

# **Illegitimate Consequences of ‘Illegitimacy’?: Article 2 UNCRC and Non-Marital Children in the British Isles**

Brian Sloan

## **Abstract**

Against the background of the non-discrimination provision in Article 2 of the UNCRC, this chapter considers the legal position of children whose parents are unmarried in England and Wales, Scotland and Ireland. Its particular concern is parental responsibility, and the fact that all three jurisdictions treat fathers differently depending on whether or not they are married to the child’s mother. The chapter begins by suggesting that parental responsibility is a children’s rights issue, and that the CRC apparently requires it to be allocated and removed other than by reference to parental marital status per se. It then highlights that, while there are some important differences between the jurisdictions in terms of the nature and allocation of parental responsibility, none of them are clearly compliant with the Convention.

## **Introduction**

Against the background of Article 2 UNCRC’s protection against discrimination on the basis of parental status, this paper considers the legal position of children whose parents are unmarried in the British Isles. While all three target jurisdictions (England and Wales, the Republic of Ireland and Scotland)<sup>1</sup> have purported to remove the historically stigma-affected status of ‘illegitimacy’,<sup>2</sup> this has not entirely removed the differential treatment of children based upon the marital status of their parents. This paper focuses on one issue affecting children who would previously have been ‘illegitimate’: the differing approach to conferral of ‘parental responsibility’ depending on the

child's parents' marital status, specifically the fact that legal fathers not married to the mothers of their children (hereafter 'unmarried fathers')<sup>3</sup> are not (unlike married ones) automatically granted 'parental responsibility' in any of the jurisdictions, and can acquire it only revocably even where their *parenthood* is not terminated by adoption.<sup>4</sup> For the sake of clarity, the paper will hereafter use the abbreviation 'PR' to refer to the generic concept of parental responsibility and the full terms 'parental responsibility', 'guardianship' and 'parental rights and (parental) responsibilities' to refer to those concepts specifically used in England and Wales, Ireland and Scotland respectively. All concern involvement in major decisions on a child's upbringing.

The paper's first substantive section considers the approach of the UNCRC and the UN Committee on the Rights of the Child to PR. It then considers the understanding of PR present in each jurisdiction, before analysing their approach to the allocation of PR against the requirements of the UNCRC. It will be argued that the allocation of PR is a children's rights issue, and that while the recognition of children's relationships with their unmarried fathers has improved in each jurisdiction,<sup>5</sup> it is still unclear that the law in any of them is necessarily compatible with Article 2.

## **The UNCRC, Non-Marital Children and PR**

While the European Convention on Human Rights has been given effect in the UK (Human Rights Act 1998) and Ireland (European Convention on Human Rights Act 2003) in a manner that provides domestic remedies to individuals, the UNCRC has not been fully incorporated into UK or Irish domestic law but is becoming increasingly influential in UK judicial decisions.<sup>6</sup>

It is tolerably clear that 'status' for the purposes of Article 2 UNCRC includes marital status, and that the article covers situations where a child is treated differently based on the marital status of her parents. On its own, therefore, the text of Article 2 might be said to support equality of treatment between married and unmarried fathers in relation to other relevant Convention rights

(discussed further below). This might mean that all parents should be presumptively granted PR. (This is arguably necessary to ensure parity of treatment between mothers on the one hand and fathers –married or unmarried – on the other, if motherhood and fatherhood are themselves relevant ‘statuses’.) Alternatively, Article 2 might simply mean that, whatever the situation regarding mothers, fathers should be granted and stripped of PR on the same basis irrespective of their marital status per se (even if it is thought that their relationship with the child’s mother has some relevance to PR allocation).

There are, however, possible objections to the invocation of Article 2 as regards the allocation of PR. It might be countered that PR, although couched in terms of responsibility, is essentially a matter of parents’ rather than children’s rights, and therefore that PR does not come within the scope of Article 2 because its allocation does not risk discrimination against children themselves. Erlings (2016, p. 625) has gone so far as claiming that ‘the principle of parental responsibility as currently applied under English law erodes children’s rights’. A related objection is that the Convention’s overriding objective in Article 3 is to promote a child’s best interests, that PR is less important than that objective, and/or that treating married and unmarried fathers equally on this question potentially undermines that objective, and is not therefore an ‘appropriate’ measure for the purposes of Article 2(2) even if it can be understood as purporting to eliminate discrimination.

As Unicef’s *Implementation Handbook* emphasises (Hodgkin & Newell, 2007: 33), ‘[t]he Convention is indivisible and its articles interdependent’, suggesting that Article 2 must be read in conjunction with the other articles. This fact, however, variously supports and undermines the arguments canvassed above, and the *Handbook* asserts that Article 2 ‘has been identified as a general principle by the Committee on the Rights of the Child, and needs to be applied to all other articles’ rather than the other way around. There are several ways in which the UNCRC recognises the role of parents in making decisions about their children, and the importance of the relationships

between parents and children. Article 5 instructs states to ‘respect the responsibilities, rights and duties of parents...to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the [Convention] rights’. Moreover, under Article 3(2), states ‘undertake to ensure the child such protection and care as is necessary for...her well-being, taking into account the rights and duties of...her parents...’. Article 18 obliges states to ‘render appropriate assistance to parents and legal guardians’, who ‘have the primary responsibility for the upbringing and development of the child’, ‘in the performance of their child-rearing responsibilities...’. Article 7 states that a child has ‘as far as possible, the right to know *and be cared for* by...her parents’ (emphasis added), and holding PR is arguably an important method through which a father could ‘care for’ a child with whom he is not living. Article 8 obliges states to respect a child’s right to her identity and ‘family relations’. None of these are expressly limited to marital parents, and they appear to support a wide granting of PR.

