HOUSE OF LORDS SESSION 2005–06
[2006] UKHL 43

on appeal from [2006] EWCA Civ 372

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

In re G (children) (FC)

Appellate Committee

Lord Nicholls of Birkenhead
Lord Scott of Foscote
Lord Rodger of Earlsferry
Lord Walker of Gestingthorpe
Baroness Hale of Richmond

Counsel

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Respondents:
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LORD NICHOLLS OF BIRKENHEAD

My Lords,

1. I have had the advantage of reading in draft the speech of my noble and learned friend Baroness Hale of Richmond. I agree that, for the reasons she gives, this appeal should be allowed.

2. I wish to emphasise one point. In this case the dispute is not between two biological parents. The present unhappy dispute is between the children's mother and her former partner Ms CW. In this case, as in all cases concerning the upbringing of children, the court seeks to identify the course which is in the best interests of the children. Their welfare is the court's paramount consideration. In reaching its decision the court should always have in mind that in the ordinary way the rearing of a child by his or her biological parent can be expected to be in the child's best interests, both in the short term and also, and importantly, in the longer term. I decry any tendency to diminish the significance of this factor. A child should not be removed from the primary care of his or her biological parents without compelling reason. Where such a reason exists the judge should spell this out explicitly.

LORD SCOTT OF FOSCOTE

My Lords,

3. I had intended to write an opinion in this case but having had the advantage of reading in advance the opinion of my noble and learned friend Baroness Hale of Richmond I find myself so completely in agreement with the conclusion she has reached and her reasons for

reaching it that an opinion from me would be otiose. I would simply say that in my opinion both Bracewell J and, in the Court of Appeal, Thorpe LJ failed to give the gestational, biological and psychological relationship between CG and the girls the weight that that relationship deserved. Mothers are special and, even after account is taken of CG's breach of the "residence" order (the justification for which I, for my part, doubt) and her reprehensible attitude towards the important relationship between the girls and CW, their other parent, CG was, on the evidence, a good and loving mother. I find myself unable to accept that the circumstances of this case came even close to justifying the judge's and the Court of Appeal's conclusion that the welfare of the girls required their primary home to be changed from that of their mother to that of CW. I concur in my noble and learned friend's opinion that this appeal must be allowed and that the order referred to in paragraph 45 of her opinion should be made.

LORD RODGER OF EARLSFERRY

My Lords,

4. I have had the advantage of considering the speech which my noble and learned friend, Baroness Hale of Richmond, is to deliver. I agree with it and with the speech of my noble and learned friend, Lord Nicholls of Birkenhead. For the reasons which they give I too would allow the appeal and make the order proposed.

LORD WALKER OF GESTINGTHORPE

My Lords,

5. I have had the privilege of reading in draft the speech of my noble and learned friend Baroness Hale of Richmond. I agree with it and for the reasons that she gives I would allow this appeal.

BARONESS HALE OF RICHMOND

My Lords,

6. The issues in this case arise in a novel context but they are issues which may arise whenever there are disputes about the future care and upbringing of children. The context is that of a lesbian couple who made the conscious decision to have children together, who together arranged for anonymous donor insemination at a clinic abroad, and who brought up the children together until their relationship broke down. Now, sadly, they are locked in a dispute about the future of those children which is just as bitter as the disputes which arise between heterosexual couples. And the issues arising are just the same as those which may arise between heterosexual couples. The legal principles are also the same.

7. There are two issues of principle. The first is the weight to be attached to the fact that one party is both the natural and legal parent of the child and the other is not. This will require us to explore the concept of "natural" parenthood and its significance both for the adults and for the child. The second is the approach to be adopted by the court where the party with whom the child has her principal home is reluctant to acknowledge the importance of the other party in the child's life.

