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Special Guardianship – What’s in it for carers?

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

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 it 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 relatively new legal order which the court can make. 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 and s/he will have to show a significant change of circumstances to get this permission. 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 with his/her special guardian on a legally secure basis.

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:

- 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
- 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.

Who can apply for a special guardianship order?

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

- You can apply for a special guardianship order if:
 - you are over 18, and
 - you are not a parent of the child.You can apply on your own or jointly with another person.

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

- 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

- However, you cannot make an application for a special guardianship order unless you have given notice to the local authority of your intention to apply for the order at least three months before the application is made. If you

s.14A(7) CA

Birmingham CC –v- R

need the court's leave to apply you must get this before giving this notice to the local authority – see below.

[2007] 1 FLR 564

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 for a special guardianship order** at least three months before you make your application.

s.14A (7) CA

Note:

- If you need the court's leave/permission leave to apply for a special guardianship order (see below) you must obtain this before giving this notice to the local authority.
- 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.

Birmingham CC –v- R
[2007] 1 FLR 564

s.14A (7) CA

Once the local authority receives this notice it must investigate the case 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:

1. **The child** – such as:

- whether the child has brothers and sisters;
- 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;
- the child's religion, race culture and linguistic background;
- the child's educational needs; and
- the child's likes and dislikes etc.

Regulation 21 and
schedule SGR

2. **The child's family** – such as:

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- ❑ details of both parents and the child's brothers and sisters;
- ❑ the child's relationship with his/her parents;
- ❑ the parents' religion, race, culture and linguistic background; and
- ❑ 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:

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

5. *The local authority* - such as:

- ❑ details of any past involvement with the child;
- ❑ 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
- ❑ 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

s.14A (11) CA

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authority.

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:

- ❑ you already have a residence order on the child; or
- ❑ 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
- ❑ 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;
- ❑ you are a relative with whom the child has lived for a period of at least one year immediately preceding the application or
- ❑ you have the consent of:
 - 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.

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

S 14(A)(5)(e)

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

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 – see

*Birmingham CC –v-R
[2007] 1 FLR 564*

<http://www.hmcourts-service.gov.uk/>). Remember, you will need to do this before giving the local authority notice of your intention to apply for a special guardianship order.

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

s.10(9) CA 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.

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.

If you need help to find a solicitor, see 'Where can I get more information' section at the end of this advice sheet.

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".

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 still 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**

Rule 9(5) FPR 1991

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appoint a CAFCASS officer to represent the child if it considers it would in his/her best interests to do so.

(as amended)

When the local authority prepares its report for the court, 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 the child's best interest, the court must have regard to the things listed in the 'welfare checklist', which include:

s.1 (1) CA

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

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

s.14C (1) CA

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 special guardian:

- 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 permission of the court. The court will not necessarily agree to a proposed change to the child's surname if it will interfere with his sense of identity.
- You cannot override the parents' rights in relation to the child's adoption or placement for adoption.
- 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.
- You must notify each parent who has parental responsibility or the child's guardian if the child dies.

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

Re: L (A Child)
(Special guardianship
and ancillary orders)
[2007] All ER (D) 208
s.14C (2) CA

s.14C (2) CA

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. In these circumstances, if the parent exercises their right to apply for one of these orders, the court could decide the issue in dispute.

s.8 CA

If this occurred repeatedly the court has the power to prevent the parents from applying for such orders without first getting the court's permission but this may not necessarily prevent or remove associated tensions. In these circumstances you could consider finding a family mediator to help you resolve the issue in dispute. For further advice on this contact Family Rights Group advice line – details at the end of this advice sheet.

s.91(41) CA;
Re S (Adoption order
or special
guardianship order)
[2007] 1 FLR 819;
Re: AJ and Neath BC
[2007] 1 FLR 507

The special guardian may appoint a guardian for the child after their death.

s.5 CA as amended
by s.115 (4) ACA)

Which order: residence, special guardianship

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or adoption?

