

## **Rights and Responsibilities Towards Children:**

### **Does the current law do enough to ensure that unmarried fathers can access parental responsibility?**

Hannaley Palmer

#### **Abstract**

This dissertation analyses the current law in regard to parental responsibility, with particular emphasis being placed on the standing of the unmarried father. There is a detailed discussion into the suggestion that all fathers should be automatically awarded parental responsibility of their child, regardless of whether they were married to the mother at the time of birth or not. An alternative to this suggestion is that the law should make joint registration of a child's birth compulsory in England and Wales. This would have the equivalent effect of automatically awarding parental responsibility to all fathers, based on the fact that those who are registered on a child's birth certificate after the 1<sup>st</sup> of December 2003 are awarded parental responsibility as a direct result<sup>1</sup>. Whilst there is a possibility that any unmarried father who acquires parental responsibility in this way could have it removed by the court if it is deemed necessary<sup>2</sup>, previous case law demonstrates that the courts are reluctant to remove parental responsibility, unless there are serious justifications for doing so<sup>3</sup>. In addition, this dissertation contains a comparative review of other jurisdictions which employ different methods to establish parental responsibility.

---

<sup>1</sup> Section 4 of the Children Act 1989, as amended by the Section 111 of the Adoption and Children Act 2002

<sup>2</sup> Section 4 (3) of the Children Act 1989

<sup>3</sup> Such as causing physical harm to the child as in *Re P (Terminating Parental Responsibility)* [1995] 3 FCR 753; [1995] 1 FLR 1048; [1995] Fam Law 471, or emotional harm as in *CW v SG* [2013] EWHC 854 (Fam)

## Introduction

The term 'parent' is one which is used constantly within society, and yet there is no clear, single definition as to who qualifies as a 'parent'<sup>4</sup>. The traditional approach, and the one which is most commonly referred to, is that a parent is the mother or the father who cares for and raises the child, the general presumption being that they genetically produced the child. This view, however, is not applicable to all modern families, as the dynamics of family life have developed over time. One such example of where there has been a major change is in regards to the increase of the 'step-parent', whereby an adult who is unrelated to the child genetically but married to a genetic parent, treats the child as their own and practically acts as a parent. It would therefore be unjust to say that these individuals, who act as parents and care for the child, are entirely removed from that status. It is for reasons such as this that the law has distinguished between different types of parenthood<sup>5</sup>, establishing that there is *parentage*, *parenthood* and *parental responsibility*<sup>6</sup>. *Parentage* refers to the male and female who are the genetic parents of the child. This includes situations such as where there is a donor of gametes, who will only usually possess this type of being a parent. *Parenthood* is the title which is given to those who are considered the child's parents by law. Usually this is the genetic parents of a child, with the exceptions being where there was the use of a registered sperm donor or where the child has been adopted. *Parental Responsibility* is generally considered to be the most important aspect of being a parent as it refers to those who have rights and responsibilities in respect of the child, and is considered

---

<sup>4</sup> Section 576 of the Education Act 1996 defines a parent as not only the natural parents (the biological mother and father) but also to include anyone who may have responsibility for a child or care of a child. It is not, however, a straight forward and definitive definition

<sup>5</sup> Eekelaar made a distinction between the legal, genetic and social aspects of parenthood in Eekelaar, J. 'Parental Responsibility: State of Nature or Nature of the State?' (1991) 13 Journal of Social Welfare and Family Law 37

<sup>6</sup> Bainham, A. 'Parentage, Parenthood and Parental Responsibility: Subtle, Elusive Yet Important Distinctions' (1999) as cited in Herring, J. (2011) *Family Law: Fifth Edition*

crucial to be able to effectively act as a parent. This does not mean that only those who are a legal parent can have parental responsibility for a child, but instead it can be awarded to those who act as a 'social parent', such as a step-parent. It is this final level of being a 'parent' which is the focus of this dissertation.

*Parental Responsibility* is defined by section 3 (1) of the Children Act 1989 as being “*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*”<sup>7</sup>. This definition demonstrates that the only way in which a person is capable of properly exercising any form of authority over a child is to be in the possession of parental responsibility, thus is a critical concept in regards to the relationship between children and their parents. This is however, somewhat problematic due to the fact that not all parents are automatically conveyed parental responsibility and it can be quite difficult to establish whether they are entitled to be a holder of parental responsibility. This refers to the position of the unmarried father. It is the birth mother (i.e., the woman who carries and gives birth to the child), and the father who was married to the mother at the time of the child's birth, who are automatically awarded parental responsibility. This has been argued to cause inequality both based on gender, and between the different categories of fathers.

This dissertation will analyse the current law regarding parental responsibility to establish whether it does enough to ensure that parents are able to access these responsibilities. The main area of focus will be on the position of the unmarried father, compared to mothers and married fathers, concluding whether enough is being done by the law to ensure that unmarried fathers are able to exercise the responsibilities which, by the course of nature,

---

<sup>7</sup> Section 3 (1) of the Children Act 1989

should belong to them. One suggestion which has been put forward is, to try and create greater equality between the various parties, and give unmarried fathers automatic responsibility in the same way that married fathers have<sup>8</sup>. This, however, has had considerable opposition<sup>9</sup> as, it was believed that giving all unmarried fathers automatic parental responsibility could potentially jeopardise both the welfare of the child and the rights of the mother. Those who oppose automatic parental responsibility believe there are sufficient ways in which a 'meritorious' father can gain parental responsibility<sup>10</sup>, and it would be pointless conveying parental responsibility upon those who do not want it<sup>11</sup>.

Another suggestion is to make the joint registration of a child's birth compulsory<sup>12</sup>. This would mean that wherever possible and practical, a child would have both a mother and father listed on their birth certificate. Part of the argument in favour of this is that having both names on the birth certificate would be highly beneficial to the child's welfare, boosting their self-esteem and would allow them to have a better understanding of their biological identity<sup>13</sup>. However, this has been countered by the argument that this, along with the idea of automatic parental responsibility for unmarried fathers, could have a

---

<sup>8</sup> Suggestions of awarding parental responsibility automatically to all fathers was demonstrated by the Lord Chancellor's Department in their Consultation Paper *'The Procedures for the Determination of Paternity and on the Law on Parental Responsibility for Unmarried Fathers'* (1998) A Lord Chancellor's Department Consultation Paper accessed via

<http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/consult/general/patfr.htm> (07/11/2013)

<sup>9</sup> Particularly from organisations such as Rights of Woman and Women's Aid

<sup>10</sup> Outlined in *Section 4 of the Children Act 1989*

<sup>11</sup> This point was considered by the Law Commission in their report *'Review of Child Law: Guardianship'* [1988] EWLC 172, paragraph 2.17 who believed that there were good reasons why some unmarried fathers should not be granted parental responsibility. See also Pickford, R. *'Unmarried Fathers and the Law'* in Bainham, A., Day Sclater, S. & Richards, M. eds. (1999) *What is a Parent? A Socio-Legal Analysis* at page 145

<sup>12</sup> Department for Work and Pensions' White Paper *'Joint Birth Registration: Recording Responsibility'* June 2008 Cm. 7293 at paragraph 25 – this has been somewhat implemented in *Schedule 6 of the Welfare Reform Act 2009*

<sup>13</sup> Department for Work and Pensions' White Paper *'Joint Birth Registration: Recording Responsibility'* June 2008 Cm. 7293 at paragraph 23. See also Bainham, A. *'What is the Point of Birth Registration?'* (2008) 20 Child & Fam. L. Q. 449 at page 459

negative effect on children's welfare<sup>14</sup>. The main reason for this is that, if made compulsory, those who registered the birth of a child would have parental responsibility conveyed to them by the simple fact that their name appears on the birth certificate<sup>15</sup>, which would be similar to granting parental responsibility automatically. It is therefore necessary to analyse the balance of the father's rights, the child's welfare and the wishes of the mother, to conclude whether this reform would be desirable and practical.

