Neutral Citation Number: [2024] EWCA Civ 1565

Case No: CA-2024-002051

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT SITTING AT CHESTER
Recorder Shaw
LV24C50490

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/12/2024

Before :

LORD JUSTICE NEWEY
LORD JUSTICE NUGEE
and
MR JUSTICE COBB

- -

Between :

CALDERDALE METROPOLITAN BOROUGH COUNCIL	**Appellant**
- and -	
CHESHIRE EAST BOROUGH COUNCIL	**Respondents**
-and-	
Others	

- -

Re G (Designation of Local Authority)

- -

Brendan Roche KC and **Fergal Allen** (instructed by **Local Authority Legal Services**) for **Calderdale MBC**
Lisa Edmunds and **Isabel Hawkins** (instructed by **Local Authority Legal Services**) for **Cheshire East Council**
Helen Hendry (instructed by **Wilkinson Woodward, Solicitors**) for the **mother**
Janice M Wills (instructed by **Alfred Newton Solicitors**) for the **father** (written submissions)
Natalia Levine (instructed by **Hibberts**, **Solicitors**) for the **Children's Guardian** (written submissions)

Hearing date : 5 December 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 13 December 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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The Honourable Mr Justice COBB :

Introduction

1. Section 31(1) of the Children Act 1989 ('CA 1989') provides that "on the application of *any* local authority" (emphasis by italics added), the court may make an order "placing the child with respect to whom the application is made in the care of a *designated* local authority" (emphasis by italics added).

2. Section 31(8) CA 1989 sets out the statutory test by which the designation of the local authority under a care order is to be decided. The statute provides that the court looks first at the ordinary residence of the child (section 31(8)(a) CA 1989), and will designate the authority in which the child is ordinarily resident; failing which, "where the child does not reside in the area of a local authority, the authority within whose area *any* circumstances arose in consequence of which the order is being made" (section 31(8)(b) CA 1989) (emphasis by italics added). Section 31(11) CA 1989 makes clear that, except where express provision to the contrary is made, a 'care order' includes an 'interim care order'.

3. The statutory provisions referenced above must be read with section 105(6) CA 1989; this subsection provides that certain periods of time shall be 'disregarded' in determining the ordinary residence of a child. The 'disregard' periods are those where the child is, for instance, in a "school or other institution", or provided with accommodation by or on behalf of a local authority.

4. On 12 July 2024, Cheshire East Council ('Cheshire') issued proceedings under Part IV CA 1989 seeking a care order, and interim care order, in respect of G, a baby boy who had been born prematurely earlier that same day. At a hearing on 23 August 2024, Recorder Shaw ('the Judge'), sitting in the Family Court at Chester, made an order that Calderdale MBC ('Calderdale') should be the designated local authority in respect of the interim care order concerning G. He reached his decision under section 31(8)(a) CA 1989; he indicated that he would have made the same decision under section 31(8)(b) CA 1989, had he been required to do so.

5. Calderdale contends that the Judge was wrong to reach these conclusions. Its appeal against the Judge's decision is brought with the permission of King LJ, who, when granting permission, also stayed the order. The stay has had the effect that Cheshire has remained the designated authority throughout the currency of the care proceedings thus far.

6. The appeal is opposed by Cheshire, by G's mother and father, and by G's Children's Guardian. Given the commonality of position of all of the Respondents, we gave

permission to the father and Children's Guardian for their legal representatives not to attend the hearing of the appeal in person, in the interests of preserving public funds. We are nonetheless grateful to all counsel for their skilled arguments both in writing and, where relevant, orally.

7. The statutory scheme under review in this appeal has been considered many times before. Insofar as this appeal has raised any new points, they are discussed at §48-49, and §64-73 below.

Brief background facts

8. The background facts set out below are taken from the limited documents available to us on this appeal.

9. G is the only child of the relationship of the mother and father. He is now five months old.

10. The mother has two older children born into previous relationships. She has a long history of engagement with Cheshire's children's services department in relation to the upbringing of these older children; there is a significant family history of serious domestic abuse, substance and alcohol misuse, sexual exploitation of the mother's older child, neglectful home conditions, anti-social behaviour, resistance to working with social workers, and the mental ill-health of both parents.

11. At the outset of the period under review, the parents were living in private rented accommodation in Cheshire. In late-2023 they were served with notice of eviction, arising from alleged rent arrears under their tenancy. In early-2024, Cheshire's children's services discovered that the mother was pregnant; this generated considerable professional concern given the matters to which I have referred in §10 above. The parents did not, it seems, co-operate with early enquiries from social workers in Cheshire; they indicated that they had purchased a caravan elsewhere, and were planning to leave Cheshire to live in the caravan.

12. The pre-birth social work planning for the baby was all conducted in Cheshire. At a child protection conference in May 2024, the father reported that he and the mother "are in the process of moving" to Calderdale, but that the plan to live in the caravan in that county was temporary: "he hopes they will be in a house by the time the baby is born as this [i.e., the caravan] is only a temporary arrangement". The father is reported to have added: "He and [the mother] want to live anywhere but [Cheshire] where there has been too much trauma and bad memories". A child protection plan was drawn up in respect of the unborn baby, under the category of neglect. The parents told the Independent Reviewing Officer at about the same time that they were considering a move to Manchester; however, as the parents had made known their intention to move to the Calderdale area at least temporarily, Cheshire notified Calderdale of its concerns.

