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Public Petition PE01513 Equal Rights for Unmarried Fathers

Sole Registrations

The issue for the petitioner really seems to be about “sole registrations”, where the mother registers the birth of the child, without naming the father. If the father is not named, he does not automatically acquire parental rights and responsibilities (“PRRs”). The various methods by which he can then acquire PRRs are set out in the SPICe briefing on the Petition.¹

United Nations Convention on the Rights of the Child

Although the Petition mentions Article 9 of the United Nations Convention on the Rights of the Child (“UNCRC”), no mention is made of other parts of the UNCRC, including Article 3, which is in the following terms:

“1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.”

In much Scottish legislation, it is paramountcy rather than primacy of the child’s best interests which governs decision making.

Article 7 is concerned with the registration of the birth of a child and is in the following terms:

“1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.”

It is self-evident that, if the child’s mother does not name the father on the birth certificate, the child will not necessarily know the father, or even his identity.

Article 8 of the UNCRC may also be of relevance:

“1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.”

A child’s identity may be seen as linked in part to the identity of both their parents.

¹ www.scottish.parliament.uk/ResearchBriefingsAndFactsheets/Petitions%20briefings%20S4/PB14-1513.pdf

Article 18 is concerned with both parents having common responsibilities:

“1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.”

Statistics

The statistics in the Petition are not particularly helpful, as they do not reflect sole registrations. The figure of 29,888 births, quoted in the petitioner’s statement read out to the Committee on 6 May 2014, relates to births to unmarried parents, not all live births.

In 2012, there were 3,009 sole registrations out of 58,027 live births, that is 5.2% of live births². In the Census of 2011, about 17.3% of the population were under 16, that is about 916,105 out of a total of 5,295,403³. If 5.2% of those children were solely registered, the issue of sole registration affects approximately 47,637 of under 16s. The figure of 160,080 separated fathers and 295,000 children in Scotland whose rights are said in the Petition to be “unprotected under our current laws” ignores the fact that many of the fathers will be named on their children’s birth certificates, and will, accordingly, have parental rights and responsibilities.

Statistics, however, are just numbers. They tell us nothing of the individual circumstances of individual children and parents. They do not inform as to the best interests of a child in their particular circumstances.

Scottish Law Commission Report 1992

In their 1992 Report on Family Law, number 135, the Scottish Law Commission recommended that *“[i]n the absence of any court order regulating the position, both parents of the child should have parental responsibilities and rights whether or not they have been married to each other.”*⁴

There was no actual discussion in the paper about joint or sole registration, but there was consideration of the child conceived as a result of a casual liaison (para 2.39) or of rape (para 2.46). The Scottish Law Commission made the point that the law at the time discriminated against unmarried fathers by treating them less favourably than married fathers and unmarried mothers (para 2.43). Arguably that discrimination remains for those unmarried fathers who are not named on their child’s birth certificate. The Scottish Law Commission also observed that *“[i]t can also be argued that the law discriminates against children born out of marriage by denying them a father with the normal responsibilities and rights.”* (para 2.44) The final recommendation about automatically conferring PRRs on both parents, irrespective of marital status, was unqualified by considerations of registration. However, when implemented finally in legislation in 2006, the recommendation of the Scottish Law Commission was implemented only in relation to unmarried fathers who appeared on the birth certificate.

Family Law (Scotland) Act 2006

When the law changed to confer PRRs on unmarried fathers, if they were named on the birth certificate, the issue of conferring PRRs purely by virtue of their being fathers (rather than being named as such on the birth certificate) was considered during the passage of the Family Law (Scotland) Act 2006, through the Scottish Parliament. In their Stage 1 report⁵, the Justice 1

² www.gro-scotland.gov.uk/files2/stats/ve-ref-tables-2012/ve-12-t3-2.pdf

³ <http://www.scotlandscensus.gov.uk/ods-web/home.html>

⁴ <http://www.scotlawcom.gov.uk/publications/reports/1990-1999/#r135>, paras 2.36-2.50

⁵ <http://archive.scottish.parliament.uk/business/committees/justice1/reports-05/j1r05-08-vol01-01.htm#autounmarried>

Committee said of the evidence before it that:

“The predominant view ... was clearly that relationships between children and their fathers should be encouraged, where this is in the best interests of the child. Indeed, the Committee is firmly of the view that the welfare of the child should be at the centre of the Bill.” (para 94)

In their written evidence, the Family Law team at Balfour and Manson Solicitors, Edinburgh had said:

“A child has the right to know and have a relationship with both parents. Enabling a mother to determine the quality of that relationship by means of a registration process is insulting to the father and the child. We believe that it is only a minority of cases where it may be inappropriate for an unmarried father to have parental responsibilities and parental rights. In the unlikely event of a father seeking to enforce his rights in such a situation, for example, where a child has been conceived following a mother having been raped, the court would be able to exercise its discretion in the matter. If one of the other core principles guiding these reforms is to update the law and reflect the reality of family life in Scotland today then the unmarried father, whether in an on going relationship with the mother or not, is part of that reality and should not be treated any differently from the mother.” (para 98)

