

Public Law Working Group



Recommendations to achieve best practice in the child protection and family justice systems:

Special guardianship orders

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¹ https://www.cfj-lancaster.org.uk/app/nuffield/files-module/local/documents/HARWIN%20main%20report%20SO%20and%20SGOs%20_%204Mar2019.pdf

² <https://www.nuffieldfjo.org.uk/resource/special-guardianship-a-review-of-the-evidence>

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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. The President of the Family Division asked me to chair the Public Law Working Group to address the operation of the child protection and family justice systems as a result of the themes he addressed in his speech to the Association of Lawyers for Children in October 2018.

2. In his address the President said,

“This additional caseload, alongside the similar rise in private law cases, falls to be dealt with by the same limited number of judges, magistrates, court staff, Cafcass officers, social workers, local authority lawyers, and family lawyers in private practice. These professional human resources are finite. They were just about coping with the workload in the system as it was until two years ago, and were largely meeting the need to complete the cases within reasonable time limits.

My view now is that the system, that is each of the professional human beings that I have just listed, is attempting to work at, and often well beyond, capacity. As one designated family judge said to me recently, the workload and the pressure are “remorseless and relentless”. I am genuinely concerned about the long-term wellbeing of all those who are over-working at this high and unsustainable level. Some have predicted that, if the current situation continues, the family justice system will “collapse” or “fall over”, but, as I have said before, I do not think systems collapse in these circumstances. Systems simply grind on; it is people who may “collapse” or “fall over”. Indeed, that is already happening and I could give you real examples of this happening now. It is because of the high level of concern that I have for all of those working in the system that I have made addressing the rise in numbers, as I have said, my

Number One priority. Other issues that come, important though they may be, must take second place.

Returning to the rise in public law case numbers, and speaking now for myself, it seems to me obvious that if there has been a very significant and sudden rise in the number of cases coming to court, these “new” cases must, almost by definition, be drawn from the cohort of cases which, in earlier times, would simply have been held by the social services with the families being supported in the community without a court order. The courts have always seen the serious cases of child abuse, where, for example, a baby arrives close to death at an A and E unit following a serious assault, or cases of sexual abuse or cases of serious and obvious neglect. No one suggests that there has been a sudden rise of 25% in the number of children who are being abused in this most serious manner.

Further round the spectrum of abuse lie those cases which, whilst nonetheless serious, do not necessarily justify protecting the child by his or her immediate removal from home. These are more likely to be cases of child neglect and will frequently involve parents whose ability to cope and provide adequate and safe parenting is compromised by drugs, alcohol, learning disability, domestic abuse or, more probably, a combination of each of these. Such families are likely to have been known to social services for months or, more often, years. The need for the social services to protect the children will have been properly met by non-court intervention somewhere on the ascending scale from simple monitoring, through categorizing the child as “a child in need”, on to the higher level of a formal child protection plan and up to looking after the child with the agreement of the parents under s 20 [or s 76].”

3. It was in this context that the President set the Public Law Working Group the task to consider reforms of the child protection and family justice systems and

to recommend best practice guidance. The working group agreed that our principal objectives were to:

i. recommend changes to current practice and procedure that may be implemented reasonably swiftly, without the need for primary or secondary legislation;

ii. make recommendations to provide best practice guidance. In doing so we are not suggesting that one size fits all. As a result of demographics, poverty and population sizes, to name just three matters, different priorities and practices will suit some local authorities and courts better than others. We suggest, however, that there are certain core changes which need to be made to social work practice and the approach of the courts which will enable fairer and speedier decisions to be made for the children and young people who are the subject of public law proceedings; and

iii. make recommendations that may require primary or secondary legislation (including revisions to statutory guidance) to effect change. These constitute our longer-term goals.

4. We established six sub-groups to consider reform and best practice guidance in the following aspect of the child protection and family justice systems, namely:
 - a. local authority decision-making;
 - b. pre-proceedings and the PLO;
 - c. the application to the court;
 - d. case management;
 - e. special guardianship orders; and
 - f. s 20 / s 76 accommodation.
5. Earlier this year we established a seventh sub-group to consider whether there was a need to make supervision orders more robust and effective public law orders and, if so, how this could be achieved.

6. The Final Report of the Public Law Working Group was delivered to the President in late February. It had been intended to roll out the recommended best practice guidance in four stages over a period of months with the final best practice guidance, Support for and Work with Families Prior to Court Proceedings, being issued in the summer of 2020. The Covid-19 pandemic and its adverse consequences has caused the President and the members of the working group to revise this plan. Accordingly, the main Final Report will not be published and the best practice guidance relating to The Application and Case Management, s 20/ s 76 Accommodation, and Support for and Work with Families Prior to Court Proceedings not issued until the end of this year.
7. The President established a Judicial Implementation Group, chaired by Baker LJ, to lead the implementation of the recommendations of this working group and of the Private Law Working Group. At a meeting of the JIG with the President in May 2020 it was agreed that there was a pressing and immediate need amongst the judiciary and legal and social work professionals for clear guidance on special guardianship orders rather than wait until the end of this year. Accordingly, it was agreed that this standalone report would be published and the SGO best practice guidance issued in June 2020. This plan was endorsed by the members of the Public Law Working Group.
8. Where in this report statements, recommendations or guidance are based on published statistics or empirical research, the reference is given in the text or a footnote. In all other instances statements, recommendations or guidance are based on the combined and extensive professional experience of the practitioners and judges on the working group. It is important to note that the proposed recommendations and best practice guidance are, of course, subject to the current legislative provisions and statutory guidance.
9. We have met with the Family Justice Council's working group on special guardianship orders supported by the Nuffield Family Justice Observatory. The

Family Justice Council and the Public Law Working Group agreed that this working group should recommend to the President the issuing of best practice guidance in respect of SGOs. This best practice guidance was drafted jointly with the Family Justice Council's working group on special guardianship orders. It is approved by the FJC and is considered to be their response to the request made by the Court of Appeal in *Re P-S* [2018] EWCA Civ 1407 for authoritative guidance. We and the FJC's working group are keen to avoid different or separate guidance being provided to child protection and family justice professionals which may result in confusion.

