

Public Law Working Group



Best practice guidance:
Special guardianship orders

March 2021

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Glossary

ADCS	Association of Directors of Children's Services
ADSS	Association of Directors of Social Services Cymru
ASF	Adoption Support Fund
ASGLB	Adoption and Special Guardianship Leadership Board
ASP	assessment and support phase
BPG	best practice guidance
CA 1989	Children Act 1989
Cafcass	Child and Family Court Advisory and Support Service and Child and Family Court Advisory and Support Service Cymru
CG	children's guardian
CMH	case management hearing
CMO	case management order
DfE	Department for Education
DFC	designated family centre
DFJ	designated family judge
EPO	emergency protection order
FCMH	further case management hearing
FGC	family group conference
FJB	family justice board
FJC	family Justice Council
FJYPB	Family Justice Young People's Board
FPR 2010	Family Procedure Rules 2010
FRG	Family Rights Group
HMCTS	Her Majesty's Courts and Tribunals Service
ICO	interim care order
IRH	issues resolution hearing

IRO	independent reviewing officer
ISW	independent social worker
JIG	Judicial Implementation Group
LAA	Legal Aid Agency
LiP	litigant-in-person
LoI	letter of instruction
MoJ	Ministry of Justice
NFJO	Nuffield Family Justice Observatory
PLO	public law outline
S 20	section 20 of the Children Act 1989
S 76	section 76 of the Social Services and Well-being (Wales) Act 2014
SDO	standard directions on issue
SG	special guardian
SGO	special guardianship order
SGSP	special guardianship support plan
SSW-b(W)A 2014	Social Services and Well-being (Wales) Act 2014
SWET	social work evidence template

Introduction

1. In December 2018, the President of the Family Division asked me to chair this working group to address the operation of the child protection and family justice systems.
2. The steep rise in the issue of public law proceedings seen in 2016/17 and 2017/18 has to some degree eased more recently. But there are still a greater number of cases being issued than in earlier years. The far greater volume of cases is, as the President observed, dealt with by the same number of social workers, care professionals, CGs, lawyers and judges, if not fewer, given those who have decided to leave their chosen careers because of the incessant and overwhelming demands of the family justice system.
3. The reasons for this recent steep rise in the issue of public law proceedings are complex and multiple, as suggested by the recent work of the FRG's *Care Crisis Review: Options for Change* (June 2018)¹ and joint work done by the MoJ and DfE.
4. The various reasons for the increase in the number of public law proceedings issued are outside the remit of this working group but the significant rise in the use of special guardianship as a route out of the care system following care proceedings provides an important context to the best practice guidance.² We are charged with considering how children and young people may:
 - i. safely be diverted from becoming the subject of public law proceedings;

¹ Available online: https://www.frg.org.uk/images/Care_Crisis/CCR-FINAL.pdf

² Harwin, J., Alrouh, B., Golding, L., McQuarrie, T., Broadhurst, K. and Cusworth, L. (2019) *The contribution of supervision orders and special guardianship to children's lives and family justice*. Lancaster: Centre for Child and Family Justice Research, Lancaster University. Available: https://www.cfj-lancaster.org.uk/files/documents/SO_SGO_report.pdf

- ii. once they are subject to court proceedings, best have a fully informed decision about their future lives fairly and swiftly made.

5. The key themes of this BPG are:

- i. the assessment of a proposed SG should be thorough and comprehensive and evidence and experience informed;
- ii. the SGSP should be comprehensive and set out the support and services to be provided to the child and the prospective SG as set out in the regulation;
- iii. where there is little or no prior connection/relationship between the child and the prospective SG, it is very likely to be in the child's best interests to be cared for on an interim basis by the prospective SG in order to establish a meaningful relationship with the child;
- iv. the SGSP should be based upon the lived experience of the child and the lived experience of the prospective SG;
- v. the SGSP should set out the contact arrangements between the child and the parent(s) and should include (i) the type of contact which is to take place, (ii) the frequency and duration of contact, (iii) who is to be responsible for making the arrangements of contact, (iv) what practical arrangements need to be provided for to facilitate contact and (v) what professional support and assistance, if any, will be provided to the prospective special guardian; and,
- vi. save for cogent (strong and clear) reasons, a supervision order should not be made alongside an SGO.

