# Who has a duty to support? Care practices and legal responsibilities in South Africa[i]

**To cite:**

Moore, E (2019) Who has a duty to support? Care practices and legal responsibilities in South Africa. *Critical Social Policy*. Vol 39(4)582-598

## Abstract

It is not always clear, through policies or law, where and when family responsibility ends. This article outlines the tensions that underlie policy and legal conceptions of obligation and everyday obligations that shape typically gendered patterns of care in families in South Africa. An examination of court cases reveals that the court found practices of intergenerational financial support amongst diffuse kin relations and ruled that the social insurance system (Road Accident Fund) was obliged to continue these following the death of a breadwinner in a road accident. The Road Accident Fund contested this responsibility by disputing the legal obligation of the deceased to support the kin member. The cases highlight the lack of coherence in policy and law concerning the agreed social norms about the family. On the one hand, the RAF's approach reproduces the gendered assumption of care, i.e. the role of the state is reduced, and the onus is placed on working class black South African women to take care of themselves and their families. On the other hand, the judiciary's focus on social practices of care rather than rights is applauded for being transformative. I argue that the state's ambiguous approach to recognising committed care work results in a situation where people have to 'win' their case in court and consequently leaves the care of family members to the unpaid and paid resources of women.

## Keywords

Family; kinship; intergenerational; duty to support; South Africa; care

## Introduction

Social policies often make assumptions about what happens within families and can overlook the gendered burden of care in families. In South Africa, scholars have criticised the norms and assumptions that are built into family policies in South Africa (Hassim, 2005; Hochfeld, 2007; Mokomane, 2013; Rabe, 2018; Sevenhuijsen, et al. 2003). There are grave concerns in the way

the policies adopt a narrow family form as its reference point in a country where multi-generational households comprise 62 percent of households where children live (Hall and Mokomane, 2017). In order to identify the approach taken to the family, one must look not only at policy measures but also at general values in relation to the family which are embodied in law. This article outlines the contradictions between policy and legal conceptions of obligation, and everyday obligations that shape typically gendered patterns of care in families. Unlike the well-established critique of South African family policies (Hochfeld, 2007; Mokomane, 2013; Rabe, 2018; Sevenhuijsen, et al. 2003), there is less known about the tensions that arise from different systems of law in a pluralist legal system like South Africa. Whilst it has been argued that the legal framework of a country shapes social policy and can establish the norms and values in relation to the family (Daly and Clavero, 2002: 19), what happens when different systems of law within a pluralist legal state do not share the same assumptions regarding who has a legal duty to support a dependant?

South Africa has a pluralist legal system, where various officially recognised state laws including common law, statutory law (legislation), customary law and religious law coexist. People may live under different legal systems that regulate their relationships with family members, but all law must be aligned with the Constitution. Responsibilities to family members, including a duty to support, are part of customary law as well as common and statutory law. Customary law, which is not found in many jurisdictions, is derived from social practices that the community accepts as obligatory. It is defined as 'the usages and customs traditionally observed among the indigenous African peoples of South Africa' which 'forms part of the culture of those peoples' (Moore and Himonga, 2018: 61) It is mostly unwritten, and the rules are flexible, changing in response to changes in the socio-economic environment, and therefore it is rooted in the contemporary rather than the past. All sources of law place responsibilities on adults to support family members, but these laws do not always share the same assumptions regarding who has a legal duty to support a dependant. In addition, as families have become more diverse in their structure and as rights and obligations have been tied to family relationships, the state's definition of families has become more complicated.

This article discusses the legal contestation around 'duty to support' and 'dependant' between a social insurance system and the courts. In doing so, the article examines the contradictions embedded in the South African state's definition of the duty to support. The Road Accident Fund (hereafter referred to as RAF) is a social insurance system that (under the Road Accident

Fund Act 56 of 1996) provides compulsory cover to all users of South African roads against injuries sustained or deaths arising from accidents. The primary source of income for the RAF is a levy raised on fuel, measured in cents per litre and set annually by the National Treasury. The levy is 193 cents per litre of fuel for the 2018-2019 financial year. The RAF fuel levy therefore, can be viewed as a compulsory contribution to social security benefits. The system compensates for loss of family support by allowing dependants of deceased breadwinners to make financial claims against the RAF. At the time of writing this article, the RAF was being reviewed and a Road Accident Benefit Scheme (RABS) Bill was at parliament. The new scheme, RABS, proposes to provide benefits to all accident victims and their dependants, irrespective of who was at fault. Benefits will be defined and paid in a structured manner and it will be capped at R160,000 per dependant.

