

# Counting on Children:

## Realising the right to social assistance for child-headed households in South Africa

by Solange Rosa, August 2004



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**For information regarding this publication, please contact:**

**Senior Researcher: Solange Rosa  
Programme Manager: Paula Proudlock  
Address: 46 Sawkins Road, Rondebosch, 7700  
Telephone: 021 – 689 5404  
Facsimile: 021 – 689 8330  
E-mail: [solange@rmh.uct.ac.za](mailto:solange@rmh.uct.ac.za)**

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## Realising the right to social assistance for child-headed households in South Africa

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**Author: Solange Rosa**

### **Abstract**

*As a consequence of the increasing numbers of orphans in South Africa in the context of the HIV/AIDS pandemic, a relatively small number of children are remaining in households where there are no adult care-givers – in so-called 'child-headed households'. Despite the lack of accurate, national data on the prevalence of such child-headed households, it is likely that the number of child-headed households in South Africa will increase as the HIV/AIDS pandemic progresses. This paper argues that, in light of this reality and future projections, under certain circumstances it may be 'in the best interests of the child' that child-headed households be recognised as a legitimate family form.*

*This paper further argues that, once recognised, children living in child-headed households require social assistance from the State if they are unable to support themselves or their dependents, and that according to the South African Constitution, they are equally entitled to such assistance. Children living in child-headed households are currently unable to access financial support, in the form of the Child Support Grant, from the government, for two reasons: the administrative identification requirements placed on the applicant 'primary care-giver', and the lack of political will to give grants directly to these children.*

*The Constitution obliges the State to provide social security to everyone, including social assistance if they are unable to support themselves and their dependants. In addition, the State has a responsibility to children who are orphaned and have no parental care. This paper argues that the government has an obligation to provide social assistance to children living in child-headed households, via a mechanism that is practical, reasonable and appropriate.*

*This paper therefore analyses the problems experienced by children living in child-headed households in accessing social assistance, in particular the Child Support Grant; outlines the constitutional obligations of the State regarding social assistance towards such children; and presents a number of mechanisms – directly and through a mentor – that will ensure that child-headed households are able to access social assistance provided by the State.*

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## I. INTRODUCTION

South Africa's *National Strategic Framework for Children Infected and Affected by HIV/AIDS* highlights a concern with the growing numbers of orphans<sup>1</sup> in the country:

In most parts of the industrialised world, usually no more than one percent of the child population is orphaned. Before the onset of HIV/AIDS, societies in the developing world absorbed orphans into the extended family and communities at a rate of just over 2,5 percent of the child population. Today, as a consequence of AIDS, 11 percent of Ugandan children are orphans, 9 percent in Zambia and 7 percent in Zimbabwe. **This scenario is likely to be repeated in South Africa.**<sup>2</sup> [emphasis added]

By July 2003, roughly 990 000 children under the age of 18 in South Africa were estimated to have lost a mother, 2.13 million children were paternally orphaned and 190 000 had lost both parents, the majority of these to HIV/AIDS. The estimated number of children who would have lost both parents by 2015 is roughly 1.97 million, and the number of maternal orphans 3.05 million, in the absence of major health interventions<sup>3</sup>.

The majority of children whose biological parent(s) have died are cared for by relatives<sup>4</sup>, primarily in informal care arrangements. A small proportion has thus far been placed in formal foster care through the courts. In an analysis of the 2002 General Household Survey, it was estimated that approximately 90% of orphans are resident with relatives. The majority of the remaining 10% live with non-relatives; a small minority lives in child-headed households, or in residential care.<sup>5</sup>

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<sup>1</sup> Note that orphans are defined in a variety of ways in international policy and programming practice: maternal, paternal and double (both parents have died). The age of children defined as orphans also differ in various definitions, with most policy-makers and international organisations defining 'orphans' as children under the age of 15 who have lost either their mother or both parents. Further, some definitions of orphanhood include children whose parents are dying. See discussion on the complexities of the definitions of 'orphan' in: S Giese, H Meintjes, R Croke & R Chamberlain *Health and Social Services to Address the Needs of Orphans and Other Vulnerable Children in the context of HIV/AIDS – Research Report and Recommendations*, Children's Institute (UCT) and National Department of Health (2003) Chapter 3 (hereafter 'Children's Institute Report'). See also J Sloth-Nielsen 'Too little? Too late? The Implications of the Grootboom Case', *Law, Democracy & Development*, Vol 7, 2003 (1) 114.

<sup>2</sup> Department of Social Development *A Draft National Strategic Framework for Children Infected and Affected by HIV/AIDS* (2000) [www.welfare.gov.za](http://www.welfare.gov.za).

<sup>3</sup> Personal communication: Leigh Johnson, based on the Actuarial Society of South Africa's ASSA2000 AIDS and Demographic Model, and the ASSA Orphans Model; H Meintjes, D Budlender, S Giese & L Johnson *Children 'in need of care' or in need of cash? Questioning social security provisions for orphans in the context of the South African AIDS pandemic*, Children's Institute & Centre for Actuarial Research (2003) 3-4, 27-28; R Dorrington, D Bradshaw, & D Budlender *HIV/AIDS Profile in the Provinces of South Africa: Indicators for 2002*, Cape Town: Centre for Actuarial Research, University of Cape Town (2002).

<sup>4</sup> Giese et al (n 1). Meintjes et al (n 3).

<sup>5</sup> D Budlender & H Meintjes *Children's Family/Household Context in Contemporary South Africa* (2004). Paper presented at the workshop on the provisions for parental rights and responsibilities in the Children's Bill, Children's Institute, Cape Town, 24 February 2004.

There is currently no comprehensive national data on the prevalence of child-headed households.<sup>6</sup> On the basis of its National Household Survey on HIV/AIDS, the Human Sciences Research Council (HSRC) argues that:

Many community-based assistance programmes report an increase in households headed by children, or consisting only of children, i.e. orphans or children without resident adult guardians. However, no national data on child-headed households has yet been reported. In this survey, just 3% of households were reported as being headed by a person between the ages of 12 and 18 years of age, and could thus be called a child-headed household (Gow & Desmond 2002). The percentage observed was 3.1% in urban formal areas, 4.2% in informal urban areas, 2.8% in tribal areas and 1.9% in farms.<sup>7</sup>

Other studies provide anecdotal evidence of the existence of child-headed households in South Africa. For example, the *Nelson Mandela Children's Fund (NMCF) Report* states that a study in a village in Langelooop of Nkomazi district in Mpumalanga Province found that 22 % of households were headed by children. In a report by the Children's Institute, five child-headed households were found to consist of children of whom the oldest was 18 years or less.<sup>8</sup> None of these studies, however, can be said to be statistically representative samples. They are merely cited here as documentary evidence of the existence of child-headed households in South Africa.

The lack of statistical evidence and probable low incidence of child-headed households should not, however, detract from the fact that child-headed households exist. Furthermore, in the context of increasing numbers of orphans as the HIV/AIDS pandemic progresses, it is possible that South Africa will face increasing numbers of child-headed households.<sup>9</sup> This recognition is important to garner support for these children from Government, as well as to guide equitable, appropriate and effective responses.

Children living in child-headed households can be considered to be particularly at risk of vulnerability considering the absence of a resident adult care-giver. It is argued that they therefore require extra support to meet their various basic needs, including financial, emotional, psychological, health, education, etc.

To date, the government and many prominent non-governmental organisations in South Africa have been reluctant to put in place mechanisms to support children to live without adult care-givers on an ongoing basis. Instead, their attention has been focused largely on arguing for the provision of substitute parental care, such as institutional care and the promotion of formal and informal foster care.

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<sup>6</sup> Nelson Mandela Children's Fund *A Study into the Situation and Special Needs of Children in Child-headed households* (2001) (hereafter 'NMCF Report') 4, [www.mandela-children.com](http://www.mandela-children.com). J Gow & C Desmond 'The Current and Future Impact of the HIV/ AIDS Epidemic on South Africa's Children' in GA Cornia *AIDS, Public Policy and Child-Well-Being* (2002) 19. [www.unicef-icdc.org](http://www.unicef-icdc.org) also remarks on the lack of accurate statistical information available on child-headed households.

<sup>7</sup> Human Sciences Research Council (HSRC) *Study on HIV/AIDS, Household Survey 2002* 68.

<sup>8</sup> Giese et al (n 1) 43. A total of 118 households were interviewed. The report notes that this data should not be taken to provide statistically relevant information that could be extrapolated beyond the research.

<sup>9</sup> Ibid 44: 'Systematic investigation in several countries (including in some of those in which the HIV/AIDS pandemic is more advanced than in South Africa) have confirmed that "child-headed households" are rare (Ainsworth, Ghosh & Semali, 1995; Gilborn et al, 2001).'



However, this paper argues that this approach is insufficient, and is thus particularly concerned with issues relating to the support (financial and otherwise) of children living without adult care-givers.

Under its constitutional obligations to provide social assistance to those who are 'unable to support themselves and their dependants'<sup>10</sup>, the government has created three types of social grants aimed specifically at children. These grants are the Child Support Grant (CSG); the Foster Child Grant (FCG); and the Care Dependency Grant (CDG).<sup>11</sup> In addition, the State has a responsibility to those children who are orphaned and have no parental care.<sup>12</sup>

Children living in child-headed households, however, are currently *not* able to access financial support in the form of social grants from the government. They are unable to access the CSG because, in practice, only care-givers with an identification document - anyone over the age of 16 - can apply for a CSG. They also can not access the FCG because children must be placed in the court-ordered foster care of an adult in order for the FCG to be payable.

This paper addresses precisely the situation of children who – in the absence of a resident adult – are their own or other children's primary care-givers. They are excluded from accessing social assistance from the government for no other reason than that they are not *adult* primary care-givers over other children in their care. This paper therefore discusses the government's obligation to provide social assistance to these children, via a mechanism that is practical, reasonable and appropriate. It argues that, considering that children who live in child-headed households can not access social assistance – in particular the CSG – and that the State has constitutional obligations towards these children, a number of mechanisms must be legislated to provide social grants to this group of children. The mechanisms suggested and discussed herein are: a mentorship scheme and the provision of direct access to grants for children who are *de facto* the heads of households.

## II. THE CONTEXT FOR CHILD-HEADED HOUSEHOLDS

### i. Problems experienced by child-headed households in South Africa and appropriate responses

This paper generally supports the definition of a child-headed household as a household where the parents or adult care-givers have died or abandoned the children and the child head is under the age of 18 years. However, in the course of conducting research for this paper, a couple of community workers defined child-headed households more broadly as consisting of children living together on their own where the eldest child was over the age of 18 but still attending school.

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<sup>10</sup> Section 27 of the Constitution of the Republic of South Africa Act 108 of 1996 (1996 Constitution).

<sup>11</sup> Social Assistance Act 59 of 1992 and the Regulations Regarding Grants and Financial Awards to Welfare Organisations and to Persons in need of Social Relief of Distress.

<sup>12</sup> Section 28 (1) (b) of the Constitution – the right to family or parental care, or to appropriate alternative care when removed from the family environment.

Whilst little statistical information is available on child-headed households, a number of studies have looked at this particular phenomenon and elaborated on the major problems encountered by children living in these circumstances.<sup>13</sup> Studies have highlighted that children living in child-headed households experience the same general problems as other children affected and infected by HIV/AIDS, as well as children living in poverty, but due to the absence of a resident adult, they also experience their own unique problems. These generic problems experienced by child-headed households have been noted by various researchers to include: poverty, discrimination, stunting and hunger, pressure to work, early marriage, difficulties accessing education, poor housing, exploitation, psychological problems, lack of adequate medical care, lack of supervision and care, disruption of normal childhood and adolescence, loss of financial support, lack of parental guidance, harassment, vulnerability to physical and sexual abuse, and poor health status.<sup>14</sup>

Children living in child-headed households use a variety of strategies to survive and overcome these difficulties, including working, getting support from relatives and non-relatives, and performing favours in exchange for support.<sup>15</sup> In light of the constitutional obligations of the government to child-headed households, it is important to identify the ways in which Government should support these children appropriately and effectively, as guided by the best interests of the child.<sup>16</sup>

The available research and literature, though limited, can serve to guide the responses of Government. In general, studies indicate that children who are orphaned should **as far as possible** be supported to remain in their own communities rather than placed in institutions. In some instances, this may mean that they remain living on their own without adult care-givers. Child-headed households, if they have access to appropriate support, are a viable social unit within the community, which can enable siblings to remain in the home even though an adult is not present.<sup>17</sup> It is submitted that providing child-headed households with financial assistance in the form of social grants is a critical way of ensuring the survival of that household and could help to address many of the problems outlined above.<sup>18</sup>

However, one of the unique problems experienced by children in child-headed households is the inability to access financial support from Government in the form of social grants due to the lack of an adult primary care-giver who is able to apply for and receive a grant on behalf of a child. Only one household of all the child-headed households examined by the Thandanani Research Project, received a grant (a CSG). The report states:

[T]his is clearly a significant problem as the children are relying on support systems within their largely impoverished communities and appear unable to access social grants.<sup>19</sup>

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<sup>13</sup> See Thandanani Children's Foundation *The Nature and Extent of Problems Facing Child Headed Households within the Thandanani Programme*, Report prepared by Ann Strode (March 2003) 16 (hereafter 'Thandanani Report'). See also NMCf Report (n 6); Giese et al (n 1).

