

Parental rights

In relation to the interesting article on pages 166 to 169 above regarding the legal treatment of children, it is appropriate to record the following facts.

When I was drafting the Children Bill in 1975 it seemed to me desirable to insert in the law certain new definitions relating to children, and this proposal was accepted. In consequence the new defined term 'the parental rights and duties' was included, among others, in the Children Act 1975 (see s 85(1)). As respects a particular child (whether legitimate or not), this definition stated that the parental rights and duties consisted of the right of access to the child, and all other rights and duties which by law the mother and father of a legitimate child have in relation to the child and his property.

By section 89(1) of the 1975 Act the new term was usefully created a free-standing legal term by being inserted as a new section 19A in the Interpretation Act 1889 (later re-enacted in the Schedule to the Interpretation Act 1978). This meant it could be used in any future legislation without definition, and this occurred.

However the framers of the Children Bill of 1989 took a dislike to my definition. They were perhaps influenced by the dictum of Woolf J (as he then was) in *Gillick v West Norfolk Health Authority* [1984] 1 All ER 365 at p 373 that the interests of parents in their child, rather than being as counsel suggested their 'fundamental rights', were more accurately described as responsibilities or duties. So they determined to change it.

By the Children Act 1989 ss 3 and 108(7) and Sch 15 my definition was replaced by a different defined term, 'parental responsibility'. The change is unsatisfactory on no less than five grounds, as follows.

- (1) The replacement definition comprises *rights* even though to include these within a definition of 'responsibilities' is misleading: responsibilities are not rights but their opposite, namely duties.
- (2) The replacement raises but does not answer the question of what the legal rights, duties etc of a parent truly are, since they may vary according to circumstances. (The previous definition, given above, carefully avoided this difficulty.)
- (3) By applying the old law relating to guardianship without setting it out, the replacement fell into the vice of archival drafting, requiring research each time into just what the old law provided.
- (4) The 1989 Act reduces the utility of the definition by failing to make the replacement, as its predecessor had been, generally applicable as a free-standing legal term.
- (5) The change unnecessarily disturbed the law, particularly the useful case law that had already begun to accumulate around my definition. The change was dismissed as merely 'cosmetic' by *The Independent* (see issue of 20 May 1991).

This 'cosmetic' change was intended to suggest that parents no longer have 'rights' in respect of their children, but only have responsibilities. This was deliberately misleading, since as I have said a reference to rights remains. The 1989 Act did not expressly take away any parental rights over children. However it *appeared* to do so; and the way it has been administered by courts and officials confirms this appearance.