

# Huge relief for children

Landmark ruling clears way for grandparents to access grants for orphans in their care

**O**N APRIL 12, the Johannesburg High Court ruled that Ms M from Kagiso qualified to be a foster parent for her three orphaned grandchildren.

She was assisted by the Black Sash, a human rights organisation, and represented by Legal Aid South Africa.

Ms M is appreciative of the decision after waiting for more than four years.

She said: "I will use the foster child grant to meet the children's needs such as food, clothing and education... I am now able to use my grant (her old-age pension) to attend the doctor, buy spectacles and meet my daily needs."

The judgment helps solve one of the challenges that have been preventing grandparents from accessing foster child grants. It will bind all magistrates in Gauteng and will be of persuasive value to magistrates in other provinces.

"We are confident that the ruling will strengthen the legal status of orphaned children, benefiting thousands of other children who have been deprived of similar rights," said Legal Aid SA's civil attorney Michael Motaung.

He said the ruling had clarified the meaning of section 150(1)(a) of the Children's Act 38 of 2005 and made it clear that a caregiver who bore a common law legal duty of support (like a grandparent) might still be appointed as a foster parent and was entitled to receive a foster child grant. The court further provided guidelines for children's courts to follow when interpreting the law.

Ms M first approached a social worker for a foster child grant in November 2008 after the children's mother died, making them "orphans" in terms of the Children's Act.

Due to the shortage of social workers and the underfunding of non-profit organisations like Child Welfare, which employs 50 percent of them, Ms M waited for two and a half years before the social worker completed the investigation and wrote a report required for the children's court inquiry.

This is despite the Children's Act prescribing that the report should be written within three months.

When Ms M eventually got to court in April 2011, the Krugersdorp Children's Court turned down her application because the Children's Act was not clear as to whether family members qualified to be foster parents.

With the help of the Black Sash and Legal Aid SA, she appealed to the Johannesburg High Court to review the Children's Court decision.

On April 12, more than four years since she first applied for state support, the high court provided relief by ruling that grandparents do qualify to be foster parents and ordered the Department of Social Development to pay the three foster child grants.

The court also ordered that the grants be backdated to April 2011 - the date of the children's court order.

However, the family received no relief for the two and a half years of lost grant income from 2008 to 2011 caused by the delay at the social worker stage.

The same pattern can be observed in the facts of the case of Child S, represented



More than 1 million orphans desperately need foster child grants, but are failed by a shortage of social workers, says the writer.

PICTURE: BONGWE MCHUNU

by the Centre for Child Law, which preceded this case.

The delay for most foster care applications is clearly lying at the door of the Department of Social Development as it struggles to keep up with demand.

The Centre for Child Law, Legal Aid SA, Black Sash and the Children's Institute (UCT) are concerned that the foster care system is failing to assist family members caring for orphaned children.

This is not a new problem but has been occurring since 2002 when the numbers of orphans applying for foster care started to grow rapidly due to the HIV/Aids pandemic. Besides failing orphans, the system is also failing abused and neglected children who desperately need the services of overwhelmed social workers and children's courts.

Black Sash regional manager Thandibe Zulu said: "Courts are not the appropriate place for grandparents and siblings caring for orphans. It is a fact that the foster care system fails these relatives and that overwhelmed social workers are unable to deliver services for many children in real need of protection."

"We believe that a non-court-based system is long overdue and must be implemented to provide much-needed income



Ann Skelton

support for kinship carers."

These civil society organisations and many others, including Childline and Child Welfare, have been calling for reform for more than 10 years as they have observed at the coalface how the system is unable to cope with the demand.

The foster care system was designed to accommodate 50 000 children yet it has more than 500 000. In 2011, after being approached by Childline and Child Welfare for help, the Centre for Child Law approached the high court to avoid a looming crash of the foster care system.

A court order was granted to temporarily alleviate pressure on the foster care system created by the backlogs of foster child orders. The backlogs were created by a lack of resources to deal with the high numbers of foster care orders, including overcrowded court rolls and overburdened social workers. Due to the backlogs, more than 110 000 foster care orders had lapsed and children had lost support.

The court order provided relief by "deeming" them not to have lapsed and placed a temporary moratorium on further lapsing. This provided time to the department to introduce reform.

The purpose of granting the Department of Social Development breathing space was to allow it to develop a solution to solve the systemic problems in the foster care system. Unfortunately, the M judgment does not solve the systemic problems that still exist and may in all likelihood add to the pressure on the foster care system as it opens the doors for more people to be placed on an already stretched system.

Another lapsing crisis is imminent as all foster care orders deemed to have been extended for two years by the original court order of 2011, will expire on June 22. If these orders lapse, the SA Social Assistance Agency (Sassa) will discontinue payment of the foster child grants and we will face the same crisis we did in 2011.

Research by UCT's Children's Institute shows that there are more than 1 million orphans living with relatives in poverty yet in 2011 only 460 000 were receiving foster child grants (Children's Institute analysis of the General Household Survey data).

Others are still in the queue while surviving on the much lower child support

grant of R290 per child per month.

Katharine Hall, a senior researcher at the institute, said: "It has taken the Department of Social Development more than years to reach these 460 000 orphans with a foster child grant. It is likely to take a further 10 years to reach the other 50 percent of orphans in dire need."

Paula Proudlock, programme manager at the institute, said: "In September 2012 the department announced its intention to introduce reform aimed at introducing a grant that relatives could access directly via application to Sassa."

"This would cut out the need for a social worker report and a court inquiry and ensure we reach all the orphans quickly. In November we attended a consultative workshop with the department where it gave further details on the proposal which would be implemented as an 'extended child support grant' which would give relatives caring for orphans a larger grant than the standard child support grant amount."

"If this proposal could be finalised and implemented in 2013, we would see great benefits for both orphans, child-headed households and abused children."

● Prof Ann Skelton is director of the Centre for Child Law, University of Pretoria.