<sup>14</sup> Ibid 5-6.

<sup>15</sup> Thandanani Report (n 13) 35; Giese et al (n 1).

<sup>16</sup> See below Chapter V: Constitutional Obligations.

<sup>17</sup> Thandanani Report (n 13) 63; Giese et al (n 1).

<sup>18</sup> Ibid, Thandanani Report 73 states similarly.

<sup>19</sup> Ibid 43.

The NMCF Report also found that many of the children were not aware that they could apply for grants, and those who were aware (mainly in urban areas) knew that they would require the intervention of a social worker to alleviate their plight. They were in any case not in a position to initiate an application for a social grant process without the assistance of an adult.<sup>20</sup>

The difficulties faced by child-headed households outlined above, clearly indicate that these children too would benefit greatly from access to social assistance from Government.<sup>21</sup> Financial support from Government in the form of social grants would go a long way in assisting these children to access food, clothing and to attend school. The provision of a social grant would better facilitate children's school attendance by relieving some of the pressure on children to earn an income.<sup>22</sup>

## **ii. Comparative experiences in other African countries**

A comparative analysis of social assistance programmes in other African countries is not of particular assistance, as social grants for children exist in very few African countries.<sup>23</sup> In addition, the literature surveyed does not deal specifically with child-headed households. Nevertheless, a number of tangential issues encountered may be worthwhile mentioning and may be helpful in formulating appropriate responses.

A review of the comparative research indicates that the problems experienced by orphans and child-headed households in other parts of the world are similarly experienced in the South African context. Such literature also confirms that the major problems for child-headed households are socio-economic, and specifically mentions a shortage of income to fulfil basic needs, including food and clothing.<sup>24</sup>

In a *Study of Child-headed households on Commercial Farms in Zimbabwe*, it was found that, although the problems identified were faced by many orphaned children in a range of different circumstances, it was felt that child-headed households were much more vulnerable and at risk because they do not have the material and personal resources to cope with the problems that they encountered on a daily basis. The study argues that many of the children do not have the skills or

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<sup>20</sup> NMCF Report (n 6) 6.

<sup>21</sup> In this paper, the terms 'social assistance', 'social grants' and 'financial assistance from Government' are used interchangeably.

<sup>22</sup> Whilst the need to work and earn an income to support a family – therefore leaving education behind – may be no different to the situation of other children living in poverty, the fact that these children do not have adult care-givers to take primary responsibility for obtaining income places a greater burden on the children.

<sup>23</sup> See R Smart *Children living with HIV/AIDS in South Africa: A rapid appraisal*, Pretoria: Save the Children Fund (UK), NACCT (2000). The study does not deal specifically with child-headed households, but as outlined above, the needs of orphans living without adult care-givers are mostly much the same as the rest of the orphan population. See also UNICEF & UNAIDS *Children Orphaned by AIDS - Frontline Responses from Eastern and Southern Africa* (December 1999) (hereafter 'UNICEF/UNAIDS Report').

<sup>24</sup> M Segu & S Wolde-Yohannes 'A mounting crisis: Children orphaned by HIV/AIDS in semi-urban Ethiopia' in The Foundation and the Association François-Xavier Bagnoud, ORPHAN ALERT I, *International Perspectives on Children left behind by HIV/AIDS* (2000) 15. Farm Orphan Trust of Zimbabwe *A Study of Child-headed households on Commercial Farms in Zimbabwe*, [www.sarpn.org.za](http://www.sarpn.org.za) (this document contains only parts of the original paper).

knowledge to ensure that they are living healthy lives and to protect themselves from exploitation and abuse.<sup>25</sup>

A review of both South African and comparative literature highlights the commonality of the view that the most successful policy responses to child-headed households are those that are community-based.<sup>26</sup> Furthermore, key principles which should guide interventions and programmes for children are that siblings should be assisted to remain together if appropriate, and that children should, as far as possible, remain in their homes or communities of origin.<sup>27</sup> For example, Malawi's National Orphan Care Guidelines state that the first line of approach should be community-based programmes and the second preferred form is informal foster care.<sup>28</sup> In Zimbabwe, the Orphan Care Policy provides for the formation of area and village Child Welfare Committees to identify and register vulnerable children and assist and support children in need of care.<sup>29</sup> The *Frontline Responses* report showed that the general approach taken in Botswana, Malawi, Zimbabwe and Zambia is that community-based models are the best models and that institutional care should be the last resort.<sup>30</sup>

Apart from the need for community-based responses in terms of specific modes of support and assistance, the comparative literature did not reveal any programmes which provided financial support to child-headed households.<sup>31</sup> In Tanzania, direct aid is provided in the form of food, and the provision of child care and counselling to orphans and child-headed households also exists.<sup>32</sup> The Tanzanian Department of Social Welfare also provides half-day educational and developmental activities for children in the 2 – 6 age groups, which enable older siblings to attend school.

In a UNAIDS report concerning children affected by HIV/AIDS, 34 countries were examined. The report contains extensive orphan estimates and describes the general impact of the AIDS pandemic on children. It also looks at strategies for intervention that include mobilising and strengthening the capacities of families and communities to enable children to stay in school.<sup>33</sup> Most notably, the report suggests that it is crucial to encourage children and *support them in defining their own needs and giving them a role in deciding how these needs should be met.*<sup>34</sup>

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<sup>25</sup> Ibid.

<sup>26</sup> Smart (n 23) 44.

<sup>27</sup> Ibid 50.

<sup>28</sup> Ibid 47.

<sup>29</sup> Thandanani Report (n 13) 23.

<sup>30</sup> UNICEF/UNAIDS Report (n 23).

<sup>31</sup> Social security data bases: [www.ssa.gov/policy/docs/progdesc/ssptw/1999/index.html](http://www.ssa.gov/policy/docs/progdesc/ssptw/1999/index.html). The following countries have no Child Support Grant: Zambia, Zimbabwe, Uganda, Nigeria, Kenya, and India. The following countries have an employment-related system: Thailand, Senegal, Togo, Niger, Brazil, and DRC.

<sup>32</sup> Smart (n 23) 47, referring to N Mc Kerrow *Implementation Strategies for the Development of Models of Care for Orphaned Children* (1996).

<sup>33</sup> S Hunter & J Williamson *Children on the Brink*, Executive Summary, Updated estimates & recommendations for intervention, UNAIDS (2000).

<sup>34</sup> Ibid 9.

### III. DIVERSITY OF FAMILY FORMS IN SOUTH AFRICA

Although South African law has no single definition of a 'family', it is evident in various pieces of legislation that the 'nuclear family', based on the relationship of a married man and woman and their biological or adopted children, is dominant.<sup>35</sup> This does not reflect the reality of South African society where responsibility for children is by no means only linked to biological parenthood. The South African Law Commission (SALC)<sup>36</sup> in their review of the Child Care Act discussed this issue in depth and recommended that it is important and necessary to recognise a broader concept of 'family' than the traditional nuclear family.<sup>37</sup> The SALC Discussion Paper comments that it is difficult to obtain legal recognition of the parenting role of 'social' or 'psychological' parents in this country, despite the wide diversity of family forms in existence.<sup>38</sup>

Recently the South African courts and Parliament have begun to recognise new types of family forms that do not fit within the traditional definitions.<sup>39</sup> Gay and lesbian relationships have been recognised;<sup>40</sup> unmarried fathers have also now been granted limited rights over their illegitimate children,<sup>41</sup> and customary and Muslim marriages, and domestic partnerships have also had their rights extended.<sup>42</sup> In *Dawood and Another v Minister of Home Affairs and Others*, Judge O'Regan stated:<sup>43</sup>

...[F]amilies come in many shapes and sizes. The definition of family also changes as social practices and traditions change. In recognising the importance of the family, we must take care not to entrench particular forms of family at the expense of other forms. [Footnote omitted]

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<sup>35</sup> See Child Care Act 74 of 1983; Children's Status Act 82 of 1987; Guardianship Act 192 of 1993.

<sup>36</sup> Known as the South African Law Reform Commission since February 2003.

<sup>37</sup> SA Law Commission Discussion Paper, Project 110, *Review of the Child Care Act* (2001) Chapter 8, 183 (hereafter 'SALC Discussion Paper'). It showed that, for example, in South African case law the High Court will only in exceptional circumstances be prepared to award guardianship or custody of a child to a non-parent to the exclusion of the natural parents, and that it is highly unusual for the court to appoint non-parents as guardians or custodians to act as such *together* with the parents of the child in question.

<sup>38</sup> *Ibid* 183. The Law Commission also goes on to discuss in some depth a comparative review of recent law reform endeavours in the area of child law in other countries. The Commission reported that the law in other African countries is beginning to reflect an increased recognition of both a broad range of family forms and the role of 'social parents', viz. persons who are not biological parents but who fulfil parental functions by taking care of children or being otherwise involved in their upbringing. (See 184 -187).

<sup>39</sup> See discussion on 'the changing nature of family forms' in B Goldblatt & S Liebenberg 'Giving Money to Children: The Constitutional Obligations to Provide Child Support Grants to Child-Headed Households' *SAJHR* (forthcoming).

<sup>40</sup> *Langemaat v Minister of Safety and Security* 1998 (3) SA 312 (T); *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs and Others* 2000 (1) BCLR 39 (CC); *Satchwell v President of the RSA and Another* 2002 (9) BCLR 986 (CC); *Du Toit and Another v Minister for Welfare and Population Development and Others* 2002 (10) BCLR 1006 (CC); *J and Another v Director-General, Department of Home Affairs and Others* 2003 (5) BCLR 463 (CC).

<sup>41</sup> *Fraser v Children's Court, Pretoria North* 1997 (2) BCLR 153 (CC).

<sup>42</sup> The Recognition of Customary Marriages Act 120 of 1998; *Amod v MVAf (CGE intervening)* 1999 (4) SA 1319 (SCA) extending benefits to Muslim marriages; see SA Law Commission Discussion Paper 104, Project 118, *Domestic Partnerships* (September 2003) 53-5.

<sup>43</sup> In: *Dawood and Another v Minister of Home Affairs and Others* 2000 (8) BCLR 837 (CC), para 31. Also quoted in Goldblatt & Liebenberg (n 38) 5.

In an analysis of the international developments in the legal meaning of 'family', Goldblatt refers to the 'functional approach' developed by Martha Minow for determining whether parties to a particular family relationship should be protected by the law.<sup>44</sup> This approach does not limit the boundaries of the concept of 'family' to traditional categories of biology and marriage, and instead looks at and recognises how certain people function as a family. Minow says that certain people may not fit a 'formal' legal definition of a family, but 'what is important is whether the group of people function as a family: do they share affection and resources, think of one another as family members, and present themselves as such to neighbours and others?'.<sup>45</sup>

The nature of family life is far from static and is shaped by the historical and socio-economic conditions in society, amongst other things. In South Africa, the history of colonialism, the creation of a migrant labour system, the complex systems of apartheid laws, and more recently the scourge of the HIV/AIDS pandemic, have had enormous impact on family life.<sup>46</sup> It is far from uncommon for children to live apart from their parents in many types of family arrangements. An analysis of the General Household Survey 2002 in fact shows that 24% of African children under the age of 18 do not live with either of their parents, 11% of coloured children, 3% of Indian children and 2% of white children – amounting to an overall average of 21%.<sup>47</sup>

The AIDS pandemic is likely a causal factor for larger numbers of children living without their parents. As a further consequence, children increasingly have to assume more significant roles of responsibility. Though not a new phenomenon, more children have to take care of younger siblings or other children while care-givers are sick and dying or when they have died already. These children have to perform all or some of the functions of a 'primary care-giver' in a family environment, including buying food, preparing it, dressing and feeding younger children, earning money and performing other household chores. In essence, they may fulfil all three of the criteria posed by Minow's functional approach to describe a family for the purposes of protection by the law.

In the Children's Institute research on the needs of orphans and other vulnerable children in the context of HIV/AIDS<sup>48</sup>, several service providers who participated argued that 'sometimes it is better for [children] to live alone'. It was remarked that some children who participated in the research were safer living on their own than living with relatives who were not eager to care for them. Furthermore, the research commented that where children are removed from the family home after the death of the parents, they stand a chance of losing their inheritance rights to the property.<sup>49</sup>

It is thus submitted that the reality of South African society necessitates a recognition and definition of 'family' that goes beyond the context of the nuclear family form and even the extended family form, and which recognises the existence of child-headed households as a

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<sup>44</sup> M Minow 'Redefining Families: Who's In and Who's Out?' (1991) 62 *Colorado Law Review* 2, 269, as discussed in Goldblatt & Liebenberg (n 39).

<sup>45</sup> Ibid 270.

<sup>46</sup> S Burman 'Capitalising on African Strengths: Women, Welfare and the Law' 7 *SAJHR* 2, 215 (1991); M Ramphela *A Bed Called Home*, Cape Town: David Phillip (1993), Chapter 6, for a discussion of the impact of migrancy on families; Goldblatt & Liebenberg (n 39).

<sup>47</sup> Budlender & Meintjes (n 5).

<sup>48</sup> Giese et al (n 1) 108.

