Cambridge Law Journal, **83(2)**, July 2024, pp. 230–233 © The Author(s), 2024. Published by Cambridge University Press on behalf of The Faculty of Law, University of Cambridge
doi:10.1017/S0008197324000333

WHERE parents are married or in a civil partnership, there is no power to revoke the parental responsibility of a father or second female parent, except by an adoption order or parental order. That position contrasts with that of unmarried fathers and unmarried second female parents where, by Children Act 1989, ss. 4(2A) and 4ZA(5), respectively, the court has power to bring their parental responsibility to an end. Irrespective of such power, the courts have power to control the exercise of parental responsibility which "extends, in very exceptional cases, to making an order prohibiting a parent from taking any steps in the exercise of parental responsibility" (*P v D and Others* [2014] EWHC 2355 (Fam), at [109] (Baker J.)), and see for examples *H v A* [2015] EWFC 58 (MacDonald J.) and *His Highness Sheikh Mohammed bin Rashid Al Maktoum v Her Royal Highness Princess Haya bint Al Hussein and Others* [2021] EWHC 3480 (Fam) (Sir Andrew McFarlane P.)). Thus, while revocation of parental responsibility is not possible in the case of a parent who is married to the child's mother, the courts can make orders which in practical terms mirror such revocation.

In *Re A (Parental Responsibility)* [2023] EWCA Civ 689 (Sir Andrew McFarlane P., Moylan and Dingemans L.JJ.), the appellant mother argued that this distinction relating to revocation of parental responsibility adversely discriminated against married mothers and their children in breach of Articles 8 and 14 of the European Convention on Human Rights (ECHR) and sought a declaration under section 4 of the HRA 1998 that the statutory scheme is incompatible with those rights. The case concerned the parental responsibility of two children whose married parents had separated. At first instance (*MZ v FZ and Others* [2022] EWHC 295 (Fam)) Russell J. "made extensive findings of violent, abusive and coercive/controlling behaviour by the father towards his wife and the children, both before and after separation" (*Re A*, at [12]). The severity of the father's prolonged abuse, evidencing "dangerous, obsessive behaviour" (at [34] (Russell J.)), had resulted in the mother suffering from PTSD and, on police advice, she and the children moving to a confidential location for protection. Based on her findings, Russell J. made a combination of specific issue and prohibited steps orders, granting exclusive exercise of parental responsibility to the mother, without the need to engage with the father, and expressly prohibited aspects of the father's exercise of parental responsibility, his contact with the children, and his ability to apply to the court without prior leave of the court (pursuant to Children Act 1989, s. 91(14)). Russell J. declined to grant a declaration of incompatibility but granted permission to appeal on that point.

The current scheme for allocation, acquisition and revocation of parental responsibility emerged from the Law Commission's examination of the law on illegitimacy (see *Illegitimacy*, Law Com No 118 (1982), *Illegitimacy*, Law Com No 157 (1986) and *Family Law: Review of Child Law Guardianship and Custody*, Law Com No 172 (1988)), and the Court of Appeal began its discussion of the law by highlighting the historical context against which the Law Commission considered the issue of parental rights. The court noted that the father of a legitimate child automatically had "full, irrevocable . . . parental authority for his child" (at [83]) whereas the unmarried father had "no rights during the life of the child's mother save for those that might be afforded by a revocable court order" (at [83]). Thus being married or unmarried was the determinative factor in terms of who did or did not hold parental authority (at [82]) and "it had always been a given under the law that the father of a married child would have full, irrevocable parental authority (save for adoption)" (at [83]). The Law Commission's focus was on expanding the parental responsibility of unmarried fathers and "it was into that context that the question of revocation of parental responsibility was introduced" (at [83]).

The Court of Appeal accepted that the appellant's case engaged Article 8 and that there was prima facie discrimination based upon marital (or civil partnership) status (at [84]). The focus thus shifted to the question of justification, if any, and the fourfold test set out in *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39, [2014] A.C. 700:

> (i) does the measure have an legitimate aim sufficient to justify the limitation of a fundamental right; (ii) is the measure rationally connected to that aim; (iii) could a less intrusive measure have been used; and (iv) bearing in mind the severity of the consequences, the importance of the aim and the extent to which the measure will contribute to that aim, has a fair balance been struck between the rights of the individual and the interests of the community?

