

# 24

## Special Guardianship - what does it mean for birth parents?

### 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, the placement may be secured legally by a court order. If this arrangement is likely to continue until your child is 18, this could be achieved by a special guardianship order. This advice sheet sets out the key features of special guardianship orders and explains how they may affect your position as a birth parent.

### What is special guardianship?

A special guardianship order is a relatively new legal order, which the court can make. It is more legally 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 permanent than an adoption order because it does not end the legal relationship between the child and his/her birth parents. This means that if your child was made the subject of a special guardianship order, their link with you as a member of your family would remain even though s/he is living with his/her special guardian on a long term and legally secure basis.

### When can the court make a special

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## guardianship order?

The court may make a special guardianship order to provide legal security for an arrangement for your child to live with someone else (not his/her other parent). This arrangement might be made:

- directly between you and the prospective special guardian. This could include a situation where you have made arrangements for a member of your family to look after your child because there is a long term family difficulty and you would prefer your child to stay within the family rather than having to go into the care system; or
- when a local authority has placed your child with a foster carer (which might be a member of your family who is approved as a local authority foster carer) on a long term basis, and that person wishes to secure the placement of your child with them so that the local authority is no longer involved.

*For more information on placements, see FRG's advice sheet on placement of looked after children.*

## Who can apply for a special guardianship order?

There are various conditions which must be fulfilled in order for someone to make an application for a special guardianship order on your child:

S/he:

- must be over 18,
- cannot be a parent of the child and
- can apply on their own or jointly with another person.

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

In every case, an application for a special guardianship order cannot be made unless the person applying has given notice of their intention to apply for a special guardianship order to the local authority at least three months before the application is made – see below.

s.14A(7) CA

The following people have a right to apply for a special guardianship order:

s.14A (5) CA

- anyone who already has a residence order on your child;
- a local authority foster carer who has had your child living with him/her for at least one year before the application is made;
- anyone who has had your child living with them for at least 3 out of the last 5 years preceding the 3 month notice period referred to above;

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

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- anyone who has the consent of:
  - any person holding a residence order on your child and if more than one person holds the residence order, the consent of each person, or
  - the local authority if your child is already in care under a care order. This means that it would be possible for a local authority foster carer to apply after your child had been living with them for less than a year if the local authority supported this; or
  - in any other case the consent of each of those with parental responsibility (usually you, the parents, but it may also include step-parents, guardians etc.)
- a guardian of your child

CA

Anyone else who wants to apply for a special guardianship order must first apply to the court for leave (permission) to be able to make an application for a special guardianship order.

When deciding whether to give permission, the court must take account of the following matters:

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

s.10(9) CA 1989

The court can also make a special guardianship order if it is already hearing a case about your child in any other family proceedings (for instance care or adoption proceedings), even if no application has been made, if it considers the order appropriate.

s.14A(6) CA

## What is the local authority's involvement?

The local authority has a central role in the proceedings. In every case, an application for a special guardianship order cannot be made unless the applicant(s) have given **notice to the local authority of their intention to apply for a special guardianship order** at least three months before the application is made.

s.14A (7) CA

If the person applying for the special guardianship order is someone who needs the court's permission (see above list) they

Birmingham CC –v- R

need to have that permission before they can give this notice to the local authority and then they will have to wait a further three months before they can apply for the order.

[2007] 1 FLR 564

When a child is in care, the notice must be given to the local authority which has the care order. In all other cases, it will be to the local authority in which the applicant(s) live.

s.14A (7) CA

Once the local authority receives this notice it must investigate your child's case and then send a report to the court [on the suitability of the applicant 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 wishes about the placement, and discussing contact arrangements for your child to keep in touch with important people in the 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

- ❑ **your child** – such as whether your child has brothers and sisters, the relationship your child has with different members of the family and the arrangements for your child to see or keep in touch with different people in the family, your child's religion, race culture and linguistic background, your child's educational needs, your child's likes and dislikes etc.;
- ❑ **your family** – such as details of both parents and your child's brothers and sisters, your relationship with your child, your religion, race, culture and linguistic background, your interests etc.;
- ❑ **your and your child's wishes and feelings** about special guardianship (if your child is old enough to understand), his/her religion and culture and any arrangements for your child to see/keep in touch with members of the family;
- ❑ **the prospective special guardian** – such as their family circumstances, their parenting capacity, whether the special guardian is willing to follow the wishes of the child or parents in relation to his/her religious and cultural upbringing, their attitude to your child's contact with your family, their reasons for applying for a special guardianship order etc.;
- ❑ **the local authority** - such as details of any past involvement

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

- **medical information** on your child, you and the special guardian; and
- **an assessment of how a special guardianship order would meet your 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

Where the court considers that a special guardianship order should be made, but no application has been lodged by the prospective special guardian, the court can ask the local authority itself to prepare this report.

s.14A (9) 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*

## **Will anyone represent my child in the case?**

Your child will not automatically be represented in the proceedings unless there is an existing care order an officer of the court known as a CAFCASS officer (or in Wales a Welsh Family Proceedings Officer) will be appointed to represent your child in the case. He or she will usually also choose a solicitor for your child. This may also happen if the application is made while your 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

*Rule 9(5) FPR 1991 as amended*

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it would in your child's best interests to do so.

