Neutral Citation Number: [2013] EWCA Civ 964

Case No: B4/2013/0839

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM MIDDLESBOROUGH COUNTY COURT
HIS HONOUR JUDGE TAYLOR
MB12C01771

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/07/2013

Before :

LORD JUSTICE RICHARDS
LORD JUSTICE LEVESON
and
LADY JUSTICE BLACK

- -

Between :

REDCAR AND CLEVELAND BOROUGH COUNCIL	**Appellant**
- and -	
OTHERS (RE B)	**Respondent**

- -
- -

Mr Jonathan Cohen QC (instructed by **Cygnet Family Law**) for the **Appellant**
Mrs Sally Bradley QC & Miss Jackie Mckie (instructed by **Appleby Hope and Matthews Solicitors**) for the **Respondents**

Hearing dates : 9 July 2013

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Approved Judgment

BLACK LJ: :

1. This appeal concerns local authority funding in relation to a child, K, who was born in November 2011 and therefore will be 2 years old in November.

2. K lives with her paternal grandparents. There is presently an interim residence order in their favour and everyone's intention is that a final residence order will be made once the question of the basis for and extent of financial support for the grandparents from the local authority has been resolved. What is available to the grandparents in this respect depends upon whether or not K is a "looked after child" as defined in section 22(1) Children Act 1989.

3. The grandparents argue that K is a looked after child and that this entitles them to a fostering allowance. The local authority (hereafter "LA") argue that K is not looked after by them.

4. On 1 November 2012, District Judge Robertson found that K was looked after. LA appealed to HH Judge Taylor who took the same view as the district judge and dismissed the appeal on 26 February 2013. LA's appeal to this court is therefore a second appeal. The active parties are the grandparents on the one hand and LA on the other.

5. It became clear during the course of argument before us that neither District Judge Robertson nor Judge Taylor in fact had jurisdiction to determine the issue. The proceedings in which they did so, at first instance and on appeal, were care and residence proceedings and neither party argued that such proceedings confer the jurisdiction to decide issues such as this. The parties agreed to the matter being determined in the county court and approached things with the pragmatism and practicality that is characteristic of those involved in family litigation – there was an issue which was getting in the way of the plans for K and it needed to be sorted out so, although the district judge in front of whom the case was listed raised the question of his jurisdiction, they agreed to it being heard by him and it proceeded. However, the unfortunate fact is that it is not possible to confer jurisdiction by agreement.

6. What should have happened is that the grandparents should have challenged LA's refusal to pay them a fostering allowance in the Administrative Court by way of judicial review proceedings. An alternative possibility, although we did not hear argument about whether this route would have been appropriate, may have been for an application to be made in the High Court under its inherent jurisdiction for a declaration that K is a looked after child.

7. We were told by email following the hearing that it is understood that the circuit judges at Middlesbrough County Court are authorised to sit as deputy High Court judges. It was not suggested that this in any way cured the lack of jurisdiction nor could it have done as it was not the circuit judge who determined the matter at first instance. However, I take this opportunity to emphasise the importance of maintaining sufficient formality even when the proceedings are family proceedings. Orders made without jurisdiction benefit no one and can be challenged without reference to the merits by the unsuccessful party. Thus where an issue such as the issue between the grandparents and LA arises, it is of critical importance that it is made the subject of a properly formulated application to the correct court. Where a circuit judge is to sit as a

High Court judge, it seems to me that this needs to be arranged deliberately, with the proceedings commenced in or transferred to the High Court. The mere fact that the judge who has heard the case happens to be authorised to sit as a High Court judge or to try Administrative Court cases might not redeem a failure to observe proper practice.

8. In this case, this court has little more jurisdiction than the County Court did. We can, indeed must, order that the decision that K is a looked after child is quashed because the court which made it had no jurisdiction to do so. But when it comes to determining the issue between the parties over K's status, we can do no more than indicate what we would have been inclined to decide had we been seised of the substantive issues in the case. Accordingly, I will confine what I say to that which is strictly necessary to resolve the question troubling the parties and resist expressing views about some of the rather vexed questions of interpretation that have been debated in front of us.

Background facts

9. The detailed facts need not be stated. A brief outline will suffice to set the scene.

10. K's mother has an older child (by a different father) whose care at home was deficient and in relation to whom a care order was made in May 2011. Following K's birth in November 2011, LA were also concerned about the way in which she was being cared for by her mother and father. They were not satisfied that the grandparents provided a suitable alternative. They therefore issued care proceedings on 13 April 2012. It was clear at all times that the parents objected to K's removal from them.