The findings reveal that in a pluralist legal system like South Africa, tensions arise between the ways in which different policy and legal frameworks support (or not) diffuse patterns of dependency as they do not always share views on who can be considered a dependant. Whilst social policy or common law might be more concerned with individuals and liberal rights, customary law is based on family norms which involve these same individuals in networks of kin (and, less often, community) with norms of interdependence and mutual responsibility, and the subordination of individual interests to collective ones. In examining the tensions between differing legal and policy frameworks for understanding kinship-based practices of financial support, I draw on Ferguson's (2015) call for the state to support 'dependence' and to recognise and support diffuse patterns of dependency. In this paper, I argue that policy should not limit 'dependence' to specific positions within a narrow definition of the family, but include other, desirable forms of it by recognising everyday practices of support. I conclude by considering how the approach to policy fails to recognise the carers who are committed to care.

**Boundaries of obligation to care for kin**

The family, at least in part, is a legal construct and a fixed legal definition of who is part of a family, who can be considered a dependant or what family members do for one another does not always reflect social practices. When a government forms a policy or piece of legislation that will impact on family relationships they are in danger of defining 'family' based on assumptions that most families operate in particular ways. In fact, until recently, South African law considered only a child, parent or spouse as a relative who could be legally obliged to offer

financial support to their indigent parent, child or spouse respectively. This common-law definition was based on the narrow understanding of a nuclear family. It was only in 2012 that the court ordered that grandparents and siblings had a 'duty of support' for a child, but uncles and aunts had no such duty (Reynolds, 2016; South Gauteng High Court, 2012). Legal obligations of what family members should do was not a reflection of what families, in particular extended families, were doing in practice (Reynolds, 2016).

The provision of childcare in South Africa is heavily gendered as women spend eight times more time on childcare than men (Statistics South Africa, 2013: 36). Recent evidence using national micro data also revealed that it is not only the physical care that is gendered but financial support for children is also gendered (Hatch and Posel, 2018). While care work, both physical and financial, can be a source of fulfilment, it is also a source of constraint, especially for women. Although the presence of women in the paid labour force has grown in South Africa the level of female unemployment has also grown (Posel, 2014: 308), and the expectation of women as caregivers has not changed. Mosoetsa (2011: 144) outlined how women bear the burden of being the primary providers and caregivers during an epidemic of crisis proportions, that of HIV and AIDS, unemployment and gender-based violence. In reality, the support of extended family living has compounded these gendered expectations; as more women migrate and/or enter the labour force to ensure the survival of the family, whilst older women in the family carry the responsibility of physical and in many instances financial care. A large body of evidence has highlighted the gendered dimensions of intergenerational financial support within particularly poorer families in South Africa (Chazan, 2008; Fakier and Cock, 2009; Goldblatt, 2005; Mosoetsa, 2011; Patel, 2012; Reynolds, 2016; Schatz and Ogunmefun, 2007). The evidence emphasised how older black South African women used their old age grants and other resources to address the financial needs in their families (Button, 2017; Chazan, 2008; Mosoetsa, 2011; Ogunmefun and Schatz, 2009; Schatz and Madhavan, 2011; Schatz and Ogunmefun, 2007). It is in this context that it has been argued that family policies and the welfare system more broadly is based on 'popular conceptions of gender roles that remain locked into conventional, familialist paradigms.' Hassim (2005; 643) argued that this approach adversely affects working class black South African women, who carry the burden of the crisis, not the state.

The heavily gendered dimension of care is reinforced by cultural principles of interdependence and need (Gouws and van Zyl, 2014). African kinship systems are imbued with normative

obligations of kin support and reciprocity. Sagner and Mtati (1999: 400) described African kinship as a moral order, structured around generalised reciprocity, that involves mutual obligations of support between relatives. This moral order was also said to be intertwined with the cultural ethos of ubuntu, which embodies the value of interdependence and emphasises the importance of ensuring the wellbeing of the collective over self-interest (Sagner and Mtati, 1999: 400). A communalist, socially oriented sensibility that connotes how individuals are not autonomous beings but are formed through relationships with others is important to understand how the boundaries to care for kin are negotiated. As members of a wider family, people are expected to be responsible for one another. However, even this should not be taken as the idea that imposes legally enforceable rights and duties between individuals; the sense of responsibility is, rather, between individuals and society. Bennett (2018: 47) outlined how it is inappropriate to think of ubuntu in terms of a right/duty dyad that corresponds to the individualism typical of Western legal systems; it is preferable to conceive of it in terms of relationships to a wider community.

