HOUSE OF LORDS SESSION 2008–09

[2009] UKHL 7

on appeal from:[2007]EWCA Civ 970

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Holmes-Moorhouse (FC) (Original Respondent and Cross-appellant) *v* London Borough of Richmond upon Thames (Original Appellants and Cross-respondents)

Appellate Committee
Lord Hoffmann
Lord Scott of Foscote
Lord Walker of Gestingthorpe
Baroness Hale of Richmond
Lord Neuberger of Abbotsbury

Counsel

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Hearing date :

27 NOVEMBER 2008

ON
WEDNESDAY 4 FEBRUARY 2009

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LORD HOFFMANN

My Lords,

1. When parents separate, a court may make a shared residence order which stipulates that their children are to reside with both parents in their separate households. On 9 August 2005, the judge in the present case ordered the father to leave the family home in Richmond upon Thames by 20 September 2005 and provided that he and the mother were to have shared residence of three of their children. The order said that they should spend alternate weeks and half of their school holidays with each parent.

2. The father had no other accommodation available to him and so on 18 August 2005 applied to the Housing Services of Richmond London Borough Council for assistance under Part VII of the Housing Act 1996, which imposes upon housing authorities duties in respect of accommodation for people who are homeless or threatened with homelessness. The nature of the duty varies according to whether or not the applicant has priority need. If he does, the duty is to secure that accommodation is available for his occupation: section 193(2). If not, the duty is only to provide advice and assistance in any attempts he may make to obtain accommodation. The Council accepted that he was homeless but not that he had priority need. The father requested a review of this decision under section 202 but on 3 May 2006 the Council affirmed it.

3. Section 189(1) lists the categories of people who have priority need, of which the relevant one is in paragraph (b): "a person with whom dependent children reside or might reasonably be expected to reside." The father said that he had dependent children living with him in the family home and that the effect of the shared residence order was that, when he left, they might reasonably be expected to reside with him. That meant that he had priority need and that it was the duty of the Council to provide him with accommodation for himself and the children: section 176. I shall in due course examine the precise way in which the Council expressed its final decision, but essentially it said that the children could not reasonably be expected to reside with the father if that required the Council to provide a second home for them. The fact that the court thought it was in the interests of the children to have two homes could not bind the Council.

4. The father had a right of appeal to the County Court on a point of law but Judge Oppenheimer dismissed his appeal on 27 October 2006. He appealed to the Court of Appeal, where the chief question was the extent to which the Council's determination as to whether the children could reasonably be expected to live with the father had been pre-empted by the shared residence order. The Court of Appeal, in a judgment delivered by Moses LJ, decided that once a court had decided in contested proceedings that residence should be shared, the housing authority could not deny that the children might reasonably be expected to reside with the father for the purposes of the 1996 Act: [2008] 1 WLR 1289, para 48. If the housing authority wished to dispute this, (on grounds concerning, for example, local conditions and the effect on others having priority need) it should intervene in the court proceedings and put its case. On the other hand, the housing authority would not be bound by a consent order rubber-stamped by the judge. It could decide the matter for itself, but should take into account the children's needs in assessing the reasonableness of an expectation that they would live with the father: para 49.

5. As the order had been made by consent, the Court of Appeal held that the Council had been entitled to make its own decision. But, on examination of the decision letter by the reviewing officer, it decided that he had misdirected himself in law as to what counted as residing with the father and that the decision should be quashed and remitted for reconsideration.

6. I shall in due course return to the question of misdirection in the decision letter. The important question of principle concerns the

relationship between the decision-making powers of the court under the Children Act 1989 and those of the Council under Part VII of the 1996 Act.

7. Shared residence orders are not nowadays unusual. They do not necessarily provide for the children to spend equal time with each parent. In the recent case of *In re A (A Child)(Joint Residence: Parental Responsibility)* [2008] 3 FCR 107 the Court of Appeal approved the practice of making a shared residence order in order to confer parental responsibility upon a man who was not the natural father, even though the child actually stayed with him only on alternate week-ends. But the present order provided for residence to be shared equally. I therefore propose to decide the case on the footing that the judge had decided that the children should reside in the fullest sense with both father and mother.

