Recent legislation has made adjustments to the legal framework for kinship care, and new regulations set out new forms of assistance and allowances. This briefing provides an overview of kinship care. It uses Census information and Scottish Government statistics to estimate the numbers of ‘looked after’ and ‘non-looked after’ children in kinship care. It sets out the different requirements for local authority assistance and briefly looks at the effect this has on social security benefits.

This briefing updates SPICe Briefings SB 12/05 and SB 08/03 and states the law as at April 2016.
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EXECUTIVE SUMMARY

Kinship care is the care of children by their extended family or a close friend of the family. It includes ‘formal’ care for children who are ‘looked after’ by the local authority. It also includes ‘informal’ arrangements made privately between family members without local authority involvement.

The 2011 Census suggests that there are between 11,000 and 17,000 children living in kinship care. Of these, around 4,000 are ‘looked after’ by the local authority. (‘Looked after’ children are those placed by the local authority in foster, residential or kinship care. It also includes those living at home, but with an element of social work supervision). The number of ‘looked after’ children placed in kinship care has been increasing and they now make up 27% of all ‘looked after’ placements.

The main policy developments over the last 10 years have been the increasing use of kinship care as placements for ‘looked after’ children and the provision of financial allowances by local authorities. Since 2014, there has been an increasing focus on supporting kinship carers of children who were previously ‘looked after’ or at risk of being ‘looked after’.

Where a child is ‘looked after’, the local authority must provide support, including a financial allowance. Since April 2016, support must also be provided if the child was previously ‘looked after’ or is at risk of being ‘looked after’. The actual amount provided is at the discretion of the local authority. There is a policy agreement between the Scottish Government and COSLA that it should be on a par with payments to foster carers. The kinship allowance does not include fees paid to the foster carer. It will take into account the receipt of social security benefits by the kinship carer that foster carers are not entitled to. In practice therefore, the actual payments made to foster carers may still be different to those made to kinship carers. In the long term, the Scottish Government intends to introduce a national allowance.

In other circumstances, local authorities have discretion over whether to provide financial support.

The interaction between local authority allowances and the benefits system is complex. For example, where a child is ‘looked after’, the kinship carer, like foster carers, will not be entitled to the child element of Universal Credit. If they are getting a payment from the local authority for ‘accommodation and maintenance’, then they will not be entitled to Child Tax Credit. These issues do not affect kinship carers of non-‘looked after’ children.

Notwithstanding the considerable policy attention over the last ten years, a number of issues remain to be resolved concerning support for kinship carers. These include:

- The interaction of the benefits system with local authority allowances
- Variation in practice between local authorities
- Identifying with more certainty the level of unmet need amongst kinship carers of non-‘looked after’ children
WHAT IS KINSHIP CARE?

A kinship carer is a relative or friend who takes over the care of a child when their parents cannot look after them. For many children, there is no state involvement as the kinship care is a completely private arrangement between members of an extended family. In some cases the carers apply to the court for an order giving them some parental rights and responsibilities (Section 11 Order). Other children in kinship care may be ‘looked after’ by the local authority and placed with relatives or friends as an alternative to foster care. Kinship carers may offer to look after a child or they may be asked to do so by social workers. Where there is a crisis situation they may have very little time to prepare for caring for children.

Kinship care has some similarities with fostering in that it offers an alternative to residential care for children who cannot live with their parents. However, a fundamental difference is that kinship carers are offering to look after a particular child rather than providing placements for any children requiring care. They therefore provide something which is between the public intervention of local authority placements and private family care. Exactly where they are on this spectrum depends on the circumstances of the individual case. The degree of variation in such arrangements makes this a complex policy area.

LEGAL BASIS OF KINSHIP CARE

The level of support received by a kinship carer will often depend on the legal status of the child – in particular whether or not they are ‘looked after’ or have a ‘kinship care order’ (section 11 order) under the Children (Scotland) Act 1995 (the 1995 Act). There are a number of different ways in which a child can be in kinship care:

‘Looked after’ Children’
1. Placed by the local authority under s.25 and 26 of the 1995 Act, with the consent of the child’s parents. This would appear to be the most common basis for ‘looked after’ kinship care (see below p.13).
2. Placed by a Children’s Hearing under a Compulsory Supervision Order which states where the child is to live. s.83 Children’s Hearings (Scotland) Act 2011). (1,294 children in 2014/15, SCRA 2016).
3. Placed by a Children’s Hearing or a court under a number of short term arrangements. These include Child Protection Orders, place of safety orders, Interim Compulsory Supervision Orders. These must be followed up with a Children's Hearing which will decide whether a Compulsory Supervision Order is required.

Not ‘looked after’ but with Section 11/Residence Order or Guardianship
5. By the carer obtaining an order under s.11 Children (Scotland) Act 1995. This is a private law order under the 1995 Act and does not need to involve the local authority. For the purposes of the Children and Young People (Scotland) Act 2014, which deals with duties to provide assistance, these are called ‘Kinship Care Orders.’
6. Guardianship under s.7 Children (Scotland) Act 1995. This is where a parent has made provision in their will for their child to live with someone else after the parent's death

No statutory basis for placement
7. Under an informal agreement, with no court orders or guardianship granted by parent or local authority assessment or involvement. This group are the least likely to receive support from the local authority.
Where a child is ‘looked after’ by the local authority there are legal requirements regarding assessment, planning and payment of an allowance. See below p.14.

Where the child is not ‘looked after’ there are still duties for the local authority to provide support in certain circumstances. See below p.17.

Further details about how a child becomes ‘looked after’ are given in annex 1.

Making matters more complex is the fact that situations change for individual children and families. Children move in and out of local authority care and different types of placement. A child can be ‘looked after’ before, during or after any of these orders are in place. A child might become ‘looked after’ while they are already in a non-‘looked after’ kinship care arrangement. Or the child might be ‘looked after’ and kinship care might be the preferred option for a permanent placement. This permanent placement could be on the basis of a Section 11 Order, permanence order or adoption. This illustrates the fluidity of some children’s situations and that it is often misleading to think of them as being in one fixed legal category.

**POLICY BACKGROUND**

Government policy recognises the value of kinship care, stating that:

"The Scottish Government recognises the important role played by kinship carers in providing secure, stable and nurturing homes for children and young people when they are no longer able to live with their birth parents. We believe that kinship carers who take on this responsibility are providing a valuable service and should be supported in carrying out this role." (Scottish Government, Kinship Care online)

The Scottish Government funds advice services to assist all kinship carers, but the focus of policy and regulation is on those caring for children who are either currently ‘looked after’, have previously been ‘looked after’ or who are at risk of becoming ‘looked after’.

In 2007, a kinship and foster care strategy had sought to "promote kinship care as an important part of the range of care available to ‘looked after’ children" (Scottish Government and COSLA, 2007a) Reflecting this approach, the 2007 Concordat between the Scottish Government and COSLA included an agreement to pay an allowance to kinship carers of ‘looked after’ children and to treat them on an equal basis to foster carers (Scottish Government and COSLA 2007b).

The 2007 strategy also recognised the need to support informal kinship care, and therefore committed to:

- fund an advice service for all kinship carers
- ensure kinship carers receive the UK welfare benefits they are entitled to, and
- improve consistency in approach to discretionary payments made by local authorities

In 2009, regulations set out an approval process for kinship carers of ‘looked after’ children and provided for a financial allowance to be paid. Unfortunately, by treating them like foster carers, receipt of this particular allowance (when paid for accommodation or maintenance) disentitled kinship carers to Child Benefit and Child Tax Credit. Most local authorities therefore tended to continue to use other, discretionary, powers to pay allowances.

