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**The case of child S and 1.1 million others like him – orphan children in need of adequate social assistance**

**Debating the nature and extent of the State's responsibility to provide social assistance to children living in poverty**

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**Introduction**

This paper is aimed at making a contribution to the debate on appropriate social assistance for orphan children living in the care of extended family. Two court cases and a reform process within the Department of Social Development have highlighted this debate. The Children's Institute applied to be an amicus curiae (friend of the court) in one of the cases and we have been participating in the Department's reform process via commissioned research and advocacy.

The primary question is about how to ensure that orphan children living in poverty are able to access adequate social assistance timeously. This question is a polycentric one that does not only effect orphans – its resolution will also have a knock on effect for millions of non-orphans living in similar poverty as well as a significant number of children who have been abused and are in need of protection services. This paper sets out the “bigger picture” behind this debate and the implications of the various policy reform options for the rights of the various categories of children affected.

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## Setting the scene

### *The facts of the case of Child SS*

Child S is a 12 year old orphan child who has been living with his great aunt and uncle since he was 2 years old because his mother was not able to care for him.<sup>2</sup> His great aunt and uncle have been receiving the child support grant (R280 per month in 2012) for his basic needs. However the family has a very low income and the small amount of the child support grant is not enough to cover his food, clothing, transport and education related costs. This is a common problem for all families surviving on the small CSG: their poverty is alleviated but not eradicated – it remains “dire”. 67% of children in South Africa live below the stats SA lower bound poverty line. 40% live below the 2 dollars a day poverty line.<sup>3</sup>

When Child SS’s mother died four years ago, making him an orphan, the family approached the Department of Social Development to begin a Children’s Court process to enable the family to access the higher valued foster child grant (R770 per month in 2012).

The family first approached the Department for a foster care placement in November 2007. The social worker report states that “[d]ue to the serious backlog in the casework of social workers this case has not been attended to since it was first reported and was referred to the student social worker in February 2010 to open and finalise the children’s court proceedings.”<sup>4</sup> The case therefore sat still on a Social Worker case load for over two years. The social worker report was eventually finalised by the student social worker in April 2010 and signed by the supervising social worker in August 2010. The matter reached the Children’s Court in November 2010 and judgment was delivered in April 2011. It therefore took three years between the family first

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<sup>2</sup> At the time of approaching the Children’s Court he was 10 years old

<sup>3</sup> Hall K & Wright G (2010) “A profile of children living in South Africa.” *In Journal of Economics and Econometrics*. Vol. 34, No.3, November 2010, pp 45-68 [see page 60]

<sup>4</sup> Department of Health and Social Development Krugersdorp. Social Worker Report. See the court record at page 55.

approaching the State for a foster child grant and the hearing of the matter by the Children's Court.

The facts of this case are not unusual - they are very common. There are many orphan children in similar situations of poverty and many extended family members attempting to apply for foster child grants. Most face lengthy delays in getting a service response from social workers and the courts. The result is that they are not able to access adequate social assistance timeously. Besides infringing their rights to social security, this lack of access to adequate and timeous social assistance; also infringes their rights to nutrition, education and protection from neglect.

*How common is this problem?*

According to the Children's Institutes analysis of the General Household Survey in 2009 there were approximately 1.5 million children who had lost either a mother or both parents (maternal and double orphans) and were living with relatives.<sup>5</sup> The number of maternally orphaned children is expected to continue increasing over the next few years reaching a high of almost 1.8 million children in 2015.<sup>6</sup>

The Children's Institute's analysis also reveals that approximately 1.1 million of these orphan children were living in poverty.<sup>7</sup> This poverty calculation is based on the commonly used poverty line for 2009 which was R552 income/month/person.<sup>8</sup> As this poverty line is a reasonable proxy for the primary care giver income threshold set by the State for eligibility for

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<sup>5</sup> K Hall & P Proudlock (2011) *Orphaning and the foster child grant: A return to the 'care or cash' debate*. Children Count brief. Cape Town, Children's Institute, University of Cape Town. The 2010 and 2011 GHS figures are similar.

<sup>6</sup> Actuarial Society of South Africa (2011) ASSA2008 Aids and Demographic Model. Data extracted by K Hall, Children's Institute, UCT

<sup>7</sup> Calculations by K Hall, Children's Institute, using the General Household Survey 2009. Preparatory analysis for Hall K and Proudlock P. *Orphaning and the foster child grant: Return to the "care or cash" debate*.

<sup>8</sup> R552 in 2009 is equivalent to a poverty line of R322 set in 2000 and inflated each year using the consumer price index reported by Statistics South Africa. In the absence of an official national poverty line, this poverty line has been commonly used by economists and reported in government publications.

the child support grant, these 1.1 million orphan children therefore qualified for social assistance.<sup>9</sup>

Analysis by Budlender of the 2011 GHS shows that 600 000 orphan children were accessing the child support grant (R280 in 2012 rands) while 400 000 were accessing the foster child grant (R770 in 2012 rands).<sup>10</sup> Orphan children are therefore accessing either one of these grants or neither.