13. On or about 11 May 2024, the mother moved to the caravan. This caravan was, at all material times, pitched in a holiday park in the area of Calderdale; the parents have a seasonal licence for the caravan to remain there until February 2025. The social work evidence (deriving from a discussion with the site owner) was that all those renting a seasonal pitch at this site must also have a permanent address elsewhere; the site

owner would not divulge to the social worker the parents' given permanent address, but it appears that the father (and possibly occasionally the mother) was spending time in Cheshire in this period, to look after the family pets. The inference is that the Cheshire property, from which the parents faced eviction, was the 'permanent address' provided.

14. In the early-summer 2024, the mother registered with a general practitioner in Calderdale; in early-July 2024 she attended for an ante-natal appointment in Calderdale.

15. In the first week of July, two pre-proceedings planning meetings took place in Cheshire. At both meetings, the parents made clear their intention to reside in Calderdale. It was recorded that the parents had confirmed that they were giving up the tenancy on their home in Cheshire and were placing their belongings in storage; it was also reported that the parents were no longer at risk of eviction from the property in Cheshire, and that they were clearing the rent arrears. The mother said that she would be looking for rented accommodation in the area of Calderdale; we were told that very shortly before the hearing on 23 August 2024, the mother registered for social housing in Calderdale but did not qualify because of her tenancy in Cheshire.

16. A pre-proceedings letter was sent by Cheshire to the parents on 8 July 2024; it contained the following passage:

> "… you advised that you bought a caravan and moved away from the [Cheshire] area. You are staying on a residential pitch and intend to remain there as you feel it is helping your mental health. You confirmed that you are giving up the tenancy on the property in [Cheshire] and your belongings are currently in storage."

17. G was born prematurely in mid-July 2024, in Manchester. As I have mentioned earlier, care proceedings were launched by Cheshire on that day, and interim care orders were made by the Family Court shortly thereafter, without material opposition. Those interim care orders have been continued to date.

18. Five days following his birth, G was moved to a hospital in Calderdale, at the request of the mother, so that the parents could be nearer to him. An entry in the child's medical notes for 19 July 2024 confirmed that G had moved to the hospital in Calderdale as "the mother had moved into the Calderdale area". We were told at the hearing of this appeal, without contradiction, that the mother spent 12-14 hours per day, every day, at the hospital with G in the period from 17 July to 8 August 2024, caring for him wherever possible.

19. At a hearing in the Family Court on 6 August 2024 the mother was successful in securing an order under section 38(6) CA 1989, in the face of opposition from Cheshire and the Children's Guardian, that she and G should undergo residential assessment. This assessment commenced two days later; the residential unit was located approximately half-way between Calderdale and Cheshire. Cheshire was ordered to pay for this assessment; it was noted at the hearing (though this was not formally recorded) that the judge who ordered the assessment had indicated that if

Calderdale were then to be 'designated' as the relevant authority, it was expected that Calderdale would pay for this assessment.

20. The mother filed a witness statement on 8 August 2024; it contained the following statements:

    i) She has no intention of returning to Cheshire;

    ii) She intends to remain in Calderdale;

    iii) She has engaged with medical services in Calderdale;

    iv) She had not returned to Cheshire since moving to Calderdale, confirming, "I intend on remaining outside of [Cheshire] and have no desire to return at all due to inappropriate associates and their negative impact on me."

    It seems likely that by that last comment the mother was referring to those she knew through her involvement with illicit drugs.

21. A hearing was set up for the court to consider the question of designation. This took place on 23 August 2024. To recap, by that time:

    i) G had spent 5 days in hospital in Manchester immediately following his birth;

    ii) G had spent 22 days in Calderdale, in hospital (from discharge from the hospital in Manchester up to 8 August 2024);

    iii) G had spent the next 15 days (from 8 August 2024) in the actual care of his mother, in a residential assessment unit between Cheshire and Calderdale.

22. On 23 August, the Judge determined that the designated authority should be Calderdale. The proceedings have now been transferred to the Family Court in Leeds, and a case management hearing and Issues Resolution Hearing has been fixed for a date in mid-January 2025.

Judgment

23. At the hearing on 23 August 2024, the Judge had a number of witness statements available to him; an agreed chronology had been prepared and filed in accordance with *Re B* (see [13]/[15] ibid.; citations for all authorities referenced in this judgment are at §44 below). The Judge received oral and written submissions from the parties, and from Calderdale. The Judge delivered a short *ex tempore* judgment. We have an approved note of that judgment.

24. In his introductory comments, the Judge identified the parties' respective positions on the application. He briefly summarised the relevant law, including the key statutory provisions and three of the relevant authorities. Under a sub-heading 'Submissions' he outlined the arguments advanced by Calderdale in its opposition to designation, but no other submissions were referenced in this section. In the next section (which he sub-headed: 'Consideration') the Judge listed the factors advanced by Cheshire which pointed to the designation in favour of Calderdale under section 31(8) CA 1989. In

this part of his judgment, it is worth noting that he identified as relevant to his decision that:

i) The parents had chosen to live in Calderdale; he commented that they had "voluntarily alighted" upon Calderdale as the place where they wished to make their home; he said that: "they have autonomy; in other words they decide where they want to live and they have the right to choose. However irresponsible or ill-advised that decision is, it has to be respected";

ii) The parents have a licence for their caravan to remain at the camp site in Calderdale until February 2025;

iii) The mother had attended an ante-natal appointment in Calderdale;

iv) The mother has registered both herself and G at a general practice surgery within Calderdale.

