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Parental Responsibility as Therapy

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In *Re S* [1995] 2 FLR 648, Ward LJ crafted an entirely new reason for granting an unmarried father parental responsibility, a reason never given in any previous case. This was to confer upon the father a stamp of approval:

'I have heard, up and down the land, psychiatrists tell me how important it is that children grow up with good self-esteem and how much they need to have a favourable positive image of the absent parent. It seems to me important, therefore, wherever possible, to ensure that the law confers upon a committed father that stamp of approval, lest the child grow up with some belief that he is in some way disqualified from fulfilling his role and that the reason for the disqualification is something inherent which will be inherited by the child, making her struggle to find her own identity all the more fraught' (at p 647).

I have previously argued that *Re S* marked a turning point in the reasons given by judges for granting unmarried fathers parental responsibility: in cases prior to *Re S*, the main reason for granting an unmarried father parental responsibility was to give him decision-making power; in cases since *Re S*, the reasons are less to do with decision-making and more to do with feelings and emotions (Reece, 'The Degradation of Parental Responsibility' in Probert et al (eds), *Responsible Parents and Parental Responsibility* (Hart Publications, 2009)). In this article, I suggest that the current approach in the case law both illustrates and reflects a cultural turn towards the therapeutic. A number of commentators have described such a cultural turn. For example, Nolan suggests that:

'The therapeutic perspective has become a taken-for-granted part of everyday life. It provides culture with a set of symbols and codes that determine the boundaries of moral life' (*The Therapeutic State: Justifying Government at Century's End* (New York University Press, 1998), at p 2).

While the institutionalisation of therapeutic practices is coterminous with modernity, Furedi explains that what is distinctive about the current period is that the therapeutic approach no longer confines itself to a particular aspect of society but rather affects all social institutions (*Therapy Culture: Cultivating Vulnerability in an Uncertain Age* (Routledge, 2003), at p 17). One such institution being the law, 'the prevailing therapeutic ethos is objectifying itself into the state's legal apparatus' (Nolan, p 55), and specifically into the way that judges decide cases about unmarried fathers' parental responsibility.

Emotivist ethic

The most important trait of therapy culture is an 'emotivist ethic' (Nolan, at p 46). This explains the rupture that *Re S* marks in judges' reasons for granting or withholding parental responsibility. An examination of case law reveals that, until *Re S*, judges paid almost no attention to the emotional effects of granting or withholding parental responsibility (*Reece*). But Nolan reasons that if an emotivist ethic is replacing more rational and scientific understandings of reality and if cultural understandings are being played out in social institutions then evidence of emotivism should be finding its way into court decisions (p 46). In line with this reasoning, evidence of emotivism abounds in recent court decisions about the allocation of parental responsibility to unmarried fathers. As is apparent from the quotation above, emotional considerations predominated in *Re S*. Further on in his judgment, at p 659, Ward LJ also suggested that emphasis should be:

'... placed upon children growing up in the knowledge that their father is committed enough to wish to have parental responsibility conferred upon him'.

Later that same year in *Re H* [1995] 2 FLR 883 His Lordship adopted similar reasoning, describing it as important, given the child's shock on discovering that his mother's husband was not in fact his biological father, that:

'... the benefits of the parental responsibility order ... be impressed upon the boy to give him the confidence that he has not suffered some life-shattering blow to his self-esteem' (at p 889).

Likewise, in *Re M (Contact: Family Assistance: McKenzie Friend)* [1999] 1 FLR 75 Ward LJ emphasised that:

'... the important thing to recognise is that it is essential for the well-being of the children ... to begin to know that their father was concerned enough to make an application to be recognised as their father, and that his status as their father has the stamp of the court's approval' (at p 80).

In the subsequent case of *Re H* [2002] EWCA Civ 542 Thorpe LJ took the same approach, granting the father parental responsibility, hedged with conditions, in the hope that this would benefit the child 'in years to come so that she knows she has two parents' (at p 575). Most recently, *Re D* [2006] EWHC 2 (Fam) retained the emphasis on emotions but switched attention from the child's feelings to those of the father:

'For Mr B, to be D's father is simply not enough; he wishes to be recognised as a father and a parent and he perceives that a parental responsibility order would bring this recognition' ...

Mr B's motives for applying for a parental responsibility order are complex and I do not insult him by attempting to reduce their sophistication to a list for this judgment. I am quite satisfied that they do not include any trace of malice but have at their root his feelings for and about D and his wish to be recognised as belonging to her and to do all that he can towards securing her welfare.'