11. An application for an interim care order was listed for hearing before the Family Proceedings Court on 20 April 2012. The grandmother and the parents attended court. The grandparents were willing to do what they could to ensure that K did not go into care. The guardian interviewed the grandmother at court and decided to support K living with the grandparents on a trial basis rather there being an interim care order. The parties all discussed whether such a family placement was practicable. A "working agreement" was drawn up and signed by the parents, social workers and grandmother recording that the parents would place K with the grandparents that day.

12. The agreement included a number of terms designed to regulate the way in which the family cared for K. For instance, K's contact with the parents was to be supervised by LA and the grandparents were not to allow them any other contact; the grandparents were not to permit the parents to attend at their property and were not to drink alcohol; they were not to leave K in the care of anyone else.

13. The court made an interim residence order to the grandparents and an interim supervision order to LA. In their reasons, the justices recorded that:

> "The Local Authority do not agree, but do not actively oppose the arrangement that parents place K in the care of paternal grandmother…. and grandfather."

14. They also recorded that it was agreed that LA would carry out a viability assessment in respect of the grandparents.

15. The case was adjourned until 9 May 2012 for a case management conference. Directions were given in preparation for this.

16. LA prepared an interim care plan dated 2 May 2012 in which they said it was their intention to seek an interim care order but not to remove K from the grandparents. However, in the event, a further working agreement was signed on 9 May 2012 and the interim residence order continued.

17. By August 2012, LA had decided that the grandparents were suitable as long term carers for K. Their final care plan drawn up that month was for a residence order in their favour; it was intended also that there would be a supervision order for one year. It appears to have been at that point that the debate about finances crystallised. LA were prepared to make payments pursuant to section 17 Children Act 1989 to help the grandparents with childcare costs but they did not accept that they had duties to K as a looked after child. So it was that the matter eventually came before the district judge for determination.

18. The grandparents have also sought financial support from LA by way of a residence order allowance but that was refused. They have declined to accept a full residence order until the present issue is resolved.

The law

19. This case takes us into what has proved to be a troublesome area of Part III of the Children Act 1989. It may be helpful to have the basic structure of the relevant provisions in mind from the start.

20. Part III concerns local authority support for children and families.

21. Section 17 imposes a general duty on local authorities to safeguard and promote the welfare of children in their area who are in need in various ways. These ways can include the provision of accommodation and giving assistance in kind or in cash.

22. Section 20 concerns the provision of accommodation for children. The material passages are as follows:

> **20 Provision of accommodation for children: general**
>
> (1) Every local authority shall provide accommodation for any child in need within their area who appears to them to require accommodation as a result of –
>
> (a) there being no person who has parental responsibility for him;
>
> (b) his being lost or having been abandoned; or
>
> (c) the person who has been caring for him being prevented (whether or not permanently, and for whatever reason) from providing him with suitable accommodation or care.

> (7) A local authority may not provide accommodation under this section for any child if any person who –
>
> (a) has parental responsibility for him; and
>
> (b) is willing and able to –
>
> (i) provide accommodation for him; or
>
> (ii) arrange for accommodation to be provided for him,
>
> objects.

23. Section 21 concerns accommodation for children in particular circumstances which do not apply here and need not concern us.

24. Preceding section 22 there is a general heading "*Duties of local authorities in relation to children looked after by them*". There then follow section 22 and sections 22A to 22G. Sections 22A to 22G were inserted by Children and Young Persons Act 2008 (in relation to England but not Wales) replacing section 23 Children Act 1989. The substitution took effect from 1 April 2011, therefore before K was born. The position in this case is therefore governed by sections 22A to 22G and not section 23. Although we were told that reference was made to these new provisions, at least in front of Judge Taylor, neither the district judge nor the judge referred to them.

25. The relevant parts of section 22(1) provide:

> (1) In this Act, any reference to a child who is looked after by a local authority is a reference to a child who is –
>
> (a) in their care; or
>
> (b) provided with accommodation by the authority in the exercise of any functions (in particular those under this Act) which are social services functions within the meaning of the Local Authority Social Services Act 1970, apart from functions under sections 17, 23B and 24B.

26. Section 22 continues to set out the local authority's general duty to safeguard and promote the welfare of "a child looked after by them".

27. As to section 22A to G, it was submitted by the parties that the relevant sections are section 22C (which featured in the submissions of both parties) and section 22B (which featured in the grandparents' submissions). Those sections provide:

> **22B Maintenance of looked after children**
>
> It is the duty of a local authority to maintain a child they are looking after in other respects apart from the provision of accommodation.

