

NOTE ON THE CASE LAW
RELATING TO SPECIAL GUARDIANSHIP ORDERS

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The statutory framework is in sections 14A-14F of the Children Act 1989, to be read together with the Special Guardianship Regulations 2005 (as amended by the Special Guardianship (Amendment) Regulations 2016) and the amended Special Guardianship Guidance issued by the Department for Education and Skills on 29 February 2016.

The procedure in relation to the making of a Special Guardianship Order is set out in the Family Court Practice (the Red Book) in Procedural Guide D10.

What is an SGO?

1. A special guardianship order [“SGO”] is a private law order appointing one or more persons as a child’s special guardian granting them parental responsibility to the exclusion of any other person who has parental responsibility for the child (apart from any other special guardian).¹
2. An SGO can be made on the free-standing application of a party or potential special guardian, within existing proceedings² or of the court’s own motion.³

Procedural considerations: making an application vs of the court’s own motion

3. In *Re H (A Child) (Analysis of Realistic Options and SGOs)*⁴, no application had been made within the existing proceedings for an SGO. The Court of Appeal [“CoA”] indicated that without good reason, it is only **where all parties agree** that the court should be invited to make an SGO of its own motion on the basis that it could give rise to “procedural irregularity for lack of notice”.⁵
4. In *Re H* where the issue of the SGO had been raised at the issues resolution hearing [“IRH”] (and was recorded by way of recital to the IRH order), the CoA found that either the potential special guardian or the local authority⁶ on the special guardian’s behalf should have made an application for an SGO in advance of the final hearing.⁷

¹ pursuant to s.14A(1) and s.14C(1) Children Act 1989 [“CA1989”]

² s.14A(3) CA1989

³ s.14A(6)(b) CA1989

⁴ [2016] 1 FLR 86

⁵ [at para 26]

⁶ But as has been pointed out, it is not easy to reconcile this – the asserted ability of the local authority to make an application – with s.14A of CA1989, which allows an application to be made only by an “individual”, or with FPR 12.3.

⁷ [at para 26]

5. The key point when considering asking the court to make an SGO of its own motion is that it should be neither the normal nor the default process⁸ and in circumstances where it remains possible, an application should be made. The reasons for this primarily relate to procedural fairness. When an application is made rather than the court making an SGO of its own motion:
 - i. It enables the potential special guardians to be joined as parties to the proceedings and thereby access the documents within the proceedings as well as seek legal advice in advance of any determinative hearing; and
 - ii. From the parents' perspective, it enables them to cross-examine the local authority and the potential special guardians on the proposals.

The special guardianship report

6. If a court is considering whether to make an SGO it **must** direct a report.⁹
7. Without a report, the CoA has determined that the court will have no power to make an SGO.¹⁰
8. Where the court is considering making an SGO of its own motion and the bulk of the information that would be required for the report is already before the court but in a different form, the court may consider the manner in which its powers to request a report could be exercised. If much of the relevant information is already before the court, the local authority should be asked to file a report which would fulfil the terms of the statute¹¹ by:
 - i. providing any missing information; and
 - ii. setting out the remaining information in the form of cross-references to the information already before the court in other reports.¹²

What if a possible special guardian is identified late in proceedings?

9. In *Re P-S (Children)*, Sir James Munby P considered what the court and the parties should do in cases where a potential special guardian is identified "*late in the day*":
 - i. **The first question is whether the proposed special guardian is a "runner"?** The answer to this question should be "evidence-based, with a solid foundation, not driven by sentiment or ... hope" albeit that the assessment process need not be too lengthy and a viability assessment or something similar may suffice.¹³
 - ii. **Second, consider what further assessment, addressing which issues, is necessary to enable the judge to come to a properly informed conclusion?** The local authority also may wish to consider how long the assessment will take

⁸ *Re PS (Children)* [2018] 4 WLR 99 [at para 54]

⁹ s.14A(9) CA1989

¹⁰ *Re S (Adoption Order or Special Guardianship Order)* [2007] 1 FLR 819

¹¹ s.14A(8) CA1989

¹² See *Re S (adoption order or special guardianship order) (No 2)* [2007] 1 FLR 855 [at paras 14-16 and 18]

¹³ [at para 67]

and how much time is needed to test the proposed placement? If the process cannot be completed within 26 weeks, the CoA has reiterated that justice must not “be sacrificed upon the altar of speed”; there must be no question of abbreviating what is necessary in terms of fair process and proper evaluation.¹⁴

Special guardianship or another order?

