UPPER TRIBUNAL CASE NO: CCS/1248/2018

DECISION OF THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER)

This decision is given under section 11 of the Tribunals, Courts and Enforcement Act 2007:

The decision of the First-tier Tribunal under reference SC900/17/00024, made on 31 October 2017 at Chester, did not involve the making of an error on a point of law.

REASONS FOR DECISION

1. The appellant before the Upper Tribunal is the father of Seren and Oliver; the respondent is their mother. Both parents are involved in their care. The mother applied for child support maintenance from their father. Was their father their non-resident parent for the purposes of the child support legislation? The First-tier Tribunal decided that he was and I have found no error of law in its decision.

A. How the child support scheme deals with parents who both care for their child

2. The basic structure of the Child Support Act 1991 assumes that a child is cared for by one parent. That parent is the parent with care; the other is the non-resident parent. If the child doesn't have a non-resident parent, the scheme doesn't apply: that is the effect of section 3(1) of the Act. The scheme then provides adjustments for different arrangements. One difference occurs when both parents are involved in the care of their child. That is what has happened here. It can have two effects. One effect is that there is a dispute about which parent is the non-resident one. The Act treats this as a special case (under section 42), which is governed by regulation 50 of the Child Support Maintenance Calculation Regulations 2012 (SI No 2677). The other effect occurs when the amount of the non-resident parent's liability is being calculated. This can only arise if there is a non-resident parent. If there isn't, the child support scheme does not apply. When it arises, it is governed by paragraph 7 of Schedule 1 to the Act and regulations 46 and 47 of the 2012 Regulations. Under those regulations only overnight care is relevant; under regulation 50, it is day to day care that matters.

B. Regulation 50

What the regulation says

3. This is what regulation 50 provides:

> **50 Parent treated as a non-resident parent in shared care cases**
>
> (1) Where the circumstances of a case are that—
>
> (a) an application is made by a person with care under section 4 of the 1991 Act; and
>
> (b) the person named in that application as the non-resident parent of the qualifying child also provides a home for that child (in a different household from the applicant) and shares the day to day care of that child with the applicant,
>
> the case is to be treated as a special case for the purposes of the 1991 Act.
>
> (2) For the purposes of this special case, the person mentioned in paragraph (1)(b) is to be treated as the non-resident parent if, and only if, that person provides day to day care to a lesser extent than the applicant.
>
> (3) Where the applicant is receiving child benefit in respect of the qualifying child the applicant is assumed, in the absence of evidence to the contrary, to be providing day to day care to a greater extent than any other person.

4. The three paragraphs of the regulation each cover a different topic:

- paragraph (1) sets out when the regulation applies;
- paragraph (2) sets out the effect of the regulation when it applies; and
- paragraph (3) deals with the significance of an award of child benefit.

All three raise problems.

There is no definition of 'person with care' in the Regulations.

5. There is a definition in section 3(3) of the Act, but it only applies 'for the purposes of this Act' (section 3(7)). This is the definition:

> (3) A person is a 'person with care', in relation to any child, if he is a person-
>
> (a) with whom the child has his home;
>
> (b) who usually provides day to day care for the child (whether exclusively or in conjunction with any other person), and
>
> (c) who does not fall within a prescribed category of person.

6. Section 3(3) only applies for the purposes of the Act, but what does that mean? It could mean that it does not apply to regulations made under the Act. Or it could mean that it applies to those regulations, but not to any other family legislation. Either way, it makes no sense to apply it to regulation 50. If the definition could apply, it must give way to the context and it must do that in order to avoid rendering the rest of the regulation redundant. Applying the definition would have the effect that the person making the application must be the person with care; but the whole point of the regulation is to deal with

disputes about which parent fulfils which role. Once the parent with care and the non-resident parent have been identified, the child will have '*his* home' with the former (section 3(3)(a)) despite having '*a* home' with the latter (regulation 50(1)(b)). It is only when regulation has been applied that it is possible to know which home is the child's home rather than just a home. That is why I interpret 'person with care' to mean the person who has presented themselves as one in an application under section 4 of the Act.

There is no definition of 'qualifying child' in the Regulations.

7. There is a definition in section 3(1) of the Act, but it only applies 'for the purposes of this Act' (section 3(7)). This is the definition:

> (1) A child is a qualifying child if-
>
> (a) one of his parents is, in relation to him, a non-resident parent; or
>
> (b) both of his parents are, in relation to him, non-resident parents.

