

CHAPTER FOUR

The case of South Africa

4. The case of South Africa

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4.1 Introduction

South Africa is one of the countries most severely affected by the HIV epidemic in Africa. Since the first AIDS case was diagnosed in 1982, the HIV prevalence has increased rapidly during the 1990s, from less than one per cent in 1990 to 22.8 per cent in 1998.¹ Although the HIV prevalence has decreased over the years,² this rapid increase of the HIV prevalence in South Africa is characteristic of the HIV epidemic in many Southern African states. Zwi and Cabral, as early as 1991, proposed the term ‘high-risk situation’ to describe a social and individual situation which puts individuals at risk of HIV transmission.³ According to Zwi and Cabral, a high-risk situation can be characterised as one where there is ‘diminished concern about health, increased risk-taking, reduced social concern about casual sexual relationships’.⁴ Citing Wilson, Zwi and Cabral listed specific situations that may be categorised as high-risk situations, such as ‘impoverishment, rapid urbanisation, anonymity of city life, migrant labour, poor wages and dependency of women’.⁵ Considering the high level of unemployment and poverty, and rapid social change in South Africa, the HIV and AIDS pandemic, as Marks points out, might have been ‘a pandemic waiting to happen’.⁶

Fortunately, the prevalence has decreased a little and the most recent UNAIDS data puts the HIV prevalence at 16.2 per cent among the general population aged between 15 and 49.⁷ The national HIV prevalence trend among antenatal attendees is naturally much higher. The HIV prevalence from the antenatal clinics shows that it reached 30.2 per cent in 2005, decreased slightly to 29.1 per cent in 2006 and in 2009, the figure climbed a little to 29.3 per cent.⁸ Despite the slight decrease in the prevalence,

¹ S Marks, ‘Epidemic waiting to happen? The spread of HIV/AIDS in South Africa in Social and Historical Perspective’ (2002) 61/1 *African Studies* 16.

² The current HIV prevalence rate is discussed in the following paragraph.

³ Zwi & Cabral, ‘Identifying high-risk situations to prevent AIDS’ (1991) 303 *British Medical Journal* 1527.

⁴ Zwi & Cabral, 1991 (as above) 1527.

⁵ As above 1527.

⁶ S Marks, 2002 (n 1 above) 17.

⁷ UNAIDS AIDS Epidemic Update 2009, 19.

⁸ *Country Report under the United National General Assembly Special Session (UNGASS) Commitment*, South Africa (2010) 10.

it is estimated that 5.7 million people were living with HIV in 2008, which makes it the largest epidemic in the world.⁹ Considering the factors, such as the primary mode of HIV transmission in Africa, including South Africa, the scale of the epidemic and the number of the total population, it is not surprising that South Africa is also a country that has the largest number of children who are orphaned by AIDS.¹⁰ The Mid-year Population Estimates 2009 by Statistics South Africa estimated that 1.9 million children in South Africa have been orphaned by AIDS-related illnesses.¹¹ As explored in chapter two, the diminishing capacity and the changing role of extended family network caused an increasing number of children being incorporated into households headed by a grandparent or a sibling in South Africa.¹² Also alarmingly, through the loss of an elderly caregiver to age-related illnesses or a surviving parent, often, to AIDS-related illnesses, many children in such households eventually are left to form child-headed households.¹³

The present chapter focuses on the situation of child-headed households in South Africa and the issue of legally recognising child-headed households. The chapter is divided into five sections. Following the introduction, section 4.2 briefly describes the impact of HIV on children in South Africa. Section 4.3 provides an overview of the status of children's rights in South Africa. Section 4.4 analyses section 137 of the Children's Act as amended by the Children's Amendment Act,¹⁴ which legally recognises child-headed households. Although the focus of the section is on the way South Africa has legally recognised child-headed household, provisions of the

⁹ UNAIDS, 2009 (n 7 above) 27.

¹⁰ Information available at: <http://www.mg.co.za/article/2007-01-18-south-africa-has-most-aids-orphans> [accessed: 18 August 2009].

¹¹ *Mid-year Population Estimates 2009*, Statistics South Africa, Pretoria, South Africa (2009) 8. The report also indicates that nearly half of all deaths occurred in 2009 was due to AIDS-related illnesses.

¹² See B A Anderson & H E Phillips, *Trends in percentage of children who are orphaned in South Africa 1995-2005*, Pretoria, Statistics South Africa (2006) 2 & 16. The report from the South African Statistics Office shows that overwhelming majority of children age between 0 and 4 and whose mother has passed away are being taken care of by their grandparents or great-grandparents.

¹³ L Richter *et al.*, *Family and community interventions for children affected by AIDS*, Human Science Research Council (2004) 16; P Armstrong *et al.*, *Poverty in South Africa: a profile based on recent household surveys*, Stellenbosch Economic Working paper 04/08, 15. The study shows a high poverty level among households headed by over 55 years.

¹⁴ Children's Act No 38 of 2005 as amended by the Children's Amendment Act No 41 of 2007.

Children's Act that provide for different types of alternative care to children deprived of their family environment are also examined. Section 4.4.2 assesses the measures of protection provided to children in child-headed households from a rights-based approach. The section contains information obtained from informal interviews with children in youth-headed households, a director of children's shelter and social workers in Temba, Hammanskraal.¹⁵ Section 4.5 provides a conclusion to the chapter by addressing the challenges of legally recognising child-headed households without violating their rights as children.

4.2 Status of South African children in the HIV epidemic

It is estimated that the overall HIV prevalence among children is 2.1 per cent.¹⁶ An alarming factor is the high HIV prevalence among older girls. The HIV prevalence among girls aged between 15 and 19 is estimated at 9.4 per cent.¹⁷ The prevalence among young pregnant girls is much higher. The 2008 South Africa Country Report under the United National General Assembly Special Session indicates that 12.9 per cent of young pregnant girls aged between 15 and 19 are living with HIV.¹⁸ The data indicates that children are not only indirectly affected by the HIV epidemic, but they form a considerable proportion of people living with HIV.

¹⁵ The informal interviews were conducted with Ms Olivia Ratema & Ms Susan Molokomme from Moretele Sunrise Hospice, Ms Catherine Sepato, a director of Tswaraganang orphanage (OVC Programme) in Temba, Hammanskraal and children from four youth-headed households in Temba, Hammanskraal. The interview with social workers was conducted in English and the interviews with children were conducted in Sesotho through interpretation by Ms Sepato (25 June 2009). For more information on the interviews, see Sec 1.6 methodology.

¹⁶ Information available at: <http://www.childrencount.ci.org.za/content.asp?TopLinkID=12&PageID=50> [accessed: 9 February 2009]. However, a much higher prevalence among the children in age groups 2 to 4 and 5 to 9 has been observed. The prevalence among children aged between 2 and 4 is estimated at 4.9 % for boys and 5.3 % for girls. In the 5 to 9 age group, the prevalence is estimated at 4.2 % for boys and 4.8 % for girls. In these age groups, the mother-to-child transmission at birth or during lactation is the most common cause of the HIV prevalence. Nevertheless, 1.5 % of the annual increase among children aged between 5 and 9 indicates that other factors, such as sexual abuse against children, may contribute to the HIV transmission among young children. See O Shisana & S Mehtar, *HIV risk exposal among young children: a study of 2-9 years olds served by public health facilities in the Free State*, Human Science Research Council (2005) 76; R Jewkes, 'Child sexual abuse and HIV infection' in L Richter *et al.*, (eds) *Sexual abuse of young children in Southern-Africa*, Human Science Research Council (2004) 130-142.

¹⁷ Information available at: <http://www.avert.org/safricastats.htm> [accessed: 9 February 2009].

¹⁸ *The National HIV and Syphilis Prevalence Survey 2007*, South African National Department of Health (2008) 19.

The 2007 General Household Survey shows that a growing number of children are orphaned by AIDS in South Africa.¹⁹ The definition of ‘orphan’ in the Survey includes children who have lost at least one parent to all causes.²⁰ The Survey indicated that there were an estimated 3.7 million children who are orphaned in South Africa.²¹ That is 18 per cent of all children in South Africa. Among the 3.7 million orphaned children, the number of children who are orphaned by AIDS is estimated at 1.91 million.²² The number of children who have lost both their parents is still relatively small. However, as pointed out in chapter one, the main mode of HIV transmission in Africa, including South Africa, is through unprotected heterosexual intercourse. Therefore, if one parent is infected with HIV, there is a high probability that the other parent is also infected with the virus, greatly increasing the possibility of the children losing both of their parents in a relatively short period of time.²³ Furthermore, as evidenced in other countries with high HIV prevalence, the time lag between the actual transmission of HIV and AIDS-related death, the number of children orphaned by AIDS will continue to grow even after the prevalence rate has stabilised or declined.²⁴

As pointed out in chapter two, one of the consequences of the increasing number of children who have lost both their parents to AIDS-related illnesses, and the decreasing capacity of the communities and extended families to absorb the orphaned children is the growing number of children living in child-headed households.²⁵ Although accurate data on child-headed households do not exist, the 2007 General Household Survey also indicated that 148 000 children were living in 79 000 child-only

¹⁹ Information available at: <http://www.childrencount.ci.org.za/content.asp?PageID=71> [accessed: 18 August 2009].

²⁰ As above.

²¹ As above.

²² Statistics South Africa, 2009 (n 11 above) 18.

²³ As above, the number of children who lost both of their parents increased from 350 000 in 2002 to 701 000 in 2007 in South Africa; G Andrews *et al.*, ‘Epidemiology of health and vulnerability among children orphaned and made vulnerable by HIV/AIDS in sub-Saharan Africa’ (2006) 18/3 *AIDS Care* 271.

²⁴ G Andrews *et al.*, 2006 (as above) 271.

²⁵ K Subbarao & D Coury, *Reaching out to Africa’s orphans: a framework for public action*, African Human Development Series, World Bank (2004) 29-30; S Tsegaye, *HIV/AIDS, orphans and child-headed households in sub-Saharan Africa*, African Child Policy Forum (2008) 17-19.

households.²⁶ It is reported that 49 per cent of all children living in child-only households are over 15 years and 70 per cent of them are over 12 years.²⁷ The proportion of the children in child-only households is still small. The 2007 survey shows that only 0.8 per cent of children are living in child-only households.²⁸ Nevertheless, despite the small proportion of children living in child-only households, the important fact is that the number of children living in such households is increasing.²⁹ For instance, in 2002 General Household Survey, the number of children living in child-only households was estimated at 118 000. In 2007, the number has increased to 148 000.³⁰ It is also important to note that the figure is for children living in child-only households rather than child-headed households. A ‘child-only household’ is defined as a household containing only children under 18, while a ‘child-headed household’ includes a household in which a child has assumed the role of primary caregiver regardless of the presence of an adult.³¹ As discussed in section 1.5, since the term, ‘child-headed household’ includes both accompanied and unaccompanied child-headed households, the actual number of children living in child-headed households can be much higher.

In the 2007 General Household Survey, it is transpired that the majority of child-only households (79 per cent) were concentrated in three provinces of South Africa: Limpopo, the Eastern Cape and KwaZulu-Natal.³² There are several reasons behind the concentration of the number of child-headed households in Limpopo, the Eastern Cape and KwaZulu-Natal. First of all, the HIV prevalence is high in all three provinces. The HIV prevalence among ante-natal clinic attendees is estimated at 20.7

²⁶ Information available at: <http://www.childrencount.ci.org.za/content.asp?TopLinkID=6&PageID=68> [accessed: 13 August 2009].

²⁷ As above.

²⁸ As above.

²⁹ O Shisana *et al.*, *Nelson Mandela/HSRC Study on HIV/AIDS*, Nelson Mandela Foundation & Human Science Research Council (2002) 68.

³⁰ Information available at: <http://www.childrencount.ci.org.za/content.asp?TopLinkID=6&PageID=19> [accessed: 13 August 2009].

³¹ The definition of ‘child-only household’ is available at <http://www.childrencount.ci.org.za/content.asp?TopLinkID=6&PageID=68> [accessed: 13 August 2009]; The definition of ‘child-headed household’, see Sec 137(1)(a), (b) & (c) of the Children’s Act as amended by the Children’s Amendment Act.

³² Information available at: Children’s Institute (n 30 above).

per cent in Limpopo; 27.6 per cent in the Eastern Cape and 38.7 per cent in KwaZulu-Natal.³³ Secondly, the unemployment rate is also high in all three provinces. The unemployment rate stands at 25.9 per cent in the Eastern Cape and KwaZulu-Natal; and 32.5 per cent in Limpopo. The level of poverty is strongly linked to the unemployment rate. Armstrong *et al.*'s study on poverty in South Africa shows that the level of poverty is highest in the three provinces.³⁴ According to the study, 64.4 per cent of people are living in poverty in Limpopo; 58.5 per cent in KwaZulu-Natal; and 57.5 per cent in the Eastern Cape.³⁵ In terms of child poverty, the result is the same. A study by Streak *et al.* shows that the largest proportion of child poverty can be found in the Eastern Cape, KwaZulu-Natal and Limpopo.³⁶ In the Eastern Cape and Limpopo, 78 per cent of children were living in poverty and in KwaZulu-Natal, the figure was 75 per cent.³⁷

Finally, the General Household Survey indicates that service delivery in the above three provinces is relatively low. For instance, in the Eastern Cape, only 72.8 per cent of the population have access to tap or piped water.³⁸ The limited access to education in the above provinces is also observed. In Limpopo, over 18 per cent of the adult population surveyed did not have any education while in KwaZulu-Natal and Limpopo, the proportion of the adult population with no education is estimated to be around 11 per cent.³⁹ The above analysis suggests that the number of child-headed households is most likely to increase in provinces where there is a combination of a high HIV prevalence, a high level of poverty and limited access to basic services.

³³ South Africa UNGASS Report 2010 (n 8 above), 12.

³⁴ P Armstrong *et al.*, 2008 (n 13 above) 10.

³⁵ As above 10.

³⁶ J Streak *et al.*, 'Measuring child poverty in South Africa' (2008) 6/4 Human Science Research Council Review (November, 2008) available at: http://www.hsrc.ac.za/HSRC_Review_Article132.phtml [accessed: 11 August 2009].

³⁷ As above.

³⁸ *General Household Survey 2008*, Department of Statistics, South Africa (2008) 38.

³⁹ *General Household Survey 2008* (as above) 61.

4.3 Children's rights in South Africa

4.3.1 Constitutional rights

Children's rights in South Africa occupy an important place in the domestic legal system. Not only is South Africa a party to the CRC and ACRWC,⁴⁰ the Constitution of South Africa⁴¹ provides extensive protection of children's rights. Children in South Africa are entitled to all the rights contained in the Bill of Rights, except the right to vote.⁴² In addition to the 25 general human rights provisions in the Bill of Rights, which are applicable to children, section 28 is specifically devoted to children's rights. The inclusion of section 28 on children's rights signifies the importance of protecting children's rights, not only the rights expressly protected in section 28 but all rights in the Constitution that are applicable to children.⁴³

Section 28 protects a wide range of rights encompassing both civil and political, and socio-economic rights. It is often pointed out that, unlike other socio-economic rights protected in the Constitution, the realisation of section 28 is not subject to the availability of resources.⁴⁴ Both sections 26 and 27, which provide, respectively, for access to adequate housing, and health care, food water and social security, contains to an internal limitation clause, 'available resources', and are termed, as 'qualified socio-economic rights'.⁴⁵ However, section 28 does not contain such conditionality.⁴⁶ The absence of the internal limitation clause has been interpreted by scholars to mean that children's basic minimum needs take precedence over the similar needs of others,

⁴⁰ South Africa has ratified the CRC on 16 June 1995, and the ACRWC on 10 October 1997.

⁴¹ Constitution of South Africa Act No 108 of 1996.

⁴² Sec 19 of the Constitution.

⁴³ *Bhe and Others v Khayelitsha Magistrate and Others*, 2005 (1) BCLR 1 (CC) para 52.

⁴⁴ J Sloth-Nielsen, 'The child's right to social services, the right to social security and primary prevention of child abuse: some conclusions in the aftermath of *Grootboom*' (2001) 17 *South African Journal on Human Rights* 220; L Stewart, 'Interpreting and limiting the basic socio-economic rights of children in cases where they overlap with the socio-economic rights of others' (2008) 24 *South African Journal on Human Rights* 473.

⁴⁵ S Liebenberg, 'The interpretation of socio-economic rights' in S Woolman *et al.* (eds) *Constitutional Law of South Africa*, Juta (2008) 33-5.

