

Balancing a Child's Best Interests and a Child's Views

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Abstract

We consider the problem of reconciling the two commitments to hear a child and to promote a child's best interests by identifying the principal issues at stake and illustrating them by reference to legal decision-making in the domains of health in the United Kingdom and custody and child protection in Norway.

We agree that a child's views are not authoritative but dispute Harry Brighouse's claim that they are only of consultative value, affirming the fundamental right of a child capable of expressing a view of doing so and of thereby participating in the procedures where decisions affecting his or her interests are made.

In conclusion we offer a checklist of questions that need to be asked about the way in which jurisdictions combine their explicit commitments to the two principles of best interests and hearing the child's views.

Keywords

best interests; views; Gillick; competence; consultative; authoritative; weighting

I. Introduction

There are two central commitments made in the law and policy that operate in Western jurisdictions with respect to children: to promote the child's best interests or the child's welfare; and, to allow the child to express his or her views on any matter affecting his or her interests, these views being given a weight proportionate with the child's maturity, age, and understanding of the issues. These two commitments have practical application in all of the key areas where a child's interests are at stake, including health care, child custody, child protection, and child welfare generally. Most obviously these commitments can be found at the heart of two of the most important Articles within the United Nations Convention on the Rights of the Child (UNCRC). Article 3.1 states that, 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'. Article 12.1 provides that,

‘States Parties shall 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’.

These commitments ought to be thought of as having equal force and standing, not least since the Convention views all of its Articles as having the same binding power upon States. Article 2.1 of the Convention guarantees that ‘States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind’. Nowhere in the Convention is there a suggestion that some of those rights set forth have priority over others. Yet one might see the two Articles as giving expression to two different kinds of commitment. In the United Kingdom, for instance, there has been a tendency to view a child’s rights and a child’s interests or welfare as discrete matters, rendering obscure the question of how to balance the two commitments (Fortin, 2006). It would also be possible to see one of the commitments – that of best interests – as having a kind of overarching primacy. For instance, in Norway all of the Convention’s articles must be interpreted in terms of the best interest principle.

Whatever the interpretation of their respective standing it is surely an intention of those who drafted the Convention and those who appeal to it that it is possible to reconcile the two commitments. Yet there is a real problem in understanding how this is to be done; something that we are not alone in recognising (Thomas and O’Kane, 1998). The problem arises because the two commitments seem to pull in different directions: promotion of a child’s welfare is essentially paternalist since it asks us to do what we, but not necessarily the child, think is best for the child; whereas, listening to the child’s own views asks us to consider doing what the child, but not necessarily we, thinks is best for the child.

How we might reconcile these two commitments will be illustrated by considering – very selectively – how two different jurisdictions, Norway and the United Kingdom, have done so. Further we have selected crucial areas of decision-making respectively within each jurisdiction: medical decision-making in the United Kingdom; and child protection and child custody in Norway. We should be clear at the outset. It is not our intention to construct a comprehensive comparative study of the treatment of children in these two countries. Our reasons for choosing the areas and the jurisdictions are as follows. First, the two jurisdictions are those that we, as authors, are familiar with. They are, nevertheless, interestingly different in certain relevant respects: the explicit acknowledgement of the principles of the UNCRC (Norway more so than the United Kingdom), and the extent of the role a liberal welfare state plays in the lives of its citizens (again, Norway more so than the United Kingdom). Second, the different areas represent domains in which the interests of children are arguably of interestingly varying significance. Thus we might arrange these areas on a scale of increasing importance

for the welfare of children: from custody cases through child protection to the life and death issues raised in medical decision-making. Third, the cases in these respective areas and drawn from two different countries provide extremely valuable illustrations of the very different ways in which a child's opinions are reconciled with a judgement of best interests, and how in turn a judgement of best interests is arrived at.

Given these reasons for our choices it is important to acknowledge that our approach is deliberately broad but not comprehensive or exhaustively comparative. We have sought to spell out in very general terms what should be of concern to anyone seeking to reconcile the two commitments to hear the child and to promote the child's best interests. Our choice of case material is determined by how best these relevant questions and problems are illustrated. We have therefore not tried to provide a complete cross-national study of decision-making in one specific area. Nor have we intended that the cases should, without further argument, demonstrate how decision-making is in fact conducted in each jurisdiction. We recognise that a fuller and more adequate discussion of the cases would require proper attention to the detailed operation of the courts and child welfare systems in each country. However we have argued not from the cases to general conclusions; but from the general issues we have identified in advance to their illustration in particular cases.

Our manner of proceeding is thus as follows. We will initially set out – in rather brief and abstract terms – the terms of the problem; then we will briefly summarise the facts from some legal cases in the two countries. We will next identify what we see as the major issues broached by thinking in terms of these two commitments, making use where appropriate of material drawn from the legal cases within the two countries. In conclusion we will suggest a checklist of critical questions that need to be addressed; in doing so we will make plain our own views of what constitutes best practice.

