GC v LD & Ors [2009] EWHC 1942 (Fam)

Case No: ZP07POO634

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

24/07/2009

B e f o r e :

THE HONOURABLE MRS JUSTICE BLACK

Between:

GC	**Applicant**
- and -	
LD	**1st Respondent**
DD by his Guardian	**2nd Respondent**
RBK	**3rd Respondent**
LCC	**4th Respondent**

Mr Newton QC (instructed by Waddington and Sons) for the Applicant
Miss Fox (instructed by Burke Niazi and Company) for the 1st Respondent
Miss Bhatt (instructed by Russell Cooke and Co) for the 2nd Respondent
Mr Singh Hayer (instructed by for Royal Borough of Kingston Legal Services) for the 3rd Respondent
Mr Hayden QC (instructed by Lancashire County Council Legal Services) for the 4th Respondents
Hearing dates: 20th and 21st July 2009

HTML VERSION OF JUDGMENT

Black J:

1. The child involved in this case (DD) was born on 4 November 1998 and is now 10 years old. His father (F) is AD and his mother (M) is LD. They were married in 1998 and separated in approximately 1999 when DD was a baby. There have been problems in relation to M's care of DD and of her other children and the local authority for the area in which she lives, the Royal Borough of Kingston upon Thames (RBK), were involved with the family on occasions prior to the events that feature in this judgment.

2. DD came into the care of RBK on this occasion on 25 June 2007 when M was incapacitated once more by mental illness. He was placed with a RBK foster carer with whom he had stayed in the past. On 27 July 2007, he was taken to stay with his paternal grandmother (PGM) who lives in the area of another local authority, Lancashire County Council (LCC), and he has remained there ever since. On 13 December 2007, a residence order was made in favour of PGM, expressed to be "in the interim". The directions given that day contemplated

that the matter would return to court in mid February 2008 with the benefit of a s 37 report on the placement with PGM from LCC.

3. In due course, steps were taken towards the making of a special guardianship order in PGM's favour. I put it this way because no application form was ever issued but everyone proceeded as if it had been and a special guardianship report was directed. All represented parties (M, DD by his guardian, LCC and RBK) are in agreement that a special guardianship order should be granted. By an oversight, no doubt compounded by the failure of PGM's representatives to issue special guardianship proceedings in the proper way, F has not been formally notified of the special guardianship application. He was apparently informed in December 2008, by DD's guardian in these proceedings, of the intention to secure DD's position by seeking a special guardianship order in favour of PGM and he was not in opposition to that. He was then contacted by the guardian again, after I raised the issue of service on the first day of the hearing in front of me. I am told that he still agrees to the special guardianship order being made. In the circumstances, I am asked to dispense with any requirement of formal service upon him. I have lamented before a widespread tendency to fail to observe basic procedural formalities prescribed for family cases. I have no doubt that the pressure under which family practitioners work these days contributes significantly to this problem. However, it is important that the rules *are* observed so as to prevent situations like this occurring. In this particular case, I am satisfied that F is genuinely content for his mother to look after DD under a special guardianship order and that no injustice will be done to him if I do proceed to make an order without involving him further. Accordingly, I will dispense with any requirement to give further notice to F and also dispense with the issue of an application form, proceeding as if the application had been properly launched by PGM, who has been entitled to apply for a special guardianship order since 13 December 2007 by virtue of the residence order in her favour (s 14A(5) Children Act 1989). A special guardianship report has been provided in accordance with s 14A(11).

4. Issues have arisen between LCC and RBK as to financial support for PGM in relation to the period from the making of the residence order on 13 December 2007 until the making of the special guardianship order ("the middle period") and for the future in the context of the special guardianship order ("the future"). As refined at the outset of the hearing, there is before me an application by PGM for declarations under the inherent jurisdiction of the court determining:

   i) Which of the two local authorities is responsible for financial support for DD and the PGM during the middle period and the proper rate of such financial support;

   ii) Which of the two local authorities is responsible for the provision of services under the special guardianship provisions for the future.

   The two local authorities have been joined as parties in the proceedings in order to deal with this aspect of the case.

