

Justice Committee

Family Law (Scotland) Act 2006

Written submission from Families Need Fathers

Introduction

Families Need Families Scotland welcomes the Justice Committee's decision to review the Family Law (Scotland) Act 2006. We are grateful for the opportunity to share the insights that we have gathered from the enquiries we receive by telephone and email and from the experiences shared by the individuals who have attended our monthly support group meetings in Edinburgh, Glasgow, Stirling and Aberdeen.

We are aware from a number of individuals who have been referred on to us by MSPs of all parties that there is sense within the Scottish parliament that the Act may have fallen behind family life as it is lived in Scotland. It feels out of touch with the Scottish Government National Parenting Strategy which now recognises more clearly the obligations of both parents to promote the wellbeing of their children and with the recognition in public policy of the United Nations Convention on the Rights of the Child, including the right to family life.

It is not a sign of good health for any piece of legislation that a perception of unfairness grows around it. There is such a feeling around the Family Law (Scotland) Act 2006 not only among non-resident parents - most of whom are fathers – but also among the grandparents, new partners and other family members who contact us. It is a sense that has also been shared with us by members of the legal profession and, on occasion, by members of the bench.

Our concerns are with the sections of the Act that affect contact and residence dynamics and with the securing of Parental Rights and Responsibilities. We will address specific anomalies below.

Overall we believe that the law in Scotland on contact and residence is ripe for comprehensive review. We promote an evolution towards the concept of 'shared parenting' as it is practised in other Nordic countries and as urged on member states by a resolution of the Council of Europe last October¹. We feel that the both the Children (Scotland) Act 1995 and in particular the Family Law (Scotland) Act 2006 encourage an adversarial attitude between separated parents that parenting time with their children must be won at the emotional, moral and financial expense of the other.

We believe there is ample evidence from many countries that children do better in all aspects of their life, attainment and wellbeing when both their parents are fully involved in their life and their parents have equal recognition by public services including schools and health providers.

¹ <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=22220&lang=en>

The Scottish Government's National Parenting Strategy² highlights the importance of fathers playing an active role in their children's upbringing. It recognises that the positive involvement of fathers with their children is associated with better exam results, better school attendance and behaviour and better relationships in adult life. Recent results from Growing Up In Scotland show that children not in contact with their father were twice as likely to show high levels of behavioural and emotional difficulties³.

We are also aware that there is a substantial cost to the public purse through legal aid assisting parties effectively to undermine each other in court.

The Family Law (Scotland) Act 2006

We are aware of the Scottish Law Commission Report 1992⁴ and its observation at the time that the law discriminated against unmarried fathers by treating them less favourably than married fathers and unmarried mothers.

The 2006 Act addressed part of that discrimination. The new rights were unavoidable in terms of the European Convention of Human Rights but the Scottish Parliament appeared to choose the most restrictive option at the time. We have reviewed the debates in committee and the chamber at the time and it stands out that the tone was very much directed towards controlling family life of unmarried parents rather than positively promoting it. We believe it remains essentially discriminatory - as flagged by the Scottish Law Commission a decade earlier - by building into statute that the status of separated fathers is largely contingent on the state of the relationship as perceived by the mother.

Section 23 Commencement date

The selection of May 4th 2006 as the commencement date has created two sets of anomalies which arise regularly in calls to FNFS.

The first is that we have unmarried fathers who have Parental Rights and Responsibilities for a child born after May 4th 2006 but not for older brothers or sisters born before that date. This anomaly will persist until 2022, and we suggest that the committee take action now to resolve it.

The second anomaly arises when children were born in England and Wales to unmarried parents after 1st December 2003, the equivalent commencement date south of the border for Parental Rights of unmarried fathers. When parents have separated and the mother has moved with the children to Scotland the father discovers that the rights he had and still has in England have somehow evaporated at the Tweed. Our experience is that the Scottish courts have not been energetically helpful in such cases⁵.

