



Residential Care Review: Call for views

Response prepared by

Family Rights Group on behalf of the Kinship Care Alliance

Endorsed by:
Grandparents Plus
Kinship Carers UK
Siblings Together

December 2015

**For further information contact:
Bridget Lindley or Cathy Ashley
Family Rights Group
The Print House
18 Ashwin Street
London E8 3DL**

blindley@frg.org.uk
cashley@frg.org.uk

The Kinship Care Alliance

1. The Kinship Care Alliance is an informal network of organisations working with kinship carers (also known as family and friends carers) which subscribe to a set of shared aims and beliefs about family and friends care. Since 2006, members have been meeting regularly to develop a joint policy agenda and agree strategies to promote shared aims which are:

- a) to prevent children from being unnecessarily raised outside their family,
- b) to enhance outcomes for children who cannot live with their parents and who are living with relatives and
- c) to secure improved recognition and support for family and friends carers.

The Kinship Care Alliance is serviced by the charity Family Rights Group.

Family Rights Group

2. Family Rights Group, which drafted this response, is the charity in England and Wales that works with parents whose children are in need, at risk or are in the care system and with members of the wider family who are raising children who are unable to remain at home. Our expert advisers, who are child welfare lawyers, social workers, or advocates with equivalent experience, provide advice to over 6000 families a year via our free and confidential telephone and digital advice service. We advise parents and other family members about their rights and options when social workers or the courts make decisions about their children's welfare. We also campaign for families to have a voice, be treated fairly and get help early to prevent problems escalating. We lead the Kinship Care Alliance and champion Family Group Conferences and other policies and practices that keep children safe in their family network.

3. This submission focuses on the fourth question posed in the call for evidence: "whether there are better alternatives for some of the children who are currently in residential care". We have addressed this both in relation to the point when children enter care and when they are already in care and may move to residential care from say a previous foster care placement. Family Rights Group is also making a separate submission to the review from the Your Family Your Voice Alliance.

The benefits of kinship care as an alternative to a residential placement

4. The Kinship Care Alliance believes that the child's wider family should always be explored as the first placement option for children who cannot live at home. This is consistent with both research evidence and the law:

- A number of research studies of kinship care arrangements have demonstrated that, despite having suffered similar adversities to children entering the care system¹ and being raised by carers who receive little, if any, support,² most children in kinship care are doing significantly better than children in unrelated care³ – in particular they feel more secure and have fewer emotional and behavioural problems and are also doing better academically. These positive outcomes suggest that kinship care should be the preferred arrangement for many children who cannot stay safely at home with their parents. It also appears to be the arrangement that is most likely to keep siblings, who cannot live with their parents, together.⁴
- Section 22C Children Act 1989 places a duty on the local authority to place a looked after child with a suitable parent, but if there are none, then in the most appropriate placement, with

¹ Farmer and Moyers (2008) Kinship Care: Fostering Effective Family and Friends Placements London, Jessica Kingsley; & Hunt, Waterhouse and Lutman (2008) Keeping them in the family: Outcomes for children placed in kinship care through care proceedings London, BAAF

² Farmer, E and Moyers, S (2008) Kinship Care: Fostering Effective Family and Friends Placements (Jessica Kingsley Press)

³ Selwyn et al (2013) The Poor Relations? Children & Informal Kinship Carers Speak Out (University of Bristol)

⁴ Ashley & Roth (2015) What happens to siblings in the care system? <http://www.frg.org.uk/images/PDFS/siblings-in-care-final-report-january-2015.pdf>

preference being given to suitable relatives, friends and other connected people who are approved as foster carers;

- Section 6 of the Human Rights Act 1998 makes it unlawful for any local authority to act in a way which is incompatible with an individual's rights under the European Convention. The key rights in child welfare practice are
 - Article 6: the right to a fair hearing/decision-making and
 - Article 8: the right to respect for family life. This is not an absolute right.

These rights apply equally to adults and children, hence the local authority should explore and identify suitable family placements for looked after children before considering alternative placements, including residential care. However there is a wide variation in practice in how suitable wider family members are identified and assessed, with the result that sometimes such placements are overlooked.