5. In order to determine which local authority is responsible for both the middle period and the future period, one needs to ascertain whether DD was looked after by RBK at the relevant time. The attempt to answer this has taken me to some of the more difficult provisions of Part III Children Act 1989.

6. It is common ground that DD was looked after by RBK from 25 June 2007 until 13 December 2007, notwithstanding that he went to live with PGM from 27 July 2007. The argument is as to whether the making of the residence order on 13 December 2007 resulted in DD ceasing to be looked after by a local authority.

7. As to the middle period, it is conceded by RBK that if DD ceased to be a looked after child following the making of the residence order, they will pay a residence order allowance for him under Sch 1 para 15 Children Act 1989, although neither the amount of that allowance nor the principles by which RBK propose to quantify it are established yet. If, on the other hand, DD

continued to be looked after following the making of the residence order, they will pay a fostering allowance for him.

8. As to the future, if DD remained a looked after child following the making of the residence order, RBK have obligations in relation to special guardianship support under s 14F Children Act 1989, by virtue of regulation 5 Special Guardianship Regulations 2005. If DD ceased to be looked after from the time that the residence order was made, LCC are responsible under s 14F for special guardianship support services.

9. It has not been possible during this hearing to address the issue of the quantum of the financial element of that support. That matter will have to be addressed by whichever local authority is found to be responsible. Counsel on behalf of PGM asked me to give my views in this judgment as to the way in which financial support should be quantified but it seems to me that it would be misguided of me to do so. Once the local authority with responsibility is identified, they will quantify the support they propose and inform the other parties of the figures and the principles by which they have arrived at them. If there is any debate as to whether the approach taken to quantification is lawful, which I doubt there will be, PGM always has judicial review proceedings open to her and the judge hearing such an application would be in a much better position than I am to rule upon the matter because he would be able to scrutinise the actual proposals with the benefit of full argument about them, rather than attempting to formulate an approach in limbo and at a time when attentions are very much absorbed by the fundamental question of which authority is responsible for payment.

10. When M became incapacitated in June 2007, it is common ground that a duty arose for RBK under s 20(1) Children Act 1989. This provides:

> "s 20(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."

11. DD was undoubtedly a child in need within RBK's area and required accommodation as a result of the person who had been caring for him being prevented from providing him with suitable accommodation or care. The decided authorities show that it may be possible in some cases for a local authority which becomes aware of an arising problem over the care of a child to deflect the crisis by placing the child with friends or relatives. In such circumstances, s 20(1) may never come into play. In this case, that was not possible. DD needed to be provided with traditional local authority accommodation with a foster parent and he needed this for more than 24 hours.

12. DD became, at this point, a child who was being looked after by the local authority. S 22(1) Children Act explains the ambit of "being looked after by the local authority" as follows:

> "s 22(1) In this Act, any reference to a child who is being looked after by the 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"

13. DD was not 'in the care of RBK' because that is defined by s 105(1) as being in the care of the local authority by virtue of a care order. He *was,* however, provided with accommodation by RBK in the exercise of their social services functions. This is obviously the case in relation to the foster placement with RBK foster parents and it is conceded that it remained so during the pre-residence order placement with PGM.

14. DD was never made the subject of a care order so, if he remained a child who was being looked after by the local authority following the making of the residence order, it could only have been because he fell within the parameters of s 22(1)(b). In order to determine whether he did so, one must examine what is meant by "provided with accommodation by the authority".

15. There have been a number of authorities in which this phrase has been considered. I had cited to me as particularly relevant in this connection, Re C (Care Order: Appropriate Local Authority) [1997] 1 FLR 544, Re H (Care Order: Appropriate Local Authority) [2003] EWCA Civ 1629, and Southwark LBC v D [2007] EWCA Civ 182. Re C (Responsible Authority) [2005] EWHC 2939 (Fam), R (C) v Knowsley MBC [2008] EWHC 2551 (Admin), and R (A) v Coventry CC [2009] EWHC 34 (Admin) were also cited. In addition, I have had reference to Kirklees MBC v London Borough of Brent [2004] 2 FLR 800. Furthermore, I am aware of other authorities in the administrative law sphere in which the courts, including the House of Lords, have considered s 20 and s 23 Children Act 1989.

