

THE TIMES THEY ARE A-CHANGIN'

Last week was Bob Dylan's 70th birthday. The father of modern rock sang that the times were a-changin'. His theme was that change had to be recognised. It was inevitable and we either joined the new world or sank like a stone. The last twenty five years have seen changes in the way in which the law has viewed fathers. There have been changes in the law's recognition of the value of fathers. There has been increased acknowledgement in courts of the practical role of fathers. The need for involvement of fathers in decisions about their children has been endorsed. Times have changed. On the other hand change brings its own challenges.

The value of fathers

In 1986 a short landmark decision was reported. This was the decision of Lord Dunpark in the Court of Session in a case called *Porchetta v Porchetta*¹. It was a divorce case where the parties had one son. The judge awarded custody (as it then was) to the mother. The father applied for access to the boy. The judge refused access. He said:

"The father's application for access was made by him on his own admission, because he is the father. He gave no other reason for his application. A father does not have an absolute right to access to his child. He is only entitled to access if the court is satisfied that that is in the best interests of the child. The onus is on the defender to show that...None of the evidence which I heard suggests that it is in the best interests of the child that the father should have access at this stage. This child does not know his father nor does he need a father's influence at this stage. For whatever reason the defender has never had any contact with this child....The uncontradicted evidence is that the child is well adjusted and emotionally secure. There is not a shred of evidence to suggest that it would be in his best interests for his father to resume contact with him at this stage."

From that decision there emerged a line of thinking that a father did not have an entitlement to maintain contact with his child. If he had to resort to the court for an order for access or contact (as we now call it), he had to explain why contact was a good thing, and produce evidence to support the making of an order. Well, times have changed.

We owe a great deal to the Children (Scotland) Act 1995. This is in many ways a remarkable piece of legislation, because it changed the language of the law relating to parents and children, and by changing the language it changed the way people think about legal relationships with children. There are a number of key features:

- The Act starts with a statement of "parental responsibilities". These include the responsibility to safeguard and promote the child's health, development and welfare and the responsibility for a parent not living with the child to maintain personal relations and direct contact on a regular basis². There is an underpinning assumption that it is in the interests of children that parents both take care of them and maintain contact with them.

¹ 1986 SLT 105

² Children (Scotland) Act 1995, section 1.

- Parental rights are afforded to enable a parent to fulfil parental responsibilities³. They have no other function. Deciding where a child should live and having contact with a child is no longer about demanding rights, it is about fulfilling responsibilities.
- The old language of “custody” and “access” was replaced by “residence” and “contact”, with a focus on practical arrangements⁴, not on possession or control.
- The courts were given a clear direction that orders about children should only be made in those cases where parents were unable to resolve the practical arrangements. No orders should be made unless these were shown to be better for the child⁵.

The result was that the court stopped making orders in every case where a marriage or relationship broke down. Both parents retained their responsibilities, unless there was a good reason for change. This was good news for fathers who no longer found themselves excluded from the life of a child by a “custody order” which in most cases was granted in favour of the mother.

The landmark case under the new regime was *White v White*⁶. This was a decision of the First Division of the Court of Session in a case where the sheriff had made a contact order setting out arrangements for a father to see his daughter. The sheriff principal recalled that order on the ground that the father had failed to produce positive evidence that contact would be in the girl’s interests⁷. This harked back to the old *Porchetta* line of reasoning. The three judges of the First Division were unanimous in restoring the decision of the sheriff. The Lord President referred to the Children (Scotland) Act 1995 and pointed out that Parliament could not have intended that courts hear evidence in all cases, including applications for interim orders, about what in general may be thought best to promote the welfare of a child. He referred to a “point of reference” representing the consensus of society that ‘it may normally be assumed that the child will benefit from continued contact with the natural parent.’ This point of reference was reflected in earlier Scottish⁸ and English cases⁹, but *White v White* endorsed it firmly in cases under the 1995 Act.