The history

8. CG and CW lived together in a lesbian relationship from 1995 until 2002. They wanted to have a family together. When the relationship began CG was aged about 21 and CW about 36. They arranged for CG to be inseminated using sperm from an anonymous donor at a clinic abroad. (Many might see this as the more responsible choice, not only for safety reasons, but also to avoid the sort of confusion and conflict which arose in *Re D (Contact and Parental Responsibility: Lesbian Mothers and Known Father)* [2006] 1 FCR 556. It does mean that the couple and their wider families are the only family that the child can at that stage have and in most cases this must be what they both intend.)

9. CG gave birth to two children, both girls. Child A was born on 2 February 1999 and is now aged seven. Child B was born on 25 June 2001 and is now aged five. Both were breast fed. CW has a son, C, who

is now aged 17, born as a result of anonymous donor insemination during a previous relationship. It was agreed at an early stage in the proceedings that the girls have a positive relationship with him and regard him as their brother, and that he regards them as his sisters.

10. The relationship between CG and CW broke down in 2002 when CW began a relationship with her present partner, LP. They plan to enter into a civil partnership next month. But the family continued to live together in the family home in Shropshire until May 2003. Then CG and the girls moved into a property nearby. In July 2003, CW and LP began living together in the former family home. Also in the summer of 2003, CG began a relationship with a new partner, MG, who lived in Leicester. They have already registered their civil partnership, in December last year.

11. Proceedings began in September 2003, when CW applied for contact and a shared residence order. She was entitled to make such an application in relation to child A, who had lived with her for more than three years: see Children Act 1989, s 10(5)(b). But she required leave to apply in relation to child B, who was then only two years old. Leave was swiftly granted and an order made for interim contact two evenings a week and every other weekend. A CAFCASS officer, Mrs Barrow, was appointed to make a report.

12. At that stage, CG was training to be a teacher and had a placement at a school in Shropshire. The girls attended a nursery in the same town. But in November or December 2003 CG decided to move to MG's home in Leicester. She obtained a placement at a school in Leicester for the New Year and enrolled the girls in a nursery and school there. CW was not told or consulted about the move in advance.

13. In January 2004, in accordance with Mrs Barrow's recommendations, it was ordered that alternate weekend contact continue, with CW collecting the children from school and nursery on Friday afternoon and returning them on Monday morning, so that they could spend the whole of Sunday with C.

14. CW's applications were heard by Her Honour Judge Hughes over three days in June and November 2004. By that time, CG had qualified as a teacher but her partner MG was working from home and playing a major part in the children's care. Mrs Barrow's report confirmed that

CG questioned CW's right to be involved in the children's lives and was opposed to a shared residence order which would confer parental responsibility upon CW. CW was now proposing that the children live with her in Shropshire. The girls clearly enjoyed life in both homes. Mrs Barrow recommended the continuation of the current arrangements, together with a move towards the equal sharing of school holidays. She also recommended a shared residence order:

> "I would suggest that the importance and value of [CW's] role in their lives needs to be acknowledged. . . . I would suggest that such a move would help to ensure that [A] and [B] grown up with a better chance of understanding the complexity of their own identity and should not be seen as detracting from [CG's] role, as their main carer."

15. During the hearing in November, CG gave evidence that she wanted to move with MG and the children to Cornwall. Mrs Barrow's view was that this was not in the children's interests, as they were happy and settled with the present situation, which met their needs. The judge agreed with Mrs Barrow on this point and concluded that the proposed move was in part deliberately designed to frustrate the current contact arrangements. Accordingly she ordered that CG continue to live with the children in the Leicester area until further order. Such orders are only made in exceptional cases, as the courts generally regard them as "an unwarranted imposition upon the right of the parent to choose where he/she will live within the United Kingdom"; but where the children will live is one of the relevant factors in deciding with whom they should live: see *Re E (Residence: Imposition of Conditions)* [1997] 2 FLR 638, at p 642.

16. The judge rejected the proposal for a shared residence order, largely because of the hostility between the parties. Nevertheless, she had no doubt that the children had developed a good and close relationship with CW and with C and that this relationship should be maintained throughout their minority. But CW's important place both historically and in the future could be maintained and reinforced by good quality frequent contact. She therefore continued the alternate weekend contact from Friday to Monday and defined holiday contact on a roughly equal basis. She also provided for CW to be informed about the children's education and medical treatment.