22C Ways in which looked after children are to be accommodated and maintained

(1) This section applies where a local authority are looking after a child ("C").

(2) The local authority must make arrangements for C to live with a person who falls within subsection (3) (but subject to subsection (4)).

(3) A person ("P") falls within this subsection if –

(a) P is a parent of C;

(b) P is not a parent of C but has parental responsibility for C; or

(c) in a case where C is in the care of the local authority and there was a residence order in force with respect to C immediately before the care order was made, P was a person in whose favour the residence order was made.

(4) Subsection (2) does not require the local authority to make arrangements of the kind mentioned in that subsection if doing so –

(a) would not be consistent with C's welfare; or

(b) would not be reasonably practicable.

(5) If the local authority are unable to make arrangements under subsection (2), they must place C in the placement which is, in their opinion, the most appropriate placement available.

(6) In subsection (5) "placement" means –

(a) placement with an individual who is a relative, friend or other person connected with C and who is also a local authority foster parent;

(b) placement with a local authority foster parent who does not fall within paragraph (a);

(c) placement in a children's home in respect of which a person is registered under Part 2 of the Care Standards Act 2000; or

(d) subject to section 22D, placement in accordance with other arrangements which comply with any regulations made for the purposes of this section.

[(7] to [9] contain detail which can be ignored for present purposes]

> (10) The local authority may determine –
>
> (a) the terms of any arrangements they make under subsection (2) in relation to C (including terms as to payment); and
>
> (b) the terms on which they place C with a local authority foster parent (including terms as to payment but subject to any order made under section 49 of the Children Act 2004).
>
> (11) The appropriate national authority may make regulations for, and in connection with, the purposes of this section.
>
> (12) In this Act "local authority foster parent" means a person who is approved as a local authority foster parent in accordance with regulations made by virtue of paragraph 12F of Schedule 2.

The arguments

28. The local authority's position is that K was "in need" for the purposes of section 20(1) until she moved to live with her grandparents on 20 April but not from that point on. They are prepared to accept that a duty to provide her with accommodation arose, in principle, under section 20(1) but submit that they were unable to fulfil it because at all times the parents objected to K being accommodated and section 20(7) therefore provided that they (LA) "may not provide accommodation".

29. The grandparents' response to this argument included an invitation to the court to examine in some detail the circumstances up to and including what happened at court on 20 April. This was done with a view to establishing that LA were involved with regard to K's welfare from before her birth, that they were, in fact, the driving force behind the arrangement for K to live with her grandparents, and that they had attempted to distance themselves from this reality by, for example, having incorporated in the justices' reasons the statement that they did not agree but did not actively oppose the arrangement.

30. There was no dispute that LA had been watching over K's welfare and had determined upon and commenced care proceedings. However, LA did not accept what Mrs Bradley QC (who together with Ms McKie represented the grandparents) submitted about the circumstances on 20 April. To resolve the factual issues would have required not only a study of the documents but also oral evidence. I was unsure how this would assist in addressing the issue of how section 20 applied in this case.

31. Mrs Bradley argued that LA were under a duty under section 20 from the date of K's birth. When they decided in mid March that her welfare would be compromised by remaining with her parents, they were obliged to provide accommodation under section 20(1)(c), she said. Their obligation was regulated by the provisions of section 22C. They were unable to place K with anyone within section 22C(3), the grandparents not by then having the parental responsibility that they were to acquire with the residence order granted on 20 April. The placement therefore had to be in accordance with section 22C(5) and having regard to section 22C(7). They were

therefore under a duty to look first to the grandparents and they did so by participating in the plan devised at court on 20 April. Accordingly, the arrangement for K to go to the grandparents, hedged about with the terms of the working agreement, amounted, Mrs Bradley argued, to a placement of K by LA and therefore to the provision of accommodation by them. Thus K was a looked after child within the meaning of section 22(1)(b).

Discussion

32. I would not be inclined to accept the grandparents' analysis of the application of Part III to these facts. There may be two ways of looking at the operation of section 20 in a situation such as this but neither, I think, is that proposed by the grandparents.

33. The important fact for these purposes is that the parents objected at all times to LA providing accommodation for K. This requires attention to section 20(7). I consider that the parents' objection falls within that sub-section and the question of LA's duty under section 20 must be approached with that in mind. I will return to that in a moment.

