

The Right of a Child to Care and the Involvement of the Family Advocate in the Sentencing of a Child's Primary Caregiver

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Abstract

The landmark dictum in S v M has set a precedent that the sentencing of a child's caregiver must consider his or her caregiving responsibilities. Amongst others, the guidelines require the court to take into account the care of the child in the event it imposes a custodial sentence on the child's primary caregiver. One of the options available to the court is to place the child in alternative care. While caregiving responsibilities of the caregiver is mostly considered in sentencing, it appears that the court often assigns the care of the child, post-sentencing, to the Department of Social Development. Such an assignment has the potential of infringing the right of the child to alternative care. In the event that social welfare agencies have to put a child of an imprisoned caregiver in alternative care, the procedure is uncongenial for such a child. There is currently no established procedure for placing a child in alternative care. While the Children's Act makes provision for alternative care, it does not make any specific stipulation regarding the placement of the child in alternative care. The survey of the orders made in some of the cases covered in this contribution shows that the care of the children involved was allocated to the Department of Social Development and none of the children were placed in alternative care. This contribution argues that the sentencing of a child's caregiver still does not consider options available for the care of the child created by the Children's Act adequately.

Keywords

best interests of the child; care; caregiver; court; family advocate; sentence

1. Introduction

In the groundbreaking judgment of *S v M* (Centre for Child Law as *Amicus Curiae*)¹ (hereinafter "*S v M*"), guidelines for the sentencing of a child's caregiver were established. The guidelines require a sentencing court to find out whether a convicted person is a primary caregiver wherever there are indications that this might be so:

1 2008 (3) SA 232 (CC).

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- (a) a probation officer's report is not needed to determine this in each case. The convicted person can be asked for the information and if the presiding officer has reason to doubt the answer, he or she can ask the convicted person to lead evidence to establish the fact. The prosecution should also contribute to what information it can; its normal adversarial posture should be relaxed when the interests of children are involved. The court should ascertain the effect on the children of a custodial sentence if such a sentence is being considered;
- (b) if on the *Zinn*² triad approach, the appropriate sentence is clearly custodial and the convicted person is a primary caregiver, the court must apply its mind to whether it is necessary to take steps to ensure that the children will be adequately cared for while the caregiver is incarcerated;
- (c) if the appropriate sentence is clearly non-custodial, the court must determine the appropriate sentence, bearing in mind the interests of the children; and
- (d) if there is a range of appropriate sentences on the *Zinn* approach, the court must use the paramountcy principle concerning the interests of the child as an important guide in deciding which sentence to impose.

The guidelines in *S v M* impose an obligation on the court to take steps to ensure that the child will be adequately cared for while the caregiver is imprisoned. The sentencing court must be able to sufficiently balance all the varied interests involved, including those of the child placed at risk.³ The court must diligently seek, wherever possible, to avoid conduct which may have the effect of placing the child in peril.⁴

The guidelines for the sentencing of a child's caregiver are the manifestation of a duty that South Africa incurred when ratifying the Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (ACRWC). The CRC and the ACRWC are binding international children's rights instruments that direct state parties to align domestic provisions concerned with children in their footing. Article 3(1) of the CRC makes provision that, in all actions concerning children – whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies – the best interests of the child shall be a primary consideration.⁵

The adoption of the Constitution of the Republic of South Africa, 1996 (hereinafter “the Constitution”) and the Children's Act⁶ (CA) are responsive measures towards placing

2 *S v Zinn* 1969 (2) SA 537 (A). In this case, a 58-year-old adult male was convicted of several counts of fraud, theft and a count of contravening the Insolvency Act. He pleaded guilty to all the counts and was sentenced to 15 years imprisonment. On appeal, the sentence of 15 years imprisonment was reduced to 12 years. It was held that the sentence imposed by the court *aquo* failed to put equal weight to the offence, the offender and to the protection of the society.

3 *S v M* para 33.

4 *S v M* para 20.

5 Article 4(1) of the CRC.

6 38 of 2005.

the rights of children on a par with international children's rights instruments. Section 28(1)(b) of the Constitution confers to a child the right to family, parental or alternative care. The child's right to care is to be comprehended within the context of section 28(2) of the Constitution that makes provision for the paramourcy of the best interests of the child in every matter that concerns the child.

While the family environment is preferred for the care of the child, circumstances necessitating separation of a child from his or her family or parents may exist. A child may be separated from his or her family or parents as a result of action by the state. An example of this separation, which falls to be considered in this article, is the imposition of a custodial sentence on the child's primary caregiver. The separation, as shall become apparent in the discussion that follows, is especially significant in instances where there is no one within the family of the caregiver to care for the child. The sentencing of the child's primary caregiver is *holus-bolus* a matter that involves the child and that requires his or her right to care to be considered.

2. Convention on the Rights of the Child

2.1 Family/parental care

Amongst others, the CRC gives recognition to the role played by the family in rearing a child. The family component is responsible for securing proper nurturing of the child and must be supported in raising the child. The right to a family allows children to be connected to their history and offers a protective perimeter against violation of their rights.⁷ The healthy development of children is crucial to the future well-being of any society.⁸ John F. Kennedy, for instance, sums up the importance of children in a community when he states that 'children are the world's most valuable resource and its best hope for the future'.⁹

The right of the child to care is not specifically mentioned in the CRC. Rather, it could be derived from various provisions of the CRC. Article 7 of the CRC states that the child has the right to know and to be cared for by his or her parents. Article 8 of the CRC complements Article 7 by obligating the state to respect the right of the child to, amongst others, preserve his or her family relations¹⁰ as recognised by law without unlawful interference.¹¹ The child has the right not to be separated from his or her parents against his or her will, except when competent authorities subject to judicial review determine in accordance with applicable law and procedures that such separation is necessary¹² for

7 Humanium 'Family and Children's Rights' (n.d.). <<https://bit.ly/3ik6JEb>> accessed 21 August 2020.

8 UNICEF 'Child Rights and Why They Matter, Every Right for Every Child' (n.d.) <<https://uni.cf/3CD1jf0>> accessed 21 August 2020.

9 AZ Quotes 'Children Quotes' (n.d.) <<https://bit.ly/39vXw6I>> accessed 22 August 2020.

10 Wolf, GI 'Preserving Family Unit: The Right of Children to Maintain the Companionship of their Parents and to Remain in their Country of Birth' (1996) 4(1) *Indiana Journal of Global Studies* 213.

11 Imprisonment of the child's caregiver on the basis of committing an offence or offences is lawful action by the state that may require the preservation of the family.

12 Abuse or neglect of the child and the incarceration of the caregiver of the child are examples of actions that may result in the child being separated from his or her parents against his or her will.

his or her best interests.¹³ Even in instances where the child is separated from his or her parents, the child retains the right to maintain personal relations and direct contact with both parents on regular basis except if it is contrary to his or her best interests.¹⁴

State parties to the CRC undertake to recognise the right of the child to a standard of living adequate for his or her physical, mental, spiritual, moral and social development.¹⁵ In addition, parents or other persons responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, conditions of living necessary for his or her development.¹⁶ Parental care enables the cognitive, socio-cultural, physical, mental and spiritual development of a child.¹⁷ The phrase ‘family environment’ is not expressly used in the CRC. However, the author suggests that conditions of living necessary for the child’s development as set out in the preamble imply a nurturing family environment.