II. The Problem

Here is a rather formal representation of the difficulty. Imagine that a child's circumstances are such that we have only two options. Call them A and B. If it helps to make this more concrete imagine that the child's medical condition suggests an operation or medical procedure. Performing it is A, not doing so is B. Or, the child welfare service have moved the child out of the home, and thinks that it is in the child's best interest to place her with foster parents (A). However, (B) the child wishes to stay with its parents. Or again, a child's parents have separated and cannot agree custody. Awarding primary custody to the mother, which is what those agencies working with the family think best, is A, awarding primary custody to the father, with whom the child wants to live, is B.

In each case the child's clearly expressed wish, when asked, is B, whereas the agreed judgement of the relevant professionals (the clinicians, social workers, court or judge) is for A. We are required both to do A and at the same time to give a certain weight to B. Yet how should and how can we do this since A and B represent two quite distinct and incompatible options? In the next section we outline the ways in which courts have sought to do this for medical decision-making in critical care cases in England; and in major Supreme Court custody and child protection cases in Norway.

III

We will be considering legal cases, not the actual quotidian practice of social workers, family agencies, and doctors. In Norway the cases are those of the highest court of appeal; in England those of lower courts but following a key decision in the highest national appellate court, the House of Lords. The legal decisions are made within the context of statutes which enshrine the two principles under consideration. However an interesting difference in the relevant legislation is as follows. In Norway the law accords to the child over seven an entitlement to be heard, and to the child of twelve that opinion is to be given significant weight. By contrast, under the English Children Act courts are enjoined only to have regard to 'the ascertainable wishes and feelings of the child concerned considered in the light of his age and understanding' (*Children Act* 1989 s.1(3)(a)). All of the legal cases are critical ones, raising in particularly acute form the problem we have identified, namely that of balancing considerations of best interests against the views of the child. The courts must thus determine what it is to give 'significant weight' to a child's opinions; or what it is for a child to be of 'sufficient' maturity; or what is 'best' for any child.

Medical Decision-Making for Children in England

Five key English legal cases in the area of medical decision-making follow the seminal Gillick judgement (*Gillick v West Norfolk and Wisbech A.H.A.* [1986] AC 112). In this landmark judgment the House of Lords resolved that a child, rather than his parent, has, in the words of Lord Scarman, a right 'to make his own decision when he reaches a sufficient understanding and intelligence to be capable of making up his own mind on the matter requiring decision'. (*Gillick v West Norfolk and Wisbech A.H.A.* [1986] AC 112, 186). The word that merits immediate comment is 'sufficient'. It is for the courts to determine if the child has demonstrated the threshold capacity for judgement: is he mature *enough* to make his own decisions? If he is then he is 'Gillick-competent'. In discussing the five cases that follow *Gillick* we set to one side those legal complications that derive from particular

interpretations of *Gillick* and of other relevant items of English statute and common law. In *re E (A Minor)* [1990] a 15 $\frac{3}{4}$ -year-old boy refused to consent to the transfusions deemed necessary to treat his leukaemia. He and his family were devout Jehovah's Witnesses and thus refused the treatment on religious grounds (*In re E (A Minor) (Wardship: Medical Treatment)* [1993] 1 FLR 386). In *re R (A Minor)* [1991] a 15-year-old girl who had suffered increasingly serious episodes of mental illness was detained in a hospital where, 'in a lucid interval', she refused the proposed treatment which included the administration, against her will, of certain drugs (*In re R. (A Minor) (Wardship: Consent to Treatment)* [1991] 3 WLR 592). In *re W* [1992] the authorities sought to admit a 15-year-old suffering from anorexia nervosa, against her wishes, to a unit specialising in the treatment of eating disorders (*In re W. (A Minor) (Medical Treatment: Court's Jurisdiction)* [1992] 3 WLR 758). In *Re L* [1998] a 14-year-old who suffered extremely serious burns in an accident refused medical treatment, blood transfusions, because she was a Jehovah's Witness (*Re L. (Medical Treatment: Gillick Competency)* [1998] FLR 810). In *Re M* [1999] a 15½-year-old refused a life-saving heart transplant essentially on the grounds that she did not want to take tablets for the rest of her life and that she did not want to have someone else's heart in her body (*Re M (Medical Treatment: Consent)* [1999] 2 FLR 1097).

In all of the cases the children are close to but nevertheless below the age, 16, at which they would have the legal right to make their own decisions. In all of the cases the children's own views are at odds with the judgement by the relevant professionals as to what is in their best interests. In all of the cases, again, the proposed courses of treatment are for very serious and often life-threatening medical conditions.

