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THE LEGAL POSITION OF PARENTS AND CHILDREN IN ENGLISH LAW*

This article examines the changing nature of the legal position of parents and children under English law from the nineteenth century to the present day. The article discusses the leading cases and considers both the significance of the Children Act 1989 and the possible impact of the UN Convention of the Rights of the Child. It concludes that notwithstanding the radical change over the last century, English law still essentially takes an "adult view" of what is best for the child and does not accord mature children "autonomy rights".

I. Introduction

GIVEN that children, particularly young children, cannot look after themselves it is obvious that someone else must do so. Any rational legal system must therefore decide who should have responsibility for bringing up the child and the authority to act on his behalf. Like most legal systems, English law primarily vests responsibility in the child's parents. However, as will be seen, the nature and focus of the legal relationship between parent and child has undergone considerable change with emphasis being placed first, on father's rights, then, briefly, attention being paid to improving the mother's position and, finally, with the primary focus being placed on the child's position.

The object of this article is to examine the changing nature of the legal position of parents and children under English law from the beginning of the last century to the present day.

II. Two Preliminary Issues

A. *Who is a Parent?*

An important preliminary issue to any discussion of the legal position of parents is who in law ranks as a "parent".

Until recently it was beyond question that the woman who gave birth to the child was in law the mother. However, with the advancement of

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reproductive techniques it is now possible for a woman to give birth to a child yet not be genetically related, for example, where an embryo or eggs and semen have been planted in her.[1] In such cases is the woman giving birth or the genetically related woman the legal mother? This matter has now been settled by the Human Fertilisation and Embryology Act 1990, section 27 which provides that it is the woman giving birth and "no other woman" who is the legal mother even if she is not genetically related to the child. However, under section 30 the court can make an order providing for a child to be treated in law as the child of the commissioning parents provided, *inter alia*, one of them is the genetic parent, they are married to one another and have applied for the order within 6 months of the child's birth, that the child has his home with the applicants and that the "carrying mother" (*ie*, the woman giving birth) and her husband (if she has one) unconditionally agrees to the making of the order.

The question of who in law is the father is also complicated. In general the man whose sperm fertilised the egg ("the genetic father") will in law be the father, save (a) where he is a "sperm donor" for "licensed treatment" or (b) where his sperm has been used after his death: section 28(6) of the Human Fertilisation and Embryology Act 1990. On the other hand a man can be the legal father even though he is not the genetic father, namely, where he consents to his wife's (or even unmarried partner's) artificial insemination or the planting in her of an embryo or of sperm and eggs: section 28(2) of the 1990 Act.

B. *The Relevance of the Parents' Marriage*

Like a number of other legal systems, English common law[2] refused to accept that the mere fact of parenthood gave rise to a legally recognised relationship between parent and child. Instead, it chose to recognise only the relationship between parent and legitimate child. At common law a child was legitimate if born or conceived in lawful wedlock.[3] Illegitimate children (*ie*, those not born or conceived in lawful wedlock) had no legal relationship with their father nor, initially, with the mother.[4] The harshness of that

1 For a detailed account of the whole issue relating to reproduction, see G Douglas, *Law, Fertility and Reproduction* (1991).

2 The term "common law" is used here to mean rules derived from judge-made laws as opposed to Statute.

3 *Blackstone's Commentaries on the Laws of England*, Vol 1, 446-447. It is established that a child conceived during the parents' marriage but born after its termination is legitimate: *Knowles* v *Knowles* [1962] P 161 and it is generally accepted that a child conceived as a result of premarital intercourse whose parents then marry but whose father dies before his birth, is nevertheless legitimate: see Bromley and Lowe, *Family Law* (8th ed) 280.