The state has a duty to respect the rights and duties of parents and, where applicable, legal guardians, to provide direction to the child in the exercise of his or her right to freedom of thought, conscience and religion in a manner consistent with his or her evolving capacities.¹⁸ No child shall be subjected to arbitrary or unlawful interference with his or her privacy or family home, or to unlawful attacks on his or her honour or reputation.¹⁹ The child shall have the right to protection of the law against such interference or attacks.²⁰

Duties of parents or legal guardians or members of the extended family towards the child are dealt with in Articles 5 and 18 of the CRC. Article 5 of the CRC provides that state parties must respect the responsibilities, rights and duties of parents,²¹ or where applicable, the members of the extended family or community as provided for by local custom. Legal guardians or other persons legally responsible for the child have the duty to provide guidance to the child in regard to his or her exercise of rights that are entrenched in the CRC. According to the United Nations Children’s Fund, state parties to the CRC must use their best efforts to ensure the recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents, or legal guardians, have the primary responsibility for the upbringing and development of

13 Article 9(1) of the CRC. See also Wolff, MJ ‘Fact Sheet: The Trauma of Childhood Separation’ (2018) <<https://bit.ly/3IXFLD2>> accessed 21 August 2020.

14 Article 9(3) of the CRC.

15 Article 27(1) of the CRC.

16 Article 27(2) of the CRC.

17 Nair, A 2018 ‘Roles of Parents in Child Development’ <<https://bit.ly/3APQXaY>> accessed 21 August 2020.

18 Article 14(2) of the CRC.

19 Article 16(1) of the CRC.

20 Article 16(2) of the CRC.

21 S. De Figueiredo Attorneys (SDEFA) ‘Parental Rights and Responsibilities over a Child in South Africa’ (n.d.) <<https://bit.ly/3kDQ5Ru>> accessed 21 August 2020. See also Guyana Chronicle ‘What are the Duties of Parents Towards their Children, and Vice Versa?’ (2015) <<https://bit.ly/3IYA2gr>> accessed 21 August 2020.

the child; and the best interests of the child are their basic concern.²² State parties must render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and must ensure the development of institutions, facilities and services for the care of the child.²³

2.2 Alternative care

Provision for alternative care in the CRC is influenced by three of its four themes, namely: survival, development²⁴ and protection.²⁵ Article 20 of the CRC gives recognition to the right of the child to alternative care. It provides as follows:

- (i) A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the state.
- (ii) State parties shall in accordance with their national laws ensure alternative care for such a child.
- (iii) Such care could include among others, foster placement, *kafalah* of Islamic law, adoption or if necessary, placement in suitable institutions for the care of children. When considering solutions due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

The child's right to alternative care has, since 2010, received international attention and Guidelines for the Alternative Care of Children (hereinafter "Guidelines") were adopted on 24 February 2010. Though the Guidelines are not binding on state parties to the CRC, their implementation is monitored by the Convention on the Right of the Child Committee (hereinafter "CRC Committee") and state parties are encouraged to adhere to the Guidelines.²⁶ The CRC Committee has, for instance, in the past ordered jurisdictions such as Norway and El Salvador to incorporate the Guidelines in their domestic provisions concerned with children.²⁷ The objectives of the Guidelines are:

- (i) enhancement of the implementation of the CRC and of relevant provisions of other international instruments regarding the protection and well-being of children who are deprived of parental care or who are at risk of being so deprived;

22 UNICEF 'Parenting in the Best Interests of the Child and Support to Parents of the Youngest Children' (2010) 16.

23 Articles 18(2) of the CRC and 25(2)(a) of the ACRWC.

24 Skutjye, D Rights of African Children Under the African Charter on the Rights and Welfare of the Child: The Addition to the Universal Protection of a Child' (Master Dissertation, University of Tilburg, 2011) 12-15.

25 The fourth theme is participation.

26 Davidson, J 'Closing the Implementation Gap: Moving Forward with the United Nations Guidelines for the Alternative Care of Children' (2015) *International Journal of Child, Youth and Family Studies* 382.

27 Save the Children 'Guidelines for the Alternative Care of Children. Save the Children Policy Brief' (2012) <<https://bit.ly/3u7AEny>> accessed 3 June 2020.

- (ii) to support efforts to keep children in, or return them to, the care of their family or, failing this, to find another appropriate and permanent solution, including adoption and *kafalah* of Islamic law;
- (iii) to ensure that, while such permanent solutions are being sought, or in cases where they are not possible or are not in the best interests of the child, the most suitable forms of alternative care are identified and provided, under conditions that promote the child's full and harmonious development;
- (iv) to assist and encourage Governments to better implement their responsibilities and obligations in these respects, bearing in mind the economic, social and cultural conditions prevailing in each state; and
- (v) to guide policies, decisions and activities of all concerned with social protection and child welfare in both the public and the private sectors, including civil society.

The Guidelines recognise that, in most countries, the majority of children without parental care are looked after informally by relatives or by others. The Guidelines require states to seek to devise appropriate means to ensure children's welfare and protection while in such informal care arrangements, with due respect for cultural, economic, gender and religious differences and practices that do not conflict with the rights and best interests of the child. Decisions regarding children in alternative care, including those in informal care, should have due regard for the importance of ensuring that children have stable homes that can meet their basic needs for safe and continuous attachment to their caregivers, with permanency generally being a key goal.

3. African Charter on the Rights and Welfare of the Child (ACRWC)

3.1 Family/parental care

Similar to the CRC, the ACRWC acknowledges the unique and privileged position of a child. For the full and harmonious development of his or her personality, the child should grow up in a family environment in an atmosphere of happiness, love and understanding.²⁸ Okon contends that 'the primary responsibility for the protection, upbringing and development of the child rests with the family'.²⁹ The family is recognised as a basic cell of the society and should enjoy protection and support of the state for its establishment and development.³⁰ Parents, or legal guardians, have a duty to provide guidance and direction in the exercise of rights of the child and best interests of the child.³¹ State parties must respect the duty of parents, or legal guardians, to provide guidance and direction

28 Para 4 of the preamble of the African Charter on the Rights and Welfare of the Child (ACRWC).

29 Okon, E 'Towards Defining 'the Right to a Family for the African Child' (2012) 12 *African Human Right Law Journal* 374.

30 Moja, A 'Concept of Family in Africa' <<https://bit.ly/3EQBeuI>> accessed 20 August 2020. See also Article 18(1) of the ACRWC.