### **Current law on parental responsibility**

The current law regarding parental responsibility is the result of constant development, whereby the law is trying to ensure that it reflects society wherever possible. One of the first major changes to the law was the removal of the distinction between legitimate and illegitimate children<sup>16</sup>. This was necessary due to the shift in society, whereby more and more children were being born 'out of wedlock', largely due to the shift in attitude whereby it is no longer essential to marry before having children. The number of births which occur outside of marriage are still steadily increasing, as was found by Pickford; the number of births outside of marriage in 1971, accounted for only 8 per cent of all live births<sup>17</sup>, but by 1996 this had increased to 36 per cent and *"by 2010, just under 47 per cent of births occurred outside of marriage"*<sup>18</sup>. These statistics are crucial as they show that there is a shift in attitude as to whether it was necessary to marry before starting a family, and suggest that within the next 20 years the majority of births will be to unmarried mothers.

---

<sup>14</sup> Herring, J. (2011) *Family Law: Fifth Edition* at page 330

<sup>15</sup> *Section 4 of the Children Act 1989* as amended by *Section 111 of the Adoption and Children Act 2002* – applies only to those whose name appears on a certificate registered after December 1<sup>st</sup>, 2003

<sup>16</sup> The *Family Law Reform Acts of 1969 and 1987* set out to remove the legal disadvantages of illegitimacy

<sup>17</sup> Pickford, R. 'Unmarried Fathers and the Law' in Bainham, A., Day Sclater, S. & Richards, M. eds. (1999) *What is a Parent? A Socio-Legal Analysis* at page 143

<sup>18</sup> Probert, R. (2012) *Cretney and Probert's Family Law: Eighth Edition* at page 16

The main problem with the change in society is that the primary way of establishing paternity, and parental responsibility, in England and Wales is through the institute of marriage. Currently, the only people who are automatically awarded parental responsibility are the birth mothers<sup>19</sup> of the child<sup>20</sup>, (regardless of whether they are married or not), and those fathers who were married to the mother at the time of the child's birth<sup>21</sup>. As the law currently stands, there is no automatic presumption of parental responsibility for unmarried fathers, and instead they must acquire it through one of the prescribed methods described within section 4 of the Children Act 1989. The primary method in which an unmarried father is able to gain parental responsibility is by being named on the child's birth certificate. However, this only applies to those who have registered, or re-registered, the birth after the 1<sup>st</sup> of December 2003<sup>22</sup>. For those unmarried fathers who were registered before this date, there are two ways in which they can be granted parental responsibility. It is either through cooperation with the mother in regards to a Parental Responsibility Agreement (PRA)<sup>23</sup> or, where there can be no agreement between the parents, by applying for a Parental Responsibility Order (PRO)<sup>24</sup> from the court<sup>25</sup>. Alternative methods of indirectly obtaining parental responsibility is to subsequently marry the mother of the child<sup>26</sup>, by obtaining a residence order (whereby, if a father does not already have parental responsibility, it will be awarded to him<sup>27</sup>) or by being appointed as the child's guardian<sup>28</sup>.

---

<sup>19</sup> Meaning the woman who carries and births the child

<sup>20</sup> *Section 2 (1) and 2 (2) of the Children Act 1989*

<sup>21</sup> *Section 2 (1) of the Children Act 1989*

<sup>22</sup> *Section 4 of the Children Act 1989 as amended by the Adoption and Children Act 2002*

<sup>23</sup> *Section 4 (1) (b) of the Children Act 1989*

<sup>24</sup> *Section 4 (1) (c) of the Children Act 1989*

<sup>25</sup> Walsh, E. & Geddes, G. (2010) *Working in the Family Justice System – The Official Handbook of the Family Justice Council: Third Edition* at page 246

<sup>26</sup> *Section 2 (3) of the Children Act 1989 with reference to Section 1 of the Family Law Reform Act 1987* – this only applies to the father of the child and not other men who consequently marry the mother (step-parents)

<sup>27</sup> *Section 12 (1) of the Children Act 1989*

<sup>28</sup> *Section 5 (6) of the Children Act 1989*

With any order which is given by the court, the primary consideration is the best interests of the child<sup>29</sup>. It is for this reason that the courts must consider whether an unmarried father is committed enough to the child before they grant parental responsibility. In the case of *Re H (Minors) (Local Authority: Parental Rights) (No. 3) [1991]*<sup>30</sup>, the court stated that for an unmarried father to be granted parental responsibility the court must consider; “(1) the degree of commitment which the father has shown towards the child; (2) the degree of attachment which exists between the father and the child; and (3) the reasons of the father for applying for the order”<sup>31</sup>. This could prove problematic for those fathers who have been denied access to their child by the mother, as it would be difficult to prove commitment to a child who has never been in your presence. This demonstrates that while in theory the PRO might be a good idea, it does not offer a clear solution for the unmarried father to gain parental responsibility.

In addition to awarding parental responsibility, another issue arises in regards to the removal of parental responsibility. Parental responsibility usually ends when a child turns 18, and otherwise cannot generally be removed unless the child is given up for adoption<sup>32</sup>. However, unmarried fathers can have their parental responsibility removed by a court order<sup>33</sup>, if the court feels that it is necessary to do so. Generally, the courts do not use this ability to remove parental responsibility as it can go against the best interests of the child to deprive them of a fully responsible father. There are however, two identifiable cases where

---

<sup>29</sup> Article 2 of the United Nations Convention on the Rights of the Child (1989) and Section 1 of the Children Act 1989

<sup>30</sup> *Re H (Minors) (Local Authority: Parental Rights) (No. 3) [1991]* Fam 151; [1991] 2 All ER 185

<sup>31</sup> *Re H (Minors) (Local Authority: Parental Rights) (No. 3) [1991]* as quoted from Harris, P. & George, R. ‘Parental Responsibility and Shared Residence Orders: Parliamentary Intentions and Judicial Interpretations’ (2010) 22 Child & Fam. L. Q. 151 at page 158

<sup>32</sup> Hoggett, B. (1993) *Parents and Children: Fourth Edition* at page 34

<sup>33</sup> Section 4 (3) of the Children Act 1989

this has happened. In *Re P (Terminating Parental Responsibility) [1995]*<sup>34</sup>, the judge allowed the application by the mother to terminate the unmarried father's parental responsibility due to the fact that he had forfeited his responsibility by causing physical harm to the child. It was stated in this case that whilst it is possible for unmarried fathers to have their parental responsibility revoked, this "*should not become a weapon in the hands of the dissatisfied mother of a non-marital child*"<sup>35</sup> and instead should only be granted on the basis that the child's welfare is of paramount consideration. This was supported by the recent case of *CW v SG [2013]*<sup>36</sup>, where it was accepted that although it is important for the child to know his origins, and where possible, have a relationship with each biological parent, consideration must also be given to the effect that interference by the father might have on the child's family life. In this particular case there was a need for emotional security above all else, which would have been jeopardised if the father continued to have an involvement in the child's life. The court acknowledged that there needs to be consideration given in regards to both the father's and child's rights under article 8<sup>37</sup>, but the rights of the child outweigh those of the father and as such, parental responsibility must be terminated. Article 8 provides that everyone has the right to respect for his private and family life, so by balancing the rights of both the child and the father, it is more important for the child to have a private life without interference so that they can grow up properly. This can seem unfair on the father, particularly considering parental responsibility could not have been removed if the father had been married to the mother at the time of birth but, it is the best interests of the child which must be of paramount importance in every decision. Other than the above examples where parental responsibility was removed in the best interests of the

---

<sup>34</sup> *Re P (Terminating Parental Responsibility) [1995] 3 FCR 753; [1995] 1 FLR 1048; [1995] Fam Law 471*

<sup>35</sup> *Re P (Terminating Parental Responsibility) [1995] 3 FCR 753 at page 753*

<sup>36</sup> *CW v SG [2013] EWHC 854 (Fam)*

<sup>37</sup> *Article 8 of the European Convention on Human Rights 1950*



child, it is possible for parental responsibility or residency to be awarded to an unmarried father where it is thought to be beneficial to the child. One example of this is the case of *Re A (Custody)* [1991]<sup>38</sup> where the father of a young child was awarded custody of his daughter due to the fact that it was in her best interests to stay where she was and not be moved to live with her mother, from whom she had been separated from for some time. The courts will also take into consideration the child's wishes and feelings in particular circumstances, especially in cases of older children, as this might influence the courts as to what they believe is in their best interests<sup>39</sup>.