Child Protection and Child Custody in Norway

The Norwegian cases considered for discussion are all Supreme Court cases decided in respect of child protection and parental custody from 2005 to 2007. In 2004 Norway implemented changes in participation rights for children, changes which were explicitly effected in order to make the laws comply with Article 12 of the CRC. After the change Article 31 of the Children and Parent's Act read as follows: 'When the child reaches the age of 7, it shall be allowed to voice its view before any decisions are made about the child's personal situation, including which of the parents it is to live with. When the child reaches the age of 12, the child's opinion shall carry 'significant weight' (*Law Revision* 2003 no. 40). Eight rulings are included in the analysis: three decisions on parental custody and five decisions on child protection. The children involved in the cases were all over seven years at which age a child under Norwegian law must be heard, informed and given the opportunity to express their opinion. The court decisions range from ones in which the court said that the child's opinion had a decisive

impact, to rulings where the court said the child's opinion has no impact at all. All the court rulings were unanimous. The Supreme Court is the final court of appeal in the Norwegian legal system, and its rulings have a major impact on legal practice and future court decisions.

The three Norwegian child custody cases disputed and presented to the Supreme Court involved four children: a 9-year-old, siblings of 9 and 12, and a 10-year-old. In each case the Court was required to make a decision about what was in 'the best interest of the child' (*Children's Act* (1981) §48); in each case also the child who 'reaches the age of 7 ... shall be allowed to voice its view before any decisions are made about the child's personal situation' (*Children's Act* (1981) §31).

The details of the custody cases are as follows. Case 1: In Supreme Court ruling 2007-967 the dispute was about visitation rights for the father of a nine-year-old girl. The girl's opinion agreed with what the Court thought was in the child's best interest. Case 2: Supreme Court ruling 2007-376 was about which of their parents a 12-year-old boy and a 9-year-old girl should stay with. The Court placed huge emphasis on the children's wishes when deciding where they should live permanently. Case 3: Supreme Court Ruling 2005-682 concerned a dispute about which of her parents a 10-year-old girl should live with. The girl expressed a wish to live with her mother, but the Court decided otherwise. In sum, we find that in case 1 (2007-967) the Court and the child shared the same opinion of what was in the child's best interest; whereas in both case 2 (2007-376) and 3 (205-682) the Court and the children had different opinions on what was in the best interest of the child.

The five Norwegian child protection cases decided by the Supreme Court involved five children. Two of them were 9-year-olds and three of them were 14-year-olds. In each case the Court made a decision where 'decisive importance shall be attached to framing measures which are in the child's best interests', and the child 'shall be informed and given the opportunity to express those views freely before a decision is made in cases affecting the child' (*Child Protection Act* (1992) §4- 1 and §6-3). Since these were child protection cases they involved considerations around the level of risk for the child. The details of the child protection cases are as follows. Case 1 (2007-561) was about the adoption of a 9-year-old boy against his mother's will, and the boy's opinion is understood to have been that he wanted to be adopted. Case 2 (2006-1672) was about an out of home placement for a 9-year-old boy, and the child's opinion was that he wished to stay in the foster home. Case 3 (2006-1308) was about an out of home placement of a 14-year-old girl who expressed a wish to stay with her biological mother. Case 4 (2006-247) was about visitation arrangements for a 14-year-old boy placed in a foster home, who wanted more visitation than the

Court decided he should have. Case 5 (2005-624) was about an out of home placement for a 13-year-old disabled girl who wished to stay at the residential home.

IV. Reconciling Best Interests and a Child's Views

The problem identified at the outset was how to reconcile two commitments: to promote the best interests of the child and to give due weight to the child's own views. We have seen how in particular cases – of medical decision taking in England, and in custody and child protection in Norway – courts have sought, in different ways, to reconcile these two commitments. In this section we discuss the theoretical issues broached by the existence of these two very different commitments, and, where appropriate, we illustrate them by reference to the cases introduced in the two previous sections. What are the issues broached? They fall into three groups: judging best interests; hearing the child's views; and balancing best interests and the child's views.

First, there are questions broached by the need to make a judgement of best interests. Thus, we need to know how the judgement that A is in the best interests of the child is actually made. Here it helps to make some distinctions. The first is between substantive and procedural determinations of best interests. Substantive statements of what is to be taken as being in a child's interests may be found in the relevant legislation, or in leading court cases, or in published guidance, or simply be extrapolated or inferred from best practice. Substantive judgements of best interests may also well be informed by assumptions – about what, for instance, constitutes ideal familial forms – which are taken up by the legal system but which may be open to challenge. Indeed such assumptions may be disputed and overturned in the light of emerging evidence and proper study of the subject (Piper, 2000). By contrast there may be procedural arrangements for the determination of any judgement of best interests. These could specify the personnel with the recognised authority, or a least accorded a leading role, to judge what is in a child's best interests. A child psychiatrist might, for example, be summoned to testify in court as to the mental health of a child; or a clinician could be asked to explicate a medial diagnosis. A second distinction is between matters that are clearly normative concerning what is best and which may be open to reasonable agreement even between relevantly informed individuals; and empirical questions of fact that one would hope are open to definitive resolution. Thus, a forum determining a child's future may be clear about what the child's situation is and what choices are open, even about the consequences of these choices, but disagree about which choice is the best.