Recent case law on parental responsibility certainly provides support for Nolan's view that '[t]he courts are presently more inclined to recognize and give credence to the belief that emotions are central to one's personhood' (above at p 55).

Pathologisation of emotions

'The manner in which emotions have been problematised implicitly raises questions about the ability of the individual to deal with disappointment, misfortune, adversity or even the challenge of everyday life' (Furedi, p 107).

According to Furedi, therapy culture 'posits the self in distinctly fragile and feeble form', its main legacy 'the cultivation of a unique sense of vulnerability' (p 21). Certainly, a picture of fragility and vulnerability is drawn in the case law. In *Re S* (above) Ward LJ believed that the absence of parental responsibility would make S's 'struggle to find her own identity all the more fraught' and in *Re H* (above) he ordered that '... the benefits of the parental responsibility order ... be impressed upon the boy to give him the confidence that he has not suffered some life-shattering blow to his self-esteem'.

This latter concern also illustrates and reflects the importance placed on self-esteem within therapy culture. Furedi argues that one of the consequences of an inward orientation towards the self is a growing significance attached to the question of self-identity. Since self-identity is increasingly associated with feeling, this significance has become systematically codified in the 'cultural myth of self-esteem' (p 143), with emotional damage invariably presented as an assault on self-esteem (p 137). In *Re S* (above) Ward LJ is quite adamant on this point, letting us know that he has '... heard, up and down the land, psychiatrists tell me how important it is that children grow up with good self-esteem'. As Furedi states:

'Terms like 'scarred for life', used to describe the experience of trauma, ominously convey the implication of a life sentence. This sentiment continually informs interpretations of the problems of childhood. Contemporary depictions of childhood send out a powerful message that psychological damage will continue to haunt adulthood' (p 111).

Closely related to the 'cultivation of vulnerability' is the idea that 'adults are merely acting out a script set in motion during their childhood' (Furedi, p 118). Psychological damage in childhood is seen as determining adults' actions for the rest of their life, human identity as the direct outcome of early childhood experience (Furedi, p 118). This deterministic outlook is taken to an extreme in *Re S*: Ward LJ believes that it is important for the father to be given parental responsibility 'lest the child grow up with some belief that ... the reason for the disqualification is something inherent which will be inherited by the child' as if there could be some gene transmitted down the generations for not having parental responsibility.

Therapeutic culture 'sensitises people to regard a growing range of their experiences as victimising and as traumatising' (Furedi, p 129). Despite the descriptions of cataclysmic consequences above, the reality is that having a father without parental responsibility is hardly worth mentioning. In 1995, the year in which Ward LJ regarded it as crucial to S' self-esteem to confer parental responsibility on her father, over a third of children would have shared S' fate of having a father with no parental responsibility. Remember that a parental responsibility order has in itself no tangible effect on the child's material existence. In this respect it is completely different from, say, a contact order, the existence of which is sometimes necessary to enable a child to see his or her father and therefore on occasions clearly important for the child's well-being. It is no surprise that in neither *Re S* nor *Re H* was there any hard evidence that refusing the father parental responsibility would actually affect the child's self-esteem (unless we count what Ward LJ 'heard, up and down the land' from psychiatrists).

In both *Re S* and *Re H*, therapeutic culture led to a concern with the child's feelings; the later cases of *Re D* and *Re B* [2007] EWHC 1952 (Fam), [2008] 1 FLR 1015 shift the focus to the adults' emotions. Understanding the therapeutic ethos explains this shift:

'Since fragile emotion has become defined as rooted in existence, the line that divides mature adults from highly impressionable children has become indistinct' (Furedi, p 137).

The line is even blurrier in relation to the particular type of adults that the cases are concerned with, namely unmarried fathers. As Collier and Sheldon observe, there is an 'emergent and increasingly dominant sense of unmarried fathers as a potentially vulnerable group' (*Fragmenting Fatherhood: A Socio-legal Study* (Hart Publications, 2008), at p 178). The recent shift of focus to adults' feelings both illustrates and reflects the self-referential character of therapy culture. Therapy culture exhorts us to put ourselves first (Furedi, p 79); the relationship and the responsibility that count is to the self (Furedi, pp 73-74). This means that applying for

parental responsibility for the sake of another, even one's own child, is increasingly hard to grasp: all that makes sense is the way that parental responsibility will make the applicant feel. This does not make the applicant selfish or even self-centred in current therapeutic discourse because to feel good is to be good (Furedi, p 31). Of course, if feeling good is being good then the applicant's feelings are of prime importance to the judge as well as the applicant.

