



Alternative (Child)care – General Remarks and Observations Regarding Placement in Institutional Care

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Abstract. Alternative care is a protective measure for children unable to live with their parents due to various reasons such as neglect, abuse, or family instability. In Slovenia, alternative care is implemented when a child's safety and well-being are compromised within their family environment. The preferred option is family-based care over institutional placement, in line with international trends towards deinstitutionalization. However, Slovenia faces challenges such as the decline in foster care availability, potentially leading to increased reliance on institutional care. Despite the efforts to promote family-based care, the need for institutional care may persist, emphasizing the importance of prioritizing a child's best interests in either setting. Ensuring suitable conditions, including proper staffing, funding, and access to essential services such as education and healthcare, is crucial in both family-based and institutional alternative care. Regardless of the form of alternative care, the primary aim remains to offer children a supportive environment conducive to their growth and to protect their rights.

Keywords: family relations, temporary protective measure, best interest of the child, gatekeeping

1. Introduction

Parents have the primary and equal responsibility for the care and upbringing of a child and their development (Article 135 of the Family Code¹ (hereafter FamC)). Following the principle of priority, they also have the right and obligation to protect the rights and interests of their child before all others. Parents are bound

¹ Family Code (Slovene *Družinski zakonik*) (FamC): Uradni list RS (official gazette), no. 15/17, 21/18 – ZNOrg, 22/19, 67/19 – ZMatR-C, 200/20 – ZOOMTVI, 94/22 – odl. US, 94/22 – odl. US, 5/23.

by parental responsibility, which includes their obligations and rights related to the child's life and health, upbringing, protection and care, supervision, and education. Similarly, parents also have the obligations and rights to represent their child, provide for them, and manage their property (Article 136(1) of the FamC in connection with Article 137(1) of the FamC). Furthermore, parents must enable their child's healthy growth, harmonious personal development, and preparation for independent life and work (Article 137(2) of the FamC).

When parents fail to exercise these rights and obligations or to do so in the best interest of the child, the state must ensure appropriate protection of the child and their rights. Article 56(3) of the Constitution of the Republic of Slovenia² (CRS) provides a constitutional basis for children and minors for whom parents do not care adequately, have no parents, or lack adequate family care to enjoy special protection from the state. The court and the social work centre (hereafter SWC) may intervene in parental responsibility if it is necessary to safeguard a child's rights and interests (Article 153 of the FamC). In doing so, they must act and take measures required for the child's upbringing and care or for protecting their property, as well as other rights and interests. These measures aim solely to protect the child and not punish the parents for their actions (inactions).³ The FamC for the protection of the child's interests specifies:

1. temporary orders (Articles 161 to 166 of the FamC);
2. emergency removal of the child (Articles 167 to 168 of the FamC);
3. measures of a more lasting nature (Articles 169 to 176 of the FamC).

For children who do not have parents or whose parents, for various reasons, cannot care for them, the state provides special protection by ensuring their placement in alternative care, where they can gain family experience to the greatest extent possible.⁴ Institutional care for the child or, according to the FamC, the measure of placing the child in an institution (regulated in Article 175 of the FamC) falls among the measures of alternative (child)care.

2 Constitution of the Republic of Slovenia (Slovene *Ustava Republike Slovenije*) (CRS): Uradni list RS, no. 33/91-I, 42/97 – UZS68, 66/00 – UZ80, 24/03 – UZ3a, 47, 68, 69/04 – UZ14, 69/04 – UZ43, 69/04 – UZ50, 68/06 – UZ121,140,143, 47/13 – UZ148, 47/13 – UZ90,97,99, 75/16 – UZ70a, 92/21 – UZ62a.

3 Republika Slovenija, 2022.

4 Republika Slovenija, 2022.

2. The Convention on the Rights of the Child as the Foundation of Children's Rights

The Preamble of the United Nations Convention on the Rights of the Child⁵ (UNCRC) states 'that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love, and understanding'. It is also evident from the Preamble that the 'family is the fundamental group of society and the natural environment⁶ for the growth and well-being of all its members and particularly children [...]'. Therefore, the family deserves the necessary protection and assistance to fully assume its responsibilities within the community. In doing so, the UNCRC recognizes the importance of the family as a social unit that plays a crucial role in a child's life.

While the UNCRC presents the family as the natural environment for the growth and well-being of a child and the realization of their rights, the FamC in Article 2(1), unlike the UNCRC, provides a specific definition of family:

The family is the life community of the child, regardless of the child's age, with both or one of the parents or with another adult person who cares for the child and has certain obligations and rights to the child under this code.

However, the concept of family is subject to constant change, just like the society. In specific provisions of the FamC, the legislator has departed from this definition of the family and used a broader, sociological concept of the notion.⁷

The fundamental premise of the UNCRC is that parents have rights and responsibilities towards their children. In doing so, they exercise their autonomy, and the state will not intervene in the relationship between a child and their parents. Unfortunately, it is not always possible for a child to live in a family environment, as circumstances may prevent them from living with their parents for various reasons. This is also evident in Article 9(1) of the UNCRC, which states:

5 Convention on the Rights of the Child (Slovene *Konvencija o otrokovih pravicah*) (UNCRC): Uradni list SFRJ – MP, no. 15/90, Uradni list RS – MP, no. 9/92.

