

**AN OVERVIEW OF THE FOSTER CARE CRISIS IN SOUTH AFRICA AND ITS EFFECT ON THE BEST INTERESTS OF THE CHILD PRINCIPLE: A SOCIO-ECONOMIC PERSPECTIVE.**

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**TEN KEY WORDS**

Foster Care, Foster Child Grant, Social Grants, Social Worker, South Africa, Children's Court, Best Interests of the Child Principle, Constitutional Law, Socio-Economic Rights, Children's Act.

## DECLARATION

I declare that *An Overview of the Foster Care Crisis in South Africa and its Effect on the Best Interests of the Child Principle: A Socio-Economic Perspective* is my own work, that it has not been submitted for any degree or examination in any other university, and that all sources I have used or quoted have been indicated and acknowledged by complete references.

Candice Lynn Fortune

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# 1. INTRODUCTION

## 1.1 BACKGROUND TO THE STUDY

“It is trite that children represent the future and investing into a bright future requires protecting children’s rights today.”<sup>1</sup> The UNCRC contains a set of rights and freedoms which are to be enjoyed by all children, throughout the world. “The drafting of a regional treaty applicable specifically to African countries in order to ensure Africa’s compliance in the realisation of children’s rights, formed a part of Africa’s threefold achievement.”<sup>2</sup> South Africa’s legislative framework is, in general, protective of children and their rights and there have been significant developments, since South Africa ratified the African Charter on the Rights and Welfare of the Child (ACRWC) in 2000. The ACRWC was drafted partly in response to the under-representation of African states in the drafting process of the United Nations Convention on the Rights of the Child 1989 (UNCRC).<sup>3</sup> This is not to say, that other laws were not in place concerning children’s rights at the time, South Africa has in its pre and post-apartheid era, recognised the need for a protection of children’s rights. Its efforts aimed to predominantly address the alleviation of poverty, much more than it focused on child protection at the time; but with a decade of change the current children’s rights issues show, that evidence did not shift practice and the challenges of addressing children’s rights issues have escalated. “In the climate of political change, social workers in the early 1990s started to articulate that many social ills that they were fighting were directly related to poverty and the apartheid system.”<sup>4</sup> The alleviation of poverty and the protection of children also needed to be equally recognizable for all children. Having therefore moved from an era of apartheid it is acknowledged that South Africa has evolved, but the extent to which children are continuously being presented as its most vulnerable entity, is as alarming as the time of apartheid, when justifications were a commonplace. Overall the welfare system did not assist to alleviate the social problems caused by apartheid; instead it worked towards

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<sup>1</sup> Assim,UM *In the best interest of the child deprived of family environment: A focus on isalamic kafalah as an alternative care option* (unpublished LLM thesis,UWC,2009)1.

<sup>2</sup>Africa has come a long way in recognising the rights of children since the downfall of apartheid. The adoption of a child-sensitive Constitution<sup>1</sup> and the ratification of the United Nations Convention on the Rights of the Child<sup>2</sup> (UNCRC) and the African Charter on the Rights and Welfare of the Child (ACRWC) <sup>3</sup> are three very important achievements as stated in Duschke P and Rosa S ‘Child rights at the Core’ a commentary on the use of international law in south African court cases on children’s socio-economic rights’ (2006) A project 28 working paper. Children’s Institute: University of Cape Town p .1.

<sup>3</sup> See Assim, UM (2009) 19

<sup>4</sup> Dutschke M ‘*Defining Children's Constitutional Right to Social Services*’ (2007) Cape Town: Children's Institute, University of Cape Town.

maintaining the status quo.<sup>5</sup> “South Africa’s challenge generally does not lie in the design of laws but in the management, coordination and implementation of services required by the laws.”<sup>6</sup> This has been its challenge.

“It is against this background that the need for an effective mechanism for the protection and care of children becomes apparent.”<sup>7</sup> Article twenty six of the UNCRC guarantees ‘the right to benefit from’ social security which is significant by itself and for the realisation of other rights in the UNCRC.<sup>8</sup> Article four of the UNCRC obliges state parties relative to ‘economic, socio and cultural rights’ to undertake such measures to the maximum extent of their available resources.<sup>9</sup> The UNCRC provides a platform upon which children’s rights will be recognisable across borders. States sign to it and a shared backdrop for the importance of protecting children’s rights as well as preventing the violation thereof is recognised. South Africa has for itself defined social security, taking into account its unique historical background as well as social and economic challenges.<sup>10</sup> At an African regional level, the ACRWC contains several provisions on socio-economic rights<sup>11</sup> but does not expressly guarantee the right to social security.<sup>12</sup> It is notable that with the provision of social security the socio-economic rights of individuals should be met. Thus having these provisions for the realisation of these rights and providing it through social security as set out in the Constitution and the Social Assistance Act (SAA), “the progressive realisation qualification requires a state to strive towards fulfilment and improvement in the enjoyment of socio-economic rights to the maximum extent possible even in the face of resource constraints.”<sup>13</sup>

South Africa has signed the primary international document regulating socio-economic rights, namely the International Covenant on Economic, Social and Cultural Rights

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<sup>5</sup> Dutschke M ‘*Defining Children’s Constitutional Right to Social Services*’ (2007) Cape Town: Children’s Institute, University of Cape Town.

<sup>6</sup> Proudlock P (ed) *South Africa’s Progress in Realising Children’s Rights: A Law Review* (2014) 1

<sup>7</sup> Mukundi-Mirugi G ‘Reaffirming the Social Security Rights of Children in South Africa with Particular Reference to the Child Support Grant’ (2010) 11 *ESR Review* 7 9.

<sup>8</sup> Mukundi-Mirugi G ‘Reaffirming the Social Security Rights of Children in South Africa with Particular Reference to the Child Support Grant’ (2010).

<sup>9</sup> Venderhole WP in Alen A et al (Eds) ‘*A commentary on the United Nations Convention on the Rights of the Child*’ (2007)1.

<sup>10</sup> Moore V Smit N van der Walt A and Jansen van Rensburg L ‘*The Concept of Social Security*’ in Olivier MP (ed) *Social Security Law: General Principles* (1999) 11.

<sup>11</sup> Articles 15-19 of the ACRWC provide the scope of rights that should be available falling within the scope of recognisable socio economic rights.

<sup>12</sup> Van Rensburg LJ & Oliver MP ‘International and Supra-Natural Law’ in Oliver MP et al. ‘*Social Security: A Legal Analysis*’ (2003) 619,634.

<sup>13</sup> Chenwi L ‘Unpacking “Progressive Realisation”, its Relation to Resources, Minimum Core and Reasonableness, and some Methodological Considerations for Assessing Compliance (2013) 46 *De Jure* 742 69.

(ICESCR)<sup>14</sup> and “the Constitution of the Republic of South Africa (the Constitution) sets out the minimum standards pertaining to socio economic rights- including social security, social assistance and social services.”<sup>15</sup> South Africa is required to provide for the socio-economic rights of all its children. “All the socio-economic rights contained in the Bill of Rights apply to children.”<sup>16</sup> It is obvious that each of these instruments may hold South Africa accountable in its obligation to progressively realising the widespread socio-economic rights of its children, but to consider that it would need to be within its means.

“The Constitution contains a section on the rights of children (section twenty eight) and legislation such as the Children’s Act 38 of 2005 (CA) which further entrenched the statutory protection of children’s rights.”<sup>17</sup> The treaties that South Africa has not only signed, but also ratified, sets the foundation for what is expected, in ensuring that socio economic rights are recognised under their Constitutional Law. It is the responsibility of the State to ensure that the socio-economic rights of children are recognised. Since socio-economic rights arguments have always maintained a ‘child first’-<sup>18</sup> approach. It is inseparable of the State under which these rights must be recognised to guarantee that children are well taken care of under the provision of their Constitutional Law. In South Africa’s ability to provide for the socio-economic needs of its vulnerable children, a closer look is taken into the practices and principles that make a ‘child first’ approach possible such as the best interests of the child principle.

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<sup>14</sup> South Africa signed the ICESCR on 3 October 1994 and ratified it on the 12 January 2015 and it further entered into force on the 12 April 2015. Previously they had to ensure the state undertakes to review all domestic law and policy to ensure it is in compliance with the obligations of the treaty, however now they are legally obligated to carry out the realisation of socio-economic rights not only under domestic law but the international covenant they are expected to ratify.

<sup>15</sup> Breen N ‘Policy brief: Foster care in South Africa: Where to from here?’ available at <http://jhbchildwelfare.co.za/wp-content/uploads/2015/04/Child-Welfare-Draft-Policy-Brief-Foster-Care-FINAL-March-2015.pdf> (accessed on 30 May 2015).

<sup>16</sup> Proudlock P and Mahery P ‘Recent Developments in Legislating for Children’s Socio-Economic Rights’ in Monson J Hall K Smith C and Shung-King M (eds) (2006) *South African Child Gauge 2006* 11

<sup>17</sup> Bower C *Initial Complementary Report to the African Committee of Experts in response to South Africa’s Initial Country Report on the African Charter on the Rights and Welfare of the Child* (2014) Community Law Centre: University of the Western Cape.

<sup>18</sup> Within the Constitution Section 28 (1) (c) provides for the rights of children in regards to socio-economic rights. Heyns C & Brand D states that these rights are seen as priority obligations. This emphasizes the child first approach when it comes to socio-economic rights in ‘Introduction to socio-economic rights in the South African Constitution’ (2005) 161.



