

# Other Person Guardianship



Government of South Australia  
Department for Child Protection



Information for carers  
and birth parents

# Other Person Guardianship

## What is it?

Transfer of guardianship provides certainty of long term care to vulnerable children who cannot live at home with their parents due to parental incapacity, abuse, neglect or trauma.

Under section 38 (1) (d) of the *Children's Protection Act 1993*, the Youth Court can appoint up to two people, other than the Minister, as the legal guardian(s) of a child.

The Department for Child Protection's Other Person Guardianship Policy sets out the process for the transfer of guardianship responsibilities from the Minister to suitable carer(s) for the care and safety of a child until the child turns 18.

To express an interest in Other Person Guardianship (OPG) of a child, a person needs to have an established carer relationship with the child.

Foster and kinship carers seeking to become Other Person Guardians (OP Guardians) are encouraged to express their interest to the department.

The process involves a case direction discussion and an assessment, followed by an application to the Youth Court.

## How does it work?

Once the department receives an expression of interest from a foster or kinship carer, the process commences with a case direction discussion.

The case direction discussion includes the principal social worker, the principal Aboriginal consultant (if the child is Aboriginal), the child (where appropriate) and actively involves foster or kinship carers with everyone working together to determine the best long term outcome for the child.

OPG assessors are trained in the department's assessment tool, Step by Step. The tool provides a clear and transparent process to carers around the criteria and capabilities evaluated during assessment.

Most children under OPG orders are between 6 and 14 years old but there is no age limit for a carer to become a child's legal guardian.

The child keeps their birth identity following transfer of guardianship. The OP Guardians become responsible for ensuring the child maintains contact with their birth family, when in the child's best interest. OP Guardians are required to follow the conditions of the Youth Court order.

It is important to note that birth parents retain some decision making responsibilities including those relating to formal name change applications, funeral arrangements, and organ transplantation.

Carers may continue working with the foster care agency to provide emergency, respite, short or long term care to other at-risk children and young people once they become a child's legal guardian.

**You can find the expression of interest form on our website:**

[www.childprotection.sa.gov.au/opg](http://www.childprotection.sa.gov.au/opg)





## Considerations for carers

Carers provide an environment where a child can thrive and grow into a confident, secure and prepared young person, ready for life beyond guardianship as an independent adult from age 18.

Before going through the OPG application process carers should consider their ability to:

- care for the child into the future – is there anything that could adversely affect this?
- manage the sometimes turbulent adolescent years and how to access services and supports that are available through the community, government and non-government organisations
- provide care and emotional support to young people beyond 18 years of age
- provide on-going care if the child has a disability and needs care beyond 18 years of age.

Following the transfer of guardianship the child will no longer receive departmental case work or case management.

### The assessment process

Carers being considered for OPG are assessed using criteria that demonstrate their capacity to provide care for the child until they reach the age of 18.

### The care plan

The care plan is developed in consultation with the department, the carer, the child (where appropriate) and the birth family. It provides guidance to all parties about the child's current and future care needs. It also has the flexibility to allow for amendments as the child matures and their needs change.

The care plan covers preparation for:

- the child's health, educational and social needs
- any special needs (trauma or disability)
- how to maintain connections to their family of origin, community and culture - how will carers arrange for the child's contact with their birth family, including, where necessary, seeking assistance from the department?
- financial support (such as basic subsidy payments, special needs loadings) and how payments will be managed and reviewed
- how to manage if parties disagree – how will carers manage disputes and access services available to assist with this?

## Building a strong and healthy sense of identity

For Aboriginal children, and for children from culturally diverse backgrounds, the right to maintain connection with community and culture of origin is very important.

Aboriginal and Torres Strait Islander children are placed in out of home care in accordance with the Aboriginal Child Placement Principle. Considerations about the possibility of transfer of guardianship for an Aboriginal child will be discussed with the principal Aboriginal consultant, principal social worker, DCP Aboriginal staff, the carer and Aboriginal Family Support Services (AFSS). This ensures decisions are made in the child's best interest which includes maintaining the child's connection to extended family, community and culture.

The assessments for transferring guardianship for Aboriginal children will also require consultation with the principal Aboriginal consultant and where appropriate, extended family and community members.

The case direction discussions will include a focus on the carers' commitment to maintaining the child's connections to family of origin, community, country and culture.

The completed Aboriginal Cultural Identity Support Tool (ACIST) must demonstrate the ways the carers have and will continue to support the child over time to maintain their cultural connections. It details the nature and frequency of family contact, identifies key people, the roles they play, and other cultural connections and activities.