It is confusing that the statutory 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. The key ground for making an adoption order is also similar. This begs the question: how will the court determine which order is most suitable for the child? The answer is that the different features of each order will be need to be considered in the light of the needs of the child in the particular circumstances of the case and the Court of Appeal has confirmed that there is no presumption of a particular kind of order in a particular category of case. So the court will make the order which best meets the child's needs in the circumstances:

*Re S (Adoption order
or special
guardianship order)
[2007] 1 FLR 819*

- **Residence order:** A residence order normally lasts until the child is 16 (although it can be extended to 18 by the court) unless it is revoked by the court. Although the person with the residence order will have parental responsibility for the child s/he may have to refer back to the parents or others with PR on any major decisions regarding the child's upbringing. S/he will not be able to appoint a guardian for the child in the event of his/her death.
- **Special guardianship order:** A special guardianship order lasts until the child is 18 unless it is revoked by the court (for the circumstances in which a special guardianship order can be revoked see below). The expectation is therefore that the child will remain with the special guardian until s/he reaches 18. The special guardian has parental responsibility and will be able to make almost all decisions about the child without referring back to the parents. S/he will be able to appoint a guardian for the child in the event of his/her death.
- **Adoption order:** The child ceases to be a member of his family of origin and becomes legally related to the adoptive family. The adoptive parents become fully responsible for the child in all respects. They have parental responsibility and do not need to refer to anyone else unless a court orders otherwise. The order is not revocable.

Contact may continue between the child and his/her parents and other relatives in all the above situations if this is in his/her interests.

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 to make a contact order, although this does not necessarily mean that contact will take place.

s.14B (1)(b) CA

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. Contact orders can also be varied by the court.

The court can also order making a contact order even if the special guardian does not agree.

Re: L (A Child)
(Special guardianship
and ancillary orders)
[2007] All ER (D) 208

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 services to help resolve difficulties which may arise on contact.

Regulation 3 SGR

However although the local authority has 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.

s. 1 CSA 1991

Special guardians will be able to receive child benefit for the child and to apply for child tax credit and/or other relevant benefits.

It will be possible for the local authority to provide financial support to the special guardian of the child but it will be means

Regulation 3 SGR

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tested. This is discussed further below.

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 as of right:

s.14D(1) CA

- a) a special guardian;
- b) any person with a residence order in force; and
- c) a local authority which has a care order.

In addition, the following people can apply to revoke the order only if the court gives them leave (permission) to do so:

- 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.

s.14D (3)CA)

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. The local authority must tell prospective special guardians about these services and how to request an assessment of needs when they receive notice from an individual or request from the court to prepare a special guardian report. They should also consider offering the prospective guardian an assessment of support needs during their investigation, if appropriate. The support services that can be provided include:

Para 103 Guidance

- Financial support for special guardian who is looking after the child – this is means tested.
- 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.
- 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:
 - **cash to help with the costs of contact** (travel, entertainment) – it is not means tested; and
 - **mediation to help resolve difficulties which may arise on contact.**
- Therapeutic services for the child.
- Assistance to you (the special guardian) to ensure that you have a 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 SGR

Guidance, para 27.

Regulation 3(3) SGR

s.14F (1)

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

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.

How can special guardians access these support services?

Does the local authority have to 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

Regulation 12

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 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.

Framework for the Assessment of Children in Need and their 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.

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:

- “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.

Regulation 6 SGR

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 and eligibility for benefits, tax credits etc. When deciding the amount of financial support payable, the local authority should have regard to the amount of fostering care allowance that would be payable if the child was fostered.

Regulation 13 SGR

Guidance para 65 and R(B)v Lewisham LBC (2008) EWHC 738

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.

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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 can I get more information?

- Contact FRG's advice line for further advice, on 0808 801 0366. It is open Monday-Friday 10am-3.30pm. You can also visit www.frg.org.uk/advice_sheets.html where you can download other relevant advice sheets.
- Contact a solicitor who specialises in child care law. Ask your local Citizens Advice Bureau to recommend one, 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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