## 1.2. THE BEST INTERESTS OF THE CHILD PRINCIPLE

“In an attempt to predict the possible impact of the constitutionalism of children’s rights in 1996, it was suggested that the inclusion of a general standard (‘the best interest of the child’) for the protection of children’s rights become a benchmark for review of all proceedings in which decisions are taken regarding children.”<sup>19</sup> The concept in itself is a debatable and challenged concept bind to various layouts yet carries a joint objective; that the determination of the best interests of the child principle be regarded as a principle given a particular prominence as further set out in the CA,<sup>20</sup> that this determination be made paramount to all decisions pertaining to the child. The UNCRC refers to best interests as being 'a primary consideration' in matters concerning the child. The ACRWC echoes a different message in Article 4<sup>21</sup> referring to the best interests of the child being the primary consideration. “Whilst 'a primary consideration' leaves best interests competing equally with other rights on the same footing, 'the primary consideration' suggests that children's best interests must be given a heavier weighting where there are competing rights.”<sup>22</sup> “The concept of the child's best interests is complex and its content must be determined on a case-by-case basis.”<sup>23</sup>

The concept of the ‘child’s best interest’ is also not a new concept. “The principle of the best interests of the child requires governments to determine the impact of their imposed actions on children, and to give priority consideration to the envisioned impact before taking decisions on matters that concern children.”<sup>24</sup> “South Africa's Constitution, in section 28(2), refers to a child's best interests as being 'of paramount importance' in every matter concerning the child.”<sup>25</sup> The child's best interest can be limited (as long as such limitation is reasonable and justifiable) where there is a need to weigh those rights against others.<sup>26</sup> This principle

<sup>19</sup> Sloth- Nielsen J and Mezmur B ‘2+2=5? Exploring the domestication of the CRC in South Africa jurisprudence (2002-2006)’ (2008) *Int'l J. Child. Rts.* 16 1 28.

<sup>20</sup> Children’s Act 38 of 2005 Section 7 Best Interests of the child Principle.

<sup>21</sup> Article 4 of the ACRWC speaks of the best interest of the child.

<sup>22</sup> Skelton A ‘The Development of a Fledgling Child Rights Jurisprudence in Eastern and Southern Africa Based on International and Regional Instruments’ (2009) 9 *Afr. Hum. Rts. L.J.* 486.

<sup>23</sup> General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para.1) P 9.

<sup>24</sup> Proudlock P and Mahery P ‘Recent Developments in Legislating for Children’s Socio-Economic Rights’ in Monson J Hall K Smith C and Shung-King M (eds) (2006) *South African Child Gauge 2006* 11.

<sup>25</sup> Skelton A ‘The Development of a Fledgling Child Rights Jurisprudence in Eastern and Southern Africa Based on International and Regional Instruments’ (2009) 486.

<sup>26</sup> *Minister of Welfare and Population Development v Fitzpatrick & Others* 2000 3 SA 422 (CC) para 20; *Sonderup v Tondelli & Another* 2001 1 SA 1171 (CC) paras 33 & 35; *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, & Others* 2004 1 SA 406 (CC) paras 54-55; *S v M (Centre for Child Law as Amicus Curiae)* 2008 3 SA 232 (CC) paras 12-27.

becomes linked even to the States' responsibility toward the provision of socio economic rights, as it places children as the State's most vulnerable entity, creating expectancy that children's rights be considered central to its collective development in the same way that the best interests of the child, is considered to be central principal. Should the provision of children's rights be recognisable as an objective to maintain, in regards to all the domestic and international treaties and laws mentioned, South Africa may be able to achieve a child first approach in the implementation of its beautifully designed laws.

### 1.3. LITERATURE REVIEW

“Children in South Africa form 44.2 percent of the population and the extent of child poverty has been described as alarming.”<sup>27</sup> In a State, where children make up close to half of the population, the implementation of children's rights laws is crucial to the States growth. The most prominent way in which child poverty is addressed is through the provision of social security. “A poor child can be defined as a child below the age of 18 years who lacks access to what is essential to fulfil their basic human needs.”<sup>28</sup> Understanding the precise nature of poverty and vulnerability provides an important conceptual foundation from which to understand social protection.<sup>29</sup> Section 27 of the Constitution establishes that everyone has the right to social security, including if they are unable to support themselves and their dependants, appropriate social assistance.<sup>30</sup> “South Africa has a large scale social assistance system based on monthly payable cash grants, some of which are directly linked to child care. The social assistance includes firstly, the child support grant which, subject to a means test, is payable to any caregiver who is caring for the child, including a biological parent and other relatives, and secondly, the foster care grant which is payable to a foster parent and is not subject to a means test. In 2013, over 11 million children were registered for child support grants and over half a million children for foster care grants.”<sup>31</sup>

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<sup>27</sup> Dutschke M *Defining Children's Constitutional Right to Social Services* (2007) Cape Town: Children's Institute, University of Cape Town.

<sup>28</sup> Chirwa DM ‘Combating child poverty: the role of Economic Social Cultural Rights’ in Sloth-Nielson J *Children's Rights in Africa: A Legal perspective* (2008) Aldershot: Ashgate Publishing.

<sup>29</sup> Neves D, Samson M, Van Niekerk I, Hlatshwayo S and Du Toit A ‘The use and effectiveness of social grants in South Africa’ available at [http://www.finmark.org.za/wp-content/uploads/R\\_socialGrants.pdf](http://www.finmark.org.za/wp-content/uploads/R_socialGrants.pdf) (accessed on 08.04.2015).

<sup>30</sup> Mukundi-Mirugi G ‘Reaffirming the Social Security Rights of Children in South Africa with Particular Reference to the Child Support Grant’ (2010) 11 *ESR Review* 7.

<sup>31</sup> Blackie D ‘Fact sheet on child abandonment research in South Africa’ available at [http://www.adoptioncoalitionsa.org/wp-content/uploads/2014/2014/05fact-sheet-sheet-Research-opn-child-abandonment-in-Sout-Africa\\_final.pdf](http://www.adoptioncoalitionsa.org/wp-content/uploads/2014/2014/05fact-sheet-sheet-Research-opn-child-abandonment-in-Sout-Africa_final.pdf) (accessed on 08.04.2015)

“Foster care refers to the substitute family care for children who cannot be adequately cared for at their home of origin.”<sup>32</sup> Children’s eligibility for placement in alternative care is captured in the concept of the child being ‘in need of care’,<sup>33</sup> therefore for a child to be placed into the foster care system, the child needs to be considered a child in need of care and protection as provided in Section 150 (1) of the CA.<sup>34</sup> “This form of care was utilised in a stable manner over a number of decades from 1960 onwards and numbers of children in foster care never rose above 40 000.”<sup>35</sup> “The South African Social Security Agency’s (SASSA) database revealed that 129 500 foster care grants lapsed in the financial year April 2009 to March 2010, and that a further lapsed in the year April 2010 to March 2011.”<sup>36</sup> “In 2011 the Department of Social Development was taken to court by civil society because approximately 120 000 Foster Child Grant’s had stopped being paid to children.” The statutory process and placement of children into the foster care system; is conducted by a social worker as provided for in the CA. “Social Workers and courts had not kept up with extending the children’s foster care court orders,” within the court ordered time. The problem was twofold. First thousands of children were left without legal and statutory protection and second, the foster parent/s lost access to the social grant which impacted on family functioning. “The Court ordered the Department of Social Development to design a comprehensive legal solution by December 2014.”<sup>37</sup> Hall and Proudlock came to conclude that, “the lapse in foster care grants came from failure to review the foster care placement, resulting in an expired court order.”<sup>38</sup> This meant that statutorily, the court orders lapsed and this led to no renewal of the foster child grants by SASSA. “Since 2011 the Department has

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<sup>32</sup> De Vos AS ‘*Research at grassroots. A primer for caring professions*’ Pretoria: Van Schalk

<sup>33</sup> Ngwenya PM ‘*Factors Contributing to the Foster Care Backlog: Service Providers’ Perspectives and Suggestions*’ (unpublished Masters dissertation, University of South Africa, 2011) 3.

<sup>34</sup> Children’s Act 38 of 2005 Sec 150 (1).

<sup>35</sup> Skelton A ‘Whose baby is it? Debating the nature and extent of the State’s responsibility to provide social assistance to children living in poverty. The story of 110 000 foster child grants that stopped being paid in 2010/2011’ available at

<http://carnegie3.org.za/docs/papers/245%20Ann%20Skelton%20for%20Carnegie3%20FINAL.pdf> (accessed 08 April 2015).

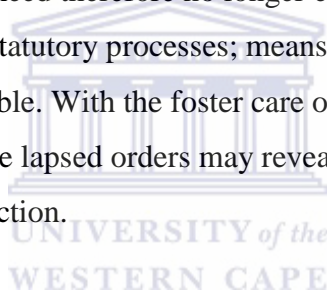
<sup>36</sup> Skelton A ‘Whose baby is it? Debating the nature and extent of the State’s responsibility to provide social assistance to children living in poverty. The story of 110 000 foster child grants that stopped being paid in 2010/2011’

<sup>37</sup> Skelton A ‘The foster care system is failing a million orphans: Child rights NGO’s call for kinship grant’ available at

<http://www.ci.org.za/depts/ci/pubs/pdf/lawreform/latestdevelopments/Civil%20Society%20Briefing%20on%20Foster%20Care%20May%202015.pdf> (accessed 30 May 2015).

<sup>38</sup> Hall K and Proudlock P ‘*Orphaning and the Foster Child Grant: Return to the ‘Care Or Cash’ Debate*’ Presentation made to the Portfolio Committee on Social Development on 14 June 2011 Cape Town: Children’s Institute; University of Cape Town.

been reviewing the Children's Act in order to address implementation challenges including the foster care challenges."<sup>39</sup> "High levels of child abandonment and low levels of adoption, coupled with conflicting cultural perceptions of these practices in South Africa, indicates a need for more understanding of the social context that created this situation."<sup>40</sup> "One of the areas in which social workers have been unable to cope because of an overwhelming demand for services is foster care."<sup>41</sup> "In the last 10 years several research studies have been conducted in South Africa focusing on the retention of social workers as well as the related themes of work stress and job satisfaction of social workers."<sup>42</sup> "In 2011 there were only 13 773 registered social workers in South Africa with only 6198 estimated to be involved in direct welfare services."<sup>43</sup> "The costing of the Children's Bill predicted that by 2010/2011 the system would require 16 504 social workers, assisted by 14 648 social auxiliary workers to run the services under the Children's Act, and this was on a 'low case scenario' developed by the costing team."<sup>44</sup> The experts started reviewing the need for children to be considered foster children when perhaps the need therefore no longer existed. The category of placing children into foster care through statutory processes; means identifying a circumstance/s by which the child is seen as vulnerable. With the foster care orders that had lapsed; experts anticipated that the review of these lapsed orders may reveal children who are no longer, children in need of care and protection.



