

The Welfare Ground for Dispensing with Consent to Adoption: the Supreme Court Decides

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In a previous article on these pages (2008 SLT (News) 213), Professor Norrie drew attention to a major innovation from the previous law which is contained in s. 31 of the Adoption and Children (Scotland) Act 2007. This section sets out the new grounds for dispensing with parental consent to adoption one of which, designed as a safety net when the other grounds cannot be shown to exist or do not apply, is that “the welfare of the child otherwise requires the consent to be dispensed with” (s. 31(3)(d)). The conclusion of the earlier article was that this ground might be overbroad, and risked falling foul of the European Convention on Human Rights. The Supreme Court addressed the issue in S v. L 2012 S.L.T. 961 and the purpose of this article is to analyse whether the decision in that case fully answers the concerns that Professor Norrie previously expressed.

The Previous Law

Prior to the coming into force of the Adoption and Children (Scotland) Act 2007, the most common (because the least precise) ground upon which parental agreement was dispensed with was that agreement was being unreasonably withheld (Adoption (Scotland) Act 1978, s. 16(2)(b)). To establish this ground, the welfare of the child was clearly relevant, but it was not determinative. The very nature of the reasonableness test, here as elsewhere in the law, presupposed a range and variety of decisions that could be characterised as reasonable, and a withholding of consent might be reasonable even when giving consent was both reasonable and, from the child’s welfare perspective, desirable. “It is perfectly feasible”, said Lord McCluskey in *Central Regional Council v. M* 1991 S.C.L.R. 300 at 302, “that the court will reach its own view that it would be better that the adoption order should proceed but nonetheless arrive at the view that a reasonable parent was perfectly entitled to withhold his or her consent to the making of such an order.” The child’s welfare alone was not enough to justify an adoption order being made against the wishes of

a parent. As Lord Carswell put it in *Down Lisburn Health and Social Services Trust v. H* [2006] UKHL 36 at para. 69: “The mere fact that the proposed adoption would conduce to the welfare of the child is not of itself sufficient to establish unreasonableness on the part of the parent”. Lord President Emslie in *AB v. C* 1977 S.C. 27 at p. 31 was to the same effect when he said, “The exact weight to be given to the child's welfare will vary according to circumstances, for the ultimate decision must be a balanced decision which can never be reached by considering only whether life with the proposed adopters would be a ‘better bet’ for the child than life with his own parent.”

All of this was designed to ensure that a satisfactory, capable and reasonable parent was able to prevent their child being adopted against their wishes, even in circumstances in which the child's welfare would be enhanced by being adopted, and this consisted well with the European Convention on Human Rights. The European Court of Human Rights accepts that “consideration of what is in the best interests of the child is always of crucial importance” (*Scott v. United Kingdom* 2000 Fam. L.R. 102 at para. 18-94) but article 8 of the European Convention requires that state intervention in family life – of which adoption of children against parental wishes is, self-evidently, the most extreme form – be justified by more than a mere identification of which of various options would be the “better bet” for the child. In *Olsson v. Sweden* (1988) 11 E.H.R.R. 259 at para. 72 the Court said that “it is not enough that the child would be better off if placed in care”. In *YC v. United Kingdom*, (2012) 55 E.H.R.R. 33 at para. 134 the Court said “the fact that a child could be placed in a more beneficial environment for his or her upbringing will not on its own justify a compulsory measure of removal from the care of the biological parents; *there must exist other circumstances pointing to the ‘necessity’ for such an interference* with the parents’ right under article 8 to enjoy a family life with their child” (emphasis added). Measures that totally deprive a birth parent of his or her family life with the child and are inconsistent with the aim of reuniting the family “should only be applied in exceptional circumstances and could only be justified if they were motivated by an overriding requirement pertaining to the child's best interests”: *Johansen v. Norway* (1996) 23 E.H.R.R. 33 at para. 78.

