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A Proposed Comprehensive Legal Solution to the Foster Care Crisis

by

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ABSTRACT

To contextualise, the problem with foster care in South Africa dates back to the early 2000s. In 2002, the then Minister of Social Development publicly indicated that relatives caring for orphans could seek to regularise their care arrangements via the foster care system, and thereby could access the foster child grant (FCG). Indeed, this is reason for the exponential increase of children in foster care. As at September 2019, there are 416 441 children in foster care which far exceeds the Department of Social Development's (hereafter "the DSD") capacity for the provision of social services. This has created a foster care backlog which has resulted in what is now coined, the foster care crisis.

The most recent dialogue, refers to the introduction of amending legislation to produce a comprehensive legal solution to the foster care crisis. Litigation previously brought to resolve the crisis has a looming deadline, as the matter is set down for hearing on the 26th of November 2019 in the North Gauteng High Court (NGHC). The DSD has positioned legislative amendments at the forefront of what constitutes an appropriate redress which progress has since then stagnated and, with less than a month before the hearing, it is unlikely that a comprehensive legal solution will materialise. However, further delay will see 150 000 foster care orders lapse at the end of 2019, and a further 97 000 in 2020, which could leave almost two-thirds of the children in the foster care system without a FCG.

This study will propose a comprehensive legal solution to the foster care crisis in response to recent jurisprudence; systemic challenges and pending legislative and policy reform. It is forecast that a solution is premised on the amendment of section 150(1) of the Children's Act 38 of 2005 discrediting the presumption that all orphans living with relatives are in need of protective services. In fact, it will argue in favour of monetary support in the form of a top-up grant as a plausible alternative to foster care. Indeed, this is subject to the recognition of kinship care as part of the solution to the foster care crisis.

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CHAPTER 1: INTRODUCTION

1 1 Introductory

In 2002, the then Minister of Social Development publicly indicated that relatives caring for orphans could seek to regularise their care arrangements via the foster care system, and thereby could access the foster child grant (FCG). The number of children in foster care increased from approximately 50 000 to over 500 000 over a 15-year period,¹ and this may be attributed to the policy change. As at September 2019, the FCG is paid out to 416 441 children which far exceeds the Department of Social Development's (hereafter "the DSD") capacity for the provision of social services.² This has created a foster care backlog which has resulted in what is now coined, the foster care crisis.

In response, the Centre for Child Law (CCL), acting on behalf of child beneficiaries and their families, approached the North Gauteng High Court (NGHC) in an effort to contain the financial implications associated with lapsing foster care orders. In 2011, the NGHC ordered the administrative extension of 123 000 foster care orders that had lapsed.³ A foster care order lapses on expiry of two years from the date on which the children's court order was made.⁴ By 2014, another 300 000 foster care orders had lapsed.⁵ This accounts for 60% of all FCGs in payment at that time.⁶ As a result, the DSD approached the NGHC for an order extending the administrative process until December 2017.⁷ It is only because the court granted this extension that 300 000 child

¹ Hall & Sambu "Income poverty, unemployment and social grants" in Delany, Jehoma & Lake (eds) *South African Child Gauge* (2016) Children's Institute, University of Cape Town 6.

² The Department of Social Development's strategy to address the foster care backlog (2019). Available at <https://pmg.org.za/committee-meeting/28925/> Accessed on 25 September 2019.

³ Skelton "Founding Affidavit" in *Centre for Child Law v Minister for Social Development* (North Gauteng High Court) Case Number 72513/2017 of 28 November 2017 par 67.

⁴ S 159 of the Children's Act 38 of 2005.

⁵ Media Release *The foster care system is failing a million orphans: child rights NGO's call for a kinship grant* (2014) Children's Institute: University of Cape Town. Available at http://www.ci.uct.ac.za/sites/default/files/image_tool/images/367/Press_Release/FC_system_failing_orphans_23Oct2014.pdf Accessed on 5 November 2019.

⁶ *Centre for Child Law v Minister of Social Development* unreported case 21726/11 of 28 December 2014.

⁷ This is a further three year extension of the 2011 North Gauteng High Court order.

beneficiaries and their families could continue receiving the FCG.⁸ By the end of 2019, the DSD would have relied for eight years on court ordered extensions to prevent the majority of FCGs from lapsing.

This study will propose a comprehensive legal solution to the foster care crisis in response to recent jurisprudence⁹; systemic challenges¹⁰ and pending legislative¹¹ and policy reform. However, in order to proceed, it is necessary to first set out the relevant legal framework.

1 1 1 Background

The Bill of Rights in the Constitution¹² guarantees everyone the right to have access to social security,¹³ including the allocation of social assistance.¹⁴ The Social Assistance Act¹⁵ provides the national legislative framework for the provision of social assistance through the delivery of social grants.¹⁶ Social grants are government paid subsidies that support multiple positive outcomes for children living in poverty. In December 2018, 17 731 402 million beneficiaries accessed social grant payments.

⁸ Hall & Skelton “Introducing a child support grant top-up for orphaned children living with family members” in Delany, Jehoma & Lake (eds) *South African Child Gauge* (2016) Children’s Institute, University of Cape Town 91.

⁹ *Centre for Child Law v Minister for Social Development* (North Gauteng High Court) Case Number 72513/2017 of 28 November 2017.

¹⁰ The systemic challenges within the Child Care and Protection System (and associated Children’s Act 38 of 2005) as well as the Social Welfare System (and associated Social Assistance Act 13 of 2004) will be addressed throughout this study.

¹¹ The Social Assistance Amendment Bill (amending the Social Assistance Act 13 of 2004) and the Children’s Third Amendment Bill (amending the Children’s Act 38 of 2005).

¹² S 27(1)(c) & (2) of the Constitution of the Republic of South Africa, 1996 (hereafter “the Constitution”).

¹³ Ch 7 of the White Paper on South African Social Welfare Policy 1997 provides that: “Social security covers a wide variety of public and private measures that provide cash or in-kind benefits or both. The White Paper defines the domains of social security as poverty prevention, poverty alleviation, social compensation and income distribution. Social security is defined as policies which ensure that all people have adequate economic and social protection during unemployment, ill health, maternity, child - rearing, widowhood, disability and old age, by means of contributory and non-contributory schemes for providing for their basic needs”.

¹⁴ S 27(1)(c) of the Constitution.

¹⁵ 13 of 2004.

¹⁶ The South African Social Security Agency (SASSA) is responsible for the administration and delivery of social grants. See Proudlock (ed) *South Africa’s progress in realising children’s rights: a law review* (2014) Children’s Institute, University of Cape Town & Save the Children South Africa 59.

This includes the allocation of 12 936 033 million social grants specifically for children.¹⁷

A child's right to social security is guaranteed in a number of international human rights instruments. These include: the United Nations Convention on the Rights of the Child (UNCRC);¹⁸ the African Charter on the Rights and Welfare of the Child (ACRWC)¹⁹ and the International Covenant on Economic, Social and Cultural Rights (ICESCR).²⁰

Article 26(1) of the UNCRC provides that every child has the right to benefit from social security.²¹ This places an obligation on the state to achieve the full realisation of the right to social security in accordance with national law. In accordance with Article 26(1) of the UNCRC, section 28(1)(c) of the Constitution entrenches a child's socio-economic rights as unqualified and immediate.²² This must be compared with the socio-economic rights of everyone which are subject to the state's available resources.²³ The UNCRC further provides that "every child has the right to a standard of living adequate for his or her physical, mental, spiritual, moral and social development".²⁴ This creates a substantial burden of care that quantifies the need for and use of social grants to regulate the child's monthly expenditure.

South Africa's social security system makes provision for three social grants specifically for children: the Child Support Grant (CSG); Care Dependency Grant

¹⁷ In October 2018, 17 757 590 million beneficiaries accessed social grant payments which includes the allocation of 12 995 813 (73%) million social grants specifically for children. In November 2018, 17 840 961 million beneficiaries accessed social grant payments which includes the allocation of 13 047 279 (73%) million social grants specifically for children. See South African Social Security Agency (SASSA) - Issue No 21 - October 2018. A Statistical Summary of Social Grants in South Africa 1-3. Available at <https://www.sassa.gov.za/annual%20reports/Documents/SASSA%20Annual%20Report%202018-2019.pdf> Accessed on 7 February 2020.

¹⁸ South Africa ratified the 1989 UNCRC on the 16th of June 1995.

¹⁹ South Africa ratified the ACRWC on the 7th of January 2000.

²⁰ South Africa ratified the ICSECR on the 12th of January 2015.

²¹ A 9 of the - ICESCR states the following: "State Parties should recognise the right of everyone to social security. This provision binds the child's economic security with that of [his/her] adults".

²² *Centre for Child Law v MEC for Education, Gauteng* 2008 (1) SA 223 (T) 227I-J.

²³ S 26 & 27 of the Constitution.

²⁴ A 27(1) of the UNCRC states the following: "Every child has the right to a standard of living adequate for his or her physical, mental, spiritual, moral and social development".

(CDG)²⁵ and the Foster Child Grant (FCG). What follows is a brief explanation of the CSG and FCG as the CDG is not relevant to the discussion.

In 1995, the South African Government appointed the Lund Committee to investigate alternatives to the State Maintenance Grant, which included a child component.²⁶ The recommended alternative was the CSG, designed as a poverty alleviation grant in response to prevailing household and care arrangements.²⁷ The CSG is a once-off, means-based²⁸ application - to the South African Social Security Agency (SASSA) – payable within three days of application to the child’s primary caregiver.²⁹ Where after, the child’s primary caregiver will receive monthly payments until the child is 18 years old.³⁰

As of 1 October 2019, the CSG accommodates 12 443 257 children living in poverty and is valued at R 430 per child per month.³¹ SASSA’s records reflect that beneficiary

²⁵ The CDG is payable to the disabled child’s parent(s), primary caregiver or foster parent appointed by the court. The child’s parent, primary caregiver or foster parent may not earn more than R 202 800 per year if single and R 405 600 per year if married to be eligible for the CDG. It is valued at R 1 690 per child, per month. See Care Dependency Grant. Available at <https://www.gov.za/services/services-residents/parenting/child-care/care-dependency-grant>. Accessed on 5 July 2019.

²⁶ Hall & Budlender “Children’s contexts: household living arrangements, poverty and care” in Delany, Jehoma & Lake (eds) *South African Child Gauge* (2016) Children’s Institute, University of Cape Town 36.

²⁷ Hall & Budlender (2016) 35.

²⁸ The prescribed means test is ten times the value of the CSG which currently amounts to R 4 300 per month or less. See World Bank *The state of social safety nets* (2015). Available at <http://documents.worldbank.org/curated/en/415491467994645020/pdf/97882-PUB-REVISED-Box393232B-PUBLIC-DOCDATE-6-29-2015-DOI-10-1596978-1-4648-0543-1-EPI-1464805431.pdf> Accessed on 10 September 2019.

²⁹ The CSG is designed to follow the child and is therefore payable to his/her primary caregiver and not for example his/her biological parent who no longer cares for him/her. S 1 of the Children’s Act defines a caregiver to be “any person other than a parent or guardian, who factually cares for a child and includes - (a) a foster parent; (b) a person who cares for a child with the implied or express consent of a parent or guardian of the child; (c) a person who cares for a child whilst the child is in temporary safe care; (d) the person at the head of a child and youth care centre where a child has been placed; (e) the person at the head of a shelter; (f) a child and youth care worker who cares for a child who is without appropriate family care in the community; and (g) the child at the head of a child-headed household”.

³⁰ A biometric validation (fingerprint of beneficiary) is required to collect the CSG and the beneficiary will be asked to provide proof of life once a year.

³¹ The CSG increased to R 420 per child, per month in April 2019 and R 430 per child, per month in October 2019. See National Budget Speech, Ministry of Finance (2019) 14. Available at <http://www.treasury.gov.za/documents/national%20budget/2019/speech/speech.pdf>. Accessed on 6 March 2019.

families residing in Kwa-Zulu Natal,³² Eastern Cape,³³ Gauteng³⁴ and Limpopo³⁵ Provinces rely extensively on the CSG to regulate their monthly expenditure.³⁶ By comparison, the FCG is available to foster parents³⁷ - in possession of a valid court order – who have been appointed by the children’s court as foster parents.³⁸ The FCG cannot be paid without a valid court order.³⁹

The CSG and FCG have distinct objectives, and despite similarities, there are important differences between them. For example, the FCG is explicitly linked to the child protection system in support of vulnerable children in need of care and protection (also known as wards of the state).⁴⁰ The FCG is a state subsidy to 416 441 children in foster care⁴¹ and is valued at R 1000 per child, per month.⁴² Similarly, SASSA’s

³² Currently, 2 827 597 million children are accessing the CSG. See SASSA - Issue No 21 - October 2018. A Statistical Summary of Social Grants in South Africa 1-3.

³³ Currently, 1 906 109 million children are accessing the CSG. See SASSA - Issue No 21 - October 2018. A Statistical Summary of Social Grants in South Africa 1-3.

³⁴ Currently, 1 842 779 million children are accessing the CSG. See SASSA - Issue No 21 - October 2018. A Statistical Summary of Social Grants in South Africa 1-3.

³⁵ Currently, 1 840 055 million children are accessing the CSG. See SASSA - Issue No 21 - October 2018. A Statistical Summary of Social Grants in South Africa 1-3.

³⁶ The Social Development and Finance Ministers have the authority to increase the value of the CSG. Yet this authority has only been used to protect the grant value from being eroded by inflation. See Proudlock “Weighing up the policy proposals: some considerations” in Delany, Jehoma & Lake (eds) *South African Child Gauge* (2016) Children’s Institute, University of Cape Town 95.

³⁷ S 182 of the Children’s Act states the following: “(1) Before a children’s court places a child in foster care, the court must follow the children’s court processes stipulated in Part 2 of Chapter 9 to the extent that the provisions of that Part are applicable to the particular case. (2) A prospective foster parent must - (a) be a fit and proper person to be entrusted with the foster care of the child; (b) be willing and able to undertake, exercise and maintain the responsibilities of such care; (c) have the capacity to provide an environment that is conducive to the child’s growth and development; and (d) be properly assessed by a designated social worker for compliance with paragraphs (a), (b) and (c)...”.

³⁸ S 150(1)(a) of the Children’s Act states the following: “A child is in need of care and protection if the child has been abandoned or orphaned and is without any visible means of support”.

³⁹ S 159 of the Children’s Act.

⁴⁰ The court and social work oversight required for foster care placements makes the administration of the FCG much more cumbersome than the CSG, which is easier to access through an administrative application to SASSA, with no oversight requirement after the initial approval of the grant. See Skelton “Kinship care and cash grants - South Africa” in Atkin *The International Survey of Family Law* (2012) 336.

⁴¹ In April 2018, 416 016 children were accessing the FCG and by the end of November 2018, 454 156 children were accessing the FCG. This is an increase of 0.70% (3 161 children). See SASSA - Issue No 21 - October 2018. A Statistical Summary of Social Grants in South Africa 1-3.

⁴² The FCG has increased by R 40 per child, per month from the previous financial year. See National Budget Speech, Ministry of Finance (2019) 14. Available at <http://www.treasury.gov.za/documents/national%20budget/2019/speech/speech.pdf>. Accessed on 6 March 2019.

records reflect that beneficiary families resident in the Eastern Cape,⁴³ Kwa-Zulu Natal,⁴⁴ Gauteng⁴⁵ and Limpopo⁴⁶ Provinces rely extensively on the FCG to regulate their monthly expenditure.⁴⁷ A child in foster care is entitled to social services⁴⁸ as well as social assistance⁴⁹ to discharge his or her socio-economic rights. By comparison, the CSG – as regulated by the social welfare system – is payable to the child’s primary caregiver (e.g. parent, guardian, grandparent, aunt or uncle etc.) as a poverty alleviation mechanism.⁵⁰ Therefore, the FCG is distinguishable from the CSG in content and scope of application. Chapter 2 will address the allocation of social grants specifically for orphaned children living with relatives which is particularly relevant to the outcome of this study.

1 1 2 Limitations and Scope of Study

This study is not based on empirical research; it places reliance rather on academic writing, published reports and court documents on the subject matter. Apart from information obtained from existing qualitative and other research studies carried out by various researchers and research institutions, the views and opinions of orphaned children living with relatives are not included in this study.

The outcome of this study, is based on the presumption that all orphans are not in need of care and protection unless, the contrary is determined by the children’s court. In relation to kinship care,⁵¹ it is not intended to state that a child deprived of parental care must not be placed in foster care with a relative, or extended family member. The risks of abuse, neglect, exploitation and other challenges associated with kinship care

⁴³ Currently, 102 741 thousand children are accessing the FCG. See SASSA - Issue No 21 - October 2018. A Statistical Summary of Social Grants in South Africa 1-3.

⁴⁴ Currently, 94 862 thousand children are accessing the FCG. See SASSA - Issue No 21 - October 2018. A Statistical Summary of Social Grants in South Africa 1-3.

⁴⁵ Currently, 53 735 thousand children are accessing the FCG. See SASSA - Issue No 21 - October 2018. A Statistical Summary of Social Grants in South Africa 1-3.

⁴⁶ Currently, 50 465 thousand children are accessing the FCG. See SASSA - Issue No 21 - October 2018. A Statistical Summary of Social Grants in South Africa 1-3.

⁴⁷ The FCG is not intended to be a poverty alleviation mechanism.

⁴⁸ S 28(1)(c) of the Constitution.

⁴⁹ S 27(1)(c) of the Constitution.

⁵⁰ Social assistance for orphaned children living with relatives. See Hall, Skelton & Sibanda “Social assistance for orphaned children living with family” in Delany, Jehoma & Lake (eds) *South African Child Gauge* (2016) Children’s Institute, University of Cape Town 68-74.

⁵¹ Kinship care, also known as care by relatives, is part of the solution to the foster care crisis. See Ch 3 par 3 4.

are duly acknowledged. However, the capacity of the foster care system is in question and the discussion to follow will address the regulation of care by relatives. After all, measures for monitoring child protection are always required in relation to all vulnerable children whether or not in alternative care.

In light of the above, where possible, it is important to re-direct orphans living with relatives to a plausible alternative outside of the child protection system which accommodates his or her burden of care (financial and otherwise). The question here is whether section 32 of the Children's Act⁵² envisaged this type of informal care? And, is that the same as kinship care?

The ongoing litigation between the Centre for Child Law and the Minister of Social Development is contentious due to the delay in producing a comprehensive legal solution to the foster care crisis. And, with less than a month before the hearing of this matter,⁵³ on 26 November 2019 – which is subsequent to the submission hereof - it is unlikely that an appropriate redress will come to light. This presents a unique opportunity to forecast the outcome; discuss the progress or lack thereof; address the merits and demerits of the proposed legislative amendments and recommend a proposed comprehensive legal solution to the foster care crisis. However, the drawback to this study is the fact that it is a *moving target* which has a continuous impact on the progression and outcome of this study.

1 1 3 Research Methodology

This study is an analysis of legal precedent. It is based on the effect and/or implications of litigation and advocacy to hold government accountable to their obligations. With regards to primary sources, the provisions of international, regional and national law (both 'hard' and 'soft' law) on children's rights and human rights generally, will be analysed. This includes Conventions, Charters, Resolutions, Declarations, Acts, Bills, Regulations, Constitutions, Case Law, among others. Secondary sources including

⁵² S 32 of the Children's Act provides for the voluntary care of a child - indefinitely, temporarily or partially - by a person not holding parental responsibilities and rights.

⁵³ *Centre for Child Law v Minister for Social Development* (North Gauteng High Court) Case Number 72513/2017 of 28 November 2017 67.

books, academic articles, the Child Gauge as well as relevant and reliable materials from the internet are also considerably relied on for the study. The prescriptive elements of this research will be used towards the end of this study when, after having evaluated the status quo and current jurisprudence, recommendations will be made with a view to further develop both the law, and the practices purporting to facilitate its implementation.

1 1 4 Research Question and Significance of Study

This study will address a number of questions, the primary question being: what is a comprehensive legal solution to the foster care crisis?⁵⁴ The discussion ranges across three disciplines namely statutory duty, legislative reform and strategic litigation. The CCL, through strategic litigation, aims to set legal precedent to improve and strengthen laws pertaining to children. Therefore, legal precedent serves a progressive and transformational child care and protection system. This study is founded on the legal analysis of the 2017 court order: its implementation and implications.⁵⁵ The outcome of this study offers an appropriate redress to the foster care backlog, a plausible alternative to the FCG for orphaned children living with relatives and an analysis of alternative care models including kinship care. In effect, it is a response to the up to date implementation of the child care and protection system and its interaction with the social welfare system. In closing, it will propose a comprehensive legal solution to the foster care crisis.

1 1 5 Conceptualization of Foster Care

Foster care was first introduced in the Children's Act of 1937 as a system regulating the care and protection of vulnerable children and their placement with foster parents, in most cases unrelated to them, by the children's court.⁵⁶ This was referred to as the "classic foster care" model – a sub-category of alternative care - in the Children's Act of 1960, which repealed the 1937 Act.

