

# *The Failure in Scots law to Recognise the Role of Step-parents and Grandparents in a Child's Life*

*By William Rennie<sup>1</sup>*

The 'Family Unit' is widely considered the best environment for children. However there is no definition of the 'Family' in any legal instrument. The United Nations Convention on the Rights of the Child<sup>2</sup> ('UN Convention') notes the inclusion of 'parents or, where applicable, the members of the extended family'.<sup>3</sup> Conversely, the Irish approach to 'members of the family' includes, *inter alia*, step-parents and grandparents.<sup>4</sup> Both approaches acknowledge the diverse nature of families coming in all forms, and taking account of the breakdown of the 'nuclear family'.<sup>5</sup> This has paved way for step-parents and grandparents to take a more predominant role *in lieu* of the child's birth parents. While 'automatic acquisition'<sup>6</sup> of parental rights and responsibilities ('PRR') are granted to the mother,<sup>7</sup> fathers,<sup>8</sup> and other key players<sup>9</sup>: members of the extended family, such as step-parents and grandparents, have no automatic rights in respect of the child.

This essay shall explore the extent to which Scots law has recognized the role both step-parents and grandparents play in a child's life. These two groups are broadly dissatisfied with the current state of the law regarding parental rights, responsibilities and adoption. This paper analyses the criticism of the current law, the potential reforms forwarded to the Scottish Parliament in 2004 and determine whether more reforms are necessary for appeasing both aforementioned groups.

## *1) Recognising the Role of Adults in a Child's Life*

Acquiring PRR's in Scotland currently provides the most access in playing an interactive role in a child's life. PRR's were first defined in Scotland under Part 1 of the Children (Scotland) Act 1995 ('1995 Act'), echoing Article 18 of the UN Convention. Section 1 of the Act defines parental responsibilities as promoting the child's health,

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<sup>2</sup> *United Nations Convention on the Rights of the Child* (1989) 1577 UNTS 3 Article 5.

<sup>3</sup> *Ibid* Article 5.

<sup>4</sup> This definition of 'members of the family' is concerning criminal conduct against family members. The inclusion of step-parents and grandparents demonstrates the significance of their legal recognition in the Republic of Ireland; see also Non-Fatal Offences Against the Person Act 1997 s1.

<sup>5</sup> Solly Dreman, *The Family on the Threshold of the 21<sup>st</sup> Century: Trends and Implications* (Psychology Press, 1997), 104.

<sup>6</sup> Alison Cleland and Elaine E Sutherland, *Children's Rights in Scotland* (W Green, 3<sup>rd</sup> Edition, 2009) para. 5-19.

<sup>7</sup> The Children (Scotland) Act 1995 c36 s3(1)(a). This includes a birth through assisted reproductive technology (ART), Human Fertilisation and Embryology Act 2008 c22 s33.

<sup>8</sup> The position of unmarried fathers has elevated since s3(1)(b)(i) of the Children (Scotland) Act 1995 and by virtue of ART (Human Fertilization and Embryology Act 2008 s35; Family Law (Scotland) Act 2006 s23 amended the 1995 Act (s3(1A)) permitting non-marital fathers to acquire PRR's automatically; Elaine E Sutherland, *Child and Family Law* (Thomson/W Green, 2<sup>nd</sup> Edition, 2008) para. 6-044 – 6-047.

<sup>9</sup> For example the mother's civil partner (Under s3(1)(c) of the Children (Scotland) Act 1995 (1995 Act)) or a woman who satisfy the female parenthood conditions under s43 and 44 of the Human Fertilisation and Embryology Act 2008.

development and welfare;<sup>10</sup> providing direction<sup>11</sup> and guidance;<sup>12</sup> maintaining contact and relations;<sup>13</sup> and acting as a legal representative for the child.<sup>14</sup> Furthermore, parental rights mirror parental responsibilities to enable parents to meet their responsibilities.<sup>15</sup> These rights are defined under s2 of the 1995 Act; the rights to regulate the child's residence;<sup>16</sup> to 'control, direct or guide' the child;<sup>17</sup> to maintain relations and direct contact with the child on a regular basis;<sup>18</sup> and to act as the child's legal representative.<sup>19</sup> As stated in the Stair Memorial Encyclopedia, parental responsibilities only exist in the practical sense that they meet the best interests of the child<sup>20</sup> in question, and introduce a level of common sense to their legal obligation as parents.<sup>21</sup> As it stands, the parental rights only exist in so far as to fulfil the responsibilities.<sup>22</sup>

