Scottish Feminist Judgments Project

***White v White* 2001 SC 689**

Court of Session, First Division, on Appeal from the Sheriff Court

Temporary Judge Norrie

The Facts

That the facts in this case are mundane, reflecting as they do a narrative of family breakdown all too often encountered in the courts, does not diminish the pain and anxiety they cause to the actors in this dispute, least of all to the child at its heart. The parties are the parents of two children, “K” and “V”, whose marriage ended in 1997 with the granting of a decree of divorce when the children were 12 and 6. They had separated around two years previously, the children remaining with the pursuer, and initially the defender saw the children around twice a week. After nine months, however, the defender moved to Scarborough to be near their recently widowed mother, and contact with the children continued mostly by telephone; there were occasional visits by the children to Scarborough.

This relatively obliging state of affairs ended when the defender commenced a new intimate relationship, which in the event did not last. The catalyst was a telephone call between the defender’s new friend and the pursuer, which ended in a quarrel during which a threat was issued to remove the children from the pursuer’s care. The pursuer responded - some may say understandably, some may say harshly - by cutting all lines of communication with the defender and stopping all contact between the defender and the children. Decree of divorce was granted five months later, and while the sheriff ordered that the children reside with the pursuer, no order was either sought or made in respect of contact between the defender and the children. However, a year after the divorce, the defender sought a variation of the interlocutor to include an order for direct contact every alternate Sunday. K, the older child, who

is now 15 years of age, expressed a desire not to have any contact with the defender, who accepted this; and the case has been argued thereafter in relation to V only, who is presently 9 years old. The pursuer opposes any contact.

The Lower Courts' Approaches

The sheriff found for the defender, while the sheriff principal found for the pursuer. The fact that both applied the welfare test to the issue, as required by s. 11(7) of the Children (Scotland) Act 1995, but nonetheless came to diametrically opposite conclusions, illustrates the inherently protean nature of that test. The test can be applied only when the courts populate the notion of welfare with factors we believe work for or against the interests of children. Effectively, the approaches of the sheriff and of the sheriff principal encapsulate the positions of each party. I agree with your Lordship in the Chair that both approaches are flawed.

In applying s. 11(7), the sheriff found the decisive factor that affected the child's welfare in s. 1(1)(c) of the 1995 Act. This imposes on a parent who does not live with their child (such as the defender) an obligation to maintain personal relations and direct contact with that child on a regular basis. In the sheriff's view, Parliament's imposing of this obligation puts into statutory form a "widely held belief; that the welfare of children is best served if they keep contact, and are afforded the opportunity to keep contact, with both parents". The sheriff concluded that this meant that "only the strongest competing disadvantages will be likely to prevail to establish that the welfare of the child would not be served by allowing contact with the parent". The pursuer was unable to establish any such strong competing disadvantages, since the sheriff concluded that there was no suggestion that the defender's contact with V would be in any way harmful to the child. It followed that the welfare of the child would be served by maintaining contact with the defender.

For reasons I will expand upon below, I do not accept that there is anything in the 1995 Act that imposes a requirement on those opposing contact to find strong competing disadvantages to continued contact. The sheriff principal overturned the sheriff for much the same reason, regarding the approach taken by the sheriff as amounting to the judicial creation of a presumption in favour of contact which had no

foundation in the 1995 Act. Yet, in doing so, the sheriff principal was to my mind also reading more into the 1995 Act than is actually there.

In applying the welfare test, the sheriff principal focused not on s. 1 of the 1995 Act but rather on s. 11(7)(a), which directs that the court "shall not make any such order unless it considers that it would be better for the child that the order be made than that none should be made at all". He concluded from these words (encapsulating what is commonly called the "no-order principle") that it was for the parent seeking the order to demonstrate to the court's satisfaction that the making of a contact order would promote the child's welfare. He considered that no change had been effected by the 1995 Act to the pre-existing law which, on high authority, had held that the onus was on the parent seeking contact to show that some positive advantage to the child would accrue from the making of the order. This had been the approach of Lord Dunpark in *Porchetta v Porchetta* 1986 SLT 105 in relation to the married father, and of Lord Hope in *Sanderson v McManus* 1997 SC(HL) 55 in relation to the unmarried father. In *Sanderson*, Lord Hope eschewed the description of the need to establish some benefit from contact as a presumption against contact, preferring instead to see it as a "point of reference" guiding decision-making.

