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*The Rights of the Unmarried Father*

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## The Rights of the Unmarried Father

*“Parental Rights to control a child do not exist for the benefit of the parent. They exist for the benefit of the child and they are justified only in so far as they enable the parent to perform his duties towards the child”*

1. So held Lord Fraser of Tullybelton some fifteen years ago in Britain’s House of Lords<sup>1</sup>. Perhaps this reasoning still serves to justify the inclusion of a paper on unmarried fathers’ rights within a conference whose primary object centers on the rights of children.
2. The linking of respect for parental rights to the exercise by the child of his or her rights also finds expression in **Article 5 of the United Nations Convention on the Rights of the Child 1989**<sup>2</sup>; this provides that:  
  
*“ States Parties shall respect the responsibilities rights and duties of parents ...to provide, in a manner consistent with the evolving capacities of the child, appropriate direction & guidance in the exercise by the child of rights recognized in the present convention ”*
3. In jurisdictions around the world there is a tendency when dealing with the rights of all parents (not just unmarried fathers) to refer to ‘Custody Rights.’ Indeed ‘Rights of Custody’ was the term adopted by the draftsmen of Article 3 of the **Hague Convention on the Civil Aspects of International Child Abduction** as being a concept most readily understood in a majority of contracting states.
4. In contrast, in England and Wales for more than a decade the express statutory focus has been upon ‘Parental Responsibility’ rather than custody rights, see: s 3 of the **Children Act 1989** which defines the concept of ‘parental responsibility’ as “ *all the rights, duties, powers, responsibilities and*

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<sup>1</sup> Gillick v West Norfolk and Wisbech Health Authority and Department of Health & Social Security [1986] AC 112.

<sup>2</sup> Although the UN Convention on the Rights of the Child was ratified in the United Kingdom on 16.12.91 it does not have the force of law, but may be used to assist in the interpretation and development of our law.

*authority which by law a parent of a child has in relation to a child and his property”.*

5. Since October 2000 when the **Human Rights Act 1989** came into force in England and Wales, our Courts have been obliged to give effect to primary legislation in a way which is compatible with rights under the **European Convention for the Protection of Human Rights and Fundamental Freedoms 1950<sup>3</sup> (ECHR)**. Chief amongst those ‘convention rights’ which are likely to have relevance to the unmarried father are:

**Article 8:**

*“(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 necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the protection of health or morals, or for the protection of the rights and freedoms of others”*

**Article 14:**

*“The enjoyment of rights and freedoms set forth in this Convention shall be secured **without discrimination on any ground such as sex, race colour, language, religion, political or other opinion, national or social origin association with a national minority, property birth or status.**”*

6. It remains to be seen whether the implementation of these principles will serve to engender a renaissance in the concept of a parent’s custodial rights (distinct from responsibilities) whose recognition is justified independently from the rights of that person’s child.
7. The essential aim of Article **8 of the ECHR** is to protect the individual against the arbitrary interference with his family life by the public authorities. Back in 1950 the dynamic, which impelled the authors of the convention, was the protection of the individual and his family against the inquisitorial practices such as those which Europe had recently experienced under fascist and dictatorial regimes.
8. Since then extensive case law has interpreted ‘necessary’ interference (within Art 8(2) to imply a correspondingly pressing social need, as a well as a level of interference that is proportionate to the legitimate aim pursued. In ruling upon whether an interference is necessary in a democratic state the European Court of Human Rights takes an account of a margin of appreciation left to the Contracting States.
9. In **Johansen v Norway (1996) 23 EHRR 33, 67-68**, para 64 the Court it was put thus:  
*‘... the Court will have regard to the fact that perceptions as to the appropriateness of intervention by public authorities in the care of*

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<sup>3</sup> Section 3(1) Human Rights Act 1998