On the 12 December 2014 the Department of Social Development presented to Court in non-compliance to their 2014 deadline. They requested for an extension and were granted a draft order. Along with a new extension date being granted to December 2017, two options were given; that the foster care backlog be eradicated by that date or that alternate solutions be sought from the amended CA, whichever came first. "The order was granted, stipulating that lapsed orders were deemed to not have lapsed and be valid for a further period of two years. The Centre for Child Law contributed to the order by insisting that this time, the Department

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<sup>39</sup> Skelton A 'The foster care system is failing a million orphans: Child rights NGO's call for kinship grant'

<sup>40</sup> Blackie D 'Fact sheet on child abandonment research in South Africa' available at [http://www.adoptioncoalitionsa.org/wp-content/uploads/2014/2014/05fact-sheet-sheet-Research-opn-child-abandonement-in-Sout-Africa\\_final.pdf](http://www.adoptioncoalitionsa.org/wp-content/uploads/2014/2014/05fact-sheet-sheet-Research-opn-child-abandonement-in-Sout-Africa_final.pdf) (accessed on 08.04.2015)

<sup>41</sup> Ngwenya P & Botha P 'The Foster Care Backlog: A Threat to the Retention of Social Workers?' (2014) 48 *Social Work/Maatskaplike Werk*.

<sup>42</sup> Ngwenya P & Botha P 'The Foster Care Backlog: A Threat to the Retention of Social Workers?' (2014).

<sup>43</sup> Dawes A '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* 12.

<sup>44</sup> Barberton C *The cost of the Children's Bill: Estimates of the Cost to Government of the Services Envisaged by the Comprehensive Children's Bill for the period 2005 to 2010. Report for the National Department of Social Development* (2006).

ought to be compelled to report to the courts every six months on the progress they have made in deriving away forward.”<sup>45</sup> Although the 2014 court order is much welcomed, it provides only a temporary solution for the over encumbered foster care system. “It does not propose a sustainable alternative for these children, and nor does it intend to.”<sup>46</sup> The reality of social workers being overburdened and buried in case work is an on-going challenge. “Draft versions of the necessary amendments already exist in the Draft Social Assistance Bill and Draft regulations and 3<sup>rd</sup> draft of the Children’s Amendment Bill, but these have yet to be circulated for public comment and tabled before parliament. It is submitted that doing so would be an essential step forward in finding a solution.”<sup>47</sup>

The Department of Social Development has indicated an intention to amend the Children’s Act so that the foster care applications can be simplified and long delays avoided. “Proposals include the overhaul of the foster care system in provinces (e.g. establishing alternative care units, employing graduate social workers, strengthening social work supervision, and better assessment of children); the conducting of longitudinal research in the field of foster care; and an audit and evaluation of foster care services. Furthermore, the appointment of a ministerial committee of foster care has been announced.”<sup>48</sup> This amendment has been interpreted as the Department of Social Development’s alternative avenue to eradicating the backlog that exists. The instruction given by Court in 2014, after the request for an extension date to 2017, was that the backlog be eradicated by then or for the amendment of the CA, whichever came first<sup>49</sup> and furthermore that solutions be sought from the amended CA. “The current amendment process to the Children’s Act provides an opportunity to find sustainable solutions. In the 2000s, there was a proposal by the SALRC (SALC) to distinctly separate kinship care from foster and reduce the burden on the Child Protection System, via 3 models: foster care, kinship care and informal kinship care.”<sup>50</sup>

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<sup>45</sup> Breen N ‘Policy brief: Foster care in South Africa: Where to from here?’ available at <http://jhbchildwelfare.co.za/wp-content/uploads/2015/04/Child-Welfare-Draft-Policy-Brief-Foster-Care-FINAL-March-2015.pdf> (accessed on 30 May 2015).

<sup>46</sup> Breen N ‘Policy brief: Foster care in South Africa: Where to from here?’

<sup>47</sup> Breen N ‘Policy brief: Foster care in South Africa: Where to from here?’

<sup>48</sup> Department of Social Development, Children’s Directorate on Foster Care Reforms, 20<sup>th</sup> January 2015.

<sup>49</sup> Breen N ‘Policy brief: Foster care in South Africa: Where to from here?’

<sup>50</sup> Assim UM ‘*Theoretical Framework on Foster Care International and Regional Standards*’ Presentation made to the Roundtable Discussion on Foster Care on 6 March 2015 Cape Town: UWC Community Law Centre.

## **1.4 RESEARCH QUESTION**

The aim of the study is to provide discussion on the development of foster care in South Africa by consequently objecting to;

- The effect of the foster care system on social workers further drawing in the best interests of the child principle,
- By looking at two socio economic rights to conclude by providing alternative strategies to better the foster care system in South Africa.

## **1.5 RESEARCH METHODOLOGY**

This paper will only make use of literature research. It will adopt an analytical method of research because an analysis of the Children's Act 38 of 2005 and various other legal texts will be made in order to properly provide an answer to the research question of this paper. It will make use of primary and secondary sources. It will further make use of journal articles and academic commentary contained on various databases. Databases, it intends to use are HeinOnline, Sabinet, Juta, Butterworths and JSTOR.

## **1.6 SCOPE OF STUDY**

The scope of the study is limited as it will focus on foster care in South Africa only. It will however make reference to international instruments that apply to the South African children's rights regime. The scope of research done is continually evolving and therefore this study is valid until December 2016. This paper is a research paper and therefore will not be all-inclusive. It is limited geographically as it only discusses the foster care system within the scope of South Africa. It will draw from international instruments that South Africa is signatory to, so as to relate its responsibility to the greater fulfilment of its constitutional laws.



## CHAPTER 2: DEVELOPMENT OF FOSTER CARE IN SOUTH AFRICA

### 2.1. INTRODUCTION

“The term foster care was first introduced in the South African law in the CA of 1960.”<sup>51</sup>

“Foster care 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.”<sup>52</sup> “The history of the placement of children in need of care and protection in foster care has shown that foster care placements were sought as a temporary solution for the children in need.”<sup>53</sup> “Foster care in South Africa focuses on the placement of a child who needs to be removed from the parental home into the custody of a suitable family or person willing to be a foster parent and the process is done by the order of the Children’s Court.”<sup>54</sup> Foster care embraces a statutory process. “It is a social service program that provides temporary, substitute, out-of-home care to children whose families cannot provide them with a safe and nurturing environment.”<sup>55</sup> By following a statutory process, the children court is made aware of the out of home care that will occur providing to the court, an element of accountability when placing children into foster care. The CA<sup>56</sup> defines foster care as the placement of a child by means of an order of the children’s court, in the custody of a sustainable family or individual, willing to act as foster parents to the child, who has the capacity to provide an environment that is conducive to the child’s growth and development.<sup>57</sup> Foster care in South Africa is practiced according to the CA and as years progressed, social services have adopted a more developmental approach where children’s rights are concerned. With foster care aiming to serve as a temporary intervention for the care and protection of children within a framework of a developmental approach to welfare

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<sup>51</sup> Skelton A and Proudlock P *Interpretation, Objects, Application and Implementation of the Act* in Davel CJ and Skelton A (eds) *Commentary on the Children’s Act* (2013) 1-6.

<sup>52</sup> Skelton A ‘Whose baby is it? Debating the nature and extent of the States 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’.

<sup>53</sup> Mantsho TC *Challenges in Realising the Goals of Permanency Planning for Children Placed in Unrelated Foster Care: Perspectives of Social Workers and Foster Parents* (unpublished Masters report, University of Witwatersrand, 2015) 15.

<sup>54</sup> Johnson H ‘Literature review of foster care’ (2007) Moshi: Mkombozi prioritizing children.

<sup>55</sup> Swann CA and Sylvester MS ‘The Foster Care Crisis: What Caused Caseloads to Grow’ (2006) 43 *Demography* 311.

<sup>56</sup> Section 180-182 of the Children’s Act.

<sup>57</sup> Ngwenya PM ‘*Factors Contributing to the Foster Care Backlog: Service Providers’ Perspectives and Suggestions*’ (unpublished Masters Dissertation, University of South Africa, 2011) 3.

services; the accountability begins. The determination of who the child is placed in foster care with, is approached through the implementation of the best interest of the child standard. All of the CA is centred on this principle and this includes the foster care process. The intention of foster care is to create opportunities for the child to live in a protective and safe environment with positive support, and to ensure that the child is surrounded by nurturing relationships that must last a lifetime. Its primary objective is to provide for the protection of a child to provide opportunities for nurturing the development of a child, whilst on the other hand, focusing on rendering reunification services to the child's biological family.<sup>58</sup> By focusing on the reunification services of foster children to their biological parents/family; the process of accountability begins and will eventually lead to the reunification of that child to their family.

There are circumstances which are commonly known to impact on children entering the system of foster care.<sup>59</sup> The system of foster care caters for the children who experienced abuse or neglect. These forms of abuse or neglect can present themselves in different forms and play a key role into the functioning and well-being of families and children.<sup>60</sup> This is why foster care is seen as a child protection mechanism; to protect children who are victim to and exposed to these forms of abuse and neglect. The removal of children and their placement into foster care may be a practical and tangible act but its action impacts beyond this for such a child. Foster care by the latter part of the word, wants to provide above all else; an element of care which may have been lacking or absent in a child's life. This is why the terminology used in the CA refers to children who are considered to be in need of care and protection. Protection touches on the literal protection of children (from harm or ill treatment), and care as both the literal and psychological aspect of care. The section 150<sup>61</sup> of the CA provides both elements of a lack of care as well as elements of a lack of protection of children and it is this section specifically referred to in statutory processes, when placing

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<sup>58</sup> The purpose of foster care placement as stipulated in the Children's Act 38 of 2005 provides for the continued supervision and monitoring of foster care in order to provide the possible family reunification services if and when it so requires and is possible.

<sup>59</sup> Mantsho TC *Challenges in Realising the Goals of Permanency Planning for Children Placed in Unrelated Foster Care: Perspectives of Social Workers and Foster Parents* (unpublished Masters report, University of Witwatersrand, 2015) 11.

