

20 Special Guardianship - What's in it for carers?

Introduction:

Sometimes circumstances arise in which children are not able to live with their parents and have to be cared for by someone else - it may be a relative or friend or could be a local authority foster carer. These arrangements may be for a short or long period, and may be made by the parents directly with the person who will care for the child, or by the local authority.

When it is intended that the child will remain with the new carer on a long term basis, the placement may be secured legally by a court order. If this arrangement is likely to continue until the child is 18, this could be achieved by a special guardianship order. This advice sheet sets out the key features of special guardianship orders.

What is special guardianship?

A special guardianship order is a new legal order which the court can make, as from December 30th 2005. It is more secure than a residence order because a parent cannot apply to discharge it unless s/he has the permission of the court to do so. However, it is less secure than an adoption order because it does not end the legal relationship between the child and his/her birth parents. This means that when a child is made the subject of a special guardianship order, s/he remains a member of his/her birth family even though s/he is living on a legally secure basis with his/her special guardian.

When can the court make a special guardianship order?

The court may make a special guardianship order to provide legal security for an arrangement for a child who is living with someone other than his/her parents. This arrangement might be made:

- q directly between the parents and the prospective special guardian. This includes where the parents have made arrangements for someone else in the family or a friend to look after their child because of a long term difficulty and they would prefer their child to stay within the family rather than having to go into the care system; or
- q by the local authority where the child is placed with a foster carer on a long term basis and that person then wishes to secure the placement of the child with them so that the local authority is no longer involved.

For more information on placements of looked after children, see FRG's advice sheets nos: 4 and 5.

There are various conditions which must be fulfilled in order for you to make an application for a special guardianship order.

- q You can apply for a special guardianship order if:
 - o you are over 18, and
 - o you are not a parent of the child.

You can apply on your own or jointly with another person.

s.14A (2)&(3) CA

- q However, you cannot make an application for a special guardianship order unless you have given notice to the local authority of your

s.14A(7) CA

REFERENCES

CA: Children Act 1989
CSA: Child Support Act 1991
FPR: Family Proceedings Rules 1991 as amended by Family Proceedings Amendment (No.5) Rules 2005
SGR: Special Guardianship Regulations 2005
Guidance: Special Guardianship Guidance 2005

intention to apply for the order at least three months before the application is made – see below.

- q Once you have given this notice you have the right to apply for a special guardianship order if you fall into a particular category of person described below, otherwise you will need the leave (permission) of the court. For more information on this see section on “How do I apply for a special guardianship order?”

s.14A (3)(4)(5) &(12)
CA

The court can also make a special guardianship order in any other family proceedings in which a question about the welfare of the child arises, without any application having been made, if it considers it appropriate that such an order should be made.

s.14A(6) CA

What is the local authority’s involvement?

The local authority has a central role in the proceedings. In every case, you cannot make an application for a special guardianship order unless you have given notice to the local authority of your intention to apply at least three months before the application is made.

Note: The only exception to this is where you have already made an application for an adoption order, and you then decide, with the court’s permission, to pursue special guardianship instead. In these circumstances you do not need to give this notice to the local authority.

s.14A (7) CA

When the child is looked after, the notice must be given to the responsible local authority. In all other cases, it will be to the local authority in which you live.

s.14A (7) CA

Once the local authority receives this notice it must investigate the matter and then file a report with the court on your suitability to be a special guardian and any other matter which the local authority considers relevant. This will involve the local authority talking to you to find out background information and your current views about the placement, contact arrangements for the child to keep in touch with important people in his/her family etc.

s.14A (8) CA

The Regulations say that the local authority report should include certain key information about:

*Regulation 21 and
schedule SGR*

1. **The child** – such as:

- q whether the child has brothers and sisters;
- q the relationship the child has with different members of the family and the arrangements for the child to see or keep in touch with different people in the family;
- q the child’s religion, race culture and linguistic background;
- q the child’s educational needs; and
- q the child’s likes and dislikes etc.

2. **The child’s family** – such as:

- q details of both parents and the child’s brothers and sisters;
- q the child’s relationship with his/her parents;
- q the parents’ religion, race, culture and linguistic background; and
- q the parents’ interests etc.

