Chapter 8 supplementary material

These are linked to the main text as follows:

- **8.2.1 The meaning of 'welfare'**
- **8.2.1 The UNCRC in domestic law**
- **8.7 The inherent jurisdiction of the High Court**

8.2.1 The meaning of 'welfare'

In the main text at p 542, we quote from Munby LJ's judgment in *Re G (Education: Religious Upbringing).*[1] That judgment draws on a number of sources, including an article by Jonathan Herring and Charles Foster which examines 'welfare', 'well-being' and 'best interests' from the perspective of both children and adults who lack the capacity to make decisions about their own lives.[2] Herring and Foster start by examining the idea of happiness, or hedonism, which they reject as a defining basis for understanding well-being. They then identify a number of factors which they see as being more relevant to welfare.

J. Herring and C. Foster (2012). 'Welfare means rationality, virtue and altruism'. *Legal Studies* 32: 480, 487-490

Virtues and Well-Being

Exhibiting virtue is seen by many writers as an element of well-being. . . .

Kraut has argued that part of well-being is flourishing and that this involves the development of and exercise of cognitive, social, affective and physical skills. But as a list such as this shows, while there may be widespread support for the view that virtues can form part of well-being, there is no such agreement about what counts as a virtue for these purposes. We might readily agree that friendship is a virtue, but what is friendship? Can we draw a distinction between abusive and beneficial relationships? And so on.

There is a particular difficulty in relying on virtue theory when considering children and those lacking capacity. Is it virtuous to have a virtuous decision made on your behalf? Does compelled altruism lose the moral virtue of altruism? The very fact that one is incapable of making decisions for oneself might be thought to indicate that one has been robbed of the chance to be virtuous. This would render a traditional virtue-based approach problematic in this context.

The problems do not mean, however, that virtue ethics need be discarded completely. The process of making decisions on behalf of children, and those who might regain capacity, can be directed towards the development of virtuous character. . . .

Life Goals and Well-Being

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[1] [2012] EWCA Civ 1233.

[2] The welfare principle applies in much the same way under the Mental Capacity Act 2005 as under the CA 1989. Section 1(5) of the MCA says: 'An act done, or a decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests'.

A popular approach to the question of what constitutes a good life is to argue that a person has well-being where they succeed in the goals they have set for themselves. This has been put in various ways. Griffin argues: 'We all want to do something with our lives, to act in a way that gives them some point and substance'. Raz puts it this way: 'the good life is for each of us to live. It is not in anyone's gift. It consists, I have argued, in the wholehearted and successful pursuit of worthwhile relationships and goals. They are goals we have to adopt and pursue. This requires the use of our powers of rational agency.' . . .

Thus, many notable philosophers, all of whom adopt an autonomy-based understanding of well-being, agree that what is of value is not simply the satisfaction of autonomy, but the attainment of valuable goals. Many such goals will be, as Raz emphasises, valuable because of their relational nature.

Herring and Foster then go on to develop this 'relational' element of their discussion by looking at the 'interconnected' nature of well-being. They comment that it is impossible to separate a child's interests from those of their parents because the two are so interconnected,[3] particularly when seen in the context of a care-giving relationship.

Well-Being and Thriving

One of us (Foster) has suggested that there is really only one criterion that should govern ethical (and by extension) legal decision making: one should seek to maximise the total amount of dignity in any contemplated transaction. Dignity, so understood, is essentially an ethical Theory of Everything: if one burrows down far enough into any ethical problem, one hits dignity. Other principles (for instance Beauchamp and Childress's famous four principles) are second-order principles, ultimately dependent on and derived from dignity. Dignity, in this sense, is human thriving, and it is possible, at least in theory, to ascertain what will maximise human thriving from empirical observations about human beings. Thriving in this sense might also be described as 'humanising': it is that which makes human beings approximate as closely as possible in the circumstances to what humans should do and be in those circumstances. It is best for humans to be human. One of the essential and quintessential human qualities is relationality. . . .