The care plan will reflect these agreements and will be a key focus.



## Culturally and linguistically diverse children

The needs of culturally and linguistically diverse children are addressed through the assessment and planning process.

A cultural identity plan detailing the way the carers will help the child maintain their connection with their culture and community of origin will be developed.

Traditions and cultural obligations, religion, beliefs, dietary requirements or dress observances, are fundamental for some cultures. It is important for the carers to acknowledge the child's origin and to commit to maintaining the child's connections with their community and traditions.

There are many places to find out more - see below for ideas:

- **Aboriginal Affairs and Reconciliation – Department of State Development** has a range of publications about Aboriginal affairs and Aboriginal culture. It also has a list of providers of cultural awareness training in South Australia
- **Aboriginal Health Council of South Australia** is the peak body representing Aboriginal health services in South Australia. It also has a number of publications and resources and provide relevant training
- **Tandanya** is managed by the National Aboriginal Cultural Institute and is a place where families can experience Aboriginal cultural expressions through visual and performing arts
- **Migrant Resource Centre of South Australia** provides support for the settlement and participation of people from diverse backgrounds through a community development approach
- **National Aboriginal Community Controlled Health Organisation (NACCHO)** is the peak body for Aboriginal health. It represents the needs and interests of the Aboriginal community
- **Tindale's Catalogue of Australian Aboriginal tribes** describes all Aboriginal language groups as published by Norman Barnett Tindale's in 1974 in his book *Aboriginal Tribes of Australia* <http://archives.samuseum.sa.gov.au/tindaletribes/>
- **Relationships Australia** provides a range of services and resources for both Aboriginal families and children from culturally diverse backgrounds
- **Multicultural SA** provides a list of service providers for multicultural communities, including personal and family support, health, education, etc. DCP through the Multicultural Community Engagement Team also provides training sessions about cultural awareness



## Contact with birth family

If the child already has established safe, regular contact with birth parents the arrangement continues following the transfer of guardianship to a carer. This includes agreements relating to contact with extended family as part of the overall care plan.

## Entitlements, allowances and grants

OP Guardians will continue to receive the basic subsidy payment, special needs loading (if relevant) and the education grant for the child following the transfer to OPG unless they no longer need this support.

OP Guardians can seek support from local community services, including child and family support, family counselling, health services, disability services and others.

All children will continue to have the same entitlements to services provided through Rapid Response as well as eligibility for a health care card, SA Dental services, Medicare card and centralised Ambulance cover.

## Commonwealth support

The OP Guardian is the child's legal guardian and may be eligible for support services from the Commonwealth Department of Human Services (Centrelink) such as child care benefit, child care rebate, youth allowance, etc. Youth allowance may be paid, regardless of the assets or income of the OP Guardians, as long as the young person meets the standard criteria (such as study or training).

To find out more about the supports available through Centrelink, visit [www.humanservices.gov.au](http://www.humanservices.gov.au) or contact 136 150.

## NDIS

Children may be eligible for National Disability Insurance Scheme (NDIS) supports. The National Disability Services Agency (NDIA) assesses the child's eligibility to access these supports. The OP Guardians must agree to any decisions regarding the contents of the plan and management of any funding provided. To determine the child's eligibility, visit [www.ndis.gov.au](http://www.ndis.gov.au) and complete the My Access Checker, which is a guide for information only.

## Funding for young people

Young people can apply for grants from both the Dame Roma Mitchell Trust Fund and the Transition to Independent Living Arrangements (TILA). To find out more about these grants visit [www.sa.gov.au](http://www.sa.gov.au) and [www.dss.gov.au](http://www.dss.gov.au).





## For carers and birth parents

As the child's legal guardians, the OP Guardians have day-to-day parenting responsibility for the child, including decisions about their health, education, holidays or child care and the child's emotional, social, cultural and spiritual needs.

The OP Guardians have authority over any activity that previously required parental (or DCP) consent and can sign all documentation.

The child has a common law right to refer to themselves by any name they choose. For example they may use their OP Guardians family name, but parental consent is required to officially change a child's name. If the child's parents do not consent to the child's official name change, and it is considered to be in the child's best interests, an application can be made to the Magistrates Court.

### **Court/Legal process**

For the initial hearing, where a child is 10 years or older, the child will be served with the papers for the commencement of the matter. However, it is common practice that dispensation of service will be sought to protect the child from information that is not age appropriate.