3. The parents' and the child's wishes and feelings about special guardianship if the child is old enough to understand, his/her religion and culture and any arrangements for the child to see/keep in touch with members of the family.

4. You, as the prospective special guardian – such as:

- q your family composition and circumstances;
- q your parenting capacity;
- q whether you are willing to follow the wishes of the child or parents in relation to his/her religious and cultural upbringing;
- q your attitude to the child having contact with his/her family; and
- q your reasons for applying for a special guardianship order etc.

5. The local authority - such as:

- q details of any past involvement with the child;
- q details of any special guardianship support services to be provided to the child, you and/or the birth parents or where they have decided not to provide such services, the reasons; and
- q where the local authority is already looking after the child, details of their involvement.

6. Medical information on the child, you and the birth parents.

7. An assessment of how a special guardianship order would meet the child's long term interests as compared with other types of order.

The local authority has the power to make arrangements for this investigation to be carried out by a suitably qualified and experienced professional on its behalf.

s.14A(10) CA

In all cases the court cannot make a special guardianship order unless it has received this report from the local authority.

s.14A (11) CA

Once the report is filed the court must consider whether to give a direction that the report will or will not be disclosed to each of the parties in the case. Before giving such a direction it must consider whether any information should be deleted before the report is disclosed. It will also be given to any CAFCASS officer who is involved in the case.

Rule 4.17A Family Proceedings Amendment (No 5) Rules 2005

How do I apply for a Special guardianship order?

The steps you need to take to apply for a special guardianship order will depend on whether you fall into a category of person who has a right to apply for an order or whether you need the leave of the court.

You have a right to apply for a special guardianship order if:

- q you already have a residence order on the child; or
- q you are an approved local authority foster carer and you have had the child living with you for at least one year before the application is made; or
- q you are not an approved local authority foster carer but you have had the child living with you for at least 3 out of the last 5 years preceding the 3 month notice period referred to above; or
- q you have the consent of:

ss.14A (3)(4)(5)&(12) CA

- § any person holding a residence order on the child and if more than one person holds the residence order, the consent of each person; or
- § the local authority if the child is already in care under a care order; or
- § in any other case the consent of each of those with parental responsibility (usually the parents, but it may also include step-parents, guardians etc.); or
- ¶ you are a guardian of the child.

If you do not fall into any of the above categories, you will have to ask the court for leave (permission) to be able to make an application for a special guardianship order. You need to complete a separate form for this (Form C2).

s. 14 A (3) (4)&(12) CA

In deciding an application for leave, the court must apply the following criteria which are set out in the Children Act 1989:

- ¶ the nature of the application;
- ¶ your connection with the child;
- ¶ any risk of disruption to the child's life caused by the application to the extent that s/he would be harmed by it;
- ¶ the local authority's plans for the child; and
- ¶ the wishes and feelings of the child's parents.

s. 10(9) CA 1989

If you fall into any of these categories or the court has granted you leave, and three months has elapsed since you gave notice of your intention to apply for a special guardianship order, you can go ahead and make your application.

You can instruct a solicitor specialising in family law to make the application on your behalf. If you are on a low income, you can ask the solicitor if you are eligible for help with the legal costs from the Legal Services Commission. Alternatively the local authority may be able to assist you with the legal costs if they "consider it appropriate".

If you need help to find a solicitor see the further help section at the end of this advice sheet.

Regulation 6 SGR

If you cannot afford a solicitor or do not want one, you can make the application in person. To do so, you need to contact the court office and ask them for a copy of the relevant forms to complete (Forms C1 and C13A). These can also be found at <http://www.hmcourts-service.gov.uk/>. The court staff will tell you what else you need to do, what fees are payable (currently £175) and what will happen next.

Will anyone represent the child in the case?

The child will not automatically be represented in the proceedings unless there is an existing care order in which case the effect of making a special guardianship order would be to discharge the care order. In this situation, a CAFCASS officer will be appointed to represent the child in the case. This may also happen if the application is made while the child is already the subject of care proceedings.

s. 41 (6) & s. 91(5A) CA

If there is no existing care order on your child the court **may** appoint a CAFCASS officer to represent your child if it considers it would in your child's best interests to do so.