This raises the same problem as 'parent with care'. A qualifying child is identified by having a non-resident parent, but the whole point of regulation 50 is to identify whether there is a non-resident parent. It can only mean that 'qualifying child' is one who would be a qualifying child in relation to the person named in the application as the non-resident parent if the regulation applies. As Upper Tribunal Judge Gray has put it, the way the regulation is worded 'seems to put the proverbial cart before the horse': *CF v Secretary of State for Work and Pensions and CG* [2018] UKUT 276 (AAC) at [22].

There is no definition of 'day to day care' in the Act or the Regulations.

8. There was a definition in previous versions of the scheme. See regulation 1(2) of the Child Support (Maintenance Calculations and Special Cases) Regulations 2000 (SI 2001 No 155), where it is defined by reference to the number of nights for which a person had care of the child. I agree with what Upper Tribunal Judge Ward said about the significance of overnight care in *JS v Secretary of State for Work and Pensions and another* [2017] UKUT 296 (AAC):

> 20. … the expression 'day to day care' in regulation 50 is a phrase in common usage and does not require definition. Whilst I agree that its connotations are of routine care, I am not looking to rephrase the statutory test. It will be a question of fact for the FtT in the light of all the evidence available to it. Such an approach is in my view consistent with *GR [v CMEC* [2011] UKUT 101 (AAC)] and (when allowance is made for the different legislative context) R(CS)11/02. In the context of reg 50, overnight care is therefore not a trump card … but is one factor, along with others.

Judge Gray, too, described *R(CS) 11/02* as the 'touchstone' on day to day care: *CF* at [33]-[34].

9. I also agree with what the Judge Ward said about the contrast with the definition in the previous scheme:

> 21. … The omission of such a definition applying to reg 50, particularly in the context of there being problems of application of the previous definition and where other structural changes were made to the provision, must be taken as deliberate.

Paragraph (3) creates an assumption.

10. Judge Gray called it a rebuttable presumption: *CF* at [21]. Maybe; assumption could just be the plain English equivalent. But then again, maybe not; perhaps the language is designed to avoid the complexities that can arise with presumptions. The assumption applies 'in the absence of evidence to the contrary'. Does this mean 'in the absence of evidence to prove the contrary'? Or does it mean that, if there is any evidence to the contrary, the issue has to be decided on the evidence as a whole? There may not be much (if any) difference in practice, because 'If there is any evidence as to a division of care it must assessed', as Judge Gray said in *CF* at [27]. Her whole analysis at [26]-[28] undermines, for me, the status of a presumption.

C. What the First-tier Tribunal found

11. The mother was receiving child benefit for the children. On that basis, the tribunal made these findings:

> It is clear that the children do spend time with both parents. It is also accepted that both parents pay for the activities for the children. The father has ensured that the children can go to the school of their choice by moving into the village. The children are registered at his address for the dentist. He has attended the hospital, although the children are registered with the mother's doctors. The mother in her statement stated in her view she pays more because the children are with her on a rolling two-week pattern for more, particularly in relation to school dinners. The decision referred to above of JS does indicate that overnight stays are not the trump card. However the Tribunal had to consider that in this case the number of overnight stays were only in Band C [in paragraph 7 of Schedule 1 to the Act], and even then at the very lower number of 156 nights. During term-time then during week one the children would be with their father from Monday after school, Monday [Tuesday?] morning and Tuesday after school. They would then go to their mother's for Wednesday and Thursday after school, returning to their father's on Friday and spending until Sunday but no overnight. They would spend Sunday, Monday or Tuesday evenings with their mother and then Wednesday and Thursday nights with their father returning to their mother and spending Friday, Saturday and Sunday nights with her. Looking at that pattern then overall the children are spending more time at their mother's after school, and [she] is involved with the children's day to day arrangements for all aspects of their care so on balance although overnight stays are not the trump card, the Tribunal conclusion that she was receiving Child Benefit, and although the father is

involved he is providing day to day care to a slightly lesser extent than the applicant mother and so his appeal has to be refused.

D. What the parties have said

12. The Secretary of State's representative supported the appeal. Her argument was this. She quoted what I said in *R(CS) 11/02* at [20]: a parent may be providing care if even they are not physically present with the child, as when the child is visiting a friend. She then argued that the tribunal concentrated too much on overnight care and failed to take account of day to day care in the sense of care that is mundane or routine.

13. The mother responded to the appeal. She disagreed with the father about the amount of time the children spent with her and denied that he contributed to the cost of their activities or schooling. She also raised an issue about non-payment of maintenance, but that is not relevant to what I have to decide.

14. The father replied to the other submissions. Leaving aside the non-payment issue, he said that he continued to have equal involvement in his children's lives. He disagreed with the mother about his financial contributions and the amounts she paid, adding that the children are not always with the mother as they may be at her parents' house. He said he meets all costs when the children are with him. Finally, he asked for an oral hearing.