16. I preface my consideration of the authorities by setting out the relevant portions of s 23 which is central to the issue I have to resolve.

> "**23 Provision of accommodation and maintenance by local authority for children whom they are looking after**
>
> s 23(1) It shall be the duty of any local authority looking after a child –
>
> (a) when he is in their care, to provide accommodation for him; and
>
> (b) to maintain him in other respects apart form providing accommodation for him.
>
> (2) A local authority shall provide accommodation and maintenance for any child whom they are looking after by –
>
> (a) placing him (subject to subsection (5) and any regulations made by the appropriate national authority) with –
>
> (i) a family
>
> (ii) a relative of his; or
>
> (iii) any other suitable person,
>
> on such terms as to payment by the authority and otherwise as the authority may determine (subject to section 49 of the Children Act 2004);
>
> (aa) [use of children's home]
>
> (b) – (e) [repealed]

(f) making such other arrangements as –

(i) seem appropriate to them; and

(ii) comply with any regulations made by the appropriate national authority.

(2A) [use of children's home]

(3) Any person with whom a child has been placed under subsection (2)(a) is referred to in this Act as a local authority foster parent unless he falls within subsection (4).

(4) A person falls within this subsection if he is –

(a) a parent of the child;

(b) a person who is not a parent of the child but who has parental responsibility for him; or

(c) [children in care under a care order]

(5) Where a child is in the care of a local authority, the authority may only allow him to live with a person who falls within subsection (4) in accordance with regulations made by the appropriate national authority.

(5A) For the purpose of subsection (5) a child shall be regarded as living with a person if he stays with that person for a continuous period of more than 24 hours.

(6) Subject to any regulations made by the appropriate national authority for the purposes of this subsection, any local authority looking after a child shall make arrangements to enable him to live with –

(a) a person falling within subsection (4); or

(b) a relative, friend or other person connected with him,

unless that would not be reasonably practicable or consistent with his welfare.

(7) Where a local authority provide accommodation for a child whom they are looking after, they shall, subject to the provisions of this Part and so far as is reasonably practicable and consistent with his welfare, secure that –

(a) the accommodation is near his home; and

(b) where the authority are also providing accommodation for a sibling of his, they are accommodated together.

(8) [disabled children]

(9) [relevance of Part II of Schedule 2]

(10) [definitions relating to children's homes]"

17. In Re C [1997], Re H, and Kirklees v Brent, the context of the court's consideration was the issue of which local authority should be designated in a care order. S 31(8) Children Act 1989 provides, inter alia, that the local authority to be designated is the authority within whose area the child is ordinarily resident. S 105(6) Children Act 1989 provides that in determining the

ordinary residence of a child, "there shall be disregarded any period in which he lives in a place - …..(c) while he is being provided with accommodation by or on behalf of a local authority." In all three cases, the court had to consider whether a period of time should be disregarded under this provision, and therefore whether it was a period during which the child was being provided with accommodation by or on behalf of a local authority.

18. In Re C, the children were subject to interim care orders but the local authority had permitted them to live at home with their mother. Wall J (as he then was) decided that the disregard provision in s 105(6) did not apply as a local authority which permits children to remain at home under an interim care order in care proceedings is not providing accommodation for them but has allowed them to live with their mother under s 23(5) Children Act 1989.

19. In Re H, the child was the subject of an interim care order obtained by Oxfordshire County Council. A judge decided, opposed by Oxfordshire, that the child ought to be placed with his grandfather and step-grandmother and the child moved to their care in Norfolk where he lived for 2 years before the issue arose as to which local authority would be designated in the event that a full care order was made. Although it looked as if the child was ordinarily resident in Norfolk, Norfolk argued that the disregard provision applied in relation to the period in Norfolk because the child was 'being provided with accommodation by or on behalf of [Oxfordshire]' during that time and that accordingly, the local authority to be designated was Oxfordshire. The Court of Appeal did not accept this argument because it concluded that, once the child moved from foster care to the relatives in Norfolk, he was not being provided with accommodation by a local authority but began to live with the grandfather pursuant to arrangements made by the local authority pursuant to its duty under s 23(6) Children Act 1989.

