Chapter Seven

FATHERHOOD AND FAMILY LAW

by
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Article 18(1) of the 1989 United Nations Convention on the Rights of the Child which New Zealand ratified in 1993 obliges State Parties to:

> *use their best efforts to ensure recognition of the principle that both **parents** have **common responsibilities** for the upbringing and development of the child.*

According to the New Shorter Oxford English Dictionary "common" means: shared alike, having the same relationship to all the things in question. This paper will show that as New Zealand Family Law currently stands the principle of common responsibilities as between mother and father for children is not universal. Specific statutory provisions such as s6 of the Guardianship Act 1968, and s7 of the Adoption Act 1955 give fathers less responsibility than mothers where the fathers are not married to the mother and are not living with her. This paper will analyse whether there is a justifiable basis for the distinction. The primary measure is whether it is in the best interests of children to have such a differential between parents.

Our legislation does not use the term "responsibilities" but rather talks in terms of "rights". "Responsibility" is a term which has come into parent-child law in the 1980's and 1990's.[1] Our parent-child law is in the language of the 1950's and 1960's. It is not that "responsibilities" give parents any more or any less than "rights". Both in fact are dependent on each other. Responsibilities (which used to be called duties) are what are owed to the child. In order to carry out responsibilities parents need rights to be able to do certain things. For example a parent has the responsibility to nurture young children, to do that the parents need the right to control the child's upbringing. Rights protect parents from outside interference and enable them to act. The second point this paper will make is our statutory language on the parent and child relationship should incorporate both "rights" and "responsibilities".

Finally this paper will analyse how fathers and their roles are described in legal judgments. The framework of analysis will follow the life cycle of pre-birth, through to birth, and then to after birth.

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[1] E.g. Children's Act 1989 (UK).

PRE BIRTH

(a) Conception

The emergence of new birth technologies has raised new issues about how potential fathers become fathers, about social fathers taking on the legal responsibility of fatherhood, and about children never knowing their genetic father. The English case of *Blood*[2] had to decide whether a man could become a father after his death. The husband and wife had planned to have a child. Before the process had begun, the husband became very ill. When he was in a coma, sperm was removed from him before he died. No consent was given for this removal of sperm. The man's wife then wanted to use the sperm combined with her egg to create an embryo that would then be implanted for birth. In England, the Human Fertilisation and Embryology Act 1990 requires consent of a person in writing before their gametes can be used for artificial methods of reproduction. Because there had been no consent in this case the Human Fertilisation and Embryology Authority refused release of the sperm for the purpose of conception. Mrs Blood asked for review of the decision in the English High Court. The High Court supported the Authority's decision. Mrs Blood appealed to the English Court of Appeal[3] on the basis that the Authority's refusal to release the sperm to her so she could go to Belgium for artificial conception was an infringement of articles 59 and 60 of the E.C. Treaty, which gave her the right to receive medical treatment in another member state (which Belgium was) unless interference with that right was justified. In Belgium written consent of the donor is not required. The Court of Appeal took the view that by refusing to hand over her husband's gametes, the Authority was interfering with Mrs Blood's right to receive medical treatment abroad. Mrs Blood was given permission to remove the sperm, and take it to Belgium. The Court of Appeal felt reinforced in their decision, relying on the fact removing sperm without consent is illegal and is not likely to happen again. But it had already happened once, what is to stop it happening again?

In New Zealand there is no directly applicable law on the issue. There is no licensing authority for dealing with removal and storage of gametes. Dianne Yates MP for Hamilton, in the Human Assistant Reproductive Technology Bill, does put in a clause that the Licensing Authority which would be set up if the Bill because an Act, should keep a record of consents of donations of gametes. But, there is nothing in the Bill requiring the consent to be in writing. Is a mother's right to medical treatment more important than the father's consent in writing and the child's interests of having no father alive at the time of conception?

The only legislation in New Zealand which deals with new birth technology has a presumption[4] in it that the married or de facto partner of a woman who undergoes a new birth technology is presumed to have consented to the procedure. This means that until he can prove otherwise a man who lives with a woman who chooses to be

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2 [1996] 3 WLR 1178.

3 [1997] 2 WLR 806.