Interpreting the 2007 Act

As an Act of the Scottish Parliament, the Adoption and Children (Scotland) Act 2007 requires to be interpreted, where at all possible, consistently with the European Convention and with the jurisprudence of the Strasbourg court, and in my earlier article, fearing that the welfare ground for dispensing with parental consent was not ECHR-compliant, I attempted to minimise its scope for application by suggesting a possible interpretation that would limit it almost out of existence. Neither adoption practitioners (see Scott, “Welfare and the New Grounds for Dispensing with Parental Consent to Adoption: A Reply” 2009 SLT (News) 17) nor, in the event, the Court of Session (see *S v. L* 2011 SLT 1204) were remotely persuaded by this suggestion, nor even it would seem by the underlying concern that motivated it. I suggested also that, if the application of the new ground was not to be limited, then the dangers it represented might be restricted by giving “welfare” as it appeared in s. 31(3)(d) a much stricter interpretation than it would receive in s. 14(3), which sets out the general rule that the child’s welfare is the court’s paramount consideration when making decisions under the 2007 Act. Such a suggestion had already been rejected by the English Court of Appeal interpreting very similar (though not identical) language in the Adoption and Children Act 2002 (*Re P (A Child)*, [2008] EWCA (Civ) 535), but when *S v. L* reached the Supreme Court (2012 SLT 961) a stricter interpretation was indeed adopted, allowing the challenge to the validity of s. 31(3)(d) of the 2007 Act to be rejected. The lead judgment was given by Lord Reed.

When does section 31(3)(d) apply?

Lord Reed accepts that, unlike the equivalent English legislation, s. 31(3)(d) does not apply in every case in which the parent can be found and has capacity to give (or withhold) consent. In a recent decision from the Outer House, *M v. R* 2012 CSOH 186 Lord Glennie at para. 62 said this: “Section 31(3)(d) of the 2007 Act lays down a sequential approach to the question of whether the requirement for the parent’s consent to the making of the adoption order should be dispensed with. Assuming that the parents are alive, can be found and are capable of giving consent, it requires first a consideration of what may be called the ‘inability test’ set out in section 31(4). The court has to make a judgment on the alleged inability of the parents satisfactorily to discharge their parental responsibilities or exercise their parental rights. Only if that test is not satisfied, or for some other reason neither of subsections (4) or (5)

applies, does the ‘welfare test’ in section 31(3)(d) – viz, whether the welfare of the child requires the consent to be dispensed with – come into play”. Subsection (5) does not apply when no permanence order has been made which deprives the parent of parental responsibilities and parental rights, and subsection (4) does not apply when the parent cannot be shown to be incapable of carrying out parental responsibilities and parental rights, or at least it cannot be shown that that incapacity is likely to continue. Now, Lord Reed (*S v. L* at para. 28) accepts that the grounds based on parental inability and the earlier removal by a permanence order of parental responsibilities and parental rights are likely to apply in many, if not most, cases where adoption is opposed by a parent, leaving only limited scope for the application of the welfare ground for dispensation in s. 31(3)(d). But that limited scope is exactly where the danger lies. Putting it at its simplest, the welfare ground applies only in the case of a parent who has parental responsibilities and parental rights, and who is either currently able satisfactorily to exercise these responsibilities and rights or is likely to (re)acquire that ability. Any applicant who relies on s. 31(3)(d) is therefore asking the court to dispense with the consent not of the parent who is incapable of bringing up his or her child properly, but of the capable – often the reasonable – parent: the parent, that is, who had the power to prevent the adoption under the pre-2007 law. Adopting a child against the wishes of a parent who cannot be shown to be incapable of bringing up his or her child properly will require a strong justification before it is consistent with article 8 of the European Convention. Given that most parents are satisfactorily able to fulfil their parental responsibilities and parental rights towards their children it can hardly be said that this amounts to the “exceptional circumstances” envisaged by the European Court in *Johansen v. Norway*. For this reason it becomes all the more important that, even although s. 31(3)(d) is applicable, how it operates in practice is such as to avoid, indeed prohibit, the “better bet” approach eschewed under the old law, rejected as illegitimate by the European Court, and inherent in s. 14 of the 2007 Act.

