

## CHAPTER 17

### FOSTER CARE

#### 17.1 Introduction

Within the formal child care system in South Africa, foster care is normally considered to be the preferred form of substitute care for children who cannot remain with their biological families and who are not available for adoption. This reflects the belief that the family is normally the environment most suited to the healthy growth and development of the child. Many thousands of South African children have benefitted from court-ordered foster care. It is, however, doubtful whether this form of care as provided for in the Child Care Act of 1983 can adequately deal with the country's changing needs. At present, there are approximately 50 000 children in court-ordered foster care in South Africa, and social workers are having difficulty in finding sufficient foster families.<sup>1</sup> It is estimated that four out of five families will need to take in a child unrelated to them in order to cope with the sheer numbers of AIDS orphans.<sup>2</sup> This is a most improbable scenario and one which would not be suitable for all the children concerned. The need thus arises to examine alternative forms of family care.

#### 17.2 Conceptualising foster care

##### 17.2.1 Problems of definition

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1 **South Africa's children made vulnerable or orphaned by AIDS** Report on a workshop held in Cape Town on 28 September 2000.

2 Ibid.

Fostering is probably the most widely practised form of substitute care for children world-wide. There are many different kinds of fostering, and definitions of 'foster care' vary internationally. A review of foster care in twenty-two countries found considerable diversity in the way fostering is both defined and practised. Kinship foster care, which is the most common form of fostering in Africa, is not defined as 'foster care' in all countries. In Ireland, for instance, only children placed with non-relatives are said to be 'fostered'. In some countries foster care is defined as applying only to children placed through official channels, whereas in others it includes children living in informal arrangements. In some countries foster care is seen strictly as a temporary arrangement, whereas in others the norm is for long-term and quasi-adoptive placements.<sup>3</sup> Given these diversities, Colton and Williams suggest the following inclusive definition of foster care:

Foster care is care provided in the carers' home, on a temporary or permanent basis, through the mediation of a recognised authority, by specific carers, who may be relatives or not, to a child who may or may not be officially resident with the foster carers.

### 17.2.2 Current Law and Practice

Foster care is defined neither in the Child Care Act, 1983, nor in the regulations to the Act. The terms 'foster child' and 'foster parent' are, however, defined.<sup>4</sup> A children's court which is satisfied that a child is a child in need of care 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>5</sup> Thus, a child can only be placed in foster care, as legally defined, by means of a children's court order. The Child Care Act makes no distinction between foster care by non-relatives and care by relatives, or 'kinship care'.

Court-ordered foster care as it currently exists in South Africa reflects two broad scenarios. In the first, children who have come to the attention of the courts due to abuse, neglect or abandonment are placed with people unknown to them who have come forward or been recruited from the

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3 M Colton and M Williams 'The nature of foster care: international trends' (1997) in **Adoption and Fostering** 21(1) 44 - 49.

4 'Foster child' is defined in the 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'. In terms of the Act, 'foster parent' means 'any person, except a parent or guardian, in whose custody a child has been placed ...'.

5 Section 15(1)(b) of the Child Care Act, 74 of 1983.

community, usually by child and family welfare NGOs, specifically to carry out the task of caring for children in need. These people will have gone through an assessment process and may have participated in a structured orientation or training programme of some kind. Such placements are, or should be, associated with a permanency plan including services to the biological family where possible, and with efforts either to return the child to their care where feasible, or to settle the child in an alternative permanent arrangement in due course.

In the second scenario, members of an extended family have taken in a child who is destitute after the death of or abandonment by one or both biological parents, or due to some form of incapacity on their part. When these caregivers come before the courts it is frequently to access financial assistance, as many such people are poor. Often they are the grandparents of the children and are themselves pensioners. The children concerned may remain with the relatives indefinitely, often throughout childhood. At present such arrangements make up a substantial proportion of the caseloads of many child and family care social workers.

In probably the majority of cases, children in substitute family care in South Africa do not go through a children's court enquiry, but are simply absorbed into the extended family system. These arrangements are agreed between individuals without recourse to formal rules and regulations.<sup>6</sup> This raises the issues of whether legal recognition should be given to informal kinship care, and how the extended family system could be strengthened to absorb the vast number of children who stand to be left parentless due to AIDS and other factors. Where children are cared for by relatives without an order of court, these caregivers are not officially appointed custodians or foster parents, and are therefore unable to access the foster care grant. The caregivers also do not have any form of guardianship over the child, and may have difficulty carrying out certain responsibilities as a result.

However, the use of the foster care system as an 'income maintenance' measure to assist families who care for the children of relatives has become a well-established child welfare practice. Social workers have used the foster care grant to obtain state support for relatives caring for children in the absence of other forms of state assistance. This has made kinship care a viable option for many families who would otherwise have been unable to maintain the children concerned. At the

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6 M C Harber **Social policy implications for the care and welfare of children affected by HIV/AIDS in KwaZulu-Natal** (1998) Master thesis, University of Natal, Durban.

same time it has placed a burden on the formal foster care system in terms of legal requirements for ongoing social work services and regular reporting obligations. There is also concern that, following the demise of the state maintenance grant and the limiting of the child support grant to children aged less than seven years, an incentive may have been created for children to be placed in formal foster care with relatives. This may, for an impoverished family with no access to state financial aid, be a more viable option than having the children remain in their own homes.

There is reluctance by some commissioners of child welfare to make orders placing children in the long-term foster care of relatives. This seems to be due to a reluctance for the court process to be used primarily as a means to access financial help, in cases where children are already in the long-term care of relatives. Objections have been raised to the effect that this is not the purpose of foster care, which is intended to be temporary measure and to be accompanied by services aimed at placing the child in permanent care. In addition, it is believed that children should not be before the court for purely financial reasons.<sup>7</sup>

There is also apparently reluctance by some officials of provincial Departments of Social Development to process requests for children to be placed in the long-term care of relatives. This could be due to the objections of the local commissioners; it could also reflect a concern about creating unmanageable pressure on overstretched social work caseloads and on provincial social security budgets. Apparently there is a tendency to try to channel applicants to the Child Support Grant rather than towards the court process; however this is of course of no help where the children concerned are over six years of age. The amount involved is also much smaller.

There seem to be regional differences in approach to this issue. At present 42% of all foster care grants are being paid in two provinces, namely the Eastern Cape and the Western Cape. In the Northern Province and the North West Province, fewer than 2000 foster care grants are being paid, despite the fact that the Northern Province is one of the most populous provinces as regards children. This has long been the case – for instance prior to 1994 there were provinces in which Black children were never brought before the children’s court for placement with relatives – qualifying caregivers were instead given the tiny ‘Granny Grant’ (so-called) – which was the child’s portion of the old Maintenance Grant. In other parts of the country, especially where child welfare

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7 See D van Greuning ‘Foster care placements: Section 15(1)(b) of the Child Care Act 74 of 1983: The legal problem’ (1998) Vol. 1 No. 3 **The Judicial Officer** 105. See further D S Rothman ‘Foster care placements: Section 15(1)(b) of the Child Care Act 74 of 1983 (as amended)’ (1999) Vol. 2 No. 3 **The Judicial Officer** 98.

NGO's were active, children in the care of relatives who could not afford to support them unaided were routinely brought before the children's court, found in need of care and given access to the foster care grant. At present it would seem that certain courts may be declining to follow this process, with certain Social Development offices following suit, while in other areas foster care placements of this kind continue to be ratified.

A small research pilot was undertaken during November to December 1998 in the Kimberley area to analyse the phenomenon of kinship care.<sup>8</sup> The researcher concluded that a clear distinction needed to be made between foster care as a developmental and therapeutic intervention, and foster care which arises out of children living with families other than their biological parents. It was further recommended that any policy-making process in this regard would need to be based on creative possibilities for financial assistance which would ensure that such children are not exposed to risks because of poverty and economic need in caregiving families, while also not creating an attitude of increasing dependency on the state. Although the research was undertaken in the Kimberley area, the assumption can be made that other provinces are experiencing similar challenges in foster care practice.

Informal kinship care is seen as an appropriate response to the crisis facing orphaned and vulnerable children because it avoids the complicated and time-consuming legal processes associated with statutory foster care, and it has the potential of providing a good quality of care.<sup>9</sup> There is, however, in community care approaches an assumption that communities have families, or capable women, who are willing and able to provide care, and this cannot be taken for granted.<sup>10</sup> The extended family will not have the capacity to take in orphans in every case, and this capacity is

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8 Abstract from a draft document on Minimum Standards on Foster Care.

9 **South Africa's children made vulnerable or orphaned by AIDS** Report on a workshop held in Cape Town on 28 September 2000.

10 M Harber **Who will care for the children? Social policy implications for the care and welfare of children affected by HIV/AIDS in KwaZulu-Natal** (1998) at 24 Research Report no.17. Durban: University of Durban, School of Development Studies.

in any case not unlimited, especially where no external support is available.

### 17.2.3 **Comparative systems in other countries**

#### 17.2.3.1 **United States of America**

Changes in statutory and administrative law, driven by the increasing demand for placement resources, clearly established relatives as the first placement preference when children were taken into state custody. In 1988, the Illinois Children and Family Services Act was amended to require that relatives 'be selected as the preferred caregivers' when placement of children outside the parental home is considered by the child welfare system. The Act requires that children be placed with close relatives after an immediate preliminary approval process.<sup>11</sup>

Wisconsin's Act 105 of 1997 provides for the creation of a long-term kinship care programme in terms of which monthly payments are paid to a relative of a child who is caring for the child on a long-term basis. The Act stipulates that only a relative who has been appointed as a child's guardian may receive long-term kinship care payments. The Act further requires:

- an investigation of the home of the relative who will provide long-term kinship care;
- a criminal background investigation and individualised consideration of the conviction record of any long-term care kinship care relative, or an adult resident in the long-term kinship care relative's home, or an employee or prospective employee of the long-term kinship care relative who has or would have regular contact with the child, to determine if any of these people has any arrests or convictions that could adversely affect the child or the kinship care relative's ability to care for the child;
- a written agreement between a long-term kinship care relative and a county Department of Human Services or county Department of Social Services;
- an annual review of each case under the long-term kinship care program.