25. In his 'Decision' section, the Judge referenced the 'disregard' provisions of section 105(6) CA 1989 and held that the periods of time which G had spent in hospital and at the residential unit "do not register or count in my evaluation of the overall picture". He nonetheless concluded that the mother had established that:

> "… she is ordinarily resident in the Borough of Calderdale and, to the extent that [G] has any ordinarily (sic.) residence separate from his mother, it must follow that this is in tandem or runs alongside that of the mother …
>
> … Whether she remains committed to Calderdale if/when Calderdale MBC doubtless comes to the same conclusion as Cheshire East about her suitability and capability as a parent, remains to be seen… On the other hand, she may find that a different chapter in her life has started and with the care and support that she has received at the residential unit … that she is capable of and will turn her life around".

26. Later in the judgment he referred again to the mother having established ordinary residence in Calderdale and that "therefore" G had acquired ordinary residence in Calderdale too.

27. In relation to the arguments arising under section 31(8)(b) he said this:

> "Clearly physical harm is of no relevance, substance and alcohol use of the parents may be relevant although I note in the interim threshold the time given for those matters seems to run out in about February so that should be disregarded. Then we get to lack of engagement moving through to lack of involvement with the local authority and in particular neglect at number nine".
>
> "… section 31(8) does not differentiate between which local authority has more of the factors present or indeed the most important factor. No, it just says *any* of the circumstances

> arise in which a consequence of which the order is being made are satisfied and, therefore, if I am wrong - and I don't believe I am - in considering s.31(8)(a) is satisfied in designating Calderdale the relevant local authority then, Calderdale qualifies as the designated local authority pursuant to s.31(8)(b)." (Emphasis by italics and underlining in the original).

Grounds of Appeal and Argument

28. Calderdale's Notice of Appeal and Grounds gave no hint of the breadth of the arguments which we have heard on this appeal. It was merely asserted that the Judge had "erred in fact and law" in designating Calderdale in respect of the interim care order for G under section 31(8)(a)/(b) CA 1989.

29. The arguments, skilfully marshalled on both sides, can, I believe, be conveniently distilled under four heads.

(i) G's ordinary residence and the 'disregard' provisions

30. Calderdale argued that G did not acquire 'ordinary residence' in either Cheshire or Calderdale (or indeed elsewhere) in his own right under section 31(8)(a) CA 1989; throughout the period between his birth and the decision under review he had been living in accommodation (including hospitals and a residential unit) all of which were of a type to be disregarded under section 105(6) CA 1989 in determining his 'ordinary residence'.

31. This point had been uncontentious before the Judge. However, in a recently filed amended skeleton argument, Ms Edmunds, on behalf of Cheshire, introduced a new argument to the effect that a hospital is *not* an 'institution' within the meaning of section 105(6) CA 1989, and that therefore the Judge could and should have considered the 22-day period when G was in hospital in Calderdale as establishing G's ordinary residence in Calderdale. She developed this point in her oral submissions.

(ii) G's ordinary residence of dependency derived from his mother

32. It was Calderdale's position that G did not necessarily or automatically acquire the ordinary residence derived from his mother; the caselaw has moved on since Thorpe LJ's comments in *Plymouth* (see below), in particular by reference to *Re W* and *A v A [CA]* and *A v A [SC]*.

33. Further or alternatively, Calderdale argued that in the period following G's birth, even if the mother's actual residence had changed, this could not lead to a finding that she had acquired a new 'ordinary residence' with which G would be fixed as her dependant, because in this period G himself had been in accommodation (hospital and then a residential unit) which had to be disregarded under section 105(6) CA 1989 in the assessment of *his* ordinary residence.

34. Mr Roche KC, for Calderdale, further argued that for G to acquire ordinary residence in Calderdale by dependency on his mother, he would have had at some point to have

physically been present there. Mr Roche argued that G's 22-day stay in Calderdale could not qualify as physical presence in Calderdale, as it had to be disregarded under section 105(6) CA 1989.

35. Cheshire argued, as an alternative to their primary argument above, that as a newborn baby, G had necessarily acquired the 'ordinary residence' of his mother; this was the Judge's explicit finding, and the caselaw supports this. If Calderdale were right that the caselaw had moved on since *Plymouth*, the result would nonetheless be the same. The disregard provisions under section 105(6) CA 1989 do not apply to the *mother's* acquisition of a new 'ordinary residence'; indeed, the period when G was in hospital in Calderdale served to reinforce the mother's integration into life in Calderdale, given the extent to which she had so fully engaged there with G, and with the hospital and medical services, in that period.

(iii) The mother's ordinary residence

36. Calderdale submitted that, in any event, as a matter of pure fact, G's mother had not acquired 'ordinary residence' in Calderdale as at 23 August 2024. They pointed to a number of factors, among them:

i) The parents had, in the months prior to G's birth, identified more than one location in the country to which they intended to move and make their home;

ii) The parents had retained their tenancy in Cheshire as at 23 August 2024, and the threat of eviction had apparently passed; the parents' permanent address remained their rented accommodation in Cheshire; they had not been consistent in their narrative about their plans;

iii) The caravan in Calderdale had been obtained by the parents as a contingency in the event of eviction; it was pitched temporarily on a non-residential caravan site, which could only be arranged if the licensee had a permanent address elsewhere (in this case, in Cheshire); the parents had conceded that it was not suitable to care for G there;

iv) The mother has no historical or current links to the community in Calderdale;

v) The mother retained a GP in Cheshire (even though she had registered, or purported to register, for herself and G in Calderdale).

