

## **Briefing note to the Ministry of Justice – proposed changes to Family Legal Aid**

### **A. Introduction:**

1. This briefing has been prepared to provide the Ministry of Justice with practitioners' proposals as to how, specifically, Government's proposed changes as set out in the Legal Action Support Plan dated February 2019<sup>1</sup> should be progressed and implemented.
2. The briefing was drafted by:
  - Family Rights Group - <https://www.frg.org.uk/>
  - Association of Lawyers for Children
  - The Law Society
  - Resolution
3. The proposals in this briefing are also endorsed by:
  - Family Law Bar Association
  - Adoption plus
  - AFA Cymru
  - CoramBAAF
  - Family Futures
  - Kinship Carers UK
  - Prison and Advice and Care Trust
  - TACT

### **B. Proposals to extend the scope of legal aid in relation to special guardianship orders:**

#### **1. Government commitment:**

- a. 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 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.
- b. Within this note, we set out the specific changes that we consider need to be made in private family law, but also highlight the importance of reflecting these changes in public family law, to ensure family members and friends who put themselves forward in the context of care proceedings to consider taking on the long-term care of a child under a special guardianship order are not left without legal advice and representation.

## **2. Special guardianship – the context of current access to legal advice and representation:**

- a. Before going on to set out the changes that we consider necessary to be implemented, it may be helpful if we provide further context as to the current landscape for proposed special guardians in terms of access to legal advice and representation.
- b. **What is a special guardianship order?** A special guardianship order is a court order which:
  - Secures a child's home with someone who is not their parent, on a long term basis (the order lasts until a child turns 18) and
  - Gives parental responsibility to that person.
  - It is often seen as having similarities to adoption, although whilst the birth parents' rights are restricted, they are not permanently ended. The concept of special guardianship relates to the exercise of parental responsibility and not to parenthood. This type of order is therefore particularly appropriate for kinship care arrangements, as the legal link to the birth family is retained.
  - Special guardians have the benefit of an enhanced form of parental responsibility, which they can use to the exclusion of all others with parental responsibility. They should still consult parents and others with parental responsibility about important decisions relating to their children, but ultimately can make the final decision themselves. There are some limitations to this, such as: a special guardian may not change the child's surname without the written consent of all others with parental responsibility, and may not take them out of the country for more than three months.<sup>2</sup>
- c. **The current difficulties for special guardians in terms of legal advice:**
  - At present, prospective special guardians have very limited access to legal advice and representation. This issue has been explored in detail by the Parliamentary Taskforce on kinship care. From 2018, a cross-party group of parliamentarians were supported by Family Rights Group to establish the Parliamentary Taskforce on Kinship Care. Operating between 2018 and 2021, the Taskforce aimed to raise awareness about, and support for, children in kinship care, and to highlight this option for children who cannot live with their parents. With legal and policy secretariat provided by Family Rights Group, the Taskforce's inquiry took extensive evidence from kinship carers, as well as children raised in kinship care. And in September 2020, the Taskforce published its report [First Thought: Not Afterthought.](#)
  - The report presented the Taskforce's key findings and set out recommendations for national government, local government, and other agencies, to deliver a vision for kinship care. In doing so, it reflected on the legal and practice framework relevant to kinship care and presented the Taskforce's key findings. The findings included that legal aid for prospective

---

<sup>2</sup> For more information, see Family Rights Group's advice sheet [2a\) Special guardianship: an introduction](#)

special guardians is extremely limited post-LASPO<sup>3</sup>, with many kinship carers finding themselves having to navigate the assessment and Family Court processes without any early or ongoing legal advice and representation:

*‘The key point made repeatedly to the Taskforce was that had these carers had access to legal advice before the orders were made, they would have been able to weigh up the pros and cons of all types of order and related support...Without legal advice, many carers simply do not understand the legal ramifications of the order that they are entering into and so cannot make the best decision for the child and their family.’*

The type of legal order that a kinship carer has will have long term ramifications for the child and the family, including the support they can access. Limited access to legal advice can have a significant, lasting impact – for example, 30% of kinship care respondents to a September 2019 survey by Family Rights Group<sup>4</sup> concluded the child was not subject to the right type of final legal order. Even where respondents felt the right order was in place, many had concerns about the type and level of support that they and the child were receiving under the order. In addition:

- 74% of respondents felt they had not had sufficient information about legal options to make an informed decision when they took on the care of their kinship child.
  - 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 children’s services, 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.
- In addition to this report, in 2019 the Nuffield Family Justice Observatory published a report: *“Special guardianship: a review of the evidence”*<sup>5</sup> 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.”*

---

<sup>3</sup> Under the [Legal Aid Sentencing and Punishment of Offenders Act 2012 \(LASPO\)](#), virtually all private family law issues were removed from the scope of legal aid. There are limited exceptions to this, including where the applicant for legal aid has evidence of either domestic abuse, or child abuse by the person who will be the respondent in the case. This ‘gateway evidence’ will bring the case back into scope for legal aid. However, the applicant for legal aid still then needs to pass a means test and a merits test. Where a kinship carer or prospective kinship carer is seeking a special guardianship order in private law proceedings, they must be able to provide such gateway evidence in order to secure legal aid.

