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Pleegrechten voor kinderen: Een onderzoek naar het realiseren van de rechten van kinderen die in het kader van een ondertoezichtstelling in een pleeggezin zijn geplaatst

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Summary

FOSTER-RIGHTS FOR CHILDREN

A study on the effective protection of the rights of children who are placed in foster care on the basis of a family supervision order.

In 2010, the United Nations General Assembly welcomed the Guidelines for Children in Alternative Care. The guidelines are intended to enhance the implementation of the rights of children in alternative care. Also, the European Court of Human Rights has delivered numerous judgments in recent years about the placement of children in care. Nevertheless, the rights of foster children as can be derived from these different frameworks have not been brought together before. This study identifies the human rights of children who live in foster care due to a family supervision order, and analyses the extent to which Dutch laws and regulations protect these rights.

Most children can rely on their parents when far-reaching decisions have to be taken. For foster children, however, how their parents represent their interests is precisely the reason for the out-of-home placement. Important decisions about foster children are therefore taken by youth care professionals and judiciaries. In many cases, they will only know the child superficially. In addition, they deal with various persons whose interests and rights regularly conflict with those of other parties involved. In a context where the focus is on protecting the child, it is then easy to ignore the views and wishes of the child. That is precisely why this research focuses on a children's rights approach to decisions in foster care so that decisions about foster children focus on the voice of the child and his or her rights. Moreover, research has shown that putting the child at the center of the child protection system is essential for effective child protection.

The aim of this research is to provide insight into the rights of foster children regarding four important decisions about their lives. Although the interests of the child are often taken as a starting point for these decisions, this does not do justice to the recognition of children as subjects of rights. After all, individual interpretations of the best interests of the child will inevitably depend on the normative frameworks of the decision-maker. By identifying which children's rights can be derived from a human rights framework,

children in foster care can be given stronger protection when making decisions about their life.

The central question in this study is:

Which children's and human rights apply to decisions about children who are placed in foster care on the basis of a family supervision order and to what extent do national laws and regulations with regard to decisions about foster children have to be amended?

Because it is impossible to discuss all decisions made about foster children, this study is limited to four decisions that are important for children in foster care:

- The decision to place the child in care (see Chapter 3 and Chapter 8);
- The placement-decision, or where will the child live; (see Chapter 4 and Chapter 9);
- Decisions about contact (see Chapter 5 and Chapter 10);
- The decision where the child will eventually grow up (see Chapter 6 and Chapter 11).

The starting point in this study is as stated, the rights of the foster child itself. In this regard account has been taken of the special position of the foster child. After all, the separation of the foster child from his parents has consequences for his legal position, because the parents play an important role in realizing the rights of their child. Therefore, first of all, the position of the child, apart from its parents, was analyzed on the basis of two questions. To what extent does the child have independent rights; And to what extent can the child also exercise these rights? After this the rights of children in foster care as enshrined in the CRC, the ICCPR and the ECHR have been identified. This was done by desk study into various international and European sources. Subsequently, it was examined to what extent national laws and regulations protect the rights of children in foster care.

Law as a safety net

This study demonstrates and argues that the law should be a safety net for children. Although most children – as well as most adults – will not take much notice of their rights in their daily lives, this is different for foster children. The law is precisely intended as a safety net for those cases in which a child cannot grow up care-free, for example when they are placed away from home. The safety net is formed by children's and human rights standards that attach procedural and material requirements to decisions about foster care. However, the foster child only benefits from the safety net if it is present when the child falls. In other words, the child must also be able to enforce his rights if they are to provide effective protection. It has been found in this study that the literal text of Dutch laws and regulations does not usually conflict with

children's and human rights. Yet in many cases, foster children have no effective means of invoking their rights, especially at times when their rights are not being respected.

The position of the child under child and human rights law

An analysis of the position of children under human rights law has shown that the legal position of the foster child is complicated for two reasons. First of all, the fact that they are children means that they can be limited in *exercising* their rights. Secondly because foster children are separated from their parents, their parents can no longer effectively exercise their rights for them.