Lord Rodger’s opinion emerges in unusually lyrical terms. He said

“In language of unsurpassed beauty that has echoed down the ages, Proverbs and the Wisdom of Solomon give expression to the views on the upbringing and welfare of children which were current in ancient Israel. While we can never hope to emulate their poetry, we too, as a society in twenty-first-century Britain, must hold certain common values and assumptions as to the upbringing and welfare of children.”

He went on to imagine the outcry if a judge were to declare that she would take as her starting point the opposite assumption, that normally a child would not benefit from contact with his absent parent. Only then did he come to the actual terms of the 1995 Act, which imposes on parents various responsibilities which he pointed out can be enforced by their children, giving rise to an inference is that Parliament considered that the welfare of children was best served by imposing those responsibilities on their parents, including the responsibility to maintain personal relations and direct contact with them on a regular basis.

³ 1995 Act, section 2.

⁴ 1995 Act, section 11(2)(c) and (d).

⁵ 1995 Act, section 11(7)(a).

⁶ 2001 SC 689.

⁷ 1999 SLT (Sh Ct) 106.

⁸ *Sanderson v McManus* 1997 SC (HL) 55; *Davidson v Smith*, 1998 Fam LR 21.

⁹ *H (Minors) (Access)*, Re [1992] 1 FLR 148.

He linked this with the rights of the child, recognised in the United Nations Convention on the Rights of the Child¹⁰, ratified by the United Kingdom which provides: “State Parties shall respect the rights of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interest¹¹.” The Convention references contact to the rights of the child, rather than those of the parent. UNCRC is not law in the sense that it could be enforced in the United Kingdom, but we are committed to ensuring that the law is consistent with the rights of the child, and so is an aid to interpretation of the law.

In *White v White* the court also measured Scots law against the right to respect for family life, found in article 8 of the European Convention on Human Rights. This Convention does have direct effect in United Kingdom¹². Public authorities are bound to act in manner that is compatible with the Convention, unless prevented by Westminster legislation. As the court noted in *White* article 8 does not merely compel the state to abstain from interference in family life, there be positive obligations inherent in an effective ‘respect’ for family life. This may involve the adoption of measures designed to secure respect for family life, including the provision of an adjudicatory and enforcement machinery protecting individuals' rights. There is however a balance to be struck between the interests of all those involved. A parent cannot insist on measures that would harm the interests of a child.

There has undoubtedly been a change in the underlying approach, but this is not a change in the test that the court must apply when making decisions about children. The court is required to make the welfare of the child the paramount consideration¹³. It used to be thought that the sheriff or judge making the decision exercised a discretion, but Lord Rodger again corrected that impression. In a case where a foster mother and a birth mother were disputing who should look after a child he explained that the court was required to consider all the relevant circumstances and decide what the welfare of the child required. Once the court has identified that, it has no discretion: the court must do what the welfare of the child requires¹⁴. In that case the child's welfare required that she stay with her foster family.

In the Family Law (Scotland) Act 2006 the Scottish Parliament imposed some new considerations when applying the test of welfare¹⁵. They are quite lengthy, but in broad terms they require the court to have regard to the need to protect the child from abuse and the need to consider whether persons would have to co-operate in relation to matters affecting the child. “Abuse” is broadly defined and includes conduct likely to give rise to physical or mental injury, fear, alarm or distress. The conduct in question may be speech, or mere presence in a particular place. It need not be directed towards the child, if it affects the child or the ability of another person to care for the child. The point is reinforced by the requirement to consider whether there is likely to be co-operation between parents or persons who have parental responsibilities or parental rights. At one level this is a sensible reminder to the courts that growing up in an atmosphere of shouting, alarming behaviour or parental conflict is not good for children. At another it could be taken as an indication that the Scottish Parliament considered that the change in approach might be going too far.

¹⁰ Ratified by the United Kingdom on 16 December 1991.

¹¹ Article 9.

¹² Human Rights Act 1998.

¹³ 1995 Act, section 11(7)(a).

¹⁴ *Osborne v Matthan (No 2)* 1998 SC 682.

¹⁵ Family Law (Scotland) Act 2006, section 24, inserting section 11(7A)-(7E) into the 1995 Act. See *R v R* 2010 FamLR 123.

