

father and where they jointly register the child's birth then the father should be given the rights in order to allow him to fulfill his parental responsibilities. The situation where the mother does not consent and where joint registration is ordered by the court is covered by section 11 of the 1995 Act. The Executive's proposal will confer PRRs on an unmarried father where he and the mother jointly register the child's birth; or where either one of the parents attend the registration, but has a statutory declaration made out by the non-attending parent.³⁶

91. The Committee considers that the Executive should make it clear that entries in the Register of Amendments which have the effect of altering the information originally given at registration of the birth have the same force as if the information was provided at the outset.

92. Respondents to the Executive's *Family Matters* consultation document expressed the majority view in support of conferring automatic rights on unmarried fathers (75%). The Policy Memorandum cites some reasons for the positive responses as promoting the involvement of the father in the upbringing of the child and as addressing the perceived current unfair discrimination against fathers.³⁷

93. There were, of course, some less positive responses. The views were expressed that fathers should have to marry the birth mother to be entitled to PRRs and that automatic provision of PRRs undermines the 'family unit'. There was also a concern that fathers may take advantage of their new rights whilst shirking the accompanying responsibility, which gave rise to suggestion that some consideration should be given to ensuring that absent fathers fulfil their responsibilities.³⁸

94. Evidence received by the Committee was on the whole supportive of the Executive's proposal, although in some cases, there was a suggestion that the proposals did not go far enough. The predominant view, however, was clearly that relationships between children and their fathers should be encouraged, where this is in the best interests of the child. Indeed, the Committee is firmly of the view that the welfare of the child should be at the centre of the Bill.

95. Children 1st said in oral evidence:

"It is clear to us that when both parents are willing to play a proper role in their child's life, the father's role should be recognised. Nearly half of all children born in Scotland today are born to cohabiting, rather than married, couples... Many children are being brought up without contact with their father. It is important that fathers' rights are extended."³⁹

96. Similarly, the Roman Catholic Church and Families Need Fathers placed an emphasis on the importance of joint parenting.⁴⁰ In its written evidence, Families Need Fathers stated that "we believe this is an overdue step in the right direction. Children have two parents, and they surely have a right to have both parents recognised in law."⁴¹

97. On a separate point, the Law Society of Scotland said that one advantage of giving PRRs to unmarried fathers is that "in the very small number of cases where a mother dies, the father will have the automatic right to continue to look after his children and will not have to compete with other family members."⁴² Despite the infrequency of such circumstances, but considering the conflict that can arise from them, the Committee believes that such situations are best avoided and should be addressed by the Bill.

98. Although it broadly welcomed the proposal, Families Need Fathers indicated that it believed PRRs "should be automatic for all fathers, by virtue of their being fathers."⁴³ The organisation's view is that the role of unmarried fathers in the family is not sufficiently recognised in legal terms and that in conferring PRRs on fathers would go some way to addressing this perceived inequality. This was a standpoint shared by the Family Law team at Balfour and Manson Solicitors, Edinburgh, who said in their written evidence:

"A child has the right to know and have a relationship with both parents. Enabling a mother to determine the quality of that relationship by means of a registration process is insulting to the father and the child. We believe that it is only a minority of cases where it may be inappropriate for an unmarried father to have parental responsibilities and parental rights. In the unlikely event of a father seeking to enforce his rights in such a situation, for example, where a child has been conceived following a mother having been raped, the court would

99. One of our witnesses, Gary Strachan, agreed with the suggestion made by Families Need Fathers, saying that "it is wrong for one parent automatically to get parental rights and for the other not to."⁴⁵ these reforms is to update the law and reflect the reality of family life in Scotland today then the unmarried father, whether in an on going relationship with the mother or not, is part of that reality and should not be treated any differently from the mother."⁴⁴

98. One of our witnesses, Gary Strachan, agreed with the suggestion made by Families Need Fathers, saying that "it is wrong for one parent automatically to get parental rights and for the other not to."⁴⁵ In preparing the Bill, the Executive considered the alternative approach of conferring automatic PRRs on all biological fathers without the need for joint registration. It did, however, strongly refute this option as the Policy Memorandum explains:

"It would not be fair to women who had suffered a trauma such as rape, or had become pregnant as a result of a casual liaison then had to go to court to have PRRs removed from the father. Scottish Ministers believe that some evidence of commitment to joint parenting such as the joint registration of the child's birth should be required before a man gains PRRs."⁴⁶

101. In oral evidence to the Committee, the Minister also said:

"I understand what Families Need Fathers are saying and I understand some of the frustrations of people who wish to play a full role in their child's life. However, a simplistic or crude approach to the issue would not necessarily be helpful."⁴⁷

102. The Committee welcomes the extension of PRRs to unmarried fathers. The Committee is of the view that the legislation should encourage the development of a structure of family law in Scotland that provides for the protection of children and support of the family. The Committee accepts that automatically granting PRRs to biological fathers could be to the detriment of existing arrangements. The Committee, therefore, believes that the Executive's approach of using the ethos of joint registration as the determining factor for conferring PRRs is the right approach.

103. The Committee notes that it is the joint registration that is the trigger for the conferral of PRRs. The Committee believes that where there is agreement between the parents, PRRs should be conferred automatically and that where agreement does not exist an unmarried father will, as at present, have the option of claiming them via the court process under section 11 of the 1995 Act.

Retrospective application of PRRs

104. The Executive believes that the automatic conferral of PRRs should take effect only in relation to the registration of births made after the legislation is brought in to force (i.e. PRRs will not be applied retrospectively). The Executive consulted on this issue⁴⁸ and ultimately decided against giving automatic PRRs to unmarried fathers who are registered on their child's birth certificate prior to the legislation coming in to force.

105. In the Policy Memorandum, the Executive argues that:

"It would be inappropriate for parents who had registered the birth of their child on the basis of one set of legal consequences then to find that subsequent legislation had materially changed those legal consequences. In addition, there is a need to protect families whose arrangements had already been settled by courts, it would not be in anyone's interests to re-open such cases."⁴⁹

106. The Committee has received a range of views in both its oral and written evidence in relation to the matter of conferring PRRs retrospectively, which appears to be a more divisive issue than the conferral of automatic PRRs on future registrations.

