

Theme: Whose baby is it? Debating the nature and extent of the State's responsibility to provide social assistance to children living in poverty

The story of 110 000 foster child grants that stopped being paid in 2010/2011

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Introduction

The General Household Survey of 2009 counted approximately 18.6 million children under the age of 18 years living in South Africa, which amounts to 38% of the total population.¹ Further analysis of the data has indicated that approximately 6 million children live with both parents, 6.9 live with the mother but not their father; and 5.6 million live with family members other than their biological parents.² In 2009 there were approximately 1.5 million maternal orphans, but the analysis shows that 4.1 million of the children in care of extended families have mothers who are alive³ but for reasons that are partly historical, partly cultural and deeply linked to patterns of poverty, live apart from them.⁴ A typical scenario is that children are left with grandmothers or aunts whilst mothers go to the city to find work.

The care of children must also be viewed against the fact that 11.3 million children (61% of the total number of children) are living in poverty.⁵ South Africa has an large-scale social assistance system based on monthly payable cash grants, some of which are directly linked to child care. This social assistance includes, firstly, the child support grant which, subject to a means test, is payable to any caregiver who is

¹ The General Household Survey (2009) records the total population of South Africa as 49.4 million people.

² Hall K (2012) Child Poverty and Foster Care: A Statistical Overview. Presentation for Black Sash Workshop 17 April 2012. Note that within the total of 5.6 million there are 787 000 "unclassified". A more conservative estimate of children living with family members other than their biological parents is 4.8 million.

³ Hall K (2012) Child Poverty and Foster Care: A Statistical Overview. Presentation for Black Sash Workshop 17 April 2012. Note that within the total of 4.1 million there are 787 000 "unclassified". A more conservative estimate of children living with family members whose mother is alive is 3.3 million

⁴ Children's Institute *Child Gauge 2010-2011* (2011) University of Cape Town 80.

⁵ Children's Institute *Child Gauge 2010-2011* (2011) University of Cape Town 85. The measure used is the 'ultra' poverty line of a household with a per capita income of R552 per month, which would be the equivalent of approximately 56 Euros or 69 US dollars at February 2012 exchange rates.

caring for a child, including a biological parent and other relatives, and secondly, the foster child grant which is payable to a foster parent and is not subject to a means test.⁶ Over and above the difference occasioned by the means test, the cash amounts for these two grants are considerably dissimilar, which causes caregivers to pursue the more lucrative foster child grant. Concerns are raised in this article about the efficacy of this approach, problems with implementation of the law, and a burgeoning systemic crisis. Sustainable solutions for the care of South Africa's children living in the care of extended family members are proposed.

Social assistance and child care

South Africa has the most comprehensive social grant system in Southern Africa.⁷ The legal impetus for social assistance to poor people living in South Africa by the State is provided by section 27 of the Bill of Rights in the Constitution which provides that everyone shall have the right to social security including, if they are unable to support themselves and their dependents, appropriate social assistance⁸. The legal regulatory framework for social assistance is provided by the Social Assistance Act 13 of 2004 and the accompanying regulations. There are three social assistance grants that relate to the care of children, namely the child support grant, the foster child grant and the care dependency grant. The first two are relevant to this article and will be discussed in some detail. The care dependency grant is payable to a caregiver who cares for a disabled child, and due to its specificity is not centrally relevant to the issues under discussion.

The child support grant was introduced in 1998.⁹ Eligibility to receive the child support grant derives from being a 'primary caregiver' of a child. A primary caregiver is defined as a person, whether or not related to the child, who takes primary responsibility for meeting the daily care needs of the child. This definition moves

⁶ The system includes the care dependency grant for parents caring for disabled children, but the recipients are a narrowly defined group and therefore this grant is not central to the general discussion in this article.

⁷ Hall K and Proudlock P 'Orphaning and the foster child grant: A return to the 'care or cash' debate' (2011) 29 (5&6) *Child and Youth Care Worker* 23.