4 It became accepted, during the nineteenth century, that the mother was the guardian of the illegitimate child.

position has now been significantly mitigated. Successive Acts of Parliament have both widened the concept of legitimacy (for example, by providing that children born illegitimate may be legitimated if their parents subsequently intermarry and that children whose parents' marriage is void are nevertheless legitimate if either parent reasonably believed the marriage to be valid)[5] and, more significantly, have removed nearly all the legal disadvantages attached to illegitimacy. Now, as a result of the Family Law Reform Act 1987,[6] the only legal disadvantage that illegitimate children suffer is that they can only acquire British citizenship through their mother and, effectively, they are unable to succeed to a title of honour. The 1987 Act, was also concerned with the very labels "legitimate" and "illegitimate" which as the Law Commission had pointed out[7] were in themselves discriminatory. Accordingly, the Act adopts the strategy that where it is still necessary to distinguish between children born within marriage and those born without reference is made to the parents, rather than the children, and to whether they are married to one another. In pursuance of this strategy section 1(2) refers to children whose parents were or were not married to each other at the time of his birth.[8]

III. The Changing Attitude Towards Parental Authority[9]

A. *Fathers' Rights – The Common Law Position*

English common law vested legal authority over legitimate children in their father, both to the exclusion of the mother and regardless of the child's welfare.

A number of nineteenth century cases demonstrate the strength of the father's position. In *R* v *De Manneville*,[10] for example, a father who had

5 See respectively the Legitimacy Act 1976, ss 1 and 2.

6 For a detailed commentary on this Act, see Lowe, "The Family Law Reform Act 1987 – Useful Reform but an Unhappy Compromise?" [1988] Denning LJ 77 and Miller, "The Family Law Reform Act 1987 and the Law of Succession" [1988] Conv 410.

7 Law Commission Working Paper No 74, *Illegitimacy* (1979).

8 This shorthand definition has to be qualified because, as we have seen, a child can be legitimate even though his parents were not married to each other at the time of the child's birth. Accordingly, s 1(2) is made subject to s 1(3) so that references to "a person whose father and mother were not married to each other at the time of the child's birth" do not include cases where the child is (a) legitimate even though his parents' marriage is void, (b) legitimate by reason of his parents' subsequent marriage, (c) adopted and (d) "otherwise treated in law as legitimate".

9 Inevitably, given constraints of space, what follows is a simplified discussion. For a more detailed discussion of the nineteenth century developments reference can usefully be had to P Pettit, "Parental Control and Guardianship" in *A Century of Family Law* (Graveson and Crane, eds, 1957), ch 4.

10 (1804) 5 East 321.

separated from his wife forcibly removed an 8-month-old child while it was actually at the breast and carried it away almost naked in an open carriage in inclement weather. Despite this, the court said it could draw no inferences to the disadvantage of the father and upheld his right to custody. In *R* v *Greenhill*[11] a wife left her husband because of his adultery and sought an order giving her the right to bring up their three daughters (aged 5, 4 and 2) who at the time of the hearing were living with her. She contended that she had not done anything that rendered her unworthy or unfit to have custody of the children. The father admitted his spouse's propriety both as wife and mother but nevertheless sought to rely on his right to bring up "his" children. The court upheld this right, even though he was cohabiting with another woman. The court was concerned about the children's possible contact with the adulteress, but upon being satisfied that there had been no such contact nor would there be future contact, it was prepared to accede to the *father's* wishes that the children should be brought up by their paternal grandmother. Even in 1883, in *Re Agar-Ellis*[12] the court was still prepared to uphold the father's rights to the extent of denying his 16-year-old daughter from having free access and communication with her mother on the grounds that his daughter's affection for him might thereby be alienated. Cotton LJ commented:

> When by birth a child is subject to a father it is for the general interest of children and really for the interest of the particular infant that the Court should not, except in extreme cases interfere with the discretion of the father but leave to him the responsibility by exercising that power which nature has given by the birth of the child.[13]

B. *The Strengthening of the Mother's Position*

As the father's position was strong so the mother's was weak especially in the early 1800s, but the position changed through Parliamentary intervention. The Infants Custody Act 1839, passed as a direct result of *R* v *De Manneville*, gave the Lord Chancellor and Master of the Rolls a discretion to grant to the mother, provided she had not committed adultery, custody of her children under 7 years old, and access to any of her children. The Custody of Infants Act 1873 extended the court's discretion to grant custody of her child up to the age of 16 and the embargo relating to the mother's adultery was dropped. The Act also allowed a wife to enforce an agreement under which the husband gave up his rights and duties over

[11] 4 Ad & E 624.
[12] (1883) 24 ChD 317.
[13] *Ibid*, at 334.

his children in her favour, unless in the court's view the agreement was not for the child's benefit. Finally, by the Guardianship of Infants Act 1886 the court's discretion to grant the mother custody was extended to all her children under the age of 21.