*children vary from one Contracting State to another, depending on such factors as traditions relating to the role of the family and to State intervention in family affairs and the availability of resources for public measures in this particular area. However, consideration of what is in the best interest of the child is in any event of crucial importance. Moreover, it must be borne in mind that the national authorities have the benefit of direct contact with all the persons concerned, often at the very stage when care measures are being envisaged or immediately after their implementation. It follows from these considerations that the Court's task is not to substitute itself for the domestic authorities in the exercise of their responsibilities for the regulation of the public care of children and the rights of parents whose children have been taken into care, but rather to review under the Convention the decisions that those authorities have taken in the exercise of their power of appreciation ... The margin of appreciation so to be accorded to the competent national authorities will vary in the light of the nature of the issues and the seriousness of the interests at stake. Thus, the Court recognizes that the authorities enjoy a wide margin of appreciation in assessing the necessity of taking a child into care. However, a stricter scrutiny is called for both of any further limitations, such as restrictions placed by those authorities on parental rights and access, and of any legal safeguards designed to secure an effective protection of the right of parents and children to respect for their family life. Such further limitations entail the danger that the family relations between the parents and a young child are effectively curtailed.'*

10. Notwithstanding the fact that parents' rights are now almost universally acknowledged, legal jurisdictions throughout Europe (and it is believed a majority of jurisdictions throughout the world) continue to draw a distinction between rights in respect of children born to married and unmarried fathers. This may be because the concept of 'custody rights' being held jointly by parents requires that paternity be already established. In most jurisdictions there is a legal presumption that a husband is the father of any child born to his wife during their marriage. Theoretically the Law could confer the same rights of joint custody on mothers and fathers irrespective of their marital status or whether or not they live together. To do so would certainly ensure the equal treatment of all children, and non-discrimination between the father and mother.
11. In the past it may have been assumed that mothers and fathers who do not marry do not necessarily want to take joint responsibility for raising their child, but it is clear that such assumptions may no longer reflect the realities of real life. In 1997 a Paper published by the Council of Europe<sup>4</sup> recorded that statistically one half of all children born in Sweden and Denmark are born out of wedlock. In France it is one third, in Austria one fourth, in Germany one sixth, in the Netherlands and Spain it is one tenth, whilst in Italy and Switzerland it is six to seven percent.

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<sup>4</sup> 'Legal Problems Relating to Parentage' XXVIIth Colloquy on European Law, Foundation for International Studies Valletta (Malta) 15-17 September 1997 see page 99.

12. More recently figures for the United Kingdom published in 1999<sup>5</sup> show that live births to unmarried mothers are now over one third. It is of course more difficult to establish how many of those children are living in families with their natural father and mother. However, the UK has seen a corresponding rise in the number of births which are jointly registered by both parents: by 1997 80% of all children born to unmarried parents were jointly registered and of those, 75% of the registering parents were living at the same address. This tends to suggest a high level of stable family units existing outside marriage.
13. In my experience as a family law barrister it comes as surprise and a shock to those unmarried fathers to discover that they do not automatically enjoy the same rights as any other (married) father.
14. In most European states unmarried parents do not enjoy automatic joint custody rights by operation of law; as a minimum both parents must expressly agree to it, or otherwise the father can apply for it. The requirements of different jurisdictions vary considerably. The Family Law Codes of the Czech & Slovakian Republics<sup>(34 par.1)</sup> and Hungary<sup>(72 par.1)</sup> are the most liberal providing for joint custody for all children irrespective of their parents marital status. The Civil Codes in Spain<sup>Arts 154 & 111</sup> and Poland<sup>Art 93(2)</sup> allow for automatic joint custody if a man voluntarily recognises paternity (but not if paternity is established non-consensually in judicial proceedings since a lack of interest in raising the child is thereby presumed). Civil Codes in France<sup>Art 372par 2</sup> and Italy<sup>Art 317 et seq</sup> provide for automatic joint custody when the applicants are living together.
15. In England and Wales the **s2 (2) of the Children Act 1989** specifies that in the case of unmarried parents only the mother shall have ‘parental responsibility’ (custody rights) in relation to their child. The only way in which an unmarried father can acquire parental responsibility is (under section 4) if he successfully applies to a Court for it, or other wise both parents enter into ‘a parental responsibility agreement’ in a prescribed form.
16. In **B v UK ECRH [2000] 1 FLR 1** (14 September 1999) a challenge was made by an unmarried father relying on Arts 8 and 14 of the European Convention on Human Rights that his rights as an unmarried father whose child had been wrongfully removed from the jurisdiction were not protected in the UK in the same manner as the rights of the married father.
17. The facts were that the father did not have ‘parental responsibility’ for his child (by one of the means available in the Children Act described above). The child lived with his mother but had a great deal of contact with his father. The mother took the child to live in Italy with her. The father had applied to a county court for a parental responsibility order and an order that the child be returned to the jurisdiction. He subsequently also applied for, but was refused, inter alia, a declaration ex parte that the child had been wrongly removed from the UK within the meaning of Art 3 of the