6 See also Universal Declaration on Human Rights (hereafter: UDHR): Uradni list RS, no. 24/2018), whose Article 16(3) states: 'The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.' Comp. also International Covenant on Economic, Social and Cultural Rights (ICESCR): (Uradni list RS, no. 35/92 – MP, no. 9/92), which in Article 17(a) emphasizes that the family is the natural and fundamental unit of society. Additionally, the European Social Charter (ESC; Uradni list RS, no. 24/1999 - MP, no. 7/99) states in Article 16, 'With a view to ensuring the necessary conditions for the full development of the family, which is a fundamental unit of society ...'.

7 VSL sodba II Cp 1916/2022, 16 January 2023.

States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

As the UNCRC imposes obligations on State Parties to provide families with the necessary institutions, services, support, and facilities to care for their children adequately, parents have primacy regarding their children. State Parties must thus provide parents with adequate support to ensure the realization of their children's rights.⁸ In Article 20 of the UNCRC, we can find a reference to alternative care for children, as protection for children who, for any reason, are deprived of their original family environment. Consequently, a child temporarily or permanently deprived of their family environment or whose interests do not allow them to continue living in that environment has the right to special protection and assistance provided by the state (Article 20(1) of the UNCRC).

State parties must, following their domestic legislation, provide alternative care for such children (Article 20(2) of the UNCRC). The UNCRC provides examples of what constitute alternative care measures, which may include foster care, *kafalah* under Islamic law (a form of guardianship), adoption, or, if necessary, placement in suitable facilities intended for childcare (Article 20(3) of the UNCRC).

When seeking and implementing measures to ensure adequate alternative care for a child in need, State Parties should pay special attention to the continuity of the child's upbringing and their ethnic, religious, cultural, and linguistic backgrounds (Article 20(3) of the UNCRC).⁹ For instance, the continuity of a child's ethnic, religious, and linguistic backgrounds was discussed in the case of *Abdi Ibrahim v. Norway*,¹⁰ decided by the European Court of Human Rights (ECtHR). The ECtHR found that, in deciding on the adoption of the child, the Norwegian authorities did not sufficiently consider the applicant's (a Somali Muslim) interests in enabling the child to maintain at least some ties with their cultural and religious background. The ECtHR emphasized that the reasons underlying Norwegian authorities' decision were not sufficiently compelling to demonstrate that the case circumstances were so exceptional to justify the complete and final severance of the ties between the applicant and her son. By

8 Vaghri, Zermatten, Lansdown and Ruggiero, 2022, p. 114.

9 Cranmer, 2022.

10 Case ECtHR *Abdi Ibrahim v. Norway*, app. no. 15379/16, 10 December 2021.

contrast, the ECtHR took a different view in the case *Kilic v. Austria*,¹¹ where the applicants (Turkish Muslims) complained that the authorities refused to return the children to their care and that the children were placed with foster families that did not match their religious or ethnic backgrounds. The ECtHR confirmed that the Austrian authorities sought to place the children with families that would match the applicants' cultural, linguistic, and religious origins. Still, at that time, such families were not available.

We can thus conclude that other articles of the UNCRC (e.g. articles 7, 8, 18) require State Parties to provide necessary support to families to enable them to care for their children. However, Article 20 of the UNCRC demands that if, despite these measures, children cannot be adequately cared for by their own families, they have the rights to special protection and assistance from the state.¹²

3. Alternative Care for Children – General Overview and in the Light of the Slovenian Family Code

3.1. Foundation

When parents are absent or, for various reasons (culpable or not),¹³ they cannot or even must not care for the child, the state must provide appropriate care for such children. In this case, the state must ensure alternative childcare.

The FamC regulates the following forms of alternative childcare: foster care, institutional care, and adoption. Additionally, a new institution introduced by the FamC in 2017 is considered an alternative childcare measure, namely granting parental responsibility to a relative (Article 231 of the FamC), which is to be applied when the child's parents are no longer alive. This represents a critical element of alternative care arising from the child's separation from their parents. Due to the death of a parent, there is a permanent reason why a child can no longer live with the parent, thus necessitating appropriate care. The court may grant parental responsibility to a close relative willing to assume full care for the child and who meets the conditions for adopting the child but cannot adopt the child due to other legal restrictions or chooses not to. The person granted parental responsibility for the child has the same rights and obligations as the child's parents would have. The court may grant joint parental responsibility to relatives who are married or live in a civil partnership. Under this arrangement,

11 Case ECtHR *Kilic v. Austria*, app. no. 27700/15, 12 April 2023.

12 Arkadas-Thibert and Lansdown, 2022, p. 164.

13 See Kraljić, 2019, p. 841.

if it is in the child's best interest, the child is allowed to stay within a circle of close relatives.¹⁴

The FamC also legally regulates the possibility for parents to express their will in advance regarding the person to whom the child should be entrusted for care and upbringing in the event of their death or prolonged incapacity to exercise parental responsibility. This person could be:

1. a person to whom the child should be entrusted for care and upbringing;
2. a relative to whom parental responsibility should be granted;
3. an adoptive parent; or
4. a guardian (Article 144(1) of the FamC).