Armed with these two distinctions we can identify a series of questions: by whom and according to what procedures are judgements of best interests made? What appeal can be made to existing and authoritative statements of what is in a child's best interests? Can we agree that any judgement of best interests falls within a recognised area of expertise that only some individuals have? When are individuals rightly displaying an expertise about some empirical matter, and when are they claiming an authority to judge on disputed normative questions? Clinicians, for instance, may be accomplished diagnosticians, but they need not be the best placed to judge whether or not a life is worth living, or whether a course of treatment imposes intolerable burdens on a patient. What key but possibly contentious assumptions do any judgements of best interests rely upon? Consider, for instance, the underlying view that any child is always best off on balance being brought up by his or her biological parents; or that it is always best for a child's life, whatever its quality, to be preserved.

Relevant here are two standard, familiar criticisms of the principle. First, there can be reasonable disagreement about those important values which would underpin any judgement of best interests. Moreover in actual fact our world comprises distinct cultures whose views on life, and, in particular, on what makes for a good childhood, differ significantly. We do not and probably cannot agree what is best for any child. Second, the outcome of any choice is indeterminate. It is so in respect of what outcomes, and their associated probabilities of occurrence, follow from any choice. We cannot, in consequence, know *ex ante* how things will turn out for any child (Alston, 1994; Elster, 1989; Kopelman, 1979; Mnookin, 1979).

In the English cases the prolonging of life is seen as being straightforwardly and obviously in the best interests of the child. In all three Norwegian custody cases the Supreme Court clearly stated its opinion that it is in a child's best interest to have a good relationship with both of her parents. Further, continuity of home environment, friends, school, and leisure activities is also considered as good for the child. In the five child protection cases it is less straightforward to identify what are considered to be the most important elements in any assessment of a child's best interest. Of course the main dilemma in these cases was how to handle the child's relation to his or her biological parents under conditions in which the level of parental care giving was inadequate and the child involved was at some sort of risk. In cases of child protection, as opposed to child custody, reliance on a simple principle that contact with both parents is for the best is difficult, and, in general, the relevant considerations are more complex.

A second set of questions concerns the child's views. How are these known? What opportunities and procedures are there for finding out the child's views? Are the child's views directly solicited or is a representative used? And if the latter how is such an advocate trained and selected? It is thus worth noting that Article

12.2 of the Convention provides, that for the purpose of hearing the child's views, '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'.

In the English legal cases practice in respect of soliciting the views of the child varied. Thus in *Re M* extensive measures were taken to ensure an adequate account of the child's wishes through a local solicitor acting on behalf of the Official Solicitor who, in the United Kingdom, is entrusted with representing the child in the hearings. The solicitor chosen was accustomed to representing children. In *Re L* a child psychiatrist gave evidence on behalf of the Official Solicitor but did not actually see or talk to the child judging that a face-to-face interview was wrong in her medical condition. In *Re E* the lawyer acting on behalf of the Official Solicitor reported the boy's views but 'in exercise of his duty to do what is best for the boy' submitted that the court should decide against those views.

In Norway the Supreme Court does not usually meet with the children involved, but it is practice for the Court to hire an expert on family relations and child development to consider the psychological dimensions of the case. Of the three custody cases documents for case 1 (2007-796) do not mention whether an expert spoke to the child; in the two other cases, by contrast, we find explicit references to experts being involved and interacting with the children, although it is not mentioned which profession the expert belongs to. In the five child protection cases an expert does not seem to have been involved in one (4. 2006-247), and the court seemed content to rely on the child's statements in the earlier court proceedings. In the other four cases experts were involved and reports of the child's opinion were also considered. In two of the cases the relevant expert is a psychologist (2.2006-1672 and 3. 2006-1308).

The commitment is both to hear the child and to give the child's views a weight proportionate to his or her maturity. How then are the child's views to be weighted? Such weighting requires a judgement as to the child's maturity, age and understanding of the issues. We need to know who makes this judgement and how it is made. There is, we think, an evident problem in having the same experts who judge what is in the child's best interests also judge the weight that should be given to the child's own contrary judgement. A doctor who thinks that an operation should be performed because it is best for the child may be disposed to think that a child who disagrees with his professional judgement is immature or does not understand the issues, and is, as a result, not competent enough to judge what is best. There is also a real danger in this context of conflating two questions: the empirical issue of what is medically best, concerning which the doctor is indeed better qualified, and the normative issue of what is in the child's best interests, that is what kind of life is best for the child, concerning which the doctor need have no greater qualification than the child.

There is here a general point of considerable importance. Any estimation of a child's maturity ought to be made independently of an evaluation of the child's opinion. Otherwise there is a danger of allowing a judgement of immaturity to be inferred simply from a disagreement with the prudence of the child's view (Thomas and O'Kane, 1998: 150-151). At most the perceived wrongness of the child's opinion might be allowed as evidence of immaturity; but it cannot be taken as sufficient to show such immaturity. In the case of adults we can clearly separate the grounds for thinking that the decision made is wrong from those upon which we would judge the adult to be irrational or cognitively impaired. We should be able and willing to make a similar separation in the case of children. It is noteworthy that key court decisions arise in this area because of a conflict between a judgement of best interests and the child's own views. Thus the court already knows that the child's views of what is for the best are opposed to those of the professionals and experts entrusted to care for the child.