On a reading of the Act, children are placed in kinship care, without court intervention, by making an

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11 R L Hegar and M Scannapieco **Kinship Foster Care: Policy, Practice and Research** (1999) 30 - 31 Oxford University Press.

application to the relevant Department.

#### 17.2.3.2 **England and Wales**

Section 23(2) of the Children Act, 1989 prioritises care by relatives. Guidelines and regulations accompanying the Children Act emphasise the advantages for children of being placed within their wider family:<sup>12</sup>

Possibilities for a child to be cared for within the extended family should have been investigated and considered as an alternative to the provision of accommodation by the responsible authority. However, even when it has become necessary for the responsible authority to arrange provision of accommodation, placement with a relative will often provide the best opportunities for promoting and maintaining family links in a familiar setting.

#### 17.2.3.3 **Ireland**

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12 R Greeff **Fostering Kinship: An international perspective on kinship foster care** (1999) 87; D Berridge **Foster Care: A Research Review** (1997) 17.

A specific provision enabling relative care was included in the Irish Child Care Act of 1991. This was followed by the Placement of Children with Relatives Regulations, which now govern policy and practice in the area. Evidence of growth in the number of relative care placements suggests that they are set to become an increasingly important aspect of Irish child care services. Child care agencies are also required to compile separate registers for foster and relative care placements.<sup>13</sup>

#### 17.2.3.4 **Ghana**

The Ghanaian Children's Act, 1998 distinguishes between placement 'with an approved fit person' and 'at the home of a parent, guardian or relative'<sup>14</sup> on the basis of a care order of the Family Tribunal. A parent, family member or any person who has been caring for a child may apply to the Family Tribunal for custody of the child.<sup>15</sup>

#### 17.2.3.5 **Uganda**

The Ugandan Children's Statute, 1996, provides that, where the natural parents of a child have died, parental responsibility may be passed on 'to relatives of either parent, or, by way of a care order, to the warden of an approved home, or to a foster parent'.<sup>16</sup>

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13 R Greeff (1999) 113 - 114.

14 Section 20(3)(b) and (c), Act 560.

15 Section 43

16 Section 7 of the Statute.



### 17.2.3.6 Kenya

After the death of the parents of a child, if there is no testamentary guardian and no court-appointed guardian, custodian or 'fit person', then in terms of the 1998 draft of the Children Bill 'a relative of the child' is recognised as having parental responsibility for that child.<sup>17</sup>

### 17.2.4 Comments received by the Commission

The worksheet associated with the research paper on Foster Care<sup>18</sup> (hereafter 'the Worksheet'), posed the following questions:

Do you think it is necessary to define 'foster care' in the new child care legislation? Should kinship care and/or care within a child-headed household be defined separately? If so, how?

How should the law deal with children cared for by relatives or close acquaintances?

What legal protection should be provided for children in informal or kinship care?

All the respondents were of the view that 'foster care' should be defined in the new child care legislation. However, a substantial number of respondents felt that as kinship care and care within a child-headed household had different requirements - with child-headed households, for example, needing to be provided with some form of adult supervision - they should be defined separately from care by non-relatives. CMR, Eastern Transvaal, suggested the following definition for 'kinship care': 'A child taken care of by a relative(s) with mutual consent of the extended family'.

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17 Section 24(1)(b)(v).

18 The worksheet, together with the research paper on foster care written by Mrs Petro Brink, was used as a basis for focus group discussions at a workshop which was held at the President Protea Hotel, Bantry Bay, Cape Town on 27 and 28 June 2000, and for subsequent inputs by organisations.

The Foster Care Association of South Africa, on the other hand, stated that the concept 'foster care' should include all types of community-based care of children away from their biological parents. The Department of Social Development, Free State, likewise submitted that kinship care and care by child-headed households should not be defined separately from care by non-relatives. The respondent said that all forms of foster care were in substance the same and that it was only the prevailing circumstances that determined who would care for the children.

South Peninsula Legal Aid Clinic argued that 'foster care' should include 'kinship care'. However, care within a child-headed household should be defined separately.

The Department of Social Development, Free State, and the Catholic Women's League suggested that relatives caring for children be vested with guardianship without going through the present statutory process. The Child Health Policy Institute was similarly of the view that kinship care should be a non-statutory arrangement. NG Welsyn, Vanderbijlpark, submitted that children placed with relatives should not be subjected to statutory supervision. This view was endorsed by the Catholic Women's League.

The South Peninsula Legal Aid Clinic proposed that there should be no age limit to the child support grant. In their view, this would enable families to care for their relatives' children. The Foster Care Association of South Africa was of the view that a standardised grant would encourage more people to care for children.

The majority of respondents submitted that children in kinship care should receive the same legal protection as all other children.

The Deaf Federation of South Africa (DEAFSA) recommended the establishment of community committees and/or child and youth committees. The respondent also suggested that children be educated on their rights and that complaints mechanisms be put in place.

The Child Health Policy Institute submitted that children should be educated on their rights and what procedures to follow when their rights are violated. Also, that community committees should be established.

### 17.2.5 Evaluation and recommendation

**The Commission recommends that provision be made for various forms of substitute family care, which should include short-term and long-term care by relatives and non-relatives. The Commission proposes to distinguish between ‘foster care’ and ‘care by relatives’, and to provide for the necessary support of both options. A further distinction is proposed between:**

- court-ordered care by relatives which arises as a result of child and family court proceedings in cases of abuse and severe neglect and is associated with professional services; and
- care by relatives which is undertaken by informal arrangement on an indefinite basis.

Recognising the placement in ‘care by relatives’, as a category separate from ‘foster care’, would entail a legislative amendment to section 15(1) of the Child Care Act, 1983, as no such placement option currently exists. Should such legislative intervention be deemed necessary, **the Commission recommends that section 15(1)(b) of the Child Care Act be amended by the insertion of the following words after the words ‘suitable foster parent’ in that section: ‘which may include a suitable person related to the child’.** Such amendment would place it beyond doubt that children may be placed with relatives when found by the children’s court to be in need of care.

**More specifically, the Commission proposes that:**

- **Legal recognition be given to care by relatives as a placement option for children who come before the court via the formal child protection system, in cases of abuse or neglect. Care by relatives should be a preferred option, unless there are indications to the contrary. Further, depending on the circumstances of each case, the court should have the discretion to specify whether a placement with relatives should be of a permanent nature, whether reunification services should be rendered to the parties concerned and whether supervision or monitoring by a state department or organisation is required.** On the other hand, (non-relative) foster care placements will usually, where appropriate, require permanency planning and the rendering

of supervision and reunification services.

- **Relatives caring for children who have been abandoned or orphaned or are for some other reason in need of their assistance, but who are not in need of formal protective services, should have access to a simple procedure whereby the necessary parental responsibilities can be conferred on them. These should include consent to medical treatment for, or an operation on a child, and capacity to apply for state financial assistance on his or her behalf. Comment is invited as to whether such an arrangement should involve an initial once-off investigation, an order by the child and family court, or whether this could be an administrative process.**
- **A parent or guardian of a child may give written consent to a person caring for that child to give consent to medical treatment for or an operation on the child.**
- **Any person, including the child him/herself, who is of the view that a particular placement in informal care with relatives is not in the best interests of a child should be able to approach the Child and Family Court.**
- **The necessary provision must be made for appropriate financial and other forms of state support for foster care by non-relatives, formal court-ordered care by relatives, and informal care by relatives. These may be subject to separate regulation for the different categories.**

### 17.3 **Alternative models of foster care**

This section explores a range of models of foster care which are alternatives to the existing forms of statutory foster care and informal kinship care. These models are already being used in South Africa in the form of pilot projects, and have been initiated in response to changing social circumstances and in recognition of the inadequacy of conventional foster care. While areas of overlap exist, two overarching models are presented for purposes of the present discussion.

### 17.3.1 **Cluster foster care, or community foster care**

#### 17.3.1.1 **Introduction**

McKerrow<sup>19</sup> describes cluster foster care as follows: 'Volunteer women and couples are recruited and trained in the basics of child care. Up to six children are placed with each volunteer who receives foster care grants and material support. Community workers link these volunteers to other resources such as day care centres which relieve foster parents of child care duties in order to undertake income-generating activities.'

#### 17.3.1.2 **Current Practice**

Despite much rhetoric in recent years, examples of successful and sustainable community care projects are hard to find. Harber<sup>20</sup> describes the experience of a non-governmental organisation that attempted to develop community-based programmes. This organisation was constantly faced with the impoverished status of the communities and expectations of material assistance. While many studies have highlighted the willingness of communities to care for children outside their family units, they have also indicated that it cannot be done without financial assistance from the state.<sup>21</sup>

Pietermaritzburg Child and Family Welfare Society has developed a cluster foster care scheme for

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19 N H McKerrow **Implementation strategies for the development of models of care for orphaned children** (1996) (unpublished).

20 M C Harber (1998) Masters thesis, University of Natal, Durban.

21 N H McKerrow and A E Verbreek **Models of care for children in distress** (1995).

children with HIV/AIDS. In terms of this scheme, potential cluster foster care (CFC) parents are recruited, screened and trained in home-based care, universal precautions and the management of AIDS-afflicted children. They are provided with a 'start-up pack' of, *inter alia*, milk formula, clothing, toiletries and, in some instances, material support until the foster care grant is received. CFC parents are also visited monthly to offer support and to ensure that children are well cared for.<sup>22</sup>

#### 17.3.1.3 **Comparative review of systems in other countries**

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22 Mark Loudon, CINDI Coordinator, **An overview of the Children in Distress (CINDI) Programme**. The paper can be accessed at <http://www.togan.co.za/cindi/papers/paper3.htm>.

The legislative Assembly of Oregon, USA has passed an Act<sup>23</sup> relating to community-based foster care demonstration projects. In terms of the Act, the State Office for Services to Children and Families, in consultation with local commissions on children and families, may agree to establish pilot programmes. The Act states that the purposes of community-based foster care demonstration projects are as follows:

- to promote strategies that keep abused and neglected children in their familiar surroundings and neighbourhood schools;
- recruit community volunteers to serve as foster parents for abused and neglected children who live in the community;
- to identify barriers to recruiting community foster parents and recommend strategies to address these; and
- to create a community-based system of support for foster children and community foster parents.

