

APPG INQUIRY ON LEGAL AID

WRITTEN EVIDENCE SUBMISSION: THE LAW SOCIETY (2204001)

The Law Society along with other stakeholders including the Family Rights Group, Resolution and the Association of Lawyers for Children have drafted a paper outlining the concerns around the funding of Special Guardianship Orders and proposals to remedy those concerns. We have included this paper as an annex to our submission and a number of our comments are based on this paper.

1) What are the main challenges (and the scale of the problem) faced by kinship carers and prospective kinship carers in accessing legal support, including advice and representation:

At present, proposed special guardians have very limited access to legal advice and representation. In Family Rights Group's recent report in relation to kinship care: 'The highs and lows of kinship care: analysis of a comprehensive survey of kinship carers 2019', over half (52%) of respondents were special guardians.

That report found that 74% of respondents felt that they did not have enough information when they took on the care of the child/ren about legal options to make an informed decision. In addition:

- 58% of respondents said there had been legal costs associated with the kinship child/ren. In some cases, this was covered all or in part by legal aid or by the local authority, but four in ten said they had no financial help with these legal costs.
- 196 respondents who had paid out of their own monies for all or part of the legal costs specified how much they had contributed. It averaged £5446, ranging from just under £100 to over £50,000. 19 kinship carers had paid £10,000 or more in legal fees.
- 55% feel that the kinship children are subject to the most appropriate legal order for them, but 30% feel that they are not.

In addition to this report, the Nuffield Family Justice Observatory has recently published a report:

"Special guardianship: a review of the evidence" which expresses concern as to the lack of access to legal advice for many special guardians, identifying:

"The stress and confusion of prospective special guardians when they find themselves in court with little, if any, legal or other forms of support. This can be amplified by any disagreements with the child's parents or other family members."

"A lack of legal and social work advice affected their ability to advocate for financial and other support. They often did not understand the nature and implications of special guardianship, and some had to resort to Google to get basic information."

The report goes on to recommend that it is crucial to: *"Ensure that prospective special guardians receive full information about the meaning, significance and responsibilities of the relevant legal Order in both the immediate and long term."*

- **Prior to the local authority starting any formal pre-proceedings process**

At present, in private law, a special guardian can only secure legal aid to make an application for a special guardianship order if they meet the means test (many do not, as detailed further in this evidence), the merits test, and if they are able to provide Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) 'gateway evidence' – for example if the child is on a child protection plan.

The LASPO criteria is of course very strict, and many prospective special guardians are unable to provide the right evidence to enable them to secure a legal aid certificate.

An additional problem that arises is in relation to means testing for legal aid. Many kinship carers, particularly older carers including grandparents, have limited income, but do own their own home, or have a small pension and may have less expenses.

This does not mean however that they have access to the funds necessary to instruct a solicitor to advise and represent them on a private basis, particularly in contested proceedings where experts may be instructed at significant cost but would likely leave them falling outside means-tested legal aid.

A further issue is that parents who are subject to local authority children's services involvement may not want their family members to know this. The local authority may be involved due to reasons such as drug / alcohol issues / mental health issues and parents may not want this information to be shared with family members / prospective kinship carers.

Prior to the pre proceedings stage when the local authority is involved (which may for example be at Child In Need level) there may be no clear reason for kinship carers/ prospective kinship carers to seek legal advice as it is not contemplated that the child will be removed from parental care. There are very few social workers that would advise kinship carers to seek such legal advice at this stage.

- **During the formal pre-proceedings stage**

During this stage it is much more likely that social workers will be considering whether family members can care for the child if the parents cannot and as part of the pre proceedings social workers should be assessing prospective kinship carers as good practice. It can be very difficult for kinship carers / prospective kinship carers to access legal advice during this stage because:

- (1) firms who will provide this advice are limited in number
- (2) the issue of who will pay for such advice as outlined above.

Local authorities do not routinely pay for legal advice for prospective kinship carers during the pre-proceedings stage but may do so depending on the situation, there are regional variations. Sometimes social workers do provide fact sheets or refer potential carers to reliable information regarding legal options, but this is not a substitute for legal advice.