This approach emphasises the need to conduct an audit of the total amount of dignity at stake. That will involve assessing the dignity-interests of all the stakeholders. In a typical medical encounter this will include, of course, the patient and the doctor, but will also include all the other people affected – perhaps carers, other patients, and so on. In the case of a child's welfare determination, a properly conducted audit will assess the dignity interests of the child (of course), but also the parents, the wider family, and indeed society as a whole. We suggest that this approach does no injustice to the interests of the child concerned. In fact it may be the only way of doing justice, because central to the scheme of assessment is the realisation that the child's thriving is crucially dependent on the thriving of all the other stakeholders. The child's thriving does not diminish if another stakeholder thrives: quite the opposite. Our interconnectedness is such that the good of one (when 'good' is properly defined) is the good of all. . . .

Herring and Foster go on to look at the ways in which the courts apply welfare. They argue that there is nothing in the welfare principle to prevent judges from taking into account these

[3] This argument might be thought to have more force in the private law context. In some child protection proceedings, for example, it may be easier to think of the child's interests as being separate from the parents'—for example, considering the child's interests separately in a case involving an intentionally abusive parent may not be that difficult.

broad, holistic considerations (in fact, they say, the welfare principle in fact *requires* judges to do so), and suggest that the courts have, at least sometimes, adopted this approach in practice. Their view about judicial practice would seem to be enhanced by the *Re G* decision, where Munby LJ drew on Herring and Foster's analysis and endorsed the 'holistic' approach to welfare.

However, Munby LJ's holistic approach is not without its critics, not least because the scale of the task set may seem unrealistic in practice.

R. Taylor (2013). 'Secular values and sacred rights: Re G (Education: Religious Upbringing)'. *Child and Family Law Quarterly*, 26: 336, 339-40, 342, 343-44.

Munby LJ's powerful explanation takes the notion of welfare to its logical conclusion: if welfare is concerned with the full development of the child as a human being, there is no logical reason to place temporal or content-based limits on the extent of the welfare enquiry; anything that may affect that development is potentially relevant. The problem with this understanding of welfare is that it is difficult to imagine how a judge might assess and apply such a diverse range of factors over such a long period. Munby LJ is careful to emphasise that the extent of the welfare enquiry will depend on the context and nature of the issue, but it is surely the case that many of the questions that are the staple of family courts will have the potential for longstanding implications for the children concerned. . . . To expect a judge to evaluate 'everything that conduces to a child's welfare and happiness or relates to the child's development and present and future life as a human being, including the child's familial, educational and social environment, and the child's social, cultural, ethnic and religious community' for the next 90 years is breathtakingly ambitious.

The future-oriented nature of decision making in children cases is of course what underlies the claim that it is indeterminate. As Robert Mnookin argued in his seminal 1975 article, to engage in rational decision-making with regard to future speculative events it is necessary to: have sufficient knowledge of likely outcomes; assess the probability of those outcomes; and identify the values by which those outcomes could be evaluated. The uncertainty surrounding the answers to each of these matters illustrates the indeterminacy of such decision-making. Such is the case here. It is difficult to see how a judge might identify the likely future outcomes for such a range of factors over such a long period, let alone assess the probability of each one occurring. Further, whilst, as we shall see, Munby LJ has given considerable assistance with the values that ought to be applied in assessing those outcomes, it is also clear from his judgment that we can expect those values to shift in ways that we cannot foresee in the coming decades. Munby LJ's explanation of welfare is comprehensive and profound in its depth but ultimately is open to the criticism that it is impossible to fully implement in practice.

Alongside the practical problems, Munby LJ's instruction that, depending on the facts of the case, judges may be required to look ahead to the 22nd century in assessing welfare raises more conceptual difficulties. As we know, conceptions of welfare are largely informed by current societal standards – the views of reasonable parents today, as the House of Lords said in *J v C* and as Munby LJ reiterated in *Re G*. However, given these changing social standards, the idea of predicting the child's welfare over a lifetime is complex.

This only further demonstrates the difficulty for the judge in attempting to apply the welfare standard to the future of the child into the twenty-second century; notions of welfare that are applied now will, no doubt, appear misguided or even shocking to those considering them in the child's old age.

It is perhaps futile to speculate on the meaning that welfare will have 90 years hence, but the question of what welfare means now is also fraught with difficulty. It is quite clear that reasonable people in 2012 disagree on what welfare may mean. Indeed the parents themselves – both found to be reasonable people in 2012 – had profound disagreements on what was of value to a child and to the adults that they would become. It is questionable whether any society, particularly one as diverse as modern Britain, has anything approaching generally accepted standards. There is also a danger that generally accepted standards can be a shorthand for the imposition of majority values. . . .