⁵⁴ See Annexure 1 attached hereto.

⁵⁵ *Centre for Child Law v Minister for Social Development* (North Gauteng High Court) Case Number 72513/2017 of 28 November 2017.

⁵⁶ Skelton "Founding Affidavit" in *Centre for Child Law v Minister for Social Development* (North Gauteng High Court) Case Number 72513/2017 of 28 November 2017 par 33.

The Child Care Act⁵⁷ repealed the Children’s Act of 1960 and continued to be the regulatory framework relating to foster care.⁵⁸ Under the Child Care Act, a foster care order was valid for a period of two years and subject to administrative extension by the Minister of Social Development (hereinafter “the Minister”) on expiry thereof.⁵⁹ The Children’s Act⁶⁰ came into operation on 1 April 2010.

Under the Children’s Act, foster care is a form of alternative care⁶¹ providing short and medium term care.⁶² A child is placed in foster care by court order⁶³ or moved their by way of a transfer from another care placement.⁶⁴ Section 28(1)(b) of the Constitution provides for appropriate alternative care when *removed* from the family environment.⁶⁵ This implies that the foster care system (and associated FCG)⁶⁶ is available to children in need of care and protection.⁶⁷ A child is in need of care and protection if the child

⁵⁷ 74 of 1983.

⁵⁸ Skelton “Founding Affidavit” in *Centre for Child Law v Minister for Social Development* (North Gauteng High Court) Case Number 72513/2017 of 28 November 2017 par 34.

⁵⁹ S 16 of the Child Care Act 74 of 1983.

⁶⁰ 38 of 2005.

⁶¹ “Alternative Care” is defined in s 1 of the Children’s Act as the care of a child in accordance with s 167 of the Children’s Act. S 167 of the Children’s Act states the following: “(1) A child is in alternative care if the child has been placed - (a) in foster care; (b) in the care of a child and youth care centre ... [or] (c) in temporary safe care...”.

⁶² Skelton “The story of 110 000 foster child grants that stopped being paid in 2010/2011” Paper presented at *Towards Carnegie: strategies to overcome poverty & inequality conference* (2012). Available at <http://carnegie3.org.za/docs/papers/245%20Ann%20Skelton%20for%20Carnegie3%20FINAL.pdf> Accessed on 16 April 2018.

⁶³ S 180(1)(a) of the Children’s Act.

⁶⁴ S 180(1)(b) of the Children’s Act states the following: “A child is in foster care if the child has been placed in the care of a person who is not the parent or guardian of the child as a result of a transfer in terms of s 171 of the Children’s Act. S 171 authorises the head of the Department of Social Development to transfer the child from one form of alternative care to another”.

⁶⁵ Own emphasis.

⁶⁶ S 7 of the Social Assistance Act renders a foster parent eligible for the FCG. The FCG forms part of the state’s statutory obligation as prescribed by the child’s placement in foster care.

⁶⁷ S 181(a)-(c) of the Children’s Act states the following: “The purpose of foster care is to protect and nurture children by providing a safe, healthy environment with positive support; promote the goals of permanency planning, first towards family reunification, or by connecting children to other safe and nurturing family relationships intended to last a lifetime; and to respect the individual and family by demonstrating a respect for cultural, ethnic and community diversity”.

is abused,⁶⁸ neglected,⁶⁹ abandoned⁷⁰ or orphaned⁷¹ and is without visible means of support.⁷² A children's court will consider whether he or she is in need of care and protection and therefore in need of alternative care. The court then decides on an appropriate placement, and one option is foster care.

Foster care placements are valid for a period of two years⁷³ and subject to extension or termination by an order of the children's court.⁷⁴ There are no provisions in the Children's Act for the administrative extension - by the Minister - of foster care orders.⁷⁵ Previously, the Child Care Act did allow administrative decisions to be made in respect of termination or extension of foster care, but the Children's Act moved this function to the children's court.⁷⁶ The Children's Act provides for review and oversight of foster care placements by the children's court as required by the Guidelines on Alternative Care⁷⁷ which provides the following:

"[R]emoval decisions should be regularly reviewed and the child's return to parental care, once the original causes of removal have been resolved or have disappeared, should be in the best interests of the child."⁷⁸

⁶⁸ "Abuse" is defined in s 1 of the Children's Act as "any form of harm or ill-treatment deliberately inflicted on a child, and includes - (a) assaulting a child or inflicting any other form of deliberate injury to a child; (b) sexually abusing a child or allowing a child to be sexually abused; (c) bullying by another child; (d) a labour practice that exploits a child; or (e) exposing or subjecting a child to behaviour that may harm the child psychologically or emotionally".

⁶⁹ "Neglect" is defined in s 1 of the Children's Act as a "failure in the exercise of parental responsibilities to provide for the child's basic physical, intellectual, emotional or social needs".

⁷⁰ "Abandoned" is defined in s 1 of the Children's Act as a child who "(a) has obviously been deserted by the parent, guardian or care-giver; or (b) has for no apparent reason, had no contact with the parent, guardian, or care-giver for a period of at least three months".

⁷¹ "Orphan" is defined in s 1 of the Children's Act as a "child who has no surviving parent caring for him or her".

⁷² S 150(1)(a) of the Children's Act.

⁷³ S 186 of the Children's Act.

⁷⁴ S 184(1)(a) of the Children's Act makes provision for the consideration of the child's cultural, religious or linguistic background to serve the child's best interests prior to his or her placement in foster care.

⁷⁵ S 186 of the Children's Act makes provision for the extension and termination of foster care orders for periods longer than two years.

⁷⁶ S 16 of the Child Care Act made provision for the administrative extension of foster care orders. This process must be compared with s 159 of the Children's Act.

⁷⁷ Guidelines for the Alternative Care of Children (2010). Available at https://www.unicef.org/protection/alternative_care_Guidelines-English.pdf Accessed on 20 September 2019.

⁷⁸ United Nations General Assembly (A/Res/64/142 dated 24 February 2010).

The children's court may extend a foster care order for a period longer than two years - if family reunification is inappropriate or impossible - subject to the child turning 18.⁷⁹ This discretionary power also provides for placements within his or her extended family which, until recently, was not categorised as classic foster care. I will discuss this further below.

The voluntary placement of children - indefinitely, temporarily or partially - with their extended family members is regulated by section 32(1) of the Children's Act. Section 32(1) is not judicially regulated, however, a court may limit or restrict a caregiver's parental responsibilities and rights in respect of the child.⁸⁰ This form of care is categorised as family care and it is not a form of alternative care.⁸¹ Chapter 3 will discuss the juxtaposition between family care also known as kinship care and alternative care more specifically foster care.

A foster parent may not take any decisions involving a child without consulting his or her parent or guardian⁸² while giving due consideration to the child's age, maturity and stage of development.⁸³ It is also for this reason that a foster parent does not acquire full parental responsibilities and rights.⁸⁴ However, a children's court may grant additional parental responsibilities and rights – save for guardianship - if the child is abandoned, orphaned or family reunification is not in the best interest of the child.⁸⁵

⁷⁹ S 186(1)(c) of the Children's Act states the following: "the foster care placement subsists until the child turns 18 years old, unless otherwise directed".

⁸⁰ S 32(1) & (3) of the Children's Act.

⁸¹ S 28(1)(b) of the Constitution.

⁸² "Guardian" is defined in s 1 of the Children's Act as "a parent or other person who has guardianship of a child". S 18(3) of the Children's Act makes provision for guardianship as follows: "...a parent or other person who acts as guardian of a child must - (a) administer and safeguard the child's property and property interests; (b) assist or represent the child in administrative, contractual and other legal matters; or (c) give or refuse any consent required by law in respect of the child, including - (i) consent to the child's marriage; (ii) consent to the child's adoption; (iii) consent to the child's departure or removal from the Republic; (iv) consent to the child's application for a passport; and (v) consent to the alienation or encumbrance of any immovable property of the child". Foster parents do not obtain guardianship in respect of the child save on application to the High Court.

⁸³ S 188(2) of the Children's Act.

⁸⁴ It is for this reason that adoption of the child or guardianship in respect of the child may be more appropriate for care of orphans living with relatives.

⁸⁵ S 188(1) & (3) of the Children's Act makes provision for a foster parent's parental responsibilities and rights in respect of the child.

Under these circumstances, an application for guardianship could resolve their lack of parental responsibilities and rights.⁸⁶

A prospective foster parent must be a fit and proper person; be willing and able to undertake, exercise and maintain the responsibilities of such care and have the capacity to provide an environment that is conducive to the child's growth and development.⁸⁷ Fit and proper suggests that he or she is capable of fulfilling the purpose of foster care as prescribed in section 181 of the Children's Act.⁸⁸ A prospective foster parent is screened by a designated social worker prior to the placement of a child in foster care.⁸⁹ Evidently, child beneficiaries and their families' will not gain overnight access to the FCG. It is a lengthy process qualified by the need for social services pending family reunification.

Based on the above-mentioned analysis, the question becomes whether all orphans living with relatives qualify for foster care placement? On this point, Skelton opines that:

"The South African government's policy shift had nothing to do with favouring foster care as an option, but more to do with trying to link kinship carers with a social grant (social assistance) which was higher in its amount, and foster care became the 'vehicle' to do this."⁹⁰

⁸⁶ Hall & Skelton (2016) 93.

⁸⁷ S 182(2) of the Children's Act.

⁸⁸ S 181 of the Children's Act states the following: "The purposes of foster care are to - (a) protect and nurture children by providing a safe, healthy environment with positive support; (b) promote the goals of permanency planning, first towards family reunification, or by connecting children to other safe and nurturing family relationships intended to last a lifetime; and (c) respect the individual and family by demonstrating a respect for cultural, ethnic and community diversity".

⁸⁹ S 184 of the Children's Act states the following: "(1) Before a children's court places a child in foster care by court order in terms of s 156, the court must consider a report by a designated social worker about - (a) the cultural, religious and linguistic background of the child; and (b) the availability of a suitable person with a similar background to that of the child who is willing and able to provide foster care to the child. (2) A child may be placed in the foster care of a person from a different cultural, religious and linguistic background to that of the child, but only if - (a) there is an existing bond between that person and the child; or (b) a suitable and willing person with a similar background is not readily available to provide foster care to the child".

⁹⁰ This formed part of the feedback received in the writing of this study.

However, the exponential increase of children in foster care has resulted in what the CCL has coined, the foster care crisis.⁹¹

1 1 6 Foster Care Crisis and its Implications

The increase of children in foster care can be attributed to firstly, the rising HIV prevalence rates and government's failure to roll out antiretroviral drugs culminating in 1.5 million maternally orphaned children between 1996 and 2004.⁹² By 2002, the then Minister of Social Development, Zola Skweyiya, delivered a public address in which he stated that the FCG should be made available to relatives caring for orphaned children.⁹³ In effect, the DSD created an unwritten policy to place orphaned children living with relatives into "classic foster care" making relatives (now foster parents) eligible for the FCG.⁹⁴ This policy was reiterated in the 2007 National Assembly and by 2010 there was a *needs based approach*⁹⁵ to the placement of orphans in foster care without formal consultation or inquiry into the systemic consequences of such a shift.⁹⁶ Civil society groups have repeatedly questioned this shift in policy based on the misappropriation of social services to the detriment of children in need of care and protection for whom foster care was intended.⁹⁷

A second concern was that, the financial incentive associated with foster care placements was raised as far back as 2003, when it was determined that African relatives are over-extended and no longer the coping mechanism that communities in sub-Saharan Africa once relied on.⁹⁸ Here, Loudon is referring to the financial incapacity of extended family members to care for their grandchild, niece or nephew and "given the larger value of the FCG compared to the CSG, relatives caring for

⁹¹ Hall, Skelton & Sibanda (2016) 69.

⁹² Hall, Skelton & Sibanda (2016) 69.

⁹³ Hall, Skelton & Sibanda (2016) 69.

⁹⁴ Rohrs, Berry, Lake & Shung-King "Legislative and policy developments 2015/2016" in Delany, Jehoma & Lake (eds) *South African Child Gauge* (2016) Children's Institute, University of Cape Town 16.

⁹⁵ The state has a statutory obligation to provide social assistance to foster parents.

⁹⁶ Hall, Skelton & Sibanda (2016) 69.

⁹⁷ Meintjes, Budlender, Giese & Johnson *Children 'in need of care' or in need of cash? Questioning social security provisions for orphans in the context of the South African AIDS pandemic* (2013) Joint Working Paper of the Children's Institute and Centre for Actuarial Research, University of Cape Town 27-30.

⁹⁸ Oswald *Because we care: programming guidance for children deprived of parental care* (2009) 25. (Published Paper).

[orphaned] children understandably shifted to the foster care queue”.⁹⁹ The value of the CSG is less than half of the FCG despite section 32(2)(a) of the Social Assistance Act¹⁰⁰ empowering the Minister to increase the amount – as a poverty alleviation mechanism - in accordance with the UNCRC’s recommendation.¹⁰¹

Save for the financial benefits for beneficiaries, the utilization on such a large scale of the foster care system that relies heavily on the children’s court and social services, has had unintended consequences for vulnerable children in need of care and protection.¹⁰² It is further noted that the limited capacity of social workers – then and now - to attend to the increased number of children in foster care has led to a systemic collapse.¹⁰³ The revised foster care dispensation is therefore distinguishable from “classic foster care”.¹⁰⁴

1 1 7 Systemic Challenges

Between April 2009 and March 2011, approximately 120 000 FCGs lapsed due to court orders expiring.¹⁰⁵ 40 000 of these expired court orders, in which the grants also lapsed, occurred in the year prior to the Children’s Act coming into force.¹⁰⁶ This shows that social workers were already inundated with the administrative extension of foster care orders under the Child Care Act. Indeed, this negates plausible deniability when discussing the reasons for non-compliance with the obligations that followed the enactment of section 159 of the Children’s Act.

⁹⁹ Skelton “Founding Affidavit” in *Centre for Child Law v Minister for Social Development* (North Gauteng High Court) Case Number 72513/2017 of 28 November 2017 par 46 1.

¹⁰⁰ S 32(2)(a) of the Social Assistance Act states the following: “the Minister must make regulations with the concurrence of the Minister of Finance if the regulations apply to the application for and payment of grants, including maximum amounts of such grants”.

¹⁰¹ UNCRC *Concluding recommendations on the second periodic report of the Republic of South Africa* (2016) 54.

¹⁰² Meintjes, Budlender, Giese & Johnson (2003) 27-30.

¹⁰³ This was exacerbated when the Children’s Act came into operation in 2010, excluding the administrative extension of foster care orders by the Minister of Social Development.

¹⁰⁴ Statistics South Africa *General Household Survey 2014* (2015). Available at <http://www.statssa.gov.za/publications/P0318/P03182014.pdf> Accessed on 30 September 2018.

¹⁰⁵ Hall “Expert Affidavit par 15 and figure 2” in *Centre for Child Law v Minister for Social Development* (North Gauteng High Court) Case Number 72513/2017 of 28 November 2017 par 10.

¹⁰⁶ Hall “Expert Affidavit par 15 and figure 2” in *Centre for Child Law v Minister for Social Development* (North Gauteng High Court) Case Number 72513/2017 of 28 November 2017 par 29 2.

By mid-2010 there was a baseline of 300 000 foster care orders that had lapsed. This was over half of the 500 000 foster care orders in the system at that time.¹⁰⁷ It is therefore not surprising that social workers working in the child protection system were overwhelmed with heavy case-loads.¹⁰⁸ Many of these cases involved children living with relatives who had been placed in foster care to access the FCG.¹⁰⁹ What follows is a discussion of the judiciary's approach to the allocation of the FCG to relatives caring for orphaned children.

In *SS v Presiding Officer Children's Court, Krugersdorp*,¹¹⁰ (hereafter "SS case") an uncle and an aunt were denied access to the FCG for a relative-child in their care, and the decision was reserved upon appeal.¹¹¹ The child in this case had been living with his uncle and aunt for 8 years when they, on the advice of a social worker, approached the children's court with an application for foster care authorising their access to the FCG as opposed to the CSG which they were already receiving.¹¹²

The issue before the court was whether the child was "without visible means of support"¹¹³ requiring placement in foster care. The Applicant's argued that the Children's Act¹¹⁴ permits foster care by relatives.¹¹⁵ However, the court held that "the FCG was not intended to provide income maintenance but rather subsidise children in need of care and protection as it was clear that the main reason for this enquiry [was] to alleviate the parties' financial position by a foster care order".¹¹⁶ On appeal to the South Gauteng High Court (SGHC), held that extended family members do not have a common law duty of support, and as such, the child in question was without visible

¹⁰⁷ Hall "Expert Affidavit par 15 and figure 2" in *Centre for Child Law v Minister for Social Development* (North Gauteng High Court) Case Number 72513/2017 of 28 November 2017 par 33.

¹⁰⁸ Skelton "Founding Affidavit" in *Centre for Child Law v Minister for Social Development* (North Gauteng High Court) Case Number 72513/2017 of 28 November 2017 par 55.

¹⁰⁹ Hall & Skelton & Sibanda (2016) 70.

¹¹⁰ *SS v Presiding Officer Children's Court, Krugersdorp* 2012 (6) SA 45 (GSJ).

¹¹¹ This case originated in the Krugersdorp children's court under Case Number 14/1/4/206/10. *SS v Presiding Officer Children's Court, Krugersdorp* 2012 (6) SA 45 (GSJ) 2-3.

¹¹² In April 2012, the CSG was valued at R 280 per child, per month. The South African Child Support Grant: Impact Assessment. Available at https://www.unicef.org/southafrica/SAF_resources_csg2012s.pdf Accessed 8 February 2020.

¹¹³ S 150(1)(a) of the Children's Act.

¹¹⁴ S 180(3)(b) of the Children's Act.

¹¹⁵ *SS v Presiding Officer Children's Court, Krugersdorp* 2012 (6) SA 45 (GSJ) 2-3.

¹¹⁶ *SS v Presiding Officer Children's Court, Krugersdorp* 2012 (6) SA 45 (GSJ) 1-10.

means of support and therefore in need of the FCG.¹¹⁷ The SGHC went on to state that:

“A child who has been orphaned or abandoned, and who is living with a caregiver, who does not have a common law duty of support towards such child, may be placed in foster care with that caregiver.”¹¹⁸

At that time, it was hoped that this judgment would provide some form of temporary relief to the foster care crisis but instead it only further served to prove that unless comprehensive changes are made to the entire system there will continue to be inconsistencies in the development of our common law.¹¹⁹

In *NM v Presiding Officer of Children’s Court, Krugersdorp*,¹²⁰ (hereinafter “*Manana* case”) a grandmother sought to access the FCG for the three grandchildren in her care.¹²¹ The court held that “the presiding officer in the initial case had erred in the enquiry by holding that they were not in need of care necessitating foster care placement as they were already being cared for and that they were not without visible means of support since they had a capable and suitable caregiver”.¹²² The court also found that their grandmother had a common law duty of support unlike the extended family members in the *SS* case.¹²³

The *SS* and *Manana* judgments are not per se objectionable when read with section 28(2) of the Children’s Act.¹²⁴ However, from a policy perspective, the High Court’s interpretation of section 150(1)(a) entrenches the use of the foster care system for poverty alleviation and fails to address the problems in the social welfare system.¹²⁵

¹¹⁷ *SS v Presiding Officer Children’s Court, Krugersdorp* 2012 (6) SA 45 (GSJ) paras 7 & 30-31.

¹¹⁸ *SS v Presiding Officer Children’s Court, Krugersdorp* 2012 (6) SA 45 (GSJ) par 29.

¹¹⁹ Skelton in Atkin (2012) 343.

¹²⁰ *NM v Presiding Officer of Children’s Court, Krugersdorp* 2013 (4) SA 379 (GSJ).

¹²¹ The biological mother of the three minor children died in 2008 with the father unknown. They resided with the maternal grandmother up to her (biological mother’s) death.

¹²² *NM v Presiding Officer of Children’s Court, Krugersdorp* 2013 (4) SA 379 (GSJ) par 13.

¹²³ *NM v Presiding Officer of Children’s Court, Krugersdorp* 2013 (4) SA 379 (GSJ) paras 13, 21 & 30-31.

¹²⁴ S 28(2) of the Children’s Act states that a child’s best interests are of paramount importance in every matter concerning the child.

¹²⁵ Rohrs “The child in need of care and protection” in Boezaart (ed) *Child Law in South Africa* (2017) 208.

The jurisprudence as detailed above, must inform the reconceptualization of social assistance within the foster care crisis. If clear demarcations are drafted to accommodate both foster care and care by relatives (kinship care), the regulations must provide for the allocation of social assistance to kinship caregivers outside of the foster care system.¹²⁶ Further, it is unreasonable to expect grandmothers (or other relatives) to rely on other grants to which they are personally entitled, by law or as of right, to accommodate the needs of children in their *de facto* care as well as their own.¹²⁷ The focus should be on the appropriate allocation of social grants.