These statistics raise a question that is very relevant to this conference on poverty and inequality: Why are orphan children in similar circumstances of poverty getting vastly different amounts of social assistance from the State? What determines whether a family living in poverty gets the small grant of R280 or the grant almost triple in value at R770?

*What other children are also affected by this decision?*

A further question arises about children who are not orphans but who live with either their biological parent (s) or a relative in similar or worse poverty to child S. There are over 10 million such children.<sup>11</sup> These children generally qualify only for the lower valued child support grant. Analysis by Hall of the 2009 GHS revealed that children living with their mother (no father in the household) were one of the poorest categories of children at R288 average per capita income per month in 2009. Children living with relatives whose mothers are still alive were living on R326 average per capita income. Orphan children living with relatives had an average per capita

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<sup>9</sup> It is a reasonable proxy for the primary care giver income threshold set by the State for eligibility for the CSG (R2400 for a single caregiver in 2009), as it equates to a household income of around R2 500 per month for a household with just under 5 members.

<sup>10</sup> Statistics South Africa General Household Survey 2011 as analysed by Debbie Budlender

<sup>11</sup> 11.2 million children are accessing the Child Support Grant. These include children living with biological parents and relatives. The number also includes approximately 600 000 orphans living with relatives.

income of between R368 and R381, while children living with both parents had an average per capita income of R734.<sup>12</sup>

This data on income poverty levels raises questions about the rationale for the difference in the amounts of the two grants and who qualifies for which grant. Why is it that children living with their mothers and non-orphans living with relatives qualify only for a grant of R280, while orphan children living with their relatives qualify for either the grant of R280 or the grant of R770? If children living with their mothers are living in similar or worse levels of poverty to orphan children in the care of relatives what is the rationale for giving the children living with mothers a small grant of R280 while targeting orphans living with relatives with a greater poverty alleviation grant valued at R770? Is this rationale based on considerations of poverty alleviation or on moral assumptions of the deserving poor vs. the undeserving poor? Or is it based on legal norms about differences in the various caregivers' legal duty of support towards the child? If it is based on legal norms – what system of law are we relying on – common law, customary law or constitutional law or a combination of all three?

There is a third category of children we should also be thinking about. These include children who have been abused, abandoned, neglected or exploited; children in child headed households; children on the street and children in child and youth care centres. These especially vulnerable children require services from the same social workers and courts that are currently required for foster care applications. Due to the shortages of social workers and court resources and the current use of these scarce resources to channel poverty alleviation grants, children are being deprived of timeous and adequate protection services. This is infringing their rights to protection from abuse, neglect and exploitation and to social services. How do we reform the grant system so that orphans can receive timeous and adequate social assistance in a way that also frees up the time of social workers and courts to provide quality services to abused children?

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<sup>12</sup> Hall K (2012) Child Poverty and Foster Care: A Statistical Overview. Presentation for Black Sash Workshop 17 April 2012. This analysis includes income from grants. When income from grants is removed, the per capita values drop but the categories remain in the same order.

These and other questions have been brewing for a number of years. Some of them have come to the fore in the case of Child SS and the High Court provides an answer to some of them. This paper will explore the debates that arose during the case of Child SS and explain the implications of the Court's interpretation of the Children's Act. I will then describe some of the options for reform that are being debated and the constitutional principles that should guide the choices that we make as we move towards finding a solution.

### **The debates raised by the parties in the Case of Child SS**

It was agreed by all parties to the court case that Child SS was living below the poverty line in circumstances which the Minister of Social Development described as "*dire*", that the provision of the small Child Support Grant was not sufficient to resolve this situation, and that he therefore requires support from the State. The debate centres around *who is responsible for supporting the child, what form this support should take, how much it should be in monetary terms and how it should be provided.*

#### *Section 150(1) (a) of the Children's Act*

Section 150 of the Children's Act is the section used by social workers and the courts to establish whether a child is in need of care and protection from the State. If a child is found to be in need of care and protection the Court can make a range of orders including alternative care orders placing the child in foster care or a child and youth care centre. To secure a foster child grant, a caregiver needs to first get a foster care order.

Section 150(1) (a) provides that a child who is has been *orphaned and is without any visible means of support* is in need of care and protection.<sup>13</sup> Magistrates considering foster care applications by relatives caring for orphaned children therefore need to find that the child is

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<sup>13</sup> Section 150(1)(a) also covers children who have been abandoned and are without any visible means of support

“without any visible means of support”. Magistrates in the various courts across the country have been interpreting these words differently. Some have been finding that a child already in the care of relatives has visible means of support and therefore cannot be placed in foster care, others have interpreted the words as a means test and assess the income of the prospective foster parents (including any social grant income they are receiving such as an old age pension), while others see the mere absence of biological parents caring for the child as a lack of visible means of support. The result is unequal application of the Act across the country. We are also seeing a slow-down in the growth of new foster child grants over the past two years which may indicate that a number of magistrates are interpreting s150(1) (a) in a way that excludes orphan children living with relatives from foster care.<sup>14</sup>

#### *The Magistrate’s ruling in the Case of Child SS*

In the case of Child SS, the Krugersdorp Magistrate rejected the application for a foster care placement. This is because he found that the orphaned child was not "in need of care and protection" in terms of s150 (1) (a) because he had "visible means of support". The fact that he was already living with his extended family and had been doing so for more than 8 years was seen as "visible means of support".