37. Cheshire argued that as a matter of fact, and for the reasons which the Judge found, G's mother had become ordinarily resident in Calderdale prior to 23 August 2024; "therefore" (as the Judge held) so had G.

(iv) Where the circumstances arose giving rise to the order

38. Calderdale argued that as G had not acquired an 'ordinary residence' anywhere on any basis, the Judge needed to consider section 31(8)(b) CA 1989. In considering this subsection, it was argued that the Judge was wrong to rely on one relatively minor factor among the nine factors which Cheshire had alleged should establish the threshold criteria for the making of a care order (under section 31(1) CA 1989) in respect of G; it was said that the Judge "cherry-picked" an allegation which appeared to support designation to Calderdale, ignoring the long history of involvement of

Cheshire with the mother and her older children. Calderdale argued that it is obvious that all of the relevant matters pleaded in the extensive interim threshold arose in Cheshire and are evidenced by the extensive chronology of their exclusive involvement with these parents.

39. On behalf of Cheshire, Ms Edmunds argued that the Judge was not wrong to identify a lack of stable home and inadequate arrangements for the care of G in the caravan in Calderdale as a primary "circumstance" which enabled him to find proven the terms of section 31(8)(b) CA 1989 in favour of designating Calderdale. She argued that the lack of secure housing was the "ultimate or outstanding" episode (per Thorpe LJ: see §61 below) which had triggered local authority intervention.

40. In the course of argument, Mr Roche and Ms Edmunds cited a number of passages from the authorities which they claimed supported their respective propositions. I turn to address this legal framework.

Legal framework

41. I referenced the key statutory provisions in the introductory section of this judgment; for a fuller understanding of the law relevant to the issues before us, I set them out here in full.

42. Section 31(8) CA 1989 provides:

> "(8) The local authority designated in a care order must be—
>
> (a) the authority within whose area the child is ordinarily resident; or
>
> (b) where the child does not reside in the area of a local authority, the authority within whose area any circumstances arose in consequence of which the order is being made".

43. Section 105(6) CA 1989 provides:

> "(6) 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 Chapter 1 of Part 9 of the Sentencing Code; or
>
> (c) while he is being provided with accommodation by or on behalf of a local authority".

It is to be noted that section 105(6) CA 1989 applies to the determination of a child's 'ordinary residence' across the whole of the CA 1989; several duties and powers in respect of a child, located within Part II, Part III and Part IV of CA 1989 turn on a finding of the child's 'ordinary residence', but assistance in understanding or applying its terms cannot immediately be found by reference to these other contexts.

44. In considering the issues arising here, we have been invited to consider a number of authorities, most notably (listed in chronological order): *Re P (Care Proceedings: Designated Authority)* [1998] 1 FLR 80 ('*Re P*'); *Northamptonshire CC v Islington London Borough Council* [1999] EWCA Civ 3031; [2001] Fam 364 ('*Northamptonshire*'); *C (A Child) v Plymouth County Council* [2000] 1 FLR 875 ('*Plymouth*'); *London Borough of Redbridge v Newport City Council* [2004] 2 FLR 226 ('*Redbridge'*); *Re D (Care Proceedings: Designated Local Authority)* [2012] EWCA Civ 627; [2013] Fam 34 ('*Re D*'); *Re W (A Child) (Designation of Local Authority)* [2016] EWCA Civ 366; [2017] 1 FLR 1511 ('*Re W*'); *Re S (A Child)* [2017] EWCA Civ 2695 ('*Re S*'); *Re B (A Child) (Designated Local Authority)* [2020] EWCA Civ 1673 [2020] 2 FLR 745 ('*Re B*').

45. We have also been directed, from a different context in family law, to: *Re J (A Minor) (Abduction: Custody Rights)* [1990] 2 AC 562 ('*Re J*'); *A v A* (*ZA & NA v PA*) [2012] EWCA Civ 1396, [2013] Fam 232 ('*A v A [CA]*'); and *A v A (Jurisdiction: Return of Child)* [2014] 1 FLR 111 ('*A v A [SC]*').

46. Before turning to the legal principles relevant to the four headline arguments which I have outlined above, it is convenient to consider a number of points of general application in this case which arise from the authorities:

    i) The date for determining 'ordinary residence' for the purposes of 'designation' under section 31(8) CA 1989 is the date of the hearing (*Redbridge* at [27]);

    ii) A designation of an authority at an interim hearing is subject to possible reconsideration and variation at a later date, if an application to designate a different authority is justified on the facts (*Redbridge* at [42]);

    iii) Section 31(8)(a) CA 1989 is to be considered and determined first. Only in the event that the court decides that the child is not ordinarily resident in any local authority will the court go on to consider section 31(8)(b) CA 1989 (i.e., where the circumstances existed which gave rise to the application for an order) (*Re W* at [18]);

    iv) The statutory provisions in section 31(8) and section 105(6) CA 1989 are to be construed in such a way as to provide a simple mechanism for designation. It is the function of the judge to conduct a rapid and not over-sophisticated review of the history in order to make a purely factual determination of the child's place of ordinary residence (*Northamptonshire* at p.374); the court "need not take the tooth comb" to decide whether a parent has voluntarily and for settled purposes acquired ordinary residence (*Re D* at [21]);

    v) The local authority in the area where the child ordinarily lives is best placed to monitor the needs of the child and to take action if the child is in need and to shoulder the financial obligations of doing so (*Re D* at [21]);

