

# THE CHILDREN ACTS IN SCOTLAND, ENGLAND AND AUSTRALIA: LESSONS FOR SOUTH AFRICA IN RHETORIC AND REALITY

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## INTRODUCTION

The late 1980s to the mid 1990s was a time of great change for child law in many of the English-speaking jurisdictions. New legislation (collectively referred to hereinafter as 'the Children Acts') came into effect in England,<sup>1</sup> Scotland<sup>2</sup> and Australia,<sup>3</sup> all with similar aims:<sup>4</sup> to reorientate the law of parent and child from one of parental right to one of parental responsibility;<sup>5</sup> to give legal effect to the proposition that the legal parent-child relationship is unaffected by the breakdown in the parent-parent relationship, except insofar as the court decrees; to replace custody with the much more limited concept of 'residence';<sup>6</sup> and, so far as possible, to give statutory effect to the international obligations contained in the United Nations Convention on the Rights of the Child.

The mid to late 1990s was also a time of great constitutional change, notably, of course, in South Africa, but also in the United Kingdom. South Africa adopted an interim and a final Constitution which already ranks as one of the world's great declarations of the rights of mankind, while the United Kingdom rather less publicly restructured its own constitution in 1998 by passing the Human Rights Act, the Scotland Act and the Northern Ireland Act, subjecting the laws of the UK to the European Convention on Human Rights (the ECHR), and reconvening the Scottish Parliament, whose laws can be struck down by the courts if they are inconsistent with the European Convention or the jurisprudence of the European Court of Human Rights.

<sup>1</sup> Children Act 1989, c 41.

<sup>2</sup> Children (Scotland) Act 1995, c 36.

<sup>3</sup> Family Law Reform Act 1995, part 7, replacing part 7 of the Family Law Act 1975.

<sup>4</sup> See J Dewar 'The Family Law Reform Act 1995 and the Children Act 1989: Twins or distant cousins?' 10 *Australian Journal of Family Law* 18; Kenneth Norrie 'The Australian Children (Scotland) Act 1995' (1998) 3 *Scottish Law and Practice Quarterly* 15.

<sup>5</sup> Per Ward LJ in *Re S (Parental Responsibility)* [1995] 2 FLR 648 at 657.

<sup>6</sup> 'Custody' carries with it the whole range of upbringing rights and powers, so that an award of (sole) custody to one parent had the effect of excluding the other parent from decision-making in relation to the child's life. 'Residence', on the other hand, carries only the right to have the child living with the residence parent: exclusion of the non-residence parent requires an explicit court order to that effect rather than simply an assumption based upon the fact that this parent no longer lives with the child.

The purpose of this article is to examine the extent to which these domestic and constitutional changes have gone beyond a mere change in the rhetoric in Scotland, England and Australia. In these jurisdictions, the law no longer uses the terminology of parent's 'rights', but has it really ditched the concept? The decision-making process has changed, but do we actually get different decisions? Reference will, at the same time, be made to the position in South Africa, where there have been profound constitutional, but no substantial domestic, amendments to child law. Given the plethora of statutes (and common-law and constitutional rules) that apply to children in contemporary South African law,<sup>7</sup> it is likely that some time in the future more comprehensive legislation, perhaps based on the British or Australian model, will be proposed. When that happens, policy-makers in South Africa will have to be careful to ensure that the changes that are made are substantive and real, and not merely theoretical and rhetorical. It is in the avoidance of that risk that comparative study can afford useful lessons.

#### CHILD LAW AS A BALANCE

Child law is and always has been an uneasy balance between conflicting principles and interests, and the time has long since passed when cases could be decided on the basis, say, of the right of the paterfamilias to bring up his children as he thought fit, in the exercise of his patria potestas. By the middle of the 19th century that concept, in Scotland at least, was being expressly qualified by the notion of the child's welfare, which was given statutory paramountcy in 1925.<sup>8</sup> Indeed, in the 18th century it was made plain by one of Scotland's Institutional writers<sup>9</sup> that parental right exists only as a necessary concomitant to the real nature of the parent-child relationship — that is, one of responsibility.<sup>10</sup> To these concepts of parents' rights, parents' responsibility and children's welfare has been added more recently the notion of children's rights, traceable to the UN Convention on the Rights of the Child and given explicit statutory recognition in the Australian Act (but not in either the English or the Scottish Acts). A successful system of child law has to find a balance between these various concepts, because child law is uniquely unsuited to the application of a single overarching principle such as we find in the law of delict,<sup>11</sup> contract<sup>12</sup> and property.<sup>13</sup> Each family circumstance is unique and the court's role is to identify a reasonable and rational compromise

<sup>7</sup> See generally C J Davel (ed) *Introduction to Child Law in South Africa* (2000).