The systemic challenges experienced in the child protection system may be further explained as follows:

“...limited resources and a weak social welfare infrastructure contribute to the ineffective service provision for abused children and their families, leaving children at risk of continued abuse as well as becoming victims of fatal child abuse.”¹²⁸

South Africa has a shortage of social workers, and not all work exclusively with children.¹²⁹ Some are dedicated to the services of the elderly, persons with disabilities, persons with substance abuse problems, victims of crime or trauma, and many other groups. In 2014, the ratio of social workers to foster care placements was estimated at 1:94 and this held only if social workers did nothing else but process and review foster care placements.¹³⁰ This is to the detriment of other social services.¹³¹ The implications of which were set out by Skelton as follows:

“A Children’s Institute study on child abuse cases in the child care and protection system produced alarming findings on the state of the system. These findings include poor

¹²⁶ Meintjes, Budlender, Giese & Johnson (2003) 1.

¹²⁷ Meintjes, Budlender, Giese & Johnson (2003) 1.

¹²⁸ Jamieson, Sambu & Mathews *Out of harm’s way? Tracking child abuse cases through the child protection system in five selected sites in South Africa* (2017) Children’s Institute, University of Cape Town. Available at http://www.ci.uct.ac.za/sites/default/files/image_tool/images/367/publication/2017/Child_Abuse_Tracking_Study_Report.pdf Accessed on 20 October 2018.

¹²⁹ *Centre for Child Law v Minister of Social Development* unreported case 21726/11 of 28 December 2014.

¹³⁰ *Centre for Child Law v Minister of Social Development* unreported case 21726/11 of 28 December 2014.

¹³¹ Hall & Skelton (2016) 91.

record keeping and tracking of cases by social workers: of the 213 cases reviewed during the study, removals of children into temporary safe care occurred in 25 of the cases; social workers conducted investigations in 80% of the cases and although abuse and neglect was confirmed in 61% of the cases, reports were only produced in 8% of the cases; and a number of parents and children were not informed of or assisted to attend children's court hearings."¹³²

The DSD is prioritising the service of foster care placements to the detriment of vulnerable children in need of care and protection and as a result, children are receiving fragmented services that offer little support for their long-term physical and psychological well-being.¹³³ These challenges cannot be completely attributed to the foster care crisis. However, the demands of the foster care crisis have contributed to the deregulation of social services including social grants. Solving the crisis will go a long way towards the effective implementation of the care and protection system as well as the social welfare system.

1 2 Legal Struggle to Resolve the Foster Care Crisis

In 2011, two civil society organisations, Childline and Jo'burg Child Welfare approached the CCL to report that 123 000 foster care orders had lapsed, and thousands more were likely to lapse in the near future.¹³⁴ This meant that the FCGs would not be paid.¹³⁵ In response hereto, the CCL brought an urgent application on 10 May 2011 to the NGHC. The court ordered settlement placed a temporary moratorium on lapsing and gave social workers temporary authority to extend foster care orders administratively, until the end of 2014, notwithstanding section 159 of the Children's Act.¹³⁶ In addition, the court order provided that all foster care orders that had lapsed

¹³² Jamieson, Mathews & Berry *Policy Brief: strengthening the child protection system in South Africa* (2017) Children's Institute, University of Cape Town. Available at http://www.ci.uct.ac.za/sites/default/files/image_tool/images/367/publication/2017/StrenghteningTheChildProtectionSystem%20Brief.pdf Accessed on 20 October 2019.

¹³³ Jamieson, Mathews & Berry (2017) 37-44.

¹³⁴ Skelton "Founding Affidavit" in *Centre for Child Law v Minister for Social Development* (North Gauteng High Court) Case Number 72513/2017 of 28 November 2017 par 67.

¹³⁵ Skelton "Founding Affidavit" in *Centre for Child Law v Minister for Social Development* (North Gauteng High Court) Case Number 72513/2017 of 28 November 2017 par 68.

¹³⁶ S 159 of the Children's Act makes provision for the review and extension of foster care orders by the children's court every two years.

since 1 April 2010 were deemed not to have lapsed and were extended for a period of two years.¹³⁷

In anticipation of the 2011 court order, the DSD put the mechanisms in place to respond to the foster care backlog.¹³⁸ Among other things, provincial budgets were increased; additional social workers, dedicated family finders and project managers were appointed; the services of additional auxiliary, veteran and graduate social workers were enlisted; and more equipment was procured.¹³⁹ In addition, the National Treasury allocated R 846 011 000 over a period of three years with the view to increase the capacity of the foster care system.¹⁴⁰ This response was criticised as increased efforts to address the backlog would only further diminish the resources of the child protection system.¹⁴¹ Therefore, the re-application of “classic foster care” must be considered to resolve the foster care crisis.

1 2 1 The 2014 North Gauteng High Court Order

By December 2014, there was no comprehensive legal solution and another 300 000 foster care orders had lapsed.¹⁴² This accounts for 60% of all FCGs in payment at that time.¹⁴³ As a result, the DSD approached the NGHC on 12 December 2014 for an order extending the administrative process to 31 December 2017.¹⁴⁴ It is only because the court granted this extension that 300 000 foster care children could continue

¹³⁷ Skelton “Founding Affidavit” in *Centre for Child Law v Minister for Social Development* (North Gauteng High Court) Case Number 72513/2017 of 28 November 2017 par 70 4.

¹³⁸ The DSD is mandated to provide for the overall development, implementation and oversight of policies and laws governing social assistance grants. See Proudlock “Children’s Socio-Economic Rights” in Boezaart (ed) *Child Law in South Africa* (2017) 59.

¹³⁹ Hall “Expert Affidavit par 15 and figure 2” in *Centre for Child Law v Minister for Social Development* (North Gauteng High Court) Case Number 72513/2017 of 28 November 2017 par 35 1.

¹⁴⁰ Hall “Expert Affidavit par 15 and figure 2” in *Centre for Child Law v Minister for Social Development* (North Gauteng High Court) Case Number 72513/2017 of 28 November 2017 par 35 2.

¹⁴¹ Hall “Expert Affidavit par 15 and figure 2” in *Centre for Child Law v Minister for Social Development* (North Gauteng High Court) Case Number 72513/2017 of 28 November 2017 par 36.

¹⁴² Media Release *The foster care system is failing a million orphans: child rights NGO’s call for a kinship grant* (2014) Children’s Institute: University of Cape Town.

¹⁴³ *Centre for Child Law v Minister of Social Development* unreported case 21726/11 of 28 December 2014.

¹⁴⁴ This is a further three year extension of the 2011 North Gauteng High Court order.

receiving grants.¹⁴⁵ And, specific foster care orders that had already lapsed were extended until 13 December 2016.¹⁴⁶ Pursuant to the 2014 court order, the DSD provided the CCL with progress reports on their efforts to mitigate the foster care backlog.¹⁴⁷ However, this was considered to be a misappropriation of funds, limiting their resources (financial and otherwise) to produce a comprehensive legal solution to the foster care crisis. Up to July 2016, the DSD's resources were spent on the foster care backlog despite the CCL requesting the diversion of their efforts to a solution.¹⁴⁸ And, what followed was a system in disarray.

1 2 2 The 2016 Application lodged by the Department of Social Development

In December 2016, the DSD approached the NGHC for an order extending the 2014 moratorium for existing orders due to lapse on 12 December 2016.¹⁴⁹ However, it was clear that even with the benefit of administrative extension it would be impossible to renew the orders in time.¹⁵⁰ It was for this reason that the CCL agreed to the extension, but warned that “they will not agree to further ‘wholesale’ extensions without concrete information before the court by way of affidavits showing policy decisions and a clear process towards legal change”.¹⁵¹ This matter was set down for hearing after 12 December 2016 and subsequently dismissed. It is still unclear whether the Minister approved a deviation from normal procedures to allow grant payments during 2017, which were duly paid.¹⁵²

By July 2017, the CCL prompted the DSD for a response pertaining to the implementation of a comprehensive legal solution to the foster care crisis to which they

¹⁴⁵ Hall & Skelton (2016) 91.

¹⁴⁶ *Centre for Child Law v Minister of Social Development* unreported case 21726/11 of December 2014.

¹⁴⁷ Skelton “Founding Affidavit” in *Centre for Child Law v Minister for Social Development* (North Gauteng High Court) Case Number 72513/2017 of 28 November 2017 par 79 1.

¹⁴⁸ Skelton “Founding Affidavit” in *Centre for Child Law v Minister for Social Development* (North Gauteng High Court) Case Number 72513/2017 of 28 November 2017 par 79 2.

¹⁴⁹ Skelton “Founding Affidavit” in *Centre for Child Law v Minister for Social Development* (North Gauteng High Court) Case Number 72513/2017 of 28 November 2017 par 80.

¹⁵⁰ Skelton “Founding Affidavit” in *Centre for Child Law v Minister for Social Development* (North Gauteng High Court) Case Number 72513/2017 of 28 November 2017 par 80 3.

¹⁵¹ Skelton “Founding Affidavit” in *Centre for Child Law v Minister for Social Development* (North Gauteng High Court) Case Number 72513/2017 of 28 November 2017 par 82 3.

¹⁵² *Centre for Child Law Brief: the foster care crisis and examination of potential orders that could be made by the High Court* (2017) Centre for Child Law, University of Pretoria 7.

responded to be “busy with consultations and the appointment of senior counsel, and needed more time”.¹⁵³ By October 2017, it was evident that the DSD would not be in a position to provide a comprehensive legal solution. However, their patchwork processes were coming to ahead.

1 2 3 The 2017 Application lodged by the Centre for Child Law

On 18 August 2017, counsel for the CCL represented by Advocate Steven Budlender, met with DSD Officials and their counsel, Advocate Naomi Manaka to discuss the way forward.¹⁵⁴ By agreement, the CCL would request a declaratory order, based on recent jurisprudence,¹⁵⁵ declaring the DSD’s conduct unconstitutional, unlawful and invalid.¹⁵⁶ The court order dated 28 November 2017 is confirmation of this. At court, the declaration of invalidity was suspended for a period of 24 months pending the introduction of legislative amendments to produce a comprehensive legal solution.¹⁵⁷ The court imposed deadline to produce amendments to the Children’s Act and Social Assistance Act was 28 February 2019. This deadline was met but not without consequence. I will discuss this further below.

In addition, the court ordered that notwithstanding section 159(1)(a) of the Children’s Act, any foster care order in existence, on 28 November 2017, or lapsing due to non-extension, would be deemed validly in place for 24 months from 28 November 2017 or until the child turns 18, whichever comes first.¹⁵⁸ And, in the meantime, the children’s court was mandated to regulate foster care placements during and after the expiry of this order.

¹⁵³ Skelton “Founding Affidavit” in *Centre for Child Law v Minister for Social Development* (North Gauteng High Court) Case Number 72513/2017 of 28 November 2017 par 97.

¹⁵⁴ Skelton “Founding Affidavit” in *Centre for Child Law v Minister for Social Development* (North Gauteng High Court) Case Number 72513/2017 of 28 November 2017 par 103 2.

¹⁵⁵ See *Electoral Commission v Mhlope* 2016 (5) SA 1 (CC); *President of the Republic of South Africa v United Democratic Movement* 2003 (1) SA 472 (CC).

¹⁵⁶ The current Minister of Social Development, Lindiwe Zulu, acknowledged that her conduct in delaying a comprehensive legal solution to the foster care crisis is unconstitutional, unlawful and invalid. As a result, she committed to prepare and introduce the required legislative amendments by 28 February 2019. See *Centre for Child Law v Minister for Social Development* (North Gauteng High Court) Case Number 72513/2017 of 28 November 2017 paras 2 1 & 4.

¹⁵⁷ *Centre for Child Law v Minister for Social Development* (North Gauteng High Court) Case Number 72513/2017 of 28 November 2017 par 4.

¹⁵⁸ *Centre for Child Law v Minister for Social Development* (North Gauteng High Court) Case Number 72513/2017 of 28 November 2017 par 5 1.

The jurisprudence of this matter was in response to the legal and strategic issues relating to the administration of FCGs including; firstly, whether it is legally permissible to have a court order that in effect, suspends the operation of section 159 of the Children’s Act where no section of the Children’s Act or conduct has been declared unconstitutional?¹⁵⁹ Secondly, if this answer is no, what legal strategy can be adopted to obtain similar relief on the basis of poor administration? Thirdly, would it be appropriate to couple any relief sought with a supervisory order, compliance with which would be mandatory for the DSD?¹⁶⁰

In a legal opinion requested by CCL, Advocates Steven Budlender and Jessica Griffiths – indicated that “an order which suspends, expressly or in effect, provisions of an Act of parliament is an extraordinary remedy subject to enforcement on an interim basis – that is pending the outcome of a final determination of the matter - in which the constitutionality of law or government conduct is at issue”.¹⁶¹ It is therefore implied that a challenge to the constitutionality of law or government conduct is a prerequisite to suspend the operation of a statutory provision.¹⁶²

In this case, section 159 of the Children’s Act - that provides for the duration and extension of foster care orders - is considered to be constitutionally unobjectionable and, indeed, eminently sensible. However, a national crisis has emerged based on the DSD’s failure to comply with this statutory provision despite two pre-existing court orders.¹⁶³ In *Electoral Commission v Mhlope*,¹⁶⁴ the Constitutional Court held that this

¹⁵⁹ S 159 of the Children’s Act state the following: “(1) An order made by a children’s court in terms of s 156 – (a) lapses on expiry of - (i) two years from the date the order was made; or (ii) such shorter period for which the order was made; and (b) may be extended by a children’s court for a period of not more than two years at a time. (2) When deciding on an extension of the period of a court order in terms of subsection (1), the court must take cognisance of the views of – (a) the child; (b) the parent and any other person who has parental responsibilities and rights in respect of the child; (c) where appropriate, the management of the centre where the child is placed; and (d) any alternative care-giver of that child. (3) No court order referred to in subsection (1) extends beyond the date on which the child in respect of whom it was made reaches the age of 18 years”.

¹⁶⁰ Budlender & Griffiths *Opinion for Centre for Child Law concerning a legal analysis of the foster care crisis and its implications* (2017) paras 3-4.

¹⁶¹ Budlender & Griffiths (2017) 6; *President of the Republic of South Africa v United Democratic Movement* 2003 (1) SA 472 (CC) paras 25 & 35.

¹⁶² Budlender & Griffiths (2017) paras 6-10; *Electoral Commission v Mhlope* 2016 (5) SA 1 (CC) paras 83 & 128.

¹⁶³ *Centre for Child Law v Minister for Social Development* (North Gauteng High Court) Case Number 2176/11 of 10 May 2011.

¹⁶⁴ *Electoral Commission v Mhlope* 2016 (5) SA 1 (CC) paras 131-133.

court is entitled to make an order which, in effect, suspends the operation of the statutory provision for a two-year period with the knowledge that:

“[T]his is an exceptional case that cries out for an exceptional solution or remedy to avoid a constitutional crisis which could have grave consequences. It is about the upper guardian of our Constitution responding to its core mandate by preserving the integrity of our constitutional democracy. And that explains the unique or extraordinary remedy we have crafted, of suspending the duty that flows from a constitutionally valid statutory provision.”¹⁶⁵

This is subject to section 172(1)(b) of the Constitution, authorising the court to suspend the declaration of invalidity and the statutory duty imposed by – in this case section 159 of the Children’s Act - for a period of two years. This being the judicial consequence for the delay in preparing and introducing before parliament amending legislation to produce a comprehensive legal solution to the foster care crisis.¹⁶⁶

1 2 4 Breach of the Constitution

The DSD is not merely a bearer of obligations flowing from section 159 of the Children’s Act, but also a bearer of constitutional obligations in relation to the rights contained in 27(1)(c),¹⁶⁷ 28(1)(c)¹⁶⁸ and 28(2)¹⁶⁹ of the Constitution. Read with section 7(2) of the Constitution, the state is obliged to “respect, protect, promote and fulfil the rights in the Bill of Rights”. According to Counsel in this matter,¹⁷⁰ the DSD is in breach of these Constitutional rights and obligations. This is so in at least the following two respects, firstly: section 159 of the Children’s Act provides that foster care orders are subject to renewal – by the children’s court - every two years. Therefore, state

¹⁶⁵ *Electoral Commission v Mhlope* 2016 (5) SA 1 (CC) par 137.

¹⁶⁶ *Centre for Child Law v Minister for Social Development* (North Gauteng High Court) Case Number 72513/2017 of 28 November 2017 par 2 1.

¹⁶⁷ S 27(1)(c) of the Constitution states the following: “Everyone has the right to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance”.

¹⁶⁸ S 28(1)(c) of the Constitution states the following: “Every child has the right to basic nutrition, shelter, basic health care services and social services”.

¹⁶⁹ S 28(2) of the Constitution states the following: “A child’s best interests are of paramount importance in every matter concerning the child”.

¹⁷⁰ *Centre for Child Law v Minister for Social Development* (North Gauteng High Court) Case Number 72513/2017 of 28 November 2017.

intervention is required to ensure that the necessary financial resources, human resources and expertise are in place to allow for the timeous renewal of foster care orders. And, this is implausible for as long as the foster care backlog subsists. On this point, Hall writes that:

“... on the Department’s own approach ... foster care should be available to orphaned children, 10 000 social workers would be needed to manage foster care placements and review for double orphans only, and 20 000 social workers would be needed to manage foster care if all maternally orphaned children are placed on the system. Additional social workers would also be needed to provide generic services to non-orphaned children in need of care and protection and the elderly, people with disabilities and other vulnerable groups. Yet, by 2014, according to the Department’s own assessment, there were only 5 306 social workers available to deal with foster care.”¹⁷¹

Hall went on to explain that, eight years after the initial application, the crisis subsists and this breaches the state’s duties under the Children’s Act. Effective implementation requires the necessary mechanisms being in place.¹⁷² This has not occurred and according to Hall this is a breach of the Constitution.¹⁷³ Secondly, the current inadequacies in this system has effected the state’s constitutional obligations with regards to vulnerable children who are not foster care children.¹⁷⁴ This is referring to the state’s obligation to ensure the effective functioning of the foster care system and associated social welfare system. This has not occurred. According to Hall, the overburdened foster care system is drawing a disproportionate share of financial and human resources away from vulnerable children in need of care and protection.¹⁷⁵ This is a misuse of social work services to accommodate the foster care crisis (which efforts

¹⁷¹ Hall “Expert Affidavit par 15 and figure 2” in *Centre for Child Law v Minister for Social Development* (North Gauteng High Court) Case Number 72513/2017 of 28 November 2017 par 107 3.

¹⁷² It is for this reason that the 2017 court order makes provision for the Department of Social Development’s delay in “putting in place the necessary mechanisms, structures and resources to ensure that the foster care system operates in a sustainable and effective manner is unconstitutional, unlawful and invalid”. See Hall “Expert Affidavit par 15 and figure 2” in *Centre for Child Law v Minister for Social Development* (North Gauteng High Court) Case Number 72513/2017 of 28 November 2017 par 107.

¹⁷³ Skelton “Founding Affidavit” in *Centre for Child Law v Minister for Social Development* (North Gauteng High Court) Case Number 72513/2017 of 28 November 2017 par 107 9.

¹⁷⁴ Skelton “Founding Affidavit” in *Centre for Child Law v Minister for Social Development* (North Gauteng High Court) Case Number 72513/2017 of 28 November 2017 par 108.

¹⁷⁵ Skelton “Founding Affidavit” in *Centre for Child Law v Minister for Social Development* (North Gauteng High Court) Case Number 72513/2017 of 28 November 2017 par 108 2.

have not resolved the problem). As a result, social workers do not respond timeously to reports of child abuse and new social workers are inexperienced because of having to focus all their attention on foster care.

“These problems were reported across nine provinces, despite the national DSD reporting that in 2011 a project plan for foster care management [had] been developed to address the backlog of expired foster care orders and to establish systemic mechanisms to sustain and manage the programme effectively.”¹⁷⁶

Thirdly, where court orders are granted with the consent or at the instance of the state (as is the case in this matter) it is important to uphold the duty on the state to protect the impartiality of the judiciary by enforcing the implications of non-compliance with this duty and/or court order(s).¹⁷⁷

1 3 Conclusion

The DSD has not adhered to the 2011 and 2014 court orders and are unlikely to have achieved what was required by the deadline set in the 2017 court ordered settlement to produce a comprehensive legal solution to the foster care crisis. This is constitutionally impermissible. The most recent dialogue on this matter is premised on the introduction of amending legislation across two statutes, namely the Children’s Act¹⁷⁸ and the Social Assistance Act.¹⁷⁹

¹⁷⁶ Department of Social Development *Comprehensive report on the review of the White Paper for Social Welfare* 1997 (2017) 157. Available at https://www.gov.za/sites/default/files/gcis_document/201610/comprehensive-report-white-paper.pdf Accessed on 25 September 2019.