In relation to ‘looked after’ children generally, there has been a focus on improving routes to permanence. That is, improve the timescales and processes in getting a child settled in a permanent placement - whether with their parents, long term fostering, long term kinship care or...
adoption. As well as being an important part of ‘looked after’ placements, kinship care is also therefore an important option for a permanent placement once a child no longer requires to be ‘looked after’.

Recently the Scottish Government has extended the requirement to provide assistance to non-‘looked after’ children in kinship care. From April 2016, if the child involved was either previously ‘looked after’ or is at risk of being ‘looked after’, then the local authority must provide assistance. This includes information, advice and a financial allowance (see below p.17).

One of the main issues has been the persistence of local variation in approach to allowances, and continuing disparities between payments to kinship carers and payments to foster carers. Citizens Advice Scotland reported on this in 2010 (Dryburgh, 2010) as did the Equality and Human Rights Commission in 2015 (EHRC 2015). A working group on allowances had been established in 2013 but was put on hold later that year. In October 2015, local authorities agreed that kinship carers of ‘looked after’ children, and those on the edge of care, would receive a financial allowance on a par with foster carers. The Scottish Government provided £10m to fund this. (Scottish Government 2015b).

Explaining the length of time taken to implement the policy, first announced in 2007, the Scottish Government stated:

"The continued growth in overall numbers of ‘looked after’ children and young people, particularly in kinship care, posed a significant challenge throughout, particularly in the current economic climate. We had continuing discussions with COSLA and the UK Government about how we could best support kinship carers - so this announcement rights a historic wrong and ensures parity is achieved locally while Scottish Government and Local Authorities work on creating a national allowances scheme." (Scottish Government kinship care online)

Longer term, the policy intention is to create a national allowance for kinship carers of ‘looked after’ children and those entitled to kinship care assistance. The Scottish Government will establish a further working group to consider fostering and kinship care allowances which will "work to develop a sustainable and fair national allowance rate that local authorities can use to financially support ‘looked after’ children.(Scottish Government kinship care online). The intention is to also cover those entitled to assistance under Kinship Care Orders (Scottish Government, personal communication).
NUMBERS AND CHARACTERISTICS OF KINSHIP CARERS

Using data from the 2011 census suggests that there are between 11,000 and 17,000 children in kinship care. This wide range is due to there being 5,975 children whose status could not be ascertained because they live in large households (National Records Scotland, online table AT_0193_2011).

AGE AND ECONOMIC ACTIVITY

While kinship carers tend, on average, to be older than parents with dependent children, they are still generally below retirement age and a large proportion are working. The census shows that of the 10,971 children who could be identified as living in kinship care, two thirds (66%) were living with their grandparents (7,289 children). However, nearly three quarters (74%) of these children were with grandparents who were aged under 65 years of age. The chart below shows the proportion of children living in households according to the age of the household reference person. Taken as whole (grandparents and other relations), 45% of children in kinship care are in households headed by someone aged between 50 and 64 years of age. In comparison, children living with their parents were most likely (62%) to be in households headed by someone aged 35 to 49 years old.

Chart 1: % of children living with Household Reference Person in various age bands, by relationship to Household Reference Person.

![Chart 1](image)

Source: National Records Scotland, Census 2011, table CT_0147b_2011, commissioned by SPICe.

Nearly half of children in kinship care are in households headed by someone in employment compared to over four fifths of children generally (48% compared to 83%). Although only a small proportion of all children are in households headed by someone permanently sick or disabled, this is more common for children in kinship care (11%) than for those living with their parents (3%).

The chart below shows the proportion of children living in households according to economic activity of the household reference person. It compares those in kinship care with those living with their parents.
Chart 2: Children living in kinship care and with their parents, by economic activity of household reference person.

Source: National Records Scotland, Census 2011 Table CT_0147d_2011. Table commissioned by SPICe.
DEPRIVATION

The Census uses poor housing, unemployment, poor education and ill-health as indicators of deprivation. The vast majority (72%) of children living in kinship care are living in households that are deprived on at least one of these measures, compared to only 42% of children living with their parents.

Chart 3: Children living in deprivation\(^1\) by relation to household reference person.

Source: Scottish Census 2011, Table CT_0147a_2011. Table commissioned by SPICe from National Records Scotland.

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\(^1\) A household is deprived in a dimension if it meets the following conditions

- employment: a person in the household aged 16 and over who is not a full-time student is either unemployed or long-term sick or disabled
- education: no person aged 16 to 64 in the household has a highest level qualification of level 2 or above, or no person aged 16 to 18 is a full-time student
- health and disability: any person in the household has "bad" or "very bad" general health, or has a long-term limiting health problem or disability
- housing: the household's accommodation is either overcrowded (with an occupancy rating of -1 or less), is in a shared dwelling or does not have central heating
DISABILITY AND HEALTH

Although only a small minority of children are affected by long term illness or disability, this is more common for children in kinship care than for those living with their parents.

Nine per cent of children in kinship care are limited to some degree by long term illness or disability compared to 5% of children living with their parents (chart 4, below).

Chart 4: Children, limited by long term illness or disability, by relationship to household reference person.

Source: National Records Scotland, Census 2011, Table CT_0147e_2011, commissioned by SPICe.

There is a greater difference when the ill health or disability of the household reference person is considered. This may reflect the older age profile of kinship carers compared to parents. Over a third (35%) of children in kinship care are in a household headed by someone with ill-health or disability, compared to only 10% of children living with their parents (chart 5).

Chart 5: Proportion of children where household reference person has long term illness or disability, by relationship to household reference person

PROBLEMS EXPERIENCED BY KINSHIP CARERS

Citizens Advice Scotland (CAS) have been running an advice service for kinship carers since 2009. Almost all of the issues raised by kinship carers are about either welfare benefits or relationships. CAS found little difference in the need for advice for those caring for ‘looked after’ children compared with those caring for ‘non-looked after’ children (CAS 2014). Research by Mentor UK in 2013 also found that relationship issues dominate people’s concerns. They spoke to 75 kinship carers and 34 professionals, practitioners and stakeholders in Scotland. They found that kinship carers often had problems with children's challenging behaviours and issues with the child's birth parent, either because of aggression or resentment, or due to the impact of their unpredictable visiting patterns on the child. The study reported that:

"Although unanimous that they would do it all again “in a heartbeat”, kinship carers in our study made huge personal sacrifices: employment and social interactions; family and personal relationships; and health and finance." (Thurman, 2013)

The Scottish Government’s 2015 strategy on ‘looked after’ children stated:

"We need to ensure that kinship carers, like any other carers, have the support and skills that they need to deliver the best outcomes for their children. Children in kinship care may have experienced very similar situations to ‘looked after’ children, and both they and their kinship carer may struggle to deal with the consequences." (Scottish Government, 2015a, para 87)

TREND IN USE OF ‘LOOKED AFTER’ PLACEMENTS

The previous section looked at kinship care as a whole. Many of these children are ‘looked after’ by the local authority. Comparing the 2011 Census with Scottish Government statistics on ‘looked after’ children for that year suggests that between 7,000 and 13,000 children were in ‘informal’ kinship care and that around 4,000 were ‘looked after’ children, placed by the local authority.² (Table 2.2 Scottish Government 2016a, National Records Scotland Table AT_0193_2011).

Geographical Variation

As chart 6 below shows, there is a considerable difference in the proportion of children in kinship care in different local authorities. Not only does the prevalence of kinship care differ by local authority, so does the likelihood of it being a ‘looked after’ child placement.

