JUSTICE COMMITTEE

CHILDREN (SCOTLAND) BILL

SUBMISSION FROM MALCOLM WHITE

Although I welcome some of the proposals within the Children (Scotland) Bill 2019, I feel it really still doesn't go as far as it could to be in the best interests of the child. The best interests of the child should be at the heart of this legislation, but it does not do enough to ensure that it does.

There should be a presumption within it, that equal shared parenting is the starting point when parents separate, if they can't agree themselves. This would be caveated though that this wouldn't apply if there was evidence of domestic abuse or some other evidence which would mean this would not be in the best interests of the child. It could only be though, evidence based, anything that would allow for it to move away from this default position. This would prevent what currently happens now, with both parents accusing the other of wrong doings without any evidence to try and get the court to look more favourably on them. This is especially the case at Child Welfare Hearings at present. This does not help their relationship to jointly care for their child(ren) between two homes.

The shared parenting presumption in law would not cut across the fact that the welfare of the child is the paramount consideration, as the Scottish Government have implied. It is evidenced that equal involvement from both parents in the upbringing of a child is beneficial to them unless there is evidence to prove otherwise. The legislation should have this caveat within it, so that it can ensure that the welfare of the child remains as the paramount consideration. Just by including additional factors which needs to be taken into account by the court in the Bill when making an order under section 11(1) of the 1995 Act, such as the effect that the order might have on the involvement of the child's parents in the child's upbringing, does not go far enough to ensure this. The reason for this, as I highlight below, is due to Sheriffs having the traditional view that it is usually in the best interests of the child to spend more time with the mother than the father. This is due to it traditionally being thought that the father works and the mother raises the children. However, this is not the case now, as many mothers also wish to have a career, while fathers wish to be more involved and hands on with the upbringing of their children.

This presumption in law is in place in France, Belgium, Australia, and New Zealand. Research also supports the benefits to children of equal shared care between parents. This would really bring the law in line with modern day practices in most households in Scotland. The days are past now of the mum staying at home and caring for the children while the dad works. Working arrangements and patterns are more flexible now for both men and women. This allows for both to be fully involved in the upbringing of the child(ren). Women now also want to work more and have a career, while men want to be more 'hands on' dads and assist with domestic chores round the family home as well. Although both parents now are equally capable of upbringing a child, unfortunately the majority of Sheriffs in the courts are still very traditional and view the mother to be the primary carer, and the father is the main income earner. They also believe that when parents separate, that they should follow the traditional model of the

dad only seeing the child(ren) every second weekend for residential contact and once through the week for non-residential contact. This is why this presumption in law requires to be put in place, as unfortunately Sheriffs do not appear to have a modern view on family life. Sheriffs that have to deal with family cases should be specially trained in this respect. While it should also be made mandatory for them to undertake a certain amount of training every year in respect of family law cases, especially in respect of subjects such as parental alienation. It would be interesting to see what a Sheriff would do if a case came before them between two women who were the parents of a child(ren) - which is a real possibility these days. By having it stated in law, will ensure Sheriffs do not continue to put their traditional view on family life into decisions they make in court, which can have significant detrimental impacts on the child(ren). Legislation is in place to ensure equality in the workplace between men and women, along with other matters in society. Therefore, why should it not be stated within Family Law? It should be, to ensure parity between both parents. Scotland could lead the way in this respect in the United Kingdom. It could be the first country within it to do this, and bring it into line with countries such as France, Belgium, Australia and New Zealand.

I am a father who has had to go through the court process to only get limited access with my son. I am a loving and hands on Dad, who wants to be fully involved with the care of my son. I have no criminal record or convictions. I am a Chartered Town Planner working in a Local Authority in a management role at present. I have two university degrees and I am from a middle class family of separated parents – where no court action was required to deal with the care of myself and my siblings.

I have found through my own circumstances the barriers which the legislation in relation to the Child Maintenance Service (CMS) puts in place with regard to getting to see my son more often. The same will apply for other parents. This is due to the CMS calculations being based on the number of nights which the child(ren) spends with the non-resident parent. Therefore, there is no incentive for the resident parent to allow the child(ren) to spend more time, especially over-night stays, with the other parent. As it would just result in them being financially worse off. This again reiterates the reason as to why the law should state a presumption of equal shared care between both parents as the starting point. As it would prevent these situations occurring, where it is purely coming down to financial reasons.

The court process is currently very slow and expensive – for both parents. I estimate that over the 17 months since I have been involved in this situation, it has cost my family £25-30,000 in solicitors and legal fees. I estimate that my ex-partner and her family will also have spent a substantial amount of money on fees in this respect. I view this to be wasted money on both sides, and if it had all been able to be secured for our son’s future instead, it would have been put to much better use. I believe that if the default position in the law was equal shared care between both parents, then it would prevent many cases from going to court. As both parents would know that they would not get any more time than this, unless there was substantial evidence to show that it was not in the child’s best interest not to be, such as violence, alcohol problems and domestic abuse. Therefore, they would not waste their money, or public money if funded by the Scottish Legal Aid Board. It would also help speed up the court process as there would not be such a high demand for cases to call there, as there is currently. To help speed up the court process for cases that do go that far, it should also be

stated in the legislation that as quick a decision as possible should be made to prevent it from being further detrimental to the child(ren).

