

ADOPTION AND CHILDREN ACT 2002

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 2 – Amendments of the Children Act 1989

Section 115: Special guardianship

271. Special guardianship orders are intended to meet the needs of children who cannot live with their birth parents, for whom adoption is not appropriate, but who could still benefit from a legally secure placement.
272. *Section 115(1)* inserts new *sections 14A to 14G* into the Children Act 1989 to provide for the new special guardianship order. The new sections provide for who may apply for an order, the circumstances in which orders may be made, the nature and effect of special guardianship orders, and for local authority support services for special guardians.
273. New *section 14A* provides for who may apply for a special guardianship order and the application process. The person in whose favour a special guardianship order is made is a ‘special guardian’. People may apply jointly to become special guardians. They need not be married. *Subsection (2)* provides that special guardians must be 18 or over and that the parents of a child may not become his special guardian. *Subsections (3) to (5)* make provision about who may apply for an order. A court may make a special guardianship order in respect of any child on the application of:
- any guardian of the child;
 - a local authority foster carer with whom the child has lived for one year;
 - anyone who holds a residence order with respect to the child, or has the consent of all those in whose favour a residence order is in force;
 - anyone with whom the child has lived for three out of the last five years;
 - where the child is in the care of a local authority, anyone with the authority’s consent;
 - in any other case, anyone who has the consent of all those with parental responsibility for the child;
 - anyone else, including the child, who has the leave of the court to apply.
274. Under *subsection (6)* the court may also make special guardianship orders in any family proceedings concerning the welfare of a child if they consider an order should be made, even if no application has been made. Family proceedings are defined in section 8(3) of the Children Act 1989 and include adoption proceedings under this Act. When considering making a special guardianship order the child’s welfare is the court’s paramount consideration, and the welfare checklist in section 1(3) of the Children Act 1989 applies.

275. *Subsections (7)* onwards set out the application process. Applicants must give 3 months' written notice to the local authority of their intention to apply for the order. The only exception to this is where a person has the leave of the court to make a competing application for a special guardianship order at a final adoption order hearing, in which case the 3 month period does not apply. This is in order to prevent the competing application delaying the adoption order hearing. On receipt of notice the local authority must then investigate and prepare a report to the court about the suitability of the applicants to be special guardians and any other relevant matters. Regulations may prescribe matters to be covered in the report. The local authority may arrange for someone else to carry out the investigation or prepare the report under *subsection (10)*. It is intended to use these arrangements to ensure a proper assessment process is followed for special guardians. The court may not make an order unless it has received a report covering the suitability of the applicants. It is intended to provide in secondary legislation that a CAFCASS officer is to be appointed in appropriate special guardianship proceedings.
276. New *section 14B* provides that before making a special guardianship order the court must consider whether or not to vary or discharge any other existing order made under section 8 of the Children Act 1989 (such as a contact order or residence order) and also whether a contact order (for example, to enable continued contact with the child's birth parents) should be made at the same time as the special guardianship order. The court may also on making the special guardianship order give leave for the child to be known by a new surname and give permission for the child to be taken out of the United Kingdom for any period longer than three months.
277. New *section 14C* sets out the effect of special guardianship orders. *Subsection (1)(a)* gives the special guardian parental responsibility for the child. Subject to any later order made under the Act, the special guardian may exercise parental responsibility to the exclusion of others with parental responsibility apart from another special guardian (*subsection (1)(b)*). An exception applies in those circumstances where the law provides that the consent of all parties with parental responsibility may be or is required (for example, the sterilisation of a child) (*subsection (2)(a)*). *Subsections (3) and (4)* provide that while an order is in force the child may only be known by a different surname or be removed from the United Kingdom for longer than three months with the consent of all those who have parental responsibility, or with the leave of the court.
278. The intention is that the special guardian has clear responsibility for all the day to day decisions about caring for the child or young person and for taking decisions about his upbringing. But the order retains the basic legal link with the birth parents, unlike adoption. They remain legally the child's parents, though their ability to exercise their parental responsibility is limited. They retain the right to consent or not to the child's adoption or placement for adoption (*subsection 2(b)*). *Subsection (5)* provides that the special guardian must also take reasonable steps to inform them if the child dies.
279. New *section 14D* provides that, unlike adoption orders, special guardianship orders can be varied or discharged on the application of:
- the special guardian;
 - the child's parents or guardian (they may only apply with the leave of the court and leave is to be granted only if there has been a significant change of circumstances since the order was made);
 - any step parent who has parental responsibility by virtue of *section 4A* (with the leave of the court, to be granted only if there has been a significant change of circumstances);
 - anyone who had parental responsibility immediately before the special guardianship order was made (with the leave of the court, to be granted only if there has been a significant change of circumstances);