When the local authority prepares its report for the court as above, it may indicate in the report if there are circumstances which suggest that your 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, your 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

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

s.1 (3) CA

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

s91(5)A CA

Parents retain parental responsibility and their legal relationship with the child throughout the duration of the order. However the special guardian has parental responsibility for the child and s/he can exercise it to the **exclusion** of anyone else with parental responsibility. This means that they can make all the major decisions about your child's upbringing and they do not have to

s.14C (1) CA

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consult you about these decisions. But there are some limitations on this:

- The special guardian cannot change your 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. *s.14C (3) & (4) CA*
- The special guardian cannot override your rights as parents in relation to your child's adoption or placement for adoption. *s.14C (2) CA*
- Even though the special guardian has this "exclusive" parental responsibility, s/he still needs to get the consent of each person with parental responsibility where this is required by law. This would include, for example, consent to your child being sterilised. *s.14C (2) CA*
- The special guardian must notify each parent or guardian if your 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 you were unhappy about a decision the special guardian had made or was proposing to make about your child's upbringing such as immunisations, medical treatment. *s.8 CA*

If this situation arose you could consider first of all finding a family mediator to help you resolve the issue in dispute, if the special guardian is also willing. For further advice on this contact Family Rights Group advice line – details below.

However, if you cannot reach agreement you could apply for one of these orders to decide the issue in dispute. However if you made repeated applications that were considered to inappropriate or were otherwise disruptive to the placement of your child with the special guardian, the court has the power to prevent you from applying for such orders without first getting the court's permission.

The special guardian may appoint a guardian for the child after their death. *s.5 CA as amended*

## **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 similar.

This begs the question: how will the court determine which order is most suitable for your child?

The answer is that the different features of each order will be need to be considered in the light of your child's needs 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.

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

So for example, in the case of a:

- **residence order:** the order will last until your child is 16 (or in some cases 18 if the court directs this) unless it is revoked. Although the person with the residence order will have parental responsibility, s/he may still need to discuss with you any major decisions regarding your child's upbringing. Also s/he cannot appoint a guardian for your child in the event of his/her death.
- **special guardianship order:** the expectation is that your child will remain with the special guardian until s/he reaches 18 and the special guardian will be able to make almost all decisions about your child without referring back to you. S/he will be able to appoint a guardian for your child in the event of his/her death. You, as parents, need permission from the court to apply to revoke the special guardianship order and this permission is dependent on a significant change in circumstances.
- **adoption order:** your 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 him/her in all respects. They have PR and do not need to refer to you or 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 should 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.

*s.14B (1)(b) CA*

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.

The court can also order contact 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 your child to spend time with you and/or other members of the family. These services can include cash to cover transport costs and mediation to help resolve difficulties, which may arise on contact.

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, your child's need and the special guardian's 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?

As a parent you remain financially liable for your child whilst she 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*

It will be possible for the local authority to provide financial support to the special guardian for the child, 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 as of right:

s.14D(1) CA

- a) a special guardian
- b) any person with a residence order in force;
- 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

**But:** 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)

## 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:

- ❑ Financial support for special guardian who is looking after the child – this is means tested.
- ❑ Services to enable children, parents and special guardians

Regulation 3 SGR

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to discuss matters relating to special guardianship – this might include support groups for parents in your situation which the local authority help to set up.

- Assistance with the arrangements for contact between your child, you, any relatives or any other person with whom your 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) – this is not means tested; and
  - **mediation to help resolve difficulties which may arise on contact.**
- Therapeutic services to your child.
- Assistance to the special guardian to ensure that s/he has a positive and continuing relationship with your child that can include:
  - respite care which means your child could stay with an approved foster carer to give the special guardian a break;
  - mediation, for example where there are difficulties over contact or there is disagreement between you and the special guardian about important decisions your child's life; and
  - training so that s/he is able to meet your child's needs.
- Counselling, advice, information and other support services.

*Guidance, para 27.*

*Regulation 3(3) SGR*

*s.14F (1)*

Although some of these services are aimed at supporting the special guardian to look after your child, there are some services which are available to you so you could ask for:

- support with the arrangements for you to see your child (not just travel costs, but also some money to enable you to take your child on an outing if this is agreed with the special guardian); and/or
- support groups in your area for parents who are in a similar situation to you.

If your child was looked after by the local authority before s/he was made the subject of a special guardianship order, s/he will 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 parents access these support services?

## Does the local authority have to assess my needs?

If your **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; or
- the special guardian.

If your **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;
- your child; 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 other members of the family).

*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 your child and the special guardian (if any) and the likely impact of a special guardianship order on that relationship. The main assessment tool will be the Assessment Framework – the

*Regulation 12*

*Framework for the Assessment of Children in Need and their Families, DoH, 2000.*

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government's standard guidance to social workers completing assessments. This provides an outline for the holistic assessment of your child's needs as well as any parent's 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.

### **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 has a need for 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 hears 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 a solicitor or Family Rights Group advice line – details below.

## 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 the decision.

## Where can I get more information?

- Contact FRG's freephone 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](http://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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