#### 17.3.1.4 **Comments received**

The following questions were posed on the worksheet: *How would you define community foster care? Is it necessary to include such a definition of 'community foster care' in the new child care legislation? How do you think such care might work, and how should it be resourced and monitored?*

The majority of respondents were in favour of providing for community foster care in the new child care legislation. Understandings of this concept varied.

Cape Town Child Welfare Society proposed the following definition: 'Community foster care is a family home in the community where a foster parent takes in more than one child, or a group of foster parents - about 2 to 3 - live together and care for a group of foster children in the same

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23 House Bill 2491, passed by the House on 6 March 2001 and passed by the Senate on 30 April 2001.

home.’ The respondent further submitted that community foster care is appropriate, especially for HIV/AIDS-infected children.

CMR, Northern Transvaal, suggested that provision should be made for community foster care homes which accommodate one to four foster children. Further, these homes should be subjected to minimum standards and monitoring. Ondersteuningsraad, Vereeniging, recommended the placement of a maximum of six children in a foster home within the community.

At a meeting with officials from the Department of Social Development held on 30 July 2001, it was recommended that fostering of children by an individual foster parent should continue to be limited to six children.<sup>24</sup> Further, that where more than six children are to be placed, at least one other person must be given legal responsibility for the children, in a clustering-type arrangement. It was also recommended that legal recognition be given to privately-funded cluster foster care schemes. These should, however, be subjected to registration and regular monitoring.

#### 17.3.1.5 Evaluation and recommendations

**The Commission recommends as follows:**

- **That ‘cluster foster care’ be understood to imply a grouping of caregivers who are linked together to provide mutual support in the care of a number of children, and who receive some form of external support and monitoring.**
- **That the new child care legislation give legal recognition to both state-funded and privately-funded cluster foster care schemes subject to regulation in terms of the Act.**

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<sup>24</sup> Although there are some differences in interpretation, this is commonly understood to be the present legal limit, as implied by the definition of a ‘children’s home’ in section 1 of the Child Care Act which requires registration by any residence or home ‘maintained for the reception, protection, care and bringing up of more than six children apart from their parents’.



- **That the court have the option of committing a child to the care of a specific cluster foster care scheme rather than to that of a particular individual or couple within that scheme.**
- **That the Minister be enabled to allocate grants to children in cluster foster care schemes and also to subsidise these schemes as entities.**
- **That in any specific case where it is believed to be appropriate for more than six children to be placed in the foster care of a single caregiver, the court be required to assign one or more additional caregivers, whether or not resident in the same household, to exercise shared responsibility for the children in question.**

### 17.3.2 **Specialist or professional foster care**

#### 17.3.2.1 **Introduction**

Colton and Williams<sup>25</sup> identify two diverging trends in fostering internationally:

The first trend ... is towards placing children with relatives who often receive very little in the way of financial or other support. The opposite trend is towards the professionalisation of fostering.

There have in other parts of the world been two main reasons for the second trend, i.e. the 'professionalisation' of fostering. First, there has been a growing recognition in many countries that caring for children who would have previously been institutionalised, such as children with disabilities or life threatening diseases, or severe emotional or behavioural problems requiring intensive therapeutic management, is a demanding task. Foster carers are thus increasingly required to undergo special training and to develop special skills. Secondly, there has been a growing recognition that fostering is reliant on the availability of women's labour. The changing position of women, particularly in more affluent societies, means that ways have had to be found to entice women into fostering.

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25 M Colton and M Williams (1997) 21(1) **Adoption and Fostering** 44-49.

Practitioners are divided in their opinions about the appropriateness and, in the South African context, the affordability of a separate category of 'professional' foster care service.<sup>26</sup> This section examines whether there is a need for professional foster care in this country, and, if so, how it can be provided within limited welfare resources.

### 17.3.2.2 Current Practice

Foster care was traditionally regarded as a placement option only for healthy and generally non-problematic children.<sup>27</sup> However, specialist or treatment fostering was introduced in the early 1970s to divert adolescents who were in trouble with the law away from residential institutions. Since then, specialist fostering programmes for children with special needs have proliferated in Europe and North America. These schemes typically pay foster carers a fee, or an enhanced allowance, in addition to the ordinary fostering allowance and any other entitlements. Such payments are usually made in recognition of the extra costs incurred in caring for a child with special needs, and of the costs involved to carers who have to leave work or reduce their hours to foster a child.<sup>28</sup> Training and support over and above those provided in regular foster care are also provided. The primary purpose of specialist fostering is to provide both 'care' and 'treatment'.

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26 Personal communication with Mrs Elmarie Swanepoel from the Department of Social Development.

27 J Triseliotis, C Sellick, and R Short **Foster Care: Theory and Practice** (1995).

28 D Berridge (1997). A Pithouse and O Parry 'Fostering in Wales' in **Adoption and Fostering** 21(2). H Argent and A Kerrane **Taking extra care. Respite, Shared and Permanent Care for Children with Disabilities** (1997) London, British Agencies for Adoption and Fostering. H Loening-Voysey and T Wilson **Approaches to caring for children orphaned by AIDS and other vulnerable children** (2001) Report prepared for UNICEF by the Institute for Urban Primary Health Care. M C Harber (1998) Masters thesis, University of Natal, Durban.

In recent years, the care of children with special needs has been given more attention in South Africa. HIV-positive children are one category who have come into focus. Child care agencies find it difficult to place these children in foster care or adoption. For example, Nazareth House reported that they have yet to find a foster care or adoptive placement for one of their HIV-positive children.<sup>29</sup> In addition, advocacy groups such as the Child Health Policy Institute have highlighted the needs of all children with chronic diseases.<sup>30</sup>

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29 H Loening-Voysey and T Wilson (2001).

30 Child Health Unit **Report on a workshop on chronic diseases in childhood** (1999) MCH news, (13) 6.

Models of specialist foster care that have been experimented with in South Africa include cluster foster care programmes for HIV-positive children<sup>31</sup> and a professional foster care pilot project implemented by the Inter-Ministerial Committee on Young People at Risk, for children in conflict with the law.<sup>32</sup> While these projects have differed in purpose, they have certain shared features, including the use of community-based carers who are trained to care for a child or children with a specific type of need. Both projects have also required a reconceptualisation of the nature of supportive and monitoring services offered to foster parents, and the involvement of practitioners from several sectors such as community health workers and child and youth care workers as well as social workers.

Despite its advantages, the notion of 'professional foster care' has been criticised here and abroad for creating an elite class of caregivers, at the expense of children in the care of 'ordinary' foster parents and these foster parents themselves. It has been pointed out that conventional foster parents are typically expected to do extremely difficult and demanding work which also requires intensive training and support, and that the creation of a separate 'professional' category leads to those in the mainstream being relegated to a type of second class status and fobbed off with fewer resources. The urgent needs of the foster care system as a whole, according to this argument, then continue to be overlooked. It is often observed that children coming into care today tend on average to display higher levels of emotional and behavioural disturbance than was the case some decades ago, and that foster parents in general require increased levels of training and support.

### 17.3.2.3 **Comments received**

Question 29 of the Worksheet read as follows: *Should the concept of professional foster care be included in the new child care legislation? If so, in what form? How should such programmes be financed and monitored? Who should run the programmes?*

The majority of respondents submitted that the concept of 'professional foster care' should be

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31 M C Harber (1998) Masters thesis, University of Natal, Durban 166 -177.

32 Pilot Project Report on **Professional Foster Care** (1998) Inter-Ministerial Committee on Young People at Risk.

included in the new child care legislation.

Communicare suggested that professional foster care should be provided for exceptionally disturbed and traumatised children. Also, multi-disciplinary teams should run professional foster care programmes. The respondent, however, questioned whether South Africa can afford the introduction of professional foster care.

The Child Health Policy Institute recommended that professional foster care should be of a short-term and intensive nature and should focus on reintegration. Further, professional foster care should be provided for children with special health/medical, emotional/psychological and physical needs.

The Foster Care Association of South Africa was of the view that all forms of foster care should be considered as professional. Foster care can then be divided into different types, e.g. therapeutic care. The respondent suggested that all foster care practitioners (social workers, foster parents and other caregivers) should be trained to render foster care services. Further, additional training can be provided depending on the type of foster care concerned. Also, foster parents trained to care for 'hard to place' children or children with special needs should get an additional allowance.

The Department of Health and Social Services, Western Cape, was also of the view that all forms of foster care should be considered as professional. Further, proper screening and training are essential for all foster parents.

However, a substantial number of respondents felt that the concept 'professional foster care' should not be included in the new child care legislation. The Department of Social Development, Free State, submitted that all foster parents should be empowered to care for children and that no additional incentives should be paid to any foster parent. Cape Town Child Welfare Society stated that professional foster care is expensive and that we do not have the resources needed for this type of care.

Question 30 on the Worksheet read as follows: *How can the new child care legislation promote foster placements for special needs and hard to place children?*

Suggestions by respondents included the following:

- an extra allowance in addition to the foster care grant to foster parents caring for special needs and 'hard to place' children;
- an increase in the foster care grant;
- special selection and training of foster parents;
- ongoing support for foster parents;
- greater access to needed resources for foster parents; and
- provision for relief foster parents.

Cape Town Child Welfare Society recommended that the cost of additional services such as medical treatment, equipment, transport etc. should be carried by the state.

The Department of Social Development, Free State, submitted that attention should be given to 'foster care houses' and that parents should receive a subsidy to provide such services. Further, the foster care grant should be limited to children with special needs.

The Child Health Policy Institute proposed that the care dependency grant should be extended to children with moderate disabilities and chronic diseases including HIV/AIDS.

#### 17.3.2.4 **Evaluation and recommendations**

It would seem that the majority of children currently placed in foster care are children with behavioural problems.<sup>33</sup> Thus, many foster parents not only provide care, but also treatment. It is therefore difficult to determine to which categories of children professional foster care should be provided. Also, as stated above, the notion of 'professional foster care' creates the impression that 'ordinary' foster parents do not provide professional care to children. **For these reason, the Commission recommends as follows:**

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33 Personal communication with Mrs Elmarie Swanepoel from the Department of Social Development.