<sup>8</sup> The Guardianship of Infants Act 1925, applicable in both Scotland and England (notwithstanding the fact that Scots law recognized neither guardians nor infants).

<sup>9</sup> That is to say, authors whose influence on the development of Scots law was so profound that they can be seen as, in a sense, the founding fathers of the law: their pronouncements, as a source of law, have the same weight as a pronouncement of the Court of Session, Scotland's supreme court.

<sup>10</sup> John Erskine of Carnock *An Institute of the Law of Scotland* (8 ed by J B Nicholson 1871, reprinted 1989) I, 6, 53, writing some 200 years before the House of Lords said much the same thing in *Gillick v West Norfolk and Wisbech Area Health Authority and Department of Health and Social Security* [1986] AC 112.

<sup>11</sup> For example, 'culpa'.

<sup>12</sup> For example, 'consensus in idem'.

<sup>13</sup> For example 'dominium'.

between factors pulling in different and sometimes opposing directions. Yet there remains a strong social and political belief that a general rule can be identified which will act as a panacea for all the difficult issues that family law courts have to deal with. And that panacea is too often believed to reside in the welfare, or the best interests, test. Neither the rhetoric nor the reality of the law has changed at all in the application of this test: it was paramount before as it is paramount after the Children Acts.<sup>14</sup> But, in truth, the welfare test is more chimera than panacea. Worse, its overwhelming dominance threatens to stifle the possibility of a real shift in the focus of the law. Such a fear would be relatively benign if the test ensured that courts did focus directly on the interests of the child, but experience has shown, as we will see, that the test is used too often as a blind to the furthering of adults' rather than children's interests.

### THE WELFARE TEST

The resilience of the welfare test is both noticeable and surprising, particularly since it is clearly paternalistic and based on a state-welfarist philosophy from which most of the law has been receding for some time. Apart from its 'feelgood' sound (we all like to think that we are kind to animals and children) it really has little to commend it.<sup>15</sup> It is paternalistic, in that it necessitates imposing someone else's views on the child, whose own wishes are often placed in opposition. It is entirely subjective, with the result that its application depends on the individual views of the judge being asked to make the decision (and the judicial acceptance of this fact is the reason why appeal courts are notoriously unwilling to substitute their own subjective views for those of the judge of first instance). And it is entirely meaningless on its own terms: its application is highly dependent on whatever view of a child's welfare currently holds sway in the ever-changing fashions of psychological research. This last point is seen very clearly in a series of cases upon which a lot of court time and public money has been wasted in England:<sup>16</sup> that of changing the name of the child after family reconstitution. The test for whether the court should allow a change of name is easy to state: it will be permitted if it

<sup>14</sup> Children Act 1989, s 1(1); Children (Scotland) Act 1995, s 11(7)(a); Family Law Reform Act 1995, s 65E. The paramountcy of the child's best interests has even been given constitutional entrenchment in South Africa: see Constitution of South Africa, s 28(2). In *Jooste v Botha* 2000 (2) SA 199 (T) the Transvaal Provincial Division held that this provision had vertical effect only — in other words, the state (as usually represented by the courts) was bound to make its decision on the basis that welfare is paramount, but private citizens (i.e. usually the parents) were not so bound.

<sup>15</sup> The test has been the subject of sustained academic criticism for some time: see, as representative of the literature, Jonathan Montgomery 'Rhetoric and "welfare"' (1989) 9 *Oxford Journal of Legal Studies* 395; Stephen Parker 'The best interests of the child — principles and problems' (1994) 8 *International Journal of Law and the Family* 26; and Helen Reece 'The paramountcy principle: Consensus or construct?' (1996) 49 *Current Legal Problems* 267. About the only positive feature of the welfare test is that, by focusing on the child rather than the parent, the court is more likely to avoid falling into the trap of parents' rights.

