

**Challenges and opportunities in family law:**

**the practitioner’s perspective**

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Who am I? Who are my parents? To what family do I belong? Who decides about my future? These are all important personal questions? In today’s world the answers to these questions can be less than clear. Families have changed. There is greater global mobility. Different countries provide different answers.

Just two months ago, from 15 to 18 February 2016, an experts’ group met at the Hague to discuss the diverse approaches in different states to the establishment and contestation of parentage, and the resulting problems. This has been on the agenda of the Hague Conference since 2010. A questionnaire was issued to members in 2013. A note and a paper emerged in 2014. The experts’ meeting in in 2016 considered the basic issues relating to maternity, paternity and identity. Matters such as immigration, nationality or statelessness and maintenance flow from the more basic issues. There are also questions of jurisdiction. These matters are particularly pressing in relation to assisted reproductive technologies (ART) and international surrogacy arrangements (ISAs). No definitive conclusions were reached. This tends to indicate the magnitude of the challenges.

While the questions are particularly acute in the international context, they arise domestically and between the different parts of the United Kingdom. The pace of change seems faster than ever before. The issues are driven by changing perspectives on the family, by technology and by globalisation. As the Hague Conference has identified these matters have to be addressed, but it is not easy.

**The challenge of “family”**

A case I litigated in 2002 will illustrate the speed of change in this area. *X v Y* 2002 SLT (Sh Ct) 161 involved two ladies living together who wanted a child. They enlisted the help of a gay male acquaintance. When the child was born it quickly became apparent that the three adults had very different expectations about the role that the father would play in the life of the child. He was, as the sheriff explains, “emotionally overwhelmed by his feelings of becoming a father and found it difficult to stay away from his son”. The mother and her partner found his attentions an intrusion and became stressed, particularly when he commenced proceedings seeking parental responsibilities and parental rights, and substantial contact. The mother’s doctor gave evidence that she was under severe stress that could lead to a breakdown. There are two moments in the case that I recall with particular clarity. The first was when I first mentioned the term “family unit”. There was an adverse reaction from the bench and I was adjured not to mention the term again. The second was in submission when I attempted to take the court through case law relating to same sex family life. I mentioned the (then) recent decision of the European Court of Human Rights in *Salgueiro da Silva Mouta v Portugal* [(2001) 31 E.H.R.R. 47](http://login.westlaw.co.uk/maf/wluk/app/document?src=doc&linktype=ref&context=11&crumb-action=replace&docguid=I9764A071E42811DA8FC2A0F0355337E9) and was told “that is Europe”. I mentioned *Fitzpatrick v Sterling Housing Association* [2001] 1 AC 27, and was told “that is England”. I tried a Scottish case, *T Petitioner* 1997 SLT 724, but to no avail. The sheriff was not convinced that the women and the child constituted a “family unit” and said so. The father got his orders.

Against this background the decision of Mrs Justice Theis in *JK v HS and KS* in the Family Court on 13 November 2015 caught my eye. The facts were astonishingly similar. Her ladyship pointed out that the parties had “wholly underestimated the emotional consequences of the arrangements they had embarked upon” and had struggled to come to terms with their differing expectations. The judge refused the father any direct contact on the ground that contact would place the child at an unacceptable level of risk of emotional harm by putting the security of her placement with the two women at risk. The result was the reverse of the 2002 Scottish decision.

It may be that the Scottish approach to maternal stress is much more robust than that prevailing in England, but there can be no going back to the approach the sheriff applied in 2002. We have the Civil Partnership Act 2004 recognising the union of same sex couples, the Family Law (Scotland) Act 2006 permitting financial claims by same sex cohabitants, the Adoption and Children (Scotland) Act 2007 permitting same sex couples to adopt and the Marriage and Civil Partnership (Scotland) Act 2014 allowing same sex couples to marry. Change has happened very quickly, at least in the United Kingdom.