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<sup>5</sup> ‘Social Trends 29’ (issued 1999) Section entitled ‘Households and Families’

Convention on the Civil Aspects of International Child Abduction 1980. The purpose of the declaration was to obtain the return of the child to the jurisdiction. On appeal the Court held that the father had no 'rights of custody' within the meaning of Arts 3 and 5 of the Convention, and therefore could not assert the child had been 'wrongfully removed'. Neither (as the Court of Appeal held at that time) could the courts be said to have 'rights of custody' vested in them simply by virtue of the fact that there were pending applications.

18. In the European Court of Human Rights it was held that the father's application was inadmissible. The Court held this was because there was an objective and reasonable justification for the difference in treatment between married and unmarried fathers with regard to the automatic acquisition of parental rights, which related to the range of possible relationships between unmarried fathers and their children. These might range from ignorance and indifference to a close stable relationship indistinguishable from the conventional family unit. The ECHR thereby justified the difference in treatment between those with parental responsibility and those without. Further it was held that the UK Court's refusal to consider that they held custody rights as a result of the father's institution of proceedings was objectively and reasonably justified bearing in mind that custody was an important decision upon which there had been no inter-partes hearing.
19. Provided that domestic law offers a mechanism whereby the unmarried father's relationship with his child is capable of being recognized, (such as s4 Children Act) it seems that the failure to accord identical rights to all fathers will be considered justifiable in European Law
20. The differential treatment of unmarried and married fathers may be justifiable discrimination in the eyes of the ECHR, but it is a measure of the perceived injustice which it engenders within the community, that the Courts and the legislature alike have since shown a willingness to move on from this restrictive approach:
21. In a case not dissimilar from **B v UK [supra]** I was involved in Hague Convention case on behalf of an unmarried Irish father in the middle of 1999: see **re H (Abduction: Rights of Custody) [2000] 1 FLR 274**. This father too had separated from the mother but had maintained contact with his daughter (albeit interrupted from time to time by periods when he was in prison). The father had initiated proceedings under the Irish Guardianship of Infants Act 1964, seeking guardianship (i.e. rights of custody) and access. At the first hearing the application was adjourned by consent, access having been agreed in the interim. One month before the case was due to return to court, the mother removed the child from Ireland to England. The father's application for the return of the child to Ireland under the Hague Convention came before the House of Lords in December 1999. Although this unmarried father still held no statutory rights of custody under English or Irish law, the Court *was* willing to enable his application to succeed by finding that the Court could be capable of holding rights of custody, if its

jurisdiction had been invoked in respect of matters of custody within the meaning of the Convention. Legal proceedings (once served, or possibly once issued but unserved), which called upon the court to determine a child's place of residence, gave the court a right of custody which would endure until the pending application was disposed of. In this case the Irish Court was held to hold custody rights as a result of the father's pending Guardianship application, and since these had been breached by the mother's unilateral removal of the child, her return to Ireland should be ordered under the provisions of the Hague Convention.