2 <http://www.gov.scot/Publications/2012/10/4789>

3 <http://www.scotland.gov.uk/Resource/0045/00452548.pdf> figure 5.2 page 18

4 <http://www.scotlawcom.gov.uk/publications/reports/1990-1999/#r135> paras 2.36 – 2.5

5 D v CHILDREN'S REPORTER 2009 Fam LR 88

The ministerial view at the time was that the new rights of unmarried fathers should not be made retrospective and that anomalies would be few and would soon fade away. The fear they expressed without much at all by way of evidence was that a decision to make the new rights retrospective might lead to vicarious seeking of parental rights and responsibilities for the purposes of domestic abuse.

Although the families that they affect are comparatively few in number they are very serious when they arise and extremely expensive and disruptive of family life to resolve. We are still contacted for advice and support in these cross border cases on a regular basis. There is a case on this matter in the Court of Session at the time of writing.

Section 24

Our experience is that the overall impact of the act has been to assist a mother who wishes to control or stop the relationship between a non-resident father and their children. Section 24, as it amends the Children (Scotland) Act, is vulnerable to casual and opportunistic abuse.

We recently assisted as lay representative in the Court of Session (JM v PK⁶) a father who challenged the interpretation of section 24 that had been used to reduce his contact with his child to nil. The challenge, using Article 8 of the ECHR, successfully argued that it appears easier effectively to remove the parental rights of a father who actively seeks parenting time with his child than it is to allow the adoption of a child whose father (or mother) wishes no contact.

We believe the requirement to consider issues of domestic abuse set out in Section 24 has provided a perverse incentive to encourage conflict between unmarried parents. We do not excuse or condone abusive behaviour on the part of separated fathers any more than we excuse or condone it on the part of separated mothers.

Domestic abuse is, of course, a serious matter and should be a consideration in any child welfare hearing where estranged parents can't agree arrangements for sharing the care of their children. We feel it is a fundamental weakness of the act that the legislators of the time viewed the proposals disproportionately through the prism of domestic abuse leading to amendment of subsection (7) of section 11 of the Children (Scotland) Act 1995.

Of course evidence of domestic abuse will be a factor in every judicial decision but the effect of the provision has been corrosive not only in court proceedings but much more so in the pre-court correspondence between solicitors. We have heard from many solicitors that Section 24 is the equivalent of putting a button in front of a mother who wishes to exclude the father from her life and that of their children and asking if she'd like to press it. Conflict and disagreement is highly likely to be a characteristic of relationship breakdown and separation but is far from any definition of domestic abuse.

6 <http://www.scotcourts.gov.uk/search-judgments/judgment?id=c88ae0a6-8980-69d2-b500-ff0000d74aa7>

We know of too many decent and loving fathers who have had to cope with unfounded allegations of domestic abuse and effectively been put on trial in the course of their family action. Even when the allegations evaporate under scrutiny months may have passed with no contact time with their children. The relationship between them and their children may be undermined and their relationship with their former partner almost always is.

In this respect we are also concerned about the open-ended instruction to the judge to take a view on domestic abuse that might take place in the future.

Summary

The welcome introduction of Parental Rights and Responsibilities (PRRs) for unmarried fathers whose children were born after May 2006 has left several loose ends and anomalies. Fathers who have to go to court to obtain PRRs are usually doing this within a motion seeking contact or residence, but courts sometimes seem to view the PRRs as an optional bonus, to be withheld until the father has proved his worth. This attitude contrasts strongly with the automatic granting of PRRs to all mothers, married or not.

We believe it is probably time for a review of both the Children (Scotland) Acts of 1995 and 2006. We believe in the current climate they support contrived adversarial behaviour and airing of unfounded accusations aimed at controlling contact with a non-resident parent that damages children and both parents. This behaviour would be pre-empted by a presumption of 'shared parenting'.

Shared parenting is not about a forced, arithmetical division of time that children should spend with each parent, shuttling between their respective homes. It is about a presumption that both parents should be accorded equal respect and recognition in discussions about contact and residence.

Families Need Fathers
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