Therefore, as the law in this area stands, automatic parental responsibility is only granted to the birth mother of the child and to the father who was married to the mother at the time of birth. While unmarried fathers do not qualify for parental responsibility automatically, they can acquire it in a number of ways, either with or without the cooperation of the mother. If the mother does not cooperate in awarding the unmarried father parental responsibility, then he must prove to the courts that he is committed to his child and as such deserves to have parental responsibility. The only category of persons with parentage whom can have their parental responsibility revoked, without having the child adopted, are unmarried fathers, the argument being that it will only be revoked where it is of the utmost importance for the child's welfare. The courts have demonstrated their reluctance to removing parental responsibility by only applying it in two cases where there were direct conflicts between the child's rights and their fathers.

---

<sup>38</sup> *Re A (Custody)* [1991] 2 FLR 394

<sup>39</sup> Such as in the case of *Williamson v Williamson* [1986] 2 FLR 146 where the children's reasons for wanting to stay with their father were paramount in deciding which parent should have custody and in *M v M (Custody Appeal)* [1987] 1 WLR 404 where the appeal was allowed due to the fact that the judge had failed to take account of the child's adamant opposition to her mother having custody

## **The present law regarding parental responsibility is unsatisfactory**

It is generally accepted that the position of the law in regards to parental responsibility has been adapted to better reflect the changes in society, however it does not appear that these changes have been substantial enough and have in fact, only made a small amount of progress<sup>40</sup>. The percentage of children who are born outside of marriage has been steadily increasing since the 1970s, to the point where nearly half of all children born are to unwed mothers. Yet the law still does not treat married and unmarried fathers in the same way. The main point of grievance is the fact that the only category of legal parent who are not automatically awarded parental responsibility is that of unmarried fathers. Instead, the unmarried father must establish his parental responsibility as per the provisions set out in section 4 of the Children Act 1989. Owing to the nature of the provisions, the only way in which an unmarried father can gain parental responsibility is to have the cooperation of a third party; either the mother who consents to the father's name appearing on the birth certificate, or the father being awarded parental responsibility through a PRA, or, where there is no agreement between the mother and father, applying to the courts to gain a PRO. The other major problem with the current law is that the only category of people who can have parental responsibility removed by order of the court is unmarried fathers<sup>41</sup>. Whilst some believe it is necessary to ensure that the best interests of the child are maintained, it has been argued to be discriminatory and thus should apply to all categories of parent equally<sup>42</sup>. A suggestion for reform which has been made<sup>43</sup> is to award all fathers, regardless

---

<sup>40</sup> Macmillan Moon, R. *'An Examination of UK Law as it Pertains to the Unmarried Father: Current Legal Thinking in an International Context'* (2010) 6 (1) CSLR 259 at page 261

<sup>41</sup> And all others who are not the legal parents of a child and gain parental responsibility by way of an order

<sup>42</sup> Nigel Lowe conducted a study for the Committee of Experts on Family Law and ultimately proposed that all parents should have parental responsibility – as cited in Macmillan Moon, R. *'An Examination of UK Law as it Pertains to the Unmarried Father: Current Legal Thinking in an International Context'* (2010) 6 (1) CSLR 259 at page 266

<sup>43</sup> Such as by the Scottish Law Commission in their report, No. 135 *'Report on Family Law'* (1992)

of whether they are married or not, with automatic parental responsibility. This would mean that all parents would be treated equally and any changes could include provisions to revoke parental responsibility, from any parent, not just the unmarried father. As will be discussed, there are multiple reasons why the current law is unsatisfactory, and although suggestions for reform have been made, and the Welfare Reform Act 2009 has made some improvements, there has not been sufficient movement in this area.

The primary element of parental responsibility which is unsatisfactory is the distinction which still exists between the positions of mothers and married/ unmarried fathers. It is an area which has been greatly debated, largely due to the fact that many consider it to be gender discrimination towards unmarried fathers. It has been argued by some, such as Beeson<sup>44</sup> and Booth<sup>45</sup>, that such discrimination breaches articles 8 (which gives everyone the right to respect for his private life<sup>46</sup>) and 14 (which prohibits discrimination on any grounds<sup>47</sup>) of the European Convention on Human Rights. This is because all parents should, be entitled to exercise parental responsibility under the protection for family life, but this right is not being protected, arguably owing to their gender/ status of marriage. This argument was rejected by the European Court<sup>48</sup> in the case of *McMichael v UK [1995]*<sup>48</sup>, where it was found to be necessary to restrict the automatic presumption of parental responsibility to all fathers based on the impact which it would have on the child's welfare. The main arguments raised in the case included the fact that unmarried fathers had, in most cases, no legal custody or responsibility for their children, which is the opposite situation for

---

<sup>44</sup> Beeson, S. 'Enforcing the Child's Right to Know Her Origins: Contrasting Approaches Under the Convention on the Rights of the Child and the European Convention on Human Rights' (2007) 21 International Journal of Law, Policy and Family 137

<sup>45</sup> Booth, P. 'Parental Responsibility – What Changes?' (2004) 34 Family Law 353 at page 355

<sup>46</sup> Article 8 of the European Convention on Human Rights 1950

<sup>47</sup> Article 14 of the European Convention on Human Rights 1950

<sup>48</sup> *McMichael v UK 16424/ 90 [1995] ECHR 8 (24 February 1995)*

mothers and married fathers. It was found that there was no breach of either article 8 or 14 rights under the European Convention on Human Rights. The main justification for this conclusion was based on the fact that the English and Welsh legal system offers alternatives (which are outlined in section 4 of the Children Act 1989) so that unmarried fathers can gain parental responsibility of a child.

The introduction of PRAs and PROs in 1990 was the first major move which enabled unmarried fathers to take a step towards having input in their child's life; at the time however, they were not widely used. About 3,000 parental responsibility agreements are registered each year, which is a tiny percentage of the children whom are born to unmarried parents<sup>49</sup>. The primary reason for the early lack of take up of PRAs and PROs was that many fathers were unaware what was required of them to ensure that they had parental responsibility<sup>50</sup>, with many believing that by being named on the birth certificate of their child was sufficient in conferring all the necessary rights and responsibilities of parenthood<sup>51</sup>. The introduction of parental responsibility being linked to the naming of a father on the birth certificate was a step in the right direction, as it placed the law on the same footing as general public assumption. There are however, still problems in cases where the mother does not consent to including the father's name on the birth certificate (for whatever reasoning), thus he must instead apply to the court for a parental responsibility order. The formalities which are required to gain an order through the court lack appeal to most fathers<sup>52</sup> with, stringent requirements that must be satisfied before an

---

<sup>49</sup> Herring, J. (2011) *Family Law: Fifth Edition* at page 356

<sup>50</sup> Pickford, R. 'Unmarried Fathers and the Law' in Bainham, A., Day Sclater, S. & Richards, M. eds. (1999) *What is a Parent? A Socio- Legal Analysis* at page 145

<sup>51</sup> This is obviously the situation in regards to those registered after the 1<sup>st</sup> of December 2003 by the implementation of the *Adoption and Children Act 2002*

