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OVERVIEW OF THE FOSTER CARE SYSTEM IN SOUTH AFRICA

1. INTRODUCTION

One of the essential components of the South African alternative care system is foster care. Research indicates that the number of orphans in South Africa range between 3.7 million and 5.2 million.¹ The South African Social Security Agency (SASSA), the Department of Justice and Constitutional Development (DoJ & CD), the Department of Health (DOH), the Home Affairs (DHA), the Department of Basic Education (DBE), Non-Governmental (NGO) Organisations and community members are some of the critical role players in foster care programmes.

This paper is divided into two sections. The first section will look at some of the challenges and interventions taken by the Department of Social Development and the role players in the management of foster care programme. The second sections will briefly discuss legislative challenges experienced in implementing certain sections of the Children's Act (No. 38 of 2005) and the court orders issued.

2. WHAT IS FOSTER CARE SYSTEM? HOW IS IT DIFFERENT TO ADOPTION?

Foster care system is a global system that is used in a wide range of placements, ranging from short term to long term. It is a way of providing a family life for children who cannot live with their own parents². Children may be placed by court order in a foster home where a foster parent(s) can look after children, not more than six (6) in number. Foster parents can be extended family members or persons unknown to a child. The latter either comes forward or is recruited usually by child and family welfare NGOs. These people often go through an assessment process and may have to participate in a structured orientation programme. In South Africa, extended family members are often grandparents whose children have either died or abandoned their children. The children may also be placed in cluster foster care run by non-profit organisations.

Foster care is one form of alternative care for children. The Children's Act in section 167 (1) states that a child is in alternative care if she/he has been placed in –

- (a) Foster care;
- (b) In the care of a child and youth care centre following an order of a court in terms of this Act or the Criminal Procedure Act (No.51 of 1977); or
- (c) In temporary safe care.

¹ Chiumia, (2014).

² International Foster Care Organisation. <https://www.ifco.info/foster-carers/what-is-foster-care>



There are a variety of reasons that some children have to be placed under foster care. These include: if the child has or is experiencing abuse, their parents are substance or alcohol dependent, there is domestic violence within the family, or there has been a family breakdown or relationship difficulties. The duration of placement may vary from few days to months or years. The goal for a child in the foster care system is usually reunification with the birth family, but may be changed to adoption when this is seen as in the child's best interest.

While foster care is temporary, adoption is permanent. Adoption from the foster care system can happen in two ways. Foster adoption is a form of adoption in which a child is placed into a home as a foster child, with the expectation that the child will become legally free and be adopted by the foster parents. Some children are not adopted by their foster parents. Their birthparents rights have been terminated, and they are legally free for adoption³.

3. LEGISLATIVE FRAMEWORK

The Foster care system is guided by the following international frameworks:

3.1 The Convention on the Rights of the Child (CRC) (1989):

Article 3(1) – states that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Article 3(2) – states that States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

Article 9 (1) – states that States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

³ Adoption centre. <http://www.adopt.org/what-foster-care>



Article 20 (1 – 3) – states:

(1) A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.

(2) States Parties shall in accordance with their national laws ensure alternative care for such a child.

(3) Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

South Africa ratified the CRC in June 1995 and ratified the Optional Protocol to the CRC on the involvement of children in armed conflict in 2009. South Africa acceded to the Optional Protocol to the CRC on child prostitution and pornography in 2003.

The UN also adopted the following guidelines:

United Nations Guidelines for the Alternative Care of Children stipulate that “all decisions concerning alternative care should take full account of the desirability, in principle, of maintaining the child as close as possible to his/her habitual place of residence, in order to facilitate contact and potential reintegration with his/her family and to minimize disruption of his/her educational, cultural and social life.”⁴

3.2 The African Charter on the Rights and Welfare of the Child (1989):

Article XXV (25) (1) – states that any child who is permanently or temporarily deprived of his family environment for any reason shall be entitled special protection and assistance.