- **That all forms of foster care be seen as having a professional dimension and that financing of this service take into account the need for training and support of caregivers.**
- **That, in addition to the current foster care grant, an additional allowance be paid to foster parents caring for children with special needs which have specific cost implications, including disabilities and chronic illnesses.<sup>34</sup>**
- **That ‘special needs’ be clearly defined.**
- **That the Minister be immediately enabled to make regulations for the provision of financial assistance to children with special needs, including HIV/AIDS.<sup>35</sup>**

#### 17.4 **Selection criteria for prospective foster parents**

##### 17.4.1 **Broad concerns and current practice**

Adequate training and preparation of foster carers are important elements in meeting children’s needs. It is therefore important to consider whether all foster parents should be selected based on a particular set of criteria and whether they should be required to undergo specific training. Currently, organisations delivering foster care services implement training programmes according to their own policies, practices and resources – if indeed they provide structured training at all. Selection is also not governed by any standardised approach.

##### 17.4.2 **Comments received**

Question 12 of the Worksheet reads as follows: *Should the new child care legislation prescribe certain criteria for prospective foster parents? If so, what should these be?*

The majority of respondents submitted that the new child care legislation should prescribe certain criteria for the selection of prospective foster parents. Criteria suggested by various respondents included e.g. the following:

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34 This will promote the expeditious placement of ‘hard to place’ children.

35 The Alliance for Children’s Entitlement to Social Security has recommended to the Committee of Inquiry into a Comprehensive Social Security System and to the national Department of Social Development that the care dependency grant be extended to children with moderate disabilities and chronic illnesses, including HIV/AIDS.

- emotional stability;
- a regular income;
- participation in the reunification process;
- being in a similar financial position to that of the biological parents;
- being trained;
- being of a certain age.

The Sinodale Kommissie vir die Diens van Barmhartigheid of the Nederduitse Gereformeerde Kerk suggested that financial and social status should not be criteria for the selection of foster parents. Ondersteuningsraad Vereeniging was, however, of the view that criteria should not be prescribed for foster parents as each situation is different.

Communicare stated that criteria for foster parents should not be prescribed by legislation, but should rather be based on broad guidelines.

#### 17.4.3 Evaluation and recommendation

It appears that there are widespread variations in thinking and practice in the field at present. In addition, resources available to child welfare organisations in different areas differ substantially. Further, the training needs of extended family caregivers and those offering indefinite care will differ from those who are unrelated to the children in their care and are expected to participate in reunification services aimed at restoring foster children to their biological families. Standardised recruitment and training procedures are therefore unlikely to be viable at this stage. However, to ensure that all children in foster care receive at least a basic standard of care, **the Commission does not recommend that the new children's statute should prescribe certain (eligibility) criteria for prospective foster parents, but is of the opinion that the Department of Social Development should embark on a consultative process of developing broad minimum criteria for the selection and training of substitute family caregivers in various categories. These criteria should then be form the basis of a comprehensive Departmental policy.**

#### 17.5 Social and cultural issues when placing children in foster care



### 17.5.1 Introduction

Internationally the issue of transracial placement of children, in either foster care or adoption, has been controversial. According to one school of thought, Black children can be seriously disadvantaged through placement in white families and this is to be avoided at all costs, even if the implication is that such children must remain in institutional care. This view has been promoted in particular by the National Association of Black Social Workers in the USA, although its position has apparently been modified somewhat in recent years. The Association has stated as follows: 'Black children should be placed only with Black families whether in foster care or for adoption. Black children belong physically, psychologically and culturally in Black families in order that they receive the total sense of themselves and develop a sound projection of their future. Human beings are products of their environment and develop their sense of values, attitudes and self concept within their family structures. Black children in white homes are cut off from the healthy development of themselves as Black people'.<sup>36</sup> This view has some support in South Africa. An alternative school of thought is that, while placement within the child's own cultural and religious context has substantial advantages and should be used when possible, no child should be denied the opportunity to grow up in a family environment purely because of the non-availability of a suitable family of similar background. This section examines the issue of placement of children across ethnic, cultural and religious boundaries.

### 17.5.2 Current Law and Practice

Section 40 of the Child Care Act requires that in the making of decisions regarding placement of a child in foster care, 'regard shall be had to the religious and cultural background of the child concerned and of his parents as against that of the person in or to whose custody the child is to be placed or transferred'. Thus, a family with the same religious and cultural background to that of the child should, where available, be the placement option of choice. This is the case not only for South African children, but also for foreign children, including refugee and undocumented immigrant children.<sup>37</sup> The CRC also stipulates that when placing a child in care, due regard must be paid to

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36 National Association of Black Social Workers, USA: Position Paper (April 1972) as quoted in Mosikatsana 'Case Comment: **Sawan v Tearoe**' (1994) 11 **CFLQ** at 98.

37 **Protecting the most vulnerable: guidelines and recommendations for protecting refugee children** NCRA Report (2000).

the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.<sup>38</sup>

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38 Article 20(3).

The matching up approach promoted by section 40 has been the subject of heated debate.<sup>39</sup> One view is that this approach is an unfortunate perpetuation of apartheid thinking, another is that it is a correct approach to transcultural and transracial placements.

While most practitioners agree that, where possible, the racial and cultural matching of children and prospective adoptive or foster parents is desirable, many express concern about the damaging effects of institutionalisation especially in the case of infants and very young children. They emphasise the urgency of the need to settle such a child into a permanent family environment in which he or she can form close bonds and develop normally, and they hold that if considerations of culture and ethnicity become the overriding factor, irreparable damage may be done to children who could have the benefit of care in a family environment, albeit by persons who are different in cultural or religious background or physical appearance.

The wording 'regard shall be had' is rather vague, and it may be that there should be more specific information in the Act on when the court should treat a difference in cultural, religious, racial, or linguistic backgrounds as a sufficiently significant factor to justify refusing a placement.

At Durban Children's Society, many abandoned HIV-positive babies end up in cross-cultural crisis-care placements because recruitment drives for crisis care parents are most successful amongst white middle-class parents.<sup>40</sup> Crisis care parents did not see a need to talk Zulu to the babies; the

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39 See D J Joubert 'Interracial Adoptions: Can we learn from the Americans?' (1993) 110 **SALJ** 726; N Zaal 'Avoiding the Best Interests of the Child. Race-Matching and the Child Care Act 74 of 1983' (1994) 10 **SAJHR** 372; T Motsikatsana 'Transracial Adoptions: Are We Learning the Right Lessons from the Americans and Canadians? - A Reply to Professors Joubert and Zaal' (1995) 112 **SALJ** 606; idem 'Examining Class and Racial Bias in the Adoption Process and the Viability of Transracial Adoptions as a Policy Preference: A Further Reply to Professors Joubert, Pakati and Zaal' (1997) 13 **SAJHR** 602.

40 H Loening-Voysey and T Wilson (2001).

children were being socialised into their culture.<sup>41</sup>

17.5.3 **Comparative review of systems in other countries**

17.5.3.1 **United States of America**

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41 Ibid.

In the state of New York, authorised agencies may view race as a factor in their decision to either place a child in or remove a child from a foster home. Such a consideration is authorised by section 421.18 (b) of the State Department of Social Services' Regulations which states that 'an authorised agency shall make an effort to place each child in a home as similar to and compatible with his or her ethnic, racial, religious and cultural background as possible'.<sup>42</sup>

In the case of **Rockefeller v Nickerson**<sup>43</sup> white foster parents initiated an Article 78 proceeding for an order to compel the Welfare Commissioner of Nassau County to accept their application for the adoption of a Black child. Judge Bernard Meyer held that the application of the foster parents was not rejected because of any unwritten policy of the Department of Welfare not to accept white foster parents for a black child. Apparently, the foster parents application was rejected on other grounds. Judge Meyer found that there was no departmental policy against interracial adoption and quoted from the leading case on the subject, **In re Adoption of a Minor**,<sup>44</sup> as follows: 'There may be reasons why a difference in race or religion may have relevance in adoption proceedings. But that factor alone cannot be decisive in determining the child's welfare'.

Carrieri<sup>45</sup> states that the existing policy, as it is with religion, is to place a child with foster parents of the same race and culture where practicable. However, policy must give way to reality and the best

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42 J R Carrieri 'Bi-racial foster care and adoptions' in **The Foster Child** (1989) published by the Practising Law Institute.

43 36 Misc. 2d 869, 233 N.Y.S 2d 314 (Sup. Ct., Nassau Co. 1962).

44 99 U.S. App. D.C. 228 F. 2d 446, 448.

45 J R Carrieri **The Foster Child** (1989).

interest of the child. Where special circumstances exist, foster children should be placed in an interracial setting. Carrieri is of the view that it would be in the best interest of a mentally ill child to be adopted by parents of a different colour or culture rather than to remain in an institutional setting for the remainder of his or her life.

#### 17.5.3.2 **England**

The Department of Health Guidance states as follows:<sup>46</sup>

It may be taken as a guiding principle of good practice that, other things being equal and in the great majority of cases, placement with a family of similar ethnic origin and religion is most likely to meet a child's needs as fully as possible and to safeguard his or her welfare more effectively.

#### 17.5.4 **Comments received**

The following questions were posed in the Worksheet:

In what situations would foster care with a South African family be the placement of choice for a non-South African child? Are there guidelines that should be observed when considering placement of, e.g. a refugee child or an undocumented immigrant child? Could these guidelines be built into the law or disseminated as policy?

How relevant to foster care placements in South Africa is the requirement that regard must be had to the cultural and religious background of the child concerned? Should there be any specific requirements for agencies who arrange placements across religious and cultural boundaries or for caregivers who accept children from a cultural or religious background different from their own?

Is section 40 of the Child Care Act, 1983 being applied in practice when children are placed in foster care? If so, how? If not, why not?

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46 D Berridge (1997) 21.