8. When a court determines any question with respect to the upbringing of a child, the child's welfare is the paramount consideration: section 1(1) of the 1989 Act. Section 1(3) contains the welfare check list to which regard must be had when considering, among other things, whether to make a residence order. These include his physical, emotional and educational needs (paragraph (b)), and the likely effect on him of any change in his circumstances (paragraph (c)). Thus the court will take into account the emotional need for a child to be able to treat his father's home as his own and the effect which depriving him of this security would have upon his development. But paragraph (f) also requires the court to consider "how capable each of his parents…is of meeting his needs." A child may have needs which a parent cannot meet. It may be in the interests of a child to reside for substantial periods with his father if the father has suitable accommodation. If he has not, the court has no power under the 1989 Act, whether in exercise of its public or private jurisdiction, to conjure such accommodation into existence: compare *In re G (A Minor)(Interim Care Order: Residential Assessment)* [2006] 1 AC 576 and in particular Baroness Hale of Richmond at p 599, para 65. The court's decisions as to what would be in the interests of the welfare of the children must be taken in the light of circumstances as they are or may reasonably be expected to be.

9. The question for a housing authority under Part VII of the 1996 Act is not the same. In deciding whether children can reasonably be expected to reside with a homeless parent, it is not making the decision on the assumption that the parent has or will have suitable accommodation available. On the contrary, it is deciding whether it

should secure that such accommodation is provided. And this brings in considerations wider than whether it would be in the interests of the welfare of the children to do so. The fact that both the court and the housing authority apply criteria which look superficially similar - the court deciding what would be in the best interests of the child and the housing authority deciding whether the children can reasonably be expected to reside with the father - does not mean that the questions are the same. The contexts are quite different. The housing authority is applying the provisions of a Housing Act, not a Children Act. The question of whether the children can reasonably be expected to reside with him must be answered in the context of a scheme for housing the homeless. And it must be answered by the housing authority, in which (subject to appeal) the statute vests the decision-making power.

10. There was some dispute about whether the words "might reasonably be expected" referred to the expectations of the applicant or those of the Council. The Court of Appeal thought it meant that the applicant's expectations had to be reasonable: paragraph 19. The Council said it referred to what it, as an independent body, would consider reasonable. I think that this is a barren argument because the phrase clearly refers to an impersonal objective standard. It is therefore unnecessary to ascribe the expectation to anyone in particular. That is the point of it being impersonal. The question is rather: what considerations does the Act require or allow to be taken into account in deciding whether one person ought reasonably to be expected to live with another?

11. The phrase clearly appeals to an objective social norm. Might a boy of 7 reasonably be expected to reside with his mother? In 5th century BC Sparta, definitely not. In 21st century England, ordinarily yes. The social norms were different. The scheme of housing provision in Part VII, which dates back to the Housing (Homeless Persons) Act 1977, was intended to give effect to the contemporary social norm that a nuclear family should be able to live together. In *Din (Taj) v Wandsworth London Borough Council* [1983] 1 AC 657, 668 Lord Fraser of Tullybelton said:

> "One of the main purposes of [the 1977] Act was to secure that, when accommodation is provided for homeless persons by the housing authority, it should be made available for all the members of his family together and to end the practice which had previously been common under which adult members of a homeless family were

> accommodated in hostels while children were taken into care, and the family thus split up. The emphasis on treating the family as a unit appears from section 1 which provides that a person is homeless for the purposes of the Act if he has no accommodation, and that he is to be treated as having no accommodation if there is no accommodation which he 'together with any other person who normally resides with him as a member of his family ... is entitled to occupy' (section 1 (1) (*a*)). The particular emphasis on families with children appears from section 2 which provides that a homeless person has 'a priority need for accommodation' when the housing authority is satisfied that he is within one of certain categories, the first of which is that 'he has dependant children who are residing with him or who might reasonably be expected to reside with him': (section 2 (1) (*a*))."

12. But the social norm must be applied in the context of a scheme for allocating scarce resources. It is impossible to consider only what would be desirable in the interests of the family if resources were unlimited. Part VII provides what Mr Luba QC (who appeared for the father) described as a safety net, a last resort for people who would otherwise be homeless. As Lord Wilberforce said in *Din's* case (at p. 664):

> "The Act must be interpreted…with liberality having regard to its social purposes, and also with recognition of the claims of others and the nature and scale of local authorities' responsibilities."