6. All those involved in the child protection and family justice systems worked under considerable pressure before COVID-19. The recommendations set out in this BPG were in large part formulated in a time before the pandemic. COVID-19 has required everyone to adapt to new ways of working. It has increased the workload

and pressure upon us all. It has created new uncertainties and further challenges for many children and families. It was agreed that the time was right to recommend to the President that in early March 2021 he publish this guidance. The implementation of this BPG should result in an easing of the burden and pressures on all those involved, to the inestimable advantage of all children who are involved in the child protection and family justice systems and their families.

7. Uniquely, all stakeholders³ in the child protection and family justice systems are agreed on the need for reform and on the direction of travel. All are agreed that the reforms and recommendations set out in this guidance will improve the outcomes for children and young people and their families.
8. The President has issued this BPG to improve the ability of social workers, senior managers, children’s guardians, the legal professions and the judiciary to promote the welfare and protection of children by working in partnership with families to achieve the best outcomes, in a fair and timely manner, for children and young people. The aim is to assist families to be able to make decisions that, wherever possible, enable children to be safely raised within their family network and avoid the need for more intrusive state intervention, including court proceedings. The BPG will help families to know what they should be able to expect from children’s services departments and the Family Court when a special guardianship assessment is being undertaken, a SGSP is being prepared and the court is being invited to make a special guardianship order.

The Honourable Mr. Justice Keehan

March 2021

³ The ‘stakeholders’ are social workers and social work managers, children’s guardians, family lawyers, family judges and groups supporting families and kinship carers.

Appendix E. Best practice guidance for special guardianship

The context of the guidance

1. SGOs have come to be a significant order in ensuring that, where children cannot be cared for by their birth parents, they are cared for by adults who can lawfully exercise parental responsibility in respect of them. These SGs are typically, but not solely, other family members. SGOs were introduced to ensure that children have the experience of a permanent family life, which is fundamental to their safety, welfare and development.
2. Since the implementation in December 2005 of SGOs, a review was undertaken in 2015 by the DfE.⁴ That review focused on growing concerns in respect of:
 - i. rushed or poor-quality assessments being submitted to the court;
 - ii. potentially risky placements being made. For example, where the SGO is made in conjunction with a supervision order because of some doubt about the SG's ability to care for the child in the long term;
 - iii. inadequate support for SGs, both before placements are finalised and when needs emerge during the placement.
3. The review caused amendments to be made to the Special Guardianship Regulations 2005, through the Special Guardianship (Amendment) Regulations 2016,⁵ with those amendments intended to strength the assessment by specifically requiring that the report prepared for the court identify any harm that the child had experienced, as well as the capacity of the prospective SG to address the developmental consequences of those issues in their parenting of the child.

⁴https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/487243/SGR_Final_Combined_Report.pdf

⁵ Similar amendments were made to to the Special Guardianship (Wales) Regulations 2005, through the Special Guardianship (Wales) (Amendment) Regulations 2018, following a review of SGOs conducted by the Welsh Government in 2016/17.

4. In 2018, the Court of Appeal handed down its judgments in *In the matter of P-S (Children)* [2018] EWCA Civ 1407, in which the resolution of the issues reflected a wider set of concerns that posed continuing challenges to local authorities and the courts when making an SGO. Some of these issues had been addressed in the DfE's 2015 review. But the judgments were specific in addressing the use of care orders as interim orders; the consequences of the statutory duty to complete care proceedings within 26 weeks; and the use of "informal guidance". The judgments included an invitation to the Family Justice Council to prepare authoritative guidance to resolve these issues.
5. In parallel with this invitation, the Family Justice Observatory, established by the Nuffield Foundation, commissioned CoramBAAF and the University of Lancaster to undertake a rapid evidence review of special guardianship⁶ so as to inform this authoritative guidance.
6. Finally, the Family Justice Council, with the approval of Sir Andrew McFarlane, President of the Family Division, issued interim guidance specifically to address the lawful extension of care proceedings beyond 26 weeks and to the conclusion of proceedings when special guardianship is being considered as an option. That interim guidance has been fully integrated into this BPG and is contained in **sub-appendix A**.

