

**Nuffield
Family Justice
Observatory**

Report focus

Report from five focus groups with practitioners regarding their views on special guardianship.

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Special guardianship: practitioner perspectives



About this review

This review was commissioned by the Nuffield Family Justice Observatory and has been co-produced by CoramBAAF, led by John Simmonds, OBE, working in partnership with Professor Judith Harwin and her team at Lancaster University. The issues for consideration were scoped by family justice practitioners, policy leads and academics.

As the work has progressed, the issues have been discussed by members of the Family Justice Board, led by HHJ Jane Probyn and David Williams and a sub-group of the President's Public Law Working Group, led by Mr Justice Keehan.

The review has been published in four parts:

- Special guardianship: a review of the evidence. Summary report
- Special guardianship: practitioner perspectives
- Special guardianship: a review of the English research studies
- Special guardianship: international research on kinship care

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About the Nuffield Family Justice Observatory

The Nuffield Family Justice Observatory (Nuffield FJO) aims to support the best possible decisions for children by improving the use of data and research evidence in the family justice system in England and Wales. Covering both public and private law, the Nuffield FJO will provide accessible analysis and research for professionals working in the family courts.

The Nuffield FJO has been established by the Nuffield Foundation, an independent charitable trust with a mission to advice social well-being. The Foundation funds research that informs social policy, primarily in Education, Welfare, and Justice. It also funds student programmes for young people to develop skills and confidence in quantitative and scientific methods. The Nuffield Foundation is the founder and co-founder of the Ada Lovelace Institute and the Nuffield Council on Bioethics.

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Introduction

The Court of Appeal judgment (*Re P-S (Children)* [2018] EWCA Civ 1407) focused on the need to resolve the current confusion and uncertainty regarding the way that local authorities and the courts were managing special guardianship by issuing authoritative guidance. The views of the sector were therefore important in understanding what were the current concerns and how these might be resolved. Five focus groups for practitioners were organised to canvas these views as a core element of the evidence review.

The focus group participants

Experienced practitioners were invited to join the focus groups on a voluntary basis. In total, 16 Cafcass guardians, 10 lawyers and 18 social workers participated. Within this, there was representation from key voluntary stakeholders – the Family Rights Group, Inter-Country Adoption/Outbound project, Association for Fostering and Adoption, Cymru. Given the timescale for the review, it was not possible to undertake focus groups with other family justice stakeholders although the views of the judiciary are addressed in Harwin et al. (2019).

The protocols for conducting the focus groups received full ethical approval from Lancaster University. Each focus group was recorded and transcribed prior to analysis and identification of the key themes.

The focus group questions

The structure of the focus groups was guided by ten questions that were asked of all five groups. The questions were framed to explore those aspects of special guardianship where children were subject to care proceedings as a result of abuse and neglect; and the current challenge to the sector in addressing a series of problems identified in the *Re P-S* judgment.

1. In *Re P-S*, key issues were identified about engaging, preparing and assessing the prospective special guardians. What do you see as the most significant obstacles that need to be thought about in redrafting the guidance to ensure that this adequately happens in future cases?
2. The judgment exposed the difficulties when prospective special guardians do not have party status in the care proceedings. Is this a problem that you have encountered? If so, what problems has it led to? How do you think these difficulties can be addressed?
3. The Children and Families Act 2014 introduced statutory timescales for completion of care proceedings in all but exceptional circumstances. In your experience, how has this affected the procedures and processes for making a special guardianship order? How do you think these difficulties can be addressed?
4. If the court does not consider it has the evidence to make a special guardianship order within the 26-week timescale what significance is given to the prospective special guardian's existing relationship, experience and knowledge of the child? What significance is given to the fact that prospective special guardians are resident in a different local authority area? How has your local area resolved these matters?
5. Has your local authority had the opportunity to discuss any of these matters at the local Family Justice Board? If yes, what were the issues? Have you been able to find any resolution?
6. In your view does it matter if different courts or judges have different ways of handling similar problems?
7. Has your authority ever challenged a decision by the court to make a special guardianship order (or not make it)? If not, why not?

8. There have been a number of major changes introduced by the DfE (Department for Education) in law and guidance. In your view, have they had the impact they were intended to have?
9. Have we lost faith in special guardianship in light of the fact that there is consistent national evidence that the majority of placements do endure?
10. Are there any other issues that you would like to bring to our attention?

Main findings

The timely identification of family members before care proceedings have begun

The early identification of and engagement with family members as the local authority started to make a care plan for the child and issue care proceedings was a commonly reported experience. The focus groups stressed that early engagement is critical to care and permanency planning and to the local authority's application for care proceedings. The skills and knowledge of social workers in working with the birth parents and their families need to be at a high level especially when care planning conveys a message from the local authority that the child will not be returning to the birth parent/s. Kinship care placement was not typically identified as requiring the same level of skills and knowledge as other placement options although it was recognised to be equally demanding. Problems were compounded where capacity of the local authority workforce and resources were significantly stretched or in situations where the work was allocated to the child's social worker who had little access to the experience, skills and support of family placement practitioners.

These issues were reported to contribute to problems with proceedings beginning without a care plan in place which sufficiently focused on an evidence-based, balanced, robust and deliverable permanence plan for the child where family members were included. The proceedings might then have to address problems as they emerge and to change the plan where prospective special guardians are identified.