In response to welfare-related concerns about the invocation of Article 2 to support equal granting of PR to all fathers, it is true that Article 3 requires a child’s best interests to be a primary consideration, and that the UNCRC explicitly seeks not to ‘affect any provisions which are more conducive to the realization of the rights of the child’ in national or international law (Article 41), but as I have argued elsewhere (Sloan, 2013), the relational rights outlined above should be used to provide clues to the nebulous meaning of ‘best interests’. Admittedly, on particular facts the exercise of PR by a parent could jeopardise not only the general ‘best interests’ provision in Article 3 but also a number of specific rights, PR as a concept can damage children’s rights, and in General Comment No 14 the UN Committee on the Rights of the Child (2013: [67]) has specifically said that it is ‘contrary to [best] interests if the law automatically gives parental responsibilities to either or both parents’. Nevertheless, these very facts can still support the argument that PR should be open to the same *limitation* whether the child’s father is married to her mother or not.

Objectors might draw an analogy with the European Court of Human Rights' approach to this question. A general difference between married and unmarried fathers on the allocation of PR is apparently justifiable under Article 8 ECHR because of the range of potential relationships that 'varies from ignorance and indifference to a close stable relationship indistinguishable from the conventional family-based unit'.<sup>7</sup> Somewhat consistently, Wallbank (2009: 281) has expressed concern about 'mothers bearing the brunt' of proposals to extend the situations where unmarried fathers are given PR. But there is also a range of potential marital relationships (even it is a narrower one) and the European Court's justification facilitates the determination of the question of (non-judicial) conferral of PR with reference to assumptions based upon a father's relationship with the mother (arguably a third party)<sup>8</sup> rather than the father's actual or potential relationship with the child.

For its part, the UN Committee on the Rights of the Child has at times taken a relatively formalistic approach to 'legitimacy'. In Concluding Observations on a report of the Philippines, for example, it stated ((2005): [21]):

As regards children born out of wedlock, the Committee requests the State Party to review its domestic legislation in order to secure their right to equal treatment...and abolish the discriminatory classification of those children as 'illegitimate'.

It could be argued that England, Ireland and Scotland have acted consistently by abolishing legitimacy and formally treating marital and non-marital children equally notwithstanding the differences on PR. There is, however, some evidence of a more substantive approach on the question of non-marital families in Convention-related documentation. Hodgkin & Newell, (2007: 296) opine that '[s]tates should reconsider...laws that do not permit fathers of children born outside marriage to have any potential rights in adoption procedures', and the Committee on the Rights of

the Child (2004: [42]) has referred to the need for ‘both legal parents’ to consent to adoption. The UN Guidelines on the Alternative Care of Children (UN General Assembly, 2010: [10]), moreover, provide that ‘[s]pecial efforts should be made to tackle discrimination on the basis of any status of the child or parents’, including *inter alia* ‘birth out of wedlock’.

As regards the jurisdictions considered in this paper, when addressing discrimination in its Concluding Observations on the United Kingdom’s fifth periodic report, the UN Committee on the Rights of the Child (2016: [20]) mentioned only concerns surrounding exempting children from protection against age discrimination and the potential discrimination against children belonging to minorities other than those of unmarried parents. The UK Government (2014: [13]-[16]) did not expressly mention non-marital children in the report itself. In the first UK Concluding Observations, the Committee (1995: [12]) was worried about ‘about the possible adverse effects on children of the restrictions applied to unmarried fathers in transmitting citizenship to their children, in contradiction of the provisions of articles 7 and 8 of the Convention’.

Discrimination against children from other minorities was the primary discrimination-related concern of the Committee in its Concluding Observations on the Irish Government’s second (2006: [20]) and third and fourth reports (2016a: [27]). The Children’s Rights Alliance, by contrast, in its *appendix* to the Irish Government’s Report (2013), regarded ‘[r]eform[ing] the law on guardianship to address discrimination against children of non-marital families’ as a key priority, albeit writing before the Children and Family Relationships Act 2015 (‘CFRA’) discussed below. In its Concluding Observations on Ireland’s initial report, moreover, the Committee (1998: [17]) was concerned ‘about the disadvantaged situation of children born of unmarried parents due to the lack of appropriate procedures to name the father in the birth registration of the child’, which ‘also has an adverse impact on the implementation of other rights in relation to adoption which, under current regulations, can take place without the consent of the father’ (an issue discussed further below).

The mere fact that the references to PR in the relevant jurisdictions are non-existent, sparing or ambiguous in the Committee's reports should not, in any case, be taken to mean that the current law is definitively compliant with Article 2.

### *Conclusion*

Whatever the uncertainties, it is arguable that the UNCRC requires the relationship of father and child to be recognised through the conferral of PR facilitating involvement in major decisions affecting the child unless that would be contrary to the child's best interests; and, conversely, requires PR to be suspended or removed where necessary (taking into account the range of rights protected by the Convention) to protect the child's rights or interests. In neither case should the child's best interests be determined via crude assumptions arising from the relationship between the father and the child's mother. The next section examines the nature of PR in England and Wales, Ireland and Scotland before the final substantive section analyses whether the law on conferral of PR matches up to the UNCRC's possible ideal.