Special guardianship orders

7. The making of an SGO enables the SG to exercise parental responsibility to the exclusion of all others with parental responsibility for the child, apart from another SG. If the child was in care when the order was made, the making of the order discharges the child from care. The order does not terminate the parental

⁶ https://www.nuffieldfjo.org.uk/resource/special_guardianship_a_review_of_the_evidence

responsibility of the parents although it severely limits their exercising of that responsibility.⁷

8. The purpose of the order is to create a permanent family life for the child or young person with all the advantages and challenges that accompany this. It lasts until the young person reaches 18, but can be varied or discharged. An SGO can only be discharged upon application, with some applications (including those made by the parents, 'others' with parental responsibility and the child) requiring the leave of the court to permit the application to proceed.⁸
9. An SGO must be underpinned by robust evidence, along with a detailed SGSP, which must comply with the amendments made to the regulations in 2016 (in England) and 2018 (in Wales), including explicitly addressing any harm that the child may have suffered and the capacity of the prospective SG to enable the child's developmental recovery from that harm.⁹

Pre-proceedings and proactive family engagement

10. The statutory guidance¹⁰ clearly indicates the importance of local authorities engaging with the parents and the wider family network at an early stage when there are identified concerns about the welfare of a child. The pre-proceedings phase of the PLO provides an important opportunity to engage the parents and family members in discussions about the future care of the child.
11. The positive contribution that family members can make in providing support and facilitating decision-making where there are child protection or welfare concerns is an important part of pre-proceedings work. This includes family meetings and

⁷ S 14C (1)(a)(b), CA 1989.

⁸ S 14D, CA 1989.

⁹ Special Guardianship (Amendment) Regulations 2016 and Special Guardianship (Wales) (Amendment) Regulations 2018.

¹⁰ Court orders and pre-proceedings: for local authorities: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/306282/Statutory_guidance_on_court_orders_and_pre-proceedings.pdf

specifically FGCs as defined in statutory guidance.¹¹ The process of engaging the wider family takes considerable skill as there may be significant issues about sharing information, disputes and conflicts with the local authority and long-standing tensions within the family. But that must not diminish the opportunities for positively engaging family members in constructive discussion about the child's future, including clarifying issues such as family membership, the history, nature and quality of family relationships, and the motivation that the family has to provide permanent care to the child.

The identification of potential carers for the child and an initial assessment of their suitability

12. Where the local authority decides that it has no alternative other than to issue care proceedings and family members are identified as potential carers, the local authority should undertake an initial family and friends care assessment (commonly referred to as a viability assessment) of those carers. This can be a complex process in itself if there are a large number of family members, family members who live in other local authorities or other countries in the UK or abroad.
13. It is important to ensure that the realistic options for the child are fairly evaluated, and that a cap is not placed on the number of potential carers by way of case management directions. The parties should nevertheless be clear that the emphasis is on realistic options and proposals for assessment will be evaluated on that basis.
14. The FRG has published comprehensive guidance in undertaking an "initial assessment" setting out the various elements required to determine whether family and friends are a realistic option to care for the child.¹²

¹¹ In Harwin et al (2019) family group conferences were held for only 37% of the children.

¹²https://www.frg.org.uk/images/Viability_Assessments/VIABILITY-MASTER-COPY-WHOLE-GUIDE.pdf The guidance is endorsed by both the FJC and Cafcass.

Identifying and agreeing the key issues for the interim care of the child

15. Where a positive initial assessment has been completed, there will need to be a plan that sets out the next steps. This will require discussing, agreeing and planning the full assessment by relevant professionals of the child's needs including health, development and education, and any specific special needs the child may have in both the short and longer term. This takes in important parenting issues, particularly those that result from any abuse or neglect, or other issues in settling in and caring for the child. The child's on-going relationship with her birth parents and any siblings will also be an important part of this plan. It should include:

- i. identifying the legal options for securing the placement in the short and longer term;
- ii. identifying the key factors that need to be addressed in ensuring that child's needs and circumstances are fully understood and addressed in the interim arrangements for the child;
- iii. ensuring that the carer of the child is fully aware of the child's needs and is fully supported to meet those needs;
- iv. ensuring that the necessary checks and references are completed, including any specific safeguarding issues beyond any initial assessment that has already been completed;
- v. where the plan is special guardianship, this will need to address how the family members will be included in any proceedings including their party status and their access to independent legal advice.^{13 14} In parallel with this, information, support and training must be provided to the prospective SG to ensure that

¹³ For a report on the future of legal aid see: <https://www.gov.uk/government/news/government-sets-out-new-vision-for-legal-support>

¹⁴ https://www.cfj-lancaster.org.uk/app/nuffield/files-module/local/documents/SO_SGO_Summary%20Report_vs1.2.pdf.

they are fully aware of and understand that: (1) the order will remain in force until the child reaches 18; (2) they will have parental responsibility for the child:¹⁵ this means all aspects of the child's care including decision-making about the child's day-to-day and long-term welfare, health and education and the provision of the resources that are needed to enable this to happen; (3) their position within the family will change as they take on the responsibility for both the day-to-day and long-term parenting of the child; this may result in strong feelings being expressed by the birth parents and other family members towards the SG particularly during any contact they have after an order is made; (4) when an order is made and the child was previously looked after, that the SG will be entitled to an assessment of their own and the child's support needs. This right to an assessment will continue until the child reaches 18; (5) following an assessment of support needs, it is at the discretion of the local authority as to whether any services will be provided, balanced against any eligibility requirements as set in law: this includes housing and financial services; (6) if the child was not previously looked after before the order was made, the eligibility for an assessment of support needs is at the discretion of the local authority.