The validity of the parents' advanced expressed will is assessed in the same manner as the validity of a last will under the Inheritance Act¹⁵ (Article 144(2) of the FamC). However, considering the child's best interest, which must guide all proceedings concerning the child, the court is not obliged to consider the advanced expressed will of the parents if it contradicts the child's best interest (Article 144(4) of the FamC).¹⁶

3.2. Definition of Alternative (Child)care

Although the UNCRC serves as the fundamental international legal document for protecting children's rights, it does not provide a specific definition of alternative care. The FamC does not define alternative care either.

The definitions of the various stakeholders or authors range from very concise to extensive. According to Kaur *et al.*, 'alternative care is a form of care provided to children by caregivers other than their birth parents.'¹⁷ Alternative Care Thailand provides the following definition: 'Alternative care is any arrangement, formal or informal, temporary or permanent, where a child is living away from his or her parents and the parents are not actively involved in their lives.'¹⁸ Similarly, but expanded and adapted to Article 20 of the UNCRC, Arkadas-Thibert and Lansdown refer to alternative care as follows:

Although the placement decision must be made by a competent authority in accordance with national laws, it may be formal or informal, temporary

¹⁴ Kraljić, 2019, pp. 815–823; Novak, 2019, pp. 759–762.

¹⁵ Inheritance Act (Slovene *Zakon o dedovanju*): Uradni list SRS, no. 15/76, 23/78, Uradni list RS, no. 13/94 – ZN, 40/94 – odl. US, 117/00 – odl. US, 67/01, 83/01 – OZ, 73/04 – ZN-C, 31/13 – odl. US, 63/16.

¹⁶ For more, see Kraljić, 2019, pp. 489–493.

¹⁷ Kaur *et al.*, 2023, p. 141.

¹⁸ Alternative Care Thailand, no date.

or permanent, and public or private with the extended family, with community members previously known to the child, with foster placement, with family style or other forms of residential care, with kafalah of Islamic law, or adoption.¹⁹

Regardless of whether a definition is short or extensive, what they all have in common is that they associate alternative care with the separation of the child from their parents. Therefore, when a child cannot live with their parents, whether due to culpable (e.g. domestic violence, alcohol abuse, neglect) or non-culpable reasons (e.g. the death or illness of parents), the state has the obligation and responsibility to ensure appropriate care for these children.

Although the UNCRC has set a clear direction of protecting children who cannot live with their parents or remain in a stable family environment, it does not establish which measures should be taken.²⁰ As a result, in 2009, Resolution A/HRC/RES/11/7 was adopted, along with the ‘Guidelines for the Alternative Care of Children’ (hereafter Guidelines 2009),²¹ which outline the approaches for policymakers, decision-makers, and professionals to provide appropriate alternative care for children. Guidelines 2009 represent a non-binding international instrument and do not impose any obligations on states. This is evident from their wording, as they use the term ‘should’ instead of ‘shall’ or ‘must’, except when referring to existing rights under the UNCRC.²² Despite their non-binding nature, the Guidelines 2009 significantly impact the field of alternative (child)care.

In 2020, Resolution A/RES/74/133 – Right of the Child²³ (hereafter Resolution 2020) was adopted, complementing Guidelines 2009. Resolution 2020 and Guidelines 2009 provide guidance to assist states in shaping policies and practices to protect and promote the well-being of children whose parents are unable to care for them or threaten their well-being.²⁴

Both CRS²⁵ and the FamC (e.g. Article 8 of the FamC) ensure special protection for children by the state, but they do not provide a definition of alternative care. Special protection by the state should be understood as a concept broader than

19 Arkadas-Thibert and Lansdown, 2022, p. 169.

20 Cantwell *et al.*, 2012, p. 19.

21 United Nations Human Rights Council, 2009.

22 Cantwell *et al.*, 2012, p. 20.

23 United Nations General Assembly, 2019.

24 United Nations Human Rights Council, 2009, p. 5.

25 Comp. Article 56 of the CRS: ‘Children shall enjoy special protection and care. Children shall enjoy human rights and fundamental freedoms consistent with their age and maturity. Children shall be guaranteed special protection from economic, social, physical, mental, or other exploitation and abuse. Such protection shall be regulated by law. Children and minors who are not cared for by their parents, who have no parents or who are without proper family care shall enjoy the special protection of the state. Their position shall be regulated by law.’

alternative care. It encompasses all measures aimed at protecting a child, their rights, and interests, as well as assisting the family, including when there is no separation of the child from their parents or removal from their biological family. Alternative care, however, refers to the measures to be taken when there is a separation of the child from their parents.