4 S.17 Status of Children Amendment Act 1987.

artificially inseminated by the sperm of another man, is presumed in law to be the father of the child. There is no requirement in the law that the man give written consent to the process, nor is there any requirement that it be explained to him that by the process he will become the legal father of the child. The Status of Children Amendment Act 1987 was passed primarily to protect donors (the genetic parents) from becoming legal parents. A cynical view of the legislation is that it was passed to protect the property and finances of medical student donors of sperm from later claims by a child. Little or no thought was given to the consequences of the social parent (the husband or partner of the person going through the new technology) being deemed to be the legal parent. An example[5] which did not involve the use of reproductive technology, but did include a child born whose genetic father was not his social father shows what can happen. The husband was not able to father children. The couple participated in a donor insemination programme over a two year period, but without success. Eventually the wife, with the consent of the husband spent a weekend with a male friend of hers and a child was conceived. The couple separated when the wife suggested conceiving another child by this man. The husband had put his name on the birth certificate of the child that was conceived to try and build a family. When the relationship broke up the mother did not want her former husband as the social father to have any contact with the child, but she did want him to be declared a step-parent[6] for the purposes of child support. The social father had had no contact with the child for 2 years. The mother's motivation for the child support application was that she could secure support and be able to return to the workforce. The High Court said the social father was being asked to perform the role of a chequebook in her life and the Court refused to declare him a step-parent for the purposes of child support. Yet if the mother had used artificial methods of reproduction to conceive the child, there is nothing in the child support legislation to stop her from using him as a chequebook. He would be deemed to be the father.

The Status of Children Amendment Act 1987 makes it clear that where there is no social father, the genetic father will not have the rights or liabilities of a father.[7] In essence the child grows up with a genetic father who the child is not likely to know the identity or background of, and who will have no legal responsibility to the child. Children whose father's die before they are born at least know the identity and background of their father. At times there will be difficulties establishing paternity of a child where there has been a very brief affair. But, at the very least there is the opportunity to do so. When artificial conception methods are used by a single parent, or by a same sex couple there is a legal bar to establishing legal fatherhood of the sperm donor. The argument for allowing a single parent or same sex couple to use artificial methods of conception is that it would be discriminatory if the service was not provided for them — it would be an infringement of the right to equal treatment. But what is overlooked is article 9 of the 1989 UN Convention on the Rights of the child — the right of the child to have contact with both parents, and article 8 the right of the child to

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5 *BPS* v *MNS* 11 Feb 1998, AP 295/94, High Court Wellington, Goddard J.

6 S.99 Child Support Act 1991 sets out the criteria.

7 Ss5, 7, 11, 13.

preserve his or her identify. The Adult Adoption Information Act 1986 is testament to the human need to know background and identity. Fertility clinics as a matter of ethics can require donors to consent to making available identifying information for the child, but it is not required by law.

(b) The Embryo Stage

Modern technology has allowed for an embryo to be formed outside the womb of a prospective mother. This has caused legal problems between a husband and wife when they separate before the embryo has been implanted in the wife. In *Davis* v *Davis*[8] the embryo was made up of the genetic material of a husband and wife. It was in storage at a fertility clinic. After the separation the wife wanted to implant the embryo and the husband objected. At the first hearing the judge took the view that the embryo had a right to life and therefore should be implanted. On appeal, it was ruled that for the embryo to be implanted against the husband's wishes would invade his rights to privacy. He would become a father against his expressed intentions. The final ruling was that the embryo could only be implanted when both parties agreed to it. One exception was allowed by the Appeal Court and that was if there was no other way the woman could have a child. Then it could be implanted. On the facts she was capable of having a child with someone else.

So before an embryo is implanted the law gives both prospective mother and father equal rights.

(c) The Foetus Stage

Statutory and case law authority[9] takes the position that once the embryo is inside the mother the father has very limited rights. Abortion laws in this country and overseas do not require the consent of the prospective father for an abortion. The decision is one for the prospective mother and her medical consultants. Legal challenges in the Courts by prospective fathers have not been successful. The Courts have taken the position that because the prospective father has no standing in the abortion statutes then their objection is of no legal relevance. Some prospective fathers have tried to argue that even if they have no rights of their own, they should be entitled to be the voice of the foetus which cannot speak for itself. The Courts have taken the view in challenges to abortions that the foetus is not recognised in law until it is born. The only possible exception is the one recognised by the English Court of Appeal in *C* v *S*[10] where it was indicated that where there is evidence of breach of the criminal law, because of an abortion being carried out not meeting the legal requirements of the statute, then action to stop such an abortion may be upheld by the Courts. In that case it was left open whether the appropriate person to bring such action was the Attorney General (whose job it is to ensure that criminal law is upheld on behalf of the public) or a prospective father whose interests would be critically affected by the illegal abortion. The

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8 Tenn App. 642, 842, SW 2d 588 (Tenn 1992).