<sup>4</sup> [The highs and lows of kinship care: analysis of a comprehensive survey of kinship carers 2019](#)

<sup>5</sup> <https://www.nuffieldfjo.org.uk/files/documents/NuffieldFJO-Special-Guardianship-190731-WEB-final.pdf>

*“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.”*
- The findings of these reports highlight that proposed special guardians need greater access to legal advice in order to ensure they understand the implications of the order they are agreeing to, their rights and, crucially, the children’s entitlement to support from children’s services. The limitations of access to legal advice emanate from both the private law scenario, and within the context of care proceedings and so it is important that any changes to legal aid are reflected in both cases.
- The Taskforce has now been succeeded by the [All-Party Parliamentary Group \(APPG\) on Kinship Care](#), set up in March 2021, which is taking forward the Taskforce recommendations.
- 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 note), the merits test, and if they are able to provide 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.
- In public law proceedings, most proposed special guardians do not receive legal aid within the context of the proceedings. Where children’s services have 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 children’s services departments 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 agreement from children’s services to cover legal costs.
- If children’s services do 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.

### **3. Proposed legal aid changes:**

- a. **Cases that are public law i.e. where children’s services 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 are entitled to non-means, non-merits tested legal aid.***

- i. Following a potential kinship carer having a positive initial/viability family and friends care assessment by children's services:
  - 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.
- ii. Following a potential kinship carer receiving a negative 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<sup>6</sup>.
- iii. Following a positive full special guardianship assessment children's services, 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 either as:
    - an intervener. Or
    - as a full party to the proceedings<sup>7</sup>

the precise basis on which they are involved in the proceedings (as intervener or party) being determined by what is most appropriate in all the circumstances of the case.

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 1407<sup>8</sup>.

- Where the full assessment is negative, that non-means, but merits tested legal aid should be available for advice on the proposed special guardian to challenge that assessment again either as:
  - an intervener. Or
  - as a full party to the proceedings

---

<sup>6</sup> NB: It is the position of the Law Society that in this scenario of a negative assessment, the kinship carer should be entitled to non-merits tested legal aid in the following scenarios:

1. Where the children are already living with the kinship carer and this negative assessment may mean that they may be removed from their current placement.
2. Where kinship carer will face difficulty in challenging a negative assessment in person (for example – but not necessarily limited to – where they suffer from a learning difficulty, there is a language barrier or where the kinship carer is deaf)

<sup>7</sup> An application for intervener and party status is made under the Family Procedure Rules 2010, r 12.3 (3) and (4).

<sup>8</sup> Re P-S [2018] EWCA Civ 1407 - <https://www.bailii.org/ew/cases/EWCA/Civ/2018/1407.html>

the precise basis on which they are involved in the proceedings (as intervener or party) being determined by what is most appropriate in all the circumstances of the case.

- b. **Private law cases where care proceedings have not been issued *nor have children's services initiated the formal pre proceedings process*** (although note, the child may be subject to child protection procedures or already be living with the kinship carer due to safeguarding concerns about the child's welfare or parent not be in a position to care for the child e.g. in prison and they now want to formalise the living arrangements)

- i. Currently a kinship carer can get means and merits tested legal aid for legal advice and representation if they provide 'gateway evidence' in support of the legal aid application (e.g. the child is on a child protection plan or there is a letter from children's services confirming the concerns and reasons why they may support the child moving to live with the kinship carer).

However, some family members will not have the relevant gateway evidence because children's services have, for example, decided that as long as the child is living with them then that child does not meet the threshold of a child protection plan.

An additional problem that arises in relation to means testing (further detail below) is that many kinship carers own their own home or have a small pension so don't meet the means requirements.

- ii. We therefore 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 children's services of their intention to apply for an order and guide them through an intensive assessment process.
- iii. Following a positive special guardianship assessment by children's services, 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.
- iv. 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).

#### **Discharge of special guardianship order/Contact with child under a special guardianship order**

- i. Funding should be made available to parents applying to discharge a special guardianship and to both parties for child arrangements/contact disputes between the parent and special guardian. This would be on a means and merits tested basis, reflecting the process in discharge of care order proceedings.
- ii. Where an application has been made to discharge a special guardianship order, the special guardian should be entitled to legal aid as a respondent on a non-means tested but merits tested basis.

#### **4. Why non-means legal aid for special guardians is essential:**

- a. We are concerned that if legal aid is only made available to those special guardians who meet the means requirements, a great many kinship carers will continue to remain without access to legal advice.
- b. This is because many kinship carers, particularly older carers including grandparents, have limited income, but own their home, or have a small pension. 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.

#### **Proposals to extend eligibility for non-means legal aid for parents and those with parental responsibility who wish to oppose applications for placement and adoption order applications**

##### Government proposal:

- The Legal Action Support Plan confirmed that Government would also bring forward by summer 2019 proposals to extend eligibility for non-means tested legal aid for parents, or those with parental responsibility, who wish to oppose applications for placement orders or adoption orders in public family law proceedings, to bring these in line with care and other orders having similar effect classified as “Special Children Act 1989 cases”. In both these cases the Government also committed to bring forward proposals to provide a less stringent merits test, equivalent to the merits test currently applicable in “Special Children Act 1989 cases”.
- We would be grateful to receive an update as to the progress of these proposals, and an expected introduction date.

##### **For further information contact:**

Caroline Lynch, Principal Legal Adviser – Family Rights Group  
[clynch@frg.org.uk](mailto:clynch@frg.org.uk)