Applying that approach to the present case, the sheriff principal considered that the defender had failed to show to the court's satisfaction any positive advantage to V in maintaining contact with the defender, and so no order could be made. We have already rejected the sheriff's suggestion that the 1995 Act contains a requirement that those opposing contact must find strong competing disadvantages to its continuation. Likewise, we do not accept the sheriff principal's suggestion that there is a converse requirement to show positive advantage before a contact order can be made. Instead, I seek to interpret the 1995 Act in light of what it is seeking to do.

The Aims of the 1995 Act

This is the first opportunity that this court has had to explore the implications of the Children (Scotland) Act 1995, and in particular both the nature and effect of section 11 and its underlying philosophy. The flaw in the reasoning of both the sheriff and

the sheriff principal in this case is that they failed, in different ways, to acknowledge just how radical are the changes to the existing law effected by the 1995 Act.

The premise behind that Act, no less revolutionary for being understated, is one of equality in parenthood. Its provisions were designed to recognise, and perhaps also to advance, a fundamental shift in society's attitudes to the parenting role. The law has now jettisoned pre-existing stereotypical gender roles in parenting, which all too often underpinned earlier court decisions on custody and access, whereby women's primary role in life was seen as mother and caregiver, and men's role was regarded as breadwinner who could afford to, or was obliged to, leave the nurturing of their children to their wives. Parents under the 1995 Act are to be seen as parents, broadly irrespective of their gender, and this allows both fathers and mothers to benefit from a greater parity in child-rearing. It is true that formal equality during marriage had previously been achieved under the Law Reform (Parent and Child) (Scotland) Act 1986, but that equality evaporated on parental separation, for thereafter parenting was no longer seen as a shared task but instead became one in which clear gender stereotypes resurfaced. Mothers tended to retain custody and – as pointed out by Wilkinson and Norrie in *The Law Relating to Parent and Child in Scotland* 1st edn, 1993 at pp.229-230 - access (typically the father's role) tended to be seen by the courts as no more than a qualification of the mother's right.

The 1995 Act sweeps away these gendered assumptions. It encourages parents to see their role as that of parent, with all the caring, supporting and nurturing responsibilities this involves and free of preconceptions about the role of "mother" or of "father". It does so not only by granting both parents full parental responsibilities and parental rights while the parties live together with their children but, unlike the previous law, it seeks to ensure that these responsibilities and rights are not affected by parental separation or divorce. The termination of the parent-parent relationship is no longer to have, in and of itself, any legal effect on the parent-child relationship. There is no legal expectation that, on parental separation, the children will remain with the mother (irrespective of the fact that this may continue to be the norm in practice); likewise, there is no longer any legal expectation that the father's decision-making role will be curtailed. Instead, mutuality of parenting is to be maintained. This is not about making the mother give up the position of exclusivity that she, as custodian, had under the pre-1995 legislation, though that is clearly one of the

effects. The 1995 Act is as much “pro-mother” as it is “pro-father” because not only does it free both from the gendered assignment of roles that might or might not be appropriate (or wanted) in any individual case, but it also frees the mother from being trapped in a situation of financial dependency on the father. A more equitable sharing of the burden of child-rearing will give mothers the space to become as financially independent as fathers usually are; it also gives an invaluable message to children about gender equality.

How is Parental Equality Achieved?

There is little doubt that, even today, the burdens of child-rearing in our society, particularly but not exclusively after parental separation, disproportionately fall on women. It is a fact that cannot be ignored that most resident parents are mothers rather than fathers. Being the resident parent after parental separation necessarily and unavoidably carries greater parental burdens than those faced by the non-resident parent, whether in terms of the constant support of the child that is required or in terms of sacrifices in employment and social life that, while not legally required, are nearly always freely given. How does the principle of parental equality address that problem? On one view (which in this case would support the defender), parental equality would encourage, or even require, the sharing of the burdens of parenthood after separation more equitably than they have been in the past. It would require non-resident parents, who are typically men, to take their parental responsibilities seriously. On this approach, the court should aim to make a contact order that would require the non-resident parent to maintain such a degree of relationship with the child that his influence in the child’s life is not diminished by leaving the family home.