In two of the five English cases the child is straightforwardly judged incompetent on account of her medical condition. In *Re W* the judge is clear that irrational beliefs are no bar to being 'Gillick competent'. However in her case the character of her condition, anorexia nervosa, is one 'destroying the ability to make an informed choice' (*In re W* [1992], 769). In *re R* her 'fluctuating mental disability' is such that she is judged not merely to be not 'Gillick competent' but 'actually sectionable' (*In re R* [1991], 603). This latter judgement is made even though the consultant child psychiatrist is quoted as reporting that R is of sufficient maturity and understanding to comprehend the treatment being recommended and is currently rational (*In re R* [1991], 597).

Is the judgement of competence made according to a standard which applies whatever the issue and decision, or is it made relative to the issue and decision? (Fundudis, 2003). In the latter case we think that the nature of the decision determines the degree of maturity required in order to be regarded as competent to decide. Here there is a distinction to be drawn between complexity and significance. A choice may be complex in that it involves many different options (think of an American menu choice of coffees) but trivial in that nothing of enormous import for the leading of one's life follows from whatever final decision is made. Or a choice may be significant in that it does bear importantly on life, and yet be simple in that it is between two options: for example, have the life-saving operation or don't have it. A judgement of a child's maturity that is relative to the nature of the decision being made needs thus to take account both of how many choices face the child and of what impact their making have on the child's life.

We endorse the following principle of equity: *a child should not be judged against a standard of competence by which even most adults would fail*. It is unfair to ask children to be more competent in their decision-making than those adults to whom we grant a general freedom to decide. A good way to ensure that this principle is honoured is to ask what kinds of reasons are advanced for doubting

the maturity of a child who expresses views, and then ask whether they would also be reasons to doubt that an adult, in comparable circumstances, was competent. Consider, then, the following kinds of reasons which get cited: emotional instability or an emotional reaction to the circumstances; ignorance or a poor understanding of the relevant issues; a lack of decision-making independence, and over-reliance on the judgements of others; inconstancy of judgement.

In *Re R* 'Gillick competency' is stated in general terms to involve 'not merely an ability to understand the nature of the proposed treatment. ... but a full understanding and appreciation of the consequences both of the treatment in terms of intended and possible side effects and, equally important, the anticipated consequences of a failure to treat' (*In re R*. [1991], 602). The English courts think then of competency in stringent terms: 'full' appreciation of the 'whole' implications, an understanding of all the relevant issues, an ability to come to terms, presumably dispassionately and calmly, with a life-threatening situation, a broad experience of life, a will unconditioned by adherence to a powerful religious faith, and so on. In *re E* the boy is judged 'of sufficient intelligence to be able to take decisions about his own well-being' but is nevertheless thought unable 'fully to grasp' the 'whole implication of what the refusal of [the] treatment involves.' (*In re E* [1993], 391). He is also described as possessed of a will that 'has been conditioned by the very powerful expressions of faith' to which he like others in the Jehovah's Witnesses adhere (*In re E* [1993], 393). In *Re L* the court acknowledges the clear statement of her wishes but notes that her 'sheltered life' has left her with a 'limited experience of life' and hence that she is necessarily restricted in her 'understanding of matters which are as grave as' her medical situation' (*Re L* [1998], 812-3). In *Re M* the girl is credited with being 'intelligent'. Her reasons not to have a heart transplant are evidently reasonable ones that can easily be imagined as articulated by a young competent adult: 'I am only 15 and don't want to take tablets for the rest of my life ... I would feel different with someone else's heart'. She understood that death is 'final' and was clear that she didn't want to die; nevertheless she would prefer death to the transplant and its aftermath. The court judged her, nevertheless, to be 'overtaken' and 'overwhelmed' by events such that 'she has not been able to come terms with her situation' (*Re M* [1999], 1100-1101). These terms are such that the competency required would surely be beyond many adults who are nevertheless accorded the freedom to make their own decisions in situations similar to those faced by the young persons. The reasoning of the courts in the English cases thus violates the principle of equity of treatment of children and adults.

In the Norwegian cases considered there is a nuanced approach to the question of a child's competence in those cases where the judgement of best interests conflicts with the child's opinion. In custody case 2 siblings of 9 and 12 years wanted to move to live with their mother, and consequently would have had to

change their school and local community. The Court affirmed the importance of showing respect for the children's opinion. Since it did not think that what the children wanted was in their best interests it found it necessary to consider the children's competence. For the Court the weight to be carried by the child's opinion was related to the following three elements: the consistency with which the opinion was expressed; the reasons given by the child for holding the opinion; and the child's appreciation of the consequences should their view be decisive. In this particular case the Court found that the children's opinion ought to carry considerable weight and thus decided in their favour.

