

## Children Act 1975 – ‘First Consideration’ - A Cautionary Tale

‘It seems only too clear that the change has simply made the law uncertain.’

A remarkable sentence that, deserving careful study. It comes from an article by S.M.Cretney ((1976) 126 NLJ 671) in which he criticises, with justification, the obscure drafting of part of section 3 of the Children Act 1975 which reads: ‘In reaching any decision relating to the adoption of a child, a court or adoption agency shall have regard to all circumstances, *first consideration* being given to the need to safeguard and promote the welfare of the child throughout his childhood...’ (italics supplied). The Act, which was based on the report of the Houghton Committee (*Report of the Departmental Committee on the Adoption of Children*, 1972, Cmnd. 5107), set out to clarify and improve the law relating to adoption, among other objectives. Clarity, always desirable in legislation, is especially necessary in this field. The lives of young children are at stake, and the Act has to be operated by non-lawyers such as adoption agency staff, welfare workers and adoption officers as well as busy county court judges and registrars.

When, in drafting the Bill for the Children Act 1975, I was asked to use the phrase ‘first consideration’ I refused. The phrase came from the Houghton Committee, who got it from section 1 of the Guardianship of Infants Act 1925. That section requires the court, in determining questions of custody, to regard the welfare of the child as ‘the first *and paramount* consideration.’ This phrase was explained by Lord MacDermott in a well-known passage in *J v C* [197] AC 668, 710, as follows:-

‘Reading these words in their ordinary significance, and relating them to the various classes of proceedings which the section has already mentioned, it seems to me that they must mean more than that the child's welfare is to be treated as the top item in a list of items relevant to the matter in question. I think they connote a process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child's welfare as that term has now to be understood. That is the first consideration because it is of first importance and the paramount consideration because it rules upon or determines the course to be followed.’

Lord MacDermott could have put this more simply. He could have said that ‘first and paramount’ is an example of draftsman's duplicity (now obsolete). It uses what Langton J once called ‘resounding adjectives’, and simply means ‘paramount’. ‘Paramount’, Lord MacDermott could have said, simply means ‘overriding’. He could have spared us the nonsense about the top item in a list of items. He could have stated, as is the case, that ‘first consideration’ taken by itself is practically meaningless.

That was why I refused to put it into the Children Bill. It is a choice example of the phrase which, to the unthinking, appears significant but in fact, when examined, is found to have no clear meaning.

In the first decided case on the meaning of section 3 of the Children Act 1975, Cumming-Bruce J speculated on the intention of the draftsman ‘when selecting the expression ‘first consideration being given to the need to safeguard and promote the welfare of the child’“ (*Re B (Adoption: Parental Consent)* [1976] 2 WLR 755, 760). As I have said, not only did the draftsman *not* select that expression, he rejected it. Valiantly Cumming-Bruce J tried to give it meaning: ‘...in my view in the construction of section 3 ‘the welfare of the child’ is to be regarded as of first importance in an objective assessment of the reasonableness or unreasonableness of a parent but is

not to be paramount...' (*ibid*). Clearly it is not to be paramount because that word does not appear in section 3, so Cumming-Bruce is right to that extent. Otherwise his judgment throws no light on the meaning of 'first consideration', which is left as obscure as before.

When Parliament gives directions to a court on the way it is to weigh factors in arriving at a conclusion this is for either of two reasons. One reason is to remind the court of a factor which Parliament (probably mistakenly) thinks the court might otherwise overlook, but which is to be given neither more nor less than its natural weight. The other reason is to *alter* the natural weight of a factor. Section 3 as originally introduced is an example of the former case, since it directed the court 'to take full account' of the child's welfare. Section 1 of the Guardianship of Infants Act 1925 is an example of the latter case. If on an assessment of the relative interests of the child, the father and the mother in a custody dispute, the interest of the father having custody is strongest on the natural weighting (perhaps because of the father's overwhelming psychological needs), but marginally it is in the child's better interest to go to the mother, the mother wins because the child's welfare overrides any other consideration, however strong.