9 Contraception, Sterilisation and Abortion Act 1977. *Paton* v *Pregnancy Service Trustees* [1979] QB276. *C* v *S and others* [1987] 1 All ER 123.

10 [1987] 1 All ER 123.

New Zealand Court of Appeal in the case of *Wall*[11] have made it clear that once medical consultants have certified that their are legal grounds for an abortion such as risk to the physical or mental health of the particular women, then the Court was not prepared to look behind those reasons which were seen as involving fine medical judgment which a Court was not well prepared to look into or overrule.

A New Zealand Family Court[12] decision has recognised a foetus a few weeks before birth as having some rights. The mother was 15 and pregnant. There was evidence that her boyfriend had been violent towards her. Judge Inglis Q.C. took the view that the Children, Young Persons', and Their Families Act 1989 was not just limited to children once they were born, but also applied to children about to be born. A restraining order was granted against the father to protect the unborn child. Fathers have responsibilities to their unborn children.

AT BIRTH

Historically at birth once a child was born to a married couple the father had sole rights to the child. In the 1804 case of *The King* v *De Manneville*[13] the mother and her young daughter of 8 months old had separated from the husband. The mother alleged ill treatment caused the separation. The father came into the mother's house at night, removed the child, then at the mother's breast, and carried her away almost naked in an open carriage in inclement weather. The Court ruled that the father was the person entitled "by law to the custody of his child". The only exception was if the father abused that right, then the Court would protect the child. The removal in the case was not held to be abuse — "there is no pretence that the child has been injured for want of nurture". Towards the end of last century the married mother was given the right to apply to Court for a custody order in respect of a child. The principle of the child's welfare being paramount was the key to giving married mothers rights in relation to the child, even though in theory right up until the 1968 Guardianship Act, guardianship was vested solely in the married father. The 1968 Guardianship Act was heralded as evidence of the "modern trend of the female of species being according that same status and standing as the male".[14] S.6 of the Guardianship Act 1968 recognises that at birth a married couple have equal rights to guardianship (the right to have day to day care of the child, and the right to control the upbringing of the child) of a child. Judge Mahony in the case of *In the Guardianship of B*[15] has held there are also equal rights where the couple are not married but are living together as if they were husband and wife at the time of birth. This is a judicial extension of guardianship which has not been challenged or appealed. But where the father is not married to the mother or is not living with her in a relationship in the nature of marriage at the time of birth, the father is not automatically a guardian. The father has to apply to Court to become a guardian in those circumstances. The Court has a discretion based on whether it will promote the child's welfare as to whether a father can be appointed a guardian.

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11 [1982] NZFLR 418.

12 *Baby P* (an unborn child) [1985] NZFLR 577.

13 5 East 210.

14 Hon J.R. Hanan. (1968) Vol 356 N.Z. Parliament Debates 1063.

15 [1986] 4 NZFLR 306.

Two views emerge from an analysis of the Family Court decisions. One is that fathers should be appointed guardians unless there is a grave reason why they should not be, or the father is unwilling to exercise the responsibilities of a guardian.[16] The other view is that fathers should not be given automatic rights of a guardianship even if they are capable of providing the child with a good quality of care and love.[17] In *K* v *B* the father was clearly fit to be a guardian. Judge Inglis Q.C. made the distinction between a child needing the father as a guardian and the father needing to be a guardian. There had never been a committed domestic relationship between the parents. The mother had decided to have the child adopted and granting guardianship to the father would have blocked out that decision. Judge Inglis Q.C. went on to state that even if the adoption were not contemplated to appoint the father as guardian would have forced the mother to cooperate with a man with whom she did not want to deal. This was bound to lead to conflict with negative consequences for the child. This analysis which has been adopted in other cases where the father's appointment as a guardian would lead to conflict with the mother[18], means that a father who is perfectly fit to be a guardian must get on with the mother before he can have a say in the child's life. As Judge Ellis[19] has said, "the appointment can undermine a custodial parent's authority and set up over the child's head a legal framework for challenging and litigating any important decisions made by the mother but not approved by the father." The child's interest in a stable environment are given priority over the fathers interests in having some say in the child's life.

