

**PE1513/M**

**EVIDENCE TO THE PUBLIC PETITIONS COMMITTEE OF THE SCOTTISH PARLIAMENT: PE1513**

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**Introduction**

I urge the Committee to reject PE1513. It is premised on some significant misconceptions. In places, the specific proposals advanced are generalised and unclear or unnecessary. While it alludes to one valid criticism of the current law (the limit on the court's powers in respect of DNA testing), the solution it offers is clumsy and does not serve the interests of the children involved. The greatest concern about PE1513 is that it is all about adult rights when the paramount concern of Scots law is – and should remain – the best interests of children.

In response to PE1513, I wrote an article, "It is a wise child ...", which was published in the Journal of the Law Society of Scotland online (uploaded 16 June 2014) and is available at: <http://www.journalonline.co.uk/Magazine/59-6/1014070.aspx>  
The evidence below summarises the main points made in the article.

**PE 1513:**

*Calling on 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.*

Mr Park expands upon that, making three specific proposals. Each will be addressed in turn below. First, it is necessary to address some errors in Mr Park's narrative.

**Errors**

- Mr Park asserts that 'a woman can name any man she likes as the child's father', putting him to the cost of disproving the assertion.

This is incorrect.

All births in Scotland must be registered within 21 days, with the obligation falling on 'qualified informants', being, the child's mother and married father, whom failing,

certain relatives and other persons.<sup>1</sup> Where the parents are not married to each other, the father may only be registered as such at the joint request of both parents or by one of them on production of declarations from each of them that the man is the child's father.<sup>2</sup>

- Mr Park quotes statistics from a variety of sources and arrives at a figure of 160,080 single fathers Scotland 'whose rights are unprotected under our current laws'.

This is incorrect.

The vast majority of fathers in Scotland do have parental responsibilities and parental rights (PR&R) in respect of their children. A father who was married to his child's mother at the time of the child's birth or subsequently, acquires PR&R automatically<sup>3</sup> and will only lose them if a court decides that is in the child's best interests. Non-marital fathers (i.e. those not married to their child's mother) who registered (or re-registered) their paternity on or after 4 May 2006, when the Family Law (Scotland) Act 2006 came into force, are in exactly the same position.<sup>4</sup> In addition, a small number of non-marital fathers who predate the 2006 Act have concluded a Parental Responsibilities and Rights Agreement with the child's mother, giving them full PR&R,<sup>5</sup> while other fathers have secured PR&R by court decree.

### **Reform being sought:**

Mr Park makes three specific proposals and each is addressed below.

1. *Both parents must be named on a birth certificate before a birth can be legally registered. Where the child's parentage is in doubt, all avenues must be explored in determining the child's father to the satisfaction of a court. If it is still not possible to name the child's father for whatever reason, a court may grant a registered birth with only one parent.*

This proposal is similar to the approach taken in England and Wales, but the law there makes an exception to accommodate maternal ignorance of the father's identity or fear of harm from him.<sup>6</sup> The absence of this qualification in PE1513 is a

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<sup>1</sup> Registration of Births, Deaths and Marriages (Scotland) Act 1966, ss 13 and 14. For this purpose, 'father' does not include 'a father who is not married to the mother and has not been married to her since the child's conception': s 14(5).

<sup>2</sup> 1966 Act, s 18.

<sup>3</sup> Children (Scotland) Act 1995, s 3(1)(b)(i).

<sup>4</sup> 1995 Act, s 3(1)(b)(ii). According to the most recent statistics from the Registrar General, the vast majority of fathers register their parentage and, in 2012, only 5.2% of children were registered in Scotland in the name of the mother only. *Scotland's Population 2012: The Registrar General's Annual Review of Demographic Trends* (Scottish Government, Edinburgh, 2013), p 23. Since 58,027 babies were born in Scotland in 2012, there were some 3,017 unregistered fathers.

<sup>5</sup> 1995 Act, s 4.