31 Article 9(2) of the ACRWC.

in the enjoyment of these rights subject to their national laws and policies.³² Chinyoka and Ganga³³ argue that ‘in African tradition the care of the child is typically a communal rather than an individual responsibility’. They support their contention by submitting that ‘communal care’ of a child resonates with the adage that ‘it takes a village to raise a child’.³⁴ The author, while acknowledging that societal care of a child may emanate from the spirit of *ubuntu*,³⁵ submits that the notion of a child being ‘raised by a village’ is a perception that society often serves the best interests of the child. The landscape of poverty and unemployment in South Africa, for example, appears to have resulted in many families relying on state grants for support. Statistics South Africa (Stats SA), for instance, points out that poverty is on the rise and by 2015 more than half South Africans were indigent.³⁶ In confirming the reliance that people may have on state grants, Skujyte correctly indicates that ‘the state has the duty to assist parents or legal guardians who are not capable of providing amenities relating to nutrition, health, education, clothing and housing³⁷ to their children’.³⁸

Parents or legal guardians have the right to exercise reasonable supervision over the conduct of the child.³⁹ No child shall be subject to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, or to attacks upon his or her honour or reputation.⁴⁰ The child has the right to protection of the law against such interferences or attacks.⁴¹ Parents or other persons responsible for the child have the primary responsibility for the upbringing and development of the child.⁴² Amongst others, they have the duty to secure, within their abilities and financial capacities, conditions of living necessary for the child’s development.⁴³ Every child is entitled to the enjoyment of parental care and protection and has, wherever possible, the right to reside with his or her parents. No child may be separated from his or her parents unless it is in his or her best interests.⁴⁴

32 Article 9(3) of the ACRWC.

33 Chinyoka, K and Ganga, E ‘Brooding Over African Traditional Child-Care in Zimbabwe: From Prenatal to Postnatal’ (2017) *Educational Research International* 136.

34 *Ibid* 136.

35 Metz, T ‘Ubuntu as a Moral Theory and Human Rights on South Africa’ (2011) 11 *African Human Right Law Journal* 532-559. See also Van Niekerk, J *Ubuntu and Moral Value* Doctor of Philosophy Dissertation (University of the Witwatersrand 2013).

36 Stats SA ‘Poverty on the Rise in South Africa’ (n.d.) <<https://bit.ly/39xllen>> accessed 22 August 2020.

37 In *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC), for instance, parents who were unable to provide their children with shelter (low-cost housing) challenged their eviction from private land earmarked for formal low-cost housing they were illegally occupying. The court found that the state has the duty to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of the right to access to adequate housing.

38 Skujyte, D ‘Rights of African Children Under the African Charter on the Rights and Welfare of the Child: The Addition to the Universal Protection of a Child’ (University of Tilburg, June 2011) 28.

39 Article 10 of the ACRWC.

40 Article 10 of the ACRWC.

41 Article 10 of the ACRWC.

42 Article 20(1) of the ACRWC.

43 Article 20(1) (b) of the ACRWC.

44 Article 19(1) of the ACRWC. Acts such as abuse and neglect of the child and the imprisonment of the caregiver of the child may necessitate the separation of the child from a parent.

3.2 Alternative care

In terms of Article 25(2), the state

- (i) shall ensure that a child who is parentless, or who is temporarily or permanently deprived of his family environment, or who in his best interest cannot be brought up or allowed to remain in that environment shall be provided with alternative family care, which could include among others, foster placement, or placement in suitable institutions for the care of children;
- (ii) shall take all necessary measures to trace and re-unite children with parents or relatives where separation is caused by internal and external displacement arising from armed conflicts or natural disasters; and
- (iii) when considering alternative family care of the child and the best interests of the child, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious or linguistic background.

The author submits that provisions of the ACRWC on alternative care are specific in their reference to alternative family care. Article 25(2)(i) and (iii) ensure that a child who is without any form of care should be placed in alternative family care that furthers the child's religion, language, culture and heritage.

4. Children's Act

4.1 Family/parental care

The right of the child to care in the CA is expansive. In terms of section 1 of the CA, care in relation to a child includes, where appropriate,

- (i) within available means, providing the child with:
 - a suitable place to live;⁴⁵
 - living conditions that are conducive to the child's health, well-being and development; and
 - the necessary financial support.
- (ii) safeguarding and promoting the well-being of the child;
- (iii) protecting the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation and any other physical, emotional or moral harm or hazards;
- (iv) respecting, protecting, promoting and securing the fulfilment of and guarding against any infringement of, the child's rights set out in the Bill of Rights and the principles set out in Chapter 2 of this Act;
- (v) guiding, directing and securing the child's education and upbringing, including religious and cultural education and upbringing in a manner appropriate to the child's age, maturity and stage of development;

45 Boezaart, T *Child Law in South Africa* (Juta 2009) 65.

- (vi) guiding, advising and assisting the child in decisions to be taken by the child in a manner appropriate to the child's age, maturity and stage of development;
- (vii) guiding the behaviour of the child in a humane manner;
- (viii) maintaining a sound relationship with the child;
- (ix) accommodating any special needs that the child may have; and
- (x) generally, ensuring that the best interests of the child are the paramount concern in all matters affecting the child.

4.2 Alternative care

Even though the CA does not define alternative care, eight sections are specifically and by implication dedicated to such care. These include sections 2(a) and (b), 22(1)(b), 45(1)(h),⁴⁶ 46(1)(a),⁴⁷ 157(1)(b)(i) and (iii), 159(2)(d),⁴⁸ 161(1)(a)(i)⁴⁹ and 305(1)(k).⁵⁰ Only sections 2(a) and (b) and 22(1)(b) are discussed briefly. The other sections are excluded on the basis that they deal with orders that the Children's Court may grant. Section 2(a) reads that 'the objective of the CA is to preserve and strengthen families'. Section 2(b)(i), amongst others, provides for the child's right to alternative care when removed from the family environment. Section 22(1)(b) creates the platform for the care of the child by a person other than the child's caregiver. A person who has an interest in the care, well-being and development of the child may acquire care of the child through a parental responsibilities and rights agreement. The wide scope of section 22(1)(b) allows for the child to be cared for by family members or by his extramarital father or by persons other than his or her parents.

5. Alternative care settings

A child's alternative care may be formal or informal and may take place in various settings. Alternative care settings are flexible and may be adapted in line with the circumstances of state parties. Formal care is care provided in a family environment that is ordered by a competent administrative body or judicial authority. This includes care provided in residences, including private facilities, regardless of administrative or judicial measures.⁵¹

46 The Children's Court may adjudicate on alternative care involving the child.

47 The Children's Court may make the following orders:

An alternative care order; which includes an order placing a child

(i) in the care of a person designated by the court to be the foster parent of the child;

(ii) The child may be left in the care of the parent or caregiver under the supervision of a designated social worker; provided that the child's safety and well-being must receive first priority; and

(iii) the child may be placed in alternative care with or without terminating parental responsibilities and rights of the parent or caregiver.

48 Views of an alternative caregiver need to be considered when extending an order of the Children's Court.

49 The Children's Court may make a contributory order of maintenance or treatment costs in favour of a child in alternative care.

50 It is an offence to aid or induce a child in alternative care to abscond from alternative care or to prevent the child from returning to alternative care.

