

23 August 2018

Agreed note of judgment [as anonymised]

Solicitor for local authority, Ms Nadia Salam

Counsel for Mr A, Mr Oliver Powell

Counsel for children, through their children's guardian, Mr Alex Laing (instructed by Duncan Lewis Solicitors)

1. This is an appeal brought by a local authority against an order of lay justices, dated 22 June 2018, in which they granted care orders to the local authority in respect of two children: X, age 7, and Y, age 5. The lay justices also made a child arrangements order for X and Y to live with Mr A, the 2nd respondent, and former partner of the 1st respondent mother, Ms B.
2. On this appeal, the local authority and Mr A are represented by counsel; the children, through their children's guardian, are represented by a solicitor. Ms B and the father of X neither appeared nor were represented, nor responded to the appeal. Mr A opposes the appeal. The children, through their guardian, support it.
3. I have considered the documents in the appeal bundle, including the justices' reasons and the helpful written and oral submissions of each counsel. In their reasons, the justices set out the issues before them. They note,

“This case is exceptional owing to the delay in the proceedings to date, which is profoundly regrettable. We are currently in week 60 and the children have been in foster care throughout that period, pursuant to a section 20 agreement. This delay is at least in part due to extended family members putting themselves forward for assessment, but then withdrawing at a late stage, despite positive assessments.”

4. They go on to say,

“Following the withdrawal of the extended family members, [Mr A's] suitability as reassessed and the assessment was positive. He was observed to have obtained new employment and made real progress towards putting himself in a position whereby he could care for the children. He has maintained that he has been free from substance abuse for at

least six months. Although no definitive drug test results have been possible (owing to the slow growth of his hair and nails) he has provided evidence from his employer that he has passed monthly random urine tests.

We also consider it regrettable that a special guardianship assessment of [Mr A] has not yet been completed notwithstanding the length of time for which these proceedings have been going on.

We also note that [Ms B], during these proceedings, gave birth to a daughter, [Z], for whom the court granted a care and placement order [earlier in 2018]. We understand that the child is being placed for adoption.

We have dealt with the hearing via submissions. All parties agreed that there was no need for any oral evidence because the main issue in this case is what final order should the court make. The placement of the children with [Mr A] not in dispute”

5. Under the heading “care rather than supervision”, they held,

“Under a care order the local authority would share parental responsibility and have statutory duties. Under a supervision order the local authority does not have parental responsibility but befriends, advises, and supports, and the local authority argues that it should adopt the least interventionist approach.

In terms of practical support there seems to be little difference between the types of order. The local authority’s care plan shows a number of visits that exceeds those required under a care order. If the placement broke down, however, a care order would allow the local authority to intervene immediately without returning the case to court.

A care order also provides for an independent reviewing officer to monitor the care plan and its progress.

The arguments are finely balanced. Mr A presented well in court and engaged in the proceedings. He spoke in open court about his commitment to X and Y and to looking after them properly. He has sought some time off work in order to settle them into their home. He is working

in a responsible job and he has provided some evidence to support his claim that he is no longer taking drugs. A family group conference showed that several members of the extended family are willing to support Mr A in his parenting of X and Y, and some of those family members have had positive assessments.

However, it was not that long ago that Mr A was abusing drugs, neglecting the children, and putting his work – and his need to support his family financially – above the immediate needs of his children.

He has come a long way in a short time, and that is to his credit. However, Mr A has never been solely responsible for the children before, and there is a risk that once the initial euphoria wears off, and the stresses of being a single parent and of juggling his work and the needs of the children mount, Mr A might struggle. This is a fragile placement, and that is an argument for putting as much protection in place as possible.

...

We have considered the rights of all parties under Article 8 of the Human Rights convention and balanced these against the paramountcy of the welfare of each child whose safety requires the making of this order. We have considered our power to make a care order or a supervision order but we believe that the local authority should have parental responsibility to protect the welfare of each child and that a care order is necessary and proportionate to the aim of promoting each child's welfare. A supervision order would be inadequate.”