20. In Kirklees v Brent, the children were in foster care under an interim care order following the mental illness of their mother. The local authority approved the aunt as a foster carer and the children moved to live with her with the agreement of all parties and were expected to live with her long term. Bodey J held, following Re C and Re H, that where a child was allowed to live with relatives, the authority was making 'arrangements to enable' the child to live with a relative under s 23(6)(b) and not providing accommodation by placing him with a relative under s 23(2) Children Act 1989.

21. In these 3 cases, the children concerned were the subject of interim care orders and were therefore looked after by the local authority by virtue of that fact (s 22(1)(a) Children Act 1989). In Southwark v D and Re C (Responsible Authority), the children were not the subject of care orders and not within s 22(1)(a).

22. In Re C (Responsible Authority), the President had to determine which of two local authorities was responsible for the provision of services to a family. Following concerns about the mother's parenting and a core assessment by the local authority where she lived, she agreed to the children being voluntarily accommodated under s 20 Children Act. A few days later, she contacted the local authority to arrange for them to be placed with their grandmother in another area of the country, which they were, a package of support within a Children in Need plan having been agreed between the two local authorities. The grandmother's local authority argued that the mother's local authority was providing accommodation pursuant to s 20 in placing the children with the grandmother and remained the responsible local authority. The President found that the children had been accommodated with the grandmother under a family arrangement approved by the first local authority acting under its duty pursuant to s 23(6) as opposed to being provided with accommodation by Thurrock under s 23(2). The grandmother's local authority was therefore responsible for the children's needs under s 17 Children Act 1989.

23. In Southwark LBC v D, the context was an issue over whether Southwark was responsible for funding a placement with a friend of the child's father. The child had had a short period with Southwark foster parents in the past but was not the subject of a care order and after a period staying with a friend of her father's, the child returned home to her father. The following year, that arrangement broke down. Southwark social services became involved again. The child

told them she would like to return to live with the father's friend. The representative of social services contacted the friend and, the friend having agreed that she would care for the child, took the child to her house. Next day, the representative told the friend that someone from his office would visit her and steps would be taken to offer her assistance. The friend indicated her willingness to co-operate. Nothing specific was said about financial arrangements and the friend assumed the person from the office would make them but no one came. Social services got the agreement of both parents to the child living with the friend but the friend never dealt directly with either parent. When the friend approached Southwark in due course for financial support, Southwark said the arrangement with her had been a private fostering arrangement and that she should look to Lambeth, where she lived, for support. Lambeth considered that Southwark had placed the child with the friend pursuant to their statutory duties so Southwark were responsible. The Court of Appeal held that Southwark had had a duty under s 20(1) Children Act to provide accommodation for the child. Such a duty might be side-stepped by a local authority helping to make a private fostering arrangement but that had not happened here where the local authority had taken a central role in the arrangements for the friend to look after the child. Once the s 20(1) duty arose, the local authority could ensure that accommodation is provided by providing it themselves under s 23(2) or they could make arrangements for the child to live with a relative, friend etc. pursuant to s 23(6). The court observed that usually, and ideally, a s 23(2) placement will be temporary and s 23(6) arrangements for the child to live with someone will provide a longer term solution to the child's needs. Considering whether the circumstances in this case amounted to a placement under s 23(2) or s 23(6), the court was clear that it was under s 23(2) because, in short, no reasonable bystander would have thought that the local authority was shedding its legal responsibility to provide accommodation for the child and the friend was taking it on. The reality was that the local authority was asking the friend to accommodate the child on their behalf and at their expense.