Kinship care is most common in Dundee, Glasgow and West Dunbartonshire. In Glasgow, the majority of kinship care appears to be ‘looked after’ placements, whereas in West Dunbartonshire only a small minority are. Kinship care also appears to be more common in local authorities with higher levels of deprivation.

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² This SPICe estimate is based on comparing Scottish Government ‘looked after’ children statistics with census records. In July 2011 there were 3,910 “looked after” children placed with friends and relatives. Assuming that all of these were included in the census category of ‘children living with another relative without their parents’ (10,971), this suggests that there were probably around 7,000 children in informal kinship care. It also assumes that children living with unrelated carers are in foster care placements, as the number of foster care placements in July 2011 (5,068) is slightly larger than the total number of children recorded under this census category (4,283). If some foster placements were miscategorised under ‘related carers’, then the estimate for informal kinship care may be lower. (10,971 + 4,283 - 3,910 - 5,068 = 6,276). n.b there are also c.6000 children in the census whose kinship status is unknown.
Chart 6 below is an estimate of the proportion of the total under 18 population in each local authority who were living in kinship care in 2011. This is based on combining information from the Census and ‘looked after’ children statistics.

Chart 6: % of 0-18 year olds in ‘looked after’ and non-'looked after' kinship care, by local authority

Source: National Records Scotland, table AT_0193_2011, and Scottish Government 2012 table 3.3. SPICe analysis combining % of under 18 population living without their parents, but living with a grandparent or other relative and % of under 18 population in a ‘looked after’ placement with friends and families. Does not include children living with non-relatives without their parents nor the nearly 6,000 children whose kinship care status could not be ascertained in the Census.

Change over time

Until the late 1990’s, only around 1,000 ‘looked after’ children were in kinship care placements each year (generally less than 10% of all ‘looked after’ children).

Over the following 6 years the numbers of ‘looked after’ children increased, and numbers in kinship care placements increased even faster. By 2012, a quarter of all ‘looked after’ children were in kinship care placements. Since then the number of ‘looked after’ children has fallen (from a peak of 16,248 in 2012 to 15,404 in 2015). Kinship care numbers peaked slightly later, at 4,217 in 2014, and have fallen to 4,158 in 2015. In 2015, 27% of ‘looked after’ children were in kinship care. The chart below shows the number of ‘looked after’ children each year since 1987, and of these, how many were placed with friends and family i.e kinship care.
Chart 7: ‘looked after’ children and ‘looked after’ children in kinship care, 1987 to 2015

Sources: Scottish Government 2016a, table 2.2, Scottish Government 2013 table 1. n.b Data prior to 2002 includes category of ‘other community’ in addition to placements with friends and relatives. It will therefore be a slight overestimate of numbers for these years.

As noted, there are several routes through which children can become ‘looked after’. The main routes to so are under a Compulsory Supervision Order made by a Children’s Hearing, or through "voluntary measures" taken by the social work department under s.25 of the 1995 Act.

The increase in use of kinship care for ‘looked after’ children appears to have mainly been due mainly to its use under ‘voluntary measures' rather than by a change in practice in Children’s Hearings. In 2009/10 there were 1,399 children on compulsory supervision in kinship care. By 2014/15 this had decreased to 1,294. Over the same period, the total number of ‘looked after’ children in kinship care increased from 3,172 to 4,158. (SCRA 2016, Scottish Government 2016a).

It would appear that kinship care has become a much more popular choice of placement for ‘looked after’ children when they do not need compulsory measures via the Children's Hearing's system.

Some local authorities are far more likely to use kinship care than others, although almost all have increased their use of kinship care over recent years.

To illustrate this change, chart 8 below compares the proportion of ‘looked after’ children in kinship care placements by local authority in 2008 and 2015. The large increase in Scotland's largest local authority, Glasgow, is particularly noticeable. In 2008, Glasgow had 19% of its ‘looked after’ children in kinship care (570 children). By 2015, this had increased to 40% (1,358 children). In 2008, just under a quarter (24%) of all ‘looked after’ kinship care placements were in Glasgow. By 2015, this had increased to a third (33%).

In 2008, only three local authorities had 25% or more of its ‘looked after’ children in kinship care placements (Dundee City, Shetland and Midlothian). By 2015, this has risen to 12 local authorities, 7 of which had over 30% of ‘looked after’ children in kinship care.
ASSESSMENT AND PLANNING ‘LOOKED AFTER’ PLACEMENTS

The Looked After Children (Scotland) Regulations 2009 require that when a child becomes ‘looked after’ – without distinction as to the legal route – they should be assessed, a plan should be developed and, after a few months, a plan for a permanent placement made. The local authority must assess:

- the child’s short term and long term needs
- arrangements for when the child is no longer ‘looked after’ and
- whether the child should be placed with kinship carers (reg 4)

The guidance on the regulations states that "The child’s extended family and friendship network should normally be the first option considered for a potential placement" (Scottish Government 2011a, chapter 5.5)

An assessment should lead to a plan. Among other things, the child’s plan must include:

- details of the services to be provided to meet the child’s care, education and health needs (sch 1)
- the responsibilities of the local authority, the carers, the child and the parents
- the expected duration of the placement and arrangements for how it will be brought to an end, including return to the child’s parents or other suitable person (sch 2)

The requirements for a formal kinship care placement under Part V of the 2009 regulations include that before making a placement, the local authority must ensure that it is in the best interests of the child and that the carer is a suitable person to provide the placement. Some local authorities have dedicated kinship care panels. Guidance recommends that fostering
panels are used to make kinship care placement decisions. The information to be considered is set out in Schedule 3 to the regulations and includes:

- standard of living, past and present employment
- criminal record disclosure checks.
- parenting capacity and motivation in seeking the placement

Following assessment, an agreement is drawn up between the kinship carers and the local authority (Schedules 4 and 5). This includes:

- arrangements for the payment of an allowance to the carers
- arrangements for contact with the child’s parents
- agreements to co-operate with the local authority’s arrangements
- support and training for the carers
- arrangements for review of the placement
- agreement not to use corporal punishment
- agreement to allow the child to be removed if the placement is terminated
- the procedure for the kinship carer to make representations to the local authority

The guidance states that ‘looked after’ children in kinship care require as much support as those in foster care:

Schedule 5 relating to Regulation 12 starts with clear statements about the obligations of the local authority to provide support and training for kinship carers. These placements are likely to need at least as much support as that offered to foster carers both because the children frequently have comparable needs including issues around managing their behaviour and contact and also because concerns about any deterioration in birth parents’ circumstances are likely to have a direct impact on the child and may also be more keenly felt by kinship carers.

**PLANNING FOR PERMANENCE**

When a child becomes ‘looked after’ it is often intended as a temporary measure. Regulations from 2009 require that right from the start the child’s long term situation should be considered as part of the ‘Child’s Plan’. In reality, the length of time children are ‘looked after’ for is increasing. A recent Scottish Government strategy noted that:

"the numbers of children ‘looked after’ for more than three years doubled since 2004, which suggests permanence is not happening quickly enough for all children." (Scottish Government, 2015a).

Scottish Government policy is to reduce the number of children and young people on long-term compulsory supervision (i.e those that last over two years) by:

- Increasing the number of children and young people achieving and sustaining permanence through returning home, kinship care orders, permanence orders or adoption.
- Reducing the length of time it takes for children and young people to achieve permanence.