Some of the respondents submitted that all efforts should be made to first trace the families of non-South African children. The respondents also agreed on a need for guidelines to assist in considering placement of foreign children. The Sinodale Kommissie vir Diens van Barmhartigheid of the Nederduitse Gereformeerde Kerk suggested that non-South African children should be placed with South African relatives, where possible. The Department of Health and Social Services, Western Cape proposed that issues to be considered when making care arrangements for a foreign child should include the possibility of tracing the child's family, as well as the existing conditions, e.g. with regard to war, in the country of origin.

The majority of respondents agreed that regard must be had to the cultural and religious background of the child as against that of the person in whose custody the child is to be placed. Some felt that a distinction should be made between short-term and long-term placements.

CMR Eastern Transvaal stated that it was paternalistic and a continuation of colonialism to reason that Black children should be placed with white foster parents for the sake of the economic benefits of such placements. The respondent suggested that agencies should be required to provide proof of what they have done to ensure the placement of a child within his or her own culture or religion. This suggestion was endorsed by CMR Northern Transvaal.

The Catholic Women's League submitted that the shortage of suitable placements is a reality and agencies are often forced to place children with available families who are not from the same background as that of the child. Thus, the law should not be too prescriptive. The Foster Care Association of South Africa was in favour of placing a child with a family of the same cultural and religious background, but submitted that a family placement, no matter how different, was better than institutional care, and that all placements must be based on the best interests of the child.

A few respondents, however, felt that culture and religion should not be criteria when placing a child in foster care. For example, Cape Town Child Welfare Society proposed that section 40 of the Child Care Act should be repealed as it militates against an integrated society.

The majority of respondents submitted that section 40 was not being rigidly applied in practice due to the shortage of foster parents. CMR Eastern Transvaal, on the other hand, mentioned that it had

procedures in place to ensure that section 40 was applied in practice. These included screening requirements from the parents' own religious and cultural group. Further, every social worker was required to make a presentation to a multi-professional team about a proposed foster care placement and to obtain written consent from the parents for placement with a person from a different religion or culture. CMR Northern Transvaal likewise stated that it applied section 40 as far as possible in practice.

#### 17.5.5 Evaluation and recommendations

Children placed with foster parents with a different background from their own may be, albeit not intentionally or directly, denied the right to enjoy their culture, practise their religion or use their language.<sup>47</sup> It is also unrealistic to expect from foster parents that they keep the child in touch with his or her culture, if the foster parents do not know what that culture entails. Culture itself is also an evasive concept and changes over time. It also seems that, although many child agencies prefer to place a child in the care of a family with the same cultural and religious background as that of the child, this is not always possible. Taking all this into account, **the Commission recommends as follows:**

- **When arranging care for a child, including a foreign child (refugee and undocumented immigrant children included), social workers should make full enquiries about the cultural, religious and linguistic background of the child, and the availability of foster parents with a similar background to that of the child.**
- **A social worker arranging care for a refugee or undocumented immigrant child should approach the United Nations High Commissioner for Refugees or relevant service agencies working in the refugee communities to identify appropriate families who can provide foster care to the child.<sup>48</sup>**
- **The social worker's report must include steps taken to secure placement of the child within a family with a cultural, religious and linguistic background similar to that of the child;**
- **A child may only be placed with a family from a different background to that of the**

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47 As is prescribed by section 31(1) of the Constitution, 1996.

48 This recommendation is supported by the National Consortium on Refugee Affairs.



**child, if no family with a similar background to that of the child is available, willing and suitable to foster the child.**

**However, a pre-existing relationship between a child and a prospective foster parent with a different background to that of the child could serve as a ground for placing the child in the care of such parent.**

## 17.6 Parental rights and responsibilities for foster parents

### 17.6.1 Introduction

Foster parents are charged with all the responsibilities of the daily care of the child, but are without decision-making capacity in a range of situations. The issue thus arises as to whether foster parents, particularly long-term foster parents, should be vested with greater rights and responsibilities in respect of their foster children.

### 17.6.2 Current Law and Practice

The Child Care Act provides that the parent or guardian of a child who has been placed in foster care by a court order, shall be divested of his or her rights of control over and custody of that child. Further, these rights, including the right to punish and to exercise discipline, shall be vested in the person in whose custody the child is placed.<sup>49</sup> The Act further stipulates that the rights transferred to a foster parent do not include the power to deal with any property of the child, or the power to consent to the marriage of the child, or to the performance of an operation upon the child or the provision of medical treatment.<sup>50</sup> Foster parents are also not eligible to sign documents required for the child to participate in school trips, holiday camps and the like. The present limitations on parental rights and responsibilities of foster parents can create considerable difficulties for them in carrying out their tasks. Their rights and responsibilities remain limited, even in situations where the biological parent or guardian has disappeared or is deceased. Where a child's parent or guardian has died, the High Court remains the upper guardian of the child, unless or until another guardian is appointed, usually through adoption. The need for a form of foster care in which guardianship could

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49 Section 53 (1).

50 Section 53 (3).

be transferred to foster parents was also highlighted by the De Bruyn Commission in its Report into the Foster Care of Children.<sup>51</sup>

### 17.6.3 **Comparative review of systems in other countries**

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51 Department of Health Services and Welfare, 1990.

In Uganda, the Children's Statute of 1996 gives more rights and responsibilities to a foster parent than the South African law. The Statute defines parental responsibilities as 'all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to a child.' The Statute stipulates that where the natural parents of a child are deceased, parental responsibility may be passed on to the relatives of either parent, or by way of a care order, to a foster parent.<sup>52</sup> The Statute further states that a foster parent with whom a child is placed has parental responsibility for the child in his or her care.<sup>53</sup> Thus, foster parents are entitled to share parental responsibility with the biological parents of the child.

In Zambia, the Affiliation and Maintenance of Children Act of 1995 defines a custodian as a person appointed under the Act or any other law to be the guardian of the child.<sup>54</sup> The Act stipulates that if the court is satisfied that certain circumstances exist which result in the mother or father of the child not being appropriate custodians for the child, it may appoint any other person as custodian of the child.<sup>55</sup>

In the District of Columbia, the Foster Children's Guardianship Act of 2000<sup>56</sup> aims to encourage stability in the lives of certain children who have been adjudicated to be neglected and have been removed from the custody of their parents. Further, the Act aims to increase the opportunities for the prompt permanent placement of children, especially with relatives, without ongoing government

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52 Section 7(2) of the Statute.

53 Section 32(1) of the Statute.

54 Section 1 of the Act.

55 Section 15(3) of the Act.

56 Approved by the Mayor, District of Columbia, on 16 January 2001.

supervision.<sup>57</sup> In terms of this Act, a person may be appointed as a permanent guardian over a child if the child has been living with him or her for at least six months.<sup>58</sup> The court may issue a guardianship order only if the court finds that:<sup>59</sup>

- the permanent guardianship is in the child's best interests;
- adoption, termination of parental rights, or return to the parent is not appropriate for the child; and
- the proposed permanent guardian is suitable and able to provide a safe and permanent home for the child.

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57 Section 16-2381 of the Act.

58 Section 16-2383 (a) of the Act.

59 Section 16-2383 (c) of the Act.

The permanent guardian has the following rights and responsibilities concerning the child:<sup>60</sup>

- to protect, nurture, discipline and educate the child;
- to provide food, clothing, shelter, education as required by law, and routine health care for the child;
- to consent to health care without liability by reason of the consent for injury to the child resulting from the negligence or acts of third persons unless a parent would have been liable in the circumstances;
- to authorise a release of health care and educational information;
- to authorise a release of information when consent of a parent is required by law, regulation or policy;
- to consent to social and school activities of the child;
- to consent to military enlistment;
- to obtain representation for the child in legal actions; and
- to determine the nature and extent of the child's contact with other persons.

Entry of a guardianship order does not terminate the parent and child relationship, including:<sup>61</sup>

- the right of the child to inherit from his or her parents;
- the parents' right to visit and contact the child (except as limited by the court);
- the parents' right to consent to the child's adoption;
- the parents' right to determine the child's religious affiliation; and
- the parents' responsibility to provide financial, medical and other support for the child.

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60 Section 16-2389 (a) of the Act.

61 Section 16-2389 (c) of the Act.

The permanent guardian is not liable to third persons, by reason of the relationship, for acts of the child.<sup>62</sup>

A guardianship order may be modified or terminated if the court finds, by a preponderance of evidence, that there has been a substantial and material change in the child's circumstances subsequent to the entry of the guardianship order and that it is in the child's best interests to modify or terminate the guardianship order.

#### 17.6.4 **Comments received**

The following questions were posed in the Worksheet:

How could parental rights and responsibilities be extended to long-term foster parents?  
When does a foster care placement become long-term?

What rights and responsibilities should foster parents have vis-a vis the biological parents of the child?

What rights and responsibilities should foster parents have vis-a-vis their foster children?

Should the rights and responsibilities of foster parents be determined by agreement, by the parties involved, by court order, or specifically in the new child care legislation? If so, how? Please motivate your answers.

The majority of respondents submitted that a foster care placement should become long-term after the expiry of the initial court order, i.e. after two years. However, Communicare in Cape Town stated that long-term foster care placements should not be allowed and that children need permanency in their lives. (This approach seems to be based on the assumption that foster care cannot be made permanent.)

The Department of Social Development, Free State, was of the view that foster parents should be

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62 Section 16-2389 (b).

vested with parental rights and responsibilities only after a period of two years and if there is no prospect of family reunification. Cape Town Child Welfare Society submitted that foster care should become long-term in cases where children are orphaned, their parents have been certified as mental patients, the prognosis for family reunification is minimal or nil, or there is a history of relapses as with alcoholic parents.

South Peninsula Legal Aid Clinic recommended that a foster care placement should become long-term in the following circumstances: (a) there is no prognosis for family reunification, (b) the child has been abandoned, (c) the parents cannot be traced, or (d) the parents are deceased.

The Department of Health and Social Services, Western Cape, stated that parental rights and responsibilities should be transferred to foster parents only if family reunification is not possible. However, provision should be made for revoking an order granting parental rights and responsibilities to foster parents in instances where the biological parent starts building up a meaningful bond with the child.