107. The Law Society of Scotland argued forcefully against making the proposals retrospective. It supported a view similar to that of the Executive, that it would be unfair to change the basis on which a

mother has made her initial decision to allow the father to register himself as such on the child's birth certificate.⁵⁰

108. Alternatively, Families Need Fathers expressed the view that PRs should be conferred universally on all biological fathers and, therefore, argue that PRs should be applied retrospectively. In recognising the concerns raised by Family Mediation Scotland and Stepfamily Scotland in relation to circumstances involving conflict or domestic abuse, Families Need Fathers suggest that in such cases PRs could be easily removed by means of a straightforward mechanism that was designed to keep any additional upset to a minimum.⁵¹

109. In formulating its position on the issue of retrospectivity, the Committee also considered the suggestion made by Alison Cleland that by not making PRs retrospective would remain contrary to international obligations under Article 8 of ECHR and the UN Convention of the Rights of the Child for a further 16 years. In evidence to the Committee on this point, the Minister said:

"We would not introduce any legislation that was not compatible with our European obligations. Such compatibility is a prerequisite of any legislation. We gave careful consideration to the matter and we believe that we have struck the right balance. We do not believe that we have infringed our wider responsibilities."⁵²

110. In considering the evidence received on the issue of retrospectivity, the Committee is of the view that it would not be appropriate to legislate in this way. This could have the effect of requiring mothers to go to court to seek the removal of PRs from a father simply in order to restore the status quo. The Committee agrees with the position taken by the Executive on this issue.

Domestic violence – rebuttable presumption

111. The Committee received some evidence reflecting the concern that women and children should be protected from inappropriate contact with an abusive father holding PRs. This led the Committee to explore the possibility as to whether a rebuttable presumption against contact in cases in which domestic abuse has occurred should be inserted in to the Bill. Both Stepfamily Scotland and Scottish Women's Aid said that they would support this suggestion.

112. In oral evidence, Scottish Women's Aid said:

"The Children (Scotland) Act 1995 is a very good piece of legislation and provides for women and children are being put at risk and are not safe because the 1995 act is not being interpreted in a way that takes account of other factors. The legislation would be fine, if only it were adhered to. Introducing a provision such as a rebuttable presumption would make the courts look at the situation, rather than ignoring all the other evidence that they could consider."⁵³

113. Professor Eric Clive, however, was not convinced that the inclusion of such a provision in the Bill would add anything, saying that:

"The presumption that it is not in the child's best interests to be ordered to have contact with a person if there is a danger of physical or mental domestic abuse does not add much to the law. The welfare of the child is already the paramount consideration [of the 1995 Act]."⁵⁴

114. This is a view reflected by the Law Society of Scotland who warned that by inserting a rebuttable presumption on this matter in to the Bill could actually act to interfere with the current provisions of the 1995 Act.⁵⁵

115. In considering its position on this matter, the Committee is also aware of a number of other issues that could arise from the inclusion of such a rebuttable presumption. In introducing a presumption this raises the question of whether other presumptions could be added as well, which suggests a prescriptive approach and potentially undermines the flexibility of the court in determining on a case-by-case basis what "the best interests of the child" actually should mean, in terms of residency and contact in individual

cases.

116. The Committee also considers that a rebuttable presumption could act to encourage people to make allegations where they may not have done so otherwise, or to exaggerate them. The Committee believes that in such cases a presumption of no contact would not necessarily be a fair reflection of the suitability of either parent to continue to have a relationship with their child. Importantly, there is also the issue of what degree of proof would be required by the court in order to judge the validity of such allegations. The Committee invites the Executive to consider whether guidance to the courts would be of assistance in this area.

117. The Committee fully recognises the seriousness of domestic abuse and the damaging effects that this can have on children and the wider family. The Committee does not wish to diminish the effectiveness of current legislation in such cases. The Committee accepts, however, that the Executive has made a firm commitment to consider this matter further and requests that it respond to the Committee on the outcome of these considerations.⁵⁵

Post separation parenting and other issues arising from discussions on PRRs

118. During its discussions on PRRs the Committee has had regard to some wider issues that, although not specifically covered in the Bill as introduced, the Committee considers are significant to its understanding of the general principles of the Bill. These issues encompass:

- post-separation parenting and whether there should be a presumption of an equal division of parenting time between mother and father, or if the emphasis should be on the quality of time a child spends with each parent;
- whether PRRs, once obtained, have practical effect; and
- enforcement of PRRs

Equal parenting time

119. On the issue of whether there should be a presumption of equal parenting time (i.e. a 50/50 split of time between parents), the Committee received a range of views. In the main, it was accepted that the quantity of contact between parents and children does not necessarily correlate with the quality of that time.⁵⁷ Children 1st asserts that a 50/50 split of parenting time is not necessarily in the best interests of the child, and that they would seek an agreement, perhaps through family conferencing where the child's input would be included, to be made on the basis of the individual circumstances.⁵⁸

120. This view is reflected by the representatives of the Australian Parliament House of Representatives Committee on Family and Human Services when it discussed the issues as part of its video conference with the Justice 1 Committee. The Australian Committee felt that such a presumption "would mean that people would spend a lot of time in court proving that the other parent was unfit so that equal time would not be automatically awarded".⁵⁹ They also stated that in framing proposals for reform of family law in Australia "we wanted to remove adversarial situations, set up parenting plans and remove the rebuttable presumption, which is based on people's self-interest in respect of what they can get out of the breakdown of a relationship".⁶⁰ Evidence received by the Australian Committee during their inquiry suggested that:

"some people thought that they would be forced to take their children for 50 per cent of the time, when their lifestyle may not be set up to do that. They thought that, if they decided not to take the child for 50 per cent of the time, they would be seen not to want to spend that time with their children when, in fact, it was their work habits and lifestyle that precluded it."⁶¹

Primary Care Giver

121. The Committee also heard evidence that it is important for a child to have a solid relationship with a primary care giver, particularly in the early years of his or her life and that this would not support the presumption of equal parenting time.⁶² The Committee recognises that the primary care giver could equally be either parent, or indeed any adult, who plays a significant part in the child's upbringing, but that the child should also have the opportunity to have a relationship with both parents.