Often it will be the parents who exercise rights on behalf of the child, or will assist the child in exercising his or her rights. For foster children in particular however the interests and rights of the child can conflict with those of their parents. At the same time, they are represented by their parents in proceedings regarding their placement. At those times, the child's interests can easily be overshadowed by those of his parents. In addition, decisions taken in the context of foster care can have far-reaching consequences for the child. It is precisely this that makes the foster child's interests of paramount importance in decisions taken from a children's rights perspective. Now that children cannot easily defend their interests, these interests must be carefully identified and taken into account in the decision-making process. This careful determination and consideration of the best interests of the child in the decision-making process therefore counterbalances restrictions for the child to stand up for his own rights. The danger that the interpretation of the interests of the child is mainly determined by the subjective normative framework of the decision-maker can be minimized by making a clear distinction between opinions and facts when determining these interests. As a starting point, consideration can be given to 1) the rights of the child 2) examinations of the child by a behavioral scientist 3) the opinion of the child. After the interests of the child have been determined, they can be weighed against the interests of others involved in the decision.

The decision to place the child in care

The decision to remove the child from his or her family constitutes an intervention in his or her family life, while this intervention can be justified when the placement is necessary in the best interests of the child. In order to be able to assess whether the out-of-home placement meets the necessity requirements, it must be clear what the purpose of the out-of-home placement is. After all, only when the goal is clear it can be assessed whether it is necessary to remove the child from home in order to achieve this goal. Already at this point the first bottleneck in national legislation becomes visible. In the application for the placement it is not required that the purpose of the placement is mentioned. Nor is it necessary for this purpose to be included in the judgement. It is

argued in this study that the law should be amended so that both in the application for a custodial placement order as well as in the judgement it should be made explicit what the purpose of the placement is, so that it can be assessed whether it is necessary to remove the child from home. In addition, it will also be possible to better assess the question when the placement is no longer necessary.

Furthermore, it is argued in this study that from a children's rights perspective there are two more necessary amendments to national laws and regulations regarding the placement decision. First of all, it must be clarified in the laws and regulations that the reason for the placement must lie in the role parents play in protecting the interests of their child. That does not mean that parents must have acted culpably. Both in the legislative amendment in 1995 and in 2015, it was decided not to add culpability of the parents to the legal ground for the supervision order. This choice can be justified from a children's rights perspective, now that the question is whether the parents can sufficiently protect the best interests of the child. If they fail, regardless of whether they are to blame or not, the Member State has an obligation to protect the rights of the child. Nonetheless, it is important to make it explicit in the legal basis that the placement revolves around the role of the parents in protecting the interests of their child. If the reason for an out-of-home placement does not lie in the actions (or omissions) of the parents, then the expectation is not justified that a separation of children from their parents can solve the problems. In such a case, the criteria for necessity required under human rights standards are not met.

Secondly, this study argues that the legal basis for placement under national law should be adapted to broaden the subsidiarity requirement contained therein. That subsidiarity requirement was specified in the last legislative amendment. The question is no longer whether other means are available to remove the developmental threat, but whether the offered support and assistance is sufficiently accepted. Because of this law amendment it now only needs to be examined whether the offered assistance is sufficiently accepted by parents and children, and not whether other means can possibly offer a solution. This is all the more pressing because the most suitable form of family-support is not always available in the current practice. Children and their parents then seem to be forced to accept a second-best option. Although the legislator stated in the Explanatory Memorandum to the Youth Care Act that parents may refuse second-best care with reasons, it seems that the legislator has forgotten that the requirement of least intrusive means is a safeguard to protect parents against intervention, and not an obligation that parents must fulfill. In other words, the subsidiarity requirement refers to an obligation of the state to make an effort to prevent a placement in care. It is therefore for the state to demonstrate that everything has been done to prevent the custodial placement.

Can children effectively invoke their rights?

Although the interests of the child form the basis for the placement decision, it has been found that the law offers few guarantees for a careful interpretation of these interests. This is all the more pressing now that the child also has few opportunities to invoke his or her rights. Under Dutch law the interests of the child in the proceedings regarding his or her placement are represented by his or her parents. At the same time, the interests of parents in the proceedings often do not match those of their children. After all, the procedure revolves around professionals' concerns about the way in which the parent protects the interests of the child. In order to ensure that the rights and interests of the foster child are sufficiently emphasized in the procedure, this study argues that it is necessary to amend the law so that children are represented separately in the procedure regarding their placement. In addition, older minors should be considered procedurally competent in proceedings regarding their own placement.