17. CW appealed to the Court of Appeal against the refusal of a shared residence order. On 6 April 2005, her appeal was allowed: *Re G (Residence: Same-Sex Partner)* [2005] EWCA Civ 462; [2005] 2 FLR 957. Thorpe LJ explained at para 27:

> "But perhaps more crucial for me was the judge's finding that between the first and second days of the hearing the mother had been developing plans to marginalise Miss W. . . . The CAFCASS officer had expressed a clear fear that unless a parental responsibility order was made there was a real danger that Miss W would be marginalised in the children's future. I am in no doubt at all that, on the judge's finding, the logical consequence was the conclusion that the children required firm measures to safeguard them from diminution in or loss of a vital side of family life – not only their relationship with Miss W, but also with her son. . . . The judge's finding required a clear and strong message to the mother that she could not achieve the elimination of Miss W, or even the reduction of Miss W from the other parent into some undefined family connection."

Hence a shared residence order was made defining the time which the children would spend in each household (as provided for in section 11(4) of the Children Act 1989). The order requiring CG to continue to live in Leicester (which she had not appealed) was expressly affirmed. (CG later described the Court of Appeal's decision as "appalling" and she would not be the first person to be appalled by an adverse decision in court.)

18. Only one month later, CG's solicitors wrote requesting CW's agreement to a move to Cornwall. This was refused. Correspondence between solicitors continued and a letter from CG's solicitors in August 2005 indicated that she intended to apply to the court for the restriction to be lifted. However, while the children were on holiday with CW, CG and MG completed the sale of their home in Leicester and the purchase of a house in Cornwall. They collected the children at the regular handover point in Leicester and drove them through the night to their new home. Both CW and the girls had been kept in ignorance of the plan. This was not only a clear breach of the court's order. As the Children's Guardian was later to say in evidence,

> ". . . from a child care perspective whether that order existed or not, to move the children in that way, in secret, without them having the opportunity to say goodbye to their friends and their school friends, I think, . . . was an appalling thing to do to them . . . .the flouting of the order was bad, but the way in which it was achieved and the emotional impact it had upon those children, was a terrible thing to do to them."

19. CW had to issue applications under the Family Law Act 1986 in order to locate the girls. The proceedings were transferred to the High Court and the children joined as parties. Mr Martin was appointed as the Children's Guardian. CG applied for the residence restriction to be lifted and CW applied for the residential arrangements to be changed, so that the children's primary home would be with her and they would attend schools in Shropshire. On 30 September, detailed arrangements for contact were made, pending the hearing fixed for February 2006. Over the intervening period, the children spent roughly every other weekend, the whole half term week and nine days of the Christmas holidays with CW.

20. The applications were heard by Bracewell J. By that time, Mr Martin had spent a considerable amount of time in both homes and got to know the children and the parties well. Of CG and the children he said this in his report:

> "She is clearly devoted to her children and they are to her. Observation of her interaction with them displays two very confident and happy children. There is a lot of laughter in the household and even when tired from work CG's interaction with them is positive and child-need led."

Of CW and the children he said this:

> "CW is an impressive woman who has clear and well thought out ideas. I did not gain the impression that she was seeking control via her children. I believe that she is genuinely driven by a desire to protect her children and that she has tried always to act in their best interests."

He also reported favourably, in different ways, of both MG and LP. Of C and the girls he said this:

> "[C] impressed as an articulate and intelligent young man. . . . His observed interaction with them was excellent. He joins in all the games, constructs games for them and is there for the rough and tumble. He is also good at spotting and deflecting situations. [C] obviously has a deep love for his sisters and this was demonstrably reciprocated."