16. It is essential that in the preparation, training and assessment of suitability to be a SG there is full exploration with the prospective SG of their past and current personal and family experiences, including their experiences of parenting and (where there is one) their relationship with the child. This may range from no relationship at all to the full-time care of the child under an informal arrangement or with the agreement or authorisation of the local authority. Where the prospective SG has developed a relationship with the child, their experiences

¹⁵ Section 3(1), CA 1989: all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property

should provide a firm foundation for discussing what the future care of the child might look like – both the known and the unknown. Where there is little or no direct child-care or relationship-based experience, these issues will need to be discussed on the basis of what the prospective SG knows or has experienced when it comes to parenting, family life and other key issues such as financial and practical resources both in the present and the past.

17. Where proceedings have commenced, all parties (including the CG) should file and serve position statements in advance of the first CMH to include outline details of proposed carers for assessment by the local authority. In the SWET, prospective SGs must be clearly identified by reference to a genogram or other materials that identifies the child, the birth parents and other relevant family members including full- or half-siblings. The CG's initial analysis/position statement should explicitly address the identification of carers and their contact details. Where this is the case, the sharing of these details must not be determined by the approval or disapproval of the parents as this information is required to ensure that the plan for the child and the order or no order which concludes the care proceedings is in the best interests of the child.

The court's power to make an SGO

18. Section 14A (3)(a), CA 1989 sets out the power of the court to make an SGO when an application is made by a person eligible to do so; s 14A (3)(b) contains the power where that individual has obtained the leave of the court to apply.

Eligibility to apply for an SGO

19. The eligibility to apply for an SGO is set out in s 14A, CA 1989. Those eligible to apply are:

- i. any guardian of the child;
- ii. any individual who is named in a child arrangements order as a person with whom the child is to live;

- iii. any individual listed in subsection (5)(b)¹⁶ or (c)¹⁷ of s 10, CA 1989 (as read with subsection (10)¹⁸);
- iv. a local authority foster parent with whom the child has lived for a period of at least one year immediately preceding the application;
- v. a relative with whom the child has lived for a period of at least one year immediately preceding the application.

20. Section 14A (7) requires that no application can be made unless, three months prior to the application, notice has been given to the relevant local authority by the applicant that they intend to make an application. When such a notice is given, the local authority must prepare a report as required in s 14A (8), namely:

- i. the suitability of the applicant to be a SG;
- ii. such matters (if any) as may be prescribed by the Secretary of State; and,
- iii. any other matter which the local authority considers to be relevant.

21. The court may also make an SGO with respect to any child in any family proceedings in which a question arises with respect to the welfare of the child even though no application has been made.¹⁹ In such circumstances the court must ensure that a report is submitted as set out in s 14A (8).

¹⁶ any person with whom the child has lived for a period of at least three years

¹⁷ (c) any person —

(i) in any case where a child arrangements order in force with respect to the child regulates arrangements relating to with whom the child is to live or when the child is to live with any person, has the consent of each of the persons named in the order as a person with whom the child is to live;

(ii) in any case where the child is in the care of a local authority, has the consent of that authority; or

(iii) in any other case, has the consent of each of those (if any) who have parental responsibility for the child.

¹⁸ The period of three years mentioned in subsection (5)(b) need not be continuous but must not have begun more than five years before, or ended more than three months before, the making of the application.

¹⁹ Section 14A (6)(b), CA 1989.