Changes in social attitudes towards the 'family norm' have meant that Scotland was the first European jurisdiction to take account of these changes and to establish legal reform.<sup>23</sup> Nonetheless, step-parents and grand-parents lobbying efforts for more diverse PRR's were not sufficiently recognised in the Family Law (Scotland) Bill. The aforementioned reforms were short lived, and never introduced in the Family Law (Scotland) Act 2006.<sup>24</sup>

## 2) *The Legal Recognition of Step-parents*

Statistics in Scotland illustrate that one in four marriages result in divorce<sup>25</sup> and subsequent relationships mean that many children are living with step-parents.<sup>26</sup> As mentioned above, step-parents receive no automatic PRR's in respect of the step-child. This position appears untenable, as even without automatic PRR's, step-parents still have an obligation of aliment if the child has been 'accepted as a child of the family.'<sup>27</sup> Moreover, step-parents are restricted in terms of marriage and sexual intercourse with their step-child.<sup>28</sup> Furthermore there are currently no succession rights for step-child,

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<sup>10</sup> Children (Scotland) Act 1995 s1(1)(a).

<sup>11</sup> *Ibid* s1(1)(b)(i).

<sup>12</sup> *Ibid* s1(1)(b)(ii).

<sup>13</sup> *Ibid* s1(1)(c).

<sup>14</sup> *Ibid* s1(1)(d).

<sup>15</sup> *The Laws of Scotland: Stair Memorial Encyclopedia, Child and Family Law* (Reissue), paras 139 [online]. Available at: <http://www.lexisnexis.com/> accessed 10/02/2014.

<sup>16</sup> Children (Scotland) Act 1995 s2(1)(a).

<sup>17</sup> *Ibid* s2(1)(b).

<sup>18</sup> *Ibid* s2(1)(c).

<sup>19</sup> *Ibid* s2(1)(d).

<sup>20</sup> The child's best interest should always be of paramount consideration, in respect of Article 3 of the UN Convention.

<sup>21</sup> *The Laws of Scotland* para. 133 [online]. Available at <http://www.lexisnexis.com/> accessed 10/02/2014.

<sup>22</sup> Cleland and Sutherland (n 5) para. 5-08.

<sup>23</sup> Fran Wasoff, 'Public attitudes and law reform: extending the legal framework for child contact to unmarried fathers, grandparents and step-parents?' (2009) 31(2) *J Soc Wel & Fam L* 159-172, p. 160.

<sup>24</sup> Henceforth '2006 Act'.

<sup>25</sup> *Family Matters: Improving Family Law in Scotland* (Edinburgh: Scottish Executive, 2004)

<http://www.scotland.gov.uk/Publications/2004/04/19220/35699> accessed 10 February 2014.

<sup>26</sup> Ian Dey and Fran Wasoff, 'Mixed Messages: Parental Responsibilities, Public Opinion and the Reforms of Family Law' [2006] 20 *IJLPF* 225-248, p. 232.

<sup>27</sup> s1(1)(d) of the Family Law (Scotland) Act 1985 c37.

<sup>28</sup> See the Criminal Law (Consolidation) Act 1985 c39 s2; which prohibits sexual intercourse between a step-child and parent and includes a current of former step-child. Anyone who has intercourse with

unless the step-parent adopts the child, then the child may inherit from the adoptive parent.<sup>29</sup> To gain PRR's, would grant step-parents more legal recognition which many argue they deserve in respect of the child.