21. He concluded that CG had been extremely foolish in defying court orders and exposing her children to the risk of emotional harm by moving to Cornwall and thereby reducing the level of involvement of CW. Nevertheless, he did not believe that removing them from CG's care and uprooting them to Shropshire would be in their best interests. There should be no further moves to marginalise CW, who was a highly significant person in their lives. He did not believe that fortnightly contact was likely to be harmful and recommended that contact be reinstated at the level ordered by Judge Hughes. He also recommended a Family Assistance Order, as he believed that he had established a good relationship with the family and could be of further help in improving communication between them.

22. His oral evidence was given after he had heard CG and MG give their evidence. He found their attitudes disturbing. It undermined his confidence in CG obeying court orders in future. He still believed that on balance the children should remain with her "but I would stress now that I see that as a fine balance, and I believe that the court would have to be confident that in future any orders would be complied with". This was because CG "has provided the majority of the care for these children since they were born and I think that the emotional trauma of being removed from their mother's care at this stage would be extremely harmful to them". He later said that it would also "be extremely emotionally harmful for these children if [CW] was marginalised." Under cross-examination he conceded that each would be "equally emotionally harmful". Nevertheless he maintained his recommendations.

23. Mrs Justice Bracewell reached a different conclusion. She found the balance of the risks of emotional harm of moving the girls to the principal care of CW, on the one hand, and of maintaining the present placement with the risk of their being deprived of their relationship with

CW, on the other, to be the crux of the case. She gave ten reasons for rejecting the Guardian's assessment. Her first, and the one which was emphasised by the Court of Appeal, was that she had no confidence that if the children remained in Cornwall CG would promote the children's essential close relationship with CW and her family. Accordingly, she preserved the shared residence order but reversed the times allocated to each home. She also made a Family Assistance Order which is due to expire next month.

24. CG appealed to the Court of Appeal on the same two grounds as she appealed to this House and to which I shall shortly turn. On 6 April 2006 her appeal was dismissed: *Re G* [2006] EWCA Civ 372. Thorpe LJ rejected Mr Jackson's submission on behalf of CG that "cogent reasons must exist if a court is to prefer the claims of a person who is not a child's natural parent to one who is", although he accepted the propositions that "the identity of a child's natural (biological) parents is always a matter of significance" and that "in each case the weight to be given to the blood relationship will depend upon the matter in issue, the identity of the parties and the court's assessment of all other factors in the welfare checklist." Given that the guardian's recommendation was conditional on the court being satisfied that CG would obey court orders in future, the judge was fully entitled to conclude that she was not so satisfied. Hallett LJ, however, agreed only with a degree of hesitation:

> "I am very concerned at the prospect of removing these children from the primary care of their only identifiable biological parent who has been their primary carer for most of their young lives and in whose care they appear to be happy and thriving. She is both a biological parent and a 'psychological' parent. Mindful as I am of the changing social and legal climate, on the facts of this case, I would attach greater significance perhaps than some to the biological link between the appellant and her children."

It is this point which Mr Peter Jackson QC has put at the forefront of his submissions on behalf of the mother. He argues that, whatever the test to be adopted, it was wrong for the courts below to attach no significance whatever to the fact that CG is the child's mother. He also argues that the judge allowed herself to be distracted, by her disapproval of the mother and her behaviour, from a full consideration of the evidence relating to the children's welfare, which would have led her to a different conclusion.

The welfare principle and the natural parent

25. Section 1(1) of the Children Act 1989 is clear:

> "When a court determines any question with respect to –
>
> (a) the upbringing of a child; or
>
> (b) the administration of a child's property or the application of any income arising from it,
>
> the child's welfare shall be the court's paramount consideration."

Section 1(3) supplements this by a list of factors to be considered in contested cases:

> "(a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);
>
> (b) his physical, emotional and educational needs;
>
> (c) the likely effect on him of any change in his circumstances;
>
> (d) his age, sex, background and any characteristics of his which the court considers relevant;
>
> (e) any harm which he has suffered or is at risk of suffering;
>
> (f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;
>
> (g) the range of powers available to the court under this Act in the proceedings in question."

