PE1513/O

Family Law Association Letter of 25 July 2014

Public Petitions Committee
T3.40
Scottish Parliament
Edinburgh
EH99 1SP

By Email: ned.sharratt@scottish.parliament.uk;
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Dear Mr Sharratt

Public Petition of Mr Ron Park re Rights of Unmarried Fathers

We refer to the above.

Thank you for providing us with the opportunity to present our views on the petition. We asked our members to provide their views in respect of the petition. Our response aims to take account of the differing views put forward by our members.

Petitioner's first proposition:

"*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*."

The generally held view is that it should not be necessary for both parents to be named on a birth certificate before a birth can be legally registered.

A requirement that both parents be named on a birth certificate may have unintended consequences. Some children only have one legal parent.

Such a requirement may have serious and undesirable consequences. If all avenues had to be explored in determining the child's father before registration, unacceptable delay would be caused. This would not be in the best interests of the child. There is a legal requirement to register a child's birth within 21 days. This would likely not be possible if the petitioner's proposition were to be accepted.

Such a change to the law would be parent-focused rather than child-centred.

It is acknowledged that a mother's refusal to name a father on a birth certificate can be for non-legitimate reasons. However, such a refusal does not, in itself, prevent a father from taking steps to establish paternity and to

establish a relationship with a child. Not being on the birth certificate does not preclude a father from raising declarator of parentage proceedings. It does not prevent a father from seeking to share the care of a child, either through agreement with the mother or by court order.
A requirement to name the father will not guarantee that the biological father will be named.

It is also important to note that there will be legitimate reasons for a mother opting not to name a father on a birth certificate (e.g. domestic abuse, rape, a mother may not know who the father is).

Petitioner's second proposition:

"*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*."

The generally held view within the Association is that situation is adequately covered already. The law as it currently stands gives the father all the remedies and rights he needs. Procedures are available to fathers to secure parental responsibilities and rights by agreement or through the court.

There is a concern that this proposition focuses on the equal rights of the parents rather than the welfare of the child; the rights of the child or the responsibility of the parents to the child. It is over simplistic. It suggests that the only criteria which requires to be satisfied prior to the granting of 'full rights and responsibilities' is that a parent be 'fit and able'. This is overly simplistic and does not consider a child's welfare or views. It does not take account of the fact that the individual child's welfare may be best promoted by more complex arrangements.

Whether a parent is 'fit and able' is only likely to be an issue where the parents dispute this. Thus, in the event a dispute arose about this, the matter may fall to be considered by the court in any event. Thus, the position would be the same as we have now but with the suggested narrower 'test' to be met about being 'fit and able'.

It would be inappropriate for decisions to be made by the court applying other than the three central principles in child law: paramountcy of the child's welfare; taking account of the views of the child and the no order principle. These principles work well and any proposed change to the law in this area must be child centred. The central principles must be enshrined in any further legislation relating to children.

The acquisition of 'full rights and responsibilities' is not a guarantee, in itself, of a particular level of involvement in a child's life. Even when a father has PRRs, the care arrangements for a child still require to be agreed between separated parents. In the event that they cannot agree, parents can a court to

make decisions regarding the care arrangements for their child. At that stage, the court would apply the three fundamental principles underpinning child law in Scotland.

All of the above is the view of the majority. Some members consider that all fathers should have automatic parental responsibilities and rights. One member also considered that there should be a positive presumption that care of children will be shared between their parents unless it is established that it would not be in the children's interests for this to be done.

Petitioner's third proposition:

"*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*."

There were different views within the Association in relation to this proposition.

On the one hand, the fact that the court has the power to draw the negative inference if the DNA test is not agreed to by the mother was felt sufficient.

On the other hand, the Law Society's position supporting the introduction of measures that will empower courts to order DNA testing of the child. was attractive. It was acknowledged that there may be human rights implications arising from compulsory DNA testing. However, on balance, it was felt that there is merit in the court having the means to ensure that paternity can be established. This was felt to be especially so in situations where the reason for refusal of DNA testing was neither legitimate nor child-centred.

DNA testing orders should always be subject to a best interests test. There are of course many legitimate situations where it may not be in the best interests of a child for a paternity test to be carried out (e.g. where the mother is the victim of rape or domestic abuse).

It is acknowledged that there might be some force in the view that courts should be able to compel the parties to provide DNA on the basis that it is in the interests of the child to know the identity of his or her father. However, as one member pointed out, DNA testing is of limited use in this regard. DNA testing can prove who is not a father in the event of a negative test. However, that may leave a child with no father and may deprive a child of having a relationship with someone who was willing to be named the father and be involved for the rest of the child's life.

There may be circumstances where it would be appropriate for failure to comply with a request to carry out a DNA test to be held to be contempt of court. It should be left to the court to consider how to deal with any such refusal, always with the welfare of the child in mind.

Other points

We would also refer you to an article of one of our members (Elaine E Sutherland, Professor of Child and Family Law at Stirling University) in the *Journal online.* The article is “It is a wise child …", and can be found at: http://www.journalonline.co.uk/Magazine/59-6/1014070.aspx. In the article Professor Sutherland responds to the petition.

Yours sincerely

Family Law Association