Respondents identified the following responsibilities of foster parents towards the biological parents of the child:

- to ensure ongoing contact between child and biological parents;
- to maintain, promote and encourage the child/parent relationship;
- to promote family reunification;
- to treat the biological parents with respect;
- to include the biological parents in special events concerning the child and to keep them informed of developments in the child's life;
- to plan holidays in advance; and
- to respect the wishes of the biological parents with regard to the language and religion of the child.

The following were seen as rights of foster parents:

- to be treated with respect;
- to privacy;

- to be in a position to consent to an operation on the child;
- to voice their opinions, thoughts and feelings.

Foster parents were regarded as having the following responsibilities towards their foster children:

- to provide for their basic needs;
- to provide emotional support;
- to protect them from mental and physical harm;
- to respect them;
- to provide opportunities for their development;
- not to differentiate between their own children and their foster children, specifically with regard to discipline;
- to build their relationship with their biological parents;
- to be honest and open with them;
- to exercise discipline;
- to place them in suitable schools.

Further, respondents felt that foster children were entitled to expect from their foster parents that they be brought up in a stable environment. It was also suggested that foster children had a responsibility to respect and accept the guidance of their foster parents.

The majority of respondents submitted that the rights and responsibilities of foster parents should be set out in the new child care legislation. A substantial number of respondents proposed that the rights and responsibilities of foster parents be determined by agreement between the parties and that such agreement be made part of a court order. A few respondents suggested that the new child care legislation should lay a broad framework for the rights and responsibilities of foster parents and that more specific rights and responsibilities should be included in a court order.

The Department of Health and Social Services, Western Cape, was of the view that basic rights and responsibilities for foster parents should not only be legislated, but also be determined by way of agreement between the parties, and that the agreement should be made part of the court order. Further, the court order should be subjected to periodical review.



#### 17.6.5 Evaluation and recommendations

##### **The Commission recommends as follows:**

- **The new children’s statute should provide for a procedure whereby a foster parent or a relative who has been appointed by the court to care for a child may, on application to the court by him or herself or by the department or organisation managing the case, acquire specified parental rights and responsibilities in addition to those initially conferred by the court.<sup>63</sup>**
- **The parties to the proceedings must include the parent(s) of the child, the foster parent(s) or relative(s) and the child if appropriate.**
- **If a parent has been given proper notice, but fails to appear, the court may proceed in the parent’s absence.**
- **Where parents cannot be found, and therefore not be given notice, the court may dispense with the requirement of giving notice to the parents.**
- **The children’s court may allocate additional parental rights and responsibilities to a foster parent(s) or relative(s) only if this is in the best interests of the child concerned.**
- **An agreement regarding specific rights and responsibilities of the foster parents reached between all the parties, including the department or organisation managing the case, may, at the discretion of the court, be incorporated into the court order.**
- **In instances where a child has been abandoned, or his or her parents are deceased, or where reunification is not in the best interests of the child, the children’s court may, when making a placement order, grant certain parental rights and responsibilities to the foster parent(s) or relative(s) over and above those normally allocated, at the time of the initial enquiry.**
- **The children’s court should have the discretion to request that a written report be**

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63 For the manner in which the Commission proposes that parental rights and responsibilities should be acquired, see Chapter 8 above.

**submitted to it within six months or any other specified period concerning the suitability of the arrangements made in respect of the child.**

**Following the approach taken by the District of Columbia, an order conferring certain parental rights and responsibilities may be altered or terminated if the court finds that there has been a substantial and material change in the child's circumstances and that it is in the best interests of the child to alter or terminate the order.**

**The new children's statute should broadly outline the rights and responsibilities of biological parents, foster parents and children in the foster care setting.**

## **17.7 Termination of parental rights and responsibilities over certain children in foster care**

### **17.7.1 Introduction**

There is an impression that the majority of foster placements last until the children reaches the age of 18.<sup>64</sup> Although the goal of the agencies is to return the children to their biological families, success appears to be limited. Resources available for reunification services are inadequate, and neglect, abuse or abandonment are seldom resolved in such a way that children can return to their natural parents. Also, kinship care arrangements are frequently of a long-term nature as the biological parents may have disappeared or have ongoing problems. The recommendations outlined in 17.6.5 above are designed to create a more secure situation for children in long-term foster care. However, an additional contributing factor to the insecurity of many children in foster care is the fact that their biological parents continue to have legal rights and responsibilities with respect to them even where efforts towards family reunification have been exhausted. This situation creates barriers to permanency planning.<sup>65</sup>

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64 Van de Vijver L **Current trends in transracial adoptions and foster care placements in the Western Cape** 12 June 1998. Master's thesis.

65 See also 10.4 above.

### 17.7.2 Current Law and Practice

The Child Care Act, 1983 does not contain a provision which specifically deals with the termination of parental rights and responsibilities except in the case of adoption, which may occur without consent in certain circumstances. For example, consent to adoption may be dispensed with if a parent has physically, emotionally or sexually assaulted, ill-treated or abused the child.<sup>66</sup> Social workers, however, report that there is often a reluctance on the part of commissioners of child welfare to use their powers in this regard. This may be due to a lack of clear guidelines. There is also no legal differentiation between children of different ages at the time of initial placement. Thus the law does not take into account the fact that very young children tend to quickly form attachments to new caregivers. A child may thus be significantly harmed by being uprooted from the foster home after having been there for a substantial period.<sup>67</sup>

Parental rights over a child placed in foster care do not terminate without an adoption, even if it becomes clear that there is no possibility of family reunification. Not only is adoption difficult to attain, for the above reasons, but many foster parents cannot afford to adopt due to their need for ongoing financial assistance in the form of the foster care grant. There may be other reasons why adoption is not advisable. For example, the child (especially an older child) may wish to maintain his or her separate identity. Or, in the case of a placement with relatives, it may be appropriate to maintain the distinction between the biological parents and e.g. the grandparents, uncles and aunts etc., in order to prevent confusion and identity problems in the child.

Foster care as presently structured is inherently insecure. Foster parents are often hesitant to bond with the child because they face the possibility of having to return him or her to the biological parents. Children in care are typically uncertain as to where they belong and tend to have an expectation, based on past experience, that they will sooner or later be rejected. Such a child may act out his or her insecurity in ways which are seriously disruptive and lead to the breakdown of the placement, and will then have to be moved to a new foster home or to residential care. Thus many

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66 Section 19 of the Act.

67 Goldstein J, Freud A and N Solnit **Beyond the Best Interests of the Child** New York: Free Press 1973.

children spend long periods of time 'drifting' in care, sometimes moving in and out of a series of placements in the process.

Contact between the child in foster care and the biological parents is an essential part of the foster care process. Helping to manage this contact and to deal with the needs and anxieties of all concerned is an issue in which foster parents require training and strong social work support. However, some biological parents, while making no progress towards resuming care of the child, maintain a pattern of extremely disruptive behaviour towards the child and the foster family. Others make contact after many years of absence, and exercise their legal entitlement to access to their children. Such parents may be immature, emotionally disturbed and/or violent. Their ongoing involvement or sudden re-entry into the child's life may cause extremes of insecurity both for the child and the foster family, which may precipitate the collapse of the placement. In addition, the continuation of parental rights and responsibilities may have the effect of preventing the recruitment of either foster or adoptive parents for children in residential care, as explained in chapter 10 at 10.4.5 above.

### 17.7.3 **Comparative review of systems in other countries**

Many countries have legislative provisions for the termination of parental rights and responsibilities in order to achieve permanency for a child who would otherwise remain indefinitely in an uncertain position in foster care.<sup>68</sup> For example, in the United States of America, the Adoption Assistance and Child Welfare Act of 1980 aims to prevent unnecessary foster care placement, to reunify families where possible, and to limit time spent in foster care by encouraging adoption when return to a natural parent is not possible.<sup>69</sup> The Act assures each child in foster care a permanency hearing no later than 12 months after the date the child is considered to have entered foster care, and not less frequently than every 12 months thereafter during the continuation of foster care. The aim of the permanency hearing is to determine the permanency plan for the child which includes whether, and if applicable when, the child will be returned to his or her parents or placed for adoption. In cases where the State agency has documented to the court a compelling reason for determining that it would not be in the best interests of the child to return home, the case will be referred for

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68 In this regard see also 10.4.6 above.

69 Guenheim M 'The effects of recent trends to accelerate the termination of parental rights of children in foster care - An empirical analysis in two States' (1995) 29:1 **Family Law Quarterly** 122 - 123.

termination of parental rights or the child will be placed for adoption with a fit and willing relative or with a legal guardian.<sup>70</sup>

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70 42 U.S.C. section 675.

The Adoption and Safe Families Act of 1997 (an Act to promote the adoption of children in foster care) obliges States to file a petition for termination of parental rights under certain conditions.<sup>71</sup>

#### 17.7.4 Recommendations

Measures to promote permanency for children in all forms of temporary care, including foster care, are discussed in detail in chapter 10 at 10.4. Specifically where children in foster care are concerned, **the Commission recommends that an existing bond with a foster parent(s) be taken into account when decisions are taken regarding the termination of responsibilities of biological parents. The securing of an established and positive bond with a foster family should, where appropriate, be given priority as a means to achieving permanency for the child.**

**The Commission further recommends that provision be made for subsidised adoption.**<sup>72</sup> This would enable long-term caregivers who cannot care for their foster children without financial aid, to adopt these children. The need for subsidised adoption could however fall away if a universal non-means-tested grant were to become available, along with a grant for children with special needs related e.g. to disability or chronic illness, as per recommendations referred to elsewhere in this Discussion Paper.

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71 It should be borne in mind that the substitute care system in the USA is differently structured from that in this country, with foster care being the usual care arrangement for children of all ages who require temporary court-ordered substitute care. In South Africa children in care who are not placed with relatives, especially older children, tend to start off in places of safety and children's homes, where possible moving into foster care later. Measures aimed at permanency for children in foster care in the USA should thus be looked at in relation to the entire care system in South Africa, and not just foster care. In addition, adoption as promoted in the USA seems usually to be by persons other than the foster parents; hence the aim usually seems to be to open the way for adoption by new families, rather than to make the foster placement permanent as is often the aim in this country .

72 See 18.6.7 below.

## 17.8 **Statutory supervision**

### 17.8.1 **Introduction**

Statutory supervision serves as a monitoring tool for children in foster care placements. However, limited welfare resources have led to the ineffective supervision of children in foster care.