Rule 9(5) FPR 1991 (as amended)

When the local authority prepares its report for the court as above, it may indicate in the report if there are circumstances which suggest the child should be represented in the proceedings.

What are the grounds for making a special guardianship order?

When deciding whether to make a special guardianship order, the child's welfare is the court's paramount consideration. However, when deciding what is in your child's best interest, the court must have regard to the things listed in the welfare checklist, which include:

s.1 (1) CA

- q the ascertainable wishes and feelings of the child;
- q the physical emotional and educational needs of the child;
- q the likely effect of any changes of circumstances on him;
- q his age sex, background and any other characteristics which the court considers relevant;
- q any harm which he has suffered or is at risk of suffering;
- q how capable each parent and any other significant person is of meeting his needs; and
- q the powers available to the court to secure arrangements for the child.

s.1 (3) CA

The court must also avoid unnecessary delay and should not make the order unless it would benefit the child.

s.1 (2)&(5) CA

Note: It is confusing that the ground for making a residence order and a special guardianship order are the same because in both cases the court must apply the welfare principle and checklist set out above. This begs the question: how will the court determine which order is most suitable for your child? The answer to that question will vary in each case but the important difference is that special guardianship is meant to secure a permanent arrangement so the expectation is that the child will remain with the special guardian until s/he reaches 18, whereas a residence order may be more temporary, although not in all cases.

What is the effect of a special guardianship order?

A special guardianship order lasts until the child reaches 18 unless it is revoked.

A special guardianship order automatically discharges an existing care order on the child.

S91(5)A CA

Parents retain parental responsibility and their legal relationship with the child throughout the duration of the order. However, you, as the special guardian also have parental responsibility for the child which you can exercise to the **exclusion** of anyone else with parental responsibility. This means that you can make all the major decisions about the child's upbringing and you do not have to consult with the parents about these decisions. But there are some limitations to this as follows:

s.14C (1) CA

- You cannot change the child's surname nor take him/her outside the UK for a period of more than 3 months without the consent of everyone with parental responsibility or the leave of the court.
- You cannot override the parents' rights in relation to the child's adoption or placement for adoption.

s.14C (3) & (4) CA

s.14C (2) CA

- Even though you have this “exclusive” parental responsibility, you still need to get the consent of each person with parental responsibility where this is required by law. This would include, for example, consent to the child being sterilised. s.14C (2) CA
- You must notify each parent who has parental responsibility or the child’s guardian if the child dies. s.14C (5) CA

Where there is a dispute about the exercise of parental responsibility, the court has the power to make a prohibited steps or specific issue order alongside a special guardianship order to resolve the disagreement. This might arise if the parent was unhappy about a decision you had made about the child’s upbringing such as immunisations or medical treatment. In these circumstances, if the parent exercises their right to apply for one of these orders, the court would decide the issue in dispute. For further advice on this contact Family Rights Group advice line – details below. s.8 CA

The special guardian may appoint a guardian for the child after their death. s.5 CA as amended by
s.115 (4) ACA

What about contact and links with family members?

Many children who are subject to special guardianship orders will remain in contact with most, if not all, members of their family as long as this is in their best interests. Therefore, before making a special guardianship order the court is required to consider whether a contact order should be made to ensure contact takes place. Contact orders can also be varied by the court, or an application for a contact order might be made, some time after the special guardianship order had been made if, for example, contact which had previously been agreed was not taking place. s.14B (1)(b) CA

The local authority may provide services to support the arrangements for the child to spend time with their parents and/or other members of the family. These services can include cash to cover transport costs and also mediation to help resolve difficulties which may arise on contact. Regulation 3 SGR

However although they have the power to provide these services, they do not have to. This will depend on the result of their assessment of your need, the child’s need and the parents’ need for these services. For more information about getting support services, see below.

Who is financially liable for a child who is subject to a special guardianship order?

Parents remain financially liable for a child who is subject to a special guardianship order throughout the duration of the order. Correspondingly the special guardian does not acquire financial liability in legal terms although they may do so in practice. Special guardians will be able to receive child benefit for the child and to apply for child tax credit and/or other relevant benefits. s. 1 CSA 1991

It will be possible for the local authority to provide financial support to the special guardian of the child, in addition to support provided by the parents, but it will be means tested. This is discussed further below. Regulation 3 SGR

When can a special guardianship order be revoked?