3.3. Interventions in Family Relationships

Although measures for alternative care are intended to protect the child, their rights and interests, they significantly interfere in the relationship between parents and the child, and thus also in family life. For example, the measure of placing a child in an institution, which results in separation from the parents, undoubtedly and irreversibly affects family relationships and usually has lasting effects, although the family unit may only be separated just for a short time.²⁶ However, a judge must not hesitate to order alternative care for a child if it is determined (with an appropriate standard of proof) or suspected that the child or their best interest is in any way endangered. The child's best interest is a fundamental principle established in Article 3 of the UNCRC, as well as in Article 7 of the FamC. The best interest of the child is a postulate of family law, and, as such, it must always be prioritized, even to the detriment of the child's parents; the child must be protected, if circumstances require, by removal from their own parents and placement in an institution.²⁷

Additionally, from Article 8 of the European Convention on Human Rights²⁸ (ECHR), it emerges that every child has the right to respect for family life, which is also recognized in Article 7 of the Charter of Fundamental Rights of the European Union²⁹ (CFR-EU).³⁰ Therefore, a child should not be deprived of contact with their parents unless it is contrary to the child's best interests. This leads to a confrontation between two of the child's rights: on the one hand, the right to respect for family life and, on the other hand, ensuring that the child is protected from harm that may occur in cases of abuse or neglect. If possible, the

26 Čujovič, 2019, p. 79; see also *VSL sklep IV Cp 212/2020*, 26 February 2020.

27 Čujovič, 2019, p. 79.

28 European Convention on Human Rights (Slovene *Evropska konvencija o človekovih pravicah*) (ECHR): Uradni list RS – MP, no. 7/94.

29 CFR-EU: Uradni list Evropske unije, no. C 83/391.

30 See also Article 12 of the UDHR, stating, 'No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.' A similar provision is also contained in Article 17(1) of the International Covenant on Civil and Political Rights (Uradni list RS, no. 35/92 – MP, no. 9/92): 'No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.'

unnecessary separation of children from their families and family environments should be prevented.

3.4. Establish a Gatekeeping Mechanism

Alternative care should provide protection for children and their rights and interests if they cannot live with their parents. Given the particularly sensitive nature of the measures that entail the separation of children from their parents, it is necessary to establish strict and systematic judicial and administrative ‘gatekeeping’ procedures to ensure that quality alternative care is recommended only after considering the child’s best interests as the primary principle. Children must be guaranteed to receive the care that best suits their needs.³¹

The ECtHR has also stated that decision-making processes (administrative or judicial) leading to interventions in family life must observe certain procedural safeguards. These procedures must be fair and respect the interests protected by Article 8 of the ECHR. In other words, they must respect family life. The placement of a child in alternative care must, thus, be lawful, pursue a legitimate aim (e.g. protecting the child’s best interests), and be considered necessary in a democratic society. Only then will the placement of a child in alternative care also be consistent with Article 8 of the ECHR.³² Every decision regarding the placement of a child in alternative care must adhere to strict criteria and procedural guarantees, and a competent authority must adopt the measure; in Slovenia, this is either the SWC or the court. Trained professionals should support the competent authority.

3.5. Reasons for Placement of a Child in Alternative Care

Millions of children worldwide grow up deprived of parental care. They may be separated from their parents and families for numerous reasons – both culpable and non-culpable. Reasons leading to the separation of children from parents can include poverty, discrimination, violence, abuse, neglect, human trafficking, humanitarian emergencies, armed conflicts, natural disasters, climate change, migration, death or illness of the parents, or lack of access to education, healthcare, and other services that could jeopardize the family.³³

Following the case law of the ECtHR, placing a child in alternative care is only permissible if it is prescribed by law, serves a legitimate aim, and is necessary in a democratic society. The competent authority must also present adequate

31 United Nations General Assembly, 2019, p. 11.

32 European Union Agency for Fundamental Rights and Council of Europe, 2022, p. 117.

33 United Nations General Assembly, 2019, p. 5.

and sufficient reasons for placing the child in alternative care.³⁴ The court must justify its decision to remove the child (according to Article 174 of the FamC), which may lead to the placement of the child in alternative care, and explain why it has opted for this measure. Moreover, it must specify any errors and deficiencies identified in exercising parental responsibility and how the child is endangered.³⁵ It is unnecessary for the reasons stemming from the parents' side to involve culpable conduct or omissions. The child can be removed if their development risks being impaired, but it is not necessary for harm to the child's development to have already occurred.³⁶

Reasons for placing a child in institutional (residential) care may vary by country. In Indonesia, for example, poverty and the hope for better education are the main reasons for placing children in residential care. Families living in remote villages send their children to residential care facilities to ensure that they receive education.³⁷ Birth outside of marriage increases the risk of parental separation, and unwanted children born out of affairs or rape are often placed in residential care as well. These children are subject to social stigma.³⁸