22. On the legislative front developments are also pending in this country. By **Part II of the Adoption and Children Bill 2001 (s91)** the Children Act 1989 (and s 4 in particular) is to be amended. When the bill becomes enacted by Parliament, an unmarried father will become automatically entitled to parental responsibility if he becomes registered as the child's father on the child's birth certificate. The consultation papers which preceded this bill made it clear that the legislature was mindful of growing the numbers of unmarried fathers in stable unions who believed that they automatically held equivalent rights to married fathers and were aggrieved when they found they did not.
23. If some indicator of commitment between a father and child is considered a necessary prerequisite to automatic custody rights, it might be observed that the signing of a child's birth register is at least a more direct indicator of this, than the signing of a marriage certificate.
24. What then remains the argument for not according automatic parental responsibility to all fathers married or unmarried irrespective of the pieces of paper they may have signed? Two reasons most frequently cited are: that it should not be imposed upon those who do not marry and have no wish to acquire parental responsibility, and secondly that there are categories of unmarried father who by virtue of their conduct (e.g. rape or serious violence) demonstrate no commitment to fatherhood and are not appropriate recipients of that responsibility. It will be interesting to compare arguments and experiences with those delegates whose countries *have* embraced automatic parental rights for all fathers, to see how such concerns may be dealt with elsewhere
25. Another question (which could be the subject of separate debate in itself) is: what does the grant of parental rights or responsibilities really mean to the unmarried father? In England (as in most European states) the obligation of financial support for a child binds the father whatever parental rights he may or may not have<sup>6</sup>. So too (in England & Wales) does the obligation to ensure his child receives full time education<sup>7</sup>. Amongst the rights which may exist irrespective of the grant of parental responsibility are the right to

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<sup>6</sup> Child Support Act 1991 s 54

<sup>7</sup> Ss 7,9,& 576 Education Act 1996

contact with a child who is in local authority care,<sup>8</sup> and the right to be consulted by that authority when it reviews the position of a child it is looking after<sup>9</sup>

26. However the grant of parental responsibility remains essential to the unmarried father if he is to be allowed the right to refuse his consent to his child's adoption<sup>10</sup>, or to his or her marriage under the age of 18<sup>11</sup>, or to object to the issue of a passport to that child, or if he is to be allowed to seek the discharge of a care order<sup>12</sup> or remove his child from voluntary care<sup>13</sup>. Judicial decisions have also affirmed the right of the father who has parental responsibility to object (in judicial proceedings) to a proposed circumcision or sterilization of his child, or to a unilateral change of his child's school, or of his surname. Only after the making of a residence order under s 8 of the Children Act, however may the unmarried father rely on a power to veto (without the need for Court application) any change of his child's name, or his removal from the country.<sup>14</sup>

27. It has been observed by **John Eekelaar (Pembroke College Oxford) in a recent article entitled "Rethinking Parental Responsibility"**[June [2001] **Family Law** page 426 that the law must bear some reasonable relationship to social life, that if a father has a duty to see his child educated irrespective of parental responsibility he must also be under a duty also to tend to his health and make the decisions necessary to promote his health. Millions of fathers may be daily making these decisions concerning their children's upbringing, but in the case of unmarried fathers without parental responsibility, the law does not recognize that they have any right to do this.

28. With the increasing mobility of peoples between international states, and the potential for conflicts of laws, the importance of an internationally applied set of minimum rights for unmarried fathers grows more pressing. An unmarried father traveling with his family from state A which accords him automatic rights to (say) consent to his child's medical treatment, or obtain a passport, may suddenly find those rights are denied him in state B. In the event of some tragedy involving the death of the mother, he may be the obvious person to continue making decisions on behalf of the child but (whilst many are likely to be required at such a time) the local law may well accord him no automatic rights to do so.

29. One of the saddest cases of my career involved an unmarried father, whose only son was tragically killed by the mother's new partner. Whilst mother and partner were imprisoned, the father was unable to secure the release of his son's body from the authorities for burial, simply because he lacked

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<sup>8</sup> Child Act 1989 ss34 (1)(a) and 12(2)

<sup>9</sup> Children Act 1989 ss26 (2)(d) and 12(2)

<sup>10</sup> Adoption Act 1976 ss16 & 72 (unchanged by the Adoption & Children Bill 2001)

<sup>11</sup> Marriage Act 1949 s 3(1A)(a) & (b)

<sup>12</sup> Children Act 1989 s39 (1)(a)

<sup>13</sup> Children Act 1989 s20 (7)&(8)

<sup>14</sup> Children Act 1989 s 13

‘parental responsibility’. At a time of extreme grief he had to find and instruct legal representatives to issue a Court application for parental responsibility first. It is not difficult to imagine the extra hardship and stress that would lie in the path of a father from a differing foreign jurisdiction faced with such treatment.

30. There are perhaps after all some instances when Lord Tullybelton’s observation does not apply, and parental rights to control a child *can* fairly be said to exist for the benefit of the parent rather than the child.

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