Lord Reed’s interpretation of “welfare ... requires” in s. 31

The thrust of Lord Reed’s judgment concerns not so much the circumstances in which s. 31(3)(d) will apply, but its actual meaning. He holds the provision compatible with article 8 because the test is not simply one of welfare in the sense of a weighing of options to identify the better outcome for the child’s welfare: rather the

test is that the “welfare of the child ... *requires*” the parent’s consent to be dispensed with. Lord Reed holds (at para. 32) that the word “requires”, as a matter of ordinary English and before colouring it with the demands of the European Convention, imports a high test meaning that something is not merely desirable or reasonable but that it is necessary. He quotes Lady Hale in *Re S-B (Children) (Care Proceedings: Standard of Proof)* [2010] 1 AC 678 at para. 7) as saying: “It is not enough that the social workers, the experts, or the court think that a child would be better off living with another family. That would be social engineering of a kind which is not permitted in a democratic society. The jurisprudence of the European Court of Human Rights requires that there be a ‘pressing social need’ for intervention and that the intervention be proportionate to that need.” Lord Reed himself goes on, in the central passage of his judgment (para. 34, emphasis added):

“It follows that legislation authorising the severing of family ties between parents and their children will not readily be construed as setting anything less than a test of necessity. Section 31(3)(d), in stipulating that the welfare of the child must ‘require’ that parental consent be dispensed with, is consistent with such a test. There must, in other words, be an overriding requirement that the adoption proceeds for the sake of the child’s welfare, which remains the paramount consideration. The court must be satisfied that the interference with the rights of the parents is proportionate: *in other words, that nothing less than adoption will suffice. If the child’s welfare can be equally well secured by a less drastic intervention, then it cannot be said that the child’s welfare ‘requires’ that consent to adoption should be dispensed with.*”

At first sight, the requirement to show that nothing less than adoption will suffice seems to confirm, indeed emphasise, that more than a mere better bet must be shown, but it leaves entirely open the question: suffice for what? Sufficient to ensure the best outcome, or sufficient to avoid the worst outcome? Sufficient to protect the child from harm, or sufficient to achieve some improvement in the child’s current position? Lord Reed’s answer is implicit in his very next sentence: that it could not be said that the child’s welfare requires dispensation of consent if that welfare could be “*equally well secured by a less drastic intervention*”. If the child is as well served by refusing the adoption (making, perhaps, a permanence order or a s. 11 order instead) as by granting adoption then, Lord Reed tells us, the dispensation cannot be

granted, which is fine, other than that it tells us nothing. For even if a scenario existed in which the options available for the child's future are so finally balanced that either an adoption order or another order will *equally* serve the child's interests, adoption would have to be refused in any case because of the rule in s. 28(2) which provides that "the court must not make an adoption order unless it considers that it would be better for the child that the order be made than not". In fact, it is far more likely, and at the heart of the problem, that adoption might be shown to be the best option for the child because other options, though they may suffice to secure the child's welfare, will do so less rather than equally well. It remains entirely unclear whether s. 31(3)(d) is satisfied in these circumstances.

Lord Reed assumes that welfare will require dispensation of parental consent when adoption is best for the child, without the necessity of showing that lesser options are positively harmful, or (it may be) he regards such lesser options as harmful merely because they are second best. If this is so, then the "welfare requires" test under s. 31 becomes the same as the welfare balance under s. 14, that is to say the "better bet". The courts are, of course, perfectly used to balancing different options and identifying the best outcome: that is the nature of the welfare inquiry in the context, for example, of applications for s. 11 orders under the Children (Scotland) Act 1995, where second-best loses even though it is harmless, satisfactory and, in itself, acceptable. But s. 31 of the 2007 Act, because it authorises compulsory state intervention in family life, must require far more. It is submitted that s. 31(3)(d) should be interpreted in such a way that it is not satisfied where the child's welfare would be served less well, *but still satisfactorily*, by a less drastic intervention than adoption. When Lord Reed requires it to be shown that "nothing less than adoption will suffice", this should be interpreted to mean suffice to protect the child from actual harm and not merely from a second-best outcome. Alternatives to adoption must be shown, in other words, to be unacceptable, rather than less good. Otherwise we risk the social engineering that Lady Hale warned against – a risk Lord Reed accepts, by his quoting of Lady Hale, is present.