Based on Article 175(1) (placement in an institution) of the Slovenian FamC, the court can decide on the placement of a child in an institution due to psychosocial problems manifested as behavioural, emotional, learning, or other difficulties in their upbringing' if the child themselves or other children in the family are endangered; and if it is only possible to adequately safeguard their interests or the interests of other children in the family by placing them in an institution. The court justified its decision to place a child in an institution as follows:

The child is verbally and physically very aggressive towards classmates, and also exhibited verbal and physical aggression towards teachers. He intimidated classmates and physically confronted them (he even brought a stun gun to school), constantly disrupted classes, to the point where teaching could not proceed smoothly, and even attempted to attack physically a teacher, prompting police intervention physically. Outside of school, the child was involved in criminal activity (actions against public order and peace, theft, violent behavior, grand theft, robbery, grievous bodily harm), which the police investigated and concluded with reports due to the child's age and associated criminal responsibility. The mentioned behaviors alone demonstrate at least severe behavioral, psychosocial problems in the child. The child [...] also has emotional and learning difficulties [...].³⁹

34 European Union Agency for Fundamental Rights and Council of Europe, 2022, p. 117.

35 Novak, 2019, p. 576.

36 UPRS sodba I U 1084/2017-9, 11 July 2007.

37 O'Kane and Lubis, 2016, p. 18.

38 Id., p. 20.

39 VSM sklep III Cp 765/2020, 27 October 2020.

In this case, both the court and the SWC recognized and identified some circumstances indicating that the parents could no longer provide the child with an appropriate upbringing environment and that the child's interests could only be adequately safeguarded by placing them in institutional care.

Therefore, priority is given to safeguarding the interests of the child rather than those of the parents. The child's interests are protected not only by the court but also by the SWC. Therefore, the court explicitly emphasized in its decision that, in Slovenia, the SWC is:

obligated to take action to protect the child's interests if there is a suspicion that the child is endangered in the domestic environment [...] It is indeed obligated to protect the constitutional rights of parents in relation to their children, as stated by the plaintiff. However, in these cases, protecting the child's interests always takes precedence over protecting parental rights [...] It is about safeguarding the interests of the child.⁴⁰

In this regard, two fundamental differences between articles 167 and 174 of the Slovenian FamC should be highlighted. Both articles provide for the possibility of placing a child in an institution. On the one hand, Article 167 of the FamC pertains to the emergency removal of a child, which is carried out by the SWC if there is a high likelihood of such severe endangerment to the child that their interests can only be safeguarded by immediate removal from the parents. In such cases, the SWC will remove the child and may place them in institutional care (or alternatively in foster care, a crisis centre, or with another person) even before the court decides on the request for an interim order (Article 167(1) of the FamC). The SWC must propose to the court the issuance of an interim order within 12 hours of removing the child. The court must then decide on the request for an interim order immediately but no later than 24 hours (Article 168(1) of the FamC). If the SWC does not propose the issuance of an interim order or if the court does not decide on the SWC request within the prescribed period or rejects the issuance of an interim order, the child must be immediately returned to the parents (Article 168(2) of the FamC).

On the other hand, Article 174 of the FamC concerns a more lasting measure of removing the child from the parents that falls within the court's jurisdiction. The court may remove the child from the parents and place them with another person, in foster care, or an institution if the child is endangered, and if only through removal can their interests be adequately safeguarded and if the circumstances of the case suggest that the parents will be able to resume care for the child after a certain period. In such cases, the court also appoints the other person, foster parent, or institution (Article 174(1) of the FamC).

40 UPRS sodba I U 1084/2017-9, 11 July 2007.

Another significant difference regarding placement in an institution exists between articles 174 and 175 of the FamC. Placement in an institution under Article 174 of the FamC represents a more enduring measure that can be implemented even without parental consent. By contrast, for the placement in an institution under Article 175 of the FamC, parental consent is required.

Additionally, the distinction between the two articles is that under Article 174 of the FamC a child is placed in an institution if their endangerment is established. However, under Article 175 of the FamC, placement in institutional care is also envisaged in case of psychosocial problems such as behavioural, emotional, learning, or other developmental issues of the child. The purpose of placing a child in an institution is to adequately safeguard their interests or those of other children in the family.