<sup>60</sup> Barbell K and Freundlich M *Foster Care Today* (2001).

<sup>61</sup> Section 150 of the CA refers to children in need of care and protection and provides sub sections describing which circumstances would place a child in the frontline of being considered as a child possibly in need of care and protection.



children into the foster care system. “Care generally refers to the provision of attention and support to meet the physical, emotional, mental and social needs of the child.”<sup>62</sup>

“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.”<sup>63</sup> “By May 2000 there were less than 50 000 children in court- ordered foster care.” Within this scope of court ordered foster care, foster care could be administratively managed. In the last decade it climbed and climbed. <sup>64</sup> “By May 2007, the number had reached 418 608. This means an increase of more than 700% in seven years, and long waiting lists for social work services and court dates.<sup>65</sup> The system became burdened and so did its social workers. The South African Social Security Agency’s (SASSA) database revealed that 129 500 foster care grants lapsed in the financial year April 2009 to March 2010, and that a further lapsed between the years April 2010 to March 2011.”<sup>66</sup> In 2015 the FCG was R860 per month per foster child; standing at R890 per month in the 2016 financial year. The FCG is provided to the foster parents caring for the foster children after placement of the child with a Court order from the Children’s Court. “The FCG assists foster care families in providing for the needs of the children under their care and relieving them from experiencing extreme poverty.”<sup>67</sup> Government acknowledges the importance of an annual increase in these grants, as the cost of daily living is understood to increase. “According to research that has compared the government’s expenditure on social grants and civil service remuneration since 2008 with government revenue over the same period, these will absorb all government income by 2026 if current growth trends are not adjusted.”<sup>68</sup> “According to a child grant evaluation report by the United Nations Children’s Fund (UNICEF), the grant has a positive impact on school

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<sup>62</sup> Assim UM ‘Theoretical Framework on Foster Care’ Presentation at Community Law Centre (16 March 2015) slide 3.

<sup>63</sup> Skelton A ‘Whose baby is it? Debating the nature and extent of the States 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.’

<sup>64</sup> Breen N ‘Policy brief: Foster care in South Africa: Where to from here?’

<sup>65</sup> Skelton A ‘Whose baby is it? Debating the nature and extent of the States 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.’

<sup>66</sup> Skelton A ‘Whose baby is it? Debating the nature and extent of the States 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.’

<sup>67</sup> Foster, G ‘Safety nets for children affected by HIV/AIDS in Southern Africa’ in Pharoah R, Richter L and Killian B *A generation at risk? HIV/AIDS, vulnerable children and security in Southern Africa* (2004) Pretoria: Institute for Security Studies.

<sup>68</sup> Ferreira, L ‘Factsheets and Guides Factsheet: Social grants in South Africa- separating myth from reality’ available on <https://africacheck.org/factsheets/separating-myth-from-reality-a-guide-to-social-grants-in-south-africa/> (accessed on 22 August 2016).

attendance and health care. An impact report using data from the same survey shows that the child grant significantly reduces adolescent risky behaviours, such as unprotected sex, alcohol use, drug use, criminal activity and gang membership.”<sup>69</sup> These are some identified factors the FCG is said to affect in a positive manner.

## 2.2. SOCIAL GRANTS AND FOSTER CARE

“The SAA<sup>70</sup> makes provision for all children lawfully resident in South Africa, including its citizens, and children in the care permanent residents or refugees to be entitled to receiving a CSG, FCG, Care Dependency Grant (DCG) and the Social Relief of Distress (SROD).”<sup>71</sup>

“The Department of Social Development (DSD) has two core and inter-related functions- the provision of social security and the delivery of social services.”<sup>72</sup> “The children’s bill costing team noted that the greatest obstacle to the implementation of the children’s bill is the acute shortage of suitably qualified personnel. This includes social workers, social auxiliary workers and child and youth care workers.”<sup>73</sup> “The growth in aggregate foster care caseloads has resulted in larger workloads for individual caseworkers, which is problematic because the mistreatment of foster children is often blamed on the ever growing number of cases the average caseworker must manage”<sup>74</sup> “The shortage of children’s courts and commissioner of child welfare have been stated to contribute to the backlog in foster care cases which also hinders the placements of children in need of care and protection in foster care.”<sup>75</sup> In 2011, the Department was taken to court by civil society because approximately 120 000 Foster Child Grant’s had stopped being paid to children. “Social Workers and Courts had not kept up with extending the children’s foster care court orders. The Court ordered the DSD to design a comprehensive legal solution by December 2014.”<sup>76</sup> “The lapse in foster care grants

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<sup>69</sup> Ferreire, L ‘Factsheets and Guides Factsheet: Social grants in South Africa- separating myth from reality’ available on <https://africacheck.org/factsheets/separating-myth-from-reality-a-guide-to-social-grants-in-south-africa/> (accessed on 22 August 2016).

<sup>70</sup> Social Assistance Act 13 of 2004.

<sup>71</sup> Martin P in Proudlock P (ed) *South Africa’s progress in realising Children’s Rights: A Law Review* (2014) 18

<sup>72</sup> Giese S ‘Setting the Scene for Social Services: The Gap Between Service Need and Delivery in Pendlebury S Lake L Smith C (eds) *South African child gauge 2008/2009*.

<sup>73</sup> Giese S ‘Setting the scene for social services’ the gap between service need and delivery” (2007/2008) 19 *South African Child Gauge*.

<sup>74</sup> Swann CA and Sylvester MS ‘The Foster Care Crisis: What Caused Caseloads to Grow’ (2006) 43 *Demography* 309.

<sup>75</sup> De Jager E *Foster Care of AIDS Orphans: Social Workers’ Perspectives* (unpublished Doctoral dissertation, University of Stellenbosch, 2011).

<sup>76</sup> Skelton A ‘The foster care system is failing a million orphans: Child rights NGO’s call for kinship grant’

came from failure to review the foster care placement, resulting in an expired court order.”<sup>77</sup> Since 2011, the Department has been reviewing the CA in order to address implementation challenges including the foster care challenges.<sup>78</sup> “The overburdened foster care system cannot be managed as an administrative task as the crises calls upon addressing the social context in which these challenges evolved. Some of what the amended foster care section stipulates in the CA<sup>79</sup> begins to give rise to the social contexts that may have initiated these challenges. One of the areas in which social workers have been unable to cope because of an overwhelming demand for services is foster care.”<sup>80</sup> “In the last 10 years several research studies have been conducted in South Africa focusing on the retention of social workers as well as the related themes of work stress and job satisfaction of social workers.”<sup>81</sup>

### 2.3. SOCIAL WORKERS AND FOSTER CARE

If the purpose of foster care is to reunify the child to his or her family, how does this clearly defined purpose provided for in the CA, implicate the applications of foster care for orphaned children? “The confusion around the purpose of the FCG not only has implications for income inequality, it also means that social workers and children’s courts do not have time to provide adequately for children truly ‘in need of care and protection’ as they spend the bulk of their time processing applications for foster care. This reduced capacity to provide services to children who face severe threats to their health, well-being and survival can be seen as yet another aspect of inequality.”<sup>82</sup> “In 2011 there were only 13 773 registered social workers in South Africa with only 6198 estimated to be involved in direct welfare services.”<sup>83</sup> “The costing of the Children’s Bill predicted that by 2010/2011 the system would require 16 504 social workers, assisted by 14 648 social auxiliary workers to run the services under the

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<sup>77</sup> Hall K and Proudlock P ‘*Orphaning and the Foster Child Grant: Return to the ‘Care Or Cash’ Debate*’ Presentation made to the Portfolio Committee on Social Development on 14 June 2011 Cape Town: Children’s Institute; University of Cape Town.

<sup>78</sup> Skelton A ‘The foster care system is failing a million orphans: Child rights NGO’s call for kinship grant’

<sup>79</sup> Chapter 12: Foster Care of the Children’s Act 38 of 2005 Amendment Bill.

<sup>80</sup> Ngwenya P & Botha P ‘The Foster Care Backlog: A Threat to the Retention of Social Workers?’ (2014).

<sup>81</sup> Ngwenya P & Botha P ‘The Foster Care Backlog: A Threat to the Retention of Social Workers?’ (2014).

<sup>82</sup> Mantsho TC *Challenges in Realising the Goals of Permanency Planning for Children Placed in Unrelated Foster Care: Perspectives of Social Workers and Foster Parents* (unpublished Masters report, University of Witwatersrand, 2015) 11.

<sup>83</sup> Dawes A ‘*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* 12.

Children's Act, and this was on a 'low case scenario' developed by the costing team."<sup>84</sup> "In recent year's families have been applying for foster care to access foster child grants due to their socio-economic status determined by the high rate of unemployment and poverty in South Africa."<sup>85</sup> "Most face lengthy delays in getting 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 nutrition, education and protection from neglect"<sup>86</sup> "For years, NGO's and legal experts have been pushing for reform of the foster care system, which they believe is unable to serve both orphans, on one hand, and abused and neglected children, on the other."<sup>87</sup>

## 2.4 THE BEST INTERESTS OF THE CHILD PRINCIPLE AND FOSTER CARE

It is essential that social workers who investigate<sup>88</sup> whether or not a child is considered a child in need of care and protection, do so in full view of the best interests of the child principle. South Africa has this obligation under its CA.<sup>89</sup> The Constitution and the CA both indicate that the best interests of the child 'are of paramount importance' in all matters affecting the child as well as under both national and international instruments, the ACRWC and the UNCRC. The committee of the UNCRC provides that an adult's judgement of a child's best interests cannot override the obligation to respect all the child's rights under the Convention.<sup>90</sup> "Child protection social workers and courts should be providing services to raped, assaulted, neglected, abandoned and orphaned children." There is no need for them to have to spend their skills and time processing paper work for grant applications for children, the majority of whom are quite safely living with their grannies or aunts."<sup>91</sup> With the recent

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<sup>84</sup> Barberton C *The cost of the Children's Bill: Estimates of the Cost to Government of the Services Envisaged by the Comprehensive Children's Bill for the period 2005 to 2010* (2006).

