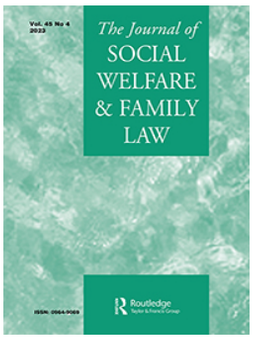

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Revoking parental responsibility – or not

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The Children Act 1989 creates various categories of holder of parental responsibility ('PR'), but on one measure there are only two types: (i) PR that is inalienable unless parenthood itself is lost by virtue of an adoption or parental order; and (ii) PR that can be removed by the court. The complicated line that the law draws in this respect, and where the arguments are not clear-cut, is between two groups of parents. On the one hand, all mothers and all fathers/second female parents who are married to or in a civil partnership with the mothers of their children are in the first category; they have PR by operation of law from the moment of the child's birth, and it cannot be removed. By contrast, unmarried fathers and second female parents, who can gain PR in one of the ways listed in ss 4/4ZA of the Children Act, are liable, in the right circumstances, to have their PR revoked (s 4(2A)/4ZA(5)). The court has set a high test for such removal (George *et al.* 2023, pp. 716–7), but it is possible.

Re A (Power to Revoke Parental Responsibility) [2023] EWCA Civ 689 involved a challenge to this distinction, and in particular arguments that the court should have the same power to revoke PR for a mother and for a married/civil partnered father or second female parent as it does for unmarried fathers and unmarried second female parents. The mother in *Re A* wanted the PR for her former husband and the father of her children revoked; she sought a declaration of incompatibility under s 4 of the Human Rights Act 1998, arguing that she and her children were discriminated against by virtue of her previous marriage to the children's father. The High Court refused that application, as did the Court of Appeal (McFarlane P, Moylan and Dingemans LJJ).

The facts

The father's behaviour was seriously abusive during and after the parents' relationship. He had been convicted for breaching a non-molestation order, and an indefinite restraining order under the Protection from Harassment Act 1997 was in place. The mother and children had moved to a confidential location on police advice, and the children's names had been changed. Had the parents been unmarried, it is likely that the father's behaviour and its effects on the mother and children would have satisfied the test for the removal of PR. As the parents were previously married, that power was not available; the High Court

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made a series of sweeping prohibited steps orders that had the effect of preventing the father from in any way exercising his PR, but refused the HRA s 4 declaration of incompatibility.

The decision

On appeal, the mother argued successfully that 'parental responsibility is a matter of status and that it cannot be reduced to being a mere label'; the mother also accepted the court's argument that being the child's father is also a status (paras 25 and 85). However, the court noted in relation to PR that 'any such status [is] of flexible weight or standing' because of the differential effects of it 'depend[ing] upon the degree to which a parent is able or permitted to exercise parental responsibility' (para 85). The court also gave less weight to this factor on the basis that even if the father's PR could be revoked, 'he would still reman the children's biological father' (para 86) – though since that is also true in the case of the unmarried parent, it is hard to know what point the court is making about that in terms of the discrimination between married and unmarried parents.

In rejecting the mother's appeal, the court placed significant weight on '[t]he legitimate aim of maintaining the status of married father and supporting the priority . . . of matrimony' (para 91). In reaffirming this as a legitimate aim, the court also held the policy difference that was under challenge to be rationally connected to that aim (para 92), when noting 'the wider social setting within which unmarried parentage may occur' (para 93). Finally, in terms of the 'fair balance' between competing rights, the court held that the fact that prohibited steps orders could be made to remove the practical effect from PR 'is, indeed, an adequate remedy' (para 96). The court then reiterated that 'the status of being the children's father will remain and cannot be revoked, save by adoption or parental order' (para 97) – again, the relevance of that point is not explained, since the same is true for unmarried parents.

Discussion

The Court of Appeal noted on numerous occasions that the status of father would remain, irrespective of the court's power to revoke parental responsibility. It is difficult to understand how that is anything other than a red herring. In the case of a child's father (the position for second female parents is more complex), he inevitably has the irrevocable status of being *the father* in any of the cases where this issue may arise. That is not a status that the court ever has power to revoke, other than by the making of an adoption order or a parental order. That is a commonality to all cases, whether the power to revoke PR exists (unmarried fathers) or not (married/civil partnered fathers). It cannot, therefore, advance the argument one way or another. The fact that parenthood cannot be removed is evidently not an argument for making PR irrevocable, because exactly that can be done for unmarried fathers.

It is right, of course, that there is a wide social setting within which unmarried parenthood can occur (para 93), though it does the court no favours for it to assume a total homogeneity of setting within the context of marriage and civil partnership. Marriages also vary hugely, and in an age when more than half of children are born outside marriage (Office for National Statistics 2022), it is

increasingly difficult to know how 'legitimate' it is for the law to draw a sharp line between married and unmarried parents for these purposes. The crux of it is that, *on the facts*, it may be that the court would use the power to revoke PR even more rarely in the context of married parents than it does for unmarried parents; but that should be the outcome of a proper evaluation, and not the result of an *a priori* limitation on the court's power. In other words, the fact that the law is generally positively oriented towards marriage is not a good reason for the court to be denied the power to revoke PR in the context of a particular marriage that would, necessarily, have been extremely abusive (because otherwise the test for revocation will not be met anyway).

The court might also have asked itself what the legitimate interest was in *not* having the ability to revoke PR from a mother or married father. The court has gone out of its way to create PR as primarily a *status*, irrespective of its practical use (Harris and George 2010). Nearly 30 years ago, the Court of Appeal emphasised in *Re S (A Minor) (Parental Responsibility)* [1995] 3 FCR 225, 234 that:

> It is wrong to place undue and therefore false emphasis on the rights and duties and the powers comprised in 'parental responsibility' and not to concentrate on the fact that what is at stake is the conferring upon a committed father the status of parenthood for which nature has already ordained that he must bear responsibility.

That has been the consistent message: what matters is the status, not the practical effects. Then to come along in the context of revocation and say, in effect, that the status is not particularly important because the practical effects can be controlled in other ways is disingenuous. The courts have largely created this problem, and they cannot now say that prohibited steps orders are an adequate answer.

Whether there may be a further appeal is unknown, but if *Re A* remains the final word on this subject that will be a disappointing outcome.

Disclosure statement

No potential conflict of interest was reported by the author.

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