Family group conferences were seen as a positive way of addressing this problem. Some areas had introduced family group conference (FGC) teams to work alongside the child's social worker to identify prospective special guardians at an early stage.

Similar concerns were expressed about the skills and knowledge required to undertake viability assessments¹ (the potential to become a carer for the child) where a large number of family members might be identified, or family members were in different parts of the country or abroad. An example was given of a court limiting the number of viability assessments, which resulted in all those who had participated withdrawing. What had seemed to be a helpful solution to this problem proved to be counterproductive and caused additional delay.

It was generally acknowledged that there is not a single solution to the problem of prospective special guardians being identified after proceedings have commenced. However, a range of opportunities to work with parents and the wider family arise when these are informed by skills and knowledge of social workers who work with families and through specific resources such as FGCs.

¹ https://www.frg.org.uk/images/Viability_Assessments/VIABILITY-MASTER-COPY-WHOLE-GUIDE.pdf

Preparation and training for prospective special guardians

There is no regulatory requirement to ensure preparation and/or training are available for special guardians as there is with adoption or fostering. The absence of preparation and training severely constrains the time available to explain and explore the nature of special guardianship to ensure that family members understand the full implications of becoming the long-term carer of the child. Without such preparation, the decision to continue may be poorly informed or even misinformed. Examples were reported where prospective special guardians understood the Order to be a short-term arrangement until the parents resolved their immediate problems; or there was confusion about entitlements to practical, financial and emotional support; or the tension and conflict with the birth parents or other family members that might result if the Special Guardianship Order (SGO) were to be made. All these issues were likely to be exacerbated when the prospective special guardian had little, if any, experience of caring for the child before the SGO was made.

Preparation was described as 'almost non-existent' and 'ad hoc' with the development of local services dependent on local initiatives, with resources being made available to support these. All the focus groups emphasised that the preparation for prospective special guardians must include access to timely and relevant legal advice and social work input to help explore complex family dynamics, history and any consequent issues.

Examples of innovation and promising practices in preparing special guardians

Despite the many obstacles, there were examples of positive practice. One local authority held monthly preparation meetings that were very important in addressing some of the issues named above. Another local authority had produced a self-completion template for prospective special guardians to assist social workers in the preparation process. Each of these was reported as positive practice developments but the participants made it clear that successful implementation needed resources, expertise and support.

FGCs were identified as an important and positive intervention – but also that they need time, resources and expertise.

Summary

- Special guardians need time and resources to reflect and explore the issues and consequences of taking becoming the permanent carers for the child. Becoming the permanent carer of the child will fundamentally alter their life plan, place significant demands on their resources and will affect wider family relationships.
- All practitioners identified that a robust system of preparation and training for prospective special guardians must be a priority and that assessments should not be concluded until sufficient preparation has been completed. The training and support of children's social workers and access to child placement expertise also needs to be prioritised as a part of the local delivery of best family placement practice.

The Assessment Report for Court - rushed and lacking a child-centred focus

There was widespread dissatisfaction and frustration with the assessment and submission of the report to the court. Numerous obstacles were identified that stand in the way of achieving high-quality, evidence-based assessments. Taken together, they show a system under severe pressure.

The primary issue identified related to problems arising from family members being identified after proceedings had begun and the requirement to complete proceedings within the 26-week timescale as set out in Section 14(2) of the Children and Families Act 2014. Delay is not in the child's best interests but an assessment that is not evidence-based and completed without due consideration of all the relevant factors was clearly identified as a major risk factor.

A parallel problem was raised concerning what was experienced to be a significantly lower standard of assessment for family members compared to other placement options such as adoption or fostering. Focus group members often struggled with what they experienced as a general assumption that special guardianship placements do not require the same rigour and depth of information on the child, their history and future needs and the fit between those needs and the prospective special guardian's parenting capacity and resources as is required in adoption or fostering. The amendments to the regulations made in 2016 which were explicit about this were not seen to have had any impact.² There was a widespread view that judicial concerns to meet the duty to comply with the 26-week timescale had often come to be prioritised over the welfare of the child and the suitability of the prospective carer as it should be addressed in the assessment. There were also examples where the social work assessor did not have appropriate access to all the relevant information to enable a robust, evidence-based and child-centred assessment of suitability.

A number of specific issues were raised:

- The timescales for completion of the assessment were reported to vary and were often described as 'unrealistic'. They are typically shorter than 12 weeks and in some cases were reported to be just a few days.³
- Short timescales for completing the assessments mean that:
 - information from the Disclosure and Barring Service (DBS) is often not available.⁴
 - a full assessment of the child's health needs and development may not be available.
 - a full assessment of the prospective health needs of the prospective carers may not be available.
 - support plans and family contact arrangements were likely to be poorly prepared and not well thought-through when they are being agreed close to making the SGO.
- Negative assessments of prospective special guardians by the local authority were reported to sometimes be overridden by the court. This then resulted in a direction to commission an independent social work assessment. Many of the focus group participants thought these lacked rigour, although were accepted as a solution by the court because they were completed within the available timescale.⁵
- Social workers commonly reported that there had been a marked rise in the number of assessments to be completed in the last year, putting pressure on local authority resources.