- **When a child is subject to care proceedings**

In public law proceedings, most proposed special guardians do not receive legal aid within the context of the proceedings. Where a local authority has positively assessed a relative or friend

of the parents during proceedings, the authority may pay for the proposed special guardian to receive legal advice.

However, this is subject to the position of individual local authorities in each case, and where local authorities do fund legal costs, this is typically limited to only one-two hours of legal advice, or kinship carers find that they have to be extremely persistent in obtaining local authority agreement to cover legal costs.

There is no agreed national approach to local authorities paying for this advice and this will be subject to regional variations. In some areas there are firms which will provide initial legal advice on the basis that the local authority has agreed to pay for it at a set rate.

If the local authority does not support the placement, then the kinship carer who has been negatively assessed is unlikely to be able to access free legal advice to challenge what could be an inadequate assessment. Ultimately, if all options of family and friends care are not properly explored, a child could end up in the care system or even adopted.

- **When a child is subject to any other legal proceedings?**

The same obstacles will apply to prospective carers in accessing legal advice in any sort of proceedings.

2) How do these challenges impact upon:

a) prospective kinship carers understanding their rights and options;

It is sometimes not until a late stage (that is not until care proceedings are issued) that prospective kinship carers/prospective special guardians are involved as at that late stage there is a real imperative to consider all family members as an alternative to a care plan for long-term fostering or adoption.

If prospective kinship carers can be involved and assessed with proper funding in place for them to have legal advice at an earlier stage as standard, then this would be optimum (especially taking into account the Public Law Working Group emphasis of the pre proceedings stage) so as to frontload the work and this should result in less delay within care proceedings. This would help them with understanding their rights and options and they would be able to take advice over a period of time.

If prospective kinship carers / prospective special guardians do not have legal advice until care proceedings are ongoing (and sometimes at quite a late stage in those proceedings) the provision of that advice can feel rushed and pressurised. In addition, it is sometimes not until care proceedings have been instigated that prospective kinship carers will actually put themselves forward / be identified as alternative carers for the child as that is when the actual reality of the potential removal of a child from parental care becomes clear.

b) The likelihood of the child being raised (safely) within their family;

Within care proceedings, all realistic options need to be analysed and explored with the focus being on the child remaining in their birth family if possible. A child will have a guardian appointed who will be focussing on this issue including in his / her reports. Before making final

orders, the Court will need to fully consider all options for the child including whether the child can live within his / her wider family in accordance with case law.

One of the significant problems facing potential kinship or special guardian carers is not having a sufficient understanding of the issues in the case and what their role would be. Often the only information they have received is from one or other of the parents and that information can be one sided and often blaming of social services. Therefore, there is a barrier to get over.

It is likely that a number of people would not put themselves forward to be assessed to become a special guardian if they knew the issues and their obligations. Therefore, not only is legal advice likely to save money (by avoiding unnecessary assessments) but also lead to more informed assessments so that we would see less negative assessments based on the conclusion that the persons assessed do not understand the seriousness of the issues so cannot be trusted to keep the child safe. It would need a greater consideration of what should be disclosed to the potential carer very early on.

The better the assessment in the first place the less likely there will be a challenge and so less delay. However good the system is there will always be challenges. By ensuring there is advice at the earliest stage we are seeking to reduce the number of mistakes. If assessments are imperfect because of a lack of understanding on the part of those assessed, then children may well be missing out on a family placement.

c) A kinship carer (or prospective kinship carer) securing a legal order appropriate to meet the child's needs;

The earlier a kinship carer / prospective special guardian can have legal advice the better. They are often having to grapple with the possibility of a child living with them permanently with all of the repercussions that brings, and good early legal advice is crucial as it can help to resolve issues and make plans for children clearer. It can ensure that the appropriate support plan is in place.

d) The child, kinship carers and birth parents getting the support they require;

See above, advice at the earliest stage is essential to ensure the appropriate support is put in place.

e) How well the family justice system is functioning including capacity issues and the 26-week time limit for care proceedings.