The historic reason why unmarried fathers who are not living with the mother are not automatically guardian's revolves around illegitimacy. Prior to 1969,[20] children born outside marriage were illegitimate. They had no claims to their father's estate. Affiliation laws did eventually place an obligation on the father to support the child with maintenance. The current law is the Child Support Act 1991 which places a financial obligation on fathers whether they are guardians or not and whether they see the child or not. There has been no debate in New Zealand as to whether this legal state of affairs of fatherhood is desirable or not. There has been debate in English, Scotland, and Australia, mainly because in those countries there have been recent changes to their parental guardianship law.

In England, their Law Commission[21] rejected the idea of all fathers (whether married or not) being given automatic parental responsibility. The main objections that found favour with the Commission were:

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16 *In the Guardianship of B* [1986] 4 NZFLR 306.

17 *K* v *B* Family Court Napier, 24 August 1990, F.P. 041/075/90. Judge Inglis Q.C..

18 E.g. *C* v *M* Family Court, Wanganui, F.P. 083/086/92, 12 Nov 1993. *C* v *B* Family Court, New Plymouth 22 April 1994.

19 *Simpson* v *Puata* Family Court, New Plymouth F.P. 043/248/89 26 May 1993.

20 Status of Children Act 1969 changed all of this.

21 Law Commission Working Paper 74 Illegitimacy 1979 (UK), Final Report, Law Commission 118 Illegitimacy 1982.

(i) Mothers would conceal the identity of the child's father to ensure that in practice he could not exercise any parental rights. This seems a weak reason because to claim child support mothers need to identify the father.

(ii) Subsequent marriage to a third party by the mother was seen as causing problems where the new husband was in locus parentis. It was thought the mother and her new husband might seek Court orders to keep the father out. But, if the father has an automatic legal relationship with the child, it is unlikely a Court would break that just to satisfy the new husband.

(iii) Automatic guardianship could lead to harassment of mothers by fathers. The Commission took special note of the evidence of the National Council of One Parent Families.

The Council said it received hundreds of enquiries from unmarried mothers and single pregnant women seeking to be reassured about their rights over the children, and of their assurance upon being informed of the general lack of rights in the father. A major difficulty of giving fathers automatic rights is that they may abuse them or exercise them intermittently, when it suits them. This puts the mother in the precarious position of not knowing when the next intervention may happen. The problem arises with married couples when one partner drifts off and then comes back with the threat to the stability of the restructured family. To deny all unmarried fathers automatic guardianship because of the problems of some may be far too heavy a remedy. A better solution may be to make the automatic guardianship subject of the responsible exercise of it. This does place the burden on unmarried mothers to apply to Court to have a father who is causing problems removed. It is difficult to remove a natural parent as guardian because there must be a "grave" reason, or an unwillingness to exercise guardianship. The current law places the burden on the unmarried father to apply to Court to have a say in the child's life. A rational way out of this dilemma is to ask what would the new born child want — both parents to be treated equally by the law, or one to be given more authority than the other. A child cannot chose whether its parents are married or not, or whether they are living together or not. But just as validly a child cannot chose whether a parent will be a responsible parent or an irresponsible one. A child would want two responsible parents. The legislation assumes that all mothers will be responsible, and fathers only if they are married to or living with the mother. The reason for the distinction in the law goes back to the days of the illegitimate child. There really is no rational basis for treating children differently in terms of their legal relationship with parents because of the circumstances for their birth. The only possible justification of the distinction is the threat to the stability of the single parents relationship with a child.

(iv) If fathers were treated equally with mothers, then a father's consent (unless it can be dispensed with) would be required for the adoption of the child. If

a mother wanted the child adopted and a father objected then the father would have to show willing to take care of the child and be a fit and proper person to do so. If he is then there is no good reason to deny him this opportunity. If he is not fit and proper or not willing to take care for the child himself, then his consent can be dispensed with. Again the objection does not stand up to analysis.

