Michaelmas Term
[2009] UKSC 5
On appeal from: [2009] EWCA Civ 545

JUDGMENT

In re B (A Child) (2009) (FC)

before

Lord Hope, Deputy President
Lady Hale
Lord Collins
Lord Kerr
Lord Clarke

JUDGMENT GIVEN ON

19 November 2009

Heard on 14 October 2009

Appellant (GB)
Alison Ball QC
Peter Horrocks
(Instructed by Powleys)

Respondent (RJB)
Pamela Scriven QC
Cherie Parnell
(Instructed by Allan Rutherford Solicitors)

Respondent (GLB)
In Person

LORD KERR

1. This is a judgment of the Court.

2. This appeal requires a revisiting of a vexed but highly important topic. The significance of parenthood in private law disputes about residence and contact has exercised many courts over many years but one might have thought that the final word on the subject had been uttered in the comprehensive and authoritative opinion of Baroness Hale of Richmond in In *re G (Children) (Residence: Same-sex Partner)* [2006] UKHL 43, [2006] 1 WLR 2305. As this case illustrates, however, misunderstandings about the true import of that decision and the applicable principles persist.

3. The case concerns a young boy whom we will call Harry, although that is not his real name. Harry will be four years old in December of this year. Until recently, apart from at weekends, he has lived continuously with the appellant, GB, who is his maternal grandmother. On 6 March 2009 Lowestoft Family Proceedings Court made a residence order in favour of GB. A contact order allowing staying contact with both parents was also made. The orders of the Family Proceedings Court were appealed by Harry's father RJB to the Family Division. His Honour Judge Richards, sitting as a High Court Judge, heard the appeal on 3 April 2009 and he made an order which, among other things, directed that there should be a transfer of residence to the father on 25 April.

4. GB appealed Judge Richards' order and her appeal was heard by the Court of Appeal (Wall and Elias LJJ) on 21 May 2009. At the conclusion of the hearing, the court dismissed the appeal and stated that the reasons for dismissal would be given later. Permission to appeal to the House of Lords was refused. The reasons for dismissing the appeal were provided in a judgment handed down on 11 June 2009. A stay on the transfer of residence was granted on that date to allow GB to petition the House of Lords for permission to appeal. It was a condition of the grant of the stay, however, that Harry should have contact with his father from Thursday afternoon until 4 pm on Monday each week. That level of contact continued until the hearing of the appeal before this court. Permission to appeal was granted on 30 July 2009 and the appeal was heard on 14 October. Both GB and RJB were represented on the appeal. Harry's mother, GLB, appeared on her own behalf and her only – albeit important – submission to this court was to the effect that she wanted the best for her son. When the hearing ended, this court

announced that the appeal would be allowed for reasons that we would provide at a later date. This judgment contains those reasons.

Family Background

5. Harry's parents met in the autumn of 2004. They separated in April 2005, eight months before Harry was born. GB has been principally responsible for caring for him from the time of his birth. Indeed, she was present when he was born and immediately afterwards he went to live in her home. Until the order of the Court of Appeal giving extended contact to his father, Harry has lived there ever since.

6. Neither of Harry's parents was able to care for him satisfactorily in the first years of his life. His mother, GLB, lived with her mother and Harry intermittently at GB's home from the time that he was born until July 2006. She left GB's home then and has not returned.

7. On 9 November 2006 GB was granted a residence order. This was made on consent. At the same time a parental responsibility order was made in favour of Harry's father, RJB. This also appears to have been made on consent. Thereafter he spent a night and a day of every weekend with each of his parents in turn.

8. In July 2007, Harry's father was convicted of racially aggravated assault. He was sentenced to a term of imprisonment. It is not clear whether this term was twelve or eighteen months but that is not important in relation to the issues which arise on the appeal. While in prison RJB met SB, the sister of another inmate. On his release in March 2008 they formed a relationship and they married some time later. On 11 February 2009 their daughter was born. SB also has an older daughter of about the same age as Harry from an earlier relationship. The older daughter lives with RJB, SB and the daughter born in February 2009. RJB has a much older son from another relationship but there is no contact between this son and his father.

9. GB has not been without difficulties in her personal life. Tests have revealed that she has had a high alcohol consumption level in the past. She has a conviction for driving with excess alcohol and she has been the victim of domestic

violence. Some episodes of this violence occurred in Harry's presence but the person who was responsible for them no longer lives with GB.