None of the above provisions gave mothers' "rights" as such but were concerned to extend the court's discretion to grant orders in the mother's favour. However, the 1886 Act did provide that upon the husband's death the mother became the sole guardian of the children (or joint guardian if the husband had appointed someone) and gave mothers the right to appoint a guardian with effect from their death.

Although, the move to establish maternal rights proved to be of passing significance with attention becoming more focused on the child's welfare, the process of equalising parental rights continued in the present century. The Guardianship of Infants Act 1925 provided that in any proceedings before any court neither the father nor the mother should be regarded as having a superior claim to the other in respect of the custody and upbringing of the child. It also gave the mother the same right to appoint testamentary guardians as the father. The Guardianship Act 1973 gave each parent (of a legitimate child) equal and separately exercisable rights. However, it is only as a result of the Children Act 1989 that the parents' positions have finally become truly equal with the abolition of the rule that during his lifetime the father is the legitimate child's sole guardian (see further below).

C. *The Evolution and Development of the Child Welfare Principle*

A striking feature of the early law was its apparent lack of concern for the child.[14] By the end of the last century, however, there seemed to be a growing awareness of the child's welfare, possibly triggered by the movement in the mid-nineteenth century that children should have a right to basic education and the general rise of individualism. For example, under the Custody of Infants Act 1873 parental agreements about custody could not be enforced if the court did not think that it was for the child's benefit. Further, the Guardianship of Infants Act 1886 directed the court to have regard to the child's welfare as well as the conduct and wishes of the parents, when deciding custody applications. The most obvious child centred statute was the Custody of Children Act 1891 which provided that if a parent had abandoned or deserted the child or allowed him to be brought up by, and at the expense of, another person, school, institution or local authority, in

[14] Though no doubt it was genuinely thought by the judiciary of the time that the fulfilment of a father's rights was in the child's own interests. See further Lowe, "The Legal Status of Fathers: Past and Present" in *The Father Figure* (McKee and O'Brien, eds, 1982), ch 2.

such circumstances as to show that he was unmindful of his parental duties, he had to prove that he was fit to have custody of the child claimed.

The most enduring development, however, was judicially inspired. It was evident that between 1880 and 1925 the courts were placing more weight on the child's welfare such that by 1925 "the tide was flowing strongly in favour of the child as the predominating consideration."[15] This development was reflected by the Guardianship of Infants Act 1925 which provided that in deciding issues concerning the custody or upbringing of a child all courts were to regard the child's welfare as the *first* and *paramount consideration*. Whether the 1925 Act was intended to do anything more than further the process of equalising rights whilst at the same time extending the courts' discretionary power to override the absolute rights of the father in custody cases is perhaps debatable.[16] Nevertheless, the lasting effect has proved to be the unequivocal establishment of the paramountcy of the child's welfare which now forms the cornerstone of the current law when dealing with the upbringing of children. The paramountcy principle was re-enacted in the Guardianship of Minors Act 1971. It is now embodied in the Children Act 1989 (discussed further below).