The role of fathers

Not so very long ago it was regarded as a “natural fact of life” that mothers should be preferred to fathers when it came to the care of children. In 1997 the House of Lords supported this proposition¹⁶. The case was in some respects extraordinary, as the sheriff proposed to remove a toddler from the care of her mother, and to place her with her father and his family. By the time the appeal reached the House of Lords the child was four years old and still with her mother. The Court of Session and the House of Lords took exception to interference with the status quo. The judge who gave the leading speech in the House of Lords (Lord Jauncey) was at pains to point out that any such belief based on the workings of nature would vary according to the age of the child and to the other circumstances of each individual case and would always yield to other competing advantages which more effectively promote the welfare of the child. We have not heard a great deal more about the case since. Meantime society has become more accustomed to men taking a nurturing role in relation to children.

This can be seen in changes to perception of shared parenting. In a case in 1990 parents agreed that they would share “custody” of their child after divorce. They asked the court to make an order for “joint custody”. The sheriff refused their request. For technical reasons he would not even hear from the father’s solicitor. The sheriff principal refused an appeal¹⁷. He said:

“The idea of joint custody raises many practical problems, and I should have thought that the occasions when it is in a child’s best interests must be rare. If the words mean what they say, they must normally require the child to be reared in two homes. If the child is reared by one parent only, in one home, it is playing with words to say that the other parent also has custody. A child as he grows up is entitled to know where his home is, and not have to explain to his friends, school teachers and others that he has two addresses. He should have a place to keep his personal belongings and clothes, and not have these split between two homes.”

The Children (Scotland) Act 1995 has facilitated a more flexible approach. The law before that Act tended to see all effective parental authority vested in the concept of “custody”. By separating out the strands of parental responsibility the 1995 Act made it possible for non-resident parents to exercise responsibility and to hold parental rights. When a decision requires to be taken about where a child should live, a residence order may be made. A residence order is defined as “an order regulating the arrangements as to - (i) with whom; or (ii) if with different persons alternately or periodically, with whom during what periods a child ... is to live¹⁸.” This opened up the possibilities.

In my experience as an advocate there are now many examples of families where children do have more than one home. After all they have more than one parent, and both parents are likely to be important to the child. Spending alternate periods in the homes of each parent may not be for every child, but for a number of children it helps them feel valued by both parents and appeals to an inherent sense of fairness. On the one hand this can relieve children them of the feeling that they are being made to take sides and reassure them that they still have two caring parents. On the other hand, if there is inflexibility and hostility between the parents, this can create a situation that is intolerable for children. Recent research in England has challenged the suggestion that “shared parenting” should be the default position¹⁹. Interestingly the study suggests that the quality of

¹⁶ *Brixey v Lynas* 1997 SC (HL) 1.

¹⁷ *McKechnie v McKechnie* 1990 SLT (Sh Ct) 75.

¹⁸ 1995 Act, section 11(2)(c).

¹⁹ *Fehlberg et al*, University of Oxford, Department of Social Policy and Intervention (funded by the Nuffield Foundation).

relationships between the parents and between parents and children and practical resources such as housing and income are more important than counting the number of days the child spends with each parent.

A shared care arrangement does of course depend on parents living in reasonably close proximity to each other and to the child's school. Interestingly the emergence of more shared care arrangements have affected parental mobility. There are a series of cases where a parent has been prevented from relocating overseas, or even within the United Kingdom, because this would disrupt the arrangements for the child's residence or contact with a father²⁰. Where relocation is inevitable, then a child's relationship with a father, exercised through shared care, has resulted in the child remaining with the father, rather than the mother²¹. Matters such as a joint passion for sport may have some part to play.

Involvement of fathers in decision-making

This has been an area of significant change for unmarried fathers. The starting position in the 1995 Act was that fathers who were not married to the child's mother at the time of conception, or subsequently generally had no parental responsibilities or parental rights²². They could acquire responsibilities and rights by entering into a registered agreement with the mother²³ or by application to the court²⁴. Then on 4 May 2006, registration of the child's birth, with the mother, resulted in automatic acquisition of responsibilities and rights for the father²⁵. Having parental responsibilities and parental rights gives fathers a different starting point in making applications to court, but the test for any order in any case is that the welfare of the child is the paramount consideration.

