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Voor een pleegkind met recht een toekomst : Een studie naar de (rechts)positie van (pleeg)ouders en (pleeg)kinderen in geval van langdurige uithuisplaatsing

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Summary

FUTURE PERSPECTIVES OF LONG-TERM FOSTER CHILDREN

In the Netherlands there are more than 15,000 places available for children who need a foster home. The rights and duties of parents, foster parents and foster children depend on the legal basis upon which the foster care placement is established: the parents place their child voluntarily in a foster home (the so-called voluntary placement) or the child is placed in a foster home without the consent of the parents (the so-called juridical placement). Foster care is intended to be temporary, but in over 25% of all foster care placements the child remains in foster care for more than two years and sometimes even until it reaches adulthood, at the age of eighteen. In this summary I shall not go into all the legal aspects of long-term foster care, but limit myself to outlining the main problem behind the lack of emphasis in the Netherlands on the long-term perspectives of foster children.

If a child lives in the foster family on a *voluntary basis*, the parents remain responsible for the upbringing of the child and the parents are fully qualified to take all the decisions regarding the child. This means for example that the parents can remove their child from foster care at any time, the foster parents cannot apply for a passport for the child (which is needed to take the child on an vacation trip or family visit abroad), the foster parents need the consent of the parents to have the child medically treated and to have the child admitted to a school system. An exception to this competence comes into play once the child has lived in the foster family for a whole year. From that moment on, the parents cannot remove the child without the consent of the foster parents. If the foster parents refuse their consent, the parents can apply to the court for substitute consent. The court then reaches a decision in the best interests of the child.

If a child lives in a foster home *without the consent of the parents*, a child protection order has been applied to justify the foster care placement. There are basically two possibilities: either the child is placed under supervision of a Child Care Bureau or the parental authority is removed from the parents by the court, after which a Child Care Bureau or a natural person is charged with the guardianship of the child. Placing a child under supervision of a Child Care Bureau is a temporary order for a maximum of one year and is intended

to keep the family situation as intact as possible. The order can be extended following this period, if necessary several times. During the period of the order, the parents receive help and support from the Child Care Bureau in raising their child; the parents themselves however are still qualified to take all decisions concerning the child and, although they are obliged to follow up instructions of the Child Care Bureau, genuine sanctions are not in place. With one exception: if the Child Care Bureau finds it necessary to place the child in a foster home or other institution, the Bureau can apply to the court for authorization to do so. If the authorization is granted, the parents are obliged to permit their child to live away from their home and they are not allowed to take the child back without the consent of the Child Care Bureau. This situation can last until the child reaches its majority, although the extension of the supervision order and the authorization to place the child in foster care has to be granted by the court. This means the child will never be certain about the home he is supposed to live in. If the parents seem to have got their act together (for example psychiatric problems or substance abuse would seem to be under control and the health and best interests of the child no longer appear to be threatened) the Child Care Bureau might not ask for an extension to the supervision order and the foster care authorization, so it comes to an end. The Child Care Bureau can also decide, while the foster care authorization is still valid, to no longer enforce it but to return the child to its parents. In this situation the foster parents cannot block the departure of the child from their home but they can request that the court reverse the decision of the Child Care Bureau. However, because the aim of the supervision order is to keep the original family situation as intact as possible, the court will only reverse the decision of the Child Care Bureau if the best interests of the child would be severely threatened by returning it to its parents. Also, a reversal of a decision taken by the Child Care Bureau would only mean that the Bureau would be obliged to take a new decision, for example with more emphasis on a careful return program for the child.

If the supervision order is not enough to protect the child, or in extreme situations (mentioned in the Civil Code), the court can relieve the parents of their parental responsibility and appoint a guardian. The parents remain the parents of the child in the legal sense. For example, they are still related to one another, the parents and the child retain their visiting rights (and parents retain their information and consultation rights), parents and child are still each other's heirs and the parents are still obliged to pay child support – if their income allows, which is not always the case. The guardian is however responsible for the upbringing of the child and is qualified to take all decisions regarding the child. It is possible to restore parental authority if the parents become capable of regaining their responsibility but this seldom happens. In contrast to the supervision order, it is highly possible to give the foster child

hope of a new future in his foster family, once his parents have been relieved of their parental authority.

The main problem with the legal possibilities to relieve the parents of their parental authority is that an order like this is only possible in the Netherlands in extreme situations. In 2004 there were only about 600 cases whereby parents were actually relieved of their parental duties, while 7,474 supervision orders were taken out? The Dutch Supreme Court decided that, even if it is clear that the child cannot return home, the temporary supervision order is sufficient to protect the child, as long as the parents declare that they will not fight the foster care placement of their child. But the moment the order and the authorization for foster care placement has to be extended, the parents get a new opportunity to try to convince the judge that, in time, they expect their child to return to them. This makes life very uncertain, for the parents themselves but also for the foster parents and foster child and, because the parents remain responsible for the upbringing of the child and are to take all the decisions concerning the child. The actual situation of the child, living year after year in the foster home, is more and more at odds with the child's legal situation.

The foster parents can be appointed guardian but, for various reasons, this seldom happens. One important reason is that, if the foster parents are appointed guardian *jointly*, they get full financial responsibility for the upbringing of their foster child; moreover the foster parent subsidy lapses. If *only one* of the foster parents is appointed guardian, this financial responsibility for the child does not occur and the foster parent will receive subsidy for raising the child, but the foster parent is fully responsible for all other matters concerning the child, including for example carrying out the visitation rights of the parents, making sure that the parents pay child support (in case the foster care subsidy is not sufficient) etc. The specialized foster care support comes to an end and, although theoretically foster parents could request the reinstatement of this specialized help from the Child Care Bureau, in practice this specialized help is not available for the foster parent who is appointed guardian. The resulting feeling of being left all alone in charge of the child, without support, makes foster parents shy away from taking full responsibility for their foster child.