#### *The appeal to the High Court*

Child SS, represented by the Centre for Child Law, appealed to the South Gauteng High Court to overturn the Magistrate’s decision. The State joined the case as a respondent and the Children’s Institute joined as a friend of the court (*amicus curiae*). The case was heard by a two judge bench in the High Court on 16 April 2012 and judgment was delivered in August 2012.

The main question facing the High Court was the meaning of section 150(1) (a) in the context of an orphaned child living with a family member. Is an orphan child who is living with extended

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<sup>14</sup> Over the period January to November 2011 there were only 20 000 new foster child grants. See Hall K (2012) Child Poverty and Foster Care: A Statistical Overview. Presentation for Black Sash Workshop 17 April 2012.

family a child "in need of care and protection"? This requires the court to determine the meaning of the words "without any visible means of support."

The Centre for Child Law argued that the best interests of the child required the court to interpret the word "and" in section 150(1) (a) to mean "or". This would mean the mere fact of being an orphan would qualify a child as "in need of care and protection" and therefore eligible for foster care placement. The State and the Children's Institute did not agree with this argument because it was very clear from the Parliamentary process that Parliament had deliberately chosen to use the word "and" instead of "or". This decision by Parliament is on record in Portfolio Committee minutes and in the changes between the tabled and amended bill.<sup>15</sup>

The State (Minister of the Department of Social Development) argued firstly that a child does not need to be found "in need of care and protection" before they can be placed in foster care. The Centre for Child Law did not agree with this argument, neither did the Magistrate or the Children's Institute. They argued that the structure of the Act is quite clear that s 150(1) is the gateway through which children must pass before they can be "placed by the court". This is to protect children from being separated from their families without due process of law.

The Minister's second argument (in the event the first does not succeed) was that the words "without any visible means of support" amount to a means test which must be administered by the magistrates. Both the Centre for Child Law and Children's Institute did not agree with the means test argument because the Social Assistance Act is very clear that foster child grants do not have a means test either for the parent or the child and the Children's Act does not prescribe a means test. In the absence of a prescribed means test each magistrate would use a different income threshold which would result in inequality across the country. The foster child

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<sup>15</sup> See Parliamentary Monitoring Group minutes of the Portfolio Committee on Social Development dated 30 May 2005 and Parliamentary Monitoring Group minutes of the Portfolio Committee on Social Development dated 14 June 2005. And see s150 (1) (a) in the tabled bill [B70-2003 reintroduced] vs. the amended bills [B70B-2003], [B70C-2003] and [B70D-2003].

grant historically does not have a means test primarily because it was designed as an alternative care grant and not as a poverty alleviation grant. It was designed to incentivize people to care for children who cannot live with their families as an alternative to placing the children in child and youth care centres.

The Children's Institute entered as a friend of the court to present evidence to the court on the potential effect of its judgment (either way) on a large number of children. The High Court's interpretation of the meaning of s150 (1) (a) binds all magistrates in Gauteng and will be a highly persuasive precedent to all magistrates across the country. It will therefore impact on all orphan children in the care of relatives whose foster care orders come up for review - approximately 350 000.<sup>16</sup> It will also impact on all those hoping to apply for foster care - approximately 750 000.<sup>17</sup> The judgment will also impact on children who have been abused, neglected and exploited and are dependent on the same social workers and courts for child protection services - number unknown.

The Children's Institute recommended to the court that it should make an interim order for child SS (and others like him) allowing him to get the foster child grant, but not rule on the meaning of s150(1) (a) and give the Department time (18 months) to make its policy decision on this question and amend the relevant Acts accordingly.

The Children's Institute recommended this remedy because there were two policy processes underway that could resolve the challenges holistically and the Department needed time to make its policy choice and provide for a transitional plan to prevent hardship for the children who may be adversely affected. We also tried to persuade the Department to reach a settlement agreement with the Centre for Child Law and place this before the court. If the State did this there was a strong possibility that the State could convince the court by admitting there

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<sup>16</sup> Analysis by Katharine Hall of the National Income Dynamics Study 2008, 2009 General Household Survey and SOCPEN data base.

<sup>17</sup> Authors calculations: Total of 1.1 million maternal and double orphans living in poverty minus 350 000 already receiving the foster care grant equals 750 000 maternal and double orphans in need of adequate social assistance.

is a problem, informing the court there are several reform processes in progress to sort out the problem, suggesting an interim interpretation, and asking for time to make the necessary policy choice and amendments. However, the Department did not agree to a settlement and the case proceeded to court.