But there is another way to see things. From the point of view of the resident parent, an approach based on parental equality might be said to exacerbate rather than reduce underlying inequality, by adding to the resident parent’s burdens – at least to the extent of having to continue to accommodate the non-resident parent in the joint family life of the child and the resident parent. An argument (that would, in this case, support the position of the pursuer) can be made that the way to tackle inequality in parenting is to ease the burdens of the parent who bears them most, including by allowing that parent the freedom to make crucial decisions – amongst other things in

respect of contact - without interference. This could be said to better reflect the reality of the primary carer's overall responsibilities, and make it more likely that they will be fulfilled successfully. Conceptualising this as a "primary carer" preference rather than a "mother" preference might help to neutralise any perceived gender dimension – as well as accommodate situations in which the father is primary carer.

How, then, should this court respond to such arguments? We need first and foremost to recognise the true radicality of the 1995 Act. The shared parenting philosophy that it gives effect to recognises that parenting is no longer to be seen primarily as women's work, and it frees men from assumptions that inhibit them from embracing caring and nurturing roles. This, of course, is an ideal that the law strives for even in the face of the continued reality that women bear the greater burden in child care, both before and after parental separation. This reality is not unconnected to the uneven distribution of advantages and disadvantages in the workplace that parenthood attracts. Child law itself cannot tackle workplace imbalances, but the message of the 1995 Act surely is that parents should aspire to share the burden in family life, and that the courts should help them move away from the assumptions behind the words "matrimony" (marriage for women is motherhood) and "patrimony" (fatherhood is power and property). Of course, that can be achieved fully only by tackling inequalities in the opportunities both for fathers to take on a nurturing role and for mothers to have an economic life – but the Children (Scotland) Act 1995 Act can only deal with the former and we should not minimise its effect just because, of its nature, it cannot tackle the whole problem of gender inequality in society.

That the 1995 Act was designed to further non-discrimination can be seen from the Scottish Law Commission's Report upon which it is based (*Report on Family Law*, SLC No. 135, 1992). At paragraphs 2.43 and 2.44 of that Report it is made plain that one of the aims of the proposed legislation (which became the 1995 Act) was to remove the double-discrimination faced by unmarried fathers – that vis-à-vis both married fathers and unmarried mothers. Of course the primary aim of the Scottish Law Commission here was to address the discrimination faced by male parents, but the assumption underpinning their approach must have been one of equality of treatment irrespective of gender, an assumption wholly absent from the existing law.

All of this leads to the conclusion that the earlier case law can no longer be said to govern the approach that the courts should take to such disputes, and that a fresh approach guided by the goal of parental equality is mandated by the 1995 Act.

Limitations to Parental Equality

Though shared parenting is the governing philosophy of the 1995 Act, this is so only when the parents are or were married. The decision was made not to deal with unmarried fathers on an equal footing in respect of the upbringing of their children. Many may see this as based on an outmoded assumption of the differing parental roles played by couples who have not married each other, but it is not for this court to challenge that Parliamentary choice. The European Court of Human Rights has recently held (as the 1995 Act was going through Parliament) that any such differentiation is justified as a mechanism for identifying fathers who are "worthy" of having parental rights: *McMichael v United Kingdom* (1995) 20 EHRR 205. That case leaves entirely ambiguous what a "worthy" father is, though I am inclined to the view that the word does no more than refer to the child's welfare. Domestic legal systems are permitted, in other words, to make assumptions (as starting points only) that the involvement of an unmarried father in a child's life is unlikely to be in the child's interests. Scots law does not make that assumption, however. The issue does not arise in this case, but given the overall push towards equal parenting, it is worth noting that the Act's differentiation in the acquisition of parental responsibilities and parental rights between married and unmarried fathers is something of an anomaly.

Whilst the courts must be guided by the objective of parental equality in applying the 1995 Act, they must not take the notion of parental equality to unrealistic lengths. The Act does not require that, after separation, the child should spend equal time with each parent, nor does it establish a presumption (or, if you like, a starting point) that a child's welfare will be enhanced by doing so. Even if that were an ideal to be aimed for, it needs to be acknowledged that the messy realities of life seldom allow the ideal to be translated into practice. It is an unusual family in which children spend the same amount of time with each parent, even while the parents live together with their child. After parental separation it is unavoidable that the child will