<sup>52</sup> Macmillan Moon, R. 'An Examination of UK Law as it Pertains to the Unmarried Father: Current Legal Thinking in an International Context' (2010) 6 (1) CSLR 259 at page 261

order will be made. As already stated, in *Re H (Minors) (Local Authority: Parental Rights) [1991]*<sup>53</sup>, there are three principles which must be considered before an order can be made for an unmarried father to have parental responsibility: commitment, attachment and reason for the application. This is obviously problematic when the father has been unable to fulfil one of these requirements due to a third party's actions, such as the mother of the child. This interference means that a father may not be able to show the necessary commitment or attachment to the child, although this is usually implied in part by the application to the court. However, in *Re S (Contact: Promoting Relationship with Absent Parent) [2004]*<sup>54</sup>, it was stated that no parent is perfect, and as such, those parents who can prove that they will have a positive impact on the child's life should be allowed to try. There is, however, another criterion which must be satisfied, although it is not explicitly referred to, which is the need for capacity to be able to exercise parental responsibility. In *Re JM (A Child) (Parental Responsibility [1999])*<sup>55</sup>, although the father was devoted to his child and there was a high level of attachment between them, it was felt that awarding him parental responsibility would be inappropriate as he could not understand the concept of parental responsibility and the repercussions which might occur if it was to be misused. This decision was however, not considered fair and is one of the crucial reasons as to why the law on parental responsibility for unmarried fathers was reformed.

The introduction of automatic parental responsibility for all parents who were registered on a child's birth certificate was a bold move for the legislature, and came after much consideration on the subject. When reviewing the law at the time, the Lord Chancellor's Department suggested in its consultation paper, *Procedures for the Determination of*

---

<sup>53</sup> *Re H (Minors) (Local Authority: Parental Rights) (No. 3)* [1991] Fam 151; [1991] 2 All ER 185

<sup>54</sup> *Re S (Contact: Promoting Relationship with Absent Parent)* [2004] EWCA Civ 18; [2004] 1 FLR 1279

<sup>55</sup> *Re JM (A Child) (Parental Responsibility)* [1999] sub nom *M v M* [1999] 2 FLR 737; Times, May 25, 1999

*Paternity*, that there were three different methods which could be implemented to make it easier for unmarried fathers to be awarded parental responsibility: (1) automatically giving parental responsibility to all fathers; (2) to all those who were registered on the birth registration; or (3) to those fathers who are cohabiting with the mother at the time of birth<sup>56</sup>. From this, it was decided by Parliament that the best solution was to give all parents who were registered on the birth certificate automatic parental responsibility, regardless of any marital status. The reason for this choice was based on the fact that there would be a legal document which could confirm who had parental responsibility of a child easily, much in the same way that the marriage certificate or parental responsibility orders/ agreements had provided in the past. It was felt that although this would leave a small group of fathers without responsibility, in such cases where the mother registered the birth of the child on her own<sup>57</sup>, this was the most desirable approach as it still allowed for a degree of certainty as to who had parental responsibility for a child. In contrast to this, it was felt that the introduction of parental responsibility being awarded to those who were registered on the child's birth certificate was little more than a parental responsibility agreement/ order<sup>58</sup> without the need for the extra formalities which would normally be required for the separate application. There is, for instance, still the need for the father to rely on the mother of the child to convey parental responsibility to the father, which some feel is not

---

<sup>56</sup> Lord Chancellor's Department *'The Procedures for the Determination of Paternity and on the Law on Parental Responsibility for Unmarried Fathers'* (1998) ) A Lord Chancellor's Department Consultation Paper accessed via <http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/consult/general/patfr.htm> (07/11/2013)

<sup>57</sup> Which accounts for around 45,000 births a year – Macmillan Moon, R. *'An Examination of UK Law as it Pertains to the Unmarried Father: Current Legal Thinking in an International Context'* (2010) 6 (1) CSLR 259 at page 266

<sup>58</sup> Herring, J. (2011) *Family Law: Fifth Edition* at page 356

sufficient for the equality of the parents<sup>59</sup>. It is for this reason that many have supported other ideas for reform so that unmarried fathers can gain parental responsibility in the same way as married fathers and similar to that of the child's birth mother.

Another unsatisfactory aspect of the law is that only the unmarried fathers can have their parental responsibility removed without having to give the child up for adoption<sup>60</sup>. The application to have parental responsibility removed from the unmarried father can be done by any person who has parental responsibility for that child<sup>61</sup>, including the unmarried father himself, and the court will decide whether to revoke the responsibility. The courts will, however, only revoke the responsibility where it is in the best interests of the child's welfare to do so. In the case of *Re M (A Minor) (Care Order: Threshold Conditions) [1994]*<sup>62</sup>, it was found that it was in the best interests of the child that the father, who was in prison for having killed the child's mother, retained his parental responsibility. This demonstrates that the courts are unwilling to remove parental responsibility unless it is absolutely necessary<sup>63</sup>. As has already been stated, there are only two cases which have actively been reported to have removed parental responsibility from the unmarried father<sup>64</sup> demonstrating that although there is the possibility of this occurring, the courts do not feel that it is necessary. It is perceived as being unfair and unjust that unmarried fathers could potentially be threatened with the removal of parental responsibility, whilst both mothers

---

<sup>59</sup> Gilmore, S. 'Parental Responsibility and the Unmarried Father – A New Dimension to the Debate' (2003) 15 Child & Fam. L. Q. 21 at page 38

<sup>60</sup> This obviously applies to all legal parents of the child – parental responsibility can also be removed from those who were awarded it through something such as a residence order, where they are not the legal parent of a child i.e. the child's grandparents

<sup>61</sup> Section 4 (3) of the Children Act 1989

<sup>62</sup> *Re M (A Minor) (Care Order: Threshold Conditions) [1994] 2 FLR 577; [1994] 2 FCR 871*

<sup>63</sup> Although, it should be noted, that just because someone has parental responsibility for a child, this does not mean that they have contact with the child. This could cause other issues if it were the case

<sup>64</sup> Firstly, *Re P (Terminating Parental Responsibility) [1995]*, and then *CW v SG [2013]*

and married fathers are secure in knowing that they will never lose parental responsibility unless they voluntarily free a child for adoption.

One of the main justifications for introducing automatic parental responsibility is the understanding of what it actually means to have parental responsibility. Traditionally, parental responsibility was thought to be the term which separated the idea of being the biological parent from the act of actually raising the child and acting as a parent<sup>65</sup>. However, this view has now changed so that parental responsibility no longer has the same practical importance it once had. In *Re P (Parental Responsibility Order) [1997]*<sup>66</sup>, the judge distinguished between the concepts of parental responsibility and the ability to ‘interfere’ with the life of the child, where the mother had been worried that the unmarried father of her child would be able to disturb everyday family life if he was to be granted parental responsibility. There are varying degrees of contact which can be had with a child and it is crucial to distinguish between parental responsibility<sup>67</sup>, which gives certain rights such as being able to choose the school which the child attends, a residence order<sup>68</sup> (which automatically confers parental responsibility), whereby the parent with this has the power to adapt the child’s everyday life and the contact order<sup>69</sup>, which allows a parent to exercise certain responsibilities over a child while they are in their care. One case which demonstrates well the differences between parental responsibility and actually having control of a child’s life is the case of *Re D (Contact and Parental Responsibility) (No. 2) [2006]*<sup>70</sup>. In this case, a lesbian couple sought the help of a friend to conceive a child, with

---

<sup>65</sup> Harris, P & George, R. ‘Parental Responsibility and Shared Residence Orders: Parliamentary Intentions and Parliamentary Interpretations’ (2010) 22 Child & Fam. L. Q. 151 at page 161

<sup>66</sup> *Re P (Parental Responsibility Order) [1997]* 2 FLR 722; Times, 24<sup>th</sup> April 1997

<sup>67</sup> Section 3 of the Children Act 1989

<sup>68</sup> Section 8 of the Children Act 1989

<sup>69</sup> Section 8 of the Children Act 1989

<sup>70</sup> *Re D (Contact and Parental Responsibility) (No. 2) [2006]* EWHC 2 (Fam)



the understanding that the couple would be the child's parents but there would be an ongoing relationship with the father. However, a disagreement in the early stages as to the degree of the relationship ensued. The court held that the father should continue to have contact with his child on a restricted basis, and would be granted parental responsibility on the basis that he would be granted a status, but "*stripped of practical effect*"<sup>71</sup>. It is for reasons such as these, where the granting of parental responsibility is awarded without giving consideration to the involvement that a father will have in their child's life, that it is impossible to see parental responsibility as having any measurable significance in its application. Therefore, if it was to be automatically awarded to all fathers, married to the mother or not, there would not necessarily be any change in the way in which families function because parental responsibility is not a right to interfere in the day-to-day life of the child.