² There was no direct reference to the Special Guardianship Amendment Regulations 2016.

³ The timescales for completing a special guardianship assessment identified in the focus groups were often significantly shorter when compared to the assessment timescale of three months as set out in the Children Act, S14A(7)(8) when an SGO is applied for where the child has been living with the carer for one year or more. Similar comparisons can be made to adopter or foster carer assessments.

⁴ A DBS check is not required in regulation although a joint agreement between ADCS and Cafcass identifies that DBS checks should always be undertaken.

⁵ Independent social workers were not included in the focus group discussions.

- Approving a family member as a connected person foster carer (when this was identified as a solution for the short-term care of the child) may run into difficulty if the carers do not meet the required standards as set out in the respective Fostering Regulations.

Practitioners reported that they were attempting to address these problems in a variety of ways:

- Some were becoming much more realistic and explicit about the amount of work they were able to do in the assessment within the timescale as set by the court.
- Some were discussing the local issues of assessments and timescales with their Local Family Justice Boards (LFJBs).
- Others were complying with the timescales as set by the court, even when that created problems.

Focus group members recommended the following:

- There should be a statutory minimum national standard for the preparation of an assessment.⁶
- Courts should ensure that children's services seek relevant DBS checks when prospective special guardians are identified.
- All prospective special guardians should have a consultation with the respective medical advisor for the child to discuss the child's development and any health issues that need to be taken into account in the care of the child.

The significance of the prospective special guardian's existing relationship, experience and knowledge of the child?

All the focus groups reported examples where the prospective special guardian's current relationship with, or experience and knowledge in caring for, the child were given little attention in the assessment. Other examples indicated that the wishes, feelings and needs of the child played little if any part in the assessment and more generally. In some examples, the prospective special guardians had never met the child, or their relationship with the child was based on occasional visits, sometimes at a contact centre or occasional overnight stays. Another example was given where the relationship between the birth mother and her friend as the proposed special guardian was prioritised as evidence rather than any relationship between the child and the friend.

Concerns were raised about too many examples where the making of an SGO almost amounted to placing a child with a 'stranger'. This is in stark comparison to the requirements as set out in the relevant sections of the Children Act 1989 that an applicant for a SGO must have had direct care of the child for a minimum period of one year before an application could be made. Another view expressed was that if a child was already in placement with the prospective special guardians, that was normally regarded as the decisive factor which trumped all other factors.

⁶ Equivalent to the three months as identified in S14A (7) Children Act 1989 where a special guardianship application has been made by eligible carers; or the timescales as set out for fostering or adoption.

Party status in care proceedings

In order to participate in care proceedings, having 'party status' is necessary. All the lawyers and the majority of social workers and Cafcass officers had dealt with cases where the prospective special guardian did not have party status⁷ in the proceedings. The most frequent reasons for this were:

- when the prospective special guardian had received a negative assessment.
- conversely, when there was a general agreement in the positive assessment of a particular prospective special guardian – in these circumstances, the prospective special guardian was often advised 'not to rock the boat'.
- practice varied between courts – some would not award party status to prospective special guardians without doing the same for other applicants.

A range of experiences were reported about how prospective special guardians found it difficult to be fully informed, adequately supported and have appropriate opportunities to participate and contribute in decision-making during care proceedings. For many, this was their first experience of coming to court, with accompanying high levels of anxiety, uncertainty, frustration and stress.

Party status was a particularly vexed question in international placements. Prospective special guardians might not be able to come to England for a variety of reasons. If they did, there might be language or a range of other barriers compounding the problems of legal representation, which would add delay to the court process.

The two main advantages of party status were highlighted by the lawyers. They stated that:

- it gives prospective special guardians 'a seat at the table'.
- it ensures that they have adequate legal representation.

The lack of full party status was 'bizarre' and intrinsically 'unfair' as it results in the prospective special guardian not having access to important information, such as the child's history and development which was available to other parties. This information could be highly relevant to their decision to become a special guardian. The absence of party status also results in them not being able to challenge the evidence presented in court. The repercussions of not having access to party status was considered to contribute to placement stress and possibly breakdown.

Some members of the lawyers' focus group pointed out some drawbacks that can arise when prospective special guardians have full party status. They noted that it can create an adversarial relationship between the prospective special guardian and the birth parents that plays itself out in court and beyond. This has the potential to create difficulties in the future. Managing party status was reported to require careful handling, especially in ensuring that the prospective special guardian was not put in the position of being asked to provide evidence about the birth parents' behaviour.

Some members of the lawyer focus group questioned more generally whether full party status is always necessary and suggested that 'intervenor status' would be an alternative. As such, it would prospective special guardians to participate in those parts of the proceedings where they have a direct interest.

⁷ The right to participate in care proceedings and to be present in court.

One drawback to full party status was noted by the lawyers' focus group which was the cost to the public purse.

Impact of statutory timescales on processes and procedures for making an SGO

The focus groups were unanimous in their view that the 26-week timescale had significantly affected the processes and procedures for making an SGO. While the principle behind the change in legislation was welcomed in minimising delay, the impact was seen to be negative when it limited the full and proper consideration and availability of evidence on the suitability of the prospective special guardians and the needs and circumstances of the child.