Particular cases

There are two very different types of case in which it is crucial that the law is clear on the point: that of the non-resident father seeking to prevent a step-parent adoption,

and that of a recovering drug-addict seeking to prevent the conversion of a permanent placement of the child into an adoptive placement.

A birth father seeking to prevent a step-parent adopting his child is perhaps the easier case. It is not uncommon for the new husband of the mother with residence of a child to seek, by adoption, to convert his status from step-parent to adoptive parent; nor is it uncommon for the birth father, even when enjoying little continuing relationship with the child, to oppose adoption in these circumstances. Under the pre-2007 law the birth father's consent could be dispensed with if he were withholding it unreasonably, but now (on the assumption that he is alive, capable of consenting and not incapable of fulfilling his parental responsibilities) the only basis for dispensing with his consent is that the child's "welfare requires" it. There are of course other means of securing the position of the step-father, most obviously an order under s. 11 of the Children (Scotland) Act 1995 conferring parental responsibilities and parental rights; but what cannot be done, short of adoption, is the transference of parenthood itself from the genetic to the social father. Even assuming, for the sake of argument, that such a transference is in the better option for the child, it certainly does not follow that it is an overriding requirement if the child's proper upbringing can be secured by a s. 11 order. It cannot be said that "nothing less than adoption will suffice" to protect the child from positive harm, though it could well be said that nothing less than adoption will suffice to ensure the child gets the better of two options. If the former is the test then step-parent adoptions become much more difficult than they were previously; if the latter is the test they become easier because the applicant no longer needs to show parental unreasonableness.

Courts have of course proved themselves willing to be persuaded that the security and permanence inherent in an adoption order amount to a better option for the child than the impermanence and challengeability of a s. 11 order (though some courts do resist that temptation: see *Re S (A Child) (Adoption Order or Special Guardianship Order)*, [2007] 1 F.L.R. 819). However, Lord Reed's judgment in *S v. L*, properly interpreted, does not give a straight choice: adoption must be "required" and that word carries "the connotation of an imperative, what is demanded rather than what is merely optional or reasonable or desirable": *Re P (A Child)*, [2008] EWCA (Civ) 535

per Wall L.J. at para. 125, quoted with approval by Lord Reed at para. 35. If, as I hope it does, this amounts to an enhanced welfare test which requires the unacceptability of all other options, rather than a simple welfare test which involves the identification of the better of two alternatives, then welfare will “require” dispensation of a birth father’s consent under section 31(3)(d) only when the court is satisfied that there exists an imperative that the adoption should proceed, so powerful that it justifies overriding the interests of the birth father, and that nothing less than adoption will protect the child from positive harm that can be shown to be a likely consequence of failing to transfer lifelong parenthood from the genetic to the social father. There can be no connotation of an imperative in circumstances in which dismissal of the application for adoption would leave the child in a satisfactory or at least an acceptable position, even where the making of an adoption order would, all things considered, overall clearly be a better bet for the child. Step-parent adoptions against the wishes of an unimpeachable birth father have been vulnerable ever since *Gorgulu v. Germany* [2004] 1 F.L.R. 894.