122. In evidence to the Committee Families Need Fathers accepted that there should certainly be a consideration given to the quality of time spent with parents, but argued that there was a minimum quantity of time at which quality time becomes possible. The organisation's view, which was supported in principle by Gary Strachan,⁶³ is that there should in fact be a presumption of equal parenting, starting from a 50/50 standpoint, which could then be re-arranged appropriately, depending on each individual's situation.⁶⁴ They argued that this presumption would indicate that the law recognises the equal importance of both parents. In an attempt to make this absolutely explicit in the legislation, Families Need Fathers also suggested that there should be inserted into the Bill the clear right of a child to maintain relationships with both parents and the wider family after separation.⁶⁵ This was not a view that was widely accepted by other witnesses from whom the Committee sought comment. For example, the Law Society of Scotland suggested that the 1995 Act makes sufficient provision for a child to have contact with both parents, where this is in the best interests of the child. Under the 1995 Act, "the absent parent has a responsibility to maintain contact with the child. The 1995 Act gives a corollary right to the child to have contact. There is also a corollary responsibility on the parent with care to make contact possible."⁶⁶

123. In relation to post-separation parenting, the Committee is of the view that the emphasis should rightly be placed on joint parenting as it believes that it is generally in the best interests of a child to benefit from a continuing relationship with both parents. However, the Committee considers that there were a presumption of equal parenting time to be added to the Bill, this would not necessarily meet this objective. The Committee agrees with the Executive that it would not wish the legislation to constrain the court by creating a presumption of an equal division of parenting time were that not in the child's best interests.

Quality of contact arrangements

124. However, the Committee is convinced that when determining access arrangements, it is essential for the court to consider the quality of the access which a non-resident parent can have with their child and the benefit which the child will derive from that access. The Committee is clear that there is a minimum amount of time in which meaningful and beneficial contact can be maintained. Ideally the court would not be required to regulate such access arrangements, they would be agreed between the parents and the child incorporating a degree of flexibility to allow changes in circumstances to be accommodated. The Committee acknowledges that the ideal is not always achievable and in situations where courts are required to intervene parents should be encouraged to accept arrangements which allow the child to spend quality time with the non-resident parent.

Practical effect of PRRs

125. One of the concerns of fathers' groups is that non resident parents who have obtained PRRs have difficulty in applying them and are therefore not able to be as fully involved in important aspects of the child's upbringing as they would wish to be. The anecdotal evidence that the Committee heard was that the practical implementation of PRRs is not as straightforward as was intended in the 1995 Act. Section 6 of the 1995 Act provides that any person, before making a major decision in relation to a child that involves the exercise of their PRRs, should consult any other person who holds PRRs in relation to that child.

126. The specific evidence of one non-resident parent was that he had found that the reality of PRRs was very different from what he had believed to be the case.⁶⁷ To him PRRs meant that he could become involved in making decisions on issues of education and health care in relation to his child, but his experience has reflected that the application of rights is patchy as are the interpretation and understanding of what the rights mean. Families Need Fathers also referred in oral evidence to the difficulties experienced by many fathers who had been married (and therefore have PRRs), but who are experiencing difficulties in maintaining a relationship with their children after separation.⁶⁸

127. The Committee's concern was that different public authorities in different parts of Scotland may take inconsistent approaches in their dealings with non resident parents. The Committee therefore wrote to the Ministers for Health and Education to ask what guidance is issued to health boards and education authorities on how to deal with requests by non-residential parents to exercise their PRRs.

128. In its response, the Executive states that it has not issued guidance to health boards on this matter. The Executive does, however, indicate that it is currently drafting guidance on the rights of parents and

73 separation with the aim of avoiding the imposition of any sanctions and court orders in the first place. This is the view held by Stepfamily Scotland, which recommended the tactic of the early intervention of mediators at the point of separation before the relationship becomes too deeply embedded in conflict.

136. The Committee's impression is that in a very small number of cases, resident parents appear able to willfully ignore a decision of the court. The Committee recognises that there are no easy solutions to this problem – the Committee is not aware that any jurisdiction has been able to find an effective enforcement mechanism in those cases where acrimony persists between the parents.

137. The Committee believes that speed is of the essence when it comes to dealing with child-related legal actions, for example where the court has granted access for a non-resident parent by way of a contact order but that this order has been breached meaning that the non-resident parent is being denied access to the child.

138. The Committee is aware that the sheriffdom of Glasgow and Strathkelvin operates a specialist family court which has enabled sheriffs in that jurisdiction to develop considerable expertise in this increasingly complex area of the law and also a deep awareness of inter-related social issues (including domestic abuse) that often form the backdrop to the cases which come to court. The other advantage that the Committee sees in specialist family law courts is the speed in which they are able to operate.

139. Some members of the Committee had the opportunity to meet with Sheriffs who work in the specialist family law courts. The Committee considers that this system has much to commend it and recommends that the Executive / Scottish Court Service investigate the practicality of developing a Scotland-wide system of specialist family courts, utilising a pool of experienced and specially trained sheriffs (perhaps on a roving basis).

140. The Committee believes that contact centres can perform a valuable function as the first step in allowing contact between family members where relationships have broken down. The Committee notes that most organisations consider that the best way forward is to concentrate on early intervention measures which are designed to prevent relationships from deteriorating to such an extent that couples resort to going to court (the process of which, itself, tends to exacerbate matters). Parenting agreements have been positively referred to in this context and it is therefore appropriate to address the Executive's proposals on this subject next.

1 Policy Memorandum, para. 4

2 Written submission from the Scottish Executive (19 April 2005), see Volume 2, Annex D, 18th Meeting, 2005 (Session 2), 1 June 2005.

3 Policy Memorandum, para. 84

4 Bruce McFee and Margaret Mitchell dissented from this conclusion.

5 Scottish Law Commission, Report on Family Law (1992) para. 7.2

6 Ibid., para. 7.4

7 This phrase is commonly used as synonymous with "cohabitation" and that is its sense here. Technically in law, however, a common law marriage is a marriage, albeit by cohabitation with habit and repute: but it brings all consequences of marriage including the need for divorce.