Where does 'first consideration' fit into this? Clearly it is not dealing with the chronological sequence. If each factor in an adoption dispute is given its natural weight the outcome will be the same whichever order the court considers the factors in. Is it then intended to alter the natural weight to be given to the child's welfare? If so by how much? Ten per cent, 50 per cent, 100 per cent? Some may think it scandalous that Parliament should import such uncertainty into this branch of the law, and I for one would agree with them. How did it happen?

The amendment which inserted the reference to 'first consideration' was carried by the House of Lords against Government advice. It was moved by a barrister, Lord Wigoder, who said that it 'places the interests of the child in the forefront of the court's consideration' (Parl. Deb. Lords Vol. 356 col. 782). It would be interesting to know exactly what Lord Wigoder thought he meant by that. Probably he didn't exactly know. The same applies to Lady Elliott, who uttered the remarkable statement that 'the words 'first consideration being given to' are perfectly simple and straightforward and mean exactly what they say' (*ibid*, col. 786). More blame attaches to Lord Simon of Glaisdale, who lent his considerable authority to the amendment, observing that it would produce 'greater simplicity and consistency in the law' (*ibid*, col. 790), a statement that could scarcely be further removed from the truth. The Lord Chancellor circulated a memorandum which said 'Since 'first consideration' is put forward in Parliament by those who do not favour paramountcy, it must be assumed that they are seeking to occupy an intermediate position....[but]....the word 'first' adds nothing. [The intention is clearly] that the child's interest is to be weighted - but the question of weighted by how much is not answered... Since the object...is to give guidance to those concerned with difficult questions of adoption, Parliament would be failing in its duty if it gave such guidance in a form which raised more questions than it settled' (quoted in Commons Standing Committee Report, col. 76). Parliament did fail in its duty. The Lord Chancellor's wise advice was brushed aside, and the Lords wrote 'first consideration' into the Bill. Nor did they limit the damage to adoption law. In his thirst for 'consistency' Lord Simon of Glaisdale also moved an amendment, which was passed, to write 'first consideration' into the provisions governing the making of orders placing children in the care of local authorities (Children Act 1975, section 59(1)). So that area too will in future be bedevilled by quite unnecessary uncertainty.

When the Children Bill reached the Commons the Government decided to leave the amendments in, no doubt fearing that if they were taken out Lord Simon of Glaisdale and his colleagues would insist on putting them back. On second reading Dr. Owen, for the Government, weakly said: 'I readily accept that there is a very fine distinction between paramountcy and first consideration, but it will be for the court to decide the weighting of its decision' (Parl. Deb. Commons Vol. 893, col. 1826). In standing committee Dr. Owen said 'The hon. Gentleman asked whether we were right to put on the statute book a wording which implied a weighting without quantifying and calibrating that weighting in exact terms. I think it is

impossible [to do so]' (*ibid*, col.82).

So there it is. On adoption and care applications the child's welfare is to be a weighted factor, but no one knows by how much it is to be weighted. No one will even know for sure that it is to be a weighted factor unless they ransack Hansard. Cumming- Bruce J in *Re B (supra)* did not say it was to be a weighted factor.

But then the rules, quite rightly, did not permit counsel (even if they knew) to draw the learned judge's attention to what was said in the Parliamentary debates. These are notoriously an uncertain guide to Parliament's intentions. The clear meaning of an Act should be discernible from the Act itself. This is a principle upon which the rule of law depends.

I have spent many years in drafting legislation, always striving hard for clarity. Not infrequently I have been defeated by such incidents as just described. Other draftsmen could doubtless say the same. People in Parliament need to think more deeply before forcing their language into Bills. Victims of statutory obscurity should remember that it is not always the draftsman's fault.

126 NLJ (1976) 1237.