The concerns about the 26-week timescale are substantial and include:

- Marked variation across the country in judicial approaches to completing proceedings in 26 weeks. The use of the statutory option to agree to an extension was a part of this. This was much less likely to be agreed for children aged under two years than for those who were aged seven to ten years. Extensions were more likely to be supported if there was evidence of proactive planning on the part of the local authority. For example, in one Family Justice Board area, the expectation was that family group conferences would be held routinely. If, however, a conference had been held but a prospective special guardian had made the decision to come forward at a late stage in the proceedings, that person would still be considered. Other judges however, had what amounted to a blanket rule and would not consider extensions.
- Marked variation in the legal order made at the end of the proceedings – care order or SGO. Some judges would not consider making an SGO unless all matters had been resolved. In these circumstances they would make a care order in the expectation that it would be discharged upon application by the local authority when the suitability or otherwise of the prospective special guardian had been established. Others were more willing to make an SGO prior to the placement being adequately tested.
- Use of supervision orders as a way of concluding proceedings within the 26 weeks. Some areas reported, however, that they had seen a decline in this practice. Most thought that this was not a legitimate use of the supervision order.

Practitioners identified several reasons for the difficulties in requesting or obtaining extensions. The most important were:

- Lack of confidence in the workforce about the evidence required to ask for an extension.
- Lawyers being reluctant to argue for an extension because they thought it would not succeed.
- The robustness of the evidence of the Cafcass guardian at the point at which an extension was being considered.
- The pressure on the judiciary to balance compliance with the 26-week timescale and the duty of the paramountcy principle as set out in the 'welfare checklist' in relation to the child.
- Judges and local authorities who were concerned with the costs and challenge of using the lawful extension to 26 weeks.

Practitioner conclusions

- The making of an SGO must be driven by the responsibility to ensure that the long-term plan for the child is robustly evidence-based as it would be with any other order

and is not compromised as a result of carers being identified after proceedings have started.

- There must be a resolution of the issue raised in Re P-S about the identification of a legal order that would allow sufficient time for the prospective special guardian/s and the child to live together before an SGO could be made.

The support plan for the child and the special guardians

The assessment of need and the agreeing of a support plan were recognised as crucial in both the immediate and longer term. There was consensus for the assessment of support needs to be evidence-based and to address all the factors that enable a placement to become stable and secure. However, practitioners suggested several obstacles that can make this difficult to achieve in practice:

- The support plan is often prepared towards the end of proceedings and may lack necessary detail on the range of issues that must be addressed. Examples were given where the preparation of a support plan was rushed in the same way that the assessment was constrained by restricted timescales. This resulted in plans that lacked evidence and the full engagement of the prospective special guardian in explaining, exploring and commenting on the plan.
- Preparing and delivering a support plan can be more difficult if the child is placed outside the local authority area or abroad.
- Concern that a support plan will not 'have teeth' unless it is accompanied by a supervision order.
- Social workers being placed in a difficult professional situation where they must prepare a support plan when they disagree with the proposed placement.
- The difficulty in preparing an evidence-based support plan if the child has not lived with the special guardian before the SGO is made.

Many efforts were being made to overcome these problems. However, when support ranges from finance to housing, the resolution of complex family relationships and contact, the emotional, behavioural and learning difficulties of the child both at home and in education and schools, the challenge in preparing a plan was seen to be enormous.

Practitioners emphasised that local practice needs to be driven by the specific regulatory framework for special guardianship, and information on eligibility for assessment and services must be readily available. The general view was that without sufficient support, there was a high degree of risk, with placement disruption being the most serious.

Local Family Justice Boards

The potential of the Local Family Justice Board (LFJB) as a problem-solving forum was clearly articulated. 'Sharing best practice, research and data' were some of the positive experiences reported. However, these opportunities were also compromised when the primary focus was exclusively on court indicators, e-bundles and other performance indicators. Practitioners were encouraged where judges were actively 'listening', 'interested' and responsive to matters that were raised by other members of the Board.

All the groups reported that timeliness of proceedings (compliance with the 26 weeks) was routinely discussed at their LFJB. Indeed, it was the only matter that consistently received attention. However, the challenge of SGOs was discussed in some areas very regularly, particularly whether they should be used as often as they were. Other topics that had received attention by LFJBs were:

- Repeat proceedings.
- Late identification of prospective special guardians and how to identify them earlier
- Assessments and timescales for their submission.
- Contact and how to help prospective special guardians manage complex family relationships.
- The possibility of introducing interim SGOs.
- Trust issues between courts and children's services regarding implementation of special guardianship support plans.

Proactive approaches to tackle long-standing problems and the role of the LFJB

There were a number of examples of the LFJB being used as a problem-solving forum. In one LFJB, social workers, frustrated by repeated requests to complete assessments within five weeks, had prepared a paper explaining why this timescale was unrealistic. They argued more time was needed to enable health and DBS checks to be included as a part of the assessment and for prospective special guardians to have sufficient opportunity to absorb and make sense of complex new information about what an SGO would mean and require of them. To support their case, the social workers had undertaken an analysis of some serious case reviews where short timescales and lack of checks were considered to be contributory factors where a child had died, and they had presented this as part of their evidence.

