

Introduction

The Constitution, the Children's Act and international instruments relating to children, all recognise the importance of family and ensuring that children as far as possible grow up in a family environment. It is also recognised that sometimes the best interest of the child dictates that the child should be removed from his/her family. All of these laws therefore contain specific provisions relating to children living outside the family environment to ensuring that they should be placed in suitable forms of alternative care. A foster care placement is one such form of alternative care. Last week the Minister of Social Development explained that the need for foster care placements is exacerbated by the 'increasing numbers of orphaned children, abandoned babies, worrying levels of abuse, neglect and exploitation of children'.¹ According to the SA Social Security Agency's statistics, 494 992 children were in foster care and were receiving the foster care grant and there was a backlog of about 157 000 reported cases of foster care waiting to be finalised due to a shortage of social workers.²

Issue 22 is dedicated to the regulation of foster care in terms of the Children's Amendment Act to see how this law will reform and improve foster care once it becomes operational. Due to space constraints, not every aspect of foster care dealt with in the Act will be considered and colleagues are advised to consult the Act together with the Draft regulations for more information on this topic. Cluster foster care schemes will be the subject of a separate Issue and will thus not be discussed here.

- **How can a child be placed in foster care?**

A child can be placed in foster care through a children's court order or as a result of an order by the provincial head of social development transferring the child from another alternative care placement into a foster care placement. The court can place the child either with a non family member or with a relative (other than the child's parent or guardian) or in a registered cluster foster care scheme. When a foster care placement is arranged, care is taken to also promote the child's cultural and religious rights by giving priority to placements with a person or family member who has the same or a similar cultural, religious or linguistic background as the child, if this is in the child's best interest.

- **How many children can one foster parent/family have?**

With the exception of cluster foster care schemes, not more than six children can be placed in foster care with a single person or two persons sharing a common household unless they are siblings or related or if a children's court made a finding to that effect.³

- **Who can be a foster parent**

¹M Magome "Dearth of social workers hampers foster care" Pretoria News October 28 at p2.

²"1.5 million children orphaned in SA" Sapa 27 October.

³ A place where more than six children have been placed is considered to be a child and youth care centre, and it must be registered as such.

Someone who is ‘fit and proper’ to care for a foster child (this excludes persons declared to be unfit to work with children); who is willing and able to undertake, exercise and maintain the responsibilities of such care and who has the capacity to provide an environment conducive to the child’s growth and development. The latter refers to the foster parent’s/family’s capacity to ensure a loving and caring environment that will create security and stability in the child’s life. There is no definition of what is meant by ‘fit and proper’ but in the context of foster care it is suggested that it means a person able to care for a child that will meet the purposes of foster care.⁴ The prospective foster parent/family must fulfil all these requirements to be considered as a prospective foster parent. A designated social worker must investigate and confirm compliance with the requirements and make recommendations to the children’s court who is considering the needs and interests of the child.

- **How can someone become a foster parent**

In terms of the Act any person (*inter alia*) acting in the interest of a child or on behalf of a child (i.e a prospective foster parent) can approach the clerk of a children’s court in a matter that falls within the jurisdiction of the court which includes foster care placements.⁵ Sometimes a prospective foster parent approaches a social worker and the social worker will then approach the clerk of the court regarding a possible foster care placement order. The clerk of the court can then refer the matter to the court.

Before making a ruling the court can order a social worker to carry out an investigation and provide a report to the court in order to assist the court to make an appropriate order. In the case of someone wanting to become a child’s foster parent the social worker would put in the report whether the prospective foster parent complied with the necessary requirements in the Act and also whether the prospective foster parents are suitable and have a background similar or different to that of the child.⁶ After considering all relevant facts and the report the court will make a finding whether the child in question is in need of care and protection. If the court finds the child to be in need of care and protection and he/she has no parent/guardian or the parent or guardian is unsuitable to care for the child the court can make an order placing the child in the care of a person designated to be the foster parent of the child.

- **What are the rights and responsibilities of foster parents?**

The rights and responsibilities⁷ that foster parents will have in respect of the foster child will be set out in the placement order from the Children’s Court. Some responsibilities and rights of foster parents are prescribed in the draft regulations and can also be crafted in a foster care plan. The regulations include a host of rights and responsibilities for foster parents which generally include the responsibility for the day to day care needs of the foster child; the duty not to obstruct contact between the child and his/her biological family

⁴ Gallinetti G and Loffel J “Foster Care” in Davel and Skelton (ed) *Commentary on the Children’s Act* [forthcoming].

