



THE RISE IN NON-STANDARD PRIVATE LAW APPLICATIONS: LATEST MESSAGES FROM RESEARCH Elizabeth Isaacs KC

This article considers the latest messages from research published in April 2023 about the rise in private law applications by people who are not parents, and also provides an update about the recent extension in legal aid for friends and family seeking special guardianship orders (in operation from 1 May 2023).

What is the latest research?

The Nuffield Family Justice Observatory has published a fascinating research project ('Uncovering private family law: Exploring applications that involve non-parents' – April 2023) <https://www.nuffieldfjo.org.uk/resource/uncovering-private-family-law-exploring-applications-that-involve-non-parents> analysing the types of orders being applied for each year in cases featuring people who aren't parents. A significant minority (10%) of private law applications each year, although usually involving separated parents, also feature people who are not actually parents. The research describes these cases as **non-standard private law applications**. The research explored the types of orders being applied for and the characteristics of the people involved and highlighted that this minority of cases is actually a very sizeable group. Around 5,500 such applications are made each year in England and about 300 in Wales. This is equivalent to around a third of the volume of public law applications for a care or supervision order.

The study was carried out by the Family Justice Data Partnership as a collaborative project between Lancaster University and Swansea University and investigated a total of 22,000 private law applications involving non-parents in England and Wales over a four-year period.

The research highlights the pressing need for the private law reform agenda to focus not just on separating parents, but also on the significant group of non-standard cases.

Who makes non-standard applications?

Overall the report paints a picture of diversity in the other 10% of private law applications.

This group of non-standard applications includes grandparents, aunts and uncles, siblings, step-parents, special guardians, foster carers, intended parents and putative fathers as applicant(s) and/or respondent(s). Parents can also be involved with such applications, either as the other party, or as a joint applicant or respondent with the non-parent.

About a quarter of non-parent applicants and respondents in the research study were aged over 60, and were mainly women.

Applications disproportionately involved individuals living in the more deprived areas of England and Wales, and overall adults from ethnic minority backgrounds in England were less likely to feature in non-standard applications than in standard applications (although it was acknowledged that levels of missing data prevented more in-depth analysis).

Which children are involved?

Around three-quarters (72%) of the non-standard applications involved a single child. This was a greater proportion than in standard applications (59%).

In both standard and non-standard applications in England and Wales, half of the children were girls.

On average, children in the non-standard applications were slightly older than in the standard applications, and a greater proportion were over 10 years old.

What kind of applications are being made?

A diverse range of orders were applied for in the non-standard cases. These includes applications for child arrangements, special guardianship, adoption, parental responsibility and parental orders in surrogacy cases. However, most applications were for a child arrangements order.

How many cases involve professional reports and investigations?

In England, less than half of non-standard applications were made in a case that included a section 7 report, a section 37 report, or a rule 16.4 guardian. These factors were used as indicators of both possible welfare concerns, and child engagement and participation, and are often assumed to imply that cases are more complex. Overall, such reports and investigations were ordered less frequently in non-standard cases than in standard cases (45% compared with 52%). In cases where extended family members were making an application for a 'live with' order, one or more of these indicators was present in just 38% of cases.

Overall, a lower proportion of non-standard applications had a section 7 welfare report ordered (36% compared to 47%), although more were carried out by the local authority (14% compared to 10%).

A greater proportion of non-standard applications were in cases where a guardian was appointed to independently represent the interests of the child (8% compared to 5%).

What are the messages from this research?

The research confirms that the current programme of reform focuses almost entirely on the experiences and needs of separating parents. The research highlights the substantial number of cases that sit outside this group, and the need for future reforms to properly engage with these alternative circumstances, where there are potentially high levels of need and complexity. Particular focus needs to be paid to the following issues:

- Although a majority of applicants were grandparents, other relatives and step-parents (and intended parents in surrogacy cases) were also identified alongside parents.
- The non-parent applicants tended to be older and less ethnically diverse than parents in standard applications.
- A greater proportion of applicants were women.
- A greater proportion of applicants lived in more deprived areas.

- Many of the cases demonstrated an element of overlap with public law, with around 38% falling into this group and a further 37% indicating that they might fall into this group where the court is asked to make orders to confirm arrangements for children who appear to be being cared for away from their parents.
- Although the 'overlap cases' are dealt with as private law, they also potentially involve background child protection concerns.
- Given the substantial number of families involved in the 'overlap cases' each year, careful thought needs to be given to the impact of cases being dealt with in the private law system, rather than the public law system. Possible factors to consider include whether the child is automatically represented, the level of scrutiny, eligibility for public funding by the adults concerned, and potentially what level of long-term support is offered to children and their families.
- There is currently no clear pathway for the 'overlap cases' through the court system, which needs to be considered given the differences with standard private law cases.
- The usual ways in which the courts consider welfare concerns and also enable children's voices to be heard in private law proceedings was less evident in the non-standard cases than the standard cases. The research suggests that this is still worthy of further exploration.
- The involvement of non-parents suggests more complex welfare considerations, especially in cases where the court is being asked to make orders to confirm arrangements for children being cared for away from their parents. The research suggests that further research is needed to understand the role of local authorities, the information recorded and the experiences of those involved.

The latest Government support for special guardians

Until recently, legal aid was only available for Special Guardianship cases where the local authority was involved in submitting an application to remove a child from birth parents.

However, on 30 April 2023 the Government announced an extension to legal aid funding for legal advice and representation for people applying for Special Guardianship orders. The new provisions will also now provide funding for free legal representation to parents opposing Special Guardianship Orders in private law proceedings to ensure they have appropriate support and advice. The new provisions came into force on 1 May 2023.

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