In case 3, where a 10-year-old girl did not want to have visitations with her father, the Court disagreed and decided against her wishes. In reasoning for making the contrary decision the Court explicitly said that the child's opinion was distorted by misinformation and that a 10-year-old did not have adequate experience to form a qualified opinion. In this case the Court questioned the manner in which the child came to have her opinion, but did not – as was done in case 2 – evaluate the nature of her actual decision.

In three of the five Norwegian child protection cases (1, 2 and 5) the Court and the child agreed on what was in the best interests of the child. In the two remaining cases (3 and 4) there were differences between the Court and the child, although in one of them the difference was a small one. How then did the Court consider the opinion of the child in these five cases? In case 1 (2007-561) which concerned the adoption of a nine-year-old boy against his parent's will, the Court thought that it was in the boy's best interest to be adopted. In the reasoning leading to the Court's ruling there was a consideration of the child's opinion, but the Court gave little time to discussing the child's right to participate in the decision-making. The Court took as a starting point the difficulty for a 9-year-old of understanding the difference between adoption and fostering. An expert had assessed the boy, and recorded his view that he wanted 'his foster parents to decide all things concerning him'. This was interpreted as meaning that the boy wanted to continue living with his foster parents, and, as such, a statement in favour of adoption. The Court agreed with this interpretation, and, save for mentioning that it is difficult for a 9-year-old fully to understand the issues at stake gave no further consideration to how the boy came to have his opinion or as to his competence.

Case 2 (2006-1672) concerned a 9-year-old boy, previously neglected, whom the child protection agency had placed in a foster home. The Supreme Court concluded that it was in the best interests of the boy for him to stay there. Only very briefly was the boy's opinion mentioned in the Court decision. The expert had spoken with the boy who had told her that he wanted to stay in the foster home. He gave as his reason that his foster parents were taking care of him. The Court did not consider this matter further. Since the boy agreed with the Court and could give a reason for his opinion, it was not apparently seen as necessary to

discuss it further. The child's reason for holding his opinion was cited but there was no consideration of the child's competence.

In case 3 (2006-1308) the Court found it proven that the child, a 14-year-old girl, had been abused and neglected, and decided that it was in her best interest to be placed with foster parents. However, the girl wanted to live with her biological mother. The Court considered the girl's opinion to be her own and to be genuinely held for two reasons. First, the 14-year-old cited as reasons for her opinion her attachment to her mother and the importance to her of having a family, a home and a place where she belonged. Second, the girl consistently held this opinion. Nevertheless, even though the Court found her opinion to be her own and genuinely held, and even though she was 14-years-old, they decided against her opinion because they judged that it was not in her best interest. The Court gave a lengthy explanation concerning the damage the abuse and neglect had had on the girl, and the part her stay in the foster home had had in healing some of this damage – by, for instance, improving her social skills.

Case 4 (2006-247) was about visitation rights for a mother whose son, a 14-year-old boy, was living in a foster home. The dispute was about how much time the mother and son should spend together and, more particularly, whether the boy should be allowed to stay several nights at his mother's home. The Court was clear that it was in the boy's best interest not to spend more time with his mother. However the boy expressed a wish to do so. The Supreme Court's judgement of the boy's opinion was very brief and essentially summarised in the following sentence: 'My main impression is that the boy is quite satisfied with the arrangement as it is'. We surmise that since the boy is described as very loyal to his mother the Court took the view that he had not expressed his real wish.

In case 5 (2005-624) the disputed issue was about a 14-year-old disabled girl who lived in a residential institution for children. The mother wanted the girl to live with her, but the girl did not want to move back. The Court considered that it was in her best interest for the girl to stay in an out-of-home placement, although they explicitly said that the girl's opinion was not decisive. The Court attached weight to the girl's opinion since it had been consistently and clearly expressed over a long period. Further she supported her view by reference to her mother's lack of respect for her situation and for the choices she wanted to make. Thus the Court evaluated the child's opinion by reference to the consistency with which it had been stated and the reasons given to support it. Her age, 14 years, is also seen as being of importance in the weighting of her opinion.