Special guardianship and care proceedings

22. The statutory framework does not explicitly address what has become a very common and challenging route to the making of an SGO. Namely, family members being identified shortly before or shortly after care proceedings have commenced, with those family members not meeting the statutory requirement of the child having lived with them for one year (the requirement applied to a relative or a foster carer making a private law application). The timetable for completing proceedings within 26 weeks then severely limits: (1) the time available to address and resolve the care proceedings application; (2) the preparation of the prospective SG and their appropriate engagement in the care proceedings; (3) the provision of interim support to address the immediate issues in the care of the child; (4) the preparation and submission of the assessment / report to court, based on the direct experience of the day-to-day care of the child. It is repeated that the eligibility to apply for an SGO when it comes to an application being made by a relative or foster carer is dependant on the child having lived with them for at least one year; (5) the preparation and submission of a detailed SGSP informed by the needs identified in the final assessment / report. The court cannot make the order in the absence of the SGSP, which must have the explicit approval of the court.
23. The resolution of this unplanned-for set of circumstances can then compromise the position of the local authority, the court and the prospective SG in making an evidence-based, life-changing decision and plan for a child aligned with the primary responsibility towards the child as set out in the welfare checklist.²⁰ Special guardianship is a highly significant option, but the evidence strongly indicates that the primary duties and responsibilities towards the child and the prospective SG

²⁰ Section 1, CA 1989.

have become compromised by a system that is being driven by the statutory duty to complete proceedings within 26 weeks.²¹

24. The interim guidance published by the Family Justice Council and approved by the President of the Family Division (contained in [sub-appendix A](#)) has provided a solution to this issue, by reinforcing the use of the judge's power to approve an extension beyond 26 weeks,²² so as to allow the issues set out above to be fully addressed. The focus will always be on welfare and the fundamental requirement for a robust, evidence-based assessment. That will be the guiding factor as opposed to the statutory timescale of 26 weeks.

25. Where care proceedings are authorised beyond 26 weeks, the case will need to be removed from the CMS 26-week track and entered into a separate database.

Key issues and steps prior to making or not making an SGO

26. Where the resolution of care proceedings has become focussed on the child's future care being determined by the making of an SGO, a number of issues must be addressed.

1. The interim placement of the child

27. The identification of family members who, as a result of an initial assessment, are then considered as a prospective SG will raise a number of issues about the placement of the child in the interim. These issues will need to be addressed in the interim plan for the child, with due consideration being given to the fact that making an interim placement which does not develop into a long-term placement will, if that placement has to be terminated, have serious consequences for the child.

²¹ <https://www.nuffieldfjo.org.uk/files/documents/NuffieldFJO-Special-Guardianship-190731-WEB-final.pdf>; https://www.cfj-lancaster.org.uk/app/nuffield/files-module/local/documents/HARWIN_SO_SGO_FinalReport_V2.1_19Mar2019.pdf.

²² Section 14 (3), (5) and (6), Children and Families Act 2014.

2. Agreeing a timetable to enable the care proceedings to be resolved

28. Where the interim plan for the placement of the child with the proposed SG is endorsed by the court, a timetable will need to be prepared that enables the proceedings to be concluded. That timetable will set out:

- i. the legal framework (as detailed in **sub-appendix B**) that authorises the placement of the child with the prospective SG until either the SGO is made or the care proceedings are concluded by other means;
- ii. the period of time required for a robust evidence base to be established about the quality of care of the child by the prospect SG that will inform the court report. There are a number of factors that will need to be taken into account in agreeing this time period, such as: (1) any prior parenting experience by the prospect SG of the child; (2) the identified needs of the child and any issues which have been identified and addressed as the child settles into the placement; (3) any wishes or feelings the child may have in light of her age and understanding; (4) any specific training or support that might be needed by the prospective SG or the child; (5) the relationship that the prospective SG has with the parents of the child and other family members, as well as the significance of those relationships. Both from the child's point of view and those of the prospective SG, the on-going relationship within the family must be explored for the benefits and, where they exist, the risks.²³

29. An agreed plan must be completed on a case-by-case basis that enables each of the issues fully and realistically to be addressed. As the relationship between the prospective SG and the child develops, specific questions and issues will arise that will further inform the detail of what needs to be explored, what support may be

²³ <https://www.gov.uk/government/publications/investigating-special-guardianship>;
<https://www.nuffieldfjo.org.uk/resource/special-guardianship-a-review-of-the-evidence>;
[https://www.nuffieldfjo.org.uk/files/documents/Nuffield%20FJO Special%20guardianship international%20kinship%20care_final.pdf](https://www.nuffieldfjo.org.uk/files/documents/Nuffield%20FJO%20Special%20guardianship%20international%20kinship%20care_final.pdf)

needed and the evidence on the effectiveness of that support. This will include any adjustments that the prospective SG needs to make in their parenting approach as aligned to the child's current stage of development.

