-20.

the Children's Act came into effect left foster families stranded. Given the perpetual extension of the court orders, now until December 2017 with a reporting provision to the court and the CCL after every six months, there is yet to date, no permanent comprehensive legal solution found by the DSD to resolve FCG problems and challenges posed in this chapter

## CHAPTER FOUR

### ANALYSIS OF CASE LAW RELATING TO THE CHILD SUPPORT GRANT AND THE FOSTER CHILD GRANT

#### 4.1 Introduction

There are a number of landmark court cases which have drastically changed the landscape of the social security jurisprudence in South Africa. Of particular emphasis are the court decisions of *Khosa and Others v Minister of Social Development and Others*; *Mahlaule and Another v Minister of Social Development and Others* 2004 (6) BCLR 569 (CC) as well as *SS v Presiding Officer of the Children's Court, District Krugersdorp and Others* 2012 (6) SA 45 (GSJ) and *MN v Presiding Officer of the Children's Court, District of Krugersdorp and Others* 2013 (4) SA 379 (GSJ).

These cases are discussed in detail in this chapter to inform the discussions made in the three preceding chapters and the conclusions and recommendations made in the concluding chapter.

#### 4.2 Case law analysis

As has been demonstrated in previous chapters, the FCG has become the favoured grant because of the fact that it is greater in value. However, this places stress on the care and protection system, because the foster care model was never intended to have so many children within it. This has led to the questions being raised in the courts about the appropriateness of children being placed in foster care with relatives already caring for them, simply as a means to access the grant that is higher in value.

The first of these cases was *SS v Presiding Officer of the Children's Court*,<sup>140</sup> a matter brought before the children's court concerning a boy, SS, whose mother died and the

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<sup>140</sup> *SS v Presiding Officer of the Children's Court, District Krugersdorp and Others* 2012 (6) SA 45 (GSJ).

whereabouts of his father were unknown. The boy is taken care by his uncle and aunt. Following the death of his mother, which made the child an orphan, his aunt and uncle were advised by the social worker to approach the children's court so that the child could be legally placed in their care and then be able to apply for the FCG rather than the CSG which they were already receiving. According to the social worker's report, the uncle and aunt were found to be suitable foster parents; and that the child was child in need of care and protection in terms of section 150(1)(a) of the Children's Act.<sup>141</sup> The social worker recommended that the child be placed in foster care with his aunt and uncle in terms of section 156 of the Act.<sup>142</sup>

The legal question posed was "are orphaned children who are already in the care of relatives 'without visible means of support' and therefore entitled to a foster care order which would entitle them to the FCG"? The Presiding Officer rejected the social worker's report and relied on section 32 of the Children's Act<sup>143</sup> in finding that there was no need for the uncle and aunt to apply for a foster care order because they were already taking care of the minor child, and thus the minor child was not in need of care as envisaged in the Children's Act.<sup>144</sup>

The Court regarded this case as "a test case" because of the different interpretations of section 150(1)(a) of the Children's Act by other presiding officers.<sup>145</sup> The Court observed that some children's courts are interpreting this section in a way that allows children living with extended families to be placed in foster care while others refuse saying that the child is not without "visible means of support" as required by section

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<sup>141</sup> *Ibid* at para 9.

<sup>142</sup> S156 (1)(e)(i) provides that 'if a children's court finds that child is in need of care and protection the court may make any order which is in the best interest of the child, which may be or include an order if the child has no parent or caregiver but that person is unable or unsuitable to care for the child, that the child be placed in foster care with suitable foster parent.'

<sup>143</sup> S32 of the Children's Act provide for care of the child by person not holding parental responsibilities and rights – (1) A person who has no parental responsibilities and rights in respect of a child but who voluntarily cares for the child either indefinitely, temporarily, including a caregiver who otherwise has no parental responsibilities in respect of a child, must, whilst the child is in that person's care-

(a) Safeguard the child's health, wellbeing and development, and

(b) Protect the child from maltreatment, abuse, neglect, degradation, discrimination.

<sup>144</sup> *SS v Presiding Officer of the Children's Court, District Krugersdorp and Others* 2012 (6) SA 45 (GSJ) para 12-13

<sup>145</sup> *Ibid* at para 12.

150(1)(a). This results in unequal treatment to some of those children who are staying with their extended families and still receive the CSG.

However, the decision made by the Presiding Officer in the Krugersdorp Magistrate Court was taken on appeal to the High Court by the Centre for Child Law (University of Pretoria), acting on behalf of the child. The appeal was based on the proper interpretation of section 150(1)(a) of the Children's Act, an interpretation which must be in keeping with the constitutional rights of children.

The court examined section 156(1)(e) of the Children's Act which provides that, if a court finds that a child is in need of care and protection, the court may make an order that is in the best interests of the child. This may include an order placing the child in foster care if the child has no parent or caregiver or their parent or caregiver is unable or unsuitable to care for the child. The court went on to point out that sections 186(2) and 180(3) of the Children's Act provide, *inter alia*, that a child may be placed in foster care with a family member if the child has been abandoned or the child's biological parents are deceased. The court, as a result, was of the view that to exclude children placed with families relate to them from receiving foster child grants would be contrary to the Children's Act.

In interpreting section 150(1)(a) of the Children's Act, the Court looked at the two enquiries: Firstly, the presiding officer must determine whether the child is in need of "care" and "protection", if the child falls under the definition of "orphaned" or "abandoned". Should the first stage of the inquiry reveal that the child is in need of care and protection, and then the child may become a ward of the state and may be assigned to the care of foster parents. If the child is living with a caregiver that does not have a common law duty of support towards him/her, such child may be placed in foster care with such caregiver.<sup>146</sup> Secondly, the Presiding Officer must then determine whether the minor child is "without any visible means of support". This includes

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<sup>146</sup> SS v Presiding Officer of the Children's Court, District Krugersdorp and Others 2012 (6) SA 45 (GSJ) para 28-29.

considering whether a legal duty of support rests on someone in respect of the child and whether, in addition to the status of being orphaned or abandoned, the child has the means currently, or whether the child has an enforceable claim for support.<sup>147</sup> The word “visible” must be given its ordinary grammatical meaning. The phrase suggests that the child is the focus of the inquiry and not others upon whom he or she is dependant. The questions to be asked are:

- Does the minor child have the means to support him/herself?
- Is the means of support readily evident, obvious, or apparent?