D. *Two Landmark Decisions*

1. *J* v *C*[17]

The effect of the paramountcy of the child's welfare is illustrated by the leading case, *J* v *C*. A Spanish couple came to England looking for work. Whilst here the mother gave birth to a boy but because she was ill the baby went to live with English foster parents. When the couple later returned to Spain they took the boy with them but whilst in Spain the boy's health deteriorated and he went back to the foster parents. The parents meanwhile went to West Germany to look for work and having successfully improved their economic position returned to Spain. They then sought their son's return. Unfortunately, litigation was protracted and it took a further 5 years for the case to reach the House of Lords. By that time the boy, who had spent all but 18 months of his 10 years with the foster parents in England, had become integrated into the family. Moreover, he had been brought up as an English boy (for example, he played cricket!), spoke little Spanish and scarcely knew his parents. The House of Lords decided that even assuming the parents to be "unimpeachable", nevertheless, their

[15] JC Hall, "The Waning of Parental Rights" [1972B] CLJ 248, 251.

[16] In *A* v *Liverpool City Council* [1982] AC 363, HL, Lord Wilberforce described the provision as a "sex equality" enactment.

[17] [1970] AC 668.

interests could be, and were in this case, outweighed by the child's welfare. They, therefore, refused to interfere with the trial judge's order that care and control should be given to the English foster parents and not to the natural parents since the latter "would be quite unable to cope with the problems of adjustment or with the consequential maladjustment and suffering and that the father's character would inflame the difficulties."

The significance of *J* v *C* cannot be over-emphasised: it unequivocally established that the child's welfare is so overwhelmingly important that it can outweigh the interests of even unimpeachable parents in seeking custody of their own child against a stranger. *A fortiori*, it is the dominant consideration in disputes between parents.[18] Yet while *J* v *C* shows that parents' interests are ultimately subservient to the child's interests, that is not to say that in disputes with third parties, the parents start in an equal position. It is still the assumption that *prima facie* children are best brought up by their own parents. This has recently been emphasised by the Court of Appeal in *Re K (A Minor) (Ward: Care and Control)*[19] which reversed a decision to give care and control to relatives because it was wrong in principle to balance the provision of a good home against fostering the child's relationship with his father. As Fox LJ put it:

> The question was not where would the minor get the better home. The question was: was it demonstrated that the welfare of the child positively demanded the displacement of the parent right.[20]

2. *Gillick* v *West Norfolk and Wisbech Area Health Authority*[21]

Important though the welfare principle is, it only applies when court proceedings are afoot. But in the second landmark decision, the *Gillick* case, the House of Lords was more directly concerned with the legal position of parents. In that case the applicant, a mother of 5 daughters under the age of 16, sought a declaration that a Government Circular in which doctors were advised that in "most unusual circumstances" it would be proper for

[18] The House of Lords have also applied the paramountcy principle in connection with a child in local authority care, holding in *Re KD (A Minor) (Termination of Access)* [1988] AC 806, that "any 'right' in law or a 'claim' by the law of nature or as a matter of common sense – [including the so-called right to see a child whilst in care] – must yield to the dictates of the welfare of the child."

[19] [1990] 1 WLR 431.

[20] His Lordship expressly acknowledged that "right" was not quite the correct word to use here and in particular was not intended to connote anything in the nature of a property right. See further *Re H (A Minor) (Custody: Interim Care and Control)* [1991] 2 FLR 109 and, for an important reiteration of the applicable principle in the light of the Children Act 1989, see *Re W (A Minor) (Residence Order)* [1993] 2 FLR 625, CA.

[21] [1986] AC 112.

them to give contraceptive advice and treatment to a girl under the age of 16 without her parents' knowledge or consent was unlawful. One of the applicant's principal arguments was that Circular was unlawful because it infringed her parental *right* to be informed and to veto any medical treatment of her children at any rate until they were 16 when statute (Family Law Reform Act 1969, section 8) gave them a right to consent for themselves.

Mrs Gillick's action failed and her contention about parental rights was rejected. The majority view was that parental authority exists for the benefit of the child and not for the parent. It, therefore, lasts only as long as a child needs protection. It will end, therefore, when the child is sufficiently mature to make the decision for himself. As Lord Scarman put it:

> The underlying principle of the law ... is that parental right yields to the child's right to make his own decisions when he reaches a sufficient understanding and intelligence to be capable of making up his own mind on the matter requiring decision.[22]

On this basis the Circular could not be said to be unlawful since girls of sufficient maturity and if under 16 could themselves consent to contraceptive treatment.