The difficulty is that by choosing the supposedly neutral values of the reasonable person, the court necessarily loads the dice against the views of 'small, weak, unpopular or voiceless minorities'.

Taylor then turns to question the basis for Munby LJ's 'secular values' which reasonable parents in 2012 are said to hold, namely equality of opportunity, aspiration, and bringing the child into adulthood in a position where the child can pursue his or her own vision of 'the good life'.

These are noble aims and no doubt many would subscribe to the vision of parental values held out by Munby LJ. They are, however, not uncontroversial. Laudable as many will think these values are, nowhere does Munby LJ explain their derivation as values that may be attributed to the reasonable parent or ought to be so attributed. . . .

Further, there is a serious risk that these aims may conflict with the values of broad-minded tolerance attributed to the reasonable person. The uncomfortable truth is that not all religious minorities do subscribe to equality of opportunity between, for example, men and women. Further, not all religious minorities consider that aspiration within the secular world is a worthwhile pursuit and may fear that bringing the child to the cusp of adulthood with maximum opportunity to pursue those goals may well be at odds with the child's ability to integrate within the religious community and to maintain religious purity. To choose these values as the values that determine the application of welfare, creates a significant disadvantage for those religious minorities that are based on fundamentally different visions of life.

Consequently, while it is easy to see the value and importance of Munby LJ's judgment in *Re G*, the decision is not without its difficulties.

8.7 The inherent jurisdiction of the High Court

In the main text, at pp 609-10, we explain the general idea of the inherent jurisdiction and the concept of wardship. Here we go into a little more detail, and give some recent examples of the ways in which they can be useful for the courts.

The first thing to consider is terminology. The court commonly now refers to orders 'under the inherent jurisdiction', and within that to orders in 'wardship'. Wardship is merely one way in which the court's inherent jurisdiction powers are exercised, described as a 'convenient machinery' by Lord Denning MR.[4] Whether by way or wardship or otherwise, the inherent jurisdiction powers have been known by numerous names over the years, and were previously commonly referred to as 'the parens patriae jurisdiction', 'the prerogative

[4] *Re L (An Infant)* [1968] P 119 (CA).

jurisdiction', and 'the paternal jurisdiction'. All of these terms can be found referenced in older materials, and occasionally in more modern ones.

The key characteristics of this jurisdiction are set out by Nigel Lowe and Richard White.

N. Lowe and R. White (1986). ***Wards of Court***, 2nd Edn (London: Barry Rose), pp 1, 3, 6-7

The law knows no greater form of protection for a child than wardship. Although the jurisdiction is now primarily concerned with the ward's welfare this has by no means always been so. Indeed it is ironic that a jurisdiction which began essentially by exploiting infants should now be pre-eminent as a jurisdiction for securing their welfare. . . .

By the nineteenth century it had become accepted (see eg Lord Campbell in *Johnstone v Beattie* (1843) 10 Cl & Fin 42 at p 120; cf Lord Eldon LC in *Wellesley v Duke of Beaufort* (1827) 2 Russ 1 at p 20) that the true origin of wardship lay in the concept that the Sovereign as parens patriae had a duty to protect his subjects, particularly those such as children who were unable to protect themselves and that this duty had been entrusted to the Lord Chancellor and through him to the Court of Chancery. . . .

Characteristics of the jurisdiction

A fundamental characteristic of wardship is that both the ward's person and property are subjected to the court's control and that the parents' rights are superseded. In the past it was said that the court became the ward's guardian. . . .

More recently it was said that custody (in its widest sense) of the ward vests in the court . . . Whatever terminology is used the essential point is, as Lord Scarman said in *Re E (SA) (a Minor) (Wardship)* [1984] 1 WLR 156 at p 159, [1984] 1 All ER 289 at p 290, that once a party persuades the court that it should make a child its ward 'the court takes over the ultimate responsibility for the child'. . .

The court exercises its supervisory function throughout the wardship from the moment the application is made until the wardship is terminated. A ring of care is thrown immediately around the ward *even before any order is made* so that as soon as the child is warded, as Cross J said in *Re S* [1967] 1 All ER 202 at p 209:

> No important step in the child's life can be taken without the court's consent.