### 17.8.2 **Current Law and Practice**

In terms of current legislation, foster care placements can be formalised only through investigations and court appearances by professional social workers. Once a child has legally been placed in foster care, supervision services have to be rendered by social workers for the duration of the placement and a report must be submitted to the Department of Social Development three months prior to the expiration of the court order.<sup>73</sup> In practice this normally means that a report must be submitted every two years until a child is transferred or discharged. As many placements are of a long-term nature, foster care social workers usually have large and unmanageable caseloads.

The non-governmental welfare sector undertakes a substantial proportion of statutory services carried out in terms of the Child Care Act. This arrangement has long been a source of discontent as this sector feels that it does not receive adequate compensation for these services, which it undertakes on behalf of the state. In recent years, the financial situation of the sector has worsened in view of cutbacks, in real terms, in subsidies paid to these organisations.

Foster care supervision frequently has limited clinical or therapeutic value and professional interventions tend to be crisis-orientated, as high caseloads make it very difficult to deliver services of an appropriate quality or intensity. Very often, statutory supervision is focussed on administrative tasks such as ensuring that foster care grants are paid and orders are extended every second year.

### 17.8.3 **Comments received**

Question 23 of the Worksheet read as follows: *How could statutory supervision services for foster care be made more effective?*

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73 Regulation 14(3).

The respondents made the following suggestions:

- volunteers should be trained and empowered to render statutory supervision services under the guidance of social workers officially designated to render such services;
- volunteers or auxiliary workers should render supervision services in long-term placements as these do not need specialised services;
- statutory supervision should be less intensive after three years;
- more resources should be made available to social workers, e.g. vehicles;
- supervision services should only be rendered in placements with non-relatives and where family reunification needs to take place;
- alternative human resource options should be utilised, e.g. community committees, to render supervision services; and
- the difference in amount between the child support and foster care grants should be addressed to reduce the demand for the foster care grant, which would in turn reduce the amount of foster care supervision.

The following question was posed on the Worksheet: *How could the new child care legislation ensure that in appropriate cases family reunification services are rendered to children in foster care?*

Cape Town Child Welfare Society submitted that social workers must every six months, during the period of the order, account to either a commissioner of child welfare or the Director-General on prognosis for reunification. Further, social workers and community leaders must ensure that those social pathologies that were prevalent in the child's home and community environment which caused the child's removal in the first place, are addressed and eliminated.

The Child Health Policy Institute suggested that reunification services should be focussed on cases where reunification is likely to take place within a certain period. The Foster Care Association of South Africa proposed that legislation should stipulate that thorough assessment must take place prior to the placement and that a detailed care plan must be drawn up. Based on the assessment, appropriate placement can be made to ensure reunification where appropriate.



CMR Pretoria North recommended that at the first review, a determination should be made whether reunification is still possible. CMR Rooihuiskraal suggested that intensive reunification services should be rendered in cases where there is a high likelihood for reunification. Where reunification is not possible, the placement should be of a more permanent nature.

The Department of Health and Social Services, Western Cape, stated that section 16(2) reports should motivate why a child cannot be returned to his or her parent(s). Further, the importance of Regulation 15 reports should be emphasised.

Respondents were also asked the following question:

It is sometimes argued that it is not cost-effective for cases involving stable long-term foster care, especially kinship care, to remain indefinitely on social work caseloads, especially where there is no likelihood of family reunification, but the grant continues to be needed in order to sustain the placement. These cases, the argument goes, should rather be dealt with via administrative processes within the social security system. Group and community work programmes can be designed to provide additional support / enrichment. Scarce social work resources for individualised work should then rather be concentrated on cases where family reunification is possible, or where there is a specific need for support and assistance.' Do you agree or disagree with this view? Please motivate your answer. If you do agree, what suggestions do you have as to how such a system might work?

The majority of respondents agreed with the view. Some, however, felt that there is still a need to monitor long-term placements to a certain extent. Pretoria Child Welfare Society suggested that welfare organisations should offer ongoing programmes to long-term foster parents, in areas such as life-skills training and income-generation. CMR Eastern Transvaal said that although it sounds like a good idea in theory, it might not work in practice. The respondent stated that there would have to be specified criteria to determine which cases could be dealt with administratively and which should be referred for case work. CMR Northern Transvaal agreed with the above view, but suggested that long-term foster parents should still have the responsibility to provide the social worker with school reports of the child and to contact the social worker when problems are being experienced.

#### 17.8.4 Evaluation and recommendations

In addition to the measures outlined at 10.4.8 above, the Commission recommends as follows with regard to family reunification services:

If a child has not been reunited with his or her family after the expiry of the initial court order, the social worker concerned must submit a report to the children's court in which it should be explained why the child was not reunified with his or her family, whether family reunification is still possible, and what steps will be taken to create stability in the child's life. At this point the court may -

- authorise the termination of reunification services; or
- terminate some or all parental rights and responsibilities subject to the conditions mentioned in chapter 10 at 10.4.8 and/or
- confer additional parental responsibilities or rights on the foster parents or relatives, should this appear to be in the best interests of the child.

With regard to statutory supervision, the Commission recommends as follows:

Supervision services should not be required for a child in kinship care, unless there is a need for such services, if the child's parents are deceased or cannot be traced and/or there appears to be no possibility of family reunification. Scarce social work resources could then be focused on cases where there is a likelihood of family reunification.

The children's court may, when making a placement in foster care or with relatives in respect of a child who has been abandoned or whose parents are deceased, determine the degree of supervision to be rendered with regard to the foster care placement, particularly if the court has ordered that the placement should be of a more permanent nature.

## 17.9 Duration and extension of foster care orders

### 17.9.1 Introduction

Originally, foster care was seen as a short-term placement with a view to the child's return as soon as possible to his or her family home. However, abandoned and orphaned children often remain in foster care until they reach the age of 18. This raises the issue of whether the court, when making a

foster care placement, should not stipulate that the placement be of a more permanent nature. In addition, there have been concerns that children who 'graduate' from foster care by reason of turning eighteen are often in a vulnerable position, being at risk of the removal of material and other forms of support before they are ready to make their way as independent adults.

#### 17.9.2 **Current Law and Practice**

An order that a child be placed in the custody of a suitable foster parent<sup>74</sup> lapses after the expiration of a period of two years or on a date determined by the children's court.<sup>75</sup> The Minister may extend the validity of a foster care placement order for a further period not exceeding two years at a time, provided that such an order may not be extended beyond the date on which the child turns 18 years.<sup>76</sup>

The Minister may, if he or she deems it necessary, extend the order that a child remain in a school of industries until the end of the year in which he or she turns 21 years.<sup>77</sup> Section 33(3) of the Child Care Act also provides that the Minister may approve that a child placed in any form of substitute care in terms of the Act remain in such care after he or she has attained the age of 18 years. This is possible on application of, or with the consent of the child, and, if they can be traced, the parents, to enable that child to complete his or her education or training. As children in foster care and children's homes are not covered by section 16(3), they can only remain in care by the consent of all concerned, without any extension of the court order. The children's court, like the Minister, does not have the power to extend the stay in foster care or in a children's home of a person over the

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74 Section 15(1)(b) of the Child Care Act, 74 of 1983.

75 Section 16(1) of the Child Care Act.

76 Section 16(2) of the Child Care Act.

77 Section 16(3) of the Child Care Act.

age of 18 years.<sup>78</sup> The point has been made that young persons in these categories of care are unprotected e.g. from exploitation by parents who may wish them to terminate their schooling and earn an income for them.

### 17.9.3 **Comparative review of systems in other countries**

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78 See however section 15(3) which provides that an order may be made regarding a person over the age of eighteen if that person was under eighteen at the time of the opening of the inquiry – this appears to be a contradiction in the law as it stands.

In Uganda, the Children's Statute of 1996 stipulates that a Family and Children Court may make an order or an interim care order placing a child in the care of the warden of an approved home or with foster parents.<sup>79</sup> The Statute further states that a care order shall be for a maximum period of three years or until the child reaches the age of 18 years, whichever is the shortest.<sup>80</sup>

In England, the Children Act of 1989 stipulates that any care order, other than an interim care order, shall continue in force until the child reaches the age of 18, unless it is brought to an end earlier.<sup>81</sup>

#### 17.9.4 **Comments received**

Question 7 on the Worksheet read as follows: *Should any changes be made to the duration and length of foster care orders, as set out in the current Child Care Act? If so, which changes would you suggest?*

A substantial number of respondents argued that a distinction should be made between short-term foster care where there is a prospect of family reunification and long-term foster care where family reunification is not likely to take place, e.g. where a child has been abandoned or orphaned. Further, short-term foster care should be limited to a maximum period of two years, whilst long-term foster care should be for periods longer than two years.

The Foster Care Association of South Africa suggested that subsidised adoption should be considered in cases where financial need is the motivation for long-term foster care and where there is no possibility of family reunification.

The SA Vroue Federasie proposed that a foster care placement should not be extended more than twice, whereafter adoption should be considered.

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79 Section 28(1) of the Statute.

80 Section 30(1) of the Act.

81 Section 91(12) of the Act.

#### 17.9.5 Evaluation and recommendations

##### **The Commission recommends as follows:**

- **In instances where a child has been abandoned, or his or her parents are deceased, or where there is no purpose in requiring family reunification services, the children's court may make a foster care order for a period of more than two years if this is in the best interests of the child.**
- **The Minister may, if he or she deems it necessary, order that a child whose period of retention in foster care has expired or is about to expire, return to or remain in foster care for any further period, and may from time to time extend that period, provided that no such order or extension shall extend beyond the end of the year in which the person turns 21 years. Further provided that if the child is about to turn or has turned eighteen, such further retention will be subject to the consent of the child.**

The Commission notes that, should the age of majority be lowered to eighteen as recommended at 4.5 above, any young person over the age of eighteen will have to give consent to an arrangement under this Act whereby he or she remains in care, and will be able to do so without the concurrent consent of his or her parents. This will do away with the present discrepancy between those in schools of industries and those in foster care and children's homes.