## **The Nature of PR in England and Wales, Ireland and Scotland**

### *England and Wales*

'Parental responsibility' is distinct from legal parenthood (which generally governs matters such as inheritance (Administration of Estates Act 1925, s 46) and financial support (Child Support Act 1991)), and is defined as 'all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property' (Children Act 1989 ('CA'), s 3(1)). George (2013: 131) has attempted a more substantive list. While the language is that of

‘responsibility’, there is a strong argument that parental responsibility ‘appears primarily concerned with parents and their powers over children’ (Erlings (2016: 631)).

While both legal parenthood and parental responsibility are often held by the same people, not all fathers necessarily have parental responsibility. Moreover, it can be held by more than two people and the acquisition of parental responsibility by one person does not itself cause it to be terminated in respect of anyone else (CA, s 2(6)). The CA section 2(7) expressly provides that ‘[w]here more than one person has parental responsibility for a child, each of them may act alone and without the...or others...in meeting that responsibility’ unless legislation provides otherwise on a particular issue. Section 2(8) prohibits acts inconsistent with a court order (likely to be triggered by a dispute between holders of parental responsibility), though the judiciary have generated a duty of *consultation* between all holders of parental responsibility on certain important matters such as education or medical treatment (Herring, 2017: 450-451). In practice, however, the person(s) with whom a child is living will have greater day-to-day control over the child’s upbringing than a holder of parental responsibility with whom she is not living, and parental responsibility does not in itself carry a right to or expectation of contact with the child.

### *Ireland*

In Ireland, guardianship ‘of the person’, according to a non-exhaustive and outdated statutory definition in the Guardianship of Infants Act 1964 (‘GOIA’), s 10(2)(a) confers an entitlement *as against non-guardians* to ‘the custody of the child and...to take proceedings for the restoration of his custody of the child against any person who wrongfully takes away or detains the child and for the recovery, for the benefit of the child, of damages for any injury to or trespass against the person of the child’.<sup>9</sup> Guardianship is broadly equivalent to ‘parental responsibility’,<sup>10</sup> and the Supreme Court has recently said that it in fact includes ‘duties to maintain and properly care for a child, and

rights to make decisions about that child's...education, health requirements, and general welfare'.<sup>11</sup> Again, it is distinct from parenthood and does not in itself carry a right to 'access'.

At one time, the Department of Justice and Equality (2014) proposed to repeal the GOIA entirely and overhaul the concept of 'guardianship'. The final CFRA adopts a rather more cautious approach by making relatively modest amendments to the 1964 Act (not apparently affecting s 10: Part 4), albeit that a greater range of people are able to apply for guardianship while both parents remain alive was previously the case (GOIA, s 6C).

### *Scotland*

The Children (Scotland) Act 1995 ('C(S)A') *prima facie* separates parental responsibilities (in s 1) from parental rights (in s 2), which is a distinctive approach as compared to the other two jurisdictions. That said, rights are expressly conferred 'in order to enable [the holder] to fulfil his parental responsibilities in relation to [the relevant] child', and each right effectively correlates to one or more responsibilities. Again, parental responsibilities and rights are distinct from legal parenthood.

Under section 1, parental responsibilities are defined as those to 'safeguard and promote the child's health, development and welfare', to provide guidance and direction 'in a manner appropriate to the stage of development of the child' (there being a right to control, direct and guide), to 'maintain personal relations and direct contact with the child on a regular basis' where the child is not living with the holder (there being a correlative right to maintain such relations in such circumstances under section 2, but also a general right 'to have the child living with him or otherwise to regulate the child's residence'), and to act as the child's legal representative (the subject of a correlative s 2 duty). The obligation to exercise parental responsibilities is limited to

circumstances where the exercise of the responsibility is ‘practicable and in the interests of the child’.

Understandably, holding parental rights and responsibilities does not (by virtue of s 3) ‘entitle that person to act in any way which would be incompatible with any court order relating to the child...’.

It seems that parental responsibilities and parental rights constitute less of a status than do parental responsibility in England and Wales or guardianship in Ireland. Courts in Scotland can adopt a nuanced approach by conferring only some rights and responsibilities and not others.<sup>12</sup> This means that there will be no right to contact (for example) unless that particular parental right has been granted.

## **The Allocation of PR**

### *Non-Judicial Conferral*

Under section 2 of the CA, parental responsibility is conferred automatically on all mothers in England and Wales, as well as on fathers married to the mother regardless of when the marriage occurred). Fathers who are not married to the mother do not automatically have parental responsibility (there are equivalent provisions for second female parents). They can acquire it under section 4. One method is by agreement with the mother. The ‘parental responsibility agreement’ must be made and recorded in a prescribed manner.<sup>13</sup> The more straightforward acquisition of parental responsibility by registration on the child’s birth certificate (available since December 2003) is also contractual in nature, since the mother’s co-operation with the registration is currently in substance vital.<sup>14</sup> While only 5.2% of births were registered by the mother alone in 2016 (Office for National Statistics, 2017: 8), suggesting that the vast majority of fathers are given parental

responsibility with no difficulty, if PR is a rights issue then it is necessary to focus on the children whose fathers do not receive it via this method in England and Wales.

Schedule 6 to the Welfare Reform Act 2009 (passed under the last Labour Government) would have obliged mothers not married to the fathers of their children to register those fathers as such, except in limited circumstances (including where the identity or whereabouts of the father is unknown or where the mother has reason to fear for her or the child's safety if the father is contacted), thereby *prima facie* giving them parental responsibility (Department for Children, Schools & Families, 2009). It seems, however, that schedule 6 is not due to be brought fully into force (Clifton, 2014). It was vociferously opposed by Wallbank (2009: 281), for example, on the basis that, presumably where the mother objects:

...there is little if anything to be gained from children being able to name the man who was biologically responsible for their birth. Indeed, there may be more damage to the developing child who starkly realises that the named man has never had and perhaps never will have any relationship whatsoever with the child.