### **The court's judgment on how s150 (1) (a) should be interpreted**

In court the Judges responded to oral argument by rejecting the various interpretations of the words "without any visible means of support" put forward by the parties. The Judges instead proposed to the parties that an orphaned child who has a "*readily apparent*" or "*easily ascertainable*" relative with a *common law duty of support* towards the child - does have visible means of support. Such a child therefore should not be found to be in need of care and protection and generally cannot be placed in foster care.

Under the South African common law certain relatives like grandparents and adult siblings have a common law duty to support their grandchildren or younger siblings, while others like aunts and uncles do not. In effect the Court's proposal would mean that orphans living with aunts and uncles (such as child SS) do qualify for foster care, while orphans living with grandparents or older siblings do not qualify for foster care.

The judges asked each party to submit further legal submissions on the categories of caregiver that bear a common law duty of support to orphan children.

The Centre for Child Law provided a summary of the common law on the question of which relatives bear a common law duty of support - namely grandparents and adult siblings. Under this analysis the caregivers of child SS would qualify for foster care because they are the child's great aunt and uncle and therefore do not have a common law duty of support.

The Children's Institute endorsed the Centre for Child Law's legal interpretation of who bears a common law duty of support under common law but emphasized that the court should also have reference to case law on customary law, in particular case law that had found that a person who had adopted a child under customary law also has a legal duty to support that child. The Children's Institute also argued that finding a child in need of care and protection and making an alternative care order should be considered a last resort if there are other appropriate orders that the court can make to support the family and safeguard the child's best interests. The Children's Act provides a range of new orders (and services to give effect to the orders) that the Children's Court can make to strengthen and support families and avoid alternative care orders. For example:

- The court could make an order in terms of section 23 of the Children's Act granting the caregiver with whom the child is living, parenting rights and responsibilities (care and contact).<sup>18</sup>
- The court could direct that the matter be referred for adjudication in terms of the Maintenance Act in order to compel the caregiver who bears the duty of support (for example the father) to pay maintenance to the caregiver with whom the child is living with (for example the grandmother).
- If the child or family is in need of additional State support, the Court could make a supervision order placing the child and caregiver under the supervision of a social worker. The court can do this without having to first find the child in need of care and protection or having to place the child in alternative care.<sup>19</sup>
- The court could order the Department of Social Development to assist the family to access prevention and early intervention programmes.<sup>20</sup> The Department would then be obliged to provide one or more of the services listed in section 144(1) and (2) to the child and family. This could for example include providing counseling,<sup>21</sup> providing home based care services if

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<sup>18</sup> read with s156(4), 156(1)(a) and (b) of the Children's Act

<sup>19</sup> See section 46(1)(f) read with section 156(4) of the Children's Act

<sup>20</sup> See sections 148(1), 149 and 155(8) (b) of the Children's Act

<sup>21</sup> See section 144 (1)(e) of the Children's Act

the family is affected by a chronic illness such as HIV<sup>22</sup> and ensuring that the family has access to the various state funded poverty alleviation programmes.<sup>23</sup> These include subsidised early childhood development programmes, housing subsidies, free basic water, free electricity, social assistance (child support grant, disability grant, care dependency grant, old age pension, grant-in aid, or social relief of distress), no-fee schools, school fee exemptions, transport subsidies, and free health care services.

The State did not provide further submissions on the court's proposal but re-iterated their original argument that the words "without any visible means of support" should be interpreted as a means test.

The judges considered these further submissions and then wrote their judgment. The court upheld the appeal and ruled that Child SS should be placed in foster care with his great aunt and uncle. For orphan children in the care of aunts and uncles – relatives who do not bear a common law duty of support - the court therefore clearly found that such children can be placed in foster care. However for children with a readily apparent or easily ascertainable relative with a common law duty of support (eg grandparents and adult siblings) the judgment is less clear. It can be interpreted to say that grandparents and siblings cannot be foster parents unless in exceptions if it would be in the best interests of the child. Legal experts familiar with magistrate's use of case law predict that the case will perpetuate the varying interpretations that we have been seeing from the different magistrate's courts. In particular - those denying access to grandparents will find authority in the case to back up their position. Those allowing access will also be able to find authority in the judgment to back their position. The result is that inequity will continue.

### **What are the worst case scenario implications of the judgment?**

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<sup>22</sup> See section 144(2)(d) of the Children's Act

<sup>23</sup> See sections 144(2) (a), (b), (c) and (e) of the Children's Act

If the High Court's judgment is understood to say that grandparents and adult siblings cannot generally be foster parents it would mean that:

- (a) A large portion of the approximately 350 000 orphaned children who live with their relatives and who are already receiving the FCG would be negatively affected. They have to have their foster care orders reviewed and extended by the courts every two years. Those who live with their grandparents or older siblings (the majority) will not be able to have their foster care court orders extended as they will no longer be children "in need of care and protection". They will therefore not be able to qualify for the FCG after their current court orders expire. They, like non-orphaned children in the care of parents or relatives, would have to rely on the lower valued child support grant.
- (b) New foster care applications by grandparents and adult siblings caring for orphans may be rejected by magistrates. There are approximately 750 000 orphans living with relatives in need of adequate<sup>24</sup> social assistance. The majority of these families will have to continue to rely on the lower valued CSG (grandparents and siblings), while a few will qualify for the foster child grant (aunts and uncles).