8 Policy Memorandum, para. 59

9 Written submission from The Law Society of Scotland, see Volume 2, Annex D, 17th Meeting, 2005 (Session 2), 25 May 2005.

¹⁰ Justice 1 Committee, Official Report, 25 May 2005, cols. 1928-1929. (All references to "Official Report" refer to the Justice 1 Committee Official Report unless otherwise stated.)

¹¹ Supplementary written submission from the Scottish Executive (16 June 2005), see Volume 2, Annex D, 18th Meeting, 2005 (Session 2), 1 June 2005.

¹² Policy Memorandum, para. 27

¹³ Ibid., para. 26

¹⁴ Ibid., para. 24

¹⁵ Ibid., para. 25. The Executive refers to a wealth of research being available, for example *Together and Apart: Children and parents experiencing separation and divorce*, Joseph Rowntree Foundation.

¹⁶ Ibid., para. 33

¹⁷ Official Report, 11 May 2005, col. 1807

¹⁸ See, for example, Major Alan Dixon's evidence, Official Report, 11 May 2005, col. 1791

¹⁹ Official Report, 11 May 2005, col. 1819-1820

²⁰ John Fotheringham, Official Report, 25 May 2005 col. 1948

²¹ Official Report, 11 May 2005, col. 1788

²² Mrs Kay Hull, Official Report, 25 May 2005, col. 1902

²³ Morag Driscoll, Official Report, 25 May 2005, col. 1949-1951

²⁴ SPICE briefing Supplementary note on matters arising out of meeting Justice 1 Committee on 16 March 2005 ('bigamous' civil partnerships and religious divorce), paper no. J1/S2/05/13/7.

²⁵ Written submission from Ephraim Borowski, Scottish Council of Jewish Communities, see Volume 2, Annex D, 14th Meeting, 2005 (Session 2), 11 May 2005.

²⁶ Policy Memorandum, para. 79

²⁷ Written submission from The Law Society of Scotland, see Volume 2, Annex D, 17th Meeting, 2005 (Session 2), 25 May 2005.

²⁸ Official Report, 18 May 2005, cols. 1886-1887

²⁹ Official Report, 25 May 2005, col. 1921

³⁰ Written submission from the Scottish Executive (19 April 2005), see Volume 2, Annex D, 18th Meeting, 2005 (Session 2), 1 June 2005.

³¹ Policy Memorandum, para. 37.

³² Parents have an obligation to provide financial support for their children under the Family Law (Scotland) Act 1985 (c 37) and the Child Support Act 1991 (c 38).

³³ Official Report, 16 March 2005, col. 1612

34 Scottish Parliament Information Service (SPiCe) Briefing 05/13 refers to the number of section 4 agreements: 1998 – 229; 1999 – 335; 2000 – 331; 2001 – 395; 2002 – 397; 2003 – 502; and 2004 – 571

35 Official Report, 11 May 2005, col. 1824

36 Policy Memorandum, para. 38

37 Policy Memorandum, paras. 51-2

38 Policy Memorandum, paras. 53-4

39 Official Report, 18 May 2005, col. 1842

40 Official Report, 11 May 2005, col. 1793 and 18 May 2005, col. 1864

41 Written submission from Families Need Fathers, see Volume 2, Annex D, 15th Meeting, 2005 (Session 2), 18 May 2005.

42 Official Report, 25 May 2005, col. 1959

43 Official Report, 18 May 2005, col. 1862

44 Written submission from Balfour & Manson Solicitors, see The Scottish Parliament website (reference at end of contents page).

45 Official Report, 1 June 2005, col. 1977

46 Policy Memorandum, para. 47

47 Official Report, 1 June 2005, col. 2006

48 SE consultation (2000) – 56% against retrospective application. However, a third of respondents took a different view.

49 Policy Memorandum, para. 49

50 Official Report, 25 May 2005, col. 1958

51 Official Report, 18 May 2005, col. 1862

52 Official Report, 1 June 2005, col. 20106

53 Official Report, 18 May 2005, col. 1894

54 Official Report, 25 May 2005, col. 1926

55 Official Report, 25 May 2005, col. 1946

56 Official Report, 8 June 2005, cols. 2042-3

57 Stepanfamily Scotland, Official Report, 18 May 2005, cols. 1864-5

58 Official Report, 18 May 2005, cols. 1846-48

⁵⁹ Official Report, 25 May 2005, col. 1898

⁶⁰ Official Report, 25 May 2005, col. 1899

⁶¹ Official Report, 25 May 2005, cols. 1899-1900

⁶² Official Report, 18 May 2005, cols. 1845-46

⁶³ Official Report, 1 June 2005, cols. 1980-81

⁶⁴ Official Report, 18 May 2005, cols. 1864-65

⁶⁵ Official Report, 18 May 2005, col. 1863

⁶⁶ Official Report, 25 May 2005, col. 1946

⁶⁷ Official Report, 1 June 2005, cols. 1974-78

⁶⁸ Official Report, 18 May 2005, col. 1861

⁶⁹ Supplementary written submission from the Scottish Executive (17 June 2005), see Volume 2, Annex D, 18th Meeting, 2005 (Session 2), 1 June 2005.

⁷⁰ Ibid.

⁷¹ Official Report, 25 May 2005, col. 1905

⁷² Official Report, 11 May 2005, col. 1826

⁷³ Official Report, 18 May 2005, col. 1865

⁷⁴ Official Report, 18 May 2005, col. 1866

Volume 2

Next

[REDACTED]
Thanks.

I've checked with the Law Society and it says we need 3000 copies of the questionnaire. I've spoken to [REDACTED] and we think this is "doable". I've started the ball rolling by setting up 150 copies of the questionnaire on the photocopier (which, as you know, staples the doc.). Can you please oversee the rest of the operation. I'm happy to provide any help that I can, so please let me know if you want to engage other printers. We will also need covering letters. The letter is on the system. I'm not sure how many colour printers we have and if we could import the logo and do it that way, but give me a shout when you're free.