<sup>6</sup> Welfare Reform Act 2009, s 56 and Sched 6.

fatal flaw. Furthermore, simply delaying registration of the child's birth is a clumsy solution and one that does not prioritise the best interests of the child.

That is not to say there is no problem with the present state of Scots law. The difficulty under current law is one that affects a small number of children and it can be addressed very easily without obstructing the birth registration process. Where a child's parents are not married to each other, the child's mother can prevent the non-marital father from gaining any PR&R simply refusing to permit him to register as the child's father. If he seeks to establish paternity by means of a declarator of parentage, she can further obstruct him by withholding consent to DNA testing of the child.<sup>7</sup> She may do this for reasons that attract some sympathy, like the fear of resumed or continuing domestic violence or to protect the child from the knowledge that he or she is the product of an incestuous relationship or of rape. Alternatively, she may do this for less commendable reasons, like her own resentment arising out of her relationship (or lack thereof) with the child's father.

The current problem is that court can do nothing to compel the mother to consent to DNA testing, nor can it substitute its own consent for that of a competent mother who refuses.<sup>8</sup> Granted, it can draw an inference from her refusal to co-operate with testing, but there is no guarantee that this will help the father in establishing paternity.<sup>9</sup> The obvious solution here is to empower the court to order DNA testing of the child, possibly subject to a best interests test. How this would work is discussed more fully in the article (see above).

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. This will include the duty of care and living arrangements either agreed by mutual consent or, as a last resort, a court order.*

It is unclear what this proposal is seeking to achieve and, in particular, it fails to address a crucial issue: how the 'investigation' into parental fitness – an investigation it accepts may be necessary in some cases – will be triggered.

As explained above, in the vast majority of cases, both of a child's parents already have full PR&R. Where a woman who knows the identity of her child's father is opposing registration and withholding consent to DNA testing, she is signalling that there is a dispute. Since any such dispute impacts directly on the child's welfare, it is essential that the dispute, and the reasons behind it, should be addressed fully. The Scottish courts have vast experience of doing just that and proceed on the basis of

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<sup>7</sup> Law Reform (Parent and Child) (Scotland) Act 1986, s 6(2).

<sup>8</sup> 1986 Act, s 6(3).

<sup>9</sup> Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, s 70. See, *Smith v Greenhill* 1993 SCLR 944, where the court refused to draw a contrary inference from the married mother's refusal when her former lover sought to establish paternity.

the familiar, fundamental principles of child law: namely, 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.<sup>10</sup> The Scottish Parliament was alert to the problem of parental non-cooperation when it amended the Children (Scotland) Act 1995, in 2006, and required the court to address it.<sup>11</sup> Thus, there is a system already in place for allocating PR&R in disputed cases.

3. *And perhaps my most important change in that 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. If we cannot rely on our legal system to fall back on, then we simply have a lawless and anarchic society.*

It is not clear what Mr Park is seeking here. Courts rarely make 'requests' and failure to obtemper a court decree is contempt of court. Lest there were any doubt about that, the Committee might remember the furore that surrounded a case, late in 2013, when a sheriff in Edinburgh held two social workers in contempt when they failed to implement her ruling.<sup>12</sup> Imprisonment is the ultimate penalty for contempt of court and, while the courts do not impose imprisonment readily, they have done so on occasion.<sup>13</sup>

## **Conclusions**

For the reasons set out above, I urge the Committee to reject PE1513.

25 July 2014

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<sup>10</sup> Children (Scotland) Act 1995, s 11(7).

<sup>11</sup> 1995 Act, s 11(7D).

<sup>12</sup> *Contempt of court proceedings in respect of M and L* 2014 S.L.T. (Sh Ct) 21.

<sup>13</sup> *S v M* 2011 SLT 918 (mother who was in dispute with her child's father over contact was sentenced to three months imprisonment for contempt of court following a catalogue of obstructive behaviour).