One option for permanence is kinship care, either on the basis of a Permanence Order or a Kinship Care Order.
"We are very clear that remaining or returning home should be the first option for permanence for children and young people [...] Where children cannot return to their family they need an alternative permanent and nurturing home, which should be underpinned by legal security, whether this is a kinship care order, permanence order or an adoption order." (para 69, Scottish Government 2015a)

Scottish Government guidance states that permanence planning should consider kinship care:

"The broadest interpretation of 'permanence planning' covers all options, with the aim of securing a stable living situation for a child which meets his or her needs for consistent, sustainable, positive relationships, normally best achieved within a family setting. The normal starting point for the local authority is assumed to be the maintenance or return of the child to their birth parents, or kinship carers if this is not appropriate." (Scottish Government 2011a, ch 3.3)

In particular, the guidance states that the permanence or adoption panel should ensure that:

"at the time of making the permanence plan, the potential of a kinship care placement has been fully explored." (Scottish Government, 2011a ch.9.11).

**Permanence Order**

Permanence Orders were introduced in 2009 under the Adoption and Children (Scotland) Act 2007. They are very flexible and are designed for where a child cannot be with his or her parents on a long term basis. It can be a prelude to adoption, but it can also be used as a long term placement.

A child with a Permanence Order remains ‘looked after’ by the local authority. The local authority takes on some of the parental responsibilities and rights, but these can also be shared with another person such as a kinship carer.

In July 2015, there were 1,461 Permanence Orders in place (not including those with authority to adopt) (Scottish Government 2016, Table 1.5). Children on Permanence Orders made up around 9% of ‘looked after’ children that year (although there will have been some overcount as children could be ‘looked after’ under more than one legal reason). There were 121 children with Permanence Orders with kinship carers (Scottish Government, personal communication).

**Section 11 Order/Kinship Care Order**

Another option for permanence is for the carer to apply to the court for a Section 11 Order under the Children (Scotland) Act 1995. In this case, the child would no longer be ‘looked after’. (A section 11 order is termed a Kinship Care Order for the purposes of providing support under the 2014 Act). The Scottish Government considers this a better option than remaining on a compulsory supervision order.

"The Kinship Care Order should be seen as the route to permanence where the kinship arrangement is intended to be a stable, long-term solution." (Scottish Government, 2015a).

The Scottish Government has stated that:

"The intention is to divert some children from being ‘looked after’, where it is not appropriate" (Scottish Government 2016c)
CHILDREN NOT ‘LOOKED AFTER’ BY THE LOCAL AUTHORITY

The previous section discussed ‘looked after’ kinship placements and the use of new Kinship Care Orders as a route to permanence. However a person may also have taken out a Section 11 Order on their own initiative, without local authority involvement. A person may be a kinship carer because they are the child’s guardian or because the situation has just evolved and there is no court order giving the carer parental rights. The arrangement might have come about in order to avoid having to become ‘looked after’ or, as discussed above, it may be a permanent arrangement following a period of having been 'looked after.'

Guidance from 2011 states that it is good practice for local authorities to monitor the support they provide to kinship carers of ‘non-'looked after’ children (Scottish Government, 2011a).

“Good practice indicates that whether or not a child is ‘looked after’, if they are cared for within a kinship arrangement and the local authority continues to have some level of role or responsibility, then the carers need the opportunity at intervals to have an acknowledged space to reflect on the impact on themselves of caring for the child and to express any needs for support and advice.”

The 2015, Scottish Government strategy stated that:

"We want to support those kinship carers able and willing to take on the responsibilities and rights of a parent and potentially avoid a complex and time-consuming involvement by statutory services where it is not required."

[...]

"We expect all local authorities to ensure that families who might benefit from the kinship care order are aware of the order and are supported to apply for it where appropriate." (Scottish Government, 2015a)

COURT ORDERS AND KINSHIP CARE ASSISTANCE

Section 11 Orders

Anyone "with an interest" has, since the 1995 Act, been able to apply for a Section 11 Order. The right to have a child live with them or otherwise determine their residence is a parental right that applies until a child reaches the age of 16. Particular types of order that can be made in relation to parental responsibilities and rights include:

- s.11(2)(1)(a) the right to have the child living with him or otherwise regulate the child’s residence. This right is restricted to children under 16 by s.1(7) which sets out parental rights.
- s.11(2)(c) to specify with whom a child under 16 should live
- s.11(2)(h) to appoint or remove a guardian of a child. Applies up to 18yrs.

As mentioned, for the purposes of providing kinship care assistance under the Children and Young People (Scotland) Act 2014, this is referred to as a Kinship Care Order. However, the order applied for in the court is still called a Section 11 Order.
Guardianship

There are two ways in which a person can become a child’s guardian. Firstly, under s.7 of the 1995 Act a parent may appoint a person to be guardian of the child in the event of the parent’s death. Secondly, a guardian can be appointed by the court under s.11(2)(h) of the 1995 Act. Following the 2014 Act, this would now be a Kinship Care Order, which can bring with it local authority assistance if the child was previously ‘looked after’ or is at risk of being ‘looked after’.

Kinship care assistance

Under regulations in force from April 2016, (SSI 2016/153) if a child is at risk of being ‘looked after’ or was previously ‘looked after’ then the local authority must provide:

- advice and information as well as financial support towards the cost of the application if the kinship carer is considering applying for a Kinship Care Order (i.e a Section 11 Order)
- advice and information to the child and the kinship carer in order to facilitate the placement where there is a Kinship Care/s.11 Order or a Guardianship Order
- advice and information to a 16 year old to aid transition from kinship care
- a financial allowance to a carer who has either a Kinship Care/s.11 Order or a Guardianship Order (see discussion below on financial allowances)

Prior to these requirements being introduced, research by Mentor UK found that the level of support received from the local authority dropped once a Section 11 Order was taken out (Thurman, 2013). The research found that at that time:

- kinship carers were not always aware of the implications of applying for a Section11 Order in terms of levels of local authority support
- kinship carers were not always aware of the support that was available to them
- although some local authorities provided assistance with fees, they could be left substantially in debt, as this does not always cover costs if the parent challenges the order

The 2016 regulations seek to address some of these issues. For example, the regulations require that the local authority publishes its policy. The local authority must publish information about the kinship care assistance it provides, including the assessment criteria for a kinship care placements, the application process for allowance and the rate at which allowances are paid. The Scottish Government has published non-statutory guidance on kinship care assistance (Scottish Government 2016b).

In Autumn 2016, Citizens Advice Scotland found that 17 local authorities had some information about kinship care on their websites, but it was not always easy to find nor was it clear that there was an entitlement to parity with foster care allowances (CAS, personal communication, October 2016).

Additional assistance for children at risk of being ‘looked after’

Under Part 12 of the 2014 Act, local authorities must ensure that families are provided with support where a child is at risk of being ‘looked after’. This came into force in August 2016. This is not specific to kinship carers, but includes support to anyone with parental rights and responsibilities to enable them to continue to care for their children. The support that must be provided includes family group conferencing, so this might involve potential kinship carers.
Leaving kinship care

Section 11 orders can regulate a child's residence up to the age of 16. Once the child turns 16, and if they were previously eligible for kinship care assistance, the local authority must provide advice and assistance to aid the transition to whatever arrangements follow. The local authority also has discretion to provide a financial allowance to the young person.

NO COURT ORDER

Where a situation has just developed over time and there is no formal recognition of it, a kinship carer does not have parental responsibilities and rights. However, they still have legal duties towards the child. Anyone with care and control of a person under 16 must; “do what is reasonable in all the circumstances to safeguard the child’s health, development and welfare” (s.5, 1995 Act). In particular, a kinship carer in this situation can give consent to any surgical, medical or dental treatment or procedure where:

- the child is not able to give such consent on his own behalf; and
- it is not within the knowledge of the person that a parent of the child would refuse to give the consent in question.