<sup>49</sup> Ibid.

current – and possibly growing – phenomena.<sup>50</sup> The development of appropriate programmes and policies to serve the needs of children living in these circumstances would best be addressed by this recognition and not by misguidedly attempting to eliminate the existence of such a family form. A denial of their existence, and worse, a presumption that such family forms are entirely negative and thus should be eliminated, ignores the reality of children's experiences, ill-considers their best interests, and it is argued below, is discriminatory.<sup>51</sup>

#### **IV. GOVERNMENT RESPONSES TO CHILD-HEADED HOUSEHOLDS: CURRENT LAW, POLICY AND PRACTICE**

##### **i. Social Assistance Act 59 of 1992**

###### ***Child Support Grant***

The law on social assistance is governed by the Social Assistance Act 59 of 1992 and the Regulations Regarding Grants and Financial Awards to Welfare Organisations and to Persons in need of Social Relief of Distress. The Act and the Regulations give effect to the constitutional rights of access to social assistance in terms of section 27 of the Constitution,<sup>52</sup> and govern the delivery and administration of social assistance. The Act includes a number of cash grants for children, namely the Child Support Grant (CSG)<sup>53</sup>, the Foster Child Grant (FCG) and the Care Dependency Grant (CDG).<sup>54</sup>

The CSG was introduced in 1997 to help alleviate the poverty experienced by many in South Africa. As recommended by the Report of the Lund Committee on Child and Family Support, the CSG replaced the State Maintenance Grant (SMG) with a flat-rate child support benefit to be paid, via the primary care-giver, to all children who qualify in terms of a test of the care-giver's means.<sup>55</sup> The grant was intended to protect the poorest children in their most vulnerable years; however this has since been broadened somewhat with the extension of the grant to all children

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<sup>50</sup> Ibid.

<sup>51</sup> See below Chapter V for discussion on unfair discrimination. In the SALC Discussion Paper (n 36) 193, the Commission recommended: '...[T]he diversity of family forms and parent/child relationships in South Africa can best be recognised by means of the inclusion, in the new children's statute, of a section expressly prohibiting unfair discrimination against children on any of the grounds set out in section 9 (3) of the Constitution, in Article 2 of the CRC, as also on the grounds of the family status, health status, socio-economic status, HIV-status or nationality of the child or of his or her parents, legal guardian, primary care-giver or any of his or her family members.'

<sup>52</sup> Section 27 (1) (c) of the Constitution stipulates: 'Everyone has the right to have access to ... social security, including, *if they are unable to support themselves and their dependants, appropriate social assistance.*' Section 27 (2) goes on to place an obligation on the State: 'The state must take reasonable *legislative* and other measures, within its available resources, to achieve the progressive realisation of each of these rights.' [emphasis added].

<sup>53</sup> The CSG was introduced into the Social Assistance Act 59 of 1992 by the Welfare Laws Amendment Act 105 of 1997 to replace the State Maintenance Grant.

<sup>54</sup> For the purposes of this paper, the primary focus will be on the CSG, however the FCG will also be dealt with briefly in relation to foster care as a response to orphans in the context of HIV/AIDS.

<sup>55</sup> Report of the Lund Committee on Child and Family Support (August 1996) Executive Summary 88 (hereafter 'Lund Report').

under the age of 14 years, to be implemented over the period 2003 – 2005.<sup>56</sup> The CSG (R170 per month from 1 April 2004) is currently available for children under the age of 11 years who live in households with an income of below R800 per month or R1 100 per month if the child and his or her so-called 'primary care-giver' either live in a rural area or in an informal dwelling.<sup>57</sup>

Although the CSG is intended to be a social grant for the benefit of the child, the law stipulates that the 'primary care-giver' of the child must receive it on behalf of the child. The Social Assistance Act provides:<sup>58</sup>

**Child-support grants.** – Subject to the provisions of this Act, any person shall be entitled to a child-support grant if that person satisfies the Director-General that-

- (a) he or she is the *primary care-giver* of a child; and
- (b) he or she and that child –
  - i. are resident in the Republic at the time of the application for the grant in question;
  - ii. are South African citizens; and
  - iii. comply with the prescribed conditions.

The Act goes on to define a 'primary care-giver':<sup>59</sup>

... [I]n relation to a child, means a person, whether or not related to the child, *who takes primary responsibility for meeting the daily care needs of the child*, but *excludes* –

- (a) a person who receives remuneration, or an institution which receives an award, for taking care of the child; or
- (b) a person who does not have an implied or express consent of a parent, guardian or custodian of the child.

A critical and innovative feature of the CSG - introduced by the Lund Commission - is the concept that the payment of the grant should not depend on biological ties and common law relationships where a duty of support towards a child exists. Instead, it should be based on a factual assessment of the person who is assuming primary responsibility for the daily care needs of the child, irrespective of his/her relationship to the child. This definitional notion of 'primary care-giver' thus gives some recognition to the reality of different 'family' structures in South Africa, in an attempt to address the role in children's lives of a range of persons other than their biological or legal parents, such as grandparents, aunts and uncles, etc., in providing for the daily needs of children who are primarily in their care and was based on the principle of 'follow-the-child'.<sup>60</sup> The Lund Committee expressly recommended this, as the payment of the CSG to the 'primary care-giver' of the child 'resolves the problem of how to define the family in such a

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<sup>56</sup> In terms of amendments to the regulations (GN No R 460 of 31 March 2003), the CSG was extended to children under the age of fourteen, to be phased in over the period 2003 – 2005. The CSG is extended to children under nine years as of the 1<sup>st</sup> of April 2003, children under eleven as of the 1<sup>st</sup> of April 2004 and children under fourteen as of the 1<sup>st</sup> of April 2005.

<sup>57</sup> Sections 2 (d) and 4 of the Social Assistance Act read with the regulations to the Act (GN 418 of GG 18771, 31 March 1998, as amended by GN No 813 of 25 June 1999, GN No R. 1233 of 23 November 2001, and GN No R 460 of 31 March 2003).

<sup>58</sup> Section 4.

<sup>59</sup> Section 1.

<sup>60</sup> See SALC Discussion Paper (n 36) Chapter 8, 181-182; Liebenberg & Sloth-Nielsen *Summary of Proceedings of Seminar on the Concept of the 'Primary Care-Giver' in the new South African Legislation*, UWC, Community Law Centre (29 August 1997).



complex and multi-cultured society'. It says that 'children, however many in a household, of whatever status, are important and need to be protected.'<sup>61</sup>

The principle that the grant 'follows the child' also stresses the importance of having a functional definition of 'primary care-giver' by recognising the reality that children living in the context of poverty and HIV/AIDS often have successive care-givers.<sup>62</sup> This is particularly important in the context of HIV/AIDS where many children have lost their parents and care-givers and find themselves in the situation where they have to look after themselves and their siblings.<sup>63</sup>

This functional concept of the person entitled to claim the CSG was adopted in the Social Assistance Act<sup>64</sup> with certain safeguards. These include that the primary care-giver has the implied or express consent of a parent, guardian or custodian and that it can be claimed on behalf of a maximum of six non-biological children or children who have not been legally adopted.<sup>65</sup> The requirement that the primary care-giver have the 'implied consent' of a parent, guardian or custodian of the child, is defined in the regulations as including the absence of any objection from the parent, guardian or custodian to the child remaining in the custody of the primary care-giver of that child 'on account of such parent, guardian or custodian being deceased.'<sup>66</sup> This would allow minor children to qualify as a 'primary care-giver' of their siblings for example, as they may not have such consent from parents who have died, or necessarily be able to prove such consent.

Bearing all of this in mind, the definition should then not necessarily exclude minor children who are playing the role of 'primary care-giver' with respect to minor siblings, cousins or other children, since neither the Social Assistance Act nor the regulations promulgated under it set any age limit for the 'primary-care-giver'.<sup>67</sup> However, in practice these minor 'primary care-givers' are precluded from accessing social grants. The reason for this is an administrative requirement under the regulations to the Social Assistance Act, which effectively requires such a person to be 16 years old as this is the age when an identity document is first provided,<sup>68</sup> and a 'primary care-giver' has to provide his/her identity document in applying for the grant.<sup>69</sup>

Finally, it is necessary to mention that amendments to the Social Assistance Act were tabled and passed in January 2004.<sup>70</sup> These amendments include a specific restriction in the definition of

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<sup>61</sup> Lund Report (n 54) 91.

<sup>62</sup> See further Ibid 18 and Giese et al (n 1) 106.

<sup>63</sup> See discussion in Chapter II above.

<sup>64</sup> The factual nature of the assessment as to who is the 'primary care-giver' is also supported by section 4 which requires the Director-General to be satisfied that the claimant is the 'primary care-giver' of the child. The regulations to the Act (n 56) also impose duties on recipients of the CSG to ensure that the child has accommodation, is properly fed and clothed, and receives immunisations and other health services where these are available without charge (Reg 20).

<sup>65</sup> Ibid (Reg 3).

<sup>66</sup> Ibid (Reg 1).

<sup>67</sup> The Community Law Centre *Seminar Report on the concept of the 'Primary Care-Giver'* (2000) discussed the age requirement for the primary care-giver and recommended no age limit on eligibility for biological parents and 18 years as the limit for non-parents. The reasoning behind this distinction is unclear in the report. However, it does also state that any age directives should not be placed in legislation but rather in regulations to facilitate potential future amendments.

<sup>68</sup> Section 3 of the Identification Act 68 of 1997.

<sup>69</sup> Reg 9 (1) to the Social Assistance Act (n 56).

<sup>70</sup> See Social Assistance Act 13 of 2004 at [www.welfare.gov.za](http://www.welfare.gov.za).

'primary care-giver' to people aged 16 and over. The new Act will thus explicitly exclude child heads of households under the age of 16 who are performing the function of 'primary care-giver' over other children and does not provide any alternative arrangements to enable these children to access social assistance, in particular the mentorship scheme.<sup>71</sup> This is ironic, to say the least. These children are especially vulnerable without the care and financial support of adult parents or care-givers, and yet the State has not provided a mechanism for them to be able to access financial assistance – it has arguably made it *more* difficult.

### ***Foster Care and the Foster Child Grant***

Government policy regarding the care of orphans, according to the Deputy Director of HIV/AIDS in the Department of Social Services and Population, Sakina Mohammed, is to concentrate on 'empowering the community to take care of orphans'. Researchers point out how, in practice, the State is concentrating on foster care as a key mechanism for 'empowering communities'.<sup>72</sup> It is evident from the literature and the government's own research that this is an unsustainable, inappropriate and limited intervention mechanism for orphans, and more specifically for child-headed households.<sup>73</sup>

The Child Care Act provides for foster care where a children's court is satisfied that a child is a child 'in need of care'<sup>74</sup>, and the court then may order that he or she be placed in the custody of a suitable foster parent designated by the court under the supervision of a social worker.<sup>75</sup> The Act outlines a set of criteria for children to be found 'in need of care', as follows:

- (a) *the child has no parent or guardian; or*
- (aA) *the child has a parent or guardian who cannot be traced; or*
- (AB) the child –
  - i. *has been abandoned or is without visible means of support;*
  - ii. *displays behaviour which cannot be controlled by his or her parents or the person in whose custody he or she is;*
  - iii. *lives in circumstances likely to cause or conduce to his or her seduction, abduction or sexual exploitation;*
  - iv. *lives in or is exposed to circumstances which may seriously harm the physical, mental or social well-being of the child;*
  - v. *is in a state of physical or mental neglect;*
  - vi. *has been physically, emotionally or sexually abused or ill-treated by his or her parents or guardian or the person in whose custody he or she is; or*
  - vii. *is being maintained in contravention of section 10. [emphasis added]*

Where children are found to be 'in need of care' and are fostered under an order of court, whether by relatives or others, these care-givers are officially appointed custodians or foster parents, and

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<sup>71</sup> See further discussion below.

<sup>72</sup> Gow & Desmond (n 6) 41. Meintjes et al (n 3).

<sup>73</sup> See Meintjes et al (n 3); Giese et al (n 1); and SALC Discussion Paper (n 36) for discussion of the appropriateness of using the foster care system as a response to the high numbers of orphans in the context of HIV/AIDS in South Africa.

<sup>74</sup> Section 14 (4).

<sup>75</sup> Sections 13 – 15 of the Child Care Act 74 of 1983. 'Foster child' is defined in the Child Care Act as 'any child who has been placed in the custody of any foster parent in terms of Chapter 3 or 6 of this Act or section 290 of the Criminal Procedure Act, 1977.' 'Foster parent' means 'any person, except a parent or guardian, in whose custody a child has been placed ...'.

are thereby entitled to access a Foster Child Grant (FCG). The FCG is currently an amount of R540 per month. Regular reports must be submitted by the social worker throughout the child's foster placement to ensure renewal of the court order and continuation of the grant.<sup>76</sup> The FCG is not means-tested in the same way that other grants are, since fostering is not seen as a poverty issue and the aim of the grant is to reimburse the non-parent for the cost incurred in caring for a child. Only the child's income is taken into consideration in evaluating eligibility for a FCG.<sup>77</sup>

Underlying the response of the government in proposing the foster care system as *the* solution to orphans in the context of HIV/AIDS, is an assumption that child-headed households are to be discouraged and should not exist. It does not recognise that child-headed households in fact exist, and do so because the capacity of communities and extended families are exhausted and under-resourced.<sup>78</sup> It is acknowledged that children living on their own without adults would not fit into the picture of a perfect world; but it may be the best possible scenario for some children affected by the reality of the HIV/AIDS pandemic.