51 Section 45(1)(h) of the CA empowers the court to make an order for the alternative care of the child.

Informal care (kinship care) is a private arrangement in a family environment whereby the child is cared for on an indefinite basis by relatives or friends.⁵² The initiative is that of the child, the child's parents or another relevant person. The arrangement is not ordered by an administrative or judicial authority or a duly accredited body.⁵³ The settings within which alternative care may take place includes kinship care, foster care, institutional care, *kafalah* or adoption.⁵⁴ The various forms of alternative care are discussed briefly hereunder. *Kafalah* and adoption are not discussed in detail by reason that they are permanent placement that the child of a primary caregiver may not require.

5.1 Kinship care

Kinship care is family-based care within the child's extended family or with persons who are known to the child, whether formal or informal in nature.⁵⁵ Informal kinship care refers to arrangements made by parents and other family members without any involvement from either a child welfare agency or the court.⁵⁶ The child may be left in the care of a grandparent, aunt, neighbour, nephew, uncle, relative or extramarital father.⁵⁷ In formal kinship care the child is placed in the legal custody of the state through a court order where after the particular child welfare agency then puts the child with kin. In this situation, the child welfare agency acting on behalf of the state has legal custody of the child and relatives have physical custody. The child welfare agency, in collaboration with the family, makes legal decisions about the child, including deciding where he or she must live. The child welfare agency is also responsible for ensuring that the child receives medical care and attends school regularly.⁵⁸

52 Save the Children 'Guidelines for the Alternative Care of Children' Policy Brief (2012) 3.

53 United Nation's Children's Fund and Kenya Government *Guidelines for the Alternative Family Care of Children in Kenya* (UNICEF 2014) 45.

54 Section 229 of the CA states that the purpose of adoption is to protect and nurture the child by providing a safe, healthy environment with positive support and promote the goals of permanency planning by connecting the child to other safe and nurturing family relationships intended to last a lifetime. See also Boezaart (2009) 133. It is a legal process that creates a legal relationship between the adoptive parents and the adopted child in the interests of the child. Adoption terminates parental responsibilities and rights of the parents of the adopted child and confer them to the adopting parents.

55 Centre for Law and Policy Research 'Foster Care in India: Policy Brief' (2014) 8. The Delhi Rules list out the criteria by which foster families must be selected. The criteria encompass the health, income, standard of living, physical, mental and emotional stability, as well as willingness of the foster family to work towards providing an environment conducive to the overall well-being of the child. See also Child Welfare Information Gateway 'Placement of Children with Relatives' (Children's Bureau 2013) 7. In the state of Alaska, for example, the placement of the child in foster care considers the following, such as the restrictiveness of the setting. It must be most closely approximate to a family environment and must meet the child's special needs, if any, it must be within reasonable proximity to the child's home, taking into account any special needs of the child and the preferences of the child or parent. The order of preference in awarding foster care is as follows: (i) an adult family member; (ii) a family friend who meets the foster care licensing requirements established by the department and (iii) a licensed foster home.

56 UNICEF 'Alternative Care for Children in South Africa: Progress; Challenges and Future Directions' (Gigiri 2008) v.

57 Child Welfare Information Gateway 'Kinship Caregivers and the Child Welfare System' (Children's Bureau 2016) '5.

58 *Ibid* 6.

Benefits of kinship care may include that it:

- is a setting that preserves continuity of the family;⁵⁹
- is a setting that is preferred by children rights instruments such as the CRC and the ACRWC;⁶⁰
- decreases the trauma and stress of relocation as well as grief from separation from parents;
- reduces the likelihood of multiple placements;
- expands self-sufficiency ongoing support;⁶¹
- secures mutual care and support of the child by family members and relatives;⁶²
- is the most culturally appropriate and understood form of alternative care as it is based on community mechanisms and processes;⁶³
- provides great benefits to the child and typically children prefer this type of arrangement;⁶⁴
- allows the child to maintain cultural, religious and linguistic links with his or her family and community and enables continuity, stability and a sense of identity and self-esteem;⁶⁵ and
- is more cost-effective than institutional care. During instances of family separation, kinship care can be an important temporary arrangement until the child's family has been traced and he or she can be reunified with them.⁶⁶

Potential risks of kinship care may include that:

- it is not regulated and not supported by government or external agencies;⁶⁷
- due to poverty levels, caring for an extra child may become increasingly difficult for many families;⁶⁸

59 Nandy, S and Vaisey, P 'Spotlight on Kinship Care: Using Census Microdata to Examine the Extent and Nature of Kinship Care in the UK at the Turn of the Twentieth Century' (2011) <<https://bit.ly/2W6XGhV>> accessed 22 August 2020..

60 Article 20(3) of the CRC.

61 UNICEF 'Guidelines for Early Child Development Department of Social Development Republic of South Africa' (New York 2006) 13.

62 Meinjes, B, Budlender, D, Giese, S and Johnson, L 'Children in Need of Care or in Need of Cash? Questioning Social Security Provisions for Orphans in the Context of the South African AIDS Pandemic' (Centre for Actuarial Research University of Cape Town 2003) 10.

63 Roby, JL 'Children in Informal Alternative Care: Discussion Paper: Child Protection Section' (UNICEF 2011) 21.

64 Chaitkin, S, Cantwell, N, Gale, C, Milligan, I, Glagotheir, C, O'Kane, C and Connelly, G 'Towards the Right Care for Children: Orientations for Reforming Alternative Care Systems Africa; Asia and Latin America European Union' (European Commission 2017) 9.

65 UNICEF (see n 55 above) 82.

66 Roby, JL 'Children in Informal Alternative Care: Discussion Paper: Child Protection Section' (UNICEF 2011) 12.

67 Ansah-Koi, AA 'Care of Orphans: Fostering Interventions for Children Whose Parents Die of AIDS in Ghana' (Families in Society 2006) 557.

68 Ainsworth, M and Semali, I 'The Impact of Adult Deaths on Children's Health in Northwestern Tanzania' World Bank Policy Research Working Paper No. 2266 (January 2000) 3.

- lack of monitoring and families' inability to access support services are leading to children experiencing abuse, violence, neglect and exploitation;⁶⁹ and
- children are moved around from household to another and the family taking in the child may be the only one willing to do so, rather than the most suitable in the best interests of the child.⁷⁰

Kinship care, either informal or formal, it is argued, is congenial for a child whose caregiver stands to be sentenced to a custodial sentence. Firstly, kinship care is supported by the CRC and the ACRWC because the child is placed with a family known to the child or in a setting that resembles a family setup and that can continue the child's culture, religion and language. Secondly and lastly, kinship care conforms to the guidelines for the sentencing of a child's primary caregiver established in *S v M*. If arrangements, formal or informal, have been made for the care of the child of a caregiver that stands to be sentenced to imprisonment, a caregiver may inform the court of such arrangements. Arrangements for the care of the child may, for example be made with the child's grandparent, aunt, niece, nephew, neighbour, uncle or the child's unmarried father.

5.2 Foster care

According to Breen, foster care occurs when a competent authority places the child with a family other than his or her own family.⁷¹ The family that offers foster care must ideally be selected, qualified, approved and supervised for providing such care.⁷² Benefits of foster care may include that a child is removed from a dangerous and harmful environment⁷³ and that it allows the child to recover and thrive in a supportive, safe living situation.⁷⁴ However, risks potentially associated with foster care include, amongst others, children developing new behavioural problems due to not being used to new daily programmes when they are in foster care.

