

R(CS) 7/08

**Mr C Turnbull
Commissioner
7 February 2008**

CCS/3056/2007

Maintenance assessment – day to day care – whether looking after the qualifying children overnight at the home of the parent with care counts as shared care

The non-resident parent appealed against the maintenance assessment on various grounds. Although the point was not argued before it, the tribunal found that occasions when the non-resident parent had looked after the children overnight at the parent with care's home counted as looking after them for shared care purposes, and as a result directed that he was entitled to the one-seventh reduction provided by paragraph 7 of Schedule 1 to the Child Support Act 1991. The parent with care appealed to the Commissioner on the grounds that that view was wrong and also that the tribunal should simply have decided as between the opposing arguments put forward by the parties. Regulation 7 of the Child Support (Maintenance Calculations and Special Cases) Regulations 2000 requires that for a night to count for shared care purposes the non-resident parent looks after the child and the child stays at the same address as the non-resident parent.

Held, dismissing the appeal, that:

1. a non-resident parent looking after the children at the home of the parent with care is clearly "looking after" the children within the ordinary meaning of those words, whether or not he incurs any additional costs in doing so (R(CS) 11/02 followed) (paragraphs 18 and 19);
 2. if a non-resident parent looks after the children overnight at the parent with care's home, the wording of regulation 7(1)(b) is, literally, satisfied in that the children are staying at the same address as the non-resident parent, and such an interpretation is not contrary to the context and purpose of the definition (paragraphs 21 to 23);
 3. the tribunal therefore reached the right conclusion, and the fact that it reached it on a basis for which the non-resident parent had not contended did not render it any less right (paragraph 24).
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DECISION OF THE CHILD SUPPORT COMMISSIONER

1. This is an appeal by the parent with care (Mrs M), brought with the permission of the chairman, against a decision of an appeal tribunal sitting at Bolton on 12 June 2007. For the reasons set out below I dismiss the appeal
2. Mrs M and the non-resident parent (Mr M) have two children, now aged 13 and 11. They separated in June 2005, when Mr M moved out of the matrimonial home.
3. On 12 September 2006 a decision was made, on Mrs M's application for child support maintenance, that Mr M was liable to pay maintenance in the sum of £146 per week in respect of the children from the effective date of 11 August 2006.
4. Within one month from the date of that decision Mr M disputed it, and stated that he wished to appeal, on two grounds. The first related to prior debts which he was paying. He was treated as applying for a variation on that ground. Mr M's second ground of dispute was that he contended that he had shared care of the two children.
5. On 15 February 2007 decisions were made (i) revising the decision of 12 September 2006, the revised decision being that the maintenance payable was

£128 per week from 11 August 2006 and (ii) that from 5 January 2007 the maintenance became £118.29 per week. Those figures were the result both of a variation in respect of prior debts and of a decision in respect of shared care. As regards the latter, the decision was on the footing that Mr M did not have care for at least 52 nights a year until 5 January 2007 but that from that date he had care of the children for between 52 and 103 nights a year and so was entitled to a one-seventh reduction in the amount of child support maintenance for which he would otherwise have been liable. The decision in respect of the period from 5 January 2007 was made under paragraph 15 of Schedule 1 to the Child Support Act 1991.

6. Mr M appealed to the tribunal against those decisions. In the appeal an error in relation to the variation in respect of prior debts was pointed out by the Secretary of State, and the tribunal directed that the calculations be amended in order to remedy that error. No issue about the variation arises in this appeal to me.

7. As regards shared care, the parties' positions before the tribunal were broadly as follows. It was common ground that the first time when the children stayed with Mr M overnight at his new accommodation was 9 September 2006. Mr M contended that from then on he had the children to stay overnight with him for an average of at least one night a week, and therefore that a reduction in respect of shared care should apply from that date. Mrs M contended that no pattern whereby the children stayed with him for at least one night a week was established until about 25 November 2006, and therefore that there should be no reduction for shared care until that date at the earliest.

8. However, it was common ground that from the separation in June 2005 down to at least September 2006 Mr M frequently stayed overnight in the former matrimonial home, when Mrs M was away, in order to look after the children. The tribunal expressed its findings in respect of that as follows:

“To ensure that [Mr M] could retain contact with the qualifying children, [Mr M] and [Mrs M] agreed that [Mr M] would stay overnight at the former family home with the qualifying children one night a week. When [Mr M] arrived, [Mrs M] would go out and stay elsewhere for the night. [Mr M] therefore had sole charge of the qualifying children overnight.”

9. The parties had been informed by the Child Support Agency that looking after the children overnight at their own home did not count for shared care purposes, and before the tribunal Mr M did not base any argument on his having done so.

10. However, the tribunal took the view that looking after the children at their home did amount to looking after them for shared care purposes, and as a result directed that Mr M was entitled to the one-seventh reduction as from 11 August 2006, the effective date of the initial maintenance assessment.

11. Mrs M sought leave to appeal to a Commissioner, essentially on the grounds that (a) the tribunal's view that looking after the children at her home counted towards shared care was wrong and (b) that in any event the tribunal should simply have decided as between the opposing arguments put forward by the parties.

12. The very experienced chairman of the tribunal took the view that permission to appeal should be granted so that the point of principle could be the subject of a decision by a Commissioner.