The court must find out if there is any obligation on any person to provide a duty of support to the minor child. However even if there is a relative somewhere who has a legal duty of support, the court could still find that the child “is orphaned or abandoned and without visible means of support” in certain circumstances, to be determined on the facts of each case. If the minor child is not readily able to access any means of support, then section 150(1)(a) of the Children’s Act will apply, in that the child is in need of care and protection, is without visible means of support and is in need of a FCG.<sup>148</sup> And that the word “visible” must be given its ordinary grammatical meaning.

The Court then turned to the question of how to interpret the clause ‘visible means of support. The Court considered the fact that in terms of common law, the biological parents of children, whether married or unmarried, have a duty of support.<sup>149</sup> Adoptive parents are considered the parents of a child once the adoption is concluded, and have a duty of support irrespective of whether the children were conceived by artificial fertilisation or surrogacy arrangements.<sup>150</sup> Both maternal and paternal grandparents,

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<sup>147</sup> *Ibid* at para 30-31

<sup>148</sup> *Ibid* at para 32

<sup>149</sup> *Ibid* at para 33.

<sup>150</sup> S40(1)(a) provides that a child born as a result of artificial fertilisation of one spouse must for all purposes be regarded to be child of those spouses; Section 297 (1) (a) provides that any child of a surrogate mother in accordance with the agreement is for all purposes the child of the commissioning parents from the moment of the birth of the child concerned.

regardless of whether the mother and father were married have a duty of support and this includes siblings unless the child lives in a child headed household.<sup>151</sup>

The court stated that since the child in the present case is an orphan and he is in the care of his uncle and aunt who owe him no parental duties and responsibilities and have no legal duty to support him, therefore, section 32 of the Children's Act cannot be an adequate substitute for foster care.<sup>152</sup> The court pointed out that the Children's Courts should take a flexible approach for the determination of the best interest of the child in each case.<sup>153</sup> The court upheld the appeal and the boy was found to be an orphan without visible means of support and was therefore in need of care and protection. He was placed in foster care with his aunt and uncle in terms of section 186(2) of the Children's Act until he turns 18 years old.

The effect of this judgment is that persons looking after orphaned or abandoned children and have a common law duty of support towards the children do not qualify to receive the foster child. However the courts can still exercise their discretion based on the facts of individual and in certain circumstances place children in foster care with family members having a duty of support such as grandparents or siblings.

Child law experts expressed concern that this judgment will mean that many grandmothers caring for children will no longer be eligible for the foster child grant. Paula Proudlock of the Children's Institute (University of Cape Town), which entered the case as *amicus curiae*, said at the time that "there are approximately 350,000 orphans living with relatives who are receiving the foster child grant, the majority of these relatives are grandparents".<sup>154</sup> The effect of these judgment implied that when the grandparents had to review their foster care orders they will lose their FCG of R770 per month by then. They relied on the lower CSG of R280 per month by then. And that

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<sup>151</sup> Van Schalkwyk N "Maintenance for children" in Boezaart (ed) *Child Law in South Africa* (2009) 44-45.

<sup>152</sup> *SS v Presiding Officer of the Children's Court, District Krugersdorp and Others* 2012 (6) SA 45 (GSJ) para 38.

<sup>153</sup> *Ibid* at para 39.

<sup>154</sup> No more foster child grants for grannies, Centre for Child Law [http://www.up.ac.za/media/shared/Legacy/site\\_files/file/47/304/pressrelease.pdf](http://www.up.ac.za/media/shared/Legacy/site_files/file/47/304/pressrelease.pdf) [ Accessed on 29 January 2015].

would also mean that hundreds of thousands of orphans cared for by grandparents and adult siblings hoped to apply for, or in the process of applying for the FCG, will not be eligible. This will also cause the crisis in the care and protection system when changing the system by removing the majority of children cared for by the relatives out of the foster care system.

The law requires that in order to be found in need of care of protection, and therefore eligible for foster care, a child must be “orphaned or abandoned and without visible means of support”. The word orphan as explained in s1 of the Children Act means “a child who has no surviving parent caring for him or her”. In South Africa, most children who are without parents are looked after by their relatives’ such as their grandmothers or aunts without them going into foster care, but by means of CSG which is lower than the FCG. Are these children not in need of care and protection, do they have visible means of support to cater for their needs as required by section 28(1)(c) of the Constitution?<sup>155</sup>

To conclude that children who are orphaned and already in the care of their grandparents are not in need of care and protection and therefore, are not without visible means of support is premature and may be unfairly discriminating orphans because children without living parents cared for by the grandparents are equally poor and vulnerable as those cared for by uncles and aunts or non-relatives. Better still, the point is and remains that the FCG is a part of the child protection system and not a poverty alleviation grant. It is not the only vehicle that can be used to get more money for relatives carrying for children. The outcome of the case could arguably be reflective of the increasingly problematic and unreasonable deferential approach of the CSG and the FCG.