The most common suggestion for reform of parental responsibility is to give all fathers, regardless of their marital status in respect of the mother, automatic parental responsibility. This was one of the suggestions which was contained within the Lord Chancellor's Consultation Paper in 1998<sup>72</sup> and has also been suggested in other areas, such as by the Scottish Law Commission in 1992<sup>73</sup> for a reform of the law in Scotland. There has not been any sufficient movement to legislate this particular reform, which means that unmarried fathers are still, in effect, treated as a lower-level parent than those who automatically qualify for parental responsibility. The idea of conveying parental responsibility is no longer

---

<sup>71</sup> Harris, P & George, R. '*Parental Responsibility and Shared Residence Orders: Parliamentary Intentions and Judicial Interpretations*' (2010) 22 Child & Fam. L. Q. 151 at page 163

<sup>72</sup> Lord Chancellor's Department '*The Procedures for the Determination of Paternity and on the Law on Parental Responsibility for Unmarried Fathers*' (1998) ) A Lord Chancellor's Department Consultation Paper accessed via <http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/consult/general/patfr.htm> (07/11/2013)

<sup>73</sup> Scottish Law Commission, No. 135 '*Report on Family Law*' (1992)

considered to be the ability to interfere with the life of the child, but rather to “confer on the natural father that status of fatherhood which a father would have when married to the mother”<sup>74</sup> as stated in *W (Children)* [2013]. The differentiation between awarding parental responsibility and the right to interfere in the day-to-day life of the child was made in *Re P (Parental Responsibility Order)* [1997]<sup>75</sup>, where the judge reassured the mother that granting parental responsibility to the father would not undermine her authority on matters concerned with the child’s “day-to-day management”<sup>76</sup>. It is therefore considered that parental responsibility is not the same as contact with the child, so the law should do everything within its power to confer parental responsibility on the child’s father as a mark of “approval”<sup>77</sup>, in order that the child can have a better understanding of their genetic origins. Should it not, therefore, be in the best interests of the child that an unmarried father is able to register his name on the birth certificate, separately to that of the mother if necessary, and be granted parental responsibility so that they can be consulted on major issues of their child’s life, but not necessarily be able to interfere with the child’s day-to-day life style? Due to the lack of development<sup>78</sup>, it would appear that the answer to this is currently no. However, automatic parental responsibility is an idea which has been a recurring topic in discussions regarding any reforms to the law in this particular area for some time. The idea of reforming the law pertaining to unmarried fathers could be desirable, if the correct balance could be found, such as being able to remove parental

---

<sup>74</sup> *W (Children)* [2013] EWCA Civ 335

<sup>75</sup> *Re P (Parental Responsibility Order)* [1997] 2 FLR 722; Times, 24<sup>th</sup> April 1997

<sup>76</sup> Gilmore, S. ‘Parental Responsibility and the Unmarried Father – A New Dimension to the Debate’ (2003) 15 Child & Fam. L. Q. 21 at page 31

<sup>77</sup> Ward LJ in *Re C & V (Parental Responsibility)* [1998] 1 FLR 392; supported by *Re M (Contact: Family Assistance: McKenzie Friend)* [1999] 1 FLR 75

<sup>78</sup> See the *Welfare Reform Act 2009*

responsibility from those parents who do not act in the best interests of the child and not just the unmarried father.

### **Reasoning behind not automatically awarding parental responsibility to unmarried fathers**

There are many arguments for not automatically awarding unmarried fathers parental responsibility, which would otherwise put them on the same standing of those who were married to the mother at the time of birth. The most prominent reason is based on the concept of commitment towards the child. There are already a number of ways, prescribed by section 4 of the Children Act 1989, which allow unmarried fathers to acquire parental responsibility either through the consent of the mother or by way of an order from the court. These methods however, only apply to those fathers who want to have parental responsibility, those who are arguably the only unmarried fathers who deserve parental responsibility. The courts are already willing to accept that in most circumstances, granting parental responsibility is in the best interests of the child's welfare, which is always of paramount concern, and as such are willing to grant parental responsibility<sup>79</sup>. To extend this further, to those fathers who might be considered "*unmeritorious*"<sup>80</sup> this would mean that a higher percentage of absent fathers would be enabled to have some impact on their child's life, even though they may not even wish to be connected to the child. There would be difficulty in establishing who is to hold parental responsibility as there would be no official documentation which could be used to demonstrate that a father had parental

---

<sup>79</sup> Demonstrated in cases such as in *Re W (Direct Contact)* [2013] 1 FLR 494 where, despite the difficulties, it was felt that the child would benefit from having a full relationship with both parents; and *Re G (A Minor) (Parental Responsibility Order)* [1994] 1 FLR 504 where it was felt that the father could contribute to the promotion of his daughter's life, but did not have to give a residence or contact order to promote her welfare

<sup>80</sup> Law Commission in their report '*Review of Child Law: Guardianship*' [1988] EWLC 172, paragraph 2.17

responsibility<sup>81</sup>. Without the use of DNA testing, there would be uncertainty as to how and when an unmarried father could be said to hold parental responsibility, which would be highly undesirable for all relevant parties involved. This demonstrates that the practicality of applying automatic parental responsibility would be too difficult and outweighs the current issues which are said to be discriminatory and therefore it is undesirable to suggest that all fathers should be conveyed parental responsibility automatically.

In the case of *B v UK [2000]*<sup>82</sup>, which was heard by the European Court of Human Rights, it was stated that while it might appear to be discrimination to allow married fathers to automatically gain parental responsibility, whilst restricting unmarried fathers from this same right, there are reasons to justify this. The level of commitment which an unmarried father demonstrates, as a general group is highly varied in the fact that *“the relationship between unmarried fathers and their children varies from ignorance and indifference to a close stable relationship indistinguishable from the conventional family- based unit”*<sup>83</sup>. This is the main justification for not awarding parental responsibility to unmarried fathers automatically because, although it would be correct for those fathers who wanted to be a part of their child’s life, those who are completely detached from their child would be given parental responsibility even though they may not want or appreciate it. If every father was to be awarded parental responsibility automatically, without consideration being given to the commitment of the father to the child or the child’s welfare, then this could jeopardise the private lives and best interests of both the child and the mother<sup>84</sup>. If parental responsibility was to be automatically granted, issues would occur such as that in *Re M*

---

<sup>81</sup> Currently this can be shown by a valid marriage certificate, being named on the birth register after December 2003 or by having a valid PRO/ PRA or residence order

<sup>82</sup> *B v UK [2000] 1 FLR 1; [2000] 1 FCR 289; [2000] Fam Law 88 ECtHR*

<sup>83</sup> *B v UK [2000] 1 FLR 1; [2000] 1 FCR 289; [2000] Fam Law 88 ECtHR*

<sup>84</sup> Such as cases where there is domestic abuse or would have been too stressful for the mother

