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The unequal power to grant and remove PR from biological parents

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Stephen Williams (called in 2010) practices in all areas of family law, with particular expertise in public law proceedings. Stephen has extensive experience in representing local authorities, parents and guardians. He is well respected for his robust forensic questioning of witnesses, his attention to detail, his application of legal principles and his engagement with clients.

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There can be no doubt that in society men have historically had many advantages over women and many of these unfair and unjustifiable advantages continue to exist today. However, there can equally be no doubt that when it comes to parental responsibility ('PR') for children that some men are at a distinct disadvantage for no particular justifiable reason. As the stereotypical 'family unit' has changed this is an area of law (that whilst niche) appears far overdue for updating.

Current legal position & the perceived problems

Parental responsibility is defined by s3(1) Children Act 1989 as '*all the rights, duties, powers responsibilities and authority which by law a parent of a child has in relation to the child and his property.'* Notably however s3(4) specifically doesn't exclude an individual who doesn't have PR from an obligation to maintain their child.

The reason why all of this is relevant is that all birth mothers acquire parental responsibility automatically, and this acquisition is not affected whether they are married or unmarried to the Father of the child.[1] Similarly fathers who are married to the mother gain automatic parental responsibility[2] however if they are unmarried to the birth mother then they have to 'acquire' it through other provisions within the act.[3] The mechanisms for acquiring parental responsibility for unmarried Fathers are set out in s4(1) CA 1989 but broadly they are:

- He is registered on the birth certificate for the child. This has to be on the first registration rather than on a later alteration;
- He and the Mother enter into a 'parental responsibility agreement' providing for him to obtain PR; or
- He obtains an order from the court granting him PR.

If the number of children born out of wedlock grows, the greater the number of Fathers who need to acquire parental responsibility for children will need to utilise s4(1). In many cases they are registered on the birth certificate and there is no difficulty or hardship suffered. However, if they are not (and the mother doesn't agree to enter into a parental responsibility agreement) then they have to go to court to acquire parental responsibility.

The government when it enacted the Children Act didn't provide any form of statutory test for how a court would judge whether a Father should acquire parental responsibility through a court order, albeit the s1(3) welfare checklist applies to such a decision. Inevitably therefore to fill the void caselaw has developed. The most regular 'test' that has been sought to applied is from Re H[4] within which the Court of Appeal (under the previous statute) provided the following guidance:

'the court would take a number of factors into account, including the degree of commitment which the applicant had shown towards the child, the degree of attachment which existed between them, and his reasons for applying for the order'

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[1] S22C(3) CA 1989
[2] S22C(4) CA 1989
[3] S22C(5) CA 1989
[4] Re H (Minors) (Local Authority: Parental Rights) (No 3) [1991] 2 WLR 763

This tripartite test has subsequently been said by Ward LJ in Re C & V[5] to not be a comprehensive test, but simply a list of factors to be used to *'answer the more general question of whether or not a father has shown genuine concern for the child and a genuine wish to assume the responsibility in law that he already had by natural causes'.* However crucially the court retains a discretion as to whether such a Father should have parental responsibility, a discretion which never exists for a mother or indeed a married father.

There inevitably are circumstances when a discretion about whether an individual should have parental responsibility are sensible. A child born as a result of a violent rape being an obvious and vivid one. However, the child born out of a violent rape whose father was married to his Mother would not have that protection, and no discretion would exist in these circumstances. Similarly, a child born out of a loving but non-marital relationship may end up with a Father who does not have PR as he was never registered, and he doesn't have the funds or ability to attend court to acquire PR.

The situation is compounded further when considering who can have their PR terminated. The only way that a birth mother can lose her PR is through an adoption order being made for the child. This is similarly the case for a married Father. However, any of those unmarried biological Fathers who acquired parental responsibility through any of the mechanisms in s4(1) can have that same PR removed via court order pursuant to s4(2A) CA 1989.

Again, there are inevitably situations where it can be imagined perfectly legitimate reasons why a court might want to remove a parent's PR. However, the current statute only provides for a small subsection of PR holders to have that parental responsibility removed by court order. There is no apparent justification for this distinction as why should one subset of parents who commit such wrongdoing be able to have their parental rights removed whilst others do not?

For both the acquisition and removal of PR there is an inevitable inequality between the sexes of parents but also between the historically recognised 'legitimate' and 'illegitimate' children. It is difficult to see why in 2021 this distinction exists or why it should continue to exist. Such a disparate position cannot be in the best interests of children.

Proposed changes

As for how the position could be changed to remedy these apparent inequities, I would suggest a few changes to the existing statute.

Firstly, the ability for a court to remove parental responsibility appears to be a legitimate and appropriate order to make in limited circumstances. Inevitably the circumstances would vary but there is a considerable bulk of caselaw on the issue which has developed. To remedy the perceived inequality (as set out above) the power under s4(2A) CA 1989 should be extended to also include those who acquire their parental responsibility automatically on birth. It is acknowledged that this may lead to other redrafting of the statute, but this would fulfil the legitimate of aim of providing equality for the power to remove parental responsibility from all parents.

[5][1998] 1 FLR 392

Secondly with respect of addressing the inequality on the granting of parental responsibility there is clearly a public interest for parents to be assumed to have parental responsibility. For every parent to have to apply for parental responsibility would be unworkable. The inclusion on the birth certificate as a ground adds in a large number of unmarried Fathers and parental agreements on PR would bring in more. It is unclear to me actually how many Mothers (who didn't include the Father on the birth certificate) subsequently enter into such agreements, but whatever number there are must help reducing those who have to go to court.

The principle focus for any change is therefore the fathers that do not appear within these other categories. For all of the other fathers (and indeed all mothers) they acquire PR automatically without having to pass any form of discretionary test. It is my view that almost any individual who can prove that they are the biological father to a child, should also have the same automatic grant of parental responsibility.

The mechanism to achieve such a change would appear to be an addition to the statute to provide that either with the confirmation from the Mother that they are the biological Father to a child or DNA testing that proves this biological connection they be granted PR automatically on a paper application. All the arguments about discretion would be removed and there would be a presumption in favour of PR being granted. Of course, in the circumstances where PR was not thought appropriate there would be the power to remove that automatically acquired PR through the pre-existing powers under s4(2A).

It is accepted that these suggestions do not cover the wide array of differing families that now exist in our modern society. Additional considerations would need to be had with respect of sperm donors, and limits would be required to prevent such biological Father's automatically being able to obtain PR for all of their biological offspring years later. This however is a limited exception to a general rule.

Similarly, it might also be argued that for some vile offenders the presumption should be that they never should have PR and it shouldn't be victims who have to go to court to take those automatic rights away. However these incidents are very much the exception to the standard case that comes before the Family Court and with proper judicial oversight (and the provision of legal aid through the Legal Aid Service) such exceptions can be properly managed. There may indeed be other specific nuanced arguments that individuals may be able to come up with against these suggestions. However, it is my view (of course always willing to be persuaded) that these exceptions do not make the unequal treatment on grounds of sex or marital status any more justifiable in 2021 and the rules need to be changed.

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