coramBAAF
ADOPTION & FOSTERING ACADEMY

PRACTICE NOTE 75

Financial Support for Special Guardians (England)

Introduction

Special guardianship orders were introduced into family law by the Adoption and Children Act 2002. Between 2005 (when special guardianship orders were introduced) and 31 March 2019, 33,200 children in England and 2,145 children in Wales ceased to be in care due to a special guardianship order being granted. In addition, since 2011, 18,100 children in England and Wales have been made subject to a special guardianship order in private law proceedings. Since their introduction, special guardianship orders have become a significant new option for permanence, and the vast majority of these orders are made to family members.

In 2019, a comprehensive review for the Nuffield Family Justice Observatory (Simmonds and Harwin, 2020) concluded that special guardianship orders provide children with a safe, permanent home with family members when the court decides they cannot live with their birth parents. The review highlighted the importance of support. Finances are one element of that support, and low income remains a significant source of stress for many special guardian families. Analysis of the 2011 census indicates that compared to parents, relative carers are more likely to: have a lower income; be in social grades D and E; be living in social housing; and have more caring responsibilities. Kinship households are more likely to be located in the poorest areas and to be categorised as experiencing deprivation on one or more of the indicators considered (employment, education, housing or disability) (Wijedasa, 2017).

In developing policy and practices around payments to special guardians, it is essential that local authorities are mindful of the legislation and associated case law. Recent judgements are aligned in respect of the direction of travel, in recognising the costs involved in raising children and finding in favour of special guardians seeking parity with foster carers. These findings are also aligned with the recommendations of the Nuffield Family Justice Observatory, and best practice guidance issued by the President of the Family Division (Public Law Working Group, 2020).

The regulatory framework

The Special Guardianship Regulations and Guidance in England (2005)[1] and amended Regulations (2016)[2] set out a local authority's duty to arrange a variety of support services, undertake assessments and plan, monitor and evaluate their effectiveness. The support services that can be provided include counselling, advice, information and financial support. It is recognised that where a child is separated from their parents and is permanently living with alternative carers, their needs may be such so as to require access to services over and above what is available as a part of the universal provision of health, education and social support.

Regulation 6 of the Special Guardianship Regulations 2005 in England states that financial support may be payable to a special guardian, or prospective special guardian, to support the child for whom they are caring, and statutory guidance in England makes clear that 'financial issues should not be the sole reason for a special guardianship arrangement failing to survive' (Department for Education (DfE), 2016, para 37).

The statutory guidance in England makes clear that it is important that children who were not looked after before becoming subject to a special guardianship order should not be unfairly disadvantaged. Often the only reason that a child was not looked after in this way was that a relative stepped in quickly to take on responsibility for the child when the parent could no longer do so. Policies should be underpinned by the principle that support should be based on the needs of the child rather than their legal status (DfE, 2011).

Regulation 6(2) states that such support is payable only in the following circumstances:

> *(a) where the local authority consider that it is necessary to ensure that the special guardian or prospective special guardian can look after the child;*
>
> *(b) where the local authority consider that the child needs special care which requires a*

1 The Special Guardianship Regulations 2005.

2 The Special Guardianship (Amendment) Regulations 2016.

greater expenditure of resources than would otherwise be the case because of his illness, disability, emotional or behavioural difficulties or the consequences of his past abuse or neglect.

In its guidance, the DfE (2016, para 65) provides the following direction in relation to determining the amount of ongoing financial support:

> *In determining the amount of any ongoing financial support, the local authority should have regard to the amount of fostering allowance which would have been payable if the child were fostered. The local authority's core allowance plus any enhancement that would be payable in respect of the particular child will make up the maximum payment the local authority could consider paying the family. Any means test carried out as appropriate to the circumstances would use this maximum payment as a basis.*[3]

The term "core allowance" refers to the element of fostering allowance that represents the cost of maintaining the child, as distinct from the remuneration of the foster carers. As this is statutory guidance, the effect of this is that a local authority is required to follow the guidance 'with liberty to deviate from it where the local authority judges on admissible grounds that there is good reason to do so, but without freedom to take a substantially different course' (as quoted by Sedley J in *R v Islington LBC, ex p Rixon* (1997-8) 1 CCLR 119 at 123). This is considered further later in this document in the section on case law.