vi) Arguments between local authorities as to which should be designated in care proceedings concerning children is wasteful of valuable resources; "[t]he budgets of the Social Services departments are already stretched enough by meeting the cost of care that they should not be further depleted by squabbles of this kind: better remember that there are swings and roundabouts and you may win one today but you will certainly lose another tomorrow" (*Re D* at [23]);

vii) 'Ordinary residence' and 'habitual residence' are cognate expressions, neither of which are terms of art. In *Nessa v Chief Adjudicating Officer* [1999] 2 FLR 1116, Lord Slynn described an "overlap" between the meaning of "ordinary" and "habitual" residence, recognising that one is sometimes defined in terms of the other. In designation cases the terms have been treated as 'akin' to one another (see *Redbridge* at [31]), 'close relatives' (*Re S* at [27]) or even 'synonymous' (see *Re P* at p.88). The determination of each is primarily a question of fact; thus, 'ordinary residence' refers to a person's abode in a particular place or country which they have adopted voluntarily and for settled purposes as part of the regular order of their life for the time being, whether of short or of long duration (*Re D* at [21]);

viii) Although 'ordinary residence' and 'habitual residence' have directly comparable meanings (see (vii) above), King LJ was clear in *Re S* (at [36]) that:

> "It would be both inappropriate and unnecessary to treat an application of this type in the same way, and with the same level of detail and sophistication as is sometimes found in disputes in relation to a child's habitual residence in international cases".

47. I turn now to other aspects of the legal framework which bear more specifically upon the arguments we have heard, and the decision which we need to make.

48. The word 'hospital' is not explicitly included in section 105(6) CA 1989. Cheshire's recently-raised argument is that a hospital is not an 'institution' (i.e., therefore is outside the express terms of section 105(6) CA 1989), and that the ordinary meaning of 'institution' is 'an organisation founded for a religious, educational, professional or social purpose' but not for medical treatment. Calderdale disagreed, and argued that a hospital is an 'institution for the care of the sick or wounded or those who need medical treatment'. Both counsel claimed support for their arguments from the Oxford English Dictionary definition of the terms 'institution' and 'hospital'; the somewhat contradictory extracts produced (as illustrated in brief above) proved to be of little assistance. It is notable that the term 'hospital' is specifically referenced many times elsewhere in the CA 1989, for example in sections 21, 24, 24C and 29 CA 1989 (duties towards accommodated children), in section 44 and 46 CA 1989 (emergency and police protection of children), and in Part XII CA 1989 (notification of children accommodated in certain establishments). Its obvious incorporation elsewhere in the CA 1989 makes its absence from the list in section 105(6) CA 1989 all the more notable; had the statutory draftsmen intended the disregard provisions in section 105(6) CA 1989 to apply to children in hospital, it may be said that the section would have made this clear. Ms Edmunds drew our attention, in support of her

submission (see §31 above), to a comment of Thorpe LJ in *Plymouth*, wherein he indicated that there was a "powerful argument" that a hospital was *not* an institution for the purposes of the section (see *Plymouth* at p.879).

49. Had it been necessary to decide this point of construction, it would have been helpful to have had more detailed and referenced argument from counsel; the late emergence of the point on behalf of Cheshire denied Calderdale much chance to rise to that challenge. However, for reasons which are given below, it has not been necessary to decide this not uninteresting point.

50. It is agreed by counsel that the starting point for considering whether G acquired the ordinary residence of dependency from his mother is the Court of Appeal's decision in *Northamptonshire*; in that case, the subject child (N) was twelve years old at the time of the appeal. Of that child, Thorpe LJ said this at 375D:

> "… the ordinary residence of a child of N's age is a dependent one and in that case that means dependent upon the ordinary residence of either his mother or his father, the only available carers outside the care system".

51. The appeal in *Northamptonshire* was followed a matter of months later by the appeal in *Plymouth*. In *Plymouth*, Thorpe LJ described as "sensible" the approach of the trial judge in holding that:

> "… a newborn babe is <u>incapable</u> of ordinary residence apart from the mother from whose body the baby has been so recently severed. In relation to a newborn baby, the ordinary residence <u>necessarily</u> has to be dependent on the residence of the mother" (p.879) (emphasis by underlining added).

52. Thorpe LJ's formula in *Plymouth* was expressly followed in 2012 by the Court of Appeal in *Re D*; that case concerned a 1-year old girl (age at the time of the appeal). Ward LJ referred more than once to the ordinary residence of the subject child as 'dependent' upon the ordinary residence of the mother (see for example [4], [21], and [29]), and accepted that this approach applied even where the baby was in foster care (see [4] and [10]). Specifically, in his supporting judgment, Elias LJ confirmed that the ordinary residence of dependence was unaffected by the fact that a child had been removed into foster care at birth and had spent "the whole of his or her young life … subject to the disregard provision in section 105(6)" (see [38]).

53. Mr Roche's challenge to the judicial declaration that a baby 'necessarily' took his or her ordinary residence from his mother led us to *Re W* - a judgment which was delivered some four years after *Re D*. Mr Roche contended that Ryder LJ had effectively 'watered down' the test which Thorpe LJ had set in *Plymouth* in this way:

> "Thorpe LJ agreed [in the *Plymouth* case] with the first instance court that it was a reasonable inference of fact in the circumstances of that case that a new born baby would be <u>unlikely</u> to have an ordinary residence apart from her primary career and that for a child of such a tender age, the child's

> ordinary residence would usually follow that of her carer" (emphasis by underlining added) (see *Re W* at [21]).