The self-referential character of therapy culture means that 'the self is defined in terms of how it feels rather than what it does' (Rose, *Governing the Soul: the Shaping of the Self* (Free Association Books, 1999), at p 219). This implies a downgrading of what the father might do with his parental responsibility and an upgrading of how he might feel about having parental responsibility. I make this point tentatively because making decisions about, for example, which school one's child will attend hardly represents the pinnacle of human achievement. Nevertheless, within therapy culture, approval 'becomes an act of affirmation of self rather than an evaluation of individual achievement' (Furedi, p 165).

Remarkably, in *Re D* the father was granted parental responsibility but allowed to do absolutely nothing with it. This odd result throws up even more acutely 'the puzzle' that Eekelaar first highlighted with regard to *Re S*:

'... as to why a parental responsibility order should be important for an unmarried, absent, father who is not bent on intermeddling ... On one reading ... the order does little more than affirm the duties the father already owes to the child. But that seems a very weak version of the concept: why should a father invoke a legal procedure to confirm his existing responsibilities? ('Parental responsibility -- a new legal status?' (1996) 112 LQR 233, at p 235).

The answer to this puzzle lies in the judge's prime concern with Mr B's feelings and emotions.

Affirmation of self through legal form

In therapy culture, the self is 'not so much affirmed or realised through the activities and relationships of the individual, but through the legal form' (Furedi, p 172). This is certainly borne out by the case law. In *Re S* Ward LJ refers to the importance of '... children growing up in the knowledge that their father is committed enough to wish to have parental responsibility conferred upon him'. He makes a similar point even more strongly in the later case of *Re M*:

'It is essential for the well-being of the children ... to begin to know that their father was concerned enough to make an application to be recognised as their father, and that his status as their father has the stamp of the court's approval'.

So according to Ward LJ, it is important for children to know that their father was committed or concerned enough to make an application to a judge for a legal order with no tangible or material effect on their lives, rather than knowing that their father was committed or concerned enough to come to their school play; it is essential that children know that their father's status has the stamp of the court's approval, not that all their school friends know that he is 'their dad'.

The affirmation of the self through legal form is taken even further in *Re H* in 2002, where Thorpe LJ suggests that a parental responsibility order would benefit the child 'in years to come so that she knows she has two parents'. The language here is informative: the very act of knowing one's parents depends on the official stamp. Knowledge constituted by official recognition then passes from child to parent in *Re D*:

'For Mr B, to be D's father is simply not enough; he wishes to be recognised as a father and a parent and he perceives that a parental responsibility order would bring this recognition'.

It is worth recalling that it is not the effect of the legal order that will make Mr B feel better but the legal order

itself. If a father, denied contact with his child, is awarded a contact order and that contact order enables him to enjoy his child's company then of course the father will feel better but this is because of the material effect of the court order. For Mr B, the parental responsibility order had no material effect at all.

It is a remarkable legal development that a legal order described by Ward LJ in *Re S* as an order for a status may be granted to make an adult 'feel good'. Usually, a status in family law -- husband, child or mother -- is awarded because the applicant has met the requisite conditions, and those conditions do not generally include, let alone consist in, the fact that the applicant will feel better if the status is granted. But:

'... once the right to self-realisation is accepted as a defining feature of a just society, it becomes difficult to place conditions on the automatic granting of esteem to every person regardless of their specific traits, accomplishments or contributions' (Furedi, p 165).

Conclusion

'The institutionalisation of the therapeutic ethos can also be interpreted as the constitution of a regime of social control. Experts are continually involved in designating what is and what is not an acceptable emotional response. The affirmation of certain forms of emotional behaviour goes hand in hand with the attempt to suppress others' (Furedi, p 199).

Furedi warns that therapeutic culture should not be conflated with the celebration of emotion (p 30): only certain emotions are welcome; there is a correct emotional script. This is clear from the court decisions discussed in this article. Father and child must both yearn for the sense of belonging conferred by legal recognition of their bond. The child at least, better still both child and father, must be devastated by denial of the official stamp. In the case law examined, there is no recognition of emotionally robust children and fathers secure in their relationship, interested only in the practical effects of parental responsibility, unconcerned about official recognition.