The English Law Commission did come up with a compromise which was put into law. While unmarried fathers do not have automatic guardianship rights, they can apply to Court (for what is called in England, a responsibility order) or they can enter into a parental responsibility agreement with the mother.

The Scottish Law Commission[22] came to a different conclusion to the English Law Commission. The Scottish Commission were not convinced that where the child is born as a result of a causal liaison the unmarried father should not have parental responsibility — "Some fathers…will be uninterested but that is no reason to encourage and reinforce on irresponsible attitude". The more difficult objection is children born as a result of rape. If all fathers have guardianship rights, then the rapist father would also have such rights. There is something morally abhorrent about a rapist father having rights to a child born as a result of rape. As the law stands if the rape occurred during marriage then the rapist husband and father would have automatic rights on the birth of the child because no exceptions are made in s.6 of the Guardianship Act about how the child is conceived. The only recourse for the married mother who has been raped is to apply under s.10 of the Guardianship Act and argue that the father's rape is a grave reason which shows that he is unfit to be guardian. A possible solution to the problem is to put the words "conceived by consensual sexual intercourse" into s.6 of the Guardianship Act, so that where their is evidence the intercourse was not consensual the father whether married or unmarried has no automatic rights of guardianship.

The three key premises for the Scottish Law Commission's stand of equal parental rights no matter what the relationship between the parents are:

(i) While some single parents may felt threatened by some irresponsible fathers coming and going out of their lives, "it is not the feelings of one parent in certain type of situation that should determine the content of the law but the general interests of the children and responsible parents".

(ii) The law must be child-centred rather than parent-centred. Arguments of possible harassment by a father were seen as parent-centred rather than child-centred. The Commission took the view that it "seems unjustifiable to have what is in effect a presumption that an, involvement by an unmarried father is going to be contrary to the child's best interests."

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[22] Scot Law Comm No 87, Illegitimacy (1984), Scot Law Comm Discussion Paper No 88.

(iii) Because parental responsibility can be exercised independently of the other, the absent parent is not an issue because the care-giver parent can make decisions without having to consult the other parent.

The Scottish Commission concluded:

> In the absence of any court order regulating the position, both parents of the child should have parental responsibilities and rights whether or not they are or have been married to each other.

The evidence which tipped the balance for the Commission is best summed up in their reasoning:

> The question is whether the starting position should be that the father has, or has not, the normal parental responsibilities and rights. Given that about 25 percent of all children born in Scotland in recent years have been born out of wedlock, and that the number of couples cohabiting outside marriage is now substantial, it seems to us that the balance has now swung in favour of the view that parents are parents, whether married to each other or not. If in any particular case it is in the best interest of a child that a parent should be deprived of some or all of his or her parental responsibilities and rights, that can be achieved by means of a court order.

The situation is not quite as pressing in New Zealand because of Judge Mahony's ruling in the case of *In the Guardianship of B*. The unmarried father who is living with the mother will still have automatic rights of guardianship.

The Government in Scotland chose not to follow the Commissions' view in the Children (Scotland) Act 1995. The law in Scotland is that the unmarried father does not have automatic parental responsibility, but can acquire it by agreement with the mother or by Court order.

In Australia both parents have equal rights at the time of birth.[23] As one academic in Australia has said:

> "Arguments based on equality and non-discrimination on the basis of marital status has been given more weight in family law in the antipodes in the past decade than they have in the UK."[24]

What we need is a clear definition of the responsibilities and rights of parents. Parents whether they be father or mother, married or not, must be legally encouraged to carry out these responsibilities and rights. At present the only responsibility which applies universally to all parents is the responsibility to financially provide for the child set out in the Child Support Act 1991. This was passed largely to remove the financial burden

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[23] S.63F(1) Family law Act 1975 (a) amended in 1987. See also s.61C(1).