<sup>85</sup> Mokgosi AS *Kinship Foster Care in Vosloorus* (1997) Johannesburg: Rand Afrikaans University.21

<sup>86</sup> Proudlock P 'The case of child S and 1.1 million others like him- orphan children in need of adequate social assistance' paper presented at Conference: *Strategies to overcome poverty and inequality: Towards Carneige III*. 3 to 7 September 2012. University of Cape Town.

<sup>87</sup> Xi J 'Over a million children fall through foster care cracks' available at [http://www.groundup.org.za/article/over-million-children-fall-through-foster-care-cracks\\_2438/](http://www.groundup.org.za/article/over-million-children-fall-through-foster-care-cracks_2438/) (accessed 20 July 2016).

<sup>88</sup> Upon the opening of a children's court inquiry to investigate whether a child is to be considered a child in need of 'care and protection' as per Section 150 of the Children's Act; a Section 50 which refers to 'investigation' will be conducted. The social worker now receives a specified time frame within which to investigate whether the child or children concerned, are to be considered children in need of care and protection.

<sup>89</sup> Section 7 of the Children's Act.

<sup>90</sup> CRC General Comment No14 The right of a child to have his or her best interests taken as a primary consideration (art 3, Para 1 (a) of the United Nations Convention on the Rights of the Child) (2013) Para 1.

<sup>91</sup> Breen N 'Policy brief: Foster care in South Africa: Where to from here?' available at <http://jhbchildwelfare.co.za/wp-content/uploads/2015/04/Child-Welfare-Draft-Policy-Brief-Foster-Care-FINAL-March-2015.pdf> (accessed 30 May 2015).

amendment of the Children's Act 38 of 2005; the 'without visible means of support' being changed to 'does not ostensibly have the ability to support himself or herself'<sup>92</sup> could potentially enlarge the foster care crisis that presently exists. This is said in light of the fact that 'without visible means of support' touched on many aspects of care; such as the inability of a parent to provide beyond the scope of financial support. It also created confusion regarding the various aspects of care it extended to<sup>93</sup> The amendment however makes clear that a child may be considered to be in need of care and protection should they be without means to support him or herself. "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 a child, may be placed in foster care with that care giver."<sup>94</sup> This appears to be more appealing to the financial upbringing aspect of care. In regards to foster care being a means of creating financial stability for many families by aiming to alleviate poverty; the amendment could potentially lead to the already existent foster care crisis to stay put and may as a result not serve in the child's best interests.

The CA does not set out a means test to be applied nor does it provide for an investigation into the earnings of foster parents. In fact, the CA provides only that a court may determine whether a child is in need of care and protection and after making a finding, may make an order placing a child in foster care.<sup>95</sup> The SAA categorically states that a foster parent qualifies for a foster care grant regardless of his or her income.<sup>96</sup> "Having regard to the foregoing findings of the Commissioner can only lead to untold hardships for the many children who are in the care of their grandparents. This is the reality of our society. To perpetuate these hardships will be to defeat the objects and spirit of our Constitution and will not be in the best interest of our children."<sup>97</sup> A fundamental, interpretative legal principle: If a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child best interests should be chosen.<sup>98</sup> Section 156<sup>99</sup> of the CA

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<sup>92</sup> Children's Act 38 of 2005.

<sup>93</sup> As seen in *NCM and Others v Presiding Officer of the Children's Court, District of Krugersdorp and Others* App No. 3075/2011, Judgement of 12 April 2013.

<sup>94</sup> *SS v Presiding Officer, Children's Court Krugersdorp and others* 2012 (6) SA 45 (GSJ).

<sup>95</sup> *NCM and Others v Presiding Officer of the Children's Court, District of Krugersdorp and Others* App No. 3075/2011, Judgement of 12 April 2013.

<sup>96</sup> Section 8 of the Social Assistance Act.

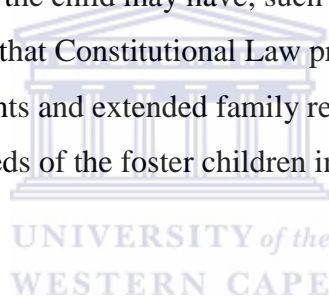
<sup>97</sup> *NCM and Others v Presiding Officer of the Children's Court, District of Krugersdorp and Others* App No. 3075/2011, Judgement of 12 April 2013.

<sup>98</sup> CRC General Comment No14 the right of a child to have his or her best interests taken as a primary consideration (art 3 Para 1 (a) of the United Nations Convention on the Rights of the Child) (2013) Para 3.

<sup>99</sup> Section 156 (1) (e) (i) of the Children's Act.



provides that if a children's court finds that a child is in need of care and protection,<sup>100</sup> the court may make any order that is in the best interests of the child concerned, which may be or includes placement in foster care with a suitable foster parent.<sup>101</sup> The placement of a child into foster care is done on the basis of that child being a child considered to be in need of care and protection, as the CA provides in Section 150. The most commonly found source of placement is with extended family, in most instances grand-parents. This is the systems presently questioned implementation, which is that many grandparents are extending care to their orphaned grandchildren with no hope or possibility of reunification. "The extended family has been the largest support system which has been caring for orphaned children in South Africa to date. Thus the majority of orphaned children in South Africa are placed in related/kinship foster care and it is usually the grandmother who takes on the responsibility of primary caregiver or foster parent"<sup>102</sup> and more often than not, as seen in the Krugersdorp<sup>103</sup> case; the extended family are in need of financial assistance in the form of a FCG. These finances provide to various needs the child may have; such as educational needs, health needs and general care. Amidst the fact that Constitutional Law provides for the provision of such socio economic needs, grandparents and extended family rely on the FCG to contribute toward the basic and essential needs of the foster children in their care.



## 2.5 CONCLUSION

The rise of foster care orders over the past decade has brought to light, the extent to which the foster care system is overburdened. Not only is it being identified as a national crisis but other undeniable factors are affected when the process of foster care placement is hindered. The exposure of lapsed foster care orders provided the DSD with an opportunity to identify its systems flaws in order to not only eradicate the backlog of foster care that exists but to introduce a better working foster care system for future. Every child is entitled to have their best interests given the highest priority and regard in all matters concerning them. If child protection agencies have failed to provide an effective foster care system, as the copious

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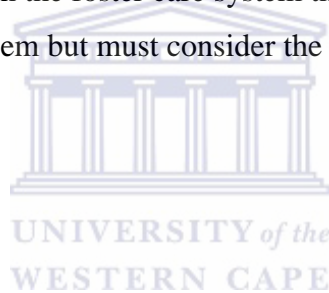
<sup>100</sup> As provided for in Section 150 of the said Act.

<sup>101</sup> Children's Act 38 of 2005.

<sup>102</sup> Mantsho TC Challenges in Realising the Goals of Permanency Planning for Children Placed in Unrelated Foster Care: Perspectives of Social Workers and Foster Parents (unpublished Masters report, University of Witwatersrand, 2015).

<sup>103</sup> *NCM and Others v Presiding Officer of the Children's Court, District of Krugersdorp and Others* App No. 3075/2011, Judgement of 12 April 2013.

amounts of lapsed orders deems the foster care system as ineffective, then ensuring the best interests of those children in foster care have been met, have failed too. With these lapsed orders, foster care grants have stopped being paid and has had a direct effect on the financial functioning of foster families but more so, on the care given to the foster children and that impacts on the child's right to social security affecting those foster children's socio economic rights being met. It is impossible to address the present problem relating to the overburdened system without looking at the best interests of the child principle. Children are placed in foster care by having the overriding principle of serving that child's best interest as the main determination that led to foster care being implemented. It is saying that the child's present environment is not conducive and not serving the child's best interests, therefore foster care / an alternate home environment must be considered, that which in essence serves their best interests. Since social workers are also primarily responsible for ensuring the placement of a child into foster care; the limited amount of social workers who render this service serves as a problem. The present challenges in the foster care system therefore, again cannot be addressed only as a backlog problem but must consider the systematic challenges that exist too.



### 3. SOCIO-ECONOMIC RIGHTS, FOSTER CARE AND THE BEST INTERESTS OF THE CHILD

#### 3.1. INTRODUCTION

“The domains of social security are: poverty prevention, poverty alleviation, social compensation and income distribution.”<sup>104</sup> “Since poor children have fewer economic and political opportunities to improve their well-being and that of their families, poverty often affects such households the most. Child poverty is therefore a measure of the extent to which a child is unable to realise his or her fundamental rights to health, food, education, water, sanitation, shelter and information.”<sup>105</sup> The purpose of this chapter is to focus on two socio economic rights provided for in the Constitution which are inexorably affected when placing a child in foster care that is; the right to family care and the right to shelter.

Since the placement of a child into foster care requires first and foremost the coercive removal of that child from his/her family upbringing and environment, the Chapters starts by discussing the possible effects of a removal, on a child by exploring the right to family care. This right has direct impact on the purpose of foster care; family reunification. The second portion of this chapter discussed looks at, the right to shelter. Once the child has been removed by a social worker, the very next step entails finding suitable placement/accommodation for that child. Since every child, by constitutional law has the right to shelter as also evident in the Grootboom case, a further discussion will be made around this socio economic right and its relationship to foster care. Although the State pointed out the parents responsibility to provide for the shelter of their children, as even seen in Section 7 (the best interests of the child) quoting that it is the parents responsibility to fulfil a child’s basic needs<sup>106</sup>; to those parents who could not fulfil their duty to provide shelter, the attention was drawn back to the Constitutional obligation of the State to progressively realise that provision. Therefore the right to shelter in regards to foster care becomes a challenging task when a child is to be removed from his/her family care and placed into a different/new home environment. It is imperative to look into the best interests of the child to ensure that

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<sup>104</sup> Para 1, Chapter 7 The White Paper for Social Welfare GN 1108 in GG 18166 of 8 August 1997

<sup>105</sup> Mukundi-Mirugi G ‘Reaffirming the Social Security Rights of Children in South Africa with Particular Reference to the Child Support Grant’ (2010) 11 *ESR Review* 7.