¹⁷⁷ See S 34 of the Constitution that states the following: “Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum; s 165(4) of the Constitution which states that organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts”.

¹⁷⁸ The Draft Children’s Third Amendment Bill (February 2019) is said to amend s 150(1)(a) of the Children’s Act as follows: “A child is in need of care and protection if such a child has been abandoned or orphaned and does not have the ability to support himself or herself and such inability is readily apparent”. See Draft Children’s Third Amendment Bill (2019) in *The Government Gazette No 42248 dated 25 February 2019*. Available at: <https://pmg.org.za/bill/876/> Accessed on 25 September 2019.

¹⁷⁹ 13 of 2004.

An amendment to the Social Assistance Act was tabled in April 2018 which has since lapsed due to dissolution on the 5th parliament.¹⁸⁰ It needs to be revived enabling the Minister to increase social grant amounts for certain categories of grant beneficiaries based on need.¹⁸¹ This refers to the proposed top-up grant, an extension of the CSG, for relatives caring for orphaned children, valued at R 860 per child per month.¹⁸² Chapter 2 will continue the discussion on this topic of analysis.

The Children's Third Amendment Bill has not yet been tabled. It contains 156 amendments which means it is a long Bill which will take at least 12 months to proceed through parliament. A long term solution will therefore not be in place by 26 November 2019 as required by the 2017 court ordered settlement. Furthermore, approximately 145 000 foster care orders would have lapsed by 26 November 2019. If provincial departments are unable to take all these cases to the children's court for extension in the next 3 months, these children will lose their FCGs by December 2019. A further 8480 are due to expire in December 2019 and 96 902 during the course of 2020.¹⁸³

Chapter 4 will detail the merits and demerits of the draft Children's Third Amendment Bill. In the meantime, it is relevant to note that on 9 September 2019 and on the back of this analysis, the Portfolio Committee on Social Development reviewed the DSD's submissions and recommended compliance with the 2017 court ordered settlement as non-compliance will be a disservice to the best interests of the child in foster care.

¹⁸⁰ Vorster "The coming crisis in foster care and why the Children's Amendment Bill won't fix it" in *the Daily Maverick* (2019). Available at <https://www.dailymaverick.co.za/opinionista/2019-09-06-the-coming-crisis-in-foster-care-and-why-the-childrens-amendment-bill-wont-fix-it/> Accessed on 7 September 2019.

¹⁸¹ The Social Assistance Amendment Bill makes provision for the insertion of "additional payments or benefits in terms of s 12A(1), the Minister, with the concurrence of the Minister of Finance, may prescribe - (a) an additional payment; (b) a funeral benefit; or (c) any other benefit, linked to a social grant or social relief of distress. (2) The Minister may, in prescribing an additional payment or benefit under subsection (1), differentiate on the basis of need between beneficiaries of social grants or social relief of distress. (3) A benefit contemplated in subsection (1)(b) and (c) must be made available out of the Supplementary Benefits Fund". It further makes provision for the Establishment of Supplementary Benefits Fund in terms of s 13A; the use of the fund in terms of s 13B and the administration and control of Fund in terms of s 13C.

¹⁸² The Department of Social Development has committed to a top-up grant that is 50% higher than the value of the current CSG. See Medium Term Strategic Framework 2014 – 2019 (Appendix 13). Available at https://www.gov.za/sites/default/files/gcis_document/201409/mtsf2014-2019.pdf Accessed on 7 February 2020.

¹⁸³ These figures were provided to by the National Department of Social Development in a letter to the Centre for Child Law dated 23 August 2019.

In closing, the DSD's failure to produce a comprehensive legal solution to the foster care crisis over a period of eight years, despite three court orders requiring same, is subject for concern. This study will respond to the crisis – which is well documented by international and regional stakeholders – in an effort to curb the implications of its continued existence. It will further propose a plausible alternative to the current dispensation.

1 4 Organisation of Dissertation

Chapter 2 will address the systemic challenges within the social welfare system, legislative reform and the delivery of social assistance and services. Key elements of the right to social assistance will be examined, as well as principles underlying the right, in an attempt to examine the content of the right. In closing, this Chapter will present a plausible alternative to the FCG for orphaned children living with relatives where after existing measures of state support, applicable to informal care (in terms of section 32 of the Children's Act) and alternative care generally will be discussed in Chapter 3, with a view of highlighting the challenges involved. These challenges include the recognition or lack thereof of kinship care which will be positioned as a key element to the resolution of the crisis. The jurisprudence of the UNCRC, ACRWC and Guidelines on Alternative Care will support the outcome of this Chapter.

Chapter 4 will critically evaluate the Children's Act and the proposed amendments thereto. This chapter will focus on legislative reform as an appropriate redress to the foster care crisis. In closing, Chapter 5 will respond to the foster care crisis and its implications. It will offer a summary of the various themes explored in this study and provide recommendations to a number of stakeholders including the DSD and the CCL in preparation for the hearing of the matter on 26 November 2019. It will present a proposed comprehensive legal solution to the foster care crisis.

CHAPTER 2: SOUTH AFRICA'S SOCIAL SECURITY SYSTEM

2 1 Introduction

The Bill of Rights in the Constitution¹⁸⁴ guarantees everyone the right to have access to social security, including the allocation of social assistance.¹⁸⁵ The socio-economic rights of everyone – in terms of section 26(2) and 27(2) of the Constitution - are subject to an internal limitation clause, which quantifies the state's obligation to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation thereof.¹⁸⁶ Whereas, children's socio-economic rights, as provided for in section 28(1)(c) of the Constitution, does not have a built-in limitation clause and in the absence thereof entrenches these rights as unqualified and immediate.¹⁸⁷

In *Government of the Republic of South Africa v Grootboom*¹⁸⁸ the Court considered 28(1)(b)¹⁸⁹ and (c)¹⁹⁰ of the Constitution as interdependent provisions. Paragraph (b) outlines who has the responsibility to care for the child while paragraph (c) outlines the essential elements of that care.¹⁹¹ If the child is in the care of his or her parents, they have the primary duty to provide for his or her basic needs.¹⁹² If they are unable to accommodate the child's basic needs, the state is obliged to assist the *family within its available resources*.¹⁹³ With regards to a child's socio-economic rights - this is subject to the maximum extent of the state's available resources-¹⁹⁴ and must be compared

¹⁸⁴ S 27(1)(c) & (2) of the Constitution of the Republic of South Africa, 1996 (hereafter "the Constitution").

¹⁸⁵ S 27(1)(c) of the Constitution.

¹⁸⁶ "Progressive Realisation" is defined by the state's compliance with its constitutional obligation to take appropriate measures within available resources.

¹⁸⁷ *Centre for Child Law v MEC for Education, Gauteng* 2008 (1) SA 223 (T) 227I-J.

¹⁸⁸ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).

¹⁸⁹ S 28(1)(b) of the Constitution states the following: "Every child has the right to family care or parental care, or to appropriate alternative care when removed from the family environment".

¹⁹⁰ S 28(1)(c) of the Constitution states the following: "Every child has the right to basic nutrition, shelter, basic health care services and social services".

¹⁹¹ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) 76.

¹⁹² *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) 77.

¹⁹³ Own emphasis. See s 27(1)(c) of the Constitution & *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) 77.

¹⁹⁴ A 4 of the UNCRC outlines the overall implementation obligations of states that have ratified the Convention. In full, A 4 reads: "State Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the present Convention. With regard to economic, social and cultural rights, State Parties shall undertake

with the socio-economic rights of everyone which are subject to progressive realisation within the state's available resources.¹⁹⁵

Article 20 of the United Nations Convention on the Rights of the Child (UNCRC)¹⁹⁶ details the nature of parental obligations as well as the state's obligations towards those fulfilling a parental function. The UNCRC instructs the state to take all appropriate measures to assist parents and other persons responsible for child care, including material assistance and programmes, particularly with regards to nutrition, health, education, clothing and housing.¹⁹⁷ Material assistance advocates in favour of an immediate obligation towards the implementation of section 28(1)(c) of the Constitution.¹⁹⁸

Legislation has a distinct role to play in giving effect to these rights. It provides the legal framework regulating the collective efforts of the state and state departments.¹⁹⁹ For example, the Minister of Social Development has the responsibility to provide a foster child grant (FCG) to the foster parent of the child in his or her care.²⁰⁰ Compliance with statutory obligations goes hand in hand with budget allocation and service delivery.²⁰¹ Service delivery is a statutory entitlement enforceable by the foster parent through legislation. For example, the Children's Act defines who is eligible for the FCG and the children's court authorises access thereto.²⁰² This process describes the separation of powers, as it should be, without the disarray of the foster care crisis.

such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation".

¹⁹⁵ S 26 & 27 of the Constitution.

¹⁹⁶ South Africa signed and ratified the 1989 UNCRC on the 16th of June 1995.

¹⁹⁷ A 20(2) of the UNCRC.

¹⁹⁸ See ACRWC Concluding Observations (2015) 7.

¹⁹⁹ Proudlock & Mahery "Recent developments in legislating for children's socio-economic rights" in Monson, Hall, Smith & Shung-Kingthe *The South African Child Gauge* (2006) Children's Institute, University of Cape Town 11.

²⁰⁰ S 4(c) of the Social Assistance Act 13 of 2004 states the following: "The Minister must, with the concurrence of the Minister of Finance, out of moneys appropriated by parliament for that purpose, make available a FCG".

²⁰¹ See schedule 4 and 5 of the Constitution.

²⁰² S 8 of the Social Assistance Act states the following: "A foster parent is, subject to s 5, eligible for a FCG for as long as that child needs such care if: (a) the foster child is in need of care; and (b) he or she satisfies the requirements of the Children's Act 38 of 2005".

2 2 Social Assistance Act 13 of 2004

The Social Assistance Act²⁰³ (hereinafter “the Act”) provides the national legislative framework for the provision of social assistance through the delivery of social grants.²⁰⁴ In December 2018, 17 731 402 million beneficiaries accessed social grant payments which includes the allocation of 12 936 033 million social grants specifically for children.²⁰⁵ Since October 2018, approximately 73% of social grant payments have been allocated to children. The South African social security system provides three social grants specifically for children, namely the Child Support Grant (CSG); Care Dependency Grant (CDG) and the Foster Child Grant (FCG) and what follows is an explanation of the CSG and FCG as the CDG is not relevant to the discussion.

2 2 1 Child Support Grant

In 1995, the South African Government appointed the Lund Committee to investigate alternatives to the State Maintenance Grant, which included a child component.²⁰⁶ The Committee recommended the CSG and stated that the design of the grant is such to respond to prevailing household and care arrangements, particularly those in poor households.²⁰⁷ The CSG is a once-off, means-based²⁰⁸ application - to the South

²⁰³ The Social Assistance Act 13 of 2004 came into effect on 1 April 2006.

²⁰⁴ The South African Social Security Agency (SASSA) is responsible for the administration and delivery of social grants. See Proudlock (ed) *South Africa's progress in realising children's rights: a law review* (2014) Children's Institute, University of Cape Town & Save the Children South Africa 59.

²⁰⁵ South African Social Security Agency (SASSA) - Issue No 21 - September 2018. A Statistical Summary of Social Grants in South Africa 1-3. Available at <https://www.sassa.gov.za/Statistics/Documents/Fact%20Sheet%20-%20Issue%20No.21%20-%20September%202018.pdf> Accessed on 4 September 2019.

²⁰⁶ Hall & Budlender “Children's contexts: household living arrangements, poverty and care” in Delany, Jehoma & Lake (eds) *South African Child Gauge* (2016) Children's Institute, University of Cape Town 35.

²⁰⁷ Hall & Budlender (2016) 35.

²⁰⁸ The prescribed means test is ten times the value of the CSG (R 430) which currently amounts to R 4 300 per month or less. See World Bank *The state of social safety nets* (2015). Available at <http://documents.worldbank.org/curated/en/415491467994645020/pdf/97882-PUB-REVISED-Box393232B-PUBLIC-DOCDATE-6-29-2015-DOI-10-1596978-1-4648-0543-1-EPI-1464805431.pdf> Accessed on 10 September 2019.

African Social Assistance Agency (SASSA)²⁰⁹ - payable within three days to the child's primary caregiver.²¹⁰

As of 28 February 2018, the CSG accommodates 12 092 183²¹¹ children living in poverty and is valued at R 400 per child, per month. The CSG is the primary grant for poverty alleviation and therefore appropriate for families in need of financial assistance. To date, the CSG accommodates 12 443 257 children and is valued at R 430 per child, per month.²¹² SASSA's records reflect that child beneficiaries and their families residing in Kwa-Zulu Natal,²¹³ Eastern Cape,²¹⁴ Gauteng²¹⁵ and Limpopo²¹⁶ Provinces rely extensively on the CSG to regulate their monthly expenditure. Therefore, the interruption of grant payments can be detrimental to childcare.²¹⁷

The international community supports the implementation of a child's socio-economic rights in the following way:

"Every child has the right to a standard of living adequate for his or her physical, mental, spiritual, moral and social development."²¹⁸

²⁰⁹ SASSA is established in terms of the South African Social Security Agency Act of 2004 as a public entity, responsible for the management, administration and payment of social grants.

²¹⁰ The CSG is designed to follow the child and is therefore payable to his/her primary caregiver and not for example his/her biological parent who no longer cares for him/her.

²¹¹ South African Social Security Agency *Social Security Statistical Report dated 28 February 2017* (2018). Available at <http://www.sassa.gov.za/index.php/statistical-reports> Accessed on 15 July 2018.

²¹² The CSG increased to R 420 per child, per month in April 2019 and R 430 per child, per month in October 2019. See National Budget Speech, Ministry of Finance (2019) 14. Available at <http://www.treasury.gov.za/documents/national%20budget/2019/speech/speech.pdf>. Accessed on 6 March 2019.

²¹³ 2 827 597 million children are accessing the CSG. SASSA - Issue No 21 - October 2018. A Statistical Summary of Social Grants in South Africa 1-3.

²¹⁴ 1 906 109 million children are accessing the CSG. SASSA - Issue No 21 - October 2018. A Statistical Summary of Social Grants in South Africa 1-3.

²¹⁵ 1 842 779 million children are accessing the CSG. SASSA - Issue No 21 - October 2018. A Statistical Summary of Social Grants in South Africa 1-3.

²¹⁶ 1 840 055 million children are accessing the CSG. SASSA - Issue No 21 - October 2018. A Statistical Summary of Social Grants in South Africa 1-3.

²¹⁷ In addition, s 26 of the Social Assistance Act, makes provision for the transfer of the CSG – to a nominated caregiver - upon the death of the child's primary caregiver.

²¹⁸ A 27(1) of the UNCRC states the following: "Every child has the right to a standard of living adequate for its physical, mental, spiritual, moral and social development".

There are generally two means by which international legislation is translated to domestic law: monism and dualism.²¹⁹ Under the monist approach, the incorporation of the provisions of the UNCRC and ACRWC is contingent on ratification.²²⁰ On the other hand, the dualist approach relies on the enactment of legislation by parliament or “where enactment has not yet taken place – through jurisprudence”.²²¹ Consequently, the formal incorporation of international law is a pre-requisite to create rights and obligations enforceable by domestic courts.²²²

South Africa follows the dualist approach and therefore relies on the Constitution, the Children’s Act and the Social Assistance Act to regulate a child’s socio-economic rights.²²³ Of particular importance: section 28(1)(c) of the Constitution;²²⁴ sections 7(1)(c), (g) & (h) of the Children’s Act²²⁵ and sections 3, 4(a) & (c) of the Social Assistance Act.²²⁶

The enforcement of international law is subject to its incorporation and the purpose of the UNCRC’s recommendations is then, to align domestic legislation with these provisions. It is therefore surprising – despite the provision of section 32(2)(a) of the Act²²⁷ – that the value of the CSG has not been increased to account for the actual

²¹⁹ Dugard, Du Plessis, Maluwa & Tladi *Dugard’s International Law: A South African perspective* (2011) 50.

²²⁰ Dugard (2011) 50.

²²¹ Phillips *Child-headed households: a feasible way forward, or an infringement of children’s right to alternative care?* (2011) (Published PhD thesis) 180.

²²² Dugard (2011) 47-64.

²²³ Dugard (2011) 47-64.

²²⁴ S 28(1)(c) of the Constitution states the following: “Every child has the right to basic nutrition, shelter, basic health care services and social services”.

²²⁵ S 7(1)(c), (g) & (h) of the Children’s Act 38 of 2005 states the following: “Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely (c) the capacity of the parents, or any specific parent, or of any other caregiver or person, to provide for the needs of the child, including emotional and intellectual needs; and (g) the child’s - (i) age, maturity and stage of development; (ii) gender; (iii) background; and (iv) any other relevant characteristics of the child”.

²²⁶ S 3 of the Social Assistance Act states the following: “The objects of this Act are to (a) provide for the administration of social assistance and payment of social; (b) make provision for social assistance and to determine the qualification requirements in respect thereof; (c) ensure that minimum norms and standards are prescribed for the delivery of social assistance; and (d) provide for the establishment of an inspectorate for social assistance”. S 4(a) & (c) of the Social Assistance Act states the following: “The Minister must, with the concurrence of the Minister of Finance, out of moneys appropriated by parliament for that purpose, make available - (a) a child support grant; and (c) a foster child grant”.

²²⁷ Proudlock “Weighing up the policy proposals: some considerations” in Delany, Jehoma & Lake (eds) *South African Child Gauge* (2016) Children’s Institute, University of Cape Town 95.

costs of meeting a child's basic needs.²²⁸ To date, the CSG is valued at less than half of the value of the FCG.

2 2 2 Foster Child Grant

The FCG is available to foster parents²²⁹ - in possession of a valid court order – appointed by the children's court to care for a child in need of care and protection.²³⁰ Most court orders are for a period of two years and extended on renewal by the children's court. If the review is not done, then the court order expires and the FCG cannot be paid. The FCG follows a statutory process, which outweighs - both in complexity and inefficiency - the administrative process of the CSG. Therefore, the accessibility of the FCG relies on the proper administration of foster care placements. As a result, the payment of FCGs is directly implicated by the foster care backlog.

The CSG and FCG have distinct objectives, and despite similarities, there are important differences between them. For example, the FCG is explicitly linked to the child protection system in support of vulnerable children (also known as wards of the state).²³¹ A child in foster care is entitled to social services²³² as well as social assistance²³³ to discharge his or her socio-economic rights. By comparison, the CSG – as regulated by the social welfare system – is payable to the child's primary caregiver

²²⁸ UNCRC *Concluding recommendations on the second periodic report of the Republic of South Africa* (2016) 54.

²²⁹ S 182 of the Children's Act.

²³⁰ S 150(1) of the Children's Act states the following: "A child is in need of care and protection if the child (a) has been abandoned or orphaned and is without any visible means of support; (b) displays behaviour which cannot be controlled by the parent or caregiver; (c) lives or works on the streets or begs for a living; (d) is addicted to a dependence-producing substance and is without any support to obtain treatment for such dependency; (e) has been exploited or lives in circumstances that expose the child to exploitation; (f) lives in or is exposed to circumstances which may seriously harm that child's physical, mental or social well-being; (g) may be at risk if returned to the custody of the parent, guardian or caregiver 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; (h) is in a state of physical or mental neglect; or (i) is being maltreated, abused, deliberately neglected or degraded by a parent, a caregiver, a person who has parental responsibilities and rights or a family member of the child or by a person under whose control the child is".

²³¹ The court and social work oversight required for foster care makes the administration of the FCG much more cumbersome than the CSG which is easier to access through an administrative application to SASSA, with no oversight requirement after the initial approval of the grant. See Skelton "Kinship care and cash grants - South Africa" in Atkin *The International Survey of Family Law* (2012) 336.

²³² S 28(1)(c) of the Constitution.

²³³ S 27(1)(c) of the Constitution.

(e.g. parent, guardian, grandparent, aunt or uncle etc.) as a poverty alleviation mechanism.²³⁴

2 3 Top-Up Grant

There is a distinct difference in need causing the foster care crisis. In order to make this distinction, it must be determined whether all orphans living with relatives are in need of protective services or whether a government subsidy – under the circumstances - would be more appropriate.

In 2016, the 1997 White Paper for Social Welfare was reviewed by the Ministerial Committee to make provision for an extended CSG - a top-up grant - for orphans living with relatives in response to the foster care backlog.²³⁵ On 6 December 2017, Cabinet approved the Social Assistance Amendment Bill tabled in parliament on 14 April 2018. At that time, the top-up grant was benchmarked to become the preferred form of social assistance for orphans living with relatives.²³⁶ And, it was projected that within 3 to 4 years, the overall number of children in foster care would be reduced to a manageable size thereby mitigating the foster care crisis.²³⁷ However, despite the timeous production of the Bill, the Bill has lapsed due to executive inaction.