Whilst societies acknowledge that people are collectively responsible for the care needs of their family members, in reality growing evidence shows that there is some scope for individual choice, and kin members in South Africa can contest and 'negotiate' claims made on them. The overwhelming evidence highlights the ways in which people contribute differently to the household income according to age and gender (Fakier and Cock, 2009; Mosoetsa, 2011). Poor people who receive an income are likely to encounter strong socially legitimate claims on that income. In fact, Ferguson (2015) writes that we perhaps have not fully appreciated the extent to which the livelihoods of the urban poor depend on the processes of seeking and securing support from kin. Therefore, when a household loses the breadwinner's income, or if a breadwinner is unable to provide an income, the effects on them and their dependants will be mitigated potentially by other kin members, either through claiming financial support from others or by moving dependants and breadwinners between households. Spiegel (2018) referred to such processes as 'strategies for spreading risk', with family members maintaining financial and social support networks across towns, cities and countryside. Some argue that these movements of family members are not random but may manage distributive claims and distribute flows (Seekings, 2008). Ferguson (2015: 108) has mapped out how much work goes into establishing ties with kin of the social standing that might enable distributive claims and stated, 'dependence is not a passive condition – but a carefully cultivated status that is the result of a long process of building social ties and reciprocal obligations.' As a result,

intergenerational financial support and diffuse patterns of kin dependency in South Africa should not be conceptualised as a safety net only in times of misfortune and transition but rather, as on ongoing social process, a strategy pursued on a daily basis.

In light of this evidence, the long-held adoption of a narrow legal definition of 'family' as nuclear, failed to consider the widespread flows of financial support, diverse living arrangements and cultural understandings of kinship in South Africa and it is in this context that cases against the RAF have emerged. The state is therefore faced with a problem: how do they define and understand 'dependant' in this context? Do they need to see how kin groups actually work to detect the principles through which relationships and obligations are constructed?

**Methods**

The evidence in this article is based on a study of judgments of 'loss of support' applications against the RAF since 2000 in all courts in South Africa. A systematic search was conducted on the case law database (Juta Publications) for 'loss of support' and 'Road Accident Fund'. I analysed a sample (N=300) of relevant court judgments in order to gain a bigger picture of what goes on in the courts involving such cases. The overwhelming majority of these cases centred on claims made by the spouses and children of deceased breadwinners. Such cases are not included in the analysis as spouses or children of breadwinners are dependants and such relations of dependence are not contested. Moreover, many of the cases focussed on liability for the accident or calculation of the quantity of loss of support which was not the focus of the research. I chose cases where claims made on the RAF, to take over the responsibility for financial support previously provided by distant kin or kin who did not have a common law obligation to provide support. The research does not include cases where the courts did not order the RAF to take over responsibility as no such case existed in the database. The research does not cover cases that do not reach the courts because the RAF does not have data available on such cases. Despite my efforts in trying to obtain such cases, I was informed that these figures are not available. Therefore, the analysis presented in this article is based on the data of 17 cases and provides a close analysis of claims of loss of support by intergenerational relations (uncle to nephew or grandparent to grandchild rather than spousal or parent-child) where the claim of a duty of support is contested.

The judgments typically contained sociodemographic information (name, age, relationship of plaintiff to deceased, size of household etc), information of the accident, detailed background of the financial support offered over time, arguments in favour of supporting application including a discussion of legal precedent. The data was analysed on a case by case basis, using qualitative content analysis and an inductive coding strategy. Key characteristics of each case were recorded in a spreadsheet to analyse the relationship between the plaintiff and the deceased; the form of financial support; the care needs of the plaintiff; the care needs of the household (including the presence and needs of other dependents). I further examined the legal arguments presented in favour and against the application for loss of support by or kin who did not have a common law right to receive such support. Two categories of cases were developed which are presented below: 1) cases where the duty to support was legally extinguished through, for example, adoption and 2) cases where a loss of support claim is being made even when the legal duty to support the plaintiff lies with another living, employed relative.

In what follows, I provide a number of short case studies to elaborate the points I make, demonstrating the range of issues that lie behind disputes over loss of support. It is important to recognise that the judgments do not provide access to how the litigants viewed their disputes or how the state handled their grievances. Statements in the judgment are constructed by the judge who is examining the case to address the issues that are relevant to the law. Moreover, the judgments are publicly available, and I have therefore not anonymised the cases or the details of the parties involved.

**Intergenerational financial support: Living customary law and common law duties**

In 2016 a news story in the national newspapers in South Africa centred on a ground-breaking judgment[ii] in the Gauteng High Court (Pretoria) which ordered the Road Accident Fund (hereafter referred to as RAF), to pay a family R72,439 (approx. £4067[iii]) towards their maintenance. The case involved a 26-year-old daughter who had been financially supporting her mother's household (R2500 per month, approx. £140) and had been killed in a road accident in 2013. The daughter and mother had an agreement that she would contribute towards her mother's household expenses until the she started receiving her old-age grant. The mother was 58 at the time of the accident and two years away from receiving the state old age grant (R1700 per month in 2019). There were five other dependent persons in the household. The mother had testified in court that the deceased honoured her undertaking until the day of the collision; she

was obliged to do so as "she knew from where she came from" (*Motha v RAF*: para 7) indicating an obligation to support her parents in terms of customary practice.