Unlike an adoption order, a special guardianship order can be discharged. The following people may apply for it to be discharged:

s.14D(1) CA

- a) a special guardian;
- b) a parent/guardian of child;
- c) any person with a residence order in force;
- d) any other person who had parental responsibility for the child immediately before the special guardianship order was made;
- e) the child; and
- f) a local authority which has a care order.

However, an application to discharge the order **cannot** be made by certain people **unless** the court has given them leave (permission) to do so. These people include:

s.14D (3)CA)

- a) the child concerned (provided s/he has sufficient understanding of the proposed application);
- b) a parent/guardian;
- c) a step-parent who has parental responsibility under s.4A; and
- d) any other person who had parental responsibility for the child immediately before the special guardianship order was made.

The court will only give such permission if it is satisfied that there has been a “significant change of circumstances” since the special guardianship order was made.

s.14D(5) CA

The court may also vary or discharge the special guardianship order if a question about the welfare of your child arises in any family proceedings even though no application has been made to discharge the order.

s.14D (2) CA

What support can be provided in special guardianship cases?

Each local authority must make arrangements to provide support services to meet the needs of people affected by special guardianship in their area. These services can be provided by the local authority or may be provided by other organisations on their behalf. These services include:

- q Financial support for special guardian who is looking after the child – this is means tested.
- q Services to enable children, parents and special guardians to discuss matters relating to special guardianship. This might include support groups for special guardians and similarly for parents which the local authority help to set up.
- q Assistance with the arrangements for contact between the child, his/her parents and any relatives or any other person with whom the child has a relationship that the local authority considers to be beneficial. This assistance can include:
 - o **cash to help with the costs of contact** (travel, entertainment) – it is not means tested; and
 - o **mediation to help resolve difficulties which may arise on contact.**
- q Therapeutic services for the child.
- q Assistance to you (the special guardian) to ensure that you have a

Regulation 3 SGR

Guidance, para 27.

positive and continuing relationship with the child which can include:

- respite care which means the child could stay with an approved foster carer to give you a break;
 - mediation, for example where there are difficulties over contact or there is disagreement between you and the parents about important decisions the child's life; and
 - training so that you are able to meet the child's needs.
- Counselling, advice, information and other support services.

Regulation 3(3) SGR

s.14F (1)

If the child was looked after by the local authority before s/he was made the subject of a special guardianship order, s/he will also be entitled (when s/he is between the age of 16 and 21) to advice and assistance from the local authority (which last looked after him/her) to make his/her own arrangements when moving into independent living.

*s.24 (1)A CA and
Regulation 22 SGR*

How can special guardians access these support services?

Will the local authority assess my needs?

If the **child was looked after** by the local authority in care or accommodation before the special guardianship order was made, the local authority **must** carry out an assessment for support services at the request of:

*s.14G and Regulation
11 SGR*

- the parent;
- the child who is subject to a special guardianship order; and/or
- the special guardian.

If the **child was not looked after** by the local authority before the special guardianship order was made, the local authority **may** carry out an assessment for support services at the request of the same people:

*s.14G and Regulation
11 SGR*

- the parent,
- the child; and/or
- the special guardian.

In addition, whether or not your child was looked after, the local authority may carry out an assessment for support services at the request of any person whom the authority considers to have a significant and ongoing relationship with your child (for example the child's relatives).

Regulation 11 SGR

If the local authority refuses to carry out an assessment (for example where they have a power to do so, but are not obliged to), they must give reasons for refusing and give the person who has been refused 28 days to make representations to the authority about this refusal.

Regulation 11(3) SGR

Local authorities also have the power to assess the needs of other people for special guardianship support services.

Regulation 11 SGR

What does the assessment involve?

When an assessment is carried out it must follow a standard procedure for assessment. This will involve interviewing you and will include looking at the relationship that you have with the parents and what support (if any) may be required to assist with any difficulties, for example regarding contact. The main assessment tool will be the Assessment Framework – the government's standard guidance to social workers completing assessments. This provides an outline for the holistic assessment of a child's needs as well as any

Regulation 12

*Framework for the
Assessment of Children
in Need and their*

parental or special guardian's need for support. This will be adapted to your circumstances and will also draw upon information contained in any previous assessments.