6. The local authority submits that a care order and “lives with” child arrangements order cannot co-exist. The local authority argues that, whilst there is some ambiguity between s 91 (1) and (2) and s 9 (6B) of the Children Act 1989, s 91 (1) and (2) is clear that both orders cannot be in force at the same time and the making of either would discharge the other. In their written submissions, the local authority argues that should the court determine that the lay justices did err in law, the local authority would seek the discharge of the care orders. Mr A would, following the special guardianship assessment, be supported by the local authority to make an application for a special guardianship order. In the event that the court is not with the local authority on this appeal and both orders remain in force, on completion of the special guardianship assessment, the local authority will

apply to discharge the care orders in October 2018 with a view to obtaining a special guardianship order for Mr A. At the beginning of this appeal hearing, the local authority readily conceded that it had not sought to impugn the reasons given by the lay justices for making the care and not the supervision orders – and, therefore, if the appeal succeeds, it is the child arrangements order and not the care orders that should be discharged.

7. Mr Powell, acting pro bono on behalf of Mr A, submits that s 9 of the Children Act 1989 reads,

“9 Restrictions on making section 8 orders.

(1) No court shall make any section 8 order, other than a child arrangements order to which subsection (6B) applies, with respect to a child who is in the care of a local authority.

...

(6) No court shall make a section 8 order which will end after the child has reached the age of sixteen unless it is satisfied that the circumstances of the case are exceptional.

(6A) Subsection (6) does not apply to a child arrangements order to which subsection (6B) applies.

(6B) This subsection applies to a child arrangements order if the arrangements regulated by the order relate only to either or both of the following—

(a) with whom the child concerned is to live, and

(b) when the child is to live with any person.”

8. Mr Powell notes that s 91 (1) and (3) of the Children Act 1989 say,

“91 Effect and duration of orders etc.

(1) The making of a child arrangements order with respect to the living arrangements of a child who is the subject of a care order discharges the care order.

...

(3)The making of a care order with respect to a child who is the subject of a supervision order discharges that other order.”

9. Mr Powell argues that s 9 of the Children Act 1989 including the explanatory notes, makes no reference to s 91 impacting on its operation, and that s 9 does not say it is subject to s 91. He argues that s 9 (1) permits the two orders to sit alongside each other, as its terms are unambiguous and it carves out an exception to s 91. He points out that there is no explanatory note in the *Family Court Practice 2018* that deals with this matter. He argues that the context of where s 9 sits in the scheme of the Children Act 1989 is important, as it is that it appears under the heading ‘Restrictions on making section 8 orders.’ Mr Powell argues: why have that if it is not to carve out an exception? He argues that this was a deliberate attempt by the legislature to carve out an exception to the general rule under the Children Act.

10. Mr Laing supports the appeal. In his written submissions, he sets out the legal framework. I agree with his reasoning, both as to the correct statutory interpretation and its effect. It is a reading that is supported by the authors of *Hershman and McFarlane* and *Clarke, Hall & Morrison*. Mr Laing correctly sets out that: the only form of child arrangements order that can be made where a care order is in force is a “lives with” child arrangements order (s 9 (1) and (6B) of the Children Act 1989); the making of a “lives with” child arrangements order discharges a care order (s 91 (1)); and, the making of a care order discharges a “lives with” child arrangements order (s 91 (2)).

11. Mr Laing also draws my attention to the ruling of in Booth J *Hounslow Borough Council v A* [1993] 1 FLR 702, where it was held,

“A care order itself automatically discharges any residence order that might be existing in respect of the child at the time the order is made. As Miss Hudson submitted before me, a residence order and a care order are two orders which are incompatible. They cannot both stand together. A residence order is clearly inconsistent with a care order and vice versa”, at 706.

12. Mr Laing argues that the position has been the same since s 91 of the Children Act 1989 first came into force on 14 October 1991, and has remained the case throughout the eight iterations of section 91 since then.
13. Mr Laing submits that there are good public policy reasons for that. [Generally], no order under s 8 of the Children Act 1989 can stand alongside a care order for a simple reason: once a care order is made, it is not for a court to interfere with a local authority's exercise of parental responsibility, save for as permitted within the framework of public law proceedings.
14. I agree. I find that, in error, the lay justices conflated the jurisdiction they had to make a "lives with" child arrangements order with the effect of the making of that order. Whilst they had jurisdiction to make the order, the effect is to discharge the care order, which they clearly did not intend.
15. Their decision was therefore wrong. I allow the appeal and set aside para 16.2, i.e. the "lives with" component of the order d. 22 June 2018.