Other examples included:

- staff devising their own 'connected persons assessment pack' with a workable timescale.
- the development of an 'app' by a judge to calculate how many viability assessments might need to be done on any given case, depending on family size.
- the positive involvement of the Independent Reviewing Officer in monitoring the implementation of the support plan.

Data and research deficits: obstacles and opportunities

There were frequent calls for better use of data and research by LFJBs. Analysis of local and national data was considered an important way of obtaining feedback on outcomes of court and local authority decision-making. Information on child outcomes, disruption rates and variations between LFJBs were singled out as particular priorities. However, some areas reported that they lacked the infrastructure to collect outcome data while others noted that it is only possible to collect reliable information on disruption after an SGO if the child re-enters the care of the local authority. To try to address this issue, a small number of local authorities had started to collect information on placement change by carrying out a needs assessment in response to requests for additional financial support, and routine monitoring of special guardianship allowances. In one authority, of 500 such reviews, 50 allowances had been terminated because the child had moved to another carer where the local authority was unaware that this had happened. This raised questions about placement changes and the extent to which there might be a significant underestimate of the number of children who had experienced a placement move. There were other questions raised about what is not known about children's development and welfare following the making of the SGO and related to this, the adequacy and effectiveness of support services.

The voice of special guardians in LFJBs

A number of participants thought that it would be particularly valuable to invite special guardians to LFJB meetings. This would enable a wider understanding of the range of issues faced by

them beyond the specifics of the law and regulation; and it would promote a conversation with the judiciary, court and local authorities on their direct experiences and views. At present these perspectives seemed to be largely absent.

Different courts have different ways of handling similar situations?

Participants from all focus groups thought that consistency was important in ensuring that the fundamentals of law determined the resolution of the complex issues faced by children and families in care proceedings. The system must operate on the basis of being just, fair and transparent for families and practitioners alike. This included, as priorities: establishing a consistent approach in respect of the 26-week timescale and the lawful use of extensions; timescales for completing assessments; the use of independent social workers to undertake assessments; and the use of care orders or supervision orders. Where there was variation in local practice, the acceptability of that variability should evolve from the identified reasons for variation. It was considered unacceptable if driven by court performance indicators but legitimate if it reflected a response to differences in children's needs or because new approaches were being tested out under specific carefully monitored conditions. No one wished for a 'one size fits all approach' but a postcode lottery of local approaches – in courts and local authorities – was identified as unacceptable. The most important issue was identifying the areas where there was local variation, identifying the reasons for this variation and what was appropriate and necessary as a resolution to these local issues.

Legal challenge to the decisions of the court of first instance on making an SGO

Challenging a decision of the court of first instance was noted to be extremely rare on the grounds of 'cost and exhaustion', the reluctance of lawyers, judicial concerns about being appealed, and lack of confidence about the evidence that is sufficient for an appeal to be made. For all these reasons, practitioners thought that there were multiple disincentives for undertaking a legal challenge in specific cases.

Impact of changes to regulation and law

The DfE *Special Guardianship Review* in 2015 led to changes in the regulations that were intended to achieve a more robust assessment to address the developmental consequences for the child of any abuse or neglect, which they may have experienced, and the parenting capacity of the proposed carer to address these issues (DfE, 2015). While the focus groups acknowledged the significance of the amendments, addressing these issues in the assessment was challenging for the reasons set out above – limited timescales, lack of carer preparation and training, and the absence of evidence from the prospective special guardian's actual relationship with, or care of, the child. The mindset of family justice practitioners was still considered to be too focussed on resolving the short-term issues, with an analysis of the longer-term needs of the child requiring both time and resources. Social workers need a skillset to explore and understand:

- the child's developmental needs both now and in the future.
- the carer's capacity to understand and then meet the child's developmental needs.
- what the key issues are that need to be set out in a care and support plan ensuring that it maximises the opportunity for development catch-up.

Important features in the responsible delivery of the plan are:

- training for prospective special guardians drawing on evidenced-based parenting programmes.
- evidence-based therapeutic interventions for the child.
- ensuring that the child receives appropriate levels of support at school.

Parallel to this is the importance of special guardians having access to child development expertise from paediatricians, and other health practitioners, including clinical and educational psychologists. The focus groups clearly identified the difficulty of arranging any of this where the prospective special guardians lived outside the child's current local authority or in another country. As described earlier, supervision orders made alongside the SGOs were seen as one way of addressing this problem. When children were going to live abroad, there were often very limited solutions to any of these issues.

Long-term permanency planning: innovation

In one local authority, the permanence plan for the child is always explored within the range of available options. A 'suitability for SGO' meeting is held, and the assessment is reviewed and signed off, or otherwise, by the 'agency decision-maker' (ADM).⁸ This then enables the ADM to address the key issues before the court considers the report. The process also allows the ADM to consider the support plan as it would typically be addressed in adoption or for long-term foster carers.

A further suggestion focused on developing a better understanding of the overall quality of permanency planning including the impact of the amendments to the Special Guardianship Regulations 2016. This might be through an audit against the specific criteria as specified in primary and secondary legislation.

Fears of a loss in the faith in special guardianship?

The Re P-S judgment raised fundamental issues about the adequacy of current process, procedures and entitlements when it comes to special guardianship where the court is proposing or makes an order without application and under its own motion. It had led to questions being asked about the whole design and use of the SGO.