Although the *Gillick* decision can simply be seen as a further (albeit important) example of the diminution of parental authority in the eyes of English law, potentially it was of much greater significance. In apparently establishing that parental authority ends in respect of any decision that the child is mature and intelligent enough to decide for himself, it seemed to acknowledge that the child himself has the power to make his own decisions. Had this been how the decision was interpreted then the decision might fairly have been described as a landmark of children's rights. However, as we shall see, it has been subsequently restrictively interpreted.

IV. The Children Act 1989

The Children Act 1989 (which came into force on 14 October 1991) is the most important reform of child law ever undertaken in England. It is the end product of massive debate about the law and practice, philosophy and principle of child law. At the moment therefore it represents the final legislative chapter in the development of English law. From the point of view of the parents' legal position the Act is important in the following respects: First, it introduces a new notion of "parental responsibility"; second, it enshrines the paramountcy of the child's welfare; third, it is based on

[22] *Ibid*, at 186D.

the basic philosophy of non-intervention and; fourth, it contains some provisions designed to promote the independence of children of sufficient understanding to make their own decisions.

A. *"Parental Responsibility"*

In their report on Guardianship and Custody[23] the Law Commission considered the pre-1989 Act law anomalous in that (a) it had no inherent legal concept of parenthood and (b) by variously referring to parents having "rights and duties" or "rights and authority", the statutory provisions were outdated and misleading. Following the Commission's recommendation, the 1989 Act creates the new concept of "parental responsibility" which is a key concept emphasising "that the duty to care for the child and to raise him to moral, physical and emotional health is the fundamental task of parenthood and the very justification for the authority it confers."[24]

This new concept is very much in line with the *Gillick* decision. There is, however, more to the concept than a change of name. Under the Act not only may more than one person have parental responsibility at the same time, but a person does not cease to have such responsibility because someone else acquires it. A parent, therefore, will not lose responsibility because, for example, a step-parent, grandparents or even a local authority acquires it. Such a parent will not, however, be entitled to act in any way that would be incompatible with a court order.

Who then has parental responsibility? Under sections 2(1) and 2(2) both the mother and father *automatically* have parental responsibility in respect of their legitimate children but only the mother in respect of an illegitimate child. The unmarried father does not automatically have parental responsibility but he can acquire it through a "parental responsibility" order or by an agreement under section 4 of the 1989 Act.

Such orders replace an action first introduced by the Family Law Reform Act 1987 but the provision for making parental responsibility *agreements* is new and is aimed at encouraging cohabiting parents to make agreements before disputes or problems arise. Agreements will only be binding if they are in prescribed form.

B. *The Paramountcy of the Child's Welfare*

The paramountcy of the child's welfare is embodied in section 1(1) of the 1989 Act, which provides:

[23] Law Com No 172, 1988.
[24] *Introduction to the Children Act* (Department of Health, 1989) para 1.4.

> When a court determines any question with respect to –
>
> (a) the upbringing of a child, or
> (b) the administration of a child's property or the application of any income arising from it,
>
> the child's welfare shall be the court's paramount consideration.

The child's welfare is expressed to be the "paramount consideration" rather than the "first and paramount consideration" as in previous statutes. This change in wording, however, was not intended[25] to lead to a change in law. *J* v *C*, therefore, continues to be the leading case (though see below for the effect of the non-intervention principle).

C. *The Non-Intervention Principle*

The basic philosophy of the 1989 Act is one of non-intervention, resting "on the belief that children are generally best looked after within the family with both parents playing a full part and without resort to legal proceedings."[26] This standpoint is encapsulated by section 1(5) which provides that a court shall not make any order "unless it considers that doing so would be better for the child than making no order at all." In effect section 1(5) creates a statutory presumption that no order should be made. This basic non-interventionist standpoint has been memorably described by one leading commentator[27] as "privatising the family".