10. We make recommendations for change and advise on elements of best practice which will permit social workers, senior managers, 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 the children and young people with whom we are concerned. Our 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 avert the need for more intrusive state intervention, including court proceedings.
11. The simple message which has guided our work, and which must guide all those who work in the child protection and family justice systems, is that the welfare of the children and young people with whom we are concerned must come first and above every other consideration.

The Honourable Mr. Justice Keehan

June 2020

Executive summary

1. The Public Law Working Group has been set up by the President of the Family Division to address the operation of the child protection and family justice systems as result of the themes he addressed in his speech to the Association of Lawyers for Children in October 2018.
2. The membership of the working group is drawn from a variety of professionals with considerable experience in the child protection and family justice systems. Our members include eight directors of children's services or senior managers, the CEO and four directors of Cafcass, the CEO and a director of Cafcass Cymru, a family silk, a junior member of the Family Bar, two child care solicitors, two local authority solicitors, representatives of the MoJ, DfE³ and HMCTS dealing with family justice, a member of the President's Office, four judges, a magistrate, a legal adviser and academics specialising in this field.
3. In respect of SGOs we make four recommendations for immediate change and four recommendations for longer-term change which will require primary legislation and/or additional public expenditure to effect and/or implement the changes.
4. The four recommendations for immediate change are:
 - i. more robust and more comprehensive special guardianship assessments and special guardianship support plans, including a renewed emphasis on (1) the child-special guardian relationship, (2) special guardians caring for children on an interim basis pre-final decision and (3) the provision of support services;
 - ii. better preparation and training for special guardians;
 - iii. reduction in the use of supervision orders with special guardianship orders;

³ MoJ and DfE participation in this working group should not be taken as government endorsement of all the recommendations in this report.

- iv. renewed emphasis on parental contact;
5. The four recommendations for longer-term change are:
- i. on-going review of the statutory framework;
 - ii. further analysis and enquiry into (1) review of the fostering regulations, (2) the possibility of interim special guardianship orders, (3) further duties on local authorities to identify potential carers, (4) the need for greater support for special guardians;
 - iii. a review of public funding for proposed special guardians;
 - iv. effective pre-proceedings work and the use of the FRG's *Initial Family and Friends Care Assessment: A good practice guide* (2017);
6. Finally, we recommend that the best practice guidance in [appendix E](#) is issued by the President of the Family Division. This guidance is made on the basis that every case turns and must be decided on its own particular facts.

The consultation

7. The consultation on our interim report was launched in July 2019 and closed on 30 September 2019. We received 420 responses via SurveyMonkey, of which 186 respondents completed the entire questionnaire and we received 47 narrative responses from key stakeholders in the child protection and family justice systems (including the ADCS, Cafcass, Cafcass Cymru, the Official Solicitor, Ofsted, FLBA, Resolution, the FRG and family judges across England & Wales). A list of the organisations who submitted narrative responses is set out in [appendix C](#). We were particularly pleased to receive a significant number of responses from parents and carers.
8. The overwhelming majority of respondents agreed with and supported all of the (then) 57 core recommendations and the (then) 16 longer-term recommendations. The percentage of respondents who agreed with the recommendations fell in the

range of 60% to 92% (a median of 76%). The percentage of those who disagreed with a recommendation was of the order of 1% to 10% (a median of 5%). The recommendations made in respect of SGOs were strongly supported by a substantial majority of respondents. The degree of agreement and disagreement in the 47 narrative responses broadly reflected the SurveyMonkey responses.

Best practice guidance

9. We recommend to the President that the SGO best practice guidance, which appears in [appendix E](#), is issued immediately.
10. We consider that it is imperative that the best practice guidance is endorsed by the principal stakeholders in the child protection and family justice systems: most notably but not exclusively the ADCS, ADSS Cymru, ASGLB, Cafcass, Cafcass Cymru, DfE, MoJ the Welsh Government. This endorsement will increase the prospects of the best practice guidance effecting real and sustained improvements in the operation of the child protection and family justice systems. It is vital that this best practice guidance is implemented by the judiciary, social work professionals and legal professionals. We acknowledge that the implications of our recommendations and the ease with which implementation will be possible will be defined by local context and current operating practice which, we know, varies nationally.
11. A new national Family Justice Reform Implementation Group has been established to drive implementation of the reforms. It is hoped that local FJBs will play a key role in monitoring implementation of this best practice guidance and taking steps to ensure good practice is achieved by all those involved in the child protection and family justice systems. The local context is crucial in determining and influencing the drivers for change which will vary nationally in relation to need and current practice.

Terms of reference

12. The working group will aim to achieve the following:

- i. to consider measures which may be taken to divert those public law applications made by local authorities to the Family Court which could be 'stepped down' with a focus on: (1) the internal processes undertaken by local authorities to determine whether and when to issue an application to the court for public law orders; (2) the extent to which there is compliance with the pre-proceedings protocol; (3) the identification of "blue water cases" to be contrasted with the "grey cases", as considered by the chief social worker: including the increase in the number of children returning home to their parent(s) under care or supervision orders in some local authority areas;
- ii. to address the issue of the increase in short-notice applications being made by local authorities when issuing applications for public law orders;
- iii. to address the issue of ensuring timely compliance with case management orders;
- iv. to consider whether guidance should be given on the appropriate use of s 20 / s 76 accommodation;
- v. the voice of the child – when and how can engagement with children be made in the most effective way?
- vi. to consider a restructuring of the case management order template;
- vii. a real benefit to children – all proposals should be measured against whether they contribute to delivering enhanced benefits and outcomes for children;
- viii. to communicate with (1) the Private Law Working Group and (2) the MoJ/HMCTS working group(s) on reform of public law proceedings.