The recognition of same sex relationships is not the only change. It has been part of a broader change in family structure. For example, when *Principal Reporter v K* [2010] UKSC 56, 2011 SC (UKSC) 91 was litigated in the Supreme Court the proportion of children born to unmarried couples in Scotland had just exceeded 50%. In 1974 the equivalent figure was less than 10%. Issues relating to the involvement of unmarried fathers in decisions relating to their children were beyond ignoring. “Parenting Across Scotland” have gathered statistics about family life in Scotland using data from 2011 and 2014 and shown:

* 5,347,600 people live in Scotland
* There were 56,725 births in 2014, 50.8% to unmarried parents, most births registered by both parents.
* In 2014 there were 29,069 marriages, 367 same-sex marriages, 359 being couples who changed their existing civil partnership to a marriage.
* There are 2.42 million households, the most common type being one-person households
* There are 1.5 million families, composed of 65% married couple families, 16% cohabiting couple families, 19% lone parent families.
* Step-families with dependent children account for 26,000 of the ‘married’ families and 26,000 of the ‘cohabiting couple’ families.

The challenge for the law relates to our understanding of “family”. In Scotland we prize certainty. We may now disparage the approach of the sheriff in *X v Y* but she was proceeding on the basis that a family was a man, a woman and a child. She would presumably have agreed with Michael Farmer, founder of RM Capital Management that the core unit of society – husband, wife, parents, children – has been dismantled. He quoted Ed Balls as suggesting that the idea of 'family' is Victorian and responded, “Give me a break. Families have been around forever, all around the world. This isn't Victorian, this is how society works best. Labour's idea of a family is three people who share a fridge.” Has Scots law abandoned any attempt to define a family? Should the law sustain the idea of “family” and if so, what do we mean by family?

**The challenge of “parent”**

The Hague Conference has been particularly exercised about parentage. At one time it was obvious what we meant by “parent”, even if paternity could sometimes be characterised as a matter of opinion, as the old American proverb had it. Now we are not so sure. This is partly a function of medical advance. We can fertilise eggs in vitro and implant them in the womb of a woman or inseminate her artificially. This has led to a requirement for the law to define what we mean by “father” and “mother”. The results in domestic terms have not been entirely satisfactory.

The Human Fertilisation and Embryology Act 2008 provides in section 33 that the woman who is carrying, or has carried, the child is the mother. The Act prevents a mere “sperm donor”, who provides material for licensed clinics to use in IVF treatment, being a father (2008 Act, section 41). If the woman is married then her husband will generally be treated as “father” (section 35). If she is not married, the child will have a father if “agreed fatherhood conditions” are met at the time of the treatment (sections 36 and 37). The proposed father and mother must give a notice to the person responsible for their treatment that each of them consents to the man being treated as the father of any child resulting from treatment provided to W under the relevant licence. There are similar provisions for a civil partner, same sex spouse, or second woman parent (sections 42 to 44). This is all designed to produce clarity over status.

The Human Fertilisation and Embryology Authority helpfully produced forms of consent for licensed clinics to use. And a number of the licensed clinics ignored the forms, or lost them. That had the potential result that a number of children had no father or second parent and no legal relationship with a second family. This came to light following a case in the English High Court in 2013 (*AB v CD and the Z Fertility Clinic* [2013] EWHC 1418 (Fam)). The HFEA then required an audit, which disclosed “lamentable shortcomings” in the procedures of many clinics. A number of couples who had undergone distressing procedures to conceive a child were suddenly faced with a set of circumstances that was acutely painful. In *Cases A, B, C, D, E, F, G and H* [2015] EWHC 2602 (Fam)Sir James Munby P came to the rescue. He managed to reach a view in a sample set of cases that gave each child a second parent. He held that forms completed under the previous legislation, that were not the prescribed forms, and in some cases were inaccurately completed or incomplete, satisfied the requirement of consent. Parenthood, he said, was not to be “denied by the triumph of form over substance.” This eminently compassionate result has been followed in Scotland. Would the effect have been achieved without Munby P’s decision?

The same question may be asked of his decision in *Re X (A Child) (Surrogacy: Time limit)* [2014] EWHC 3135 (Fam) to allow parties to a surrogacy arrangement to apply for a parental order more than 6 months after the birth of a child, despite the apparently inflexible 6 month time limit imposed by section 54 of the 2008 Act. The applicants had commissioned a child in India. The surrogate mother conceived using eggs donated by a third party and the commissioning father's sperm, but she was married and her husband was presumed to be the child’s father. The child was born in 2011, but not brought to the UK until 2013. The commissioning parents had no idea that there was any need to apply for a parental order if they were to be the legal parents of this child. The child was two years and two months old when they presented their application. To make matters worse they had separated, although they did later reconcile. It was common ground that a parental order presented “the optimum legal and psychological solution” for the child.