[REDACTED]
27/06/2005 11:07

To: [REDACTED]
Subject: Contact questionnaire

Please file at 0044105 Greater Paper: Post Sup. (see 2)

Better justice for fathers needed, says report

between CAFASS case workers and families, and would require "considerable" extra resources in terms of staff and skills to succeed, the Mfs said.

Even though the courts "rigorously avoid conscious bias", non-resident parents—usually fathers—are disadvantaged by the system, with delay being a major factor, the report states. This could only change if solutions are found to problems involving delay, lack of judicial continuity, inability to come back to the judge promptly, and

Life of judges transformed to broaden the bench

for law students, are also being considered by the DCA. Lord Falconer pledged to improve diversity in October 2004, in his consultation paper, *Increasing Diversity in the Judiciary*. Currently, less than 16% of judges are women and less than 4% come from minority ethnic groups.

However, the Lord Chief Justice Lord Woolf warned conference delegates that there was a "terrible danger" judicial impartiality might be influenced by partnership prospects if judges

Bowman clarifies money laundering reporting obligations

The court of appeal has clarified the circumstances in which lawyers have to report a suspicion of money laundering to the authorities during litigation.

In *Bowman v Felts* (Judgment 8 March 2005), the court held lawyers were not required to disclose to the National Criminal Intelligence Service (NCIS) any suspicion they developed regarding the source of their client's assets—and that they could continue with the case notwithstanding any such suspicion. Their lordships held that the Proceeds of Crime Act 2002 (POCA 2002) did not override legal professional privilege.

However, the court stated that different considerations applied to litigation created as a sham to facilitate money laundering.

In *P v P* [2003] EWHC Fam 2260, the High Court ruled that lawyers had a duty under POCA 2002 to report all suspicions of financial irregu-

STATWATCH

- **Criminal Procedure Rules 2005** SI 2005/384 (coming into force on 4 April 2005). Govern the practice and procedure to be followed in criminal courts. Facilitate the management of criminal cases by the court in accordance with the overriding objective that criminal cases be dealt with justly. Consolidate the existing rules of court, which are for the time being re-enacted without any substantial changes as part of the Criminal Procedure Rules.
- **Housing (Right to Buy) (Priority of Charges) (England) (No2) Order 2005** SI 2005/407 (Due to commence on 7 March 2005). Specifies Money Partners Limited and Money Partners Finance Limited as approved lending institutions for the purposes of the Housing Act 1985, s 156 (priority of charges on disposals under the right to buy), in addition to the bodies already specified or in previous orders under that section. The companies also become approved lending institutions for the purposes of s 36 (priority of charges on voluntary disposals by local authorities) and s 12 (priority of charges on voluntary income-related benefits (subsidy to Authorities) Order 1998, SI 1998/562). Provides for subsidies to be payable to authorities administering housing benefits and council tax benefits.
- **Public Trustee (Fees) (Amendment) Order 2005** SI 2005/351 (Enabling Power: Public Trustee Act 1906, s 9. Due to commence on 1 April 2005. Amends the Public Trustee (Fees) Order 1999, SI 1999/855. Relates to fees payable on or after 1 April 2005. Sets out executorship fees and annual administration fee increases. Provides, for the purposes of calculating the administration fee, that the estate or trust will be valued as at 30 September 2004 (provided the Public Trustee was acting on that date), instead of 30 September 2002.

StatWatch is supplied by Legal Update, for more information visit our online data service www.legalupdate.com/legalupdate

clients should involve them in "becoming concerned in an arrangement which... facilitates the acquisition, retention, use or control of criminal property".

It was satisfied that even if, contrary to their primary view, s 328 is to be interpreted as including legal proceedings, it cannot be interpreted as meaning either that legal proceedings should be overruled or that a lawyer is to breach his or her duty to the court by disclosing to a third party external to the litigation, documents revealed to him or her through the disclosure processes.

The Court of Appeal upheld the decision of Judge Cowell on the basis that s 328 did not in the context of the legal proceedings apply to require the appellant's legal advisers to disclose to NCIS any suspicion that they may have developed regarding the source of any of the respondent's assets on the basis of information derived from their conduct of the proceedings and they were free to continue with the ordinary conduct of legal proceedings notwithstanding any such suspicion. The court commented that this approach to the construction of the statute will hopefully remove most of the difficulties which have impeded the orderly conduct of litigation ever since s 328 became law.

But what about all those clients and/or their spouses who have been reported to NCIS over the past two years?

Contact
The issue of contact remains in the media spotlight, highlighted by the continuing campaign by Fathers for Justice. Furthermore the Children Act court forms have changed since the beginning of February 2005 so that any allegations of threat of abduction of or harm to the child, including as a result of domestic violence, are brought to the courts' attention much more readily. The respondent is also given the opportunity to respond to such allegations at the outset.

With these factors in mind, two recent decisions of the Court of Appeal may be of interest. On 16 February 2005, in *Re C (a child)* [2005] (UTL 16 February 2005 EXTENP0RE (unreported elsewhere)), the Court of Appeal (Potter and Wall LJ) allowed the father's appeal against a decision refusing his applications that the National Youth Advocacy Service (NYAS) should be joined to the proceedings to act as guardian for his son in relation to contact and an expert should be appointed to advise on the child's asberger syndrome. The child had shown a strong resentment to having any