13. The working group is encouraged to make recommendations which can be implemented relatively quickly in terms of making the current system more effective.
14. It will also be encouraged to make recommendations, including a radical restructuring of the existing system, if this is what the working group considers necessary, which may take longer to implement – perhaps because it requires primary legislation or public expenditure which only ministers can approve.

Special guardianship

Current issues

15. When a court decides that a child cannot safely be cared for by her birth parents in a way that promotes her welfare, development and best interests, the court will make an order based on the local authority's care plan for the child and an analysis of the options open to the local authority. These are scrutinised by the court for the robustness of that balancing exercise and compliance with the duties and responsibilities as set out in law. The duty to provide a child with an alternative family life where this cannot be achieved by her birth parents – the concept of permanence – secured by an appropriate legal order is a central feature of this responsibility. Section 22C (3), CA 1989 / s 81, SSW-b(W)A 2014 set out a hierarchy of options and requirements when deciding with whom the child should be placed. These are identified as:

- i. the parent of the child;
- ii. a person who is not the parent of the child but has parental responsibility;
- iii. where a child is in the care of the local authority and there was a child arrangements order in force with respect to the child immediately before a care order was made, the person named in the order.

16. In assessing the appropriateness of these people, the local authority must assess whether any option:

- i. would not be consistent with the child's welfare; or
- ii. would not be reasonably practicable.

17. If the placement of the child cannot be made as set out above, the local authority must place the child in the most appropriate placement. The priority is identified as a placement with an individual who is a relative, friend or other person

connected with the child and who is also a local authority foster parent. Where this is not possible then the child should be placed with a local authority foster parent not connected to the child or placement in a children's home. When the local authority is determining the most appropriate placement for the child it must ensure that the placement:

- i. allows the child to live near her home;
- ii. does not disrupt the child's education or training;
- iii. if the child has a sibling for whom the local authority is also providing accommodation, then it enables the siblings to live together;
- iv. is suitable if the child is disabled where her needs can be met in the accommodation provided.

In determining the most appropriate placement, s 8 of the Children and Social Work Act 2017 requires that the permanence provisions of a s 31, CA 1989 plan must take into account:

- v. the impact on the child concerned of any harm that he or she has suffered or was likely to suffer;
- vi. the current and future needs of the child (including needs arising out of that impact);
- vii. the way in the which the long-term plan for the upbringing of the child would meet those current and future needs.

18. The above legal framework sets out important and detailed requirements that are consistent with the welfare checklist in the CA 1989, with the child's needs and with welfare being paramount. They specifically apply to children who are looked after, but they are relevant to those issues that must be considered when the local authority is making a care plan for the child that is focussed on the permanence

plan for the child and this may result in the child leaving care through an adoption, special guardianship or child arrangements order.

19. The introduction of SGOs as an amendment to the CA 1989 has been a significant new option for permanence since 2005. The number of children leaving care through SGOs is now very similar to the number of children leaving care through adoption.⁴ In recent years, family courts have made more SGOs than placement orders and the proportion of SGOs has risen whilst the proportion of placement orders has fallen.⁵

20. The CA 1989 defines an SGO as a private law order made upon application. There are a number of eligibility requirements set out in the relevant clause. One significant requirement is that an application to the court from the prospective SG can only be made by a foster carer or relative where the child has been cared for by the foster carer or relative for one year or more: s 14A (5)(d)(e), CA 1989. Upon receipt of the application, the local authority is required to prepare an assessment report within three months of the application with the issues that must be addressed in that assessment set out in regulation 21 and the relevant schedule. This legal framework fundamentally requires an evidence-based assessment that results from the child have been cared for by the applicant 24/7 for at least a year. This evidence will focus on a range of core components such as the integration of the child into her new family, the way the child's needs have been met across the range of typical issues that parenting and family life addresses. There is no legal requirement that the applicant will have received any preparation although that may have happened through the local authority if the local authority placed the child under fostering regulations secured by a care order. Support to the carer over that time will have been provided as set out in the fostering regulations. The

⁴ <https://coram-i.org.uk/asglb/data/>

⁵ https://www.cfj-lancaster.org.uk/app/nuffield/files-module/local/documents/SO_SGO_Summary%20Report_vs1.2.pdf

absence of these requirements in the design of special guardianship is marked as they are required for both adoption and foster care. The development of special guardianship was focussed on the making of an SGO where the child had been cared for by a relative or foster carer for one year or more. The submission of a private law application, motivated by the experience of the direct care of the child, assumes that whatever preparation and training that were needed would have taken place within that year.

21. The CA 1989 also sets out an option where the court may make an SGO of its own motion. This introduces a significant degree of flexibility into the use of the order but there is nothing in the clause that identifies what the court needs to be satisfied is in place when it exercises this power. But drawing on the clauses that do set this out when it is a private law application this might include:

- i. evidence of a detailed understanding of the nature, implications, duties and responsibilities of the order for the prospective SG;
- ii. evidence that the prospective SG has significant experience of providing parenting care to the child as set out in the clause that identifies the one-year eligibility requirement. The court will need to be satisfied that the prospective carer has come to understand the nature of the child's needs and development and where this is the case, the complexity of their needs and development and the adjustments that they have made to their parenting of the child;
- iii. the prospective SG's exploration and awareness of the issues that may result from the making of the SGO on their relationship with their own family members (their partner, their own child as the parent of the child in question, or other family members) and their support or opposition. This will include the appropriate management of the child's relationships with those family members;
- iv. the challenges that may result as the child and the prospective SG grow older.