Ironically, therefore, while the new concept of "parental responsibility" properly reflects the diminution in importance of parental authority, the non-intervention principle promotes the parents' wishes at least where they can agree with one another. Indeed, it has been argued[28] that the welfare principle has been diluted by that of non-intervention in that the Act effectively accords primacy to the wishes and interests of the adults (normally the parents) rather than to those of the children.[29] Whether this is really any different from that under the former law is debatable. It was certainly the case that, as now, the courts were generally reluctant to interfere with

[25] See White, Carr and Lowe, "A Guide to the Children Act 1989", para 1.4.
[26] *An Introduction to the Children Act 1989, ibid*, para 1.3.
[27] Professor Stephen Cretney, "Privatising the Family: The Reform of Child Law" [1989] Denning LJ 15. See also Bainham, "The Privatization of the Public Interest in Children" (1990) 53 MLR 206.
[28] Bainham, "The Children Act 1989 – Welfare and Non-Intervention" [1900] Fam Law 143.
[29] Whether this would be in breach of Art 12 of the United Nations Convention on the Rights of the Child 1989 is discussed further below.

arrangements agreed between parents as to which of them should look after the child. Under the 1989 Act the difference is that the courts may make no order at all rather than an order reflecting the parents' agreement. Furthermore, section 10(8) of the 1989 Act does allow for children themselves, at any rate those having sufficient understanding, to seek leave to apply for orders. There are also the "Gillick type" provisions[30] allowing, for example, children of sufficient understanding to make an informed decision to refuse to submit to medical or psychiatric examination or other assessment. The child's wishes are also expressly included in the checklist of factors (see section 1(3)) to which the court must have regard at least in contested section 8 and all care proceedings. If anything, therefore, under the Act there is more rather than less regard for the child's own wishes to be taken into account.

V. The Retreat from Gillick[31]

Many, though by no means all,[32] commentators regarded *Gillick* as a landmark decision in establishing children's rights. Subsequent case law, however, has shown that in that respect at least *Gillick* has so far proved a false dawn. The two leading cases are *Re R (A Minor) (Wardship: Medical Treatment)*[33] and *Re W (A Minor) (Medical Treatment: Court's Jurisdiction)*[34] both decided by the Court of Appeal.

The former case, *Re R*, concerned a 15-year-old girl who had suffered emotional abuse and had become suicidal. Fears for her mental state had led the local authority to intervene and a place was found for her at an adolescent psychiatric unit. Her condition was felt to warrant the use of sedatives and drugs. However, during a lucid period the girl indicated that she would refuse any such treatment. Despite the unit's insistence of the necessity of the treatment the local authority declined to consent and instead took the issue to court. Perhaps controversially the court unanimously held that *R* lacked the necessary maturity to decide whether to take the medication on the basis that "Gillick competence" could not fluctuate on a day-to-day basis, so that a child is one day regarded as competent, while on another day she is not. Accordingly, the court unanimously agreed to sanction the

[30] *Viz*, ss 38(6), 43(8) and 44(7) of the Children Act 1989. But note that it has since been held, somewhat dubiously it is submitted, that notwithstanding these provisions the High Court has an inherent power to override the child's refusal: *South Glamorgan CC* v *W and B* [1993] 1 FLR 574 *per* Douglas Brown J.

[31] The writer has taken this title from Gillian Douglas' note on *Re R* at (1992) 55 MLR 569.

[32] See, *eg*, Bevan, *Child Law*, at para 1.16 who doubted whether the courts would accept the full import of Lord Scarman's dictum so far as terminating parent power.

[33] [1992] Fam 11.

[34] [1993] Fam 64.

treatment. Lord Donaldson MR, however, went further. He held (*obiter*) that all *Gillick* decided was that a competent child could consent to medical treatment but that it did not decide that such a child can veto medical treatment. In his view both parents *and* the court retain the power to consent to treatment even of a "Gillick competent child" notwithstanding that the child has refused treatment. In his view there are concurrent powers to consent (which he described as being "keys which unlock the door") and only if *all* the "key holders" fail or refuse to consent will a veto be treated as binding.