<sup>16</sup> This is, perhaps, a Scottish perspective: such cases almost never come before the Scottish courts, as the issue is, legally, irrelevant. The only reported case in which the name of the child was at issue is *Flett v Flett* 1995 SCLR 189, in which the sheriff dismissed the action on the basis that a child's name is not open to judicial regulation. A person's name being a matter of fact in Scotland, a Scottish court can as readily regulate the size of a child's foot as his or her name.

is in the best interests of the child. But that statement on its own takes us no further in determining how to approach any individual case. We need to identify factors that will help us determine whether a change in name is or is not good for a child. In the 1970s, English courts tended to take the view that the important factor was a child's need to be fully integrated into the new family;<sup>17</sup> by the 1990s, the same courts were to be found emphasizing the child's sense of original identity.<sup>18</sup> Both approaches regard welfare as paramount, and they give entirely opposing answers. The point is that in deciding which factor is the more important (and which, therefore, is decisive of the issue at hand) the court receives no help from the welfare test itself, and it must rely on its own, unaided, assessment of which of the opposing factors better protects the child's welfare.

However, welfare is not, and never has been, the only consideration, though it may be paramount. The reforms of the 1990s in the jurisdictions considered here have made two significant changes, which sound as if they are pulling in opposite directions, but in fact are not. Family law has at the same time been privatized, and constitutionalized. The rhetoric rather obscures it, but the effect of both these changes has been to shift the balance of the law away from welfare and back towards the old idea of parental rights.

## THE PRIVATIZATION OF FAMILY LAW

In all three of the Children Acts under consideration here, the state has made a deliberate attempt to back off from family disputes. In England and Scotland this is manifested in the so-called 'no-order presumption': that is to say, a statutory declaration that the court shall make no order unless persuaded that to do so would be better for the child than to make no order at all.<sup>19</sup> This principle was, in Scotland, interpreted by commentators as having a direct effect on the onus of proof — i.e. the person seeking an order has the onus of proving that it is in the welfare of the child to make the order;<sup>20</sup> in England, on the other hand, it has been suggested that the no-order presumption can be overturned simply by showing that there is a serious dispute between the adults concerned.<sup>21</sup> Australia has no such statutory declaration, but their Act does introduce 'parenting plans', which can be registered with the court: the idea is the same as the no-order presumption — that parents should be encouraged to sort things out privately, without coming to court.<sup>22</sup> In all

<sup>17</sup> See for example *R v R (Child: Surname)* [1977] 1 WLR 1256; *D v B (Otherwise D) (Surname: Birth Registration)* [1979] FLR 38.

<sup>18</sup> See for example *Re B (Change of Surname)* [1996] 1 FLR 791; *Re T (Change of Surname)* [1998] 2 FLR 620.

<sup>19</sup> Children Act 1989, s 1(5); Children (Scotland) Act 1995, s 11(7)(a).

<sup>20</sup> See A B Wilkinson & K McK Norrie *Parent and Child* 2 ed (1999) paras 10.38 — 10.40. But see now *White v White* 2001 SLT 485, discussed below.

<sup>21</sup> See S M Cretney & J M Masson *Principles of Family Law* 6 ed (1997) 657–9; S Cretney in P Birks (ed) *English Private Law* (2000) vol I para 2.207.

<sup>22</sup> Though this was the theory and the hope, recent research has shown at the same time a very low take-up rate of parenting plans and, since the 1995 amendments, a very substantial increase in litigation: see 'The Family Law Reform Act 1995: The first three years' Report for the Family Court of Australia, by Helen Rhoades, Reg Graycar and Margaret Harrison, 21 February 2001, available at [www.familycourt.gov.au/papers/html/fla1.html](http://www.familycourt.gov.au/papers/html/fla1.html)

three jurisdictions, this is effectively a privatization of family law: yet in a clear example of rhetoric being used to hide reality, the change is always presented as one designed for the welfare of children. It is argued that children are generally better off not being subject to court orders, or that their parents have, by definition, a better idea of where their children's interests lie than a court ever could, or that since the court and the parent might both be rational and reasonable and at the same time come to opposing views, the court should interfere only when one view is positively harmful.<sup>23</sup> This, however, only follows if we believe in parents' rights. And though today we tend rather to distrust that concept, we as a society continue to cling to an unspoken belief that parents should have the freedom to bring up children in the manner they deem appropriate.