The Family Proceedings Court Hearing

10. On 28 May 2008 Harry's mother applied for a residence order. In the course of the proceedings which followed, Harry's father made his own application for a residence order. Despite having applied herself for a residence order, Harry's mother supported the father's application. The order of 9 November 2006 in favour of GB was, of course, still in force at this time and she made plain her wish to continue to care for Harry.

11. A report from a social care manager of the local authority, AW, was prepared for the hearing pursuant to section 7 of the Children Act 1989. It is dated 4 January 2009. It is not clear whether AW spoke to SB, the wife of Harry's father, but he certainly spoke to Harry's grandmother and to both his parents. AW considered that Harry was thriving in the care of his grandmother. He enjoyed contact with other family members, however, and had developed positive relationships with them. AW concluded that Harry's mother was not capable of providing a safe and stable environment for Harry. While there were some concerns about GB, AW reached the view that she had proved capable of meeting Harry's needs. In relation to Harry's father, AW said this:

> "In my opinion, there is very little in [RJB's] commitment, motivation and capabilities to indicate that he could not meet [Harry's] needs. He is in a secure relationship and can provide stability to his son. He and his wife possess the necessary knowledge and skills to raise a child healthily.
>
> Their situation with the birth of their child places them in an untested situation that only a period of time would resolve."

12. AW considered that to transfer Harry's residence to his mother or father would have "a significant impact" on him. In his view, the stability and security that Harry enjoyed was due to the consistency and predictability of his grandmother's care. He had begun to form his first significant peer relationships at

nursery and a move away from this would be disruptive for him. AW concluded therefore that, while Harry's placement with GB was not perfect, on balance it should continue.

13. A sentence in the conclusion section of AW's report has proved to be somewhat controversial in the case. It was to this effect:

> "In my opinion there needs (*sic*) to be compelling reasons to disrupt [Harry's] continuity of care and the consistency and predictability that accompanies (*sic*) it."

14. The justices used the same formulation in the pro forma document that recorded the reasons for their decision. Incongruously, however, this appeared as the final paragraph in the section of the form that recorded findings of fact. It read:

> "We have not found compelling reasons to disrupt [Harry's] continuity of care and the consistency and predictability that accompanies (sic) it."

15. Plainly, this was a verbatim quotation from AW's report. It has been suggested that the justices fell into error in stating that they required compelling reasons to remove Harry from his grandmother's care. We do not accept that suggestion. In the first place, the justices did not say that they *required* compelling reasons – merely that they did not find such reasons. More importantly, taken as a whole, the pro forma that the justices prepared points unmistakably to their having conducted a careful weighing of the various factors that bore directly on what was in Harry's best interests. Thus, for instance, they reviewed his development while in the care of GB; noted that she had facilitated contact with both Harry's parents, even when his father was in prison; noted the risk of harm if he was moved; recorded that he had good relationships with both parents and his grandmother, all of whom were significant in his life; and expressly stated that they had balanced all interests in making their decision and had treated Harry's welfare as paramount.

16. We are satisfied, therefore, that the justices did not consider that compelling reasons were an essential prerequisite to any alteration of the status quo. It is perhaps unfortunate that the social care manager made the 'compelling reasons' reference and unfortunate too that it was incorporated by the justices in their

statement of reasons but one should guard against an overly fastidious approach in parsing the contents of such statements. Isolated from its context, the phrase is redolent of an over-emphasis on the importance of continuing what had gone before but we have concluded that, on a fair reading of the entire statement, it can be confidently said that this did not happen.

The decision of Judge Richards

17. In para 21 of his judgment, Judge Richards acknowledged that the justices had taken all the evidence into account and that their recorded reasons betokened a very careful weighing of that evidence. He concluded, however, that they had been "distracted by their consideration of the settled way in which [Harry] has been brought up." (para 29)

18. The judge referred to the decision of *In re G*, (which had received a passing reference in the justices' statement of reasons that we will consider later in this judgment). He suggested, at para 23, that the House of Lords had made clear in that case that "in the ordinary way … the rearing of a child by his or her biological parents can be expected to be in the child's best interests, both in the short term and, more importantly, in the longer term". For reasons that we shall give presently, we do not consider that this is a proper representation of the decision in *In re G* and we believe that it was the failure to properly understand the burden of the decision in that case that led the judge into error.

19. The theme that it was preferable for children to be raised by their biological parent or parents was developed by the judge in paras 24 and 25 of his judgment. He stated that it was the right of the child to be brought up in the home of his or her natural parent. (It is clear from the context that the judge was using the term 'natural parent' to mean 'biological parent'.) We consider that this statement betrays a failure on the part of the judge to concentrate on the factor of overwhelming – indeed, paramount – importance which is, of course, the welfare of the child. To talk in terms of a child's rights – as opposed to his or her best interests – diverts from the focus that the child's welfare should occupy in the minds of those called on to make decisions as to their residence.