This judgment also raised a concern to Black Sash, a human rights organisation. The Regional Manager, Thandiwe Zulu, raised concerns of unhappiness that this judgment

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<sup>155</sup> S28(1)(c) provides for the right of every child to basic nutrition, shelter, basic healthcare services, and social services.

fails to acknowledge the real financial burden placed on grandparents and siblings who take responsibility for orphaned children in families which are mostly already desperately poor. While the foster care system, social workers and courts, have been overburdened for a very long time, and are not the appropriate vehicle to support family care of orphans, it is necessary to find an effective mechanism to offer appropriate income support to those who take this essential social role.<sup>156</sup>

Professor Ann Skelton of the Centre for Child Law at the University of Pretoria said that “the issue of a special ‘kinship grant’ which avoids taking all cases through the foster care system has been on the table for some time, and the Minister can avert any possible crisis through creating such a grant”.<sup>157</sup> Paula Proudlock of the Children’s Institute at the University of Cape Town said that “if a new ‘kinship grant’ could be accessed by relatives directly from the South African Social Security Agency (SASSA), instead of via social workers and the magistrate’s courts, it will be in the best interests of all children affected by the crisis in the foster care system. It could mean that orphans will get their grants faster and more efficiently, and abused and neglected children will get better quality protection services from social workers and courts. This will not cost any extra budget. It will just mean shifting these cases from the foster care system into the normal grant application system”.<sup>158</sup>

Lucy Jamieson also of the Children’s Institute, University of Cape Town said that social workers and courts are currently swamped by foster care applications. The complex foster care system was designed for 50,000 children but at the end of April 2012 there were 544,000 children getting the foster child grant and such stats parameter includes hundreds of thousands in various stages of application.<sup>159</sup> The majority of orphans, like the 12 year old boy in the recent High Court case, wait up to four years before they get their grants. Furthermore, abused and protected children are getting inadequate protection services because the social workers and courts have such high burdened

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<sup>156</sup> Centre for Child Law Media Release: Over one million orphans desperately need the Foster Child Grant – can the Department of Social Development deliver! 17 April 2013.

<sup>157</sup> Black Sash, Huge Relief for Children- Pretoria News 23 April 2013.

<sup>158</sup> Black Sash, Huge Relief for Children- Pretoria News 23 April 2013.

<sup>159</sup> Black Sash, Huge Relief for Children- Pretoria News 23 April 2013.

foster care caseloads. These problems could be prevented if a new kinship grant system was created.<sup>160</sup>

*MN v Presiding Officer of the Children's Court, Krugersdorp District*<sup>161</sup> brought some relief to grandparents who take care of their orphaned grandchildren. However, it did not solve foster care system crisis. *MN* concern three orphaned children who were in the care of their grandmother (Ms M). The grandmother was receiving the CSG (R750,00) for all three children and the FCG (R710,00) for one child and disability grant for amount of R1010,00. These added together amounted to R2470,00, which was not enough to cover all their expenses (R2850,00), as she had a shortfall of R380,00.<sup>162</sup>

The issue in this case was whether a caregiver who does owe a legal duty of care may be appointed as a foster care parent; and that FCG be paid to that caregiver. The facts in this case are distinguishable from the ones in the aforementioned case to the extent that the caregiver (uncle and aunt) in the previous case did not owe a legal duty of care to the child, whereas the grandmother (as in this case) did have such a legal duty.

The social worker recommended that the children were in need of care and protection in terms of section 150(1)(a) of the Children's Act, and that they should be placed in foster care with their grandmother. The recommendation was rejected by the Children's Court Presiding Officer who relied on section 32 of the Children's Act<sup>163</sup> based on the fact that there was no need for Ms M to apply for foster care order as she was already taking care of the children. The children were found not to be in need of care and protection.

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<sup>160</sup> Centre for Child Law Media Release: Over one million orphans desperately need the Foster Child Grant- can the Department of Social Development deliver! 17 April 2013.

<sup>161</sup> *MN v Presiding Officer of the Children's Court, District of Krugersdorp and Others* 2013 (4) SA 379 (GSJ).

<sup>162</sup> *Ibid* at para 11.

<sup>163</sup> *Ibid* at para 13; Section 32 of the Children's Act provides that 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 –

- a) safeguard the child's health, well-being and development, and
- b) Protect the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation, and any other physical, emotional or mental harm, or hazards.

As a result, the Presiding Officer of the Children's Court found that there was no need to legalise the placement of the children.<sup>164</sup>

On appeal in the High Court, the above finding was criticised based on the fact that the Presiding Officer should have enquired whether the children are in need of care and whether they have any visible means of support. The appeal centres around the correct interpretation of section 150(1)(a). The Court stated that the Presiding Officer erred by collapsing the two inquiries into one; because the children were in the care of a *de facto* caregiver and there was no need to place them in foster care as they were not in need of care; and the children have visible means of support because they have a caregiver who is able and suitable to care for them. What was required was for Presiding Officer to consider whether the children have visible means of support and not whether the caregiver has visible means of support.<sup>165</sup>

As in *SS* above, the court adopted the two stage inquiry when interpreting section 150 and the court *a quo* agree with this approach and intended to follow in the determination of this matter. The interpretation of s150(1)(a) had already been dealt with by the High Court on appeal in the case of *SS* in which the court held that a child who has been orphaned or abandoned, and who is living with a caregiver, who does not have a common law duty of support towards the child and such child, may be placed in foster care with that caregiver. The court further stated that the application of section 150(1)(a) of the Children's Act involves a factual inquiry that enables the determination that is consistent with the best interest of the child; abides by the spirit of the Children's Act and is consistent with the constitution.

The court has to look at: (1) whether the children are in need of care and protection and (2) whether they have a visible means of support.

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<sup>164</sup> *MN v Presiding Officer of the Children's Court, District of Krugersdorp and Others* 2013 (4) SA 379 (GSJ) para13.

<sup>165</sup> *Ibid* at para 13.