spend more time with the parent with whom he or she lives and less with the non-resident parent. Indeed, the child's life is unlikely to be able to accommodate readily any requirement to spend the same amount of time with each parent: forcing the child into such a model is likely to interfere unnecessarily in the child's own freedom of action and movement. This is obviously so when the separated parents live at a distance from each other, or when the child is older and has their own social circle to maintain; but it will often be so for younger children too whose parents live in close proximity to each other. Equal time is, therefore, too crude a mechanism to ensure equal responsibility. It is not discrimination against the non-resident parent (or against men in a world – our world – in which most non-resident parents are men) that the child spends vastly more time with the residence parent. It is simply a reflection of the way families, both before and after parental separation, organise themselves. And insofar as the child's welfare is affected by social norms, it reflects what will normally be in the interests of any individual child.

Rather, the equal parenting message contained in the 1995 Act is one not of equality of time but of responsibility. The most profound change to what went before is that under the 1995 Act the non-resident parent retains their right to be part of the decision-making process in relation to how the child is to be brought up, and needs to be consulted on all important matters affecting the child. We should not see this, for reasons I explain below, as detracting from the residence parent's "rights" but rather as a mechanism for sharing the burdens of bringing up the child that otherwise would disproportionately fall on the residence parent. The 1995 Act's departure from the exclusivity of custody also gives recognition to the undoubted fact that children benefit from contact with a wide range of family members and others within the family's social circle. Contact, as a legal concept, is no longer a qualification of the right of residence, in the way that access was a qualification of the right of custody. It is a responsibility that both parents (passively) have but which becomes active, as ss. 1(1)(c) and 2(1)(c) make plain, whenever one or other parent does not live with the child. In these circumstances, the parents must together decide how contact is to be organised. If a private arrangement cannot be agreed between the parents (and, with older children, between the parents and the child) then it is for the court to regulate the arrangements by which the non-resident parent's responsibility and right

of contact is to be exercised. The court's decision is governed by the welfare of the child, and the welfare of the child is governed by the reality of the child's situation.

A Rights-Based Analysis

It is unfortunate, to say the least, that the 1995 Act (radical in its aspirations in other respects) continues to use the traditional language of parental "rights" for the so-called "parental rights" listed in s. 2 are not in any understandable juridical sense "rights" at all. They cannot be vindicated "as of right", nor on the ground that what the claimant holds by virtue of s. 2 is weightier than what his or her opponent holds. A parent with a parental "right" under the Act does not automatically win a dispute with, say, a grandparent who holds no such "right". A better word to describe what s. 2 deals with – and what is open to this court to regulate under s. 11 – would have been "power", or perhaps "capacity". The law imposes on parents, under s. 1, the responsibility to maintain personal relations and direct contact with their children, and it confers upon them, in s. 2, the power or capacity to do so. Putting it this way is helpful, in my view, because it emphasises the lack of a hierarchy of interests.

This is more than a merely terminological, or legally recondite, point. The language of rights suggests to citizens that the Act has given them something they can enforce, or at least seek the court's protection for. That is what most people understand by the word "right", and indeed that is how lawyers mostly use it. Recently published research from Australia on the operation of their Family Law Reform Act 1995, which had the same policy objectives as our own 1995 Act, carries the clear message that conferring equality on mothers and fathers via the language of rights has had the effect of increasing the number of contentious cases before the courts as fathers seek to vindicate "rights" that they believed the law had conferred upon them (see Rhoades, Graycar and Harrison, "The Family Law Reform Act 1995: The First Three Years" (2001) *Australian Family Lawyer* 1). In Scotland, the purpose of our 1995 Act is to focus the court's attention on the child's interests, rather than on a battle of rights between parents.

Applying the Law to the Present Case

The defender has been given by the 1995 Act full parental responsibilities and parental rights, and loses none of them when the relationship with the pursuer breaks down and the defender no longer resides, in family, with the children. The defender remains subject to the same duties and is endowed with the same "rights" as the pursuer. This is an inevitable consequence of parental equality. The order sought is to regulate the exercise of what the law imposes on parties: it is not an order seeking the conferral of any new power or responsibility on either.

