

**“SCOTS LAW HAS NO EFFECTIVE MEANS OF DEALING WITH MOTHERS WHO WILL NOT ALLOW CONTACT?”**

**Chairman Professor J R G Furnell, Advocate**

**For the motion: Ross Macfarlane, Advocate**

***Porchetta v Porchetta* 1986 SLT 105 (decision of 27<sup>th</sup> April 1984)**

Lord Dunpark (refusing the father’s application for access): “The father’s application for access was made by him on his own admission, because he is the father. He gave no other reason for his application. A father does not have an absolute right of access to his child. He is only entitled to access if the court is satisfied that that is in the best interests of the child.”

***Law Reform (Parent and Child) (Scotland) Act 1986***

Section 3(2): In any proceedings relating to parental rights the court shall regard the welfare of the child involved as the paramount consideration and shall not make any order relating to parental rights unless it is satisfied that to do so will be in the interests of the child.

***Russell v Russell* 1991 SCLR 429**

Sheriff Gordon: “As I see the general picture, there is nothing that can be said against the pursuer [father] which would actively disentitle him from exercising a parental right of access...I have formed a much more favourable impression of the pursuer [father] than I have of the defender [mother], but I doubt if that takes the pursuer very far...Even if the defender [mother] has acted unfairly towards the pursuer, she may still have created a situation in which the interests of the child require that the pursuer [father] be denied access...”

***Sanderson v McManus* 1997 SC (HL) 55 (still under the 1986 legislation)**

Lord Hope of Craighead: “...I consider the effect of section 3(2) of the Act of 1986 is to show that the approach taken by Lord Dunpark [in *Porchetta*] is the one which should now be adopted by the court. This was the approach which was accepted by Sheriff Gordon in *Russell v Russell*...”

***Children (Scotland) Act 1995***

Section 11(7)...in considering whether or not to make an order...and what order to make, the court - (a) shall regard the welfare of the child concerned as its paramount consideration and shall not make any such order unless it considers that it would be better for the child that the order be made than that none should be made at all...”

***Consultation towards the Family Law (Scotland) Act 2006***

<http://www.scotland.gov.uk/Topics/Justice/Civil/17867/13804>

[http://www.scotland.gov.uk/justice/familylaw/responses\\_summary.pdf](http://www.scotland.gov.uk/justice/familylaw/responses_summary.pdf)

***Children (Scotland) Act 1995 (as amended by the Family Law (Scotland) Act 2006):***

Section 11 (7A) In carrying out the duties imposed by subsection (7)(a) above, the court shall have regard in particular to the matters mentioned in subsection (7B) below.

(7B) Those matters are — (a) the need to protect the child from—

(i) any abuse; or (ii) the risk of any abuse, which affects, or might affect, the child; (b) the effect such abuse, or the risk of such abuse, might have on the child...;

(7C) In subsection (7B) above — “abuse” includes — (a) violence, harassment, threatening conduct and any other conduct giving rise, or likely to give rise, to physical or mental injury, fear, alarm or distress; (b) abuse of a person other than the child; and (c) domestic abuse...

(7D) Where - (a) the court is considering making an order under subsection (1) above; and (b) in pursuance of the order two or more relevant persons would have to co-operate with one another as respects matters affecting the child, the court shall consider whether it would be appropriate to make the order.

***Treasure v McGrath* 2006 FamLR 100**

Full circle or a step backwards?

**Against the motion: Kirsty Malcolm, Advocate**

**Donnelly v Green 1998 FamLR 12** : An example of where an appellate court has felt able to interfere with the exercise of discretion in a lower court. There had been no contact between father and child for 18 months, due to the refusal of the mother to allow it but the sheriff principal overturned the earlier decision of the sheriff which was based on the difficulties having been the father's fault and that the access would not be in the child's interests, partly because it would not be encouraged by the mother.

**Davidson v Smith 1998 FamLR 21:**

The court in its dictum states that the sheriff "is entitled and indeed bound to take account of the fact that it is normally in the best interests of a child to maintain contact and relations with the natural parent with whom the child is no longer living. That may be judged as a benefit without the need for evidence from experts or otherwise."

**White v White 2001 SC 689:**

*Held* (1) that a court making an order under [Part I of the Children \(Scotland\) Act 1995](#) requires to have regard to the welfare of the child as its paramount consideration, and will generally consider that it is conducive to the welfare of children if their absent parents maintain personal relations and direct contact with them on a regular basis, particularly since this general principle is to be deduced from Parliament's enactment of [sec 1](#) (*per* the Lord President (Rodger) pp 694D–697E, *per* Lord McCluskey pp 702H–703G); and (2) that the terms of [sec 11 of the Children \(Scotland\) Act 1995](#) are inconsistent with the notion that [sec 11\(7\)\(a\)](#) itself imposes a legal *onus* on the person who asks for an order regulating contact (*per* the Lord President (Rodger) pp 698A–699C, *per* Lord McCluskey pp 702F–H, 703G–704A).

**Article 8 ECHR:**

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

**W v United Kingdom [1998] 10 EHRR 29**

"The mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life. Furthermore, the natural family relationship is not terminated by reason of the fact that the child is taken into public care. It follows—and this was not contested by the Government—that the Authority's decisions resulting from the procedures at issue amounted to interferences with the applicant's right to respect for his family life."