13. The scarcity of housing is expressly made a relevant consideration in relation to the question of whether someone is to be regarded as homeless. Section 175(3) says that a person is not to be treated as having accommodation unless it is accommodation "which it would be reasonable for him to continue to occupy" and section 177(2) says that in determining whether this would be reasonable," regard may be had to the general circumstances prevailing in relation to housing in the district of the local housing authority to whom he has applied." The Court of Appeal (at paragraph 44) said that the fact that Parliament had expressly provided that, in this context, the scarcity of housing should be taken into account lent support to the view that in relation to the different question of whether children should reasonably be expected to reside with a parent, it should not be taken into account. I respectfully

disagree. Even without section 177(2), it would be absurd to decide the question of whether it was reasonable to expect someone to continue to occupy accommodation without regard to some minimum standard of what decency in 21st century Britain requires. I say a minimum because Part VII is intended, as Lord Brightman said in *R v Hillingdon London Borough Council, Ex p Puhlhofer* [1986] AC 484, 517, "provide for the homeless a lifeline of last resort". But such a standard must necessarily take account of the way in which, given the scarcity of housing, many people nowadays have to live. All that 177(2) does is to enable different standards to be applied by different housing authorities, according to their local situations.

14. The question which the housing authority therefore had to ask itself was whether it was reasonably to be expected, in the context of a scheme for housing the homeless, that children who already had a home with their mother should be able also to reside with the father. In answering this question, it would no doubt have to take into account the wishes of both parents and the children themselves. It would also have to have regard to the opinion of a court in family proceedings that shared residence would be in the interests of the children. But it would nevertheless be entitled to decide that it was not reasonable to expect children who were not in any sense homeless to be able to live with both mother and father in separate accommodation.

15. In the Court of Appeal, Moses LJ said (at paragraph 43) that the fact that housing was a scarce resource should be regarded as irrelevant to the question of whether it was reasonable to expect the children to live with the father:

> "Parliament has already decided how the scarce resource of public housing should be deployed. It has, in the context of the scarcity of such accommodation, decided that priority shall be afforded to those with whom dependent children might reasonably be expected to reside. It seems to me therefore that there is no room for permitting the scarcity of resources to play a part in considering the reasonableness of the expectation."

16. I am afraid that I cannot agree with this proposition, whether as a matter of law, logic or social policy. There seems to me no reason in logic why the fact that Parliament has made the question of priority need turn upon whether a dependent child might reasonably be expected

to reside with the applicant should require that question to be answered without regard to the purpose for which it is being asked, namely, to determine priority in the allocation of a scarce resource. To ignore that purpose would not be a rational social policy. It does not mean that a housing authority can say that it does not have the resources to comply with its obligations under the Act. Parliament has placed upon it the duty to house the homeless and has specified the priorities it should apply. But so far as the criteria for those priorities involve questions of judgment, it must surely take into account the overall purpose of the scheme.

17. In my opinion the Court of Appeal was wrong to suggest that a housing authority should intervene in family proceedings to argue against the court making a shared residence order. It will obviously be helpful to a court, in dealing with the question of where the children should reside, to know what accommodation, if any, the housing authority is likely to provide. It should not make a shared residence order unless it appears reasonably likely that both parties will have accommodation in which the children can reside. But the provision of such accommodation is outside the control of the court. It has no power to decide whether the reasons why the housing authority declines to provide such accommodation are good or bad. That is a matter for the housing authority and, if necessary, the County Court on appeal. Likewise, it is relevant for the housing authority to know that the court considers that the children should reside with both parents. But the housing authority is not concerned to argue that the court should not make an order to this effect. The order, if made, will only be part of the material which the housing authority takes into account in coming to its decision. The two procedures for deciding different questions must not be allowed to become entangled with each other.

18. Section 182 of the 1996 Act provides that in the exercise of its functions relating to homelessness, a local housing authority shall have regard to guidance from the Secretary of State. At the time when the Council issued its decision, the relevant guidance was contained in the *Homelessness Code of Guidance for Local Authorities*, issued by the Office of the Deputy Prime Minister in July 2002. Paragraph 8.10 said:

> "Residence does not have to be full-time and a child can be considered to reside with one parent even where he or she divides her time between both parents. However, as mentioned above, there must be some regularity to the arrangement. If the child is not currently residing with the

> applicant, the housing authority will need to decide whether, in the circumstances, it would be reasonable for the child to do so. An agreement between a child's parents, or a joint residence order by a court, may not automatically lead to a conclusion that it would be reasonable for the child to reside with the parent making the homelessness application, and housing authorities will need to consider each case individually. However, housing authorities should remember that where parents separate, it will often be in the best interests of the child to maintain a relationship with both parents. It would only be in very exceptional cases though that a child might be considered to reside with both parents."