Placement of a child in foster care must be in the best interests of the child and must be capable of continuing the child's culture, language, religion and heritage. The author submits that securing foster care placement that is aligned with a child's language, religion, culture and heritage may not be a simple task. Though section 7(1)(f)(ii) of the CA recognises the right of the child to maintain a connection with his or her family or extended family, culture or tradition, the procedure followed in placing a child in foster care does not acknowledge the perpetuation of a child's religion, language, culture

69 Varnis, SL 'Promoting Child Protection Through Community Resources: Care Arrangement for Ethiopian AIDS Orphans' (2011) *Northeast African Studies* 144.

70 UNICEF (see n 61 above) 21.

71 Breen, N 'Policy Brief: Foster Care in South Africa: Where to From Here?' (Child Welfare Johannesburg 2015) 1.

72 Child Welfare Information Gateway (n 57 above) 7.

73 Family for Every Child 'Strategies for Delivering Safe and Effective Foster Care: A Review of the Evidence for Those Designing and Delivering Foster Care Programs Family for Every Child' (London 2015) 4.

74 Johnson, H 'Literature Review of Foster Care' (Mkombozi Centre for Street Children (2005) 20; Durant, BK 'The Support and Training of Foster Parents' Master of Laws dissertation (University of Stellenbosch 2007) 23.

and heritage. A child must be found to be in need of care and protection in terms of section 150 before referral to the Children's Court may be made and section 155 makes no stipulation regarding consideration of a child's culture, language, religion and heritage in placement in foster care.

5.2.1 Institutional care

Miles and Stephenson define institutional or residential as care that is provided in a non-family-based group setting. It is a group-living arrangement for children by means of which care is provided by remunerated adults who would not be regarded as traditional carers within the wider society.⁷⁵ According to McLean, today, the definition of residential care is more inclusive. It encompasses children's homes that are run as family-type group homes and accommodate several children of no relation to the person running the home. The staff may be volunteers or related to the person in charge. It is a setting that may be used as a measure of last resort⁷⁶ when other settings, such as foster and kinship care have failed.⁷⁷ In institutional care a child is placed in the care of persons who are not of his or her family or who are related to him or her.

Benefits of institutional care may include that:

- the needs of the child are met when he or she cannot live with his or her own family;⁷⁸
- the homes are a place for children to develop and grow, as well as providing food, shelter and space for play and leisure in a caring environment;⁷⁹
- children with different needs are being looked after; and⁸⁰
- the child attends school regularly.⁸¹

Potential risks of institutional care may include that:

- it is non-therapeutic;⁸²
- care of the child is often not exercised in the best interests of the child;⁸³

75 Miles, G and Stephenson, P 'Children in Residential Care and Alternatives: Children at Risk Guidelines' (Tearfund Teddington 2001) 8.

76 UNICEF 'Children in Alternative Care' (2017) <<https://bit.ly/3shvBzR>> accessed 23 August 2020.

77 McLean, S, Price-Robertson, R and Robinson, E 'Therapeutic Residential Care in Australia: Taking Stock and Looking Forward' (National Child Protection Clearing House 2011) 2.

78 Child Welfare Information Gateway (see n 59 above) 7.

79 Durant (see n 74 above) 30.

80 Such as neglected and abused children; orphaned children, street children and children affected by HIV AIDS.

81 Bedford Borough Council 'Residential Care for Children' (n.d.) <<http://www.bedford.gov.uk>> accessed 3 June 2020.

82 McLean (see n 77 above) 1-24. Therapeutic Residential Care is intensive and time-limited care for a child or young person in statutory care that responds to the complex impacts of abuse, neglect and separation from family. This is achieved through the creation of positive, safe, healing relationships and experiences informed by a sound understanding of trauma, damaged attachment and developmental needs.

83 Hart, D, La Valle, I and Holmes, L 'The Place of Residential Care in the English Child Welfare System' (London Department of Education 2015) 33.

- some of these homes are not registered with a government department;⁸⁴
- it accommodates children from various backgrounds such as disabled, street and homeless children;⁸⁵
- children in institutional care facilities often have developmental damage and are abused and exploited;⁸⁶ and
- the damage caused by institutional care on children also affects physical and motor skills of the children.⁸⁷ The damage caused to the physical and motor skills of the child may be attributed to the fact that children below the age of six are not offered the same care as other children above the age of six years.⁸⁸

It is submitted that the CRC appears to least support institutional or residential care. The framing of the text of Article 20(3), amongst others, suggests that other forms of alternative care must be exhausted before regard may be had to residential care. Article 20(3), amongst others, makes use of the words ‘if necessary, placement in a suitable institution for the care of children’ and ‘due regard shall be paid to the desirability of continuing in a child’s upbringing and to the child’s ethnic, religious, cultural and linguistic background.’⁸⁹ The provisions of Article 20(3) direct states to consider alternative care options that are able to perpetuate the child’s culture, religion, language and heritage. With regard to other alternative care options, it makes it undesirable to resort to institutional care.

5.3 *Kafalah*

Kafalah is of Islamic origin. It is informal care⁹⁰ of the child deprived of his or her family environment⁹¹ that is also recognised by the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Child.⁹² Under *kafalah*, a family may take a child to live with them on a permanent and legal basis, but the child is not entitled to use the family’s name or to inherit from the family.⁹³

5.4 Adoption

‘Adoption is a judicial process that conforms to statute in which the legal obligations and rights of a child toward the biological parents are terminated and new rights and

84 Csaky, C ‘Keeping Children Out of Harmful Institutions: Why we Should be Investing in Family-Based Care’ (Save the Children 2009) 3.

85 Miles (see n 77 above) 11.

86 Csaky (see n 86 above) 6-10.

87 Browne, K ‘The Risk of Harm to Young Children in Institutional Care’ (Save the Children 2009) 9.

88 Durant (see n 76 above) 16.

89 Section 25(3) of the ACRWC also refers to the desirability of continuing in a child’s upbringing and to the child’s ethnic, religious, cultural and linguistic background when considering placement of a child in alternative care.

90 Article 20(3) of the CRC.

91 Assam, UM and Sloth-Nielsen, J ‘Islamic Kafalah as an Alternative Care Option for Children Deprived of a Family Environment’ (2014) *African Human Rights Law Journal* 324.

92 *Ibid.*

93 UNICEF (see n 58 above) vi.

responsibilities are created between the child and the adoptive parents.⁹⁴ Adoption involves the creation of the parent-child relationship between individuals who usually are not naturally related.⁹⁵ Under the draft United Nations Guidelines on Alternative Care, adoption is understood as permanent care.⁹⁶

6. Analysis

While the trend in sentencing caregivers of children shows courts' awareness of their duty to act in the best interests of the child, it would appear that courts often do not pursue the placement of the child in alternative care. Some of the cases discussed below demonstrate that the responsibility of securing the care of the children of imprisoned primary caregivers was allocated to the Department of Social Development (DSD). Though the children in the cases discussed were not placed in alternative care, it is argued that had it become necessary for them to be put in alternative care, the procedure could have been extraordinary and not suitable for such children. Failure by the court to pursue placement of children of incarcerated caregivers in alternative care, if needs be, may result in the court infringing the right of the child to alternative care. The guidelines for the sentencing of a primary caregiver established in *S v M*, amongst others, direct the sentencing court to take steps to secure the care of the child in the event it imposes a custodial sentence on the child's caregiver.