Presently, the first way in which step-parents and grandparents can attain PRR's is via s11 of the 1995 Act. Under s11(1) a number of applications may be made in respect of PRR's or guardianship, or under s11(2)(d) a contact order for example. In doing so, the person applies to the court with a 'claim of interest' to the child.<sup>30</sup> The court is left with the onus of examining the relevant factors before making a decision that is in the best interest of the child.<sup>31</sup> The court will rely upon three principles when determining an application. First, the welfare of the child is paramount.<sup>32</sup> Secondly, the child's view in respect of s6 of the 1995 Act and Article 12 of the UN Convention, which echoes reforms made in England and Wales under the Children Act 1989. Finally, the no-order principle holds an order to be more beneficial than no order at all.<sup>33</sup> However, success down this avenue is difficult for step-parents and grand-parents, when biological parents retain already established PRR's.<sup>34</sup> Elaine Sutherland suggests that allowing others outside the confines of the child-parent relationship the ability to gain PRR is in violation with Article 8's right to a family life under the European Convention on Human Rights.<sup>35</sup> However, the European Court of Human Rights<sup>36</sup> has continued to value the diverse family dynamic, and the role of step-parents and grandparents.<sup>37</sup> Article 5 of the UN Convention also places great value to the role of other family members, subject to the child's welfare.<sup>38</sup> Jane Mair suggests that the case of *McGibbon v McAllister*<sup>39</sup> questions whether 'parenthood' exists in situations where would-be parents have not acquired PRR through s11 of the 1995 Act. Mair further considers whether 'parenthood' exists for those who acquire legal recognition, or those who fulfil the practical parenting role.<sup>40</sup> Arguably, McGibbon proved himself a *de facto* parent to the deceased child, showing that he had accepted the child as his own, providing the paternal role.<sup>41</sup>

The second approach for step-parents gaining PRR's is through adoption. Statistics demonstrate that half of Scottish adoptions are by step-parents.<sup>42</sup> The previous position for adoption by step-parents was dubious; both the step-parent and the birth parent would have to apply for adoption of the child, meaning that the birth parent would

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their step-child will be guilty of an offence if the step-child is under the age of 21 years of age or has lived with the child at any time before the of 18 years and been treated as a child of his or her family.

<sup>29</sup> Under s40 of the Adoption and Children (Scotland) Act 2007 asp 4.

<sup>30</sup> Elaine E Sutherland, *The Future of Child and Family Law* (Cambridge University Press, 2012) para. 3.28.

<sup>31</sup> Lenard Mair, *Whale... or rabbit?* (2004) 49(5) JLS 24-25, pp. 24-25.

<sup>32</sup> Kenneth McK Norrie, *Title to seek contact: grandparents, welfare and constitutionality* (2000) 5(4) SLPQ 430-432, p. 432.

<sup>33</sup> Sutherland, *Child and Family Law* (n 7) para. 6-136 – 6-158.

<sup>34</sup> Lilian Edwards and Anne Griffiths. *Family Law* (Thomson/W.Green, 2<sup>nd</sup> Edition, 2006) para 6-06 – 6-07.

<sup>35</sup> Cleland and Sutherland (n 5) para. 5-19. Henceforth ECHR.

<sup>36</sup> Henceforth 'EcrHR'.

<sup>37</sup> Step-parents; *Söderbäck v Sweden* (1999) 29 EHRR 95. Grandparents; *Marckx v Belgium* (1979) 2 EHRR 330, [54]. This also may include other members of the extended family, such as siblings *Moustaquim v Belgium* (1993) 13 EHRR 802, [32] and *Olsson v Sweden* (1998) 11 EHRR 359 as well as uncles in *Boyle v the United Kingdom* (1994) 19 EHRR 179; See also Norrie (n 31) pp. 430-432 for further discussions.

<sup>38</sup> Cleland and Sutherland (n 5) para. 5-19.

<sup>39</sup> 2008 S.L.T. 459.

<sup>40</sup> Jane Mair, *Parents and Parenting: McGibbon v McAllister* (2008) 12(3) Edin L R, 442-446, p. 446.

<sup>41</sup> *McGibbon v McAllister* 8 S.L.T. 459 [2].

<sup>42</sup> Cleland and Sutherland (n 5) para. 8-17.

lose all parental rights *in lieu* of adoption rights. This was offensive and upsetting for many parents who had to 'adopt their child', which demonstrated an alarming problem within the law.<sup>43</sup> The Adoption (Scotland) Act 1978 was amended to allow for step-parents to be adoptive parents, whilst the birth parent retained their status.<sup>44</sup> This approach covers married couples, and now extends to civil partnerships and qualifying cohabitants.<sup>45</sup> However, should the 'other birth parent' be opposed to the step-parents adoption of the child, the court may be reluctant to dispense rights in response to the ECHR position in *Söderbäck v Sweden*, which was concerned with providing the child a stable environment for development.<sup>46</sup>

Adoption is widely rejected as an appropriate adoptive measure as this would prevent the child from forming relations with that parent, severing all legal ties to the birth parent and their extended family.<sup>47</sup> The Scottish Law Commission considers adoption an 'excessive legal response to a commonly felt need'.<sup>48</sup> Therefore, it is the duty of the Adoption Agency to consider preferred alternative,<sup>49</sup> for example, to allow the step-parent to hold PRR. If this is the preferred method, then consideration of this child's views is paramount.

