

CENTRE FOR CHILD LAW SUBMISSIONS
ON
THE SOCIAL ASSISTANCE AMENDMENT BILL, 2018



CENTRE FOR
CHILD LAW

FACULTY OF LAW, UNIVERSITY OF PRETORIA

17 DECEMBER 2019



UNIVERSITEIT VAN PRETORIA
UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA
Denkleiers • Leading Minds • Dikgopolo tša Dihlalefi

1. ABOUT THE CENTRE FOR CHILD LAW

The Centre for Child Law (the Centre) is an impact litigation organisation that is registered as a Law Clinic with the Legal Practice Counsel. The Centre aims to set legal precedent to improve and strengthen laws pertaining to children. The Centre contributes towards the establishment and promotion of the best interests of children in South African law, policy and practice through litigation, advocacy, research and education.

2. THE CENTRE'S SUBMISSIONS

The Centre welcomes and supports the proposed amendments set out in clause 4 of the Bill (insertion of section 12A in Act 13 of 2004) that will give the Minister of Social Development (the Minister) the power to – with the concurrence of the Minister of Finance – prescribe that additional payment be linked to a social grant. This additional payment may be made on the basis of need between beneficiaries of social grants as determined by the Minister.

The Centre believes that this proposed provision will contribute to the Minister's formulation of a comprehensive legal solution to the foster care crisis that has been the subject of litigation since 2011; namely a "top-up" to the child support grant to be provided to relatives caring for orphaned children. This will drastically lessen the pressure on the foster care system that is causing the crisis in the system.

What follows is a short synopsis of a description of the foster care crisis; the history of the litigation; how the proposed provision will contribute to developing a comprehensive legal solution to the crisis and concluding remarks.

2.1 The foster care crisis: how did we get to where we are?

The foster care system had for many decades functioned with the number of children in foster care placements remaining below 50,000. However, when orphan rates started to increase rapidly in the early 2000s due to the rise in HIV prevalence the number of maternally orphaned children doubled from half a million to over a million between 1996 and 2004. This rise in orphaning rates saw a shift in the system allowing relatives caring for orphaned children to have the children placed in foster care with them which would allow for access to the foster child grant (FCG) which was larger in amount than the child support grant. This shift was as a result of a policy decision



expressed the Minister of Social Development in 2002 when he stated that the DSD was “encouraging relatives to take care of orphaned children under the foster care package”¹

As a result of the above, there was an exponential rise in the number of children in the foster care system and FCGs in payment. In 2010, there were over 500, 000 FCGs in payment – this is ten times the number that had previously been accommodated by the foster care system. The number of children in the foster care system as fluctuated over the years – in 2011 there were 512 874 foster orders registered, in 2017 financial year there were 440 016 foster orders and in the 2019 financial year 386 019.²

Multiple concerns have been raised over the years by civil society organisations and practitioners about the negative impact that using the foster care system for orphans living with relatives will have. Some of these concerns include:

- Orphans (and their caregivers) experience long delays in accessing FCGs because of the time-consuming process of foster care placements.
- It is highly unlikely that the foster care system would be able to cope with all orphans. It only reaching a fraction of the eligible orphans in the country.
- The foster care system does not cater for the fluidity of child care arrangements whereas the CSG is designed to follow the child.
- A foster care order does not give foster parents full parental rights and responsibilities, and is therefore not an appropriate arrangement for orphans, whose orphan status is by definition permanent (adoption or guardianship may be more appropriate).
- The capacity of the social welfare system, and in particular the child protection system, has been greatly strained by the need to enrol and monitor large numbers of children in the foster care system, leaving abused and neglected children without the responsive protection services they need.

2.2 The foster care crisis the subject of litigation: court orders to keep the system afloat

¹ K Hall, A Skelton and S Sibanda ‘Social assistance for orphaned children living with family’ in A Delany, S Jehoma & L Lake (eds) South African Child Gauge 2016 (2016) 68.

² Children Count by the Children’s Institute: <http://www.childrencount.uct.ac.za/indicator.php?domain=2&indicator=39>.



The strain placed on the foster care system has resulted in the lapsing of foster care orders because social workers and children's courts cannot keep up with the high numbers of foster care orders that have to be renewed every 2 year as required by the Children's Act 38 of 2005. When court orders lapse the South African Social Security (SASSA) cannot pay out foster child grants. In 2011 over 120 000 foster care orders granted by Children's Courts across the country lapsed. The Centre, after being approached by concerned civil society organisations and practitioners, approached the High Court, Pretoria on an urgent basis to revive lapsed foster care orders. The Centre and the Minister of Social Development a settlement that was made an order of court, the court order:

- placed a temporary moratorium on lapsing of further FCG orders and FCGs;
- ordered the Department to re-instate the FCGs that had already lapsed;
- granted the Department temporary authority to extend the majority of foster care court orders administratively – i.e. social workers need not apply to court to extend the court orders but could do it administratively, following a review of the child's situation. As this temporary authority was in direct conflict with the requirements of the Children's Act, a time limit for finding a more sustainable solution was set; and
- required the Department to design a comprehensive legal solution to the foster care crisis by amending the Children's Act by 31 December 2014.