In *Piater v S*⁹⁷ (hereinafter "*Piater*"), the appellant, a caregiver to minor children aged 12 and 15 respectively, was convicted of fraud and theft and was sentenced to seven years imprisonment. She appealed against the sentence only. The probation officer who prepared the pre-sentence report contended that there was no one to care for the appellant's minor children if a custodial sentence was imposed. The appellant's husband arrived at home late, the appellant's mother was going blind and the paternal grandparents were sickly.⁹⁸ The appeal succeeded partially. The sentence of seven years' imprisonment was reduced to four years' imprisonment and the National Commissioner for Correctional Services (NCCS) was directed to ensure that a social worker in the employ of the Department of Correctional Services (DCS) visits the children at least once every month during the first three months of the appellant's imprisonment.

The circumstances of this case made it necessary for the court to make provision for the care of the children. The court order did not provide specifications regarding the care of the children upon the expiry of the three months. The children of the appellant would have respectively required care during the incarceration of the appellant. The manner in which the children of the appellant were cared for was not clarified. The DSD was not even ordered to provide a report to either the NCCS or to the court on the care the children were receiving or likely to receive.

94 The Free Dictionary (n.d.) <<https://legal-dictionary.thefreedictionary.com/Adopted+child>> accessed 25 August 2021.

95 Chapter 16 of the CA.

96 Barthelet, E 'Child Adoption: Trends and Policies' (n.d.) <<https://bit.ly/3iN1f5u>> accessed 3 June 2020.

97 *Piater v S* unreported case number A411/2011 of 7 December 2012 <<https://bit.ly/3ENkG6R>> accessed 23 August 2020.

98 *Ibid* para 43.

In *Noorman v S*⁹⁹ (hereinafter “*Noorman*”), the appellant, a primary caregiver to a three-year-old daughter, was convicted with the murder of her partner who was the father to her minor child. She was sentenced to 13 years’ imprisonment and appealed against the sentence only. The basis for her appeal were, amongst others, that the court paid inadequate attention to her primary caregiving responsibilities. Though the death of the child’s father was caused by the appellant,¹⁰⁰ the result was that the incarceration of the caregiver will inevitably leave the child with no one to care for her. The sentence was reduced to four years’ imprisonment and the DSD was ordered to investigate the actual circumstances of the appellant’s minor child and to take necessary steps to ensure that the minor child is cared for by a responsible adult and that provision of care to the minor child is monitored. The responsibility of securing the care of the child and its supervision was entirely left to the DSD.

In *Langa v The State*¹⁰¹ (hereinafter “*Langa*”), the appellant and a primary caregiver to six minor children whose ages were not specified, was convicted for murder, kidnapping, theft and malicious damage to property. She was sentenced to life imprisonment for the murder and to 30 years’ imprisonment for the other offences. She appealed against the sentences. Her grounds of appeal were, amongst others, that the court should have taken into account that she was a caregiver. The appeal was dismissed and the court emphasised that primary caregiving responsibilities do not afford convicted primary caregivers an escape route. Appropriate custodial sentences may still be imposed even to caregivers. The offences for which the appellant was convicted were serious and the sentences imposed were commensurate with the offences.¹⁰²

Though the sentencing court was found to have given due regard to the appellant’s caregiving status, the High Court went a step further to make provision for the care of the appellant’s minor children during their caregiver’s incarceration. It ordered the DSD to investigate the circumstances of the appellant’s minor children without delay and to take all necessary steps¹⁰³ to ensure that they are properly cared for in all respects,¹⁰⁴ and that they remain in contact with the appellant during her period of imprisonment and to have contact with her, insofar as it is permitted by the DCS.¹⁰⁵

6.1 Child in need of care and protection

While the CA makes provisions for alternative care, it does not specify the procedure for placing a child in alternative care. In the event that a child must be put in alternative care, it would appear that the following steps would have to be taken:

99 Unreported case number A532/10 of 27 January 2011 <<https://bit.ly/3AG1vJI>> accessed 21 August 2020.

100 *Noorman* para 47.

101 2010 (2) SACR 289 (KZP).

102 *Langa* paras 10 and 11.

103 *Ibid* para 2.1.

104 *Ibid* para 2.1.1.

105 *Ibid* para 2.1.2.

- (a) the circumstances of the child should be investigated by a social worker¹⁰⁶ and the maximum period for such investigation is 90 days; and¹⁰⁷
- (b) a hearing should be conducted to determine¹⁰⁸ if the child is in need of care and protection.¹⁰⁹

A child in need of care is defined in section 150 of the CA as a child who

- (i) has been abandoned or orphaned and is without any visible means of support;
- (ii) displays behaviour which cannot be controlled by the parent or caregiver;
- (iii) lives or works on the streets or begs for a living;
- (iv) is addicted to a dependence-producing substance and is without any support to obtain treatment for such dependency;
- (v) has been exploited or lives in circumstances that expose the child to exploitation;
- (vi) lives in or is exposed to circumstances which may seriously harm that child's physical, mental or social well-being;
- (vii) may be at risk if returned to the custody of the parent, guardian or caregiver of the child as there is reason to believe that he will live in or be exposed to circumstances which may seriously harm the physical, mental or social well-being of the child;
- (viii) is in a state of physical or mental neglect; or
- (ix) is being maltreated, abused, deliberately neglected or degraded by a parent, a caregiver, a person who has parental responsibilities and rights or a family member of the child or by a person under whose control the child is.

It is worth noting that section 150 makes specific reference to circumstances that may qualify a child to be in need of care and protection. The following cases demonstrate the definite application of section 150. In *SS v The Presiding Officer of the Children's Court, District of Krugersdorp and Others*,¹¹⁰ (hereinafter "SS"), an appeal against the refusal to declare an orphan child who was in the foster care of the appellants eligible for a foster care grant was lodged. At court *aquo*, the Child Commissioner made an order that the child did not meet the requirements to receive a foster grant. According to the Child

106 Section 151(1) of the CA. The investigation of the circumstances of the child is initiated by a social worker. It would appear that the probe is instituted when a social worker suspects that the child falls into any of the category of children listed in section 150. A social worker may remove the child from an environment where the child appears to be violated with or without a court order.

107 Section 155(2) of the CA.

108 Section 156(1)(i) of the CA.

109 Section 155 of the CA.

110 Unreported case no A3056/11 of 29 August 2012 <<https://bit.ly/3zB5Hta>>; *NM and Others v The Presiding Officer of the Children's Court, District of Krugersdorp and Others* unreported case no A3075/2011 of 12 April 2013 <<https://bit.ly/3CFs8PI>> accessed 26 August 2020.

