Case No: B4/2017/3415

Neutral Citation Number: [2018] EWCA Civ 900
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM BOURNEMOUTH AND POOLE FAMILY COURT
(HIS HONOUR JUDGE DANCEY)

The Royal Courts of Justice
Strand, London, WC2A 2LL

Wednesday, 7 March 2018

Before:
LORD JUSTICE MCFARLANE
LORD JUSTICE MOYLAN

IN THE MATTER OF C (CHILDREN)

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THE APPELLANT DID NOT APPEAR AND WAS NOT REPRESENTED.

THE RESPONDENT DID NOT APPEAR AND WAS NOT REPRESENTED.

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Judgment

(Approved)

LORD JUSTICE MCFARLANE:

1. This is an appeal from a decision made by Judge Dancey, sitting in the Family Court in Bournemouth and Poole, initially on 20 November 2017 when the judge at the conclusion of care proceedings made a care order designating the local authority as Wakefield District Council. The children had for some time lived in the area of Dorset County Council, and there was a dispute as between the two local authorities in relation to which of the two would be designated as the local authority under the care order. The position that has now been reached is that, following the judge's decision, both local authorities now submit that the judge was in error and that the correct order should have been to designate Dorset County Council as the designated local authority. The appellant, Wakefield District Council, has brought the appeal. Having read the papers I granted permission to appeal.

2. The other parties to the proceedings are, of course, the children's parents and the children themselves. This court has had not communication from either of the parents or from those acting on behalf of the children. I therefore gave directions allowing the parent's time to make any submissions on this narrow administrative point should they wish to do so. I also established this hearing in the expectation, which has proved to be correct, that nobody would attend but it would be necessary for the court to consider the issue and determine it in the absence of there being express consent by the parties and also because, if the appeal is allowed, we will be overturning a recent decision by an experienced circuit judge.

3. Before turning to the background facts of the case, it is necessary to set out the legal context. The issue arises in relation to the "disregard period" (as it is known) established by section 105(6) of the Children Act 1989:

> "In determining the 'ordinary residence' of a child for any purpose of this Act, there shall be disregarded any period in which he lives in any place—

(a)which is a school or other institution;

(b)in accordance with the requirements of a supervision order under this Act;

(ba)in accordance with the requirements of a youth rehabilitation order under Part 1 of the Criminal Justice and Immigration Act 2008; or

(c)while he is being provided with accommodation by or on behalf of a local authority."

4. The point that arises on the appeal relates to section 105(6)(b), which requires the disregard of any period in which the child lives in any place "in accordance with the requirements of a supervision order under this Act." Supervision orders made under part IV of the Children Act can contain requirements. The provisions as to requirements are set out in schedule 3 to the Act, and in particular paragraphs 1, 2 and 3:

"1. In this Schedule, "the responsible person", in relation to a supervised child, means—

(a)any person who has parental responsibility for the child; and

(b)any other person with whom the child is living.

2 (1)A supervision order may require the supervised child to comply with any directions given from time to time by the supervisor which require him to do all or any of the following things—

(a) to live at a place or places specified in the directions for a period or periods so specified;

(b) to present himself to a person or persons specified in the directions at a place or places and on a day or days so specified;

(c)to participate in activities specified in the directions on a day or days so specified.

(2) It shall be for the supervisor to decide whether, and to what extent, he exercises his power to give directions and to decide the form of any directions which he gives.

(3) Sub-paragraph (1) does not confer on a supervisor power to give directions in respect of any medical or psychiatric examination or treatment (which are matters dealt with in paragraphs 4 and 5).

3(1) With the consent of any responsible person, a supervision order may include a requirement—

(a) that he take all reasonable steps to ensure that the supervised child complies with any direction given by the supervisor under paragraph 2;

(b) that he take all reasonable steps to ensure that the supervised child complies with any requirement included in the order under paragraph 4 or 5;

(c) that he comply with any directions given by the supervisor requiring him to attend at a place specified in the directions for the purpose of taking part in activities so specified."

(2) A direction given under sub-paragraph (1)(c) may specify the time at which the responsible person is to attend and whether or not the supervised child is required to attend with him.

(3) A supervision order may require any person who is a responsible person in relation to the supervised child to keep the supervisor informed of his address, if it differs from the child's.

5. It is plain, from a reading of those provisions, that a supervision order may contain a requirement under paragraph 2(1)(a) for the supervised child "to live at a place or places specified in the directions for a period or periods so specified". There is also the facility for the court to impose an obligation on the responsible person (for example the father in this case to comply with directions. It seems, therefore, apparent that the provisions in paragraphs 2 and 3 of Schedule 3 of the Children Act may include a requirement in an appropriate case for a child to reside at a particular location. That that is so has long been

established in case-law and, in particular, the decision of Hollings J in the case of Croydon LBC v A (No.3) [1992] 2 FLR 350.