In December 2014, the Minister and the Department of Social Development had still not developed a comprehensive legal solution and faced a significant backlog of approximately 300 000 expired foster care orders. On 12 December 2014 the High Court granted an order which broadly had the effect of extending the 2011 order for a three-year period. The order was handed down by agreement between the Minister and the Centre.

In November 2017 there were still no signs of a comprehensive legal solution and foster care orders were at risk of lapsing. The Centre again approached the High Court for relief, an order – by agreement between the Centre and the Minister – was granted. The order declared that the delay by the Minister in amending legislation to develop a comprehensive legal solution was unconstitutional, unlawful and invalid. As well as the delay in putting in place the necessary mechanisms, structures, resources to ensure that the foster care system operates in a sustainable and effective manner. The order required the Minister to put measures in place to ensure the necessary legislative amendments, to bring about a comprehensive legal solution to the foster



care crisis, to be concluded within a period of 2 years. It also ensured that children whose foster care orders have lapsed or are due to lapse are reinstated or extended.

The most recent court order was obtained on 26 November 2019, when the Minister had still not met the terms of the 2017 court order; particularly developing a comprehensive legal solution. The Minister approached the High Court for a further extension. The Centre, amongst other things, requested that more stern conditions be placed on the Minister. The court order, reached by agreement, retains the finding of unconstitutionality against the Minister and gives the Minister 12 months to develop a comprehensive legal solution. It also places stringent reporting requirements on the Minister – who needs to report to the Court and the Centre on progress made in implementing the court order every 3-months.

2.3 The Social Assistance Amendment Bill and the comprehensive legal solution to the foster care crisis

During all of these court applications attempt have been made to engage with the Department on what the comprehensive legal solution should be. The solution that has been put forward as the most workable is to have orphans living with relatives on the child support grant system and provide a top-up amount for this category only (CSG top up).

Children already receiving the FCG would continue to receive it so as to not be regressive. The number of new children coming into the foster care system would then be reduced to those actually in need of care and protection because of abuse, neglect and other reasons set out in the Children's Act. This would ensure that the overall numbers of children in foster care returns to a manageable size for the resources and personnel in the child care and protection system. Social workers and Children's Courts would be freed up to do more preventive work and care and protection work with children who are abused and neglected, irrespective of their orphan status.

The proposal in clause 4 of the Bill (insertion of section 12A in Act 13 of 2004) would be one of two legislative amendments needed to put the proposed comprehensive legal solution into place. The second phase of amendments that would be needed would be to the Children's Act 38 of 2005, that would clarify for social workers and children's courts that only children in need of care and protection are to be put in the foster care system and orphans being cared for by relatives (who are not in need of care and protection) should be diverted to the CSG top up. This was previously set out in a October 2018 version of the Children's Amendment Bill (the current version



of the Bill that will be before the Committee in due course does not contain this provision and this fact will be the subject of submissions made in relation to the Bill). The October 2018 version made it clear that an orphaned child in the care of a family member is not automatically considered to be in need of care and protection due to their care arrangements. Such children would therefore not be placed in foster care and would be eligible to receive the CSG top-up:

“89. Section 150 of the principal Act is hereby amended—

(a) by the substitution in subsection (1) for paragraph (a) of the following paragraph:

“(a) has been abandoned or orphaned and is **[without any visible means of support]** not in the care of a family member as defined in paragraph (c) of the definition of family member in section 1;”;

2.4 Transitional arrangements for the proposed comprehensive legal solution

As mentioned above, children already receiving the FCG should continue to receive it in order to prevent retrogressive effects of the implementation of the new policy and in so doing deprive an often marginalised and vulnerable group of people (children and economically disadvantaged members of society) of access to a basic social service. “New children” would be referred to the CSG top up if they are being care for by relatives and are not in need of care and protection.

It will be necessary to have this transitional arrangement reflected in the Children’s Amendment Bill in order to give clarity on how this Bill (the Social Assistance Amendment Bill) and the Children’s Amendment Bill will be implemented in unison once both are finalised. We submit that a clause should be inserted in the Children’s Amendment Bill clearly providing direction to social workers and children’s courts on who should be referred to the foster care system (children found to be in need of care and protection) and who should be referred to the CSG top-up (orphaned children being cared for by relatives and are not in need of care and protection).

3. ORAL SUBMISSIONS

The Centre requests the opportunity to make oral submissions.



* Evidence based information in these submissions is taken from Delany A, Jehoma S & Lake L (eds) (2016) South African Child Gauge 2016. Cape Town: Children’s Institute, University of Cape Town and “Children Count” a data resource base that sources its information from SASSA’s SOCPEN monthly reports.