⁸ In *Khosa and others v Minister of Social Development and Others* 2004 (6) SA 505 (CC) the payment of grants was extended beyond South African citizens to permanent residents.

⁹ Under the Apartheid regime there has been a state maintenance grant which in practice generally excluded black families and children. In 1994 South Africa became a constitutional democracy and the new government was tasked with creating support systems for poor families. A committee was appointed, chaired by Professor Frances Lund, to investigate the various options. The Report of the Lund Committee on Child and Family Support (August 1996) recommended the child support grant.

away from definitions of care based on biological ties or common law relationships, and in doing so gives recognition to the many family forms and care arrangements that are commonplace in South Africa, most notably children being cared for by extended family members. The grant was originally targeted specifically to the poorest and youngest children, but has since been progressively increased both in terms of the amount and the eligibility age range and is now payable in relation to all poor children under the age of 18 years. It is means-tested on the basis of household income, and the threshold is relatively low (matching closely the Statistics SA lower bound poverty line of R552 per child per month in 2009 rands for a 5 person household). The grant currently reaches 11 million children through their primary caregivers¹⁰. The amount is small in monetary terms, only R 280 per child per month, up to a maximum of six children per household.

The other important cash grant to be considered is the foster child grant. The term 'foster care' was first included in the law in the Children's Act of 1960.¹¹ Foster care as introduced at that time was, for the most part, a 'classic' foster care model in which children who were found to be in need of care were placed by a children's court into foster care with foster parents who were not related to them. This cost-effective form of alternative care was and is subsidised by the government through the monthly payment of a cash grant. This foster child grant is free from any means test. Apart from being cost-effective when compared with residential alternative care options, foster care is viewed as a preferred form of alternative care for children who are not living with biological parents and for whom adoption is not appropriate.¹² This form of care was utilised in a stable manner over a number of decades from 1960 onwards and the numbers of children in foster care never rose above 40 000. However, in the last decade the situation has changed dramatically, with the numbers of children in foster care showing a marked increase from 2002 to 2012, tapering off in 2010 when the new Children's Act came into operation. There are

¹⁰ South African Social Security Agency (2012) Summary of Social Grant Distribution in South Africa as at 30 April 2012. Fact Sheet Nr 4

¹¹ Skelton A and Proudlock P 'Interpretation, objects, application and implementation of the Act' in CJ Davel and AM Skelton *Commentary on the Children's Act* [Original Service 2007] Juta: Claremont 1-6.

¹² Gallinetti J and Loffell J 'Foster care' in CJ Davel and AM Skelton (eds) *Commentary on the Children's Act* [Original Service 2007] Juta: Claremont 12-2.

currently 545 000 children in receipt of a foster child grant¹³. These trends will be discussed in more detail later in the article.

The sudden rise in the number of children being fostered has its genesis in the HIV AIDS pandemic that South Africa has experienced, and the concomitant rise in the number of orphans. As will be demonstrated later in this article, the rise in numbers was also driven by certain policy choices set out in the Children's Act.

Apart from not being subjected to a means test, the value of the foster child grant in 2012 is R770 per child per month, not a large amount in terms of its value, but considerably larger than the child support grant which stands at R280. This difference in amount understandably causes poor families caring for children who are not biologically their own to seek regularisation of their child care arrangements through the foster care system, particularly as it renders them eligible for the foster child grant. This in turn places burdens on an over-stretched care and protection system. The child support grant can be relatively easily accessed by primary caregivers through an administrative application to the South African Social Assistance Agency.¹⁴ There is no social work oversight or involvement before or after the grant is approved. By contrast, foster care is viewed as an alternative care placement and as part of the care and protection system.¹⁵ A decision to place a child in foster care is made by a children's court which is satisfied, on the basis of a social worker's report and any other evidence it calls for, that the child is in need of care and protection, that the prospective foster parent is a fit and proper person and that the placement is in the best interests of the child. Once a child is placed in foster care, there must be ongoing social work oversight of the placement, and subsequent reports to court, usually every two years, to recommend whether the foster care placement should be extended or whether some other care arrangement is more appropriate.¹⁶

¹³ South African Social Security Agency (2012) Summary of Social Grant Distribution in South Africa as at 30 April 2012. Fact Sheet Nr 4.