Your Lordship in the chair suggests that the Act's omission of a list of factors that would enhance the child's welfare (a "welfare checklist" as it is known in England) indicates a parliamentary acceptance that judges will have a common conception of what welfare involves. I am not myself persuaded that any such "common conception" can be helpful in cases like the one before us. As society changes, so do our understandings about what is good for children. Given that this court does not normally take evidence from sociologists, educational psychologists and the like on what is generally believed to be good for children, our reliance on common conceptions is in truth a reliance on our own judicial instincts, and acts as a protection of our judicial discretion. That discretion may well be exercised differently by judges differently affected by their own beliefs, upbringing and, not least, their own gender. And even if we did commonly take evidence of what was good for children generally, it would be of limited value in deciding a case involving a real and individual child who may – or may not – fit the norm. Lord Bingham, writing extra-judicially ("The Discretion of the Judge" (1990) Denning LJ 22 at 41), described custody (now residence) as "the last real stronghold of almost unreviewable discretion". He suggests that judges use their own instincts to decide wherein a child's welfare lies. That is surely accurate, however we try to disguise the fact by invocations of common understandings.

This makes litigation over children unpredictable and encourages parties to seek judicial redress rather than compromise, in the hope that one party's conception of welfare coincides with the judge's. Yet compromise, being at the heart of every successful family, must be at the heart of family law. It is this court's role to give some guidance, beyond the protean concept of "common conceptions", as to how compromise can be accommodated in any individual case. I do not wish to become

trapped in the web of distinctions between presumptions, assumptions, starting points and common conceptions, for the distinction between a “common conception” that a child is best served by continued contact with both parents and a presumption to that effect is subtle indeed. I prefer instead to take the 1995 Act at its word. The key to understanding s. 11 is that it allows the court to “regulate” matters. In this case, the defender (the non-resident parent) has the responsibility to maintain direct contact and personal relations with the child and seeks an order under s. 11 regulating how that responsibility is to be carried out. Since the parents cannot agree on how the non-resident parent’s responsibility of contact is to be fulfilled and have submitted the question to the court, the court must make an order under s. 11, unless it believes that making such an order would be worse for the child than not making an order at all. If one party wishes the order to “regulate” contact by prohibiting it – that is, by removing what the legislation grants – they are entitled to seek to persuade the court that this is in the child’s interests. But I do not see this as imposing a burden, or an onus in the technical sense, on the parent wishing that termination, notwithstanding that its effect is the same: it is no more than an acceptance of the consequences of the Act’s underlying philosophy of parental equality. If, on the other hand, one party wishes an order to “regulate” contact to allow that to take place, then the question becomes whether they too must seek to persuade the court that this is in the child’s interests. To me, the answer to this must be ‘no’, because Parliament itself has already answered that question. An order regulating how contact is to take place is an order regulating the exercise of a joint responsibility and right already determined by Parliament to be in the child’s interests. In either case, the court should make an order that reflects Parliament’s understanding of children’s welfare, unless persuaded that to do so would be against the interests of the individual child whose future is in question.

The crux of the problem in the present case is that there is no robust evidence (as opposed to hints of concern) that one decision rather than the other would actually harm the child. We need, here, to be very careful about what we mean by “harm”. The welfare test is too often interpreted to imply that any decision less than “best” will hurt the child. This is not so. In a case like the present, where either allowing contact or denying contact between the non-resident parent and the child both have advantages and disadvantages (inevitably, of a different nature), either decision is

acceptable in the sense that neither will harm the child: a disadvantage is not "harm". But one is likely to be better, in an absolute sense, than the other. In a crude scale of "good", "better" and "best", the court's invariable preference for "best" is not to be taken to imply that either "good" or "better" is actually bad. We have long assumed that making the welfare of the child our paramount consideration requires us always to decide on the best option, that we should reject a good option in favour of a better option, that we should reject a better option in favour of the best option. This preference for the best is not, in fact, a *necessary* implication from the words of s. 11(7)(a) of the 1995 Act, nor of any of its predecessors going back to the Guardianship of Infants Act 1925, which simply requires the court to treat the child's welfare as its paramount consideration. These words might equally be interpreted to mean that we must make no decision that goes against the child's welfare, which we must place at the centre of our consideration. However, the assumption that the welfare test requires us to seek the best solution is so hardwired into our judicial approach to child law that, in the absence of a full debate in a case where the issue directly arises, I cannot use this case to determine otherwise.