Insofar as the first stage of the inquiry is concerned, the High Court (HC) held that:

“In determining this issue, the court must have regard to the social worker’s report, which must necessarily include the current living arrangements of the child, the identity of the present and prospective caregivers, and the status of their relationship to the children, as well as the child’s emotional, physical and psychological wellbeing which must be applied in the way that is consistent with the best interest of the child, abides by the spirit of the Children’s Act and is consistent with the constitution.”<sup>166</sup>

The High Court further held that “should the first stage of the inquiry reveal that the child is in need of care and protection, as s/he has been abandoned or orphaned, then the child may become a ward of the state and may be assigned to the care of foster parents”.<sup>167</sup> Counsel for the respondents submitted that:

“The above finding should not be limited only to those children who are living with caregivers who do not have a common law duty towards the children. It should also extend to those children who are living with caregivers who owe children a duty of support.”<sup>168</sup>

The Counsel for the respondents further submitted that “the effect of the judgment in SS matter would exclude Ms M from becoming the foster parent of the children in this case. And such conclusion would exclude children in the care of their grandparents who are found to be abandoned or orphaned from accessing government source of support. To do so would be to distinguish and create various categories of children, for

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<sup>166</sup> *MN v Presiding Officer of the Children’s Court, District of Krugersdorp and Others* 2013 (4) SA 379 (GSJ) para 22.

<sup>167</sup> *Ibid.*

<sup>168</sup> *Ibid* at para 24.

example, children who have grandparents will be treated differently from those who do not.”<sup>169</sup>

Insofar as the second stage of the inquiry is concerned the High Court further held that:

“In determining whether or not the minor children are “without visible means of support”. The Presiding Officer was to enquire whether or not the children have the means to support themselves. If not, the court must enquire whether children have an enforceable claim for support. The inquiry should focus on whether or not the children had necessary financial resources; for example, whether the children have received an inheritance or an insurance policy.”<sup>170</sup>

If it appears that the children do not have the financial means to support themselves, are they in a position to enforce their claim against those who owe them a legal duty of support?<sup>171</sup> The Counsel for the respondents submitted that “if the persons against whom this legal duty of support is enforceable are not in a financial position to support the children, then the caregivers should be able to apply for the FCG. The fact that a duty of support existed, does not necessarily meant that the caregiver had the financial means to support the children.”<sup>172</sup> As in this case, according to the social worker’s report, the appellant (Ms M) received R2 470,00 per month. Her expenses amounted to R2 850,00 and thus show a clear deficit of R380,00. That has showed that the appellant had no sufficient means to support the children.<sup>173</sup> Moreover, section 156 specifically provides for caregivers to become foster care parents whether or not they owe the children a duty of support.

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<sup>169</sup> *MN v Presiding Officer of the Children’s Court, District of Krugersdorp and Others* 2013 (4) SA 379 (GSJ) para 24

<sup>170</sup> *Ibid* at para 30.

<sup>171</sup> *Ibid* at para 32.

<sup>172</sup> *Ibid*

<sup>173</sup> *Ibid* at para 32.

The court concluded that the appellant (Ms M) did not have the financial means to support the children. Therefore she should be able to apply for the FCG. The appeal was upheld and the minor children were found to be in need of care and protection and were to be placed in foster care in terms section 186(2) of the Children's Act with their grandmother Ms M and a FCG in relation to the three minor children was to be paid to the foster care parent.

Michael Motaung stated that “the ruling had clarified the meaning of section 150(1)(a) of the Children's Act 38 of 2005 and makes it clear that a caregiver who bears a common law legal duty of support (like a grandparent) may still be appointed as a foster parent and thus entitled to receive the FCG.”<sup>174</sup> While the judgment appears to be a victory for thousands of South African grandparents and orphans and children deprived of their rights, the foster care model will eventually collapse as it originally intended to absorb a limited capacity of 50,000, but now is already overstretched. It is very clear that complete overhaul of a comprehensive legal solution is eminent to resolve the crisis of the foster care system.

To this end, there is now sufficient ground to argue that the social worker and court-based foster care system is not coping with the demand for foster care orders. As a result, large numbers of FCGs have lapsed, leaving vulnerable children without assistance, while social workers are unable to provide quality services to abused children due to high foster care caseloads, and caregivers and children are to wait an unreasonably long time for their grants. The delay for most foster care applications is clearly lying at the door of the DSD because the system struggles to keep up with demand. The foster care system was designed to accommodate 50,000 children yet it has more than 500,000.<sup>175</sup> Since the M Judgement, the FCG figures seems to have gone down because in March 2014, 512,000 FCGs were paid each month to the

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<sup>174</sup> Centre for Child Law Media Release: Over one million orphans desperately need the foster child grant-can the Department of Social Development deliver! 10 April 2013.

<sup>175</sup> Hall K (2013) “Income, Poverty, Unemployment and Social Grants”: South African Children Gauge Children's Institute, UCT.

caregivers of children in foster care, down from 532,000 in March 2013.<sup>176</sup> Moreover, since 2011 there seems to be a decline in the number of new FCGs and again there has been substantial increase in the number of grants that terminate at the end of each year when the children turned 18 years of age.<sup>177</sup> However, according to Child Gauge 2014, the reasons behind the further lapsing of the FCG between 2013 and 2014 remains to be investigated.<sup>178</sup> Also, there is no guarantee of the constant decrease because the number of grants that terminate due to children turning 18 years of age, there is likelihood that others entering the system to counterbalance the decrease due to socio-economic conditions.

By looking at the two aforementioned cases, “M” and “SS” on FCG, “M” case seems to provide more equitable solution to grandparents and the adult siblings than SS case. Grandparents were found in terms of common law to have a legal duty of support towards their grandchildren and therefore not entitled to FCG.<sup>179</sup> However, inasmuch as it has provided solution or victory to grandparents, unfortunately, the M judgment does not solve the systemic problems that still exist and may in all likelihood add to the pressure on the foster care system as it opens the doors for more people to be placed on an already stretched system.<sup>180</sup> As such, that would cause the FCG to fail at achieving the purpose it was intended for because it will be used wrongly as the poverty alleviation scheme for orphans in care of relatives, not as primary objective of care and protection system. Moreover, the number of foster care applications in South Africa already far exceeds social workers’ capacity to process them.