This unconvincingly implies that there should be a presumption against conferring parental responsibility on unmarried fathers coupled with a power to facilitate it, rather a presumption in favour with a power to withhold it or remove it for good reason. The reform proposal was described by Bainham (2008: 459) as 'consistent both with the fundamental rights of the child, especially those enshrined in the...UNCRC..., and also with the historical function of birth registration'. The system as proposed would arguably have been consistent with my interpretation of UNCRC requirements, but for the moment mothers remain in control unless and until the father applies to a court.

Irish child law has undergone major reform following a Government commitment to ‘ensure that children’s rights are strengthened’ (Coalition Government of Ireland, 2011: 18). By virtue of a 2015 amendment, the Irish Constitution now asserts in Article 42A.1 that ‘[t]he State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights’<sup>15</sup> (Children’s Rights Alliance, 2012; Collins, 2013). One purpose of the changes is said to be to ensure that there is ‘no discrimination between children based upon the marital status of their parents’ in various contexts (Department of Children and Youth Affairs, 2012).

It is particularly significant that, until the implementation of the CFRA, only married parents were automatically joint ‘guardians’ of the child (GOIA, s 6(4)). The rights of even an unmarried mother in relation to the child were said to ‘derive from the fact of motherhood and from nature itself’.<sup>16</sup> Her marital status did not prevent her from being the child’s ‘guardian’ automatically. Fathers who are not married to the mothers of their children are not always so fortunate, albeit that their situation was improved under the 2015 Act. Previously, this state of affairs was bolstered by the view that the relationship between children born out of wedlock and their fathers was not protected by the Constitution, such that a father not married to that mother had ‘no constitutional right to the guardianship or custody of or access to a child of which he is the natural father’.<sup>17</sup>

Unmarried fathers do not all automatically acquire ‘guardianship’ for their children. Under the pre-CFRA GOIA, an unmarried father could obtain it non-judicially only through a statutorily declared agreement with the child’s mother (GOIA, s 2(4)) or a deed/will (s 7) of the mother. This approach undermined the status of an unmarried father’s relationship with his child, particularly in cases where a child’s parents no longer have (or never substantially had) an amicable relationship, and notwithstanding the fact that at least access is almost always granted between a father and child.<sup>18</sup>

Citing principles of the primacy of child welfare and equality, the Law Reform Commission (2010) almost reiterated the recommendation, originally made in Law Reform Commission (1982), that all unmarried fathers be given automatic guardianship. The 2010 Report sought to achieve generally automatic guardianship through a linkage between guardianship and compulsory joint registration of a child's birth. The Commission (2010: [2-23]) proposed, however, that registration would not be compulsory where 'the mother does not know who the father of the child is or where there is a risk to the safety and welfare of the mother or the child'.

The original General Scheme of the Children and Family Relationships Bill 2014 would have given an unmarried father automatic guardianship if the father and mother 'cohabited for at least 12 consecutive months before the child's birth, which cohabitation ended (if applicable) not less than 10 months before the child's birth' (Head 31(3)(b)), but this was changed in the September 2014 version so that a father would be a guardian if he 'cohabited for at least 12 consecutive months including at least three months after the birth of the child' (Head 34(3)(b)), albeit that there may have remained a lack of clarity on the meaning of 'cohabited' for these purposes (Shannon, 2014). The final CFRA's formulation is that an unmarried father will be a guardian if he 'and the mother of the child concerned have been cohabitants for not less than 12 consecutive months occurring after the date on which [the relevant] subsection comes into operation, which shall include a period, occurring at any time after the birth of the child, of not less than three consecutive months during which both the mother and the [father] have lived with the child' (GOIA, s 2(4A)), and it is expressly provided that "'cohabitant" shall be construed in accordance with' the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 (CFRA, s 2).<sup>19</sup> The new provision is clearly an improvement on the previous law, though it still places much control for the automatic granting of guardianship in the hands of the mother (Treoir, 2014: [2.1.1]). Shannon (2014: [7.9]-[7.12]) criticised the originally proposed time requirements for their arbitrariness, but also sought to justify them in the particular context of guardianship on the basis that they ensure a

‘significant degree of stability to the relationship’ before automatic guardianship can be conferred. This reinforces the notion that a relationship between a father and his child should to a significant extent be determined by his relationship with that child’s mother, even where there is no real suggestion that the father’s involvement could harm the child. That said, Ireland appears to be the only jurisdiction considered in this paper where an unmarried father can *obtain* PR without either the active co-operation of the child’s mother or a court order.

The Constitution as previously formulated must take a share of the blame for the discriminatory treatment of unmarried fathers, which continues in spite of the equality statutorily granted to children born outside marriage. It should be re-emphasised, however, that was improved when the relevant parts of the CFRA were commenced in January 2016,<sup>20</sup> and that (as discussed earlier) reforms similar to the Law Reform Commission’s proposals have not yet been fully implemented in England and Wales even in the absence of constitutional constraints.