26. The statutory ancestor of this principle was section 1 of the Guardianship of Infants Act 1925 (later consolidated with minor changes of terminology in section 1 of the Guardianship of Minors Act 1971) which read:

> "Where in any proceedings before any court … the custody or upbringing of an infant, or the administration of

> any property belonging to or held on trust for an infant, or the application of the income thereof, is in question, the court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration, and shall not take into consideration whether from any other point of view the claim of the father, or any right at common law possessed by the father, in respect of such custody, upbringing, administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father."

27. The 1925 Act was passed at a time when the father was sole guardian of his legitimate children and the mother the only person with parental rights over her illegitimate child. Section 1 clearly meant that, in future, such legal claims were to be ignored and the child's welfare was to prevail. In the landmark case of *J v C* [1970] AC 668, this House held that this was equally applicable to disputes between parents and non-parents. In an oft-quoted passage, at pp 710-711, Lord MacDermott explained the meaning of the words "shall regard the welfare of the infant as the first and paramount consideration" thus:

> ". . . it seems to me that they must mean more than that the child's welfare is to be treated as the top item in a list of items relevant to the matter in question. I think they connote a process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child's welfare as that term has now to be understood. That is the first consideration because it is of first importance and *the paramount consideration because it rules upon or determines the course to be followed*." (emphasis supplied)

The House therefore rejected the proposition that there was any presumption in favour of the natural parents of the child. Lord MacDermott put their position in this way, at p 715:

> "2. In applying section 1, the rights and wishes of parents, whether unimpeachable or otherwise, must be assessed and weighed in their bearing on the welfare of the child in conjunction with all other factors relevant to that issue.

> 3. While there is now no rule of law that the rights and wishes of unimpeachable parents must prevail over other considerations, such rights and wishes, recognised as they are by nature and society, *can be capable of ministering to the total welfare of the child in a special way*, and must therefore preponderate in many cases. . . ." (emphasis supplied)

Lord MacDermott also referred, as did Lord Oliver of Aylmerton in *Re KD (A Minor) (Ward: Termination of Access)* [1988] AC 806, 828, to a proposition of FitzGibbon LJ in the Irish case of *Re O'Hara* [1900] 2 IR 232, 240, decided before the enactment of the paramountcy principle in 1925:

> "In exercising the jurisdiction to control or to ignore the parental right the court must act cautiously, not as if it were a private person acting with regard to his own child, and acting in opposition to the parent only when judicially satisfied that the welfare of the child requires that the parental right should be suspended or superseded."

28. Since then, the position has been put in a variety of ways in the Court of Appeal. Some have repeated the reference to the parental right: see, for example, Fox LJ in *Re K (A Minor) (Ward: Care and Control)* [1990] 1 WLR 431, 434; Butler-Sloss LJ in *Re H (A Minor) (Custody: Interim Care and Control)* [1991] 2 FLR 109, 111. In *Re K*, however, Waite J pointed out, at p 437:

> "The speeches in the House of Lords make it plain that the term 'parental right' is not there used in a proprietary sense, but rather as describing the right of every child, as part of its general welfare, to have the ties of nature maintained, wherever possible, with the parents who gave it life."

But he went on to say that the question was,

> "Are there any compelling factors which *require* me to override the prima facie right of this child to an upbringing by its surviving natural parent?" (emphasis supplied)

29. In *Re H,* Lord Donaldson of Lymington MR, at p 113, explained matters this way:

> "So it is not a case of parental right opposed to the interests of the child, with an assumption that parental right prevails unless there are strong reasons in terms of the interests of the child. It is the same test which is being applied, the welfare of the child. And all that *Re K* is saying, as I understand it, is that of course, there is *a strong supposition* that, other things being equal, it is in the interests of the child that it shall remain with its natural parents. But that has to give way to particular needs in particular situations."