If one considers the number of orphans that the country face or will face, it is clear that social welfare, court capacity and resources are utterly inadequate to support the application of foster care. Furthermore, it will also have a knock-on effect and an impact

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<sup>176</sup> South African Child Gauge 2014; South African Social Security Agency (2014) SCOPEN database-special request. Pretoria: SASSA.

<sup>177</sup> *Ibid.*

<sup>178</sup> *Ibid.*

<sup>179</sup> *SS v Presiding Officer of the Children’s Court, District Krugersdorp and Others* 2012 (6) SA 45 (GSJ).

<sup>180</sup> Centre Child Law Media Release: Over one million orphans desperately need Foster Child Grant – can the Department of Social Development deliver!, 17 April 2013, The submission by the Children’s Institute (UCT) on the draft Children’s Amendment Bill, 2013 (as published for comment in the Government Gazette on 15 November 2013, Notice 1106 of 2013) by Proudlock P and Tilley A, 13 December 2013.

on the number of abused, neglected and exploited children who are receiving poor social work services because social workers are overwhelmed by high foster care caseloads.

The Minister of the DSD, Batahile Dlamini is already confirming this frustration in her media statement, 20 October 2014:<sup>181</sup>

“There are human resource shortages – in the form of social workers and social work supervisors – which make it difficult to implement the Children’s Act; high staff turnover for both NGOs and the Department of Social Development, putting an extra case load strain on those left behind; inadequate supervision of social workers, *often leading to short-cuts in their work – we have seen this many times in social workers opting to process a Child Support Grant instead of the applicable foster child grant*; inadequate supervision of foster placements by social service professionals; foster parents not submitting extension orders to SASSA, resulting in the discontinuation of grants; and a lack of a proper management information system to properly coordinate the foster care system and make accurate data available for decision making.”

To give effect to the court ordered settlement, the Department is obliged to implement a comprehensive legal solution to the foster care crisis by 31 December 2014.<sup>182</sup> Since then, the department has initiated research and reform processes to devise a solution, but to date nothing was brought to the table. It has a duty to provide solution that is in the best interest of all children affected by the crisis in the foster care. In an effort to solve foster care crisis, the Directorate in the Department of Social Development commissioned Community Agency for Social Enquiry (CASE) together with Children’s Institute to investigate the challenges in the foster care system and made recommendations for reform to improve children’s access to social grants. Their finding

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<sup>181</sup>[http://www.dsd.gov.za/index.php?option=com\\_content&task=view&id=637&Itemid=106](http://www.dsd.gov.za/index.php?option=com_content&task=view&id=637&Itemid=106) [Accessed on 31 October 2014].

<sup>182</sup> Centre for child law v Minister of Social Development and Others, North Gauteng High Court, case no 21726/11.

was that “it is clear that the child protection system and the FCG was not the appropriate solution for the large numbers of orphans in need of timeous and adequate social assistance.”<sup>183</sup> As such, it was recommended that ‘a “kinship grant” should be created for the family members carrying for the country’s 1,1million maternal and double orphans and that should be administered by SASSA. Furthermore, they also provided a set of draft amendments to the Social Assistance Act regulations to the Department that showed how this solution could be implemented using the existing successful mechanism of the CSG to pay a larger CSG to orphans in the care of family members (the Department calls this proposal the “Extended Child Support Grant”).

The Department announced its intention in September 2012 to introduce reform aimed at introducing a grant (kinship grant) that relatives could access directly via application to SASSA.<sup>184</sup> This grant will be in the form of an Extended Child Support Grant<sup>185</sup> If this grant is implemented, it will presumably improve access to adequate social assistance for more than 1,1 million orphans living with relatives, and will free up social worker and court time to enable better services for children who have been abused and neglected and it will also help in solving foster care crisis and backlogs. The “Extended Child Support Grant” will give relatives caring for orphans a larger CSG than the standard CSG amount (330 from April 2014).<sup>186</sup> This is because the difference in amount between the FCG and the CSG understandably ends up causing confusion and poor extended families caring for children to migrate from CSG R330,00 to FCG R860,00 and therefore seek regularisation of their child care arrangements through the foster care system as they were excluded from foster care and the accompanying grant. “This

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<sup>183</sup> The submission by the Children’s Institute (UCT) on the draft Children’s Amendment Bill, 2013 (as published for comment in the Government Gazette on 15 November 2013, Notice 1106 of 2013) by Proudlock P and Tilley A, 13 December 2013 p3.

<sup>184</sup> Jehoma S (2012) “Policy options for social security for children” Presentation by the Deputy Director General of the Department of Social Development, Strategies to Overcome Poverty and Inequality: Towards *Carnegie3 conference*, UCT, 6 September 2012; Lucy Jameison, Paula Proudlock and Tendai Nhenga-Chakarisa (Children’s Institute, CT: South African Child Gauge 2012, Legislative Developments in 2011/2012.

<sup>185</sup>, The submission by the Children’s Institute (UCT) on the draft Children’s Amendment Bill, 2013 (as published for comment in the Government Gazette on 15 November 2013, Notice 1106 of 2013) by Proudlock P and Tilley A, 13 December 2013.

<sup>186</sup> The submission by the Children’s Institute (UCT) on the draft Children’s Amendment Bill, 2013 (as published for comment in the Government Gazette on 15 November 2013, Notice 1106 of 2013) by Proudlock P and Tilley A, 13 December 2013.

solution would not only ensure that the majority of orphans living in poverty with family members are able to access an adequate social grant quickly but it would also free up social workers and courts to provide better protection and care services to abused, neglected and exploited children. This solution is therefore in the best interests of both groups of vulnerable children and would promote the progressive realisation of their rights”<sup>187</sup> but it remains to be seen to pass the reasonableness tested.