22. In any assessment of adopters or foster carers these issues will be explored in detail. With adoption, the period of preparation is two months followed by four further months of preparation and training alongside the assessment process; and this typically does not happen while the prospective adopters are caring for a child. Training and preparation will continue after adopters are approved during the matching process and will continue during the period where they are getting to know the child, the child is placed and during the settling in period and beyond.

23. Where the court is considering making an SGO of its own motion, an assessment must be undertaken by the local authority. However, the timescales for this assessment are frequently constrained by the statutory duty to complete proceedings within 26 weeks. This is amplified by the prospective SG finding themselves thrust into the challenge and complexity of care proceedings with no preparation, independent legal advice or access to the time and space to think through what is being proposed. This can be amplified when the prospective SG has little, if any, knowledge and experience of the child. Assessments are likely to be seriously compromised by the significant pressures these matters create.

24. In the 2015 DfE review of special guardianship,⁶ concerns were raised by most stakeholders about the adequacy of assessments; a similar picture emerged in the review of SGOs conducted by the Welsh Government in 2016/17. As a result, amendments were made to the regulations that were intended to address these issues by giving clarity and specificity to a number of issues that must be addressed. These are:

- i. any harm which the child has suffered;

⁶https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/487243/SGR_Final_Combined_Report.pdf

- ii. any risk of future harm to the child posed by the child's parents, relatives or any other person the local authority consider relevant;
- iii. a description of the child's personality, her social development and her emotional and behavioural development and any current needs or likely future needs.

25. In addition, the report must address:

- i. the nature of the prospective SG's current and past relationship with the child;
- ii. the prospective SG's parenting capacity, including: (1) their understanding of, and ability to meet the child's current and likely future needs, particularly, any needs the child may have arising from harm that the child has suffered; (2) their understanding of, and ability to protect the child from any current or future risk of harm posed by the child's parents, relatives or any other person the local authority consider relevant, particularly in relation to contact between any such person and the child; (3) their ability and suitability to bring up the child until the child reaches the age of 18.

26. There is little, if any, evidence that this amendment (firstly to secondary, and then to primary, legislation) has made any difference to the matters considered in the assessment or by the court. The incorporation of these issues into primary legislation in s 8, Children and Social Work Act 2017 has had limited, if any, impact,⁷ ⁸ even though statutory compliance is required; in Wales, the Special Guardianship (Wales) (Amendment) Regulations 2018 and the Special Guardianship Orders: Code of Practice, which came into force on 24 May 2019, have, as yet, had similarly limited impact.

⁷<https://www.nuffieldfjo.org.uk/resource/the-contribution-of-supervision-orders-and-special-guardianship-to-children-s-lives-and-family-justice>

⁸<https://www.nuffieldfjo.org.uk/files/documents/NuffieldFJO-Special-Guardianship-190731-WEB-final.pdf>

27. The issues that must be addressed in the schedule and the subsequent amendments to the schedule strongly suggest that an assessment cannot be completed without substantial time and resources. Further, the making of an order of the court's own motion would not be justified unless the court had access to a report that was fully compliant with the requirements of the schedule. Plus, the evidence cannot be sufficient unless it results from substantial experience of the prospective SG in caring for the child and, in the case of a private law application, for one year or more.

28. In the design of special guardianship, the possibility of the issues that must be addressed in the report to court as an evidence-based assessment may be available through other routes which allows the court to be satisfied that the order should be made. But as a common route to the making of an order in the circumstances that are now very familiar, this cannot be the case. The conclusion to this is that only in exceptional circumstances should a court exercise its power to make an SGO of its own motion. If it is considering this option, then the report prepared by the local authority must be fully compliant with the schedule and primary legislation and fully evidence-based.

29. If this is accepted, then the route to making an SGO would return in the majority of cases to a private law order made upon application as set out in the CA 1989. The problem that needs to be solved in doing so is what to do in the interim when care proceedings have started and they need to be concluded. There are two issues:

- i. the need for the child to be placed with the carers. The clearest option is to place the child with the prospective SGs where they are approved as connected persons foster carers. This brings many advantages in enabling them to have access to various forms of support. The challenge comes where there are issues with individual compliance with the fostering regulations. This

should not usually be an insurmountable problem unless the issues are significant and this would in any case impact on their suitability to apply for an SGO;

- ii. the second issue is the legal order that would enable the placement of the child to be made on conclusion of care proceedings. Currently this could be through a care order, although as *Re P-S (Children)* [2018] EWCA Civ 1407 identified, care orders are not short-term orders. This then suggests that an ICO could be a solution, but that would not conclude care proceedings. The issue that must be addressed in this route is the provision of support to the SG and the child when the order is made as they are excluded from a mandatory assessment of need if the child was not in care immediately before an SGO is made. Local authorities are required to exercise their discretion when deciding whether to undertake an assessment and the fact that the child was placed under fostering regulations should not influence how that discretion is exercised.
30. The two other options are as follows. First, an interim SGO – but a number of issues have been raised about this option: it does not exist in law and, if it did, may create legal complexities in the future. Second, extending the use of placement orders, but this would need exploration and new primary legislation.
31. SGOs are being made in respect of people who have close/other prior connections with the child, but also in favour of individuals who have no, or little prior connection with the child. Good practice in the assessment of prospective SGs, in the preparation of SGSPs and in how the Family Court considers plans for a child to be raised by a SG presently seems to be insufficiently tailored to respond to these very different scenarios.
32. There are concerns about the quality of some SG assessments and SGSPs. Where assessment and support planning is poor and insufficiently robust the risks which may arise include: carers and children struggling to manage in the face of

inadequate preparation and inadequate short and longer-term support; the breakdown of special guardianship placements; and in extreme cases, the risks to the child in a proposed placement being unassessed leading to the injury or, exceptionally, the death of a child.