(2) (a) – states that States Parties shall ensure that a child who is parentless, or who is temporarily or permanently deprived of his or her family environment or who is in his or her best interest cannot be brought up or allowed to remain in that environment shall be provided with alternative family care, which could include, among others, foster placement, or placement in suitable institutions for the care of children.

(3) states that when considering alternative family care of the child and the best interests of the child, due regard shall be paid to the desirability of continuity in a child's up-bringing and to the child's ethnic, religious or linguistic background.

South Africa ratified the Charter on 7 January 2000.

⁴ United Nations General Assembly, (2010)



4. SOUTH AFRICAN LEGISLATIVE FRAMEWORK

South Africa's legislative framework is, in general, protective of children and their rights and there have been significant developments since South Africa ratified the African Charter on the Rights and Welfare of the Child (ACRWC) in 2000. The Constitution of South Africa (Section 28(1)) stipulates 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".⁵ Furthermore, Chapter 12 of the Children's Act (No. 38 of 2005) states that Foster care is a form of alternative placement that a children's court can order.⁶

4.1 Children's Act (No.38 of 2005)

Foster care is a statutory intervention programme legislated in section 180 of the above-mentioned Act. This stipulates that a child should be placed in foster care as a result of a court order of a Children's Court or as a transfer from alternative care as ordered by a provincial head of social development (section 171). Section 180 (3)(a – c) stipulates different types of placements as follows:

A children's court may place a child in foster care-

- (a) with 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.

Purpose of foster care

Section 181 (a –c) states the purpose of foster care is as follows:

- (a) to protect and nurture children by providing a safe, healthy environment with positive support;
- (b) to promote the goals of permanency planning, promoting family reunification, or connecting children to other safe and nurturing family relationships intended to last a lifetime; and

⁵ Constitution of the Republic of South Africa, (1996)

⁶ Children's Act 38 of 2005



- (c) respect the individual and family by demonstrating a respect for cultural, ethnic and community diversity.

Duration of placement

The Act in section 159 (1)(a) stipulates that a foster care order issued by the children's court lapses on expiry two (2) years from the date it was issued. It may however be extended by the court for a period of not more than two (2) years at a time. Section 186 allows the court to remove supervision of a social worker after the child had been in foster care with a person other than a family member for more than two years and after having considered the need for creating stability in a child's life.

5. SITUATION ANALYSIS

The role of the Department of Social Development (DSD) in children's foster care is identifying the children who need care and support. In order to do this effectively, the DSD rely on a number of role players as indicated above. The DoJ & CD has an important role provided for in Section 186 of the Children's Act for issuing of the foster care orders, which assist in the management of orders. While SASSA is the custodian of the system, which manages payment of foster care grants, it only features at the end of the value chain of social workers and magistrates. Section 158 of the Children's Act allows the children's court to review the foster care order every two years unless the court specifies a shorter period. The previous Child Care Act did not allow orders to be reviewed, the DSD used to review orders administratively. It should be noted that these new changes added more work for social workers, which means more staff and additional resources for DSD are required.

In South Africa, it is often found that in large extended families, some family members look after orphans due to death in the family. In these cases, it may not be in favour of the orphaned child to be placed in a foster care placement. Furthermore, the concept of "common law duty to support" excluded all aunts and uncles living with the orphan children.⁷ The family members who look after related orphans are often excluded from receiving a foster grant. As a result, it has been suggested that a Kinship Care Grant be introduced as a practicable way of catering for orphans living with relatives. It is, however, unclear what the budgetary implications of introducing a new grant will be. *Therefore, it is advisable that irrespective of the status of the caregiver, the orphan child must be given a foster care grant instead of the introduction of the new grant (Kinship Care Grant- This this is the alternative route to adoption would likely have the same budgetary effect).*

The Department's presentation to the Portfolio Committee on Social Development (dated 22 November 2017) indicates that, in July 2010, SASSA submitted to the department a national

⁷ Breen, (2015)



list of 299 076 foster children with lapsed foster care orders who received foster child grants, per province⁸. This resulted in litigation against the Department by the Centre for Child Law. The National DSD has developed a draft Child Care and Protection Policy, which has a foster care chapter, with the necessary policy reforms that will contribute to a comprehensive legal solution to resolve the challenges faced within the programme.