Families, DoH, 2000.

How will the local authority decide on which services to provide?

At the end of the assessment the local authority must draw up a written report. If the local authority decides as a result of assessment that a person needs special guardianship support services, they must decide whether to provide services to that person and they must give the person whose needs they have assessed notice of their proposed decision before it is finalised.

Regulation 14 and 15, SGR

If they propose to provide support they must prepare a plan of the services they intend to provide and nominate someone in the local authority to monitor the provision of services. This draft plan will then be sent to the person who will receive the services and they must be given an opportunity (normally 28 days) to comment on the proposal before it is finalised. They should also be referred to independent sources of advice and advocacy at this stage.

Regulation 14 and 15, SGR

Once the local authority hear back from the person to whom they intend to provide services, they must finalise their decision and inform that person of the decision with reasons. They must tell them of the plan for services and the name of the person in the local authority who will monitor the implementation of the plan.

What if the local authority refuses to provide services?

If the assessment indicates that the person has a need for support but then the local authority refuse to provide services, there is no right of appeal but if this decision appears to be totally unreasonable you could take advice about whether there may be grounds for judicial review. For further information on this contact Family Rights Group advice line – details below.

What kind of financial support could I get?

The local authority has the power to provide financial support to special guardians:

i) To enable you to become a special guardian, and after the order is made to enable the special guardianship arrangement to continue, where either the local authority:

Regulation 6 SGR

- “considers it necessary” to ensure that the special guardian can look after the child; or
- considers that the child needs special care, arising from the child having an illness, disability, or emotional or behavioural difficulties. These may arise from past abuse or neglect and require unusually high expenditure.

ii) Where the local authority “considers it appropriate” to contribute to your legal costs (including court fees) including in relation to the making or discharge of a special guardianship order, any application in relation to contact with the child etc..

iii) Where the local authority considers it necessary to contribute to the cost of accommodating and maintaining the child.

This support can be paid as a single payment (this could be by instalment) or periodically where the need is likely to lead to recurring expenditure. *Regulation 8 & 13 SGR*

If you have previously been a local authority foster carer for this child, you may also be able to receive an additional reward element for up to 2 years (or, exceptionally, for even longer) if you previously received this as part of your fostering allowance. *Regulation 7 SGR*

Whether or not you get financial support will depend on the local authority assessment of the child's needs and your circumstances including your financial resources including eligibility for benefits, tax credits etc. However there is no means testing where the local authority consider it appropriate to contribute towards your legal costs in relation to an application for a special guardianship order on a child the local authority is already looking after and where the local authority support your application. *Regulation 13 SGR*

In the case of financial support which is paid periodically, the special guardian **must** inform the local authority immediately if there is any change in circumstance and in any event s/he is required to provide an annual financial statement on his/her financial circumstances and the financial needs of the child. *Regulation 10 SGR*

If these conditions are not complied with the local authority must give the special guardian a written reminder of the need for this financial statement and if it is still not provided within 28 days, the local authority may suspend or terminate payment. *Regulation 10 SGR*

Can support services be withdrawn at a later date?

The plan to provide services will be kept under review at least annually and/or when there is a change in circumstances and/or the local authority considers it appropriate. *Regulation 17, SGR*

Reviews involve the same procedure for assessment as set out above, although if the change of circumstances is minor the re-assessment may occur through an exchange of correspondence rather than a full re-assessment.

If the local authority proposes to vary or terminate support services they must give the person notice of this and give them an opportunity to make comment on it before they finalise their decision.

Where to get further help:

- Contact FRG's advice line for further advice, on 0800 731 1696. It is open Monday-Friday 10-12 & 1.30-3.30.
- Contact a solicitor who specialises in child care law. Ask your local Citizens Advice Bureau to recommend one, or call the Law Society Information Line on 0870 606 6575 or search on <http://www.lawsociety.org.uk/choosingandusing/findasolicitor.law>. If you are on a low wage, or on income support or job seekers allowance, you may be able to get free advice initially under the Legal Help Scheme.

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