Furthermore, In trying to respond to various court cases relating to the interpretation of section 150(1)(a), the Department of Social Development has published two draft Bills for public comment in November 2013: the Children’s Amendment Bill<sup>188</sup> and the Children’s Second Amendment Bill<sup>189</sup> The draft Bill removes the words “is without any visible means of support” used in “SS” and “M” judgments and substitutes it with “does not have the ability to support himself or herself and such inability is readily evident, obvious or apparent”.<sup>190</sup> However, Children’s Institute (UCT) is not in support of the amendment to section 150(1)(a) in the second amendment bill but rather in the proposed third amendment bill and submitted that:

“That the proposed amendment to section 150(1)(a) is not in the best interests of the two categories of vulnerable children that will be affected by this amendment. These include approximately 1,5 million orphaned children in need of timeous and adequate social grants and hundreds of thousands of abused, neglected, and exploited children in desperate need of protection and care services. Furthermore, s150 (1)(a) is not a comprehensive legal solution. In contrast it is likely to have the effect of creating greater inequality and suffering for children in South Africa. And that also it will not pass the reasonableness test as set out by the

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<sup>187</sup> The submission by the Children’s Institute (UCT) on the draft Children’s Amendment Bill, 2013 (as published for comment in the Government Gazette on 15 November 2013, Notice 1106 of 2013) by Proudlock P and Tilley A, 13 December 2013 pg3

<sup>188</sup> Children’s Amendment Bill, 2013. *Government Gazette* 37014, Notice 1106, 15 November 2013.

<sup>189</sup> Children’s Second Amendment Bill, 2013. *Government Gazette* 37014, Notice 1106, 15 November 2013.

<sup>190</sup> The submission by the Children’s Institute (UCT) on the draft Children’s Amendment Bill, 2013 (as published for comment in the Government Gazette on 15 November 2013, Notice 1106 of 2013) by Proudlock P and Tilley A, 13 December 2013.pg7.

Constitutional Court in the *Grootboom* and *Treatment Action Campaign* cases.”<sup>191</sup>

Therefore, according to Children Institute the purpose of section 150(1)(a) “is to allow the court to consider the circumstance of the child and make a care order. It was never intended to act as the eligibility criteria for accessing the FCG.”<sup>192</sup>

Again, in trying to come up with the comprehensive legal solution that will benefit all children and also relieve pressure on the care and protection system and help solve foster care crises, the department commissioned service providers to draft the third amendment bill which was presented and discussed for the first time at the Department’s Child Care and Protection Forum on 20 November 2013.<sup>193</sup>

The draft bill includes an amendment to s150 and “aims to divert orphan children who are living safely with their family members away from the child protection system to SASSA to apply for the Extended CSG. It builds in a number of safeguards to ensure that the few orphans who may not be safe with their families are provided with care and protection services by social workers. It also aims to promote these families gaining access to social services that can be provided by a range of social service practitioners including child and youth care workers and community development practitioners.”<sup>194</sup> This proposal is similar to the proposal made by the SA Law Reform Commission (SALRC) when it researched and drafted the Children’s Bill in 2002. The SALRC proposed the model limiting foster care to placement with unrelated caregivers and then divide kinship care into court ordered kinship which was required only for children who were in fact abused or neglected and in need of care and protection, with social work oversight. An informal kinship was for the grant payable through social assistance

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<sup>191</sup> Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC); Minister of Health and Others v Treatment Action Campaign and Others 2002 (5) SA 703 (CC).

<sup>192</sup> The submission by the Children’s Institute (UCT) on the draft Children’s Amendment Bill 2013 (as published for comment in the Government Gazette on 15 November 2013, Notice 1106 of 2013) p9.

<sup>193</sup> *Ibid* p9.

<sup>194</sup> *Ibid* p11.

system without social work oversight.<sup>195</sup> This solution was also echoed by Professor Ann Skelton in her article.<sup>196</sup> If this draft is adopted and implemented it could be the most sustainable solution for foster care crisis because the court orders and the current extensions as well as the social work oversight will be no longer required. The Kinship Grant system would take pressure off existing foster care system. So it could better serve abused, neglected and abandoned children.

### 4.3 Conclusion

This chapter examined *SS v Presiding Officer of the Children's Court, District Krugersdorp and Others* 2012 (6) SA 45 (GSJ) as well as *MN v Presiding Officer of the Children's Court, District of Krugersdorp and Others* 2013 (4) SA 379 (GSJ) at length. These two court judgments, when read together, drastically changed the landscape of social security in South Africa. The *M* case for example, provided a more equitable ruling than *SS* case. But can the system manage to take more children into the foster care system? Does it solve the system problems that still exist or does it add to the pressure on the foster care system as it opens door to more people to be placed on the already stretched system? Are there any other alternative solutions that can be implemented to get sufficient funds to grandparents caring for orphans? These questions are addressed in the concluding chapter which has drawn some inferences informed by the historical context and analyses of cases related to the CSG and the FCG.

It is clear that the FCG is already overstretched and pressurised. There is insufficient social worker capacity to cope with increasing caseloads to be processed, and that drags the system into unnecessary short cuts by overwhelmed social workers and delays which frustrate the beneficiaries of both the CSG and the FCG stamping on the rights of the vulnerable children. Overall, having no permanent comprehensive legal solution in December 2014 informed by an urgent request to extend the order again

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<sup>195</sup> SALRC Discussion Paper on the Review of the Child Care Act, Project 110 (2001) 17.2

<sup>196</sup> Skelton A (2001) "Kinship care and cash grants: in search of sustainable solutions for children living with members of their families in South Africa" *The International Survey of Family Law* 333.

until December 2017, it is evident that the department has at this stage nothing on the table to offer permanent legal solution in the best interest of the affected children at risk and this is a cause for concern including the court which perpetually gives the DSD repeated extensions.