24. I confess that unconstrained by authority, my approach to the interpretation of this very difficult part of the Children Act might have been different for reasons to which I allude very briefly below. I am bound, however, by the Court of Appeal authorities, Re H and Southwark v D. They quite plainly proceed upon the basis that s 23(2) and s 23(6) represent two different routes by which a child may be housed, each with wholly different consequences. When arrangements are made for a child pursuant to s 23(6), he is not being provided with accommodation by the local authority and, following placement, unless he is the subject of a care order, he ceases to be a looked after child. When arrangements are made pursuant to s 23(2), the child *is* being provided with accommodation by the local authority. The distinction perceived between the two methods appears to derive from the contrast between the phrase "make arrangements to enable him to live with" in s 23(6) (also reflected in s 23(5) which includes the words "allow him to live with") and the phrase "provide accommodation …. by placing him with" in s 23(2).

25. As I have said, RBK concede that DD was placed initially with PGM under s 23(2), but they argue that they ceased to provide him with accommodation from the point when the residence order was made in PGM's favour. Miss Theis QC drafted the original skeleton argument for RBK, although they were ably represented by Mr Singh Hayer at the hearing, and she put it this way:

> "44. The duty to accommodate (and the associated status the child acquires of being 'looked after') under s 20 arises where a child in need appears to require accommodation as a result of either there being no person with PR, the child having been lost or abandoned or the person who has been caring for the child being prevented from providing suitable accommodation or care. In DD's case, it was the last of these three that gave rise to the initial duty.
>
> 45. However, when PGM acquired her residence order, which settled the arrangements as to with whom DD should live, she also, of course, by virtue of s 12(2) of the Act, acquired parental responsibility for the duration of the order.

> 46. In the circumstances, it is clear that there can no longer have been any duty on RBK to accommodate DD since there was an independent, court approved and non-temporary basis on which he was to be provided accommodation by a person with PR. This is wholly inconsistent with the subsistence of a s 20 duty.
>
> 47. Given that it is clear that RBK could not be said to be accommodating DD under any other social services function within the meaning of s 22(1), it is therefore clear that RBK were not 'looking after' DD from the time at which the residence order was granted."

26. Mr Singh Hayer pointed out that up to the making of the residence order, by virtue of s 23(3), PGM was a "local authority foster parent". When the residence order gave PGM parental responsibility, her status changed and, because she then fell within s 23(4)(b), she ceased to be a local authority foster parent. He would argue that, as a necessary corollary, DD ceased to be provided with accommodation by the local authority and, not being the subject of a care order, ceased to be looked after by them. Putting it in my words, not his, being a local authority foster parent and being a child who is provided with accommodation by the local authority are two sides of a coin and, where the child is being looked after by an individual rather than, for instance, in a children's home, you cannot have either one without the other. Mr Singh Hayer acknowledges that the local authority continued to give significant assistance to PGM after the residence order was made but points out that local authorities have got ways to assist children which do not amount to providing accommodation or bring the child within s 22(1), notably under s 17 Children Act 1989. The giving of such assistance does not serve artificially to prolong the period during which the child is provided with accommodation by the local authority or to elevate child's status to that of a looked after child.

27. My attention is invited to the decision of Charles J in R (M) v Birmingham City Council [2008] EWHC 1863 (Admin). There, a mother moved with her child from one local authority to live with her brother in another local authority area, then departed leaving the child with its uncle. The uncle contacted the mother's local authority and was told that the local authority was happy for him to care for the child because the alternative was that the child would be taken into care and advised to seek a residence order which he did. The uncle sought financial assistance by way of a residence order allowance. Charles J says:

> "18. It is clear that in a number of cases the making of a residence order will relieve the local authority of obligations to provide accommodation and maintenance for a child and thus of financial (and other) obligations. For example this will occur when a child ceases to be accommodated under s 23(2) as a foster child and becomes a child subject to a residence order in favour of a foster carer, or a different person. More generally this occurs when a child ceases to be a child who is 'looked after by the local authority' (see s 22(1)) and becomes the subject of a residence order."
>
> "19. It could also occur when a child has never been looked after by a local authority but would have been if a residence order had not been made, or if there had not been a family placement (followed by a residence orders)."

28. If it is suggested that this passage is evidence that Charles J considered that a child would necessarily cease to be accommodated under s 23(2) when a residence order was made, I cannot agree that it goes that far. Certainly, the passage makes clear that Charles J's view was that a residence order *could* have that consequence but I do not think it confirms that he considered that it *necessarily would* have that consequence.