It is important to note that – as set out in other sections of this report – research on the outcomes of SGOs has not found evidence of their fragility compared to other permanence options. However, it is also important to recognise that this evidence depends on how outcomes are defined – whether the child is returning to care, moving informally within the family, if there are further care proceedings, serious case reviews, or the child's development over time.

A strong theme conveyed in the focus groups was that special guardianship is an important order that enables a positive option when it is focused on 'the right child and the right family'. Some participants went further and expressed the view that 'we need to have more faith' in the potential for SGOs in England and Wales:

There's a lot more family out there than social workers are finding.

Special guardians show huge commitment to the child and resilience and outcomes are good.

⁸ As in adoption.

Where there is a loss of confidence in special guardianship, it is focused on how it is being delivered rather than on whether it should be delivered.

The consensus view was that special guardianship is a permanence order that must continue to be a core part of permanence planning options. The following statement summarised the key elements of reform that are being called for:

If the process were clear and equitable across the country and there was clear guidance and the support was equal to that provided for other sorts of placement, I think it's a really important order that... should be thought about at every opportunity.

Discussion and conclusions

With 44 experienced lawyers, social workers and Cafcass guardians drawn from all parts of England and Wales, the focus groups provided significant feedback on local experience. This enabled a timely exploration of the issues that needed to be considered in addressing the current challenges of special guardianship. They highlighted current dilemmas, obstacles, possible causes and innovative strategies to address some of the problems identified in the Re P-S judgment. They provided a significant opportunity to explore current experiences and views about practice, policy and options that should guide the unique characteristics of a child- and special guardianship-focused process.

It is also important to acknowledge that there are a number of groups for which we did not explicitly arrange focus groups. This includes special guardians although the Harwin study and the unpublished McGrath study had done so and we drew on that work (Harwin et al., 2019; McGrath, forthcoming). Similarly, Harwin drew on the views of 89 family justice practitioners and that was accessed as well. We did not have direct access to children placed on an SGO, or to a range of practitioners: independent social workers, frontline children's social workers, and a wider group of voluntary sector organisations.

Special guardianship: a valuable order for 'the right child and the right family'

A first clear conclusion is that the practitioners have not lost faith in special guardianship as a permanency option. All focus group members considered that it fulfils a very important place in the menu of options for children who cannot be cared for by their birth parents. A second equally clear conclusion is that changes are needed, and these can be grouped into three main areas:

- 1. Changes in mindset.**
- 2. Guidance and protocols.**
- 3. Broader system reforms.**

1. Changes in mindset

Practitioners from all disciplines were calling for a new mindset. This change must clearly recognise that while placement with family members has very strong benefits and advantages, it must remain child-focused and be robustly evidence-driven as other forms of child placement are required to be. The challenges to family members in taking on this fundamental life-changing role cannot be under-estimated and the complexity of the issues that they may have to face cannot be ignored. In itself, placement within the family is not a sufficient guarantee of good outcomes. That is not the assumption in either adoption or foster care and there needs to

be much closer alignment between all placement options, acknowledging their significant differences as well.

2. Guidance, protocols and timescales

There was a very clear and unambiguous message that guidance and protocols need to be significantly amended to address the following issues:

Early engagement and care planning

- The identification of prospective special guardians after care proceedings have begun creates a serious and largely unmanageable set of issues for local authorities, the courts and others. Protocols and practice must ensure that where a local authority is undertaking the process of care and permanency planning for a child, the engagement of the birth parents and the extended family must be facilitated, and the early identification of family members as potential carers explicitly addressed.
- Viability assessments and family group conferences must play a significant part in the early stages of care planning and be undertaken with a sufficient degree of professional skill and knowledge.
- Where family members are identified as potential long-term carers for the child, the advantages and disadvantages of the available orders must be identified based on the best evidence available. This balancing of the issues must then be incorporated into the agreed care plan and the care application.
- Appropriate preparation and training must be made available to potential family carers that provides adequate information about the core issues relating to the preferred order.
- The plan for the care of the child prior to care proceedings and during care proceedings must take into account the importance of the prospective carers developing a relationship with the child. The status of the carers during this period must be addressed if the child is looked after – particularly approving them as foster carers.
- The current protocols for managing and delivering the above are not sufficiently aligned or available and need to be reviewed.

Assessment of suitability

The focus groups provided important illustrations of local changes introduced to strengthen the quality of evidence available in assessments and decision-making. But it was very clear that there was widespread experience of this being a severe challenge where prospective special guardians were identified after care proceedings had commenced. The current timescales, largely driven by the statutory requirement to complete proceedings within 26 weeks, do not acknowledge the significant risks that result from a poor-quality assessment that has not sufficiently gathered robust evidence on protective and risk factors. It was strongly recommended that there should be a statutory minimum of 12 weeks to complete an assessment and that the specialist nature of this work be fully recognised, as it is in other forms of family placement.

The development of an approach to assessment that is robust, fair and equitable must also acknowledge the experience, knowledge and skills of the workforce that are required in working with family members. The equivalent knowledge and skills are recognised in adoption and fostering. Local capacity and resource issues must also be addressed.