[24] Bailey-Harris, "Family law Reform — Changes Down Under" [1996] Fam Law 214.

from the State, rather than out of any interests in the welfare of children. The following provision set in the Children (Scotland) Act 1995 s.1(1) provide an excellent definition:

> A parent has in relation to his child the responsibility —
> (a) to safeguard and promote the child's health, development and welfare;
> (b) to provide, in a manner appropriate to the stage of development of the child—
> (i) direction;
> (ii) guidance,
> to the child;
> (c) if the child is not living with the parent, to maintain personal relations and direct contact with the child on a regular basis;
> and
> (d) to act as the child's legal representative,
> but only in so far as compliance with this section is practicable and in the interest of the child.

To enable a parent to fulfil those parental responsibilities, s2(1) provides that a parent:

> has the right—
> (a) to have the child living with him otherwise to regulate the child's residence;
> (b) to control, direct or guide, in a manner appropriate to the stage of development of the child, the child's upbringing;
> (c) if the child is not living with him, to maintaining personal relations and contact with the child on a regular basis; and
> (d) to act as the child's legal representative.

S.8 of the Guardianship Act 1968 allows the Family Court to appoint a step father as a guardian who will then take on the responsibilities of fatherhood.

FATHERS DURING THE LIFE OF THE CHILD

The best source of how the law sees fathers in relation to children is in disputed custody cases. In these cases there is a dispute over which parent should have the day to day care of the child. In *Parsons* v *Parsons*[25] Smith J gave the following meaning to the welfare principle:

> "A woman may be a great deal to a child in its earliest years, but a male child has very many difficult years in front of it, and in all ordinary circumstances, in my opinion, it is very desirable that a male child should have the care and guidance of its father."

[25] [1928] NZLR 477.

Smith J concluded that "in the interests of this male child, who is now a little over three years of age, that it would be better that the husband should have the custody of the child". No authority whether psychological or otherwise is cited for the principle. It is based solely on the learned Judge's view of life. In subsequent cases it was made clear by both Smith J and other Supreme Court Judges of the time that the preference for boys to be brought about by their fathers was only a general consideration — it was not to be a rule which superseded the general principle that the welfare of the child is the permanent consideration.

Myers C.J. who was the Chief Justice of the Supreme Court in 1940 whilst conceding that there was no rule of law that it was best for boys to be brought up by their fathers still goes on to say:

> "…there is one point that I consider of considerable importance. I think that in any case the influence of a father is important to the upbringing of a boy, and that aspect of the case may assume all the greater importance when it is considered in the light of the respective characters and conduct of the father and mother. In this case if the child remains in the custody of the mother and goes to Napier, he will be under no male supervision at all."[26]

Since the 1981 amendment to the Guardianship Act 1968, s23(1)A of that Act now makes it clear that there is no presumption that a parent because of their sex is better able to care for children. A survey of recent Family Court decisions where fathers have been given custody of their children shows that the emphasis is now on "parenting skills" and the relationship with the child. Here are some descriptions of fathers who have been awarded custody.

> "The father's parenting skills, on the other hand, appear on the evidence to be very good. He understands children, is readily able to empathise with them without patronising them and has certainly attracted his own children's affection. The evidence demonstrates that he is an active and effective parent. Plainly there are no concerns for P's or E's upbringing, nurturing and safety in his sole care."[27]

> "As a witness the father demonstrated a strong and mature appreciation of the responsibilities he owed his child as a parent, a truly child-centred outlook, a practical ability to make personal sacrifices for the child's welfare and advancement. He retained an air of calmness and certainty under the pressure of cross-examination, and had a realistic appreciation of this past faults and mistakes and a determination that A should not follow the same path."[28]

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[26] [1941] NZFLR 953 at 957.

[27] *P* v *P and C* Family Court, Palmerston North, F.P. 054/379/92 10 Dec 1997, Judge Inglis Q.C..

[28] *M* v *R* Family Court, Palmerston North, 10 Dec 1997, F.P. 054/041/95, Judge Inglis Q.C.