Nonetheless, should child-headed households be officially recognised, we would still be left with their inability to access the FCG, as it is highly unlikely that the children would ever be designated foster parents of other children through the court process outlined above. Therefore this grant is likely *not* a viable solution to the lack of access to financial resources encountered by child-headed households.

The problems for children living in child-headed households therefore remain. There is an urgent need – as well as a constitutional obligation on the government - to seriously acknowledge the circumstances of children for whom there is no adequate or desirable alternative to living without adult care-givers, and to provide such children with financial resources via accessible mechanisms so that they can survive and develop.

## **ii. Children's Bill 2003**

During 1997, the Minister for Social Development requested that the South African Law Commission (SALC) investigate the Child Care Act 74 of 1983 and make recommendations to the Minister for the reform of this particular branch of the law. On the 21<sup>st</sup> of January 2003, the SALC officially handed over the draft Children's Bill to the Department of Social Development.<sup>79</sup> The drafting of the bill involved a lengthy process of research and consultation. The bill is to replace the 1983 Child Care Act that currently regulates the child protection and care system, because it had become abundantly clear that existing legislation aimed at children was not in keeping with the realities of current social problems and no longer protected children adequately.<sup>80</sup> In addition, it was recognised that South Africa had acceded to various international

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<sup>76</sup> Ibid section 16.

<sup>77</sup> *Regulations Regarding Grants and Financial Awards to Welfare Organisations and to Persons in need of Social Relief of Distress in terms of the Social Assistance Act 49 of 1992, Reg 4.*

<sup>78</sup> SALC Discussion Paper (n 36) Chapter 17, 715-717.

<sup>79</sup> SALC Draft Children's Bill 2002.

<sup>80</sup> The lives of children are affected by various pieces of legislation and international conventions. Apart from section 28 of the Constitution, which deals with the rights of children specifically, some of the statutes pertaining to children currently on the statute book are the following: The Age of Majority Act, 1972 (Act No 57 of 1972); The Child Care Act 1960 (Act No 74 of 1983); Children's Status Act, 1987 (Act No 82 of 1987); Guardianship Act, 1993 (Act No 192 of 1993); and the Hague Convention on the Civil Aspects of International Child Abduction Act, 1996 (Act No 72 of 1996).

conventions, such as the UN Convention on the Rights of the Child and the African Charter on Children's Rights, the principles of which have to be incorporated into local legislation.

The Department of Social Development took the process further through close liaison with the national Departments of Justice and Constitutional Development, Education, Health, Labour, the South African Police Service, the provinces, national non-governmental organisations (NGOs) and service providers, as well as the Office on the Rights of the Child in the Presidency. The result was the production of another version of the bill (August 2003 Children's Bill). The bill was published for general comment in the *Government Gazette* on 13 August 2003. Submissions on the bill by interested NGOs and other parties were made to the Department of Social Development in September 2003. Consultative workshops were also held with the Portfolio Committee on Social Development and the bill was thereafter submitted to the State Law Advisors, and finally to Parliament.<sup>81</sup>

The bill, which was initially submitted to Parliament in September/October 2003 ('the consolidated bill') dealt with the full spectrum of protection of children in both national and provincial spheres and was to be dealt with in terms of section 76 of the Constitution (functional area of concurrent national and provincial legislative competence). Shortly thereafter it was declared by the State Law Advisors to be a 'mixed' bill, as it included elements to be handled in terms of both section 75 (functional area of national legislative competence) and section 76 of the Constitution.

Due to its mixed character, the Deputy Speaker of the National Assembly requested the Executive to split the consolidated bill. The provisions of the consolidated bill that will apply to provincial governments have been removed and, consequently, the current bill only contains matters which have to be dealt with in terms of section 75 of the Constitution. As soon as the current bill<sup>82</sup> is enacted an amendment bill containing the matters which apply to the provincial governments only ('the amendment bill') will be introduced. The amendment bill will have to be dealt with in terms of section 76 of the Constitution. The amendment bill will complete the current bill by inserting the provisions which deal with welfare services.

The main objects of the proposed Children's Bill are:<sup>83</sup>

- (a) To make provision for the structure, the services and the means for promoting and monitoring the sound physical, intellectual, emotional and social development of children;
- (b) To strengthen and develop community structures which can assist in providing care and protection for children;
- (c) To protect children from maltreatment, abuse, neglect, degradation, discrimination, exploitation and any other physical and moral harm or hazards;
- (d) To provide care and protection for children who are in need thereof;
- (e) To give effect to the Republic's obligations concerning the well-being of children in terms of the international instruments binding on the Republic; and
- (f) In general, to promote the protection, development and well-being of children.

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<sup>81</sup> State Law Advisors' Memorandum on the Objects of the Children's Bill, 29 October 2003.

<sup>82</sup> Children's Bill B70-03, [www.welfare.gov.za](http://www.welfare.gov.za).

<sup>83</sup> Ibid.

The Children's Bill has been lauded, in particular, for providing significant new proposals to address lacunas in the present situation such as: specific provision for the participation of children in matters affecting them; an extension of the rights of unmarried fathers; provision for a High Court procedure to allow persons other than *parents to gain rights with regard to children*; and *the need to formally recognise and provide for child-headed households*.<sup>84</sup>

The SALC Discussion Paper highlighted the possibility that child-headed households would become a familiar phenomenon due to the increase of HIV/AIDS infected adults. It had thus recommended that while some children may cope while living without any adult intervention, it would be preferable for the State to put in place external mechanisms to support children living without adults.<sup>85</sup> The SALC Discussion Paper further detailed communities' response to the presence of children living independently in their neighbourhoods – generally that children are monitored and do receive some degree of supervision and support. The intensity of the supervision is usually determined by the ages of the children – the younger they are the more frequent visits to the house – whilst the nature of the support is also determined by the socio-economic status of the community.<sup>86</sup> The advantages and disadvantages of this model are similar to those experienced by children living independently, however, with some degree of adult supervision and support, the problems may be reduced.

As an example, the experience in Kwasha Mukwenu, Zambia, was mentioned.<sup>87</sup> There a community-based NGO operated entirely by volunteers who each contribute at least four hours a day to the project, ran a programme to identify, care for and support orphaned children. Each member of the NGO is responsible for identifying children in need in their neighbourhood, and for acting as a care-taker parent to 3 – 5 families of children living without adults. Once child-headed households are identified, and if no appropriate places with relatives or in institutions are found, the children are left in their homes under the supervision of a member of Kwasha Mukwenu. Each care-taker parent will visit the children on a daily basis and ensure that they have adequate shelter, food, clothing and health care, and are attending school and have access to adult attention.

Commenting on the SALC Discussion paper, the Childline Family Centre argued that it is in the best interests of siblings who have collectively suffered the loss of parental care to remain living together even if this means without adult care-givers, so as to continue to have the support and relationship of the sibling group wherever possible.<sup>88</sup> They asserted:

[M]ore thought should be given to how child-headed households can *materially* and psychologically be supported and given *access to resources* to facilitate their survival in both the physical and psychological sense, without compromising the development and particularly the education of the older caretaker sibling(s), and without exposing the caretaker siblings to exploitative labour and/or sexual practices.<sup>89</sup>

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<sup>84</sup> Ibid. See also specifically section 234 of the SALC Draft Children's Bill 2002.

<sup>85</sup> SALC Discussion Paper (n 36) Chapter 13, 551.

<sup>86</sup> Ibid.

<sup>87</sup> Ibid 552, referring to P Kamanga 'A Case Study of Kwasha Mukwenu: A CINDI Programme in Urban Lusaka, Zambia' in *Community Based AIDS Prevention and Care in Africa: Building on Local Initiatives. Case Studies from Five African Countries*. The Population Council (1997) 29-33.

<sup>88</sup> Ibid, SALC Discussion Paper 561.

<sup>89</sup> Ibid.

In light of this, the Commission recommended that legal recognition be given to child-headed households as a placement option for orphaned children in need of care, and a mentorship scheme established to assist these children to access grants and other benefits to which they currently do not have access.<sup>90</sup> In order to provide support to child-headed households, the Commission recommended that:<sup>91</sup>

- Legal recognition be given to schemes in terms of which one or more appropriately selected and mandated adults are appointed as 'household mentors' over a cluster of child-headed households by the Department of Social Development, a recognised NGO or the court;
- The proposed 'household mentor' may not make decisions in respect of the child-headed household without consulting the child at the head of the household and without giving due weight to the opinions of the siblings as appropriate to their age, maturity and stage of development;
- The proposed 'household mentor' be able to access grants and other social benefits on behalf of the child-headed household; and
- The proposed 'household mentor' be accountable to the Department of Social Development or a recognised NGO or the court.

A mentorship scheme was thus proposed and included in the draft Children's Bill, which was submitted to the Department of Social Development in January 2003:<sup>92</sup>

- 234.** (1) A provincial head of social development may recognise a household as a child-headed household if –
- (a) the parent or primary care-giver of the household is terminally ill or has died because of AIDS or another cause;
  - (b) no adult family member is available to provide care for the children in the household; and
  - (c) a child has assumed the role of primary care-giver in respect of a child or children in the household.
- (2) A child-headed household must function under the general supervision of an adult designated by –

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<sup>90</sup> SALC Final Report, Project 110, *Review of the Child Care Act* (December 2002) 172. The issue of at what age and under what conditions a child may 'head' a household was not conclusively debated. The Commission suggested that the stage at which a child should be able to head a household should not be dependent on his or her age but on the maturity of the child and the availability of a support structure. The Commission also noted that a child considered to be the 'head' of a household will need some form of recognised parental responsibility over the younger siblings to perform certain tasks, e.g. giving consent to a medical operation. However, such a child may be too young and immature to be entrusted with total responsibility for his or her siblings.

<sup>91</sup> Ibid 169. This is further supported by the Commission's broad, inclusive definition of the family that 'should be relationship focused and should entrench a non-traditional approach to family relations.' (Report at 58-59). See also SALC Discussion Paper (n 36) 566. The Report of the Taylor Committee of Inquiry into a Comprehensive System of Social Security in South Africa *Transforming the Present – Protecting the Future* (March 2002) 81 (hereafter 'Taylor Report'), also made recommendations with regard to the provision of support to child-headed households, including a mentorship scheme for child-headed households, the extension of the CSG to all children 0 – 18 years and a simplified process for child-headed households to access social grants - but it did not suggest what that process should be.

<sup>92</sup> Section 234 of SALC Draft Children's Bill 2002. A similar scheme was included in section 136 of the departmental draft bill which was later submitted to the State Law Advisors to finalise as the official bill – Children's Bill B-2003.

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- (a) a child and family court; or
  - (b) an organ of state or non-governmental organisation determined by the provincial head of social development.
- (3) The adult person referred to in subsection (2) –
- (a) *may collect and administer for the child-headed household any social security grant or other grant or assistance to which the household is entitled; and*
  - (b) is accountable to the child and family court, or the provincial department of social development, or to another organ of state or a non-governmental organisation designated by the provincial head of social development, for the administration of any money received on behalf of the household.
- (4) The adult person referred to in subsection (2) may not take any decisions concerning such household and the children in the household without consulting –
- (a) the child at the head of the household; and
  - (b) given the age, maturity and stage of development of the other children, also those other children.
- (5) The child heading the household may, subject to the supervision and advice of the adult person referred to in subsection (2), take all day-to-day decisions relating to the household and the children in the household as if that child was an adult primary care-giver.
- (6) A child-headed household may not be excluded from any aid, relief or other programme for poor households provided by an organ of state in the national, provincial or local sphere of government solely by reason of the fact that the household is headed by a child.

Essentially, the system provides for child-headed households to be assisted by ‘mentors’ (individuals working in NGOs or CBOs and other responsible individuals) to provide the necessary adult supervision in the application and spending of the grant. According to this system, one or more appropriately selected and mandated adults are appointed as ‘mentors’ over a cluster of child-headed households, by the Department of Social Development, a recognised/accredited NGO or the court. The proposed ‘mentor’ is able to access grants and other social benefits on behalf of the child-headed household.<sup>93</sup> However, the ‘mentor’ may not make decisions in respect of the child-headed household without consulting the child at the head of the household and without giving due weight to the opinions of the siblings as appropriate to their age, maturity and stage of development.

The proposed ‘mentor’ would be accountable to the Department of Social Development or a recognised/accredited NGO or the court. Furthermore, safeguards against exploitation and fraud were included in that a person is guilty of an offence if that person misappropriates money for which that person is accountable in terms of section 234 (3).<sup>94</sup>

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<sup>93</sup> Note that there is also special provision for children in child-headed households not to be excluded from grants solely on the basis of their status of child-headed households (section 234 (6)). In addition, section 341 (2) – as part of the regulations concerning social security for children – stipulates a duty that the social security scheme *must* be administered in a way to ensure that the grants reach child-headed households. It however leaves out a concrete suggestion as to how to implement this duty. The SALC Discussion Paper (n 37) Chapter 25 further recommended that administrative barriers to child-headed households accessing existing grants should be removed through amendments to the Social Assistance Act.

<sup>94</sup> Section 353 (1).