10. The CoA in *Birmingham City Council v LR*¹⁵ emphasised that SGOs are not “to be embarked upon lightly or capriciously, not least because the status it gives the special guardian effectively prevents the exercise of parental responsibility on the part of the child’s natural parents, and terminates the parental authority given to a local authority under a care order (whether interim or final). In this respect, it is substantially different from a residence order which, whilst it also brings a previously subsisting care order in relation to the same child to an end, does not confer on any person who holds the order the exclusivity in the exercise of parental responsibility which accompanies a special guardianship order.”
11. In *Re S (adoption order or special guardianship order)*¹⁶ the CoA held that **each case must be determined on its own facts.**
12. In *Surrey County Council v Al-Hilli*¹⁷, Baker J suggested that special guardianship orders are particularly suitable for children who require a greater degree of permanence and stability but for whom adoption is not suitable.
13. The factors which are likely to be persuasive will differ with each case but could include:
 - i. the child's knowledge of his/her identity;
 - ii. the likelihood of future applications by a birth parent; or
 - iii. the importance of holding parental responsibility where there are challenging parental dynamics.
14. In *Re T (A Child: Adoption or Special Guardianship)*¹⁸, the CoA dismissed an appeal against the making of an adoption order for a child living in a family placement whose older half-siblings were being placed in the same home under SGOs. Describing *Re S* as the leading authority in this area, the CoA reiterated that the key question was what order would best serve the welfare of this particular child.
15. No matter the different factors at play, ultimately the order to be made is that which in all the circumstances of the case best meets the welfare needs of the child or children concerned.¹⁹
16. In considering the child’s welfare needs and weighing up each of the options available, the court must apply the s.1(3) CA1989 welfare checklist. The well-established

¹⁴ [at para 69]

¹⁵ [2006] EWCA Civ 1748 [at para 78]

¹⁶ [2007] 1 FLR 819

¹⁷ [2014] 2 FLR 217

¹⁸ [2017] EWCA Civ 1797

¹⁹ [at para 47]

principle of preference remains for “the least intrusive effective option” (per Peter Jackson LJ).²⁰

SGO made in one local authority where the child lives in another

17. This is a practical consideration which may or may not arise. Where the child is placed under an SGO with special guardians who do not live within the local authority who has been party to the proceedings, the key question is whether the child is “looked after” by that local authority. If they are, then that local authority remains the responsible authority for at least three years;²¹ if not then the responsible authority is simply that in which the child is living.²²

Post-SGO parental rights

18. In *Re S (adoption or special guardianship order)*²³, the CoA made it clear that the statutory scheme for making SGOs was designed generally to allow parents unrestricted access to the court after an SGO is made, unless there has been a direction under s.91(14) CA1989 (which places a bar on a person applying without permission).
19. After an SGO is made, a parent does not need to apply for the leave of the court to apply for child arrangement orders²⁴, including time spent, specific issue or prohibited steps orders.

Financial support for special guardians

20. In *B v London Borough of Lewisham*²⁵ Black J highlighted the importance of financial support where children are not living with their parents, including under SGOs: “as regulation 6 shows, the intention of the legislation and regulations about special guardians is that financial support should be made available to special guardians to ensure that financial obstacles do not prevent people from taking on this role.”²⁶

Discharging or varying an SGO

21. In *Re G (special guardianship order)*²⁷, the CoA provided guidance on applications to discharge or vary SGOs (under s.14D CA1989). The court clarified that the approach in relation to SGOs should be treated in exactly the same way as applications for leave to apply to revoke a placement order.²⁸ This means that the “significant change of circumstances test” (under s.14D applicable to SGOs) is treated the same as the “change of circumstances” test in relation to the revocation of placement orders.

²⁰ *Re W-P (Children)* [2019] EWCA Civ 1120 [at para 37]

²¹ Special Guardianship Regulations 2005, reg 5; after this responsibility may transfer to the local authority in which the child is living

²² *Suffolk County Council v Nottinghamshire County Council* [2012] EWCA Civ 1640 [at paras 18, 21, 22]

²³ [2007] EWCA Civ 54

²⁴ under s.8 CA1989; see *A Local Authority v YZ* [2006] 2 FLR 41

²⁵ [2008] 2 FLR 523 at para 57

²⁶ More information about financial support can be found at

<https://www.google.com/search?client=safari&rls=en&q=ombudsman+special+guardianship+financial+support&ie=UTF-8&oe=UTF-8>

²⁷ [2010] EWCA Civ 300

²⁸ under s.24(3) Adoption and Children Act 2002

22. The leading case in relation to the revocation of placement orders (which in light of the above also applies in relation to the discharge/variation of an SGO) is *M v Warwickshire County Council*.²⁹ Applying *M v Warwickshire CC*, a change of circumstances is a necessary but not sufficient condition to discharge an SGO. The existence of a change of circumstances gives rise to a **discretion** whether to grant leave or not.
23. In exercising the discretion both the child's welfare and the prospects of success of the proposed application should be weighed.³⁰

²⁹ [2007] EWCA Civ 1084

³⁰ *Re G* [at paras 13-14]