The local authority has a general duty to promote social welfare by making available advice, guidance and assistance on such a scale as may be appropriate for their area (s.12, Social Work (Scotland) Act 1968). In addition, the Scottish Government intends to establish a statutory 'named person' and 'Child's Plan' under Part 4 of the 2014 Act. These provisions are not specific to kinship care, but will be relevant where the child needs extra support.

Children 'in need'

Children 'in need' are those who need local authority services in order to achieve or maintain a reasonable standard of health or development. It also includes children who are disabled or who are affected by the disability of another person in their family (s.93, 1995 Act).

If a child is 'in need', the local authority has a duty to safeguard and promote their welfare by providing an appropriate range and level of services (s.22, 1995 Act). This may be services for a particular child and, in exceptional circumstances, can include cash payments. Where cash payments are made, they may be subject to conditions or require to be paid back.

These provisions are not specific to children in kinship care, but have been used to provide support, particularly financial allowances, to kinship carers.

LOCAL AUTHORITY PAYMENTS TO KINSHIP CARERS

The variation in the payments to kinship carers in different local authorities has been a policy issue for a number of years. As mentioned, the Scottish Government established the Kinship Care Financial Review Group in 2013. A new agreement with local authorities was reached in October 2015 and new legal provision for allowances for some kinship carers were introduced in April 2016.

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3 The commencement of Named Person provisions will be delayed pending the resolution of issues raised by the Supreme Court in relation to data protection and human rights legislation.
LEGAL PROVISION TO PAY ALLOWANCES

Local authorities are **required** to:

- pay an allowance "as they see fit" to kinship carers who are approved under the ‘looked after’ (Children (Scotland) Regulations 2009, Regulation 33, Looked After Children (Scotland) Regulations 2009).

- pay an allowance to kinship carers with a Kinship Care Order (i.e s.11 order) or guardianship order if the child was either previously ‘looked after’ or is at risk of becoming ‘looked after’. Regulation 4, Kinship Care Assistance (Scotland) Order 2016 (the 2016 regulations).

Local authorities have **discretion** to make payments to any other kinship carer or guardians. The legal provisions that enable them to do so are:

- Section 22 of the Children (Scotland) Act 1995 allows local authorities to make services available to ‘children in need’. These services “may include giving assistance in kind or, in exceptional circumstances, in cash.”

- Section 50 of the Children Act 1975 enables local authorities to make payments for maintenance or accommodation for children not living with their families.

Local authorities also have **discretion** to pay an allowance to the child.

- Regulation 4(e) of the 2016 regulations enables local authorities to make payments to a young person aged 16 or over who was previously under a kinship care order AND who was, at that time, at risk of being ‘looked after’ or previously ‘looked after’

- Regulation 4(g) of the 2016 regulations enables local authorities to make payments to a child under a guardianship order who is either is at risk of becoming ‘looked after’ or who was previously ‘looked after’.

The table below shows how requirements to pay kinship allowances vary according to the regulations used and the child's circumstances.

### Table 1: Summary of legal provisions to pay financial allowances to carers

<table>
<thead>
<tr>
<th>'looked after' status (across)</th>
<th>Never 'looked after' nor at risk of being so</th>
<th>At risk of being 'looked after'</th>
<th>Currently 'looked after'</th>
<th>Previously 'looked after'</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Legal provision (below)</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Kinship Care Assistance Regulations 2016</td>
<td>no</td>
<td>Required if have a kinship care order or guardianship</td>
<td>no</td>
<td>Required if have a kinship care order or guardianship</td>
</tr>
<tr>
<td>Looked After Children (Scotland) Regulations 2009</td>
<td>no</td>
<td>no</td>
<td>Required if assessed as kinship carer</td>
<td>no</td>
</tr>
<tr>
<td>Children (Scotland) Act 1995, s.22</td>
<td>discretion</td>
<td>discretion</td>
<td>discretion</td>
<td>discretion</td>
</tr>
<tr>
<td>Children Act 1975, s.50</td>
<td>discretion</td>
<td>discretion</td>
<td>discretion</td>
<td>discretion</td>
</tr>
</tbody>
</table>

The table does not include local authority discretion to pay allowances to the child. ‘Kinship Care Order’ is a s.11 order or residence order under 1995 Act.
POLICY AGREEMENT ON FINANCIAL ALLOWANCES

The above legal provisions do not set out either the amount of the allowance or whether it should be the same as allowances paid to foster carers. In 2007, there was a policy commitment to create equivalence between foster care allowances and allowances for kinship carers of ‘looked after’ children. In October 2015, local authorities again agreed to do this and extended it to include children:

- previously ‘looked after’
- at risk of becoming ‘looked after’, and
- placed with the involvement of the local authority (Scottish Government online).

The Scottish Government has fully funded the additional cost of allowances required to be paid under the 2016 regulations to bring them into parity with fostering payments (Scottish Government 2016c). They also provided 50% of the cost of bringing allowances for ‘looked after’ children into parity with foster care allowances (Scottish Government, personal communication).

‘On a par with foster carers’

Although the agreement on kinship care is to provide the equivalent allowance as that given to foster carers, this does not mean that kinship carers will receive exactly the same amount. This is because foster carers are not entitled to claim Child Benefit, Child Tax Credit or the child element of Universal Credit for the children they foster. The logic of this is that because they receive a payment from the local authority they should not also be funded through UK welfare benefits. Therefore, under the October 2015 agreement, kinship carers of ‘looked after’ children and of those ‘on the edge of care’ will get the local foster care allowance minus any Child Benefit and Child Tax Credit received by the kinship carer for the children concerned.

"Where a kinship carer receives benefits to cover accommodation and maintenance but these do not total the local allowance rate, local authorities will provide them with a ‘top up’ payment, for the wellbeing of the child, to ensure that they have the same opportunities as other children in a similar position" (Scottish Government online, accessed 25 July 2016)

Some foster carers are also paid a fee which is separate from the allowance paid to support the child. This fee element is not part of the above agreement.

A national rate

The fostering network has been critical of the lack of a national rate in Scotland.

"We were delighted when governmental recommendations for minimum allowances were introduced in England almost a decade ago, followed by Wales in 2011. Minimum rates are also set in Northern Ireland. The Scottish Government has, for several years, committed to making national recommendations in the near future. However there is no timescale for this which is why we are still campaigning for these recommendations in Scotland." (Fostering Network online, accessed 22 July 2016).

The Scottish Government has set out the argument for not setting a national rate at the moment for kinship care or for foster care allowances.

"By not setting any rate for payments, we recognise that local authorities have already agreed to make payments at a particular level and we respect the political agreement we
and they have entered into in good faith. This should allow is to maintain a good working relationship with them and with COSLA based on trust." (Scottish Government 2016d)

The Scottish Government retains the option of setting minimum rates should that prove necessary:

"The Scottish Government will monitor the situation with allowances and take action as necessary if local authorities are not acting on their new duty to pay an allowance to eligible kinship carers. We will do this through interaction with COSLA and local authorities, kinship carers and third sector organisations who have contact with kinship carers" (Scottish Government 2016d)

That said, in November 2015 the Scottish Government said that it would convene a working group to comprehensively evaluate a national allowance scheme for kinship and foster care. (November 2015 strategy). The new group will: "work to develop a sustainable and fair national allowance rate that local authorities can use to financially support 'looked after' children" (Scottish Government online)

The Scottish Government is also committed to formally reviewing the Children and Young People (Scotland) Act within 10 years of it coming into force to ensure that it is still fit for purpose (Scottish Government 2016d).