3.6. Child's Right to Information

In line with Art. 12 of the ECHR, the child must also be involved when making decisions regarding their placement in alternative care.⁴¹ Specifically, a child has the right to information and express their views regarding their placement in alternative care.⁴² Moreover, the child has the right 'to be consulted and to have their views taken into account in accordance with their evolving capacities'.⁴³

When assessing whether the procedures interfering with family life comply with Article 8 of the ECHR, the ECtHR considers whether parents are sufficiently involved in the decision-making process.⁴⁴ Therefore, their inclusion in this process should ensure the protection of their interests. Decisions regarding alternative care should thus be made with the involvement of the child, parents, and extended family, as a last resort, and for the shortest possible period. Even a child already placed in alternative care still has the right to be informed about their rights and options. On the one hand, alternative care represents a protective measure that ensures the temporary safety for a child separated from parents or the nuclear family. On the other hand, alternative care can facilitate the child's return to the family, if feasible.⁴⁵ This includes being informed about any developments, providing opportunities to participate in decisions, and, in certain circumstances, listening to the affected child.⁴⁶

41 Sandberg, 2019.

42 European Union Agency for Fundamental Rights and Council of Europe, 2022, p. 113.

43 Id., p. 114.

44 Arkadas-Thibert and Lansdown, 2022, p. 168.

45 European Union Agency for Fundamental Rights and Council of Europe, 2022, p. 114.

46 See, for example, *B. v. Romania (No. 2)*, app. no. 1285/03, 19 February 2013; *B.B. and F.B. v. Germany*, app. nos. 18734/09 and 9424/11, 14 March 2013; *B. v. Romania (No. 2)*, no. 1285/03, 19 February 2013; *B.B. and F.B. v. Germany*, nos. 18734/09 and 9424/11, 14 March 2013.

In Article 158(1), the Slovenian FamC explicitly emphasizes that the court, when deciding on measures for the protection of the child's interests (including placement of the child in an institution), considers the child's opinion expressed by the child themselves or through a person they trust and have chosen if the child is capable of understanding the significance and consequences. However, the court may issue an interim order without previously obtaining the child's opinion (Article 158(2) of the FamC).⁴⁷

3.7. Temporary (Interim) Nature of the Measure

The fundamental premise is that alternative care measures should primarily be temporary protective measures, including placing a child in institutional care. Despite a child's placement in alternative care, efforts should be made towards family reunification and the child's reintegration into their family or familial environment. An exception to this is adoption. According to Slovenian legislation, adoption establishes the same legal relationship between the child and the adoptive parent as between biological parents and children. Through adoption, the adoptive parent acquires parental responsibility and all the rights, obligations, and responsibilities derived from it (Article 9 of the FamC).

Unlike adoption, the measure of placing a child in institutional care constitutes a reversible measure. When a court orders placement in an institution, it sets a duration for this measure, as the placement of a child in institutional care should not last longer than necessary. Despite being classified as a more enduring measure, the duration of the placement in an institution is limited to a maximum of three years (Article 175(3) of the FamC). However, to ensure the protection of the child's interests to facilitate their potential return and reintegration into their biological family, the imposed measure must be regularly reviewed. During the child's institutional placement, both the child and the parents should receive all necessary assistance. During this time, the state (through the SWC overseeing the implementation of the measure) should strive to address the underlying causes that led to the imposition of the measure and facilitate family reunification as soon as possible. The purpose of removing the child and subsequently placing them in an institution is not to break up families but to temporarily separate them, thus allowing each member to strengthen individually so that the family can ultimately live more harmoniously after the reunification and the child can reintegrate into the family and society more effectively.⁴⁸ During this period, the

47 See more about the children's right to express their views in Kraljić, 2019, pp. 537–539; Kraljić, Kežmah, and Čujovič, 2022, pp. 401–409; Kraljić and Drnovšek, 2022, pp. 101–116; Novak, 2019, pp. 488–496.

48 Tako tudi Recommendation Rec(2005)5 of the Committee of Ministers to member states on the rights of children living in residential institutions, *adopted by the Committee of Ministers on 16*

parents should address the reasons that led to the child's endangerment (e.g. seeking treatment for drug addiction).

The period of placing a child in an institution can be extended, but only exceptionally, when it is expected that the child will be able to return to the family soon. The child will only return to the family if the parents demonstrate that they can take care of the child. Otherwise, after the measure expires, the court must protect the child's interests and ensure permanent alternative care for the child, which may involve depriving the parents of parental responsibility or opening up the possibility of adoption.

However, if a child who has been placed in an institution gains full legal capacity (at the age of eighteen, upon marriage, or by a court decision if they become a parent), they may remain in the institution only if they provide written consent to do so (Article 175(4) of the FamC).

3.8. Preferential Treatment of Family Care over Institutional Care

International law confirms that family care for a child must take precedence over institutional care. As such, the decisions regarding alternative care should be temporary, made with the involvement of the child, parents, and extended family, as a last resort and for the shortest possible period. The Convention on the Rights of Persons with Disabilities⁴⁹ (CRPD) explicitly mentions alternative care for children. Article 25(4–5) of the CRPD states:

4. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. In no case shall a child be separated from parents on the basis of a disability of either the child or one or both of the parents. 5. States Parties shall, where the immediate family is unable to care for a child with disabilities, undertake every effort to provide alternative care within the wider family, and failing that, within the community in a family setting.

This is particularly important because disabled children are even more vulnerable due to their disabilities, and ensuring appropriate alternative care for them in practice is even more challenging. Therefore, efforts are first made to provide alternative care within the extended family (e.g. fostering by relatives), as these are usually individuals and environments that the child knows. If this is not

March 2005 at the 919th meeting of the Ministers' Deputies (v nadaljevanju: Recommendation 2005).

