

Court orders preventing the foster care system from collapse

A look at the background to the 2011 order and the recent 2015



Awareness of lapsing early 2011

- An official of the Department reported at a forum at which civil society partners were present, that 123 236 foster child grants had already lapsed by January 2011. Alarmed, civil society organisations Childline and Jo'burg Child Welfare approached the Centre for Child Law, a law clinic based at the University of Pretoria which undertakes litigation on children's rights.
- SASSA confirmed, said more would be lapsing at the end of the month and CEO had ordered that grants must be paid, but it was a problem as the system requires court orders



Research subsequently shows problems began earlier

- Hall and Proudlock found that 39 200 (in April 2009-March 2010) and 74 200 (in April 2010 – March 2011) foster child grants had lapsed due to a failure to review the foster care placement, resulting in an expired court order. This amounted to a total of 110 000 foster child grants lapsing due to an expired court order over a two year period from 1 April 2009 to 30 March 2011



Court approached urgently

- After papers were launched, DSD indicated that they would not oppose, and asked for a meeting to draft a court order.
- At the time, they seemed confident that if they could just get some breathing space they could sort out backlogs, and a more comprehensive legal solution could be considered



10 May 2011 Court order

- Para 3 Any foster care order granted prior to 1 April 2010 not yet expired shall, when due, be dealt with administratively
- Para 4 Administrative procedure in para 3 will continue until 31 Dec 2014/or until Children's Act is amended to provide comprehensive legal solution
- Para 5 All foster care orders that have expired since 1 April 2010 deemed not to have expired and extended for 2 years date of this order



10 May 2011 Court Order (cont)

- Para 6 All foster care orders that expired not more than 2 years prior to 1 April 2011 (ie orders expired btwn 31 March 2009 and 1 April 2011) extended for 2 years
- Para 7 originally said all those in Para 6 and 7 should be administratively extended, but this para was replaced by an order dated 22 June 2011, which said that the social worker 'may' approach children's courts if they wanted the order to be longer/shorter than 2 years



The order averted a collapse

- The order was complicated but it did work in the sense that no significant numbers of children fell off the system
- Attempt to push an Amendment through Parliament allowing administrative extension of all alternative care orders failed due to the state law advisor's opinion that it was unconstitutional
- 3rd Amendment Bill does contain a comprehensive legal solution but has not been approved by cabinet yet, timeline unclear



But system remained in crisis

- So the DSD ran out of time, and as the expiry of the court order loomed at the end of 2014, they rushed to court on 12 December 2014, on very short notice, seeking to extend the order.
- The Director-General put up a founding affidavit in which he gives some of the reasons



National Crisis

- The D-G admits that if the court order of 10 May 2011 is not varied before 31 December 2014 'The Departments of Social Development will have a National Crisis on their hands'
- No payments to beneficiaries will be processed if payments are not authorised by a court order



Stability and Clarity

- Extending the order of 10 May 2011 to end of 2017 will bring about stability and clarity
- Best interests of children are paramount, and if order not extended, children will be subjected to hardship such as going without food, schools uniforms or fees etc.
- The aim is not to change the order, only to extend the period of the order to the end of 2017



Background (D-G)

- The D-G explains that on 07/07/2010 SASSA submitted to Chief Directorate: Children a list of 299 076 of lapsed foster care orders. An action plan was developed in June 2010 and the Court order was issued in April 2011 (Actually May) which had the effect of extending foster care orders administratively.
- Action plan was revised as a project plan and approved by MINMEC – aimed at compliance w court order and clearing of foster care backlog



There is a still a backlog

- D-G goes on to explain that despite all there efforts there is still a backlog – they seem to say it got better but then it got worse again.
- They were met with various challenges and they explain what they did about them: meetings with magistrates forums to argue for a sensible interpretation of the Act and the High Court order, and encouraging s 186 orders



Law reform attempt

'The Chief Directorate: Children begun (sic) with the process of reviewing the provisions of foster care in the Children's Act to provide a long-term solution to the administrative challenges experienced. However the period provided by the North Gauteng High Court is limited as a result the deadline will be not be met by 2014 to provide a solution to the foster care programme through legislative review process'.



Other things that DSD has done

- Developed excel spread sheets
- Established a project management unit for foster care
- Got money from treasury to appoint unemployed graduates
- Engaged veteran social workers
- Started work on a costing model for services rendered by NPOs which may alleviate workload of Dept



Ministerial Committee

- The Minister has appointed an independent committee to oversee audit and implementation evaluation of foster care programme and advise her on measures that may be put in place to address challenges
- ‘The ultimate reason for extension..is for the accommodation of the anticipated amendment of the Children’s Act’. It is possible that this may take 3 years.



Comparing the orders

10 May 2011 order

- Para 3 Orders granted prior to 1 April 2010 that have not lapsed to be extended administratively
- Para 4 The administrative procedure will continue until 31 Dec 2014 or until comprehensive legal solution

12 Dec 2014 order

Para 2 – Para 4 of 2011 order extended to be followed until 31 Dec 2017 or comprehensive legal solution



Comparing the orders (cont)

10 May 2011 order

- Para 5: All foster care order that have expired since 1 April 2010 are deemed not have expired and are extended for 2 years from date of order

12 Dec 2014

- Para 3: Para 5 of 2011 order extended to read:
- 'All foster care orders that have expired since 1 April 2010 are deemed not have expired and are extend for 2 years form date of this order



Comparing the orders (cont)

10 May 2011 order

- Para 6: All foster care orders that expired not more than 2 years prior to 1 April 2011, are deemed not have expired, and extended for 2 years

12 Dec 2014

- Para 4: That para 6 of 2011 order be read as follows:
All foster care orders that expired not more than 2 years prior to 1 April 2011, are deemed not have expired, and extended for 2 years from date of this order



Puzzling way to extend the order

- The application was hastily brought, originally as a 'variation' which was incorrect, then shifted to an extension, but not properly thought through. Magistrates will have a field day finding interpretation problems in it
- However, CCL considered it risky to oppose the application because the consequences for children receiving the grant – and for the whole system – could be dire



A supervisory order

- So CCL proposed a supervisory order.
- Such orders are not common because they are considered to interfere with separation of powers, but considered necessary where state has failed to carry out its work and there is risk to beneficiaries
- This creates an ongoing accountability mechanism



Supervisory order

- Para 6 The Applicant (DSD) shall report on the progress in respect of clearing the backlog of foster care orders to this Court and to the Centre for Child Law every six months from the date of this order.
- So this gives us an opportunity – we can study their reports, and reply to them, pointing out problems and asking where the comprehensive solution is

