



Policy Brief: Foster Care in South Africa: Where To From Here?

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INTRODUCTION

One of the integral components of the South African alternative care system is foster care. Since 2002 the number of orphans in South Africa has risen drastically, the demand on foster care placement has increased, which has placed strain on the delivery of services. Overburdened and, some may argue, on the brink of collapse, foster care placement has been the subject of litigation and much debate. Despite this, a sustainable solution, rooted in child rights, has yet to be formally proffered by government. This policy brief aims to examine foster care placement in South Africa and the challenges with which it is fraught. It will seek to provide a way forward for government to ameliorate the plight of the children who require these services as well as those who are rendering them.

HOW IS FOSTER CARE DEFINED IN SOUTH AFRICAN LAW?

The Constitution of the Republic of South Africa sets out minimum standards pertaining to socio-economic rights - including social security, social assistance and social services. Section 28(1) of the Constitution states that *“every child has the right...(b) to family care or parental care or to appropriate alternative care when removed from the family environment [and] (c) to basic nutrition, shelter, basic health care services and social services.”* Importantly, section 28(2) of the Constitution states that *“the best interests of the child are of paramount importance in every matter concerning the child”*. The right to appropriate alternative care, with consideration of the best interest of the child principle is the starting point and real issue when we review and analyse the placement of children in foster care.

Foster care, as set out in Chapter 12 of the Children's Act 38 of 2005, is a form of alternative placement a children's court can order. A child may be placed in foster care when the child has been deemed by the children's courts to be a child in need of care and protection as defined in section 150 of the Act or if a child is transferred to this type of placement in terms of section 171 of the Act. According to section 180, a child may be placed in foster care with *“(a) a person*

who is not a family member of the child, (b) with a family member who is not the parent or guardian of the child; or (c) in a registered cluster foster care scheme”. Section 181 of the Act cites the purposes of foster care as being to *“(a) protect and nurture children by providing a safe, healthy environment with positive support; (b) promote the goals of permanency planning, first towards family reunification, or by connecting children to other safe and nurturing family relationships intended to last a lifetime; and (c) respect the individual and family by demonstrating a respect for cultural, ethnic and community diversity.”*

Section 7 of the Social Assistance Act 13 of 2004 renders a foster parent eligible for a foster child grant (FCG) for the child concerned if the child is *“placed in his or her custody in terms of the Child Care Act of 1983”* (repealed by the Children's Act); that the *“child remains in his or her custody”* and that the *“foster parent is a South African Citizen, a permanent resident or a refugee.”* The value of the FCG is R830 per child.¹ Notably, there is no means test in order to be eligible for a FCG, differentiating it from other grants geared towards poverty alleviation, such as the Child Support Grant (CSG). The FCG is therefore part of the state's statutory obligation towards the care and protection of children placed in foster care, in much the same way as it is obliged to provide for children in other forms of alternative care placement. While these provisions appear fairly comprehensive, the following will illustrate how their interpretation and other provisions of the Children's Act have caused much of the overburdening of the foster care system in South Africa.

WHAT HAVE BEEN THE MAIN CHALLENGES BEEN IN IMPLEMENTING THE SYSTEM?

1. *The sheer volume of children entering into the system*

As the HIV and AIDS pandemic took hold, the number of orphans rose dramatically and the need for alternative care placements increased. In 2002, the then Minister of Social Development encouraged relatives caring for children to approach the children's

courts seeking foster care orders, placing the children in their care in this manner.ⁱⁱ This was a factor causing the number of children in foster care to increase exponentially, overwhelming the child care and protection system (social workers and the children's courts in particular). Social workers and children's courts began seeking and granting these placements to orphans in large numbers. While previously the number of children receiving the FCG never rose above 40 000, in the last decade it has climbed and climbed.ⁱⁱⁱ As at March 2014, 512,055 children were in foster care placements receiving the FCG.^{iv}

In 2012 the question as to whether orphaned children living with relatives should be placed in foster care with them came before the courts.^v As stated above, for a child to be placed in foster care, he or she is required to be deemed by the children's courts to be a child in need of care and protection. A component of this is that the child should be "without visible means of support". It was contended that children living with relatives do not fall into this category and should thus be excluded from foster care placements. The court held that if the child is living with someone with a common law duty of support towards the child, that they will generally not be placed in foster care but that the court had a discretion in this regard, depending on the facts and circumstances of each case. In the judgement, the concept of "common law duty to support" was summarised to include biological parents (whether married or unmarried), adoptive parents, maternal and paternal grandparents, siblings and step- parents (in a narrow set of circumstances). It excluded all aunts and uncles.^{vi} This has affected the number of orphans living with relatives who are successfully being placed in foster care, but not sufficiently so as to address the incredible volume of orders already granted, pending or prospective.