Identifying kinship carers before, or when, children enter care

5. Given the importance of timely decision-making for vulnerable children (including the 26 week timescale for care proceedings), the effective engagement and identification of suitable potential carers in the wider family at an early stage is essential if the right balance is to be struck between ensuring that the child's short and long term welfare needs are met and that their and their family's rights to family life are respected. Statutory guidance (Court orders and pre-proceedings, 2014)⁵ supports this by saying:

- It is important wider family are identified and involved as early as possible as they can play a key role in supporting the child and helping parents address identified problems. Where problems escalate and children cannot remain safely with parents, local authorities should seek to place children with suitable wider family members where it is safe to do so (para 22).
- Enabling wider family members to contribute to decision-making where there are child protection or welfare concerns, including when the child cannot remain safely with birth parents, is an important part of pre-proceedings planning (para 24).
- Family group conferences (FGCs) are an important means of involving the family early so that they can provide support to enable the child to remain at home or look at alternative permanence options (para 24).

6. Whilst this guidance is very helpful, there is as yet ***no statutory duty requiring local authorities to explore wider family or offer the family a family group conference before a child becomes looked after***, only afterwards. This has led to wide variation in the practice of early family work. Moreover, there is no system for potential kinship carers to get free, independent legal advice, and many struggle to get the advice they need to make informed decisions about their legal options for taking on the care of a child. 80% of kinship carers who responded to the recent survey stated that when they took on the care of the children, they felt they did NOT know enough about the legal options and the consequences for accessing support, to make an informed decision (Ashley et al, 2015)⁶.

7. FGCs are an effective way of identifying potential carers within the wider family, including on a contingency basis if the parents have not yet been ruled out. They also give the family the opportunity to prioritise those that are identified and they enable the young person's views to be heard (with the support of an advocate, if the young person wishes). The earlier the FGC is offered, the sooner viability/suitability assessments can begin, reducing the chances of latecomers within

5

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/306282/Statutory_guidance_on_court_orders_and_pre-proceedings.pdf

⁶ Ashley C, Aziz R and Braun D (2015) Doing the right thing: a report on the experiences of kinship carers http://www.frg.org.uk/images/Kinship_Care_Alliance/151013%20Report%20on%20kinship%20carers%20survey.pdf

care proceedings. However, whilst there has been a growth in the use of family group conferences, with 76% of local authorities in England now running or commissioning an FGC service⁷, only a small minority of authorities have a policy to offer an FGC **to all families** prior to proceedings. Two thirds of local authorities that run or commission an FGC service, are running less than 50 FGCs a year. Moreover, a number are now closing or being scaled down, or the principles upon which they work are being compromised as a result of funding cuts. This means that many families are not offered a FGC before their child enters care or care proceedings are commenced. Furthermore, there is also no national requirement for FGC services to be accredited hence the standard of FGC practice can vary in terms of how FGCs are delivered.

8. There is a further obstacle to engaging wider family at an early stage: currently there is no standardised system for assessing whether or not an identified family member is suitable enough to be assessed, known as a **viability assessment**. Viability assessments are regularly used to rule identified family members in or out as potential carers. This is deemed appropriate by the courts provided they are undertaken with a 'sufficient degree of rigour'⁸. However, the current lack of consistency in how they are conducted has again led to a wide variation in practice with some family members being ruled out on the basis of no more than a fifteen minute phone call. Family Rights Group has received considerable support from practitioners and from the President of the Family Division for their proposal that there should be minimum standards for such assessments with which local authorities would need to comply in order to fairly assess whether or not a family member is a potentially realistic option to care for the child. The paper in Appendix A outlines Family Rights Group's proposal to develop a viability toolkit, which is supported by the Family Justice Council. A high level working group has now been established to implement this proposal.

9. The young person should also be supported in an age appropriate way to have their views heard within all statutory decision making and review processes, so that their wishes about where they will live and who they wish to have contact with are taken into account. This should include the young person having access to an independent advocate if they wish.