The more difficult scenario is that (broadly) illustrated by *S v. L* itself. A child is removed from its mother’s care because her inability to fulfil her parental responsibilities unchallengeably poses a risk of significant harm to the child. After some time while the child is being looked after by a local authority, staying with long-term foster carers, the decision is made that the foster carers will seek to adopt the child; around the same time, however, the mother shows signs of recovering her capacity – perhaps by escaping from drug addiction or the like. The better bet for the child may well be to remain where he or she is, rather than to be subjected to the uncertainties of rehabilitation with a recovering drug addict. A simple application of the welfare test, as set out in s. 14(3) of the 2007 Act, achieves this result. But the mother’s consent must be dispensed with *before* the court turns to the question, governed by s. 14(3), whether or not to make the adoption order. Section 31(4) will, *ex hypothesi*, not be applicable if the mother is likely to reacquire parental capacity (so making the scenario very different from that in, for example, *Scott v. United Kingdom* where there was no indication that the alcoholic mother would ever escape from her addictions and where the European Court held (at para. 18-101) that the domestic authorities could not be criticised for concluding that adoption was “the only option” for the child). Section 31(3)(d), the “welfare requires” ground, is therefore the

only one applicable. Adoption is not in principle required to secure the child's permanent placement with the foster carers: a permanence order, or even a s. 11 order, can achieve that aim. Nothing short of adoption will suffice, of course, to create a new life-long parent-child relationship, but to use that aim as the justification for doing so is circular. It ought to be insufficient to show that the new parent-child relationship would secure the child's welfare better than the old: that is not the test, for a mere balancing of options does not import the necessity required to satisfy the "welfare requires" ground for dispensation. It needs to be shown that it would be unacceptable from the point of view of the child's welfare not to proceed with adoption, that retaining the recovering drug addict as the child's mother would be harmful in some way – beyond securing the child's placement throughout childhood, which can be done without lifelong adoption – to the child. For only then could it be shown that dispensation with parental consent was an "imperative". That imperative was held to be established in *M v. R* (above) where the children were long settled with foster carers, due to the risk that if the adoption order were not made in favour of the foster carers the birth parents would introduce disruption and uncertainty into the children's lives by seeking to have them returned to their care, even although their chances of success would be nugatory. That risk, of disruption and continued uncertainty, must be shown to be genuine and substantial, and not speculative or fanciful. Far less must it be allowed to become the mantra of all applicants for an adoption order seeking to rely on s. 31(3)(d).

The true role of section 31

There is, in fact, a flaw at the very heart of the Adoption and Children (Scotland) Act 2007. Unlike with any other state intervention in family life, this most drastic, most severe and most irreversible intervention has no conditions precedent laid down before the court can move on to the question of whether to make the order sought. This is to be compared with, for example, s. 84 of the 2007 Act which sets down the conditions for the making of a permanence order, or ss. 37 or 38 of the Children's Hearings (Scotland) Act 2011 which sets down the conditions for the making of a child protection order, or s. 67 of the 2011 Act which sets out the grounds upon which a child may be referred to a children's hearing. All of these provisions have in common that they must be satisfied *before* the court or hearing moves on to a consideration of the welfare test in the determination of whether to grant the order

sought: they are designed to establish that there is some pre-existing breakdown in the proper upbringing process or to indicate that the child is at risk in some way. It is that pre-existing breakdown or risk that justifies the state's intervention. These provisions, in other words, provide the conditions precedent or, as they are often described in English law, the "threshold criteria" for state action and they emphasise that (in their different contexts) it is avoiding risk to the child's wellbeing rather than a desire for betterment of the child's situation that is the justification for state intervention in family life. Only once these conditions precedent have been satisfied is the court justified in examining, from the perspective of the child's welfare, the various options that are available. As such, they serve the role of the "other circumstances" beyond welfare required by the jurisprudence of the European Court of Human Rights.

But these "other circumstances", or conditions precedent, are entirely missing from the adoption provisions in the Adoption and Children (Scotland) Act 2007. Their absence is explained by the peculiar position that adoption holds within child law – as a private law action designed to achieve public law aims. Adoption is an order sought by private individuals and not the local authority, and as such it appears to have no need for conditions-precedent for state intervention: it is on a par with s. 11 of the 1995 Act which similarly allows the court to move straight to the welfare balance without establishing any justification for state involvement in family life (beyond the fact that the parties have asked for it). But the reality of adoption is, of course, very different and it is, in large measure, a public law process, the ultimate and most severe outcome of child protection proceedings instigated by the state. As such, conditions-precedent are all the more essential to provide the state with its justification for intervention.