## **CHAPTER FIVE**

### **CONCLUSIONS AND RECOMMENDATIONS**

The introductory chapter foregrounded issues of social security with particular emphasis on the CSG and the FCG. It became apparent from the chapter that these two grants have opened debates in court and in academic circles. The study posed research questions which were answered in part in Chapters two and three, and in full in Chapter four of this study. The research question: “Have the courts provided sustainable answers as to whether foster care is a suitable means to deliver social assistance to children living in the care of extended family members, and if not, what other alternative solutions may be proposed?” has been answered in the negative and also that the DSD has failed to launch the comprehensive solution in December 2014 according to the court order.

The underlying assumptions of the study were also tested in chapters one through four and found that foster care is part of the care and protection system, although a social grant attaches to it, and that the CSG is not part of the care and protection system, but is a form of social security which may be accessed without going through the care and protection system. People caring for children who are not their own should be provided with the maximum amount of social assistance that is affordable and further that the dissertation was only limited to case analysis and not detailed assessment on the financial ramifications.

In chapter two, the historical origin and evolution of CSG from SMG has proved to be a very important social security vehicle to progressively realize socio-economic rights of the vulnerable children. This chapter traced critical issues of importance more especially, issues of differential means test, children in formal and urban areas as opposed to children in rural and informal settlement. The positive development in extending the grant to benefit children up to the age under 18 years is well received similarly with the increase in value of the CSG to R330, 00 although it is still inadequate

given the increasing poverty gap and HIV/Aids pandemic which continues to increase the number of orphans in the country.

The historical origin and evolution of the FCG was discussed in chapter three and emphasised that the cumulative effect of increasing the value of the FCG to R860, 00 was well received by the beneficiaries even though it is still inadequate given the standard of living and number of orphans in the country. However, the drop off of the grant which left foster families stranded is a cause for concern. Also, the FCG is linked to the foster care system, which relates to care and protection, but it has been subverted from its purpose. It is crucial that it should revert to its original intention of care and protection. The FCG having been exposed to court order lapses took long time to resolve, but even then, only a temporary solution was found. Following the arguments in the corpus of this research, it was clear that the DSD was not going to meet the court ultimatum of finding permanent comprehensive legal solution in December 2014, hence urgent request for further extension to December 2017 which was granted by the court. This is implausible and it is hard to accept the extension, but this remains to be seen in December 2017 when the court order expires yet again.

With further extensions, after waiting in abeyance for a permanent comprehensive legal solution in December 2014, it seems the department is failing to come up with the solution as nothing can be done about it except to still wait and see until expiry of the court order in December 2017. This in itself poses serious implications on the court decisions and puts the beneficiaries of the FCG on a fix as there are already over 500,000 children at risk in the foster care system and one wonders what possible remedial actions needed to be made by the courts to force the implementing departments to honour court orders without being accused of interfering in the affairs of the executive due to the doctrine of separation of powers.

The position of the Centre for Child Law by demanding the supervisory order to be built into the court order to force the department to report progress after every six months is an action that is welcomed to constantly keep the department on check. Also, with these

numerous extensions by the court, regrettably, one conclude by insisting that actually, the court has failed dismally to sympathise with the beneficiaries of the grant as the extensions in favour of the department are unnecessarily prolonging and dragging and thus consistently expose the children to risks and vulnerabilities and those who have the obligation to take care of them. In summation, it appears that the court decision is a trade-off or *quid pro quo* between the court and the department at the expense of the poor children suffering loss in the meantime of finding a comprehensive solution, the delay which is now a cause for concern.

To this end, one can infer that given analysis of case law relating to the CSG and the FCG and further extensions until December 2017, one remains in doubt as to whether the department will ever come with the comprehensive solution sooner than later.

Chapter four presents the crux of this research, raising underlying critical issues through case law analyses. The chapter examined *SS v Presiding Officer of the Children's Court, District Krugersdorp and Others 2012 (6) SA 45 (GSJ)* and *MN v Presiding Officer of the Children's Court, District of Krugersdorp and Others 2013 (4) SA 379 (GSJ)*. When read together, the landmark cases drastically changed the landscape of social security jurisprudence in South Africa. The MN and SS case were also interrogated and arrived at the conclusion that the foster care system is pressurised as it opens door to more people to be placed on the already stretched system.

There is insufficient social worker capacity to cope with increasing caseloads to be processed and that drags the system into unnecessary delays which frustrate the beneficiaries of both the CSG and the FCG which continues to place the rights of vulnerable children at risk. To date, there is no comprehensive non-court and non-social worker solution launched by the DSD despite court order which was not honoured, hence, yet, another extension until December 2017.

Consequently, there are currently human resource shortages – in the form of social workers and social work supervisors – which make it difficult to implement the Children's Act; high staff turnover for both NGOs and the Department of Social

Development, putting an extra caseload strain on those left behind; inadequate supervision of social workers, often leading to short-cuts in their work hence social workers were seen opting to process a CSG to avoid going through circuitous applicable FCG procedures.

Overall, it became apparent from the study that the courts did not provide sustainable answers as to whether foster care is a suitable means to deliver social assistance to children living in the care of extended family members hence the recommendations hereunder to propose alternative solutions to the already over-stretched system. The study considered conceptual and contextual issues of CSG aims to alleviate poverty. However, even if it has reached acceptable number of beneficiaries, it is not adequate in amount hence it is failing to achieve its intended purpose. It is evident from the cases presented in chapter four that the co-existence of these two mechanisms created for accessing social grants brought about disparity of pay, which needed to be resolved.