contact with the father and had refused to see him. He had difficulties in maintaining relationships and his contact with the father was suspended.
The Court of Appeal held that it was clear that the CAF/CASS officer had reached the limit of his expertise and the child had lost faith in him. In the circumstances, the court had the power to make an order that the NYAS be appointed guardian without any preliminary enquiries being made to CAF/CASS under para 5.2 of the President's Direction (Representation of Children in Family Proceedings pursuant to Family Proceedings Rules 1991, r.9.4) 5 April 2004, on the basis that CAF/CASS was no longer appropriate. The NYAS would be in a good position to obtain expert advice if appropriate.
The court ruled *obiter*, that where an application was made by a caring parent for contact with a child who had expressed a view not to see that parent, and that refusal could have stemmed from a psychiatric problem, the court should not refuse the application for contact without proper expert assistance.
A week later, on 24 February 2005, in *Re F-K (a child)* [2005] EWCA Civ 155, the Court of Appeal (again Potter and Wall LJ) allowed the mother's appeal against an order requiring her to make her 10-year-old daughter available for contact with her father every third Saturday. The father applied for residence and/or contact orders as the mother had terminated all contact between the child and her father, after a series of contact orders often made by consent. The judge (the first judge) did not hear oral evidence but accepted the mother's account of the father's physical violence towards her while they were cohabiting, and accepted the psychiatric evidence that the mother was suffering from post-traumatic stress disorder (PTSD) as a result. The first judge dismissed the father's application for a residence order, suspended his application for direct contact and ordered indirect contact to continue at a reasonable level. The father appealed. The Court of Appeal allowed his appeal and directed that contact should resume once per month after the mother had started treatment for PTSD.
The case was transferred to the High Court where a further contact order was subsequently made, after which the mother refused to allow contact and applied to discharge the contact order. The father made a further application for a residence order and the judge agreed to re-open the first judge's findings of fact. The judge again did not hear

Anna Worwood is a partner, Manches Solicitors

oral evidence but held that the mother had failed to prove that she was suffering from PTSD and had exaggerated some of her evidence and claims against the father.
The mother appealed and the Court of Appeal held that the judge as a matter of the exercise of his discretion, had not been wrong to embark on a re-hearing of the mother's allegations of the father's violence. However, his findings were flawed. His contact order could not stand and the father's contact application should be remitted for further consideration by a High Court judge.
Annular relief - costs
Finally a word of warning about proportionality. On 24 February 2005, in *S v H* [2005] EWHC 247 (Fam), Sumner J allowed the wife's appeal against a costs order made against her former husband at the conclusion of the nine-day final hearing of her application for ancillary relief. In the course of the hearing, the wife had alleged that her former husband had exerted undue influence in a financial transaction between them and had sent the sum of £275,000 out of the jurisdiction. The judge awarded a total of £236,000 to the wife and ordered her to pay the husband's costs from November 2001. The husband, who was terminally ill, died the day after the judgment.
The significance of November 2001 was that this was the point at which the husband had varied his first offer for a share of his pension fund plus another sum totalling £242,500. In February 2002, the husband offered to pay a lump sum of £200,000.
Sumner J held that the November offer was materially to affect the final outcome, size of money which was of a sufficient indirect contact to continue at a reasonable level. The father appealed. The Court of Appeal allowed his appeal and directed that contact should resume once per month after the mother had started treatment for PTSD.
The case was transferred to the High Court where a further contact order was subsequently made, after which the mother refused to allow contact and applied to discharge the contact order. The father made a further application for a residence order and the judge agreed to re-open the first judge's findings of fact. The judge again did not hear



Residence and Contact Disputes in Court: Volume 1
by

Carol Smart, Vanessa May, Amanda Wade and Clare Furniss

Executive Summary

Background

There is currently much concern over why the issue of contact with children after divorce or separation is so difficult for parents and for the legal system, and why disputes over contact seem so hard to resolve. There are also questions over whether court orders are effective as there is a lack of information on, and understanding of, the management of these conflicts. There has been a particular concern that disputes over contact have not diminished, notwithstanding the aim of the Children Act 1989 to reduce conflict between parents. The fact that this has not happened has led to questions about whether there is something more fundamental about these disputes between parents. The aim of this study was to bring some clarity into this picture so that as new policies develop they are based on a better understanding of the cases that come to court. The current Volume of the Report is based on the first two stages of the study, examining the cases that are brought to court and how these are processed by the courts. The second Volume will examine how well the outcomes of these court cases 'work' for the families involved.

The methodology of the study

For this study, we examined a random sample of court files that began with a section 8 application in the year 2000. We selected three County Courts (which we have called Northay, Minster and London) in different parts of England and with very different catchment areas. Our sampling procedure produced 430 'cases' which form the basis of our analysis. Throughout this report we have referred to 'cases' rather than individual applications because it makes more sense to count the actual families involved in disputes rather than the numbers of applications that each family member might make.

Findings

- Over half (60 per cent) of the cases brought to court began with an application for a residence order, and were hence classified as Residence Cases. This may appear surprising given the public concern over the issue of contact, and reminds us that it is important to keep in mind that the daily work of the courts is not solely concerned with disputes over contact.
- It is important to be aware of the different populations and their different

relationship histories in relation to each other and their children when interpreting outcomes. Similarly, we suggest that it is always important to understand statistical data on outcomes in context because the same 'order or 'outcome' will have very different meanings for different families.

- In both the Residence and Contact cases, approximately half of the applicants were granted the orders they applied for. Under ten per cent of cases were dismissed. Approximately one in five Residence Cases and one in three Contact Cases ended in withdrawal or in an order for 'no order'.
- Mothers applied more for residence orders, while fathers tended to apply for contact orders. The fear that a non-residential father would remove the children seemed to be of particular concern to the residential mothers. For fathers, the main reasons applying for contact were either that contact was not working satisfactorily or was being refused completely by the mother.
- The principle that seems to guide the courts when deciding on residence is that of the *status quo*. The courts appeared unwilling to disturb the stability of the lives of the children unless grave concerns were expressed over their well-being.

- A clear majority of both Residence and Contact Cases were resolved within a year. Cases that were resolved quickly in court tended to be Residence Cases. Disputes that became protracted tended to be Contact Cases and were characterised by a high degree of hostility that drove the dispute.
- The parents often appeared to initiate the court process out of a sense of insecurity or to have clear boundaries imposed on a problem they could no longer handle themselves. This runs counter to the general view that it is harmful for disputes to go to court because it can delay a resolution or because it increases hostility.

- It is not clear whether speedy legal solutions are available in the thorniest of disputes. These disputes invariably require numerous reports by professionals (if they are not withdrawn or settled before the case gets to that stage) and therefore take a long time to conclude.
- Almost one in four of the cases in our study included allegations of domestic violence. The key to whether allegations of domestic violence led to further investigation was whether or not the children had been witnesses to or subjected to abuse.

- One in two of the cases involving allegations of domestic violence resulted in an order for direct contact and only nine cases out of 98 resulted in a final order for indirect contact. This should be understood in the light of recent research findings that indicate that a significant minority of mothers and children are put at risk of violence during contact.