33. There is a notable variation in the quality of the assessments filed with the court and the evidence base of the recommendations. All assessments/suitability reports should comply with the schedule set out in regulation 21 of the Special Guardianship Regulations 2005, as amended,⁹ or, in Wales, with regulation 2 of the Special Guardianship (Wales) Regulations 2005.¹⁰ In the event that local authorities commission assessments from independent social workers, it is essential that there is clarity about the standard of the assessment commissioned before it is filed.

34. There is an increase in the number of supervision orders being made alongside SGOs.¹¹ The making of a supervision order alongside a SGO is a “red flag” where this is a result of the assessment and the SGSP not being sufficiently clear, thorough or robust to give confidence that either the placement is in the welfare best interests of the child or the support plan will meet the needs of the proposed placement. A proposal to make a supervision order is likely to signify a lack of confidence in the making of an SGO at that time and/or results from the inadequacy of the support and services provided for in the SGSP. The cases where it would be appropriate/necessary to make a supervision order alongside a SGO are likely, in our view, to be very small in number.

⁹ The Special Guardianship (Amendment) Regulations 2016 amends the schedule to the 2005 Regulations prescribing the matters to be dealt with by local authorities in preparing these reports.

¹⁰ As amended by the Special Guardianship (Wales) (Amendment) Regulations 2018.

¹¹ https://www.cfj-lancaster.org.uk/app/nuffield/files-module/local/documents/SO_SGO_Summary%20Report_vs1.2.pdf

35. In order to ensure the assessments and support plans are of a sufficiently high quality and to ensure the court is able to make a fully informed welfare decision, the following will need to be addressed:

- i. SGOs were established to provide an alternative route to permanence for a child other than adoption. The differences between the two orders are significant but the primary issue is not. Namely, meeting the needs, welfare and development of the child throughout her minority and beyond. As such, potential carers should be thoroughly assessed to ensure they can meet the child's needs in her immediate childhood and through adolescence. The assessment of a potential SG must fulfil all elements of the statutory guidance which means that the SG should be well prepared and offered the opportunity of training and preparation akin to a prospective foster carer. An effective SGSP will address immediate needs and potential areas for help in the longer term. The gravity of the task suggests such an assessment will take a significant number of weeks similar to a fostering or adoption assessment and be experience-based and evidence-based;
- ii. whether there has been adequate attention paid to/time taken to build relationships and develop (and observe) that relationship between the child and the proposed SG. This may well be a vital component of a rigorous special guardianship assessment if the initial phases of the assessment are sufficiently positive to indicate such contact is in the welfare interests of the child and where the court is satisfied that such a step is not prejudicial to the fairness of proceedings.

36. Careful consideration needs to be given to the arrangements for contact proposed between a child who is the subject of an SGO and a parent, including what support arrangements need to be put in place. Evidence suggests that

insufficient planning as well as short-term or inadequate ongoing support in relation to contact can have a significant impact on placement stability.¹²

37. Under the current statutory framework, and save in emergencies for strictly limited time periods, where a local authority wants to place a child with carers who will go on to become the child's SG they can only place children who are the subject of an ICO or care order with approved foster carers. This raises real difficulties finding an appropriate legal vehicle by which to place children with a proposed SG prior to a final order being made. Some consider that the power of the court to make an interim SGO may be a helpful tool in the judicial armoury; there are, however, a range of views as to whether this is an appropriate and helpful way forward or not. Those in favour consider this would enable the court to approve, on an interim basis, the placement of a child with a proposed SG and may provide a basis to circumvent the issue of a local authority seeking to place the child under an ICO or a care order with a proposed SG but being unable, for all manner of appropriate reasons, to approve the placement under the fostering regulations. Those expressing concern or opposition suggest that interim SGOs do not provide an appropriate response and highlight ways in which a range of difficulties, as well as tensions within the legal and practice framework, result.

Recommendations

38. **Recommendation 1: Special guardianship assessments and special guardianship support plans.** Special guardianship assessments and SGSPs should be robust and comprehensive and compliant with regulations. Timetabling for the provision of such assessments should be realistic to provide for this.

¹² <https://mk0nuffieldfounpg9ee.kinstacdn.com/wp-content/uploads/2019/08/NuffieldFJO-Special-Guardianship-190731-WEB-final.pdf>; https://mk0nuffieldfounpg9ee.kinstacdn.com/wp-content/uploads/2019/08/Nuffield-FJO_Special-guardianship_English-research-studies_final.pdf

39. The assessments and support plans must comply with and address all of the statutory requirements and consider all matters both in the short term and in the long term.

40. In order to ensure the assessments and support plans are of a sufficiently high quality and to ensure the court is able to make a fully informed welfare decision, the following will need to be addressed:

- i. whether there has been adequate attention paid to/time taken to build relationships and develop (and observe) contact between the child and the proposed SG. This may well be a vital component of a rigorous special guardianship assessment if the initial phases of the assessment are sufficiently positive to indicate such contact is in the welfare interests of the child and where the court is satisfied that such a step is not prejudicial to the fairness of proceedings;
- ii. where such relationship-building work has not (for whatever reason) formed part of the assessment process itself, it is likely that further time will be needed to allow this work to be carried out before proceedings are concluded (e.g. through an extension of the 26-week time limit). This may particularly arise as necessary where early work to identify prospective carers and begin assessment prior to proceedings was not carried out;
- iii. where there is little, or no, prior connection/relationship between the child and the prospective SG and after an the analysis of all the available evidence and of child's best interests, it is very likely to be in the child's best interests that the child is cared for on an interim basis by the prospective SG (e.g. under an ICO) before any final consideration is given to the making of an SGO. There is a debate amongst professionals and the judiciary about whether (1) care proceedings should be extended beyond the 26-week timetable to enable the court to allow further time and assessments before deciding to make a SGO or (2) where a lengthy period of time is likely to be required before the court

could consider making a SGO, the proceedings are concluded with the making of a care order on the basis that the local authority will assist the proposed SG in making a future application for an SGO. One important benefit of this approach is that the provisions of the SGSP will be informed by the needs on the ground of the child and of the proposed SG rather than on assumptions and expectations of what will be required to achieve a successful long-term placement;

- iv. where a party proposes the court should make an SGO, consideration should be given at an early stage to the issue of joining the proposed SG as a party to the proceedings and if joined consideration should be given to the funding of legal representation for the proposed SG.