30. Alongside the plan, the court will draw up a timetable for the outstanding issues that need to be resolved before a final order is made. As the interim guidance (contained in [sub-appendix A](#)) makes clear, that timetable should be dictated by the facts of the particular case. It is anticipated that this will be no more than 12 months from the interim placement of the child with the prospective SG. Where the evidence indicates that this may be through an SGO, this will include the preparation and submission of a report to the court which is evidence-based and compliant with the Special Guardianship Regulations 2005, as amended. In drawing up the timetable, the parties and the court should consider:

- i. whether the prospective SG should make a formal application (if they have not already done so) for an SGO; and, if so, whether leave to make that application is required;
- ii. alternatively, the court will, in due course, subject to the court report prepared by the local authority, make an order of its own motion.

Changes to an agreed plan and timetable

31. Where it becomes apparent to the local authority that there is sufficient information to reach an evidence-based conclusion that the prospective SG is unsuitable, the authority must inform the court with a view to reviewing the process and timetable for the conclusion of proceedings.²⁴

32. The local authority's reasoning must be set out in a report and made available to the prospective SG. The local authority must notify them of the procedure to be followed in challenging the assessment, including the procedure for any

²⁴ Where the prospective SG was approved as a connected person foster carer, a parallel process will need to be followed within the local authority to resolve those matters.

application to the court either seeking leave of the court for ongoing assessment pursuant to s 10(9), CA 1989 or to be joined as a party. Any challenge must be pursued promptly within a reasonable timescale. The application should be referred on issue to the allocated judge for urgent directions. It is recommended that in any event it is good practice for local authorities to review the progress of their plan including the assessment at regular intervals.

The making of a supervision order in conjunction with a special guardianship order

33. The purpose of an SGO is to provide a firm foundation on which to build a lifelong permanent relationship between the child and the carer. A supervision order should not need to be used as a vehicle by which support and services are provided by the local authority. All support and services to be provided to the SG and to the child by the local authority or other organisations should be set out in the SGSP which should be attached as an appendix to the order. The cases where it would be appropriate or necessary to make a supervision order alongside an SGO will be very small in number. The issues that are intended to be addressed in the making of a supervision order are most likely to be achieved through the process as set out above.²⁵

Special guardianship orders in international cases

34. In identifying potential long-term carers for the child within the family, it is not uncommon for this to include those who are either resident in or nationals in overseas countries. Special guardianship can therefore be considered in placing a child outside of the jurisdiction. Consideration must be given to how assessments

²⁵ Attaching a supervision order to an SGO nationally peaked at 35% of all SGOs made in 2013/14, and despite a small drop to 30% in 2016/17, remains substantially above 2010/11 levels (18%). The research did not find that child outcomes in the three-year follow-up were better when a supervision order was attached: https://www.cfj-lancaster.org.uk/app/nuffield/files-module/local/documents/SO_SGO_Summary%20Report_vs1.2.pdf

are carried out in a legally compliant and culturally relevant manner. Further thought should be given to:

- i. the status of special guardianship in that country and other legal matters;
- ii. the relevant matters associated with the care of children in that country: permanent, stable and secure family life; safeguarding; education and health; and specifically how all of these relate to the personal living circumstances of the host family and their need for support services, including financial and therapeutic support and contact between family members including those resident in the UK.

35. In advance of the child being placed, a plan will need to be agreed about how the placement will be supported and what the contingency arrangements are.

Sub-appendix A. Family Justice Council: interim guidance on special guardianship

1. This interim guidance is issued by the Family Justice Council with the approval of Sir Andrew McFarlane, President of the Family Division, in response to some of the issues identified in *Re P-S (Children)* [2018] EWCA Civ 1407. Its primary purpose is to address cases where an extension to the statutory 26-week time limit is sought in order to assess potential special guardians, more fully, within public law proceedings.
2. In producing this guidance, the Council has worked closely with the President's Public Law Working Group, chaired by Mr Justice Keehan and with the researchers commissioned by the Nuffield Family Justice Observatory, and led by CoramBAAF in partnership with Lancaster University, to review the research evidence on special guardianship. More comprehensive guidance on public law is expected later in the year but the Council felt there was a need to provide some interim guidance on special guardianship to assist practitioners, now, and to help start the process of change.
3. As a general proposition, alternative potential carers should be identified at an early stage and, where possible pre-proceedings, by adherence to good practice including convening a Family Group Conference at an early stage. Assessments should be commenced promptly and be evidence based, balanced and child centred. In the event that a full assessment is undertaken it will usually require a 3-month timescale. See the document, *Timetabling and timescales for full family and friends' assessments* (with thanks to Natasha Watson, Principal Lawyer Safeguarding and Litigation, and the Family and Friends social work team of Brighton & Hove City Council) and the Family Rights Group assessment template (<https://www.frg.org.uk/involving-families/family-and-friends-carers/assessment-tool>). Both are a model of good practice and in the absence of any exceptional

features, the process and criteria identified should be standard to any special guardianship assessment.