10. We recommend that:

- a. There should be a new statutory duty on local authorities that when they consider that a child may need to become *looked after* or become the subject of care proceedings, they must, unless emergency action is required:
 - i. identify, and consider the willingness and suitability of any relative, friend or other person connected with the child, to care for them as an alternative to them becoming looked after by unrelated foster carers; and
 - ii. offer the child's parents/any other person with parental responsibility a family group conference, run by an accredited FGC service, to develop a plan which will safeguard and promote the child's welfare;
- b. Government should adequately fund free specialist independent legal advice and information services to family and friends who are considering, or have taken on a child. This should include the DfE urgently addressing the need for continued government funding of Family Rights Group's advice service (which is the only open access, free, specialist legal advice service for kinship carers) after March 2016.

⁷ Family Rights Group FGC mapping exercise (2015)

⁸ Re R (A Child) [2014] EWCA Civ 1625.

- c. The DfE supports the development of, endorses and helps disseminate, minimum standards for viability assessments.

Alternatives for children currently in residential care

11. The local authority is under a duty to review the case of every child who is looked after (in care or accommodation) at regular intervals⁹. The review must consider all aspects of the child's case, including contact arrangements with their parents, siblings and wider relatives, and whether the placement continues to meet the needs of the child.¹⁰ Guidance states that the child's placement should not be changed unless it is clearly in the child's best interests having consulted all parties¹¹. The child's Independent Reviewing Officer (IRO) who chairs their statutory review should address this at each review; and where the placement is considered not to meet their needs, an FGC should be offered to identify the most suitable family placement and to marshal support for such a placement from the family and from the local authority.

12. If a return to the family is explored, it is critical that there is a full assessment of the how the parent/potential carer can meet the child's needs and thorough preparation and planning of how their support needs will be met. This applies equally to children returning to live with their family under a care order and those who are leaving accommodation and returning to the care of their parent or another person with parental responsibility (for example a wider family member with a child arrangements order or a special guardianship order)¹². For example there could be a plan for a young person to live with a relative but continue to receive respite and specialist support from the residential setting.

13. **We therefore recommend that** guidance (including statutory guidance and the IRO Handbook, as relevant) should be amended so that:

- a. Where a residential placement is considered by the statutory review to no longer meet the child's needs, the IRO should ask the social worker to offer the family a FGC to explore whether there are suitable carers within the family before seeking an alternative non-family placement;
- b. For children who remain in residential care, the review should always consider in detail how contact arrangements can be supported to ensure the child has positive relationships with their parents, siblings and wider family; and
- c. When the local authority is assessing whether a child should return to their family, they should consider the continued use of specialist residential care and therapeutic services, as part of a package of support for the family placement.

Kinship care & support

14. Kinship care arrangements are generally inadequately supported. The kinship carers and the children they are raising who get the least support from local authorities are those children with highest levels of emotional and behavioural difficulties. The main determinant of access to

⁹ CPPCRR Reg 32

¹⁰ CPPCRR Reg 35 and Sch 7; Vol 2 guidance para 4.29-4.30

¹¹ Vol 2 Guidance para 4.30

¹² Reg 39(2) Care Planning and case review regulations 2010 plus associated guidance says before deciding to cease to look after C the responsible authority must (a) carry out an assessment of the suitability of the proposed arrangements for C's accommodation and maintenance when C ceases to be looked after by them; (b) carry out an assessment of the services and support that C and, where applicable P, might need when the responsible authority ceases to look after C; (c) ensure that C's wishes and feelings have been ascertained and given due consideration, and (d) consider whether, in all the circumstances and taking into account any services or support the responsible authority intend to provide, that ceasing to look after C will safeguard and promote C's welfare.

support is the child's legal status, in particular whether the child is in or out the care system, rather than their needs.¹³