By virtue of section 3 of the Scottish C(S)A, ‘a child’s mother has parental responsibilities and parental rights in relation to him whether or not she is or has been married to his father’. For fathers, however, the position is different. While the father will have parental rights and responsibilities where he is ‘married to the mother at the time of the child’s conception or subsequently’, if he is unmarried he will have such rights and responsibilities if he has been registered as the father on the child’s birth certificate (from May 2006 under s 3) (including re-registration, unlike in England and Wales), by registered agreement with the mother (s 4) or by court order (s 11). Importantly, as Norrie (2013: [6.09]) describes and as reflects the current situation in England and Wales, ‘[t]he father must have the co-operation of the mother to be registered [on the birth certificate], and so, in the absence of any court decree, the mother is the “gatekeeper” to the father’s entitlement to parental responsibilities and parental rights’, albeit that (again broadly consistently with England and Wales), only 4.3% of birth registrations in 2016 were sole ones (National Records of Scotland, 2017). Tellingly, the provisions detailing the

circumstances in which parental rights and responsibilities are held have to be set out in section 3 '[n]otwithstanding Section 1(1) of the Law Reform (Parent and Child) (Scotland) Act 1986 (provision for disregarding whether a person's parents are not, or have not been, married to one another in establishing the legal relationship between him and any other person)'. As Norrie (2013: [6.09]) puts it, 'it cannot yet be said that the question...whether...the parents are married to each other is completely irrelevant to the acquisition of parental responsibilities and parental rights'. This may be problematic for the purposes of Article 2.

### *Judicial Conferral*

Parents not married to the child's mother in England and Wales can also acquire parental responsibility via a court order (CA, ss 4(1)(c)-4ZA(1)(c)). The threshold is low notwithstanding the paramountcy of child welfare (s 1), and according to the Ministry of Justice (2012: table 2.4) (2011 being the last year for which specific figures are available) parental responsibility orders were actively refused in only 0.7% of private law cases in which they were sought. The courts will 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>21</sup>

A fact-specific approach is taken.<sup>22</sup>

In Ireland, the principle that 'in the resolution of all proceedings' *inter alia* 'concerning the adoption, guardianship or custody of, or access to, any child' 'the best interests of the child shall be the paramount consideration' is now enshrined in the Constitution (article 42A.4.1; see also GOIA,

s 3). When summarising the courts' approach to applications for a guardianship order under GOIA, s 6A in the pre-CFRA Supreme Court case of *J McB v LE*,<sup>23</sup> Fennelly J emphasised the importance of child welfare and said that the court would consider 'all the circumstances of the relationship which exists between the father and the child',<sup>24</sup> including the rights of the mother and the child. He accepted that the biological link between father and child was 'an important element', but said that the strength of the relationship would 'vary in accordance with the extent to which the father is or has been actively engaged in the care, nurture, education and upbringing of the child'.<sup>25</sup> Fennelly J was anxious to assert the court's 'power to regulate and control the scope and ambit of that relationship in an application for guardianship or custody on the part of the natural father'.<sup>26</sup> The success rate is apparently relatively high, albeit not as high as in England and Wales: orders were not granted in 24% of applications by 'unmarried applicants' in 2015 (Courts Service Ireland, 2018; no figures appear to be available for 2016: Courts Service Ireland, 2018a).

In Scotland in 2014-15, 23% of applications initiated in the Sherriff Courts for parental rights and responsibilities were apparently dismissed (Scottish Government, 2017). In *S v J*, an unmarried father of a one-year-old child whom she had not seen since she was six weeks old sought parental responsibilities and parental rights.<sup>27</sup> There was evidence of the father's violence towards a previous partner and her child, and controlling behaviour towards the mother of the child in issue. The judge acknowledged that 'the law's working hypothesis is that it is normally in the best interests of a child to maintain contact and relations with a natural parent with whom the child is no longer living',<sup>28</sup> subject to the child's paramountcy of the child's best interests (C(S)A, s 11(7)). He was mindful of the requirements of the ECHR, considered supervised contact appropriate and therefore awarded the father the parental responsibility of contact and the correlative right of contact. The judge did not, however, consider it appropriate to grant other rights and responsibilities, despite his acceptance that, had the father remained in Scotland for one further day

following the child's birth, it was likely that both parents would have registered the birth, thereby granting the father full parental rights and responsibilities.

It might be argued that there is little real difference between automatic and other methods of acquiring PR because of the low threshold applied, and that any difference is justified because (consistently with the objections to the compulsory registration proposal considered above) the parents will inevitably be in dispute if the mother refuses consent (eg) to registration and the court is best placed to resolve the dispute. That said, a failure to register could be a matter of inertia (Wright, 2010) and, as argued above, it is undesirable to make PR presumptively dependent on the relationship between the parents. By the time a father makes an application for PR, fundamental decisions might have been taken without his consent or knowledge.

The implications of the difference between automatic and other methods can be illustrated by comparing the English adoption cases of *Re C (A Child) (Adoption: Duty of Local Authority)*<sup>29</sup> and *Re A (Father: Knowledge of Child's Birth)*.<sup>30</sup> *Re C* involved a mother who had become pregnant after a 'one-night stand', and made clear her wish for the resulting child to be adopted shortly after birth. She kept the pregnancy secret from the biological father (lacking parental responsibility), and refused to identify him. The relevant local authority sought judicial guidance on whether it should attempt to identify the father, inform him of the child's birth and possible adoption and assess him as a potential carer. The Court of Appeal ordered the local authority not to take any such steps. The priority was held to be finding a permanent home for the child without further delay. This was the course of action most compatible with the child's best interests, on the court's analysis, and there was no evidence that the father could care for her based on what the mother had said. Arden LJ was somewhat influenced by the fact that the father's consent was not formally relevant to the adoption (Adoption and Children Act 2002, s 52(6)). She held that in 'exceptional situations' such as this it was appropriate a father to remain ignorant of a child's birth at the time of the adoption.<sup>31</sup> In *Re A (Father: Knowledge of Child's Birth)*,<sup>32</sup> the facts of which

many would more readily describe as ‘exceptional’ compared to those of *Re C*, a mother similarly sought to prevent a father from finding out about the birth and development of their child, whom she intended to relinquish for adoption. The key difference was that the parents were married. The father suffered from ‘Severe Depression with Psychotic Symptoms and Post Traumatic Stress Disorder’, such that his behaviour was unpredictable and violent. The Court of Appeal nevertheless refused to grant the order sought. A ‘very high degree of exceptionality’ was required before such secrecy could be justified,<sup>33</sup> and that test was not held to be satisfied. Because he had parental responsibility, the father’s consent was *prima facie* necessary before the adoption could proceed, and the first-instance judge (upheld by the Court of Appeal) failed to see ‘how the consent could reasonably be dispensed with if it has never actually been sought’.<sup>34</sup> Both may be unusual cases, but they illustrate the difficulties of making PR depend in the first instance on the relationship between the parents.