How do the Norwegian cases illustrate key issues in taking the child's views into account? In the eight cases considered there are five interesting features of the ways in which the Court took account of the children's opinions. First, in evaluating the opinion, the Court emphasised both the reasons the children gave in support of their opinion, and their consistency in holding the opinion. These cases thus offer evidence of how an appeal can be made to considerations other

than a straightforward judgement of the imprudence of the view and hence incompetence of the child. What ought to enter into a full judgement of the child's capacity is not just a judgement of the opinion's good sense, but the manner in which the opinion is held and defended. Second, the court evaluated the children's understanding of the consequences of acting on their own views. A full estimation of a child's competence ought to take account of not simply whether she understands the view she is expressing and even the matter in respect of which she is expressing a view but also and perhaps most critically whether she appreciates what would happen if her view was decisive. This will of course be especially true in life-or-death decisions which require a full understanding of what death signifies (Speece and Brent, 1987). Third, the Court consistently stressed the importance of respecting the child's opinion. Such a sentiment – which the English courts frequently also explicitly affirm – may only be nominal and token. It is obviously only as impressive as the weight that is actually given, and seen to be given, to those opinions. Thus a case such as custody case 2 where the Court judged in favour of the children's opinions and against its own judgement of best interests is evidence of how an estimation of the weight to be accorded to those opinions can be decisive and ought to be in some circumstances. Fourth, the child's age is mentioned as an important consideration. Age as such is not a good criterion of competence. Whilst we can make some use of general developmental guidelines and milestones in assessing competence there are at least two important sources of variability in the correlativity of age and competence: children vary in their degrees of ability; and matters of different complexity and significance will require different degrees, and kinds, of competence. Fifth, the Court evaluated the manner in which the child formed his or her opinion by asking if the child was in possession of good information, if the circumstances in which the opinion has been formed were favourable, and if the child had acquired enough relevant experience to hold an opinion about the issue at stake. Once again there is in the appeal to such considerations a commendable assessment of the manner in which the view is held – in this instance, how it is arrived at – rather than a simple inference from the perceived error of the opinion to the incapacity of the child who holds it.

To summarise thus far, there are issues raised by the making of a judgement as to what is in the best interests of a child, and there are issues raised by the manner in which we seek the views of a child and weight those views according to the child's maturity. There is a still further and third set of issues which arise just because we do have a commitment both to the interests of the child and to weighting the child's views, and need to balance one against the other.

The first of these has to do with why exactly we seek the views of the child. There is a basic but extremely important difference between thinking of a child as entitled, to some degree, to shape her own life, and thinking of a child as not so entitled. Even when a child is thought of as not having a right to make her own

decisions, there are nevertheless important reasons for giving her a voice. In what follows we try to clarify what these reasons are. We start by noting Harry Brighouse's useful distinction between taking children's voices as authoritative and taking them as consultative. 'Someone's view is regarded as authoritative when it is regarded as the view that must be taken as defining the person's interests for the purpose of decision-making..... By contrast, to regard a view as consultative is to treat the person who expresses it as having a right to express her own view of her own interests, but not to treat that expression as sufficient grounds for action, even if only her interests are at stake' (Brighouse, 2003: 692-693). Brighouse argues that a competent adult's views are authoritative with respect to his interests, whereas a child's views should be taken only as consultative. When a competent adult expresses her view that B is best for her, even though all her adult friends and companions judge that A is, the authoritative character of her view is such that it should prevail. For us to insist upon B in the face of her authoritative pronouncement would be a paternalistic denial of her autonomy. By contrast, a child has a right to express her views but we do not, as adults, act wrongly in failing to act on these views. Before assessing the different reasons we might give for hearing the child's views, we think it important to stress that it should always be the child's own views that are sought. A child – just as an adult can – may express views that she believes the other wants to hear or which she knows to be those of a significant adult to whom she is close or even by whom she is intimidated. She does not then say what she really wants to happen. If she does express an opinion which is genuinely hers she may not be sufficiently mature to justify the overruling of a contrary judgement by adults of what is in her best interests. Nevertheless it is important to know what is really and genuinely her view. Ensuring that we do hear the voice of the child, and not some proxy opinion, requires proper procedures – such as being interviewed by someone the child trusts, who is properly trained to elicit the views of the child, away from the presence of those who might otherwise unduly influence her, and in circumstances which give her ample opportunity to express her true opinions.

If we have ensured that we have heard the child's own views what are our reasons for doing so? We think that these can be interestingly different. In the first place consultation of a child can help adults make a better judgement of the best outcome, all things considered. It helps in two ways. First, knowing what a child thinks assists us in working out our initial judgement of what is best for the child. If a child says that she does not want to live with her mother after the divorce, or reside with her father in a child protection case, then hearing those views may clarify for us what makes the child happy or unhappy, what she values, what is important to her, what she is worried about, what has caused her difficulties in the past, what, in sum, makes her life go better or worse. This is rather akin to a doctor seeking to find out from his patient information that will help him to formulate an initial diagnosis. He does not elicit these statements in the

expectation that the patient will deliver an authoritative judgement of what is wrong; but he can only make the correct diagnosis if the patient is accurate and truthful about her situation.

Second, if we judge that A is for the best we know – the child having expressed her own view in favour of B – that implementing our judgement will have costs. The child will resist or not cooperate; she will resent our acting as we do. That she does not want to do what we think is best is a reason not to do it. However, on balance and all things considered, it need not be a decisive reason not to do it. The child, for instance, does not want to have the medical operation but we think it is best that she have it. She may not cooperate with the doctors, she may be obstructive in post-operative care, and she will hate our refusal to act on her own wishes. These are all the costs of a treatment that is still, so we judge, best for her. Again – to pursue the earlier analogy - an accurate prognosis must take full and proper account of the patient's own future behaviour and dispositions.