Perhaps the most marked difference arising from having parental responsibilities and parental rights relates to securing a hearing. This has been more of a problem in the 'public law' areas of adoption and child protection. Here too matters are changing. Back in the 1980s there was firm judicial disapproval of asking a father who had no parental rights whether he agreed to the proposed adoption²⁶. In 1994 the Inner House of the Court of Session were persuaded that such a father might have something to say in adoption proceedings about the child's welfare, but this was perhaps a rather grudging acceptance²⁷. Now the court rules require that all fathers be given notice of applications relating to adoption.

Back in the 1980s fathers who did not have parental rights could not take part in children's hearings, unless they had care of the child²⁸. The Children (Scotland) Act 1995 limited those who could take part to "relevant persons" and fathers who did not have parental responsibilities and parental rights were not "relevant persons"²⁹. In order to become a relevant person an unmarried father had to secure an order from the sheriff court giving him some kind of parental responsibility or parental right. Meantime the children's hearing proceedings could take off and grounds for referral to the hearing could be established on the basis of a statement of facts that were derogatory in relation to the father.

²⁰ *Eg, Fourman v Fourman* 1998 FamLR 98; *X v Y* 2007 FamLR 153; *M v M* 2008 FamLR 90;

²¹ *H v H* 2010 SLT 395

²² 1995 Act, section 3.

²³ 1995 Act, section 4.

²⁴ 1995 Act, section 11.

²⁵ Family Law (Scotland) Act 2006, section 23, amending 1995 Act section 3.

²⁶ *A and B v C* 1987 SCLR 514.

²⁷ *A v G* 2004 FamLR 51, decided by the Second Division on 12 April 1994.

²⁸ *See C v Kennedy* 1991 SC 68

²⁹ 1995 Act, section 93(2)(b).

Lord Rodger in Supreme Court likened this to the train leaving the station while the father was still waiting at the barrier³⁰.

Principal Reporter v K was a case taken to the Supreme Court by an unmarried father who had been pursuing parental responsibilities and parental rights in the sheriff court since he separated from the child's mother. He had contact, but all did not proceed smoothly and the mother eventually accused him of sexual abuse of the child. The little girl was referred to the children's hearing. The sheriff made an order giving the father parental responsibilities and rights to the extent he became a relevant person, but too late to have any influence over the grounds for referral. Contact stopped, while the social work department assessed the situation. The hearing were reluctant to reinstate contact. The father appealed, at which point the Principal Reporter went to the Court of Session and secured an order to suspend the order from the sheriff that allowed the father to be viewed as a relevant person. It took the Supreme Court to advance the plain common sense that what had happened was obviously and outstandingly unfair, or in Lord Hope's more refined language "quite contrary to one of the fundamental rules of natural justice."

Baroness Hale of Richmond addressed the human rights implications of the situation. She pointed out that mere biology does not establish a right to respect for family life, but in this case the father and child did in fact enjoy family life together. The children's hearing had taken steps that did interfere with the family life of this father and child. Involvement of a parent in the decision-making process is fundamental to respect for the family life. Involvement is necessary to provide protection of the parent's interests³¹. The European Court of Human Rights gives national authorities wide scope in relation to decisions about residence and taking a child into care, but applies much stricter scrutiny to restrictions placed on rights of access and on safeguards to secure effective protection of the rights of parents and children to respect for their family life. There must be procedural safeguards to ensure that any interference with family life is, in the words of article 8 "necessary in a democratic society". Lady Hale made the important point that interference with family life is a separate matter from involvement in decision-making. The child as well as her father had an interest in his participation in the children's hearing, so that the hearing had the best and most accurate information in order to make the best decisions about the child. No child, she said, should be brought up to believe that she has been abused if she has not, any more than any child should be persuaded by the adult world that she has not been abused when in fact she has.