*(Contact: Parental Responsibility) [2001]*<sup>85</sup>, where it was felt that awarding parental responsibility to the unmarried father of a severely disabled child would not be suitable, owing to the fact that the situation would have been too stressful for the mother and undermined her ability to care for the child. Owing to the actions and accusations which the father made about the mother's new partner, it was also felt that he would misuse his parental responsibility thus it was refused. Whilst this is an exception to the generally accepted rule that a child would benefit from both parents holding parental responsibility, and having contact with both, it demonstrates perfectly the reason why parental responsibility should not be granted automatically to those fathers who have shown no other commitment to either the mother or the child. The fact that parental responsibility could be removed in certain circumstances where the father was deemed 'unmeritorious' would be insufficient, based on the fact that the courts are currently resistant to removing responsibility which has already been awarded to the father, based largely on the distinction between parental responsibility and contact with the child. One major issue which has arisen from the idea of automatic parental responsibility is in regards to the child who is conceived through rape as it would be unfair to expect the mother to cooperate with him and in most cases would be in the best interests of the child to not be connected to their father. However, this has always been an exception to the usual rules of parental responsibility and would not change with the change in the law<sup>86</sup>. The paramount concern in any case regarding parental responsibility should be the welfare of the child, which would be undermined if there was no court which reviewed the situation, and instead the burden would be on the mother to have the parental responsibility removed.

---

<sup>85</sup> *Re M (Contact: Parental Responsibility) [2001] 2 FLR 342*

<sup>86</sup> It has never really been suggested that the rapist father should be capable of receiving parental responsibility

In contrast to this, there is no need for the unmarried fathers to be granted automatic parental responsibility as it can be accessed in a variety of other ways. Some argue, including Hoggett<sup>87</sup>, that the best way to ensure that it is worthwhile for a child to have their father in their life is to either, demonstrate to the mother that they would be a 'good' father so that she will consent to putting his name on the birth certificate, or by proving to the court that they meet all of the requirements which were set out in *Re H (Minors) (Local Authority: Parental Rights) (No. 3) [1991]*<sup>88</sup>. The courts have shown that they are willing to award parental responsibility to any unmarried father, provided that they will not damage the welfare of the child, whenever it is possible to do so. The main focus is whether the father might damage the child in the future, such as the risk to further injury being caused to the child in *Re H (Parental Responsibility) [1998]*<sup>89</sup>, where the father had sadistically injured the child, or where the father was in possession of obscene photographs of children as in *Re P (Parental Responsibility) [1998]*<sup>90</sup>. In both of these cases, parental responsibility for the unmarried father was refused on the basis that it would not be in the child's best interest for him to have any responsibility, particularly considering that there were fears that he might misuse those responsibilities to interfere with the child's home life. It would therefore be undesirable to automatically award all father with parental responsibility as it might disrupt the principle of the child's welfare being paramount where the father would not have a positive impact on their life.

The main argument for automatically granting parental responsibility to all fathers is that, without this reform, English and Welsh law is breaching the European law on non-

---

<sup>87</sup> Hoggett, B. (1993) *Parents and Children: Fourth Edition* at page 32

<sup>88</sup> *Re H (Minors) (Local Authority: Parental Rights) (No. 3) [1991]* Fam 151; [1991] 2 All ER 185

<sup>89</sup> *Re H (Parental Responsibility) [1998]* 1 FLR 855

<sup>90</sup> *Re P (Parental Responsibility) [1998]* 2 FLR 96; [1998] 3 FCR 98

discrimination; however this has already been rejected by the European Court of Human Rights. Article 8 of the ECHR<sup>91</sup> states that there is a right to respect for family life and there have been various cases<sup>92</sup> where the unmarried fathers have suggested that the restricting of their right to automatic parental responsibility was in breach of article 8. This must be viewed alongside Article 14 which states that there must not be discrimination against any person, including on the basis of their gender or marital status. The leading case in this area is *McMichael v UK [1995]*<sup>93</sup> where the court considered whether there were any reasonable justifications which enabled the English legal system to restrict the ability of unmarried fathers to gain parental responsibility. It was found that due to the nature of the varying degrees of relationship which could be had between an unmarried father and their child, the fact that unmarried fathers are excluded from automatic parental responsibility did not breach articles 8 or 14. The justification for this decision was that the UK offers reasonable alternatives to unmarried fathers so that they can be awarded parental responsibility if they so wish and if it is in the child's best interest to do so. This shows that under European law, restricting those fathers who were not married to the mother at the time of birth from automatically gaining parental responsibility does not breach any rights under either articles 8 or 14.

It can therefore be concluded that awarding automatic parental responsibility to unmarried fathers would be undesirable and as such, should not be legislated into the legal system of England and Wales. To award all fathers parental responsibility automatically would cause many problems, particularly in regards to the quality of father who may now receive

---

<sup>91</sup> *European Convention on Human Rights 1950*

<sup>92</sup> Including *B v UK* [2000] 1 FLR 1 and *McMichael v UK 16424/90* [1995] ECHR 8

<sup>93</sup> *McMichael v UK 16424/90* [1995] ECHR 8 (24<sup>th</sup> February 1995)

parental responsibility. It has been noted<sup>94</sup> that the current law offers multiple opportunities for unmarried fathers to acquire parental responsibility, based on their ability to demonstrate commitment and attachment to the child. Generally, it has been accepted that if a father cannot demonstrate that he satisfies these criteria, then it is probably not in the best interests of the child to award parental responsibility, however he might be conveyed it automatically if the law were to be reformed, causing controversy.

### **Alternatives to automatically awarding parental responsibility**

With the current law being deemed unsatisfactory, and automatic parental responsibility for all fathers undesirable, alternative suggestions for reform need to be made. A key suggestion, which would alter the law in regards to parental responsibility indirectly, would be to introduce a scheme of joint registration of births, whereby it would be compulsory for both parents, whether they are married or not, to register their names in the birth register. The law would be adapted so that, wherever possible, the name of the father would have to be included in the birth register for the purpose of allowing the child to know who their father is. If implemented it would remove the need for the unmarried father to rely on the mother in order to be registered on the birth certificate<sup>95</sup> as they would be able to bring a paternity claim and be named on the birth certificate, even in cases where the mother may not agree<sup>96</sup>. This would be a preferable solution to automatically awarding all fathers parental responsibility automatically as there would be a legal document which confirms

---

<sup>94</sup> Most notably in *B v UK* [2000] 1 FLR 1

<sup>95</sup> The mother is required even in cases where the unmarried father believed that they were legally married, see *A v H (Registrar General for England and Wales and another intervening)* [2009] 3 FCR 95

<sup>96</sup> Although the paternity would have to be proven – which could be legitimately inferred if the mother refuses a DNA test of the child. See *Re A (Paternity: Refusal of Blood Test)* [1994] 2 FLR 463 for a similar example



whether the father has parental responsibility and the mother still retains the ability to avoid naming the father on the birth certificate if it is in the best interests of the child.