29. Mr Singh Hayer points out that the Children Act does not contemplate that a care order should survive the making of a residence order. S 91(1) provides that the making of a residence order in respect of a child who is the subject of a care order discharges the care order. That would, of course, mean that the child who had been a looked after child by virtue of being in the local authority's care under a care order would cease to be a looked after child. Why should the position be different when a residence order supervenes in relation to a child who is being provided with accommodation by the local authority without a care order?

30. All the other parties join together to submit that DD continued to be provided with accommodation by the local authority following the residence order and therefore remained a looked after child. I hope they will forgive me if I do not always differentiate the source of the various points that are made in support of this argument.

31. The argument depends to a considerable extent upon the circumstances surrounding PGM's application for the residence order. It is pointed out that:
    - As RBK accept, it was RBK who encouraged PGM to make the application. They also encouraged PGM to seek her own legal advice, which she did, and assisted her financially when there were difficulties over the cost of that. It seems that the impetus for considering a residence order was to ensure that the placement with PGM was secure if M should attempt to remove DD. The only other way in which that could have been achieved was by instituting care proceedings.
    - The residence order was not an end in itself. The ultimate goal of the local authority, their plan for their looked after child, was a special guardianship order but time was needed before that could be sought. The residence order itself was labelled as interim and the directions given by the court show that it was a temporary measure en route to a more permanent solution. I accept all of this, which is clear from the papers.
    - The local authority continued, following the residence order, with the same framework as before the order was made. Amongst other things, the local authority continued to be involved in facilitating contact between DD and the rest of his family. This too seems to be evident from the papers.

32. It is submitted that (as Mr Hayden QC for LCC puts it) "the placement was driven, monitored and supported by RBK throughout. There are no hallmarks of a truly 'private fostering arrangement'." He further submits that there is no evidence of a conversation between RBK and PGM explaining the financial implications of the arrangements that were in contemplation and no evidence that PGM took decisions about such matters at all, let alone informed decisions. On the other hand, there is no suggestion of bad faith on the part of RBK, or that they were in any way deliberately trying to divest themselves of responsibility for DD, and PGM's instruction of her own solicitor, with RBK's assistance, was, it seems to me, the route by which she could be advised of the consequences, advantageous and disadvantageous, of the making of a residence order.

33. LCC submit that "the central issue for this hearing as LCC identify it is whether the granting of the interim residence order had the random effect of transferring financial and service responsibility for the special guardianship order from RBK to LCC." They submit that Parliament cannot have intended that because the consequences would run contrary to the interests of looked after children in that:
    - Local authorities would be able to divest themselves of financial responsibility for children they are looking after if they managed to identify a suitable family member outside their area. I would observe, in this regard, that it must be understood that this would not necessarily strand the child and its relatives without local authority assistance although I agree that the nature of the assistance might change because the child's status would alter and, further, that recourse might have to be had to a different local authority. In my judgment, however, it is important to remember that a necessary step in the process would be the making of a residence order. A family member who felt that the making of such an order would be prejudicial would not have to apply for one. The local authority would have no right to apply themselves for such an order and, if it was suggested that the court should make such an order of its own motion, the family member could resist that course by explaining its adverse consequences. Independent legal advice, as sought by PGM, should fortify a relative sufficiently to deal with these matters.

- It would be a powerful disincentive for those advising potential special guardians to apply for interim residence orders because doing so might weaken their ability to negotiate a proper package of support. The making of a special guardianship order can take some time and no interim special guardianship order is available. In the meanwhile, the looked after child would be vulnerable as nobody would effectively be exercising parental responsibility. It is submitted that the undesirable consequence would, in many cases, be the instigation of public law proceedings which might not otherwise have been taken.

34. I prefer the analysis of RBK to that of the other parties. I cannot agree that the process of transferring responsibility from one local authority to another is a "random effect" of a residence order. It is the consequence of a set of legal rules, albeit a set of legal rules which are complex and of which it is extremely difficult to make complete sense. The disadvantage of the analysis proposed by PGM, LCC etc., is that, under their 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, RBK's 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.