13. Having looked at the evidence before and submissions to the tribunal, I doubt whether the tribunal's finding that **it was agreed** that Mr M would stay at the former family home **one night a week** in order to look after the children was justified, at any rate quite in those terms. I think that it is clear that the arrangements were somewhat more ad hoc, and less regular, than that. However, there was ample evidence before the tribunal (see especially page 78) that Mr M did in fact stay overnight on a substantial number of occasions, amounting **on average** to at least once a week. At one point in her evidence Mrs M is recorded as saying that before September 2006 Mr M looked after the children in the matrimonial home "1 or 2 nights a week". Mrs M does not in her grounds for this appeal contend that the tribunal was wrong to make the basic finding of fact that Mr M stayed overnight for on average at least one night a week, and I do not therefore think that it matters whether the tribunal's findings on that point were in all respects accurate.

Does looking after children overnight at the parent with care's home count towards shared care?

14. By Schedule 1 to the Child Support Act 1991:

"7.—(2) If the care of a qualifying child is shared between the non-resident parent and the person with care, so that the non-resident parent from time to time has care of the child overnight, the amount of child support maintenance which he would otherwise have been liable to pay the person with care ... is to be decreased in accordance with this paragraph.

(3) First, there is to be a decrease according to the number of such nights which the Secretary of State determines there to have been, or expects there to be, or both during a prescribed twelve-month period.

...

9.—(1) The Secretary of State may by regulations provide –

(a) for which nights are to count for the purposes of shared care under paragraphs 7 and 8, or for how it is to be determined whether a night counts;

(b) for what counts, or does not count, as 'care' for those purposes; and

(c)"

15. By regulation 7 of the Child Support (Maintenance Calculations and Special Cases) Regulations 2000 (SI 2001/155) (headed "shared care"):

"(1) For the purposes of paragraphs 7 and 8 of Part I of Schedule 1 to the Act a night will count for the purposes of shared care where the non-resident parent –

(a) has the care of a qualifying child overnight; and

(b) the qualifying child stays at the same address as the non-resident parent.

(2) For the purposes of paragraphs 7 and 8 of Part I of Schedule 1 to the Act, a non-resident parent has the care of a qualifying child when he is looking after the child."

16. The requirements for a night to count for shared care purposes are therefore simply that (i) the qualifying child stays “at the same address as the non-resident parent” and (ii) the non-resident parent is “looking after the child”.

17. The point made by Mrs M is that the rationale for the reduction in maintenance where the non-resident parent looks after the child overnight is that he is likely to incur costs in doing so, for which he should be compensated. Mrs M says that in the present case Mr M incurred no additional costs in looking after the children at her home, because Mr M and the children simply ate the food which was in the house.

18. In my judgment the condition that Mr M was “looking after” the children overnight was clearly satisfied. Although the rationale for the shared care provisions must be that the non-resident parent is likely to incur additional costs in looking after the children, I do not find it possible to conclude that a non-resident parent is not “looking after” the children overnight unless in the course of doing so he incurs additional expense. What amounts to “looking after” a child will depend on the precise facts of the case, in particular the age of the child. In the present case the children were at the material time aged 9 and 11. As the only adult present in the house with them overnight Mr M took responsibility for their immediate safety and welfare. He was in my judgment clearly “looking after” them, within the ordinary meaning of those words, whether or not he incurred any additional costs in doing so.

19. I respectfully agree with what Mr Commissioner Jacobs said in paragraph 25 of R(CS) 11/02 (in relation to the definition of “day to day care” in regulation 1(2) of the Child Support (Maintenance Assessments and Special Cases) Regulations 1992 (SI 1992/1815) (which does not contain the further definition that “care” means “looking after”):

“This not to say that day to day care is concerned solely with cost. It is undoubtedly correct that the assumption of financial responsibility that usually accompanies day to day care is the rationale behind the allowance for shared care in the child support maintenance formula. However, financial responsibility and care, though they may be connected, are not the same thing. Indeed, short-term overnight care may involve only minimal cost, or even no cost at all.”

20. That then leaves only the question whether the children were “stay[ing] at the same address as the non-resident parent” within the meaning of regulation 7(1)(b) of the 2000 Regulations. Clearly, Mr M was staying at the same address as the children, but does the requirement that the children be “stay[ing] at the same address as the non-resident parent” imply that that address must be somewhere other than the parent with care’s home?

21. In my judgment it does not. Regulation 7(1)(b) could have been worded: “the non-resident parent and the qualifying child stay at the same address”. In my view regulation 7(1)(b) is worded as it is simply because in almost all cases where the non-resident parent looks after the children overnight he will in fact do so at an address other than that of the parent with care. However, I do not think that the wording positively requires that that be so. If a non-resident parent looks after the children overnight at the parent with care’s home, the wording of regulation 7(1)(b) is, literally, satisfied in that the children are staying at the same address as the non-resident parent. The question is whether the context and purpose of the definition

lead to an implication that the address must be some address other than the parent with care's home. I do not think so, because a non-resident parent might well incur significant expenditure in looking after the children overnight at the home of the parent with care, thus satisfying the rationale of the shared care provisions.

22. By section 3(2) of the 1991 Act the parent of a child is a non-resident parent in relation to him if (a) that parent is not living in the same household with the child and (b) the child has his home with a person who is, in relation to him, a person with care.

23. It is possible for parents to be still living at the same address, but to be living separate lives and in different households. One of those parents would be (or would be treated under regulation 8 of the 2000 Regulations as being) a non-resident parent. If that parent were regularly to look after the children overnight (when the parent with care was away, for example), I see no reason why the shared care provisions should not apply. He might well incur significant expense in looking after them.

24. In agreement with the Secretary of State's submission in this appeal, I therefore consider that the tribunal reached the right conclusion. The fact that it reached it on a basis for which Mr M had not contended did not render it any less right.