Arguably, any adult who is directly involved in a child's life, providing care and welfare for the child within the family should have the requisite legal recognition over the child.<sup>50</sup> However even without going through the channels of s11 of the 1995 Act or adoption to gain PRR, parents are expected by law to 'safeguard the child's health, development and welfare'.<sup>51</sup> It is in this respect that step-parents cannot make important decisions regarding the child, for example consenting to healthcare.<sup>52</sup> To allow step-parents easier methods of accruing the legal status of PRR, will undoubtedly increase the efficiency of the law's operation.

### 3) Reforming the Step-parent's Position

In response to these inequalities, it was proposed in the Scottish Government's *White Paper on Scottish Family Law*,<sup>53</sup> to establish a special agreement to allow step-parents to gain PRR's in the early 21<sup>st</sup> century. It was intended that the child's parent (holding PRR's) could delegate PRR's to the step-parent through a 'Step-parent Parental Responsibilities and Rights Agreement'.<sup>54</sup> This is similar to the scheme already

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<sup>43</sup> Sutherland, *Child and Family Law* (n 7) para. 5-072.

<sup>44</sup> Adoption (Scotland) Act 1978 c28 s15(i)(aa), as amended by s97 of the 1995 Act.

<sup>45</sup> Adoption and Children (Scotland) Act 2007 asp 4 s30(4)(a)(ii) and s30(5) respectively.

<sup>46</sup> (1999) 29 EHRR 95.

<sup>47</sup> Sutherland, *Child and Family Law* (n 7) para. 5-073 and *Family Matters* (n 23).

<sup>48</sup> Scottish Law Commission, *Report on Family Law* (Scot Law Com No 135, 1992) para. 5.39.

<sup>49</sup> The approach adopted by England and Wales under the Adoption and Children Act 2002 is that an agreement may be made between the step-parent and birth parent to bequeath PRR, without courts interaction (s112 of the 2002 Act); Sutherland, *Child and Family Law* (n 7) para. 5-073.

<sup>50</sup> *Parents and Children: A White Paper on Scottish Family Law* (Edinburgh: Scottish Executive, 2000) <http://www.scotland.gov.uk/Topics/Justice/law/17867/FLSA2006/13804/ParentsandChildren> accessed 10 February 2014, 2013, para. 2.27.

<sup>51</sup> s1(1)(a) of the 1995 Act.

<sup>52</sup> Step Family Scotland, 'Living in Stepfamilies - Parental Responsibilities and Rights' (Stepfamilies Scotland.org.uk)

<http://www.stepfamilyscotland.org.uk/sitebuildercontent/sitebuilderfiles/parentalresponsibilitiesrights.pdf> accessed 10 February 2014, p. 1.

<sup>53</sup> *A White Paper on Scottish Family Law* (n 50).

<sup>54</sup> *Ibid*, Proposal 2 and 2.25 - 2.45; Cleland and Sutherland (n 5) para 5.20. Henceforth 'SPRRA'.

established in England and Wales under s4A of the Children Act 1989,<sup>55</sup> in which an agreement may be made by both parents to allow the step-parent to hold PRR, or the court may order the step-parent to have PRR.<sup>56</sup> The SPRRA would allow step-parents to acquire PRR without lengthy litigation with the courts involvement.<sup>57</sup> At face value, the proposal of SPRRA's seemed fairly popular generating support from a number of bodies for example UK Men's Movement<sup>58</sup> and Stepfamily Scotland.<sup>59</sup> It was reported that there were 67% responses in favour of the regime.<sup>60</sup>

Nevertheless, there was strong criticism of the SPRRA's. The first issue concerned how the child's views (Article 12 UN Convention) would be respected in SPRRA's. The courts must allow the child to indicate whether they wish to express their views in the concern and to ensure they do so.<sup>61</sup> The primary concern was just how the child's views would be taken in these agreements. A number of responses to the *White Paper* elevated this concern, the Faculty of Advocates stated that:

