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## PE1513/G

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Date: 25 June 2014

Dear Mr Sharratt

### **PUBLIC PETITION – PE01513 (the “Petition”) EQUAL RIGHTS FOR UNMARRIED FATHERS MR RON PARK (“the Petitioner”)**

We refer to your letter of 9 May 2014 in relation to the above. The Law Society of Scotland welcomes the opportunity to express its views on the Petition. Our views are noted below, taking each of the Petitioner’s propositions in reverse order. We have also made some observations on the accuracy of the Petition which are contained in the Appendix.

#### **Overview**

The Society supports the introduction of measures that will empower courts to order DNA testing of the child, subject to a best interests test. However, it is important not to conflate establishing paternity with the legal and practical consequences that may flow from this. We do not support the proposition that both parents must be named on a birth certificate before a birth can be legally registered. Nor do we support the proposition there there should be a presumption that both mother and father are fit to be parents or that there should be a presumption of full parental responsibilities and rights for both parents once parentage has been determined.

It is submitted that any law reform should proceed with regard to the following criteria:

1. It must be child centred and premised on the child lawyer’s mantra, embodied in the three fundamental principles of Scots child law: the welfare of the child is the paramount consideration; account must be taken, in the light of the child’s age and maturity, of any views the child wishes to express; and the court should make no order unless to do so would be better than not making the order;

2. It should take account of the reality that domestic abuse will be present in a (significant) number of relationships where there is a dispute; and
3. It should take account of the economic and emotional burden of having to raise an action in court in order to secure the desired outcome.

### **Proposition Three: Court Ordered DNA Test and a Failure to Comply with Order Should Be Contempt of Court**

At present, a mother, not married to her child's father, can seek to prevent him from gaining any recognition at all by:-

- (i) refusing to permit him to register as the child's father; and
- (ii) by withholding consent to DNA testing of the child where a father seeks to establish paternity by means of a declarator of parentage.<sup>1</sup>

The mother may do this for legitimate reasons that attract sympathy, like the fear of domestic abuse or to a lesser extent, to protect the child from the knowledge that he or she is the product of an incestuous relationship or rape. Alternatively, she may do this for less commendable reasons like her own resentment over her relationship (or lack of) with the child's father.

The Society believes that there is much to be said for ensuring that paternity can be established regardless of the mother's preference. This is in line with other areas, such as adoption and assisted reproduction using donor gametes, where the current thinking is that for a child to know the truth about their genetic origins is preferable to ignorance or deception. Furthermore, arguably, article 8 of the UN Convention on the Rights of the Child supports disclosure - at least once the child is old enough to understand.

However, it does not follow that it is *always* in the child's best interests to know the truth about paternity. Again an example of where this would not be the case is where the child results from rape or incest. Consequently, the Society believes that this determination should be left to the court.

Therefore, the Society supports a reform that broadens the tools at the court's disposal by empowering it to order DNA testing of the child, subject to a best interests test. What constitutes good grounds to refuse an order should be left to the court's discretion. It may be that indicators of such grounds could be provided for in statute.

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<sup>1</sup> Law Reform (Parent and Child) (Scotland) Act 1986, s 6(2).

## **Proposition Two: If Both Parents Are Deemed Fit (Which is to be Presumed) Both Parents Should Be Awarded Full Responsibilities and Rights**

The Law Society is concerned about the consequences that would result from the Petitioner's second proposal as this would provide insufficient safeguards where the child's father has abused the mother in the past.

### *Presumption that the Father is a Fit Parent*

The Petitioner proposes that the onus should be on the state or mother to prove that a father was unfit. This would shift the burden of raising a court action from the alleged father to the mother (or the state). The scenario of a rape victim having to raise court proceedings to prevent her rapist exercising parental responsibilities and rights in respect of their child presents the paradigm objection to such an approach.

However, a possible way to avoid such difficulties may be to require a court, hearing a DNA test order, to examine the allocation of parental responsibilities and rights upon receiving the DNA results and prior to granting declarator of parentage. That would save the mother from having to raise an action and she would simply be a party to an action in the same way as she is currently a party when the alleged father raises an action for declarator of parentage.