This important limitation on the effect of *Gillick* has since been confirmed in the second Court of Appeal case, *Re W*. That concerned a 16-year-old girl who suffered anorexia and who refused treatment. Her condition was such that without treatment she would shortly die. Because the child was 16 she had a statutory right (under section 8 Family Law Reform Act 1969) to give a valid consent to treatment. The question was, however, did section 8 or *Gillick* give her an absolute power of veto? Again the Court of Appeal, though this time unanimously, held that neither section 8 nor *Gillick* could be considered to vest in the child a power of veto. Instead, they held that the High Court could (and in this case, should) overrule the child's wishes. They rejected the argument that implicit in a right to consent must also be a power of veto. That of course did not mean that the court would pay no regard to the child's wishes. On the contrary as Lord Donaldson MR said "good parenting involves giving minors as much rope as they can handle without an unacceptable risk that they will hang themselves." Yet as Balcombe LJ said "if the court's powers are to be meaningful there must come a point at which the court, whilst not disregarding the child's wishes, can override them in the child's own best interests, objectively considered." Relying on another case *(Re E (an infant)*[35] the court "should be very slow to allow an infant to martyr himself".

In summary, the current position under English law is that neither a parent nor even a child of 16 or 17 or who is "Gillick competent" if under the age of 16 has an absolute power of veto over proposed medical treatment for the child since the High Court can override either party's wishes. On the other hand, subject to the court's overriding powers,[36] a 16- or 17-year-old or a "Gillick competent" child, can validly consent to

[35] (1990) 9 BMLR 1.

[36] It was accepted by the Court of Appeal judges in *Re W* and by the majority in the leading Australian decision, in *Secretary, Department of Health and Community Services* v *JWB and Another* (1992) 106 ALR 385 (in which the Australian High Court ruled that the court had inherent power to sanction the sterilisation of a child), that the court when acting under its inherent jurisdiction has wider powers than parents. For a scholarly examination of the nature of the court's inherent powers, see Seymour, "Parens Patriae and Wardship Powers: Their Nature and Origins" (1994) 14 Oxford Journal of Legal Studies 159.

medical treatment though according to Lord Donaldson MR in *Re R* and *Re W*[37] such a power does not deprive a parent of their ability to give a valid consent. Hence, outside the courtroom whilst parents cannot override a competent child's consent, they can, at any rate according to Lord Donaldson MR, override their refusal of treatment.[38]

Of course it remains open to the House of Lords to overrule *Re W*. Should it? It is submitted that insofar as it deals with the court's powers[39] it should not.[40] *Re W* is a pragmatic remedies approach in the classic common law tradition. It seems right that notwithstanding their alleged competence, the court should at least have the power to override the child's wishes especially where that would lead to the child's death or permanent damage. To those who question how a child can be held able to give a valid consent yet be unable to exercise a power of veto it may be replied that there *is* a rational distinction to be made between giving consent and withholding it. We must start with the assumption that a doctor will act in the best interests of his patient. Hence, if the doctor believes that a particular treatment is necessary for his patient it is perfectly rational for the law to facilitate this as easily as possible and, hence, allow "Gillick competent" children to give a valid consent. In contrast it is surely right for the law to be reticent to allow a *child* of whatever age to be able to veto treatment designed for his or her benefit particularly if a refusal would lead to the child's death or permanent damage. The proper safeguard is, as *Re W* unequivocally establishes, to give the court the last word.

VI. UN CONVENTION ON THE RIGHTS OF THE CHILD[41]

Before concluding this discussion of the legal position in England and Wales, reference must be made to the United Nations Convention on the Rights of the Child 1989, to which the United Kingdom is a party. For our purposes the relevant provision is Article 12 which provides:

[37] *Cf* Balcombe LJ who in *Re W* expressly left the matter open.

[38] But even Lord Donaldson MR did not envisage, when account is taken of medical ethics, the many cases where at any irreversible operations, such as abortion, would be carried out on the basis of parent consent but against the wishes of a "Gillick competent" child.

[39] Clarification, however, is needed on whether parents retain a power of consent once the child becomes "Gillick competent".