The presence or absence of parental responsibilities or rights can also be extremely important in Ireland or Scotland. For example, in Scotland a ‘parent’ whose consent is *prima facie* required for a child’s adoption means a parent who ‘has any parental responsibilities or parental rights in relation to the child’ or does not have them ‘by virtue of a permanence order which does not include provision granting authority for the child to be adopted’ (Adoption and Children (Scotland) 2007, s 31(15)). Similarly, in Ireland the basic position (subject to the ability to dispense with consent) is that an adoption order cannot be made ‘without the consent of every person, being the child’s mother or guardian or other person having charge of or control over the child’ (Adoption Act 2010, s 26), which may exclude a father who is not a guardian, albeit that the relevant Authority is under a basic duty to ‘take such steps as are reasonably practicable to ensure that every relevant non-guardian of the child is consulted in relation to the adoption’, except in limited circumstances (s 30).

## *Removal*

In England and Wales, where a mother or father has acquired parental responsibility automatically (in the latter case via marriage), only adoption can terminate parental responsibility (and transfer it to the adoptive parents: Adoption and Children Act 2002, s 46). Fathers who have not been in a marriage with the mother are vulnerable to having parental responsibility removed by court order even when they do acquire it.<sup>35</sup> In *Re DW (A Child) (Termination of Parental Responsibility)*,<sup>36</sup> one of few reported cases on removal, it was held that the court would consider the extent to which the criteria for judicially *granting* parental responsibility in the first place are still satisfied and apply the welfare principle even in cases of acquisition by registration. The Court of Appeal rejected any presumption of continuance, but accepted that in general it was ‘vitaly important to encourage the exercise of parental responsibility by fathers’.<sup>37</sup> On the facts, the father’s conviction for sexual abuse of the relevant child’s half-sisters, and the resulting emotional harm caused to the whole family, justified the removal of his parental responsibility.

Under the Irish GOIA even as amended, unmarried fathers can similarly obtain guardianship only revocably, while mothers and married fathers cannot be deprived of guardianship short of adoption (s 86) because of what has been described as their ‘constitutional right to guardianship’ (Department of Justice and Equality, 2015: 14). Unmarried fathers can have their guardianship revoked on the following statutory grounds (GOIA, s 8(7)):

- (a) there is another guardian in place or about to be appointed,
  
- (b) the court is satisfied that it is in the best interests of the child that the guardian be removed...

(c) for substantial reasons that appear to it to be sufficient, the court considers it necessary or desirable to do so, and

(d) the guardian who is to be removed... —

(i) consents to the removal,

(ii) is unable or unwilling to exercise the powers, responsibilities and entitlements of guardianship..., or

(iii) has failed in his...duty towards the child to such extent that the safety or welfare of the child is likely to be prejudicially affected if he...is not removed....

It seems that a court in Scotland may make an order depriving *any* parent of some or all of her parental rights and responsibilities, without that necessarily leading to adoption (C(S)A, s 11(2)(a)). In *AY v MM*,<sup>38</sup> the parental rights and responsibilities of a child's mother were removed after she attempted to smother the child and took a drug overdose. This is a more balanced and child-focused approach than the other two jurisdictions, although it must be borne in mind that automatic PR may be *controlled* by court orders even where it cannot be removed. That said, and particularly given the potentially drastic children's rights implications of adoption (Sloan, 2013), it should not be the sole means of removing PR on the basis of welfare for only some fathers and not for others, or indeed for mothers.

## **Conclusion**

This paper has shown that, despite recent improvements, married and unmarried fathers are treated differently as regards the allocation of PR in England and Wales, Ireland and Scotland. While there are some important differences between the jurisdictions, so that (for example) only Ireland will in some circumstances confer PR in the absence of both maternal agreement and a court order and only Scotland will contemplate removing it from a married father without adoption, the chapter has argued that general differential treatment is potentially detrimental to children's rights and interests, and therefore potentially incompatible with Article 2 UNCRC and the Convention as a whole. It has been seen that PR is arguably key to Convention rights such as Articles 5 (on parental guidance) and 7 (on care by parents). If the primacy of child welfare is the ultimate goal, its determination as regards PR should arguably be based on an assessment of the child's relationship or potential relationship with her father, rather than on crude assumptions flowing from the father's relationship with the child's mother. The analysis of the UNCRC's requirements undertaken in this paper is by no means beyond question, however, and as ever the Convention has not provided 'a specific and readily ascertainable recipe for resolving the inevitable tensions and conflicts that arise in a given situation among the different rights recognized' (Alston, 1994: 2).

## References

- Alston, P., 1994. The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights. *International Journal of Law and the Family*, 8(1), 1-25.
- Bainham, A., 2008. What is the point of birth registration?. *Child & Family Law Quarterly*, 20(4) 449-474.