¹⁴ The Agency was established by government in terms of the South African Social Security Agency Act 9 of 2004 to administer and pay out social assistance payments.

¹⁵ Skelton A and Carnelley M (eds) *Family Law in South Africa* (2010) Oxford University Press: Cape Town 318.

¹⁶ *Ibid* 323. The court can order foster care for periods longer than two years in certain specified circumstances, which obviates the need for further court appearances, the supervision by a social service professional is still required for the duration of the foster care placement, as per section 186(3) of the Children's Act.

Systemic crisis

There has been a phenomenal growth in uptake of the foster child grant over the past decade. Statistics demonstrate that the foster child grant had been fairly stable for many years at around 40 000 children, rising slightly to 49 843 by April 2000. From this time onward it showed a sharp increase which continued to rise exponentially until it reached over 518 500 in April 2010, and then started to level off¹⁷. The sudden sharp increase from the year 2000 may have been a reflection of the impact of HIV/AIDS-related orphanhood rates. Another possible explanation is that the Minister of Social Development delivered a public address in 2002 in which he stated that the foster child grant would be made available to relatives caring for children.¹⁸ He was unwavering in his promotion of this idea: At the second reading of the Children's Bill in the National Assembly in 2007 he reiterated that relatives caring for orphaned children who were receiving the child support grant should rather be receiving the foster care grant. He noted that some magistrates were reluctant to place children with relatives, and he singled out three magistrates who were making foster care placements with relatives, and praised their approach.¹⁹

The system began to lurch in 2010. Over the previous decade the number of foster child grants had increased significantly every year, despite a drop off at the end of each year when children who had turned 18 during the year were discharged from the foster care system and their foster child grants lapsed.²⁰ Hall and Proudlock, using the South African Social Security Agency's own SOCPEN social grants database, have revealed that 129 500 foster care grants lapsed in the financial year April 2009 to March 2010, and that a further 164 900 lapsed in the year April 2010 to March 2011. Allowing for the fact that some of these lapses are as a result of the children turning 18 years, the beneficiary's death, or the child no longer being with the beneficiary, Hall and Proudlock come to the astonishing but irrefutable conclusion that 39 200 (in April 2009-March 2010) and 74 200 (in April 2010 – March 2011) foster child grants had lapsed due to a failure to review the foster care

¹⁷ Hall K (2012) Child Poverty and Foster Care: A Statistical Overview. Presentation for Black Sash Workshop 17 April 2012.

¹⁸ Skweyiya, Z Keynote address at the conference on HIV/AIDS and the Education Section: Together the Education Coalition Against HIV/AIDS, ESKOM Conference Centre, Midrand, 30 May – 1 June 2002.

¹⁹ Budlender, Proudlock and Jamieson (2008) 38.

²⁰ Hall K and Proudlock P 'Orphaning and the foster child grant: A return to the "care or cash" debate' (2011)29 *Child and Youth Care Work* 23 at 25.

placement, resulting in an expired court order. This amounted to a total of 110 000 foster child grants lapsing due to an expired court order over a two year period from 1 April 2009 to 30 March 2011. Prior to the analysis by Hall and Proudlock, those working in the care and protection system were alerted to the crisis by the Department of Social Development. An official of the Department reported at a forum at which civil society partners were present, that 123 236 foster child grants had already lapsed by January 2011. Alarmed, civil society organisations Childline and Jo'burg Child Welfare approached the Centre for Child Law, a law clinic based at the University of Pretoria which undertakes litigation on children's rights. They called upon the Centre to bring an urgent application before the High Court in an attempt to resolve the crisis and prevent any further children from dropping of the foster child grant system. The reason for the crisis as advanced in court papers was that foster care orders lapse after two years from the date on which the order was made (unless the court specified a shorter period) and under the new Children's Act these orders now had to be extended by the children's court²¹ This process had to be preceded by a social work investigation, and a social worker's report must be placed before the court. These requirements of the Children's Act marked a substantial departure from the previously applicable Child Care Act which had allowed foster care placements to be extended via an administrative process governed by the Department of Social Development. Furthermore, the Social Assistance Act required SASSA to stop payment of foster child grants if the order was not extended in time. The Department and SASSA started to implement this section of the Act before the new Children's Act was in effect. It was evident, the court papers averred, that the lapsing of such large numbers of foster care orders was due to systemic failure. This involved both social workers, who had failed to investigate and compile reports timeously, and the children's courts, which had failed to consider the extensions prior to the lapsing of the orders.