In addition, recognition is given to children as care-givers in the definition of 'care-giver', as meaning 'any person other than the biological or adoptive parent who *factually* cares for a child, whether or not that person has parental responsibilities or rights in respect of the child, and includes ... the child at the head of a child-headed household to the extent that that child has assumed the role of primary care-giver'.<sup>95</sup>

The August 2003 version of the draft Children's Bill also provides for a designated organ of state or NGO to collect and administer social grants on behalf of the child-headed household, but it does not allow an individual adult to do so.<sup>96</sup> It furthermore provides that the 'child heading the household may take all day-to-day decisions relating to the household and the children in the household *as if that child was an adult primary care-giver*'.<sup>97</sup> [emphasis added].

Finally, the section 75 bill – which was eventually tabled and then retracted in Parliament – makes provision in section 46 for a children's court to make an order 'placing a child in a child-headed household in the care of the child heading the household *under the supervision of an adult designated by the court*' [own emphasis]. This is an amended provision of the earlier SALC scheme and is the only mention that is made of the mentorship scheme and child-headed households in this bill. It is presumed that the section 76 bill will contain the missing pieces of the puzzle, however it is unclear as to what the proposed picture will look like in the end. Both the section 75 and 76 portions of the Children's Bill will be tabled in the new Parliament in 2004/2005.

### iii. Government policy responses

A number of documents and strategies make up the government's policies in relation to children infected and affected by HIV/AIDS.<sup>98</sup> Most of them mention the need for Government and community-based support for children who are orphaned, while some of them refer obliquely to the need for social security grants to be made accessible to these children. However, the majority indicate a preference for in-kind support in the form of food security programmes and formal and informal fostering as a means of making social security available to children who are orphaned.

The *National Guidelines for Social Services to Children Infected and Affected by HIV/AIDS*<sup>99</sup> recommend the fast-tracking of the process for accessing social security grants. It supports proposed amendments to the child care legislation to enable kinship fostering and thereby bypass the courts. The Department of Social Development was also to investigate other forms of grants, mostly alternatives to cash payments.<sup>100</sup> Another recommendation deals with linking food security programmes to Community Home-Based Care (CHBC), and identifies the Department of Agriculture as the department responsible for that issue.<sup>101</sup>

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<sup>95</sup> Section 1. Precisely the same definition appears in all the later versions of the bill.

<sup>96</sup> Section 136 (3), Children's Bill B-2003.

<sup>97</sup> Ibid section 136 (5).

<sup>98</sup> See generally: *National Guidelines for Social Services to Children Infected and Affected by HIV/AIDS*; Department of Social Development *Care and Support for People who are Affected and Infected by HIV/AIDS*, [www.welfare.gov.za/Documents/2002/December/aids scare.htm](http://www.welfare.gov.za/Documents/2002/December/aids scare.htm) .

<sup>99</sup> Ibid 24.

<sup>100</sup> Ibid 28.

<sup>101</sup> Ibid 31.



The *National Strategic Framework for Children Infected and Affected by HIV/AIDS* acknowledges that families and communities must be strengthened and that provision is made for *adequate resources and support*. This is because of the increasing numbers of children orphaned as a result of HIV/AIDS, which will place extreme strain on extended families and immense pressure on Government and community resources.<sup>102</sup> This requires that most resources are shifted to work with children and families (for example strengthening families, communities and young people themselves) and ensuring that the maximum number of children and youths (especially orphans) receive care, protection and development within their families and/or communities of origin.<sup>103</sup> The Framework also stipulates that the special needs of child-headed households should be addressed and that there must be access to government financial support services such as the Child Support Grant.<sup>104</sup> It however does not say how this will be achieved.

An internal research report compiled for the Minister of Social Development, Dr. Zola Skweyiya<sup>105</sup>, on the issue of orphans and child-headed households, suggests that child-headed households should be supported by the government. However, specific recommendations regarding social assistance were not made. The report recommends that the Department of Social Development, with various stakeholders in the field of children affected by HIV/AIDS, formulate a strategic plan. Recommendations regarding support for orphaned children include the following: ensuring a sustainable supply of food to affected children; assisting the children to continue with their schooling; supporting volunteer workers to ensure effective home-based care; and financial support to relatives who can not afford to look after orphaned children. Regarding households headed by a child, the report recommends that if these children can not be accommodated in foster care programmes, community and government support should be offered to help them cope with their plight. Again, it does not elaborate how this would be done.

The *National Integrated Plan for Children and Youth Infected and Affected by HIV/AIDS* (NIP) includes different strategies to be undertaken by four government departments: Health, Social Development, Agriculture and Education. One aspect of the plan is again focused on the Community Home-Based Care Programme (CHBC). However, the NIP does not sufficiently take into account the phenomenon of child-headed households.<sup>106</sup>

It is submitted that none of the government policy documents mentioned above deal specifically and adequately with responses to the needs of child-headed households, in particular the issue of the lack of access to financial support.<sup>107</sup> The CHBC Programme 'can do little more than provide social and medical support, rather than the nutritional support they desperately need'.<sup>108</sup> Furthermore, it is well-known and documented that the provision of benefits in-kind – such as

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<sup>102</sup> *National Strategic Framework for Children Infected and Affected by HIV/AIDS* (n 1) 3.

<sup>103</sup> Ibid 6.

<sup>104</sup> Ibid 7, 8.

<sup>105</sup> Internal Research Report: Summary – Chief Directorate Population and Development, [www.welfare.gov.za/Documents/2002/December/matrix.doc](http://www.welfare.gov.za/Documents/2002/December/matrix.doc).

<sup>106</sup> J Adams & M Claassens *The role of Poverty Relief and Home-based Care within the National Integrated Plan for HIV/AIDS*, Budget Information Service No 78, IDASA (14 September 2001) 10, [www.idasa.org.za/pdf/881.pdf](http://www.idasa.org.za/pdf/881.pdf).

<sup>107</sup> Sloth-Nielsen (n 1) 127. Sloth-Nielsen assesses the care models within the *Draft Strategic Framework for Children Infected and Affected by HIV/AIDS* and the *National Integrated Plan for Children Infected and Affected by HIV/AIDS* and criticises them for their failure to pay attention to the needs of child-headed households, as well as the limited allocation of resources to child-headed households.

<sup>108</sup> Ibid.

food security and nutrition programmes – is not as cost efficient and accessible to those most in need as the distribution of grants.<sup>109</sup> There is also much evidence (documented and anecdotal) from community-based organisations about the corruption which often surrounds and undermines these programmes.<sup>110</sup> Sloth-Nielsen proposes that the needs of child-headed households can only be met through an extension of the CSG or through the establishment of other grants and access mechanisms (mentor system), as recommended by the SALC<sup>111</sup>.

Although it does not have the status of government policy, it is also noteworthy that the Report of the Taylor Committee of Inquiry into a Comprehensive System of Social Security in South Africa recommended that: '[T]he Department of Social Development must, as a matter of urgency, make provision to support the growing number of orphans, especially those left in child-headed households'.<sup>112</sup> With regard to the provision of support to child-headed households, it strongly recommended the extension of the CSG to all children 0 – 18 years, a mentorship scheme for child-headed households, and a simplified process for child-headed households to access social grants. However, the report did not suggest what that process should be.<sup>113</sup>

## V. CONSTITUTIONAL OBLIGATIONS

In this chapter, the constitutional obligations of the State relevant to the provision of social assistance to child-headed households<sup>114</sup> will be analysed. The obligations of the State to provide social assistance to child-headed households arise under several constitutional provisions. Section 27 of the Constitution establishes the right of everyone to social security, including social

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<sup>109</sup> The general advantages of cash payments compared to in-kind schemes in alleviating poverty was also emphasised in the Lund Report (n 55) 91.

<sup>110</sup> See, for example, press releases from the Ministry for Social Development: *Minister Appeals to Political Formations not to Politicise Food Distribution* (7 October 2003); *Minister urges the South African Council of Churches (SACC) and Faith-based Organisations to Assist with the Monitoring of the Food Emergency Programme* (30 January 2004); *Department expresses shock at reports of food meant for the poor are rotting in a warehouse in KwaZulu-Natal* (31 March 2004). See also Goldblatt & Liebenberg (n 39) 2, citing the Lund-Report 9: 'Cash benefits on the whole are easier and cheaper to deliver than in-kind schemes...Furthermore, when delivered efficiently, they hold out greater possibilities than do most other development initiatives that resources will go into the pockets of the really poor, rather than being skimmed off by middle-men.'; see also Giese et al (n 1) 90-93.

<sup>111</sup> Other researchers query the appropriateness of the development of additional grants to those in existence, arguing that the extension and appropriate implementation of those that exist will better address the needs of children in need, including children who have been orphaned. See Meintjes et al (n 3).

<sup>112</sup> Taylor Report (n 91) 81.

<sup>113</sup> *Ibid.*

<sup>114</sup> For a comprehensive analysis of the constitutional obligations of the State in relation to social assistance for child-headed households, see W Lehnert *The Constitutional Right to Social Assistance for Child-headed Households in South Africa, Research Paper* (2003), University of the Western Cape (unpublished and on file with the author); and Goldblatt & Liebenberg (n 39). *South African Human Rights Commission: 4th Annual Economic and Social Rights Report: 2000 – 2002* Executive Summary 28-29. The South African Human Rights Commission, in its *4th Annual Economic and Social Rights Report: 2000 – 2002*, (hereafter 'SAHRC Report 2000–2002') commented that children in child-headed households are not able to apply for child grants without the assistance of adults, which is particularly problematic in light of the difficult situation of children living in child-headed households. The HRC recommended that the CSG should be extended to all children and the State should enable children in child-headed households, children living in the streets and refugee children to access social security.

assistance. In addition, section 28 of the Constitution protects the rights of children specifically in relation to their socio-economic needs and also in relation to their right to parental and family care. Section 9 – the equality provision – is also pertinent to the discussion at hand.

### **i. Section 27 (1) (c) – The right to social assistance**

The Constitution makes provision for the right of everyone (including children)<sup>115</sup> ‘to have access to [...] social security, including, *if they are unable to support themselves and their dependants, appropriate social assistance*’. [own emphasis added] The right to social security comprises of the right to social insurance and social assistance. Social insurance is based on contributory schemes; social assistance does not require any kind of contribution and is implemented through state grants.<sup>116</sup> Social grants make up the South African Government’s major poverty alleviation programme.<sup>117</sup>

The fundamental purpose of the right to social assistance is to ensure that persons living in poverty are able to access a minimum level of income, which is sufficient to meet basic subsistence needs, so that they do not have to live below minimum acceptable standards.<sup>118</sup> Per section 27 (1) (c), ‘everyone’ has the right to social security – including adults and children; and those who are ‘unable to support themselves and their dependants’ are entitled to social assistance.

Children living in child-headed households by and large, it is presumed, do not benefit from a system of social insurance and are ‘unable to support themselves and their dependants’ due to the situation of abject poverty within which they live, exacerbated by their orphanhood. They would therefore be prime target beneficiaries of state social grants. However, the State’s social assistance programme aimed at poor children, the Child Support Grant, targets children via their ‘primary care-giver’. The absence of an adult primary care-giver should therefore not remove the entitlement of children living in child-headed households to social assistance.

The State’s obligation in relation to the rights in sections 26 and 27, including the right to social assistance, is qualified by three elements. Firstly, the State has an obligation to take reasonable measures; secondly, the State’s obligation is limited by its available resources; and thirdly, the measures must be directed at the progressive – not immediate – realisation of the rights.

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<sup>115</sup> The right in section 27 (1) (c) is given to ‘everyone’ including children, despite the separate socio-economic rights provisions for children in section 28. See *Government of the Republic of South Africa v Grootboom and others* 2000 (11) BCLR 1169 (CC) paras 34, 74.

<sup>116</sup> S Liebenberg & K Pillay (eds) *Socio-Economic Rights in South Africa* (2000) 322. See also: L Lamarche ‘Social Security as a Human Right’ in D Brand & S Russell *Exploring the Core Content of Socio-Economic Rights: South African and International Perspectives*, Pretoria, Protea Bookhouse (2002); S Liebenberg ‘Social Security as a Human Right’ in A Blyberg & DJ Ravindran (eds) *A Circle of Rights. Economic, Social and Cultural Rights Activism: A Training Resource*, New York, International Human Rights Internship Programme/Asian Forum for Human Rights and Development (2000); MP Olivier, N Smit & ER Kalula *Social Security: A Legal Analysis*, LexisNexis Butterworths, Durban, 1<sup>st</sup> Edition, (2003); and M Scheinin ‘The Right to Social Security’ in A Eide, K Krause & A Rosas *Economic, Social and Cultural Rights: A Textbook*, Dordrecht, M. Nijhoff (1995).

<sup>117</sup> On the right to social assistance in the context of poverty and inequality in South Africa, see S Liebenberg ‘The Right to Social Assistance: The Implications of *Grootboom* for Policy Reform in South Africa’ (2001) 17 *SAJHR*, 232.

<sup>118</sup> See the White Paper for Social Welfare (February 1997), Chapter 7, para 27.