4. Where proceedings have commenced, all parties (including the Guardian) should file and serve position statements in advance of the first Case Management Hearing to include the details of proposed carers for assessment by the local authority. In the social work statement potential carers must be clearly identified by reference to a genogram or otherwise and the Guardian's Initial Analysis/position statement should explicitly address the identification of carers and their contact details. These SHOULD NOT be governed by the parents' approval or disapproval but must be focussed on the child's interests. If the whereabouts of prospective carers are unknown, the family or, if appropriate, other agencies should be invited to assist in locating them. If the viability assessment is negative, the local authority must notify the subject of the assessment of the procedure to challenge the assessment including the procedure for any application to the court either seeking leave pursuant to section 10(9) of the Children Act 1989 or to be joined as a party. Any challenge must be pursued promptly within a short timescale. The application should be referred on issue to the allocated judge or (if not available) another public law ticketed judge for urgent directions.
5. In most cases, compliance with good practice will ensure that any prospective special guardian has been identified at an early stage and the assessment completed within the statutory timescale. Issues of non-compliance/litigation failure fall outside of this guidance.
6. It is recognised, however, that there are cases where possible carers are identified late in the proceedings or for other reasons further time is required to assess the relationship between the child/ren and the carer(s) fully:

- a. The issue of later identification of potential carers was addressed by Sir James Munby, P in *Re S (A Child)* [2014] EWCC B44 (Fam) at paragraph 33 (ii)(c). In summary, a proposal for assessment of a late entrant to the proceedings must be realistic and not merely a trawl through all possible options, however unlikely. If the application has a sound basis, an extension beyond 26 weeks should be permitted if it is, "necessary to enable the court to resolve the proceedings justly" [section 32(5) Children Act 1989] and as such will be readily justified as required by section 32(7) of the Act.
 - b. Where the proposed carers appear to be viable, the assessment of carers living in another country will also justify an extension of 26 weeks. In these circumstances time may be needed for Children and Families Across Borders (CFAB) to carry out an assessment and there may be unavoidable delays which will, quite properly, take the case beyond 26 weeks.
 - c. Where more time is needed to assess the quality of the relationship between the child and proposed carers. This is likely to arise after the court has undertaken the welfare evaluation in terms of the possible arrangements for the child/ren but further time is required to ensure the stability of the placement. Whilst circumstances vary widely, it is likely that this will lead to an extension of the timetable, particularly if the court has indicated that this is the preferred placement. The extension period will depend on the individual features of the case but any delay should be proportionate to the welfare criteria set out at sections 1(3) and 1(4) of the Act.
7. Where a viability assessment is positive, the parties and the court should, when making directions for a full SGO assessment, consider, and if necessary make orders relating to, the time the children will spend with the proposed carers. An evidence-based assessment which does not include any assessment of the proposed carers' relationship with the child is likely to be regarded as incomplete.

8. If the court approves an extension, consideration will need to be given to the legal framework. It may not be possible for the child to be placed pursuant to an interim care order under the current regime imposed by Regulation 24 of The Care Planning, Placement and Case Review (England) Regulations 2010. In these circumstances, an alternative approach would be placement pursuant to section 8 of the Act: a Child Arrangements Order and an interim supervision order to provide support for the placement, particularly during any transition period. The court should bear in mind the consequences arising out of any change to the legal framework, particularly if it impacts upon the child's status as a "looked after" child pursuant to section 22 of the Act (since April 2016 children cared for by special guardians who were 'looked after' immediately before the Special Guardianship Order was granted have been eligible for the Adoption Support Fund (ASF). The ASF provides funds to local authorities and regional adoption agencies to pay for essential therapeutic services for eligible adoptive and special guardianship order families).