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(c.38) which received Royal Assent on 7th November 2002*

- the child (with the leave of the court);
 - if a care order is made in respect of the child, the local authority can apply to discharge the special guardianship order;
 - anyone who has a residence order in respect of the child.
280. *Subsection (2)* provides that the court may, during any family proceedings in which a question arises about the welfare of a child who is subject to a special guardianship order, vary or discharge the order in the absence of an application.
281. New *section 14E* makes supplemental provisions, including allowing the court to set timescales for proceedings involving special guardianship applications.
282. New *section 14F* makes provision for local authority support services for special guardians, children subject to special guardianship orders and others. Each local authority must arrange to provide support including counselling, advice and information, and such other services as are prescribed in regulations (*subsection (1)*). *Subsection (2)* provides that the power to make regulations under *subsection (1)(b)* is to be exercised so as to secure that local authorities provide financial support. Regulations will be made prescribing the circumstances where local authorities must, at the request of special guardians, children subject to special guardianship orders, their parents and other prescribed persons, carry out an assessment of that person's needs for special guardianship support services (*subsection (3)*). It is intended to use these regulations to ensure that local authorities put in place a range of support services to be available where appropriate for special guardians and children subject to special guardianship orders, their parents, and where appropriate, to others, which could include members of the birth family. *Subsection (4)* gives local authorities the discretion to carry out an assessment of need for support services at the request of any other person. *Subsections (5) to (11)* govern the assessment process and, where support services are to be provided, the arrangements for their provision. As with adoption support services, the needs assessment may be carried out at the same time as an assessment of that person's needs for any other purpose (*subsection (10)*). Again, the intention is to facilitate joined up planning and provision of public services support. There is provision for local authorities to delegate assessments and the provision of special guardianship support services to other local authorities or prescribed persons (*subsection (9)*).
283. New *section 14G* obliges every local authority to establish a procedure for considering representations (including complaints) made to them in respect of special guardianship support services by those eligible to receive the services. *Subsection (3)* provides that in considering representations local authorities must follow any regulations made by the Secretary of State. It is intended to use these powers to require authorities to establish complaints procedures for special guardianship support modelled on the revised Children Act 1989 complaints procedure to be established under section 27 as amended by *section 117* (paragraphs 290 to 295).
284. *Subsections (2) to (4)* of *section 115* amend sections 1 and 5 of the Children Act 1989. *Subsection (3)* amends section 1 to apply the welfare checklist to special guardianship applications. *Subsection (4)* amends section 5 to make provision about the appointment of guardians for children after the death of a special guardian.
285. Further provision about special guardianship is made in Schedule 3. Schedule 3 amends the provisions added to the Children Act 1989 by the Children (Leaving Care) Act 2000 to place a duty on local authorities to consider whether to provide advice and assistance to former looked-after children aged between 16 and 21 subject to special guardianship orders, including support for employment, education and training. Where the authority determines the child is in need of advice and assistance that the special guardian cannot give him, the authority is placed under a duty to advise and befriend him and may also provide him with assistance, for example in respect of education and training.

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286. [Schedule 3](#) also provides that the making of a special guardianship order discharges any existing care order. However, if the need arises, a care order or a residence order may be made while a special guardianship order is in force. If made, the special guardianship order is not automatically discharged but the local authority concerned or person in whose favour the residence order is made will have the right to apply for discharge or variation of a special guardianship order by new *section 14D*.