This case, and the findings that follow, show a feature of working-class black South African family life that has been referred to as the crisis of social reproduction (Fakier and Cock, 2009). In this case, similar to the others in the study, a 58-year-old mother, who is uneducated, unemployed, living in a large household and does not qualify for any state support, took the responsibility to care for her family following the death of her employed daughter. Sduhla Martha Motha is a widow who lives with five offspring. Following the death of her daughter, she became destitute. Like many other black South African working-class women she found employment in the poorest-paying sector of the labour market – domestic work – earning R800 per month. The deceased had been the shock absorber in this household, contributing from her income to her siblings and mother. After her passing, and in the absence of adequate state provision, the responsibility to provide for the household was left to her mother. The mother believed that the RAF should compensate her for loss of support as, under customary law, the daughter was legally obliged to support her, and she was therefore entitled to compensation for that loss. The RAF contested that the daughter had a *legal* duty to support the mother and paid little attention to the mother's commitment to care. The judge was positioned to interpret the law.

The question of who has a legal duty to support dependent kin members is complicated in South Africa, for two main reasons. Firstly, due to the pluralist legal system, South Africans have a customary or a common-law duty to support specific kin members. The ways in which such a duty is proven is guided by different legal principles in each case, but it is unclear when the courts decide to apply customary law. In what I present below, it seems that if the common law does not provide a claim, the courts will fall back on customary law. Secondly, practices of care in South African families are diverse, as many children do not live with biological parents. Therefore, the court has been forced, over time, to recognise the expectations of support that arise out of everyday practices that stretch far beyond the nuclear family. In doing so, they have had to go beyond a 'conventional' and position-orientated interpretation of who has a duty to support. These two issues are outlined in further detail in this section.

In South Africa, parents and grandparents have an obligation to support children and (adult) children have a reciprocal obligation to support parents. This duty can arise from a common-

law or a customary-law duty. The common-law duty to provide for a parent is subject to proving a parent is indigent. Therefore, in cases applying common law, the deciding principle is whether a parent can prove that he or she was dependent on the child's contribution for the necessities of life. The customary-law duty does not require such measures, although this has only recently been recognised in the courts. In customary law, it is incumbent upon a child to reciprocate by supporting a parent once that child is in a position to do so. It is important to note here that customary law is not a unified body of law and customary laws can vary according to location, ethnic group and or community. The judgments used for the purpose of the analysis often refer to 'customary law' in a general sense and fail to recognise the diversity of practices. That said, in the case *Fosi v Road Accident Fund*,[iv] the court held that the customary-law principle that a duty rests upon a child to support his or her parents when in a position to do so, should apply in determining the liability of the RAF towards a parent who has lost a child in a motor vehicle accident. Many of the judgments at the centre of this article detail the ways in which African children in South Africa have a customary duty to support parents, as Justice Dlodlo outlined in *Fosi v Road Accident Fund* at paragraph [16]:

> …in African tradition to bring up a child is to make for oneself an investment in that when the child becomes a grown-up and is able to participate in the labour market, that child will never simply forget about where he came from. That child without being told to do so, will make a determination (taking into account the amount he/she earns, her travelling to and from work, food to sustain himself and personal clothing etc) of how much he must send home to the parents on a monthly basis. This duty is inborn, and the African child does not have to be told by anybody to honour that obligation.

Justice Dlodlo goes as far as to say that it is a morally reprehensible act to fail to maintain one's own parents and if a child would do so, it would be ostracised and looked down upon as a person who has no ubuntu. In the post-apartheid era where customary law is recognised and supported through the Constitution, the court must apply customary law when that law is applicable, according to section 211 (3) of the Constitution. In essence, where litigants have been living according to customary law, that law should be applied unless overruled by statute or the Bill of Rights.

The question of who has a legal duty to support is further complicated by the diverse living and care arrangements. In South Africa, 30% of children aged 7–17 and 18% of children aged 0–6 do not live with their biological parents (Seekings and Moore, 2014) and are not necessarily financially supported by their biological parents. Other kin members are expected, not only legally but morally, to support kin. This could include an uncle or aunt who do not have a common-law duty to support a nephew or niece but are expected to do so through norms of obligation and perhaps even living customary law, as women and children were guaranteed economic security by the all-encompassing duty to support borne by their respective families (Bennett, 2007: 279). Over the years, the courts have had to recognise duties of support, and the reciprocal right to claim support, by persons who are in a relationship, regardless of the positions involved. Justice Sutherland expounded further on this matter in *JT v Road Accident Fund*[v] at paragraph [26] as follows:

> It seems to me that these cases demonstrate that the common law has been developed to recognise that a duty of support can arise, in a given case, from the facts specific circumstances of a proven relationship from which it is shown that a binding duty of support was assumed by one person in favour of another. Moreover, a culturally imbedded notion of 'family', constituted as being a network of relationships or reciprocal nurture and support, informs the common law's appetite to embrace, as worthy of protection, the assumption of duties of support and the reciprocal right to claim support, by persons who are in relationships akin to that of a family.

