

'Inferior fathers? The unmarried father in English law.'

Historically, an unmarried father would not have any kind of rights over his 'illegitimate child'. Recent legislation has done much to change this, but it is still the case that unmarried fathers are not treated identically to married fathers in English law. This is particularly evident in the provisions in the Children's Act 1989 ('CA 1989') regarding the acquisition of parental responsibility. Whether such differential treatment results in the unmarried father being treated as an 'inferior father' depends on the scope and effect of the differences, and it is also necessary to examine whether any justification exists for treating unmarried and married fathers differently.

Parental responsibility is defined in s3(1) CA 1989 as the 'rights, powers responsibility and authority....in relation to the child and his property.' This appears to be a very general definition: it does not attempt to define what the rights and powers involved are. However, a list compiled by Douglas and Lowe¹ is frequently cited, which gives examples of such rights (although the list is non-exhaustive). Ultimately, an individual with parental responsibility for a child has the right to partake in decisions regarding the child's upbringing. It is therefore clearly a concept of great importance. S2(1) CA 1989 provides that a father, who is married to the mother of the child, acquires parental responsibility automatically at the time of birth. By contrast, the unmarried father receives no such automatic parental responsibility; instead, he must acquire it by being registered on the birth certificate² as the child's father, through an express agreement with the mother (which is in the correct legal form³) or via a parental responsibility order from the court⁴. Therefore, if the child's mother does not object to the child's father acquiring parental responsibility, he may acquire it with relative ease. The fathers who suffer are those whose relationship with their child's mother has broken down: if the mother will not consent to the father having parental responsibility, the father must apply for it through a court order and as such is in a markedly different position to that of a married father.

In many situations, an unmarried father lacking parental responsibility will not find his position to be greatly affected; he will still be able to apply for a Child Arrangements Order under the CA 1989⁵ (an order which, if made, brings parental responsibility with it), and if he is still living with the mother, it is unlikely that any part of his involvement in decisions affecting the child is likely to be challenged. However, where the parents are at odds, the unmarried father finds himself in a more difficult position, and may in some circumstances be overlooked if he does not have parental responsibility. Such situations include where the child is subject to an adoption order, which could be made without the unmarried father's consent (such as in *Re L (A Minor)*⁶), and, where there is a residence order in force, his consent will not be required before the child's surname can be changed or the child can leave the country. There is therefore evidence that a father, who finds himself unable to acquire parental responsibility, is at a significant disadvantage in the above situations.

It thus follows that the extent of the prejudice against the unmarried father is dependent on the ease with which such a father may obtain a parental responsibility order under s4(1)(c) CA 1989.

¹ In 'Bromley's Family Law' (10th edition, Oxford: OUP 2007) 377

² S4(1)(a) CA 1989

³ S4(1)(b) CA 1989

⁴ S4(1)(c) CA 1989

⁵ S8 CA 1989

⁶ 1984 The Times 21 June

Statistics seem to suggest that it is likely that such an order will be granted: in 2010, 5,520 orders were granted out of 5,980 applications.⁷ The statutory provision itself does not contain any criteria for the court to apply in deciding whether to make the order, but making the order is subject to the paramountcy principle in s1 of the CA 1989. In the leading case of *Re H (Minors)(Local Authority: Parental Rights)*⁸, the court determined which factors should be considered when faced with an application for acquisition of parental responsibility. It was held that the degree of commitment the father has shown to the child, the degree of attachment between them, and the father's reasons for applying for such an order should all be held in the contemplation of the court. These criteria present evident problems. If a father is being denied access to his child, he has far less opportunity to form an attachment to the child; he is not allowed to have contact with that child and so it should be questioned how he can be expected to form an attachment. However, in practice, the criteria laid out in *Re H* seem to have been interpreted rather broadly by the courts in the subsequent case-law. For example, in *Re S (Parental Responsibility)*⁹ the court held that children should have a favourable image of the absent parent, suggesting that not having contact with the child would not stand in the way of a parent's ability to meet the criteria in *Re H*. The court also suggested in *Re M (Parental Responsibility Order)*¹⁰ that the criteria in *Re H* can be easily satisfied: it was suggested that a denial of parental responsibility should be a last resort. The court held that if there are fears of a misuse of parental responsibility, a prohibited steps order should be used to control it, rather than a denial or the parental responsibility itself. Therefore, in the vast majority of cases there appears to be no substantive prejudice against the unmarried father: the majority will be able to satisfy the *Re H* criteria as interpreted generously by the courts, and so ultimately will find themselves in the same position as a married father with regards to their children.