⁴⁶ S Liebenberg, 2008 (as above).

especially in relation to health care services, nutrition, shelter and social services.⁴⁷ The following excerpt from the *Memorandum on Children* by the Panel of Constitutional Experts clearly illustrates the reasoning behind prioritising the needs of children:

The international instruments dealing with children's rights do not limit the rights of children by requiring reasonable and progressive steps. This is so because of the view that it is inappropriate for children's rights to be so qualified on account of two underlying reasons. The vulnerability, lack of maturity and comparative innocence of children render them deserving of more effective protection. Also children cannot be expected to participate actively in human rights discourse, in defining its scope, or articulating its social dimensions and implications, as adults can be expected to do. The difference in formulation means that the state would undertake to make a greater effort in order to secure the rights of children. The sub-clause will not permit children to make unreasonable demands on the state.⁴⁸

Due to time-bound developmental needs of children and their general inability to pursue their own needs effectively, children need 'special protection' by states. As discussed briefly in section 3.3.4, 'the special care and assistance' granted to childhood in Universal Declaration of Human Rights⁴⁹ or the 'special protection' conferred to children under article 24 of the International Covenant on Civil and Political Rights⁵⁰ also show the importance of timely and active state intervention to prioritise the realisation of children's rights despite the limited resources.

With regard to socio-economic rights of the children, it is also argued that, while sections 26 and 27 provides the right of access to housing,⁵¹ health care,⁵² sufficient

⁴⁷ A Skelton & P Proudlock, 'Interpretation, object, application and implementation of the Children's Rights' in C J Davel & A M Skelton (eds) *Commentary on the Children's Act*, Juta (2007) 10; S Liebenberg, 2008 (n 45 above) 33-50; A Friedman & A Pantazis, 'Children's rights' in S Woolman *et al* (eds) *Constitutional Law of South Africa*, Juta (2008) 47-6.

⁴⁸ Panel of Constitutional Experts, *Memorandum on Children*, (5 February 1996) 2, cited in C J Davel & A M Skelton, 2007 (as above) 10.

⁴⁹ Art 25 of the Universal Declaration of Human Rights.

⁵⁰ HRC, General Comment No 17: Article 24 Rights of the child (07/04/89) para 2

⁵¹ Sec 26 of the Constitution.

⁵² Sec 27(1)(a) of the Constitution.

food and water⁵³ and social security,⁵⁴ section 28(1)(c) provides a direct entitlement to ‘basic nutrition, shelter, basic health care services and social services’.⁵⁵ The wording of the Constitution led to the argument that, unlike sections 26 and 27, section 28(1)(c) provides ‘basic’ services, which imposes ‘a direct and immediate duty’ on the state to provide for the ‘minimum core’ obligation on states.⁵⁶ For instance, under section 28(1)(c), children have the right to ‘basic nutrition’ rather than ‘sufficient food and water’. However, the interpretation and application of socio-economic rights by the Constitutional Court has been far from clear.⁵⁷ I now turn to that Court’s interpretation of section 28.

The nature of the state obligation towards the realisation of children’s socio-economic rights under section 28(1)(c) is discussed in the *Grootboom* case⁵⁸ and *TAC* case.⁵⁹ In both cases, the Court rejected the minimum core argument.⁶⁰ In the *Grootboom* case, the Constitutional Court overturned the judgment of the Cape High Court⁶¹ with regard to the interpretation of the children’s right to shelter under section 28(1)(c) and

⁵³ Sec 27(1)(b) of the Constitution.

⁵⁴ Sec 27(1)(c) of the Constitution.

⁵⁵ L Stewart, 2008 (n 44 above) 473; Sec 28(c) of the Constitution. (Emphases are mine.).

⁵⁶ M Pieterse, ‘Reconstructing the private/public dichotomy? The enforcement of children’s constitutional social rights and care entitlement’ (2003) 1 *Journal of South African Law* 5; L Stewart, 2008 (n 44 above) 473; S Rosa & M Dutschke, ‘Child rights at the core: The use of international law in South African cases of children’s socio-economic rights’ (2006) 22 *South African Journal on Human Rights* 250; D M Chirwa, *Child poverty and children’s rights of access to food and basic nutrition in South Africa*, Socio-Economic Rights Project, Community Law Centre, University of Western Cape (2009) 20.

⁵⁷ L Stewart, 2008 (n 44 above).

⁵⁸ *The Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).

⁵⁹ *Minister of Health v Treatment Action Campaign* (2) 2002 (5) SA 721 (CC).

⁶⁰ D M Chirwa 2009 (n 54 above) 19; M Wesson, ‘*Grootboom* and beyond: Reassessing the socio-economic jurisprudence of the South African Constitutional Court’ (2004) 20 *South African Journal on Human Rights* 287-289 & 300; S Rosa & M Dutschke, 2006 (n 54 above) 254; L Stewart, 2008 (n 44 above) 481.

⁶¹ *Grootboom v Oostenberg Municipality* 2000 (3) BCLR 277 (C); The main issue in this case is the nature of the rights of children to shelter under section 28(1)(c) of the Constitution. It was argued by the appellants that section 28(1)(c) created an unqualified right to shelter for children. Moreover, since it is in the best interests of the children to remain with their parents, section 28(1)(c) should be extended to the parents. The Court found that the term ‘shelter’ indicated ‘temporary shelter’, which falls short of ‘adequate housing’ under section 26. The Cape High Court agreed with the appellants and found that, unlike the right of access to housing under section 26, the children’s right to shelter is not subject to progressive realisation. Furthermore, the Court held that, in order for children to enjoy their right to shelter, the right should be extended to include the parents.

denied the argument that ‘shelter’ is a rudimentary form of ‘housing’.⁶² It also rejected the argument that the state had a direct and immediate responsibility to provide basic housing to every child.⁶³ The Constitutional Court argued that section 28(1)(c) and 28(1)(b) should be read together.⁶⁴ Section 28(1)(b) protects children’s right to parental care and family care. It is only when such care is lacking, the state has an obligation to provide an alternative care.⁶⁵ Therefore, it is the parents and families of children who have the primary responsibility to realise children’s care, including in particular their socio-economic rights.⁶⁶ As discussed in chapter three, the CRC and the ACRWC also place primary responsibility to care and provide for children on the parent(s) and other legal guardian(s). The state’s direct obligation to provide for section 28(1)(c) is only applicable when children are deprived of parental or family care.⁶⁷ Nonetheless, the state also has an obligation to put in place a legal and policy framework to assist parents to care adequately for their children,⁶⁸ such as a social welfare mechanism would be one such measure.⁶⁹

If the *Grootboom* judgment determined the scope of the children who have a direct claim against the state with regard to their socio-economic rights rather narrowly, the *TAC* case, in which the limited availability of Nevirapine at public health facilities was challenged, has broadened the scope to give not only children who are deprived of their family and parental care but also children whose parents are unable to adequately provide for their children a direct claim against the state under section 28(1)(c).⁷⁰ The reading of the Transvaal High Court judgments in the subsequent cases regarding children who lacked parental care indicates that the state has an

⁶² The *Grootboom* case (n 58 above) para 73; see S Liebenberg, 2008 (n 45 above).33-24.

⁶³ D M Chirwa, 2009 (n 56 above) 19-22; L Stewart, 2008 (n 44 above) 481; S Rosa & M Dutschke, 2006 (n 56 above) 246-250; S Liebenberg, 2008 (n 45 above) 33-50.

⁶⁴ The *Grootboom* case, (n 58 above) para 76.

⁶⁵ As above, para 76.

⁶⁶ As above, para 76.

⁶⁷ As above, para 77.

⁶⁸ As above, para 78.

⁶⁹ As above, para 78.

⁷⁰ The *TAC* case (n 59 above) para 77. For a discussion on the issue, see K Creamer, *The impact of South Africa’s evolving jurisprudence on children’s socio-economic rights on budget analysis*, Occasional Paper, IDASA (December 2002) 6-9; S Rosa & M Dutschke, 2006 (n 56 above) 250; S Liebenberg, 2008 (n 45 above); A Friedman & A Pantazis, 2002 (n 47 above) 47-16.

immediate and active duty to protect and provide the rights enshrined in section 28 to children who lack parental and family care including unaccompanied foreign children.⁷¹ As Stewart pointed out, the direct and immediate state responsibility to protect and realise section 28(1)(c) is only applicable for children who are deprived of their parental and family care, and children living in extreme poverty.⁷²

The Constitutional Court's understanding of the limited direct state obligation under section 28(1)(c) and the Court's rejection of the 'minimum core' argument has been criticised.⁷³ The Constitutional Court held that the Court was not in a position to determine the minimal core content of sections 26 and 27 due to factors such as the Court's institutional incapacity and the lack of information to determine the contents of the minimum core,⁷⁴ the danger of breaching the separation of powers,⁷⁵ and the impossibility of delivering the minimum core obligation to everyone immediately.⁷⁶

Instead, the Court adopted the 'reasonableness' approach to determine if the measures adopted to realise certain socio-economic rights are reasonably capable of delivering basic human needs.⁷⁷ Liebenberg summarised the threshold for the reasonableness test developed in *Grootboom* and *TAC*.⁷⁸ The reasonableness test should consider whether the measures in question are comprehensive, coherent and coordinated; whether appropriate financial and human resources to implement the measures have been allocated; whether the approach taken is balanced and flexible enough to cater for short, medium and long-term needs; whether there has been reasonable planning

⁷¹ *Centre for Child Law v MEC for Education*, unreported case no. 19559/06(T) 8-9, The case concerned the children in Luckhoff High School, a state industrial school for children in need of care; Also see, *Centre for Child Law v Minister of Home Affairs* 2005 (6) SA 50 (T) para 17.

⁷² L Stewart, 2008 (n 44 above) 478; S Liebenberg, 2008 (n 45 above) 33-51.

⁷³ L Stewart, 2008 (n 44 above) 478; S Rosa & M Dutschke, 2006 (n 54 above) 250; S Liebenberg, 'Socio-economic rights: Revisiting the reasonableness review/minimum core debate' in S Woolman & M Bishop (eds) *Constitutional Conversations*, Pretoria University Law Publications (2008) 309; S Liebenberg, 2008 (n 45 above) 33-27.

⁷⁴ The *Grootboom* case (n 58 above) para 32; *TAC* case (n 59 above) para 37; L Stewart, 2008 (n 44 above) 481.

⁷⁵ *TAC* case (n 59 above) para 96; L Stewart 2008 (n 44 above) 481, M Wesson, 'Grootboom and beyond: Reassessing the socio-economic jurisprudence of the South African Constitutional Court' (2004) 20 *South African Journal on Human Rights* 300-301.

⁷⁶ *TAC* case (n 59 above) para 35; M Wesson, 2004 (as above) 302.

⁷⁷ S Liebenberg, 2008 (n 73) 305.

⁷⁸ S Liebenberg, 2008 (as above) 307.

and implementation; and finally, whether the measures are developed and implemented in a transparent manner.⁷⁹

In addition to the above criteria, the measures to realise socio-economic rights should cater for the most vulnerable section of the society ‘whose needs are most urgent and whose ability to enjoy all rights, therefore, is most in peril.’⁸⁰ Justice Yacoob further stated that to pass the reasonableness test, the measures implementing socio-economic rights should be beyond achieving statistical advancement.⁸¹ Although statistically successful, if the measures fail to respond to the needs of the most desperate, they should not pass the reasonable test.⁸² Liebenberg argued that through the component of the reasonableness tests, the Court has implicitly accepted the notion of minimum core. Yet, the distinction between the minimum core and the reasonableness test is that reasonableness test does not confer a right upon any individual to claim concrete goods and services from the state.⁸³ Similarly, Rosa and Dutschke, while stating that the ‘at the end of the day the reasonableness test achieves a similar effect to the underlying the sentiments behind the minimum core’, lamented that the establishing the minimum core could be the key to understanding the relation between the socio-economic rights of children in section 28(1)(c) and the other socio-economic rights in sections 26 and 27.⁸⁴ It has been argued that children’s special vulnerability requires the prioritisation of children’s needs in resource allocation.⁸⁵ Establishing section 28(1)(c) as the minimum core to other socio-economic rights, including section 26 and 27 would establishing a direct and immediate claim of section 28(1)(c) for all children regardless whether children have parental or family care or are deprived of such care.

⁷⁹ S Liebenberg, 2008 (as above) 307.

⁸⁰ The *Grootboom* case (n 58 above) para 44; S Liebenberg, 2008 (as above) 307.

⁸¹ As above, para 44.

⁸² As above, para 44.

⁸³ S Liebenberg, 2008 (n 45 above) 33-30.

⁸⁴ S Rosa & M Dutschke, 2006 (n 56 above) 254 & 256.

⁸⁵ F Viljoen, ‘Children’s rights: A response from a South African perspective’ in D Brand & S Russell (eds) *Exploring the core content of socio-economic rights: South African and international perspective*, Protea Book House, Pretoria (2002) 203; L Stewart, 2008 (n 44 above) 480.

Another relevant right for the purpose of the thesis is section 28(1)(b) on children's right to family care, or parental care, or to appropriate alternative care when removed from the family environment. The separate listing of 'family care' and 'parental care' mirrors the wording of article 25 of the ACRWC, which differentiates between children who are parentless, on the one hand, and children who are deprived of their family environment, on the other hand. The distinction between the parental and family spheres should be understood as recognising the important role played by extended families in child care.

Section 28(1) is not an exhaustive list⁸⁶ and section 28(2) provides a further layer of protection by requiring the best interests of the child to be given paramount importance in all matters relating to the child.⁸⁷ Justice Goldstone stated that the plain language of the section indicates that the constitutional obligation to give the paramount importance to the best interest of the child is not limited to section 28(1) and section 28(2) creates a right that is independent from section 28(1) of the Constitution.⁸⁸ Unfortunately, section 28 does not include a provision on child participation.

4.3.2 Children's Act as amended by the Children's Amendment Act

Whether legislation directly and explicitly refers to children or not, it is hard to imagine any piece of legislation that does not impact on children's lives in one way or another. However, the purpose of the section is not to provide a detailed analysis of all the laws that have implications for children's lives, but to highlight the most relevant laws.

The most recent and important Act, for the purpose of the study, is the Children's Act No 38 of 2005 as amended by the Children's Amendment Act No 41 of 2007.⁸⁹ In

⁸⁶ *Minister of Welfare and Population Development v Fitzpatrick and others*, 2000 (3) SA 422 (CC) para 17.

⁸⁷ A Skelton & P Proudlock, 2007 (n 47 above) 7.

⁸⁸ *Fitzpatrick* (n 85 above) para 17. More discussion on the best interest of the child is included in sec 4.4.2.

⁸⁹ The relevant sections from the General Regulations Regarding Children, 2010 (the Children's Act 2005) are also discussed.

1997, the Minister of Social Welfare requested the South African Law Reform Commission (SALRC)⁹⁰ to review the Child Care Act to make recommendations in a view to reform the existing legislation.⁹¹ However, the SALRC interpreted its mandate broadly and over the six years, from 1997 to 2002, drafted a comprehensive children's bill based on broad consultation.⁹² Initially, the Children's Act and Children's Amendment Act were meant to form a single Act to repeal the old Child Care Act and to codify some areas of existing family law.⁹³ The SALRC also envisaged provisions on several new areas relating to children, such as parental rights and responsibilities, children in especially difficult circumstances, international adoption, the age of majority, prevention and early intervention, child trafficking, the rights of children as consumers, and social security for children to be encapsulated into a single act.⁹⁴

The splitting of the Bill was due to the procedural issues rather than the contents of the Bill. Under the Constitution, provisions regulating issues over which the national government has exclusive legislative competence are dealt with following the procedures established under section 75. In the case of provisions over which both national and provincial government have legislative competence, section 76 is applied. The original Bill contained both section 75 and section 76 provisions. Parliament requested the Bill to be split into the section 75 Bill and section 76 Bill.⁹⁵ The Section 75 Bill eventually became the Children's Act⁹⁶ and the Section 76 Bill the Children's Amendment Act.

⁹⁰ Prior to 2003, the South African Law Reform Commission was called South African Law Commission. In the study, the current name is used to prevent possible confusion.

⁹¹ *Project 110 Report of review of the Child Care Act*, South African Law Reform Commission (December 2002) 1.

⁹² As above, 3; also see A Skelton & P Proudlock, 2007 (n 47 above) 1-12.

⁹³ SALRC, 2002 (n 90 above) 10.

⁹⁴ As above 10.

⁹⁵ A Skelton & P Proudlock, 2007 (n 47 above) 1-14.