Even after the court has granted care and control (this expression is used to denote the day-to-day upbringing of the ward . . .) to individuals the rights thereby vested remain subject to the court's directions and supervision.

While it is probably right, as Lord Sumption said in *Re B (Habitual Residence: Inherent Jurisdiction)*, that [t]he continued existence of an inherent jurisdiction in an age of detailed and comprehensive statutory provision is something of an anomaly',[5] nonetheless it remains of significant practical importance in a number of areas of child law. Whether this should be so is a matter of debate,[6] but the court seems wedded to retaining the possibility of using this ancient power, at least as a 'back-up' if other remedies are not available.

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[5] [2016] UKSC 4, [81].

[6] See, eg, George (2019) on medical treatment, and the debate in *Re NY (A Child)* [2019] UKSC, forthcoming, on child abduction.

As we say in the main text, the use of wardship and the inherent jurisdiction was cut dramatically by the CA 1989. This is achieved in two principal ways. First, under s 100(3), no local authority may make any application under the inherent jurisdiction unless the court has first given leave for it to do so. Before leave can be given, it must be established that (i) the outcome sought cannot be achieved by way of any order that the local authority is entitled to apply for under the CA 1989,[7] and (ii) unless the order or made, the child is likely to suffer significant harm.

Second, under s 100(2), the court itself is limited in what it may use the inherent jurisdiction to do. In particular, the court may not use the inherent jurisdiction to:

(i) require a child to be placed in the care of, or under the supervision of, a local authority;
(ii) require a child to be accommodated by or on behalf of a local authority;
(iii) make a child who is subject to a care order a ward of court; or
(iv) confer on a local authority any decision-making power in relation to a child which relates to any aspect of parental responsibility.

Nonetheless, the court's inherent jurisdiction remains important in a number of circumstances. The Court of Appeal made a wardship order in *Re E (Wardship Order: Child in Voluntary Accommodation)*,[8] where a child had been placed in voluntary local authority accommodation under s 20 of the Children Act. The Court of Appeal considered that there was no difficulty in making the child a ward, and saw a benefit of being able to hold both the child's parents and the local authority to account for their actions in relation to the child.

Another area where the High Court has used wardship is where an informal surrogacy arrangement had gone wrong, such as in *JP v LP*.[9] The commissioning couple had separated during the pregnancy, and the surrogate and the father ended up being registered as the child's parents on the birth certificate, though the surrogate did not take on a parental role. The commissioning couple – who were, of course, no longer a couple – failed to lodge their application for a parental order within the statutory six-month time limit, and so the surrogate remained the child's legal mother. A shared residence order had been made, but that conferred parental responsibility on the commissioning mother only for the duration of the order and did not recognise her legally as the child's mother. Adoption was not an option, because the marital relationship was no longer subsisting. Eleanor King J decided that wardship offered the best answer:

JP v LP [2014] EWHC 595

ELEANOR KING J:

36. The parties put before the court the following structure which, given the exceptional circumstances the court has endorsed;

i) [The child] shall be made and remain a ward of court until further order
ii) A shared residence order as between the mother and father

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[7] In fact, this restriction in theory applies to anyone making an application under the inherent jurisdiction, as Practice Direction 12D provides that such applications should only be made if the outcome sought cannot be achieved under the Children Act. However, this restriction is not always complied with in practice.

[8] [2012] EWCA Civ 1773.

[9] [2014] EWHC 595.

iii) All issues of parental responsibility are delegated to the mother and father jointly
iv) The surrogate mother is prohibited from exercising any parental responsibility for [the child] without the leave of the court

37. The court bore in mind before approving the proposed consent order that the very purpose of the introduction into the Children Act 1989 of Prohibited Steps Orders and Specific Issue Orders was to incorporate into the 'new' Act valuable features of wardship which had prevented the taking of important steps in a child's life without the leave of the court. I bear in mind that prohibited steps orders can be made against third parties and therefore, in theory, could be made to regulate the use made by the surrogate mother of her parental responsibility. I concluded however that given the wholly exceptional circumstances of this case, wardship is the most appropriate way in which to manage the overall use of parental responsibility as between the father, the legal mother and the psychological mother of this child.