41. Recommendation 2: Better preparation and training for special guardians.

Consideration should be given by local authorities to providing training to prospective SGs and to take adequate steps to prepare them for caring for the child. We have regard to the training and preparation afforded to prospective adopters. This should include consideration of the DfE publishing regular data analysis on the number of approved applications made by local authorities that provide funding from the ASF at national and local level including the amount approved and the focus of the intervention.

42. Recommendation 3: A reduction in supervision orders with special guardianship orders.

Save for cogent reasons, a supervision order should not need to be made alongside an SGO. Where cogent reasons are found to exist, the order should contain a recital setting out the same. 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. The SGSP should be attached as an appendix to the order making the SGO. For the avoidance of doubt, this recommendation is made to effect a culture shift and to

ensure there is a focus on (1) an SGO only being made when there is cogent evidence that it is in the welfare best interests of the child and (2) the support and/or services to be provided by the local authority to the child and to the SG are clearly, comprehensively and globally set out in the SGSP.

43. **Recommendation 4: Renewed emphasis on parental contact.** Prior to the making of an SGO, the issue of parental contact with the child who may be made the subject of an SGO should be given careful consideration, in terms of (1) the purpose of contact; (2) the factors which are relevant in determining the form of contact, direct or indirect, and the frequency of contact; (3) the professional input required to support carers in facilitating the same over time and (4) the planning and support required to ensure the stability of the placement in the context of ongoing contact.

Best practice guidance

44. We recommend that the best practice guidance, set out in [appendix E](#), is issued by the President.

Longer-term changes

45. **Recommendation 1: On-going review of the statutory framework.** Guidance and regulations relating to fostering and adoption are regularly reviewed and have evolved over time. It is essential that the same attention and care is paid to special guardianship, drawing on the views and expertise of those working within the child welfare and family justice systems as well as the children and families impacted. Review of primary and secondary statutory provisions relating to SGSPs seems particularly important to prioritise and strengthen.

46. The Government should undertake regular reviews of the primary and secondary statutory provisions relating to SGSPs to ensure the same are meeting the needs of children and young people and the SGs; in Wales, the secondary legislation

and accompanying guidance (or codes) require review by the Welsh government. This should include a review of the placement regulations to consider whether an option for local authorities to place with prospective SGs under a care order might be an appropriate development.

47. Recommendation 2: Further analysis and enquiry. Further detailed analysis and enquiry should be undertaken (for example, by the MoJ, DfE and the Welsh Government in discussion with relevant stakeholders) in relation to the placement of children with prospective SGs to include: (1) whether the fostering regulations require review and revision in relation to family and friends carers; (2) whether the CA 1989 should be amended to provide the court with the power to make an interim SGO;¹³ (3) whether to impose a further duty on a local authority to explore whether there are potential carers who could be appointed a SG for the child with accompanying statutory provisions to further support local authorities to gather this information; and (4) improved national support provisions for SGs and the children they are raising (including, in line with recommendations from the FRG's *Care Crisis Review: Options for Change*, June 2018:¹⁴ a right to a period of paid leave from work for the child to settle in, akin to paid leave following the making of an adoption order; that the household is exempted from the benefit cap and the spare room subsidy; the same entitlement to support provisions including pupil premium plus and access to the ASF, regardless of whether or not the child has previously been looked after).

48. Recommendation 3: A review of public funding for proposed special guardians. The Government should review the need for increased expenditure to provide public funding for a proposed SG who may seek to assume the long-term care of a child and whose assessment as an SG has been approved by the court; in Wales,

¹³ The concept of an interim SGO does not accord with the position of the FRG.

¹⁴ https://www.frg.org.uk/images/Care_Crisis/CCR-FINAL.pdf

the secondary legislation and accompanying guidance (or codes) require review by the Welsh government.

49. **Recommendation 4: family group conferences.** Effective pre-proceedings work, including FGCs (or a similar model for engaging with the family) being considered as a matter of routine and the use of the FRG's *Initial Family and Friends Care Assessment: A good practice guide*,¹⁵ should enable early identification of those family or friend carers who are a realistic option to care for the child. This should avoid scenarios where significant resources are devoted to lengthy assessment of numerous individuals who are not a realistic option for the child.

¹⁵ https://www.frg.org.uk/images/Viability_Assessments/VIABILITY-MASTER-COPY-WHOLE-GUIDE.pdf

Conclusion

50. The working group commends these recommendations and the proposed best practice guidance to the President of the Family Division.

51. The key themes of the SGO recommendations are:

- i. to ensure full and comprehensive assessments are undertaken of prospective SGs and that sufficient time is afforded to local authorities to undertake these assessments;
- ii. 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 that the child is cared for on an interim basis by the prospective SG before any final consideration is given to the making of an SGO;
- iii. the SGSP should be based on the lived experience of the child and of the proposed SG and must be a comprehensive plan based on the assessed needs of the individual child and of the proposed SG; and
- iv. the plan should include clear provisions for the time the child will spend with his parent(s) or former carers and the planning of and support for the contact arrangements.

52. We are of the view that the implementation of the recommendations and the BPG will lead to a better outcome for (1) the children and young people who are involved with local authority children's services departments and are the subject of care proceedings or are the subject of private law proceedings and (2) for special guardians and their families. Our focus throughout has been on seeking to put the welfare best interests of these children and young people at the forefront of all considerations.