⁹⁶ The Children's Act consists of 15 chapters; chapter 1 Interpretation, objects, application and implementation of the Act; chapter 2 General principles; chapter 3 parental responsibilities and rights; chapter 4 children's courts; chapter 7 Protection of children; chapter 9 Child in need of care and protection; chapter 10 Contribution order; chapter 15 Adoption; chapter 16 Inter-country adoption; chapter 17 Child abduction; chapter 18 Trafficking in children; chapter 19 Surrogate motherhood; chapter 20 Enforcement of Act; chapter 21 Administration of Act; and chapter 22 Miscellaneous matters. The provisions in chapter 7 are divided into provisions under the national competence and provisions under the national and provincial competence. Part 2 of

One of the most innovative features of the Act is its expanded section on diverse form of alternative care placements and the recognition of child-headed household. In 1999 Consultative Paper on Children living with HIV/AIDS addressed the need to consider broader options of alternative care in the context of the HIV epidemic in South Africa.⁹⁷ In the paper, it was pointed out that available forms of care under the Child Care Act were limited and could not meet the dramatically increasing demands of alternative care placements and proposed the options, which represent a variation on the existing models of care in South Africa, including ‘cluster foster care’, ‘independent living by orphans’ and ‘independent living with external supervision and support’.⁹⁸

The study does not delve into the details of the all sections of the Children’s Act. However, the most relevant section for the purpose of the study is section 137 on child-headed households, which will be examined in section 4.4. Also, other selected provisions of chapters on alternative care, such as chapters 9, 11, 12 and 13, are summarised below. Although not considered as forms of alternative care in the Children’s Act, adoption and inter-country adoption are considered as forms of alternative care as understood under the CRC and ACRWC. Therefore, selected provisions from chapters 15 on adoption and 16 on inter-country adoption of the Children’s Act are also examined.

chapter 7 on national child protection measures and part 3 on protective measures relating to health of children fall under the national competence, hence was included in the Children’s Amendment Act. However, part 1 of chapter 7 on Child protection system and part 4 on other protective measures (save section 142 Regulations) falls under the national and provincial competences and, therefore, included in the Children’s Act. Other chapters also included in the Children’s Act are chapter 5 Partial care; chapter 6 Early childhood development; chapter 8 Prevention and early intervention; chapter 11 Alternative care; chapter 12 Foster care; chapter 13 Child and youth care centre; and chapter 14 Drop-in centres.

⁹⁷ C Barret, *et al.*, ‘Consultative paper on children living with HIV/AIDS’ (January 1999) 22. The Paper was commissioned by the South African Law Reform Commission but was never been published. It has been used only as research material for Issue Paper 13: The review of the Child Care Act, which preceded Discussion Paper 103: Review of the Child Care Act. The Paper does not reflect the view of the Commission.

⁹⁸ C Barret, *et al.*, 1999 (as above) 26.

(i) *Definition of children in need of care*

As mentioned earlier, under section 28(1)(b) of the South African Constitution, children have the right to alternative care if their parental and family care is inadequate.⁹⁹ As confirmed in the *Grootboom* case, the right to alternative care only arises where existing parental and family care is seriously deficient or non-existent.¹⁰⁰

Section 150(1) of the Children's Act provides nine grounds on which children can be found in need of care and protection. The nine grounds may be grouped into three categories; 1) children who are abandoned or orphaned and are without any visible support;¹⁰¹ 2) children at risk of maltreatment, abuses and neglect;¹⁰² and 3) children whose parents or care givers lack the ability to provide appropriate support and care.¹⁰³ Although the list is similar to that of section 14(4) of the now repealed Child Care Act, the notable difference is the general focus of the grounds.¹⁰⁴ Section 150 is more child-centred in the sense that the grounds focus on the needs of children rather

⁹⁹ C Matthias & N Zaal, 'Children in need of care & Maintenance order', C J Davel & A Skelton, 2007 (n 47 above) 9-3.

¹⁰⁰ *Grootboom* case (n 58 above) para 76; also C Matthias & N Zaal, 2007 (as above) 9-3.

¹⁰¹ Sec 150(1)(a) the child has been abandoned or orphaned and is without visible means of support.

¹⁰² Sec 150(1)(c) the child lives or works on the streets or begs for a living; Sec 150(1)(e) the child has been exploited or lives in circumstances that expose the child to exploitation; 150(1)(f) the child lives in or is exposed to circumstances which may seriously harm that child's physical, mental or social well-being; Sec 150(1)(g) may be at risk if returned to the custody of the parent, guardian or care-giver of the child as there is reason to believe that he or she will live in or be exposed to circumstances which may seriously harm the physical, mental or social well-being of the child; and Sec 150(1)(h) the child is in a state of physical or mental neglect.

¹⁰³ Sec 150(1)(b) the child displays behaviour which cannot be controlled by the parent or care-giver; Sec 150(1)(d) the child is addicted to a dependence-producing substance and is without any support to obtain treatment for such dependency, and Sec 150(i) the child is being maltreated, abused, deliberately neglected or degraded by a parent, a care-giver, a person who has parental responsibilities and rights or a family member of the child or by a person under whose control the child is.

¹⁰⁴ C Matthias & N Zaal, 2007 (n 96 above) 9-9; The grounds listed in Sec 14(4) of the Child Care Act are following: a. the child has no parent or guardian; a(A) the child has a parent or guardian who cannot be traced; a(B) the child (i) is abandoned or without visible means of support, (ii) displays behaviour which cannot be controlled by his or her parents or the person in whose custody he or she is in, (iii) lives in circumstances likely to cause or conduce to his or her seduction, abduction or sexual exploitation, (iv) lives in or is exposed to circumstances which may seriously harm the physical, mental or social well-being of the child, (v) is in a state of physical or mental neglect, (vi) has been physically, emotionally or sexually abused or ill-treated by his or her parents or guardian or the person in whose custody he or she is, or (vi) is being maintained in contravention of section 10.

than the deficiencies of parents.¹⁰⁵ In the discussion paper on children in need of protection, the SALRC pointed out the importance of a broad-based approach to tackle to pertinent issues, poverty and barriers to accessing basic social services.¹⁰⁶ As the categorisation shows, the majority of the grounds for protection and care focus on the circumstances of the children. By focusing on the situation of the children that render them in need of care and protection rather than the deficiencies of caregivers, a wider range of children can be reached under section 150. Furthermore, it is important to note that in the new Act, the term ‘children in need of care and protection’ replaced the previous term ‘children in need of care’.¹⁰⁷ Matthias and Zaal argued that the change in the terminology showed the intention to require the state to provide for the children’s safety needs in addition to nurturing needs.¹⁰⁸ The inclusion of the term ‘protection’ may also reflect the Commission’s view that a broader structural intervention is necessary to address the causes of children’s marginalisation.¹⁰⁹

It is important to note that under section 150(2), children in child-headed households or children who are victims of child labour may be found to be in need of care and protection, but being in child-headed households or being a victim of child labour itself is not an automatic ground for finding a child in need of care and protection. If children in such circumstances are not found to be in need of care and protection as foreseen in section 150(3), the social worker, where necessary without court order, should provide appropriate support and services without removing the child from the existing placement of care. It may stressed that, although a children’s court has the power to made an order placing a child in child-headed household under section 46(1)(b) of the Children’s Act, such order is different from an alternative care order, which is defined as foster care, residential care and temporary safe care under section 46(1)(a) of the Act. As mentioned before, an alternative care order is only to be issued when a child is found to be in need of care and protection. The possible court

¹⁰⁵ C Matthias & N Zaal, 2007 (n 98 above) 9-9.

¹⁰⁶ *Project 110 Review of the Child Care Act*, Discussion paper, South African Law Commission (2001) 526.

¹⁰⁷ C Matthias & N Zaal, 2007 (n 98 above) 9-3.

¹⁰⁸ As above 9-3.

¹⁰⁹ SALRC, 2001 (n 105 above) 526.

interventions when children are found to be in need of care and protection under section 150 are discussed in the following section.

(ii) Possible court orders when the child is found to be in need of care and protection

Section 156(1) gives a children's court the power to make any placement order as long as the order is in the best interests of the child. Sections 156(1)(e) and 156(1)(f) are particularly relevant for the thesis. Under section 156(1)(e), if the child has no care giver, or has parents or other care givers but they are unsuitable to care for the child, the court may order the child to be placed in suitable foster care, cluster foster care, temporary safe care, pending an application or, and the finalisation of, adoption, or a child, shared care and youth care centre that provides residential programmes. As Matthias and Zaal point out, the wording of section 156(1) gives a children's court the liberty to create an order to meet the specific needs of a child concerned.¹¹⁰ Nevertheless, when the court makes a decision to remove a child from the child's parents or primary caregiver under section 156, it must consider section 157, which stipulates the importance of providing stability in the child's life. The basic guiding principles are the prioritisation of the family preservation by providing appropriate support and assistance to the parents or other care givers of the child and, in case children should be removed even after the government intervention, the priority should be given to the family-type of alternative care.

Under section 157, the court is required to consider a report submitted by a designated social worker compiled in terms of section 152(2) of the Act. The report by the social worker should include: 1) an overall assessment of the needs of the child;¹¹¹ 2) information on previous interventions and family preservation services that have been taken;¹¹² and 3) a permanency plan for the child.¹¹³ A different priority is given to each alternative care option reflecting the importance of establishing stability of care in the child's life. For instance, the most desired option is the foster care placement

¹¹⁰ C Matthias & N Zaal, 2007 (n 98 above) 9-22.

¹¹¹ Sec 157(1)(a)(i).

¹¹² Sec 157(1)(a)(ii).

¹¹³ Sec 157(1)(a)(iii).

with relatives or non-relatives who live geographically close to parents, or other care giver of the child to encourage visiting by the parents or care giver. If that is not possible, in the following order, four other options may be considered: 1) the possibility of adoption by relatives; 2) the possibility of guardianship with relatives; 3) the possibility of adoption by non-relatives; or 4) the possibility of foster care by relatives or non-relatives or cluster foster care may be considered.¹¹⁴ Important to note is that the possibility of adoption by non-relatives is given priority to the foster care placement with relatives who do not live geographically close to the parents or other care giver of the child. It may be due to the fact that ‘adoption’ provides more permanent care than ‘foster care’ placement. Although the section does not specify domestic or inter-country adoption by non-relatives, the preference is given to adoptive parents with a ‘similar ethnic, cultural and religious background’.¹¹⁵ The prioritisation of the permanency of the care placement in the South African law reflects the general international standards in the UN Guidelines for the Alternative Care of Children. Paragraph 60 of the Guidelines stipulates that considering the negative impact of frequent change in care setting to the child’s development, an appropriate permanent solution should be arranged without due delay.

In addition to the consideration given to the report submitted by the designated social worker, under section 157(1)(b), the court is further required to consider options, which could best establish the stability in the child’s life, giving priority to the possibility of keeping the child within its family environment by providing appropriate support and supervision to the parents or other care giver of the child.

Each of the alternative care options provided in the Children’s Act is now discussed.

Foster care

Foster care, which is regulated under chapter 12 of the Children’s Act, may be the preferred mode of care for children who cannot remain with their biological families and who are not available for adoption, especially if a foster placement can be found

¹¹⁴ Sec 55(2) of the General regulations regarding Children 2010, Children’s Act 38 of 2005 (1 April 2010).

¹¹⁵ Sec 55(2)(d) of the General regulations (as above).

geographically close to the parents or other care giver of the child.¹¹⁶ The prioritisation of the foster placement close to the parents or other caregiver of the child promotes the permanency planning, including family unification. Enabling children to maintain their contact with their own community and the family network facilitates the future integration of children back into their community. Furthermore, the ethnic, cultural and other background of the child should be considered when placing the child into foster care and the preference should be given to foster parent(s) from the similar background as the child. Section 184(2) further stipulates that a child may be placed in foster care with foster parents from a different background only if there is an existing bond between the child and the prospectus foster parents or if a suitable person from a similar background with the child is not available. Prioritising foster families from the similar cultural background and locality is in line with the 2009 UN Guidelines for the Alternative Care of Children.¹¹⁷ In order to maintain family-type care, no more than six children may be placed under a same foster care placement, unless those children are siblings or blood-related, or it is in their best interests.¹¹⁸

Apart from the conventional foster care, the Children's Act introduced two new forms of foster care: cluster foster care and shared care, which are discussed below. The introduction of these new forms of foster care is an attempt to meet the dramatically increased number of children in need of alternative care due to the HIV epidemic. As early as 1999, the need to consider different forms of foster care had been pointed out.¹¹⁹ The SALRC, in its discussion paper, also pointed out that, in order to provide a conventional form of foster care, four out of five families need to take in a child unrelated to them.¹²⁰ The problem of lack of human and financial resources to monitor foster care to ensure well-being of children in formal and informal foster care has been raised and the development of cluster foster care was proposed as one of the ways address the short coming of conventional foster care.

¹¹⁶ SALRC, 2001 (n 105 above) 17-1.

¹¹⁷ Para 119 of the UN Guidelines for the Alternative Care of Children.

¹¹⁸ Secs 185(1)(a) & 185(1)(b) of the Children's Act.

¹¹⁹ C Barret, *et al.*, 1999 (n 96 above) 28.

¹²⁰ SALRC, 2001 (n 105 above) 17-1.

Cluster foster care

Cluster foster care is defined as ‘reception of children in foster care in accordance with a cluster foster care scheme registered by the provincial head of social development’.¹²¹ More than six children, only, may be placed in a cluster foster care scheme. The cluster foster care scheme may be managed by NGOs and should be registered with the provincial head of social development for that purpose.¹²² Unlike conventional foster care, where children are placed with individual foster parents, in cluster foster care, children would be cared for by a group of individuals or an organisation. There has been a concern over the operation of a cluster foster care scheme. Most notably, the Children’s Institute pointed out the ambiguous definition of cluster foster care and raised the concern that some organisations were using the foster care legislation to operate residential care without having to operate within the stricter regulations of residential care.¹²³ The Children’s Institute called for amending the provision to ensure that children are placed directly with foster parents and not into the care of an organisation.¹²⁴ Similar concern was raised by the National Association of Child Care Workers, which argued that without a clear definition of cluster foster care, there was a danger of cluster foster care being operated as ‘mini-children’s home’.¹²⁵ However, the suggested amendments are not reflected in the Act.

Although the regulations require the organisation operating a cluster foster care scheme to submit an annual report to the Provincial Head of Social Department indicating the number of children assigned per active member of the organisation providing foster care and the number of active members of the organisation who provide foster care to children, it does not specify how many children could be

¹²¹ Sec 3(e) of the Children’s Act.

¹²² Sec 3(e) of the Children’s Act.

¹²³ S Moses & H Meintjes, ‘Submission from the Children’s Institute, University of Cape Town on residential care in the Children’s Amendment Bill [B19B of 2006]’, Children’s Institute, University of Cape Town (2007) 9.

¹²⁴ Children’s Institute suggested that ‘cluster foster care scheme’ to be defined as ‘a support network’ for foster parents and ‘foster parent’ as ‘person who has foster care of a child by order of the Children’s Court’ by removing the phrase ‘includes an active member of an organisation operation cluster foster care scheme and has been assigned responsibility for the foster care of a child’. S Moses & H Meintjes, 2007 (as above) 9.

¹²⁵ National Association of Child Care Workers, ‘Reviewed submission on the draft Children’s Amendment Bill’, National Association of Child Care Workers (August 2007) 4.

managed in one cluster foster care scheme.¹²⁶ Section 69(4)(a) stipulates that an organisation providing a cluster foster care scheme or schemes should employ a social worker per 50 children served by the cluster foster care scheme or cluster foster care schemes. This wording seems to suggest that more than 50 children may be served in one cluster foster care scheme.

The general duration for any court order related to alternative care, including foster care and cluster foster care, is two years or for a shorter period and the court may renew the order of the foster care placement every two years.¹²⁷ However, after a child has been in foster care more than two years, the court may, considering the need to create the stability in the child's life, extend the order until the child turns 18 if the conditions set out in section 186(2) are met. In case of foster care with non-relatives, after a careful assessment under section 186(1), the court may also order that no further social work supervision or social worker report is required. However, despite subsections 1 and 2, the social worker must visit at least once in two years to monitor and evaluate the placement.¹²⁸ Section 186, which allows the court to make a long-term foster care order or freeing the social workers from the obligatory monitoring and supervision, is useful to lessen unnecessary burden on the limited human and material resources of organisations providing social work. Section 186 reflects the concern and recommendation of the SALRC. The SALRC pointed out that children were often looked after in safe long-term care by relatives which, in practice, did not require on-going supervision and monitoring.¹²⁹ The Commission further recommended that in order to reduce the social work load, the court should have the discretion to determine whether a placement with relatives should be of a permanent nature, and also whether supervision and monitoring by the state is necessary.¹³⁰

¹²⁶ Secs 69(2)(c) & 69(2)(d) of the General regulations (n 113 above).

¹²⁷ Sec 159(1)(a) of the Children's Act.

¹²⁸ Sec 186(3) of the Children's Act.

¹²⁹ SALRC, Discussion Paper 103 on the Review of Child Care Act (2001) 4; Similar concerns of overburdening of social workers due to the increasing number of long-term care by relatives for children who are orphaned by AIDS was raised by H Meintjes *et al.*, in *Children in 'need of care' or cash? Questioning social service provisions of orphans in the context of the South African AIDS pandemic, A joint-working paper of the Children's Institute and the Centre for Actuarial Research, University of Cape Town* (2003) 29 & 54.