The Department of Social Development did not oppose the application, and a draft order was presented to the North Gauteng High Court by agreement between the parties.²² The court order provided that until such time as the foster care backlog could be resolved, but not later than the end of 2014, an administrative process

²¹ Centre for Child Law v Minister of Social Development and Others, North Gauteng High Court, case no 21726/11, Founding Affidavit of the Applicant.

²² The Court Order was granted on 7 April 2011.

similar to the one previously applicable under the Child Care Act must be utilized in respect of Children whose foster care orders were due to lapse. The court order also provided that all orders that had already lapsed would be deemed not to have lapsed, and would be extended for a period of six months from the date of the order. As a result of the court order approximately 80 000 foster child grants were re-instated over the period January to November 2011.²³ However over the same period there were only 20 000 new foster child grant applications²⁴. Besides other factors slowing down new applications (such as the interpretation of s150 to exclude relatives caring for orphans), this data could indicate that the re-instatement process has taken up much of social workers time.

The court order has provided a temporary 'band-aid' solution, but it is clear that law reform will be required to properly resolve the crisis. The Department of Social Development has already embarked on a consultative process towards amendments to the Children's Act. One of the issues that has been placed on the list of necessary amendments is the question of foster care, though the Department of Social Development has not yet indicated the precise form these amendments should take.

Hall and Proudlock question whether the lapsing of foster care orders can be fully laid at the door of the newly required procedures under the Children's Act. They acknowledge that the introduction of the Children's Act has exacerbated the problem of backlogs, but they point out that the problem pre-dates the Children's Act. They point to the fact that a total of 39 000 foster child grants had lapsed before the Act was put into operation. The authors therefore predict that even if the temporary solution of administrative extension provided by the court order were to be made permanent, it would not in and of itself solve the problem of backlogs.²⁵ In 2011 there were only 13 773 registered social workers in South Africa with only 6198 estimated to be involved in direct welfare services.²⁶ The costing of the Children's Bill predicted that by 2010/2011 the system would require 16 504 social workers, assisted by 14 648 auxiliary social workers to run the services under the Children's Act, and this

²³ Hall K (2012) Child Poverty and Foster Care: A Statistical Overview. Presentation for Black Sash Workshop 17 April 2012.

²⁴ Ibid

²⁵ Hall and Proudlock (2011) 23 26.

²⁶ Dawes A (2011) Social Services: Are there enough social workers to ensure adequate care and support? in Giese S (Ed) *The Children's HIV and AIDS Scorecard 2011: Monitoring South Africa's Response to children and HIV and AIDS*. Durban: Children's Rights Centre & Secretariat for Yezingane Network. See page 12 – 13

was on a 'low case scenario' developed by the costing team.²⁷ The concern is that social workers are currently spending an inordinate amount of their time servicing the foster care system, where they are dealing with children who are, for the most part, not in any danger. As a result, children who are more acutely in need of services, such as children who are abused or neglected, or orphaned and abandoned and have no one caring for them, are not receiving prompt services from social workers.²⁸ This is untenable, and calls out for a sustainable solution.

²⁷ Barberton C *The cost of the Children's Bill* (2006) Cornerstone Economic Research, Cape Town 94

²⁸ Meintjies H, Johnson L, Budlender D and Giese S 'Children "in need of care" or in need of cash? Social security in a time of AIDS' (2005) 36 (2) *South African Review of Sociology* 238.