Support plans

There are serious challenges in assessing need and agreeing an appropriate support plan. The availability of sufficient time to do so is one important objective; knowledge of the circumstances of the prospective special guardian is another. It is also likely that the issues will become clearer and evolve over time. There are commonly reported issues of finance and housing and specific questions about the appropriate use of the Adoption and Special Guardianship Support Fund.

3. Broader system reforms

In the context of exploring issues of parity between foster carers, adopters and special guardians, there needs to be an explicit recognition of the wide-ranging socio-economic factors affecting special guardians and the child. These include the protective and risk factors associated with the age, health and circumstances of special guardians. Reforms considered to be needed include:

- Equivalent parental leave for special guardians.
- Entitlement to appropriate legal aid during proceedings.
- Advice and information about entitlements in relation to the child's health and education.
- The modification of the criteria for accessing therapeutic services currently set by the Adoption Support Fund that address the specific needs of children placed with special guardians.
- An approach to the provision of support that does not assume that making a SGO resolves all other issues in respect of the needs of the child. This is a key and poorly addressed question when the child reaches the age of 18 and the SGO expires.

Why is special guardianship generating so much concern?

The focus groups provided a rich and detailed insight into the local experience of delivering special guardianship as a permanence plan for the child. There was no doubt that there was a consistent view that special guardianship has a significant part to play as a placement plan for children who cannot be looked after by their birth parents. What follows places the issues set out above within a wider context and set of questions.

Given the advantages and benefits of special guardianship, it is troubling that its implementation is now such a cause of concern as identified in the Re P-S judgment and separately in the focus groups. The divergence from the protocols that typically drive foster care and adoption are a part of this. The most striking issues are:

1. The assessment of adopters and foster carers follows a pathway that separates out 'suitability to adopt' or 'suitability to become a foster carer' from the decision to place a specific child with specific carers.⁹ In special guardianship, the two assessment processes are conflated, with 'suitability' as a carer and the legal authorisation of the placement of the child being made **at the same time**.
2. In special guardianship, the court makes both decisions. In adoption or foster care, 'suitability' to adopt or become a foster carer is addressed through the adoption or fostering agency following scrutiny of the assessment reports by a panel and authorisation by the agency decision-maker. **The court plays no part in that process.**

⁹ The exception to this is the regulations that allow a child to be placed with 'connected persons' for up to 16 weeks.

3. In adoption, the prospective adopter/s make an application to the court for an adoption order following the timescales and requirements as set out in law, which include the care of the child for a minimum of ten weeks. In fostering, it is the local authority that agrees the placement of the child with specific carers. The local authority has the power to place the child in foster care where this is a voluntary arrangement agreed with the birth parents. In other situations, the court will make an order – typically a care order – that gives the local authority the power to agree and make that placement, without the birth parents' approval.
4. The separation of suitability to become an adopter or foster carer from the authorisation and legal status of the placement allows a timely process to be followed in preparation, assessment, decision-making and provision of support.
5. The question might therefore be: how has a different process come to drive special guardianship, moving the primary responsibility for approval of the suitability of the carers from the local authority to the court?
6. The consequences of this re-allocation of role from the local authority to the court places a burden on the court which is complex to resolve.

Special Guardianship Review

In the final report of the Department for Education's 2015 *Special Guardianship Review*, the government re-affirmed its objectives, as follows:

We need to ensure that children living under an SGO are safe, and that the placement gives them the best chance of good outcomes in their life. To be confident of this, we need to make sure that in every case:

- There is a robust assessment of the potential special guardian (or guardians) and their capacity to care for the child and meet his or her needs;
- Decision making by local authorities, Cafcass and the courts is robust, consistent, and based on sound evidence about the child, potential carers, and the options available, including the benefits and risks of different placement options;
- The placement has a strong probability of lasting permanently until the child is 18;
- Children and carers living in special guardianship arrangements have the support they need to do well and for the placement to last permanently.

(DfE, 2015: 4)

The 2015 Review re-affirms the importance of special guardianship as a permanence order but also identifies a significant minority of cases where the protective factors that could be expected in each case are not in place. In particular, the following issues have been found:

- Rushed or poor quality assessments of prospective special guardians, for example: where family members come forward late in care proceedings; where there has been inadequate consideration early on of who might be assessed; when assessments have been carried out very quickly to meet court timelines; or when the quality of an initial assessment is challenged, requiring the reassessment of a special guardian.
- Potentially risky placements being made, for example, where the SGO is awarded with a supervision order (SO) because there remains some doubt about the special guardian's ability to care for the child long-term.

- Inadequate support for special guardians, both before placements are finalised, and when needs emerge during the placement, for example, where the special guardian has not received the information or advice to make an informed choice about becoming a special guardian, or where they receive little or inadequate support post order to ensure they can support the child's needs. 72% of respondents to the Call for Evidence said that advice and support should be provided to children, special guardians and birth parents before, during and after the award of special guardianship.

(ibid.: 6)

It was noted that:

- 70% of respondents to the Call for Evidence said that the assessment process for determining whether a prospective special guardian is suitable could be improved.