The placement-decision – where will the child live?

Chapter 4 discusses the rights of the child in the placement decision. Compliance with foster children's rights in the decision where they will live after they are taken into care, starts with an obligation to ensure the availability of enough adequate foster families. Only when sufficient foster homes are available the other requirements arising from human rights can be met.

Children and human rights documents impose different requirements on the placement decision. An out-of-home placement can only be justified if the child is actually better off in the new situation. In finding a suitable place to live, the desirability of continuity in upbringing, the ethical cultural and religious background of the foster child and his background in terms of language must be taken into account. In addition, compliance with the right to protection of family life between siblings requires that they be placed together in principle.

The analysis of the national laws and regulations shows that it is unclear who is responsible for the placement decision, how this decision is substantiated and how the legal position of those involved, in particular the foster child, is regulated. This lack of clarity about the roles of the different authorities, in particular that of the children's judge, is a major problem in the legal protection of children. It has been found in this study that it is possible to introduce some changes in the law and regulations to make these better comply with children's rights.

First of all, an explicit preference for placement in the child's own network should be included in the Youth Care Act and it should only be possible to deviate from this principle when the interests of the child so require. Also, it must be included in the Youth Care Act that when it is decided where the

child will live the desirability of continuity in a child's upbringing and the religious background of the child should be taken into account. Furthermore, family life between brothers and sisters should be better protected. In current practice, brothers and sisters are often placed in different foster homes. Since family life exists between them, the decision to place them in separate families leads to an intervention within that family life. A shortage of sufficient foster families cannot be argued as a sufficient justification for the separation of brothers and sisters. For that reason, the right to protection of family life of siblings should be included in the Dutch Civil Code.

Lastly, when it comes to the decision where the child will live, current laws and regulations offer little guidance for taking into account the views of the child. Therefore a provision must also be included in the Youth Act that obliges youth care providers to consult the child when taking decisions about the place of placement.

Can children effectively invoke their rights?

In order to complain about the placement decision, it is important to know who is responsible for the decision. However, it has been found that under the current law, it is unclear who is responsible for the placement decision. The Youth Care Agency is responsible for the implementation of the supervision order, but the foster care provider has a contractual relation with the foster parents. The children's judge then issues the authorization. However, the judge may only decide on whether the child is placed in care, but not on the implementation of the placement order. The law offers appeal options with regard to decisions by the Youth Care Agency and the foster care provider, as well as with regard to decisions by the court. However, it has been found that the legal entrances to complain about the decision are limited and difficult to access.

Decisions about contact

During the foster care placement, the child remains entitled to contact with his or her loved ones. Chapter 6 has established that this applies primarily to contact between the foster child and his or her parents, but it also applies to brothers, sisters, grandparents, former foster parents and others who are important to the child. The child has a right of contact with those with whom he has a close personal relationship, while contact can be limited when this is considered to be in the best interests of the child.

Chapter 10 showed that national law does not provide for a logical or coherent system with regard to the arrangement of contact rights during the placement. It is precisely this fragmentation that makes it difficult for everyone involved to find their way in legislation and regulations. It has been found that the child has the right to contact with different persons, but that it is not self-evident that a contact arrangement is actually made. It is also not easy for the child to complain when there is no contact between him or her and

people who are important to the child such as brothers and sisters. Conversely, the law also does not provide any requirements for the complete cessation of contact between children and their parents, even though under children and human rights standards this is only allowed under very strict conditions. It can be deduced from parliamentary history that this is only allowed if there are particularly strong reasons for this. However, it would benefit the legal protection of foster children if it were explicitly codified in law that contact should only be terminated when necessary in the interests of the child. In addition, it should also be included in the Dutch Civil Code that limitations of contact should be regularly reviewed to see if they are still necessary in the interests of the child.