54. In developing this theme, Mr Roche invited us to look more critically at Thorpe LJ's formula in *Plymouth* in the light of the Supreme Court's decision in an international case focusing on habitual residence, namely *A v A [SC]*. In presenting this argument, he took us back to the speech of Lord Brandon of Oakbrook in *Re J* at 579B, which had included the following important text:

> "… where a child of J's age [about three years old] is in the sole lawful custody of her mother, his situation with regard to habitual residence will necessarily be the same as hers" (emphasis by underlining added).

In *A v A [SC]*, Baroness Hale at [44] described Lord Nicholls' comment (above) as a "helpful generalisation" of fact, which will "usually but not invariably be true". Baroness Hale discounted that Lord Nicholls' remarks had the status of a proposition of law.

55. Mr Roche went on to argue, secondly, that in the court's determination of the *mother's* ordinary residence (to which G would, at least in 'usual' circumstances, be dependent), the disregard provisions applied. He submitted that any change in the mother's circumstances, if they pointed towards her acquiring a new ordinary residence, would have to be disregarded under section 105(6) CA 1989 insofar as they applied to G as her dependant. This was, I believe, a point of construction not previously argued in the cases in this area. His reasoning was that G could not acquire an ordinary residence of any kind (including by dependence on his mother) when he was in an institution (hospital) or local authority accommodation (residential unit) which statute had declared must be disregarded.

56. Thirdly, Mr Roche argued that in order to acquire ordinary residence by dependence it was necessary for a child to be, or have been, physically present in the relevant local authority area. This was a reprise of the argument he had run in *Re S* (see [29]-[31]), although in this appeal, on these facts, Mr Roche has been required to extend the reach of his argument. In *Re S*, there was no doubt as a matter of fact that the baby (of a few months old) had never once been physically present within the local authority area which had been designated by the judge at first instance; whereas, by contrast in this case, G spent a little over three weeks in Calderdale in hospital. Mr Roche's argument before us was that G's stay in an institution ('hospital') in Calderdale for 22-days was to be 'disregarded' in determining his ordinary residence, therefore he could not be said to have been physically present at any time in Calderdale.

57. In seeking to drive home the importance of a child's presence in a place in which it was argued he was ordinarily resident, Mr Roche relied on *A v A [CA]*; in the judgments of this Court, Patten LJ had said at [60]:

> "It is clearly artificial as a matter of ordinary language to say that a child is habitually resident at birth in a country to which it has never been. As the cases recognise, residence denotes and involves a physical presence. Where the parents

> or parent have established a place of habitual residence in a particular country it will usually require no more than a moment's presence in that jurisdiction for a newly born child to acquire the same status. The child's integration into the family and social life of his parents already centred in that location will be completed by his physical presence there.…" (emphasis by underlining added).

58. The Supreme Court decision in the same case (*A v A [SC]*) was not ultimately founded upon the issue of whether physical presence is a necessary ingredient of habitual residence. However, Baroness Hale (with whom three other Supreme Court Justices agreed), clearly indicated her view, albeit as I have said *obiter*, (at [55]) that "presence is a necessary pre-cursor to residence and thus to habitual residence".

59. The arguments at §§57-58 above were helpfully reviewed by the Court of Appeal in *Re S*. As I mentioned earlier (§56), the baby in *Re S* had never physically entered the authority area of his parents, nor had he been cared for by them. Having considered *A v A [CA]* and *A v A [SC]*, and relevant recent European caselaw, King LJ observed as follows (*Re S* at [43]/[44]):

> "[43] What is clear from *A v A*, at both the Court of Appeal and Supreme Court level and in the European jurisprudence, is that, in order to establish habitual residence, there will be an expectation that the child will have been present in the area where it is suggested that he, or she, is habitually resident.
>
> [44] In my judgement, the requirement of physical presence must equally apply to a determination of ordinary residence". (emphasis by underlining added).

60. At [49], King LJ continued:

> "… presence, in my view, is a requisite before the child can acquire ordinary residence in a specified area. If I am wrong and presence is not an essential ingredient in order for ordinary residence to be established, I am nevertheless of the view that where circumstances arise where there has not only been no presence, but also that the baby in question has never lived with the parent through whom ordinary residence is asserted, that cannot be a basis upon which to make a finding that the baby's ordinary residence follows that of his or her mother's".

61. Finally, in addressing the Judge's conclusion that the statute entitled him to look at whether *any* of the circumstances arose in which a consequence of which the order is being made are satisfied, we were referred again to the decision of *Northamptonshire*. Thorpe LJ addressed this issue at 374B:

> "The circumstances to which the Judge should have regard are the primary circumstances that carry the case over the

> section 31 threshold. That may be a positive act or series of acts, such as sexual or physical abuse. If there has been extensive abuse there will usually be an ultimate or an outstanding episode that triggered local authority intervention. The judge will have no difficulty in locating that event... even in chronic cases without any acute episode it will usually be simple enough for the judge to discern the place or, if more than one, the principal place at which the failure occurred." (Emphasis by underlining added).

Conclusion

62. When reaching his decision on designation, the Judge was not invited to, nor did he, make any specific findings of fact; he relied upon the written evidence and submissions. In this regard, he was faithful to the oft-repeated guidance offered by Thorpe LJ in *Northamptonshire* to undertake a rapid and not over-sophisticated review of the history (see §46(iv) above) in order to make a purely factual (not discretionary) determination of the child's place of ordinary residence.

63. I outline my conclusions under the four heads identified above.

(i) G's ordinary residence and the 'disregard' provisions

64. The argument advanced by Cheshire on this appeal that a hospital is not an 'institution' under section 105(6) CA 1989 was not expressly before the Judge, and unsurprisingly he expressed no view on this point.