In theory, the success of the top-up grant relies on the recognition of care by the child's *de facto* caregiver, in this case, his or her extended family member(s).²³⁸ This will be discussed in more detail in Chapter 3 of this study. Secondly, it is a monetary incentive to remain outside of the foster care system unless protection services are actually needed. It is therefore intended to divert applicants away from the child protection

²³⁴ Hall, Skelton & Sibanda “Social assistance for orphaned children living with family” in Delany, Jehoma & Lake (eds) *South African Child Gauge* (2016) Children’s Institute, University of Cape Town 68-74.

²³⁵ Department of Social Development *Comprehensive report on the review of the White Paper for Social Welfare 1997* (2016). Available at https://www.gov.za/sites/default/files/gcis_document/201610/comprehensive-report-white-paper.pdf Accessed on 25 September 2019.

²³⁶ Hall, Skelton & Sibanda (2016) 91.

²³⁷ Hall, Skelton & Sibanda (2016) 92.

²³⁸ Proudlock (2016) 97.

system. The value of the top-up grant is projected at 50% higher²³⁹ than the current CSG (R 430), valued at R 860 per child, per month.²⁴⁰

The Social Security Directorate supports this initiative and has been leading the reform process since 2012, when the Minister established an inter-departmental task team to discuss and develop it further. By 2015, the proposal was included in the Medium Term Strategic Framework, for implementation in 2018.²⁴¹ Indeed, the subsequent lapsing of the Social Assistance Amendment Bill with no further comment or development derailed this initiative.²⁴² And, this will effect, if not further delay, the successful outcome of this study.

The proposed amendment would authorise the Minister of Social Development to increase social grant amounts for certain categories of grant beneficiaries based on need.²⁴³ This includes the proposed top-up grant for relatives caring for orphaned children. In addition to the financial benefits, this change would re-direct the delivery of social services to children in need of care and protection.²⁴⁴ However, Hall & Skelton have indicated that “it is possible that relatives caring for orphaned children will want to apply for the top-up grant as an interim source of financial support pending the child’s foster care placement. [And], if this happens, then the top-up grant will not help to relieve the burden on the child protection system, and may in fact exacerbate it”.²⁴⁵ The main concern centres on the cost involved. On this point, Budlender writes that “at least part of the cost of increasing the CSG will be offset by targeting the FCG to children in need of care and protection rather than children in poverty living apart from their parents”.²⁴⁶

²³⁹ Medium Term Strategic Framework 2014 – 2019 (Appendix 13). Available at https://www.gov.za/sites/default/files/gcis_document/201409/mtsf2014-2019.pdf Accessed on 7 February 2020. .

²⁴⁰ Hall, Skelton & Sibanda (2016) 92.

²⁴¹ Medium Term Strategic Framework 2014 – 2019 (Appendix 13).

²⁴² Social Assistance Amendment Bill. Available at <https://pmg.org.za/bills/tailed/year/2018/> Accessed on 4 July 2019.

²⁴³ S 12A(1) of the Social Assistance Amendment Bill.

²⁴⁴ Hall & Skelton “Introducing a Child Support Grant top-up for orphaned children living with family members” in Delany, Jehoma & Lake (eds) *South African Child Gauge* (2016) Children’s Institute, University of Cape Town 91.

²⁴⁵ Hall & Skelton (2016) 91-94.

²⁴⁶ Budlender “Increasing the amount of the child support grant” in Delany, Jehoma & Lake (eds) *South African Child Gauge* (2016) Children’s Institute, University of Cape Town 79.

At September 2019, approximately 416 441 children were beneficiaries of the FCG. If we assume that ten per cent of these children are in need of care and protection and should remain on the FCG, and the remaining 374 797 receive the CSG valued at R 430 per child, per month, there would be a saving of R 258 634 290 per month in social grant payments.²⁴⁷ However, this will be regressive if children already in foster care are denied access to the FCG. The alternative would be the top-up grant valued at R 860 per child, per month allocated to the 374 797 caregivers amounting to R 322 325 420 per month. This accounts for a saving of R 52 471 580 per month.²⁴⁸ Evidently, the top-up grant (for orphaned children living with relatives) is financially viable with a saving of R 52 471 580 per month which may be reallocated to the delivery of social services.

The top-up grant relies on an administrative process much like that of the CSG, “family members caring for orphaned children would apply directly to SASSA using the CSG process for quick enrolment. The Applicant would need to provide death certificates of parents (or at least one parent combined with an affidavit) to qualify for the top-up amount. [And], the Applicant must depose to an affidavit his or her relationship with the child and qualify in terms of the means test”.²⁴⁹

According to Hall and Skelton, “the top-up grant will not prevent orphans living with relatives from accessing child care and protection services in the same way as any other child who is found to be in need of care and protection, in terms of section 150(1) of the Children’s Act. The top-up grant is in effect a monetary incentive to remain outside the foster care system unless protection services are actually needed”.²⁵⁰

Additionally, there could be a requirement in which the details of the caregiver are sent to the provincial DSD after the allocation of the top-up grant. This will not obstruct or

²⁴⁷ The calculation is as follows: 374 797 (children not in need of care and protection) x R 1 000 (FCG) = R 374 797 000. As compared to: 374 797 (children not in need of care and protection) x R 430 (CSG) = R 116 162 710. Total saving: R 258 634 290. See: Budlender (2016) 79.

²⁴⁸ The calculation is as follows: 416 441 (children not in need of care and protection) x R 1 000 (FCG) = R 416 441 000. As compared to: 374 797 (children not in need of care and protection) x R 860 (top-up grant) = R 322 325 420 plus [41 644 (children in need of care and protection) x R 1 000 (FCG) = R 41 644 000]. Total: R 363 969 420. Total Saving: R 52 471 580.

²⁴⁹ Hall & Skelton (2016) 91-94.

²⁵⁰ Hall & Skelton (2016) 91-94.

delay the Applicant's access to the top-up amount.²⁵¹ It would be a precautionary measure resulting in an investigation by the DSD. However, the implementation of the top-up grant is subject to legislative amendments which – as previously stated – have not been effected. It can therefore not be an immediate redress to the foster care crisis.

2 4 Maladministration of Social Grants

In South Africa where most families buy rather than grow food, the importance of social grants becomes apparent in managing their monthly expenditure.²⁵² With this in mind, the Centre for Child Law (CCL) intervened as *amicus curiae* during a procurement dispute against SASSA in 2012.²⁵³ This matter argued a tender for payment of social grants to approximately 15 million beneficiaries, including children, pensioners and people with disabilities.

In 2012, SASSA signed a contract with Cash Payment Masters (CPS) to manage the payment of 15 million beneficiaries. The contract was worth R 10 billion and would involve processing grant payments totalling approximately R 500 billion over the five-year contract period. An aggrieved bidder, AllPay, alleging irregularities in the tender process, challenged its lawfulness. The High Court found the tender process to be unfair, unlawful and invalid.²⁵⁴ At that time, the CCL asked the court to be mindful of the devastating effect of the delay and/or interruption in the delivery of social grants to over 10 million children.²⁵⁵ As a result, the court grappled with drafting an appropriate remedy that would balance the commercial interests of AllPay, the need to prevent and discourage maladministration and corruption, and the best interests and rights of children to socio-economic goods and services.²⁵⁶ The court therefore decided that while they had found the tender process invalid, it would not be just and equitable to set it aside and ordered costs against SASSA and CPS for the irregular tender

²⁵¹ Hall & Skelton (2016) 92-93.

²⁵² Proudlock "Children's socio-economic rights" in Boezaart (ed) *Child Law in South Africa* (2017) 366.

²⁵³ *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* ZAGPPHC 185 of 28 August 2012 par 80.

²⁵⁴ *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* ZAGPPHC 185 of 28 August 2012 par 80.

²⁵⁵ *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* ZAGPPHC 185 of 28 August 2012 par 73.

²⁵⁶ Proudlock (2016) 362.

process. AllPay and CPS appealed this decision and the SCA found the tender process to be free of irregularities and, therefore, lawful.²⁵⁷ While not required, the court commented on what would have been a just and equitable remedy if the tender had been found to be unlawful and in doing so, made reference to the arguments advanced by the CCL.

“We need no evidence to know the immense disruption that would be caused, with dire consequences to millions of the elderly, children and the poor, if this contract were to be summarily set aside. The prospect of that occurring has prompted the CCL to intervene as *amicus curiae* in the case. We value the contribution they have made but they have no cause for concern, it is unthinkable that that should occur.”²⁵⁸

On appeal, the Constitutional Court, declared the contract between SASSA and CPS to be constitutionally invalid.²⁵⁹ The court suspended the declaration of invalidity in order to give SASSA sufficient time to run a new tender process. While the tender was re-run, the court ordered that the current service provider, CPS, must continue to deliver the service.²⁶⁰ The court emphasised that there must be no disruptions to the payment of grants.

“A significant proportion of social grant beneficiaries are children. This means that any assessment of the possible disruption in the payment process should be the subject of even greater scrutiny where the rights of children are at stake.”²⁶¹

In the event that the tender was not awarded after the process was re-run, the court ordered that the declaration of invalidity would apply until the completion of the five-year contract period (1 April 2017).²⁶² In November 2015, SASSA filed a report with the court stating that it had decided not to award a new tender and intended to in-

²⁵⁷ *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* 2013 (4) SA 557 (SCA) par 97.

²⁵⁸ *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* 2013 (4) SA 557 (SCA) par 99.

²⁵⁹ *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* 2013 (4) SA 557 (SCA) par 99.

²⁶⁰ *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* 2013 (4) SA 179 (CC) par 36.

²⁶¹ *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* 2013 (4) SA 179 (CC) par 36.

²⁶² *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* 2013 (4) SA 179 (CC) par 78.

source the payment function of social grants from 1 April 2017. Accepting SASSA's assertions, the court ended its supervision of SASSA.²⁶³

By 2016, it was clear that SASSA was not in a position to take over the payment of grants itself and the Minister of Social Development intended to extend the invalid contract with CPS without following the competitive tender process. As a result, in early 2017 the Black Sash Trust, an NGO with a long history as an advocate for the right to social assistance challenged the regulation of grant payments by SASSA.

What followed was the disarray of SASSA, in a detailed order aimed at ensuring the right to social assistance was protected amidst the apparent inability by the Ministry and SASSA to do so within the prescripts of the rule of law.²⁶⁴

“One of the signature achievements of our constitutional democracy is the establishment of an inclusive and effective programme of social assistance. It has had a material impact in reducing poverty and inequality and in mitigating the consequences of high levels of unemployment. In doing so, it has given some content to the core constitutional values of dignity, equality and freedom. This judgment is, however, not an occasion to celebrate this achievement. To the contrary, it is necessitated by the extraordinary conduct of the Minister of Social Development and of SASSA that placed that achievement in jeopardy.”²⁶⁵

At that time, the court ordered the surveillance of grant payments requiring the Minister and SASSA to file reports with the court every three months, setting out their plan and progress for ensuring the payment of social grants after the expiry of the 12-month period. This was supplemented by the request to create an independent committee to review the reports and submit their opinions to the courts.²⁶⁶

In closing, the implosion of SASSA – synonymous with the efforts of the Black Sash Trust in the Constitutional Court and the up to date restructuring of grant payments –

²⁶³ *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* 2013 (4) SA 179 (CC) par 78.

²⁶⁴ *Black Sash Trust v Minister of Social Development* 2017 (3) SA 335 (CC) paras 4-14.

²⁶⁵ *Black Sash Trust v Minister of Social Development* 2017 (3) SA 335 (CC) par 1.

²⁶⁶ *Black Sash Trust v Minister of Social Development* 2017 (3) SA 335 (CC) paras 4-14.

must be considered. One may argue that the progression of this matter will contribute to the success of the top-up grant should SASSA manage the transition effectively. Secondly, there are particular similarities in the legislative process and outcome employed by the court in this matter which may be helpful to the resolution of the foster care crisis.

2 5 Conclusion

Legislation has a distinct role to play in giving effect to a child's socio-economic rights. Statutory obligations and entitlements go hand in hand with service delivery. This is particularly important in the consideration of social grants specifically for children whose rights are unqualified and immediate. As a result, the payment of social grants is not subject to progressive realisation.

However, there is a distinct difference in need causing the foster care backlog. In order to make this distinction, it must be determined whether all orphans living with relatives are in need of care and protection or whether a government subsidy – under the circumstances - would be more appropriate. The latter supports a plausible alternative to the FCG for relatives caring for orphaned children. The alternative would be a top-up to the CSG valued at R 860 per child, per month. In effect, the top-up grant is a monetary incentive to remain outside the foster care system unless protection services are actually needed.

By re-directing orphaned children, there would be a saving of R 52 471 580 per month, available for distribution within the child protection system.²⁶⁷ This would mitigate the misappropriation of funds for services necessitated by foster care placements. It is therefore imperative to distinguish between the child's need for cash or care. And, this is particularly important when considering the current jurisprudence implementing the right to social assistance.

²⁶⁷ See calculation fn 248.

As previously stated, the *SS*²⁶⁸ and *Manana*²⁶⁹ judgments are not per se objectionable when read with section 28(2) of the Children's Act.²⁷⁰ However, from a policy perspective, the High Court's interpretation of section 150(1)(a) entrenches the use of the foster care system for poverty alleviation and fails to address the problems in the social welfare system.²⁷¹ This calls for a reconceptualization of social assistance within the foster care crisis. If clear demarcations are drafted to accommodate both foster care and care by relatives (kinship care), the regulations must provide for the allocation of social assistance to kinship caregivers outside of the foster care system.²⁷² This will resolve questions around the appropriateness and effectiveness of making the FCG available for kinship care generally.²⁷³

The systemic challenges experienced in the social welfare system are largely attributed to the ineffective service provision for vulnerable children exacerbated by the placement of orphans in foster care without formal consultation or inquiry into the systemic consequences of such a shift.²⁷⁴ These challenges cannot be completely attributed to the foster care crisis. However, it has contributed to the deregulation of social services including social grants. Solving the crisis will therefore go a long way towards the effective implementation of the care and protection system as well as the social welfare system.

A discussion on the allocation of social welfare services would not be complete without a consideration of the burden of care. Chapter 3 will therefore address the structure, functioning and role of the African family (classified as kinship caregivers) as part of the solution.

²⁶⁸ *SS v Presiding Officer Children's Court, Krugersdorp* 2012 (6) SA 45 (GSJ).

²⁶⁹ *NM v Presiding Officer of Children's Court, Krugersdorp* 2013 (4) SA 379 (GSJ).

²⁷⁰ S 28(2) of the Children's Act states the following: "A child's best interests are of paramount importance in every matter concerning the child".

²⁷¹ Rohrs "The child in need of care and protection" in Boezaart (ed) *Child Law in South Africa* (2017) 208.

²⁷² Meintjes, Budlender, Giese & Johnson (2003) 1.

²⁷³ Meintjes, Budlender, Giese & Johnson *Children 'in need of care' or in need of cash? Questioning social security provisions for orphans in the context of the South African AIDS pandemic* (2003) Joint Working Paper of the Children's Institute and Centre for Actuarial Research, University of Cape Town 1.

²⁷⁴ Hall, Skelton & Sibanda (2016) 69.

CHAPTER 3: KINSHIP CARE: A PART OF THE SOLUTION

3 1 Introduction

The non-recognition of kinship care has been a topic of discussion since 1999.²⁷⁵ According to Scannapieco & Hegar, “much of the controversy around the status of kinship care revolves around its interactions with the child protection system, particularly with regards to its relationship with foster care”.²⁷⁶ This study is aligned with the status of orphaned children living with relatives in foster care and will therefore not account for interactions outside of this.

In Africa, kinship care, otherwise known as care by relatives,²⁷⁷ has been an ever-present family resource, in the presence and/or absence of parental care.²⁷⁸ Kinship carers are categorised as *de facto* caregivers in the absence of formal recognition and state subsidy.²⁷⁹ What follows is the categorization of kinship care as general recognition would be counterproductive to the outcome of this study.

²⁷⁵ Scannapieco & Hegar “Kinship foster care in context” in Hegar & Scannapieco (eds) *Kinship foster care: policy, practice and research* (1999) 6.

²⁷⁶ Scannapieco & Hegar (1999) 5.

²⁷⁷ “Care” is defined in s 1 of the Children’s Act 38 of 2005 to include, where appropriate and “(a) within available means, providing the child with - (i) a suitable place to live; (ii) living conditions that are conducive to the child’s health, well-being and development; and (iii) the necessary financial support; (b) safeguarding and promoting the well-being of the child; (c) protecting the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation and any other physical, emotional or moral harm or hazards; (d) respecting, protecting, promoting and securing the fulfilment of, and guarding against any infringement of, the child’s rights set out in the Bill of Rights and the principles set out in Chapter 2 of this Act; (e) guiding, directing and securing the child’s education and upbringing, including religious and cultural education and upbringing, in a manner appropriate to the child’s age, maturity and stage of development; (f) guiding, advising and assisting the child in decisions to be taken by the child in a manner appropriate to the child’s age, maturity and stage of development; (g) guiding the behaviour of the child in a humane manner; (h) maintaining a sound relationship with the child; (i) accommodating any special needs that the child may have; and (j) generally, ensuring that the best interests of the child is the paramount concern in all matters affecting the child”.

²⁷⁸ O’Brian “The benefits and challenges of kinship care” (2012) *Child Care in Practice* 127.

²⁷⁹ Ankut *Balancing parental responsibility and state obligation in fulfilling the socio-economic rights of children under the African Charter on the Rights and Welfare of the Child* (2003) unpublished LLM thesis, University of the Western Cape 26.

3 1 1 Private Kinship Care

Private kinship care refers to a *temporary*²⁸⁰ arrangement between family members with no state involvement or intervention. The arrangement is usually in response to the family's inability to finance the child's burden of care.²⁸¹ It is therefore distinguishable from informal kinship care by its dissociation from child protection issues such as abandonment, abuse, neglect, violence or exploitation. Indeed, there is a need for care as well as social assistance but not protection.

3 1 2 Informal Kinship Care

Informal kinship care is founded on state intervention in response to a child protection issue which necessitates the placement of a child with his or her relative(s) – on the family's request.²⁸² This request is usually related to issues outside of the child protection system discrediting placement in foster care. However, the burden of care is often greater than the *de facto* caregiver's means to provide for the child in his or her care. And, since many kinship carers are indigent, this form of care is reliant on state subsidies and the delivery of social grants.²⁸³

3 1 3 Formal Kinship Care

Formal kinship care is initiated by the state in response to a child protection issue subject to investigation by child welfare services.²⁸⁴ This process is procedurally akin to foster care, requiring pre-screening and training of relatives as well as on-going monitoring of the child's well-being.²⁸⁵ Pre-screening requirements include standards

²⁸⁰ Own emphasis.

²⁸¹ This approach to private kinship care does not in any way affect other forms of support or grants in terms of social security measures that individual members of the family or child may be entitled to like the CSG.

²⁸² O'Brien (2012) *Child Care in Practice* 128.

²⁸³ Scannapieco & Hegar (1999) 6.

²⁸⁴ Cantwell & Holzscheiter "Article 20: children deprived of their family environment" in Alan *et al* (eds) *A commentary on the United Nations Convention on the Rights of the Child* (2008) 37.

²⁸⁵ Oswald *Because we care: programming guidance for children deprived of parental care* (2009) 27.

around “housing, finances, family composition, family history, relationships, attributes about parenting and a variety of other factors”.²⁸⁶

However, many kinship carers are not able to meet these standards often yielding to demands that some be waived, reviewed or adapted.²⁸⁷ This raises concerns relating to “selection criteria, certification, supervision, payment, reunification efforts and permanency plans making it nearly impossible to implement the provisions for funding as applicable to foster care placements”.²⁸⁸ While these are difficult issues to answer conclusively, it is important to note that whether the child’s best interests is regulated by formal kinship care or foster care, this form of care is temporary (a maximum of two years). As such, the additional investment in the formalization of kinship care (which, if orphaned, the child is likely to need on a longer term basis) is justified in the context of alternative care as defined by the Children’s Act.²⁸⁹

3 2 Guidelines on Alternative Care

As stated above, the majority of African children are absorbed into kinship care.²⁹⁰ The Guidelines on Alternative Care recognise these placements as informal care and the relevant provisions in 4 paragraphs are reproduced below:

“With a view to ensuring that appropriate conditions of care are met in informal care provided by individuals or families, States should recognise the role played by this type of care and take adequate measures to support its optimal provision on the basis of an assessment of which particular settings may require special assistance or oversight.

Competent authorities should, where appropriate, encourage informal carers to notify the care arrangement and should seek to ensure their access to all available services

²⁸⁶ Scannapieco & Hegar (1999) 6.

²⁸⁷ Scannapieco & Hegar (1999) 5.

²⁸⁸ Scannapieco & Hegar (1999) 6.

²⁸⁹ Cantwell “Improving protection for children without parental care: developing internationally accepted Standards” Paper presented at the European Congress in *Gmunden* (2005) 37. Available at <http://www.crin.org/bcn/details.asp?id=11692&themeID=1001&topicID=1007> Accessed on 19 August 2019.