#### 17.10 Right of non-South African children to foster care grants

##### 17.10.1 Introduction

Refugee and undocumented immigrant children usually enter South Africa without any means of support. Some are initially in the company of their parents or other adults but become destitute later on, e.g. due to the death or disappearance of the adults involved. Others may be abandoned after

being born in this country, or may require protective intervention due to abuse or neglect. Foster care is often the appropriate measure for such children, and access to the foster care grant is usually necessary to arrange this form of placement.

#### 17.10.2 **Current Law and Practice**

The CRC affords to every child the right to social security,<sup>82</sup> and both the CRC and the African Children Charter prohibit discrimination against children on the grounds of nationality.<sup>83</sup> The South African Constitution gives all children irrespective of nationality the right to basic social services and to appropriate care when removed from the family environment.<sup>84</sup>

Section 4A of the Welfare Laws Amendment Act, 1997, read with Regulation 9(1)(b) of the Social Assistance Act, 1992, entitles a child in need of care who is not a South African citizen to a foster care grant, provided such child has a South African 13-digit identification document or an official document from the country of origin. The Department of Home Affairs has since 2 May 2001 been issuing 13-digit, maroon refugee identity documents. However, these documents are only issued to adults with refugee status. The Commission has been informed that, in practice, children who have fled from their country because of war or who are for other reasons displaced are being denied access to the foster care grant, due to being unable to produce the required identification documents.<sup>85</sup>

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82 Article 26.

83 Articles 2 and 3 respectively.

84 Section 28(1) (b) and (c)

85 In a presentation at a workshop on *the Protection of Unaccompanied Refugee and Asylum Seeker Minors*, held in Pretoria on 3 August 2001, Ms P. Naicker of the Department of Social Development reported that the Department was putting in place administrative measures to overcome this problem. These, however, do not yet appear to be operational.

### 17.10.3 **Comments received**

The following question was posed in the Worksheet: *Are there difficulties in obtaining foster care grants for non-South African children? If so, what are the difficulties and how could these be overcome through legislation?*

The majority of respondents agreed that the lack of identification documentation was a major obstacle to obtaining financial assistance for non-South African children. The Child Health Policy Institute recommended that birth certificates be issued at hospitals. South Peninsula Legal Aid Clinic suggested that commissioners of child welfare be empowered to order that the Department of Home Affairs issue identification documents for foreign children. Some respondents, however, felt that only South African children should be entitled to financial assistance.

### 17.10.4 **Evaluation and recommendations**

It is a reality that a number of child refugees and others of indeterminate status are in South Africa and are coming to the attention of the child protection services due to destitution, abandonment, abuse or neglect. Constitutionally and in terms of international child rights agreements these children are entitled to appropriate care and protection, with foster care being an important means to this end. In the absence of required documentation, foreign children are denied a basic measure of care and protection. **The Commission therefore recommends that a children's court order declaring a child in need of care should, in the absence of a 13-digit SA identification document or any official document from the country of origin, serve as a basis for granting financial assistance to any child. The Commission is further of the view that the children's court should assist, where possible, such undocumented children in obtaining the necessary identification documents.** In this regard, the court could make fruitful use of a personal accountability order in terms of which the court can order any particular individual who may have failed in his or her obligation towards a particular child to appear before the court and explain that failure.<sup>86</sup>

### 17.11 **Social Security**

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86 See 23.10.4 below.



### 17.11.1 Introduction

It has been suggested that 'social security should provide for the basic needs of a child, and for those special needs that arise from a chronic health condition or a compromised home situation, in order to ensure his or her survival and a standard of living adequate for his or her development'.<sup>87</sup> However, social security has yet to reach many children who are in need of assistance. For purposes of the present discussion, social security is examined as it applies to children in foster care.

### 17.11.2 Current Law and Practice

Social assistance for children in the form of grants is administered by the provincial Departments of Social Development in terms of the Social Assistance Act of 1992 and the Child Care Act of 1983 as amended.<sup>88</sup> A foster care grant is payable to foster parents in respect of a foster child who has been legally placed in their custody in terms of the Child Care Act. The Constitution also gives children the right of access to social security.<sup>89</sup>

Unlike most other benefits, the foster care grant is not means-tested unless the child has his or her own income. When the child support grant replaced the old maintenance grant, fear was expressed that the demand for foster care grants would increase. There are indications that this has happened in certain areas of the country. Recent research undertaken in rural hospitals in KwaZulu-Natal has shown that social workers are encouraging informal caregivers to apply for foster care grants instead of the child support grant, as the latter is far less than the foster care grant and is only available to children under the age of 7 years.<sup>90</sup> It also appears that parents who would otherwise be able to care for their own children may be handing them over to relatives so that these relatives

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87 Submission to the Committee of Inquiry into a Comprehensive Social Security System and to the National Department of Social Development on **Social Security for Children in South Africa** (2001) made by the Alliance for Children's Entitlement to Social Security (ACCESS).

88 **Issue Paper on Social Security for Children in South Africa** (2000). Prepared for the Committee of Inquiry into a Comprehensive Social Security System in South Africa, prepared by the Child Health Policy Institute and Black Sash

89 Section 27(1)(c).

90 P M Brink **Child abandonment in South African hospitals** (2000) Research report for Health Systems Trust.

can access the foster care grant.<sup>91</sup> The number of foster care grants paid increased from 45 599 in September 1999 to 49 600 in April 2000, an increase of 8,8%.<sup>92</sup>

### 17.11.3 **Comments received**

The following questions were posed on the Worksheet:

Should the amount of financial support made available to foster parents differ according to the type of foster care they are providing?

Should means testing for foster parents (a) who are not related to the child (b) in kinship care situations be introduced?

The majority of respondents submitted that financial support should differ according to the type of care involved. Some felt that placements with non-relatives should qualify for a higher amount. Other opined that the amount of financial support should vary in accordance with the needs of the child, e.g. foster parents caring for a child with a disability or with HIV/AIDS should qualify for a higher amount.

One respondent felt, however, that financial support for all foster parents should be the same. The respondent feared that the extended family might become less interested in fostering if paid a lesser amount than an unrelated foster parent.

The majority of respondents argued that foster parents not related to the child should not be subjected to a means test. Some suggested that a means test be introduced for foster parents who

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91 **Issue Paper on Social Security for Children in South Africa** (2000).

92 Ibid.

were relatives. Communicare and the Catholic Women's League were in favour of a means test in non-related foster placements.

The Department of Health and Social Services, Western Cape, proposed that a universal means-tested child care grant be introduced, and suggested that this should replace the child support and foster care grants.

#### 17.11.4 Evaluation and recommendations

Where children are removed from their parents or primary caregivers through the State intervention (the children's court process), the State has a constitutional obligation in the light of the **Grootboom**-decision to care for such children.<sup>93</sup> Such care can take the form of payment of a foster care grant. **In our opinion, the State must provide a foster care grant when a child is placed in foster care, whether with a relative or not, through formal State intervention.**

The Commission accordingly recommends:

- **Foster care placements with persons unrelated to the child should be supported through a non-means-tested foster care grant as is presently the case. Should a universal grant be introduced, this would be an additional source of support for persons willing to provide substitute care for children in need thereof. The Commission invites comment on whether the universal grant should be in addition to the foster care grant or whether the amount of the universal grant should be set off against the foster care grant.**
- **Children who require formal protective services and are placed in care with relatives by means of a court order should qualify for the same foster care grant, which should be of the same amount as the grant payable to non-relatives.**
- **Relatives caring for related children on an informal basis may approach the children's court to formally place such children in their care. However, it must be born**

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93 See 3.4 and 3.5 above.

in mind that such placement would involve the children's court finding a particular child in need of care.

**Informal care by relatives (non court-ordered placements) should be facilitated through a non-means-tested universal grant<sup>94</sup> or, in the absence of such a measure, a specific grant designed for this purpose. This grant should be supplemented with an additional needs-based grant such as the care dependency grant if the child has special needs with cost implications.<sup>95</sup>**

**In addition to the current foster care grant, an allowance should be paid to foster parents and relatives caring for children with special needs.<sup>96</sup>**

**Measures to facilitate the fostering of 'special needs' children should be considered. These could include tax rebates, and free health services and education for the biological children of the caregivers as well as the children in their foster care.**

It came to the Commission's attention that there is reluctance by some commissioners of child welfare to make orders placing children in the long-term care of relatives.<sup>97</sup> There is also apparently reluctance by some officials of provincial Departments of Social Development to process requests for children to be placed in the long-term care of relatives. This happens despite the fact that the Child Care Act as it presently stands provide for assistance to relatives caring for related children.<sup>98</sup> The present Act in no way exclude relatives of the child from being approved as foster parents, and the Social Assistance Act makes no distinction between relatives and non-relatives for purposes of

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94 This is the same measure mentioned in several other places in this Discussion Paper, having been recommended to the Taylor Commission by various organisations. Such a grant would help ensure that households do not only rely on the grant of the additional child that they have taken in as all children in a household would have access to such grant. Such a measure would strengthen the capacity of the extended family to absorb more orphaned children, while also greatly reducing the incentive to move children away from their biological parents in order to secure financial assistance.

95 See also 25.4 below.

96 Ibid.

97 See 17.2.1 above.

98 The grounds set out in section 14(4) in terms of which a child can be found in need of care would cover virtually all situations of children whose parents or guardians have died of AIDS or whose parents are too ill to care for them, and whose relatives lack adequate means to support them.

the allocation of foster care grants.<sup>99</sup>

**The Commission would therefore suggest as an interim emergency measure that the Ministers of Justice and Social Development send directives to all the relevant offices under their jurisdiction pointing out that foster care with relatives, where available, is usually the placement of choice for destitute children including those orphaned by AIDS, and encouraging them to facilitate such placements and to remove current obstacles until such time as new legislation is in place to provide specifically for these children.** The Commission assume that top-up financing might be required to ensure that all provinces have sufficient funds in their social security budgets to cover the children who would then enter the system – failing this, barriers to placement might continue to be raised by officials.

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99 D S Rothman 'Foster care placements : Section 15(1)(b) of the Child Care Act 74 of 1983 (as amended)' (1999) Vol. 2 No. 3 **The Judicial Officer** 98.