### *Presumption of Joint Rights for Fit Parents*

The Petitioner's proposal appears to come very close to creating a presumption of equal parenting along the lines of the model introduced in Australia in 2006<sup>2</sup> which was found to be so woefully inadequate in protecting domestic abuse victims<sup>3</sup>. This legislation has since been amended.<sup>4</sup> It was, in part, this experience that led a recent review of family law in England and Wales to recommend: "No legislation should be introduced that creates or risks creating the perception that there is a parental right to substantially shared or equal time for both parents."<sup>5</sup> In the Society's view, any presumption of equal parenting time should be rejected in Scotland not least because it is premised on an adult-centred approach that resonates with a

<sup>2</sup> Family Law Amendment (Shared Parental Responsibility) Act 2006 (Australia).

<sup>3</sup> R Kaspiw, M Gray, R Weston *et al.*, *Evaluation of the 2006 Family Law Reforms* (Melbourne: Australian Institute of Family Studies, 2009); R Chisholm, *Family Courts Violence Review* (2009), available at: [www.ag.gov.au/Documents/Chisholm\\_report](http://www.ag.gov.au/Documents/Chisholm_report); Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence And Family Law Issues* (Barton: Family Law Council, 2009); and Social Policy Research Centre, *Shared Care Parenting Arrangements since the 2006 Family Law Reforms* (Sydney: University of New South Wales, 2010).

<sup>4</sup> Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011 (Australia).

<sup>5</sup> *Family Justice Review: Final Report* (London: Ministry of Justice, 2011), p 142.

view of children as property rather than a child-centred, individualised assessment of the best interests of the particular child.

Whether a father is entitled to full parental is a matter that should continue to be determined by a court. At present, when a Scottish court is addressing the regulation of parental responsibilities and rights, it is directed to apply the three fundamental principles of Scots child law: the welfare of the child is the paramount consideration; account must be taken - in the light of the child's age and maturity - of any views the child wishes to express; and the court should make no order unless to do so would be better than not making the order.<sup>6</sup>

There has been criticism in certain quarters over the lack of sufficient statutory guidance regarding the way in which the "welfare" (best interests) component of this test should be applied by courts. This has left the test open to criticism for being vague and arbitrary, particularly in relation to children being exposed to domestic abuse and uncooperative parents who obstruct contact with the other parent.<sup>7</sup>

The Society believes that it would be desirable to revisit the issue of a "welfare checklist" and to provide the court with more comprehensive guidance on factors that it is – or is not – permissible to take into account. However, this is out with the scope of the present Petition and does not alter our position that the question of parental responsibilities and rights in this context is a matter most suitable for the courts to establish.

**Proposition One: Both parents must be named on a birth certificate before a birth can be legally registered.**

The Petition proposes that both parents must be named on the birth certificate before a birth can be legally registered, save with the consent of court as a last resort. The Society believes that serious negative consequences could result if such a measure was introduced. This proposition is parent-centred with a lack of court oversight or real debate over what will serve the child's best interests.

For example, where the child is a product of rape or incest, there may clearly be sound reasons why the father should not be named on the birth certificate. Similarly, where the mother has been a victim of domestic abuse, an obligation to find the father and insert his name on the birth certificate may jeopardise the health and wellbeing of both mother and child.

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<sup>6</sup> Children (Scotland) Act 1995, s 11(7).

<sup>7</sup> See, E E Sutherland, *Child and Family Law*, 2nd edn (Edinburgh, W. Green, 2008), paras 6-169–6-218.



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Separately, a requirement for both names to be added to a birth certificate would not guarantee that the name of the father inserted would be accurate. A mother may add the name of her then boyfriend to the birth certificate even if he was not the father. The Petitioner does not outline any safeguards to ensure that the name on the birth certificate is accurate.

Finally, from a practical perspective, a requirement for “all avenues to be explored” to determine the child’s father prior to a birth being legally registered would place a huge administrative burden on the state and court system far beyond current resources. In a (significant) number of cases, this provision would mean that the birth could not be registered until a substantial investigation had been undertaken and a determination by court. The economic and emotional burden of any, let alone protracted, court proceedings would certainly not be in the child’s best interests.

