To the Scottish Law Commissioners:

CONSULTATION SUBMISSION: Dr Lesley-Anne Barnes Macfarlane, Child & Family Law Team, Edinburgh Napier University

I have three brief suggestions to make, the first of which is general in nature with the remaining two being specific.

Suggestion 1: A Review of Scots Child and Family Law

Here I would add my voice to the others requesting a comprehensive review of Child and Family Law in Scotland.

The last comprehensive review produced the excellent 'Report on Family Law' (no. 135, 1992), which contained a draft Family Law (Scotland) Bill. Almost all of the recommendations in the Report/bill were implemented, albeit in various stages, throughout the years that followed. However, Report 135 is now quarter of a century old and family life has evolved considerably over the last three decades.

Some areas of Child and Family Law have been substantially re-written and harmonised during this time. Yet in other areas legal provision remains piecemeal and as such is insufficient (*e.g. cohabitants' claims on separation; defining cohabitants; time-limits for raising proceedings, Family Law (S) Act 2006, ss 25, 28, 29*), uncertain (*e.g. child capacity, Age of Legal Capacity (S) Act 1991; "the welfare test", Children (S) Act 1995, s 11(7)) or otiose (e.g. divorce / dissolution "grounds": "adultery", and "fault" itself, Divorce (S) Act 1976, s 1; Civil Partnership Act 2004, s 117*). I am aware that other academics, such as Dr Gillian Black of the University of Edinburgh and Professor Elaine E Sutherland of the University of Stirling, have made specific reference in their submissions to the detail of the areas mentioned in my previous sentence.

A comprehensive review of Child and Family Law would (i) identify current fitness for purpose of existing, and wide-ranging, legislation, (ii) enable steps to be taken to address any specific provisions that are now problematic in practice and (iii) highlight those general areas in which reform or further provision is desirable.

More specifically,

Suggestion 2: A Review of Child Capacity (in particular, the Age of Capacity (Scotland) Act 1991, s 1(3)(c))

The above subsection of the 1991 Age provides that "nothing in this Act shall affect the delictual or criminal responsibility of any person". Steps have been (or are about to be) taken towards reform with regard to the age of liability/responsibility in terms of criminal law *(s 52, Criminal Justice and Licensing (Scotland) Act 2010; https://news.gov.scot/news/minimum-age-criminal-responsibility*). However, the child's capacity/liability in delict (and, indeed, that of parents) remains uncertain. For example, since the criminal law was modernised, a child aged 11 years would not be prosecuted for deliberately smashing a window but the same child could be held

liable in the civil courts (as might his or her parents) for accidentally breaking a window while playing.

The above issue falls within the remit of Child Law and the UN Convention on the Rights of the Child to which the UK is a signatory. Further, despite the general and coherent capacity provisions of the 1991 Act (e.g. s 2), s 1(3)(c) continues to give rise to inconsistent treatment of the young across Scots law. Accordingly, it is submitted that a review of this particular provision would be timely.

Suggestion 3: General Consideration of "Legal Parenthood" / Extension of Parental Responsibilities and Rights ("PRRs") Agreement found in Children (S) Act 1995, s 4 to include "Known Biological Fathers"

(A) "Legal Parenthood": The law regarding parenthood is the product of decades (and in some instances centuries) of piecemeal legislative and judicial provisions. Within this uneven legal landscape, a longstanding distinction has been drawn between, on one hand, bearing the status of being a parent and, on the other, the possession of parental authority (*Elaine E Sutherland, Child and Family Law, 2nd ed,. Edinburgh: W Green, 2008, pp. 203-257, 357-403; Alexander B Wilkinson and Kenneth McK Norrie, The Law Relating to Parent and Child in Scotland, 3rd ed,. Edinburgh: W Green, 2013, pp. 71-97*). The former status, often described as being a "legal parent", creates a lifelong relationship, while the latter (i.e. possessing PRRs) invests in the individual concerned the authority necessary to parent a child throughout childhood. These categories, and the distinction between them, were certainly more unambiguous historically when parental status was a simple matter of lineage. However, in contemporary law, this is not always the case. It is suggested that it would be most useful to have a broad consideration of who, or what, ought to be considered in contemporary family life and society to be a "parent"– and of the legal consequences that should attach to parental status.

(B) Extension of PRRs Agreement: Further, and more specifically, section 4 of the Children (Scotland) Act 1995, providing for PRRs agreements, has always been an underused provision where heterosexual parents are concerned. More recently, the Human Fertilisation and Embryology Act 2008 (Sch 6(2) para 51) added a new section 4A. This additional section enables a second female parent to acquire parental responsibilities by agreement with the child's "mother" (i.e. the woman who carried and gave birth to the child, regardless of the genetic "parenthood" of the child concerned). Section 4A does not extend to those, not uncommon, cases in which a female couple have a child using the sperm of an acquaintance with whom they wish to co-parent (as opposed to an anonymous donor, which is governed by the terms of the 2008 Act).

In such cases, where a known genetic, or known biological, father (historically called a "known donor") has provided sperm, it is common for all three adults involved to wish to be known as "parents" and to possess PRRs. Courts have recognised that sharing parental status and PRRs amongst more than two adults is valid (*e.g. see DB v AB (Contact: Alternative Families) [2014] EWHC 384 (Fam), para 3*). No mechanism currently exists in statute to provide for sharing of PRRs in such a scenario.

Insofar as the sharing of PRRs between more than two parents is concerned, there is, for example, precedent in English legislation. The Children Act 1989, s. 4A(a), states that, if the mother's ex-partner also retains parental authority, "both parents may by agreement with the step-parent provide for the step-parent to have parental responsibility for the child". It is perhaps also worth noting that other jurisdictions have already made provision for more than two adults to be recognised as a child's legal parent (*e.g. British Columbia's Family Law Act 2013, ss. 29-31, allows for three or more legal parents; California's Family Code, § 7612(c) provides that "In an appropriate action, a court may find that more than two persons with a claim to parentage… are parents if the court finds that recognising only two parents would be detrimental to the child"*).

Section 4 agreements were designed to enable co-parenting by adults who live in a permanent family relationship with a child and his or her mother. It is therefore suggested that consideration now be given to whether the section 4 agreement might be revised/extended to allow for a co-parenting agreement between a female couple and their child's genetic father to be signed and registered.

Kind regards.

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