

PE1513/H

Scottish Women's Aid Letter of 27 June 2014

Foreword

Scottish Women's Aid ("SWA") is the lead organisation in Scotland working towards the prevention of domestic abuse. We play a vital role in campaigning and lobbying for effective responses to domestic abuse.

We provide advice, information, training and publications to members and non-members. Our members are local Women's Aid groups providing specialist services, including safe refuge accommodation, advocacy, information and support to women, children and young people experiencing domestic abuse.

An important aspect of our work is ensuring that women and children with experience of domestic abuse get both the services they need, and an appropriate response and support from, local Women's Aid groups, agencies they are likely to contact and from the civil and criminal justice systems.

Introduction

SWA welcomes the opportunity to respond to the Petition, which calls upon the Scottish Parliament to "*urge the Scottish Government to review the laws that govern parental rights and child access, and their implementation, to ensure unmarried fathers have guaranteed rights to be a part of their children's lives if they are deemed fit parents.*"

While Article 9 of the United Nations Convention on the Rights of the Child ("UNCRC") is quoted in the Petition, the emphasis that Article places on the best interests of the child is not made clear, or indeed, that the best interests of the child are the primary consideration of the Convention and thus the best interests principle has to be considered when interpreting all other provisions. Further, other important Articles of relevance have been ignored, for instance, Article 3 (the best interests principle); Article 12 (the child's right to be heard in all decisions affecting the child); Article 18 (in the upbringing and development of the child, the best interests of the child will be states' and parents' basic concern) and Article 19 (the child's right to protection from abuse and violence.)

We would comment that the Petition is unquestionably focussed on parents' rights, as opposed to children's rights and does not take into account the fact that the welfare of the child should be the paramount consideration in any matters relating to them and any legal approach should have the best interests of the child as a central principal.

Consequently, we neither support the proposal that both parents must be named on a birth certificate before a birth can be legally registered, nor any presumption that full parental responsibilities and parental rights ("PRRs") should automatically be granted to both parents once parentage has been determined.

General Comments

The Petition appears to have two separate issues- paternity and the process by which unmarried fathers are legally recognised and how they acquire parental responsibilities and parental rights

1) Paternity and the process by which unmarried fathers are legally recognised

The Petitioner's states that "... *that there are over 174,000 lone parents..Of these it is estimated 92% of these single families are female led (Daily Mail) which in Scotland equates to 160,080 seperated (sic) fathers - approximately 3.07% of the population – whose rights are not currently protected...*" This ignores several crucial facts- that some of these fathers will have been married and will already have PRRs; some will be unmarried fathers who may already have PRRs, having either obtained them automatically if the birth was jointly registered with the mother after 4th May 2006 or granted them by the court; and that there will be separated fathers who are still in contact with their children by agreement with the mother and are exercising their PRRs

In 2012, there were 3,009 sole registrations out of 58,027 live births, that is 5.2%¹ and the figure representing sole registrations has been falling steadily from a figure of 6-7% in the 1980s and 1990s. Therefore, it would appear that the overwhelming majority of fathers do actually register as parents.

The Petition proposes that "1. *Both parents must be named on a birth certificate before a birth can be legally registered...3. If the court orders a DNA test or anything else for that matter, then failure to comply with this request should be considered contempt of court. ..*"

Under Scots law, any birth which occurs in Scotland must be registered within twenty-one days by the Registrar of Births, Deaths and Marriages so delaying the registration of a child's birth would be contrary to this legal requirement

The Petition also incorrectly states that "...*A woman can name any man she likes as the child's father*" Under the Registration of Births, Deaths and Marriages (Scotland) Act 1965 section 18, unmarried fathers cannot be registered unless both he and the mother jointly request this and jointly sign the register, or on production of a declaration from both parties that the man is the father.

Where the mother and father of the child are married, the man is presumed to be the father; if the mother and father are unmarried, and the mother acknowledges the man as the father and he is then accordingly registered as such, the presumption also applies- section 5(1) (b) of the Law Reform (Parent and Child) (Scotland) Act 1986 Act. If the mother does not acknowledge the unmarried father as such, he can apply to the court for a declarator of parentage under section 7 of the 1986 Act where the court will look at "*sufficient evidence*" and make a decision accordingly.

¹ www.gro-scotland.gov.uk/files2/stats/ve-ref-tables-2012/ve-12-t3-2.pdf

In terms of DNA and blood tests, consent to this may be given by a party having PRRs for a child under 16 -Section 6 of the 1986 Act above- or the court may request a party to provide a 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 from the refusal or failure such adverse inference, if any, in relation to the subject matter of the proceedings as seems to it to be appropriate”*, under Section 70 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990. Consequently, it may be possible for the father to establish paternity that way, even if the mother refuses consent to a DNA test or through the court’s powers under section 7 of the 1986 Act.

Regardless of which approach is taken, the child’s best interests must be the paramount consideration in the court’s decision, so it is concerning that the Petition objects to the position that a child will not be subject to forced DNA testing and suggest that children be forced to provide such samples. To do so cannot be considered to be looking after the welfare of the child and their best interests and is surely a breach of the child’s rights under Article 8 of ECHR; similarly, such compulsion could also amount to a breach of the mother’s Article 8 rights. This proposal also ignores the fact that the child could refuse to give a sample, if they are recognised as having capacity to do so.

An important issue is that the mother may not wish to either acknowledge the man as the father of the child, or have his name registered as the father on the birth certificate, due to domestic abuse and fears for the child’s safety and welfare, and her own safety, arising from this, a particular issue if she is no longer living with, or in contact with, the perpetrator. Pregnancy is often a time when abuse begins or intensifies ²; about 30% of domestic abuse starts in pregnancy ³. For some women experiencing abuse, this could be an unwanted pregnancy, perhaps conceived through rape, or because they have been denied access to contraception.