As well as regular financial support under Regulation 6, Regulation 3 permits non-means tested financial assistance for legal costs, to meet the child's therapeutic needs, or for the purpose of ensuring the continuance of the relationship between the child and the special guardian, including training, mediation and respite. Although Regulation 3 does allow cash payments to be used to purchase these services, they have to be monitored separately from Regulation 6 payments as this ongoing financial assistance is means tested.

Case law and Ombudsman findings

London Borough of Lewisham (2008)

Black J in *B v London Borough of Lewisham* (2008) EWCH 738 (Admin) considered practice in Lewisham, which had devised a scheme under which the special guardianship order allowance was paid at the same rate as an adoption allowance. The policy of linking the special guardianship order allowance to the adoption allowance was held to be unlawful. The judge found that paragraph 65 of the statutory guidance did not create an obligation on the local authority to pay the special guardianship order allowance at precisely the rate of the core fostering allowance, but did indicate that: 'those responsible for the guidance were thinking in terms of a close association between fostering allowances and special guardianship allowances' (para 49). The judge found that:

> *…those giving the guidance intended that the local authority's fostering allowances would serve as a ranging shot for the local authority's consideration of what their special guardianship provision should be or at least be held firmly in mind when fixing that provision.*

The local authority had failed to justify its 'radical departure' from the guidance, had 'failed to understand the central importance that paragraph 65 gives to the amount paid by way of fostering allowances', and had instead made 'a rigid link with adoption allowances which was not in accordance with the Guidance' (para 54).

Kirklees Council (2010)

The policy of Kirklees Council in 2010 was to pay a special guardianship order allowance at two-thirds of the rate at which it paid a fostering allowance. Mrs Barrett, a special guardian for her grandson, challenged the lawfulness of that policy.

The essential question for the court was whether the setting of a special guardianship order allowance at two-thirds of the core fostering allowance, but without deduction of child benefit, was a sufficient approximation to a core fostering allowance within paragraph 65 of the statutory guidance. In considering the matter, the judge noted that the more substantial the departure from the policy contained in the guidance, the more convincing should be the reasons advanced in support of that departure. He ultimately found in Mrs Barrett's favour, and concluded that:

> *Kirklees' decision of March 2006, and the policy enunciated in February 2007, to pay SGOA at two-thirds of core fostering allowance, involved a substantial departure from the relevant ministerial guidance. No sufficient justification for that departure has been provided. It follows that the decision and policy were, and the policy remains, unlawful.*

London Borough of Merton (2012)

In *R v London Borough of Merton*, the judge suggested that local authorities should use Fostering Network's

3 The DfE means test is not fit for purpose, as it does not take into account Universal Credit.

recommended minimum allowance[4] as a starting point for calculation, and that 'the decision to adopt a level of allowance for special guardians of two-thirds of the Fostering Network's minimum allowances was unlawful'. The judge also found that there is no basic obligation to pay every special guardian a financial allowance.