As outlined elsewhere (see Button, et al., 2018) this issue has been further tested in the courts in contestations over who may apply for a foster care grant. In providing the necessary financial support to enable family members to provide for dependants, the state is fulfilling its duty under section 28(1)(b) and (c) of the Constitution to ensure that children are appropriately cared for by encouraging and enabling others to do so.

**Recognising legal duties or social practices**

The cases that involved an underlying dispute over issues to do with whether a legal duty of support exists can be divided into two sub-categories: 1) disputes over whether a duty of support can exist in cases where the duty to support was legally extinguished through, for example, adoption and 2) disputes over whether a child can claim loss of support even if the

legal duty to support lies with another living, employed relative. In the first instance, the court is left to decide what to do when a person voluntarily assumes the duty to support a grandparent or a child, even when they are not legally obliged to do so. Does that give the recipient of support an enforceable right to compensation following the loss of such support?

In the case *JT v Road Accident Fund*, a young girl had been adopted by her grandmother when she was about seven years old, but the biological father had voluntarily continued to financially support her. The Fund admitted that it was liable for damages suffered by any person resulting from his death but contended that the deceased's legal obligation to support his child had been extinguished when the adoption had taken place; consequently, there was no liability on the Fund to compensate such loss. The issue therefore was whether the daughter had an enforceable right against the deceased. Justice Sutherland ordered the RAF to compensate the girl for her loss of support, stating at paragraph 30:

> It would be invidious to rule that a natural parent had no duty to support his daughter when he had voluntarily assumed that obligation. The undertaking had given the plaintiff a reasonable expectation that his maintenance contributions would continue. A duty of support between de facto family members was one of those areas in which the law gave expression to the moral views of society, and the common law ought to be developed to embrace this norm.

In essence, the courts argued that the practice of providing support means that the care recipient can reasonably expect maintenance contributions to continue and therefore has a right to claim for loss of support should the provider pass away. It seems here that the court resists the question of contractual duty and the judiciary concentrates on family relationships and social practices (not simple contractual undertakings).

The second sub-category of cases involved disputes over whether a person can claim loss of support when some relative other than a parent assumes the responsibility to support a child or spouse, even when the biological parent or spouse is in a position to support the dependant. These issues were discussed specifically in three cases, two of which are outlined here. In the first case, *Keforilwe v Road Accident Fund*,[vi] a 46-year-old mother who was unemployed had been receiving between R750 and R1000 (and groceries) per month from her son until he died in a road accident in 2013. The son, mother, father and two dependent children were living in

the same house. The son was the only regular earner. The father was unemployed for the most part, although occasional jobs earned him R2000 in some months. The father's irregular income was insufficient to provide for the family. The mother received child support grants for the two children, but this was insufficient to sustain the family; she relied on the support of her adult son. At the time of the case, the plaintiff argued that her past and future loss of support amounted to R810,800. The defence argued that the legal duty rested with the plaintiff's husband and not her deceased son. They argued that the mother was 43 and healthy, and nothing prevented her from working. The defence also argued that the deceased had assisted the plaintiff voluntarily; there was no legal obligation on him to support the plaintiff. The courts, however, did not agree. Justice Djaje stated at paragraph 14: 'the plaintiff [mother] was dependent on the deceased for the necessities of life and is now unable to enjoy those necessities due to the untimely death of the deceased.' Moreover, Justice Djaje supported the belief that a voluntary undertaking to support a relative created an expectation that such support would continue and therefore the loss of that support should be recognised.

In *M v Road Accident Fund*,[vii] the dispute centred on whether the grandchild of the deceased [grandfather] could claim loss of support even when his mother was employed and had a legal duty to support him. The child's biological father had died several years prior. The grandfather financially supported his grandson, despite the child's mother being employed and bearing the legal duty to support the child. The grandchild stayed with the grandparents when the mother relocated to another city for work. When the grandfather died in a road accident, the grandson lost the financial support he received from him. He was never adopted by the grandparents and the defence argued that there was no legal duty on the grandfather to financially support the child: the RAF was therefore not liable to compensate the child for loss of support. Justice Maluleke, however, rejected the claim made by the defendant that the grandfather had a duty to support the grandson only if it could be shown that the mother was indigent or unable to support the child. Instead, Justice Maluleke argued in paragraph 9 that:

> the voluntary assumption of support is emphasised as relevant to the duty arising and being enforceable against third parties. The voluntary assumption of support by the deceased created an expectation of its continuation and his untimely death resulted in such support being lost by the child.