Since current legislation does not take the child's right to contact as a starting point, but the possibility of restricting contact, it is easy to forget that contact is primarily a right, and that contact between the child and his or her family should be encouraged to stimulate the re-integration of the child. In order to make sure that the right of the child to contact is the starting point when decisions about contact are being taken, an obligation for the Youth Care Agency to make a contact-arrangement plan the moment a child is placed in care, should be included in the Dutch Civil Code. This plan should include at least contact arrangements with parent (s) and brothers and sisters. With regard to grandparents, former foster parents and other persons who have a close personal relationship with the child, it is then necessary to consider to what extent the contact arrangements are in the best interests of the child. The obligation to make a contact-arrangement-plan must also include an obligation to regularly evaluate the scheme.

Can the child stand up for his rights in determining contact arrangements?

It has been found in this study that national laws and regulations in no way offer the child a coherent and logical system of legal protection. It makes a considerable difference for the child on which article he bases his or her application. There are clear differences with regard to whether legal costs must be paid; whether requests made by children under the age of twelve can be admissible; whether the child is even entitled to a decision; whether an appeal is open; whether the request must be submitted in and whether the minor is admissible at all. For minors who want to invoke their right of contact, child-friendly information and (free) legal assistance are indispensable. However, it would be even better to introduce the above-mentioned obligation to draw up a contact-plan.

The decision where the child will eventually grow up

The last decision examined in the context of this study concerns the decision on the child's future living situation. The supervision order is primarily intended as a temporary arrangement, within which period a decision must

be taken as to where the child will grow up. It is therefore perhaps the most complex decision to be made. Under children and human rights standards the decision to end parental authority can only be made if sufficient efforts have been taken to make a reunification possible. To this end, it is important, among other things, that during the placement there is regular contact between the foster child and his parents and that the child is not placed too far away from his parents in order to make this interaction practically possible. If it is subsequently decided that the child can return home, the transfer must be carefully supervised.

Although the basic premise of child and human rights law is that the child and his parents must be reunited, it is also recognized that this is not always possible. The child's interest in continuity of care may outweigh the parents' right to protection of their family life. For the cessation of parental authority, exceptionally strong reasons are then required. Factors that are important when it comes to whether there are exceptional circumstances are then whether there is insight into improvements in the home situation, the cooperation of parents in the past and the attachment of the child in the foster home. It has been found that it is precisely the interest of the child in a stable upbringing situation that has received increasing recognition in human rights in recent years.

The Dutch law regarding the termination of parental authority has been amended in 2015. Since then the main benchmark for how long the custodial placement can be continued is the question of how long this specific child can have uncertainty about his parenting situation without this leading to serious damage to his development. This has put the foster child's rights, and in particular his interest in continuity of care, more central in the decision-making. However, concerns remain in the light of children's rights. It has been shown in this study that the child's interest in maintaining his family ties has become central to decision-making. Two pressing amendments in the lights of children's rights are there for proposed. Firstly, the regular evaluation of the placement should be added to the law as a legal obligation. Secondly, the law should be amended so that it is clear which cases the legislator had in mind when introducing the new legal grounds for termination of parental authority.

Can the child stand up for his or her rights when making decisions about his future living situation?

When the judge is requested to end parental authority, the minor aged twelve years or older will be invited to be heard. This also happens when all parties involved agree or when the child has already given his opinion in writing. It is not clear whether the minor is also involved in the decision made by the Youth Care Agency, who will start the process to termination of parental authority. Precisely now that this decision of the Youth Care Agency may be taken long before the judge can test the decision, it can be difficult for children

to object effectively to the termination of parental authority. After all, if the Youth Care Agency decides that the future of the child lies with the foster family, the family-support provided will also be focused on the foster family. This may mean that there is less contact between the child and his parents, or that no more investments are made to make reunification possible. When the judge then has to consider the request for termination of parental authority, he may be faced with a *fait accompli*, as the bonds between the child and his family are diminished. In cases in which the child is not involved in decision of the Youth Care Agency to start the process towards termination of parental authority, it might also be too late for the child to effectively object to the termination of parental authority before the judge. As a consequence the child is virtually not involved in the decision to end parental authority.

Ending

The title of this book is foster-rights for children. Although foster children have rights, like foster parents, they do not have full control over those rights. Just as foster children belong to the foster family but are not their own children, foster rights are children's rights, but not their own. Improving the position of children could help foster children to exercise their rights effectively. With this book and the recommendations it contains, I hope to contribute to law amendments so that we no longer offer foster-rights to children, but children's rights to foster children.