FAMILIES NEED FATHERS – SCOTLAND
Both Parents Matter
Feumaidh na Teaghlaichean Athair Alba
Tha an Dà Phàrant Cudrom

PUBLIC PETITION PE01570: Parental Rights to Child Contact
PUBLIC PETITION PE01589: Independent Review of child contact and financial provision post-separation

We are grateful for the opportunity to contribute to the Public Petitions Committee's deliberations on both these petitions.

Petition PE01589 calls for an independent and comprehensive review of the law, policy and practice in arrangements for parenting after separation.

We support the need for a comprehensive review of the law relating to contact and residence. However, we suggest that such a review might better be conducted by the Scottish Government or through Scottish Parliament committees. Almost all the issues of practice or policy raised in these petitions and by others in the course of this parliament fall within devolved powers with the exception of arrangements for child maintenance.

In our responses to two previous petitions 1529 and 1513 last year we conveyed to the Committee *"our strong belief that these petitions taken together should be seen as a timely invitation to the Scottish Parliament to review and update Scottish Family Law which has been overtaken both by social and economic changes within families in Scotland and by government policy which now recognises more clearly the obligations of both parents to promote the wellbeing of their children and also their children's right to family life."*

The Committee now has before it two more petitions highlighting dissatisfaction with the fairness and effectiveness of the status quo.

Changes to court rules that are currently being considered by the Scottish Civil Justice Council through its Family Law Committee could address some of the issues raised in these petitions, but changes in primary legislation are also necessary.

Both the law as it stands and common sense make it imperative that a child's interests are paramount in reaching arrangements for his or her day to day care and broader wellbeing when the parents do not live together. However, we feel that some contributors to the discussion inside and outside of Holyrood have used the "paramount principle" as a reason for looking the other way so as not to see daily examples of unfairness, inconsistency and unprectability in courts across Scotland and in the pre-court jousting between solicitors that damages important relationships, empties bank accounts and adds to public expense.

In the case of NJDB v JEG the Supreme Court Judge Lord Reed, a former Court of Session judge, observed, *"it is easier to change rules of court than to change a prevailing culture."* He was referring to culture within the civil justice system that had failed so badly in that case but it is our view that Scotland's children and families will benefit from a broader change in prevailing culture that looks for the positives in parenting after separation. This is far better for children than the current adversarial approach by which one parent's time with his/her children is "won" at the expense of inflicting damage on the other.

Sometimes sheriffs tell a parent with care that it is her/his duty to actively promote a good relationship between the children and their other parent. But we are concerned that this does not happen very often. On the other side of the balance we frequently hear a sheriff or a bar reporter (now child welfare reporter) highlight as a factor to be weighed the negative view of a non-resident parent about his/her former partner. It doesn't feel like a level playing field.

Both parents should be encouraged and expected to express respect for the parenting of the other if they are genuinely putting the interests of their children first, even if they now dislike each other as individuals. We do hear of some sheriffs who do make this point to parents, telling them that abstaining from criticising the character of their ex in front of their children is not enough. But we fear that many sheriffs do not consider it worthwhile to make this positive use of their authority. In some courts the parents are not even present in court during their child welfare hearing, contrary to the rules.

Leadership from the legislature to promote the worth of parenting after separation and to acknowledge and address the disincentives within the present system that work against equal respect for both parents and that indulge negativity between them would help bring about this culture change.

Our view is that a cultural change in favour of "shared parenting" as practiced in many other countries is socially progressive. It would also pre-empt many of the relatively trivial disagreements that take up so much court time and public funding in Scotland.

"Shared parenting" means that both parents are properly involved with the care of their children and have an equal role in making key decisions. It doesn't mean that there is an inflexible 50:50 division of children's time but it does mean that children spend a significant amount of time with each parent, both routine activities and special occasions are shared and the child feels that both parents have an equal status.

Many Scottish families manage to make shared parenting work very well after separation without ever going near the courts. Evidence from large scale studies such as Growing Up In Scotland is starting to indicate the benefits of shared parenting, and studies from Sweden show very clearly that children do better when both parents are meaningfully involved in their welfare and development.

Our recent Father's Day Charter summarises these principles.

ENFORCEMENT OF CONTACT ORDERS

Both petitions touch on the difficulty of enforcing contact orders.

We note the letter from Lord Carloway to the committee and his restatement of the seriousness with which courts view failure to comply.