Issues to Consider:

- The Child Care Act used to allow reviews of foster cases to be done by the DSD administratively while the current Act allows the court to review orders. This clearly places a burden on the social workers and children's court. **What are the budgetary implications of this? Has the Department made an application for funding from the National Treasury to cater for these changes, especially the social work funding? What were the outcomes?**
- The previous (5th term) Portfolio Committee on Social Development in 2017 advised the Minister of Social Development to approach the National Treasury to request more funding to deal with challenges pertaining to Foster Care System. Was this done? If so, what was the outcome?
- It also recommended that the department should prioritize the process to deal with legal reforms dealing with Foster Care System to avoid the intervention by the courts. What progress has been made in this regard?

Departmental Challenges in the implementation of foster care

Below are the challenges faced by the three role players that play a significant role in the actual implementation of foster care:⁹

DSD	DoJ and CD	SASSA
Shortage of resources to implement the Act	Lack of resources to manage the demand of foster care cases	Lack of a proper information management system to track and trace children in foster care (this leads to disputes regarding the actual numbers, as

⁸ Department of Social Development, (2017)

⁹ Department of Social Development, (2011)



		figures on SASSA database do not always agree with the manually maintained figures in DSD
Inadequate supervision of foster placements	Difficulty securing court dates and prioritisation of criminal cases over children's court cases	Foster care orders misplaced in some SASSA offices
Shortage of resources to implement the Act	Lack of standardisation in the application of the Act and issuing of court orders by presiding officers.	Foster care parents not approaching SASSA to submit the extension orders
Inadequate supervision of foster placements	Non availability of space in some DoJ&CD offices, requiring social workers to submit reports a month prior the lapse date of an order instead of the 4 months stipulated in the Act	Lack of documentation for non-South African children

Backlog in the foster care system

The above reasons result in the lapsing of the court orders. In 2010, there were **299 076** lapsed foster care orders¹⁰. This resulted in the litigation by Centre for Child Law against the Department of Social Development. Subsequently the North Gauteng High Court issued an order on 2 June 2011 which instructed the department to extend foster care orders administratively until 31 December 2014. On 12 December 2014, this order was extended to 31 December 2017. This was applicable to the backlog.

The backlog of the foster care orders is complicated by the fact that these orders have to be renewed every two (2) years according to section 159 of the Children's Act (No. 38 of 2005). Therefore, there is ongoing lapse of court orders on a monthly basis. In its presentation to the previous Portfolio Committee on Social Development, the Department of Social Development explained that the eradication of the backlog of these orders had been hindered by the fact that social workers simultaneously had to deal with the North Gauteng High Court order as well as the orders issued in terms of the Children's Act.

¹⁰ SASSA Presentation to PC on Social Development. 2017



In addition, there were administrative extensions of children reaching the age of 18 years. This indicated that when there were cases that were due to lapse and were not resolved within that specific month, they accumulated to a backlog¹¹. As of September 2017, there were **39 102** North Gauteng High Court orders¹². As at November 2017, there was a total of **49 534** foster care orders in terms of the Children's Act, which needed to be extended by the Children's Court before 31 December 2017. At the time of reporting to the Committee there was a projection of estimated **30 232** orders that were going to lapse between January – March 2018.

To address this challenge, the Department drafted a policy on Child Care and Protection Policy which is aimed at amending the Children's Act. The amended bill is due to be tabled in Parliament during the 6th term of Parliament.

The Committee resolved that the Minister should approach the National Treasury to request more funding to deal with challenges pertaining to the Foster Care System. The department should prioritize the process to deal with legal reforms dealing with Foster Care System to avoid the intervention by the courts.