E. The tribunal did not go wrong in law

15. Most of what the parents have said on this appeal relates to the facts. What I have to decide is whether the decision 'involved the making of an error on a point of law' (section 12(1) of the Tribunals, Courts and Enforcement Act 2007).

Day to day care

16. The tribunal directed itself correctly by following Judge Ward's decision in *JS*. I agree with that decision. The judge was right that the tribunal has to apply the language of day to day care and not substitute some other phrase by way of definition. It is, though, necessary to analyse what it involves in order to make findings of fact on matters that are relevant.

17. The father has spoken of his involvement in his children's lives and the money he pays for them. Those points are not directly relevant. The test is about providing care. It is not about love, affection and devotion. No one is doubting his feelings for his children. It is just that they are not relevant under regulation 50. What matters is the practical care that is provided. Nor is the test just about finances. Of course money is important and some aspects of care involve money. But not all care costs money and care that comes for free is care nonetheless. Bandaging a knee, responding to a cry in the night, or providing comfort for the loss of a pet, these are all part of day to day care and no less a part because they come without charge and at no cost.

18. The father has tried to counterbalance the additional nights that the children spend with their mother by emphasising his contributions. The time that a child spends with a parent is important, but not just for itself. The longer a parent spends with their child, the greater the chances to provide care. That is why overnight care is relevant – because protecting children and responding to their needs at night is part of day to day care - and why it is not decisive – because the night is only part of the time.

19. Details can be significant, but it is important not to lose sight of the pattern, which is what the tribunal has to find. Fluctuations may cancel themselves out: here the father accepted that the week-long holidays with each parent 'would largely balance themselves out'. And a child's specific needs may vary from time to time: it may be pure chance whether the child is with their father or mother when they fall and need to go to the hospital.

20. The tribunal had to look for a pattern or distribution of care by taking account of the evidence as a whole, including all the details that the parents provided. These are easy words for the Upper Tribunal to write, but they are not so straightforward for the First-tier Tribunal to apply and explain. There is no formula that a tribunal can apply to take account of all the different aspects of care. Suppose the father pays for his children to attend an after school club, their mother picks them up, unless she is working, when her parents stand in for her. How is the care involved to be allocated? And how does any of that compare with making sure that the children go to bed at a sensible time and don't eat too much junk food? Unless the facts make the decision clear cut, it must involve a broad and impressionistic evaluation.

How can the tribunal explain its reasoning?

21. The First-tier Tribunal does not just have to make a decision; it has to explain how it made it. That can be difficult when the reasoning is, at least partly, impressionistic. As with all cases, it is essential to make findings on all the facts that matter. The difficult part is to explain how the tribunal extracted the pattern from the details. The law requires that the reasons be adequate and the Upper Tribunal has to take account of the reality that it is not possible to explain precisely the thought process that led to the conclusion. One way to do that is to explain the more significant factors that influenced the tribunal's judgment. Here what struck the tribunal was the distribution of overnight care. This was in favour of the mother. It was important because of the opportunities for care that arise overnight. The tribunal did not treat that as decisive, even though the father had care 'at the very lower number of 156 nights.' It said that the father 'is providing day to day care to a slightly lesser extent' than the mother. Given the balance in overnight stays, the tribunal remark shows that it took other factors into account as well. Judges often say that cases are finely balanced. That is what the tribunal said in this case. Often it is just a sop to the losing party; here it was true.

Conclusion

22. I have not found an error of law in the tribunal's decision. It directed itself correctly on the law. Its findings of fact were supported by the evidence. I do not accept that the tribunal concentrated inappropriately on overnight care. It dealt with that in detail because it was significant in its reasoning, but it did not limit itself to that. It has given reasons that are adequate.

F. Why I have refused the request for an oral hearing

23. I have not held an oral hearing. The Upper Tribunal has a discretion whether or not to hold a hearing: rule 34(1) of the Upper Tribunal Rules. The test I have to apply is whether 'fairness requires such a hearing in the light of the facts of the case and the importance of what is at stake': *R (Osborn) v Parole Board* [2014] AC 1115 at [2(i)]. I am required to have regard to the reasons for the application: rule 34(2). I have exercised the discretion against holding a hearing and have decided the appeal on the papers. The father says that he wants to give evidence, but that is not appropriate. I only have jurisdiction to make findings of fact if I find an error of law in the tribunal's decision; I have not. He also says that he wants to answer any questions I have. There is no need for a hearing on that ground, as I do not have any questions.

Signed on original
on 12 October 2018

Edward Jacobs
Upper Tribunal Judge