A similar failed surrogacy arrangement was resolved with the inherent jurisdiction in *AB v CD, EF and GH*,[10] where Keehan J was unable to make a parental order. His Lordship commented that '[t]he absurdity of the law not recognising the first and second respondent as the mother and the father of these children is plain'.[11] Whether this issue is addressed as part of the Law Commission's work on surrogacy remains to be seen.

Another use of the inherent jurisdiction, described by the judge as 'bold and novel', was seen in *Birmingham City Council v Sarfraz Riaz*.[12] The case concerned a vulnerable 17 year old girl, referred to as AB. She had a difficult childhood and a poor relationship with her mother, and had been known to the local authority for some time, her mother having reported her as being beyond parental control. Birmingham City Council claimed that AB had been the victim of child sexual exploitation by a group of older men, though AB herself did not consider herself to be a victim. The matter came before the court in October 2014, when AB consented to the making of a secure accommodation order under s 25 of the CA 1989.

After the police concluded that they would not be able to secure convictions against the men concerned, Birmingham City Council sought civil injunctions under the inherent jurisdiction. Keehan J considered Practice Direction 12D, with its instruction that, in protecting a child, '[t]he court may in exercising its inherent jurisdiction make any order or determine any issue in respect of a child unless limited by case law or statue', though such proceedings should be commenced only if the CA 1989 offers no way to resolve the case.[13] The Practice Direction goes on to list some possible uses for the inherent jurisdiction, including 'orders to prevent an undesirable association'.

Looking at the facts of the case along with this guidance, Keehan J reached 'the firm view' that using the inherent jurisdiction to make injunctive orders to prevent child sexual exploitation was at 'the heart of the parens patriae jurisdiction of the High Court'.[14] Neither the statutory limitations nor those practical limitations to be found in the caselaw prevented

[10] [2018] EWHC 1590.

[11] Ibid, [74].

[12] [2014] EWHC 4247. See George (2015), on which the following text draws.

[13] Ibid, [44].

[14] Ibid, [46].

orders being made. The local authority was consequently given permission to bring the application, and substantive orders were made. In summary, the effect of the orders was to stop the named persons from contacting, attempting to be with, or following AB, from passing on any details about her or encouraging others to meet her, and prevent them from approach any female under the age of 18 not already associated with them in a public place.

These cases show the creative ways in which the inherent jurisdiction can be used, and why it may still be an important power of the court despite the apparently coherent statutory scheme provided by the CA 1989. However, the most common use of wardship in the modern law is in cases involving an international element, most frequently international child abduction. The United Kingdom, along with 91 other states, is a signatory to the Hague Convention on the Civil Aspects of International Child Abduction 1980. This Convention provides a process for dealing with abductions as between the signatory states, and the inherent jurisdiction cannot be used to frustrate that process. However, there are cases where, for technical reasons, the Convention cannot achieve its aim, and then the inherent jurisdiction can be used to support it, as a secondary solution.[15] More commonly, in cases involving an abduction to or from a country which is not a signatory to the Convention, the inherent jurisdiction is often the court's primary legal tool, though there is a live question as to why CA 1989 orders (a specific issue order, coupled with s 11(7) directions, for example) would not do the job just as well.[16]

References:

George, R. (2015). 'The Inherent Jurisdiction and Child Protection' [2015] *Journal of Social Welfare and Family Law* 250.

George, R. (2019). 'The Legal Basis of the Court's Jurisdiction to Authorise Medical Treatment of Children', in I Goold, J Herring, and C Auckland (eds), *Parental Rights, Best Interests and Significant Harms*. Oxford: Hart Publishing.

[15] *Re KL (A Child) (Abduction: Habitual Residence: Inherent Jurisdiction)* [2013] UKSC 75; *Re K (Abduction: Rights of Custody)* [2014] UKSC 29, [67].

[16] The leading authority cited in support of this use of the inherent jurisdiction is *Re J (A Child) (Return to Foreign Jurisdiction: Convention Rights)* [2005] UKHL 40, which ironically involved an application for a specific issue order under the CA 1989. This issue was one of the grounds of appeal in *Re NY (A Child)* [2019] UKSC forthcoming.