<sup>106</sup> Section 7 of the CA using ‘parents’ duty’ as imposing that parents carry a responsibility toward the fulfilment of children’s basic needs. In instances where parents are unable to fulfil their duties the State has a responsibility to progressively recognise the needs of its children.



the new and temporary home environment is conducive to the child's needs as much as the removal of that child is being carried out to serve as being in their best interests. To assess whether the home environment is conducive to the well-being and needs of that specific child and also whether one child's best interest (being the foster child) impacts or affects the best interest of the other child/children also in the home. This chapter also explores the best interests of the child principle under each of these recognised socio-economic rights and throughout the chapter, relating it to foster care. The relationship between foster care; the socio economic rights affected when placing a child in foster care and the best interests of the child principle provides an holistic approach when looking into the present foster care challenges.

### **3.2 THE RIGHT TO FAMILY CARE AND FOSTER CARE**

“The family is the basic unit upon which society is based. This makes it the most important unit of society.”<sup>107</sup> “Given the steady decline in traditional family living due to amongst other factors HIV/AIDS, poverty and unemployment in South Africa, the dominant view of family care being prioritized may not always be feasible.”<sup>108</sup> Article 20 of the CRC identifies that any child who cannot be looked after by their own family have a right to special care.<sup>109</sup> It further on mentions that the State has a responsibility to provide alternative care under their domestic laws. The Constitution law of South Africa under Section 28, in alliance with the international treaty identifies two rights in this subsection. First it speaks of the right to family or parental care and in conjunction to that right or should it not be fulfilled as set out, the Constitution provides that alternative care be sought. Relaying it in this specific order agrees with the CRC and the ACRWC, on the importance of family care first being explored before that of alternative care is explored. “Any child who is permanently or temporarily deprived of his family environment for any reason shall be entitled to special protection and assistance, which will ensure that a child who is parentless, or who is temporarily or permanently deprived of his or her family environment, or who in his or her best interest cannot be brought up or allowed to remain in that environment, shall be provided with

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<sup>107</sup> Article 18 (1) of the African Charter on the Rights and Welfare of the Child.

<sup>108</sup> Perumal N and Kasiram M ‘Living in foster care and in a children’s home: voices of children and their caregivers’ (2014) June Social Work/Maatskaplike Werk 45 2.

<sup>109</sup> Article 20 of the CRC is identified as a protective right.

alternative family care, which could include foster placement or placement in suitable institutions for the care of children.”<sup>110</sup>

In terms of the United Nations Guidelines for the Alternative Care of Children, “all decisions concerning alternative care should take full account of the desirability, in principle, of maintaining the child as close as possible to his/her habitual place of residence, in order to facilitate contact and potential reintegration with his/her family and to minimize disruption of his/her educational, cultural and social life.”<sup>111</sup> This resonates with the best interest of the child standard which informs our Children’s Act 38 of 2005 as the rights set out in the CA ultimately aim to give effect to the rights set out in the Constitution.

The CA in Section 7 focuses on the best interest of the child standard. In this section there is mention made around the likely effect on the child of any change in the child’s circumstances, including the likely effect of any separation from<sup>112</sup> the child’s home environment. The realisation of this basic need was seen in the Grootboom matter, that although the State imposed that the parents be responsible for providing to their children’s basic needs, the State had an obligation to step in whenever parents/guardians failed to assume that responsibility. In the same way, foster care placements include an investigation which needs to occur before the foster care placement is finalised.<sup>113</sup> Social workers are responsible for investigating the home circumstances of the said child. This forms direct part of the completion of the social workers report. It is however rarely seen as being crucial. Given the high case loads of social workers and the challenges surrounding foster care backlog, social workers very seldom have the option or resources to seek alternative placement based on the home environment not appearing conducive. Many children reside in over-crowded homes and especially when these children are foster children in homes where other children too reside i.e. the foster parents own children or grandchildren or even cluster foster care homes. In foster care and the social work responsibilities in finding appropriate

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<sup>110</sup> Article 25 of the African Charter on the Rights and Welfare of the Child.

<sup>111</sup> United Nations General Assembly ‘Guidelines for the Alternative Care of Children’ available at [https://www.unicef.org/protection/alternative\\_care\\_Guidelines-English.pdf](https://www.unicef.org/protection/alternative_care_Guidelines-English.pdf) (accessed on 8 April 2015) South African Catholic Bishops Conference, parliamentary Liaison Office ‘Foster Care: The present system and possible alternatives’ Briefing Paper (April 2015) Pg. 1.

<sup>112</sup> Section 7 of the CA.

<sup>113</sup> A Section 50 investigation, out of the Children’s Act takes place after the social worker opens the matter at Court (with/without a form 36 removal order). The social worker is granted 90 days (with a valid court order) to investigate circumstances surrounding that child/children, in order to determine whether the child/children are to be considered, ‘a child in need of care and protection’ as provided for in the Children’s Act 38 of 2005, Section 150 (1).

shelter for vulnerable children, one must study closely the relationship between Section 28(1) (b) and 28(1) (c) of the Constitution. “The question may be asked whether the state, when obligated to provide children with basic shelter, is also obliged to provide shelter to their parents.”<sup>114</sup> In reference to the right to adequate housing<sup>115</sup> in the Grootboom case; “the court held that, “these provisions did not impose an obligation on the state to provide housing to everyone demand.”<sup>116</sup> “The simple reason for this conclusion is the fact that the realisation of any socio-economic right is subject to the availability of resources.”<sup>117</sup>

### 3.3 THE RIGHT TO SHELTER AND FOSTER CARE

“The framework provided in the Constitution, Section 28 (1) (c)<sup>118</sup> provides the state with the duty and obligation imposed on them in respect of a child’s right to shelter. In the Grootboom case; the Constitutional Court was obliged to consider the relationship between everyone’s right to housing in section 26, and the children’s right to shelter, as provided for in section 28(1)(c).”<sup>119</sup> “The court suggested, consequently, that the obligations imposed by section 28(1) (c) rested primarily on parents and families, at least in respect of the right to shelter.”<sup>120</sup> “Grootboom recognises that children’s rights to protection from abuse, neglect, maltreatment and degradation in section 28(1) (d) are rights that are enforceable against the state.”<sup>121</sup> The Constitution makes reference to the States obligation to take reasonable measures, within its available resources to achieve the progressive realisation of the right to adequate housing.<sup>122</sup> This socio-economic right is beheld in Article eleven of the ICESCR.<sup>123</sup> When a child is placed in foster care the need and requirement for shelter, amongst other socio-economic rights recognisable in the Constitution and flowing from Article eleven in the ICESCR becomes essential. “The Constitution contains a number of founding values and rights that

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<sup>114</sup> Murray MC and van Rensburg LJ ‘The utilisation of the right of children to shelter to alleviate poverty in South Africa’ (2004) *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 7 1.

<sup>115</sup> Section 26 of the Constitution.

<sup>116</sup> Grootboom High Court case par a 286H. J. See also De Waal, Currie and Erasmus Bill of Rights 464.

<sup>117</sup> Murray MC and van Rensburg LJ ‘The utilisation of the right of children to shelter to alleviate poverty in South Africa’ (2004) *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 7 1.

<sup>118</sup> The Constitution.

<sup>119</sup> Sloth-Nielsen J ‘Too little? Too late The implications of the Grootboom case for state responses to child-headed households’ *Law Democracy & Dev* (2003) 7 113 136

<sup>120</sup> Sloth-Nielsen J ‘Too little? Too late The implications of the Grootboom case for state responses to child-headed households’ *Law Democracy & Dev* (2003) 7 113 136

<sup>121</sup> Sloth-Nielsen J ‘The child’s right to social services, the right to social security, and primary prevention of child abuse: some conclusions in the aftermath of Grootboom’ (2001) *17 S. Afr. J. on Hum. Rts.* 210

<sup>122</sup> Section 26(2) of the Constitution.

<sup>123</sup> *Republic of South Africa v Grootboom* Case No. CCT/11/00.2000(11) BCLR 1169 and South Africa ratified this Covenant in January 2015.

need to be considered when making policy choices that affect children.”<sup>124</sup> South African law also makes provision for the child’s right to alternative care; and this can be seen as the state providing appropriate shelter through child and youth care centres (CYCC). Justice Murphy clarified it well, that in respect of children in alternative care, “the state has an unqualified and immediate obligation to provide for the basic needs as well as psychological and therapeutic needs.” He proclaimed that these are a fundamental component of the rights to care and protection.<sup>125</sup> So in fulfilling the purpose of foster care; a child must be provided with adequate housing and their right to shelter must be recognised.

The newly amended CA speaks first of foster care being purposed to, ‘protect and nurture children by providing a safe, healthy environment with positive support.’<sup>126</sup> Providing a safe and healthy environment imposes a duty on the State to ensure that the environment is conducive to the overall development of a child. Overcrowded households could inflict on the right of a child, to a healthy environment. According to Grootboom<sup>127</sup> “the Constitutional Court’s landmark decision on the socio-economic rights pursuant to the 1996 Constitution, the formulation of socio-economic rights delimits the state’s positive obligations, qualifying them in three ways: (a) the obligation to ‘take reasonable legislative and other measures’, (b) ‘to achieve the progressive realisation’ of the right; and (c) ‘within available resources’.”<sup>128</sup> “Traditionally, a Constitution is only seen as a protective device in so far that it places a duty on the state to refrain from interfering with the rights of individuals.”<sup>129</sup> “However in Section 7(2) of the Constitution an obligation clause is imposed. Therefore in terms of this section; the state no longer only has a duty to respect the socio-economic rights of children, as seen in the initial application of Grootboom; but also to protect, promote and fulfil them along the other rights entrenched in the Bill of Rights.”<sup>130</sup> Foster care is the moving of a child from one home to another and this impacts on a child’s right to shelter. It is imperative that social

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<sup>124</sup> Proudlock P ‘The case of child S and 1.1 million others like him- orphan children in need of adequate social assistance’ available at [www.carneige3.org.za/docs/papers](http://www.carneige3.org.za/docs/papers) (accessed on 09 June 2015).