- As the cases unfolded, it became clear that underlying the disputes over children were complex issues often involving matters that are no longer considered relevant by the courts. Thus issues to do with financial support, housing, and the quality of the past relationship which were not seen as

» [To the top](#)

Overall we found a very complex picture in which the concerns of parents did not always match with the priorities of the courts. But we found that there are genuine moves towards hearing the voices of children and that whilst the welfare of children is the courts' main priority there may be institutional reasons why these concerns do not result in specific orders from the courts. We also found that the courts could deal efficiently and quickly with some issues and that these appeared to provide the applicant parent with a degree of security. It may therefore not be advisable to seek to divert all cases from the courts. The closer one looks at disputes over contact and residence, the more one realises that this is not a simple matter of the courts issuing orders and parents complying. Not only do we find parents who are at odds with one another, but also a complex picture of competing values and ideas about child rearing, families with multiple problems, courts with limited resources, children who have clear feelings about their parents, extended families who have strong views, and of course much distress.

Conclusion

- Court welfare officers (now children and family reporters) often seemed to point out to the parents that they needed to be more flexible and to listen to their children's wishes and feelings.
- Children's voices were heard but only if they were old enough and only if the cases were complex enough to warrant a report. The courts did seem to be interested in finding out whether the children had a 'preference' with regards to contact or with whom they should live.
- Our data suggest that there are families who fall between available provision because their problems go beyond the remit of the family courts but fail to be serious enough to warrant proceedings under public law. There is little in place to offer long-term support to these families if Social Services decline to become involved.
- The welfare of the children is the court's paramount consideration when coming to a decision in all cases relating to residence or contact. However, in a subset of cases particular concerns were raised over children's welfare. When specific concerns were raised over children's welfare they tended to be of a more serious and complex nature in the Residence Cases than in the Contact Cases.
- Our data suggest that it may be difficult for people to understand why the law does not take into consideration issues that they themselves view as highly relevant to the question of who should be allowed to have contact or residence.
- The welfare of the children is the court's paramount consideration when coming to a decision in all cases relating to residence or contact. However, in a subset of cases particular concerns were raised over children's welfare. When specific concerns were raised over children's welfare they tended to be of a more serious and complex nature in the Residence Cases than in the Contact Cases.
- Our data suggest that there are families who fall between available provision because their problems go beyond the remit of the family courts but fail to be serious enough to warrant proceedings under public law. There is little in place to offer long-term support to these families if Social Services decline to become involved.
- Children's voices were heard but only if they were old enough and only if the cases were complex enough to warrant a report. The courts did seem to be interested in finding out whether the children had a 'preference' with regards to contact or with whom they should live.
- Court welfare officers (now children and family reporters) often seemed to point out to the parents that they needed to be more flexible and to listen to their children's wishes and feelings.

relevant by the courts to deciding matters of residence and contact would appear to have been important to the parents.

Human rights obligations and policy supporting children and families

Governments face a considerable challenge in balancing the needs of children, on the one hand, with those of parents and the wider community on the other. This study, by Clem Henricson of the National Family and Parenting Institute and Andrew Bainham of the Faculty of Law at the University of Cambridge, aims to stimulate debate about the tensions in family and child policy by reviewing government policy in the context of international human rights commitments, such as the European Convention on Human Rights. It explores ways of reconciling differing interests to the maximum benefit of all family members.

Human rights commitments require the government to formulate policies that take account of the rights and needs of children and parents, but these needs are often competing.

Progress in balancing individual and collective needs of different family members across policy areas varies.

Children's welfare has dominated both the social exclusion agenda and issues of residence and contact. In both cases, this may have been to the detriment of the rights of parents and other adults.

In education, the balance is in favour of parents' rights; children do not have rights to representation, consultation or choice.

Tough youth justice measures promote the welfare of society above the rights and welfare of children and their parents. As such, they risk breaching the spirit, if not the letter, of the UN Convention on the Rights of the Child and the European Convention on Human Rights.

The greatest balance has been achieved in managing commitments to universal family support alongside investment in child protection.

The researchers conclude that:

the field would benefit from an overarching child and family policy that takes account of the separate and collective needs and rights of family members;

such a policy would need underpinning by a consideration of human rights to ensure that the entitlements of individuals are protected and balanced across the generations.



The government is seeking to balance tensions between parental autonomy and children's access to an 'open future'. It has increased parental involvement in education, for example, by providing more information and increasing parental representation. On the other hand, there is greater direct contact between State and child, through, for example, the Connexions service, the expansion of topics covered in PSHÉ (personal, social and health education), and the provision of sexual health advice.

Overall, however, children's rights receive little recognition in the education arena. Parents' rights continue to be the dominant influence. Children, and in particular, young people, have little say over the choice of school, attendance, withdrawal from sex and religious education, and issues of discipline.

Criminal responsibility

Recent youth justice measures, such as Anti-Social Behaviour Orders and Parenting Orders, seek to promote the welfare of society; this risks being at the expense of children's and parents' rights.

In the context of the CRC, the age of criminal responsibility for children is too low (set at 10 in England and Wales).

On the other hand, the introduction and extension of Parenting Orders, which reinforce parents' responsibilities for controlling their children's behaviour up to the age of 16, do not take account of the degree of independence of this age group. By threatening to criminalise parents for their children's behaviour these measures breach the spirit if not the letter of the ECHR.

Despite these positive developments, local authorities would benefit from greater guidance around prioritising investment across family support and child protection. Guidance could emerge out of a review of the relationship between the demands and resources available for social care.

While rights issues are reflected in some of these developments, such as the appointment of a Children's Commissioner, the policy agenda, as reflected in discussion documents and debates, is largely driven by children's welfare rather than children's rights.

Residence and contact

International obligations provide a clear framework for consideration in cases of parental separation. Children have the right to be heard and to have a say over their destiny. Parents have a right to enjoy the society of their children. Children and parents have a right to family life. Under English law, however, the priorities are different. Children's welfare rather than children's rights is the paramount consideration. Parents' rights are not central to considerations of contact; for example, they are not embedded as a core principle of the recent Green Paper - *Parental separation: Children's needs and parents' responsibilities*.