65. On the limited material and abbreviated argument before us, I would have been tempted to the view that a hospital *is* capable of being considered within the term 'institution' in section 105(6) CA 1989; an admission to hospital generally only creates a temporary absence from home, and therefore has similar characteristics to a period away from home at a school, or time spent under a youth rehabilitation order (section 105(6)(ba) CA 1989), and/or in many cases a period in local authority accommodation. However, Ms Edmunds was right to point us to the contrary view expressed by Thorpe LJ in *Plymouth* (see §48 above); I had also noted (see also §48) that a child's stay and/or accommodation in hospital is notably absent from section 105(6) CA 1989 whereas accommodation in a hospital is multiply referenced elsewhere in the CA 1989. As it happens, even if Ms Edmunds were right in her submission that a hospital is not an 'institution', it would not have followed that a 22-day stay in hospital in Calderdale was in any event sufficient for G to acquire 'ordinary residence' there independent of his mother under section 31(8)(a) CA 1989.

66. I consider that the Judge was not wrong to adopt the formulation advanced by Calderdale, and agreed at the hearing by Cheshire: he was entitled on the facts to conclude, and proceed on the basis, that there was no time when G was otherwise than in accommodation which was to be 'disregarded' under section 105(6) CA 1989, and he therefore did not acquire an ordinary residence anywhere in his own right.

(ii) G's ordinary residence of dependency derived from his mother

67. This Court is bound to follow the repeated dicta of Thorpe LJ in *Northamptonshire* and *Plymouth* (see §50 and §51 above), albeit that his comments must now be regarded, in my judgment, as qualified (albeit not expressly) by the comments of the Court of Appeal and Supreme Court in *A v A [CA]* and *A v A [SC]*. Thus, I consider that it would be appropriate to substitute 'necessarily' in Thorpe LJ's formula in *Plymouth* with the words 'generally' or 'usually but not invariably'. I do not accept, as Mr Roche submitted, that Ryder LJ in *Re W* was attempting to set a new test for ordinary residence by dependency, in a more diluted form; it is clear from the opening words in the passage which I have cited above (see §51 above) that Ryder LJ was purporting to reproduce essentially what Thorpe LJ had said in *Plymouth*, but (even though he did not specifically reference either *A v A [CA]* or *A v A [SC]* in his judgment) with the qualifications to the test added by those courts. In this regard, I agree with King LJ when she observed in *Re S* (at [23]) that Ryder LJ was 'summarising' the law as it then stood, not redefining it.

68. I do not accept Mr Roche's argument (see §33 above) that the disregard provisions in section 105(6) CA 1989 must apply to deny G, or any child in his situation, an ordinary residence by dependency on his mother. The court surely has to look carefully at the *reality* of the mother's situation in this regard, and take a view about *her* ordinary residence, and the child's dependency on her; section 105(6) CA 1989 does not apply to the acquisition by a parent of ordinary residence, it focuses on the child. In this regard, it seemed to me that Mr Roche's submission followed the same unsuccessful path taken by leading counsel for the Appellant in the *Plymouth* case (see *Plymouth* at p.878).

69. Moreover, it seems to me that Mr Roche's argument in this regard is largely (if not entirely) answered by the judgment of Ward LJ in *Re D*. This was a case in which the mother herself was still a child when she delivered the subject child; the mother was at that time the subject of a care order to Surrey County Council, but had been placed by Surrey County Council in a foster home in Kent. The mother was living in Kent when she gave birth; she had been living in Kent for four years prior to the birth. Ward LJ made clear (at [7] and again at [28]) that the court needed to look for her ordinary residence at where the mother was *actually* living. He referred to the "reality of the mother's position". He was clear that the court should not make a determination of *her* ordinary residence by reference to a construct of the law which on the facts would have led to a conclusion that the mother's home was in Surrey, where she had not lived for some years; he was satisfied that a 'literal' construction of the statute "produces absurdities when set against the purpose which section 31(8) seeks to achieve" ([18]). At [10] he said this:

> "'*The* child' with whom the subsection is concerned, and I am adding the emphasis, is clearly the child who is the subject of the care order, the baby. As I have already indicated, her ordinary residence is fixed by her mother's ordinary residence and the vital question is whether section 105(6) requires us to apply its disregard provisions not only to the baby but also to the mother" (emphasis by italics in the original).

70. He answered this "vital question" at [25] when he referred to the fact that the mother:

> "… is as a matter of fact living in, and so far as we know intending to remain in, Kent".

He referenced the 'simple exercise' of identifying "where this mother is *in fact* ordinarily resident" (my emphasis), in preference to the "much more uncertain and complicated review" which would involve a consideration of "the mother's mother's ordinary residence". In making clear that section 105(6) CA 1989 applies to the child not his/her mother, even in a 'ordinary residence by dependency' case, he continued:

> "Ordinary residence has to be determined in order to designate the local authority in the care order being made in respect of *the* child who is the subject of the order. So we are to disregard any period in which "*he*, i.e. *that* child named in the care order, lives in any place while *he* is being provided with accommodation". The purpose of 105(6) is to stop the clock and to stop it running <u>in respect of the child with whom the court is dealing</u>". (Emphasis by italics in the original; emphasis by underlining added). (para.[28])

71. Were Mr Roche's argument to succeed, I am satisfied, like Ward LJ, that it could produce artificial, even absurd, results. The mother's acquisition of a new ordinary residence in the area in which her child has been accommodated or hospitalised would have to be regarded as suspended, or indeed event completely thwarted, because the clock had stopped on the *child's* acquisition of ordinary residence.