In our response to the petitions before the Committee last year we pointed out that the sheriff or judge is only likely to see a fraction of the occasions in which compliance is a problem:

"The reality for the majority of non-resident fathers (and other family members) who contact FNF Scotland is that their legal advisers will be advising them not to pursue the contempt of court route but instead to persist with child welfare hearings where they are the pursuer. For those in receipt of legal aid for the initial contact action their certificate will continue. For those who do not have legal aid the projected costs may be prohibitive and the outcome will be dependent on the amount of leeway the sheriff will give the parent with care. What does a sheriff do when the contact order is obtempered only once on three, four or five dates? Is that complying or not complying? We are aware of a spectrum of tolerance among sheriffs leading to differences in outcome that are often difficult to explain. What is clear is that the effect of occasional and irregular contact can be damaging to the relationship between father and children and does not help settle matters between the parents."

A member who attended a recent FNF group meeting recently observed: "I know my children's mother really just wants me to go disappear off the face of the earth. Even though there's a court order in place very few contacts take place as scheduled. She'll text and say my son has a cold and can't come. My solicitor says there's nothing I can do about it. The sheriff will understand her concern etc. But I would like the sheriff to point out to my ex that looking after your child when he's poorly is part of parenting just as much for the non-resident parent and it builds a bond just as much as rough and tumble and fancy treats."

Perhaps the Committee could write back to the Lord Justice Clerk to ask for any statistics the court service can gather on the number of contempt proceedings concerning child contact orders there have been in the Court of Session and the Sheriff Court and for the outcome of these cases.

It may be of interest to the committee that our online user survey among non-resident fathers who had made contact with FNF Scotland in the preceding year revealed:

- Only 7% had not lived together with children before the relationship breakdown. 70% had lived as a family for three or more years.
- 15% were trying to enforce an existing court order
- 26% have had more than five court hearings and 7% had more than ten hearings. One case involved 30 hearings.
- Of those already involved in court proceedings, three fathers had been in court for 13-24 months, three for 25-36 months and five had spent more than 36 months in court.

We acknowledge that most people - non-resident fathers, grandparents, new partners, brothers and sisters and some non-resident and resident mothers - contact us because they are involved high conflict cases. It should not be presumed that high conflict is necessarily the same as indicating serious issues of child safety or protection. Often the conflict is about control of the other parent's relationship with the children and is persistent, undermining and corrosive.

We know of many non-resident parents who in the end decide the best thing they can do for their children is walk away, not because they don't care but precisely the opposite. It is the last loving thing they can do for their kids. Who knows what their children are told? This should not happen in the best country in the world to grow up in.

We noted the dialogue between Committee member, Kenny MacAskill, and Mr Lee in September in which Mr MacAskill said he had struggled for years as a solicitor and for more years as a minister to find "a third way".

It is our understanding that courts in England and Wales have a range of disposals available to them short of imprisonment. In an interview with Families Need Fathers England in the aftermath of the Children and Families Act there, Lady Butler-Sloss, former President of the Family Division in England and Wales, said:

" I would like to see I must say, mothers who flout contact orders required to do all sorts of things that don't actually send her inside. I can see absolutely no reason why she shouldn't do community service. I should like to see her penalised in all sorts of inconvenient ways as long as it doesn't have any impact on her care of the child. So as long as the child is over 5 or goes to a child minder, then there is no reason why she shouldn't be required to go and clean the streets, whatever it may be. I would make her do something really unpleasant so that she understands the consequences of this. But to send her to prison is counter productive, because the child will not want to know the man who has sent his mother to prison, particularly when she comes back and tells him about it."

As the lack of flexibility in finding an appropriate and proportionate disposal has been identified by Mr MacAskill, perhaps the Committee could recommend that a range of disposals could be made available to sheriffs and judges. If this requires primary legislation then it may be drawn to the attention to ministers.

Finally, with respect to enforcement, the role of solicitors should also be considered. We have referred to the reluctance of the non-resident parent's solicitor to advise pursuing a contempt of court action. The same solicitor on another day and with another client may be representing the parent with care who is erratic about compliance.

We also know that there are solicitors who do emphasise to their client that it is their duty to comply with a court order but also to promote positively the relationship between her/his children and their father. We deduce this from the number of occasions the parent with care is instructing her 3rd, 4th or 5th firm of solicitors because she doesn't like that exhortation.

Each new set of instructions leads to a continuation of proceedings or renewed prolonged pre-court correspondence between agents on the matters that they never intend to place before a sheriff. Months pass that affect the non-resident parent's time with his/her children and often irreparably damages their relationship.