19. I am bound to say that this guidance, while sound in instinct, is muddled in its reasoning. It is correct, as I have said, that the housing authority has to decide whether, in the circumstances, it would be reasonable for the child to reside with the applicant and that a shared residence agreement or court order will not automatically lead to that conclusion. It is also the case that housing authorities will need to consider each case individually. Of course. But the guidance says little about what "might reasonably be expected" means or the considerations which the housing authority should take into account. It is this gap which I would invite your Lordships to fill.

20. It is certainly desirable that housing authorities should remember that where parents separate, it will usually be in the best interests of the child to maintain a relationship with both parents. But the last sentence does not seem to follow from anything which has been said in the earlier part of the paragraph and might come as a surprise to anyone who knew nothing else about the matter. Perhaps that is why it has been deleted from the recent (2006) edition of the Guidance: see the new paragraph 10.10. If the parents are living together, then of course the children will be residing with both of them. Mr Luba in fact submitted an alternative argument that this was enough in itself to establish his priority need under section 189(1)(b) because, at the time when he made his application, he was still in the family home and the children were residing with him. In my opinion, however, when an application is made on the basis that someone is threatened with homelessness, the question is whether the children will be residing or might reasonably be expected to reside with him when he becomes homeless. In the absence of accommodation provided by the housing authority, the children would not be residing with him when he became homeless. So the only

question is whether they might reasonably be expected to reside with him.

21. Taken literally, therefore, the statement that "it would only be in very exceptional cases though that a child might be considered to reside with both parents" is unhelpful because in most cases (such as this one) the question will not be whether the child is residing with both parents but whether, after a separation, he might reasonably be expected to do so. Nevertheless, the sentiment which it expressed was based on sound instinct because I think it will be only in exceptional circumstances that it would be reasonable to expect a child who has a home with one parent to be provided under Part VII with another so that he can reside with the other parent as well. It seems to me likely that the needs of the children will have to be exceptional before a housing authority will decide that it is reasonable to expect an applicant to be provided with accommodation for them which will stand empty for at least half of the time. I do not say that there may not be such a case; for example, if there is a child suffering from a disability which makes it imperative for care to be shared between separated parents. But such cases, in which that child (but not necessarily any sibling) might reasonably be expected to reside with both parents, will be unusual.

22. In his admirable extempore judgment in the County Court, Judge Oppenheimer put with clarity and succinctness the points which I have tried to express at what might be thought to be wearisome length. After referring to the fact that shared residence orders were now not very unusual and to the last sentence of the Guidance, he said:

> "Different considerations…apply when a local authority rather than a family court is considering whether or not a child might be considered to reside or might reasonably be expected to reside with both parents; and there seems to me to be no necessary inconsistency there. This is particularly so when a local authority is taking account of the fact that if their practice did not accord with this passage in the Code, it might have to provide two houses, one to each parent, both of which houses are likely to be under occupied. In my judgment…a local authority is entitled to take account of such matters…[I]t is…not for the family court but for the local housing authority to decide whether a child might reasonably be expected to reside with an applicant for housing under Part VII. That is a question that Parliament has under the Housing Act

> 1996 entrusted to the local authority who will consider its housing resources and other matters. Furthermore, there is nothing in the Children Act 1989 which empowers the court hearing residence proceedings to order the provision of accommodation for anyone."

23. I entirely agree. Finally, I come to the point upon which the Court of Appeal quashed the Council's decision. The father's solicitors wrote two letters of representations to the Council, putting forward reasons why their client should be considered to have priority need. The first reason, in a letter of 20 March 2006, was that the shared residence order was made because until the break-down of the relationship the father was the primary carer (the mother worked full time) and therefore "the children should be considered to reside with both parents". In fact the father was living in accommodation provided by the Council pending resolution of the case and therefore the children were not residing with him. The father said as much when , on 4 April 2006, pending the review decision, the father and mother went back to the court to complain that the Council had been unco-operative in implementing the earlier order. The court made a further order -

> "recording it's [sic] concern that, due to no fault of either party, the shared residence order has not been implemented by reason of the inability of the respondent to obtain accommodation suitable for him to share with the said children, and thus enable him to share residence within the terms of the said order."

24. Presumably this order was forwarded to the reviewing officer, who seems to have taken no notice. He was quite right not to do so: it is not the business of a court exercising jurisdiction under the 1989 Act to try to exert pressure upon a housing authority to provide resources for one or other of the parties.