The Court identified the "legitimate aim of maintaining the status of married fathers and supporting the priority that had consistently been afforded by Parliament to the state of matrimony" and held that this "is plainly capable of justifying the limitation of a fundamental right" (at [91]). The Court then asserted that the measure (presumably of not permitting revocation of parental responsibility) is rationally connected to that aim, and no less intrusive a measure was possible because any measure which would reduce the married parent's status would defeat the object of the policy. Addressing the final *Bank Mellat* question, the Court held that the law struck a fair balance: the judge's order in this case provided an adequate remedy and, given that the father's status as a parent remained (see at [15], [97]), only minimal weight could be attached to the continuing impact on the mother and children of his empty vessel of

parental responsibility (at [96]). Accordingly, the Court concluded that the appellant had failed to establish a breach of the ECHR, refused the application for a declaration of incompatibility, and dismissed the appeal.

The Court of Appeal's judgment in this case is carefully reasoned and it is not difficult to have sympathy with the outcome given the marginal impact of the discrimination on the mother. However, discrimination needs to be justified, and one wonders whether the Court's approach to identification and application of a legitimate aim was sound in this case. As pointed out by Lord Bingham in *A v Secretary of State for the Home Department* [2005] 2 A.C. 68 *Department*, at [68], and reiterated by Lord Kerr in *R. (Steinfeld and Keidan) (Appellants) v Secretary of State for International Development* [2018] UKSC 32, at [42]: "[w]hat has to be justified is not the measure in issue but the difference in treatment between one person or group and another." As Lord Kerr put it: "To be legitimate, therefore, the aim must address the perpetration of the unequal treatment, or … the aim must be intrinsically linked to the discriminatory treatment" (*Steinfeld*, at [42]). Here the Court of Appeal appears to be hoist on the petard of its historical analysis. In light of that analysis, the Court of Appeal went on to say that the "newly created ability to grant, but also to revoke, parental responsibility for unmarried fathers is not connected with the legitimate aim of prioritising the creation of, what are hoped to be, stable and enduring family relationships within marriage or civil partnership" (at [92]). It added that the "separate aim underpinning the law relating to unmarried fathers is, first, to allow parental responsibility to be afforded to some such fathers, and, second, to encourage that to take place by agreement, court order or by birth certificate by allowing for the responsibility to be revoked at a later time if that is justified" (at [92]). If, as the court acknowledges, the law relating to revocation of unmarried fathers' parental responsibility is not linked to the legitimate aim of prioritising marriage, it is difficult to see how that legitimate aim can be intrinsically linked to justification of the discriminatory treatment between married and unmarried parents. The Court of Appeal is justifying the measure and not the discrimination and simply asserting that marriage is, and should continue to be, given priority. The law having given unmarried fathers revocable parental responsibility, the question required to be addressed was on what rational basis could marriage be seen as providing a reasonable and objective justification for the distinction.

The closest the court got to engagement with the discrimination issue was its noting that in a line of cases (e.g. *McMichael v United Kingdom* (Application no. 16424/90) (1995) 20 E.H.R.R. 205 and *Smallwood v United Kingdom* (Application no. 29779/96) (1999) 27 E.H.R.R. 155, discussed at [34], [35]) the distinction regarding acquisition or removal of parental responsibility, "from the perspective of the Art 14 rights of

the unmarried father" had "been held not to establish a breach of the European Convention" (at [90]). The objective and reasonable justification provided by the Strasbourg case law for difference of treatment has been that unmarried fathers inhabit a spectrum, from "ignorance and indifference at one end . . . to a close stable relationship indistinguishable from the conventional matrimonial-based family unit at the other" (*McMichael*, at [98]). It is disappointing that the court did not engage more actively with the case law, especially given the obvious flaw in the "spectrum argument": as the facts of *Re A* and many other cases disclose, there would appear to be no rational connection between marital status and whether as a matter of fact a parent merits the status of parental responsibility or should be susceptible to having it revoked if unmeritorious. Married fathers equally inhabit a spectrum.

The Court of Appeal's readiness to privilege marriage on the issue of parental responsibility arguably sits uneasily aside statistics which show that in 2022 51.4 per cent of births were registered to women outside of marriage or civil partnership (ONS, 2022), as compared with at the time of the Law Commission's deliberations, only 12 per cent in 1980, rising to 27 per cent in 1990. The prospect of a human rights challenge to the statutory scheme for allocation, acquisition and revocation of parental responsibility now seems slim, and any change to the law is likely to require the initiative of Parliament. It remains to be seen whether the social change evidenced by the statistics will be more influential on the legislature.

Stephen Gilmore

Address for correspondence: Jesus College, Jesus Lane, Cambridge CB5 8BL, UK. Email: sg995@cam.ac.uk