Perhaps the Committee could write back to the Family Law Association for its view on the balance between a solicitor's duty to his/her client and their support for focus on the paramount interests of the child.

LEGAL AID

We fully understand that SLAB has certain obligations placed on it in legislation and welcome Paul Wheelhouse's stated willingness to consider new regulations and primary legislation if it can further streamline this process .

Mr Lancaster's response gives the average total durations for SLAB assessments for considering passported and full financial assessment in contact cases to be 33 and 69 calendar days resp. Given that some cases will take significantly longer than the quoted average figure, plus the time taken for preliminary correspondence and to engage court proceedings, we would suggest any acceleration of this process would be very desirable.

FNF Scotland has had several constructive discussions with SLAB about ways to focus proceedings ultimately on the best interests of the children and we publicised the letter sent out to solicitors earlier this year reminding them of their obligations within the legal aid regulations to advise SLAB if a client is being unduly obstructive in proceedings.

Perhaps the Committee could ask SLAB for figures on the number of cases from which it has withdrawn or warned that it may withdraw legal aid on these grounds.

While we believe SLAB's efforts to establish control of its civil legal spending are well motivated we are concerned about two issues.

First, Mr Lancaster refers on page 2 of his letter first to 'probable cause' and then to the 'reasonableness' thresholds for the award of legal aid.

We are aware that SLAB already has in mind that it will not find it reasonable to legally aid a case where the action is to vary an existing order by a day or two. We think this carries the risk of placing a non-resident parent who made a major compromise (often on legal advice "just to get something" or "as a step to establishing credibility with the court") in requesting less than meaningful parenting time . It does not seem fair or wise that the reasonable party (and his/her children) should be penalised by having their time frozen at a point in time, regardless of the changing needs and preferences of the children as they grow if the other party continues to refuse to communicate.

Secondly, SLAB will be placed in an invidious situation in terms of funding an action for non-compliance in the same way as described above for a sheriff. It will have to make its own decision on whether one contact out of three constitutes reasonable grounds to fund a non-compliance action.

Perhaps the Committee could write to SLAB for its view on these matters and whether it has an underlying notion of what comprises 'reasonable contact'. Of course, every case is different but we know of solicitors who advise their client that asking for more than contact every other weekend is unlikely to be suppported by legal aid.

It would be useful for them and for their clients for SLAB to state whether that is correct.

FINANCE AFTER SEPARATION

The blunt reality in many cases is that the parent with care will lose money if s/he agrees to the non-resident parent having the children for more overnights. This is a major disincentive for an otherwise reasonable parent with care to put the children first and to agree to shared parenting. We feel this issue must be incorporated into any com prehensive review of post-separating parenting.

FNF Scotland made a submission to the Smith Commission in this matter last year, inviting it to devolve child support to Holyrood. We saw it as part of the essential change of culture that we advocate. We wrote of the present system:

"Rather than promoting co-operation and facilitating both parents in fulfilling their parental rights and responsibilities, the divorce of child support from family policy has for more than two decades polarised the perception of parents of their interests and duties and wasted emotional effort that should have been directed towards supporting and nurturing the development of their children."

Unfortunately, our suggestion did not make the Smith Commission final report. Our view is that it is fundamentally wrong that child support and family law should run on separate, effectively divergent, tracks.

CONCLUSION

We acknowledge that there have been significant improvements in the recognition of the positive part that fathers, including non-resident fathers, play in family life in modern Scotland. We look forward to playing our part in next year's Year of the Dad.

The Scottish Government's National Parenting Strategy highlights the importance of fathers playing an active role in their children's upbringing. It recognises that the positive involvement of fathers with their children is associated with better exam results, better school attendance and behaviour and better relationships in adult life. Recent results from Growing Up In Scotland show that children not in contact with their father were twice as likely to show high levels of behavioural and emotional difficulties. This equally applies to non-resident mothers and other kinship carers.

The Strategy also restates the United Nations Convention on the Rights of the Child (UNCRC) which repeatedly refers to the right of children to family life and identity. Our feeling is that the reality of family life as it is lived in Scotland has left the legislative framework in its wake. The result is that many of the cases that take up court time are in effect fighting yesterday's battles.

We urge the Committee to recognise the momentum behind the succession of petitions that have come before it and recommend that it is time for family law to catch up. It is time for a comprehensive review that looks forward positively, not back.

Yours sincerely

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