35. Furthermore, it seems to me logical that where a child is living with an individual (rather than in, say, a children's home), the concept of a local authority providing accommodation for a child is tied to the concept of a local authority foster parent as defined by s 23(3).

36. I am not persuaded by the argument that this interpretation is detrimental to the interests of vulnerable children. I accept that it may be necessary for people in the position of PGM to think carefully before seeking a residence order and that they may be disinclined to do so, in order to preserve their links with (and rights in relation to) the local authority who initially placed the child with them. However, should the decision be not to seek a residence order, and should there be a real threat to the security of the placement because of outside influences such as a parent who wishes to resume care of the child, there is a statutory scheme by which the child (and its carer) can be protected. The impact of an interim care order obtained in these circumstances would not necessarily be that much more burdensome for the child and its carer than would be the impact of the child continuing to be looked after by the local authority in the context of a residence order.

37. I said that I would allude to the reason why, unconstrained by authority, I might have viewed s 23 rather differently. I should say immediately that I do not think this different view would have resulted in a different outcome for PGM and LCC, simply that my analysis and route to that outcome might have been different. As this is so, and because I do not pretend to have arrived at a complete answer with regard to the interpretation of the very challenging provisions of ss 20 – 23, I will say only sufficient to identify why I wonder, respectfully, whether there might be a problem with the approach taken by the courts so far. That approach depends upon s 23(2) and s 23(6) (or s 23(5) as Wall J put it in Re C [1997]) being two separate pathways to providing a child with a home, each with distinct and different consequences. S 23(2) is the provision which is identified as involving the provision of accommodation by a local authority and reliance is put upon the use within it of the concept of placing the child with someone in contrast to the concept in ss 23(5) and (6) of allowing a child to live with someone/making arrangements for the child to live with someone. This perceived separation of concepts is difficult to sustain, I think, when one notes that the placing of the child under s 23(2) is made subject to subsection (5) (see s 23(2) (a)). Looking at this, albeit through a glass darkly, it seems to me that it means that the concepts of placing the child and allowing the child to live with someone are in fact intertwined and not separate at all. I have been left wondering, therefore, whether the structure of s 23 is a unified one in which placements of a child with a family or individual all take place under s 23(2) and the effect of s 23(6) is simply to put upon the local authority a duty to place the child with a parent, relative etc rather than in traditional foster care wherever possible. If the child is placed with someone

who is not within s 23(4), that person is a local authority foster carer and the corollary of that is that the accommodation is being provided by the local authority and the child continues to be looked after by them. If the person is within s 23(4), they are not a local authority foster carer and the child is not being provided with accommodation by the local authority, and, unless he is the subject of a care order, is no longer a looked after child. I apprehend that there may be as many difficulties with this approach as with the approach followed by the courts thus far but if the issue is worthy of further exploration and argument at all, that must be in another case in front of another court. If the matter *were* ever to be explored further, it would be necessary to review not only the terms of the Children Act itself (and probably more widely than just ss 20 – 23, also including, for example, Schedule 2 Part II) but also the various regulations concerned with the powers and duties of local authorities in relation to the placement of children with individuals. The Placement of Children with Parents etc Regulations 1991 featured in Wall J's reasoning in Re C [1997] and there are other relevant provisions such as Fostering Services Regulations 2002. I invite this wider focus because I am all too conscious of how easy it is, when interpreting provisions that regulate the responsibility of local authorities to support children and families, to fail to appreciate that a proposed construction of a provision upon which one is concentrating will conflict with the obvious meaning of similar words elsewhere in the body of relevant law or disrupt established good practice in some unforeseen way.

38. Returning to my decision in the instant case, it follows from my having adopted the reasoning of RBK that DD ceased to be a looked after child upon the making of the residence order in favour of PGM. LCC is therefore the authority to whom PGM will look for support in relation to the proposed special guardianship order. As for the allowance that RBK will by paying for the middle period, between the residence order and the special guardianship order, that will be a residence order allowance although, given the circumstances in which the residence order came into being, as part of RBK's long term plan, it may be that it will be indistinguishable from the allowance that would have been paid had DD remained a looked after child.