¹³⁰ SALRC, 2002 (n 90 above) 216.

Although such measures could reduce human and material burden of social workers, the discontinuation of on-going supervision and monitoring could put children at risk. Paragraph 79 of the UN Guidelines for the Alternative Care of Children stipulate that states should devise special and appropriate measures to protect children in informal care and paragraph 128 of the Guidelines further require that care placements to be inspected frequently through both scheduled and unscheduled visits.¹³¹ Considering above international standards, rather than discontinuing on-going supervision and monitoring, training community members to visit and monitor the condition of care on a regular basis might be a better solution. The format of the assessment report could be simplified for the community trainees to easily complete. Social workers may only intervene or conduct a thorough assessment of the placement only when there are concerns raised by the community trainees regarding the placements.

Shared care

Shared care is another new concept introduced in the Children's Act.¹³² Shared care is a practice 'where different care-givers or centres alternate in taking responsibility for the care of the child at different times or periods'.¹³³ The aim of the shared care is to supplement the inadequate care by primary caregivers. For instance, the court may order shared care by requiring a child to be cared for by a community organisation during school days, while allowing the child to remain with their parents (or other primary caregivers) during school holidays.¹³⁴ Shared care is the least intrusive measure, which enhances the quality of care to children without completely removing them from their families.¹³⁵ However, no regulations relating to the operation and implementation of share care have been developed.

¹³¹ Paras 79 and 128 of the UN Guidelines for the Alternative Care.

¹³² Secs 46(1)(e) and 156(1)(e)(iv) of the Children's Act.

¹³³ Sec 156(1)(e)(iv) of the Children's Act.

¹³⁴ C Matthias & N Zaal, 2007 (n 98 above) 9-26.

¹³⁵ As above, 9-27.

Residential care

Under section 158(1), a court may order the placement of a child in child and youth care centres only when no other appropriate options are available. Such stipulation reflects the principle that residential care should only be used as a last resort. However, the section does not specifically state that the placement order in residential care should be used only for the period as short as necessary.

A reading of section 191 suggests that the residential care serves three broad purposes: 1) to provide alternative care to children who are in need of care and protection due to inadequate parental and family care; 2) to provide developmental and secure care to children awaiting trial or sentencing; and 3) to provide developmental and secure care to children with behavioural or psychological difficulties. In addition to the residential programmes, a child and youth care centre may offer various developmental and therapeutic programmes, such as programmes for children with drug dependency, children living with disabilities and children with psychiatric difficulties.¹³⁶ Therefore, under section 158(2), when place a child in a child and youth care centre, the court should identify a suitable residential programme for the child concerned. Section 158(3), in turn, requires the provincial head of social development to consider the particular developmental and therapeutic needs of children, permanency plan for the child and the distance between the residential centre and the child's community and family. Section 158(4) stipulates that the provincial head of social development, where feasible, must select a residential care placement which is located as close as possible to the children's family or community. The efforts to facilitate the integration of children who stayed in the residential care into the community are also made through the developmental programmes provided to children. While in the residential care, children are entitled to various developmental programmes, which would help them to adjust to a life outside of the residential care. Such programmes include life skills, after-care, income generating activities and independent living for children disengaging from residential care.¹³⁷

¹³⁶ Sec 191(3) of the Children's Act.

¹³⁷ Sec 194 of the Children's Act & Sec 74 of the General Regulations (n 115 above).

The rights of children in such residential care are also protected under section 73 of the Consolidated Regulations for the Children’s Act. Importantly, section 74 of the Regulations provides for an age appropriate and accessible complaints procedure. However, the Regulations do not specify the possible actions should be taken against staff members against whom repeated complaints are made.

One of the important features of the Children’s Act with regards to alternative care placements is that it provides the possibility of extending an alternative care order beyond the age of 18. Under section 176(1), an alternative care order may be extended until the child reaches 21 years of the age, if the current alternative care provider is willing and able to continue to provide care and if the continued stay is necessary for the child to finish his or education or training programme.¹³⁸ It is a way to further prepare the child for the life outside of alternative care, but the limited ground for the extension of the alternative care order may fall short of the standards of the UN Guidelines for the Alternative Care of Children, which stipulate that appropriate after-care programmes and assistance, which include counselling and mentorship scheme where possible, to be provided to all children who are leaving care.¹³⁹

*Adoption*¹⁴⁰

When making a placement order, section 157(2) requires courts to consider the best way to secure the stability of the child’s life. Adoption, in certain circumstances, could be the best way to secure the stability of the child’s life. For a very young orphaned or abandoned child, who cannot be reunited with the parents or family, adoption may be the best way to provide permanent care in a family. Section 157(3), which requires that ‘a very young child who has been orphaned or abandoned by its parents must be made available for adoption’ unless this is not in the best interests of the child, seems to reflect the importance given to adoption as a permanent care option for very young children. The provision reflects the standard set in the UN

¹³⁸ Sec 176(1) of the Children’s Act.

¹³⁹ Paras 131 to 136 of the UN Guidelines for the Alternative Care of Children.

¹⁴⁰ Adoption and inter-country adoption are not considered as alternative care placements in terms of under Sec 167(1) of the Children’s Act, which classifies alternative care as: 1) foster care; 2) residential care; and 3) temporary safe care.

Guidelines for the Alternative Care of Children, which stipulates that children under the age of 3 years should be provided in family-based settings.¹⁴¹

There are several grounds based on which a child may be found adoptable. Section 230(1) of the Children's Act provides that any child may be adopted if three conditions are met: 1) the child is adoptable under section 230(3); 2) the adoption is in the best interests of the child; and 3) the provisions of the relevant sections on adoption are fully complied with. Section 230(3) provides for five categories of children who are considered as adoptable. Under section 230(3)(a), a child is adoptable if the child is an orphan and has not guardian or caregiver who is willing to adopt the child. Reading it together with section 230(3)(e), which states that a child in need of a permanent alternative placement is an adoptable child, the fact that the existence of the relatives or other caregivers of the child who are able and willing to provide a permanent alternative care, for instance, long-term foster care, does not affect the fact that the child is adoptable. In that case, the best interests of the child should be the determinant factor whether the child should be adopted or placed in a long-term foster care by relatives.

Sections 230(3)(b) and 230(3)(c) provide that if the whereabouts of the child's parents or guardian cannot be established or and the child has been abandoned, the child is adoptable. Section 56(1) of the Consolidated Regulations stipulates that to determine whether a child is abandoned, the social workers should post on advertisement about the child in at least one local newspaper circulating in the area where the child has been found. The social worker should prove that no one has claimed the responsibility for the child for three months after the publication of the advertisement¹⁴² and also provide an affidavit explaining the measures taken to trace the child's parents, guardian or care-giver of the child.¹⁴³

Other category of children are adoptable are children in need of care and protection and have no prospectus of reuniting with their families. Under section 230(3)(d) of the

¹⁴¹ Para 22 of the UN Guidelines for the Alternative Care of Children.

¹⁴² Sec 56(2)(ii) of the General regulations (as above).

¹⁴³ Sec 56(2)(d) of the General regulations (as above).

Children's Act, children who have been deliberately abused and neglected by their parents or guardians or whose parents or guardians has allowed the children to be abused and neglected are also adoptable. Section 236(1), which provides for the grounds where the consent of parents or guardians of the child to the adoption of the child is not necessary, contains many of the same grounds provided in section 230(c). Related sections may be section 28 providing for the termination of parental responsibilities and rights and section 135, which provides for the Director-General, a provincial head of social development or a designated child protection organisation to submit application, without consent of a parent or care giver, to terminate or suspend parental responsibilities for young children who has been in alternative care for a considerable length of time with no prospectus for reuniting with their family. Section 135 is linked the age and development of the child and the younger the child is the shorter period is required before such application to terminate parental rights and responsibilities can be made. As Mosikatsana and Loffell pointed out, the insertion of section 135 greatly strengthen the protection of the children's right to family care due to the refusal of the parents or care giver to consent to the adoption of the children, by enabling children who previously might have been considered unadoptable to be adopted.¹⁴⁴

Adoption provides permanent family care to children who are deprived of their family environment. From this perspective, adoption should be promoted and facilitated where appropriate. However, it should be noted that in many cases, adoption is not a suitable option. In South Africa, adoption by non-related persons is uncommon and limited to absorb the increasing number of orphaned children due to current HIV epidemic.¹⁴⁵ Furthermore, adoption of a large sibling group by one family is highly unlikely. Therefore, siblings are likely to be separated. The limitations of foster care, residential care and foster care in providing quality care to a diverse group of children who are orphaned in South Africa necessitate the need to devise a new form of child care practice, including the recognition of child-headed households.

¹⁴⁴ T Mosikatsana & J Loffell, 'Adoption' in C J Davel & A M Skelton (eds) *Commentary on the Children's Act*, Juta Publishers (2007).

¹⁴⁵ *Child adoption: Trends and policies*, United Nations Department of Economic and Social Affairs, Population Division (2009) 69. The report indicated that in 2001, total 2218 adoption took place and among them, 1906 were domestic adoption. More recent data on adoption in South Africa was not available in the report and other data base.

*Inter-country adoption*¹⁴⁶

The landmark case in the area of inter-country adoption is *Minister of Welfare and Population Development v Fitzpatrick*, in which the Constitutional Court decided that the prohibition of adoption by non-South African was invalid.¹⁴⁷ South Africa is a party to the Hague Convention on Protection of Children and Cooperation in Respect of Inter-Country Adoption and the Children's Act incorporates the 1993 Hague Convention in chapter 16. Section 254 clearly states that one of the main purposes of the chapter is to domesticate the Hague Convention on inter-country adoption. It is an important development as inter-country adoption plays an increasingly important role in providing a permanent care to children who cannot be suitably cared for domestically. Section 256 gives effect to the Hague Convention by providing that the provisions of the Convention are law in South Africa.

A child may be available for inter-country adoption if the name of the child has been on the Register of Adoptive Children and the Prospective Adoptive Parents for at least 60 days and no 'fit and proper' adoptive parents have come forward in South Africa.¹⁴⁸ This is to give effect to the subsidiarity principle that the possibility of suitable domestic adoption should be given priority over inter-country adoption. However, the principle of subsidiarity is not applicable blindly as the wording of the section also suggests that the prospective adoptive parents should be 'fit and proper'.

In *AD and another v DW and others*, the Constitutional Court held that while the principle of subsidiarity should be given due consideration, 'a contextualised case by case enquiry' to determine the best interests of the child in each inter-country adoption should be conducted.¹⁴⁹ The court further stressed that the courts should guard the best interest of the child rather than rigidly adhering to technical matters.¹⁵⁰ The importance of the best interests of the child in inter-country adoption cases is also

¹⁴⁶ Inter-country adoption in general has been discussed in detail in Chapter 3. Therefore, the discussion in this section focuses only on the relevant provisions in the Children's Act.

¹⁴⁷ The *Fitzpatrick* (n 85 above).

¹⁴⁸ Sec 261(1)(g) of the Children's Act.

¹⁴⁹ *AD and another v DW and others*, CCT 48/07, 2008 (3) SA 183 (CC) para 50.

¹⁵⁰ As above, para 55.

reflected in section 261(5)(a) of the Children's Act, which stipulates that inter-country adoption should only take place if it is in the best interests of the child. Also importantly, to give effect to article 4(d) of the 1993 Hague Convention, which requires that views and opinions of the child is given due consideration, section 112 of the Consolidated Regulations requires that the report by the Central Authority under the terms of sections 261(3) and 262(3) of the Children's Act should include the views of the child concerning the adoption where the child is capable of forming his or her own view.¹⁵¹ If the child is over 10 years of age, the consent of the child should be attached to the report.¹⁵²

So far, the possible care orders the court may make in case a child is found to be in need of care and protection have been discussed. In the earlier section, it was briefly mentioned that under section 150(2), a child in a child-headed household may be children in need of care and protection contemplated under section 150(1) and a designated social worker should conduct an investigation to determine whether a child is in need of care and protection. When the child is found to be in need of care and protection, the matter should be referred to a local children's court for care and protection order as contemplated under section 156 of the Children's Act. However, if the child is not found to be in need of care and protection, the social worker should provide necessary support services and programmes without the intervention of the court. In the later section, provisions related to child-headed households are discussed in detail.

4.4 Recognising child-headed households

In 2002, in the Review of the Child Care Act, the SALRC pointed out that child-headed households would become 'a familiar phenomenon' due to the increasing number of adult caregivers dying of AIDS-related illnesses.¹⁵³ Therefore, the

¹⁵¹ Sec 112(2)(g) of the General regulations (n 113 above).

¹⁵² Sec 112(2)(h) of the General regulations (as above).

¹⁵³ SALRC, 2002 (n 90 above) 199.

Commission recommended that child-headed households be given a legal recognition ‘as a placement of option for an orphaned child in need of care’.¹⁵⁴

The recommendation by the SALRC generated heated debate on the related issues including the age of which a child should be allowed to head a household, the role of supervisors to child-headed households and the monitoring of the functioning of child-headed households.¹⁵⁵ The Children’s Bill Working Group has been formed in 2003 to facilitate discussions around the provisions in the Children’s Amendment Bill.¹⁵⁶ In 2006, the Children’s Bill Working Group help a workshop and the members of the working group raised the concerns over the rigid definition of child-headed household, which may not cater for households in transition, such as households headed by over youth aged between 18 and 21, and ensuring the proper identification and recognition process to ensure that all child-headed households benefit from the support measures.¹⁵⁷ Finally, the Children’s Act recognised child-headed households as one of the ‘protective measures’.¹⁵⁸

4.4.1 Section 137 of the Children’s Act

As mentioned briefly in the introduction, the 1999 Consultation paper on the children living with HIV/AIDS, recommended that ‘independent living with external supervision and support’ as a potential means to provide care to children who are orphaned.¹⁵⁹ The paper further pointed out the need to clarify whether and what form a child-headed household should be recognised and the legal aspects, which needed to be considered, including the age of the child heading a household and guardian and custodian issues.¹⁶⁰ Section 137 of the Children’s Act, introduced by way of an amendment via the Children’s Amendment Act and its related regulations address

¹⁵⁴ As above 199.

¹⁵⁵ SALRC, 2002 (n 90 above) 170-172.

¹⁵⁶ Workshop Report, Children’s Bill Working Group Workshop in Draft Children’s Amendment Bill (28-29 March, 2006), Children’s Institute (June 2006) 1.

¹⁵⁷ Children’s Institute, 2006 (as above) 39.

¹⁵⁸ The child-headed household is recognised under ‘other protective measures’. See Sec 137, Part 4 Other Protective Measures, Chapter 7 Protection of Children of the Children’s Act.

¹⁵⁹ C Barret *et al.*, 1999 (n 96 above) 31.

¹⁶⁰ As above, 31.

concerns pointed out in the 1999 Consultation paper. Section 137 of the Children's Act and relevant regulations are discussed in the following sections.

(i) *Defining the term 'child-headed household'*

In order for a household to be recognised as a child-headed household, all four criteria mentioned in section 137(1) should be met. The first criterion is that there should not be a *de facto* head of household who is an adult. It is important to note that the recognition is not only dependent on whether there is an adult living together in the household, but whether the adult is providing effective care to the children.¹⁶¹ For instance, under section 137(1)(1), a household in which an adult caregiver is terminally ill may be recognised as a child-headed household if the other criteria are met. Inclusion of such households is important as it recognises that in many cases, especially in the case of AIDS-related illnesses, children assume a role of *de facto* head of the household providing care to their parents and younger siblings even before their parents pass away. This inclusion also accommodates the concerns raised by Desmond and Richter that the conventional understanding of 'child-headed households' as 'adultless households' failed to include many households where children are *de facto* heads of households because their adult caregivers are unable to provide care.¹⁶² However, the criteria could be broadened to include incapacity due to old age to cover children living with their grandparents who are too old to provide effective care. As Desmond and Richter point out, in some grandparent-headed households, children are heading households when their grandparents become unable to care for them due to old age.¹⁶³

The second criterion is that there is no adult family member available to provide the care to the children in the household. However, it is not clear how the term 'availability' of an adult family member should be interpreted and the relationship between the 'suitability' of the 'available' adult member. Section 137(4) prevents a

¹⁶¹ Definitions of unaccompanied and accompanied child-headed households have been discussed in Sec 1.5 of the study.

¹⁶² C Desmond *et al.*, 'Child-headed households: dissecting our understanding of who is at risk' (2003) Special edition, *ChildrenFirst* 55.

¹⁶³ C Desmond *et al.*, 2003 (as above).

person ‘unsuitable’ to work with children from being assigned as a supervisor. Therefore, it can be assumed that the suitability of an adult member of the family will be examined before he or she is granted the rights and responsibilities of the guardian of the children using the same criteria, which is provided under section 120 of the Children’s Act.¹⁶⁴ Nevertheless, the determination of ‘suitability’ should also consider subjective elements. As Sloth-Nielsen has clearly pointed out, the problem may arise if a family member is available to provide care but children refuse him or her.¹⁶⁵ In that situation, the available family member is clearly not suitable to care for the children.