<sup>125</sup> Centre for Child Law and Others v MEC for Education Gauteng and Others 2008 (1) SA 223 (T) at 229 D-E taken from Jamieson L *Children’s rights to appropriate alternative care when removed from the family environment: A review of South Africa’s child and youth care centres* in Proudlock P (ed) *Realising children’s rights law review* (2014) 220.

<sup>126</sup> Chapter 12 of the CA.

<sup>127</sup> *Republic of South Africa v Grootboom* Case No. CCT/11/00.2000(11) BCLR 1169 and South Africa ratified this Covenant in January 2015.

<sup>128</sup> Mukundi-Mirugi G ‘Reaffirming the Social Security Rights of Children in South Africa with Particular Reference to the Child Support Grant’ (2010) 11 *ESR Review* 7.

<sup>129</sup> De Waal, Currie & Erasmus ‘Bill of Rights’ () 433: De Vos 1997 SAJHR 78; Van Rensburg J and Oliver 2001; Law, Democracy and Development 87.

<sup>130</sup> Murray MC and van Rensburg LJ ‘The utilisation of the right of children to shelter to alleviate poverty in South Africa’ (2004) *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 7 1.

workers find suitable accommodation for the foster child. As seen in *Grootboom* and in looking at the right as a general rather than foster care only right; the child's right to shelter as it was imposed on the State; was especially readdressed based on the in conducive temporary home environment the State provided them with. Although it was ultimately those children's parents who approached the Court for relief of poor or no living conditions; the State became responsible for ensuring that the children's socio-economic right to shelter be not only met, but in an conducive and most suitable manner.

### 3.4 CONCLUSION

The placement of children into foster care and the moving of those children into familiar (family related) or even unfamiliar (unrelated foster carers) requires of social workers to not only consider the removal of that child but the movement and alternate placement or accommodation found for that child. This accommodation is often limited and children are placed in the care of relatives who may not necessarily have the proper space to cater to the child's developmental needs. "It is not surprising that most of South Africa's children lack basic shelter and are often homeless. This prevailing manifestation of poverty needs to be addressed effectively. One way of addressing this is through a rights based approach whereby socio-economic rights are realised to the poorest of the poor."<sup>131</sup> The child's right to shelter in relation to foster care firstly provides protection to the child, and also caters to alleviate poverty because by the State providing shelter to children; it is at the same time alleviating child poverty.. The child's right to family care and shelter is a socio economic right that is progressively realised through the system of foster care. With the provision of a foster child grant; the removal of a child from an environment or home that fails to serve their best interests; the State is directly ensuring that these socio economic rights of children, who are children first before they are foster children, are being progressively realised.

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<sup>131</sup> Murray MC and van Rensburg LJ 'The utilisation of the right of children to shelter to alleviate poverty in South Africa' (2004) *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 7 1.

## **4. POTENTIAL AVENUES TO ADDRESSING THE FOSTER CARE BACKLOG**

### **4.1. INTRODUCTION**

This chapter briefly discusses the decisions of the Department of Social Development in their amendments made to the CA by providing an overview of the amendments made in the CA in relation to foster care, to understand how these changes made could impact the foster care backlog that exists as well as that of adoption. It is apparent that by seeking this alternative in place of the suggestion of an inclusion of a formalised kinship grant, that the Department of Social Development may only have touched the surface of the foster care problem that exists. This chapter will provide an overview of the amended foster care stipulations as provided for in the CA, the avenue of adoption so as to lessen the foster care burden and then what a formalised kinship care would have possibly entailed. It will also discuss care plans as an early intervention mechanism to better monitor and supervise foster care placements.

### **4.2 THE CHILDREN'S ACT AND FOSTER CARE**

Quite a substantive amount of information has changed in the amended CA with the addition of a chapter 12 titled Foster Care, containing 11 subsections. It starts by explaining the grounds for foster care placement. In essence what is said in this subsection is that children considered to be found in need of care and protection<sup>132</sup> as brought forward to court will be considered for foster care placement. It goes on to highlight the purpose of foster care, and as discussed in this paper, the purpose has remained centred around family reunification,<sup>133</sup> making reunification foster care's primary objective. However the stipulations provided for in the duration and termination of foster care in the amended CA, contradicts the basic acknowledgement given to foster care which is, family reunification. . With the amendment, the duration and termination process in foster care appears to keep a child within the statutory system instead of the initial understanding of the child being moved out of the child protection system. It can almost lead to an entirely new interpretation as to the purpose of foster care. Social services are afforded options of what appears to sound like permanent foster care placements. The CA explains that after the initial two year placement, social services may opt for an extension of more than two years at a time or for an order that would

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<sup>132</sup> Section 150 of the CA

<sup>133</sup> Chapter 12, 181 (b) of the CA



be valid until the child turns 18. The reasons to follow conflicts with the concept of adoption and more specifically what would deem a child adoptable in the CA. Since different court systems are open to interpret the laws in their own manner, questions may start being posed, making this determination of the duration and termination of foster care quite difficult. The determination of child abandonment for instance, as also why adoption is not the first call of reference for orphaned children. Foster care is not comparable to adoption, or kinship care placements. Unlike the understanding of kinship care, foster care can only occur through formalised processes. Kinship care makes more reference to the informal or private arrangement of care extended to children within their families. A distinct difference has been made as kinship care, even though it is defined in the CA, there exists no formalised provision made in the CA of kinship care. Unlike that of adoption, foster care in the CA past provision, did not give a foster parent the same responsibilities and rights as that of a biological parent<sup>134</sup>, instead section 188 now defines clearly the responsibilities and rights of foster parents by opening the same provision to the interpretation of the court.<sup>135</sup> The reunification aspect of foster care is mentioned in section 187 right after the duration of foster care is discussed. It could be insinuated as reunification being less important than that of determining the duration of foster care. What could be asked is how the duration of foster care will be determined when reunification should be an active and on-going service rendered.

#### **4.3.RATIONALE FOR FORMALISED KINSHIP CARE**

“In term of the CA, the definition of ‘family member’ extends to any person who has parental responsibilities and rights in respect of the child; this may be a grandparent, brother, sister, uncle, aunt or cousin, or any other person with whom the child has developed a significant relationship, based on psychological or emotional attachment, which resembles a family relationship. The definition is broad and accommodates the diversity of family composition that characterizes our society. 80% of children presently in foster care are in kinship foster care.”<sup>136</sup> “While the term ‘kinship foster care’ is in the Children’s Act, it is not defined,

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<sup>134</sup> Section 18 of the CA; Parental Responsibilities and Rights

<sup>135</sup> If a Court finds it necessary to afford a foster parent parental responsibilities and rights this may be made an order of court in terms of Section 23.

<sup>136</sup> Law L, South African Catholic Bishops Conference, parliamentary Liaison Office ‘Foster Care: The present system and possible alternatives’ Briefing Paper (April 2015) Pg. 2

which results in much confusion.”<sup>137</sup> “The Kinship Care Grant would be extended to those children that are orphaned and living with relatives. It is currently being suggested that application for a grant of this nature would require an initial assessment of the child’s situation, but would not in most cases involve the same intensive supervision as a foster care placement.”<sup>138</sup> “UN Guidelines do not provide for kinship care (informal care generally) to interact with the formal child protection system governing formal care, such as traditional foster care.”<sup>139</sup> “The inclusion of kinship care in the UNG is the reality that the majority of children requiring alternative care are cared for under informal arrangements, but provides guidelines for States to organise/regulate it without necessarily interacting with the formal child protection system.”<sup>140</sup> “Much of the controversy around the status of kinship care in an South African context revolves around its interactions with the child protection system, particularly with regards to its relationship to foster care - in terms of accruing financial ‘benefits’ (grants), among others.”<sup>141</sup>

#### 4.4 ADOPTION FOR ORPHANS

“The practice of using the FCG for orphans was explicitly promoted by former Minister of Social Development, Zola Skweyiya<sup>142</sup> The opportunity was eagerly taken up both by applicants and the social workers who assisted them. This was done because of the substantial difference in the monetary value of the CSG and FCG, and despite the fact that the foster placement involved a lengthy and expensive process in terms of social worker and court time. This situation creates several inequalities. It provides inequality between children on the basis of living and care arrangements- an outcome that contradicts the Lund

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<sup>137</sup> Law L, South African Catholic Bishops Conference, parliamentary Liaison Office ‘Foster Care: The present system and possible alternatives’ Briefing Paper (April 2015) Pg. 1.

<sup>138</sup> Xi J ‘Over a million children fall through foster care cracks’ available at [http://www.groundup.org.za/article/over-million-children-fall-through-foster-care-cracks\\_2438/](http://www.groundup.org.za/article/over-million-children-fall-through-foster-care-cracks_2438/) (accessed 20 July 2016).

<sup>139</sup> Assim UM ‘*Theoretical Framework on Foster Care International and Regional Standards*’ Presentation made to the Roundtable Discussion on Foster Care slide 11.

<sup>140</sup> Assim UM ‘*Theoretical Framework on Foster Care International and Regional Standards*’ Presentation made to the Roundtable Discussion on Foster Care slide 13.

<sup>141</sup> Assim UM ‘*Theoretical Framework on Foster Care International and Regional Standards*’ Presentation made to the Roundtable Discussion on Foster Care slide 17.

<sup>142</sup> Mantsho TC *Challenges in Realising the Goals of Permanency Planning for Children Placed in Unrelated Foster Care: Perspectives of Social Workers and Foster Parents* (unpublished Masters report, University of Witwatersrand, 2015).



committee's principle of 'follow the child'.<sup>143</sup> Foster care offers a therapeutic environment in a non-institutional setting. Unlike adoption, it is a temporary placement which is supervised by a social worker assigned to the case.<sup>144</sup> Since one of the mentioned challenges in foster care now surrounds discussion on children who are in the system but not necessarily in need of care and protection anymore; as also orphaned with no possibility of family reunification, adoption needs to be explored more, or at least that was the indication previously given. Different to the proposed kinship care grant and implementation thereof; adoption is both defined and explained in the CA. Children who are orphaned children and who has no possibility of ever being reunified or returned to their family's care; should become explored as possible adoptable children. The contradiction to this however is that the provision of the duration<sup>145</sup> and termination<sup>146</sup> foster care as now provided, almost seems similar to that of determining whether or not a child is to be deemed an adoptable child. The foster care provisions made will have a direct impact on the amount of adoptions that will be filed in upcoming years. "There is also some discussion taking place regarding the introduction of a 'poverty grant', which would mitigate the consequences of extreme poverty. And, given that the number of adoptions that take place is very low, there has been some suggestion that the introduction of an adoption grant would result in more adoptions and permanent placements, since many families, while being willing and suitable to provide a child with a loving home, cannot afford to do so."<sup>147</sup> Since foster care has primarily served the poorer communities and it now provides for a court ordered 'once off' placement of up to 18 years/ when the child turns 18, there exists no valid reason why foster parents would consider adoption over foster care.