That was the last word before the Children Act 1989 came into force. In *Re W (A Minor) (Residence Order)* [1993] 2 FLR 625, at p 633, Balcombe LJ agreed "wholeheartedly" with Lord Donaldson and hoped that "this divergence of views, if such it really is, can finally be stilled". Waite LJ also agreed with Lord Donaldson's formulation at p 639, and remarked that:

> "The authorities which have been cited by Balcombe LJ illustrate the difficulty of finding, within the infinite variety of circumstances in which the welfare of a child may fall to be applied as the paramount consideration, some principle which does precise justice to the element in every child's welfare represented by the advantage of maintaining the ties of nature with its own parent."

30. My Lords, the Children Act 1989 brought together the Government's proposals in relation to child care law and the Law Commission's recommendations in relation to the private law. In its Working Paper No 96, *Review of Child Law: Custody* (1986), at para 6.22, having discussed whether there should be some form of presumption in favour of natural parents, the Commission said this:

> "We conclude, therefore, that the welfare of each child in the family should continue to be the paramount consideration whenever their custody or upbringing is in question between private individuals. The welfare test itself is well able to encompass any special contribution

> which natural parents can make to the emotional needs of their child, in particular to his sense of identity and self-esteem, as well as the added commitment which knowledge of their parenthood may bring. We have already said that the indications are that the priority given to the welfare of the child needs to be strengthened rather than undermined. We could not contemplate making any recommendation which might have the effect of weakening the protection given to children under the present law."

Nor should we. The statutory position is plain: the welfare of the child is the paramount consideration. As Lord MacDermott explained, this means that it "rules upon or determines the course to be followed". There is no question of a parental right. As the Law Commission explained, "the welfare test itself is well able to encompass any special contribution which natural parents can make to the emotional needs of their child" or, as Lord MacDermott put it, the claims and wishes of parents "can be capable of ministering to the total welfare of the child in a special way".

31. None of this means that the fact of parentage is irrelevant. The position in English law is akin to that in Australian law, as explained by Lindenmayer J in *Hodak, Newman and Hodak* (1993) FLC 92-421, and subsequently approved by the Full Court of the Family Court of Australia in *Rice v Miller* (1993) FLC 92-415 and *Re Evelyn* [1998] FamCA 55:

> "I am of the opinion that *the fact of parenthood is to be regarded as an important and significant factor in considering which proposals better advance the welfare of the child*. Such fact does not, however, establish a presumption in favour of the natural parent, nor generate a preferential position in favour of the natural parent from which the Court commences its decision-making process … Each case should be determined upon an examination of its own merits and of the individuals there involved." (emphasis supplied)

32. So what is the significance of the fact of parenthood? It is worthwhile picking apart what we mean by "natural parent" in this context. There is a difference between natural and legal parents. Thus,

the father of a child born to unmarried parents was not legally a "parent" until the Family Law Reform Act 1987 but he was always a natural parent. The anonymous donor who donates his sperm or her egg under the terms of the Human Fertilisation and Embryology Act 1990 is the natural progenitor of the child but not his legal parent: see 1990 Act, ss 27 and 28. The husband or unmarried partner of a mother who gives birth as a result of donor insemination in a licensed clinic in this country is for virtually all purposes a legal parent, but may not be any kind of natural parent: see 1990 Act, s 28. To be the legal parent of a child gives a person legal standing to bring and defend proceedings about the child and makes the child a member of that person's family, but it does not necessarily tell us much about the importance of that person to the child's welfare.

33. There are at least three ways in which a person may be or become a natural parent of a child, each of which may be a very significant factor in the child's welfare, depending upon the circumstances of the particular case. The first is genetic parenthood: the provision of the gametes which produce the child. This can be of deep significance on many levels. For the parent, perhaps particularly for a father, the knowledge that this is "his" child can bring a very special sense of love for and commitment to that child which will be of great benefit to the child (see, for example, the psychiatric evidence in *Re C (MA) (An Infant)* [1966] 1 WLR 646). For the child, he reaps the benefit not only of that love and commitment, but also of knowing his own origins and lineage, which is an important component in finding an individual sense of self as one grows up. The knowledge of that genetic link may also be an important (although certainly not an essential) component in the love and commitment felt by the wider family, perhaps especially grandparents, from which the child has so much to gain.