> "He admits to a gender orientation which has both masculine and feminine aspects. He presents himself as a man but considers that he is closer to the feminine end of the gender spectrum and, for example, buys his clothes in women's shops. Although there is the risk that, on occasions, this gender ambivalence could cause embarrassment for the children he is certainly conscious of avoiding this if possible. In my view the father's mix of masculine interests and feminine sensitivity makes him an above average parent. Not only does he have a deep understanding of the difficulties currently being faced by the children but he is also sympathetic to the mother's needs. Such a balanced and sensitive parent is seldom seen in the custody arena."[29]

In a number of states in America, and in the UK there are legal presumptions of joint custody, joint parenthood, when parents break-up. In New Zealand when parents break-up there is no legal presumption of joint parenthood. While both parents will normally have equal rights of guardianship (the right to control the upbringing of the child) if the parents cannot agree on custody, the only principle that is applicable is what is best for the child. Two Judges in the Family Court, have used s.13 of the Guardianship Act to give parents the message of joint responsibility where there is a dispute over custody of the child. S13 generally applies where there is a dispute over guardianship. Judge Inglis Q.C. and Judge von Dadelszen have taken the view that because guardianship is the overriding legal concept, when there is a dispute over custody (the day to day care), such a dispute is really about when each parents will exercise their guardianship responsibilities. The Court orders have been made as directions under s.13 to when the child will live with each parent, rather than the normal custody to one parent and access to the other.[30] Academics have questioned this approach in legal terms because if a custody application is made the Court's jurisdiction should be limited to making such an order. What the Judges are trying to do by using s.13 is to encourage involvement by both parents, rather than one thinking they have the major prize of custody, and the other believing they have the wooden spoon of access. Joint custody orders are another way of giving the parents equal rights after break-up, although New Zealand Judges have been suspicious that such orders can be sometimes used to keep the parents satisfied, but may not necessarily be in the best interests of the children.

> "Any arrangement by which a child spends substantial time with each parent has the potential for harm to the child arising from inconsistent activities, influences and living patterns. To reconcile these for the purpose of providing the child with stable and consistent support necessarily must involve substantial agreement and cooperation between the parents. These problems of course remain where children spend substantial periods of time with non-custodial parents exercising access

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29 *B* v *R* Family Court, Christchurch, F.P. 1512/96 18 Dec 1997, Judge Somerville.

30 *Makirir* v *Roxburgh* [1988] 4 NZFLR 673 was the first case in this trend. See para 6.115 footnote 11, of Butterworths Family Law Service (March 1998) for a detailed list of cases where this approach has been used.

> rights. I think that difficulties are likely to be less when primary responsibility for the care for the child rests with one parent rather than with both."[31]

Young children particularly need stability and security in their lives and it will be a reality that they need to have a home base, rather than be moved around to give each parent equal time with them. Equal time was not likely to be the reality when the parents lived together, so it is artificial to enforce it after the break-up.

Access which is not defined in the Guardianship Act is generally assumed to be the legally enforceable right (once a Court order is made) to see the children at specific times, or flexible times depending on the wording of the order. The approach of the Courts has been that children generally benefit from access and the maintenance of contact with the non-custodial parent.[32] Two difficulties have arisen involving fathers over access. One is the problem of a custodial mother who makes access difficult. The legal options for the father are to have the access enforced by warrant[33] which requires further legal costs. Most other orders in the Family Court such as Domestic Protection Orders are enforceable as of right. Another option is to have the custodial parent prosecuted for hindering access.[34] This is rarely done, and is inconsistent with the policy on breach of domestic protection orders which are strictly enforced. (The father may apply for custody which, if the situation has reached the stage where the child is suffering because of not seeing the father, is a viable option.)

The other problem is one for fathers themselves to deal with. That is the problem of the father who the children want to see but the father for his own reasons drifts out of their lives. The Family Court has made it clear that there is no provision to enforce fathers to exercise access.[35] The reasoning was that the Guardianship Act gives no power of enforcement in such circumstances, nor would it benefit the child to see a reluctant parent.

The 1996 amendment to the Guardianship Act which inserted ss16A, B, C had the potential to prevent fathers who had used violence against their partners from ever having custody of their children or unsupervised access. There is a rule in the amendment that once violence in the past has been proved, the violent parent is not to have custody or unsupervised access unless the Court is satisfied they are safe with the child. No one doubts that safety is a crucial value when determining a child's interests. But safety at all costs without the consideration of other issues such as the benefits for a child of a meaningful relationship with a parent has the potential for the child's welfare to be put at risk.

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31 *B* v *V.E.* [1988] 5 NZFLR 65, 70.

32 *M* v *M* [1981-82] NZFLR FLN 131 C.A. - parent should only be deprived of access in "exceptional circumstances".