### THE CONSTITUTIONALIZATION OF FAMILY LAW

The constitutionalization of family law in the United Kingdom, by which is meant the subjecting of the law to the requirements of the European Convention on Human Rights, also shifts the emphasis away from welfare and back towards parents' rights. Of course, we do not use that phrase. Rather we talk about what seems more neutral and certainly more attractive — the notion of family autonomy, or in the words of the ECHR, the right to respect for private and family life.<sup>24</sup> The meaning of that concept is the right of the "family" to be free from state interference — but in reality, given the power structure inherent in any parent-child relationship, what that amounts to is the right of the parents to do what *they* want without interference. Perhaps this is as it should be, but it does mean allowing parents to do things to their children of which other people, the state, and even the courts might disapprove. So constitutionalization actually enhances privatization of family law.

This point is illustrated quite dramatically in two decisions of the English Court of Appeal. In *Re J (Specific Issue Orders)*<sup>25</sup> a Muslim man and a non-Muslim woman had a child but separated, the child remaining with the mother. The father (who was not particularly devout in following his own religious heritage) wanted his son to be brought up as a Muslim, and to be genitally mutilated. The mother refused. The matter went to court and the Court of Appeal held that it would be against the boy's interests to have his genitals mutilated.<sup>26</sup> That is all very well, but there is a very interesting wee comment in the judgment which is apparently so self-evident that we usually forget it. The Court explicitly accepted that had the parents agreed to mutilate

<sup>23</sup> This was the ratio decidendi in the US Supreme Court case of *Troxel v Granville* 530 US 57 (2000), which similarly evidences a withdrawal by the state from the regulation of families.

<sup>24</sup> European Convention on Human Rights, art 8(1).

<sup>25</sup> [2000] 1 FLR 571.

<sup>26</sup> The court did not, it is to be admitted, use precisely these terms, preferring the more neutral term 'circumcision'.

the genitals of their son then that mutilation would be lawful.<sup>27</sup> In other words, it is lawful for parents to do something which a court would declare — if it were asked — to be contrary to the welfare of the child, so long as the parents agree with each other. We see this again in *Re A (Children)*,<sup>28</sup> the conjoined twins case, though the disagreement there was not between the parents but between the parents on the one hand and the doctors on the other. The Court of Appeal held that it was lawful to carry out an operation that would save the life of one child while at the same time bringing an end to the life of the other child. It is not the purpose of this article to criticize that difficult — and dangerous — result but rather to bring attention to the statement identical to that in the genital mutilation case: that had the parents and doctors agreed either to attempt to save one by killing the other, or to allow both twins to die, then either choice would be lawful.<sup>29</sup> Again, something possibly contrary to welfare becomes lawful so long as there is no dispute.

So, without a dispute it is family autonomy, or parental right, rather than welfare, that is paramount. Parents may decide, for example, to send their young children away to boarding school (which is cruel), to mutilate the genitals of their baby boys (which is wicked), to pierce the ears of baby girls (which is pathetic), or to refuse to inoculate them against disease (which is silly and dangerous).<sup>30</sup> But we allow parents to be cruel and wicked and pathetic and silly and dangerous, so long as they agree with each other. What does that tell us about the real balance of interests struck by the law of parent and child? The constitutionalization of the law has necessarily — and in large part beneficially — made us much more ‘rights-conscious’. But the fatal flaw in the concept of ‘parental rights’ is that it involves not freedom from undue limitations but rights *in and over other human persons*. The dignity of the individual cannot exist in the subject of a ‘right’.

#### ILLUSTRATING THE BALANCE: RELOCATION CASES

A good series of cases with which to illustrate these points further is that of relocation cases.