6. INTERVENTIONS TAKEN TO MANAGE THE FOSTER CARE ORDERS (2011-2014)

6.1 ACTION PLAN

In September 2011, an action plan was finalised by Welfare Services Forum whereby seven (7) provinces attended. The purpose of the action plan was to develop and implement a strategy on the management of foster care. The action plan was categorised as follows:¹³

Short-term: During this period Provincial DSDs were expected to align the implementation plan with the updated national project plan and ensure that SASSA is included in the revised provincial action plan by October 2011. Initiate a process to appoint a project manager with 3 staff members by the year 2014 was achieved as indicated in the presentation.

Medium Term: During the period between **(January 2012-June 2013)**, it was envisaged by the DSD that an establishment of a dedicated Unit for alternative care in provinces will be in place. It has been reported by DSD that some district offices in various provinces have set up fully- fledged Alternative Care units focusing on the provision of foster care and Child and Youth Care Centre services.

¹¹ ibid

¹² ibid

¹³ Department of Social Development, (2011)



Long Term (July 2012- March 2014): A Mid Term Impact assessment to monitor and evaluate foster care was the process that National DSD followed from September 2013-March 2014.

Issues to Consider:

- The Department of Social Development reported that some district offices in various provinces have set up fully-fledged Alternative Care units focusing on the provision of foster care and Child and Youth Care Centre services. **Which district offices in which provinces have been established? The Department needs to provide further details on these units.**
- Measures taken to manage the foster care orders was for 2011-2014 financial years. What has the Department done since 2015-2019?

6. 2 INTEGRATED FOSTER CARE PROJECT – 2014 - 2018

Below are the interventions employed by DSD for the Integrated Programme to manage Foster care in line with the National Strategy on Foster Care: 2014-2018. It is divided into 3 phases:

Phase 1

This phase deals with the situation of expired foster care that were still in payment. As of December 2014, there were 301 644 (included in this number is 20 710 for children who have failed to register but still receive payment) foster child grants who are registered with SASSA with expired court orders. KwaZulu-Natal had the highest number (83 082) of court orders that needed to be updated by 2014/15, followed by Eastern Cape 56 885 and the lowest of all 9 provinces is Northern Cape 6 297¹⁴.

Phase 2

The second phase was supposed to deal with the Extension of Foster care orders to reduce the backlog and ensure compliance with the North High Court. However, the National DSD has obtained a legal opinion, which states unequivocally that this function must revert to the DOJ and that it is unconstitutional for the DSD to extend foster care placements. As at 2 November 2017 there were 49 534 foster care orders in terms of the Children's Court and therefore should have been extended by the Children's Court before 31 December 2017.

¹⁴ DSD&SASSA, (undated)



Phase 3

In 2017 the Department reported that an audit of foster care programmes were going to be conducted. This was going to be done in 3 phases, namely:

(1) Rapid assessment of foster care, (2) Evaluating of foster care programme which will lead to the next phase of (3) Conducting comprehensive research project looking at efficacy of the foster care programme.

At the end of October 2017 there were 478 158 children in foster care receiving the Foster Child Grants (SOCPEN, 4 Nov 2017)¹⁵.

Issues to Consider:

- What are the outcomes of auditing the foster care programmes and can the Department share these with the Committee.
- Does the Department have the statistics of children who are supposed to be accessing foster care grant but are not?

Conclusion

This paper briefly explored the various issues regarding foster care in South Africa. It looked at the legislative framework, highlighted the challenges in the system, including the backlog and interventions taken by the Department to address the backlog. The intervention includes the development of the Integrated Foster Care Project 2014 -2018. Notwithstanding the implementation of this project, it appears that challenges in the system are very difficult to overcome because of the recurring backlog. It will be critical for the Committee to scrutinise how the legislative amendments ordered by the High Court eliminate the administrative bottlenecks that result in very high backlog. How will the legislative amendments significantly improve the current interventions, which do not seem to be able to eliminate the backlog. The foster care system in South Africa has proved to be a complex matter which requires constant committee oversight. It is a priority area as it negatively affects hundreds of children.

¹⁵ DSD, (2017)



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