Most importantly, Justice Maluleke at paragraph 13 argued that 'this is a case where the law must clearly express the morals of society and for the common law to resonate with modern day life expectations of society' and in making an order for compensation for the loss of support, Justice Maluleke respected such practices. It appears in this case that the court relies on a combination of factors, including voluntary assumption of support, expectation of support and societal morals.

The disputes that arise in these cases focus on the recognition of practices of intergenerational support rather than on legal duties to support between specific related kin members. The judges adopt a context-sensitive understanding of financial support practices in economically under-resourced families where practices are influenced by ubuntu, the African philosophy of communalism, as did Justice Dlodlo, in the *Fosi v Road Accident Fund* case discussed above.

**Conclusion**

The article examined the contestations that arise when different legal systems and state policies do not share the same assumptions regarding who has a legal duty to support a dependent.
The findings demonstrated several cases where plaintiffs, following the death of a family member, were left in financially precarious positions, with a heightened burden of care. The women were unable to claim any state support as carers for dependants, and in contexts of high unemployment, had been sustaining their households through regular support from adult children or others. These cases represent the very distinctive situation of many black South African working-class households, outlined above, that without the transformative justice making of the judiciary, would be unable to absorb the level of care they undertake.

This article also uncovered the ways in which everyday practices of interconnection, relationship and responsibility drive legal responsibilities. Instead of deriving responsibilities from rights based on specific relations, judicial reasoning acknowledges everyday practices of care and responsibility, many of which are underpinned by principles of ubuntu. I argued that the judiciary's focus on social practice rather than categories should be commended. In a context where expectations around financial support are gendered and follow cultural understandings of family and kinship and are ever-changing due to stresses such as high levels of unemployment, migration, poverty and the AIDs epidemic, the RAF's adoption of a narrow definition of who can be considered dependent seems restrictive and inappropriate. The RAF's

approach overlooks the practices of care that many black South African working-class women are left to carry. There are clear gendered assumptions at the heart of the RAF's policies. The policies reproduce the gendered assumption of care, i.e. the role of the state is reduced, and the onus is placed on working class black South African women to take care of themselves and their families. They are assumed to have resources to assist themselves or their family members. The RAF's failure to provide, unless successfully contested in the courts, results in a situation where the maintenance of life and care of family members are increasingly realised through the unpaid and paid resources of women. Goldblatt (2005) reminds us that in South Africa there is no financial support for parents themselves and no recognition of or compensation for their caring work. Applying a gender sensitive focus to the approach leads to an assessment of the extent of gender (in)equality in these policies.

In response to the question posed earlier in this article as to how the RAF and the state should define and understand 'dependant', I argue that they could draw on the lessons of the judiciary who investigate how kin groups actually work to detect the principles through which relationships and obligations are constructed. The reality of kin dependency in South Africa, especially amongst poor people, is more fluid because we know that resources are likely to flow in from multiple directions generationally and across households. I argue that a politics (and policy) that supports diffuse patterns of kin dependency may offer new forms of belonging and care, in a context where the social and moral obligations to support kin are changing and are subjected to considerable stress and shocks in contemporary life. In this way, and in responding to Ferguson's (2015) call for suitable forms of dependency, I argue that social policy should not limit 'dependence' to specific positions within a narrow definition of the nuclear family, but include other, desirable forms of it by recognising everyday practices of support. The data show that the RAF judgments at the heart of this article reflect Ferguson's arguments. The RAF and its policies are inserted into a world in which distribution is already a well-practised set of activities. Citing Meth (2004) Ferguson (2015: 158) confirms that debates around social policy must accept that the real questions are not about whether people are deemed 'legal dependants' but rather about the forms of (inter)dependence that are displayed and how they are to be acknowledged, compensated and therefore promoted. The assumption of rights and responsibilities is too rigid a measure to follow when the RAF is dealing with applications of 'loss of support.' The cases need to make decisions with reference to the reality of the lives involved, this would ensure that attentiveness was integrated into the policy framework as policies would be based on 'grounded practices of care and knowledge'.

The RAF should consider the care needs of the applicant and other household members. The policies need to recognise the carers not as rights-based individuals but as family members who are committed to care.