Please do not hesitate to contact the writer should you have any questions in relation to this or wish to discuss matters further.

Yours sincerely

**David Paton**  
Law Reform Assistant

## **APPENDIX**

### **Accuracy of the Petition**

#### *Charter for the Rights of the Child*

The Petitioner refers to what he describes as “a charter for the Rights of the Child,” and states that Article 9 of this charter provides:-

"You should not be separated from your parents unless it is for your own good. For example, if a parent is mistreating or neglecting you. Children whose parents have separated have the right to stay in contact with both parents, unless this might hurt the child."

We are not entirely clear what document the Petitioner is referring to. There is *Protecting Children and Young People: The Charter* but that is concerned with the rights of the child in the child protection context. There is also the *Charter for Grandchildren* but that seems not to be relevant. A Scottish Government publication, *The United Nations Convention on the Rights of the Child Explained*, states the position in similar, but not identical, language. We think that the Petitioner may be referring to a document that summarises, in child-friendly language, the United Nations Convention on the Rights of the Child, as the passage quoted mirrors aspects of article 9 of that instrument.

#### *Statistics*

On the assumption that the figures of 174,000 lone parents and 160,080 separated fathers quoted in the Petition are accurate, it does not follow that all – or even the majority – of these fathers are being denied parental responsibilities and rights.

Firstly, there are the fathers who registered (or re-registered) their paternity on or after 4 May 2006 when the Family Law (Scotland) Act 2006 came into force. They acquired the full complement of parental rights and responsibilities just like mothers and married fathers. According to the most recent statistics from the Registrar General, the vast majority of fathers register their parentage. Indeed, in 2012, only 5.2% of children were registered in the name of the mother only.<sup>8</sup> Secondly, there are a small number of fathers who predate the 2006 Act but have full parental responsibilities and rights having concluded a Parental Responsibilities and Rights Agreement under section 4 the Children (Scotland) Act 1995. Thirdly, there are the fathers who secured some parental responsibilities and rights as a result of court action. Finally, there are all the fathers who are exercising parental responsibilities and rights by informal agreement with the child's mother. Thus, the figure of 160,080 grossly overstates the magnitude of the problem.

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<sup>8</sup> *Scotland's Population 2012: The Registrar General's Annual Review of Demographic Trends* (Scottish Government, Edinburgh, 2013), p 23, at: <http://www.gro-scotland.gov.uk/files2/stats/annual-review-2012/rgar-2012.pdf> Since 58,027 babies were born in Scotland in 2012, there were 3,017.4 unregistered fathers.

Nevertheless, the accuracy of the statistics is somewhat irrelevant since injustice suffered by only one person is still injustice and is something that the legal system should address.

*Equality: The Position of the Mother Not Married to her Child's Father*

The Petitioner states the mother “can name any man she likes as the child’s father even if she knows this to be false” leaving the man to “fight a potentially long legal battle” to disprove the assertion of paternity. That is not an accurate statement of the law because a mother cannot register a man as the child’s father without his consent. The avenues open to her are either to raise an action for declarator of parentage or to assert paternity in the child support context. In the first case, she is put to the trouble of raising the action and, in either case, the onus of proof lies on her.

*Court Ordered DNA Testing/Contempt of court*

The Petitioner suggests that currently a court can order a DNA test but that if a mother fails to comply with this then it will not be considered contempt of court. However, the current legal position is that a court can do nothing to compel the mother to consent to testing, nor can it substitute its own consent for that of a competent mother who refuses. Consequently, contempt of court does not arise. Were the law to change so as to empower a court to order DNA testing then a mother who obstructs this request would be liable to a conviction for contempt of court. It may be that the Petitioner is echoing calls that were heard, from some quarters, during discussions that preceded the Family Law (Scotland) Act 2006, for more severe penalties for contempt where a parent (mother) obstructs contact. While the courts do not impose imprisonment for contempt lightly, *S v M*<sup>9</sup> demonstrates that they will do so in appropriate cases.

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<sup>9</sup> 2011 SLT 918.