'Having regard to the [UN Convention]... any such mechanisms would almost require to provide that the child's views be given in person to an appropriate official, rather than recorded by the parents and step-parent'.<sup>62</sup>

Other responses highlighted that the child's views should be paramount to the agreements;<sup>63</sup> however, it would be difficult to ensure the parents retained them as paramount.<sup>64</sup>

Secondly, the SPRRA's would be limited to married step-parents, with some arguing that an unmarried cohabitant lacked any legal commitment to the parent or child.<sup>65</sup> If the child's views were expressed during the agreement and there were no objections to the cohabitant step-parent, then in respect of Article 3 of the UN Convention, creating a SPRRA would be in the best interest of the child.

Thirdly, there was a concern in the event of terminating an agreement. Appropriately, the Scottish Government attempted to address this in the *White Paper*, suggesting that courts would be the only body able to terminate the agreement. Both the Law Society and the Scottish Law Agents Society were in favour of this, imploring that the courts were able to ensure that the child's best interests were met.<sup>66</sup> Although numerous responses commented, that the child should be given the chance to express their voice in the termination.<sup>67</sup> A particular distaste to the agreement was from the Women's

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<sup>55</sup> As amended by s112 of the Adoption and Children Act 2002.

<sup>56</sup> Children Act 1989 c41 s4A(1)(a) and (b).

<sup>57</sup> Dey and Wasoff (n 22) 248, p. 227.

<sup>58</sup> *Family Matters* (n 223) p. 15.

<sup>59</sup> Fran Wasoff (n 22) p. 163.

<sup>60</sup> *Family Matters* (n 23).

<sup>61</sup> Children (Scotland) Act 1995 s6; see also *Treasure v McGrath* 2006 Fam L R 100 and Cleland and Sutherland (n 5) para. 5-29.

<sup>62</sup> *Family Law White Paper: Parents and Children – Analysis of Responses* (Edinburgh: Scottish Executive) <http://www.scotland.gov.uk/Resource/0039/00396142.pdf> accessed 10 February 2014, p. 20.

<sup>63</sup> *Ibid*, p. 20; in particular Children 1<sup>st</sup>, Children in Scotland, Family Law Association and Elaine E Sutherland.

<sup>64</sup> *Ibid*.

<sup>65</sup> *Family Matters* (n 23).

<sup>66</sup> *Analysis of Responses* (n 63) p. 24.

<sup>67</sup> *Ibid*, p.28; in particular Elaine E Sutherland, UK College of Family Mediators (Scottish Committee), Children 1<sup>st</sup>, Children in Scotland and Professional Association of Teachers.

group, fearing this would accelerate the position of abusive step-parents and a simple approach to termination should be established.<sup>68</sup>

Finally, the Scottish Government's current forms used for non-martial fathers are perhaps too simplistic in detail. If a similar layout were used for the SPRRA they would inevitably require more detailed planning than simply filling in the names of the parents and the child's name, even if they were to be registered in the Books of Council and Session.<sup>69</sup> The decision of the Scottish Government, in light of the responses, was that it would not advance the SPRRA proposal. The Scottish government's justification was that the consideration of the child's best interests was not clear and there was the potential that children's upbringings may be unfairly compromised.<sup>70</sup> Finally it was considered to be unclear how the views of the child would be considered in light of Article 12 of the UN Convention.<sup>71</sup>

Further reforms to increase the accessibility of PRR's are a necessary response to the evolving nature of the Family unit. The Scottish Government must be more proactive in securing much needed reforms for step-parents seeking to gain more legal recognition over children they accept as their own, and particularly where children also accepts the step-parent as a parent. If step-parents are willing and expected to attend to the child's socio-economic needs and provide the necessary levels of education and general upbringing, it seems contradictory to prevent them from acquiring legal recognition, particularly where there is consensus with the child. However, this does not mean that anyone should be capable of securing PRR's, and a threshold must be carefully considered prior to legislation. It would be the suggestion of the writer that a re-work of SPRRA's, with more consideration and planning, and consultation with the Scottish Law Commission that could assist in making SPRRA's a success.