Commissioner, the appellants had assumed responsibility for the care of the child, the child had visible means of care and support and was not entitled to a foster grant.¹¹¹ The Child Commissioner was found to have erred in declaring the orphan child not to be in need of care and protection and to have visible means of care and support. The child had been cared for by his foster parents from a tender age and by reason that his foster parents were no longer able to continue caring for him from their meagre means, the child lacked visible means of care and support.¹¹² An order was therefore made for the child to receive a foster grant until he reached the age of 18 years.

In *R v A and Another*,¹¹³ the court had to determine whether an eight-month-old child was in need of care, and protection and whether he should rather be removed from the care of his parents and placed in the care of the applicant. Prior to the parents relocating to Benoni, Gauteng with the minor child, the child was on occasions cared for by the applicant. The application for removal of the child was based on alleged abuse of the child by his parents. The court declined to make an order relating to the care of the child, instead, it directed that the circumstances of the child be investigated and a report concerning his welfare be filed.

In *V v V*,¹¹⁴ the court, amongst others, had to decide whether a child was in need of care and protection and whether her father was liable to maintain her at an additional cost. The child was living or exposed to circumstances which could seriously harm her physical, mental or social well-being. A contributory order against the father was in force and he sought to challenge the additional sum he had to pay for the maintenance of the child. The court found that the father of the child was liable to pay the supplementary amount. The fact that the child was attending a boarding school did not extinguish his obligation to support the child.

In *Jonker v The Manager, Gali Them bani JJ Serfontein School and Others*,¹¹⁵ the court was seized with the question whether children in need of care and protection (with behavioural, psychological and emotional difficulties) placed in a school by order of the Children's Court could be relocated to a Child and Youth Care Centre without ratification by the Children's Court. The court held that the children could not be relocated to a Child and Youth Care Centre, unless so ratified by the Children's Court. In *Steward obo A.S v The Member of the Executive Council, Department for Social Development Eastern Cape*,¹¹⁶ the court had to determine whether a person vested with the care of a child may compel the DSD to investigate and compile a report on the care and circumstances of a minor child for purposes of determining whether the child was in need of care and protection. The court found that instituting action to compel an arm of the state to investigate and compile a report on whether a child is in need of care and protection is enforcement of a constitutional right.

111 *Ibid* para 12.

112 *Ibid* para 9.

113 Unreported case no A3446/2017 of 2 November 2017 <<https://bit.ly/3u6aXnv>> accessed 25 August 2020.

114 Unreported case no A100/2004 of 2 March 2015 <<https://bit.ly/3ohYhsT>> accessed 24 August 2020.

115 Unreported case no 94/2011 of 19 March 2012 <<https://bit.ly/3lTvoAc>> accessed 20 August 2020.

116 Unreported case no 628/2013 of 4 October 2015 <<https://bit.ly/3AD8jrz>> accessed 17 August 2020.

6.2 Care of the child after the sentencing of the caregiver

The prescript of the best interests of the child direct the sentencing court to act in the best interests of the child in every matter that concerns the child and the sentencing of the child's primary caregiver is *holus-bolus* a matter that involves the child. The sentencing court should always be alive to its duty to secure the care of the child post sentencing. It should therefore take into account all the forms of alternative care available and make a determination on the one that serves the best interests of the child.

Kafalah and adoption are permanent placement that are uncongenial for a child of a caregiver that stands to be sentenced. These options do not allow the child to maintain contact with his or her caregiver and to be reunited with her or him upon release from jail. In view of the permanency of *kafalah* and adoption, alternative care options for consideration in respect of a child whose caregiver that stands to be sentenced are foster, institutional and kinship care. The suitability of the alternative care option to a child of a primary caregiver that stands to be sentenced must, amongst others, be informed by the prescript of the best interests of the child and the continuation of the child's culture, religion, language and heritage.

It is argued that foster care and institutional care are incompatible for a child of a caregiver that stands to be sentenced. Firstly, foster care results in the placement of the child with a person or persons that he or she is not familiar with and the perpetuation of the child's culture, religion, heritage, language and religion may not be attained. The foster carer may, for example, be aligned to a religion, culture and language different from that of the child and the process of placement does not establish this aspect. Secondly, the procedure that may be adopted for a placement is not apt. The ambit of section 150 does not extend to a child of a caregiver that stands to be sentenced and pays no regard to other alternative care options as the placement of a child in need of care and protection in foster care is a foregone conclusion. Section 156(1)(ii) of the CA unequivocally stipulates that a child that is found to be in need of care and protection may be placed with a suitable foster parent or in foster care with a group of persons or an organisation operating a cluster foster care scheme.¹¹⁷ Placement of a child in foster care without having regard to other alternative care options amounts to disregard of the fact that children may require care and protection in varying degrees and that the state should provide a broad range of support to children.¹¹⁸

The posture of the CRC and ACRWC on foster care is that the placement of the child should be in a setting that is within a family or that resembles a family setting and that promote the cultural, religious and linguistic rights of the child. The author submits that foster care placement may translate to good policy if children are placed with a person or persons they are familiar with and who are able to further the children's religion, culture, language and heritage. However, according to Carter and Van Breda, there are no set of objectives and contextually-relevant criteria for the assessment of prospective foster

¹¹⁷ Section 156(1)(ii) of the CA.

¹¹⁸ Nonyana-Mokabane, M 'Children in Need of Care and Protection and Their Rights to Family Life' Doctor of Law Dissertation (University of Pretoria 2012).

parents in South Africa¹¹⁹ and this has the potential of compromising the right of the child to be cared for in a nurturing environment.¹²⁰

Institutional or residential care is a form of alternative care that is not supported by international children's rights instruments. It is non-therapeutic;¹²¹ it does not consider the best interests of the child;¹²² it accommodates children from various backgrounds such as disabled, street and homeless children;¹²³ and its facilities often have developmental damage and children are abused and exploited.¹²⁴

In view of the unsuitability of *kafalah*, adoption, foster and residential care to cater for the care of a child of a primary caregiver, it is argued that kinship care is the only option that a sentencing court may utilise to put a child of a caregiver that stands to be sentenced in alternative care. Firstly, kinship care is supported by international children's rights instruments such as the CRC and the ACRWC. Secondly and lastly, kinship care resonates with section 22 of the CA. Section 22 makes provision that a caregiver of a child may enter into a parental responsibilities and rights agreement with a person who has an interest in the care, well-being and development of the child.¹²⁵

The parental responsibilities and rights agreement concluded between the child's primary caregiver and the person who has an interest in caring for the child must be registered with the Family Advocate.¹²⁶ The broadened scope for the care of the child means that a child may be cared for by persons such as his or her extramarital father, uncle, nephew, aunt, grandparent or neighbour. It is in the best interests of the child to continue to be cared for even when his or her caregiver is imprisoned.¹²⁷ According to Mia,¹²⁸ the exercise of parental responsibilities and rights by people other than the parents of the child reverberates with the development of the concept of a family.

The role of the Family Advocate of registering a parental responsibilities and rights agreement concluded between a child's caregiver and a person with an interest in the care of the child is acknowledged in the CA. It is submitted that conclusion of a parental responsibilities and rights agreement between a child's caregiver and a person who will care for the child is formal kinship care.