Acquisition of Parental Responsibilities and Rights (PRRs)

Establishing paternity and a declaratory of paternity does not, however, confer PRRs, the granting of which are subject to the principles that the welfare of the child is the paramount consideration; account must be taken, in the light of the child’s age and maturity, of any views the child wishes to express; and the court should make no order unless to do so would be better than not making the order.

The Petition proposes *“2. After parentage is determined, and should both parents be found to be fit and able to care for the child should an investigation be necessary, full rights and responsibilities will be awarded to BOTH parents...”*

The petitioner states that *“Additionally, many studies have shown uncatagorically that it is far more beneficial for a child to have both parents involved in his/her life*

² Mezey GC. **Domestic violence in pregnancy**. In: Bewley S, Friend J, Mezey G, editors. *Violence against women*. London: RCOG; 1997.; Mezey, G., Bacchus, L., Bewley, S. & Haworth, A. (2001) **‘An exploration of the Prevalence, Nature and Effects of Domestic Violence in Pregnancy’**. London: ESRC/Violence Research Programme.

³ 2. Lewis, Gwynneth, Drife, James, et al. (2001) **Why mothers die: Report from the confidential enquiries into maternal deaths in the UK 1997-9**; commissioned by Department of Health from RCOG and NICE (London: RCOG Press); Lewis, Gwynneth, and Drife, James (2005) **Why Mothers Die 2000-2002** - Report on confidential enquiries into maternal deaths in the United Kingdom (CEMACH).

rather than one.” However, the mere fact of “having” two parents “involved “ has not been shown to be beneficial.; the benefit to the child accrues from the involvement being positive for them. A recent major UK study on well-being found it made no difference whether the children lived with two biological parents, with a step-parent and biological parent, or in a single parent family.. The quality of the relationship was the issue, not the family composition.⁴

Under the Children (Scotland) Act 1995 the acquiring of parental rights is there to support parents fulfilling their responsibilities; PRRs are always qualified by the rights and best interests of the child. Giving all unmarried fathers automatic PRRs may therefore have unintended consequences detrimental to children.

We have outlined above circumstances where a mother, due to domestic abuse, may not wish to have the father’s name registered on the birth certificate. The same issues would arise were automatic PRRs granted, in that this fails to protect the child, and the mother, from domestic abuse perpetrated by the father .Perpetrators of such abuse will use child contact as a means of continuing domestic abuse and as a mechanism to control women, a fact well- documented in extensive research.⁵

We also know that court-ordered contact with abusive men facilitates the continuation of abuse and negates the protective consequence of leaving an abuser. After separation, for the child, contact with the abusive father maintains the negative effect of living with domestic abuse, sometimes from witnessing the abuse of the mother at handover, simply being aware of the mother’s fear and anxiety about contact, or sometimes directly from father to child. Again, the effects of domestic abuse and the negative impact on children are well-documented.

Despite the onus on the court in section 11(7A)-(7E) of the Children (Scotland) Act 1995, as amended, to have regard to the need to protect the child from domestic abuse, and the general requirement that the contact sought should be in the best interests of the child, domestic abuse is not routinely taken into account and abusive men are consistently granted contact with their children. Until the duty under section 11(7A) is consistently and regularly undertaken, inappropriate and unsafe contact orders will continue to be made and abused women will continue to be fearful of undertaking court-ordered contact obligations, due to risks posed to both their children’s safety and long-term welfare and their own protection.

It is worthwhile clarifying that there is no presumption of shared parenting in legislation in England and Wales. This was rejected by the recent Family Law Review, a view supported by the Ministry of Justice.⁶ A presumption introduced in Australia in 2006 was subsequently abandoned, and the law amended, after an in-depth review of the original provisions revealed their failure to both consider the child’s best interests and to protect women and children who had experienced

⁴ National Centre for Social Research: **Predictors of Wellbeing** (2013) <http://www.natcen.ac.uk/media/205352/predictors-of-wellbeing.pdf>

⁵ Coy, M., Perks, K., Scott, E., Tweedale, R. (2012) **Picking up the Pieces: Domestic Violence and Child Contact**. London. Rights of Women.; MacKay, K (2013) **Hearing children in court disputes between parents**; Centre for Research on Families and Relationships; MacKay, K (2013) **The treatment of the views of children in private law child contact disputes where there is a history of domestic abuse**; **A report to Scotland’s Commissioner for Children and Young People**; Morrison, F, Tisdall K, Jones f, Reid, A (2013) **Child Contact Proceedings for Children Affected by Domestic Abuse**; **A report to Scotland’s Commissioner for Children and Young People**

⁶ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/177097/CM-8273.pdf

domestic abuse. Other research also supports the position against a presumption of shared parenting on the same grounds.⁷

We believe that children should be able to have contact with both parents but only where the contact can be shown to be safe for both the child and the non-abusing parent, is of clear benefit to, and in the best interests of, the child and takes place in a safe and nurturing environment.

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⁷ <http://www.oneplusone.org.uk/wp-content/uploads/2012/03/firm-foundations-report.pdf>; Shared residence: a review of recent research evidence: Professor E Trinder: *Child and Family Law Quarterly*, Vol 22, No 4, 2010; **Caring for children after parental separation: would legislation for shared parenting time help children?** University of Oxford (2011) [http://www.nuffieldfoundation.org/sites/default/files/files/Would%20legislation%20for%20shared%20parenting%20time%20help%20children\)OXLAP%20FPB%207.pdf](http://www.nuffieldfoundation.org/sites/default/files/files/Would%20legislation%20for%20shared%20parenting%20time%20help%20children)OXLAP%20FPB%207.pdf)