Changes should be made to the legislation in terms of how court orders for family cases are enforced if they are breached. Currently, if a court order is breached, then it can result in that person being sent to prison through being in contempt of court. In these cases, this is not beneficial to either parent. As for the one that is looking for the order to be adhered to and enforced, it is not going to benefit them by pursuing getting it enforced, getting the other parent sent to prison. As the child(ren) is not going to look favourably on the parent that gets the other sent to prison! Therefore, there needs to be other mechanisms put in place that can ensure that family court orders are adhered to properly. This could be making the parent having to undertake community service when the other parent has the child(ren); or reducing the time which they have the child(ren) for in favour of the other parent.

The voice of the child(ren) should be paramount to the decision made by the court. This would be undertaken by improving the way their views are collected, and also feeding back to them the decision of the court. Children should be able to provide their views to court and obtain proper support to help them communicate. It is welcomed that the presumption of a child of 12 years and older can make a view to the court within the Bill. The decision should be based on the individual circumstances and ability of the child(ren) which could be based on school performance reports. Children should also get feedback in an appropriate form on all occasions when decisions are made, not just when the court decides that they should be told why their views weren't followed in the final decision. This would help make it clear to the child(ren) that they are not being asked to make the decisions or to choose between their parents. The people obtaining children's views need to understand a lot about the capacity of children at various ages to express views, and should also develop ways to ensure that the child is not unduly influenced by one parent (either through parental alienation or worry about the effect expression of affection for the other parent may have on the one s/he lives with more of the time). To further assist with this, proper training and regulation should be in place for those who collect the views.

This should also be the position regarding Child Welfare Reporters. A required programme of induction, training and oversight of child welfare reporters should be introduced across Scotland. Child Welfare Reporters are lawyers or, occasionally, social workers appointed by the family court to investigate and report on the circumstances and views of children and the respective parents and some others who know them, so that the sheriff can have an independent source of information. The recommendations made by Child Welfare Reporters have far reaching significance to the children concerned yet there is no transparency in their appointment and no appraisal of performance. This contrasts with the training and appraisal required of social workers and police who interview children in connection with criminal matters where they are taught how to avoid tainting evidence and how to identify 'coaching'. There is also the issue that through some lawyers doing child welfare reports, some sheriffs will become more familiar with them than others or party litigants. This means that when they are representing a client in court, the sheriff is likely to take their word more than the opposition lawyer or party litigant. Even if they don’t have evidence to back up the statement they are making for their client. This creates an element of bias for the party who is represented by this lawyer.

Changes should be made to the terminology used "residence" and "contact" from the courts to stop one parent assuming they can make unilateral decisions on important parenting issues and control relations with schools and health providers. Parents with a residence order often say that this puts them in sole control. They may feel that they are the only decision-maker when it comes to a child's wellbeing or education, and that they are doing the other parent 'a favour' by allowing the child to spend time with him or her. They may also feel that they can dictate how the other parent spends his or her time with the child - giving instructions and demanding, accounting for the time in a way they would consider oppressive and controlling if applied in reverse. In other words, the label puts the 'non-resident' parent in an inferior position, which is not what the Children (Scotland) Act actually intends. Child support legislation in other countries have moved away from this terminology, and so Scotland should do the same. If all court orders simply refer to "parenting" or "children's" orders the disparity can be removed at a stroke. This simple change doesn't undermine the legislation in any way, but would strengthen the understanding of its intent. It would send a clear message that children deserve to see both their parents regarded as equal individuals however much time they spend in the respective homes.

Parental rights and responsibilities (PRRs) should be given to all parents or considerably simplify the process for obtaining PRRs, including compulsion to put both parents on the birth certificate, with provisions for exception in case of rape/incest. All biological fathers and mothers should be granted PRRs. Removal of PRRs in certain cases (incest, rape etc.) should be made easier to cater for the (likely) small number of such cases where it is immediately obvious that the child will not benefit from having paternal or maternal involvement. The current court process for obtaining PRRs is slow and difficult and how it is undertaken, can vary across courts. This change would save court costs and also be compatible with human and child rights and be an equal opportunities measure, as noted in resolution 209 of the Council of Europe. This resolution stresses the benefits for children of the involvement of both parents in their upbringing, and calls on member states to ensure that family law foresees, in case of separation or divorce, the possibility of joint custody of children, in their best interests, based on mutual agreement between the parents.

In summary, although the Children (Scotland) Bill does introduce some elements which will improve the legal system currently, it does not go far enough to ensuring it can make a real difference to children’s lives who unfortunately get caught up in these family disputes when parents separate. Although very important, it appears as though the Bill mainly focuses on families where domestic abuse is an issue, and does not give the same level of support to families where this is not an issue or consideration. A way to greatly improve it would be by introducing the presumption in law that the starting point should be equal shared care between both parents, with the caveat that this is not the position taken if it is proven that domestic abuse, violence, substance misuse issues, etc is an issue with one of the parents. It would not only improve matters for children and parents, but also the judiciary system, as I believe it would reduce the amount of cases which go to court. This has been proven in other countries where this presumption is set out within the legislation.

Malcolm White
14 November 2019