Children's Rights Alliance, 2012. Recognising Children's Rights in the Constitution: The Thirty-First Amendment to the Constitution (Children) Bill 2012.

Clifton, J., 2014. The Long Road to Universal Parental Responsibility: Some Implications from Research into Marginal Fathers. *Family Law*, 44(6), 858-861.

Coalition Government of Ireland, 2011. Government for National Recovery 2011-16. Dublin.

Collins, T.M., 2013. International Child Rights in National Constitutions: Good Sense or Nonsense for Ireland?. *Irish Political Studies*, 28(4), 591-619.

Committee on the Rights of the Child, 1995. Consideration of Reports Submitted by State[ ] Parties under Article 44 of the Convention – Concluding Observations: United Kingdom (Initial Report). CRC/C/15/Add.34.

Committee on the Rights of the Child, 1998. Consideration of Reports Submitted by State[ ] Parties under Article 44 of the Convention – Concluding Observations: Ireland (Initial Report). CRC/C/15/Add.85.

Committee on the Rights of the Child, 2004. Consideration of Reports Submitted by State[ ] Parties under Article 44 of the Convention – Concluding Observations: Papua New Guinea. (Initial Report). CRC/C/15/Add.229.

Committee on the Rights of the Child, 2005. Consideration of Reports Submitted by State[ ] Parties under Article 44 of the Convention – Concluding Observations: Philippines. (Initial Report). CRC/C/15/Add.259.

Committee on the Rights of the Child, 2006. Consideration of Reports Submitted by State[ ] Parties under Article 44 of the Convention – Concluding Observations: Ireland. (Second Report). CRC/C/IRL/CO/2.

Committee on the Rights of the Child, 2013. General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1). CRC /C/GC/14

Committee on the Rights of the Child, 2016. Consideration of Reports Submitted by State[ ] Parties under Article 44 of the Convention – Concluding Observations: United Kingdom. (Fifth Report). CRC/C/GBR/CO/5.

Committee on the Rights of the Child, 2016a. Consideration of Reports Submitted by State[ ] Parties under Article 44 of the Convention – Concluding Observations: Ireland. (Third and Fourth Reports). CRC/C/IRL/CO/3-4

Courts Service Ireland, 2018. Topic: Guardianship. Available from:

<http://www.courts.ie/Courts.ie/Library3.nsf/pagecurrent/969AC9BD2337B7CB8025800C003304B1?opendocument> [Accessed 16 May 2018].

Courts Service Ireland, 2018a. Topic: Guardianship. Available from:

<http://www.courts.ie/Courts.ie/Library3.nsf/pagecurrent/220D2018BA6360438025800C00363FBA?opendocument> [Accessed 16 May 2018].

Department for Children, Schools & Families, 2009. *The Registration of Births (Parents Not Married And Not Acting Together) Regulations 2010: A Consultation*.

Department of Children and Youth Affairs, 2012. Thirty-First Amendment of the Constitution (Children) Bill 2012: Explanatory Memorandum. Dublin.

Department of Children and Youth Affairs, 2013. Ireland's Consolidated Third and Fourth Reports to the UN Committee on the Rights of the Child. Dublin.

Department of Justice and Equality, 2014. General Scheme of a Children and Family Relationships Bill 2014. Dublin.

Department of Justice and Equality, 2015. Children and Family Relationships Bill 2015 Explanatory Memorandum. Dublin.

Erlings, E., 2016. Is Anything Left of Children's Rights?: How Parental Responsibility Erodes Children's Rights under English Law. *International Journal of Children's Rights*, 24(3), 624-656.

George, R., 2012. *Ideas and Debates in Family Law*. Oxford: Hart.

- Herring, J., 2017. *Family Law*. 8th ed. Harlow: Pearson, 2017.
- Hodgkin, R. and Newell, P., 2007. *Implementation Handbook for the Convention on the Rights of the Child*. 3rd edn. Geneva: Unicef.
- Law Reform Commission, 1982. *Report on Illegitimacy*. LRC 4. Dublin.
- Law Reform Commission, 2010. *Legal Aspects of Family Relationships*. LRC 101. Dublin.
- Marshall, J., 2012. Concealed Births, Adoption and Human Rights Law: Being Wary of Seeking to Open Windows into People's Souls. *Cambridge Law Journal*, 71(2), 325-354.
- Ministry of Justice, 2012. *Judicial and Court Statistics 2011*. London.
- National Records of Scotland (2017). Table 3.02: Live births, numbers and percentages, by marital status of parents and type of registration, Scotland, 1974 to 2016.
- Norrie, K.McK, 2013. *The Law Relating to Parent & Child in Scotland*. 3rd ed. Edinburgh: W Green.
- Office for National Statistics, 2017. *Statistical Bulletin: Births by parents' characteristics in England and Wales: 2016*. London.
- Ryan, F., 2012. Out of the Shadow of the Constitution: civil partnership, cohabitation and the constitutional family. *Irish Jurist*, 48, 201-248.