The devolution of further welfare powers to Scotland under the Scotland Act 2016 may be of relevance to kinship care policy. The new powers include the ability to create new benefits which would give the Scottish Parliament the legal power to introduce a single national kinship care allowance, if it chose to do so.

Each local authority also agreed, in October 2015, to publish the details of entitlement to their kinship care allowances:

"each local authority should publish a revised Kinship and Fostering Allowances Policy which should include key details of entitlement, eligibility criteria, how it will be assessed, where more information can be found, where complaints can be made and any other relevant information. These policies should be published as soon as possible and local authorities will wish to update them on a regular basis." (Scottish Government online).

As noted above, from April 2016, there is also a legal requirement for local authorities to publish information on kinship care assistance.

**RATES PAID IN 2016**

Information collected by Citizens Advice Scotland this year (2016 personal communication and East Renfrewshire personal communication) suggests that all local authorities appear to be meeting the October 2015 agreement to pay parity.

While in general the agreement appears to have been kept, there are still variations in payments. The agreement did not cover:

- different payments for different age groups
- different payments in different local authorities
- payments made to non-'looked after' children whose kinship carers do not have a s.11/ Kinship Care Order.
The actual rates paid varied by age of the child and varied between local authorities. For example, the payment for a child age between 5 and 10 ranged from £96 in Highland to £200 in North Ayrshire.

Overall, weekly payments can vary from £78 for under 5’s in Highland to £246 to those aged 16 or over in five local authorities (Orkney, Aberdeenshire, West Dunbartonshire, Angus and Moray). Renfrewshire has an unusually narrow range across the age bands from £109 to £141. North Ayrshire pays a flat rate of £200.

Table 2: Financial Allowances to Kinship Carers, 2016

<table>
<thead>
<tr>
<th>Age of child</th>
<th>LOW (Highland)</th>
<th>HIGH (Group of five LAs)</th>
<th>AVERAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>0 - 4</td>
<td>£78</td>
<td>£143</td>
<td>£131</td>
</tr>
<tr>
<td>5 - 10</td>
<td>£96</td>
<td>£163</td>
<td>£146</td>
</tr>
<tr>
<td>11 to 15</td>
<td>£120</td>
<td>£203</td>
<td>£180</td>
</tr>
<tr>
<td>16+</td>
<td>£155</td>
<td>£246</td>
<td>£213</td>
</tr>
</tbody>
</table>

Source: Citizens Advice Scotland, personal communication, July 2016.
Notes: above rounded to nearest £. As the age bands used also varies by local authority, the above is an approximation to the nearest age band. For example, for the few authorities that distinguish between 11 to 13 and 14 to 15 yr. olds, the midpoint was used. Does not include East Renfrewshire.

While the situation seems to have improved for ‘looked after’ children and ‘s.11’ kinship carers, the same cannot be said for those kinship carers of non-‘looked after’ children with no court order. Citizens Advice Scotland found only two local authorities that make set payments to this group. Both Fife and East Lothian pay £50 per week. None of the 27 other local authorities, where information was available, made payments (although Shetland will make payments on a discretionary basis). (Citizens’ Advice Scotland, personal communication July 2016).

EFFECT OF LOCAL AUTHORITY PAYMENTS ON SOCIAL SECURITY BENEFITS

If a child is ‘looked after’ then, in some cases, getting a payment from the local authority can mean a kinship carer is no longer entitled to also claim Child Benefit, Child Tax Credit or the child element of Universal Credit. The technical interpretation of the regulations is complex but there is a clear underlying policy issue. Foster carers get payments from the local authority instead of certain payments from the UK welfare system. In what (if any) situations should kinship carers of ‘looked after’ children be treated in the same way?

Kinship carers of children who are not ‘looked after’ are potentially entitled to child benefit, child tax credit/the child element of universal credit regardless of any payment from the local authority.

The problems arise for carers of ‘looked after’ children. When a child is placed in kinship care by the local authority then the carers can be treated by the benefits system as though they were foster carers, but this depends on the benefit involved and the exact legal provisions that the local authority uses to pay allowances.

In summary, kinship carers of ‘looked after’ children ought to be able to claim child tax credit and child benefit so long as the kinship allowance is not for accommodation and maintenance. However, they will not be able to claim the child element of Universal Credit (which will eventually replace Child Tax Credit). The basic provisions are summarised in table 3 below together with the number of local authorities using each provision (as at July 2016).
Most local authorities (19) use s.22 of the 1995 Act, which, providing the payment is not for accommodation or maintenance, means these kinship carers should be able to claim both Child Benefit and Child Tax Credit. Nine use section 50 of the 1975 Act, which may result in them not being able to claim Child Tax Credit. Two local authorities use regulation 33 which, if payments are for accommodation and maintenance, means these kinship carers cannot claim either Child Benefit or Child Tax Credit. When Universal Credit is fully rolled out, kinship carers of ‘looked after’ children will not be able to claim the Child Element of Universal Credit.

Table 3. Summary of effect on UK social security benefits of allowances to kinship carers of ‘looked after’ children

<table>
<thead>
<tr>
<th>Number of local authorities using</th>
<th>Payment made under</th>
<th>Child Tax Credit</th>
<th>Child Benefit</th>
<th>Child element Universal Credit</th>
</tr>
</thead>
<tbody>
<tr>
<td>9</td>
<td>s.50 1975 Act “accommodation and maintenance”</td>
<td>Not entitled because payment can only be for ‘accommodation and maintenance’</td>
<td>Generally paid</td>
<td>If a child is ‘looked after’ then the kinship carer will not be entitled to the child element, regardless of whether or not they are getting a payment from the local authority.</td>
</tr>
<tr>
<td>19</td>
<td>s.22 1995 Act “children in need”</td>
<td>Entitled, unless payment is for ‘accommodation and maintenance’</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>Reg 33, 2009 regulations, foster/kinship allowance</td>
<td>Entitled, unless payment is for ‘accommodation and maintenance’</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

n.b the payment of allowances to kinship carers of non-‘looked after’ children does not affect entitlement to these welfare benefits. Local authority information from CAS personal communication. For further detail on the regulations see Gillies, 2015.

Child Benefit

Child benefit should be payable unless the local authority is making a payment in respect of accommodation and/or maintenance under regulation 33 of the ‘looked after’ children (Scotland) Regulations 2009 (reg 18 SI 2006/223 read with s1 SSBCA).

Child Tax Credit

A person cannot claim Child Tax Credit for a ‘looked after’ child if they are also receiving a payment for the child’s maintenance and accommodation from the local authority or any other public funds (reg 3 SI 2002/2007).

Universal Credit

Under the Universal Credit regulations 2013 (SI 2013/376) if a child is ‘looked after’ by the local authority the person caring for them is not considered responsible for that child unless they also have parental responsibilities and rights for that child (regulations 4 and 4A).

Kinship carers of ‘looked after’ children are therefore not considered responsible for the child for the purposes of Universal Credit. This means that:

- they are not able to claim the child element of Universal Credit (this is replacing Child Tax Credit).
- a lower level of, or no, ‘work allowance’ will apply to their claim (reg 22).
The reasoning for this given by the DWP is that the local authority is obliged to provide support (DWP 2013).

DWP guidance states that:

"A child or qualifying young person is not treated as being the responsibility of any person when the child or young person is being ‘looked after’ by a local authority. [...] A person does not have parental responsibility if they are a foster parent or, in Scotland, a Kinship Carer" (DWP 2013).

There are also specific rules for foster carers and kinship carers of ‘looked after’ children in relation to their responsibilities under the claimant commitment. These complications mean that it is important that kinship carers get advice about their own, individual situations.