The third criterion is that of an age restriction. Under section 137(1)(a) only a person over 16 may assume the role of head of household. The rationale behind setting the age limit to 16 is to enable the child heading the household to apply for appropriate social grants to sustain the household. In order to access the social grants, the appellant needs a South African identity document, which can be obtained at 16 years of age. In addition, according to section 3(1) of the South African Schools Act children are required to attend school till they reach age of 15 or ninth grade, whichever comes first. Also the Basic Conditions of Employment Act prohibits employment of anyone under 15 years¹⁶⁶ or under a minimum school leaving age.¹⁶⁷ Therefore, a child heading a household can be legally employed.¹⁶⁸ In case where the conditions listed in section 137(1)(a) and 137(1)(b) are met but the oldest child is younger than 16, the household cannot be recognised as a child-headed household. In that case, the children in that household will be considered as children in need of care

¹⁶⁴ Sec 120(1) specifies that a person may found unsuitable to work with children by a) children’s court; b) any other court in criminal or civil proceedings; and 3) any forum established or recognised by law in any disciplinary proceedings concerning the conduct of the person relating to a child. In terms of criminal matters, a person who is convicted of murder, attempted murder, rape indecent assault or assault with the intent to do grievous bodily harm with regard to a child is a person unsuitable to work with children under Sec 120(4). Furthermore, Sec 120(6) stipulates that in terms of Sec 120(1)(b), whether the person is found guilty or innocent in the criminal trial does not affect the determination of the unsuitability of the person to work with children.

¹⁶⁵ J Sloth-Nielsen, ‘Protection of children’ in C J Davel & A M Skelton (eds), 2007 (n 47 above) 7-47.

¹⁶⁶ Basic Conditions of Employment Act No 75 of 1997, Sec 43(1)(a).

¹⁶⁷ As above sec 43(1)(b).

¹⁶⁸ The issue of the employment of children is discussed in Sec 4.4.2.

and protection and court-mandated interventions, including a placement in appropriate alternative care, will be sought under section 156.

The ‘best interests of the child’ is the fourth criterion. Even if the other three criteria are met, if it is not in the best interests of the children to remain as a child-headed household, the household will not be recognised as such. For instance, as pointed out by Couzens and Zaal, the fact that a child older than 16 has ‘assumed’ the responsibility as a head of a household, does not mean that the child is ‘capable’ of providing adequate care to the members of the household.¹⁶⁹ If an assessment reflects that the child is unable to provide adequate care to the members of the households, applying the best interests of the child criterion, the household cannot be recognised as a child-headed household.

As mentioned in section 4.2, South Africa is not only bound under the CRC and ACRWC to give the best interests of the child a paramount importance in matters related to the child. Also under its Constitution, the best interests of the child are of ‘paramount importance in every matter concerning the child’.¹⁷⁰ The inclusion of the best interests of the child criterion illustrates the determination of the South African Government to adhere to its international and constitutional obligation towards children. However, it is not clear what criteria will be used to determine the best interests of the child and whose best interests will be given priority when the best interests of young children and the child-head of the household come into conflict. As Sloth-Nielsen points out, the right to childhood, especially that of the child heading the household, could be threatened if children have to assume the responsibilities of a primary caregiver.¹⁷¹

Three main concerns can be raised with regards to section 137(1).

Firstly, as mentioned above, section 137(1) does not contain a criterion requiring children’s participation in determination of a child-headed household. Child

¹⁶⁹ M Couzens & F N Zaal, ‘Legal recognition for child-headed households: an evaluation of emerging South African Framework’ (2009) 17 *International Journal of Children’s Rights* 310.

¹⁷⁰ Sec 28(2) of the Constitution.

¹⁷¹ J Sloth-Nielsen, ‘Of newborns and nubile: some critical challenges to children’s rights in Africa in the era of HIV/AIDS’ (2005) 13 *International Journal of Children’s Rights* 77.

participation in all decisions concerning the children and the respect for children's view is one of the fundamental principles of the CRC and ACRWC.¹⁷² Unfortunately, the section does not contain a specific provision requiring the participation of children in the determination of child-headed households. Therefore, it is not clear whether and to what extent the opinions of the children will be sought and respected when determining if a household can be recognised as a child-headed household. It can be argued that child participation in matters related to the children is protected in several different provisions in the Children's Act. Most importantly, section 10 of the Children's Act, which incorporates article 12 of the CRC and article 4(2) of the ACRWC into South African domestic law, provides as follows:

Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration.

It is feasible to argue that section 10 should suffice to protect the wishes and opinions of the children in this regard. It can also be argued that from the wording of section 137(1)(c) - a child over 16 *has assumed* the role of care-giver - one can surmise that the child has voluntarily taken over the role of caregiver and, therefore, the issues of wishes and opinions of the children do not need to be addressed separately. Nonetheless, considering the gravity of the matter, it should be clear without doubt that a child who has 'assumed' the role of caregiver understands all the long and short-term implications of his or her decision, and has voluntarily opted to remain in a child-headed household. The insertion of the respect for the view and opinions of the children concerned as one of the criteria will ensure that children's views and informed consents are actively sought.

The second concern is the age limit of which a child can head a household. During the initial discussion stage, the SALRC recommended against setting an age limit at which a child can head a household but the maturity of the child should be a determining factor.¹⁷³ In the later stage, the prevalent argument was that the age limit

¹⁷² For further discussion on the children's rights-based approaches, see Sec 3.3.6.

¹⁷³ SALRC, 2002 (n 90 above) 172.

should be set to 15 years of age.¹⁷⁴ Nevertheless, the Act specifies the age at which a child can head a household at 16.

It is true that children under a certain age should not be allowed to ‘head’ a household. As pointed out in section 3.5.2, not having any age limit as is the current case in Namibian Bill might also pose a problem. However, the inflexible age limit can be equally undesirable. For instance, set age limit may be difficult to apply in a case of an accompanied child-headed household where a child younger than 16 has assumed a role of a *de facto* head of the household due to the illness of his or her parents but is living together with a *de jure* head of the household.¹⁷⁵ In that case, not recognising the household as a child-headed household could lead to two situations. The first situation is that despite the extreme vulnerability of the child and other members of the household, the children will not be qualified to receive the same kind of support and protection as children in recognised child-headed households. For example, terminally-ill parents may have difficulty accessing relevant grants, such as child support grants or disability grants due to their physical weakness. Furthermore, children under 15 who are *de facto* primary caregivers, but the households are not recognised as such, those children will not be able to apply for the grants themselves for their siblings. Also, while children in child-headed households are assisted by their supervisors to access relevant grants, children in unrecognised child-headed household are not entitled to such assistance. The second situation is that of placing the children in an alternative care placement. As the household cannot be recognised as a child-headed household and it is clear that the children are not receiving adequate care from their terminally-ill parents, they will qualify as children in need of care and protection, and therefore, could be placed in conventional alternative care.

¹⁷⁴ Children’s Amendment Bill: Summary of key recommendations by the Children’s Bill Working Group, Children’s Institute (2007) 6; Z Vice, Submission to National Assembly, Child Welfare South Africa (August 2007) 8-9; W Mukoma & L Jamieson, Submission to National Assembly, Children’s Institute (August 2007) 1. However, Children in Distress (CINDI) insisted setting no age limit for the child-headed household. It argued that the recognition should be given depending on the maturity and capability of the child rather. See Submission on the Children’s Amendment Bill from the Child Advocacy Project from the CINDI Network (August 2007) 1.

¹⁷⁵ The term ‘accompanied’ child-headed household is taken from *Reversed roles and stressed souls: child-headed households in Ethiopia*, African Child Policy Forum (2008). For a detailed explanation of the term, see Sec 1.5 Definitions.

Neither of these situations seems to reflect the best interests of the children. Children may want to remain with their ill parents but also are in need of the same type of support and protection provided to other ‘recognised’ child-headed households. In such cases, a hard and fast age criterion may not be best for the children. In a case like that described above, the household should be recognised as a child-headed household if the other three criteria are met. Nevertheless, the level of supervision may be strengthened to meet the different needs of the children. For instance, linking the household with a home-based care organisation to support the child in providing physical care to their parents would be an example. Furthermore, whenever feasible, the parents should be involved as far as possible in making decisions regarding households. A study of child-headed households in Ethiopia showed that in many cases, incapacitated adults in child-headed households play a vital role in counselling and advising children on various issues.¹⁷⁶ Their role and contribution to the working of the households should be fully respected and encouraged.

The third concern relates to the fact that a child-headed household is a household headed by a child under 18 years. The support measures, including the assignment of a supervisor, are provided because a household is headed by an under-18. The Act does not provide for when an oldest child who heads the household has turned 18 and the household is no longer classified as a ‘child’-headed household. The discontinuation of the support to a household is no longer defined as a ‘child-headed household’ may fall short of the international standard, which requires states to provide appropriate aftercare to children leaving care placements. Paragraph 135 of the UN Guidelines for the Alternative Care of Children stipulates that ongoing educational and vocational training opportunities should be provided to young people leaving care. Although child-headed household may not be classified as an alternative care placement, the situation of children in child-headed households may be similar to that of children in alternative care setting. It may be argued that children in child-headed households have more opportunity to exercise their independence than children in alternative care, such as foster care or residential care as the role of supervisor is less intensive than the role of foster parents or caregivers in residential care. However, in many situations, the problems faced by a ‘child’-headed household

¹⁷⁶ African Policy Forum, 2008 (as above) 85.

will not disappear simply because it is no longer classified as a ‘child’-headed household when the child heading the households turns 18. In some cases, youths over 18 years old may still be in school and may wish to pursue further education.¹⁷⁷ Therefore, the termination of support measures should be gradual to enable the smooth transition of a young head of a household from ‘childhood’ to ‘adulthood’.

(ii) Operation of supervision

Section 137(2) stipulates that, once a household is recognised as a child-headed household, the household should function under the general supervision of an adult supervisor. The supervising adult should be designated by a children’s court,¹⁷⁸ or an organ of state or an NGO determined by the provincial head of social development.¹⁷⁹ The appointment of supervisor reflects the paragraph 19 of the UN Guidelines for the Alternative Care of Children, which stipulate that children should be supported and protected by a legal guardian or other recognised responsible adult or competent public body at all times.¹⁸⁰ Paragraph 37 of the Guidelines also require state to ensure that children are protected from all forms of exploitation and abuse through appropriate measures including the appointment of a legal guardian, a recognised responsible adult, or a public body legally mandated to act as guardian.¹⁸¹

From the onset of the discussion to legally recognise child-headed households, the SALRC has endeavoured to ensure the autonomy of child-headed households.¹⁸² Part III of the National Norms and Standards on Child Protection stipulates that ‘the

¹⁷⁷ From the informal interviews with children in youth-headed households, it transpired that many of the youth heading households who are over 18 were still in school (grade 10 and 12). The interviews were conducted in Sesotho through Ms Catherine Sepato, a director of Tswaraganang orphanage (OVC Programme) in Temba, Hammanskraal. (25 June 2009). For details of the households visited, see Sec 1.6 of the study; Also see J Kuhanen *et al.*, ‘Junior-headed households as a possible strategy for coping with the growing orphan crisis in Northern Namibia’ (2008) 7/1 *African Journal of AIDS Research* 123; The similar issue has been pointed out before during the Children’s Bill Working Group workshop in 2006 where the need to support households in transition phase, households headed by youth between 18-21, is recognised. See Sec 4.4.

¹⁷⁸ Sec 137(2)(a)

¹⁷⁹ Sec 137(2)(b)

¹⁸⁰ Para 19 of the UN Guidelines for the Alternative Care of Children.

¹⁸¹ Para 37 of the UN Guidelines for the Alternative Care of Children.

¹⁸² SALRC, 2002 (n 90 above) 169.

independent functioning of a child-headed household must be promoted as far as possible'.¹⁸³ The aim of the supervision is to enhance 'the capacity of the children living in the child-headed household to function as a family'.¹⁸⁴ The maintenance of the independent functioning of the household aims to protect the children's right to family life.¹⁸⁵

While section 137(3)(a) gives a general description of the duties of a supervisor, section 50 of the Consolidated Regulations Pertaining to the Children's Act gives a more detailed list of duties, which include providing psychological, social and emotional support to the children,¹⁸⁶ ensuring the all members of the household who are by law required to attend educational institutes do so,¹⁸⁷ assisting with children with homework¹⁸⁸ and educating children about basic health and hygiene including sexually transmitted infections where appropriate.¹⁸⁹ The supporting role of the supervisor is oriented to 'enhancing the capacity of the children living in the child-headed household to function as a family.'¹⁹⁰ Therefore, the supervisor is required to perform the role that is much similar to a foster parent but with much more limited decision-making power. Section 137(6) specifically prohibits a supervisor from taking any decisions concerning a household without consulting a child-head of the household and other children in the household given the maturity and age of the children. Section 137(7) further stipulates that the child heading the household may take all day-to-day decisions concerning the household and the members of the household.

It is not clear to what extent the views and opinions of the children in child-headed households expressed during the consultation will be taken into account when the decision is made. Section 137(6) merely requires a supervisor to consult children in a

¹⁸³ Part I. National Norms and Standards for Child Protection, Annexure B, General regulations (n 111 above).

¹⁸⁴ Part I, Sec 11(a)(iii) (as above).

¹⁸⁵ As above, Part I, Sec 11(a)(ii) specifically lists the protection of the right to family life.

¹⁸⁶ Sec 50(a) of the General regulations (n 113 above)

¹⁸⁷ Sec 50(b) of the General regulations (as above).

¹⁸⁸ Sec 50(c) of the General regulations (as above).

¹⁸⁹ Sec 50(d) of the General regulations (as above).

¹⁹⁰ Sec 11(a)(iv), Part I National Norms and Standards for Child Protection.

child-headed household when making decisions concerning the household, but does not specify to what extent the decisions should reflect the opinions of the children, especially if their wishes are in conflict with that of the supervisor. Since the child heading the household may take only the ‘day-to-day’ decisions relating to the household and the children in the household, the supervisor may have the power to take decisions other than day-to-day decisions as long as children have been consulted. It may have been useful if the regulations concerning the duties of the supervising adult in relation to child-headed households or section 137 clearly specify that children’s views and opinions should be given due weight in all decision making process.

Under section 137(8), a child heading a household and, given the maturity, age and stage of development, any members of the household, could make a complaint regarding the performance of a supervisor. Nonetheless, it is not clear what actions the NGO or a state organ which designated the supervisor is required to take after the complaints are made. The regulations do not specify the procedure regarding an investigation and the disciplinary measures to be taken if the complaints were found to be valid. It can be assumed that if the complaints are valid, the supervisor would be directed to ensure that he or she adheres to the regulations. If the situation does not improve, it is only logical that the supervisor is removed and a new supervisor should be assigned to the household. However, it is not clear if the supervisor, against whom the complaints are made and found valid, would be allowed to work with other households.

Limiting the role of a supervisor also helps to minimise the potential abuse of power by a supervisor. It is particularly important as, under section 137(5)(a), a supervisor could collect and administer any grants available to the household. In order to prevent any financial fraud, section 137(5)(b) requires that a supervisor to be accountable to the organisation that designated him or her to supervise the household under section 137(2). Regulation 51 should be read together with section 137(5)(b). A supervisor or anyone who collects and administers money should develop a monthly expenditure plan, which must be signed by a child heading the household. The signed monthly expenditure plan with original documents, receipts, invoices and other relevant documents should be submitted to the NGO or the organ of state, which designated

the supervisor to the household. Under regulation 51(2), the NGO or the organ of state, which designated the supervisor, can initiate an investigation if there is any suspicion of misappropriation or maladministration of money. In cases of such financial fraud, appropriate steps should be taken, including the institution of criminal charges against the supervisor and the replacement of the supervisor.

4.4.2 Legally recognising child-headed households: Adopting a rights-based approach

In the following section, the analysis focuses on the adequacy of the protection provided to children in child-headed households in the South African legal framework. The provisions, which protect the rights of children in child-headed households, are analysed from a rights-based approach. In addition to analysing relevant legal and regulatory provisions, the section also contains information extracted from informal interviews with social workers in Hammanskraal, a director of the Tswaraganang Orphanage in Temba, Hammanskraal and children living in youth-headed households in Temba.¹⁹¹ The informal interview with relevant professionals and children provides valuable information on the reality on the ground. It also serves as an important tool to assess the effectiveness of legal provisions.

As well as section 137(2), which prescribes the supervision for child-headed households, Part III of the National Norms and Standards on Child Protection provides a detailed guideline on the support and protection of children in child-headed households. The provisions in Part III and other protective measures are compartmentalised into five main thematic areas: the best interests of the child; children's participation; non-discrimination; survival and development of the child; and monitoring and evaluation.