[40] For a longer exposition of the reasons, see Lowe & Juss, "Medical Treatment – Pragmatism and the Search for Principle" (1993) 56 MLR 865.

[41] See generally Bainham, *Children, The Modern Law* (1993), 607-618.

1. States parties should assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the *views of the child being given due weight in accordance with the age and maturity of the child*. [Emphasis added.]

2. For this purpose the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

It will be noted that Article 12(1) stops short of giving even mature children autonomy rights. Although the precise meaning of the phrase "the views of the child being given due weight in accordance with the age and maturity of the child" is debatable, it is submitted that the English position of reserving the power of the court to override the wishes of a "Gillick competent" child in no way breaches Article 12(1). Neither *Re R* nor *Re W* establishes that such competent children's views are ignored; far from it, considerable stress was placed on the need to have the greatest regard to such views. Further, section 1(3)(a) of the Children Act 1989 specifically directs the court, at any rate, in *contested* private law proceedings for section 8 orders, to have regard to the ascertainable wishes and feelings of the child. However, as Butler-Sloss LJ eloquently put it in another context:[42]

> The courts, over the last few years, have become increasingly aware of the importance of listening to the views of older children and taking into account what children say, not necessarily agreeing with what they want nor, indeed, doing what they want, but paying proper respect to older children who are of any age and the maturity to make their minds up as to what they think is best for them, bearing in mind that older children very often have an appreciation of their own situation which is worthy of consideration by, and the respect of, the adults and particularly including the courts.

In many ways the Children Act 1989 more than satisfies the requirements of Article 12(2) since not only does it direct the court to have regard to the child's wishes, it also provides that children with sufficient understanding to make the application can seek leave to apply for section 8 orders in their own right.[43] Indeed, the procedural rules have been changed for this

[42] *Re P (A Minor) (Education)* [1992] 1 FLR 316, 321, CA.
[43] Children Act 1989, s 10(2)(b), (8).

purpose allowing such children to prosecute or defend such proceedings without the need for a next friend.[44] The one possible area of doubt is where the parents are agreed. In such cases the court is not *directed* to have regard to the child's wishes,[45] though it can do so if it chooses,[46] and there is the danger that by applying the principle of non-intervention under section 1(5) the court by making no order at all could overlook the child's wishes. No doubt in the case of older children the judges are generally alive to this possibility but in cases where they are not, there could be a breach of Article 12.

VII. Conclusion

It can be seen that over the last 150 years the legal position of parents has radically changed. Whereas fathers began by having virtual absolute authority over their legitimate children, today they are in the same position as mothers. Whereas originally no regard was paid to the child's welfare, today that issue is so overwhelmingly important as to even override the wishes of unimpeachable parents. This overall change of attitude towards parental authority is well reflected by the abandonment of concepts such as "parental rights and duties" in favour of the concept embodied in the Children Act 1989 of "parental responsibility".

Ironically, at the same time as reflecting the change of attitude towards parental authority, by employing a principle of non-intervention the 1989 Act has promoted parents' wishes, at least where they are agreed with one another. This, however, is not truly at the expense of the child's welfare, but it does show that English law still essentially takes an "adult view" of what is best for the child. Our law is certainly a long way from establishing children's rights to make their own decisions for though the seeds for that development could well have been sowed by the House of Lords decision in the *Gillick* case, the recent Court of Appeal decisions in *Re R* and *Re W* show that the courts are not yet ready to accord mature children (the so-called "Gillick competent children") "autonomy rights".

NV Lowe**

[44] Family Proceedings Rules 1991, r 9.2A. For the leading case-law on which, see, *eg, Re S (A Minor) Independent Representation* [1993] Fam 263 and *Re T (A Minor) (Child Representation)* [1994] Fam 49.

[45] It is only mandatory to consider the welfare checklist under s 1(3) in private law proceedings where the application for a section 8 order is opposed: s 1(4)(a).

[46] See *Southwark London Borough* v *B* [1993] 2 FLR 559, CA.

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