Of all births which are to unmarried mothers, around eighty per cent are registered by both the mother and the father<sup>97</sup>. There are however, around 45,000 births each year where the child is registered solely in the mother's name with no indication as to the identity of the child's father<sup>98</sup>. The number of children who only have one parent listed on their birth certificate has been decreasing over recent years, mainly due to the number of people who are choosing to cohabit and have children, as opposed to marrying first<sup>99</sup>. Another reason for the increase in joint registration can be related to the introduction of automatic parental responsibility for all those who are named on the child's birth certificate after the 1<sup>st</sup> of December 2003. There are however, still those children who do not have a father named on their birth certificate because of the mother not wishing for them to appear<sup>100</sup>. Not a desirable position as every child has the right to know both parents. As demonstrated in the case of *Re H & A (Paternity Tests) [2002]*<sup>101</sup>, there are very few cases in which the suppression of the truth would be considered to be in the best interests of the child and thus, including the use of science, the law should try to ensure that the child knows their true identity. It is therefore crucial that the law does more to ensure that all children are easily able to access the information identifying both their biological parents. Joint registration would better achieve this, whilst still allowing the mother and courts to decide

---

<sup>97</sup> Herring, J. (2011) *Family Law: Fifth Edition* at page 356

<sup>98</sup> Department for Work and Pensions' White Paper '*Joint Birth Registration: Recording Responsibility*' June 2008 Cm. 7293 at page 4, paragraph 3

<sup>99</sup> Department for Work and Pensions' Green Paper '*Joint Registration: Promoting Parental Responsibility*' June 2007 Cm. 7160 at page 10, paragraph 39

<sup>100</sup> Obviously this applies to those fathers who may not know that they are a father – unmarried fathers are able to apply for an order from the court to establish paternity through a DNA test which can lead to the father being named on the birth certificate

<sup>101</sup> *Re H & A (Paternity Tests) [2002]* EWCA Civ 383; [2002] 2 FCR 469; [2002] 1 FLR 1145

when a child should not have a father listed on their birth certificate, as well as awarding parental responsibility to those fathers who were listed on the birth register.

The possibility of incorporating compulsory joint registration is one which has been debated a great deal in recent years, with many being in favour of a possible change to the current law. It is for this reason that in June 2008, the Department for Work and Pensions published a White Paper, *Joint Birth Registration: Recording Responsibility*<sup>102</sup>, which suggests that all parents should be under an obligation to register their child's birth, and not only the mother where the parents are not married<sup>103</sup>. The White Paper sets out that it was to become a legal requirement for unmarried fathers to register their name on a child's birth certificate, unless the registrar considers joint registration to be "*impossible, impracticable or unreasonable*"<sup>104</sup>. The implementation of this into law would have meant that, unless there was an agreeable reason as to why the father of the child should not be contained within the birth register, the mother would be required to provide sufficient information about the father much more than is currently prescribed<sup>105</sup> so the registrar could contact him to confirm whether he is the child's father. The intention behind this was to promote the child's welfare, parental responsibility for the unmarried father and the right of every child to know who his parents are<sup>106</sup>. A by-product of this change in the law would have been that all fathers who were registered on the birth certificate would be awarded automatic parental responsibility, as is already given to those registered since 1 December 2003. This

---

<sup>102</sup> Department for Work and Pensions *Joint Birth Registration: Recording Responsibility* June 2008 Cm. 7293

<sup>103</sup> Married parents are already under an obligation to register the child's birth and can do so independently of each other – *Section 2 of the Births and Registrations Act 1953*

<sup>104</sup> *Joint Birth Registration: Recording Responsibility* June 2008 at page 9 in Macmillan Moon, R. 'An Examination of UK Law as it Pertains to the Unmarried Father: Current Legal Thinking in an International Context' (2010) 6 (1) CSLR 259 at page 268

<sup>105</sup> Sheldon, S. 'From 'Absent Objects of Blame' to 'Fathers Who Want Responsibility': Reforming Birth Registration Law' (2009) 31 *Journal of Social Welfare and Family Law* 4

<sup>106</sup> Bainham, A. 'What is the Point of Birth Registration?' (2008) 20 *Child & Fam. L. Q.* 449

would therefore have indirectly afforded parental responsibility to those who were now under an obligation to register their name on the birth certificate of their child, thus promoting the right of the child to know who their parents are.

There were however, problems with the way in which these changes in the law were presented. For instance, some opposed the change for the same reasons they thought automatic parental responsibility was undesirable<sup>107</sup>, namely for the fact that it could jeopardise the general welfare of both the child and the mother. To combat this, there was an inclusion within the paper to say that the joint registration would not be necessary if the mother could prove to the registrar that it was either *'impossible, impracticable or unreasonable'* for the father to be identified. The problem here is that whilst it would protect those who needed it, such as children who were conceived as a result of rape, it could mean that the mother would still have control over the child's relationship with the father by stating simply that she did not know who the father was. It would be difficult for the registrar to establish whether she is lying about knowing the identity of the father or not. It could be argued that it would be possible for the suspected father to bring a claim to the registrar, in most cases where the parents are not likely to cooperate, he may not know of the child's existence. Therefore, it can be concluded that the practicability of this change would be inappropriate until further classification and clarity could be made as to how joint birth registration should ideally be achieved. This was demonstrated by the fact that the provisions were contained within the White Paper, but by the time that the Welfare Reform Act 2009<sup>108</sup> was passed<sup>109</sup>, there was no specification as to joint registration. However,

---

<sup>107</sup> Such as Women's Aid in their *'Response to: Joint Birth Registration: Promoting Parents Responsibility'* for the Attention of the Department for Work and Pensions (September 2007) accessed via [www.womensaid.org.uk/core/core\\_picker/download.asp?id=1442](http://www.womensaid.org.uk/core/core_picker/download.asp?id=1442) (20/12/2013)

<sup>108</sup> *Welfare Reform Act 2009*

there was classification as to some of the requirements which a mother should provide when registering the birth of a child alone. It would therefore appear that joint registration would be highly beneficial to all parties involved with the birth of a child, but better clarification needs to be made before the changes can be implemented efficiently into the law.

### **Unmarried fathers and parental responsibility in other jurisdictions**

When considering possible reforms which could be implemented into the English and Welsh legal system to improve the current law, it is crucial to examine the way in which other jurisdictions approach this particular issue. The way in which unmarried fathers may appropriate parental responsibility is one issue which has been approached in a variety of ways, with some countries encouraging joint registration of a child's birth which will be the way in which parental responsibility will be appointed, whilst others employ a system whereby there is a government body which actively seeks the identity of the father of the child. It is therefore critical to analyse the systems which are used by foreign jurisdictions to establish whether these are a more desirable way to ensure that the welfare of the child is upheld.

Automatic parental responsibility for unmarried fathers is a concept which has been reviewed in many nations, but which has not had much success when it comes to implementation<sup>109</sup>. The main reason for this is that the law would be highly uncertain as to who holds parental responsibility if there was no obligation to have proof of that responsibility. Under the current law in England and Wales, proof of parental responsibility can be demonstrated by presenting a valid marriage certificate, birth certificate, parental

---

<sup>109</sup> It should be noted that it is not all yet in force

<sup>110</sup> Including Scotland in the Scottish Law Commission, No. 135 *'Report on Family Law'* (1992)

responsibility agreement or parental responsibility order. Without one of these documents, unless DNA tests were conducted to ensure that the father was biologically related to the child, it would be nearly impossible to establish whether a man was entitled to parental responsibility automatically by virtue of being the unmarried father of the child<sup>111</sup>. There are however, certain jurisdictions which have adapted their laws to encompass this element of trying to ensure that unmarried fathers are able to access parental responsibility.