34. I raised the question during the appeal hearing as to whether a parent who is inadequate is in fact "willing and able to …provide accommodation" but it did not excite much argument. That is explained, I think, by there being a common understanding that where parents in fact object to a local authority providing accommodation, a local authority will have to have recourse to care proceedings if they seek to accommodate a child and any debate as to whether the parents are "able" to provide accommodation is to be had in that context, not in the context of section 20. That accords with the overall structure of the Children Act 1989 and is the interpretation I would presently support. It follows that section 20(7)(b)(i) covered the situation here, but even if it did not, section 20(7)(b)(ii) did because the parents were willing and able to arrange for the grandparents to provide accommodation.

35. To return to my analysis of section 20, I can see that one possibility is that, as LA argued, (i) a duty arose under section 20 because K's care at home was such that she was in need and section 20(1)(c) applied as the people who had been caring for her were prevented, for whatever reason, from providing her with suitable accommodation or care but (ii) LA were prevented from fulfilling that duty by section 20(7) as the parents objected. The alternative is that the joint effect of section 20(1) and section 20(7) was to prevent a duty arising at all. Either way, it seems to me that LA could not have provided K with accommodation under section 20(1) at any time. To say, as I think would have to be Mrs Bradley's submission, that the parents did not object to LA providing accommodation with the grandparents and that that placement was therefore under section 20(1) would be to twist the section into inappropriate contortions.

36. The determination that LA did not provide accommodation under section 20 is sufficient to deal with the point at issue in this case. K is not a looked after child because she is not being, and has never been, provided with accommodation and is not within the definition in section 22(1).

37. However, even if that is the wrong view and K might be said to have been provided with accommodation when placed with the grandparents, the provision of

accommodation was fleeting because, in my view, the making of the residence order brought K's looked after status to an immediate end.

38. The arguments in this case about the impact of the residence order to a large extent replicated those advanced in *GC v LD & Ors* [2010] 1 FLR 583 ("*GC*"). There, sitting in the Family Division, I accepted that a child who had been looked after by a local authority (albeit living with the grandmother) ceased to be looked after on the making of a residence order in the grandmother's favour. More detail of the argument advanced by both sides in that case can be found in the report and I do not intend to rehearse it (or all of my reasoning) here.

39. Despite having now had the opportunity to take another look at the issue, and to do so in the light of the replacement of section 23 (which was the material section in *GC*) by sections 22A to G, I have not changed my mind since I decided *GC*, nor do I think that there is anything which materially distinguishes the facts of the present case from it. It is fair to say that the grandmother in *GC* had legal representation, paid for by the local authority, which is quite different from this case where the grandparents were not advised or represented, but I do not think that that alters the legal analysis of the impact of the making of a residence order on K's status.

40. When a residence order is made, it confers parental responsibility on the holder for the duration of the order by virtue of section 12(2) Children Act 1989. From the moment of the making of the residence order, the child is therefore provided with accommodation by a person with parental responsibility, whose role has been approved by the court. That is wholly inconsistent with a continuing duty under section 20 in my view.

41. It is instructive to consider what happens when a residence order is made in relation to a child who is looked after by virtue of being in the local authority's care (section 22(1)(a)). Section 91(1) provides that the making of the residence order discharges the care order. Section 22(1)(a) therefore ceases to be applicable and the child is no longer looked after by virtue of it. This is powerful support for the view that a residence order also brings to an end the looked after status of a child who was up to that point provided with accommodation within the meaning of section 22(1)(b).

42. Furthermore, the present case underlined for me that, as I had observed in *GC*, there are great advantages in terms of clarity and certainty if the making of a residence order is determinative. Mrs Bradley's submissions on behalf of the grandparents, relying as they did on disputed details of the history, amply demonstrated the contrast if it were not to be treated as determinative. As I said in *GC* at §34:

> "The disadvantage of [that] analysis….is that, under [that] approach, the answer to whether a child is provided with accommodation by a local authority and is, therefore, looked after, depends on what could, in some cases, be a very detailed consideration and interpretation of the individual facts. In contrast, [the other] proposed approach has the advantage of certainty, depending, as it does, upon a readily identifiable single event. Once someone acquires parental responsibility by the making of a residence order, albeit a temporary one, the provision of accommodation ceases."

43. Accordingly, had I been determining the substantive issues in this case, for the reasons I have shortly set out, I would have allowed LA's appeal and determined that K was not a looked after child at any material time.

44. As it is, I would simply quash the decision made by the district judge.

LEVESON LJ:

45. I agree.

RICHARDS LJ:

46. I also agree.