It is the cases where parental responsibility applications have been denied that demonstrate the limits on courts granting parental responsibility: it is these cases where an unmarried father is in a substantially (rather than procedurally) different position to the married father. Cases where the criteria from *Re H* have not been met include *Re P (Parental Responsibility)*¹¹, where it was held that the father's motivation in seeking the order was to undermine the mother and so no order was granted. In *M v M (Parental Responsibility)*¹² parental responsibility was not granted to a father with a low IQ due to a serious head injury, on the basis that he did not have sufficient reasoning capabilities to be able to exercise parental responsibility properly. This appears to be a case where the criteria from *Re H* have been met but an order has still not been given, although perhaps this could be argued to be justifiable, as it would be pointless granting responsibilities to someone who is simply unable to exercise them. A case where an order has been refused that is perhaps harder to justify is *Re H (Parental Responsibility)*¹³, where a father's cruel behaviour towards his child meant that he posed a future risk to his son, and so a parental responsibility order was not granted. In a cases such as these, the unmarried father is substantially prejudiced against, as a married father in the same situation would be granted parental responsibility and the question of his treatment of the child would not even be considered as part of this.

⁷ MOJ (2009), table 5.4

⁸ 1991 Fam 151

⁹ 1995 3 FCR 225

¹⁰ 2013 Fam Law 1256

¹¹ 1998 2 FLR 98

¹² 1999 2 FLR 737

¹³ 1998 1 FLR 855

The unmarried father therefore has a number of legal hurdles to overcome to achieve parental responsibility. Whereas most are relatively easy to overcome, making the prejudice procedural rather than substantial, in some cases where the courts are making moral judgements as to whether a father is a suitable candidate for parental responsibility, the prejudice becomes a substantive one, and the unmarried father ends up worse off than a married one. However, regardless of whether the prejudice is purely procedural or substantial, the fact still remains that the prejudice exists and unmarried fathers are being treated differently from married fathers. This may have many negative consequences, and unmarried fathers may feel that they are 'inferior' even if they are eventually able to end up in the same position as a married father, simply because of the extra procedural requirements that they are subjected to.

Given, therefore, that such a prejudice does exist against unmarried fathers in English law (albeit more a procedural rather than substantive difference), it is therefore necessary to consider how far this is compatible with the European Convention on Human Rights ('ECHR'), because any incompatibility would suggest that the difference is harder to justify. The European Court of Human Rights considered the issue in *B v UK*¹⁴, a case in which an unmarried father argued that his rights under Article 8 ECHR in conjunction with Article 14 ECHR had been violated. However, these rights are qualified rights, and the court held that there was an objective and reasonable justification for the difference in treatment between married and unmarried fathers. There were, it was said, a broad range of possible relationships between a father and his child and fathers would therefore have different levels of responsibility, and so it should not be an unqualified right. The court has been generally unwilling to accept that paternity itself gives rise automatically to 'family life' under Article 8 ECHR between the child and the father. However, this may be at odds with Article 18 UN Convention on Rights of the Child which emphasises the importance of equality between the child's parents; to accord the mother parental responsibility automatically but to make the biological father meet further requirements before being granted parental responsibility would appear to violate the Convention. As such, it may be the case that the position in English law is in breach of Article 18 UN Convention on Rights of the Child.