### **How can the Department respond to the judgment?**

The Department could:

- (a) appeal the judgment – however this will be difficult and is likely to take a further two years to reach finality which would mean the delays in access to grants and services will continue and the uncertainty and inequality will persist; or
- (b) accept the judgment and refer grandparents and siblings caring for orphans to the Child Support Grant instead; or

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<sup>24</sup> The majority (approximately 600 000) are receiving the CSG. This is not however considered by the recipients or most stakeholders as "adequate".

- (c) propose a comprehensive solution based on considerations of children's rights, best interests, poverty alleviation and the achievement of equality.

### **What are the options on the table for a comprehensive alternative solution?**

Over the past few years there have been many debates about how best to solve this growing challenge. It has been a complex and multi-layered debate with many different stakeholders holding different opinions on the solution that would be in children's best interests.

There are a number of options for reform being discussed at the moment. I will briefly describe four.

- (1) **Foster child grant:** Use the FCG as the appropriate grant for orphans living with extended family.

*In the light of the judgment, this option would require the state to successfully appeal the judgment or to amend the Children's Act to remove the words "without visible means of support".*

- (2) **Child Support Grant:** Use the Child Support Grant as the appropriate grant for orphans living with extended family (the same as extended family and biological parents caring for non-orphans).

(a) At the current amount of the CSG for all primary caregivers (R280)

(b) At an increased CSG amount for all primary caregivers (eg R426<sup>25</sup>)

*Increasing the CSG amount can happen through the promulgation of a notice in the Government Gazette.*

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<sup>25</sup> This is the 2012 value of the food component of the Stats SA lower bound poverty line. Calculation by Debbie Budlender.

(3) **Kinship Care Grant:** Create a Kinship Care/Family Care Grant for orphans living with extended family that:

- (a) does not require a court process but can be accessed after a social worker assessment and report or
- (b) does not require a court or social worker process but is accessed by direct application to SASSA with a *retrospective* visit by a social worker or child and youth care worker.

Questions:

- what should the amount of the grant be? Same as the FCG at R770 or between the CSG and FCG at about R500?
- should the grant be means tested or not?
- what should the grant be called? Kinship Care Grant, Family Care Grant, Supplementary CSG, Extended CSG, Survivor Benefit, Grant-in Aid?

*A kinship care grant in the form of a "supplementary CSG" could be created by amending the regulations of the Social Assistance Act. A kinship grant that does not use the mechanism of the existing CSG would need to be created by an amendment to the Social Assistance Act.*

(4) **Kinship Care Grant PLUS an increased CSG amount:** Option 4 is the same as option 3 with the addition of increasing the CSG amount to match the food component (R426 in 2012 rands) of the lower bound Stats SA poverty line. The amount of the Kinship Care Grant would be between the CSG and FCG and it would be means tested like the CSG.

*This option could be introduced via amending the regulations of the Social Assistance Act and promulgating a notice in the government gazette.*

**Do we have the available resources to implement these options?***Money*

Some of the permutations of these options (or phasing in) would be affordable within the existing 2012 Medium Term Expenditure Framework. Others would require additional budget but could be phased in over time to reduce the immediate impact on the budget.

The reason why some are affordable now is because the 2012 MTEF's projected number of foster child grants and the budget for these grants is higher than actual take-up of the grant. The low take-up is the result of the large scale lapsing of grants since 2009 and a slow-down in new applications. This means that there is budget for a solution. However, there needs to first be a political decision to use the available budget in this way. Preceding this – there needs to be political recognition that there is a serious design flaw in the current system that needs a serious long term solution.

For the options that require additional budget – we will need substantial political shifts within government and pressure from outside government. This should not stop us from taking steps now to start introducing the first phase of the solution with the available budget.

*Human and court resources*

Due to the chronic shortage of social workers and the current burden on the courts - the option chosen should decrease the workload of social workers and the courts. This will require us to simplify the process required for providing social assistance to orphans living with family members. This would free up social workers for delivery of protection and alternative care services. It would also free up the budget that would otherwise be spent on employing additional social workers for employment of other less costly staff, such as child and youth care

workers required for the roll out of the Isibindi programme. It would also free up court time and save the related staff and other costs in the Justice budget.

### **What Constitutional principles should guide our decision making on reform?**

The Constitution contains a number of founding values and rights that need to be considered when making policy choices that affect children. These include:

- the founding values and rights of equality and dignity (preamble, s1, s7(1), s9 and s10)
- the principle and right that the best interests of the child must be considered of paramount importance in any matter concerning the child (s28(2))
- everyone's right to have access to social security, including, if they are unable to support themselves and their dependents, appropriate social assistance (s27(1)(c))
- children's rights to family care or parental care, or to appropriate alternative care when removed from the family environment (s28(1)(b))
- children's rights to basic nutrition, shelter, basic health care services and social services (s28(1)(c))
- children's rights to be protected from maltreatment, neglect, abuse or degradation (s28(1)(d)).