25. Clearly what the solicitors meant was that, having regard to the shared residence order, it might reasonably be expected that the children would reside with the father. But the way in which he put his case, namely that "the children should be considered to reside with both parents" seems to have influenced the way the reviewing officer dealt with the point in his decision letter. He said:

> "You have submitted that the children should be considered to reside with both parents, and as such your client should be in priority need for accommodation. You argue that the order is intended to be permanent, but this does not seem to me to decide the question of whether in fact the children are staying with Mr Holmes-Moorhouse on a permanent basis. …..When children are staying alternative weeks with each parent, and the other parent is adequately housed, and the main carer, it seems to me that something more than the bare fact of staying is required before one would ordinarily describe the children as 'residing' with the homeless parent. I am satisfied that the children do not reside with Mr Holmes-Moorhouse and neither are they expected to reside with him."

26. The Court of Appeal said that this was a mis-direction because the effect of the court order, if implemented, would be that the children resided with both parents and not merely reside with one and stay with the other. My Lords, I would accept that the reviewing officer wrongly construed what was intended to be the effect of the court order. But that was irrelevant. It did not matter what the current situation was or what it would be if the order was implemented. The question was whether, in the context of the duty of the housing authority to make provision for the homeless, the children might reasonably be expected to live with the father as well as the mother. To that question the reviewing officer gave a negative answer and in my opinion there were ample grounds upon which he was entitled to do so. I would therefore allow the Council's appeal. Since drafting this opinion, I have had the privilege of reading in draft the speeches to be delivered by my noble and learned friends Baroness Hale of Richmond and Lord Neuberger of Abbotsbury. They should be required reading by family court judges dealing with residence orders and County Court judges hearing appeals under section 204 of the Housing Act 1996 respectively.

LORD SCOTT OF FOSCOTE

My Lords,

27. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Hoffmann and am in full and respectful

agreement with the explanation he has given of the reasons why this appeal should be allowed. There is nothing I can usefully add and for those reasons I too would allow Richmond's appeal.

LORD WALKER OF GESTINGTHORPE

My Lords,

28. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Hoffmann. I am in full agreement with it and for the reasons given by Lord Hoffmann I too would allow this appeal. I am also in full agreement with the further observations made by my noble and learned friends Baroness Hale of Richmond and Lord Neuberger of Abbotsbury.

BARONESS HALE OF RICHMOND

My Lords,

29. I do not agree that my noble and learned friend Lord Hoffmann might reasonably be thought to have expressed his reasons for allowing this appeal at wearisome length. But I agree with everything else which he has said. This case is such a good illustration of the different roles of the family courts and homelessness decision-making system that I shall risk actually wearying the reader by adding a few words from a family lawyer's point of view.

30. When any family court decides with whom the children of separated parents are to live, the welfare of those children must be its paramount consideration: Children Act 1989, s 1(1). This means that it must choose *from the available options* the future which will be best for the children, not the future which will be best for the adults. It also means that the court may be creative in devising options which the parents have not put forward. It does not mean that the court can create options where none exist. Further, the court must not make any order unless it considers that to do so would be better for the children than making no order at all: s 1(5). This means that there must be some

tangible benefit to the children from making an order rather than leaving the parents to sort things out for themselves. Additionally, if the making of an order is opposed, the court must have regard in particular to the statutory checklist of factors relevant to the children's welfare, including the children's own wishes and feelings and the ability of each of their parents to meet their needs: s 1(3), (4). But the court does not have to do this if the making of an order is unopposed, as it was in this case.

31. The reality is that every effort is made, both before and during any family proceedings, to encourage the parents to agree between themselves what will be best for their children. There are many good reasons for this. The parents know their own children better than anyone. They also know their own circumstances, what will suit them best, what resources are available and what they can afford. Agreed solutions tend to work much better and last much longer than solutions imposed by a court after contested proceedings. The contest is likely to entrench opposing viewpoints and inflame parental conflict. Conflict is well known to be bad for children. Not only that, the arrangements made when the couple separate are bound to have to change over time, as the children grow up and their own and their parents' circumstances change. Parents who have been able or helped, through mediation or in other ways, to agree a solution at the outset are more likely to be able to negotiate those changes for themselves, rather than to have to return to court for further orders.