In *Grootboom*, the Constitutional Court elaborated the content of these requirements. It in particular focused on the fact that it is incumbent on the State to institute a *reasonable programme* to 'progressively realise' the socio-economic rights enumerated in sections 26 and 27. The court laid out a number of criteria against which to measure the 'reasonableness' of a government programme:<sup>119</sup> establish a co-ordinated and comprehensive programme that is 'capable of facilitating the realisation of the right'<sup>120</sup>; ensure that policies and programmes are reasonable both in their conception and their implementation<sup>121</sup>; and ensure that the programme does not 'exclude those in desperate need and living in intolerable conditions'<sup>122</sup>. It is argued that the lack of access to social assistance of child-headed households would fall foul of the Constitution on the latter two grounds in particular.

The court stated:

To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. [...] Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures at achieving realisation of the right. [...] If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.<sup>123</sup>

According to the above, the State is obliged to ensure that a programme realising the right to social assistance for children must consider the needs of the most vulnerable children. Children living in child-headed households, as discussed above, are particularly vulnerable due to the loss of parental care and the high levels of poverty which they experience – exacerbated by the fact that they have to fend for themselves. It is therefore incumbent on the State to ensure that children living in child-headed households are able to access its social assistance programme to provide for their basic subsistence needs. By these standards, the exclusion of this highly vulnerable group of children from the current state grants programme would arguably be unconstitutional.

The Constitutional Court's requirement that programmes must also be reasonable in their *implementation* of the socio-economic right, allows one to conclude that if the benefits of the government's social assistance programme do not reach the people who are eligible for such assistance, the programme may not pass constitutional muster and barriers to accessibility must be reduced.<sup>124</sup> Consequently, poor children who live in child-headed households should be able to access grants, in particular the CSG.

Although it is up to the legislature and the executive to decide upon 'the precise contours and content of the measures to be adopted', they must ensure that the adopted measures are reasonable.<sup>125</sup> In this case, it may be argued that the State may choose to rather provide goods in-kind like food, shelter and clothing, than make money available to children living in child-headed

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<sup>119</sup> *Grootboom* (n 115) paras 40–44.

<sup>120</sup> *Ibid* paras 40–41.

<sup>121</sup> *Ibid* para 42.

<sup>122</sup> *Ibid* paras 43–44, 68.

<sup>123</sup> *Ibid* para 44. The Constitutional Court reaffirmed these principles in *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (10) BCLR 1033 (TAC case) para 68.

<sup>124</sup> S Liebenberg 'The Right to Social Assistance: The Implications of *Grootboom* for Social Policy in South Africa' (2001) 17 *SAJHR* 241-245. See also Lehnert (n 114).

<sup>125</sup> *Grootboom* (n 115) para 41.

households. The question is whether the legislative and other measures taken by the State are reasonable as per the criteria mentioned above. The court stated that:

It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met.<sup>126</sup>

It is submitted that the general advantages of cash payments compared to in-kind schemes in alleviating poverty were enunciated in the Lund Report.<sup>127</sup> In addition, as outlined above, currently no other programmes for children in child-headed households that give children a similar legal entitlement and are equally broad in reach, exist.<sup>128</sup>

The second argument that may be levelled against the provision of social assistance to child-headed households is the fact that children would not be able to spend the money reasonably due to their limited level of maturity. Children's law, however, increasingly recognises the independence of children and the weight of their own decisions in their lives. This is evident in one of the central concepts of the international rights of the child, the principle of the 'evolving capacities of the child'. Central to this principle is the child's growing maturity, which has to be taken into consideration in decisions affecting them.<sup>129</sup> Under South African law, minors already have various rights and legal capacities, for example a child is able from the age of seven to enter into certain contracts with the consent of a guardian or parent; and there is a rebuttable presumption that the child is not accountable or criminally liable.<sup>130</sup> From the age of 10, a child must consent to his or her own adoption. Twelve is the age of puberty for girls, and for boys it is 14. At this age the child can enter into marriage, with the consent of his or her parents, as well as the Minister for Home Affairs.<sup>131</sup> From the age of 14 a child can also be a witness to a will, and there is a rebuttable presumption that the child is accountable for his or her unlawful acts and the child can consent to medical treatment without the consent of his or her parents<sup>132</sup>. From the age of 15, girls do not need the consent of the Minister of Home Affairs to marry. From the age of 16, a child can execute a will and may become – without assistance of his or her parents or guardian – a member of, or a depositor at, a financial institution.<sup>133</sup>

Thus, taking into account the extent of rights that minors in South Africa have, as well as the immense responsibilities that a child leading a households in fact already bears, it is argued that children – even though they are still legal minors – are in a position to control the money they would receive from the CSG, and they should be given the necessary capacity to do so. This, of course, should not be the case for all children, irrespective of age and level of maturity. Very young children leading a household will likely need support and supervision to reasonably spend

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<sup>126</sup> Ibid.

<sup>127</sup> See Goldblatt & Liebenberg (n 39) 2, citing the Lund Report 9: 'Cash benefits on the whole are easier and cheaper to deliver than in-kind schemes...Furthermore, when delivered efficiently, they hold out greater possibilities than do most other development initiatives that resources will go into the pockets of the really poor, rather than being skimmed off by middle-men.'; see also Giese et al (n 1) 90-93.

<sup>128</sup> See Liebenberg (n 124) at 9.

<sup>129</sup> Article 5 of the Convention on the Rights of the Child, General Assembly Resolution 44/25 (CRC); see G van Beuren *The International Law on the Rights of the Child* (1995) 50-51.

<sup>130</sup> CJ Davel *Introduction to Child Law in South Africa* (2000) 22.

<sup>131</sup> Ibid.

<sup>132</sup> Section 39 (4) (b) of the Child Care Act.

<sup>133</sup> Davel (n 130) 22.

the grant. Therefore a mentor system, as suggested in the draft Children's Bill<sup>134</sup>, where mentors are appointed to assist child-headed households, could be a reasonable solution.<sup>135</sup>

## ii. Section 28 – Children's rights

Section 28 of the South African Constitution provides an important benchmark for the protection of children, based on principles derived from international law on children's rights. The constitutional obligation of the State to provide social assistance, in particular, for child-headed households arises under several children's rights provisions, discussed below. Section 28 states:

- (1) Every child has the right-  
...
  - (b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
  - (c) to basic nutrition, shelter, basic health care services and social services;
  - (d) to be protected from maltreatment, neglect, abuse or degradation;  
...
- (2) A child's best interests are of paramount importance in every matter concerning the child.
- (3) In this section 'child' means a person under the age of 18 years.

### ***Section 28 (1) (b) – Right to family care or parental care, or appropriate alternative care***

Section 28 (1) (b) gives orphaned children a direct right against the State to provide them with *appropriate* alternative care.<sup>136</sup> This implies that the State functions as 'substitute parent', or 'primary care-giver'. Since the 'primary care-giver' receives the grants on behalf of the child, it could be argued that, in the absence of any other mechanism of direct access to the grant for these children, the State as 'primary care-giver' may access the grant on behalf of a child in a child-headed household. For this purpose, it is incumbent on the State to establish a system that would ensure the availability of the grant for the benefit of the child. The mentorship model, discussed below, is one such system.

The argument above is based on a broad interpretation of 'care' in section 28 (1) (b), as including obligations to provide direct forms of assistance, including social assistance, to ensure those children's continued survival and development.<sup>137</sup> The Constitutional Court in *Grootboom* placed a primary duty of support of children on their parents and families, and only alternatively, in default, upon the State.<sup>138</sup> The State thus incurs the primary obligation for the care of children where children are removed, orphaned, abandoned or lack a family environment. But what obligations and duties are placed on parents that would be transferred to the State upon their death?

The traditional concept of parental authority or power can be defined as:

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<sup>134</sup> See section 234 of the SALC Draft Children's Bill.

<sup>135</sup> See further discussion below in Chapter VII.

<sup>136</sup> *Grootboom* (n 115) para 77: '[...] a child has the right [...] to alternative appropriate care where [parental or family care] is lacking.'

<sup>137</sup> Lehnert (n 114) 12. See also Sloth-Nielsen, (n 1) 124.

<sup>138</sup> *Grootboom* (n 115) paras 75, 77.

'The sum of rights, responsibilities and duties of parents with regard to their minor children on account of their parenthood, and which rights, responsibilities and obligations must be exercised in the best interests of such children and with due regard to the rights of the children'.<sup>139</sup>

There are three aspects of parental power or authority: guardianship, custody and access. Under the common law in South Africa, the concept of 'parental power' or 'natural guardianship' refers to the lawful authority of one person over another and/or the property of another who suffers from incapacity to manage his or her own affairs. There are a couple of ways of interpreting guardianship, in a broad sense or in a narrow sense. In a broad sense, natural guardianship is a synonym for parental power, and in a narrow sense guardianship and custody are the two elements of parental power.<sup>140</sup>

Custody is the portion of parental power which pertains to the personal life of the child. It involves the nurture and upbringing of the child.<sup>141</sup> Custody of a child is closely connected with the duty to support, which means a duty to supply children with the necessary amenities of life, such as accommodation, food, clothing, education and medical care.<sup>142</sup> Section 41 of the Child Care Act<sup>143</sup> expresses the general principle that custody rights include the duty of support for the child.

The law states that parental power terminates upon the death of a parent or both parents, the child attaining majority, or an order of court depriving the parent of power. *Upon the death of both parents, the minor child has no legal or natural guardian*, unless the natural guardian has appointed a guardian in a will. There is thus no-one to legally control the child's daily life, administer the child's property, or supplement the child's limited legal capacity. The High Court can in such a case appoint a tutor to administer the child's property. Care and control of the minor's person would have to be provided by making an application to the High Court for the appointment of a guardian to the child's person (i.e. custodian), or make provisions for the custody of the 'child in need of care' under the Child Care Act.<sup>144</sup> A *curator ad litem* would be appointed to represent the minor in legal proceedings where a minor has no parent or legal guardian.

The High Court has common law power to act as upper guardian of all minors within its area of jurisdiction. The High Court may thus make any orders, including those mentioned above, to ensure that the 'best interests of the child' are served. The court can also at all times interfere with parental powers in the interests of children. In a way, one can thus say that the High Court is the representative of the State in its capacity as upper guardian of minors.

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<sup>139</sup> Visser & Potgieter *Introduction to Family Law*, 2<sup>nd</sup> edition (1998) 199.

<sup>140</sup> 'Parental power' vests equally in both parents of a child born in wedlock, whilst it is only the mother of an extra-marital child who automatically has parental power over such child. Where the unmarried mother of an extra-marital child is herself a minor, the guardianship (in the narrow sense, excluding custody) of that child vests in the mother's guardian or guardians while the mother has custody of her child. See section 1 (1) of the Guardianship Act 192 of 1993. See also sections 2, 8 (3) and 8 (4) (d) of the Recognition of Customary Marriages Act 120 of 1998.

<sup>141</sup> Section 3 of the Children's Status Act 82 of 1987.

<sup>142</sup> Visser (n 139) 209.

<sup>143</sup> Act 74 of 1983.

<sup>144</sup> B Van Heerden et al *Boberg's Law of Persons and the Family*, 2<sup>nd</sup> Edition, (1999), 323. Sections 11-15 of the Child Care Act 74 of 1983 concerning the custody of a child 'in need of care'.

In light of these legal issues, the argument that the State is the 'substitute parent' or 'primary care-giver' is thus reflected and strengthened. The rights and responsibilities which fall on the State with respect to orphaned children therefore also include a 'duty of support' to these children. The duty of support is the duty of parents to support their children with the bare necessities of life, including shelter, medicines, health care, education, religious instruction, food and clothing. It will be argued with different emphasis below that it is thus incumbent on the State to provide financial and other support to orphaned children to ensure their survival, development and growth just as it would have been incumbent on the parents to do so.

It is argued that this obligation is not subject to progressive realisation over time, nor to the constraints of available resources that qualify other socio-economic rights; the reason being that there are no similar textual qualifications to the rights in section 28.

***Section 28 (1) (c) – Right to basic nutrition, shelter, basic health care services and social services***

The socio-economic rights of children enumerated in section 28 (1) (c) are textually speaking, not qualified by the same limitations of availability of resources and 'progressive realisation' as those in sections 26 and 27. The Constitutional Court, however, refused to interpret these rights as independent and unqualified rights for children but regarded them as closely linked to the socio-economic rights of everyone articulated in sections 26 and 27. Yacoob J in *Grootboom* stated that, while the primary responsibility for supporting children lies on parents and families,<sup>145</sup> he considered that the State bears the primary responsibility with respect to children who are abandoned, orphaned or removed from their families.<sup>146</sup> Therefore, where children are orphaned and living alone without adults, it is the State's obligation to adopt measures to ensure fulfilment of its primary obligation to support these children. The Constitutional Court reaffirmed the position in the TAC case: that section 28 (1) (c) can indeed create duties for the State and independent rights of children who lack parental care.<sup>147</sup>

The state is obliged to ensure that children are accorded the protection contemplated by section 28 that arises when the implementation of the right to parental or family care is lacking... [Mothers] and their children are in the main dependent upon the state to make health care services available to them.