#### *Equality*

The principle of equality is very relevant when we consider the amount of each of the grants. If we are going to have different amounts for different groups of children this differentiation should be based on the principle of equality – i.e. it should be aimed at achieving equality. We need to consider equality of income and access to services as well as equality of opportunities and outcomes. Per capita income analysis tells us that children living with their mothers (father's not present) are the poorest category of children. They are followed by non-orphans living with relatives and then by orphans living with relatives. These are the three categories

therefore most in need of income support. Looking beyond equality in income - research into the vulnerability of children orphaned by HIV shows that these orphans (as opposed to non-orphans) are more likely to suffer from food insecurity, abuse and anxiety.<sup>26</sup> The same research also found that orphans living with an HIV affected caregiver (of which many will be paternal orphans living with their mothers) are the most at risk of all orphans. Therefore on a vulnerability analysis it is particularly paternal orphans living with HIV positive mothers who are at most risk followed by orphans living with relatives affected by HIV and then orphans living with relatives not affected by HIV.

Taking this into account, can we justify a higher poverty alleviation grant for maternal and double orphans in the care of relatives without also providing a comparable amount for paternal orphans and non-orphans living with their mothers?

To achieve equity there is a need to reduce the gap between the size of the various grants. Moral assumptions or legal norms need to be tested against the principle of equality and the Bill of Rights as a whole to assess whether they are still constitutionally valid.

A further consideration when looking at the amount of the grants is the underlying objective rationale for the amount. If the grant is aimed at poverty alleviation for families caring for children it should be linked to a poverty line. There are various poverty lines and components within poverty lines that could be used as an objective basis. In 2011 rands, these range from R305 per month (2 dollars per day), R396 per month (Food component of the Stats SA lower bound poverty line), R604 per month (Stats SA Lower bound poverty line) to R1122 per month (Upper bound Stats SA poverty line).<sup>27</sup> On the other hand if the grant is aimed at incentivizing alternative care (foster care) of children on the state's behalf it should be based on an objective analysis of the total costs of raising a child. Furthermore if orphans are more vulnerable to

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<sup>26</sup> Cluver, L, Orkin, M, Boyes, M & Gardner, F (2011) *Journal of Child Psychiatry and Psychology*; Cluver, L, Orkin, M, Boyes, M & Gardner, F (2012). *Journal of Paediatric Psychology*; and Cluver, L (2011). *Nature*, 474 27-29.

<sup>27</sup> Hall K (2012) *Child Poverty and Foster Care: A Statistical Overview*. Presentation for Black Sash Workshop 17 April 2012.

abuse and anxiety on the basis of being an orphan, as opposed to on the basis of being poor – is an additional monetary transfer the appropriate support response or would the child not benefit more from access to home based care for their sick caregiver, counseling, access to a social worker and to a range of other prevention and early intervention programmes (in addition to a poverty alleviation grant)?

*The difference in the State's duty towards children in family care vs. children in state care (alternative care)*

In *Government of the Republic of South Africa v Grootboom and Others*,<sup>28</sup> a case which dealt with the rights to shelter and housing, the Constitutional Court provided the first interpretation of government's duty of care towards children. The Court concluded that s28(1)(b) and (c) needed to be understood together. Sub-section (b) outlines who has the responsibility for the care of children (parents, family or the state) while sub-section (c) outlines the essential elements of that care (basic nutrition, shelter, basic health care services and social services). Thus if the child is in the care of the parents or family, then they have the primary responsibility to provide for the basic needs of the child. If the child is removed from the parents or family and placed in alternative state care (for example in foster care or in a children's home) then government bears the primary responsibility to provide for the basic needs of the child.

The Court further elaborated that while the parents and family may bear the primary duty of care for children in their care, this does not remove government's constitutional obligation to assist parents and families to provide for the basic needs of their children. Government is obliged to assist by providing families with:

*access to land in terms of section 25, access to adequate housing in terms of section 26 as well as access to health care, food, water and social security in terms of s27. One of the ways in which the state would meet its s27 obligations would be through*

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<sup>28</sup> 2000 (11) BCLR 1169 (CC)

*a social welfare programme providing maintenance grants and other material assistance to families in need in defined circumstances.*<sup>29</sup>

The Court's example mirrors article 27(3) of the UN Convention on the Rights of the Child. This article provides that states, within their means, must "take appropriate measures to assist parents and others responsible for the child" to provide children with an adequate standard of living and "shall in cases of need provide material assistance and support programmes particularly with regard to nutrition, clothing and housing."

In a later judgment, *Minister of Health and Others v Treatment Action Campaign and Others*,<sup>30</sup> a case concerned with the right to health care services, the Court developed its interpretation further. It recognised that for services such as health (and by analogy also social services in s28(1)(c)), where parents and families are dependent on others (private and the state) to provide for their children, government bears an obligation to assist families in need to provide these services to their children. The Court said that government bears a duty to provide the s28(1)(c) entitlements to children not only when children are physically separated from their family (i.e. "removed") but also when "the implementation of the right to parental care is lacking" (i.e. if the family lacks the financial resources to pay for the services).