49 CRPD: Uradni list RS, no. 37/2008.

possible, efforts are made to place the child, if possible, in a family setting within the community (e.g. fostering by other individuals). If this is not possible, the most suitable institutional placement should be sought for the child. Alternative care for a child outside the family (i.e. institutional care) should be limited to cases where such placement can be identified as particularly appropriate, necessary, or constructive for the individual child and is in the child's best interest.⁵⁰

However, it cannot be assumed that family care is always more suitable. If the circumstances of a case dictate that institutional care for the child is more appropriate and meets an individual child's needs and best interests, it must be considered. Institutional care will also be more suitable if the child, when capable and old enough, expresses the desire for placement in institutional care.

3.9. The Necessity Principle

Guidelines 2009 are based on ensuring two fundamental principles that must be followed regardless of the measure taken to provide and implement alternative care for children: the principle of necessity and the principle of suitability.

Alternative care for a child should only be implemented if such care is genuinely needed. In this context, the principle of necessity focuses on preventing situations and conditions that may lead to alternative care. The reasons that may lead to alternative care for children are diverse and may include material poverty, stigma, discrimination, parental or child education, domestic violence, and neglect.⁵¹

The principle of necessity also dictates establishing the aforementioned gatekeeping mechanism, ensuring that children are admitted into the alternative care system only after all options for remaining with their parents, or at least with the extended family, have been considered. If there is a need for a child to be placed in alternative care, measures must be taken to ensure that the placement undergoes regular review.⁵² Regardless of the type of alternative care, the child's best interests should be the primary consideration, and all activities should aim to provide the child with the most appropriate care according to their needs.

3.10. The Suitability Principle

If the competent authority (i.e. judicial or administrative body) determines that a child genuinely needs alternative care, it must be provided in an appropriate manner. All care environments must, thus, meet general minimum standards in terms of conditions, staffing, regimen, financing, protection, and access to essential

50 European Union Agency for Fundamental Rights and Council of Europe, 2022, p. 114.

51 Cantwell *et al.*, 2012, p. 22.

52 Ibid.

services (especially education and healthcare). To ensure these conditions, mechanisms and procedures for alternative care providers must exist.⁵³

Although Guidelines 2009 do not clearly define the terms of alternative care and are non-binding, they provide clear indications regarding the quality of care and the quality of minimum standards for alternative care. The Slovenian legislator has also followed this approach and prescribed the conditions that must be met by foster or adoptive parents who care for a foreign child in the FamC.⁵⁴ Additionally, the Provision of Foster Care Act⁵⁵ specifies mandatory training for foster parents, participation in interdisciplinary teams, and the requirements for institutions where children who cannot live with their parents are placed (e.g. spatial equipment). The suitability and appropriateness of individuals and spaces must be ensured both before placement and throughout its entire duration.

Another aspect of 'suitability' relates to aligning the caregiving environment with the individual child. This means selecting the best option to meet the child's needs at any given time. It also means that there are various family-based and other caregiving environments available, genuine choice, as well as a recognized and systematic process for determining which is the most suitable (gatekeeping). However, although family care for the child (e.g. foster care) is given priority, it may not be suitable in every case. For example, a child who is taken into care due to negative family experiences (e.g. domestic violence) may not be open to family placement because of their own negative experiences. Instead, they may prefer to distance themselves from the family environment and prefer institutional care (e.g. a facility) or a residential unit.

Therefore, dual suitability must be established. That is, the court will first need to determine, for example, that placing the child in foster care or an institution is the most appropriate form of alternative care for the child. Then, based on the child's individual needs (e.g. health, education), the most suitable foster parent willing and able to take on the foster care of the child will need to be selected. This is particularly important for kinship foster care. Even in case of placement in a facility, the child's individual needs and characteristics must be considered.

When deciding on the placement of a child in an institution, the court also determines the facility the child will be placed in and obtain an opinion from the SWC. During the implementation of the measure, the court may also transfer the child to another facility if it decides that such a transfer benefits the child.

Additionally, it is important to consider the provision of the Article 20(3) of the UNCRC, which requires State Parties to pay special attention to maintaining

53 Phillips, 2008, p. 23; Cantwell *et al.*, 2012, p. 22.

54 See more Kraljić, 2019, pp. 849–858.

55 Provision of Foster Care Act (Slovene *Zakon o izvajanju rejniške dejavnosti*): Uradni list RS, no. 110/02, 56/06 – odl. US, 114/06 – ZUTPG, 96/12 – ZPIZ-2, 109/12, 22/19.

the continuity of a child's upbringing and to their ethnic, religious, cultural, and linguistic backgrounds when ensuring appropriate alternative care.