Relocation cases arise when parents have separated and the child resides with one (typically the mother) and has substantial contact with the other (typically the father). The residence parent then decides to relocate with the child to such a distance from the non-residence parent that the exercise of contact is seriously curtailed or even effectively terminated. Both before and after the Children Acts, this was permitted if, but only if, that was in the

<sup>27</sup> Per Thorpe LJ at 576E and Butler-Sloss P at 577E. The judges here were adding to a small (judicially created) list of decisions which require the consent of both parents, notwithstanding the rule in s 2(7) of the Children Act 1989 that when two persons have parental responsibility, each may act independently of the other. Other decisions in this list include sterilization operations and changing the child's name. If the consent of both parents is not forthcoming, any such decision can only be taken with the authority of the court.

<sup>28</sup> [2000] 4 All ER 961.

<sup>29</sup> Per Ward LJ at 987.

<sup>30</sup> The parenthetical assessments are, of course, personal, as any application of the welfare test is.

interests of the child. But that proposition is meaningless, as it was with the change of name cases, unless we identify factors which we believe positively or negatively affect welfare. And it is easy to identify factors in any individual case which could operate in either direction. One might argue that it would be against the interests of the child to inhibit the residence parent from seeking a better life for herself and the child;<sup>31</sup> alternatively one might argue that it would be against the interests of the child to break off contact with a caring and loving parent who happens no longer to live with the child.<sup>32</sup> The welfare test cannot tell us which approach to take and courts need to look to factors or beliefs which will indicate that one approach is better than the other. The pre-reform position would appear, at first sight, to favour the first approach, for the old custodian was assumed to have exclusive decision-making rights over the child's life. The post-reform position, on the other hand, would appear to favour the second approach, since the reforms were based partly on the belief that continued contact with the non-residence parent would be good for the child. If the reforms affected reality rather than rhetoric, one would expect the courts to approach relocation cases today rather differently from how they previously approached them. However, little if any difference can be detected in the jurisdictions under examination here. The issue has most frequently been discussed in the Australian courts.<sup>33</sup>

*B v B: Family Law Reform Act 1995*<sup>34</sup> was decided just nine months after the coming into force of the 1995 amendments and it is revealing as a relocation case in which the non-residence parent expressly asked the Full Court of the Family Court of Australia to depart from its previous approach to such cases and to take account of the 1995 amendments. The argument, put rather more simply than it was in the case itself, was that, while welfare was the paramount consideration before 1995 and remained so now, it had to be assessed in the light of the fact that the 1995 amendments had converted contact with the child from a right of the non-residence parent to a right of the child: the non-residence parent argued that the element of children's rights, now expressly written into Australian law, tilted the welfare balance in favour of disallowing relocation (that is, that children's rights tilted the balance in his — the father's — favour).<sup>35</sup> The argument failed. Welfare was paramount,

<sup>31</sup> Recent South African cases founding on this factor include *Van Rooyen v Van Rooyen* 1999 (4) SA 435 (C) and *Godbeer v Godbeer* 2000 (3) SA 976 (W).

<sup>32</sup> This was the approach of a court in Natal in *Wicks v Fisher* 1999 (2) SA 504 (N). This point is also very clearly illustrated by the divergent judgments in *Jackson v Jackson* 2002 (2) SA 303 (SCA) — two judges of appeal decided in favour of relocation with the 'custodian' father, while the majority (three judges of appeal) decided against it — all the judges who wrote judgment (three) purported to be deciding the matter in the best interests of the children involved.

<sup>33</sup> It may be speculated that Australia, being so much larger than Scotland and England, is more likely to experience relocation cases. The mobility of the population is another factor.

<sup>34</sup> (1997) FLC 92-755.

<sup>35</sup> It is a common feature of cases in which children's rights are invoked that they are used primarily as a strategy designed to further adults' interests. Julia Sloth Neilsen ('Children's rights in the South African courts: An overview since ratification of the UN Convention on the Rights of the Child', paper presented at the Miller Du Toit conference 'Family law in a changing society: From the margins to the mainstream' held in Cape Town on 1-2 February 2001) points out that this is so in a number of South African cases, such as *Fraser v Naude* 1998 (11) BCLR 1357 (CC) and *Jooste v Botha* 2000 (2) SA 199 (T) especially at 210. A

said the Court (unsurprisingly), and the fact that the child now had a right to contact did not affect that assessment: the factor of import, the Court held, remained that the child's welfare would be harmed by freezing the parties in the location they were presently at and so denying the residence parent the chance to improve her, and the child's, life opportunities.