2. The Children's Act's Provisions Regarding Extension of the Grant

Section 158 of the Children's Act requires that a foster care order be reviewed by the children's courts every two years, unless the court has ordered that a shorter period be specified. This kind of judicial review was not required by the previous Act, which allowed for orders to be reviewed administratively by the Department of Social Development. This new and more onerous process only added to the pressure that social workers and the children's courts were already under. It also had considerable budgetary implications. Because of this, by 2010, thousands of foster care orders had

begun to lapse, resulting in the children concerned no longer being legally placed in foster care nor being eligible for the FCG. As a result, an urgent court application was brought in 2011 by the Centre for Child Law to provide interim relief.^{vii} The resultant order stated that all grants that had lapsed because of the backlog were deemed not to have lapsed and that these foster care orders, together with the foster care grants could be extended administratively until the Department of Social Development could come up with a systemic solution.

During the time for which the court order was valid, the Department of Social Development took several steps to address the foster care backlog. These included the development of a monthly foster care monitoring tool, successfully approaching National Treasury to allocate funding for the employment of social work graduates, and engagement with veteran social workers to assist with the supervision of the social work graduates.^{viii} The Department also "finalised a costing model for the services rendered by non-profit organisations and is in the process of developing a funding model" - after which it will make a bid to National Treasury for more funds.^{ix} Each of the provinces also implemented various measures to reduce the backlog.^x In addition, an inter-ministerial task team has been created with a view to addressing the challenges experienced in foster care.



Despite these efforts, the court order expired in December 2014 with no solution having been reached. At this time, in the wake of another potential crisis situation, the Department of Social Development approached the courts requesting an extension to 2017 or until the Children's Act could be amended, whichever came first.^{xi} The order was granted, stipulating that lapsed orders were deemed to not have lapsed and to be valid for a further period of two years. The Centre for Child Law contributed to the order by insisting that this time, the Department ought to be compelled to report to the courts every six months on the progress they had made in deriving a way forward. This was also included in the order.

WHAT IS THE PROPOSED WAY FORWARD?

It is necessary to note that local culture in South Africa brings with it a readiness on the part of extended families to take responsibility for children who have been orphaned. On this basis, in certain cases, foster care may simply not be the appropriate placement for a child, nor does it serve the best interest of the child.

The family concerned may be in a position to adopt the child, or indeed may have a common law duty to support the child, as set out above. Caregivers can also have parental rights and responsibilities assigned to them as contemplated in sections 23 and 24 of the Children's Act. In order to prevent cases such as these from further burdening foster care placement as part of the alternative care system, better screening is needed so as to determine the appropriate course of action with regard to the child concerned. If social assistance is required by such caregivers in order to support these children, they should apply for the Child Support Grant (CSG) as contemplated by section 6 of the Social Assistance Act which they will then receive, should they meet the requirements. The obvious downside of being a recipient of the CSG as opposed to the FCG is that the grant is substantially less, with the CSG standing at R320 per month.^{xii} A further distinction is that a means test is applicable, in contrast to the FCG where the grant is an automatic consequence of the court order. A natural proposition therefore, is to raise the amount of the child support grant and to universalise it - making it available to everyone caring for children. Given that the CSG has considerable reach, however, this has significant budgetary implications that are beyond the scope of this discussion.

Furthermore, care should be taken not to directly associate foster child grants with social assistance grants, as it is fundamentally different in its intention and legal obligation. Previously, the provisions surrounding the FCG were located within Regulation 4 of the Child Care Act 74 of 1973, rendering it a component of foster care itself, not of social assistance. Location of the provisions surrounding the FCG within the Social Assistance Act is misleading, as it suggests that the grant is a form of social assistance. Ultimately foster care placement is a mechanism through which the government provides for children who are considered to be wards of the state and is not chiefly intended as a poverty alleviation mechanism unlike, for instance, the CSG. It is submitted that this has been the cause of much misperception and it is therefore asserted that provisions regarding the FCG should be relocated to the Children's Act through amendment of the legislation (though the grant payment can still be administered through the South African Social Security Agency).