15. Furthermore, we are extremely concerned that **proposed changes to benefits and tax credits** in the Welfare reform and Work Bill 2015 may deter some suitable family members from coming forward to take on the care of children who cannot remain with their parents and may put at risk existing kinship carer placements. By becoming the full-time carer of a child, often in an emergency, kinship carers face significant additional costs both in terms of equipment needed (eg: beds, school uniform, larger car) and maintenance costs. Their family size increases and can even double overnight. Unlike adopters, they are not entitled to a period of paid leave for the children to settle in. Many carers end up in severe financial hardship as a result of taking on the child.¹⁴ Nearly half have to leave their job or reduce their hours¹⁵ when the child comes to live with them. A recent survey of kinship carers found 49% of kinship carers had to give up work permanently to take on the children, thus becoming reliant on benefits.¹⁶ The same survey found that 57% of kinship care households received child tax credits and 30% received housing benefit. Further analysis of the survey revealed that 22% of kinship carer households have 3 or more children and 63% of these households currently receive child tax credit.

16. If the following proposals in the Bill are implemented, such carers or potential carers will have a substantial drop in household income which may prevent them from caring for the children:

- a. the limiting of tax credits to two children only. This will apply to the child element for disabled children;¹⁷
- b. the reduction in the benefit cap;
- c. new measures in the Bill that will require the carer of a child aged 3 or 4 to be subject to:
 - i. all work-related requirements;
 - ii. the carer of a child aged 2 to be subject to work-focused interview and work preparation; and
 - iii. the responsible carer of a child aged 1 to be subject to work-focused interview requirement;
- d. the provision that those making a new claim for Universal Credit can be disadvantaged in a way that is inconsistent with the approach applied through Tax Credits;¹⁸

14. **We recommend the following** in order to ensure that children who cannot live with their parents are adequately support to live in kinship care arrangements, when this is in their interests:

- a. That the Government introduces the following new statutory duties on local authorities, and funds them accordingly:
 - i. To publish a kinship care policy and have a named, designated senior council officer for kinship care;
 - ii. To establish and commission kinship care support services including equivalent preparation, training and provision of support groups to that provided to foster carers; and
 - iii. To assess the support needs of children in kinship care who cannot live with their parents.

¹³ Hunt & Waterhouse 2013

¹⁴ Hunt J and Waterhouse S (2012) Understanding family and friends care: the relationship between need, support and legal status (University of Oxford & FRG)

¹⁵ Ashley C (ed) Aziz R, Roth D and Lindley B (2012) Understanding family and friends care: the largest survey (Family Rights Group)

¹⁶ Ashley C, Aziz R and Braun D, 2015, Doing the right thing: A report on the experiences of kinship carers (FRG)

¹⁷ The disability premium (the disabled and severely disabled child elements in Child Tax Credit) and an amount for each disabled child in Universal Credit will be protected regardless of the number of children in a family. However, the Child Element in Child Tax Credit and Universal Credit will only be paid in respect of two children in a family, even where the third child is disabled.

¹⁸ For Child Tax Credits claims made after April 2017, more than 2 children could be included *providing* they were born before April 2017. Conversely, for Universal Credit the 2 child limit will be imposed regardless of when the children were born (unless the Universal Credit claim is linked to a previous Child Tax Credit claim).

b. That the Government:

- Recognises that children in kinship care have often suffered similar prior adversities to those who are adopted, and introduces equivalent entitlements to support, including a kinship care passport and the extension of the following provisions:
 - i. Pupil Premium Plus
 - ii. Free 2 year childcare
 - iii. Priority school admissions
 - iv. Extension of post adoption support fund.
- Introduces a new period of paid employment leave for kinship carers who are permanently raising children, equivalent to that provided to adopters.
- Exempts kinship carers from Welfare Reform and Work Bill proposals including
 - i. The limiting of child tax credit to two children
 - ii. The benefit cap
 - iii. The extension of work conditionality rules to carers of children aged under 5.

There is an important precedent for these recommended exemptions: kinship carers have already been exempted from work conditionality requirements for a year after they take on the care of a child.¹⁹ This was a significant step towards recognising the particular circumstances that kinship carers face and the valuable contribution they make. It is also consistent with the Family Test which makes explicit reference to kinship carers. In our view similar exemptions are necessary here to maximise the chances of kinship care placements being successful as an alternative to residential care and to protect the human rights of the vulnerable children and families concerned.