Furthermore, the findings highlighted a culture clash between the law and judicial interpretation. The judicial interpretation in these cases enforces the norms of society's culture, in particular the principle of ubuntu. The authority and content of the judiciary's decisions must be understood as flowing not only from cultural concepts such as ubuntu and social relations of the society but also from their desire to enact transformation, both economically and in legal culture. Ubuntu, as argued by Bennett (2018), has had the most pervasive impact on the law. It appears in an epilogue to the Interim Constitution. It includes a shift away from the rights of an individual, to a concern with the individual as a member of a community who is embedded in a web of relationships of interdependence and care with others, all of whom deserve equal respect. However, the law is also being used by the RAF as a tool to reduce the state's liabilities and responsibilities. Considerable tension between using law to enforce customary norms and using law to reduce the responsibility of the state to support low-income families lies at the centre of these cases. Interestingly, law performs both functions at the same time. Law enforces existing cultural norms when it establishes an adult child's obligation to support parents, but also questions these norms when it questions the practice of 'duty to support' in order to serve the ends of the RAF and the state. It questions the role of customary law when it contests customary law obligations by foregrounding statutory obligations.

A question that arises from this article is whether the different understandings of dependency that underlie the RAF's policy are explicit or implicit – do they act simply as background assumptions against which the operation of RAF policy is designed, or is it the declared purpose of the policy to promote particular forms of family life (resembling a nuclear family), or is it merely trying to limit the financial cost of covering wider kin members' claims? Some South African scholars argue that the neoliberal South African state has called for 'good family values', foregrounding the nuclear family as the key site of care, even if this does not align to the experiences of many families (Button et al., 2018; Hochfeld, 2007; Rabe, 2018). In centring the importance of the nuclear family model for ensuring the (re)production and maintenance of healthy and prosperous societies, the state attempts to shift responsibility for social and economic policy away from themselves, towards individuals. The cases in this study offer a glimpse of the importance of recognising social practices of care. Normative prescriptions of

who counts as a dependant can limit and constrain forms of financial support and care for dependants. Given the high level of interdependence within poorer black South African families, the RAF needs to expand its definition of dependant to recognise the everyday flows of support given by a wider range of kin. In this regard, it seems that customary law and the judiciary are showing greater flexibility than social insurance systems.

**Biography**

Elena Moore is an Associate Professor of Sociology and Director of the Families and Societies Research Unit at the Centre for Social Science Research at the University of Cape Town. She is currently the National Research Foundation (NRF) Chair in Customary Law, Indigenous Values and Human Rights. She is the author of *Divorce, Families and Emotion Work* (Palgrave, 2017) and (with Chuma Himonga) *Reform of Customary Marriage, Divorce and Succession in South Africa* (Juta & Co. 2015). Her work has appeared in the Journal of Family Issues; Gender & Society; Families, Relationships and Societies; and the Journal of Southern African Studies.
Postal address: University of Cape Town, Rondebosch, Cape Town 7701, South Africa
Email: elena.moore@uct.ac.za.

**Acknowledgements**

An earlier version of this article was published as 'Intergenerational family dependence: Contradictions in family law and policy', *CSSR Working Paper* 415 (Cape Town: Centre for Social Science Research, University of Cape Town). The research was funded by the DST-NRF Centre of Excellence in Human Development and DST-NRF Chair in Customary Law, Indigenous Values and Human Rights. Opinions, findings and conclusions expressed in the article is that of the authors alone, and the NRF accepts no liability in this regard.

**References**

Bennett TW (2007) *Customary Law in South Africa*. Cape Town: Juta Publications.

Bennett TW (2018) *Ubuntu: An African Jurisprudence*. Cape Town: Juta and Company (Pty) Ltd.

Button K (2017) *The impact of intergenerational negotiations and power dynamics on the burden of care experienced by low-income grandmothers*. CSSR Working Paper No. 400, Centre for Social Science Research, University of Cape Town.

Button K, Moore E and Seekings J (2018) South Africa's hybrid care regime: The changing and contested roles of individuals, families and the state after apartheid. *Current Sociology*, *Special Issue: Global Sociology of Care and Care Work* 66(4): 602–616.

Chazan M (2008) Seven 'deadly' assumptions: Unravelling the implications of HIV/AIDS among grandmothers in South Africa and beyond. *Ageing and Society* 28 (7): 935–958.

Daly M and Clavero S (2002) Contemporary Family Policy: A comparative review of Ireland, France, Germany, Sweden and the UK. Dublin: Institute of Public Administration.

Fakier K and Cock J (2009) A gendered analysis of the crisis of social reproduction in contemporary South Africa. *International Journal of Feminist Politics* 11(3): 353–371.

Ferguson J (2015) *Give a Man a Fish: Reflections on the New Politics of Distribution*. Raleigh, NC: Duke University Press.

Goldblatt B (2005) Gender and social assistance in the first decade of democracy: A case study of South Africa's Child Support Grant. *Politikon: South African Journal of Political Studies* 32(2): 239–257.

Gouws A and van Zyl M (2014) Feminist ethics of care through a Southern lens. In: Reddy V, Meyer S, Shefer T & Meyiwa T (eds) *Care in Context: Transnational Gender Perspectives*. Cape Town: HSRC Press, pp. 99–125.