53. We are immensely grateful to the FJC and to the FJC's working party on special guardianship orders for the co-operation they have afforded to us in our joint work. It is a measure of the importance of SGOs as an order available to the court

that we and the FJC have agreed the terms of the best practice guidance in [appendix E](#). It stands as the FJC's response to the request for authoritative guidance sought by the Court of Appeal in *In the matter of P-S (Children)* [2018] EWCA Civ 1407. The FJC and this working group were keen to ensure that only one set of clear guidance was issued to social workers and legal professionals in this significant area of family law.

54. We wish to acknowledge the meaningful contributions made to the drafting of this report and to the formulation of our recommendations by the ADCS. In addition, we thank ADSS Cymru, which fully endorses the report and its recommendations.

55. We wish to thank the FRG and the members of its focus groups for the invaluable assistance they have given to this working group in preparing this report.

56. We wish to pay tribute to the invaluable contribution made to this working group by Anthony Douglas, formerly the CEO of Cafcass, who retired in April 2019 and was replaced by Christine Banim, the Cafcass National Service Director, and to Caroline Lynch, of the FRG, who began extended leave in April 2019 and was replaced by Jessica Johnston, a legal adviser to the FRG.

Appendix A. Membership of the working group

The Hon. Mr. Justice Keehan (Chair of the Public Law Working Group) (Sub-chair, Case management; Sub-chair, Special guardianship; Sub-co-chair, Supervision orders) (High Court judge)

Alexander Laing (Secretary to the Public Law Working Group) (Barrister)

Sarah Alexander (Assistant Director, Bolton Council)

Iram Anwar (Legal Adviser, Nottingham)

Cathy Ashley (Chief Executive, Family Rights Group)

Kate Berry (Department for Education)¹⁶

Helen Blackman (Director of Children's Integrated Services, Nottingham City Council; ADCS)

Professor Karen Broadhurst (Co-Director, Centre for Child and Family Justice Research)

Nigel Brown (CEO, Cafcass Cymru), subsequently replaced by Jane Smith (Head of Operations, Gwent, Cafcass Cymru) and Laura Scale (Senior Practice Development Officer, Cafcass Cymru)

Melanie Carew (Head of Legal, Cafcass)

Steven Chandler JP (Magistrates Association, Family Courts Committee)

Anthony Douglas (CEO, Cafcass), subsequently replaced by Christine Banim (Cafcass National Service Director)

Rob Edwards (Legal Adviser, Cafcass Cymru)

Cath Farrugia (Department for Education)

Shona Gallagher (Head of Children and Families Social Care, South Tyneside Council)

Professor Judith Harwin (Professor in Socio-Legal Studies, Lancaster University) (Sub-co-chair, Supervision orders)

HHJ Rachel Hudson (Sub-chair, The application) (DFJ, Northumbria and North Durham)

¹⁶ DfE participation in this working group should not be taken as government endorsement of all the recommendations in this report.

Gareth Jenkins (Assistant Director – Head of Children’s Services, Caerphilly County Borough Council)

Sally Ann Jenkins (Sub-co-chair, Support for and work with families prior to court proceedings) (Head of Children’s Services, Newport City Council; ADSS Cymru)

Helen Johnston (Assistant Director for Policy, Cafcass)

Andrew Jones (Head of Public Family Justice Policy, MoJ), subsequently replaced by Helen Evans (Head of Public Family Justice Policy, MoJ)¹⁷

DJ Martin Leech (District Judge, Plymouth)

Oliver Lendrum (Family Justice Policy – Public Law, MoJ)

Caroline Lynch (Principal Legal Adviser, Family Rights Group), subsequently replaced by Jessica Johnston (Legal Adviser, Family Rights Group)

Simon Manseri (Principal Social Worker, Bolton Council)

Hannah Markham QC (Barrister)

Jo McGuinness (Child Solicitor, Stoke)

Lucy Moore (Local Authority Solicitor, Swansea Council)

HHJ Kambiz Moradifar (Sub-co-chair, Support for and work with families prior to court proceedings; Sub-chair, S 20/ s 76 accommodation; DFJ, Berkshire)

Richard Morris, MBE (Assistant Director, Cafcass)

Ifeyinwa Okoye (Department for Education)

Emma Petty (Family Public Law Reform Project, HMCTS)

Dr John Simmonds, OBE (Director of Policy, Research and Development at CoramBAAF)

Natasha Watson (Local Authority Solicitor, Brighton and Hove Council)

Teresa Williams (Director of Strategy, Cafcass)

Kevin Woods (Department for Education)

¹⁷ MoJ participation in this working group should not be taken as government endorsement of all the recommendations in this report.

Hannah Yates (Department for Education)

Additional members who joined as part of the **Supervision orders** sub-group appear in **Appendix B**

Appendix B. Membership of the working group's sub-groups

Support for and work with families prior to court proceedings

Sally Ann Jenkins (sub-co-chair)

Kambiz Moradifar (sub-co-chair)

Sarah Alexander

Christine Banim

Kate Berry

Helen Blackman

Nigel Brown

Rob Edwards

Shona Gallagher

Michael Keehan

Caroline Lynch (replaced by Jessica Johnston)

Simon Manseri

Lucy Moore

Ifeyinwa Okoye

Natasha Watson

Hannah Yates

The application

Rachel Hudson (sub-chair)

Iram Anwar

Helen Johnston

Martin Leech

Jo McGuinness

Lucy Moore

Emma Petty

Case management

Michael Keehan (sub-chair)

Helen Blackman

Steven Chandler

Shona Gallagher

Rachel Hudson

Caroline Lynch (replaced by Jessica Johnston)

Hannah Markham

Richard Morris

Natasha Watson

Supervision orders

Michael Keehan (sub-co-chair)