Munby P found a solution. In the course of his argument he quoted from Lord Rodger of Earlsferry in *Regina v Soneji and another* [2005] UKHL 49, [2006] 1 AC 340

“…if your young daughter wants to go out with friends for the evening and you agree, but tell her that she must be home by eleven o'clock, she is under a duty to return by then. But this does not mean that her duty is to return by then or not at all. Rather, even if she fails to meet your deadline, she still remains under a duty to return home...”

This was considered apposite to construction of the 6 month time limit. Barring a late application could not “sensibly” be considered fatal to an application of such importance to the welfare of a child. He reached this construction on the basis of domestic law, but held that had it been necessary to do so he would have “read down” the legislation under the Human Rights Act 1998.

Again, how far would such a view be acceptable under Scots law? How comfortable would a Scottish court be with such a statutory construction? But where would we leave a child born using genetic material from one woman, carried by another, with a view to being brought up by a third? Is maternity still a fact? Or is it a construct of the law?

**The challenge of families from other states**

And then how do we deal with children who arrive in Scotland and encounter difficulties? We have our own procedures for protection, which may lead to a child acquiring a new family through adoption. We are one of the few legal systems that facilitates “forced adoption”, that is adoption without parental consent. At present we make no distinction between children from other nations and children from domestic families. We may need to rethink how we approach this.

In the reported decision of the English Court of Appeal in *Merton LBC v B* [2015] EWCA Civ 888 a letter is reproduced. It is dated 16 February 2015 addressed to the Speaker of the House of Commons and emanates from the Saeima of the Republic of Latvia. It commences:

Your Excellency Mr John Bercow,

With all due respect and on behalf of two standing committees of the parliament of the Republic of Latvia - the Saeima - the Human Rights and Public Affairs Committee and the Social and Employment Matters Committee - we would like to draw your attention to a particular issue, as well as to request that you involve the relevant committees of your parliament in addressing this issue which has created concern within the two aforementioned committees. It is the matter of insufficient cross-border co-operation on the part of United Kingdom authorities in relation to the United Kingdom’s national procedure of placing Latvian citizens up for adoption without parental consent…

The letter appears in an English case, but it could equally have been written to the Scottish Parliament and it may only be a matter of time before we receive a similar epistle. The mother, supported by the Latvian authorities, argued that the child concerned was a Latvian national, with a Latvian heritage and identity which should be fostered by maintaining her connection with her country, her language, her religion and her culture. The Latvian authorities argued that the case should be transferred to Latvia under article 15 of Council Regulation (EC) No 2201/2003 (“Brussels II *bis*”). However the issue by then was adoption. Brussels II *bis* no longer applied. It was too late to consider transfer.

What was raised was compliance with the Vienna Convention on Diplomatic Relations of 1961. This Convention has been ratified by 190 states and is the cornerstone of modern diplomatic relations. Article 37 is headed: “*Information in cases of deaths, guardianship or trusteeship, wrecks and air accidents*.” Article 37(b) states

“If the relevant information is available to the competent authorities of the

receiving state, such authorities shall have the duty . . . (b) to inform the

competent consular post without delay of any case where the appointment of a

guardian or trustee appears to be in the interests of a minor or other person

lacking full capacity who is a national of the sending state. The giving of this

information shall, however, be without prejudice to the operation of the laws and regulations of the receiving state concerning such appointments . . .”

In *Re E (A Child) (Care Proceedings: European Dimension) – Practice Note* [2014] EWHC 6 (Fam) Munby P held this to imply that Consular officers should be informed of care proceedings concerning their own nationals and be permitted to attend court. *A fortiori*  there should be notice of adoption proceedings, and the opportunity to intervene. Is Scotland prepared for the challenge of being part of a global legal community. It is a challenge for the courts, but even more of a challenge to the children’s hearing, where cases like *Re CB* or *Re E.* will commence.

Brussels II *bis* applies between EU member states and it covers placement of a child in a foster family or in institutional care. The basis of jurisdiction is the habitual residence of the child. In an EU cross-border case, the children’s hearing does not have jurisdiction to place a child in a foster family unless the child is habitually resident in Scotland, or some other basis for jurisdiction can be found in terms of the regulation. If a child is brought to Scotland after proceedings have commenced in another EU member state then those proceedings have priority under the *lis pendens* provisions of article 19.