34. The second is gestational parenthood: the conceiving and bearing of the child. The mother who bears the child is legally the child's mother, whereas the mother who provided the egg is not: 1990 Act, s 27. While this may be partly for reasons of certainty and convenience, it also recognises a deeper truth: that the process of carrying a child and giving him birth (which may well be followed by breast-feeding for some months) brings with it, in the vast majority of cases, a very special relationship between mother and child, a relationship which is different from any other.

35. The third is social and psychological parenthood: the relationship which develops through the child demanding and the parent providing

for the child's needs, initially at the most basic level of feeding, nurturing, comforting and loving, and later at the more sophisticated level of guiding, socialising, educating and protecting. The phrase "psychological parent" gained most currency from the influential work of Goldstein, Freud and Solnit, *Beyond the Best Interests of the Child* (1973), who defined it thus:

> "A psychological parent is one who, on a continuous, day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfils the child's psychological needs for a parent, as well as the child's physical needs. The psychological parent may be a biological, adoptive, foster or common law parent."

36. Of course, in the great majority of cases, the natural mother combines all three. She is the genetic, gestational and psychological parent. Her contribution to the welfare of the child is unique. The natural father combines genetic and psychological parenthood. His contribution is also unique. In these days when more parents share the tasks of child rearing and breadwinning, his contribution is often much closer to that of the mother than it used to be; but there are still families which divide their tasks on more traditional lines, in which case his contribution will be different and its importance will often increase with the age of the child.

37. But there are also parents who are neither genetic nor gestational, but who have become the psychological parents of the child and thus have an important contribution to make to their welfare. Adoptive parents are the most obvious example, but there are many others. This is the position of CW in this case. Whatever may have been the mother's stance in the past, Mr Jackson on her behalf has not in any way sought to diminish the importance of CW's place in these children's lives or to challenge the legal arrangements put in place as a result of the first proceedings. Indeed, he asks us to restore those orders.

38. What Mr Jackson challenges is the reversal in the parties' positions in response to the mother's removal of the children to Cornwall. He points out that, with one exception at the beginning of Bracewell J's judgment, there was no reference to the important fact that CG is these children's mother. While CW is their psychological parent, CG is, as Hallett LJ pointed out, both their biological and their psychological parent. In the overall welfare judgment, that must count

for something in the vast majority of cases. Its significance must be considered and assessed. Furthermore, the evidence shows that it clearly did count for something in this case. These children were happy and doing very well in their mother's home. That should not have been changed without a very good reason.

The children's welfare

39. Mr Jackson argues that there was not a very good reason to change the children's primary home. The judge over-emphasised what she saw as the "crux" of the case at the expense of the overall picture of what would be best for these children. Although she twice referred to the "checklist" of relevant factors in section 1(3) of the 1989 Act, had she gone through the evidence relating to each of those factors systematically, giving proper weight to the children's relationship with their mother, she could not have reached the conclusion which she did. In particular, when concluding that she had no confidence that the mother would not seek to marginalise CW in the future, she gave no weight to the fact that regular and good quality contact had been continuing since it was re-established after the move.

40. My Lords, it is of course the case that any experienced family judge is well aware of the contents of the statutory checklist and can be assumed to have had regard to it whether or not this is spelled out in a judgment. However, in any difficult or finely balanced case, as this undoubtedly was, it is a great help to address each of the factors in the list, along with any others which may be relevant, so as to ensure that no particular feature of the case is given more weight than it should properly bear. This is perhaps particularly important in any case where the real concern is that the children's primary carer is reluctant or unwilling to acknowledge the importance of another parent in the children's lives.