The latest statistics show that the length of time care proceedings are taking has increased. In the third quarter of 2021 proceedings were on average taking 45 weeks which is a rise compared to previous periods. Proceedings are sometimes delayed because assessments of prospective family carers have not been done, noting that sometimes proceedings can be issued urgently with no pre proceedings work having taken place.

Assessments of prospective carers are necessarily lengthy pieces of work and carrying them out during proceedings can lead to delay noting that various checks need to be made (including DBS checks) which all take time. In addition, interpreters may be needed when carrying out these assessments which can further delay them.

This can all lead to the 26-week statutory time limit being breached. The importance of such assessments being carried out prior to proceedings being commenced with those being assessed having proper legal advice cannot be underestimated and is of course best practice.

3) What changes should be made to address these challenges and enhance the chances of children remaining safely and being adequately supported within their family network?

In private law cases where proceedings have not been issued nor has the local authority initiated the formal pre-proceedings process:

- We propose that non-means tested legal help advice is available for potential or actual kinship carers who are considering applying for a special guardianship order in relation to a child. In these cases, the legal aid provider (the solicitor) will need to be satisfied that there is a sufficient benefit to the individual to justify the provision of, respectively, Legal Help and help at court.
- This legal help would enable the solicitor to advise the kinship carer about special guardianship, support them to provide notice to the local authority of their intention to apply for an order and guide them through an intensive assessment process. It will then allow the potential carers to get some advice over a period rather than just a one-off advice after a positive assessment. That would also mean that any negotiations over the terms of the support plan can take place earlier and not hold up final hearings.

Following a positive special guardianship assessment by the local authority, the potential special guardian:

- Should be entitled to non-means and non-merits tested legal aid in order to apply and be represented in proceedings
- The parents (or anyone else with parental responsibility) should be entitled to non-means and non-merits tested legal aid where a special guardianship order application has been made in relation to their child.

Where the special guardianship assessment is negative, that non-means but merits test legal aid should be available to the proposed special guardian to apply and be represented in proceedings. This would enable a legal aid provider to apply for legal aid where it is deemed that there is sufficient merit to do so (for example in the scenario of an inadequate assessment, which may be subject to successful challenge if legal aid is granted).

In cases that are public law i.e., where the local authority have or are considering issuing care proceedings including where a PLO letter before proceedings has been provided to parents

Note: in public law proceedings all parents/those with parental responsibility will be entitled to non-means, non-merits tested legal aid.

Following a potential kinship carer having a positive local authority initial/viability family and friends care assessment:

- Non-means and non-merits tested legal help advice should be made available for initial advice for the proposed special guardian, (remunerated on a level 2 basis). This advice will take them through the assessment process.

Following a potential kinship carer receiving a negative local authority initial/viability family and friends care assessment:

- Non means but merits tested legal aid should be made available for the proposed special guardian to enable them in cases where the viability assessment is inadequate, to challenge that assessment and, for example, seek a court direction for a further viability assessment.

Following a positive full special guardianship assessment by the local authority, in public law cases, the potential special guardian:

- Should be entitled to non-means and non-merits tested legal aid in order to be joined to care proceedings on an intervenor basis. This will then enable the proposed special guardian to make their own application as the per the Court of Appeal guidance in *Re P-S* [2018] EWCA Civ 14075.

4) Would implementation of the commitment made by the Ministry of Justice in the 2019 [Legal Action Support Plan](#) to expand the scope of legal aid to cover special guardians in private law make a difference?

The Legal Action Support Plan confirmed that Government would by Autumn 2019 bring forward proposals to expand the scope of legal aid to include Special Guardianship Orders (SGOs) in private family law.

The Support Plan acknowledges that *“Ordinary care proceedings are in scope of LASPO, but SGOs are not unless there is risk of abuse to the child, despite the fact that such orders are often made as an alternative to care orders or adoption orders”* and that proposals would be brought forward to change this.

This proposal would make a difference; however, we believe these changes should also be reflected in public family law cases to ensure family members who put themselves forward in the context of care proceedings to consider taking on the long-term care of a child under an SGO are not left without legal advice and representation

5) Are there any other points about access to legal advice and representation in relation to kinship care that you wish to make?

Please see further comments outlined in our annexed document.