20. The distraction that discussion of rights rather than welfare can occasion is well illustrated in the latter part of Judge Richards' judgment. In paras 28 and 30 he suggested that, provided the parenting that Harry's father could provide was

"good enough", it was of no consequence that that which the grandmother could provide would be better. We consider that in decisions about residence such as are involved in this case; there is no place for the question whether the proposed placement would be "good enough". The court's quest is to determine what is in the *best* interests of the child, not what might constitute a second best but supposedly adequate alternative. As the Court of Appeal pointed out at para 61, the concept of 'good enough' parenting has always been advanced in the context of public law proceedings and of care within the wider family as opposed to care by strangers.

21. Judge Richards acknowledged that he could only reverse the decision of the justices if he came to the conclusion that they were plainly wrong. He explained his reasons for coming to that conclusion in the following passage from para 29:

> "… I have come to the view, applying as I do the test of whether this was plainly wrong, that in circumstances where it is clear that the father can meet this child's needs that he would have a settled and established home with his own family, that the justices were plainly wrong in coming to their conclusion that [Harry] should remain with his grandmother."

22. After the judge had delivered his judgment, counsel on behalf of Harry's grandmother applied for leave to appeal. She submitted that the judge had attached undue importance to what he perceived to be the desirability of Harry being brought up by his biological parent and that he had been thereby distracted from concentrating on Harry's welfare. The judge rejected that submission, stating:

> "For my part, I hope I made it clear that [Harry's] welfare is, and remains, the paramount consideration. The test that the justices should have applied was the welfare test. That is the test that I apply as well."

23. In fact, at no point in his judgment did the judge say that Harry's welfare was the paramount consideration. We do not suggest that this statement requires to be intoned like a mantra on every occasion that a judgment on the residence of a child is given. Often it will be clear from the approach of the judge that this fundamental consideration underlay his or her reasoning. In the present case,

however, we are satisfied that the judge, notwithstanding what he said in refusing leave to appeal, did not afford Harry's welfare the dominant position that it should have occupied in the decision as to his residence. Instead, he allowed the question of the child's so-called right to be raised by his biological parent to influence – indeed to define – the outcome of the residence debate.

The judgment of the Court of Appeal

24. The Court of Appeal concluded at para 24 that the justices had made what were described as "two important errors of law". The first of these related to their treatment of *In re G*. At para 14 of the section in the justices' statement of reasons entitled 'findings of fact' the following appeared: -

> "In r*e G (Residence: Same-sex Partner)* [2005] EWCA Civ 462, [2005] 2 FLR states a child should not be removed from primary care of biological parents. [Harry] has never resided with his father. Grandmother has been his psychological parent."

25. Wall LJ, who delivered the judgment of the court, observed at para 23 that it was unfortunate that the justices had referred to the decision of the Court of Appeal in *In re G* since that had been reversed by the House of Lords. In fairness to the justices, the incorrect citation appears to have derived from the skeleton argument of counsel for the father. In any event, it is clear from the reference in para 14 that the justices had considered (to the extent that they had considered it at all) the decision of the House of Lords rather than that of the Court of Appeal. In her skeleton argument, counsel for RJB had quoted the virtual entirety of the short speech of Lord Nicholls of Birkenhead. It would appear that this provided the source material for the justices' statement that a child should not be removed from the primary care of biological parents.

26. Despite the fact that Baroness Hale had delivered the leading opinion in *In r*e *G* and that all the other members of the appellate committee had expressed their unqualified agreement with it, her speech does not appear to have been extensively considered – indeed a single sentence of her opinion was all that was quoted in the skeleton argument submitted on behalf of the father. It was to the effect that "parenthood is to be regarded as an important and significant factor in considering which proposals advance the welfare of the child" ([2009] 1 WLR 2305, para 31).

As we shall see, the significance of Baroness Hale's speech to the outcome of this case went far beyond this somewhat selective quotation.

27. In developing its first criticism of the justices' approach the Court of Appeal suggested that there had not been a sufficient discussion of the respective roles of parents and grandparents in a child's life. As a consequence, the court concluded that the justices had fallen into error in referring to the grandmother as Harry's psychological parent while failing to acknowledge his father's role beyond recording that he was capable of meeting Harry's needs.