Sub-appendix B. Options for placement with family and friends

1. There are multiple options:
 - i. approval as foster carers and placement under an ICO or a care order;
 - ii. placement directed as assessment under s 38 (6), CA 1989, within care proceedings;
 - iii. application of regulation 24²⁶ / regulation 26²⁷ to provide temporary approval of relative, friend or other person connected with the child;
 - iv. in England, placing a child under regulation 27 (an unregulated setting) under s 22C (6)(d), CA 1989; there is no equivalent provision under the Welsh regulations;
 - v. an SGO;
 - vi. a child arrangements order.
2. **Placement with family as foster carers under interim or final care order.** This will provide for the local authority to maintain parental responsibility and exercise it to the exclusion of the parents as deemed necessary. This requires the prospective carers to be approved as foster carers. The fostering regulations do not set out a specific set of standards against which family and friend carers can be approved. If the children are placed under an ICO, consideration will need to be given to timescales until a final determination can be made as to final orders, and whether an extension to the 26-week deadline is required.
3. **Where the carers cannot be approved as foster carers but the court / local authority wants to test the placement: the placement is directed as an assessment under s 38 (6), CA 1989.** Case-law²⁸ has established that the court may order an

²⁶ In England, regulation 24, Care Planning, Placement and Case Review (England) Regulations 2010.

²⁷ In Wales, regulation 26, the Care Planning, Placement and Case Review (Wales) Regulations 2015.

²⁸ *Re A (A Child)* [2009] EWHC 865 (Fam) <https://www.bailii.org/ew/cases/EWHC/Fam/2009/865.html>

assessment of the child under s 38 (6), CA 1989 to take place while the child is living with prospective carers, as an exception to the general rule that local authorities make placement decisions under ICOs. The placement is not a local authority placement but is “under the continuing control of the court”. There are difficulties with this arrangement as there is no guidance on the position of the local authority in terms of how it exercises its parental responsibility for the child (who remains a looked-after child) and how the placement might lawfully be maintained immediately after completion of the assessment. The ICO is maintained and so the local authority maintains parental responsibility for the child.

4. **Temporary approval under regulation 24 or other arrangements under s 22, CA 1989.** Local authorities must place all children in care in accordance with the requirements of s 22C, CA 1989. Section 22C (6) suggests placement with connected persons. Regulation of family and friend carers can be achieved via regulation 24, Care Planning, Placement and Case Review (England) Regulations 2010. Regulation 24(1) provides that where the responsible authority is satisfied that,

- i. the most appropriate placement for the child is with a connected person, notwithstanding that the connected person is not approved as a local authority foster parent, and
- ii. it is necessary for the child to be placed with the connected person before the connected person’s suitability to be a local authority foster parent has been assessed in accordance with the 2002 regulations,

the local authority may approve that person as a local authority foster parent for a temporary period not exceeding 16 weeks provided that they first comply with the following requirements as to assessment:

- iii. assess the suitability of the connected person to care for C, including the suitability of (a) the proposed accommodation and (b) all other persons

aged 18 and over who are members of the household in which it is proposed that child will live, taking into account all the matters set out in schedule 4;

- iv. consider whether, in all the circumstances and taking into account the services to be provided by the responsible authority, the proposed arrangements will safeguard and promote the child's welfare and meet the child's needs set out in the care plan; and,
 - v. make immediate arrangements for the suitability of the connected person to be a local authority foster parent to be assessed in accordance with the 2002 regulations ("the full assessment process") before the temporary approval expires.
5. In Wales, the relevant statutory provision is s 81, SSW-b(W)A 2014 which, together with regulation 26, the Care Planning, Placement and Case Review (Wales) Regulations 2015 provides a similar outcome.
6. Section 22 C (6)(d), CA 1989 provides that children can be placed in a "placement in accordance with other arrangements". In conjunction with regulation 27, Care Planning, Placement and Case Review (England) Regulations 2010, these permit (in England) placement of children in an unregulated setting, subject to consideration of the suitability of accommodation, tenancy arrangements for the child, financial commitment of the child and other matters listed in schedule 6. It relies on the young person understanding their rights and responsibilities in relation to the accommodation and giving their consent to being in the placement. It is used in relation to older children, usually in relation to supported lodgings. There is no statutory requirement to supervise or support a s 22 placement in the same way as fostering placements but there is a duty to supervise and support the placement generally under s 22 and the 2010 regulations.
7. **A child arrangements order (CAO)**. This has the potential disadvantage that the local authority has no parental responsibility for the child, and the parents maintain

parental responsibility. The carers will acquire parental responsibility under the order, but they will share it with the parents. A CAO stating with whom the child lives will expire when the child turns 18. It will be necessary for any CAO to set out in some detail what the arrangements are for the child and the extent to which the parental responsibility acquired by the carers under the order can be exercised to the exclusion of the parents. A CAO can sit alongside a supervision order, but the courts will need some persuasion as to why a supervision order is needed if the local authority is satisfied the carers will provide good enough care and will cooperate with the local authority without the need for an order.

Best practice guidance:

Special guardianship orders

March 2021

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