32. This all means that, although the court is never bound to make the order which the parents have agreed and is free to canvas solutions which the parents have not, it is only in a small minority of cases that the court makes an order after a full investigation of what the best interests of the children require. And even if the court has done this, it is open to the parents to agree upon alterations to the arrangements which the court has ordered. It would, for example, be open to parents to agree that, despite an order which contemplated a roughly equal division of the children's time between them, in fact the children would spend most of their time with the parent who had stayed in the family home and only visit the other parent in his new home. That is another reason why the distinction drawn by the Court of Appeal between consent and contested orders, tempting though it may seem, does not work.

33. It is worthwhile looking at the facts of this particular case in a little more detail, because the striking feature about them is how little we (and the housing authority) know about the family proceedings and how little the family court appears to have known about the family. The

parents are not married to one another and moved into the family home, which is rented from a registered social landlord in the mother's sole name, after all four of their children had been born. In August 2005, when the relevant order was made, those children were aged 16, 14, 9 and 6. The youngest is disabled with Prader-Willi syndrome (a genetic disorder affecting the hypothalamus). At that time the parents were still living in the family home.

34. We do not know when the family proceedings began or what stage they had reached before the relevant order. We know that there were proceedings under Part IV of the Family Law Act 1996 ("Family Homes and Domestic Violence") relating to the occupation of the family home. We know that orders were also made under the Children Act 1989 relating to the children (such orders can be made in any family proceedings even if no formal application has been made: see 1989 Act, s 10(1)(b)). We know that on 21 July 2005, the Family Law Act proceedings were adjourned until 2 August with a time estimate of half a day. This suggests that evidence may have been filed in those proceedings, but the main purpose of the adjournment was to secure the attendance of a social worker from the local authority with the relevant records relating to the four children. The father gave certain undertakings on that occasion but we do not know what they were. On 2 August, the Family Law Act proceedings were further adjourned for a "short mention" on 9 August. On 9 August, Her Honour Judge Knowles made the order in question. The father was to leave the family home by 4.00 pm on 20 September 2005 (with penal notice attached). The parents were to have shared residence of the youngest three children (orders are not made once a child has reached 16 unless the circumstances are exceptional: see 1989 Act, s 9(7)). Specifically, "the children do spend alternate weeks with each parent and half of each school holiday". Although neither order is expressed to be by consent, the parties agreed to a shared residence order. The father applied to the local authority for emergency housing on 18 August and it would appear that he was given temporary accommodation which enabled him to comply with the court's order to leave the home.

35. It seems unlikely, therefore, that evidence had been filed in any Children Act proceedings or that the Child and Family Court Advisory and Support Service, CAFCASS, had been involved in any way. The housing authority, on the other hand, made inquiries of the father's GP, the local NHS Primary Care Trust, and the local children's services. They also interviewed both parents. From their inquiries it emerged that the family had been known to the local children's services since 2003, having been referred by the police "because of incidents of domestic

violence". It also emerged that the two older children had been placed on the child protection register in April 2005 under the category of emotional and physical abuse. The assessments carried out by the social workers concluded that the mother, although working, did all the physical care of the children, running the house, collecting the two younger children after school, helping the children with their homework and preparing supper.

36. There is, of course, another side of the story. The father claims to have been the primary carer for the children. He denies the allegations of domestic violence and puts the tensions between the parents down to the mother having formed a new relationship. My point is that the family court was in no position to adjudicate upon all this and, it appears, made no effort to do so. There also appears to have been no evidence of the children's wishes and feelings. Yet these ought to be particularly important in shared residence cases, because it is the children who will have to divide their time between two homes and it is all too easy for the parents' wishes and feelings to predominate. The history of police and social services involvement does suggest that there was a debate to be had about whether sharing the children's time equally between the two parents was indeed in their best interests, even if there had been two homes available for them to do so. Having said that, I do thoroughly sympathise with the family judge. She accepted a compromise which avoided both the existing conflict within the home and the prospect of further conflict in the courts, by getting the father out of the house in return for the mother's agreement that the children should spend half their time with him.

37. Nevertheless, in my view, this order should not have been made. A residence order is "an order settling the arrangements to be made as to the person with whom a child is to live": 1989 Act, s 8(1). Although, as I have said, the parents are free to depart from it by agreement if they wish, it is an order which can be enforced, by physical removal of the children if need be: see Family Law Act 1986, s 34 (see also 1989 Act, s 14 and Magistrates' Courts Act 1980, s 63). It is one thing to make such an order when each parent has a home to offer the children, even if it is not exactly what they have been used to before their parents split up. It is another thing entirely to make such an order when one parent is living in the family home and the other parent has no accommodation at all to offer them and no money with which to feed and clothe them (the father was living on £56 incapacity benefit based income support, apparently because he had a broken rib). Suppose, for example, that this couple had been living in privately owned or rented accommodation: it could not have been in the best interests of the children to make such an order