28. When considering the criticism that the justices had failed to – in the words of Wall LJ at para 24 – "grapple adequately with the fundamental issue in the case" - one must keep closely in mind that the context in which discussion of the respective roles of the father and the grandmother in Harry's life should take place is how those roles and the manner in which the parent and grandparent fulfil them can conduce to the child's welfare. Whether this particular criticism is justified depends, therefore, on the sufficiency of the justices' consideration of the roles of the father and grandmother in terms of the contribution that they could make to Harry's welfare.

29. The pro forma document that the justices prepared giving the reasons for their decision should not, we believe, be treated as containing an exhaustive record of all the material that was considered by them. From the note of the evidence given in the family proceedings court it is clear that the role that the father could play in Harry's life and the care that he had provided in the past were comprehensively canvassed and debated. Both GB and AW were cross examined extensively about these issues and it is difficult to accept that the justices did not have them in mind in making the decision about residence.

30. It would perhaps have been preferable if the justices had placed on record that they had considered the role of his father in Harry's life but it is not easy to see what they might have said beyond that. They had commented that RJB had helped with Harry's care in the past and had expressed himself willing to do so again; they acknowledged that he was capable of meeting Harry's needs; and they accepted that Harry had enjoyed a good relationship with his father. It is clear that they were alert to the role that he had played in this young boy's life. We cannot therefore agree that they failed to grapple with the respective roles of father and grandmother.

31. The second “important error of law” identified by the Court of Appeal was the justices’ statement in relation to compelling reasons. Wall LJ said this about that statement:

> “25. … in our judgment, it was clearly an error of law for the justices to say, as they did, that it required compelling reasons to remove H from his grandmother's care. Whilst they make it clear that [Harry's] welfare was their paramount consideration, the question which they had to decide was whether or not it was in [Harry's] interests in both the short and the long term to live with his grandmother or his father. The introduction of 'compelling reasons' clearly means, we think, that the justices gave too much weight to the 'status quo' argument, and too little to the role of his father in [Harry's] life and care. Indeed, they appear to have created a presumption that the status quo should prevail unless there are compelling arguments to the contrary.”

32. As we have pointed out at [14] above, the justices did not say that they required such reasons, merely that they had not found them. When one examines the statement of reasons as a whole and has in mind that this was a direct quotation from AW’s report, it is not difficult to reach the conclusion that the justices did not regard this as an essential pre-condition to Harry’s residence being transferred to his father. We find it impossible to agree with the judgment of the Court of Appeal that this statement betokened an over emphasis by the justices on preserving the status quo.

In re G

33. The Court of Appeal acknowledged that *In re G* had given the final quietus to the notion that parental rights have any part to play in the assessment of where the best interests of a child lay. Indeed, (correctly in our view) it identified this as the principal message provided by the case. It is certainly the principal message that was pertinent to the present case. It appears, however, that the urgency of that message has been blunted somewhat by reference to the speech of Lord Nicholls and some misunderstanding of the opinion that he expressed. Having agreed that the appeal should be allowed for the reasons to be given by Baroness Hale, Lord Nicholls said at para 2:

> "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."

He then said:

> "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."

34. As we have observed, it appears to have been in reliance on the latter passage that the justices stated that a child should not be removed from the primary care of biological parents. A careful reading of what Lord Nicholls actually said reveals, of course, that he did not propound any general rule to that effect. For a proper understanding of the view that he expressed, it is important at the outset to recognise that Lord Nicholls' comment about the rearing of a child by a biological parent is set firmly in the context of the child's welfare. This he identified as "the court's paramount consideration". It must be the dominant and overriding factor that ultimately determines disputes about residence and contact and there can be no dilution of its importance by reference to extraneous matters.

35. When Lord Nicholls said that courts should keep in mind that the interests of a child will normally be best served by being reared by his or her biological parent, he was doing no more than reflecting common experience that, in general, children tend to thrive when brought up by parents to whom they have been born. He was careful to qualify his statement, however, by the words "*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" (emphasis added). In the ordinary way one *can* expect

that children will do best with their biological parents. But many disputes about residence and contact do not follow the ordinary way. Therefore, although one should keep in mind the common experience to which Lord Nicholls was referring, one must not be slow to recognise those cases where that common experience does not provide a reliable guide.