This gap is filled, if only partly, by the grounds for dispensing with parental consent which, properly understood, serve the function of providing the justification for state intervention in family life – whether it be that the child's parents are dead, or cannot be found, or are unable satisfactorily to fulfil their parental responsibilities. It is with this function very firmly in view, rather than the necessity to allow parents to participate in the process, that the welfare ground in s. 31(3)(d), no less than the others in s.31(3), must be interpreted. Given this fundamental role of s. 31 the

decisions, relied upon heavily by Lord Reed, of both the European Court of Human Rights in *YC v. United Kingdom* and the Court of Appeal in *Re P (A Child)* (above) upholding the compatibility of the equivalent provisions in the English legislation with article 8 are not in point. Both these cases required an interpretation of the English “welfare requires” ground for dispensing with parental consent in circumstances in which conditions precedent had already been shown to be satisfied and there was no need, therefore, to interpret them in such a way as served that function. Both cases involved dispensing with parental consent not to adoption, but to a placing order, which can only be made under s. 21 of the (English) Adoption and Children Act 2002 if the threshold criteria for making a care order set out in s. 31 of the Children Act 1989 have already been satisfied: that the child concerned is suffering, or is likely to suffer, significant harm, attributable to lack of parental care or to the child’s being beyond parental control. By satisfying these threshold criteria, the European Court’s requirement for “other circumstances” to be shown beyond a mere balance of welfare is satisfied and the domestic court may then go on to make a placement order, applying the “welfare requires” test to the question of dispensation on the basis that this is better for the child than any other available option. In Scotland on the other hand, the “welfare requires” test *is* the “other circumstance”.

These English cases would be analogous to an application in Scotland to dispense with parental consent to the making of a permanence order with authority to adopt: s. 84 of the 2007 Act sets down the conditions precedent (the circumstances beyond the welfare balance – particularly that the child’s residence with the parent is or is likely to be seriously detrimental to the child) which, once satisfied, allows the court to go on to consider whether the child’s welfare requires dispensation of parental consent under s. 83(2)(d). Here too, as in the English cases, the requirement for dispensation of parental consent does not provide the condition precedent that requires to be satisfied before turning to the balance of welfare: that function is served by s. 84. For this reason, the concerns about the breadth of the ground in s. 31(3)(d) do not arise with the identically worded ground in s. 83(2)(d) of the 2007 Act under which parental consent to including authority to adopt in a permanence order may be dispensed with, because before addressing that question the threshold criteria in s. 84 of the 2007 Act must first have been satisfied.

Of course, it might be argued that in the vast majority of adoption applications it will already have been shown in earlier proceedings that the child is at risk: children adopted against their parents' wishes are likely already to be subject to orders like permanence orders and compulsory supervision orders for which conditions precedent have already been satisfied. However, even if this were true for all children being adopted against their parents' wishes (which it is not, as the step-parent scenario shows), the argument is not sufficient protection against ECHR challenge. The requirement to satisfy other threshold criteria appears on the face of s. 52(1)(b) of the English legislation when placing orders are sought, but no such requirement to satisfy the "risk" conditions in other legislation appears in s. 31(3) of the 2007 Act and as such fails to satisfy the ECHR requirement for legal certainty.

Conclusion

Lord Reed's judgment in *S v. L* partially but does not fully assuage the concerns that I previously expressed in relation to s. 31(3)(d). The ambiguities in his judgment, as described above, leave room for doubt which require as a matter of some urgency to be resolved. The Children and Young People (Scotland) Bill provides the Scottish Parliament with an ideal opportunity to do so before it is required to act by the European Court of Human Rights. A simple amendment is all that would be required: making s. 31(3)(d) applicable only when, in addition to welfare requiring dispensation, the condition-precedent for making a permanence order in s. 84(5)(c)(ii) is also satisfied. In that way, a parent who poses no risk to his or her child, who is reasonable, and who is capable to bringing up his or her child satisfactorily (if not ideally) will be able to maintain their parenthood, even if there is no question of the child being returned to their full-time care.