²⁹⁰ Cantwell “Improving protection for children without parental care: developing internationally accepted Standards” Paper presented at the European Congress in *Gmunden* (2005) 76. Available at <http://www.crin.org/bcn/details.asp?id=11692&themeID=1001&topicID=1007> Accessed on 19 August 2019.

and benefits likely to assist them in discharging their duty to care for and protect the child. The State should recognise the *de facto* responsibility of informal carers for the child.

States should devise special and appropriate measures designed to protect children in informal care from abuse, neglect, child labour and all other forms of exploitation, with particular attention to informal care provided by non-relatives, or by relatives previously unknown to the children or living far from the children's habitual place of residence."²⁹¹

From the above, it is clear that states must provide mechanisms to support the practice of informal care, in response to the foster care crisis, specifically for orphaned children living with relatives. Support in this context refers to social assistance and social services where appropriate.

3 3 South African Law Reform Commission

According to Skelton, "the genesis of the foster care crisis is traceable to the refusal of the South African parliament (for political and other reasons) to adopt the proposal of the South Africa Law Reform Commission (SALRC) on the right to alternative care while the Children's Act was still in the Bill stage".²⁹² The SALRC recommended that "relatives caring for children who have been abandoned or orphaned or are for some or other reason in need of their assistance, but who are not per se in need of formal protective services, should have access to a simple procedure whereby the necessary parental responsibilities can be conferred on them".²⁹³ Skelton explains this further as follows:

"The Children's Bill produced by the SALRC provided for three models of care, namely foster care, court-ordered kinship care and informal kinship care. Foster care was limited to children placed by the formal childcare and protection system in the care of persons unrelated to them. These foster carers would be screened and carefully selected, and

²⁹¹ Guidelines on Alternative Care paras 76-79.

²⁹² Skelton "Kinship care and cash grants - South Africa" in Atkin *The International Survey of Family Law* (2012) 338-340.

²⁹³ South African Law Reform Commission (2002) Project 110 Report: Review of the Child Care Act. Available at http://www.justice.gov.za/salrc/reports/r_pr110_01_2002dec.pdf Accessed on 19 August 2019.

the initial court order would be of limited duration, with the emphasis on family reunification services. Court-ordered kinship care would aim to provide care with relatives for children who were unable to remain in their homes due to abuse or neglect. Although reunification services would often be appropriate in these cases, the court should also have a discretion to make a longer term order from the onset, and to dispense with social work supervision in appropriate cases. Informal kinship care was for the recognition of children being cared for by their families in situations where they did not need care and protections services, but needed social security to help the families financially.”²⁹⁴

The recognition of informal kinship care provides a plausible alternative to foster care for orphans living with relatives.²⁹⁵ And, the then recommendations of the SALRC - is aligned with this analysis and may be explained as follows: kinship care placements not requiring court intervention should be allocated a social grant in support of the practice of kinship care throughout South African communities. And:

“Children who require formal protective services and are placed in care with relatives by means of a court order should qualify for a grant, which could be structured on the same basis as the foster care grant.”²⁹⁶

These recommendations may be likened to today’s top-up grant²⁹⁷ in support of informal kinship care arrangements (for children not in need of protective services) including orphaned children living with relatives.

3 4 Section 32 of the Children’s Act 38 of 2005

The voluntary placement of children - indefinitely, temporarily or partially - with their relatives is regulated by section 32(1) of the Children’s Act.²⁹⁸ This form of care is

²⁹⁴ Skelton in Atkin (2012) 337.

²⁹⁵ Skelton in Atkin (2012) 339.

²⁹⁶ South African Law Reform Commission (2002) Project 110 Report: Review of the Child Care Act 230. Available at http://www.justice.gov.za/salrc/reports/r_pr110_01_2002dec.pdf Accessed on 19 August 2019.

²⁹⁷ See Ch 2 par 2 3.

²⁹⁸ 38 of 2005.

categorised as family care.²⁹⁹ Family care is not a form of alternative care but envisaged as informal kinship care under section 32 of the Children’s Act.

The provision for kinship care is generally categorised by a need for care and distinguished by the circumstances giving rise to this need, be it protection and/or social assistance. It is for this reason that informal kinship care should not be associated with the child protection system where a plausible social assistance mechanism would be more appropriate. Indeed, the practice of informal kinship care cannot exist on the assumption that all children – in this category – are not in need of protection services. Rather, methods of administering the process which do not place an undue burden on the limited resources of time, finances and social workers must be considered. Chapter 4 will further the discussion on legislative reform in support of informal kinship care which is part of the solution to the foster care crisis.

3 5 Child Care and Protection Policy

The Children’s Act provides substantive protection for the children in South Africa, the gap is an overarching and comprehensive policy that clearly articulates government’s overall policy for the implementation of care and protection mechanisms. The comprehensive child care and protection policy (CCPP), developed for introduction during the 2018/19 financial year is said to address the maladministration of foster care responsible – at least in part – for the foster care backlog in the absence of a plausible alternative for orphaned children living with relatives.

The CCPP represents an overarching statement of intent and direct implementation of the Children’s Act, international conventions and treaties, the Constitution and the principles of the White Paper on Social Welfare.³⁰⁰ In May 2018, the then Minister of Social Development, Susan Shabangu, participated in extensive consultation with various stakeholders including the National Child Care and Protection Forum, DSD internal decision-making structures, the Social Protection, Community and Human

²⁹⁹ S 28(1)(b) of the Constitution of the Republic of South Africa, 1996 (hereafter “the Constitution”).
³⁰⁰ Annexure “F” of the Department of Social Development’s Progress Report in *Centre for Child Law v Minister of Social Development* (North Gauteng High Court) Case Number 72513/2017 of 28 November 2017.

Development Technical Working Group as well as the Justice Development Committee.³⁰¹ The outcome being a draft CCPP released for comment in December 2017.³⁰² The policy promotes co-operation and collaboration between government and civil society organisations to strengthen equitable access to quality social services for children and families.³⁰³ It provides three distinct services for children and their families firstly, access to “clean water, sanitation, electricity, birth registration, early education facilities, schools, health care services, recreational facilities, police services, parent support programmes and public education on child development”.³⁰⁴ The delivery of these services is facilitated by departments across all three spheres of government.

Secondly, providing “parenting skills programmes, social grants, employment programmes for caregivers, psychosocial support for families and children, among others”.³⁰⁵ The policy was designed to respond to the need for social assistance within vulnerable families who are unable to discharge their burden of care.³⁰⁶

Thirdly, responsive protection services that field “risk assessments, investigations into abuse; children’s court inquiries; placement in alternative care; supervision and regular review of placements in alternative care; family reunification services and support for children who age-out of the child care and protection system”.³⁰⁷ However, this will demand a greater social service presence which is currently implausible while the foster care crisis subsists.³⁰⁸ The policy deals explicitly with some of these challenges, across all three services, but not all.

In terms of section 150(1) of the Children’s Act, a child in need of care and protection must be referred to a designated social worker who will investigate the live-in

³⁰¹ Annexure “F” of the Department of Social Development’s Progress Report in *Centre for Child Law v Minister of Social Development* (North Gauteng High Court) Case Number 72513/2017 of 28 November 2017 2.

³⁰² Draft Child Care and Protection Policy (2018) 63-64. Available at http://www.ci.uct.ac.za/sites/default/files/image_tool/images/367/Child_Gauge/South_African_Child_Gauge_2018/Chapters/legislative%20developments.pdf Accessed on 20 September 2019.

³⁰³ Annexure “F” of the Department of Social Development’s Progress Report in *Centre for Child Law v Minister of Social Development* (North Gauteng High Court) Case Number 72513/2017 of 28 November 2017 1.

³⁰⁴ Draft Child Care and Protection Policy (2018) 63-64.

³⁰⁵ Draft Child Care and Protection Policy (2018) 63-64.

³⁰⁶ Draft Child Care and Protection Policy (2018) 63-64.

³⁰⁷ Draft Child Care and Protection Policy (2018) 63-64.

³⁰⁸ Draft Child Care and Protection Policy (2018) 63-64.

circumstances of the child and submit a report to the children’s court recommending placement – if so determined – in alternative care.³⁰⁹ Foster care is a form of alternative care which provides for the placement of a child with his or her relative(s) if so required.³¹⁰

The policy recognises that the majority of children living with relatives are not in need of formal protection services via the foster care system because they are not suffering abuse, neglect or exploitation.³¹¹ However, the DSD still considers them to be more vulnerable than children in the care of biological parents. For this reason, it is suggested that the biological parent(s) and kinship caregiver(s) approach the children’s court to formalise their care arrangements by completing a parental responsibilities and rights (PRR) agreement.³¹² To enforce the PRR agreement, in terms of section 22 of the Children’s Act, it must be made an order of the children’s court or registered with the family advocates’ office.³¹³

This must be compared with the letter of recognition of parental responsibilities and rights in respect of the child which is available for issuing - subject to screening and assessment - to the kinship caregiver of orphaned children in his or her care.³¹⁴ However, it is unclear - from this policy’s provisions - how this letter is different from the PRR agreement.

It is noteworthy that if the PRR agreement, alternatively, the letter of recognition is requested on application for the top-up grant, a significantly large number of caregivers will then need the services of the family advocate or the children’s court.³¹⁵ Indeed, this is contrary to an effective and sustainable solution as the increased demand will reveal the current incapacity of the children’s court and family advocates’ office thereby

³⁰⁹ S 155(2) of the Children’s Act states the following: “Before the child is brought before the children’s court, a designated social worker must investigate the matter and within 90 days compile a report in the prescribed manner on whether the child is in need of care and protection”.

³¹⁰ S 180(3)(b) of the Children’s Act.

³¹¹ Draft Child Care and Protection Policy (2018) 62.

³¹² Draft Child Care and Protection Policy (2018) 95.

³¹³ Draft Child Care and Protection Policy (2018) 87.

³¹⁴ The Children’s Third Amendment Bill (August Version) defines an “orphan” as “a child who has lost both parents”, thereby restricting the definition to double orphans only. See Children’s Third Amendment Bill (August 2018 Version). Available at <http://www.ci.uct.ac.za/news/consultations-children%E2%80%99s-third-amendment-bill> Accessed on 10 September 2019.

³¹⁵ Draft Child Care and Protection Policy (2018) 87.

limiting access to social services.³¹⁶ A less administratively burdensome approach to proving the status of primary caregivers would be to draw on the documents currently listed in the Regulation 11(3) of the Social Assistance Act for proving a primary caregiver's status.³¹⁷

From the above, it is clear that regardless of the proposal adopted to regulate kinship care arrangements, the foster care system is not equipped to regulate an orphan's access to social assistance in that the DSD's policy mis-step:

"...placed tremendous strain on the foster care system, with the excessively high numbers of children and caregivers entering it [creating] administrative bottlenecks. [And, this] has led to the exclusion of large numbers of children in need of intensive protection services and left the system unable to maintain its monitoring and renewal of court ordered foster care placements. Critically, this has resulted in the exclusion from the FCG of many of the orphans unable to access the system because of overcrowding, delays and inequities in administration of the relevant processes."³¹⁸

The challenge in using the foster care system for all orphans living with relatives is the gap between the large number of orphans and the nominal social workers available to serve them. Indeed, prior to implementation of the CCPP, the DSD will have to answer to the demand on social workers to facilitate this policy change. The DSD must further answer to how the PRR agreement or letter of recognition differs from an application for guardianship. The latter being part of pending legislative reform.

In closing, there are substantial implications associated with the ongoing foster care crisis which will continue to undermine the efforts of service providers for as long as it is not addressed. Indeed, the CCPP was intended to supplement the concurrent amendments to the Children's Act and Social Assistance Act in recognition of kinship care arrangements. However, if the provisions of this proposal remain implausible -

³¹⁶ Draft Child Care and Protection Policy (2018) 134.

³¹⁷ Reg 11(3) provides that: "A caregiver may prove that they are the primary caregiver for the purposes of a social grant application, by providing any of the following documents: (i) an affidavit from a police official; (ii) a report from a social worker; (iii) an affidavit from a biological parent of the child; or (iv) a letter from the principal of the school attended by the child".

³¹⁸ Draft Child Care and Protection Policy (2018) 62.

due to limited resources - its potential to alleviate the state's burden of care will be immaterial for as long as the crisis subsists.

3 6 Conclusion

Kinship carers are categorised as *de facto* caregivers in the absence of formal recognition and state subsidy.³¹⁹ In Africa, kinship care, otherwise known as care by relatives, has been an ever-present family resource, in the presence and/or absence of parental care.³²⁰ According to Scannapieco & Hegar, "much of the controversy around the status of kinship care revolves around its interactions with the child protection system, particularly with regards to its relationship with foster care".³²¹

According to Skelton, "the genesis of the foster care crisis is traceable to the refusal of the South African parliament (for political and other reasons) to adopt the proposal of the South Africa Law Reform Commission (SALRC) on the right to alternative care while the Children's Act was still in the Bill stage".³²² The SALRC recommended that "relatives caring for children who have been abandoned or orphaned or are for some or other reason in need of their assistance, but who are not per se in need of formal protective services, should have access to a simple procedure whereby the necessary parental responsibilities [and rights] can be conferred on them".³²³ The current dialogue discredits the presumption that all orphans living with relatives are in need of care and protection which necessitates placement in alternative care (i.e. foster care). On this point, Skelton opines that:

"The South African government's policy shift had nothing to do with favouring foster care as an option, but more to do with trying to link kinship carers with a social grant (social assistance) which was higher in its amount, and foster care became the 'vehicle' to do this".³²⁴

³¹⁹ Ankut (2003) 26.

³²⁰ O'Brian (2012) *Child Care in Practice* 127.

³²¹ S 150(1) of the Children's Act provides a closed list of circumstances when a child is in need of care and protection which necessitates placement in alternative care. Foster care is an alternative care model. See Scannapieco & Hegar (1999) 5.

³²² Skelton in Atkin (2012) 338-340.

³²³ South African Law Reform Commission (2002) Project 110 Report: Review of the Child Care Act.

³²⁴ This formed part of the feedback received in the writing of this study.

The Bill of Rights in the Constitution³²⁵ guarantees everyone the right to have access to social security,³²⁶ including the allocation of social assistance.³²⁷ Section 28(1)(c) of the Constitution entrenches children's socio-economic rights as unqualified and immediate.³²⁸ However, the exponential increase of children in foster care has resulted in a foster care backlog causing overcrowding, delays and inequities in the delivery of social services.

Indeed, the practice of informal kinship care cannot exist on the assumption that all children – in this category – are not in need of protective services. Rather, methods of administering the process which do not place an undue burden on the limited resources of time, finances and social workers must be considered. Informal kinship care places a burden on indigent caregivers which is often greater than the *de facto* caregivers' means to provide said care, and the child support grant (CSG) is insufficient. Therefore, the alternative would be a top-up grant valued at R 860 per child, per month.³²⁹ The top-up grant is in effect a monetary incentive to encourage a shift away from the foster care system being used to provide social assistance, and to ensure that children are only placed in foster care if protection services are actually needed. In this way, the recognition of informal kinship care – as envisaged by section 32 of the Children's Act - is part of the solution to the foster care crisis.

Indeed, it was envisaged that the CCPP would provide a policy basis for the content of legislative reform.³³⁰ This has not occurred. Instead, the DSD has positioned the Children's Third Amendment Bill as the comprehensive legal solution to the foster care crisis without further comment on the role of the CCPP. Evidently, the shortage in social workers may be a contributing factor to its discontinuance. Chapter 4 will now continue the discussion on the implementation of current and proposed amendments to the Children's Act.

³²⁵ S 27(1)(c) & (2) of the Constitution.

³²⁶ See fn 13.

³²⁷ S 27(1)(c) of the Constitution.

³²⁸ *Centre for Child Law v MEC for Education, Gauteng* 2008 (1) SA 223 (T) 227I-J.

³²⁹ See Ch 2 par 2 3.

³³⁰ Rohrs, Berry, Lake & Shung-King (2016) 17.

CHAPTER 4: CHILDREN'S THIRD AMENDMENT BILL

4 1 Introduction

To contextualise the problem with foster care in South Africa dates back to the early 2000s.³³¹ Since then, the Department of Social Development (hereafter “the DSD”) has used the foster child grant (FCG) to incentivise the care of orphaned children by relatives.³³² Indeed, this is the reason for the then onset and now subsistence of the foster care backlog.³³³ This has resulted in a number of systemic challenges due to the exponential increase of children in foster care.³³⁴ At that time, the DSD was remiss to the implications hereof and it has taken eight litigious years to prevent the majority of foster care orders from lapsing.

The most recent dialogue on this matter is based on the provisions of the 2017 court ordered settlement and the introduction of amending legislation to produce a comprehensive legal solution to the foster care crisis.³³⁵ This matter is set down for hearing on the 26th of November 2019 in the North Gauteng High Court (NGHC). However, with less than a month before the hearing, it is unlikely that a comprehensive legal solution will materialise.³³⁶

The DSD has positioned legislative amendments at the forefront of what constitutes an appropriate redress. Indeed, this will be tested against the content and scope of the

³³¹ Vorster “Regressive and deeply flawed, the Children’s Amendment Bill is rushed to the new parliament” in *the Daily Maverick* (2019). Available at <https://www.dailymaverick.co.za/opinionista/2019-05-29-regressive-and-deeply-flawed-the-childrens-amendment-bill-is-rushed-to-the-new-parliament/> Accessed on 7 June 2019.

³³² See Ch 1 par 1 1 3.

³³³ Vorster “Regressive and deeply flawed, the Children’s Amendment Bill is rushed to the new parliament” in *the Daily Maverick* (2019).

³³⁴ See Ch 1 par 1 1 7.

³³⁵ *Centre for Child Law v Minister for Social Development* (North Gauteng High Court) Case Number 72513/2017 of 28 November 2017 par 4.

³³⁶ In the 2017 court order it is declared that: “The delay by the [Minister] in preparing and introducing before parliament amending legislation to produce a comprehensive legal solution in respect of the foster care system is unconstitutional, unlawful and invalid; and the delay in putting in place the necessary mechanisms, structures and resources to ensure that the foster care system operates in a sustainable and effective manner is unconstitutional, unlawful and invalid”. See *Centre for Child Law v Minister for Social Development* (North Gauteng High Court) Case Number 72513/2017 of 28 November 2017 paras 2 1 & 2 2.

proposed amendments which have since then stagnated.³³⁷ Further delay will see 150 000 foster care orders lapse at the end of 2019, and a further 97,000 in 2020, which could leave almost two-thirds of the children in the foster care system without a FCG.³³⁸

Children are by their very nature economically dependent on their caregiver(s) who - more often than not – reside in acute poverty. Under these circumstances, the child support grant (CSG) would give effect to his or her right to social security.³³⁹ This is a socio-economic right in response to the burden of care.³⁴⁰ Indeed, this is distinguishable from the FCG which is a state subsidy allocated to children in need of care and protection.³⁴¹ Care and protection mechanisms are regulated by the delivery of social services, tailored to the family's social needs.³⁴² For example, section 186 of the Children's Act mandate's the children's court to extend a foster care placement for a period exceeding two years subject to the child turning 18 years. This creates a *permanent placement option*³⁴³ for orphaned children living with relatives. While in law the child remains in foster care, the placement resembles subsidised adoption.³⁴⁴ This is however contrary to the form and function of foster care as provided for in the Children's Act.³⁴⁵

³³⁷ The Children's Third Amendment Bill is listed as a draft and the Social Assistance Bill has lapsed. See All Tabled & Draft Bills from 2019. Available at <https://pmg.org.za/bills/all/year/2019/> Accessed on 10 October 2019.

³³⁸ Vorster "The coming crisis in foster care and why the Children's Amendment Bill won't fix it" in *the Daily Maverick* (2019). Available at <https://www.dailymaverick.co.za/opinionista/2019-09-06-the-coming-crisis-in-foster-care-and-why-the-childrens-amendment-bill-wont-fix-it/> Accessed on 7 September 2019.

³³⁹ S 27(1)(c) of the Constitution of the Republic of South Africa, 1996 (hereafter "the Constitution").
³⁴⁰ It is a poverty alleviation mechanism. See Ch 1 par 1 1 1.

³⁴¹ Refer to s 150(1) of the Children's Act 38 of 2005.

³⁴² Proudlock, Smith & Jamieson "Families need government's support to protect children from abuse" in *Sunday Argus* (2008) 29. Available at http://www.ci.uct.ac.za/sites/default/files/image_tool/images/367/Projects/Completed_Projects/Guide_to_ChildrensAct_26%20May2008.pdf Accessed on 15 September 2019.

³⁴³ Own Emphasis. Foster care is a temporary form of alternative care subject to periodic renewal. It is for this reason that it does not confer guardianship onto the caregiver. Family reunification is a priority. See s 181 of the Children's Act.