#### **4) *The Legal Recognition of Grandparents***

Grandparents also face legal inadequacy in terms of the full capacity they can play in their grandchildren's lives. Over the years, the role of the grandparent has evolved providing a well 'trusted source of wisdom and advice'<sup>72</sup> as well as stability, security<sup>73</sup> and providing childcare when parents are working.<sup>74</sup> Generally, there is the view that grandparents should have more legal recognition or at least more of a legal status,<sup>75</sup> especially for the remarkable support they provide under difficult circumstances.<sup>76</sup> Again, grandparents receive no automatic PRR's, however, just like step-parents they are also faced with such legal restrictions such as a prohibition on marriage<sup>77</sup> or sexual intercourse with a grandchild.<sup>78</sup> The major difference being that there is no legal obligation of aliment. That being said, it is important, especially in cases of divorce, that

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<sup>68</sup> *ibid* p. 27.

<sup>69</sup> *A White Paper on Scottish Family Law* (n 50) Proposal 2 and 2.30.

<sup>70</sup> *Family Matters* (n 23).

<sup>71</sup> UN Committee, *General Comment No 12* (n 49) [26].

<sup>72</sup> Rosemary Carter, *Grandparents: Rights or responsibilities?* [2001] 182Childright 17-18, p. 17.

<sup>73</sup> Gillian Douglas and Neil Ferguson, *The Role of Grandparents in Divorced Families* [2003] 17 IJLPF 41-67, pp. 41-42.

<sup>74</sup> Carter (n 76) p. 17.

<sup>75</sup> Douglas and Ferguson (n 77) p. 42.

<sup>76</sup> Carter (n 78) p. 18.

<sup>77</sup> Marriage (Prohibited Degrees of Relationship) Act 1986 c16 s2.

<sup>78</sup> Criminal Law (Consolidation) Act 1985 c39 s1 is the prohibition of incest amongst family members, including grandparents and grandchildren.

children retain contact with their grandparents.<sup>79</sup> Research conducted illustrates that grandparents should maintain healthy relations with grandchildren; to keep in contact, support one another and encourage their family's history and traditions/values.<sup>80</sup>

Grandparents taking advantage of s11 of the 1995 Act for a court order for PRR's face the same difficulties suffered by step-parents. Although it is considered that s11 should be seen as a last resort to seek contact.<sup>81</sup> In the case of *Re B (A Child)*<sup>82</sup> concerning contact for grandparents, it was decided that the court should come to its finding based on examination and that to do so would be in the best interests of the child.<sup>83</sup> The child's interest is paramount, and should be taken in connection with the child's welfare.<sup>84</sup> Leonard Mair submits that it is absurd that any group, other than the parents should be given automatic PRR.<sup>85</sup> He states that grandparents should not be given specific rights to PRR, in contrast to other close members of the family (for example siblings). In Mair's view, it would be both illogical and contrary to the established principles under both the 1995 Act and the UN Convention.<sup>86</sup> A further issue is that grandparents, as well as parents have the right to a private life as afforded under Article 8 of the ECHR.<sup>87</sup> The case of *Marckx v Belgium*<sup>88</sup> illustrates that Article 8 also exists between the child and grandparents,<sup>89</sup> therefore a breach of this would therefore amount to an interference of this right.<sup>90</sup>

Secondly, there is no special position regarding adoption. Arguably, it is questionable whether the Adoption and Children (Scotland) Act 2007 improved the position of grandparents concerning adoption.<sup>91</sup> However, in attempts to prevent adoption of their grandchildren there must be a level of interest in the grandchild before adoption. The case of *DN v LJ*<sup>92</sup> demonstrates that in situations where little interest is shown in a grandchild pre-adoption, an application may be rejected. This poses further difficulties for grand-parents who may, by no fault of their own, have had limited access to their grandchildren previously. An example of this can be seen in the case of *F v F*<sup>93</sup> whereby the grandparents had to apply for PRR to gain custody of the child to prevent the adoption. In an attempt to tackle this issue, s96 of the 1995 Act required adoption agencies to consider alternatives to adoption, when this would entertain the best

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<sup>79</sup> Fran Wasoff (n 22) p. 161.

<sup>80</sup> Nicola Ross, Malcolm Hill, Helen Sweeting and Sarah Cunningham-Burely, *Relationships between grandparents and teenage grandchildren* (June 2005) (Centre for Research on Families and Relationships, University of Edinburgh, Research Brief No 23).