¹⁹¹ The term, 'youth headed-household' is used to describe those households visited because the head of the households are over 18 years. All the households visited stayed as a child-headed household for several years until the eldest sibling turned 18 years.

(i) *Best interests of the child*

In South African jurisprudence, ‘the best interest of the child’ has occupied an important position. Section 28(2) of the Constitution requires that the best interests of the child to be given the paramount importance in all matters affecting the child. Therefore, the courts are obliged to consider the effects their decisions will have on the rights and interests of the child.¹⁹² There is rich jurisprudence exploring the best interests of the child in South Africa.¹⁹³ Importantly, the need to consider individual circumstances of the children when determining the best interests of the child has been emphasised in several judgments.¹⁹⁴

The concept of ‘best interests of the child’ has also been frequently mentioned throughout the Children’s Act. For instance, as mentioned briefly in section 4.4.1, the principle of the best interests of the child is one of the criteria based on which a household would be assessed to qualify as a child-headed household in South Africa.¹⁹⁵ The best interests of the child is determining factor in adoption matters.¹⁹⁶ Moreover, section 9 of the Children’s Act clearly states that ‘all matters concerning the care, protection and well-being of a child, the standard that the child’s best interests is of paramount importance, and must be applied’. However, determining the best interests of the child is a complex issue. Section 7 of the Children’s Act provides a comprehensive list of points to be considered whenever the best interests of the child should be applied in the Children’s Act. Yet, the issue of whose interests may be prioritised remains. The criteria listed in section 7 have more relevance in assessing the needs and interests of younger children than the needs and interests of the older child whose long-term interests and needs could be affected by the responsibilities as a head of a household. For instance, many criteria, such as the capacity of the caregiver to provide for the needs of the child, including emotional and intellectual

¹⁹² *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development for Others*, CCT 36/08, 2009 (7) BCLR 367 (CC) para 74.

¹⁹³ For instance, *The Director of Public Prosecutions* (as above); *The Fitzpatrick* case (n 83 above); *AD and Another* (n 146 above); *M v S* 2007 (12) BLCR 1312 (CC).

¹⁹⁴ *The Fitzpatrick* (n 83 above) para 18; *The AD and Another* (n 148 above) para 12; A Friedman & A Pantazis, 2002 (n 47 above) 47-35.

¹⁹⁵ Sec 137(1)(d) of the Children’s Act.

¹⁹⁶ Sec 230(1)(a) and 261(5)(a) of the Children’s Act.

needs,¹⁹⁷ the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from their family members or care-giver,¹⁹⁸ the need for the child to remain in the care of his or her family and the need for the child to maintain a connection with his or her family, extended family, culture or tradition¹⁹⁹ might reflect the emotional needs of younger children than older children who interests might be more geared towards the opportunity to continue with education and to develop intellectually and professionally.

The principle of the best interests of the child is an elusive concept. As discussed in section 3.3.6, the interests can be categorised as immediate interests and future-oriented interests.²⁰⁰ It is difficult to argue which set of interests should be given a priority. There might even be a case where a balance needs to be found between immediate interests of younger children, such as emotional security, and future-oriented interests of elder children, such as educational opportunities. It should be noted that the best interests criteria can be used to determine the ambit of another right or the rights of others.²⁰¹ The best interests of one child may be validly limited by the competing interest of another child. As Fridman and Pantazis pointed out, the Constitution states that the best interests of the child are of 'paramount importance', not that they are 'paramount'.²⁰² The measures to support children in child-headed households should be designed to meet both sets of interests of children. The rights and interests of children heading households should not be unreasonably compromised due to their responsibilities as a primary caregiver to their younger siblings, and perhaps, to their ailing parents. The court should assess the best interests of the child on a case-by-case basis giving equal weight to the interests of all children in a household.²⁰³

¹⁹⁷ Sec 7(1)(c) of the Children's Act.

¹⁹⁸ Sec 7(1)(d) of the Children's Act.

¹⁹⁹ Sec 7(1)(f) of the Children's Act.

²⁰⁰ M Freeman, *A commentary on the United Nations Convention on the Rights of the Child, article 3: the best interests of the child*, Martinus Nijhoff (2007) 3.

²⁰¹ A Friedman & A Pantazis, 2002 (n 47 above) 47-34.

²⁰² A Friedman & A Pantazis, 2002 (n 47 above) 47-35.

²⁰³ Para 6 of the UN Guidelines for the Alternative Care of Children also stipulate that the best interests of the child to be considered an individual case by case basis.

(ii) Child participation

The principle of child participation is not only one of the fundamental principles of the CRC but one of the most important rights of children. As discussed in section 3.3.6, the right to participate in decision making processes that affect their lives enables children to actively assert their rights. The right to participate, to be heard and to have their opinions given due weight is one of the most important rights for children in child-headed households. As mentioned in section 4.4.1(ii), the intention of legally recognising child-headed households is to protect and assist such households to function independently as a family. The purpose of limiting the role of a supervisor and legally protecting the right of a child heading a household to make day to day decisions is based on the notion that the autonomy of child-headed households should be preserved. In order for a child-headed household to function independently, children's right to participate in the running of the household and make decisions affecting them is vital.

The National Norms and Standards on child-headed households endeavour to ensure and encourage all children in the child-headed household to participate in running of the household and benefit equally from the available resources. Section 11(g) of the National Norms and Standards on child protection specifically requires that all children living in the households should participate in matters affecting the functioning of the household. It also requires a social worker to consult child-headed households in any investigation under sections 150(2) and 150(3) of the Act.²⁰⁴ Section 11(b)(v) of the National Norms and Standards requires that the 'culture, spirit, dignity, individuality, language and development of each child' living in the household should be respected and promoted and section 11(b)(vi) ensures that available resources should be used equitably to promote wellbeing of all children in the household. These provisions may be more important when the child-headed household includes members who are not siblings or blood-related.

²⁰⁴ Sec 150(2) and (3) of the Children's Act concerned investigation to determine if a child is in need of care and protection.

Other important sections in the Children’s Act, which aim to enhance children’s decision-making power and autonomy, are sections 129, 130 and 134. Section 129 allows a child who is 12 years of age or older²⁰⁵ or under 12 years of age and is of sufficient maturity²⁰⁶ to give consent to medical treatment and surgical operation. Section 130 allows a child who is 12 of age or older or under 12 years of age²⁰⁷ and is of sufficient maturity to understand the implication of HIV testing²⁰⁸ to give consent to be tested. Section 134 allows children to obtain contraceptives under prescribed conditions, such as age and maturity of the child.²⁰⁹ Although these sections are applicable to all children whether they are in child-headed households or not, these are particularly important provisions for children in child-headed households. As discussed in chapter 2 and section 4.2, the emergence of child-headed households cannot be understood out of the context of HIV. In section 4.2, there is a high concentration of child-headed households in provinces which have the highest HIV prevalence in South Africa. Children in child-headed households are often directly affected by HIV or live in communities, which have high HIV prevalence. Legally enabling children to give consent to an HIV test, medical treatment or to provide access to contraceptives could potentially allow children in child-headed households to make life-altering decisions regarding their health and long-term future.

(iii) *Non-discrimination*

The general aspects of the right to non-discrimination have been explored in section 3.3.6. South Africa does not only have an obligation to realise the right of non-discrimination under international human rights instruments, but it also has a constitutional obligation to respect, promote and fulfil the right of non-discrimination of all children.

Section 9 of the Constitution protects the right to equality and non-discrimination. It is noteworthy that section 9(3) includes ‘age’ as one of the grounds on which a person

²⁰⁵ Sec 129(2)(a) and 129(2)(b) of the Children’s Act.

²⁰⁶ Sec 129(2)(b) & 129(3)(b) of the Children’s Act.

²⁰⁷ Sec 130(2)(a)(i) of the Children’s Act.

²⁰⁸ Sec 130(2)(a)(ii) of the Children’s Act.

²⁰⁹ Sec 134(1)(b), 134(2)(a), 134(2)(b) & 134(2)(c) of the Children’s Act.

should not be discriminated against. The principle of non-discrimination is emphasised throughout the Children's Act. Section 6(2)(d) of the Children's Act protects a child from unfair discrimination based on any ground. Apart from the general non-discrimination clause, section 137(9) prohibits excluding child-headed households from accessing any grants, social assistance and programmes on the ground that the household is headed by a child.

The right of non-discrimination is extremely important for all children, and in particular, for children in child-headed households. The importance of implementing the measures to protection children from discrimination is also stipulated in paragraph 10 of the UN Guidelines for the Alternative Care of Children. Paragraph 10 specifically requires states to make special efforts to tackle discrimination on the basis of any status of the child or parents, including HIV and AIDS or other serious illnesses. The right of non-discrimination is, as Abramson describes, an 'umbrella right', which protects the realisation of all the other rights.²¹⁰ As such, the right of non-discrimination works in conjunction with other rights.²¹¹ State obligation under the right of non-discrimination is two-fold. Taking children in child-headed households as an example, states are prohibited from making any discriminatory laws and policies, either directly or indirectly, preventing children in child-headed households from enjoying their rights. For instance, any laws or policies, which prohibit those children from accessing social services, including health and educational services, are contrary to the right to non-discrimination. Also, states are prohibited from making any laws or policies, albeit 'facially-neutral', that negatively affect children in child-headed households.²¹² Abramson used the literacy test imposed in certain part of the United States of America to deprive African-Americans from their right to vote and political participation.²¹³ With regards to children in child-headed households, a law or policy requiring an adult legal guardian to be presented before a child can be admitted to a school or receive health care would be 'facially-

²¹⁰ B Abramson, *A commentary on the United Nations Convention on the Rights of the Child, article 2: right on non-discrimination*, Martinus Nijhoff (2008) para 14.

²¹¹ B Abramson, 2008 (as above) para 67.

²¹² The expression, 'facially-neutral' has been taken from B Abramson, 2008 (as above) para 99.

²¹³ B Abramson, 2008 (n 207 above) para 100.

neutral' but discriminatory as such requirement could greatly hinder children in child-headed households to access education and health services. .

To implement fully the right to non-discrimination is complicated. Particularly, where a child-headed household is affected by HIV, for instance a member or members of a child-headed household are living with HIV, the complexity of fully implementing the right to non-discrimination increases. A study by Deacon and Stephney illustrated that children who are orphaned by AIDS-related illnesses experience stigma and discrimination based on one's actual or perceived HIV status.²¹⁴ The link between stigma and discrimination is hard to define. Stigma has been often linked to discrimination since the main problem of stigmatisation is that it could lead to unfair discrimination.²¹⁵ However, the link is subtle and hard to address because not all stigmatising beliefs lead to actual discrimination.²¹⁶ Although stigma may not necessarily lead to actual discrimination, the stigma attached to HIV and AIDS has negative effects on all who are affected, including children.²¹⁷ Stigmatised children may withdraw from social encounters exacerbating their social marginalisation.²¹⁸

Actual discrimination is easier to address than stigmatisation through laws or policies that prohibit discrimination. However, stigmatisation based on false beliefs or ignorance cannot be addressed adequately through laws or policies unless education or campaigns to address the root causes of the stigma are implemented concurrently. It is commendable that the right of non-discrimination is firmly established in the legal framework to protect children in child-headed households. However, it should be noted that to achieve the aim of non-discrimination and enable children to benefit from basic social services, the measures should also address subtle stigmatisation of child-headed households and HIV. Therefore, active public campaigns and education of relevant professionals, such as health care providers, teachers and grant officers to tackle stigma attached to child-headed households would be an another important

²¹⁴ H Deacon & I Stephney, *HIV/AIDS, stigma, children: a literature review*, Human Science Research Council (2007).

²¹⁵ H Deacon & I Stephney, 2007 (as above) 5.

²¹⁶ As above 5.

²¹⁷ As above 6.

²¹⁸ As above 6.

means to achieve the right to non-discrimination of children living in child-headed households.

(iv) *Right to survival and development*

As mentioned in chapter 3, the right to survival and development is a complex concept. Together with the right of non-discrimination, the right to survival and development can be seen as an umbrella right which encompasses various rights, including but not limited to the right to education or the right to an adequate standard of living. The purpose of the section is not to delve into the concept of the right to survival and development since the concept has been discussed in the previous chapter. In the following section, several rights that have implications for the realisation of the right to survival and development are discussed. The rights discussed include: the right to property; the right to education; and the right to basic nutrition, shelter, basic health care services and social services; and the right to be protected from exploitation and child labour; and the right to play and leisure.²¹⁹

Right to property

‘Property grabbing’ against children in child-headed households has been reported in various documents.²²⁰ In a study by Munthali and Ali, it is for example reported that the right to property is one of the most violated rights of children in Malawi.²²¹ In a report on orphans and vulnerable children in Botswana, it is also reported that the property grabbing against children is one of the major problems.²²² In the report, the need to put in place measures to protect the property rights of children and to

²¹⁹ The right to survival and development encompasses a wide range of rights. To mention all the rights in detail would be out of the scope of the study. The three rights above are selected because those rights are deemed essential and also the CRC Committee has repeatedly emphasised the importance of those rights in its General Comment No 3 on HIV/AIDS and the rights of the child. See the CRC General Comment No 3 HIV/AIDS and the Rights of the Child, CRC/GC/2003/3, paras 31 & 32.

²²⁰ See A Munthali & S Ali, *Adaptive strategies and coping mechanisms: the effect of HIV/AIDS on the informal social security system*, National Economic Council, Malawi (June, 2000) xviii; G N Tsheko *et al.*, *A census of orphans and vulnerable children in two villages in Botswana*, Human Science Research Council (2006) 16 & 17; L Richter *et al.*, *Family and community interventions for children affected by AIDS*, Human Science Research Council (2004).

²²¹ A Munthali & S Ali, 2000 (as above).

²²² G N Tsheko *et al.*, 2006 (n 217 above) 16 & 17.

encourage parents to make wills so that the property can be legally protected is mentioned.²²³

Although a report on orphans and vulnerable children in two communities in South Africa indicates that property grabbing is not very common, the analysis of the report suggests that, depending on the area, the level of protection of property rights of children differs.²²⁴ For instance, the report points out that in Kanana, a densely-populated township in a mining area in North-West province, 18 per cent of child-headed households lost their property, while in Kopanong municipality, a sparsely-populated farming area in southern Free State, only five per cent of child-headed households reported to have lost their property.²²⁵ However, obtaining accurate figures on the issue is difficult and there is a danger that the figures are underestimated due to the under-reporting.

Section 11(d) of the National Norms and Standards on child-headed households protects children's right to property by providing that children living in child-headed households should be able to assume full responsibility for any property belonging to the household. Furthermore, children in child-headed households should be assisted to maintain and preserve, or dispose of or preserve the property as they wish. However, it is not clear who has the duty to assist the children in their endeavour to preserve and maintain their property. It can be assumed that it is a duty of the supervising adult, but the duty to assist in such cases is not clearly listed in section 50 of the Consolidated regulations. The insertion of the protection of children's property rights in the National Norms and Standards is highly commendable. Nonetheless, it would have rendered stronger protection if the children's property rights were safeguarded under section 137 of the Children's Act.

²²³ As above 66.

²²⁴ S Jooste *et al.*, *A Census of orphans and vulnerable children in two South African communities*, Human Science Research Council (2006) 30 & 19.

²²⁵ As above 30 & 19. However, the validity of the information can be questionable as the information was not obtained from children in child-headed households. See S Jooste *et al.*, 2006 (as above) 30.

Right to education

As mentioned in section 4.2, children in South Africa have a constitutional right to education. The importance of the right to education is that the right to education is an enabling right. Education empowers the children to make their life choices based on their interests and wishes. The importance of education in the present and future of children cannot be exaggerated. For instance, the link between poverty and the lack of education is undeniable. In a study by Armstrong *et al*, it has been reported that, while 41.7 per cent of the whole population of South Africa were living in poverty, the rate of poverty was 66.3 per cent among people who had no schooling.²²⁶ Such data shows, children who are educated will have more opportunity to escape poverty and make an adequate living for themselves and for their future families. Unfortunately, as highlighted in the earlier part of the section, the difficulty of children in child-headed households to continue with their education is cited in various reports.²²⁷

Under section 11(c)(4) of the National Norms and Standards, children in child-headed households who are at a school-going age should attend school regularly and are entitled to any necessary assistance to enable them to access education. Furthermore, section 51 of the Consolidated regulations requires that the supervisor to ensure that any child who is legally required to attend school receive education. Under section 5(3)(a) of the South African Schools Act, the inability to pay for the school fees should not be a ground for non-admission. However, Davids and Skinner reported that, although children who have been orphaned are entitled to an exemption from paying school fees, many principles insist on orphaned children to pay for the fees.²²⁸ Furthermore, other school requirements, such as uniforms and the lack of stationery, cause children to leave school.²²⁹

²²⁶ P Armstrong *et al.*, 2008 (n 13 above) 19.