This strongly supports the argument that the State has an obligation to provide nutrition, shelter, health care and social services for children living in child-headed households who lack parental care. Although section 28 does not specifically include children's rights to social security or social assistance, it is under this provision that the State is obliged to provide for the basic needs of children. The questions which arise are: a.) whether there is an obligation on the State with respect to the provision of social assistance – specifically in the form of the provision of a grant – under section 28 (1) (c) to children in child-headed households? And if so, b.) within which right would it be possible to make such an interpretation of the right to social assistance: (1) as a means to realise the rights to nutrition, shelter and basic health care; or (2) as a part of the right to 'social services'?'<sup>148</sup>

<sup>145</sup>The intersection between section 28 (1) (b) and section 28 (1) (c).

<sup>146</sup> *Grootboom* (n 115) para 79.

<sup>147</sup> *TAC* (n 123) paras 73-78.

<sup>148</sup> See also Lehnert (n 114) 10.



Firstly, according to Sloth-Nielsen, the State has a duty to ensure that children in child-headed households are provided with the resources necessary for their survival and development. The duty can, however, be implemented via the payment of grants *or* the direct provision of food and clothing, or relief from payment of school fees (and the like).<sup>149</sup> The State could thus choose which poverty alleviation mechanism to initiate to support the children. If it could be shown that children in child-headed households were provided with appropriate basic shelter, delivered food parcels and provided with free basic health care, the State would not need to discharge its duty via the provision of social grants to these children.

The State could thus either choose to place these children in state institutional care instead, and thereby provide them with food, shelter and health care, or provide each of the goods in-kind to the households. One would thus have to evaluate whether the State's support to child-headed households does in fact encompass these. Based on the analysis of government policies and programmes above, the provision of goods in-kind is clearly not in place.<sup>150</sup> Institutional state support, on the other hand, is also not the solution for the following reasons: it is not necessarily appropriate in all circumstances; it may be more costly for the State; may require taking children out of their communities (not recommended above); and the fact that the State has stopped funding many children's homes across the country, who are now struggling to help orphaned children.

Therefore, in lieu of the above, the need for financial support from the State for child-headed households arises. Child-headed households live in particularly difficult circumstances since they can not rely on income – however small – from their care-givers. It is argued that the State must provide social assistance to children in child-headed households as a way to ensure the realisation of the rights to basic nutrition, shelter and basic health care. Social assistance would likely be the only form of income on which they could rely to buy food and meet other basic needs.<sup>151</sup>

Secondly, the right to social assistance could be interpreted within the construction of the right to 'social services'. 'Social services' is an ambiguous phrase which allows for various interpretations. Unfortunately, the right to 'social services' for children as stated in section 28 (1) (c) of the Constitution has not yet been interpreted by South African courts, but there have been a number of academics who have attempted its interpretation and they can provide us with some guidance. De Wet draws on UNICEF criteria in the search for guidelines on how to interpret the right of the child to 'social services' and concludes that 'basic services' such as water, sanitation and adequate day care would seem to be compatible with 'social services'.<sup>152</sup> Liebenberg and Pillay link the right to 'social services' to 'social security' and 'social assistance' and interpret the child's right to 'social services' based on the UN Convention on the Rights of the Child, which comprises the following: protection of children from physical or mental abuse or neglect; protection and assistance to children temporarily and permanently separated from their families;

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<sup>149</sup> Sloth-Nielsen (n 1) 122.

<sup>150</sup> It could also be argued that the provision of social grants is a more effective poverty alleviation mechanism compared to the provision of goods in-kind. See above notes 105 and 106 for discussion on grants being more effective than in-kind benefits. See also: Lund Report (n 55) 91; Lehnert (n 114) 10; Goldblatt & Liebenberg (n 39) 2; Giese et al (n 1) 90-93.

<sup>151</sup> It could be argued that the small amount of the CSG (R170 in 2004) would not be sufficient to provide the proper nutritional support that a growing child would need. See J Streak, *Child poverty in South Africa and implications for policy: Using indicators and children's views to gain perspective*, Children's Budget Unit, Budget Information Service, IDASA, forthcoming 2004.

<sup>152</sup> E de Wet, *The Constitutional Enforceability of Economic and Social Rights* (1996) 107.

assistance to children with disabilities; and protection of children from economic exploitation, drug abuse, sexual exploitation and abuse.<sup>153</sup>

Sloth-Nielsen analyses section 28 (1) (c) and says that there would appear to be two possible approaches to the scope and meaning of the right to 'social services'. The first would be to interpret this right broadly to include rights that properly fall under the category 'social spending'. This would include nutrition, basic sanitation, basic education and primary health care, and a safe, caring, diverse and stimulating environment, which brings into play matters such as child development. The narrower view, by contrast, would focus more pertinently on developmental social welfare programmes and services as normally provided by the Department of Social Development. Sloth-Nielsen is of the opinion that the *Grootboom* case weights the choice in favour of a welfarist reading of the right to 'social services', as opposed to the unbounded environmental and community development reading.<sup>154</sup> She does not indicate whether it includes the right to social assistance.

It is therefore suggested that the right to social services in section 28 (1) (c) constitutes a duty of the State, and respectively a right of children to social welfare services which arises only in cases of children lacking a family environment, based on the Constitutional Court's interpretation.<sup>155</sup> This would mean that children in child-headed households would have a direct right to social services but not necessarily to social assistance in the form of social grants. It is submitted that it would be difficult to base a right to social assistance on section 28 (1) (c) because it would require a very broad interpretation of 'social services' and would not make sense that the drafters of the Constitution would use two different terms for the same concept.

### ***Section 28 (1) (d) – Right to be protected from maltreatment, neglect, abuse or degradation***

Finally, a claim to social assistance for children could be based on section 28 (1) (d) which provides a right 'to be protected from maltreatment, neglect, abuse or degradation.' The Constitutional Court in *Grootboom* stressed the constitutional obligation which rests upon the State to protect children from 'maltreatment, neglect, abuse and degradation'.<sup>156</sup> The court said:

[78] This does not mean, however, that the state incurs no obligation in relation to children who are being cared for by their parents or families. In the first place, the state must provide the legal and administrative infrastructure necessary to ensure that children are accorded the protection contemplated by section 28. This obligation would normally be fulfilled by passing laws and creating enforcement mechanisms *for the maintenance of children, their protection from maltreatment, abuse, neglect or degradation, and the prevention of other forms of abuse* of children mentioned in section 28. [Own emphasis added]

It may therefore be possible to read a broad interpretation of this section, such as that inspired by the Constitutional Court, to include all forms of physical or emotional ill-treatment.<sup>157</sup> Children in child-headed households have been reported to experience various forms of maltreatment, in

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<sup>153</sup> Liebenberg & Pillay (n 116) 315.

<sup>154</sup> J Sloth-Nielsen 'The Child's Right to Social Services, The Right to Social Security, and Primary Prevention of Child Abuse: Some Conclusions in the Aftermath of *Grootboom*' *SAJHR* Vol 17 Part 2 (2001) 210-231.

<sup>155</sup> *Ibid* 226.

<sup>156</sup> *Grootboom* (n 115) para 78.

<sup>157</sup> Sloth-Nielsen (n 154) 221.

addition to the vast psychological and material problems that many of them experience.<sup>158</sup> Exacerbated by the fact that they do not have adult care-givers to provide them with income and protect them from exploitation, they may also be forced to engage in particularly harmful and inappropriate income generation activities such as prostitution or other forms of prohibited child labour. Under these circumstances, they are also more vulnerable to physical and sexual abuse.<sup>159</sup>

This serves to illustrate the link between poverty and child ill-treatment<sup>160</sup>: it follows from this connection that poverty alleviation is an extremely important measure to prevent the ill-treatment of children. The provision of social grants for children is one of the most effective measures for poverty alleviation<sup>161</sup> and is therefore at least an indirect contribution to the realisation of their rights under section 28 (1) (d).<sup>162</sup> Therefore, it could be argued under this section that the State has an indirect duty to provide social assistance to children in child-headed households because the provision of grants to these especially vulnerable children would considerably reduce their degree of maltreatment, neglect, abuse and degradation.

### iii. Section 9 – Equality

The right to equality in section 9 (1) states that ‘everyone is equal before the law and has the right to equal protection and benefit of the law’. Section 9 (3) prohibits unfair discrimination<sup>163</sup> by the State ‘directly or indirectly’ on the basis of a list of grounds: race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth, and possibly other unlisted grounds.<sup>164</sup> Section 9 (5) creates a presumption of unfairness if a claim of unfair discrimination is made on the basis of a listed ground. The State then has the responsibility to establish that the discrimination was not unfair (or that the discrimination was not in fact based on the listed ground alleged).

Under section 9 (3) there are a number of listed grounds of unfair discrimination that appear applicable to the present issue of denying minor primary care-givers access to grants. The most obvious ground of unfair discrimination is ‘age’. As indicated above, the Act sets no age limit for a ‘primary care-giver’. The fact that a ‘primary care-giver’ is a minor does not mean that she or he is not fulfilling the functions of a ‘primary care-giver’. It would thus be unfair discrimination to give a grant to a 21-year-old but deny it to a 16-year-old or even a 14-year-old who is in fact performing the functions of a ‘primary care-giver’. It has been established above that children heading households bear the same burden of responsibilities over themselves and over other children in their care, that adults would.

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<sup>158</sup> Thandanani Report (n 12) 21-22.

<sup>159</sup> See for example NMCF Report (n 5) 5-6; SAHRC Report 2000–2002 (n 114) 28.

<sup>160</sup> Sloth-Nielsen (n 154) 221-224, 227.

<sup>161</sup> See Liebenberg ‘The Right to Social Assistance: The Implications of Grootboom for Social Policy in South Africa’ (2001) 17 *SAJHR* at 254. See also Minister Trevor Manuel in his Budget Speech 2003: ‘Social assistance grants provide critical income support to vulnerable groups – the elderly, young children and people with disabilities. This is our largest and most effective redistribution programme.’

<sup>162</sup> Lehnert (n 114) 13.

<sup>163</sup> The test for unfair discrimination is set out in *Harksen v Lane NO and others* 1998 (1) SA 300 (CC) para 38.

<sup>164</sup> See Goldblatt & Liebenberg (n 39). The Constitutional Court found there to be unfair discrimination on the basis of the unlisted ground of citizenship in *Larbi-Odam v MEC for Education (North-West)* 1998 (1) SA 745 (CC).

The listed ground of 'social origin' may also be the basis for claiming that the State is unfairly discriminating against minor 'primacy care-givers' by not giving them access to social grants. The context of poverty, HIV/AIDS and migrancy experienced by many children, forces them to look after and take financial and other responsibilities for other children. The failure to recognise this and assist such children is to discriminate unfairly against them because they come from poor backgrounds.<sup>165</sup> In this instance, the State is not merely discriminating against the minor 'primary care-givers' but also the children whom they are looking after, since the CSG is supposed to 'follow the child' and the 'primary care-giver' is merely the conduit for receiving the grant on behalf of the child.

It might also be argued that there is unfair discrimination on the ground of 'birth', since most of the children living in child-headed households have been orphaned due to the onslaught of HIV/AIDS.<sup>166</sup> Again this discrimination, it is argued, is being levelled at the minor 'primary care-givers' and the other children in the household.

Furthermore, it is submitted that this discrimination would be deemed unfair based on the 'family status' or 'socio-economic status' of the children under South Africa's equality legislation, the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.<sup>167</sup> 'Socio-economic status' could be used in a similar manner to the ground of 'social origin'. 'Family status' discrimination arises because of the type of family that a person comes from, for example children whose parents have died of AIDS, or who are looked after by children, or who are orphans and are treated unfairly as a result of this status.<sup>168</sup>

In rebutting the presumption of unfairness, the State might argue issues of law and principle regarding the legal age of majority and the inability of children to take responsibility for controlling and using money on behalf of other children. This issue could be responded to in terms of the 'evolving capacities of the child' principle outlined above. Taking into account the adult responsibilities that children living in child-headed households in fact already bear, it is argued that children – even though they are still legal minors – are in a position to control the money they would receive, and that they should, by law, be accorded the necessary capacity to do so. Since they are already *de facto* bearing the burden of those responsibilities, it is thereby incumbent on the State to ensure that child heads of households can adequately look after the children in their care by providing them – the 'primary care-givers' – and the children in their care with the financial resources to do so more effectively.

This, of course, should not be the case for all children, irrespective of age and level of maturity. The State might very well raise the problem of the lack of a cut-off age for which a CSG can not be given directly to a child. Very young children leading a household will likely need support and supervision to reasonably spend the grant. Therefore a mentor system, as suggested in the Draft

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<sup>165</sup> Goldblatt & Liebenberg (n 39) 11.

<sup>166</sup> See figures outlined in Chapter II above.

<sup>167</sup> The Act's list of prohibited grounds are the same as those found in s 9 (3) of the Constitution. The Act however contains five additional grounds that may be included in the list of prohibited grounds after consideration by the Equality Review Committee and the Minister of Justice. At the time of writing, the Minister had not yet decided whether any of these grounds should be included as prohibited grounds. 'Family status' is an additional ground of discrimination listed in the *Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000*.

<sup>168</sup> Goldblatt & Liebenberg (n 39).