<sup>81</sup> *Melville v Melville*, Unreported Nov 23 2007 Perth Sheriff Court; as cited in Sutherland, *Child and Family Law* (n 7) para. 4-111. [2005] UKSC 5.

<sup>84</sup> *Re B (A Child)* [2005] UKSC 5, [37].

<sup>85</sup> Leonard Mair, *Granny's rights* (Morton Fraser Solicitors, 8 November 2012), [http://www.morton-fraser.com/blog/its\\_a\\_wonderful\\_life\\_blog/3207\\_grannys\\_rights](http://www.morton-fraser.com/blog/its_a_wonderful_life_blog/3207_grannys_rights) accessed 10/02/2014.

<sup>86</sup> *ibid.*

<sup>87</sup> Felicity Kaganas and Christine Piper, *Grandparents and Contact: Rights v Welfare Revised* [2001] 15 IJLPF 250-275, p. 261.

<sup>88</sup> *Marckx v Belgium* (1979) 2 EHRR 330.

<sup>89</sup> *Ibid.*, [45].

<sup>90</sup> Norrie (n 31) p. 431.

<sup>91</sup> Sutherland, *Child and Family Law* (n 7) para. 5-078.

<sup>92</sup> *DN v LJ and Fife Council*, Sheriff Evans at Cupar, October 21, 2004, F122/2003; as cited in Family Law Bulletin, *Adoption v Grandparent's care* (2004) 72(Nov) Fam L B 6, p. 6.

<sup>93</sup> 1991 SLT 357.

interests of the child.<sup>94</sup> This would therefore incorporate the views of the child's relatives.<sup>95</sup>

## 5) *Reforming the Grandparent's Position*

Much like the movement regarding step-parents, there have been calls for a specific right to contact following parental separation, rather than enforcing a s11 application or adoption.<sup>96</sup> The Scottish Government did consider introducing a right of contact for grandparents, though the Government ultimately decided against an automatic right or new measures under the 2006 Act, as it was feared that this would be at the expense of the views of the child.<sup>97</sup> In light of the failed proposal for contact, the Government introduced the *Charter for Grandchildren* ('*Charter*')<sup>98</sup> as a non-legally binding document with sensible, neutral, advice for grandparents.<sup>99</sup> Elaine Sutherland argues that the *Charter* is a 'feel good statement' for obvious emotional sentiments.<sup>100</sup> The *Charter* values the importance of the extended family, and the important roles played by the grandparents. The *Charter* was designed with the children's needs in mind and with the purpose of guiding grandparents and professionals on the role grandparents play in a child's life.<sup>101</sup> Parents are therefore encouraged to look beyond their personal emotions and assist in maintaining the child's contact with their grandparents.<sup>102</sup> Creating non-legally informal norms for parents to abide by, restructuring the Family unit and resolving future disputes.<sup>103</sup> Nonetheless, the *Charter* may be viewed as nothing more than a half-hearted attempt to calm the nerves of frustrated grandparents across Scotland.

The 'Grandparents Apart UK'<sup>104</sup> group is 'fully dedicated to easing the suffering grandparents'<sup>105</sup> and has previously considered that the Scottish Government should make the *Charter* legally binding.<sup>106</sup> However, there is perceived weakness in such pressure groups arguments, as they continue to concentrate on what has been labeled 'selective and simplified' research in their findings.<sup>107</sup> Grandparents should perhaps be

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<sup>94</sup> Sutherland, *Child and Family Law* (n 7) para. 5-079.

<sup>95</sup> Adoption and Children (Scotland) Act 2007 asp 4 s14(5).

<sup>96</sup> Wasoff (n 22) p. 167.

<sup>97</sup> A White Paper on Scottish Family Law (n 50) 1.3; Louise Falconer, *SPICe Briefing for the Public Petitions Committee: Petition calling on the Parliament to urge the Scottish Government to review the administration of child and family law services to ensure they are operating in the best interests of the child* (12 May 2008) PE1156.

<http://www.scottish.parliament.uk/ResearchBriefingsAndFactsheets/Petitions%20briefings%20S3/PB08-1156.pdf> accessed 10/02/2014.