Southend-on-Sea Borough Council (2020)

The Local Government Ombudsman upheld a complaint in December 2020 that Southend-on-Sea Borough Council's practice regarding special guardianship order allowances was not in accordance with statutory guidance. The complainants had taken on the full-time care of their grandchildren and were initially paid a family foster carer allowance. Subsequently, they became special guardians and, after the making of the special guardianship order, the local authority paid them in accordance with its practice at that time, which was to reduce the allowance over a two year transitional period. The local authority paid special guardians, who were former family foster carers, the special guardianship order allowance at 75 per cent of the core fostering allowance for the first year, and then 50 per cent during the second year. The local authority explained to the Ombudsman that it genuinely thought that this was in keeping with the statutory guidance, which states:

> *The purpose of the two year transitional provision is to enable local authorities to maintain payments to foster carers who become special guardians, at the same rate as they received when they were fostering the child. This should give the family time to adjust to their new circumstances.*

Regulation 7 permits the "reward element" of a fostering allowance to continue to be payable to a former foster carer, if that payment is necessary to facilitate a child's foster carer to become their special guardian. Regulations set out that this payment can continue for a two year transitional period.

The Ombudsman found fault in the local authority's understanding of the statutory guidance in this respect, and they agreed to make backdated special guardianship order allowance payments for the two year transitional period. The local authority also agreed to review and amend its allowance practice so that it would be in accordance with the legislation, statutory guidance and case law.

Peterborough City Council (2021)

A similar issue arose in care proceedings involving Peterborough City Council. In an unpublished judgement, a judge opined that Peterborough City Council was misapplying Regulation 7 in their generic financial support plans for special guardians. Special guardians, who have been foster carers during the care proceedings, should not be given the impression that after two years, payments will automatically cease and only continue in "exceptional circumstances". The judge suggested that this amounted 'to a misrepresentation of their obligations and duties under the Regulations'.

> *I believe Peterborough City Council may be seeking to rely on Regulation 7 which deals expressly with remuneration for former foster parents. It cannot have been the Government's intention that just because a former foster parent (e.g. grandmother, who under an interim care order has been receiving fostering allowance) should be disqualified from obtaining financial support for the duration of the child's minority save in "exceptional circumstances".*
>
> *Regulation 7 permits an element of remuneration to be payable to a foster carer on the special guardianship needs basis. This could be more than the basic foster allowance, but that element of remuneration ceases after the expiry of two years under Regulation 7 unless the local authority considers its continuation to be necessary having regard to the exceptional needs of the child or any other exceptional circumstances.*
>
> *The intent of the Regulations is that financial support should be made available to special guardians to ensure that financial obstacles do not prevent people from taking on the role. A blanket policy to stop guardianship allowance to former foster carers after two years must be contrary to that objective and Government guidance. At best unreasonable, at worst unlawful.*

Conclusion

In developing policy and practice around payments to special guardians, it is essential that local authorities are mindful of the legislation and associated case law.

In considering their policy, local authorities should take account of the following principles.

- The provision of financial support must always begin with ensuring that prospective special guardians or special guardians are claiming all available benefits and tax credits to which they are entitled.

4 The Fostering Network no longer recommends minimum levels of allowances – for details, see: https://www.thefosteringnetwork.org.uk/policy-practice/policies/allowances/recommended-allowances.

- The support regulations do not allow local authorities to duplicate any payment that is available from other sources and, in assessing for financial support, the calculation must include any grants, benefits, allowances or resources available to the prospective special guardian or guardian.
- There is no basic obligation to pay every special guardian a financial allowance.
- In establishing its baseline for calculating support and determining the amount payable, the local authority should use its fostering allowance scheme. The special guardianship order allowance must be based on the *basic* fostering allowance that would be payable for the particular child – which is usually age related, with uplifts for disability or complex needs.
- The reward/remuneration element for former foster carers is not part of the basic special guardianship order allowance, but can be paid for or phased out over two years (from the making of the special guardianship order) if necessary to allow families time to adjust to their new circumstances.
- A local authority may continue to pay the remuneration element after this period if it considers its continuation necessary, having regard to the exceptional needs of the child or any other exceptional circumstances.
- Local authorities must review the financial support they pay the special guardian annually, and when there is a relevant change in their or the child's circumstances. If a local authority then proposes to reduce or end financial support, it must give notice (Reg 16 (3)) and allow the special guardian the opportunity for representation (Local Government and Social Care Ombudsman, 2018).

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