unless the other parent had a reasonable prospect of obtaining suitable accommodation within a reasonable time. If a couple are married, the family court can rearrange the resources which they already have or are likely to have in the foreseeable future: see Matrimonial Causes Act 1973, Part II. The court will always try to use those powers to preserve a suitable home for the children and, if the resources are available and it is in their best interests to do so, to enable them to spend as much time as possible with the other parent. If the couple are not married, the family court has some rather more limited powers to alter their occupation rights in the short term, to transfer public sector tenancies in the long term, and to order capital provision for the children: see Family Law Act 1996, Part IV and Schedule 7, 1989 Act, Schedule 1. But there was no suggestion that those longer term powers would be appropriate here.

38. Family court orders are meant to provide practical solutions to the practical problems faced by separating families. They are not meant to be aspirational statements of what would be for the best in some ideal world which has little prospect of realisation. Ideally there may be many cases where it would be best for the children to have a home with each of their parents. But this is not always or even usually practicable. Family courts have no power to conjure up resources where none exist. Nor can they order local authorities or other public agencies to provide particular services unless there is a specific power to do so (an example is the making of a family assistance order under section 16 of the1989 Act). The courts cannot even do this in care proceedings, whose whole aim is to place long term parental responsibility upon the state, to look after and safeguard and promote the welfare of children who are suffering or likely to suffer harm in their own homes: see *Re G (A Minor) (Interim Care Order: Residential Assessment)* [2005] UKHL 68, [2006] 1 AC 576. *A fortiori* they cannot do this in private law proceedings between the parents. No doubt all family courts have from time to time tried to persuade local authorities to act in what we consider to be the best interests of the children whose welfare is for us the paramount consideration. But we have no power to order them to do so. Nor, in my view, should we make orders which will be unworkable unless they do. It is different, of course, if we have good reason to believe that the necessary resources will be forthcoming in the foreseeable future. The court can always ask the local authority for information about this. It may even require a report from the local children's services authority under section 7 of the 1989 Act.

39. But the family court should not use a residence order as a means of putting pressure upon a local housing authority to allocate their resources in a particular way despite all the other considerations which,

as Lord Hoffmann has explained, they have to take into account. It is quite clear that this was what the family court was trying to do in this case: after a series of postponed reviews, on 4 April 2006, the court not only recorded that the shared residence order had been made "in full consideration of section 1 of the Children Act 1989", but also "it's [sic] concern that, due to no fault of either party, the shared residence order has not been implemented by reason of the inability of the respondent to obtain accommodation suitable for him to share with the said children". We do not know whether this was communicated to the reviewing officer whose decision letter was written on 3 May 2006 but it is a fair assumption that the order was designed to help the father's case.

40. I should add that, just as we have very little information about the family proceedings, so too had the local housing authority. I agree with the Court of Appeal to this extent: if the housing authority had had the benefit of a fully reasoned judgment of a family court, explaining why it was in the interests of these particular children to have two homes rather than one, that would obviously carry more weight than an order made by consent, where the local authority had no access to a reasoned judgment or any reports or other evidence which may have been filed. But it could never be determinative because the issues for the housing authority are different from the issues for the family court.

41. There may be cases where a child could reasonably be expected to live with a parent in accommodation provided under the homelessness legislation, despite also having a perfectly suitable home with the other parent. Lord Hoffmann has given the example of a disabled child, whose parents might be better able to look after him properly if they shared his care between them. Another example might (I only say might) be where a shared residence order was made some time ago and has been working extremely well, but one of the parents has unexpectedly and unintentionally become homeless (perhaps because of domestic violence from a new partner). It might then be reasonable to expect those children's existing living arrangements to be continued by the provision of social housing for one of the parents. But that is not this case.

42. A final point is that this shared residence order is still in force: it was last confirmed "for the avoidance of doubt" on 13 November 2007, no doubt to preserve the position for these proceedings. This appeal is to be allowed. The father will not be provided with accommodation under the homelessness legislation to enable the children to spend half their time living with him. Unless, therefore, he is able to find accommodation for himself and the means to support his children while

they are with him, that part of the shared residence order should be discharged. It may well be, however, that it would be in the best interests of the children for their father to have parental responsibility for them, sharing it with the mother in the same way that a married father does. This can be done by means of an order or agreement under section 4 of the 1989 Act: there is no need to make a residence order for this purpose, as there is, for example, in the case of a same sex parent who is not the genetic or gestational parent of the child: see *In re G (Residence: Same Sex Partner)* [2005] 2 FLR 957, CA.