The English approach to relocation is very different from the Australian one, but it too has not been affected by statutory development. It has not even changed in terminology with the coming into force of the Children Act 1989. The courts today still found upon *Poel v Poel*<sup>36</sup> and *Chamberlain v de la Mare*.<sup>37</sup> The issue in England is primarily one of the reasonableness of the residence parent's decision, and if it is reasonable then leave to relocate will be refused only if can be shown to be clear *beyond reasonable doubt* that the interests of the child will suffer.<sup>38</sup> So the (heavy) onus lies with the non-residence parent to show either that the residence parent's decision to relocate is unreasonable — *from the point of view of the adults* — or, if it is reasonable, that the child's interests will definitely suffer.<sup>39</sup> The Court of Appeal has recently decided that this is affected not one bit by the incorporation of the ECHR into English domestic law and its protection to the right of family life. In *Re A (Permission to Remove Child From Jurisdiction: Human Rights)*<sup>40</sup> the Court held that the non-residence parent's art 8 right to family life, which would clearly be compromised by allowing relocation, had to be balanced with the residence parent's right to privacy, which included the right to relocate — in other words, the balance was as it always has been, that is to say between the opposing interests of the parents. No account is given to the policy of the Children Act 1989 to encourage maintenance of contact with the non-residence parent after the parents separate. That policy is revealed as a principle to which lip-service, but little more, need be paid. The rhetoric of children's welfare is not permitted to stand in the way of adult's interests. Nor would the recognition of children's rights (as opposed to welfare) affect this reality. For as Elsje Bonthuys insightfully points out, if it was the child's right of contact that was really important (as the rhetoric has it), why are there no cases attempting to prevent the *non-residence* parent from relocating, thereby

notable exception is the claim by the children convicted of the Bulger murder when they themselves invoked the UN Convention on the Rights of the Child in both the House of Lords (*R v Secretary of State for the Home Department, ex parte Venables; R v Secretary of State for the Home Department, ex parte Thomson* [1997] 3 All ER 97) and the European Court of Human Rights (*T v UK, V v UK* 16th December 1999). Another aspect of the same phenomenon can be seen in the 'family life' cases at the European Court of Human Rights. There is a large number of cases in which parents complain that there is an infringement of family life when children are removed as part of the care and protection procedures but, notwithstanding that 'family life' must be a mutual two-way concept, there are far fewer cases raised by children, and when both parent and child make the claim, the practice of the court is to deal with the parent's claim and then dismiss the child's claim as 'raising the same issues': see in particular *Eriksson v Sweden* (1990) 12 EHRR 183.

<sup>36</sup> [1970] 1 WLR 1469.

<sup>37</sup> [1983] 4 FLR 434.

<sup>38</sup> For a recent example, see *Re C (Leave to Remove From Jurisdiction)* [2000] 2 FLR 457.

<sup>39</sup> An assessment of the residence parent's reasons for relocating is also an important aspect of the South African courts' decision-making in relocation cases: see the decisions cited at note 31 above.



compromising the child's rights to continued contact?<sup>41</sup> The law of relocation in England continues to reflect the old custody-based, winner-takes-all approach to decisions about a child's upbringing, and neither the Children Act 1989<sup>42</sup> nor the Human Rights Act 1998 has persuaded the English courts to change their approach in the determination of individual cases.

In Scotland, the position under the 1995 Act applicable there appears to be exactly the reverse of that in England. The Scottish Act specifically requires that, for a child to be removed from the United Kingdom the consent of *both* parents must be given,<sup>43</sup> failing which the permission of the court must be sought.<sup>44</sup> But the Scottish legislation also contains a 'no-order' presumption, which suggests that no such permission will be granted unless the court believes that there will be benefit to the child in relocating. In *Fourman v Fourman*<sup>45</sup> the residence parent failed to persuade the court that it was in the children's interests to be relocated from Scotland to Sydney;<sup>46</sup> but in *M v M*<sup>47</sup> a move to Arizona was allowed, primarily because the current contact arrangements in Scotland were extremely disruptive to the children's lives: in both cases the judges not only repeated the welfare mantra but made express reference to the no-order presumption, one applying it, the other saying that it had been overturned by the evidence.<sup>48</sup> In the most recent case, *Shields v Shields*,<sup>49</sup> the no-order principle was not mentioned and the case was decided on the basis of the child's expressed views not to relocate to Australia.