Being appointed guardian is about the maximum situation that can be reached in a legal sense, however this guardianship comes to an end once the child reaches majority. From then on, in the eye of the law, foster parents and foster child become strangers to one another again. The adoption of foster children is possible in the Netherlands but rarely happens. The consequence of adoption is that the legal ties with the parents and the rest of the family are broken and new ties are established in their place between the foster family and the foster child. Although the establishment of legal ties with the foster family could

be of great advantage to the child, the breaking of the original ties as an inevitable consequence is, in most cases, seen in the Netherlands as not being in the best interests of the child. The reason for this is that it is thought that a child can benefit: – from remaining a member of its original family, including its siblings; – from the possibility to maintain or renew contact with its original family; – from retaining its original surname, which is not legally possible if the child is adopted; – etc. As a result, adoption of foster children very rarely occurs in the Netherlands, with the huge disadvantage that, after a child is removed from its parents and family, it never achieves ‘full membership’ of the foster family.

An important part of the Dutch hesitation to allow foster care to be more than an temporary arrangement can be ascribed to art. 8 of the European Convention on Human Rights and Fundamental Freedoms. The Netherlands are party to this Treaty in which Art. 8 states that everyone has the right to respect for his family life and the competence of the State to interfere is limited. The latest case law of the European Court on Human Rights shows however that, although foster care situations are meant to be temporary, it can be necessary to protect the best interests of the child by allowing it to stay in the foster home. This is also in accordance with the Child Rights Convention (CRC) which in art. 3 grants that, in all actions concerning children, the best interests of the child should be the primary consideration. And in art. 20 CRC it is stated that continuity in a child’s upbringing is desirable. This can mean that, to prevent another break in the upbringing of the child, the upbringing in the foster home is not to be terminated anymore.

In contrast with the situation of foster children in the Netherlands, in the United States foster care is supposed to lead to adoption. In an effort to relax legislation, in 1997 the Adoption and Safe Families Act (ASFA) was launched. If a child lives in a foster home for a reasonable length of time (at least 15 of the last 22 months), the state is obliged to start a procedure for termination of parental rights of the parents. Termination of parental rights goes much further than relieving parents of their parental authority: it means that the parent whose rights are terminated and the child cease to be family members. Or to quote the Act: all the parental rights and duties end, including visitation rights. After the court has terminated the parental rights, the child is free for adoption. Unfortunately it is apparently not always possible to have the children adopted, especially children with special needs. A child which is not adopted becomes a so-called legal orphan: in a legal sense it has no parents at all. Although it will remain in foster care, it’ll live the rest of its life without belonging to a family. Although ASFA’s aim of offering a foster child a new family is admirable, it is all too much an all-or-nothing-system. This is in violation of the right of the child to respect for its identity (art. 8 Child Rights

Convention which, by the way, though signed, has not been ratified by the United States of America).

The Netherlands could learn from this American idea of permanency planning and, although the legal situation lags behind, in the non-legal field there have been some interesting developments in the Netherlands. In 2000, on behalf of the Department of Health, Welfare and Sport, a new Outlook on Foster Care was developed, in which two types of foster care are distinguished: foster care as part of a *care program* and foster care as an *instrument of upbringing*. Foster care as part of a care program is meant to give short term, intensive help to a family in need, while the child stays in foster care; as soon as possible the child returns home. This type of foster care is left out of consideration in this book. Foster care, when applied as an instrument for raising a child, is intended for a longer period which can last until the child reaches majority. The idea is that the child is raised in a foster home in as normal as possible a way, which means for example that the foster parents are responsible for the upbringing of the child, in exactly the same way as the foster parents are responsible for the upbringing of their own children, if they have them. In this type of foster care returning the children to the parents is no longer the aim. However both parents and foster parents – if necessary with the assistance of the Child Care Bureau – work towards achieving a modus, whereby the parents retain a place in the life of the child through visiting arrangements or even consulting arrangements in important aspects in the life of the child.

This new Outlook on Foster Care does not comply so well with the present legal system because, in order to raise the child as normally as possible, the new Outlook on long-term foster care requires – at least partial – transfer of parental duties to the foster parents. The present legal system on the other hand is aimed at keeping parental responsibilities as much as possible with the parents.

How to bridge this gap? I ended my research with various proposals to bring the legal situation of foster care in the Netherlands into line with the new Outlook on Foster Care and to improve the (legal) position of foster parents. These proposals are:

- The improvement of the legal position of foster parents by giving them better and more opportunities to request the court to intervene;
- The introduction of the possibility of the partial transfer of parental authority to foster parents;
- The introduction of new grounds for relieving parents of their parental authority when the prospect of the parents taking care of their child themselves is not anticipated and it is foreseeable that the parents will not be able to reassume their parental responsibilities in the near future;

- After the parents are relieved of their parental authority, this authority should be transferred to the foster parents; the parents keep their visitation rights and efforts should be made to give them a roll in the life of the child, as much as is in the best interests of the particular child and is suited to the capabilities of the parents;
- Foster parents should receive any necessary help to fulfill their duties, including full financial support, also after being appointed guardians;
- If both the foster family and the foster child feel the need to have the child take an official place in the foster family, it should be possible for the foster parents to adopt the child in an "passive" way, meaning that the legal ties with the original family would remain intact, concurrent with the newly established ties with the foster family.