Based on critical issues raised in the preceding chapters and the conclusion drawn, the following propositions are made:

- a) Due to obvious disparity in monetary value of the CSG and the FCG, there is urgent need to increase the CSG to that of the equal value of the FCG to ensure that there is zero or insignificant marginal difference in value of the grants to prevent the migration from the CSG to the FCG;
- b) As the FCG is already overstretched and pressurised due to the migration from the CSG and caseloads which the available social workers cannot cope with, a permanent comprehensive solution to be determined by the DSD should be non-court and non-social worker reliance to access the grants without going through the courts and already overburdened social workers to make the system more efficient and effective.

## BIBLIOGRAPHY

### Books

Boezaart T *Child Law in South Africa* Cape Town: Juta (2009)

Currie I and de Waal J eds *The Bill of Rights Handbook* Cape Town: Juta (2005)

Davel CJ and Skelton AM *Commentary on the Children's Act* Cape Town: Juta (2007)

Flick E Van Kardorff E & Steinke I eds *Companion to Qualitative Research* London: SAGE (2004)

Govindjee A and Vrancken B eds *Introduction to Human Rights Law* Durban: LexisNexis Butterworths (2009)

Miller D *Handbook of research design and social measurement*, New York: Longman (1983)

Olivier MP Smit N Kalula ER & Mhone GCZ *Introduction to Social Security* Durban: LexisNexis Butterworths (2004)

Lund F *Changing Social Policy The Child Support Grant in South Africa* HSRC press (2008)

Liebenberg S *Adjudicating Socio-economic Right under a Transformative Constitution* Cape Town: Juta (2010)

Proudlock P *South Africa's Progress in Realising Children's Rights: A Law Review*. Cape Town: Children's Institute, University of Cape Town & Save the Children South Africa (2014)

## Journal articles

Skelton A (2011) “Kinship care and cash grants: In search for sustainable solutions for children living with members of their extended families in South Africa” *The International Survey of Family Law* 333

Skelton A (2010) 26 “Girl Socio-economic rights in South Africa” *SAJHR* 141

Hall K and Proudlock P (2011) 29 “Orphaning and Foster Child Grant: a Return to the ‘care or cash’ debate” *Child and Youth Care Worker* 23

Mirugi-Mukundi G (2010) 11 “Reaffirming the Social Security rights of children in South Africa with particular reference to the Child Support Grant” *ESR Review: Economic and Social Rights in South Africa* 7-9

Nkosi G (2011) “An analysis of the South African social assistance system as it applies to children in rural communities: A perspective from *Grootboom case*” *SAPL* 26

## Conference papers

Black Sash Alert: The foster care Crises in South Africa, Fact Sheet July 2012

Centre Child Law Media Release “Over one million orphans desperately need Foster Child Grant – can the Department of Social Development deliver!” 17 April 2013

Guthrie T (2002) “Assessing the Impact of the Child Support Grant on the Well-Being of Children in South Africa: A Summary of available evidence” Children’s Institute, UCT

Hall K (2013) “Income, Poverty, Unemployment and Social Grants” South African Children Gauge Children’s Institute, UCT

Jameison, Paula Proudlock and Tendai Nhenga-Chakarisa (Children's Institute, CT: South African Child Gauge 2012, Legislative Developments in 2011/2012

Jehoma S (2012) "Policy options for social security for children". Presentation by the Deputy Director General of the Department of Social Development, Strategies to Overcome Poverty and Inequality: *Towards Carnegie3* conference, UCT, 6 September 2012

Kaseke E (2000) "The challenges of extending social security to the poor: an African perspective" Unpublished paper. International Council on Social Welfare Biennial Conference, Cape Town, South Africa. 23-27 October

SALRC Discussion Paper on the Review of the Child Care Act, Project 110 (2001).

Skelton A "Whose baby is it? Debating the nature and extent of the State's responsibility to provide social assistance to children living in poverty" 2010/2011.

Skelton A (2012) "The Story of 110 000 Foster Child Grants that Stopped being Paid in 2010/2011". Paper presented at *Towards Carnegie3: Strategies to Overcome Poverty & Inequality* conference, 3-7 September 2012, UCT

The submission by the Children's Institute (UCT) on the draft Children's Amendment Bill 2013 (as published for comment in the Government Gazette on 15 November 2013, Notice 1106 of 2013)

United Nations Children's Fund (UNICEF) and Department of Social Development South Africa (2008) "Review of the Child Support Grant: Uses, implementation and obstacles"

## **South African case law**

*Centre for Child Law v Minister of Social Development and Others*, North Gauteng High Court case no 21726/11

*Government of the Republic of South Africa and others v Grootboom and others* 2000 (11) BCLR 1169, 2001(1) SA 46 (CC).

*Grootboom v Oostenburg Municipality and Others* 2000 (3) BCLR 277 (C)

*Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of social Development and Others* 2001 (1) SA 46 (CC), 2004 (6) SA 504 (CC)

*Treatment Action Campaign v Minister of Health* 2002 (4) BCLR 356 (T)

*Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 703 (CC)

*MN v Presiding Officer of the Children's Court, District of Krugersdorp and Others* 2013 (4) SA 379 (GSJ)

*SS v Presiding Officer of the Children's Court, District Krugersdorp and Others* 2012 (6) SA 45 (GSJ)

*Alliance for Children's Entitlement to Social Security v Minister of Social Development* case no 5251/2005 Transvaal Provincial Division of the High Court (unreported)

## **South African legislation**

Child Care Act 74 of 1983

Children's Act 38 of 2005

Social Assistance Act 13 of 2004

South African Security Agency Act 9 of 2004

The Constitution of the Republic of South Africa Act, 1996

### **International instruments**

African Charter on the Rights and Welfare of the Child

International Covenant, on Economic, Social and Cultural Rights

United Nations Charter on the Rights of the Child

Universal Declaration of Human Rights

### **Other**

Haarman D (1998) "From state maintenance grant to a new child support system: Building a policy for poverty alleviation with special reference to the financial, social, and developmental impacts" Unpublished Thesis, University of Western Cape