In the event, there being no harm beyond disadvantage (which itself is outweighed by advantage) to the child, V, in this case in allowing contact with the non-resident parent, it becomes necessary to make an order regulating the contact between the two, because without any such order contact would simply not be allowed to happen, as the evidence in the case amply shows. Making the order (effectively in the terms determined by the sheriff at first instance) will keep the non-resident parent fully a part of the child's life and so will enhance the aim of equality with the residence parent that underpins the approach in the 1995 Act, as well as enhancing what the Act sees as being in the best interests of the child. V will grow up with a better chance of perceiving parenthood in non-stereotyped terms, itself offering a clear advantage.

The Human Rights Dimension

The whole approach of equal parenting encapsulated in the Children (Scotland) Act 1995 resonates with the European Convention on Human Rights. A parent, such as the defender in this case, will certainly have the sort of family life with the child for

which Article 8 of the ECHR demands respect. The European Court of Human Rights has made plain on numerous occasions that “family life” can exist in the absence of marriage (*Berrehab v Netherlands* (1988) 11 EHRR 322; *Keegan v Ireland* (1994) 18 EHRR 342) and even in the absence of cohabitation (*Kroon v Netherlands* (1994) 19 EHRR 263; *Boughanemi v France* (1996) 22 EHRR 228). The European Court requires that we look to the reality of the relationship between the individuals in respect of whom there are said to be family ties. In the present case, the facts that the defender lived with the children and the pursuer during the children's early life and maintained contact in the early months after separation, and is the biological parent of the children, make it undeniable that there is family life between the defender and the children which requires respect and protection under Article 8. That the defender has not had contact for some two years does not affect that conclusion. The important question is what does Article 8 add to the argument in favour of making an order regulating contact? Clearly, it does not necessarily follow from a finding of the *existence* of family life that the court must make an order for the *maintenance* of family life, for Article 8 rights are not absolute and may be qualified by, amongst other things, the welfare of the child. But the approach I have indicated above is entirely consistent with the thinking behind Article 8 and is, therefore, to be taken as confirmation of this approach.

Even more resonant with the 1995 Act’s aim at parental equality is Article 14, which requires that respect be shown without discrimination based on a variety of factors, including gender, to the rights in Article 8. The obvious way to show such respect is for the court to make an order that allows and indeed encourages both parents, on a basis of equality in opportunity to be involved, to continue to fulfil the parenting obligations imposed on them by domestic law until such time as the court comes to the view – on its own assessment of the evidence – that fulfilling those obligations will be harmful for the child. It might be argued that that would be an interference in the right to respect for private and family life of the resident parent. The fact that the ECHR unavoidably focuses on “rights” is not necessarily inconsistent with domestic law which focuses on the child’s welfare. We are always required to ask what weight is to be given to the rights of the parents in determining wherein the child's welfare lies? To put it another way, does the Human Rights Act 1998 affect how the courts are to apply the welfare test in applications for an order under s. 11 of the 1995 Act?

The 1998 Act was not in force when the sheriff and the sheriff principal gave their judgments, but it is in force now and governs us. It seems to me, however, that the 1998 Act does not require any different approach to that underpinning the 1995 Act. Even on a rights analysis, the competing rights at issue require to be balanced with each other, for the ECHR seldom works in terms of absolute winners and losers. And the European Court has never claimed that a domestic focus on the child's welfare is, by itself, inconsistent with the rights protected by the Convention. It follows that the making of a contact order for the reasons I have set out above would not be inconsistent with the ECHR, as implemented by the Human Rights Act 1998.

Conclusion

It is clear that Parliament has sought to further the cause of parental equality with the Children (Scotland) Act 1995, and it does so in a way that is entirely consistent with the ECHR. It is clear also that the 1995 Act encourages non-resident parents to embrace their responsibilities to remain part of their children's lives. The non-resident parent in the present case seeks to do so, and the order that is sought becomes necessary, and therefore satisfies the minimum intervention test, because the facts show that contact is unlikely to be permitted by the residence parent otherwise. Though the sheriff in the present case went too far in requiring "strong competing disadvantages" to be shown before contact could be terminated, his order allowing contact to the defender requires to be restored, on the simple basis that the 1995 Act tells us that contact with both parents is normally to be regarded as good for the child's welfare. There is nothing in the facts of this case to suggest otherwise.