³⁴⁴ Proudlock & Jamieson *Guide to the Children's Act no 38 of 2005 as amended by the Children's Amendment Act no 41 of 2007* (2008) Children's Institute, University of Cape Town 8. Available at <http://www.ngopulse.org/press-release/guide-childrens-act-no-38-2005> Accessed on 15 September 2019.

³⁴⁵ S 181 of the Children's Act specifies that the purpose of foster care includes the promotion of family reunification services.

4 2 Children's Act 38 of 2005 (as amended)

The Children's Act is the legislative resource for the implementation of foster care. It is a comprehensive instrument motivated by the preservation of families, the enforcement of constitutional rights of children and the protection of children in need of care and protection.³⁴⁶ However, the implementation of the provisions in Children's Act, rely on the delivery of social services³⁴⁷ which have been reassigned to address the foster care backlog.³⁴⁸ In South Africa, funding from non-profit organisations (NPOs) field the delivery of social services which makes the regulation of NPOs particularly relevant to the outcome of this study insofar as it relates to the appointment of social workers.³⁴⁹

A child's right to social services is related to other children's rights found in section 28 of the Constitution, as well as to other socio-economic rights applicable to everyone,³⁵⁰ and should therefore be read in the context of these other rights.³⁵¹ The integration of other rights defines the day-to-day needs of the child that will best serve his or her interests and this is particularly relevant to the outcome of this study.³⁵² A child's right to social assistance must be distinguished from his or her right to social services. The latter, regulates alternative care arrangements subject to the qualification of section 150(1)(a) of the Children's Act and the need for care and protection.

The Children's Act gives meaningful protection to children's rights however, it was enacted with insufficient mechanisms, structures and resources to ensure the effective and sustainable implementation of the respective provisions, and this was exacerbated by the policy mis-step on foster care. Consequently, there is a disconnect between the enactment and enforcement of children's rights. And, the 2017 court ordered

³⁴⁶ S 2 of the Children's Act.

³⁴⁷ S 28(1)(c) of the Constitution.

³⁴⁸ Proudlock & Jamieson *Guide to the Children's Act no 38 of 2005 as amended by the Children's Amendment Act no 41 of 2007* (2008) Children's Institute, University of Cape Town 8.

³⁴⁹ Proudlock & Jamieson *Guide to the Children's Act no 38 of 2005 as amended by the Children's Amendment Act no 41 of 2007* (2008) Children's Institute, University of Cape Town 8.

³⁵⁰ S 27 of the Constitution.

³⁵¹ Dutschke *Defining children's constitutional right to social services* (2007) Children's Institute, University of Cape Town 1. Available at http://www.ci.uct.ac.za/sites/default/files/image_tool/images/367/Projects/Completed_Projects/RightsInBrief.pdf Accessed on 13 September 2019.

³⁵² S 9 of the Children's Act.

settlement makes an example of the foster care system in this regard.³⁵³ Experience has shown that the DSD is unable to meet the current legal requirements of the foster care system. According to section 159 of the Children's Act, foster care orders are subject to renewal - by the children's court - every two years. And, according to a legal opinion commissioned by the CCL, section 159 is constitutionally unobjectionable and indeed, eminently sensible.³⁵⁴ The crisis lies in the lack of financial and human resources to implement foster care in terms of the Children's Act.³⁵⁵

To circumvent the renewal of foster care orders every two years for which there is limited resources and continued delay, the Children's Act, provides for the following specifications under section 186(2), namely "(a) the child has been abandoned by [his or her] biological parents; or (b) the child's biological parents are deceased; or (c) there is for any other reason no purpose in attempting reunification between the child and the child's biological parents; and (d) it is in the best interest of the child". This would be uncontentious save for the misappropriation of services in an overburdened foster care system.³⁵⁶

There is a deficit of approximately 55 000 social workers required to implement the Children's Act.³⁵⁷ The number of social workers dedicated to the foster care programme (in addition to other social services) is determined by the number of cases. Or at least it should be. As at 3 September 2019, the number of children in foster care was 416 441.³⁵⁸ Given that foster care runs on a two-year cycle, all 416 441 cases will

³⁵³ The 2017 court ordered settlement states the following: "The delay in putting in place the necessary mechanisms, structures and resources to ensure that the foster care system operates in a sustainable and effective manner is unconstitutional, unlawful and invalid". See *Centre for Child Law v Minister for Social Development* (North Gauteng High Court) Case Number 72513/2017 of 28 November 2017 par 2 2.

³⁵⁴ Budlender & Griffiths *Opinion for Centre for Child Law concerning a legal analysis of the foster care crisis and its implications* (2017) 3-4.

³⁵⁵ Skelton "Founding Affidavit" in *Centre for Child Law v Minister for Social Development* (North Gauteng High Court) Case Number 72513/2017 of 28 November 2017 par 108 2.

³⁵⁶ Meintjes, Budlender, Giese & Johnson *Children 'in need of care' or in need of cash? Questioning social security provisions for orphans in the context of the South African AIDS pandemic* (2003) Joint Working Paper of the Children's Institute and Centre for Actuarial Research, University of Cape Town 27-30.

³⁵⁷ Foster care system backlog: progress report by the Minister of Social Development (4 September 2019). Available at <https://pmg.org.za/committee-meeting/28808/> Accessed on 25 September 2019.

³⁵⁸ The provincial breakdown on dealing with 89 538 cases is as follows: Gauteng has 9 932 cases managed by 350 social workers; the Free State has 6 465 cases managed by 207 social workers; Limpopo has 5 313 cases, managed by 1 481 social workers; North West has 8 652 cases,

have to be renewed sometime in the next two years. Currently, it is impossible for the DSD to sustain its foster care renewal programme without compromising other activities, including its ability to provide emergency interventions which could have significant consequences for vulnerable children.³⁵⁹ On this point, the media reported that “the sheer volume of the children in the system, and those still awaiting placement in foster care, makes the manual renewal of orders an unsustainable and impractical solution (the very reason for the 2011 collapse and multiple High Court orders)”.³⁶⁰

The Portfolio Committee on Social Development (hereafter “the Committee”) echoes these concerns referring to the DSD’s legal requirement to implement foster care as stated in the Children’s Act. Failure to implement this legal requirement will have legal implications.³⁶¹ Indeed, this relies extensively on the legislative amendments to the Social Assistance Amendment Bill and the Children’s Third Amendment Bill.³⁶² However, with the amendments multiple months away from approval and operationalisation it is unlikely that this will offer an appropriate redress to the crisis.

The Social Assistance Amendment Bill (hereafter “the Bill”) which was tabled on 14 April 2018 has since lapsed. This is contentious to the outcome of this study insofar as it delays the introduction of the proposed top-up grant.³⁶³ Without the top-up grant, there is no financial incentive to divert relatives caring for orphaned children away from the foster care system. Similarly, the Children’s Third Amendment Bill is still in the draft

managed by 650 social workers; the Eastern Cape has 18 065 cases, managed by 562 social workers; the Northern Cape has 1 181 cases managed by 196 social workers; Mpumalanga has 929 cases managed by 245 social workers; the Western Cape has 8 500 cases, managed by 572 social workers and Kwa-Zulu Natal has 29 484 cases, managed by 1 767 social workers. See Foster care progress report on High Court order (23 October 2019). Available at <https://pmg.org.za/committee-meeting/29138/?via=cte-menu> Accessed on 3 November 2019.

³⁵⁹ Plenary, National Assembly (11 September 2019). Available at <https://www.youtube.com/watch?v=mkTI5nv3Cc8> Accessed on 13 October 2019.

³⁶⁰ Star Newspaper *Gauteng DA worried about thousands of kids awaiting foster care placement* (2019). Available at <https://www.iol.co.za/the-star/news/gauteng-da-worried-about-thousands-of-kids-awaiting-foster-care-placement-32803287> Accessed on 15 September 2019.

³⁶¹ For example, non-compliance with the 2017 court ordered settlement will result in a declaration of invalidity ordering the DSD’s conduct to be unconstitutional, unlawful and invalid. *Centre for Child Law v Minister for Social Development* (North Gauteng High Court) Case Number 72513/2017 of 28 November 2017 paras 2 & 3.

³⁶² The Portfolio Committee on Social Development is concerned about the ability of the DSD to meet the court ordered deadline of 28 November 2019. See Portfolio Committee on Social Development, Mr. Mondli Gungubele (2019). Available at <https://Pmg.Org.Za/Committee-Meeting/28808/> Accessed on 5 October 2019.

³⁶³ See Ch 2 par 2 3.

phase due to its amendment of 156 clauses, most unrelated to foster care, and many controversial.³⁶⁴ And, despite the broad scope, it is still unclear how the DSD will resolve the foster care crisis.³⁶⁵ This is contrary to the 2017 court ordered settlement and may result in an order declaring the DSD's conduct to be unconstitutional, unlawful and invalid.³⁶⁶

4 3 Call for Comments

Following the appointment of Minister Shabangu, in February 2018, was a brief period of vetting and approval of the Children's Third Amendment Bill which was duly submitted to parliament on 19 February 2019. However, the vetting process involved three preceding versions of the Bill, in July, August and October 2018. The contents of each version will be discussed below including commentary on the material differences and scope of the amendments bearing in mind that the Children's Third Amendment Bill is positioned as the comprehensive legal solution to the foster care crisis.

4 3 1 Children's Third Amendment Bill (July 2018 Version)

The DSD shared the Children's Third Amendment Bill (hereafter "the Bill") for comment at the National Child Care and Protection Forum during July 2018.³⁶⁷ At that time, the proposed amendments, relevant to the outcome of this study, were as follows:

The Bill defines an orphan as "a child whose mother and father have both died". Thereby substituting "who has no surviving parent caring for him or her" from the principal Act.³⁶⁸ Section 32 of the principal Act provides for the voluntary care of a child

³⁶⁴ All Tabled & Draft Bills from 2019. Available at <https://pmg.org.za/bills/all/year/2019/> Accessed on 10 October 2019.

³⁶⁵ In July 2019 the DSD was directly questioned - at the National Child Care and Protection Forum - on how the Children's Third Amendment Bill provides a comprehensive legal solution to foster care, which question it could not answer. See Vorster "The coming crisis in foster care and why the Children's Amendment Bill won't fix it" in *the Daily Maverick* (2019).

³⁶⁶ *Centre for Child Law v Minister for Social Development* (North Gauteng High Court) Case Number 72513/2017 of 28 November 2017.

³⁶⁷ Children's Third Amendment Bill (July 2018 Version). Available at <http://www.ci.uct.ac.za/news/consultations-children%E2%80%99s-third-amendment-bill> Accessed on 10 September 2019.

³⁶⁸ Children's Third Amendment Bill (July 2018 Version) par 1(r).

either indefinitely, temporarily or partially by a person not holding parental responsibilities and rights but authorised to exercise the parental responsibilities and rights reasonably necessary to comply with the provisions of section 32(1) of the principal Act.³⁶⁹ This is distinguishable from foster care parents who have limited parental responsibilities and rights – to the exclusion of guardianship - and is comparable with informal kinship care.³⁷⁰ In this version of the Bill, it is proposed that the principal Act be extended to include a declaratory order in recognition of existing parental responsibilities and rights conferred by this section, or grant additional rights upon application.³⁷¹ Read with section 32(5), the provincial Head of Social Development will be authorised to grant the exercise of parental responsibilities and rights by another person other than the parent caring for a child.³⁷² In this way, the Children’s Act would agree to the recognition of informal kinship care as a sub-category of family care thereby discouraging additional applications for foster care by relatives caring for orphaned children.³⁷³ This would be an appropriate alternative for as long as the child is not in need of care and protection.

Section 150(1)(a) of the principal Act makes provision for a child in need of care and protection if “the child has been abandoned or orphaned and is without visible means of support”.³⁷⁴ In July 2018, the amendment provides for a child in need of care and protection if abandoned or orphaned and not in the care of a family member as defined in paragraph (c) of the definition of family member in section 1.³⁷⁵ Evidently, this denies the presumption that all orphans are in need of care and protection which would exclude them from the child care and protection system. However, should the need for protection arise, section 150(2) of the Bill makes provision for an investigation by a

³⁶⁹ S 32(1) of the Children’s Act states the following: “A person who has no parental responsibilities and rights in respect of a child but who voluntarily cares for the child either indefinitely, temporarily or partially, including a care-giver who otherwise has no parental responsibilities and rights in respect of a child, must, whilst the child is in that person’s care - (a) safeguard the child’s health, well-being and development; and (b) protect the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation, and any other physical, emotional or mental harm or hazards”.

³⁷⁰ See Ch 3 par 3 2.

³⁷¹ This must be compared with the Child Care Protection Policy specifically, the parental responsibilities and rights agreement (PRR) to recognise informal kinship care arrangements. See Ch 3 par 3 5.

³⁷² Children’s Third Amendment Bill (July 2018 Version) par 24.

³⁷³ See Ch 3 par 3 1.

³⁷⁴ S 150(1)(a) of the Children’s Act.

³⁷⁵ Children’s Third Amendment Bill (July 2018 Version) paras 95(a) & (b).

designated social worker.³⁷⁶ In addition, section 150(3) – quite profoundly – indicates that a social worker is mandated to assist a child – not in need of care and protection – which may include assistance to the family to apply for any appropriate social grant.³⁷⁷ Indeed, this refers to the financial incentive to remain outside of the foster care system.³⁷⁸

4 3 2 Children’s Third Amendment Bill (August 2018 Version)

The second draft was released for comment in August 2018, which as you will see essentially gutted the material amendments in support of a comprehensive legal solution to the foster care crisis.

Section 1³⁷⁹ and 32 of the August 2018 Bill is in principle undistinguishable from the July version of the Bill. However, section 150(1)(a) is materially different in that it excludes the provision for family care and instead defines a child in need of care and protection as abandoned or orphaned and does not have the ability to support himself or herself and such inability is readily apparent as prescribed.³⁸⁰ Indeed, this largely resembles the controversial text as cited in the principal Act referring to “visible means of support”.³⁸¹ In effect, the exclusion of family care in the amendment of section 150(1)(a) is regressive and contrary to the best interests of vulnerable children in need of protective services.

4 3 3 Children’s Third Amendment Bill (October 2018 Version)

In October 2018, a third version of the Bill was released for comment pending the court imposed deadline of 26 February 2019.³⁸² At that time, the extent of the changes were

³⁷⁶ Children’s Third Amendment Bill (July 2018 Version) par 95(e).

³⁷⁷ Children’s Third Amendment Bill (July 2018 Version) par 95(f).

³⁷⁸ See Ch 2 par 2 3.

³⁷⁹ “Orphan” is defined as “a child whose parents have died”. See Children’s Third Amendment Bill (August 2018 Version) par 1(s). Available at <http://www.ci.uct.ac.za/news/consultations-children%E2%80%99s-third-amendment-bill> Accessed on 10 September 2019.

³⁸⁰ Children’s Third Amendment Bill (August 2018 Version) par 95.

³⁸¹ See Ch 1 par 1 1 7.

³⁸² In the 2017 court order, “[t]he Minister [was] directed, within 15 months of this order, to prepare and introduce before parliament the necessary amendments to the Children’s Act 38 of 2005 and/or the Social Assistance Act 13 of 2004, to produce a comprehensive legal solution regarding

as follows: “orphan” is defined as “a child whose biological or adoptive parents are dead”.³⁸³ This is indeed distinguishable from the July and August versions by the inclusion of adoptive parents. In addition, section 150(1)(a) of this version of the Bill foregoes the August 2018 amendment and reverts back to; “a child is in need of care and protection if the child has been abandoned or orphaned and is not in the care of a family member as defined in paragraph (c) of the definition of family member in section 1”.³⁸⁴ The proposed amendment to section 150(1)(a) as cited in the July and October 2018 versions of the Bill was endorsed by the Centre for Child Law (CCL) as part of the solution to the ongoing foster care crisis.³⁸⁵

The above-mentioned provision is coupled with section 159 of the principal Act - to address the foster care backlog - with the addition of the following sub-section: “[a] presiding officer may extend an alternative care order that has lapsed or make an interim order for not longer than 6 months as prescribed, on good cause shown provided that: (a) the designated social worker files before the presiding officer for consideration a report as prescribed explaining the lapsing of the order; and (b) a presiding officer stipulates conditions attached to the extended order or interim order including the supervision of the child’s placement”.³⁸⁶ However, the DSD has – on more than one occasion - been cautioned against prioritising the foster care backlog over other care and protection services.³⁸⁷ According to the Memorandum of Outcome, section 159 (as amended) offers temporary relief for foster care orders that have lapsed due to administrative shortfalls that infringe the constitutional rights of such children.³⁸⁸ On this point, experts argue that it is less a solution, and more an admission that the backlog is unlikely to be resolved. Although the retrospective extension of the

the foster care system”. See *Centre for Child Law v Minister for Social Development* (North Gauteng High Court) Case Number 72513/2017 of 28 November 2017 par 4.

³⁸³ Children’s Third Amendment Bill (October 2018 Version) in *The Government Gazette No 42005 dated 29 October 2018* par 1(q). Available at <https://archive.opengazettes.org.za/archive/ZA/2018/government-gazette-ZA-vol-640-no-42005-dated-2018-10-29.pdf> Accessed on: 14 September 2019.

³⁸⁴ Children’s Third Amendment Bill (October 2018 Version) par 89.

³⁸⁵ Inputs for the Children’s Third Amendment Bill compiled by the Centre for Child Law on 30 November 2018. Available at <https://centreforchildlaw.co.za/archives/> Accessed on 31 October 2019.

³⁸⁶ Children’s Third Amendment Bill (October 2018 Version) par 94.

³⁸⁷ Skelton “Founding Affidavit” in *Centre for Child Law v Minister for Social Development* (North Gauteng High Court) Case Number 72513/2017 of 28 November 2017.

³⁸⁸ Vorster “The coming crisis in foster care and why the Children’s Amendment Bill won’t fix it” in *the Daily Maverick* (2019).

order will restore the grant - subject to back-pay by SASSA - it won't alter the fact that extremely poor families may have to endure months without grant payments first.³⁸⁹

4 3 4 Draft Children's Third Amendment Bill (February 2019)

In February 2019, the definition of "orphan"³⁹⁰ is again distinguishable from the preceding versions of the Bill but it is important to note that the definition of "orphan" will be used mostly with regards to section 150(1) to ascertain whether a child is in need of care and protection. Evidently, a comprehensive legal solution to the foster care crisis is premised on the recognition of family care under section 150(1)(a) to distinguish between a child's need for cash or care.³⁹¹ With the exclusion of the amendments to section 32 and 150(1)(a) as cited in July and October 2018, civil society organisations agree that there is nothing in this version of the Bill that will resolve the foster care crisis.³⁹²

Additionally, this version of the Bill, is reliant on the increased use of section 186 to manage the obligations imposed by section 159 of the principal Act. However, experience has shown that presiding officers are reluctant to do so as this negates the need for periodic judicial review of the placement in foster care which by definition is a form of "state alternative care".³⁹³ So, to counter-act this hesitancy, the Bill orders a home visit every year instead of every two years.³⁹⁴ If it's enforced, it may appease the presiding officers and induce them to use long-term placements more often. But, it will increase the burden on already overburdened social workers. Currently, 65 000 social workers are required to implement the provisions of the Children's Act³⁹⁵ but, a 2017 study, "Out of Harm's Way", revealed that as recently as two years ago, there

³⁸⁹ Vorster "The coming crisis in foster care and why the Children's Amendment Bill won't fix it" in *the Daily Maverick* (2019).

³⁹⁰ "Orphan" is defined as "a child whose parent or both parents are deceased". See Draft Children's Third Amendment Bill (February 2019) par 1(q). Available at: <https://pmg.org.za/bill/876/> Accessed on 25 September 2019.

³⁹¹ Meintjes, Budlender, Giese & Johnson (2003) 6.

³⁹² Vorster "The coming crisis in foster care and why the Children's Amendment Bill won't fix it" in *the Daily Maverick* (2019).

³⁹³ Child Protection Week – Children's Amendment Bill. Available at <https://www.youtube.com/watch?v=F8H0z7y599Q> Accessed on 13 October 2019.

³⁹⁴ Vorster "The coming crisis in foster care and why the Children's Amendment Bill won't fix it" in *the Daily Maverick* (2019).

³⁹⁵ 38 of 2005.

were only 9 289 social workers employed by the DSD and NPOs, only a portion of whom work with children and families.³⁹⁶ Evidently, the foster care backlog subsists due to a lack of available social workers, not children's courts. So, this clause may actually exacerbate the problem.³⁹⁷

An alternative to section 186, is adoption but this is a lengthy process that can take up to two years, amounting to approximately R 40 000 per child.³⁹⁸ For this reason, adoption is not a viable option to appease the foster care crisis.³⁹⁹ With the rumblings of adoption, it was further suggested that the children's court be mandated to award guardianship to relatives caring for orphaned child. As the upper guardian of the child, the High Court, maintains exclusive jurisdiction for guardianship however, this position is subject to change in favour of informal care arrangements. And, coupled with the revision of sections 32 and 150(1) as per the July and October 2018 versions of the Bill, the DSD may succeed in diverting relatives caring for orphaned children.