33 S.19 Guardianship Act 1968

34 S. 20A Guardianship Act 1968

35 *Cunliffe* v *Cunliffe* [1992] 9 FRNZ 537.

A very recent decision of the Family Court[36] shows how one family Court Judge is prepared to weigh the balance.

In *R* v *C* there were the following findings of violence against the father:

1. In 1992 in the course of an argument, Mr X drove his elbow into Ms Y ribs with extreme force causing three of them to break.
2. On Boxing Day 1993 he hit her over the head with a telephone as a result of which she received a small laceration.
3. When they were living in Hastings Mr X punched Ms Y's on the jaw causing her to bleed from the mouth.
4. Sometime subsequently when drive the car, Mr X whacked his arm, which was encased in a heavy plastic brace, across Ms Y's nose causing severe bruising and bleeding.
5. On another occasion, this time in Wainuiomata, Mr X pushed the rocking chair that Ms Y was on almost back to the floor and then put his hands around her throat and began squeezing very hard.
6. Mr X often hit Ms Y around the head. The last such incident occurred on 2 June 1995 and led to the charge of male assaults female.
7. During arguments Mr X would swing a knife around in front of Ms Y to threaten and intimidate her.

There were also the following findings of violence against the father on the children:

1. Hit A and B round the head.
2. Once kicked A on the bottom as she was walking down some concrete steps.
3. Forced B to hold pieces of wood or rubber while he cut them with an electric saw or drill, even though she was extremely frightened and didn't want to be involved.
4. Used a leader riding crop to discipline both girls, sometimes hitting them with it, but more commonly threatening to use it on them.

Judge Frater concluded that:

> "I am satisfied that [Mr X] inflicted physical and psychological violence on Ms Y regularly throughout their relationship. This continued right up until they finally separated. He also physically and emotionally abused both A and B. The nature of the violence varied and was unpredictable. The result and physical injuries sustained by Ms Y were serious. The emotional costs for the children in experiencing abuse themselves and also in witnessed in her mother being abused must be considerable."

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[36] *R* v *C* Family Court, Lower Hutt, F.P. 239/95.

The father completed 12 individual counselling sessions. These addressed topics such as the context of learning, the inter-generational cycle of learnt behaviour, the nature and use of power in relationships, change behaviour, developing safety plans and relapse prevention.

The Counsellor's report consisted of the following observations made of the father:

> "Whilst Mr X did not actually resist the introduction of new concepts and beliefs, and in fact was willing to be quite complaint in all matters, he does hold to some of the old dominant stories about male-female roles and behaviours. He expresses these in the context of provocation which is an indefensible rational when dealing with issues of violence.
>
> He does espouse some beliefs and attitudes in that if they were to be witnessed in the context of a relationship and family life, would indicate quite appropriate parenting approaches. These are at present neither tested or observed because of his current living arrangements.
>
> For this reason also, any change behaviour has not been able to be verified. That does not mean that given the context of a new and different relationship that Mr X will not be able to use the insights he has gained in the counselling to good purpose."

The father was willing to attend further counselling. He attended a P5 parenting programme and was willing to attend a further programme. The father gave evidence that he had learnt other ways of discipline and now uses the time out technique. The father's sister had come forward and offered to monitor his care of the female child, aged six. The child made it clear to the s.29 A reporter that she wanted to return to live with her father. The child's primary attachment was seen to be to the father rather than the mother. The mother had moved house a number of times and taken the older child in her care to four different schools. The mother was described as "unstable". While the father was described as not yet fully reformed in his attitude to women — "he still persisted with some of his old justifications for behaving as he did towards the mother". The father was seen as providing commitment and stability to the six year old daughter. He had attended the courses, he lived in the area the child was familiar with, and he kept regular contact with the child's school. The father was given custody of the daughter.

CONCLUSIONS

The law gives messages about the importance of fatherhood in children's lives. When fatherhood is not treated equally as motherhood by the law, as is the case with guardianship, there is the very real potential for an attitude of father as second best to pervade the legal analysis of parenthood. This can become more acute in an area of law where the legal criteria of the "best interests of the child" is open to the value judgements of Judges, expert report writers, and counsel for the child. Children suffer if the law sees their parents as unequal.