**Counted As Income**

In most cases, kinship care payments are not counted as income when calculating means tested benefits. The exceptions are if a kinship carer is getting an older version of Job Seekers Allowance or Income Support which included an amount for children (claims dating from 2004 or earlier), then part of the kinship care allowance might be taken into account when calculating the award.

**‘Two child rule’**

Under the Welfare Reform Act 2016, a person will only be able to include up to two children in their Child Tax Credit or Universal Credit claim. (Currently, extra amounts are included for every child). There will be some exceptions. A consultation in October 2016 proposed that the ‘two child rule’ would not apply where the kinship carer:

a) has a Child Arrangement Order conferring residence or Special Guardianship Order (or their equivalents in Scotland and Northern Ireland and predecessor arrangements) in place; or

b) is entitled to Guardian’s Allowance; and

c) is neither the parent nor step-parent of the child.

Where there are no ‘formal orders’ in place and where a child is living with friends or family because they are unable to live with their parents, the friend or family carer will need to provide evidence from a social worker which supports this. This is in order to establish eligibility for the exception and ensure that the exception is provided to those for whom it is intended (DWP 2016).

The exceptions listed above do not include ‘looked after’ children. The UK policy intention is that ‘looked after’ children receive a payment from the local authority instead of Child Tax Credit and so there would be no need to include them. However, many local authorities make payments to ‘looked after’ children that are, technically, not for accommodation and maintenance, and their carers can claim Child Tax Credit. On the basis of the above proposals, these children would not be excepted from the ‘two child’ rule.
ADVICE AND SUPPORT FOR KINSHIP CARERS

The Care Inspectorate’s triennial review (2015) found varying levels of support for kinship carers across different local authorities:

"The findings from our joint inspections and feedback from our link inspectors tell us that the arrangements for assessing the needs and planning for children living in kinship care placements varies considerably between local authorities. Similarly, the level of support, including financial support, available to kinship carers is also highly variable. Some provide dedicated teams or extend the support and training available to foster carers to kinship carers, while for others arrangements are much less well defined. The need to secure long-term nurturing environments for children in kinship and fostering care remains a challenge for local authorities."

As mentioned above, local authorities are now required to provide advice and information to kinship carers of ‘looked after’ children, those at risk of being ‘looked after’ and those previously ‘looked after’. There are also national voluntary organisations that provide advice and support to both kinship carers and local authorities.

Citizens Advice Scotland are funded by the Scottish Government to provide advice on kinship care. This is available either at local CABs or through helpline 0808 800 0006. Advice is available to kinship carers and local authorities.

Children 1st are funded by the Scottish Government to run a kinship support service and a helpline on 08000 28 22 33. They also maintain a list of kinship care support groups.

Child Poverty Action Group publish a guide to welfare benefit for kinship carers as part of their 'Children’s Handbook Scotland’. They also have a factsheet on welfare benefits for kinship carers (last updated March 2016) and run training courses on the issue for welfare advisors and other frontline workers such as social workers.

Mentor UK have published a Kinship Care Guide which is being updated this year.
ANNEX 1: BECOMING ‘LOOKED AFTER’

**Voluntary measures.** Accommodated under Children (Scotland) Act 1995, s.25 and placed with ‘friends and family’ under s.26

A local authority must provide accommodation if no-one has parental responsibility for a child, if they are lost or abandoned or the person who has been caring for him is prevented, whether or not permanently and for whatever reason, from providing him with suitable accommodation or care.” If there is someone with parental rights who is able to provide accommodation, then the local authority must have their consent before ‘accommodating’ the child. A local authority also has power to accommodate a child if ‘to do so would safeguard or promote his welfare’ but they cannot do so without parental consent (s.25, 1995 Act).

**Emergency measures** Children’s Hearings (Scotland) Act 2011

In an emergency, a Child Protection Order can be obtained from the court. This can authorise the removal of the child to ‘a place of safety’ pending investigations. During this time the child is ‘looked after’ by the local authority. This is a short term measures, and a children’s hearing must be held after a week. There were 754 children referred to Children's Hearings following a CPO in 2014/15 (SCRA)

**Compulsory measures** Children’s Hearings (Scotland) Act 2011

If a child is referred to a children’s hearing, the hearing has to decide whether compulsory measures of supervision are required. It may take a number of panel meetings before a decision is reached. If necessary, the Hearing can issue various warrants and orders in order to ensure the child attends a hearing, or resides in a certain place or has a medical assessment. If a child is subject to these orders he or she is ‘looked after’. All these orders are temporary measures, pending a decision on whether a compulsory supervision order is needed. A Compulsory Supervision Order is very flexible. It must state where a child is to live, but can have any other condition attached. It must be reviewed at least every year. Although it is not intended as a long term measure, the SCRA found (2011 report) that 15% of children on a supervision requirement had been on them for five years or more.
ANNEX 2: LEGISLATION RELATING TO KINSHIP CARE PAYMENTS

Scottish Legislation enabling local authority payments

Children Act 1975
50. Payments towards maintenance of children.
Without prejudice to any existing powers and duties to make payments in respect of the maintenance of children, where [ a child under the age of [eighteen] is residing with and being cared for (other than as a foster child) by a person other than a parent of the child, a council constituted under section 2 of the Local Government (Scotland) Act 1994]¹ may make to that person payments for or towards the maintenance of the child.

Children (Scotland) Act 1995
22.— Promotion of welfare of children in need.
(1) A local authority shall—
(a) safeguard and promote the welfare of children in their area who are in need; and
(b) so far as is consistent with that duty, promote the upbringing of such children by their families, by providing a range and level of services appropriate to the children's needs.
(2) In providing services under subsection (1) above, a local authority shall have regard so far as practicable to each child’s religious persuasion, racial origin and cultural and linguistic background.
(3) Without prejudice to the generality of subsection (1) above—
(a) a service may be provided under that subsection—
(i) for a particular child;
(ii) if provided with a view to safeguarding or promoting his welfare, for his family;
or
(iii) if provided with such a view, for any other member of his family; and
(b) the services mentioned in that subsection may include giving assistance in kind or, in exceptional circumstances, in cash.

Looked After Children (Scotland) Regulations 2009
Fostering and kinship care allowances
33.—(1) A local authority shall, subject to such conditions as they consider necessary, pay such allowance, as they see fit to—
(a)a foster carer or a kinship carer with whom a child has been placed in accordance with these Regulations;
(b)where a child is required by virtue of section 70(3)(a) of the 1993 Act to reside with a person other than their parent, the person with whom the child is directed to reside; and
(c)any person in whom parental responsibilities and parental rights are vested by virtue of the making of a permanence order with whom a child who is the subject of that order is residing.
(2) Any allowance payable in terms of paragraph (1) may—
(a)be—
(i)a fixed allowance applicable in the case of all children for whom the local authority have responsibility by virtue of section 17 of the 1995 Act;
(ii)a rate applicable to certain categories of case; or
(iii)amounts relevant to the individual needs of a particular child; and
(b)take into account the needs and circumstances of the person with whom the child is placed.
**Kinship Care Assistance (Scotland) Order 2016**

4. For the purposes of section 71(2) of the Act, the following assistance is specified—
   (a) in relation to a person falling within section 71(3)(a) of the Act where the person is considering applying for a kinship care order, the provision of such information and advice as that person may reasonably require for the purpose of making a decision about that matter;
   (b) in relation to a person falling within section 71(3)(a) of the Act where the person is applying for a kinship care order the provision of—
      (i) such information and advice as that person may reasonably require for the purpose of the application; and
      (ii) financial support towards the cost of the application;
   (c) in relation to a child falling within section 71(3)(b) of the Act, the provision of such information and advice as that child may reasonably require for the purpose of facilitating the placement under a kinship care order;
   (d) in relation to a person falling within section 71(3)(c) of the Act—
      (i) the provision of such information and advice as that person may reasonably require in relation to a kinship care order; and
      (ii) the provision of an allowance;
   (e) in relation to a child falling within section 71(3)(d) of the Act—
      (i) the provision of such information and advice as that child may reasonably require for the purpose of facilitating a transition following a placement under a kinship care order; and
      (ii) when the local authority considers it appropriate, the provision of an allowance;
   (f) in relation to a person falling within section 71(3)(e) of the Act—
      (i) the provision of such information and advice as that person may reasonably require in relation to a kinship care order; and
      (ii) the provision of an allowance;
   (g) in relation to a child falling within section 71(3)(f) of the Act—
      (i) the provision of such information and advice as that child may reasonably require for the purpose of facilitating that child’s placement with a guardian; and
      (ii) when the local authority considers it appropriate the provision of an allowance.