The High Court has built on the Constitutional Court's jurisprudence and found that children in alternative care (i.e. "wards of the state") have a directly enforceable entitlement to have their basic care needs met by the state. Relevant cases include *Centre for Child Law and Another v Minister of Home Affairs and Others*<sup>31</sup> (which concerned the rights of foreign unaccompanied children in state deportation centres), and *Centre for Child Law and Others v MEC for Education and Others*<sup>32</sup> (where government was ordered to provide basic care entitlements and social services to children in a state child and youth care centre).

In summary, the jurisprudence of both the Constitutional Court and High Court is clear in relation to the state's obligation to children *in alternative care*, namely that government bears a

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<sup>29</sup> Grootboom para [78]

<sup>30</sup> 2002 (10) BCLR 1033 (CC)

<sup>31</sup> 2005 (6) SA 50 (T).

<sup>32</sup> 2008 (1) SA 223 (T).

direct and immediately enforceable duty to provide for the basic care needs of the children. *For children in the care of parents or family*, the Constitutional Court has interpreted s26, 27 and s28 together to place an obligation on government to support parents and families to provide for the basic care needs of their children and specified that this obligation can be realised by the provision of social grants and other material assistance for those in need. The obligation to support parents and families has been found to be subject to the concepts of progressive realisation and “within available resources”.

The practice of using the foster care system for children living with related family results in these children becoming “wards of the state” once the court has “placed” them in “alternative care”. This categorisation as “wards of the state” results in much stronger constitutional obligations for government than government bears for children living in family care without the intervention of the courts. For children placed in alternative care (“wards of the state”), government is directly responsible for providing for all the needs of the child – i.e. the full costs of raising the child. In contrast, for children in family care, government is obliged to provide support where the family is unable to provide. This support is subject to the principle of progressive realisation within available resources. Therefore the State is not liable for immediately covering the full costs related to raising the child (as the state is for children in alternative care) but rather bears a duty to provide a basic package of grants and services that is expanded progressively over time.

It is important therefore to define which children are in alternative care and which are in family care. The Bill of Rights juxtaposes three kinds of care: parental, family or alternative care. Family care is therefore not alternative care and visa versa. The question then arises as to whether orphan children living in the care of family members are in family care or alternative care. If they are placed in foster care by the court or social workers, they become wards of the state and the state is directly responsible for the full costs of raising the child. If they are considered to be living in family care then the state bears a duty to support the family if the family is in need subject to the States available resources and the concept of progressive realization.

Grants aimed at poverty alleviation tend to be means tested in order to determine eligibility. This is because they are aimed at supplementing people's income to an acceptable level. Grants aimed at incentivizing alternative care (such as the foster child grant) on the other hand are not means tested. This is because the State is primarily responsible for the care of the child and must therefore pay the foster parent the full costs of raising the child. When deciding whether or not grants have a means test it is therefore important to know the underlying rationale for the grant. It is also important to assess who has the primary duty of support for the child. If the duty of support rests with the family then the state's duty is one of providing assistance in cases of need. However if the duty of support rests with the state because the child is "ward of the state" then the state is immediately and directly responsible for all the child's costs.

If a new grant for orphans with family is introduced a question arises as to whether it should be means tested or not. If it is means tested it will be targeted at 1.1 million orphans. If it is not, it will be aimed at 1.5 million. The larger the number of beneficiaries the more the cost of the new grant. Furthermore, given the likelihood of a "fixed envelope" (pre-determined budget upon which the proposal can be based), the more beneficiaries are targeted the lower the grant amount will be and visa versa. In deciding whether or not the grant should be means tested we are asking ourselves therefore whether we want to reach all orphans with a small grant or orphans in poverty with a larger grant?

### *Progressive realisation*

The Constitutional Court has developed the "reasonableness test" for assessing the constitutionality of government laws, policies and programmes that are aimed at progressively realising socio-economic rights. This test involves the following questions:

- Is the programme reasonably conceptualised? Is its design capable of achieving eventual full realisation of the right?
- Is the programme comprehensive, coherent and co-ordinated?

- Have appropriate financial and human resources been allocated for the implementation of the programme?
- Is the programme being reasonably implemented?
- Is the programme transparent and have its contents been made known effectively to the public?
- Is the programme balanced and flexible and does it make provision for short, medium and long-term needs? In particular the programme should not exclude a significant segment of the population – especially those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril.

To satisfy the principle of progressive realisation, the option chosen should result in an increase in the number of children benefiting from social assistance and an increase in the monetary value of the grants. If resources are constrained, the children most vulnerable to multiple violations of their rights should be prioritized first and there should be timeframes set for reaching more children over time. The option should also result in the system working more coherently, reasonably and efficiently by decreasing the bureaucracy required for accessing grants. This will result in children accessing the benefits quicker and with less expenditure of time, effort and money on the part of caregivers and the state.