36. Although the factual background to the case of *In re G* was, as Baroness Hale described it, 'novel' (a lesbian couple decided to have children together, arranged for anonymous donor insemination and brought up the children together until their relationship broke down) the issues arising and the legal principles that applied were, as Baroness Hale pointed out, just the same as would arise in the case of a heterosexual couple. After conducting what the Court of Appeal rightly described as a scholarly analysis of the statute and the authorities which pre-dated the 1989 Act, Baroness Hale turned to consider the recommendations of the Law Commission report on private law cases relating to child care. She said this at para 30:

> "[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, *Family Law*: *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 Law Commission said:
>
> > '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.'
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> Nor should we. The statutory position is plain: the welfare of the child is the paramount consideration. As Lord MacDermott explained in *J v C* [1070] AC 668, 711, 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'."

37. This passage captures the central point of the *In re G* case and of this case. It is a message which should not require reaffirmation but, if and in so far as it does, we would wish to provide it in this judgment. All consideration of the importance of parenthood in private law disputes about residence must be firmly rooted in an examination of what is in the child's best interests. This is the paramount consideration. It is only as a contributor to the child's welfare that parenthood assumes any significance. In common with all other factors bearing on what is in the best interests of the child, it must be examined for its potential to fulfil that aim. There are various ways in which it may do so, some of which were explored by Baroness Hale in *In re G*, but the essential task for the court is always the same.

38. For the reasons that we have given, we consider that the justices' decision cannot be characterised as 'plainly wrong'. True it is that they misapprehended the real import of *In re G* and it was, as we have said, unfortunate that they repeated the phrase 'compelling reasons' from AW's report but we do not consider that these detract from their careful evaluation of the evidence and their weighing of the various competing factors involved in their determination of the question of

Harry's residence. Nor do they detract from their important recognition that his welfare was the paramount consideration in that determination.

39. It follows that Judge Richards erred in his conclusion that it was open to him to reverse the justices' findings. The judge was correct in his view that *G v G* [1985] 1 WLR 647 forbade interference with the exercise of the justices' discretion unless the decision was plainly wrong. Where he fell into error was in deciding that his analysis of their statement of reasons supported his conclusion that it was so.

40. The Court of Appeal recognised some of the deficiencies in the judge's analysis, in particular his apparent application of the principles relevant only in public law cases to private law proceedings under the 1989 Act; his pronouncement of something which came close to a presumption that a child should live with his biological parent or parents; and of the relevance of the concept of 'good enough' parenting in this case. But the court considered that it could overlook these shortcomings because "the judge's fundamental [approach] was not plainly wrong" (para 62). This in turn depended on their acceptance of the judge's conclusion that the justices' decision *was* plainly wrong. Since we have concluded that it was not, the basis on which the Court of Appeal felt able to uphold Judge Richards' decision falls away.

41. As we have said earlier, many disputes about residence and contact do not follow the ordinary way. This case is one such. Harry has lived virtually all of his young life with his grandmother. He has naturally formed a strong bond with her. There is reason to apprehend that, if that bond is broken, his current stability will be threatened. Harry's father had undergone significant changes in his own domestic arrangements at the time that the justices made their decision. While he was assessed as capable of meeting Harry's needs, those arrangements remained untested at the time the justices had to determine where Harry should live. There was therefore ample material available to the justices to reach the determination they did. That determination lay comfortably within the range of the decisions that the justices, in the exercise of their discretion, could reasonably make. For these reasons we allowed the appeal.

42. What we heard of the contact and residence arrangements made as a result of the conditions imposed by the Court of Appeal's order granting a stay confirmed the view that considerable disruption to Harry's life would have been involved in a transfer to live with his father. The distance between the homes of his

grandmother and his father exceeds thirty miles, we were told. It seems inevitable that, if he were to live with his father, he would no longer be able to attend the nursery where he has already made good progress. Transfer of his residence would involve a great deal more than a change of address. Many of the familiar aspects of his life which anchor his stability and sense of security would be changed. The justices were therefore right to give significant weight to the desirability of preserving the status quo. This is a factor which will not always command the importance that must be attached to it in the present case but we are satisfied that it was of considerable significance in the debate as to where this child's best interests lay.

43. For that reason, it is perhaps regrettable that such a radical change to Harry's residence and contact arrangements came about as a result of the conditions imposed by the Court of Appeal. Conscious of the need to minimise the sense of bewilderment that can accompany abrupt and substantial changes to a child's living arrangements, we made a transitional order that provided for a phased return to those that were in place before. We consider that, as a general rule, conditions such as were imposed by the Court of Appeal in this case should not be made where a party seeks permission to appeal, not least because these might be seen as an unwarranted disincentive to the pursuit of what proved in this case to be a fully merited application.