⁵ Section 53 of the Act.

⁶ See Draft Regulation 61(1)(a);(viii);(gg) and 61(1)(b)

⁷ See regulations 70-71.

and other persons with an interest in the child's wellbeing; and the duty to comply with a foster care plan.

In terms of the draft regulations a foster parent has the right to make day to day decisions for the care, upbringing and development of the child including the right to consent to the surgery of the child in certain instances.⁸ Foster parents further have the right to carry out their responsibilities free from abuse (verbal or otherwise); harassment or invasion of privacy by biological parents or family members. Foster parents may also apply for a passport and take the child out of the country in certain instances. They also have the right to financial assistance from the state. One other significant right foster parents have is the right to know and be informed of any act or occurrence which might affect the foster placement. This section might be referring to situations where parents or family members are unhappy with the placement order and threaten to apply for its termination or where parental rights and responsibilities are transferred to someone not known to the foster parent or where the parents have agreed to the adoption of the child by someone known or not known to the foster parent. The objective of this right is to notify foster parent of developments in respect of the child's placement in order to appropriately respond to the situation.

If the children's court has not made a specific order regarding the roles of the foster parents and the child's parents or guardians, or the Act and regulations do not cover some aspects of the foster placement that need to be resolved, then a foster care plan may be entered into by those interested parties. The draft regulations to the Act allows the biological parents; family members or other interested parties; and the foster parents, in consultation with the child in question, to agree on a foster care plan setting out the respective rights and responsibilities they have in respect of the child. The plan further records the role of social workers or designated child protection organisations. A copy of the plan must be given to all of the interested parties, including the child if he/she is of sufficient age and maturity. Although it is not compulsory to make the plan an order of court, the plan can only be terminated or suspended upon application to the children's court.

- **What happens if a child is seriously injured/ abused or dies while in foster care?**

If the child has been abused or seriously injured, the foster parent must immediately report this to the provincial head of social development who must investigate the circumstances of the injury or abuse.⁹ Section 178 does not address the situation of who should report if it is the foster parent who could have been responsible for the injury or the abuse and they withhold this information. This situation is covered by section 110 of the Act that requires members of certain professions (like social workers, doctors and teachers) to report abuse to the provincial department of social development, a designated child protection organisation or a police official. Furthermore, any person who

⁸ This is important to note since it is an exception to section 129 of the Act which does not allow care-givers to consent to a child's surgery.

⁹ Section 178 of the Act.

suspects that a child is being abused may also report it to a social worker or the police.

If the fostered child dies this must also be reported by the foster parent to the child's parents/guardian (if they can be traced); a police official; the provincial head of social development and a social worker. The police official must investigate the child's death unless he or she is satisfied that the child died of natural causes. It is an offence not to report serious injury, abuse, neglect or death of a child in foster care and a person convicted could face a fine or imprisonment of 10 years or both.

- **When can a child leave the foster care household?**

Generally a child can leave alternative care at the age of 18. An alternative care order usually lapses after two years or a shorter period if so ordered and the court may then extend the order for two years at a time. However when it comes to foster care placements the court can rule that the order subsists until the child reaches 18. If the child was placed with a family member the court can rule that the order extends for more than two years at a time.

If a court ordered the foster placement to subsist until the child turns 18 then the child will not be able to leave the foster household until the age of 18 unless a court terminates the foster care before the child turns 18. If a court did not order that the foster care placement runs until the child is 18, that foster child is still entitled (but not obliged) to remain in foster care until the age of 18. Furthermore, a child will also be able to remain in foster care until the age of 21 in order to complete his/her education if the foster parents agree to this and are able to care for the child until then.¹⁰

The foster parent may also grant the foster child a leave of absence allowing him/her to be away from the foster parent or household under certain conditions, but the child cannot leave the country without authorisation from the provincial head of social development.

Conclusion

Foster care placements are not meant to be permanent and it does not dissolve the parental rights and responsibilities of biological parents towards their child (unless a court made an order to that effect), but it is aimed at providing children in need of care and protection with a stable, safe and healthy environment and to promote permanency planning for that child's future. Given the need to provide stable and permanent homes for the thousands of desperate and vulnerable children in the country, foster care placement is encouraged and legal professionals must be equipped to readily advise clients on process and procedure to secure the best possible outcomes for children in need of foster homes.

¹⁰ Section 176(2)