For kinship care to accommodate the needs of a child of a primary caregiver to care effectively and efficiently, it is significant that the risks associated with it be minimised. It is suggested that the Family Advocate should be an integral part of the sentencing of a child's caregiver. When imposing a custodial sentence on the child's primary caregiver, the court should order the Family Advocate to assist a caregiver to identify and enter into a

119 Carter, J and Van Breda, A 'The Design of a Protocol for Assessing Prospective Foster Parents in South Africa' (2016) 52(2) *Social Work* 208.

120 *Ibid* 210.

121 McLean (see n 79 above) 1-24.

122 Hart (see n 86 above) 3.

123 Csaky (see n 68 above) 6-10.

124 *Ibid*.

125 Section 22(1)(b) of the CA.

126 Section 224(a) of the CA.

127 *L v Lukoto* 2007 (3) SA 569 (T).

128 Mia, N 'An Exploratory Study of Grandparent-Grandchild Relationships from the Perspectives of Adolescents' Honours in Psychology Thesis (University of Cape Town n.d.) 7.

parental responsibilities and rights agreement with a person who will care for her child. At present, placement of children in need of care and protection in foster care is mandated by section 156 of the CA. Provisions of section 150 of the CA are inappropriate for a child of caregiver that stands to be sentenced to a term of imprisonment. A child of a caregiver that is to be sentenced to a custodial sentence requires continuation of care. The fact that the CA is silent on the precise procedure to be pursued for putting a child of a caregiver that stands to be sentenced to imprisonment in alternative care makes it inevitable for social welfare agencies to resort to section 150 to place such a child alternative care.

The involvement of the Family Advocate in the sentencing of the child's caregiver, it is argued, is aligned with kinship care. The Family Advocate's role will be to assist the child's caregiver to identify and to conclude a parental responsibilities and rights agreement with the person who has an interest in the care, well-being and development of the child. The parental responsibilities and rights agreement entered into between the caregiver of the child and the person who will care for the child will formalise the care of the child and will have to be monitored by the Family Advocate, for instance, to avoid abuse and neglect of the child. The advantages flowing from an official parental responsibilities and rights agreement made an order of court is that the risk of the child being moved from one household to another will be reduced and the child's culture, religion, language and heritage will be perpetuated.

The Family Advocate is a legal representative of children¹²⁹ and deals with matters such as parental responsibilities and rights, albeit in private family law. In order for the Family Advocate to be part of the sentencing of a child's primary caregiver, it is suggested that section 22 of the CA be amended to incorporate some of the provisions of section 4(1) of the Mediation in Certain Divorce Matters Act (MCDMA). Section 4(1)(b) of the MCDMA currently stipulates that the Family Advocate, if so, requested by any party to such proceedings or the court concerned, may institute an enquiry to enable him or her to furnish the court at the trial of such action or the hearing of such application with a report and recommendations on any matter concerning the welfare of each minor or dependent child of the marriage concerned or regarding such matter as is referred to him by the court. When considering an application contemplated in subsection (i), the court must take into account the best interests of the child; the relationship between the applicant and the child and the relation between the child and persons other than the applicant, and any other fact that should, in the opinion of the court, be taken into account. It is argued that the amendment of section 22 by provisions of section 4(1)(b) of the MDCMA should only exclude 'any party to such proceedings or and of the marriage.'

7. Conclusion

Courts have an obligation to act in the best interests of a child in every matter that involves a child. The sentencing of the caregiver of a child is *hokus-bokus* a matter that concerns the child and that require furtherance of his or her right to care. Imposition of a

129 Department of Justice and Constitutional, 'The Office of the Family Advocate Development' n.d. <<https://bit.ly/3o4k0Ew>> accessed 3 June 2020.

custodial sanction on the child's caregiver does not terminate the child's right to care. The prescript of the best interests of the child direct courts to take steps to ensure that the child continues to receive care even though his or her caregiver is incarcerated. The dictum in *S v M* has set precedent that the care of the child should be the primary preoccupation of the sentencing court when it imposes a term of imprisonment on the child's caregiver. Amongst others, the guidelines require the court to avoid conduct that places the right of the child to care at risk of infringement or that violates the right of the child to care.

This article has been able to show that sentencing courts often do not pursue the placement of the child of a caregiver in alternative care. Instead, the responsibility of securing the care of the child post-sentencing appears to be vested to the DSD and is not monitored by the court. Assigning of the care of the child to the DSD, this contribution has demonstrated, has the potential of placing the care of the child of an imprisoned primary caregiver at risk of infringement. Though in the cases surveyed the children were not put in alternative care, the article has been able to argue for consideration of the options for care of the child created by section 22 of the CA. Section 22 has widened the scope for the care of the child and the child may be cared for by his or her grandparent, extramarital father, niece, uncle or neighbour. The provisions of section 22 resonate with the posture of international children's rights instruments. Both the CRC and the ACRWC that South Africa has ratified require that the placement of children who are deprived of family or parental care in alternative care that promote their culture, religion, language and heritage.

The contribution has been capable of arguing that kinship care remains the only viable form of alternative care for a child of an incarcerated primary caregiver. *Kafalah* and adoption are discounted as forms of alternative care for a child of caregiver that stands to be sentenced to a custodial sentence. They are permanent placements that sever the relationship between the child and his or her caregiver. Even though the child's primary caregiver may be sentenced to a term of imprisonment, there has to be hope that she or he will be reunited with his or her child upon discharge from prison. Residential and foster care are also opted out as forms of alternative care. The placement of the child in such settings is with persons that the child is unfamiliar with and the advancement of the child's culture, religion, language and heritage may not be realised.

The recommendation that the Family Advocate should be an integral part of the sentencing of a child's caregiver is plausible. The Family Advocate deals with matters such as parental responsibilities and rights, albeit in private family law. The role of the Family Advocate should be to assist the primary caregiver of the child who stands to be sentenced to a term of imprisonment to identify and to conclude a parental responsibilities and rights agreement with a person that has an interest in the care, well-being and development of the child. The involvement of the Family Advocate in the sentencing of a child's primary caregiver will not only enable the court to oversee the placement of the child in alternative family care but will also dispense with the apparent assigning of the child's placement to the DSD. It has been shown that section 150 of the CA does not cater for a child whose caregiver is to be sentenced to a custodial sentence and that placement of a child in foster care is a foregone conclusion.

Placement of a child in foster care in the absence of empowering provisions and lack of a definite criterion for assessment of a foster caregiver has the potential of infringing the child's right to alternative care. The procedure that the DSD may have to pursue to put a child of a primary caregiver that stands to be sentenced to a term of imprisonment in alternative care is not only uncongenial for such a child but has the potential of not securing continuation of the child's culture, religion, language and heritage. The child of an incarcerated caregiver is not a child in need of care and protection as defined in section 150 of the CA. The amendment of section 22 through insertion of provisions of section 4(1)(a) of the MDCMA as recommended, will ensure that the child is cared for by a person he or she is familiar with; that his or her right to language, culture, religion and heritage remains intact and that he or she continues to be cared for and that such care is monitored by the Family Advocate. The parental responsibilities and rights agreement concluded by the child's caregiver and the person who has an interest in the care, well-being and development of the child will be an order of the court and in the best interests of the child.

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