The Committee considered the possibility of automatic PRRs:

“In preparing the Bill, the Executive considered the alternative approach of conferring automatic PRRs on all biological fathers without the need for joint registration. It did, however, strongly refute this option as the Policy Memorandum explains: “It would not be fair to women who had suffered a trauma such as rape, or had become pregnant as a result of a casual liaison then had to go to court to have PRRs removed from the father. Scottish Ministers believe that some evidence of commitment to joint parenting such as the joint registration of the child’s birth should be required before a man gains PRRs.” (para 100)

They went on to support that approach:

“The Committee welcomes the extension of PRRs to unmarried fathers. The Committee is of the view that the legislation should encourage the development of a structure of family law in Scotland that provides for the protection of children and support of the family. The Committee accepts that automatically granting PRRs to biological fathers could be to the detriment of existing arrangements. The Committee, therefore, believes that the Executive’s approach of using the ethos of joint registration as the determining factor for conferring PRRs is the right approach.

The Committee notes that it is the joint registration that is the trigger for the conferral of PRRs. The Committee believes that where there is agreement between the parents, PRRs should be conferred automatically and that where agreement does not exist an unmarried father will, as at present, have the option of claiming them via the court process under section 11 of the 1995 Act.” (paras 102-103)

Declarator of parentage

The petitioner is concerned that the child’s mother can simply deny that the putative father is actually the child’s father, and cannot be forced to submit the child for DNA testing.

The relevant provisions are as follows. If a sample of blood, other bodily fluid or body tissue is sought from a child under 16, for evidence in relation to determination of parentage, consent may be given by a person with PRRs. (Section 6, Law Reform (Parent & Child) (Scotland) Act 1986) A court may request a party to provide sample or to consent to the taking of a sample from a child. If the party refuses or fails to provide or consent, the court may draw such adverse inference as appropriate. (Section 70 Law Reform (Miscellaneous Provisions) (Scotland) Act 1990) If DNA samples are not produced, it is possible that parentage can be proved. (See eg Cameron v Carr (No 2) 1998 FamLR 16) However, an adverse inference may, in some circumstances, be insufficient to lead to the establishment of paternity. (See eg Smith v Greenhill 1994 SLT (Sh Ct) 22)

The case for compulsory provision of samples for analysis has been advanced in an article titled "Sensitive Relations"⁶. It is, however, arguable that this would be amount to a breach of the individual's rights in terms of Article 8 of ECHR.

Conclusion

There is a need to consider the rights of the child, as well as those of the parents. We are concerned that the Petition focuses predominantly on the rights of the father in particular, although his statement to the Committee on 6 May 2014 did conclude by referring to a case in which a child had suffered as a result of unequal treatment of her parents, in relation to their legal rights. The child, their rights and their best interests should be at the heart of the law in this field.

At present, the law allows for sole registrations, which does not allow the child to know their father from his being named on the birth certificate. It is clear that, in some situations, the mother may feel that it is in the best interests of the child to exclude the father from the child's life by registering the birth without naming the father. In other cases, the father will be excluded from the child's life at the whim of the mother, without any sound basis, and not necessarily having regard to the welfare of the child. It may be possible in either case for the father to establish paternity, as outlined above, even if the mother refuses consent to a DNA test.

Our concern is that the rights of the child should be recognised, consistent with their best interests. It is a matter of regret to us that the Scottish Law Commission's recommendations were not fully followed when the issues around registration of births and parental rights and responsibilities were considered by the Scottish Parliament in 2005 to 2006.

If the law in this area is to be re-examined, we recognise that there are complexities and possible unintended consequences, such as those referred to in Gary McLelland's submission of 10 May 2014⁷. There are competing interests which require to be taken into account. We suggest that the issue of whether to extend the present law so that all fathers automatically have PRRs is raised with the Scottish Law Commission for possible inclusion in their Ninth Programme of Law Reform, on which they are consulting until 12th September 2014⁸. It is possible, however, that they will refer back to their earlier report from 1992, unless they feel that there have been sufficient changes in society to justify their looking at the matter again.

Clan childlaw offers a unique legal advocacy service to children and young people within Edinburgh and the Lothians and Glasgow. We aim to make the law more accessible to children and young people, including the most vulnerable in our society, by providing free, specialist legal advice and representation at a place suitable to them at the time that they need it. Children's rights are central to our work.

⁶ <http://www.journalonline.co.uk/Magazine/53-11/1005883.aspx>

⁷ www.scottish.parliament.uk/ResearchBriefingsAndFactsheets/Petitions%20briefings%20S4/PB14-1513.pdf

⁸ <http://www.scotlawcom.gov.uk/law-reform-projects/ninth-programme-of-law-reform/>