It is interesting to note that in Australia, in the recent case of *A & A: Relocation Approach*,<sup>50</sup> the Full Court of the Family Court of Australia dealt with the issue of onus and overruled the judge at first instance for holding that the residence parent had to justify the relocation of the child's residence (effectively the Scottish approach): rather, the court must simply assess the two options on offer and decide which is the better for the child. But the Full

<sup>40</sup> [2000] 2 FLR 225.

<sup>41</sup> Elsje Bonthuys 'Clean breaks, custody, access and parents' rights to relocate' (2000) 16 *SAJHR* 486 at 491. Bonthuys draws attention to a case from the Transvaal Provincial Division in which the court held that the constitutional right of the child to parental care did not mean that an unwilling father could be forced to take an interest in his child: *Jooste v Botha* 2000 (2) SA 199 (T), 2000 (2) BCLR 187 (T). Interestingly, that case was raised in delict, the child seeking damages (unsuccessfully) for the father's failure to provide love and affection.

<sup>42</sup> See s 13(1)(b), which states: 'Where a residence order is in force with respect to a child, no person may . . . remove him from the United Kingdom; without either the written consent of every person who has parental responsibility for the child or the leave of the court.'

<sup>43</sup> Children (Scotland) Act 1995, s 2(3) and (6).

<sup>44</sup> This is also the position in South Africa when both parents remain 'guardian' of the child after divorce: Guardianship Act 192 of 1993, s 1(2)(c) and (d).

<sup>45</sup> 1998 Fam LR 98.

<sup>46</sup> Interestingly, the sheriff found that the mother's plans to move were motivated more by her own desires than by the children's welfare. As in England and South Africa, parental motives are a significant factor, but the sheriff avoided the superficial assumption that there was a necessary identity between the interests of the parent and the interests of the child.

<sup>47</sup> 2000 Fam LR 84.

<sup>48</sup> The no-order presumption is, in fact, rather more complicated in its effect on onus, for the decision would be the other way if the case arose as one of the non-residence parent seeking to interdict the residence parent from removing the child out of the jurisdiction: the no-order principle would apply here also with the result that the onus would be on the non-residence parent.

<sup>49</sup> Inner House of the Court of Session, January 16, 2002.

<sup>50</sup> [2000] FamCA 751, August 1, 2000. See also *H & L* [2000] FamCA 752, decided on the same day.

Court also pointed out that, while the welfare or best interests of the child is the paramount consideration, it is not the sole consideration. Other factors, in particular the constitutional right of free movement of the parents,<sup>51</sup> also need to be taken into account.<sup>52</sup>

So, we have three different jurisdictions adopting three different approaches, yet all are applying the same test: that the child's welfare is paramount.

## CONCLUSION

Parental rights were supposed to have been replaced with the notion of parental responsibilities. But the more family law is privatized, and the more this privatization is seen as the means of protecting family autonomy, the stronger the practical power of parents over their children becomes. The idea of the domestic reforms was to encourage continued involvement of the non-residence parent when parents separate, but the relocation cases show that this proposition is not being taken seriously by the courts in any of the jurisdictions being considered here. The rhetoric of welfare grows ever stronger even when, in reality, it is parents' interests that the courts are attempting to balance. Even the re-emergence of parental rights is being presented as necessary for children's welfare. But the truth is that adults have the power in the parent-child relationship and it is adults' welfare and adults' interests that are being played out, notwithstanding the language of children's welfare. A classic example of this<sup>53</sup> is found in the great political debate that erupted in England at the fag end of the last Conservative government when the grounds for divorce were being amended.<sup>54</sup> Divorce is self-evidently a matter of balancing the interests of the divorcing parties, yet both sides argued primarily from their own (opposing) perception of the welfare of the child — stable family life is best for children, or clean breaks away from family dispute are best for children. One could interpret this as a belief in the overwhelming importance of children in modern society, but since not all marriages have children, or have offspring who are still children, the reality is that the political imperative to claim that you are being nice to children hijacks the debate and hides the real positions of the protagonists.