6. Turning to the facts of this case, the two children at the centre of the proceedings, a boy and a girl aged 11 and 13, have had a difficult childhood. Their mother, through difficulties of her own in terms of her mental health and lifestyle has proved unable to provide safe and adequate care for them. Thus it was that the issue of where they should live became live in the course of 2016 before the family courts in Yorkshire. The children's father, who had had mental health difficulties of his own over the years, had not been in touch with the children for some time but commendably he stepped up to the plate and offered his home in Dorset as a place for the two children to live. It was that plan that was endorsed by the local authority, which was Wakefield District Council, and the Family Court in the form of District Judge Charles Prest QC, and resulted in an order under section 8 of the Children Act 1989 being made in the father's favour on 12 December 2016. The order was a child arrangements order providing for both of the children to live with the father in Dorset and it was in standard terms. The judge also made a supervision order under section 31 of the Children Act 1989 for a period of one year. No express requirement was added to the supervision order, and the face of the order simply records that the supervision order was made.

7. Unfortunately, the best laid hopes of the father that he was able to care for the children were not to be realised. The children were upset by no doubt their history and by the move. They did not settle well, and the father's internal abilities were not up to the task of providing stable care for them. Thus it was that first one of the children and then the second came to be accommodated by the local authority in Dorset in May and June 2007 and Dorset issued care proceedings at that time. It was those proceedings that came before Judge Dancey for determination in November 2017. By that time the children had moved back up to Yorkshire and were settled with long-term foster parents in the Wakefield area, not far from the bulk of the maternal family. Thus it was that Judge Dancey expressed a view that, so far as the children's welfare was concerned, they being basically Yorkshire children who had now come back to live in Yorkshire, it was in their best interests for the local authority to be the local local authority, namely Wakefield District Council. But, as the judge readily accepted, the decision as to which

local authority should be designated is not one that is to be determined by reference to the children's welfare being the paramount consideration. It falls to be determined under the dry provisions of the Children Act. No party had raised the point before the court that the judge eventually relied upon in making his decision. In fairness to the judge, the decision was made at an extremely short hearing where he, in order to accommodate the parties, heard the case during a gap in the main hearing of another case that was being conducted before him on that day.

8. The judge, having identified that a supervision order was in place, considered that that of itself, without any additional requirements, was sufficient to trigger the disregard provision in section 105(6)(b) and that therefore the clock, as it were, in terms of ordinary residence under section 31, was stopped at the time that the supervision order was made and therefore before the children physically moved to Dorset. The children, prior to that moment, had also been subject to interim care orders and so the clock as it were will have stopped at an earlier stage. Unfortunately, neither of the two counsel representing the two local authorities had come prepared to deal with the point and both seemingly accepted the correctness of the judge's indication as to his decision at that hearing. By the time it had become apparent that Wakefield Metropolitan District Council wished to challenge the decision and invite him to reconsider it, the final order had been drawn up. Thus it was at a hastily convened hearing on 7 December 2017 that the judge concluded that he had no jurisdiction to re-determine the issue and he simply rehearsed his original reasoning in the course of a very clear and helpful judgment. The reasoning was as I have described. The judge went on to describe a possible alternative position, which was that the children had no ordinary residence at the relevant time that the care proceedings were issued, but no party takes that point before us, and the judge did not rely upon it in making his order.

9. The appeal that is now brought by Wakefield can be described in short terms, I having now laid the ground. The point simply is the supervision order made in these proceedings was not one that can be said to fall within the definition in section 105(6)(b) because there are no "requirements" made within the supervision order made under the Act. Having looked at the orders as I have described, that plainly is correct. This was a bald supervision order with no additional adornments, directions or requirements added to it.

The basis of the order was that the children were to live in Dorset, but I accept, as the local authority submits, the purpose of the supervision order was to support that placement rather than to require it or to dictate that the children should remain living there. Thus it is plain, on my reading of the facts and of the provisions that it is not possible to hold that this case falls within section 105(6)(b). That position is expressly accepted by Dorset County Council in a helpful position statement that they have filed with this court. In terms they say this:

> "Having considered Wakefield's skeleton argument, Dorset County Council are not contesting this appeal. In fact, Dorset consents to the appeal."

The skeleton argument makes plain that there is now agreement between the administrative authorities of the two local authorities that the groundwork, as it were, in terms of running the supervision of the care orders will be undertaken locally by Wakefield but will be funded and reimbursed by payments from Dorset. As I have indicated, neither of the parents have made any submissions on this point and there has been no communication from those acting for the children. It seems to me that the position now put forward by the two local authorities is entirely correct and that the period during which the children resided permanently with their father under the child arrangements order from December 2016 until the middle of 2017 represented their ordinary residence and that therefore they were ordinarily resident in Dorset at the time that Dorset issued the care proceedings that were eventually determined by the judge. On that basis, if my Lord agrees, I would therefore allow the appeal and direct that the care orders made for these two children should be amended so that the local authority designated is now to be shown as Dorset.

LORD JUSTICE MOYLAN: I agree.

Order: Appeal allowed.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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