Judith Harwin (sub-co-chair)

Bachar Alrouh

Cathy Ashley

Nengi Ayika

Jenny Coles

Kate Devonport

Denise Gilling

Jeremy Gleaden

Sheila Harvey

Kate Hughes

Alan Inglis

Martin Kelly

Alexander Laing

Oliver Lendrum

Helen Lincoln

Caroline Lynch

Hannah Markham

Kambiz Moradifar

Richard Morris

Peter Nathan

Ifeyinwa Okoye

Jamie Paul

Sarah Richardson

Laura Scale

Sharon Segal

John Simmonds

Alasdair Smith

Jane Smith

Jacky Tiotto

Isabelle Trowler

Natasha Watson

Special guardianship orders

Michael Keehan (sub-chair)

Cathy Ashley

Helen Blackman

Shona Gallagher

Judith Harwin

Rachel Hudson

Caroline Lynch (replaced by Jessica Johnston)

Hannah Markham

Richard Morris

John Simmonds

Natasha Watson

S 20/ s 76 accommodation

Kambiz Moradifar (sub-chair)

Helen Blackman

Cath Farrugia

Shona Gallagher

Kevin Woods

Alexander Laing

Lucy Moore

Teresa Williams

Appendix C. The organisations and groups who submitted narrative responses to the consultation

1. Association of Directors of Children's Services
2. Association of Directors of Children's Services - NW
3. Association of Lawyers for Children
4. British Association of Social Workers
5. Cafcass
6. Cafcass Cymru
7. Centre for Justice Innovation
8. CFAB
9. Cheshire & Merseyside Local Authorities (9)
10. CoramBAAF
11. Family Justice Council
12. Family Law Bar Association
13. Family Rights Group
14. Gateshead Council
15. HHJ de Haas QC
16. HM Council of Circuit Judges
17. Judges of the Family Court at Birmingham
18. Judges of the Family Court in Essex & Suffolk
19. Judges of the Family Court at Stoke on Trent

20. Justices' Clerks Society
21. Kinship Care Alliance
22. Kinship Carers UK
23. Leeds Children's Social Care Legal Team
24. Mary Ryan & Jo Tunnard (Independent Consultants)
25. Mrs Justice Gwynneth Knowles and Mr Justice Lane
26. NALGRO
27. National IRO Managers' Partnership
28. North East Local Authorities (12)
29. NSPCC - awaited
30. Northumberland County Council
31. Northumbria & North Durham LFJB
32. OFSTED
33. Pause
34. Professor Judith Masson
35. Resolution
36. Shropshire Council
37. South London Care Proceedings Project
38. South Wales LFJB
39. The Cambridgeshire Family Panel
40. The Law Society

41. The Magistrates' Leadership Executive
42. The Official Solicitor
43. The Transparency Project
44. The Welsh Government
45. Together for Children
46. West Yorkshire LFJB
47. Working Together with Parents Network

Appendix D. Analysis of responses to the SurveyMonkey consultation

Recommendation		Agree (%) ¹⁸	Not know (%)	Disagree (%)
Core recommendations				
47	SGO assessments	79	14	5
48	Training	92	4	3
49	SOs and SGOs	75	18	6
50	Parental contact	75	13	10
Longer-term changes				
11	Review statutory framework	80	18	2
12	Further analysis	81	16	2
13	Review funding – proposed SGs	88	7	4
14	FGCs	79	14	6
SGO		74	21	5

Role of those who responded

A child	1
Parent	49
Foster carer	3

¹⁸ All % are rounded to the nearest whole number.

Judiciary	8
Magistrate	4
Solicitor	27
Barrister	34
Local authority	31
Social worker	23
Cafcass	8
Court staff	1
Expert witness	3
Other	27

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.¹⁹ That review focussed 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 2016,²⁰ 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.

¹⁹https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/487243/SGR_Final_Combined_Report.pdf

²⁰ 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 guardianship²¹ 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

²¹ 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.²²

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.²³
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.²⁴

Pre-proceedings and proactive family engagement

10. The statutory guidance²⁵ 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

²² S 14C (1)(a)(b), CA 1989.

²³ S 14D, CA 1989.

²⁴ Special Guardianship (Amendment) Regulations 2016 and Special Guardianship (Wales) (Amendment) Regulations 2018.

²⁵ 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.²⁶ 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.²⁷

²⁶ In Harwin et al (2019) family group conferences were held for only 37% of the children.

²⁷ https://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.^{28 29} In parallel with this, information, support and training must be provided to the prospective SG to ensure that

²⁸ For a report on the future of legal aid see: <https://www.gov.uk/government/news/government-sets-out-new-vision-for-legal-support>

²⁹ 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:³⁰ 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

³⁰ 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 an 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)³¹ or (c)³² of s 10, CA 1989 (as read with subsection (10)³³);
- 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.³⁴ In such circumstances the court must ensure that a report is submitted as set out in s 14A (8).

³¹ any person with whom the child has lived for a period of at least three years

³² (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.

³³ 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.

³⁴ 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.³⁵ 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

³⁵ Section 1, CA 1989.

have become compromised by system that is being driven by the statutory duty to complete proceedings within 26 weeks.³⁶

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,³⁷ 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.

³⁶ <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.

³⁷ 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.³⁸

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

³⁸ <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

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.³⁹

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

³⁹ 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.⁴⁰

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

⁴⁰ 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 24⁴¹ / regulation 26⁴² 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-law⁴³ has established that the court may order an

⁴¹ In England, regulation 24, Care Planning, Placement and Case Review (England) Regulations 2010.

⁴² In Wales, regulation 26, the Care Planning, Placement and Case Review (Wales) Regulations 2015.

⁴³ *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.

Recommendations to achieve best practice in the child protection and family justice systems: Special guardianship orders

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