¹⁹ Reg 91, Universal Credit Regulations 2013 <http://www.legislation.gov.uk/uksi/2013/376/regulation/91/made>

Appendix A: Proposal to establish a high level working group to develop National Minimum Standards and procedures for Viability Assessments

Background

Recent legal and practice developments have highlighted the importance of early identification of suitable wider family members who could care for the child where there is a possibility that they cannot safely remain with their parents. Statutory guidance (Court orders and pre-proceedings, 2014)²⁰ says:

- It is important wider family are identified and involved as early as possible as they can play a key role in supporting the child and helping parents address identified problems. Where problems escalate and children cannot remain safely with parents, local authorities should seek to place children with suitable wider family members where it is safe to do so. (para 22)
- Enabling wider family members to contribute to decision-making where there are child protection or welfare concerns, including when the child cannot remain safely with birth parents is an important part of pre-proceedings planning. (para 24)
- Family Group Conferences are an important means of involving the family early so that they can provide support to enable the child to remain at home or look at alternative permanence options (para 24).

Case law has also addressed the importance of early consideration of wider family members. Following *Re B (A Child)* [2013],²¹ in the case of *Re: B-S (Children)* [2013],²² the Court of Appeal held, amongst other things, that:

- orders contemplating non-consensual adoption are very extreme things, a 'last resort', 'only to be made where nothing else will do'; and
- the court can only reach such a conclusion that nothing else will do if it has considered evidence on all the options which are realistically possible, together with an analysis of the arguments for and against each option.

In the subsequent case of *Re R* [2014], the Court of Appeal clarified that *Re B-S* does *not* require every conceivable option to be canvassed – only those options which are "realistically possible" and it held that 'realistic' "does *not* require the further forensic pursuit of options which, having been properly evaluated, typically at an early stage in the proceedings, can legitimately be discarded as not being realistic." The court added that early initial viability assessments can properly be used to exclude wider family members at an early stage of the proceedings, provided they are carried out with "an appropriate degree of rigour" (para 64-67).

More recently, McFarlane LJ in *Re S* [2015] EWCA Civ 325 has highlighted the need for caution when a judge is invited to exclude parents or family members as potential carers before the final hearing. At paragraph 54 he said

"For an option to be regarded as not realistic requires the court to be in a position of some confidence and clarity that the option is plainly not one that would have any real prospect of being chosen if a full welfare evaluation of all the pros and cons were undertaken. Such an option would be one where its suitability to provide for the child's long term care is so far down the scale for any positive features that it may have to outweigh the established negative features."

Although in the context of *Re S*, McFarlane LJ was not referring to the quality of the assessment, it must follow from this that, for the court to be in a position of 'confidence and clarity', the judge must be certain that the initial assessment is sufficiently comprehensive and has been carried out in a fair manner.

²⁰

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/306282/Statutory_guidance_on_court_orders_and_pre-proceedings.pdf

²¹ *Re B (A Child)* [2013] UKSC 33

²² *Re B-S* [2013] EWCA Civ 1146

It is clear that wider family members must be explored and identified at an early stage in the case and that unsuitable wider family members can be ruled out as being unrealistic options, provided viability assessments are conducted with sufficient degree of rigour. However viability assessments have no statutory basis. They are practice tools that have been developed in an ad hoc way, with no national consistency, minimum standards or procedures. They can vary from a fifteen minute phone call to a full day of assessment with a detailed report.

Early viability assessments are clearly being used to rule out wider family members as being unsuitable, yet it is hard for those ruled out to challenge such conclusions because either:

- there is no judicial forum in which to challenge, for example, in accommodation cases;²³ or
- where there are care proceedings, the family member is not usually a party, hence they have no status to argue their case in court and instead have to rely on the parents to challenge for them or they simply disappear.

Family Rights Group believes that it is important to avoid such injustices and ensure that the opportunity for the child to be raised in their family network has been fully and fairly explored before they are placed permanently outside the family.