Joint birth registration is the main focus for establishing parental responsibility in other jurisdictions, as opposed to the English and Welsh system, which focuses primarily on the institute of marriage in order to establish whether a father is connected to the child and should be afforded parental responsibility, therefore retaining a distinction between the married and unmarried fathers<sup>112</sup>. The proposals for joint registration in England and Wales, which were not subsequently legislated, were based upon the measures which are implemented within the Australian legal system. In July 2006, the *Family Law Amendment (Shared Parental Responsibility) Act 2006*<sup>113</sup> came into force, making dramatic changes to Australia's child custody law, including the rights of the child to have a "meaningful relationship with both of [their] parents"<sup>114</sup>. Under the new legislation, the matrimonial status of the parents is irrelevant due to the fact that both parents, whether married or not, are required to register the birth of their child. Where only one parent signs the birth register, there must be a formal attachment as to why the other has not, which might need to be investigated further by the Registrar if they are not satisfied with the explanation

---

<sup>111</sup> Herring, J. (2011) *Family Law: Fifth Edition* at page 366

<sup>112</sup> Reference to the Scottish Law Commissions' statement in Macmillan Moon, R. 'An Examination of UK Law as it Pertains to the Unmarried Father: Current Legal Thinking in an International Context' (2010) 6 (1) CSLR 259 at page 270

<sup>113</sup> *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Australian Legislation)

<sup>114</sup> *Section 60CC (2) (a) of the Family Law Amendment (Shared Parental Responsibility) Act 2006* (Australian Legislation)

which is given by the parent<sup>115</sup>. This means that either parent can register their name on the birth certificate of the child, and this can be verified in some circumstances by conducting a DNA test of the child and the disputed parent, without the consent or agreement of the other. When one parent does register the child solely, they must provide details of the other so that the registrar may enquire as to whether the other consents to having their name contained within the birth register. This has the effect of automatically conferring parental responsibility on the unmarried father, and has had since 1975<sup>116</sup> when Australia introduced parental responsibility for all whose names appeared on the birth certificate of a child<sup>117</sup>.

The system in Sweden goes further still; there is an active investigation into every birth as to who a child's parents are. Swedish legislation encourages parents to jointly register the birth of their child so that the child can easily recognise their 'biological identity'. Sweden, like England and Wales, recognises the presumption that the man, who is married to the mother at the time of the child's birth, is the father of the child. However, in the case of unmarried mothers, Sweden does more to ensure that the father can be identified. Where an unmarried mother gives birth to a child, there is an active investigation undertaken to identify the issue of paternity by the Social Welfare Committee<sup>118</sup>. It is the task of this committee to follow up on any claim of paternity and where necessary, to issue court proceedings to ensure that the child has a recognised father. There are however, certain circumstances in which the Social Welfare Committee is capable of deciding not to pursue court proceedings where it is in the best interests of the child that their father is not

---

<sup>115</sup> Macmillan Moon, R. 'An Examination of UK Law as it Pertains to the Unmarried Father: Current Legal Thinking in an International Context' (2010) 6 (1) CSLR 259 at page 271

<sup>116</sup> *Family Law Act 1975* (Australian Legislation)

<sup>117</sup> Fatherhood Institute 'Joint Birth Registration: A Fatherhood Institute Analysis' (16 June 2008) accessed via <http://www.fatherhoodinstitute.org/2008/joint-birth-registration-a-fatherhood-institute-analysis/> (13/10/2013)

<sup>118</sup> Hamilton, C. & Perry, A. eds. (2002) *Family Law in Europe: Second Edition* at page 646

identified<sup>119</sup>. This demonstrates that, while the English and Welsh system might feel that requiring registrars to seek further information about the father and then follow this up would be too much, it can be done by way of a third party who would be responsible for the enquiry. The system which is employed in Sweden better promotes the ideal situation whereby the father would be identified to the child and awarded some form of responsibility, without necessarily having to be given contact.

These are just two examples where other jurisdictions have implemented a better resolution to promoting parental responsibility to the unmarried fathers in regards to their children, but these are in no way perfect systems. It is critical that England and Wales look at the systems which are being used in other areas and see how well they work, to be able to eventually have the best situation for both the welfare of the child and the rights of the parents.

## Conclusion

The law regarding parental responsibility in the English and Welsh legal system has been repeatedly criticised as not doing enough to promote the position of the unmarried father<sup>120</sup>. In some ways, it has been criticised as breaching Article 14 of the European Convention because it differentiates between the mother and father, therefore discrimination on the basis of gender, as well as the married and unmarried father, which is discrimination on the basis of marital status. Whilst this can be seen as being actively discriminatory, this view has been rejected in a number of cases which have been heard by the European Court of Human Rights<sup>121</sup>. One of the main justifications which has been made

---

<sup>119</sup> Such as where the conception was due to rape

<sup>120</sup> Particularly groups such as Fathers4Justice and Families Need Fathers

<sup>121</sup> Such as in *McMichael v UK* 16424/90 [1995] and then *B v UK* [2000]

so that a state can differentiate between various categories of parents is that the definition of who is to be considered an unmarried father is too unclear<sup>122</sup>. Whilst it is generally accepted that the committed father who makes the effort to have a positive impact on their child's life should have parental responsibility conveyed automatically as if he had been married to the mother at the time of birth, it does not seem fair to award the same responsibility to those fathers who will not promote the child's welfare. Automatic parental responsibility therefore, could be potentially damaging to the welfare of the child, and also to the mother, which would be highly undesirable.

The concept of the unmarried father needing to be recognised more readily prompted Parliament to introduce automatic parental responsibility to all fathers who were named on the birth certificate, or subsequently re-registered, after 1 December 2003. This was a major step forward as it now conveys on unmarried fathers, the same rights and responsibility which were awarded to the married father automatically, without having to fill in additional forms (namely the Parental Responsibility Agreement) or have to apply to the courts for a Parental Responsibility Order. Whilst this was a big improvement on the law at the time, as it meant that children were more likely to have two parents with parental responsibility, there are still a number of births each year which are not registered with the father's name at all. This means that the child does not know the identity of their biological father, as well as the fact that the father has no parental responsibility towards the child.

---

<sup>122</sup> *Re H (Minors) (Local Authority: Parental Rights) (No. 3)* [1991] Fam 151; [1991] 2 All ER 185



Suggestions have been made, such as those by the Department of Work and Pensions<sup>123</sup>, that a system of compulsory joint birth registration should be placed on all parents, whereby both the mother and father, regardless of whether they are married, would be able to register their name on the birth certificate of a child without any consideration from the other. It is obvious that where there is a dispute as to whether a man really is the child's biological father, then it would be necessary for proof to be provided. There is no longer the need for presumptions now that DNA tests can easily be conducted and in most cases are indisputable. This system has already been implemented in Australia, with positive results being seen as those who registered gain parental responsibility over their biological child, in a fashion similar to automatic parental responsibility, without any specification as to the mother's marital status. The benefit of this system, compared to simply awarding all fathers automatic parental responsibility without any need for formalities, is that in certain circumstances the mother is able to collaborate with the courts to ensure that a father who would sacrifice the welfare of the child, would not be awarded parental responsibility. This therefore, is arguably the best way to ensure that both the rights of the father to know and be known by their child are upheld, whilst also ensuring that the child's welfare is the paramount concern in all decisions.

It can therefore be concluded that the current law regarding parental responsibility and the unmarried father in England and Wales is unsatisfactory and in need of reform. It is however, accepted that this should not be done until a stable alternative to the current system can be established. The current state of the law allows unmarried fathers, who

---

<sup>123</sup> Such as in the Department for Work and Pensions' Green Paper *'Joint Registration: Promoting Parental Responsibility'* June 2007 Cm. 7160 and Department for Work and Pensions' White Paper *'Joint Birth Registration: Recording Responsibility'* June 2008 Cm. 7293

would promote a child's life, to gain parental responsibility easily, either with or without the mother's consent, but it is more difficult for those who have been unable to have a positive impact on their child's life. There is now a common distinction between parental responsibility and actually being able to interfere with the child's day-to-day life thus it seems more understandable that every father, where possible, practicable and fair to do so, should be given parental responsibility over their biological child. Thus, the law needs to be reformed in an efficient way to better provide for unmarried fathers.

**Aberystwyth University Law and Criminology Student Journal (AULCSJ), 1st Edition  
published online by the Department of Law and Criminology, Aberystwyth University on  
behalf of the AULCSJ. August 2014. Article downloaded from  
[http://www.aber.ac.uk/en/law-  
criminology/informationforcurrentstudents/studentactivities/auslcj/](http://www.aber.ac.uk/en/law-criminology/informationforcurrentstudents/studentactivities/auslcj/)**