The reasons for such a difference in treatment are unclear. For Deech¹⁵, the act of marriage is symbolic of a 'permanent connection' that the father should undertake if he desires to be in possession of the rights appertaining to a married father. Deech however was writing in 1992, and even in the last 13 years, the perception of social norms has shifted. It is now socially acceptable for couples to have children out of wedlock (47.5% of children were born to unmarried parents in 2012)¹⁶. Surely having parental responsibility for a child should not be linked to how connected the father is to the mother. If anything, it is suggested that it would be in the child's best interests to have two unmarried parents, instead of two unhappily married parents. It is somewhat undermining the institution of marriage to suggest that it is simply a means by which to obtain parental responsibility, whilst ignoring the other dimensions to it. Furthermore, we know from the Family Law Reform Act 1987 (FLRA 1987) that a father who is married to the mother acquires automatic parental responsibility even if the marriage between them is void. This would seem to suggest that it is not the validity of marriage itself that gives rise to the justification to treat these fathers

¹⁴ 2000 1 FLR 1

¹⁵ (1992) 4 Journal of Child Law 3

¹⁶ Office for National Statistics

differently, but instead the attempt to make a permanent commitment to mother and child. However, given a void marriage can be something that is in fact so far away from anything that would constitute a valid legal marriage (such as a marriage that breaches rules regarding polygamy¹⁷) this may not be a satisfying explanation either.

The Law Commission in 1982¹⁸ identified certain areas of concern in relation to the possibility of granting unmarried fathers automatic parental responsibility based on the genetic tie alone. It was suggested that mothers could potentially refuse to identify the father of the child, in order to prevent the father having an influence over that child's upbringing. However, given that the courts can make a prohibited steps order alongside a parental responsibility order to limit the power that the father can exercise, this point is somewhat invalidated. The Law Commission also suggested that an unmarried father who is granted parental responsibility may be tempted to blackmail a vulnerable mother, but there have been criticisms of this view, and the lack of evidence the Law Commission has to suggest that this is the case. Eekelaar¹⁹ states that the Law Commission is 'operating a stereotyped father as a social deviant' and that it is simply not acceptable to presume that an unmarried father has fewer morals than a married one. Bainham²⁰ makes the point that it is not 'at all self-evident that a failure to cohabit with the mother is an indication of a lack of responsibility on the man's part'. This is surely even truer in today's society where it is becoming normal for parents to have children before getting married, and where many people believe that living together as though they are married will grant them similar, if not the same, rights as actually being married. It may not be that the father has made a conscious decision to avoid any kind of commitment to the family unit, as the Law Commission seems to suggest is the case. As Collier and Sheldon²¹ write, the image of unmarried fathers as being 'unworthy' has been replaced in today's society by 'a depiction of men who are often deeply committed to their children.'

Furthermore, if we feel that the law is justified in withholding parental responsibility from a biological parent on the basis of the parent being a 'social deviant' then there does not seem to be a good enough justification as to why this should only apply to unmarried fathers rather than married fathers, and perhaps even mothers too. Surely the starting point should be the same for all parents: either there is a presumption of parental responsibility that can be rebutted, or parental responsibility is never something that is granted automatically (although surely it is in the best interests of the child to have someone who is automatically responsible for it). Presently, the starting point in English law with respect to the unmarried father is that he does not have parental responsibility, whereas there is an automatic presumption that a married father does. If we are so keen to assess the moral capabilities of a parent with parental responsibility and use this as a justification of withholding parental responsibility from some unmarried fathers, this needs to also be applied to married fathers if it is to be at all a convincing argument. It is also worth considering whether the mother should also be treated the same way as the father. Perhaps the fact that we are automatically giving the mother responsibilities with regard to her children, and not the father, could be said to be outdated in a modern society where women are no longer regarded as primary caregivers.

¹⁷ S11 MCA 1973

¹⁸ Law Commission Report No 118 (1982) paragraph 6.28

¹⁹ 1985 Fam Law 261

²⁰ (1989) 3 International Journal of Law, Policy and the Family 208

²¹ 'Fragmenting Fatherhood: A Socio-Legal Study' 2008.