A further option for alleviating pressure from the children's courts exists in the regular employment of section 186 of the Children's Act. This section empowers a children's court to order that in the event of a child being placed in foster care with a non-family member for more than two years, "(a) *no further social work supervision is required for that placement; (b) no further social work reports are required in respect of that placement; and (c) the foster care placement subsists until the child turns 18, unless otherwise directed.*" In respect of children placed in foster care with families, section 186(2) allows a court to extend

that period of placement beyond two years if "(a) *the child has been abandoned by the biological parents; or (b) the child's biological parents are deceased; or (c) there is for any other reason no purpose in attempting reunification between the child and the child's biological parents; and (d) it is in the best interests of the child.*" Regular application of this section would reduce the pressure on children's courts and social workers. It would not, however, reduce the number of children placed in foster care; which is truly what is at the crux of the problem.

Both the 2011 and 2014 court orders provided for the administrative extension of lapsed foster care orders. Should the Children's Act be amended to allow for extension of this nature after the court has taken the initial decision to place the child in foster care, this could also serve to decrease the burden placed upon the children's courts. It would also render the process of extension less cumbersome. Again, this would not decrease the number of children in foster care, and the lack of judicial oversight for particularly vulnerable children who have been victims of abuse, neglect or exploitation may be problematic.

The final suggested means of alleviating pressure from the management, supervision and support of orphaned children in foster care is not a new proposition. In fact, it was suggested as early as 1996 by child rights organisations and recommended in 2001 by the South African Law Reform Commission when it proposed a draft Children's Bill^{xiii}. This is the idea of introducing a new Kinship Care Grant for orphans, which would be brought into place through amendment of the Social Assistance Act^{xiv} and the Children's Act. The Kinship Care Grant would be extended to those children that are orphaned and living with relatives. It is currently being suggested that application for a grant of this nature would require an initial assessment of the child's situation, but would not in most cases involve the same intensive supervision as a foster care placement.^{xv} This would "free up" the children's courts as well as child protection social workers for issues where there is "*abuse, neglect and abandonment, because those children require urgent and swift intervention.*"^{xvi} It would mean that significantly fewer children would be within the foster care system, which would have the effect of hugely reducing the existing backlog, and the number of children who ought to be eligible for a grant but are not currently receiving one. Judicial supervision of placements where the child is in a volatile setting, or where family reunification could take place is important. Orphans, however, who can never be reunited with their parents and who are safe in their living arrangements with relatives simply have a different set of needs; needs to which a kinship care system could respond.

As Paula Proudlock of the University of Cape Town has stated:

"Child protection social workers and courts should be providing services to raped, assaulted,

neglected, abandoned and orphaned children. There is no need for them to have to spend their skills and time processing paper work for grant applications for children, the majority of whom are quite safely living with their grannies or aunts. South Africa has a very effective Social Security Agency (SASSA) with an army of social grant officers who could be tasked with processing these grant applications and reaching orphans quickly. A screening system implemented by the full range of social service professionals, including the growing number of child and youth care workers, could ensure that any child living with a relative who is not safe, can be referred to the protection system. These reforms would free up the social workers to provide child protection services to children and families at risk.^{xvii}

Draft versions of the necessary amendments already exist in the Draft Social Assistance Bill and Draft Regulations and 3rd draft Children's Amendment Bill, but these have yet to be circulated for public comment and tabled before Parliament.^{xviii} It is submitted that doing so would be an essential step forward in finding a solution. In addition, the Department of Social Development has formulated a Foster Care Policy Document, which has been through several drafts. It is further submitted that this document should also be circulated among, and subject to full consultation with, child protection NPOs before being and tabled before Cabinet for approval.

CONCLUSION

Although the 2014 court order is much welcomed, it provides only a temporary solution for the over-encumbered foster care system. It does not propose a sustainable alternative for these children, and nor is it intended to. Considerable thinking around viable alternatives is urgently required in order to prevent the crisis from worsening. It is submitted that overall, introducing a Kinship Care Grant system is the most practicable way of doing so and stakeholders are urged to lobby for its introduction.

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