Children's Bill<sup>169</sup>, according to which mentors are appointed to assist child-headed households, could be a reasonable approach in such cases.<sup>170</sup>

## VI. THE CHILD'S RIGHT TO SOCIAL ASSISTANCE IN INTERNATIONAL LAW

The right to social security, including the right to social assistance, is recognised in various international and regional instruments. Article 9 of the *International Covenant on Economic, Social and Cultural Rights (ICESCR)* guarantees the right to 'social security, including social insurance'.<sup>171</sup> Since this clause does not suggest a right to social assistance to meet basic subsistence needs, some scholars have argued that this right could be interpreted from Article 11 of the ICESCR which recognises the 'right to an adequate standard of living, including adequate food, clothing, and housing, and the continuous improvement of living conditions'.<sup>172</sup> In contrast to other socio-economic rights however, it is rather underdeveloped and the content is less clear.<sup>173</sup> In any event, the relevance of the general right to social security is limited in the South African context, since South Africa has merely signed but not ratified the Covenant on Social, Economic and Cultural Rights and is therefore not bound by obligations under it.

With respect to the rights of children in child-headed households specifically, the almost universally recognised *Convention of the Rights of the Child (CRC)*<sup>174</sup> is more pertinent. Although the Convention does not contain an explicit right to social security, it recognises in Article 27 (1) the 'right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.' Moreover, according to Article 27 (3), states are obliged to 'assist parents and others responsible for the child to implement the right'. In light of the growing phenomenon of child-headed 'families', heads of those households should be included in the interpretation of 'others responsible for the child'.

This interpretation is supported by the emphasis which the *Committee on the Rights of the Child* placed on the need for special protections for orphans and children in child-headed households in its recent General Comment on 'HIV/AIDS and the Rights of the Child' where it stated:

'Special attention must be given to children orphaned by AIDS, children from affected families, including child-headed households, as these impact on vulnerability to HIV infection. ... The Committee wishes to underline the necessity of legal, economic and social protections for affected children to ensure their access to education, inheritance, shelter, health and social services .... In

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<sup>169</sup> See section 234 of the bill.

<sup>170</sup> See further discussion below in Chapter VII.

<sup>171</sup> Article 10 of the ICESCR concerns the protection of the family and mentions specifically social security benefits during maternity leave. Article 10 (3) requires states to undertake special measures of protection and assistance for children and young persons. The ICESCR is guided primarily by the International Labour Organisation and thus focuses on social security in the narrow sense of income-based and situation-based cash benefits for workers and their families. See also Article 25 of the Universal Declaration of Human Rights; Article 5 (e) (iv) of the Convention on the Elimination of All Forms of Racial Discrimination and Article 11 (1) (e), 11 (2) (b), Articles 13 (a) and 14 (2) of the Convention on the Elimination of All Forms of Discrimination of Women.

<sup>172</sup> See Liebenberg (n 124) 214; and Scheinin (n 116) 162-163.

<sup>173</sup> Ibid.

<sup>174</sup> General Assembly Resolution 44/25.

this respect, States parties are reminded that these measures are critical to realisation of the rights of children and to give them the skills and support necessary to reduce their vulnerability and risk of becoming infected.’<sup>175</sup> [Own emphasis]

Furthermore, the more general right to survival and development in Article 6 (2) of the CRC is also relevant. The Committee interpreted this particular section to include a right ‘to benefit from economic and social policies which will allow them to survive into adulthood and develop in the broadest sense of the word.’<sup>176</sup>

The Children's Rights Committee in making its observations under the CRC has also specifically emphasised South Africa's obligations under international law to reduce the number of child-headed households and to provide those in existence with adequate support.<sup>177</sup>

Finally, it is interesting to note that there is no express provision that recognises the right to social security in the *African Charter on Human and People's Rights*. Certain aspects of the right may, however, derive from the socio-economic rights provisions.<sup>178</sup> It does also mention, in Article 18, the duty of the State to protect the family unit and to ‘take care of its physical health and moral health’. Articles 18 (2) and (3) go further in placing obligations on the State to ‘assist the family’ and ‘ensure the protection of the rights of ... the child as stipulated in international declarations and conventions’. The child's right to survival, protection and development in Article 5 of the *African Charter on the Rights and Welfare of the Child* could also be invoked.

## VII. MAKING SOCIAL GRANTS AVAILABLE TO CHILD-HEADED HOUSEHOLDS

A mechanism allowing child-headed households to access and benefit from social assistance must be designed. A number of options are available and have been outlined above. In this regard it is important to discuss the most appropriate and effective measure in the circumstances and based on the real and varied contexts in which these children live. It must be borne in mind that we are trying to address mechanisms for channelling financial assistance to children in the context of their living without adult care-givers, and the need to recognise the legitimacy and necessity of that form of existence. Two possible mechanisms will be examined: the mentorship model and children accessing grants directly.<sup>179</sup>

In determining the ideal avenue to take, the best interests of the child are of paramount concern and have been primarily considered in identifying the mechanism discussed below. A number of factors mentioned in the literature and research on the context of child-headed households and children infected and affected by HIV/AIDS provide direction in assessing what the best interests of these children may be in these circumstances. These factors include the following: a.) that it is

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<sup>175</sup> Committee of the Rights of the Child, General Comment No 3 ‘HIV/AIDS and the Rights of the Child’ para 28.

<sup>176</sup> *Ibid* para 9.

<sup>177</sup> *Concluding Observations of the Committee on the Rights of the Child: South Africa*. 23/02/2000, CRC/C/15/Add.122, para 22, [www.communitylawcentre.org.za](http://www.communitylawcentre.org.za).

<sup>178</sup> Articles 14-18.

<sup>179</sup> The inappropriateness of foster care and in-kind support in the form of food programmes has been dealt with in Chapter IV.

generally in the best interests of children to remain together with their siblings; and b.) that it is generally in the best interests of children to remain in their communities.

### **i. Recognition of 'child-headed households' as a family form**

In the first place, it is submitted that the reality of South African society necessitates a recognition and definition of 'family' that goes beyond the context of the nuclear family form and even the extended family form and recognises the existence of child-headed households as a current – and possibly growing – phenomenon. The development of appropriate programmes and policies to serve the needs of children living in this environment would best be addressed by this recognition and not by misguidedly eliminating all existence of such a family form. A denial of such existence, and worse, a presumption that such family forms are entirely negative and thus should be eliminated, ignores the reality of children's experiences and consideration of their best interests.

The recommendation of the SALC that legal recognition be given to child-headed households as a placement option for orphaned children is thus supported. The Children's Bill should incorporate such a provision and any court making this order should try to ensure that suitable adult support will be available. Support structures, e.g. regular visits by community workers should be put in place to support the functioning of the child-headed households.

### **ii. Mentorship model**

It is further submitted that while some children may have to cope with living without any adult intervention, it would be preferable for the State to put in place external mechanisms to support children living without adults. In particular, the external mechanisms must ensure that these children are able to access social grants from the State. The mentorship scheme embodied in the SALC draft Children's Bill, as discussed above, is thus supported.<sup>180</sup>

Legal recognition should be given to mentorship schemes in terms of which one or more appropriately selected and mandated adults are appointed as 'household mentors' over a cluster of child-headed households by the Department of Social Development, a recognised NGO or the court (children or family court). The 'household mentor' may access grants and other social benefits on behalf of the child-headed household but it may not make decisions in respect of the children without giving due weight to their opinions as appropriate to their capacity and to the opinion of the child at the head of the household. To prevent fraud and abuse, the 'household mentor' would be accountable to the Department of Social Development or a recognised NGO or the court (children or family court).

'Mentors' could act as care-taker parents to 3 – 5 families of children living without adults. Each care-taker parent should visit the children on a regular basis and ensure that they have adequate shelter, food, clothing and health care, and are attending school and have access to adult attention. Members of NGOs could be responsible for identifying children in need in their neighbourhood as well as identifying who could act responsibly as a 'mentor'.

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<sup>180</sup> SALC Draft Children's Bill 2002, section 234.

The issue as to what age and under what conditions a court will allow a child to 'head' a household should not be the critical issue. Instead, a child should be considered to be the 'head' of a household if he/she is old enough and sufficiently mature to be entrusted with total responsibility for his or her siblings. An assessment of the child's level of maturity and whether it is in the best interests of all the children in the household concerned for it to remain a child-headed household must be conducted by a social worker or children's court worker. Caution must be taken in not setting up too onerous a system which makes it equally cumbersome and impossible for these children to access social assistance under the proposed system as it already is under the current system. The current well-established overload on social workers<sup>181</sup> must be borne in mind and alternative arrangements made possible.

An important motivation for the support of the mentorship model is that in many ways it mirrors the response by the community to the presence of children living independently in their neighbourhood, which has generally been that children are monitored and do receive some degree of supervision and support. The intensity of the supervision is usually determined by the ages of the children - the younger they are the more frequent the visits to the house - whilst the nature of the support is also determined by the socio-economic status of their community.<sup>182</sup> The advantages and disadvantages of this model are similar to those experienced by children living independently. However, with some degree of adult supervision and support, the problems may be reduced.

Secondly, it is submitted that it is in the best interests of siblings who have collectively suffered the loss of parental care to remain living together even if this means being without adult caregivers, so as to continue to have the support and relationship of the sibling group wherever possible.<sup>183</sup>

### **iii. Children as 'primary care-givers'**

Nothing in the Social Assistance Act legally precludes children over the age of 16 from receiving the CSG on behalf of other children for whom they act as the primary care-givers. This means that children could receive grants on behalf of eligible children and manage and administer the money on behalf of the other children whom they look after. However, for children under the age of 16 it is not possible to collect grants as 'primary care-givers', as they are required to produce identification documents.<sup>184</sup>

It is submitted therefore that a flexible approach should be adopted whereby children who are primarily caring for other children are entitled to access directly the CSG on behalf of those children under their care. This will also ensure that they have other options where children do not have access to the mentorship scheme proposed above. The Regulations to the Social Assistance

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<sup>181</sup> SALC Discussion Paper (n 36) Chapter 17, 715. Giese et al (n 1) 79-89; and Meintjes (n 3) 16, 22-30. See also press release from the Ministry of Social Development, *Minister Skweyiya and the Dutch Reformed Church agreed to form a partnership to fight HIV/AIDS, poverty and register children for birth certificates and social grants* (25 September 2003). The Minister of Social Development, Dr Zola Skweyiya met with a delegation of the Dutch Reformed Church meeting where they noted the disparity that exists in the conditions of remuneration of social workers who work for the church and the government, as well as the need for the improvement of the overall conditions of social workers in the country.

<sup>182</sup> SALC Discussion Paper (n 36) 551.

<sup>183</sup> *Ibid* 561.

<sup>184</sup> Reg 9 (1) to the Social Assistance Act 59 of 1992. Section 3 of the Identification Act 68 of 1997.



Act should specifically stipulate that children who are *de facto* the 'primary care-giver' over other children may access grants directly on behalf of other children. It is also important that administrative barriers to child-headed households accessing existing grants introduced through the recent amendment bill should be removed through further amendments to the Social Assistance Act.<sup>185</sup> This should be cross-referenced to the scheme in the Children's Bill.<sup>186</sup> In particular, the age limitation in the definition of 'primary care-giver' must be removed, as well as the requirement that the 'primary care-giver' produce an identification document.

## VIII. CONCLUSION

It has been argued above that the State is constitutionally obliged to ensure that its primary poverty alleviation programme – the Child Support Grant – is accessible to the most vulnerable children in South Africa, including children living in child-headed households. The strongest arguments for that duty can probably be drawn from section 9, section 27 and 28 (1) (b) in the Constitution. It is further submitted that the State does not have sufficient justification for denying children who are acting as primary care-givers access to social grants on behalf of children in their care. A number of options have been raised above, which the State could implement in order to comply with its obligations. The most appropriate and effective model must be one that takes into account the reality of the lives of this group of children.

The resolution of the problem is complex but it is important in deciding what to provide, to take into account that the best interests of the child are paramount. In considering what the best interests are, it is also crucial to take into account what the children see as best for themselves.<sup>187</sup> It is therefore submitted that the State must allow children functioning as factual primary care-givers to have direct access to the Child Support Grant, both on behalf of their siblings and themselves. This option clearly requires the least resources and is easiest to implement. As many children who are *de facto* the heads of households would probably be mature enough to spend the money reasonably and in the best interests of both their siblings and themselves, as argued above, there would be no need to lay down a certain minimum age.

In addition, the State should implement the mentorship scheme proposed by the draft Children's Bill for child-headed households who are legally recognised. According to the bill, each legally recognised child-headed household would function under the general supervision of a mentor who would also be responsible for the collection and administration of state grants on their behalf. In the author's opinion, the mentor system combined with children being able to access grants directly if they are the *de facto* head of a household, is a reasonable and necessary strategy for ensuring that child-headed households are able to access social assistance.

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<sup>185</sup> Section 1 Social Assistance Act 2004 (n 69).

<sup>186</sup> SALC Draft Children's Bill section 341 (2): 'The social security scheme mentioned in sec. 339 must be administered in such a way as to ensure, in particular, that the child grant...(a) reaches child-headed households ....'

<sup>187</sup> SALC Discussion Paper (n 36) Chapter 3, 37.

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# children's institute

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Research • Advocacy • Education

46 Sawkins Road, Rondebosch, Cape Town, 7700

Tel. 021- 689 5404 Fax. 021-689 8330

E-mail: [ci@rmh.uct.ac.za](mailto:ci@rmh.uct.ac.za) Web: <http://web.uct.ac.za/depts/ci/>



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