²²⁷ A Davids & D Skinner, (eds), *Situational analysis of the socio-economic conditions of OVC in four districts in South Africa*, Human Science Research Council (2005) 71; G N Tshoko *et al.*, 2006 (n 215 above). 27.

²²⁸ A Davids & D Skinner, 2005 (as above) 71.

²²⁹ Plessis and Conley reported that despite section 5 of the South African Schools Act, some children are abused to pay the school fees. In some cases, the school demands a special customized tracksuit, which children cannot afford. See P Plessis & L Conley, 'Children and poverty in South Africa: The right to social security' (2007) 2/4 *Educational Research and Review* 55.

Sections 3(5)(a) and 3(5)(b) of the South African Schools Act stipulate that if a learner, who is subject to compulsory attendance under section 3(1) of the Act, has failed to enrol in or attend school, a head of department *may* investigate the circumstances of the learner and take appropriate measures to remedy the situation.²³⁰ The South African Schools Act Amendment Bill²³¹ attempts to replace section 3(5)(1) of the South African Schools Act and stipulates that ‘if a learner who is subject to compulsory attendance in terms of subsection (1) is not enrolled or failed to attend a school, a head of department *must*’ investigate the situation and take appropriate measures to enable the learner to continue with the education.²³² The change of the wording of section 3(5)(1) is a positive development as it provides stronger protection to children who are in danger of dropping out of school.

Another interesting point from the study by Armstrong *et al.* is that the rate of poverty between people who completed matriculation and who had not differed greatly. While 23.2 per cent of people who had matriculation were living in poverty, the rate of poverty among people with no matriculation was 44.9 per cent.²³³ Especially, the poverty rate dropped to 4.6 per cent among people who had matriculation and an additional certificate or diploma.²³⁴ What this data shows is that although children are allowed to leave school after completing grade 9 or at age of 15, whichever comes first, children should be encouraged and supported to carry on further education if they wish and academically able to do so. It is particular important that children in child-headed households are supported and encouraged to stay in education despite they are legally able to leave schools.

It should be borne in mind that, often, the assistance required for the children in child-headed households to remain in education goes beyond the financial. Children, especially older children in the household, may be required to provide intensive care

²³⁰ The emphasis is mine.

²³¹ South African Schools Act Amendment Bill, a private members’ bill, submitted under section 73(2) of the Constitution, available at: http://www.da.org.za/docs/569/gettingbasicsright_PMB.pdf [accessed: 8 January 2010].

²³² Sec 3(5)(1) of South African Schools Act Amendment Bill.

²³³ As above 19.

²³⁴ As above 19.

to their ailing parents or relatives. The household may contain very young children who need to be under constant supervision. The measures of the assistance under section 3(5)(1) should go beyond the exemption of fees. The measures should be devised after a thorough assessment of the situation of the households to meet the particular needs of each household. Fortunately, chapter 5 of the Children's Act provides for partial care, which is defined as 'care of more than six children on behalf of their parents or care-givers during specific hours of the day or night, or for a temporary period, by agreement between the parents or care-givers and the provider of the service'.²³⁵ If properly implemented, partial care facilities, such as crèches, education centres and after-school centres, can lessen the burden of care on the child heading the household.

*Right to basic nutrition, shelter, basic health care services and social services*²³⁶

The right to basic nutrition, shelter, basic healthcare services and social services is protected under section 28(1)(c) of the South African Constitution. As discussed in section 4.2, in the *Grootboom* case, the Constitutional Court held that section 28(1)(c) does not create a separate right for children. Nevertheless, in case of children who are deprived of their parental and family care, or whose parents or other care-givers are unable to provide adequate care to the children, the State assumes a direct responsibility to realise section 28(1)(c) for the children or assist parents or adult caregivers to enable them to realise section 28(1)(c) for their children.²³⁷ In case of children in child-headed households, the state should assume a direct and immediate responsibility to provide for the children as they are deprived of their parental care.²³⁸

Section 137(5)(a) mandates a child heading a household or a designated supervisor of such household to collect and administer any grants that are available to the household

²³⁵ Sec 76 of the Children's Act.

²³⁶ All rights are inter-linked and inter-dependent. Yet, the right to basic nutrition, shelter, basic health care services and social services is particularly linked to the right to be protected from child-labour, which is discussed in the following section. Although the two rights are discussed separately, the inter-dependency of these rights has been emphasised throughout the section.

²³⁷ P Proudlock, 'Children's socio-economic rights: do they have a right to special protection?' (2002) 3/2 *ESR Review* 6-7.

²³⁸ L Stewart, 2008 (n 44 above) 478. Stewart argued that children without parents and children in extreme poverty may have a direct and immediate claim to socio-economic rights.

under the Social Assistance Act.²³⁹ Under the Social Assistance Act, there are three main grants: the child support grant, the foster child grant and the child dependency grant.

The child support grant, which is means tested, is currently available to a primary care-giver of a child who is born after 31 December 1993.²⁴⁰ The definition of primary caregiver is defined as ‘a person older than 16 years, whether or not related to the child, who takes primary responsibility for meeting the daily care needs of the child’.²⁴¹ Therefore, the primary care-giver does not need to be parents of the child. The factual assessment of determination of a ‘primary caregiver’ is based on the premise that the ‘grant should follow the child’.²⁴² By the definition, a child heading a household and providing care to younger children in the household is entitled to apply for a grant for the children. Currently, the amount of a child support grant is R250 per month.²⁴³

The foster child grant is available to a foster parent who is providing care to a child aged between 0 to 18 years who is in need of care and protection.²⁴⁴ To access the foster child grant, the applicant needs to be appointed as a foster parent by a children’s court. The foster child grant is renewed on the expiry of the court order, which is currently every two years. The Social Assistance Act or the Children’s Act does not specify the age at which one can apply to be a foster parent. However, considering that the lower age limit for adoption is 18 years, it can be assumed that a person over 18 years of age would be eligible to apply to be a foster parent. The amount for a foster child grant is R720 per month.²⁴⁵

²³⁹ Social Assistance Act No 14 of 2004.

²⁴⁰ Information available at: <http://www.services.gov.za/ServicesForPeople/Socialbenefits/childsupportgrant.aspx?Language=en-ZA> [accessed: 22 June 2010].

²⁴¹ Chapter 1 of the Social Assistance Act.

²⁴² J D Triegaardt, ‘The child support grant in South Africa: a social policy for poverty alleviation?’ (2005) 14/4 *International Journal of Social Welfare* 251; However, the primary care-giver cannot apply for the grant for more than six children who are not his or her biological or legally adopted children.

²⁴³ SASSA (n 237 above).

²⁴⁴ Sec 8 of the Social Assistance Act.

²⁴⁵ SASSA (n 237 above).

The care dependency grant is available to a parent, primary caregiver, or a foster parent who is caring for a child aged between 0 to 18 years ‘who requires or receives permanent care or support services due to his or her physical and mental disability’.²⁴⁶ Although the grant is means tested, a foster parent is exempt from the test.²⁴⁷ The amount for a care dependency grant is R1 080 per month.²⁴⁸

Children heading a household will be eligible to apply for child support grants for their siblings provided that other requirements are met. If a child under the care of a child heading a household requires permanent care and support services due to the physical or mental disabilities as envisioned in section 7 of the Social Assistance Act, the child-head of the household should be eligible to apply for the care dependency grant. It should be noted that child support grants cannot be converted to foster child grants without a court order. Therefore, if a child-heading a household turns 18, he or she could apply to be a foster parent to younger siblings and once approved, can apply for foster child grant.

Section 137(9) ensures that a child-headed household will not be excluded from ‘any grant, subsidy, aid, relief or other assistance or programmes provided by an organ of state in the national, provincial or local sphere of government solely by reason of the fact that the household is headed by a child’. This is an important inclusion as a number of reports indicate that despite the Social Assistance Act, which enables a primary caregiver over 16 years old to apply for child support grants, in some cases, a child caregiver has difficulty assessing the grants.²⁴⁹

Rosa pointed out that despite the laws allowing children over 16 to access grants, children living in child-headed households face difficulties in securing financial support, in the form of the child support grant, from the government for two reasons: 1) the administrative identification requirements placed on the applicant to prove that he or she is a ‘primary caregiver’ to other children; and 2) the lack of political will to

²⁴⁶ Sec 7 of the Social Assistance Act.

²⁴⁷ SASSA (n 237 above).

²⁴⁸ As above.

²⁴⁹ S Rosa, *Counting on children: realising the right to social assistance for child-headed households in South Africa*, Children’s Institute, University of Cape Town (2004) 4.

give grants directly to the children.²⁵⁰ For a primary caregiver who is not a parent of the child to apply for a child support grant, a letter or affidavit from either of the parents confirming that the applicant is a primary caregiver of the child or, if the parents are dead or missing, a death certificate of the parents or proof that the father or mother is missing, such as a missing person's report from the police and sworn statements from the applicant and another family member are required.²⁵¹ The applicants who do not have such documents could still apply for the grant if they can submit following documents: 1) an affidavit commissioned by a justice of the peace; 2) a sworn statement by a reputable person who knows the applicant and the child; 3) proof that application for a birth certificate or ID document has been lodged with the Department of Home Affairs; 4) where appropriate, a temporary ID issued by the Department of Home Affairs; 5) a baptismal certificate; 6) a Road to Health Clinic card; and 7) a school report.²⁵² However, various reports noted the difficulty of obtaining appropriate documents from government departments and 'uncooperative relatives'.²⁵³

Another difficulty of accessing child support grant is the difficulty of obtaining basic documents such as birth certificate of the children. It may be particularly difficult for children living in remote areas where due to the distance and lack of public transportation accessing relevant government offices is difficult. However, in 2008, the Alliance for Children's Entitlement successfully challenged the documentation requirement in the High Court and it was held that alternative forms of identification should be accepted where birth certificate or identity documents are lacking.²⁵⁴

²⁵⁰ S Rosa, 2004 (as above) 4.

²⁵¹ Information available at: <http://www.paralegaladvice.org.za/docs/chap09/03.html> [accessed: 16 August 2009].

²⁵² The information available at: <http://www.services.gov.za/ServicesForPeople/Socialbenefits/socialservices/childsupportgrant.aspx?Language=en-ZA> [accessed: 29 July 2009].

²⁵³ A Delany *et al.*, *Review of the Child Support Grant: Uses, Implementation and Obstacles*, Community Agency for Social Enquiry (June 2008) 56; D Skinner & A Davids (eds), *Multiple vulnerabilities: qualitative data for the study of orphans and vulnerable children in South Africa*, Human Science Research Council (2006) 29 & 71; also see A Davids & D Skinner, 2005 (n 224 above).

²⁵⁴ See G Mirugi-Mukundi, *Realising the social security rights for children of South Africa, with particular reference to the child support grant*, Community Law Centre (2009).

Also see
<http://access.org.za/home/images/stories/3%20projects%20and%20campaigns/4%20challenging>

Through the personal informal interviews with children in youth-headed households, it has transpired that the children in the interviewed households faced difficulties accessing grants.²⁵⁵ All the households interviewed had not been able to access grants, although all the necessary documents had been submitted.

In Household A, three youths aged, 14, 18 and 20 were looking after each other after their parents' death in 2006. The eldest has been trying to access a foster child grant since 2006, but has not been successful. The reason for applying for a foster child grant rather than a child support grant, which is much faster to access, was the higher amount of the foster child grant compared to the child support grant.

In household B, three siblings have been living in child-headed households after their parents passed away in 2002. The eldest youth was 14 years old. He has been looking after his two younger sisters (then 11 and 12 years old respectively). However, he has not been successful in accessing grants for his siblings.

In Household C, a 22 year-old youth was looking after his two younger sisters, 5 and 12 years respectively. He has been looking after his sisters since 2004. He was not receiving any grants for his sisters.

In Household D, a 24-year old youth was looking after 11 children. She has been looking after the children since her grandmother passed away in 2006. Her late grandmother had been receiving foster child grants for the children, but it was not clear if she had been receiving the grants for all the children. After the death of her grandmother, the grants ceased. She has been trying to access foster child grants for the children since 2006, but she has not been informed of the progress of her application. However, she was receiving child support grants for her two young children.

[%20barriers%20to%20service%20delivery/1%20Enabling%20documents%20campaign/6%20litigation%20-%20court%20papers/Paper-Chase-Court-Order.pdf](#) [accessed: 22 June 2010].

²⁵⁵ Informal interviews were held with children in five youth-headed households. The interviews were conducted in Sesotho through Ms Catherine Sepato, a director of Tswaraganang orphanage (OVC Programme) in Temba, Hammanskraal. (25 June 2009) For more details on the interview and households visited, see Sec 1.6 Methodology.

From the discussions, it has transpired that accessing a foster child grant was a big challenge. Many considered the lack of social workers as one of the reasons for the delay. Social workers in Moretele Sunrise Hospice reported the heavy workload as one of the biggest challenges. The two of the social workers interviewed were in charge of 405 families.²⁵⁶

In addition to the difficulty of accessing grants, the small amount of the child-support grant is also problematic. According to a report published by National Statistics South Africa in 2007, in 2006 prices, an individual would need R431 per month to purchase essential food and non-food items.²⁵⁷ Considering 6.9 per cent inflation on consumer prices, in 2009 prices, R526 would be required to purchase essential food and non-food items.²⁵⁸ The current amount for the child support grant covers only about 50 per cent of the cost of purchasing essential food and non-food items.

It can be argued that the child support grant was not intended to *eliminate* poverty, but to *alleviate* poverty.²⁵⁹ However, for children in child-headed households, a child support grant may be the only source of income. One can also argue that, considering the rate of unemployment in South Africa, for many households, whether it is headed by a child or not, a child support grant or old age pension is the main source of income. Nevertheless, the difference between the household headed by an unemployed adult and a child-headed household is the very fact that a child-headed household is headed by a child whose rights as a child should be respected as much as possible. Adults heading households are expected to work full-time when jobs become available. However, as discussed above, for a long-term benefit of children, children should be encouraged and supported to remain in education regardless of the law allowing them to leave school at age 15. Adequate grants and an increased access

²⁵⁶ However, the social workers interviewed stated that if all the necessary documents were submitted, the procedure to receive a foster child grant should take three months.

²⁵⁷ *A National Poverty Line for South Africa*, Statistics South Africa, National Treasury (21 February 2007) 8.

²⁵⁸ The rate of inflation on consumer prices is available at: [http://www.indexmundi.com/south_africa/inflation_rate_\(consumer_prices\).html](http://www.indexmundi.com/south_africa/inflation_rate_(consumer_prices).html) [accessed: 18 August 2009].

²⁵⁹ H Meintjes *et al.*, 2003 (n 128 above) 4.

to free education may be the two most important measures, which could protect children from exploitation and child labour.

Right to be protected from exploitation and child labour

As mentioned in the earlier section, children over 15 years of age can be legally employed. However, children between the age of 15 and 18 have the right to be protected from having to perform work or services that are detrimental to their wellbeing and development.²⁶⁰ It should be clearly noted that not all work performed by children between age 15 and 18 is defined as child labour. Child labour is a labour practices that is exploitative and harmful to developmental and safety needs of children. Articles 32 of the CRC and 15 of the ACRWC do not define ‘child labour’. Nevertheless, both articles prohibit ‘economic exploitation’ of children and ‘any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.’²⁶¹ They further require states to develop a legal framework to determine minimum wage for admission to every employment, and provide for appropriate regulation for hours and conditions of work.²⁶²

In South Africa, there are well-developed legal and policy frameworks protecting children from engaging in child labour. Section 28(1)(e) of the South African Constitution protects children from exploitive labour practices and section 28(1)(f)(i) prohibits children from being employed to perform work or services that are inappropriate for the age²⁶³ and at places at risk the child's wellbeing, education, physical or mental health, or spiritual, moral or social development.²⁶⁴

Although section 28(1)(f) of the Constitution does not specify which type of work may constitute inappropriate for children, article 3 of the International Labour

²⁶⁰ Art 32 of the CRC; Art 15 of the ACRWC; Sec 43(2) of the Basic Conditions of Employment Act.

²⁶¹ Art 32(1) of the CRC & Art 15(1) of the ACRWC.

²⁶² Art 32(2)(a) & 32(2)(b) of the CRC; Art 15(2)(a) & 15(2)(b).

²⁶³ Sec 28(1)(f)(i).

²⁶⁴ Sec 28(1)(f)(ii).