43. I too would allow this appeal and restore the decision of the circuit judge.

LORD NEUBERGER OF ABBOTSBURY

My Lords,

44. I have had the privilege of reading in draft the opinion of my noble and learned friends Lord Hoffmann and Baroness Hale of Richmond. I agree with Lord Hoffmann's conclusion and the reasoning on which it is based, and I also agree with the additional remarks of Lady Hale.

45. The only further point that I would like to mention arises out of the Court of Appeal's treatment of the review decision in the present case. As Lord Hoffmann has explained, the review decision contained an error as to the effect of the shared residence order, but it was not an error which invalidated the decision. In my view, His Honour Judge Oppenheimer was quite correct when he said:

> "the whole thrust of the review decision, in my judgment, dealt with the practical arrangements for these children both presently and in the future rather than the legal formalities which were entirely incidental to the practical questions that the housing authority is obliged to consider under the 1996 Act. This seems to me to be a technical error of law having no practical result on the outcome of the review decision, and in my judgment, relief in this case ought not to depend on such an error."

46. The rights granted by Part VII of the 1996 Act to those claiming to be homeless or threatened with homelessness are based on humanitarian considerations, and this underlines the fact that any challenge to a review decision should be carefully considered by the County Court to whom such challenges are directed. Given that the challenge in the County Court is treated as a first appeal, the responsibility on the Judge considering the challenge is heavy, and, if he or she is satisfied that there is an error in the reasoning which undermines the basis upon which the decision was arrived at, then the decision should obviously be set aside.

47. However, a Judge should not adopt an unfair or unrealistic approach when considering or interpreting such review decisions. Although they may often be checked by people with legal experience or qualifications before they are sent out, review decisions are prepared by housing officers, who occupy a post of considerable responsibility and who have substantial experience in the housing field, but they are not lawyers. It is not therefore appropriate to subject their decisions to the same sort of analysis as may be applied to a contract drafted by solicitors, to an Act of Parliament, or to a court's judgment.

48. Further, at least in my experience, and as this case exemplifies, review decisions generally set out the facts, the contentions, the analyses and the conclusions in some detail. To my mind, given the importance, particularly to the applicant, of the issues considered in review decisions, such fullness is to be strongly encouraged. However, as any lawyer knows, the more fully an opinion is expressed, the greater the opportunity for alleging mistakes of fact, errors of law, or inconsistencies. If the courts are too critical in their analyses of such decisions, it will tend to discourage reviewing officers from expressing themselves so fully.

49. In my view, it is therefore very important that, while Circuit Judges should be vigilant in ensuring that no applicant is wrongly deprived of benefits under Part VII of the 1996 Act because of any error on the part of the reviewing officer, it is equally important that an error which does not, on a fair analysis, undermine the basis of the decision, is not accepted as a reason for overturning the decision.

50. Accordingly, a benevolent approach should be adopted to the interpretation of review decisions. The court should not take too technical view of the language used, or search for inconsistencies, or adopt a nit-picking approach, when confronted with an appeal against a review decision. That is not to say that the court should approve incomprehensible or misguided reasoning, but it should be realistic and practical in its approach to the interpretation of review decisions.

51. Further, as the present case shows, a decision can often survive despite the existence of an error in the reasoning advanced to support it. For example, sometimes the error is irrelevant to the outcome; sometimes it is too trivial (objectively, or in the eyes of the decision-maker) to affect the outcome; sometimes it is obvious from the rest of the reasoning, read as a whole, that the decision would have been the same notwithstanding the error; sometimes, there is more than one reason for the conclusion, and the error only undermines one of the reasons; sometimes, the decision is the only one which could rationally have been reached. In all such cases, the error should not (save, perhaps, in wholly exceptional circumstances) justify the decision being quashed.

52. In the present case, while one paragraph of the review decision contains an error, it seems to me that it is not an error which in any way undermines the reasoning upon which the conclusion is based. It is also fair to add that, if one excises the short passage which contains the error, the review decision in this case, when read as a whole, contains a full and very fair summary of the relevant facts, an accurate assessment of the issues, a clear explanation of the reviewing officer's reasoning, and a conclusion which seems to me to be unassailable.

53. Accordingly, I too would allow this appeal.