The CA refers to adoption as a possible reason for termination of foster care, by the determination of whether it is in the best interests of the child. Clarity needs to be given on who makes this determination. As the application for adoption can be made by a foster parent themselves, even in instances where the foster child was deemed not adoptable by social services, as ultimately the court to their own discretion makes the final determination on

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<sup>143</sup> Mantsho TC *Challenges in Realising the Goals of Permanency Planning for Children Placed in Unrelated Foster Care: Perspectives of Social Workers and Foster Parents* (unpublished Masters report, University of Witwatersrand, 2015).

<sup>144</sup> Law, L South African Catholic Bishops Conference, parliamentary Liaison Office 'Foster Care: The present system and possible alternatives' Briefing Paper (April 2015)' Pg. 2.

<sup>145</sup> Section 186 of the CA.

<sup>146</sup> Section 189 of the CA.

<sup>147</sup> Law L, South African Catholic Bishops Conference, parliamentary Liaison Office 'Foster Care: The present system and possible alternatives' Briefing Paper (April 2015)' Pg. 3.

adoption. Children remain in foster care for years and are never deemed nor not deemed adoptable by social workers, as the option of adoption is never brought to the table perhaps both based on the social workers overburdened case load and little time to provide more in depth services and also, based on the foster parents need and reliance on the foster child grant. With present foster care provisions allowing foster parents to foster a child/children until they reach the age of 18, permanent foster care may well take the place of adoption. Families whom have raised and cared for their own children in informal kinship care may too start approaching social services for foster care with the assurance of receiving a FCG.

#### **4.5. IDP'S AND CARE PLANS AS AN INTERVENTION TOOL FOR FOSTER CARE**

Another purpose of foster care as identified in section 181 of the CA speaks of permanency planning. "A care plan must centre on the best interests of the child and therefore requires an on-going assessment of the child and their needs. The failure to have kept within the two year period of foster care came with the thousands of lapsed court orders. Orders lapsed because social workers were overburdened and lacked the necessary resources to attend to the high case loads."<sup>148</sup> A part of any foster care process, includes the rendering of early intervention services which can be identified in Chapter 8 of the CA which speaks of the early intervention and prevention programmes that can be implemented to assist with the continuous development and skills of a child assisting broadly with the permanency plan of a child. "Barriers identified from previous research studies conducted reveal that it is the difference in interpretation of permanent planning in practice that leads to it being a non-effective tool. Statistics revealed that up until 31 August 2015 the total number of foster care grants in all 9 provinces of SA on the SASSA database was 529.269."<sup>149</sup> The total number of lapsed foster care orders would not form part of this. Given the high case load of foster care orders that exist, it is difficult to see the backlog eradicated without the hiring and employment of more social workers. The ideal would be that every social worker has a social auxiliary worker<sup>150</sup> to assist them. The DSD has failed to provide sufficient social workers to

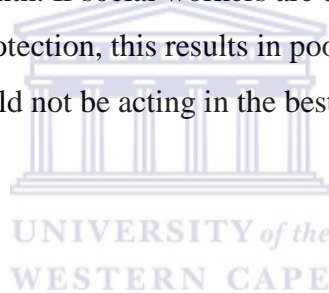
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<sup>148</sup> Fact sheet: Issue no 8 of 2015 SASSA House, 501 Prodinsa Building Corner of Beatrix and Pretorius Street Arcadia, Pretoria 0083, South Africa 31 August 2015

<sup>149</sup> Fact sheet: Issue no 8 of 2015 SASSA House, 501 Prodinsa Building Corner of Beatrix and Pretorius Street Arcadia, Pretoria 0083, South Africa 31 August 2015

<sup>150</sup> Out of a four year social work degree, social auxiliary workers study two years and may enter the work field as a social auxiliary worker. The scope of work they're able to do is vast and they are rarely limited in their skills and ability to work to conduct fieldwork or investigations for the purposes of children's court. However social auxiliary workers do not render services which are required to go to court, as DSD and NGO organisations

accommodate the work loads. At Cape Town Local Office DSD, there were over 9 social work resignations/transfers to other regions. Social workers resign from the profession or seek alternative employment in first world countries as they are provided with more support and less workloads. The DSD needs to start with employing more social workers and social auxiliary workers. The NGO sector of social work has been more burdened than that of DSD. Up until the new financial year 2015-2016, social workers with experience in the field earned an estimate of R10, 000 gross salary per month<sup>151</sup>, whereas DSD social workers receive at least a 10% increase annually, bringing DSD social work gross salaries to R17,000 plus minus per month. If government cannot realise the impact of an overburdened work system, within a scarce skill like social work with continuing retention of its social workers; then looking at foster care backlog as an administrative task is government going amiss. After much debate and deliberation with the DSD the NGO sector social worker's has had their salaries increased as of April this year. Presently contract social workers could earn up to R24, 000<sup>152</sup> gross salaries per month. If social workers are unable to provide quality services to children in need of care and protection, this results in poor quality services which in turn means that state intervention would not be acting in the best interests of the child.



#### **4.6. CONCLUSION**

The system of children's rights in South Africa is continually evolving. Children in South Africa serve as the Country's most vulnerable entity and the success of society at large rests on the ability of the State to provide care to its children. If children are not a part of a countries fundamental realisation to providing for its socio economic needs, then all other needs realised would not be progressively met. Foster Care is a service rendered by DSD for the care and protection of the children it serves. This care provided on a larger scale addresses the social security needs that children have. Foster care cannot effectively function and achieve its objectives without the provision of the FCG, which caters to the socio economic right of that child. Providing to these needs also addresses the Countries high rate of poverty because every child represents a household and a family. Foster care therefore serves as a pivotal part of this Countries poverty alleviation tool.

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<sup>151</sup> As disclosed by a social worker presently at Badisa Metro North region. Badisa is a NGO social work organisation rendering social work services in different communities, often relieving DSD social workers from rendering services in certain areas.

<sup>152</sup> A social worker at Badisa NGO within Cape Town, working on contractual basis with less than 5 years social work experience.

There is great relationship between the foster care of a child and the socio economic needs of that foster child being met. The understanding of the concept of foster care creates a better understanding around what has caused the present foster care challenges. These challenges don't only present as substantive challenges but also systematic challenges and since the system of foster care is a system closely linked to the profession of social work it's inevitable that the eradication of this backlog will not be effective if the social work challenges are not addressed first. Social workers are ultimately responsible for the present challenges that exist. They work toward ensuring that the foster care process is finalised. Due to thousands of lapsed orders and the new extended foster care orders not being issued on time, social workers have not fulfilled their mandate to ensure the protection of all children. However, reasons are the challenges presented and social workers as an entity cannot be blamed for the backlog of foster care. The DSD has an entire year (December 2016) to accompany the amended CA as it stands, with additional systematic changes relating directly to social work as a profession. The implementation of the suggested strategies serves to create a better flowing system both for the substantive changes needed as well as the systematic changes needed. Each socio economic right that a child is entitled to is addressed on a case to case scenario or basis. In order to understand these rights discussed, in relation to foster care, a more broadened perspective needs to be given in regards to how the two (foster care and the socio economic rights discussed) are inseparable.

“If kinship care and foster care by non-related adults were separated statistically, South Africa would have a clearer picture of who actually cares for children in South Africa. Processes for kinship care would be simplified as opposed to foster care and more time could be devoted to placing children with biological family in permanent foster care or rather, using the present foster care provisions of the CA, or in adoptive families. The challenge is there remains a great need for short term non-institutional care of children.”<sup>153</sup> The research has reflected that the provisions contained in the ICESCR, CRC, ACRWC, CA and the Constitution of SA reflects the importance of South Africa progressively working towards a system that promotes a ‘child first’ approach. In order to have this approach it must be clear that the best interests of the child remain the driven principle it intends to be. This applies to the placement of children into foster care. Any new policies or amendments to; must be done in understanding of this principle. The Committee of the CRC determines that upholding the

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<sup>153</sup> Mcanyi P ‘Towards a better investment in the rights of the child. Challenges related to mobilization, allocation and spending of resources for children’ available on [www.ohchr.org](http://www.ohchr.org). (Accessed on 24 August 2016.)

child's best interests in coordination and implementation of policies must be upheld throughout the Nation. The introduction of a formalised kinship grant in order to separate children considered to be in need of care and protection to those who are not was a good tool to consider as the informal use of kinship care within families is an on-going and daily occurrence. The present foster care provisions made, portrays moving away from an adopted developmental approach back to a society reliant on welfare services. It's been determined that many families depend on the FCG for financial relief and that, "in recent year's families have been applying for foster care to access foster care grants due to their socio-economic status determined by the high rate of unemployment and poverty in South Africa."<sup>154</sup> By not providing better alternatives than foster care especially for orphaned children, foster care will remain much preferred over that of adoption as it is aimed at alleviating poverty more than it is to serve as a tool of child protection as provided in the CA.

The research provided has presented an argument that shows that legislation and rules that govern the foster care system will continue to present various substantive and procedural challenges. A large number of these provisions present unreasonable demands on social workers and this is not seen on ground level work. The recommendations provided are aimed at improving the legal norms and practices within the foster care system; as well as progressively realising the socio-economic rights of children to ensure also that child protection systems, always act in their best interests.

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<sup>154</sup> Ngwenya PM *'Factors Contributing to the Foster Care Backlog: Service Providers' Perspectives and Suggestions'* (unpublished Masters Dissertation, University of South Africa, 2011) 5.

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