Organisation Convention on the Worst Form of Child Labour 1999, which South Africa is also a party,²⁶⁵ provides detailed examples of the line of work for which children should not be employed. Under article 3, the worst form of child labour includes; 1) slavery or practices similar to slavery; 2) any work or activity related to sexual exploitation of children, such as child prostitution or pornography; 3) any illegal activities such as drug trafficking; and 4) work that is likely to harm the health, safety or morals of children.²⁶⁶ Section 141 of the Children's Act further protects children against the similarly worded type of exploitative and harmful labour practices. Section 11(e)(i) of the National Norms and Standards states that children in child-headed households should not be exposed to harmful or hazardous labour practices. However, despite the legal and policy frameworks to protect children from harmful and hazardous child labour, a study of the International Labour Organisation on child labour in South Africa pointed out that South Africa had one of the highest numbers of children engaged in child labour in Africa.²⁶⁷

Furthermore, the study, which was conducted in KwaZulu-Natal, showed the undeniable link between poverty and child labour.²⁶⁸ The main reason for children engaged in various work and services was the need to supplement the family income due to unemployment or illness of their parents.²⁶⁹ In some cases, children were heading the households and reported having to cater for their younger siblings without external support.²⁷⁰ Undoubtedly, prostitution, domestic labour and farm labour are some of the examples of the worst form of child labour.²⁷¹ Alarming, nearly 50 per cent of the girl children interviewed were engaged in either prostitution or working as

²⁶⁵ South Africa ratified the 1999 ILO Convention in 2000 and it came into force in June 2001.

²⁶⁶ Art 3 of the Convention concerning Prohibition and Immediate Action for the Elimination of the Worst Form of Child Labour, C182 ILO (1999). South Africa has ratified the Convention on 7 June 2000.

²⁶⁷ A Mturi & N Nzimande, *HIV/AIDS and Child Labour in South Africa: a rapid assessment the case of KwaZulu-Natal*, Study No 4, ILO (2003) 4.

²⁶⁸ A Mturi & N Nzimande, 2003 (as above) 15; A Friedman & A Pantazis, 2002 (n 47 above) 47-21.

²⁶⁹ As above 15.

²⁷⁰ As above 16.

²⁷¹ As above 39.

domestic labourers.²⁷² For boys, the majority of them were engaged in miscellaneous works, street vendors, car attendants and trolley attendants.²⁷³

Children, regardless of their age, should be protected from such hazardous forms of child labour. Commendably, South Africa has developed the Regulations on hazardous work done by children under the basic Conditions of Employment Act.²⁷⁴ The Regulations prohibit children under 15 or who is receiving compulsory schooling from working while setting out protective measures for children over 15 or who are not receiving compulsory schooling. The Regulation also provides the list of economic activities that constitute worst form of child labour.

The ILO Worst Form of Child Labour Recommendation recommends that programmes to eliminate child labour under the Convention on the Worst Form of Child Labour should aim, among other things, to give special attention to children with special vulnerabilities and needs.²⁷⁵ Children in child-headed households are ‘children with special vulnerabilities’ and needs. The Government of South Africa should urgently strengthen labour laws to protect working children. Furthermore, special attention should be given to economic needs of children in child-headed households to prevent them from being forced into hazardous forms of child labour.

Considering the strong link between poverty and child labour, the adequacy of grants and other supports to children in child-headed households should be urgently addressed.²⁷⁶ As Sloth-Nielsen pointed out, ‘given the especially vulnerable position of children in child-headed households, the state has a primary responsibility to provide immediate and direct assistance to such children to ensure their continued survival and development’.²⁷⁷ The important point is that such assistance should be

²⁷² As above 24.

²⁷³ As above 24.

²⁷⁴ Regulations on the health and safety of children at work and on hazardous work by children, Department of Labour, South Africa (July 2010).

²⁷⁵ Sec 2(c)iv of the Worst Form of Child Labour Recommendations, R190 International Labour Organisation, 1999.

²⁷⁶ A Friedman & A Pantazis, 2002 (n 47 above) 47-22.

²⁷⁷ J Sloth-Nielsen, ‘Too little, too late: provisioning for children in child-headed households’ (2002) 3/1 *ESR Review* 31.

adequate to ensure not only ‘survival’, but also ‘development’ of the children. Considering the level of vulnerability children in child-headed households face, it seems reasonable to argue that the government has a responsibility to prioritise the most vulnerable group in society to ensure that the right to basic nutrition, shelter, basic health care and social services is realised.²⁷⁸

Right to leisure, play and culture

Children’s right to leisure, play and culture is protected under article 31 of the CRC and article 12 of the ACRWC. Play and leisure are fundamental aspects of childhood. However, the importance of the right is often underestimated.²⁷⁹ The importance of the right to leisure and play, particularly for children in child-headed households, becomes clear when it is considered in relation to other relevant rights, such as article 32, which in limited conditions, allows children under 18 to work.²⁸⁰ Reading two articles together, the right to leisure and play protects children in child-headed households, particularly the child heading household, from long hours of work, either paid or unpaid.

As Sloth-Nielsen pointed out, one of the dangers of legally recognising child-headed households is that it could legally sanction the loss of childhood, especially for children heading households.²⁸¹ Section 11(b)(iv) of the National Norms and Standards clearly states that ‘children living in child-headed households must be able to benefit from the right to rest, leisure and play.’ For children to be able to benefit from the right to rest, leisure and play, adequate social support, which guarantees an adequate standard of living is necessary. It would be unreasonable to expect children to rest and play when their dire financial circumstances force them to work overtime, or a heavy load of household or child-care responsibilities does not leave children any

²⁷⁸ See S Liebenberg, ‘Taking stock: the jurisprudence of children’s socio-economic rights and its implications for government policy’ (2004) 5/4 *ESR Review* 6.

²⁷⁹ R Hodgkin & P Newell, *Implementation handbook of the Convention on the Rights of the Child*, UNICEF (2002) 465; P David, *A commentary on the United Nations Convention on the Rights of the Child, article 31: the right to leisure, play and culture*, Martinus Nijhoff (2006) para 46.

²⁸⁰ M S Pais, ‘Convention on the Rights of the Child’, *Manual on human rights reporting under six major international human rights instruments*, OHCHR (Geneva), UNITAR & UNSCP (1999) 469.

²⁸¹ J Sloth-Nielsen, 2005 (n 170 above) 77-78.

free time. The right to leisure and play is a fundamental part of the right to survival and development of children. The harmonious development of children cannot be possible without the right to leisure and play. However, the realisation of the right to leisure and play is dependent on the implementation of adequate measures to realise the right to survival and development, such as economic and social support and protection of children.

(v) Monitoring and evaluation

It has been noted in the previous chapter that under sections 150(2) and 150(3), children in child-headed households or children who are victims of child labour may be found to be in need of care and protection. Section 150(2) stipulates that a child in a child-headed household may be a child in need and protection and should be referred to a social worker for an investigation. If a child is found to be a child in need of care and protection, a ‘court-mandated intervention’ will be required.²⁸² If the child is found *not* to be in need of care and protection, the social worker should provide appropriate measures to assist the child where necessary. Such measures may include ‘counselling, mediation, prevention and early intervention services, family reconstruction and rehabilitation, behavioural modification, problem solving and referral to another suitably qualified person or organisation.’²⁸³ In the case of child-headed households, a supervisor will be assigned as contemplated in section 137(2) of the Act.

The question may arise as to the criteria to determine whether a child in a certain child-headed household is a child in need of care and protection. In her commentary on section 157, Sloth-Nielsen commented that section 11(b) of the National Norms and Standards for child-headed households are the indicators according to which an assessment can be made.²⁸⁴ The contents of section 11(b) of the National Norms and Standards are the following:²⁸⁵

²⁸² The orders a children’s court can make are listed in Secs 46 and 156 of the Children’s Act.

²⁸³ Sec 150(3) of the Children’s Act.

²⁸⁴ J Sloth-Nielsen, 2007 (n 164 above) 7-48; Sec 11(b) of the National Norms and Standards (n 182 above).

²⁸⁵ Sec 11(b) of the National Norms and Standards (n 182 above).

(b) A safe and nurturing environment for children

1. Children must experience safety, security and feel cared for while living in a child-headed household, and have their basic needs met.
2. Adequate nutrition, water and means for preparing food must be available to meet the basic needs of the children in a child-headed household.
3. Adequate care of the health of children living in child-headed households must be undertaken.
4. Children living in child-headed households must be able to benefit from the right to rest, leisure and play.
5. A child-headed household must respect and nurture the culture, spirit, dignity, individuality, language and development of each child living in that household and children must be encouraged to develop positive social values.
6. The resources available to the household must be used equitably to promote the well-being of all children living in the child-headed household.
7. Children living in child-headed households must have access to psychosocial support.

A close examination of the contents of section 11(b) suggests that, in reality, it seems highly unlikely that child-headed households will meet the standards of the indicators without intervention from the government or NGOs. Therefore, the investigation by a social worker should consider, first of all, whether a child-headed household is meeting the indicators and, if not, whether the child-headed household *can* meet the indicators through support measures other than non-court-mandated interventions, for example, through the supervisory orders under section 150(3) of the Children's Act. In most cases, the answer to the first question will be negative. However, if the answer to the second question is positive, such children in child-headed households should be supported as prescribed in section 150(3). In cases where the answer to the second question is also negative, the child may be in need of care and protection and should be referred to a children's court where a court-mandated intervention under section 156 of the Children's Act should be devised.

After the initial assessment and if it is determined that children should remain in child-headed households, the situation of child-headed households should be monitored regularly. Under 11(h)(ii) of the National Norms and Standards on child-headed households, children living in child-head households are 'entitled to be visited

on a regular basis, and not less than once every two weeks, for the purposes of monitoring and supervision'. To ensure that the supervision and assistance is available when it is needed, section 50(o) of the General regulations stipulates that the designated supervisor should be available to provide required services to a child even after working hours.²⁸⁶

Effective monitoring and evaluation mechanisms have tremendous importance to children in any care placement, including child-headed households. Implementing effective mechanisms to monitor and evaluate well-being of children in care placements is one of the most effective ways to ensure children in care placements are receiving adequate care. States are accountable for the well-being of children in care placement and children have the right to periodic monitoring and evaluation under article 25 of the CRC. As discussed in chapter three, a holistic rights-based approach to providing care to children who are deprived of their family environment goes beyond simply providing a physical place to stay. The application of a rights-based approach ensures that children are receiving adequate care, as defined in chapter one, in their care placements.

(vi) *Accountability and rule of law*

The principle of accountability is what distinguishes a rights-based approach from other approaches. As discussed in chapter three, a rights-based approach is based on the premise that states have the obligation to respect, promote, protect and fulfil the rights enshrined in the domestic legal framework as well as in relevant international legal frameworks. As illustrated through the discussions with children in child and youth-headed households, the existence of legal provisions does not necessarily mean an effective implementation of such provisions. The principle of accountability means that, through a rights-based approach, a government can be held accountable for the failure to effectively deliver the social welfare provisions, which are protected under the law.

²⁸⁶ In her commentary to sec 137, Professor Sloth-Nielsen indicated that the visit should be conducted at least once in every two weeks. J Sloth-Nielsen, 2007 (n 164 above) 7-49.

South Africa has a rich jurisprudence on the effective realisation of socio-economic rights, including the *Gootboom* case and the *TAC* case, which are discussed in the earlier section of the chapter. Other important cases are *Kate v The MEC for the Department of Welfare Eastern Cape*²⁸⁷ and *Vumazonke and others v The MEC for Social Development and Welfare for Eastern Cape Province*.²⁸⁸ These cases are two of the many similar cases concerning the maladministration and inefficiency in administration of social assistance. Justice Plasket, in the *Vumazonke* case, lamented about the vast number of cases dealing with similar problems and the lack of efforts to improve the service delivery and warned that the administration should ‘operate within the limits of Constitution and the law’.²⁸⁹ Justice Plasket’s comment expressed the very essence of a rights-based approach. Application of a rights-based approach means when the administration does not effectively deliver its legal obligation to uphold constitutional rights, it can be held accountable for its maladministration and inefficiency.

Nevertheless, it should be reminded that, as Bonthuys point out, ‘the most disadvantaged people’ who are unaware of their rights and entitlement, or who are discouraged from accessing social services because of the transportation fees or illiteracy may not be helped through the courts.²⁹⁰ The majority of children who are in the most vulnerable situation would not be able to access courts without external assistance, such as NGOs.²⁹¹ To borrow Justice Cameron’s expression, children are one of the groups that are ‘most lacking in protective and assertive armour’.²⁹² In order to truly hold the administration accountable for the most vulnerable people whose needs are most desperate, active monitoring and evaluation of the effective implementation of social services is vital.

²⁸⁷ *Nontembiso Norah Kate v The MEC for the Department of Welfare, Eastern Cape*, ECJ 2004/028 [2005] 1 All SA 745 (SE).

²⁸⁸ *Vumazonke and others v The MEC for Social Development and Welfare for Eastern Cape*, ECJ 050/2004, [2004] ZAEHC 40 (25 November 2004).

²⁸⁹ As above, para 11.

²⁹⁰ E Bonthuys, ‘Realising South African children’s basic socio-economic claims against parents and the State: what courts can achieve’ (2008) *International Journal of Law, Policy and the Family* 353.

²⁹¹ E Bonthuys, 2008 (as above).

²⁹² *The Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government and others v Ngxuzza and others*, 493/2000, [2001] ZASCA 85, para 12.

4.5 Conclusion: Development and challenges

The question of whether to legally recognise child-headed households has generated much debate in South Africa as well as other Southern African countries heavily affected by the HIV epidemic. There were views that children should not be given parental responsibilities over younger siblings.²⁹³ Also, there were views that child-headed households would become a familiar phenomenon and a legal recognition would provide them with better protection.²⁹⁴ At the same time, it should be acknowledged that the existence of child-headed households is a reality in many African states, including South Africa. By legally recognising child-headed households, the government may be able to develop a legal and policy framework to protect the children in child-headed households. Also, giving them legal recognition and entitlements, which can be legally enforced against states, could empower children in child-headed households. However, as Sloth-Nielsen pointed out, there is a great danger that by recognising child-headed households and assuming that they can function independently in society could lead to masking ‘further neglect and degradation’.²⁹⁵

South Africa has taken a bold step towards acknowledging the existence of child-headed households, and their needs for appropriate care, and special protection and assistance. Also, South Africa has developed a comprehensive legal and policy framework providing for the rights of children in child-headed households. Although such a step is admirable, the implementation of those protection measures remains problematic due to the structural problems, such as shortage of trained human resources and limited access to public services in rural areas. Furthermore, the measures of protection and assistance should fully recognise the particular vulnerability of children in child-headed households. Special assistance should be provided to children heading households in order for them to realise their rights as children as well as the head of a household. The measures of special protection and assistance should be assessed not only by the existence of such measures, but also by the adequacy and effectiveness of the measures. For instance, as pointed out in the

²⁹³ SALRC, 2002 (n 90 above) 170.

²⁹⁴ As above 169 & 170.

²⁹⁵ J Sloth-Nielsen, 2005 (n 170 above) 78.

previous section, despite the law and policy that children in child-headed households should be able to access the applicable social grant which is, in most cases, a child support grant, the limited amount of the available grant does not fully provide for an adequate standard of living for these children. The limited amount of available grants, in many cases, force children to be engaged in harmful and hazardous labour practices, which would be detrimental to their educational development, effectively depriving them of the right to education and the right to leisure and rest.

Also, in order for the measures of special protection and assistance to be effective, the context in which child-headed households appear and exist cannot be ignored. It is true that AIDS-related illnesses are not the only cause of orphanhood. Nevertheless, General Household Survey 2007 showed that a number of children who have lost both of their parents increased from 400 000 in 2002 to 700 000 in 2007.²⁹⁶ Furthermore, nearly 50 per cent of children who are orphaned were living in KwaZulu-Natal and the Eastern Cape.²⁹⁷ It has been pointed out, in section 4.2, that the majority of child-only households were concentrated in Limpopo, the Eastern Cape and KwaZulu-Natal. Considering that these three provinces also have the highest HIV prevalence in South Africa, it can be assumed that the major cause of children losing both of their parents and remaining in child-headed households is related to the HIV epidemic.²⁹⁸ Both legal and policy measures to protect and assist children in child-headed households should be devised reflecting the context in which children in child-headed households find themselves: the context of HIV epidemic. In such context, children in child-headed households may be stigmatised due to their actual and perceived HIV status and their parents' HIV status.²⁹⁹ Such stigmatisation may lead to isolation of the children and render them more vulnerable to abuses and maltreatment by others. Therefore, active campaigns to educate and sensitise communities on the rights of children, especially the rights of children in child-headed households is one of the essential measures to ensure that their rights are respected and protected in reality.

²⁹⁶ More information can be found at: <http://www.childrencount.ci.org.za/content.asp?PageID=71> [accessed: 19 August 2009].

²⁹⁷ As above.

²⁹⁸ As above.

²⁹⁹ See generally, B Rau, *Combating child labour and HIV/AIDS in sub-Saharan Africa: A review of good policies, programmes and projects in South Africa, United Republic of Tanzania and Zambia to identify good practices*, ILO (2002) 23-24; S Tsegaye, 2008 (n 25 above).