Due to the urgency of the problem and the fact that we have been seeing a slowdown in new foster care applications since 2009 (indicating a lack of progressive realisation)- a solution that can be quickly and easily introduced should be chosen. Using existing systems and mechanisms that have proven to be successful would facilitate ease of introduction. For example - making amendments to regulations as opposed to amendments to Acts of Parliament will take less time. As long as the proposal extends rights and there is a public consultation process it would be constitutional to introduce the reform via regulations.

*The obligation not to take regressive action*

A further principle that needs to be considered is the obligation not to take regressive action – these are actions that reduce people’s existing benefits and rights. If government decides to reduce a current benefit to an individual child or group of children this action stands the risk of being found to be regressive and therefore unconstitutional. However, if government can show that overall the policy change will provide a different but appropriate benefit to the affected group, have the net effect of reaching more vulnerable children and promoting equality, and that all efforts have been made to minimise harm to the group whose current benefits are being changed, regressive actions can be justified. For example, when the CSG was introduced in 1998 its value was smaller than that of the state maintenance grant that it replaced, but the new grant would reach many more, and previously excluded, children. The net effect was therefore considered constitutional.

The option chosen therefore must be assessed to gauge any possible negative impact on existing benefits. If existing benefits are going to be reduced for a small group of children in the interests of reaching a much larger group of children with a larger benefit it will be important to have transitional measures and supplementary services to prevent undue hardship to the small group.

### *Best interests of the child*

The South African Constitution and the Children’s Act both say that the best interests of the child “are of paramount importance” in all matters affecting the child. The best interests principle applies both to matters that affect individual children as well as to those that affect children as a body. Chapter 7 of the Children’s Act lists the factors that should be taken into consideration where relevant in applying the standard of the best interests of the child. These factors include a preference for children to remain with parents or family where possible. The option should therefore be aimed at supporting families to care for children so as to prevent children from having to be placed in state care. It should also ensure families do not have to move children around to chase the higher amount.

## Conclusion

If we look back at the four options and consider the constitutional principles, the option that would most advance equality and promote the best interests of all children affected - would be to increase the CSG amount (eg from R280 to R500) for the over 11 million primary caregivers in receipt of the CSG (including the 1.1 million orphans being cared for by relatives). This option would solve the current foster care crisis and free up social workers and the courts to provide better services to abused children. It would also alleviate poverty for all children irrespective of who they are living with (and take us further towards eradicating poverty).

For those relatives already on the FCG (approximately 350 000) this could be experienced as a regressive move if the amount of the increased CSG is less than the FCG. But because it will result in an overall increase in the number of orphan children reached (1.1 million as opposed to 350 000) and an overall increase in the amount of money transferred to children (two times the current CSG amount) it would pass the test of progressive realisation. The challenge of this option is that it will require almost double the budget that is currently being spent on the Child Support Grant. However, if the increased amount is phased in over time it would reduce the impact on the budget.

The second best option would be to increase the CSG amount slightly for all primary caregivers (e.g. from R280 to R380) and introduce a kinship grant for relatives caring for orphans that is valued higher than the CSG but lower than the FCG (e.g. R450). This would contribute to the alleviation of poverty of all primary caregivers. However, the difference in amount between orphans and non-orphans would need to have a reasonable rationale to explain why caregivers living in similar poverty receive different amounts. This rationale could not be based on poverty alleviation as both groups live in equal poverty. It would therefore need to be justified based on legal norms of levels of duty of care or on other forms of increased vulnerability experienced by orphans (such as higher levels of abuse and anxiety). It could also be based on the rationale of

the need to incentivize (encourage) care by extended family. This option has been costed and is affordable if a phased approach is followed.

The third best option would be to create a means tested kinship grant for orphans being cared for by relatives that is valued between the CSG and the FCG (eg R450). This option would solve the current foster care crisis and free up social workers and the courts to provide better services to abused children. If the new grant is directly accessible via SASSA, this option would result in triple the number of orphans accessing an adequate social grant. This option is affordable within the 2012 - 2014 Medium Term Expenditure Framework and could be quickly and easily introduced as a "supplementary CSG" via amending the regulations of the Social Assistance Act.

For those relatives already on the FCG (approximately 350 000) this approach could be experienced as a regressive move. But because it will result in an overall increase in the number of children reached (1.1 million as opposed to 350 000), and would ensure grants did not lapse every two years, it would pass the test of progressive realisation. Furthermore, the 350 000 already on the FCG could be provided with additional support in the form of prevention and early intervention programmes and a gradual transition from the FCG to the new kinship grant to prevent sudden hardship when they start to receive a slightly reduced amount.

If resources are constrained now and we are forced to deal with a fixed envelope of budget, then we could start with introducing a kinship grant by January 2013 and then gradually (over 5 years) phase in an increased amount for the Child Support Grant. This approach would eventually get us to the gold standard approach without an immediate shock on the budget.