41. Making contact happen and, even more importantly, making contact work is one of the most difficult and contentious challenges in the whole of family law. It has recently received a great deal of public attention. Courts understandably regard the conventional methods of enforcing court orders as a last resort: fining the primary carer will only mean that she has even less to spend upon the children; sending her to prison will deprive them of their primary carer and give them a reason to resent the other parent who invited this. Nor does punishment address the real sources of the problem, which may range from a simple failure

to understand what the children need, to more complex fears resulting from the parents' own relationship. That is why the assistance of a professional such as Mr Martin in this case can be so valuable. It is also why more constructive measures are to be introduced under the Children and Adoption Act 2006. The court will be able to direct either parent to engage in activities which will help them to understand and work through the difficulties. The range of penalties for breach of court orders will include an order to engage in unpaid work, thus reducing the risk that punishing the parent will also punish the child.

42. However, at least as long ago as *V-P v V-P (Access to Child)* (1978) 1 FLR 336, it was realised that a more potent encouragement to comply with court orders may be to contemplate changing the child's living arrangements. Ormrod LJ put it very directly:

> ". . . I do not wish to issue threats, but the mother should, I think, realise this: the father has a home with the half brother in it, he is unemployed, he is available to look after both these children full time. The mother is fully occupied, so that the grandmother is playing a very important part in this child's life . . . That being so, it would be a mistake on the part of the mother, in my judgment, to assume that the order for custody in her favour is inevitable; it is not and if the situation goes on as it is at present then it may be necessary to reconsider the question of custody."

It is, I believe, becoming more common for family judges not only to issue such warnings but also to implement them. However, the object is to ensure that the arrangements which the court has made in the best interests of the child are actually observed. Only if this is not happening will the court conclude that other arrangements will be better for the child.

43. In this particular case, the mother had behaved very badly. She, together with MG, had deliberately disobeyed the court's order. This had required considerable planning and the deception of her own solicitor. More importantly, it had been a terrible thing to do to the children. The aim had been to frustrate the contact arrangements ordered by the court. However, once she had been located and contact arrangements reinstated, she had abided by them. Had this been the usual case of a similar dispute between mother and father, I find it impossible to believe that a court would have contemplated changing the

children's primary home and schooling while contact was continuing in accordance with the court's order. Of course, were the contact itself to be further frustrated, that would be a different matter.

Conclusion

44. My Lords, I am driven to the conclusion that the courts below have allowed the unusual context of this case to distract them from principles which are of universal application. First, the fact that CG is the natural mother of these children in every sense of that term, while raising no presumption in her favour, is undoubtedly an important and significant factor in determining what will be best for them now and in the future. Yet nowhere is that factor explored in the judgment below. Secondly, while it may well be in the best interests of children to change their living arrangements if one of their parents is frustrating their relationship with the other parent who is able to offer them a good and loving home, this is unlikely to be in their best interests while that relationship is in fact being maintained in accordance with the court's order.

45. I would therefore allow the appeal and make the order which Mr Jackson invites us to make. This is simply to reverse the names in the current allocation of time between the two households. I would also make a fresh Family Assistance Order so that Mr Martin may continue his excellent work with this family for a further six months from today's date. That order may, of course, be repeated in due course and Mr Martin may refer the case back to court if the arrangements are not working: see Children Act 1989, s 16(6). I am very conscious, as was Dr Sturge, the child psychiatrist who gave evidence in the case of *Re D (Contact and Parental Responsibility: Lesbian Mothers and Known Father)* [2006] 1 FCR 556, of the vulnerability of someone in CW's position. Her importance in these children's lives has been stressed by both the professionals and all the judges who have decided this case. The mother should now be in no doubt about that or about the possible consequences should she not adhere to the arrangements which we have ordered. It is, however, always possible for parents to modify their arrangements by agreement. Modifications become inevitable as children grow older and develop lives of their own. Agreed arrangements are almost always preferable to those imposed by a court. I am sad to see these two women, who deliberately brought these children into the world for them to share, and who both love and want the best for them, locking themselves into the same sort of battles that, sadly, we so often see between mothers and fathers. I hope that they can

now move on from this dispute into a happier and more co-operative future for the sake of their children.