While it is preferable for the birth parents to give their consent to an application for transfer of guardianship, the absence of parental consent does not prevent an application progressing to court if it is assessed as being in the child's best interests.

Research and practice experience indicates that birth family objections are generally about a fear of loss of contact and connection to the child.

Concerns from the birth parents (and extended family) about a proposed change of guardianship should be discussed and addressed as part of the care planning process and can be eased by the care plan addressing issues such as family contact and dispute resolution.

The Youth Court makes the final decision about a guardianship order.

## Dispute resolution

A dispute resolution process could involve the birth parents, extended family and OP Guardian who agree to meet together to identify, discuss and resolve the concerns informally. If this does not work well, a more formal meeting can be arranged with a mediation service or with DCP whereby DCP will attempt to facilitate discussions.

An application to the Youth Court by any party to vary or revoke the existing court orders should only occur when all attempts to resolve the concerns have been exhausted. The party challenging the decision will need to refer the matter back to the Youth Court using their own legal support.

## Travel, passports and relocating

The OP Guardians are free to take the child on interstate and overseas travel without the permission of the department.

An OP Guardians can apply for a passport on behalf of the child. If it is not possible to obtain parental consent, the OP Guardians can request that consent be granted under the special circumstances provisions or for one of the other reasons stated in the *Australian Passport Act 2005*.

The Commonwealth Department of Foreign Affairs and Trade through the Australian Passport Office make the final decision about whether birth parents' consent is required.

Any plans to move interstate or overseas with the child when there is an access order in place (and impacts existing contact arrangements) would need to be carefully negotiated by the OP Guardians with the birth family, including an agreed plan that is in the best interest of the child and with which each party is satisfied.

If there is disagreement regarding travel or relocating, the dispute resolution process must be implemented. If a satisfactory outcome cannot be reached, the birth parent can take the matter back to court.

## Upon the death of a child or guardian

### A child

The birth parent(s) of a child under guardianship remain the child's legal parent(s) and therefore have the right to make decisions upon the death of their child. Decision regarding donation of organs revert to the senior available next of kin. Funeral and burial rights are derived from common law and will revert to the senior available next of kin. Senior available next of kin means (in order of priority):

1. A parent of the child
2. A brother or sister, who has attained the age of 18 years, of the child
3. An OP Guardian of the child (subject to legal feedback).

Where there is disagreement between the OP Guardians and the child's next of kin regarding funeral arrangements and/or disposal of the child's remains, DCP will endeavour to assist the parties to reach an agreement, at the request of one or both of the parties.

## An OP Guardian

Where a court order grants joint OPG to two persons, under an OPG order and one person passes away, the surviving person generally continues as the child's OP Guardian.

An OP Guardian has the right to nominate who they wish to continue caring for the child in their Will, in the event of their death. However, naming the person to take on custody doesn't automatically establish that person as a custodian – it simply indicates to the court the OP Guardian's preference.

When a court has removed guardianship or parental responsibility from a parent, it is not revived upon the death of the OP Guardian. Under the provisions of the *Child Protection Act 1993* the Youth Court can only make orders for guardianship if the court believes that the child is at risk. A new order should be made to the court to secure the child's care and protection if there is no parent able, willing and available to do so.

## Assistance with birth family contact

If the OP Guardians believe it is unsafe or unreasonable to manage the child's contact with their birth family, they can access a support service through The Australian Children's Contact Services Association.

The Children's Contact Services provide safe, neutral and child-focused venues for supervised visits and changeovers to occur between children and their parents and other significant people in the child's life. To find out more visit [www.accsa.org.au](http://www.accsa.org.au).

## What if the OPGs separate or divorce?

In the event of a separation or divorce, both OP Guardians continue to hold OPG responsibility for the child. As for parents in the general community, the OP Guardians need to consider the child's views and the circumstances of the separation or divorce, and negotiate future plans for the daily care and guardianship of the child. OP Guardians may, but are not required to, apply for orders from the Family Court.

If an OP Guardian subsequently remarries or re-partners, there is no legal provision for the new partner to be approved as a guardian to provide care for the child.

## Is OPG a pathway to adoption?

Transfer of guardianship is not a pathway to adoption – it is very different to adoption.

Adoption is administered under the *South Australian Adoption Act 1988*. Adoption permanently changes the legal status of the child. Adoption severs all rights of the birth parent who are no longer recognised by law as the child's parents.