(ibid.: 8)

In conclusion the summary states that:

The review indicates that the challenges identified with SGOs occur at different points in the care process, but an assessment that lacks quality at the start is a major contributor to the issues highlighted above. It is vitally important for the local authority analysis to be robust, supported by strong and intelligent evaluation. SGOs are permanence orders, awarded on the expectation that the child will remain in that placement until he or she is an adult. For this reason, a sound prediction of the child's long-term welfare in that placement should sit at the heart of the assessment and form the basis for the final care plan.

(ibid.: 6)

The summary of findings is closely aligned to the responses identified by the focus groups in this report. The government identified next steps in addressing these significant concerns with a specific focus on assessment. These were:

Amend regulations and statutory guidance to require that the local authority report to the court on prospective special guardians addresses:

- the capacity of the guardian to care for the child now
- and until the child is 18
- the prospective special guardian's understanding of the child's current needs and likely future needs, particularly in light of any abuse or neglect the child has previously suffered, and their ability to meet those needs
- the prospective special guardian's understanding of any current or future risk posed by the child's birth parents and their ability to manage this risk
- an assessment of the strength of the previous and current relationship between the child and the prospective guardian.

(ibid.: 7)

As a result, the Special Guardianship Regulations 2005 were amended in 2016 in England and 2018 in Wales. The amendments require that the report to court specifically addressed these issues. Subsequently Section 8 of the Children and Social Work Act 2017 amended Section 31(A) of the Children Act 1989 to require these issues to be addressed when the court is considering 'the long-term plan for the upbringing of the child'.

The focus groups did not report that the amendments had had any impact on the assessment process in special guardianship. More generally there is little if any evidence of the use of Section 8 in making permanence plans for children in care proceedings. The explanation for this is difficult but the issues identified above of undertaking a robust evidence-based assessment and answering complex questions within a severely restricted timescale and the absence of the required skillset and support to do so is not feasible. This is particularly the case when protocols that allow the court to make an SGO without an application having been made do not require any evidence rooted in the actual experience of the child being cared for by the prospective special guardian. In addition, if it were to be made a requirement that the child should live with prospective special guardians before the assessment could be completed, under what order could that happen and how would proceedings be managed during that time?

Summary and recommendations

The issues identified from the analysis undertaken of the five focus groups are consistent with and align with those issues identified in the DfE 2015 review. If anything, the issues have become even clearer. The system as it currently operates is at odds with itself as various drivers – the late identification of potential carers, the absence of direct care experience with the child, the 26-week statutory timescale – operate against one other. This cannot be seen to be in the best interests of the child, their prospective carers or the conditions that enable best professional and responsible practice. And that centres around the question of whether in the original design of special guardianship, the option for a court to make an Order ‘under its own motion’ was intended to introduce the degree of flexibility as it has currently come to be implemented?

There is no ready-made solution to the above question. But there are some fundamental problems that must be addressed.

1. How to strengthen and resource the pre-proceedings part of the Public Law Outline to maximise the chances of identifying family members who might become long-term carers for the child if that becomes the local authority’s plan.
2. How to make appropriate information available to prospective carers about the meaning and significance of legal orders that enable a permanence plan for the child to be delivered.
3. How to ensure that viability assessments are appropriately robust in identifying an appropriate assessment of risk and protective factors that enable the next steps to be undertaken.
4. Where a prospective special guardian is identified, to ensure that they complete preparation and training at an agreed statutory minimum.
5. To agree a plan whereby the prospective special guardian can develop a significant relationship with the child including the day-to-day care of the child.
6. To agree a plan for the local authority to supervise the development of the relationship and care of the child.
7. To ensure that the local authority agrees a plan with the prospective special guardian about the assessment process and preparation of the report for court.
8. To explore the significance of the amendment of the Special Guardianship Regulations to ensure their full implementation.
9. To ensure that a support plan is based on an assessment of need as required by the Special Guardianship Regulations.
10. To ensure that support services are available locally that comply with the Special Guardianship Support Regulations 2005 and the statutory guidance.

As identified above, there are a number of changes that must be made to ensure the implementation of these recommendations:

1. The legal extension of the 26-week period for completing care proceedings must be appropriately used as set out in the revised interim guidance from the President of the Family Division (May 2019).¹⁰
2. The legal option to make an SGO when there has been no application – S14(A)6b – needs to be explored in terms of its current mis-alignment with the minimum period of one year for the child to live with the carer prior to an application by a foster carer (S14A(5d), or relative (5e).
3. If it is agreed through regulation or guidance that a minimum period of time should apply, then a legal framework must be established that authorises the placement of the child with the prospective special guardians under the supervision of the local authority. This reflects one of the key issues raised in the Re P-S judgment.
4. Use should be made of the learning from the Fostering Regulations that allow the urgent placement of a child with ‘connected carers’.
5. A review must be undertaken of the current Fostering Regulations that result in some connected carers not meeting the requirements of those regulations.
6. Guidance should be drafted that sets out the minimum standards of risk and protective factors when the proposed plan is to place a child in another country under an SGO.

¹⁰<https://www.judiciary.uk/wp-content/uploads/2019/05/fjc-sg-interim-guidance-pfd-approved-draft-21-may-2019-1.pdf>

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Despite the challenges that both professionals and carers are having in finding answers to complex questions, there is a deeply held commitment to identifying and finding solutions for families whose lives have been changed by special guardianship.

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