3.11. The Impact of the Child's Placement in Institutional Care on Parents' Rights and Obligations

When the court decides to remove a child from their parents, it may also simultaneously decide to place the child in an institution as one of the possible alternative forms of child protection. This measure is only possible with parental consent. By the court's decision, an institution is appointed where the child will be placed. However, with placement in an institution, other obligations (e.g. child maintenance payments, representation) and rights (e.g. visitation rights) of the parents towards the child do not cease unless the court also restricts parental responsibility (Article 174(2) of the FamC). When issuing the measure of placing a child in institutional care, the court must assess whether it is necessary to restrict parental responsibility to protect the child's interests. To exercise these rights, the child must be assigned a guardian by the SWC.

The measure of removing a child from their family's care should be treated as a last possible and, whenever possible, temporary resort. Before a child is placed in institutional care, the court must first decide on the removal of the child, which entails separating the child from their parents. The placement of a child in a facility represents an intervention in parental responsibility aimed at safeguarding the child's interests, given their vulnerability. Before the court decides on a more permanent measure (including placement in an institution), the SWC prepares a plan of assistance for the family and the child (e.g. family therapy, treatment for addiction). The court may also decide not to inform one or both parents about the child's placement to protect the child's interests, that is, the court delivers the decision to the parents without disclosing where the child is placed. The decisions regarding the removal of a child should be regularly reviewed. Once the reasons for removal are addressed or eliminated, the child's return to parental care must be in the child's best interest.⁵⁶

In all decisions regarding alternative care for children, it is important to consider that the child should remain as close as possible to their usual place of residence. This facilitates contact with the parents and potential reintegration into the family. Additionally, this approach can minimize any disruptions to the child's educational, cultural, and social life.⁵⁷

When deciding to place the child in institutional care, the court also decides on the child's contact with their parents. The right to contact with the child can be restricted or revoked for one or both parents (Article 175(4) of the FamC in

⁵⁶ United Nations General Assembly, 2019, para. k.

⁵⁷ SOS Children's Villages International, 2010, p. 7.

connection with Article 173 of the FamC) if there is a risk to the child due to the visits and only by restricting them (e.g. time, place, supervised visits) or by completely revoking them can the child's interests be sufficiently safeguarded. Therefore, children placed in alternative care must retain the right to establish contact with their parents. The ECtHR has emphasized that mutual contact between parents and children is a fundamental part of family life under Article 8 of the ECHR. As placement in alternative care is usually a temporary measure, maintaining family relationships is crucial for ensuring the child's successful return to their family.⁵⁸

When the court decides on the measure of placing the child in institutional care, it also decides on the maintenance of the obligations of each parent (Article 175(5) of the FamC). That is, parents subject to the measure of placing the child in a facility are not exempt from paying maintenance. They will have to pay a certain amount of maintenance into a special account opened by the child's guardian for this purpose (Article 184(3) of the FamC).

When placing a child in institutional care, the court may also restrict parental responsibility for the parents (Article 171 of the FamC). The court may prohibit parents from managing the child's maintenance, other property, or only prohibit the disposal or encumbrance of the child's property (Article 171(2) of the FamC). If parental responsibility is restricted for the parents, a guardian is appointed for the child, but only to the extent that the parental responsibility is restricted. The measure of restricting parental responsibility lasts for a maximum of one year. However, if the court decides on the measure of restricting parental responsibility together with the measure of placing the child in institutional care, the duration of the measure restricting parental responsibility is aligned with the duration of the measure of placing the child in institutional care. In this case, both measures can last for up to three years (Article 174(3) in connection with of Article 171(5) of the FamC).

4. Final Thoughts

Alternative (child)care protects children who cannot live with their parents, the reasons for which vary. In Slovenia, alternative childcare is used when a child's rights and interests are endangered in their own family, primarily due to neglect or abandonment, the child's psychosocial problems, family violence, etc. Placement in institutional care as an alternative care measure is used only when it makes it possible to protect the child's rights and interests adequately. Efforts are made to provide primary family placement for every child in need of alternative care. In other words, family placement typically takes precedence over placement in a

58 European Union Agency for Fundamental Rights and Council of Europe, 2022, p. 121.

facility as an institutional form of childcare. Development guidelines in the field of alternative childcare have been moving towards from institutional childcare to family- or community-based care for children.⁵⁹ In short, the trend is towards deinstitutionalization. However, deinstitutionalization is already proving to be a problem in Slovenia, as there is a noticeable decrease in individuals opting to provide foster care and, consequently, a reduction in foster care capacity. If this trend continues, the vulnerability of foster care as family-based alternative childcare can be expected. Such a decline in foster care reopens the need for institutional care. This means that children will continue to be placed in facilities when family-based care is not guaranteed. Therefore, in addition to the trend towards deinstitutionalization in alternative childcare, it is necessary to consider that institutional care may be necessary for a longer time than anticipated and may even be the only option for some individual cases. However, regardless of whether it is institutional or deinstitutionalized alternative childcare, the focus must always be on the best interests and well-being of the child.

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⁵⁹ Anghel, Herczog and Dima, 2013, p. 240.

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