So what is the sheriff to do when faced with a proof in a contested referral to the children’s hearing of two German children, brought to Scotland by their mother who did not like the interference of German court in her family life and fled to Scotland, where child protection orders were granted and the children were placed in foster care (*Application in respect of A and B* 2014 Fam LR 137)? In that case the problem was the opposite of *Re CB.* The German court were only too relieved to be spared the problem of dealing with the case and happily agreed to transfer jurisdiction, but could not quite understand that jurisdiction had to be transferred primarily to the children’s hearing, when the approach to them had come from the sheriff court. And the children’s hearing had no process for considering a request for transfer that had to be accepted or declined under article 15 of the regulation within six weeks. The reporter was initially disinclined to convene a hearing, and was only persuaded when it was pointed out that unless there was a transfer, jurisdiction might have to be declined altogether.

Matters are complex for the children’s hearing. We now await the outcome of the Irish reference to the CJEU in *Child and Family Agency (CAFA) v JD* (Case C-428/15), which asks the basic question of when article 15 of Brussels II *bis* applies to “public law care applications by a local authority in a member state, when if the court of another member state assumes jurisdiction, it will necessitate the commencement of separate proceedings by a different body pursuant to a different legal code and possibly, if not probably, relating to different factual circumstances?” This is an important question in the context of the children’s hearing, not only because of the way the system is structured, but also because the hearing deals with some applications where placement in foster care falling within the scope of the regulation will be relevant, and other cases where the regulation may be thought not to have any immediate application. In the meantime, two days ago, it was necessary for the Supreme Court to offer guidance on when a domestic tribunal with jurisdiction should transfer a case to a court in another member state (*In the matter of N (Children)* [2016] UKSC 15). These are difficult issues, at the cutting edge of decisions relating to children and families in the modern global context.

Aside from the obvious complexity, there are a number of further challenges. The hearing is working with a jurisprudence on jurisdiction that is out of step with the requirements of a global legal culture. There has been no revision of the law since *Mitchell v H* 2000 SC 334 where the Inner House endorsed jurisdiction based on presence in Scotland. The children’s hearing had no jurisdiction in respect of a child who moved from Scotland to England after the referral to the reporter, but before the case had been referred to the children’s hearing. Jurisdiction based on presence as opposed to habitual residence was very recently acknowledged to be unsatisfactory in *Re B (A Child) (Habitual Residence: Inherent Jurisdiction)* [2016] UKSC 4; [2016] 2 W.L.R. 557. It allows adults to move children to invoke what is perceived as the most favourable jurisdiction. The approach to jurisdiction in Brussels II *bis* based primarily on habitual residence is now widely adopted. In England jurisdiction in care proceedings depends on habitual residence. This gives rise to a serious problem. A child who is habitually resident in Scotland, but during a temporary stay in England is found to be at risk of serious harm, cannot be the subject of care proceedings in England. And there would be no jurisdiction in Scotland. There is potential for the child to be left in limbo. This does have to be resolved.

And there must be sympathy for the parent from England who comes to Scotland for a visit, encounters difficulties here, has his or her child removed on a child protection order, and then finds that the juggernaut of jurisdiction rolls forward in Scotland, and the child can never be retrieved. The parent spends his or her life travelling from somewhere like Birmingham to Scotland for hearings in respect of a child who started out as habitually resident in England, but who grows up in Scotland after a short trip that went badly wrong.

“Brexit”, if it comes about, will not solve these issues. Similar issues arise under the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (the “1996 Hague Convention”). We are currently part of that Convention following EU authorisation, but will presumably wish to remain part of the international community of nations in relation to jurisdiction and enforcement of orders relating to children even if we leave the EU.

The point is obvious. Scotland urgently requires to re-examine how it treats intervention in family life in the context of the global community. We do not exist in isolation. We need to wake up to the range of international conventions governing the relationship between nations in relation to children. We need to ensure a coherence of jurisdiction with other countries and within the United Kingdom. Matters relating to families are complex without adding difficulties over jurisdiction.

**Concluding questions**

Scotland has a proud history of a principled approach to law. Are we principled and coherent in our approach to the status of families and children? Can we afford to be? Should pragmatism prevail? And if it does, then how does this cohere with the global approach to family law, and to jurisdiction in family cases? There was no Scottish expert at the Hague meeting in February. Were we at the table, what would our contribution be to the issues of parentage, identity and decision-making? Will the Scottish contribution live up to the stature of Professor Eric Clive, who in February in *Re B (A Child)* was described by Lord Wilson JSC as “the great Scottish family law jurist”.