Reflective Report

The judgment I have offered in *White v White* is, I hope, a plausible – at least not impossible – interpretation of the Children (Scotland) Act 1995. In constructing my version of a judgment in the case, I take as my guide s. 3 of the Human Rights Act 1998, which requires courts to interpret statutes "so far as it is possible to do so" consistently with the European Convention on Human Rights. As under the Human Rights Act, the court must "strive to find a *possible* interpretation compatible with Convention rights" (*R v A* [2002] 1 AC 45, per Lord Steyn at para 44, emphasis added), so too I strive to find a possible interpretation of the 1995 Act that is consistent with, and based upon, feminist principles. Equally, however, I must strive not to exceed the bounds of possible interpretation by going "against the grain of the legislation" and giving the Act a meaning that it simply will not bear.

Adopting this approach allows me to exaggerate the "parental equality" aspect of the 1995 Act, which in reality can hardly be said to have been the most important aim of the legislators. The Act does of course seek to ensure that both parents retain their relationship with their child after separation, and this was a major change to the previous law where custody was very much a "winner takes all" concept, with the non-custodian (normally the male parent) dropping out of the child's life.

I am, however, conscious that when I focus on equality I am making a choice between different feminist perspectives. My major aim is to move away from gender stereotypes. So I reject the approach that seeks to "compensate" women for bearing a disproportionate burden in bringing up children by giving them more control over that upbringing, because in my view that approach would exacerbate rather than ameliorate gender stereotypes. It also makes the assumption that all women (or all mothers) would wish to have full control. My preferred version of feminism is one that offers an escape to both women and men from the gendered roles that society and the law seek to impose on them in relation to the upbringing of their children. As a gay man, gender-neutrality has as much resonance for me as sexuality-neutrality.

In any case, both my self-imposed constraints on statutory interpretation by using the Human Rights Act analogy and the requirements of the present project to offer a possible interpretation of the law that is not inconsistent with its fundamental features demand a rejection of the argument that primarily carers should, in "compensation"

for their greater burdens, have greater control over who has contact with their children. The grain of the 1995 Act is to move away from the "winner takes all approach" and towards one of shared parenting. That simply does not allow a conclusion that primary carers should, as they were before the pre-1995 Act, be primary decision-makers. The Inner House could not have so decided in *White v White*.

But the 1995 Act, as originally passed and as applying when *White v White* was decided in 2001, was fundamentally flawed in that it allowed for this equality of relationship only in respect of married parents. Unmarried couples were subject to different rules, and the Act absolved unmarried fathers of their parental responsibilities and parental rights (other than financial) while at the same time requiring the (equally) unmarried mother to bear the whole burden of bringing up the child. Actually, I have always seen this flaw in the 1995 Act (righted by the Family Law (Scotland) Act 2006) as evidence of the legislators' failure to escape from the notion of parental "rights" notwithstanding the language of responsibilities: a father who didn't marry the mother, didn't "do the right thing", didn't "make a respectable woman of her" did not deserve any "rights" in respect of his child. That this was based on gender stereotypes is obvious from the fact that no mother was ever required to prove her worthiness of parental "rights": it was her natural role in life, whether she deserved it or not. This is the main reason that I spend some time challenging the understanding of the word "rights" in the context of the parent-child relationship.

Throughout the judgments *White v White* actually delivered – and, I accept, even more so in my own version of a judgment in the case – the children themselves are virtually invisible. Indeed my obscuring of the genders of all parties tends to dehumanise the whole argument. But this is a feminist judgments project, not a children's judgments project. Were it the latter the judgment offered here would be written in a very different way, and the children would be centre-stage. However, to assume either that women's interests and children's interests are conterminous, or that a woman's perspective would be presented with less disinterest than a man's, perpetuates the very stereotypes that I am seeking to escape from. Further, my expulsion of the children from the case reflects my suspicion in relation to most private law disputes over children: that while they are argued as disputes as to what

is in the interests of the individual child, they are in reality disputes over adult interests. Resident parents often want to remain in control of their child's upbringing without interference; non-resident parents often want to vindicate their own position as parent with continuing influence. Each presents the dispute (the law requires them to present it) as a clash over what is best for their children, and the courts (and the rest of us) pretend that that is what the case is about. But all too often the dispute in the minds of both (and, not least, of the child) is "mum v. dad" and not "mum's ideas about my welfare v. dad's ideas about my welfare". This is not, I accept, a necessarily or exclusively feminist point but it is nevertheless one worth making here.