In order to meet its international obligations, the government needs to support parents in reaching decisions that maximise contact with both parties, subject to the welfare and interests of the child and the practicalities of the individual case.

Education

There is potential for considerable conflict in the field of education between the interests of children, parents and society. While parents have both a significant role in their child's education and the right, under the CRC and the HRA, to guide their child's spiritual, cultural and philosophical convictions, the State has an interest in ensuring that the adults of tomorrow are properly educated. For some commentators, proper education includes providing children with an 'open future' so that they are equipped to make their own choices across cultural, spiritual and economic spheres. Moreover, the CRC provides for children to exercise freedom of thought and religion, and to have a say over their life course, including over the direction of their education.

Introduction

How should governments balance the needs of children with those of parents? This study examines the tensions inherent in child and family policy, the implications of human rights legislation for policy development and the extent to which government has managed these responsibilities through the development of appropriate policies and structures for service delivery. It is intended to stimulate debate about managing the tensions between policies in support of children and those directed at parents and the family.

International obligations and child and family support policies

The European Convention on Human Rights (ECHR) sets out children's and parents' entitlements, including the rights to respect for private life and family life, enshrined in Article 8. The Human Rights Act (1998) (HRA) effectively incorporates the requirements of the ECHR into English law.

The ECHR has significant implications for central and local government. National legislation, such as The Children Act 1989 and the Adoption and Children Act 2002, makes children's welfare the paramount consideration in, for example, cases of contact or adoption. However, the ECHR requires parents' rights to be taken into account.

At the local level, statutory authorities must invest in child protection mechanisms, in line with Article 3's provision for the protection of children from torture, inhuman and degrading treatment. However, authorities must also invest sufficient resources in family support in order to maintain the integrity of the family unit and uphold the right to family life (Article 8).

The United Nations Convention on the Rights of the Child (CRC) sets out the independent rights of children. However, it also states that the best interests of the child are usually served by supporting the child's family.

The UK has been criticised by the UN Committee on the Rights of the Child for its failure to comply, on various fronts, with the requirements of the CRC. Criticisms include the fact that child poverty has not been eradicated and a lack of representation for children.

How have international obligations been incorporated into policy and practice?

Poverty and social exclusion

International commitments require the government to tackle child poverty (CRC) and social exclusion across the generations (e.g. EU and Council of Europe). The government has demonstrated a strong commitment to, and some success in, reducing child poverty. Other impoverished groups, however, such as those on Job Seeker's Allowance or incapacity Benefit, have not seen increases in benefit levels.

While there are convincing arguments for the government's focus on child poverty rather than cross-generational social exclusion, there are still no clear principles which determine levels of investment at different life stages. A debate of such principles would be necessary to ensure that resources are allocated in line with international stipulations on equitable distribution (such as EU, ECHR and CRC commitments).

Family support and child protection

Recognising, in part, that supporting children at risk involves supporting families, the government has invested in both universal family support and child protection. It has developed integrated structures at national level, for example, by bringing together responsibility for children and families under the Department for Education and Skills. At local level, too, integration is apparent in proposals for Children's Trusts and measures for tracking and information exchange.

The European Union (EU) has a significant impact on family life but has not, until recently, had a coherent family

policy or children's rights policy. This is set to change, however, as the proposed EU Constitution contains a Charter of Fundamental Rights which includes provision for family rights and those of the child. The Charter could have a significant impact on member states should the Constitution come into force.

Conclusion

Policy development and implementation

The government has put in place structures to support the delivery of child and family policy. At national level, responsibility for family support and child protection has been brought under the remit of the Department for Education and Skills. At local level, child and family services will be integrated under the proposed Children's Trusts.

Against this backdrop, the researchers conclude that it would be timely to conduct an overarching review of family policy as the foundation for producing a formally recognised national family and child protection policy. Such a policy should contribute to policies and services that support:

- children as having separate and distinct interests from those of adults;
- children in the context of their families;
- human rights across the generations.

Family policy could be strengthened further by taking account of other issues that impinge on family life, such as health, environment and transport. This may be achieved through increasing the profile of the government's existing inter-ministerial group, Misc 9. At the local level, Children's Trusts might be strengthened by changing their name to Children and Family Trusts, thus making their remit explicit and encouraging holistic thinking among those within them.

About the project

The study involved a review of documents from the last twenty years across family law, education, criminal justice, child protection and financial support. Sources were identified using a range of databases, websites and bibliographic resources and included family law reports; international directives and conventions; and UK government legislation, strategy documents and ministerial speeches.

The researchers suggest that integrating a rights approach into government thinking and practice would help address such deficits. Rights provide a framework and point of reference for handling competing interests. They make individual and collective entitlements transparent and engender an expectation that interests will be balanced.

A human rights agenda

Application of the human rights agenda is not consistent. For example, although the ECHR has been integrated into domestic law through the HRA, its entitlements are not promoted in social policy. Moreover, despite signing up to the CRC, the government has not incorporated its articles into UK legislation.

This has resulted in contradictions and conflicts in policy. In some cases, children's welfare eclipses parents' rights; in others, such as education, parents' considerations dominate. There is also no consistent overview of how the interests of family members are managed across the generations, particularly in terms of allocating finite resources.

For further information

The full report, **The child and family policy divide: Tensions, convergence and rights** by Clem Henricson and Andrew Bainham, is published by the Joseph Rowntree Foundation (ISBN 1 85935 330 4, price £9.95). You can also download this report free from www.jrf.org.uk (ISBN 1 85935 331 2).

Printed copies from York Publishing Services Ltd, 64 Hallfield Road, Layerthorpe, York YO31 7ZQ, Tel: 01904 430033, Fax: 01904 430868 (please add £2.00 p&p per order).

Read more *Findings* at www.jrf.org.uk
Other formats available. Tel: 01904 615905,
Email: info@jrf.org.uk

Published by the Joseph Rowntree Foundation, The Homestead,
410 Water End, York YO30 6WF. This project is part of the JRF's research
and development programme. These findings, however, are those of the
authors and not necessarily those of the Foundation. ISSN 0958-3084