- Scherpe, J.M., 2009. Establishing and Ending Parental Responsibility: A Comparative View. *In: R. Probert, S. Gilmore and J. Herring, eds. Responsible Parents and Parental Responsibility.* Oxford: Hart, 43-62.
- Scottish Government, 2017. Civil Justice Statistics in Scotland 2015-16. Edinburgh.
- Shannon, G., 2010 *Child Law*, 2nd ed., Dublin: Round Hall.
- Shannon, G., 2014. The Children and Family Relationships Bill 2014. Children's Rights Alliance 2014.
- Sloan, B., 2009. *Re C (A Child) (Adoption: Duty of Local Authority)* – Welfare and the Rights of the Birth Family in “Fast Track” Adoption Cases, *Child & Family Law Quarterly*, 21(1), 87-103.
- Sloan, B., 2013. Conflicting Rights: English Adoption Law and the Implementation of the UN Convention on the Rights of the Child. *Child & Family Law Quarterly*, 25(1), 40-60.
- Wallbank, J., 2009. ‘Bodies in the Shadows’: joint birth registration, parental responsibility and social class. *Child & Family Law Quarterly*, 21(3), 267, 282.
- UK Government, 2014. The Fifth Periodic Report to the UN Committee on the Rights of the Child United Kingdom. London.

United Nations General Assembly, 2010. *UN Guidelines on the Alternative Care of Children*.

A/RES/64/142.

Wright, O., 2010. I'll register both births this time, vows Miliband. *The Independent*, 3 November 2010, available at: <https://www.independent.co.uk/news/uk/politics/ill-register-both-births-this-time-vows-miliband-2123549.html> [Accessed 16 May 2018].

## Endnotes

---

<sup>1</sup> Northern Ireland largely mirrors English Law on points within the paper's scope (Children (Northern Ireland) Order 1995).

<sup>2</sup> See Family Law Reform Act 1987, s 1 (England and Wales); Status of Children Act 1987, s 3 (Ireland); Law Reform (Parent and Child) (Scotland) Act 1986, s 1.

<sup>3</sup> A father married to someone who is *not* the relevant child's mother is also classed as an 'unmarried father' for these purposes.

<sup>4</sup> A similar situation can occur where a same-sex partner who is not married to, or in a civil partnership with, the child's mother becomes a parent via assisted reproduction (see, eg, CA, s 4ZA (England and Wales)). For reasons of space, this chapter will focus on fathers.

<sup>5</sup> For a broader comparative analysis, see, eg, Scherpe (2009).

<sup>6</sup> *R (on the application of SG and others (previously JS and others)) v Secretary of State for Work and Pensions* [2015] UKSC 16. Cf *Dos Santos and others v The Minister for Justice and Equality and others* [2015] IECA 210.

<sup>7</sup> *B v UK* [2000] 1 FLR 1, 5; see also *McMichael v UK* (1995) 20 EHRR 205; *Elsholz v Germany* [2000] 2 FLR 486.

<sup>8</sup> Cf, eg, Marshall (2012).

---

<sup>9</sup> GOIA, s 10(2)(a). See also the ‘guardian of the estate’ (s 10(2)(b)). All guardians obtain guardianship of both types ‘unless, in the case of a guardian appointed by deed, will or order of the court, the terms of his appointment otherwise provide’ (s 10(1)).

<sup>10</sup> Indeed, the Law Reform Commission (2010, [1-06]-[1-10]) recommended that the terminology of ‘parental responsibility’ be adopted in Ireland, though the old terminology is used under the CFRA due to its presence in the new article 42A of the Constitution: see Shannon (2014: [7.2]) for criticism.

<sup>11</sup> *O’S & anor v Doyle & ors* [2013] IESC 60 [27] (Macmenamin J).

<sup>12</sup> See, eg, *S v J* [2012] CSOH 49.

<sup>13</sup> See Parental Responsibility Agreement Regulations 1991/1478, sch 1, as amended.

<sup>14</sup> See CA, ss 4(1A), 4ZA(2); Births and Deaths Registration Act 1953, s 10. Cf Welfare Reform Act 2009, sch 6, considered below.

<sup>15</sup> Inserted by the Thirty-First Amendment of the Constitution (Children) Act 2012.

<sup>16</sup> *G v An Bord Uchtála* [1980] IR 32, 55 (O’Higgins CJ). See, eg, Ryan (2012: 212).

<sup>17</sup> *McD v L* [2009] IESC 81 [299] (Fennelly J).

<sup>18</sup> See, eg, Shannon (2010:[12-64]-[12-66]). See CFRA, ss 53-57 for a reformulation of the substantive law on custody and access.

<sup>19</sup> The existing methods of an unmarried father’s acquiring guardianship would broadly be retained (CFRA, Part II).

<sup>20</sup> See Children and Family Relationships Act 2015 (Commencement of Certain Provisions) Order SI 2016 12/2016.

<sup>21</sup> *Re H (Minors) (Local Authority: Parental Rights) (No 3)* [1991] Fam 151, 158.

<sup>22</sup> Compare, eg, *Re S (A Minor) (Parental Responsibility)* [1995] 2 FLR 648 and *M v M (Parental Responsibility)* [1999] 2 FLR 737.

<sup>23</sup> *J McB v LE* [2010] IEHC 123.

---

<sup>24</sup> *ibid* [32].

<sup>25</sup> *ibid* [33].

<sup>26</sup> *ibid* [33].

<sup>27</sup> [2012] CSOH 49.

<sup>28</sup> *ibid* [131].

<sup>29</sup> [2007] EWCA Civ 1206. See further Sloan (2009).

<sup>30</sup> [2011] EWCA Civ 273. See, eg, Sloan (2013: 57-59).

<sup>31</sup> *Re C* (n **28**) [24].

<sup>32</sup> *Re A* (n **29**).

<sup>33</sup> *ibid* [25].

<sup>34</sup> *ibid* [7].

<sup>35</sup> Compare CA, s 2(1) and s 2(1A) with s 2(2)(b) and s 2(2A)(b).

<sup>36</sup> [2014] EWCA Civ 315.

<sup>37</sup> *ibid* [33].

<sup>38</sup> 2012 GWD. 33-674.