Hall K and Mokomane, Z (2018) The shape of children's families and households: A demographic overview. In: Hall K, Richter L, Mokomane Z & Lake L (eds) *South African Child Gauge 2018.* Cape Town: Children's Institute, University of Cape Town, pp.32-45.

Hassim S (2005) Turning Gender Rights into Entitlements: Women and welfare Provision in Post-Apartheid South Africa. In Social Dynamics: *A Journal of African Studies* 34(2): 104

18.

Hatch M and Posel D (2018) Who care for children? A quantitative study of childcare in South Africa. *Development Southern Africa* 35(2): 267-282.

Hochfeld T (2007) Missed Opportunities: Conservative Discourse in the Draft National Family Policy of South Africa. International Social Work 50(1): 79-91.

Mokomane Z (2013) Social Protection as a Mechanism for Family Protection in Sub-Saharan Africa. *International Journal of Social Welfare* 22: 248-59.

Moore E and Himonga C (2018) Living customary law and families in South Africa. In: Hall K, Richter L, Mokomane Z and Lake L (eds) *South African Child Gauge 2018.* Cape Town: Children's Institute, University of Cape Town.

Mosoetsa S (2011) *Eating from One Pot: The Dynamics of Survival in Poor South African Households*. Johannesburg: Wits University Press.

Ogunmefun C and Schatz E (2009) Caregivers' sacrifices: The opportunity costs of adult morbidity and mortality for female pensioners in rural South Africa. *Development Southern Africa* 26(1): 95–109.

Patel L (2012) Poverty, gender and social protection: Child support grants in Soweto, South Africa. *Journal of Policy Practice* 11(1/2): 106–120.

Posel D (2014) Gender inequality. In Bhorat H, Hirsh A, Kanbur R & Ncube, M (eds) *Oxford Companion to the Economics of South Africa*. Oxford: Oxford University Press, pp.303-310.

Rabe M (2017) Family policy for all South African families. *International Social Work*, 60(5): 1189–1200.

Reynolds S (2016) Deciphering the 'duty of support': Caring for young people in KwaZulu Natal, South Africa. *Social Dynamics* 42(2): 253–272.

Sagner A and Mtati RZ (1999) Politics of pension sharing in urban South Africa. *Ageing and Society* 19(4): 393–416.

Schatz E and Madhavan S (2011) Headship of older persons in the context of HIV/AIDS in rural South Africa. *African Population Studies* 25(2): 440–456.

Schatz E and Ogunmefun C (2007) Caring and contributing: The role of older women in rural South African multi-generational households in the HIV/AIDS era. *World Development* 35(8): 1390–1403.

Seekings J and Moore E (2014) Kinship, market and state in the provision of care in South Africa. *Soziale Welt.* Sonderband 20, Nomos: Baden-Baden. 435—451.
Seekings J (2008) *Beyond 'fluidity': Kinship and households as social projects*. CSSR Working Paper No. 237, Centre for Social Science Research, University of Cape Town.

South Africa (2012) *White Paper on Families in South Africa*. Pretoria: Department of Social Development.

Sevenhuijsen S, Bozalek V, Gouws A and Minnaar-McDonald M (2003) 'South African Social Welfare Policy: An Analysis Using the Ethic of Care'. *Critical Social Policy* 23(3): 299–321.

South Gauteng High Court (2012) *SS v Presiding Officer of the Children's Court: District of Krugersdorp and Others* (Children's Court case number 14/1/4-206/10, Appeal Court case number A3056/11 in the South Gauteng High Court), ZAGPJHC 149; 2012 (6) SA 45 (GSJ) (29 August 2012). Available at: www.saflii.org/za/cases/ZAGPJHC/2012/149.html (accessed 7 August 2017).

Spiegel M (2018) Reconfiguring the culture of kinship: Poor people's tactics during South Africa's transition from apartheid. *Africa* 88 (S1) 2018: S90–S116.

Statistics South Africa, 2013. A survey of time use 2010. Resource document. Statistics South Africa.

## Notes

[i] An earlier version of this article was published as 'Intergenerational Family Dependence: Contradictions in family policy and law', *CSSR Working Paper* 415 (Cape Town: Centre for Social Science Research, University of Cape Town).
[ii] *Motha v Road Accident Fund* (40852/2015) [2016] ZAGPPHC 559 (23 June 2016).
[iii] At the time of completing this article, the exchange rate was 1GBP = 17.81 ZAR.
[iv] *Fosi v Road Accident Fund* (1934/2005) [2007] ZAWCHC 8; 2008 (3) SA 560 (C).
[v] JT v Road Accident Fund 2015 (1) SA 609.
[vi] *Keforilwe v Road Accident Fund* [2016] JOL 35680 (NWM).
[vii] *M v Road Accident Fund* (44393/2012) [2017] ZAGPPHC 247.