The outcome of *Principal Reporter v K* was that the Supreme Court held that as currently constituted the children's hearing system violates the article 8 rights of the father and the child. There was no good justification for excluding from the hearing fathers who, like K, had established family life with their child. The Court also looked at the fact that an unmarried father has the hurdle of securing a court order for parental responsibilities and parental rights in order to become a "relevant person", whereas a married father does not. Article 14 of the Convention proscribes discrimination on the ground of status. The Court was not inclined to find that this hurdle was justified. The Supreme Court acknowledged that fathers have a right to a fair hearing in cases involving family life. This was also

³⁰ *Principal Reporter v K* [2010] UKSC 56.

³¹ *W v United Kingdom* (1987) 24 EHRR 29; *Elsholz v Germany* (2000) 34 EHRR 58.

acknowledged in Scotland in the decision of the Court of Session in *Authority Reporter v S*³², where fathers with contact orders had been excluded from the children's hearing.

These cases now require courts and children's hearings to read legislation in a different way. A person who appears to have established family life with the child with which the decision of the children's hearing may interfere must be allowed to attend the hearing, as must a father with a contact order from the sheriff court. It would, of course, be preferable to have this stated in legislation, but the new Children's Hearings (Scotland) Act 2011³³ does not correct the problem. The judgment in *Principal Reporter v K* was handed down after the new Act was passed (on 25 November 2010) and before it received the Royal Assent (on 6 January 2011). The 2011 Act expressly excludes from hearings persons who have only a contact order or a "specific issue order" dealing with specific questions about the exercise of parental responsibilities or rights³⁴. In so far as this is inconsistent with the European Convention on Human Rights it is unlawful and beyond the competence of the Scottish Parliament³⁵. There is a power for a pre-hearing meeting to "deem" an individual to be a relevant person if "the individual has (or has recently had) a significant involvement in the upbringing of the child"³⁶. If a father has been effectively excluded from the life of the child for some time, this would not allow him into the hearing. Ministers may amend the deeming provisions. Steps should be taken to bring the new Act into line with the Convention. In the meantime fathers who have established family life with their child should nevertheless be treated as "relevant persons" at the children's hearing.

The future for fathers in court

Times have changed. The direction of the law for fathers has been positive. Many of the hurdles of twenty years ago have been swept away. There is in case law now a recognition of the value of fathers. Fathers are in practice enjoying an expanded role in the lives of their children. The Supreme Court has handed down a decisive judgment on the involvement of fathers in decisions about their children.

The difficulties now are matters of practice. The legal remedies are there, but it may be difficult to access them. Much depends on how legal proceedings are conducted. If proceedings are conducted so that they become protracted and expensive, then it may be difficult to secure legal remedies. In a case at the end of last year the First Division took the opportunity to criticise parties for conduct of a child contact case that they considered went on too long³⁷. They commented that primary responsibility for this unhappy state of affairs lay with the parties, not the court. If however one party is determined to draw out the proceedings, then unless there is firm case management by the sheriff or judge, the other may simply run out of funds. Unless a father is eligible for legal aid, and can find a legal aid lawyer, then he may be driven to representing himself, and the courts are seeing an increasing number of litigants in person. They may now have support from another lay person, which offers some support. However one of the key skills of a good lawyer is a capacity to focus a case, to prune it to the essentials and to present it economically.

³² [2010] CSIH 45, 2010 SC 531.

³³ Passed just before the Supreme Court judgment in *Principal Reporter v K*, but receiving the Royal Assent shortly after the judgment.

³⁴ Children's Hearings (Scotland) Act 2011, section 200.

³⁵ Scotland Act 1998, section 29(2)(d).

³⁶ 36 2011 Act, section 81.

³⁷ *B v G* [2010] CSIH 83, 2010 FamLR 134.

One of the challenges of change is that it does not necessarily solve the problem. It may simply introduce new difficulties. The issues here are matters of human relationships. The law may have provided a more helpful framework but the law has not and cannot provide a solution. The problem has to be addressed on many fronts. Times may change, but the human dilemma continues.

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