**For the motion: Janys M Scott QC**

The law is ineffective because this is not a legal issue:

**Bruce v Bruce** 1996 GWD 38-2186

Father in Aberdeen seeking contact with children living in Wales was refused order for delivery in Stoke-on-Trent. Mother had frustrated residential access, and had been sentenced for contempt in England (seven days suspended). Court was not prepared to order handover in unfamiliar surroundings.

**Re W (A Minor) (Contact)** [1994] 2 FLR 441

Contact with parent is fundamental right of the child. Avoiding making a decision on the basis that a mother will not obey an order of the court amounts to an abdication of responsibility.

**T v T** 2001 SC 337

Mother accused father of sexual abuse of four year old daughter. After proof the sheriff issued a judgment on 25 August 1999 in which he concluded that "it would not be surprising if the pursuer

(father) had sought sexual satisfaction from his four year old daughter". Five judges reversed his decision on 10 November 2000, but remitted to the sheriff court...

**B v B** – latest decision 9 September 2008, Extra Division

In September 2000 the mother left the father in Aberdeen and took the one child of the marriage to London, where the District Judge made orders, despite having no jurisdiction. The father conducted a fruitless attempt to challenge the jurisdiction of the English courts. There was no hearing dealing with substantive issues of welfare. The Scottish courts (who had jurisdiction) sisted the case, refused to recall the sist and then upheld a plea of *forum non conveniens*, finally reversed by the Extra Division on 9 September 2008. Still no substantive hearing ...

**Henderson v Henderson** 1997 FamLR 120

"I would anticipate that ... the court should normally be able to have regard to the views of the child without the child entering the process and, while there may always be exceptional cases, I would deprecate any general tendency for applications to be made for children to be party minutes and to lodge defences."

*Cf Fourman v Fourman* 1998 FamLR 98

**C v Finland** 46 EHRR 24

Father was Swiss, mother Finnish. She left him to live with her female partner in Finland. Mother died when the children were 12 and 9. The girl said she would like to meet the father occasionally. The boy did not want to see him at all. Reports indicated that the children were dependent on the mother's partner, unable to act against her will, and not allowed to like the father, endangering the development of their identity. Father was awarded custody. This was eventually reversed on appeal, on sole basis of children's wishes. Giving children an "unconditional veto" was in the circumstances a breach of father's article 8 rights. It "left the applicant with the impression that L, the mother's partner, had been allowed to manipulate the children and the court system to deprive him unjustifiably of his parental role."

**Glaser v United Kingdom** (2000) 33 EHRR 1; 2001 FamLR 103

A cautionary tale where a father was unable to enforce an English contact order in Scotland. The court took "reasonable steps". The "complexity of the case" meant that delay was "not unreasonable"....

**Against the motion: Jonathan Mitchell QC**

**OCR 33.22A** – child welfare hearing

**OCR 33.22, RC 49.23** mediation

**Harris v Martin** 1995 SCLR 580

The sheriff issued an interlocutor finding in principle that there should be access, but continuing the case in order that he might be satisfied about practical arrangements. The First Division approved and directed the sheriff to consider referring the dispute to mediation.

*Cf Patterson v Patterson* 1994 SCLR 166

Sheriff Kelbie refused to grant decree in terms of a Joint Minute referring access to the Conciliation Service.

**Thomson v Thomson** 1979 SLT (Sh Ct) 11

An order for delivery is an order *ad factum praestandum*. Leave to appeal is not required.

**Johnston v Johnston** 1996 SLT 499

When contempt is alleged and not admitted a hearing on evidence is required. The issue is whether there has been wilful disregard of the contact order.

**Hunter v Hunter** unreported 11 December 1997, First Division

Sheriff failed to make findings that specified exactly why the mother was in contempt, leading to the quashing of his finding and £100 fine. In view of delay (2 years) there should be no remit to the sheriff. Mother warned that frustration of access ordered for welfare of child would be relevant to any future decision on custody.

See **Contempt of Court Act 1981**, section 15.

**Council Regulation (EC) 2201/2003** provided for direct enforcement of European orders. Registration will result in warrant for execution (**RC 62.72**). Access orders do not generally require registration, **article 41**.

Background material: it is not Scots law that is ineffective, but legal systems per se.

See Scottish Parliament's [debate on Family Law Disputes](#) on 11 September 2008; the motion debated was *'That the Parliament recognises that current arrangements for settling family law disputes could be improved and that current law still discriminates against parents who are not married; notes that parents can find it difficult or impossible to enforce contact orders where the other parent is unco-operative and that disputes where broken families live in more than one jurisdiction within the United Kingdom are unnecessarily difficult to resolve; further notes that these issues are particularly relevant due to recent cases in the north east; encourages current moves by Scotland's legal profession towards collaborative dispute resolution, and notes with interest the new system of less adversarial trials being developed in Australia.'*

In a report leading to the introduction of the Family Law (Scotland) Act 2006, the [Justice 1 Committee concluded](#) (see paragraphs 132 to 140 and references in footnotes) *"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"*.

The Westminster Parliament debated the [difficulties of cross-border contact](#) on 4 December 2007.

The [survey of sheriff clerks](#) referred to, which followed [this feasibility study](#) into cases where difficulties in contact followed allegations of abuse, is [criticised here](#).

See this [literature review](#) into mechanisms for enforcing contact orders in different jurisdictions.

The Ministry of Justice in England has also addressed these issues; see e.g. ['Courts do not treat non-resident parents unfairly – report'](#) and [link to report](#); and ['Conciliation in court helps parents agree over child contact and residence'](#) and [full report](#).