Yet in child law what better test is there than the welfare test? Some people<sup>55</sup> argue that since the dispute is seldom between good and evil but is in reality usually between two perfectly acceptable positions, one of which, if it is better than the other, is only marginally so, we should replace the welfare test with a presumption in favour of the decisions of the primary care-giver.

<sup>51</sup> Free movement within Australia, that is.

<sup>52</sup> I am not familiar enough with Australian cases to know how common it is for courts in private-law cases to invoke the Australian Constitution, but this statement does reflect that constitutionalization of private law that is an ever-increasing feature of South African and UK law.

<sup>53</sup> Pointed out by Helen Reece 'Subverting the stigmatization argument' (1996) 23 *Journal of Law and Society* 484.

<sup>54</sup> Family Law Act 1996, the divorce provisions in part 2 of which proved unworkable in pilot schemes. The British Government announced on 16 January 2001 that these provisions will not be brought into force and will be repealed: Hansard H L Written Answers, 26 January 2001, col WA126.

<sup>55</sup> See for example Elsje Bonthuys op cit note 41.

This, however, does not give any answer to the separating couple where the issue is who between shared care-givers is in future to be the primary care-giver — that was in essence the old issue in custody disputes when the winner took all.<sup>56</sup> This is also the flaw in cases like the US Supreme Court decision of *Troxel v Granville*,<sup>57</sup> for the dispute there was between a parent and a (legal) stranger (actually, a grandparent) and is no precedent for a dispute between two parents. An alternative is giving preference either to paternal or to maternal decision-making, but that is irredeemably sexist and must be rejected for that reason.

At the end of the day, the thing that annoys me most about the welfare test is that, for all its flaws, I can't think of anything better. But one should not be misled by its predominance in the rhetoric into believing that that child law actually concerns itself primarily with children. Child law is, rather, the law for finding resolutions or compromises in disputes between parents (and for protecting parents' freedom when there is no dispute). The rhetoric of child law is that the child's interests are paramount; the reality is that paramountcy belongs to parents. Child law is parents' law.

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#### THE FUTURE OF ROMAN-DUTCH LAW IN SOUTH AFRICA

'Some eminent English lawyers — usually men singularly destitute of any knowledge of the Civil Law as a system, but men gifted with the capacity for strong expression — have had but little esteem for the Roman law. Thus Lord Brougham in *Thomson v Campbell's Trustees* (5 W. & S. 16) said: "If there is one department in which the authority of the Civil Law shall not be taken to rule points in our day, it is that of mercantile jurisprudence, where the defective nature of ancient commercial dealings and commercial institutions connected with them and growing out of them necessarily makes that code of far less weight than in other cases . . . But I not only deny the authority of the Civil Law as a direct authority, I deny the weight of it — the general deference to it — in a question of mercantile law and in a mercantile country." I think I am not going too far when I say that there is not one single statement in this whole passage which will bear critical examination or to which much respect is due, even though it comes from so eminent a person as Lord Brougham.'

Sir John Wessels 'The future of Roman Dutch law in South Africa' (1920) 37 *SALJ* 269–70.

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<sup>56</sup> The major policy objection to this approach is that in the 'all or nothing' game, parties are encouraged to exaggerate their claims — to show their opponent in as bad a light as possible. The reality in most cases is that both parents are well intentioned and can both provide something for the child. It is good social policy, therefore, to allow the non-residence parent some involvement in the child's life.

<sup>57</sup> 530 US 57, 147 L Ed 2d 49 (2000). Here the Supreme Court held that for a court to apply the welfare test in a dispute between a parent and a third party is merely the court substituting its own views of welfare for that of the parent, and that to do so (in the absence of circumstances which would justify compulsory state intervention — i.e. the implementation of child protection procedures) is an unconstitutional infringement of parents' rights.