4 4 Conclusion

With only one session of parliament left for 2019, a review of the parliamentary monitoring group website details a draft Children's Third Amendment Bill and lapsed Social Assistance Amendment Bill.⁴⁰⁰ Evidently, the DSD has prioritised the foster care backlog over all other social services and, after eight litigious years, the DSD is essentially lost for words thereby discrediting the possibility of a sustainable solution to the foster care crisis. On this point, the media reports that:

"While the department may be concerned about civil society publicly debunking its legal solution, it is equally plausible that it also has no confidence in the solution. Why else

³⁹⁶ Jamieson, Sambu & Mathews *Out of harm's way? Tracking child abuse cases through the child protection system in five selected sites in South Africa* (2017) Children's Institute, University of Cape Town. Available at http://www.ci.uct.ac.za/sites/default/files/image_tool/images/367/publication/2017/Child_Abuse_Tracking_Study_Report.pdf Accessed on 20 October 2018.

³⁹⁷ Draft Children's Third Amendment Bill (February 2019) par 99.

³⁹⁸ Vorster "The coming crisis in foster care and why the Children's Amendment Bill won't fix it" in *the Daily Maverick* (2019).

³⁹⁹ Vorster "The coming crisis in foster care and why the Children's Amendment Bill won't fix it" in *the Daily Maverick* (2019).

⁴⁰⁰ All Tabled & Draft Bills from 2019. Available at <https://pmg.org.za/bills/all/year/2019/> Accessed on 10 October 2019.

would it focus all of its attention on manually renewing all of the foster care orders that will lapse at the end of 2019 and during 2020, when a comprehensive legal solution should, in theory, have minimised this task?”⁴⁰¹

As at 3 September 2019, the number of children in foster care was 416 441 and experience has shown that the DSD is unable to meet the current legal requirements of the foster care system. In terms of section 159 of the Children’s Act, foster care orders are subject to renewal - by the children’s court - every two years. And, according to a legal opinion commissioned by the CCL, section 159 is constitutionally unobjectionable and indeed, eminently sensible.⁴⁰² The crisis lies in the lack of financial and human resources to implement foster care in terms of the Children’s Act.⁴⁰³ Currently, the availability of social services falls far short of the needs of children and families, and the demand increases every day as social stresses continue unabated.⁴⁰⁴ This has been exacerbated by the policy mis-step that was made when the DSD started inviting caregivers to use the foster care system as a route to accessing social assistance. The increase in numbers over a rapid period engulfed the foster care system and made it ineffective for all children, including those who really need foster care services.

A child’s right to social services is related to other children’s rights found in section 28 of the Constitution, as well as to other socio-economic rights applicable to everyone,⁴⁰⁵ and should therefore be read in the context of these other rights.⁴⁰⁶ The integration of other rights defines the day-to-day needs of the child that will best serve his or her interests which is particularly relevant to the outcome of this study.⁴⁰⁷ However, a child’s right to social assistance must be distinguished from his or her right to social

⁴⁰¹ Vorster “The coming crisis in foster care and why the Children’s Amendment Bill won’t fix it” in *the Daily Maverick* (2019).

⁴⁰² Budlender & Griffiths (2017) 3-4.

⁴⁰³ Skelton “Founding Affidavit” in *Centre for Child Law v Minister for Social Development* (North Gauteng High Court) Case Number 72513/2017 of 28 November 2017 par 108 2.

⁴⁰⁴ Proudlock & Jamieson *Guide to the Children’s Act no 38 of 2005 as amended by the Children’s Amendment Act no 41 of 2007* (2008).

⁴⁰⁵ S 27 of the Constitution.

⁴⁰⁶ Dutschke *Defining children’s constitutional right to social services* (2007) Children’s Institute, University of Cape Town 1. Available at http://www.ci.uct.ac.za/sites/default/files/image_tool/images/367/Projects/Completed_Projects/RightsInBrief.pdf Accessed on 13 September 2019.

⁴⁰⁷ S 9 of the Children’s Act.

services. The latter, regulates alternative care arrangements necessitated by the need for care and protection in terms of section 150(1) of the Children’s Act.

The categorization of orphan care does not rely on a definitive need for protective services and this is reflected in July 2018 amendment of section 150(1)(a) of the Children’s Act stating that “a child is in need of care and protection if abandoned or orphaned and *not in the care of a family member*”.⁴⁰⁸ Evidently, this denies the presumption that all orphans living with relatives are in need of protection necessitating placement in alternative care. However, should the need for protection arise, section 150(2) of the July 2018 version of the Bill makes provision for an investigation by a designated social worker.⁴⁰⁹ In addition, section 150(3) – quite profoundly – indicates that a social worker is mandated to assist a child – not in need of care and protection – which may include assistance to the family to apply for any appropriate social grant.⁴¹⁰ And, these are the provisions material to an appropriate redress of the crisis.

In closing, a comprehensive legal solution to the foster care crisis is premised on the recognition of kinship care – as envisaged by section 32 of the Children’s Act – to distinguish between a child’s need for cash or care.⁴¹¹ And, with the exclusion of the amendments to section 32 and 150(1)(a), as cited in July and October 2018, civil society organisations agree that there is nothing in this version of the Bill (dated February 2019) that will resolve the foster care crisis.⁴¹²

⁴⁰⁸ Own emphasis.

⁴⁰⁹ Children’s Third Amendment Bill (July 2018 Version) par 95(e).

⁴¹⁰ For orphaned children living with relatives, social grants refer to the top-up grant. See Ch 3 par 3 3; Children’s Third Amendment Bill (July 2018 Version) par 95(f).

⁴¹¹ Meintjes, Budlender, Giese & Johnson (2003) 6.

⁴¹² Vorster “The coming crisis in foster care and why the Children’s Amendment Bill won’t fix it” in *the Daily Maverick* (2019).

CHAPTER 5: CONCLUSIONS AND RECOMMENDATIONS

5 1 Introduction

The Centre for Child Law (CCL), through strategic litigation, aims to set legal precedent to improve and strengthen laws pertaining to children.⁴¹³ Therefore legal precedent serves a transformational child care and protection system. A child's need for care and protection necessitates his or her placement in alternative care. Foster care is an alternative care model in service of vulnerable children in need of care and protection.⁴¹⁴ As at September 2019, there are 416 441 children in foster care which far exceeds the Department of Social Development's (DSD) capacity for the provision of social services. This has created a foster care backlog which has resulted in what is now coined, the foster care crisis.⁴¹⁵

The foster care crisis is defined by the lack of financial and human resources to implement foster care in terms of the Children's Act.⁴¹⁶ This was exacerbated by the policy mis-step that was made when the DSD publicly indicated that relatives caring for orphans could seek to regularise their care arrangements via the foster care system, and thereby could access the foster child grant (FCG).⁴¹⁷ However, the increase in numbers over a rapid period engulfed the foster care system and made it ineffective for all children, including vulnerable children in need of protective services. And, the 2017 court ordered settlement makes an example of the foster care system in this regard.⁴¹⁸

⁴¹³ Centre for Child Law – Impact Litigation. Available at <https://centreforchildlaw.co.za/impact-litigation/> Accessed on 6 February 2020.

⁴¹⁴ S 150(1)(a) of the Children's Act states the following: "A child is in need of care and protection if the child has been abandoned or orphaned and is without any visible means of support".

⁴¹⁵ See Annexure 2 attached hereto.

⁴¹⁶ Skelton "Founding Affidavit" in *Centre for Child Law v Minister for Social Development* (North Gauteng High Court) Case Number 72513/2017 of 28 November 2017 par 108 2.

⁴¹⁷ At R 1 000 per child, per month it would be their preferred form of social assistance.

⁴¹⁸ The 2017 court ordered settlement states the following: "The delay in putting in place the necessary mechanisms, structures and resources to ensure that the foster care system operates in a sustainable and effective manner is unconstitutional, unlawful and invalid". See *Centre for Child Law v Minister for Social Development* (North Gauteng High Court) Case Number 72513/2017 of 28 November 2017 par 2 2.

5 2 Informal Kinship Care

In Africa, kinship care, otherwise known as care by relatives, has been an ever present family resource, in the presence and/or absence of parental care.⁴¹⁹ According to Scannapieco & Hegar, “much of the controversy around the status of kinship care revolves around its interactions with the child care and protection system, particularly with regards to its relationship with foster care”.⁴²⁰ And, history seems to have proved that Skelton was correct when she observed that:

“The South African government’s policy shift had nothing to do with favouring foster care as an option,⁴²¹ but more to do with trying to link kinship carers with a social grant (social assistance) which was higher in its amount,⁴²² and foster care became the ‘vehicle’ to do this”.⁴²³

The South African Law Reform Commission (SALRC) was on the right track when it recommended that “relatives caring for children who have been abandoned or orphaned or are for some or other reason in need of their assistance, but who are not per se in need of formal protective services, should have access to a simple procedure whereby the necessary parental responsibilities [and rights] can be conferred on them”.⁴²⁴ On this point, the current dialogue, discredits the presumption that all orphans living with relatives are in need of care and protection. Instead, it argues in favour of monetary support in the form of a top-up grant as a plausible alternative to foster care.

Indeed, the practice of kinship care cannot exist on the assumption that all children - in this category – are not in need of protective services, because orphans are vulnerable to abuse and neglect, even by relatives. However, not all children living with

⁴¹⁹ O’Brian “The benefits and challenges of kinship care” (2012) 18(2) *Child Care in Practice* 127.

⁴²⁰ Scannapieco & Hegar (1999) 5.

⁴²¹ S 28(1)(b) of the Constitution of the Republic of South Africa, 1996 (hereafter “the Constitution”) states the following: “Every child has the right to family care or parental care, or to appropriate alternative care when removed from the family environment”.

⁴²² The foster child grant (FCG) is valued at R 1 000 per child, per month as compared to the child support grant (CSG) which is valued at R 430 per child, per month.

⁴²³ This formed part of the feedback received in the writing of this study.

⁴²⁴ South African Law Reform Commission (2002) Project 110 Report: Review of the Child Care Act. Available at http://www.justice.gov.za/salrc/reports/r_pr110_01_2002dec.pdf Accessed on 19 August 2019.

relatives can be assumed to be in need of protection, as a starting point. Rather, methods of administering access to social assistance, and only where necessary, social services, which do not place an undue burden on the limited resources of time, finances and social workers must be considered.

Informal kinship care places a financial burden on indigent caregivers which is often greater than the *de facto* caregivers' means to provide said care, and the child support grant (CSG) is insufficient. Therefore, the alternative would be the top-up grant valued at R 860 per child, per month.⁴²⁵ The top-up grant is in effect a monetary incentive to encourage a shift away from the foster care system being used to provide social assistance, and to ensure that children are only placed in foster care if protection services are actually needed. In this way, the recognition of informal kinship care – as envisaged by section 32 of the Children's Act - is part of the solution to the foster care crisis.⁴²⁶

5 3 Social Assistance Amendment Bill

Legislation has a distinct role to play in giving effect to a child's socio-economic rights. Statutory obligations and entitlements go hand in hand with service delivery. This is particularly important in consideration of social grants specifically for children whose rights are unqualified and immediate. By re-directing orphaned children, there would be a saving of R 52 471 580 per month available for distribution within the child protection system.⁴²⁷ This would mitigate the misappropriation of funds for services necessitated by foster care placements. It is therefore imperative to distinguish between the child's need for cash or care. And, this is particularly important when considering the current jurisprudence implementing the right to social assistance.⁴²⁸

⁴²⁵ See Ch 2 par 2 3.

⁴²⁶ This form of care is categorised as family care under s 28(1)(b) of the Constitution. Family care is not a form of alternative care and is in this way distinguishable from foster care.

⁴²⁷ See fn 248.

⁴²⁸ See Ch 1 par 1 1 7.

5 4 Draft Children’s Third Amendment Bill

Litigation previously brought to resolve the crisis has a looming deadline, as the matter is set down for hearing on the 26th of November 2019 in the North Gauteng High Court (NGHC). The DSD has positioned legislative amendments at the forefront of what constitutes an appropriate redress which progress has since then stagnated and, with less than a month before the hearing, it is unlikely that a comprehensive legal solution will materialise.⁴²⁹ However, further delay will see 150 000 foster care orders lapse by the end of 2019, and a further 97 000 in 2020, which would leave almost two-thirds of the children in foster care without a FCG.⁴³⁰ Evidently, the DSD has relied for eight years on court ordered extensions to prevent the majority of FCGs from lapsing.

5 5 Foster Care Progress Report (23 October 2019)

As at October 2019, the DSD has prioritised the foster care backlog over all other social services despite fair warning by the CCL that “they will not agree to further ‘wholesale’ extensions without concrete information before the court by way of affidavits showing policy decisions and a clear process towards legal change”.⁴³¹ Indeed, it was envisaged that the Child Care and Protection Policy (CCPP) would provide a policy basis for the content of legislative reform.⁴³² This has not occurred. Instead, the DSD has positioned the Children’s Third Amendment Bill as the comprehensive legal solution to the foster care crisis without further comment on the role of the CCPP. Evidently, the shortage in social workers may be a contributing factor to its discontinuance although, this does little to address the DSD’s lack of progress, in the form of policy decisions and/or a clear process towards legal change.

As at November 2019, social workers are mandated to oversee the resolution of the foster care backlog to which the Chairperson of the Portfolio Committee on Social Development responds: “Social Development is not just about Foster Care. There are

⁴²⁹ See Ch 4 par 4 1.

⁴³⁰ Foster care system backlog: progress report by the Minister of Social Development (4 September 2019). Available at <https://pmg.org.za/committee-meeting/28808/> Accessed on 25 September 2019.

⁴³¹ Skelton “Founding Affidavit” in *Centre for Child Law v Minister for Social Development* (North Gauteng High Court) Case Number 72513/2017 of 28 November 2017 par 82 3.

⁴³² Rohrs, Berry, Lake & Shung-King (2016) 17.

many matters that need to be dealt with in vulnerable communities”⁴³³ which matters will consequently be suspended to appease the DSD which states that the foster care backlog necessitates a 24 month extension from 26 November 2019 thereby discrediting the introduction of a sustainable solution on said date. On this, Manganye (ANC) reports that: “...[in] reading the fortnightly progress report from the Department, one could tell that there was nothing concrete in that report. Nothing indicates that the Department is on the right track towards achieving its mandate”.⁴³⁴ In addition, Abrahams (DA) asked the DSD to “...cost how much it had spent over the past ten years chasing the backlog and consider how many social workers they could have employed instead”.⁴³⁵

5 6 Declaration of Invalidity

The DSD’s lack of progress, pre-dates this narrative and, it is for this reason that I recommend enforcing the declaratory order declaring the DSD’s conduct unconstitutional, unlawful and invalid.⁴³⁶ Indeed, this would be the judicial consequence for the delay in preparing and introducing a comprehensive legal solution to the foster care crisis.⁴³⁷

5 7 A Proposed Comprehensive Legal Solution to the Foster Care Crisis

On the matter of pending legislative reform, acting Director General, Mxolisi Toni reports that:

“[T]he Social Assistance Amendment Bill will empower the Minister of Social Development to augment the value of the Child Support Grant so that the relatives caring for children whose parents have died, can obtain a social grant without them

⁴³³ Portfolio Committee on Social Development, Mr. Mondli Gungubele (2019). Available at <https://Pmg.Org.Za/Committee-Meeting/28808/> Accessed on 5 October 2019.

⁴³⁴ Portfolio Committee on Social Development, Mr. Mondli Gungubele (2019). Available at <https://Pmg.Org.Za/Committee-Meeting/28808/> Accessed on 5 October 2019.

⁴³⁵ Portfolio Committee on Social Development, Mr. Mondli Gungubele (2019). Available at <https://Pmg.Org.Za/Committee-Meeting/28808/> Accessed on 5 October 2019.

⁴³⁶ *Centre for Child Law v Minister for Social Development* (North Gauteng High Court) Case Number 72513/2017 of 28 November 2017 par 2 1 & 3.

⁴³⁷ S 172(1)(b) of the Constitution authorised the suspension of the declaration of invalidity for a period of two years as per date of order, 28 November 2017.

having to go through the Foster Care process. This is because they will be raising children that are not their own. As such, they are given a grant slightly higher than a Child Support Grant and slightly lower than a Foster Care Grant. The CSG Top-UP grant will not lapse every two years and will not require a children's court order."⁴³⁸

And, on this point there is consensus, that this will offer an appropriate and immediate redress to the foster care crisis. As a result, the Chairperson of the Portfolio Committee on Social Development requested the DSD to submit, in writing, a legislative process plan to support the implementation of the amending legislation. In response to this, the Minister of Social Development, Lindiwe Zulu, stated that: "they remain committed to getting out of any perpetual crisis mode the Department is in".⁴³⁹ In the meantime, the DSD will continue to correspond with the Portfolio Committee to account for its appropriation of resources towards a sustainable solution which I propose to be:

The recognition of kinship care – as envisaged by section 32 of the Children's Act – to distinguish between a child's need for care or cash which is aligned with the proposed amendments to section 32 and 150(1)(a), as cited in the July and October 2018 version of the Children's Third Amendment Bill. And, to alleviate the relative's financial burden of care, access to the proposed top-up grant as envisaged by section 12A(1) of the Social Assistance Amendment Bill.

⁴³⁸ Portfolio Committee on Social Development, Mr. Mondli Gungubele (2019). Available at <https://Pmg.Org.Za/Committee-Meeting/28808/> Accessed on 5 October 2019.

⁴³⁹ Portfolio Committee on Social Development, Mr. Mondli Gungubele (2019). Available at <https://Pmg.Org.Za/Committee-Meeting/28808/> Accessed on 5 October 2019.

KEY WORDS AND PHRASES

1. Child Care Act
2. Children's Act
3. Orphans living with relatives
4. Foster Care
5. Foster Child Grant
6. Foster Care Crisis
7. Top-Up Grant
8. Kinship Care
9. Guidelines on Alternative Care
10. Child Care and Protection Policy
11. Top-Up Grant
12. Social Assistance Act
13. Social Assistance Amendment Bill
14. Children's Third Amendment Bill (July 2018 version)
15. Children's Third Amendment Bill (August 2018 version)
16. Children's Third Amendment Bill (October 2018 version)
17. Draft Children's Third Amendment Bill (February 2019)
18. Comprehensive Legal Solution to the Foster Care Crisis

ACRONYMS/ABBREVIATIONS

Acronyms	Description
1. ACRWC	African Charter on the Rights and Welfare of the Child
2. CCL	Centre for Child Law
3. CCPP	Child Care and Protection Policy
4. CPS	Cash Payment Masters
5. CSG	Child Support Grant
6. DSD	Department of Social Development
7. FCG	Foster Child Grant
8. ICESCR	International Covenant on Economic, Social and Cultural Rights
9. NGO	Non-Government Organisation
10. NPO	Non-Profit Organisation
11. PRR	Parental Responsibilities and Rights Agreement
12. SALRC	South African Law Reform Commission
13. UNCRC	United Nations Convention on the Rights of the Child
14. UNICEF	United Nations Children's Fund

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CONTENT FRAMEWORK

TO RESOLVE THE FOSTER CARE CRISIS

in terms of the

Centre for Child Law // Minister of Social Development

we need to:

1. Address the systemic challenges in the child care & protection system with reference to the Department of Social Development's Child Care & Protection Policy & Children's Third Amendment Bill.
2. Address the systemic challenges in the social welfare system with reference to the Social Assistance Amendment Bill and the Administration of SASSA.

**AMENDMENT OF 2 STATUTES:
CHILDREN'S ACT AND SOCIAL ASSISTANCE**

CHILDREN'S ACT:

S150(1)(a): children living with family members are not in need of care and protection.

S32: recognition of kinship care.

SOCIAL ASSISTANCE ACT:

Top-up grant of R 860 for relatives caring for orphaned children.

FINANCIAL INCENTIVE ↓

Diversion away from the child care and protection system to address the backlog, further lapsing of foster care orders & delivery of social services (what are the implications for vulnerable children in need of care and protection?).

FAILURE TO IMPLEMENT A COMPREHENSIVE LEGAL SOLUTION:

1. Declaration of invalidity - conduct of Department of Social Development is unconstitutional, unlawful and invalid.
2. Will the court grant a further extension to prevent foster care orders from lapsing? Note: the administrative extension of foster care orders is deemed unconstitutional (inadequate monitoring of vulnerable children).
3. Do the legislative amendments provide for the successful diversion of orphans living with relatives?
4. Should we consider the outsourcing of social services into the private & international sector (e.g. UN volunteers, companies, attorneys, advocates etc.)?

A TIMELINE OF THE FOSTER CARE CRISIS: 2011 TO 2019