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**UK BENEFITS LEGISLATION: setting out where receiving local authority payments disentitles a person to child benefit, child tax credit and the child element of universal credit**

**Child benefit regulations**

This section on interpretation of child benefit regulations has been provided by CPAG.

Child benefit should be payable unless the local authority is making a payment in respect of accommodation and/or maintenance under regulation 33 of the ‘looked after’ children (Scotland) Regulations 2009.

There are rules which exclude certain children who are ‘in the care of the local authority’ from child benefit. However, there is a separate rule which allows child benefit to continue to be paid in certain circumstances. This is the provision which enables kinship carers to get child benefit. The detailed argument is as follows:

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4 Schedule 9(1)(c) SSCBA 1992; reg 18 CB Rags
5 Reg 16(1) CB Rags. Although the child would normally be excluded from CB under schedule 9(1)(c) of the Social Security Contributions and Benefits Act 1992 and regulation 18 of the Child Benefit (General) Regulations
Schedule 9 paragraph 1(c) of the Social Security Contributions and Benefits Act 1992 (SSCBA 1992) excludes a child from child benefit where the child is “in the care of a local authority in such circumstances as may be prescribed”. The circumstances are prescribed by regulation 18 of the Child Benefit Regulations 2006 as follows:

“Child or qualifying young person in care
18. For the purposes of paragraph 1(c) of Schedule 9 to SSCBA and paragraph 1(c) of Schedule 9 to SSCB(NI)A (child or qualifying young person in care in such circumstances as may be prescribed), the prescribed circumstances are that—

(a) the child or qualifying young person is provided with, or placed in, accommodation under Part 3 of the 1989 Act, under Part 2 of the 1995 Act, by virtue of a requirement in a child assessment order within the meaning of section 35 of the Children’s Hearings (Scotland) Act 2011, a child protection order within the meaning of section 37 of that Act, a compulsory supervision order within the meaning of section 83 of that Act or an interim compulsory supervision order within the meaning of section 86 of that Act, or under Part 4 of the 1995 Order and the cost of that child or qualifying young person's accommodation or maintenance is borne wholly or partly out of local authority funds, authority funds or any other public funds, and

(b) the child or qualifying young person is not in residential accommodation in the circumstances prescribed in regulation 9.”

Note: the circumstances prescribed in regulations 9 do not have any bearing on this issue.

Regulation 16 of the Child Benefit Regulations 2006 provides some relief from this provision, setting out various circumstances in which a claimant remains entitled to child benefit in spite of the provisions of schedule 9 and regulation 18.

Regulation 16(1) sets out the situations in which schedule 9 to SSCBA 1992 “do not apply to disentitle a person to child benefit”. In short, these are during the first eight consecutive weeks during which schedule 9 applies (i.e., the child is 'looked after'), and during weeks where the child spends time at home with the claimant (there are various options, e.g., 2 nights every week or seven consecutive nights). It seems very likely that a kinship carer, with whom a child is living, would be able to fit into one or more of the situations described.

The remainder of regulation 16 sets out various situations in which a potential claimant cannot have the benefit of the concession set out in regulation 16(1). None of the exceptions cover the situation of a kinship carer of a 'looked after' child unless the local authority is making a payment under regulations 33 of the 'looked after' Children (Scotland) Regulations 2009 and that payment is in respect of accommodation or maintenance.

Conclusion: kinship carers of 'looked after' children should be able to continue to claim child benefit as a result of the effects of regulation 16 of the Child Benefit Regulations 2006 unless the local authority is making a payment in respect of accommodation and/or maintenance under regulation 33 of the 'looked after' children (Scotland) Regulations 2009

regulation 16 provides relief from this provision which allows child benefit to be paid providing the child is living with the kinship carer.
Child Tax Credit Regulations 2002, rule 4, reg 3

regulation 3

3.—Circumstances in which a person is or is not responsible for a child or qualifying young person

(1) For the purposes of child tax credit the circumstances in which a person is or is not responsible for a child or qualifying young person shall be determined in accordance with the following Rules.

[...] A child or qualifying young person shall be treated as not being the responsibility of any person during any period in which any of the following Cases applies.

Case A
The child or qualifying young person is provided with, or placed in, accommodation [...] Part II of the Children (Scotland) Act 1995 [...] and the cost of that child's or qualifying young person's accommodation or maintenance is borne wholly or partly—

(i) out of local authority funds under section 23 of the Children Act 1989 or section 26 of the Children (Scotland) Act 1995,

(ii) out of other public funds.

Universal Credit regulations 2013 SI 2013/376

regulation 2,

“foster parent” means—

[...] (c) in relation to Scotland, a foster carer or kinship carer with whom a child is placed under the 'looked after' Children (Scotland) Regulations 2009;

regulation 4

(6) [ Subject to regulation 4A, a ] 1 child or qualifying young person is to be treated as not being the responsibility of any person during any period when the child or qualifying young person is—

(a) 'looked after' by a local authority

regulation 4A

4A.—Responsibility for children 'looked after' by a local authority

(1) There is excluded from regulation 4(6)(a)—

(a) any period which is in the nature of a planned short term break, or is one of a series of such breaks, for the purpose of providing respite for the person who normally cares for the child or qualifying young person;

(b) any period during which the child or qualifying young person is placed with, or continues to live with, their parent or a person who has parental responsibility for them.

(2) For the purposes of this regulation, a person has parental responsibility if they are not a foster parent and—

[.] (b) in Scotland, they have any or all of the legal responsibilities or rights described in sections 1 or 2 of the Children (Scotland) Act 1995
SOURCES


Fostering Network (online) *Our Campaigns - Scotland Allowance*. Available at: https://www.thefosteringnetwork.org.uk/get-involved/our-campaigns/scotland-allowances [accessed 22 July 2016]


Scottish Government. (online) *Kinship care*. Available at: http://www.gov.scot/Topics/People/Young-People/protecting/lac/kinship [Accessed 6 April 2016]


**Legislation**;

Social Work (Scotland) Act 1968
Children Act 1975
Social Security Contributions and Benefits Act 1992
Children (Scotland) Act 1995
Children’s Hearings (Scotland) Act 2011
Children and Young People (Scotland) Act 2014
Welfare Reform Act 2016

Child Tax Credit Regulations SI 2002/2007
Child Benefit Regulations SI 2006/23
‘looked after’ Children (Scotland) Regulations 2009
Universal Credit Regulations 2013 SI 2013/376
Kinship Care Assistance (Scotland) Order SSI 2016/153
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