72. I reject Mr Roche's further point (§34 above), by which he argued that G had never been physically present in Calderdale because the 22-day stay in hospital was to be disregarded under section 105(6) CA 1989. The statutory regime in section 31(8) and 105(6) CA 1989 provides a framework for the court to establish where the child is 'ordinarily resident', but does not require the court to close its eyes to, or otherwise adopt a fictional narrative about, where the child is actually physically present.

73. Given that in the period under review, G had been physically present in Calderdale for a period of weeks, and had been cared for in hospital by his mother for extended periods of each day, there is no reason why the general rule of acquisition of ordinary residence by dependency should not apply. Even if the Judge's phraseology could have been clearer, the Judge was nonetheless right in his conclusion that G had acquired an ordinary residence which he derived from a dependency on his mother.

(iii) The mother's ordinary residence

74. The Judge was invited to conduct a factual assessment on the written evidence and submissions. Even if the mother had at times since February 2024 prevaricated over where she had wanted to live, and/or had been disingenuous in what she had said about her intentions to the different authorities (which the Judge himself referenced), she had increasingly made known to the professionals her firm wish to leave Cheshire for good, and her increasingly firm wish to move permanently to Calderdale. The mother's intentions translated into her actual move to Calderdale in mid-May. After her move, she took steps to integrate, and there was sufficient evidence on which the Judge could find on the papers that the mother and father had a "current intention" to

make their permanent home in Calderdale. It is apparent that both the mother and Cheshire recognised that the mother's mental health well-being and her avoidance of associates of the drugs world would be served by leaving Cheshire; the Judge referenced this as a possibility that "a different chapter in her life has started… particularly if she stays off the drugs". The Judge was entitled to reflect in his judgment that "they decide where they want to live and they have the right to choose", while appropriately acknowledging the submission of Calderdale that the parents' decision-making may have been strategic, in order to avoid further engagement with the Cheshire social services department. He took into account the temporary nature of some of the connections which they had made with Calderdale, but acknowledged the parents' transfer of medical support (GP) to the Calderdale area.

75. I have made clear already my acceptance that G's admission to hospital in Calderdale (albeit for 22-days in the relevant period) could not and did not count towards his own acquisition of ordinary residence in Calderdale given the provisions of section 105(6) CA 1989 (see §66 above); however, this period did serve to support and reinforce the mother's own integration into her new life in Calderdale, as submitted by Cheshire. At the time of the hearing, G was in the actual care of his mother; it was, in this regard, immaterial that this was not physically within the boundary of Calderdale.

76. In my judgment, the Judge was entitled on the facts to conclude that G's mother had become ordinarily resident in Calderdale as at 23 August 2024. He was entitled further to find that G had by then acquired the ordinary residence of his mother.

(iv) Where the circumstances arose giving rise to the order

77. As the Judge was, in my judgment, entitled to conclude that G was 'ordinarily resident' in Calderdale at the relevant time under section 31(8)(a) CA 1989, by his dependency on his mother who was by then ordinarily resident there, it is not necessary for me to consider the Judge's back-stop determination that section 31(8)(b) CA 1989 would have led him to the same result.

78. Section 31(8)(b) CA 1989 appears to be deliberately widely drawn in its terms, and does not confine the court's consideration to one particular issue. It is nonetheless noted that in *Northamptonshire*, Thorpe LJ expected that it would be "the primary circumstances" which carry the case over the section 31 threshold which would be relevant. In a case with a chronic history of neglect or abuse he was of the view that it was likely to be an "ultimate or an outstanding episode that triggered local authority intervention". I acknowledge the force of many of Mr Roche's arguments to the effect that the Judge had failed to consider the 'primary' circumstances giving rise to the application; however, for the reasons outlined above, they do not assist him in the ultimate resolution of this appeal.

Order on appeal

79. The decision in this case has obvious implications for both of these local authorities, and especially for the authority which is designated by the court. Designation brings with it multiple statutory duties, and significant financial responsibilities, for G. It is regrettable that the dispute over designation has hung unresolved over the management of the case for the last three months; both authorities will have expended valuable time, effort and money in its resolution. Many times since Thorpe LJ made

his remarks in *Plymouth* (at p.878) have courts urged local authorities to refrain from litigating these issues wherever possible, particularly given that litigation is undertaken at public expense, "unless there are truly exceptional circumstances demanding that expenditure". I was left largely unconvinced at the conclusion of the hearing of this appeal that exceptional circumstances existed here. We were nonetheless reassured to learn that the dispute has not been a distraction in the delivery of services on the ground for G, and the co-working of the case between the two local authorities has been co-operative.

80. It is of course possible, indeed it is likely given the relatively fluid state of the arrangements as at 23 August 2024, that the circumstances of G and his parents will have changed materially during the period while this appeal has been pending; the situation which obtained more than three months ago may be markedly different now. Although counsel made passing reference at the hearing to a number of developments on the ground in the period since 23 August 2024, I have not for obvious reasons taken them into account.

81. While not encouraging further disputes about 'designation' it should of course be remembered that this is not a 'once and for all' decision; if the circumstances clearly warrant a reconsideration, it would be open to one or other authority to apply to the court for a fresh determination, particularly at the final hearing.

82. For the reasons given above, I would dismiss this appeal.

Lord Justice Nugee

83. I agree.

Lord Justice Newey

84. I also agree.