<sup>98</sup> *Family Matters: Charter for Grandchildren* (Edinburgh: Scottish Executive, 2006)

<http://www.scotland.gov.uk/Resource/Doc/112493/0027333.pdf> accessed 10/02/2014.

<sup>99</sup> Wasoff (n 22) p. 164.

<sup>100</sup> Sutherland, *The Future of Child and Family Law* (n 29) para. 12.26.

<sup>101</sup> *Family Law: Family Law in Scotland – Affects Everyone* (Edinburgh: Scottish Executive, 2006)

<http://www.scotland.gov.uk/Resource/Doc/112499/0027334.pdf> accessed 10/02/2014.

<sup>102</sup> Kaganas (n 101) p. 25.

<sup>103</sup> *Ibid.*

<sup>104</sup> Formally known as the Grandparents Apart Self Help Group (GASH).

<sup>105</sup> Falconer (n 102).

<sup>106</sup> Jimmy Deuchars, *PE1051: Jimmy Deuchars on behalf of Grandparents Apart Self Help Group Scotland, calling on the Scottish Parliament to urge the Scottish Executive to make the Charter for Grandchildren legally binding ensuring that the rights of children are recognised by all public agencies and families, and enforced by law* (Scottish Government Public Petitions, PE1051, 30 April 2007)

<http://archive.scottish.parliament.uk/business/petitions/pdfs/PE1051.pdf> accessed 10 February 2014.

<sup>107</sup> *Ibid.*



granted *de facto* PRR's, whilst the biological parents retain *de jure* PRR's. This approach would appear to be difficult at first, and careful scrutiny is necessary in drafting provisions to allow this that would not impede on the rights retained by parents. However, for those grandparents seeking PRR's, it would be beneficial to have the option of avoiding litigation. Many grandparents will not have either the time or the financial capacity for lengthy court proceedings. Reforms to the current law will help iron out these problems with the *Charter* arguably representing is nothing more than an apology from the Government for not listening.

Finally, codification of child and family law may provide the best reform to the law, bringing fairness and recognition of legal status to step-parents and grandparents in Scotland. Commentators, including Elaine Sutherland, argue their case for codification, which would allow fairer access and legal recognition for those currently ignored under Scots law, as well as making the child and family law more accessible to all. This argument is based upon the notion that Scots child law is severely fragmented, with child protection measures being the perfect illustration of this. As it stands, the core legal mechanisms for child protection can be allocated under both the Children's Hearing (Scotland) Act 2011 and the Children (Scotland) Act 1995, which strips the law of the clarity and ease of access necessary to resolving issues of parenthood.

Therefore, it is posited that codification should be modeled on Professor Eric Clive's Scottish Child and Family Code in 1992,<sup>108</sup> which provided that the role of step-parents and grandparents is honoured. Codification would provide the opportunity for legislatures, academics and anyone with a stake in these particular issues to come together and raise public awareness to their legal rights (or lack of).<sup>109</sup> Codification should be seen as a mere suggestion and by no means the definitive answer to bringing justice to step-parents and grandparents.

## 6) *Conclusion*

Reform is necessary to make amends for the lack of legal rights of step-parents and grandparents, who are nonetheless expected by the law to conform to parental expectations. Granting blanket rights to any would however be inappropriate, as this would empower some adults at the expense of others, thus making the object and prize of litigation.<sup>110</sup> However, it also clear that reform is required to ease the process for those who merit having legal rights in relation to the child, and the codification of child and family law appears the most appropriate mechanism for bringing fairness to parties who are presently neglected by the law.

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<sup>108</sup> Scottish Law Commission, *Report on Family Law* (Scot Law Com No 135, 1992), Part XIX, para. 19.4; further discussion on Professor Eric Clive's draft code can be found in Eric Clive, *Current codification projects in Scotland* (2000) Edin LR, 4(3), pp. 341-350 and Sutherland, *The Future of Child and Family Law* (n 29) para. 12.10.

<sup>109</sup> Elaine E Sutherland, *Brining order to family law* (The Journal of the law Society of Scotland, 16 September 2013) [http://www.journalonline.co.uk/Magazine/58-9/1013027.aspx#.UvWxuPI\\_uSo](http://www.journalonline.co.uk/Magazine/58-9/1013027.aspx#.UvWxuPI_uSo) accessed 10/01/2014.

<sup>110</sup> *Ibid.*