Proposal

In order to provide greater rigour and consistency in viability assessments, Family Rights Group proposes to set up a high level working group with other key stakeholders to develop a viability toolkit. This toolkit would be likely comprise, for example,

- a standardised viability assessment form, national minimum standards and procedures for viability assessments, which meet the expectations of the courts;
- guidance for social workers on conducting viability assessments including on the format/methodology and approach used, any limit on the number of family members who can have a viability assessment in any one case and conducting viability assessments in international cases; and
- a leaflet and on line resources for families explaining what viability assessments are and how they can get further advice about them.

We have canvassed this proposal with the President and McFarlane LJ, both of whom are very supportive. The President said this work should be undertaken as a matter of urgency. The DfE is also supportive and considers it may be relevant to the Special Guardianship review. The Family Justice Council supports the project and we believe that there is also considerable support for such a toolkit in practice. At the NAGALRO conference in March 2015, we raised this proposal and, through a show of hands of the 150 delegates, we received unanimous support for it. This view was echoed in a recent survey we undertook where we sought the views of practitioners through our informal networks (using Survey Monkey). The results of this survey are set out below:

In a period of 8 days in July 2015, 102 practitioners commented on their experience of at least 1000 cases over the last year. A quarter of those who responded to the survey had dealt with more than 20 cases involving viability assessments in the last 12 months. The respondents were as follows:

- social workers and social work managers (56)
- solicitors/barristers (15),
- guardians (7)
- independent social workers/assessors (7)
- Family Group Conference coordinators/managers (7),
- Independent reviewing officers (3),
- kinship care support teams (2),
- family members (2) and
- others (2)

²³ They can complain to the Ombudsman but only after they have exhausted the internal complaints procedures of the local authority, which is time consuming and therefore may be far too slow for the timetable for the child.

Their responses were as follows:

1. 92% thought there should be greater consistency in the way viability assessments are conducted. Common reasons given were that:
 - viability assessments are too brief, don't pick up on the essentials and/or are entirely reliant upon information in written files only with no contact with the potential carer;
 - there is a wide variation in practice between teams within the local authority and between local authorities, for example what is considered an acceptable age for a potential carer, how much information is required about finances, employment and understanding and knowledge of risks, what standard should be applied regarding offences and smoking, and what is the minimum required to pass/fail a viability – at present the assessor personal views may determine the outcome;
 - the current system feels unfair and is a 'postcode lottery'.

The small number who did not feel this toolkit was necessary said that this was because they had already developed a consistent document with consensus from all key local agencies including the courts.

2. The following methods/approaches to conducting viability assessments were identified (respondents could choose multiple answers here so their responses reflect their range of experiences in their caseloads)
 - Phone call only 35%
 - Assessor had undertaken at least one visit with no clear criteria/guidelines (52%)
 - Assessor had undertaken at least one visit with clear criteria/guidelines (63%)
 - Use of viability assessment template (68%)
 - Information for families about what to expect from a viability assessment (32%)
 - Other (8%) including that it was undertaken as a paper exercise only with no phone call or face to face meeting with the potential carer.
3. 62% said that viability assessments are routinely undertaken at the pre-proceedings stage.
4. 55% had undertaken viability assessments of relatives abroad, with 40% of these assessments being conducted by phone and 44% involving a visit. 61% used interpreters for these assessments, but 6% said they did not use interpreters and one said the wrong interpreter was used, making communication difficult.
5. 31% said that limits were imposed on the number of relatives who could be assessed as viable carers. In 67% of cases where there was a limit, this was decided by the local authority and in 17% of cases by the court. Those most common limit was between two and four family members. One commented that this was determined by time limits and another said it depended on the whim of the local authority. Another said there was no limit but that they ask the family to identify the three most viable relatives. A quarter said that they were aware of relatives being ruled out because of that limit.

This initial data suggests that there is a core problem of lack of consistency and fairness in the way viability assessments are conducted, that there is an appetite for change and also that there is good practice out there which can be built upon.

Family Rights Group, 10th August 2015