On this view consultation is valuable for the child only indirectly and inasmuch as it helps the adults to form a better overall assessment of what is best for the child. In all five English cases the young persons are deemed not to reach the threshold level of 'Gillick competency'. Nevertheless the courts acknowledge that what the child wishes for is an important consideration in the final overall judgement: it 'weighs very heavily in the scales' the judge holds in making his decision (*In re E* [1993], 393). In *re W.* her 'wishes and feelings considered in the light of her age and understanding, are the first of the factors to which the court must have regard' (*In re W.* [1992], 781). In *Re M.* the wishes of the girl 'should carry considerable weight' (*Re M* [1999], 101). Since the children are incompetent their views cannot have weight inasmuch as they are authoritative; they can do so only as consultative. They provide assistance to the courts in forming a judgement of what is best; and they indicate the scale of the problem faced should the courts proceed to do what the child does not want.

Given that the child's wishes do not have the status they would have if made by a competent adult, the court must simply do what it judges is best overall for the child. Thus they must balance the benefits of the proposed medical treatment against the costs of doing what the child does not want. In *Re E.* the judge explicitly calculates the scale of E's resistance to the treatment and subsequent emotional trauma occasioned by the overruling of his wishes against the benefits of the treatment and finds in favour of the latter (*In re E*, 394). Equally in *Re M.* the judge estimates that the risks of M rejecting her treatment and of her likely subsequent lifelong resentment at treatment against her wishes are easily counterbalanced by the benefits of the avoidance of her certain death in the absence of treatment.

What do the Norwegian cases show us about 'weighting' the child's opinion? In four of the eight cases the Court's opinion of what was in the best interest of the child concurred with the child's own opinion of what was the best thing

to do. In these cases it is thus hard to see how much weight the child's opinion might carry. Nevertheless there are differences in how the Court evaluated the child's opinion. In some cases the child's opinion is barely mentioned (custody case 1, child protection cases 1 and 2) whereas in another (child protection case 5) the child's view is much more thoroughly investigated. On the whole an agreement between the child's opinion and the Court's own judgement disposes the Court not to assess the child's maturity and the quality of the child's opinion.

In the other four Norwegian cases the Court's assessment of what is in the best interest of the child conflicts with the child's own opinion of what is for the best. Only in one of these cases (custody case 2) does the Court decide in accordance with the child's own suggestion. In the other three cases the Court decides against the child's wishes. Thus, it is only in one of the cases that we can be relatively certain that the child's opinion carries considerable weight. Nevertheless, when the Court does decide against the child's view it makes an effort to explain and justify its decision. This is especially so where the Court's judgement differs as much from the child's opinion, as it does in custody case 3 and in child protection case 3.

The following seems like a fair but crude summary. On one model exemplified most obviously in the English cases the critical question is whether or not the child demonstrates a 'threshold' level of competence. If the child does not do so then, although formal acknowledgement is made of the importance of the child's views, a final judgement is made exclusively in terms of best interests. The role of the child's opinions serve only to help the court determine what, on balance, is in the child's interests. On another model – which Norwegian practice exemplifies if not always consistently – the hearing of the child's views has an importance which is not simply that of assisting an overall judgement of best interests. Moreover care is taken, not admittedly in every case, to provide an explicit assessment of the child's opinion and the competence it displays. How might a child's views be important if not merely consultative and instrumentally useful to the judgement of best interests? To show that a child's opinions have a role which is not that of being merely consultative in Brighthouse's terms it helps to look at the respects in which the actual terms of Article 12.1 complicate matters. First, the right to express views is accorded only 'to the child who is capable of forming his or her own views'. It is not accorded to all children, and to those to whom it is accorded there is already a presumption of a basic capacity. Second, it is a right that is accorded to children. The Convention does not advise adults to consult children if they wish to form a better judgement of what is best for children. It says that children are entitled to express their views. Third, Article 12.1 speaks of 'due weight' being given to the child's views where it is clear enough that the due weight is determined by the age and maturity of the child, and clear too that what really matters is maturity, age being a fairly reliable guide to maturity but not of itself the most important consideration. Hence the more mature the child

the greater the weight to be attached to her views. It is not easy to understand how one might 'weight' a child's views. Part of the difficulty here lies in the status of the child's views. If the child is being consulted then presumably her views carry greater weight if they are viewed as being a more reliable guide to what is in her best interests; if her views are interpreted as possibly authoritative, by contrast, then they are seen as somehow more or less determinative of what is in her interests. However this second possibility is very puzzling. In the case of a competent adult if his views are authoritative then they wholly define what is in his best interests. If an adult says that A is in his interests then that is enough. If a child's views are authoritative but given 'due weight' then they do not wholly or sufficiently determine what is in her interests. But how can a set of views be authoritative but not completely?

Consider the balance between best interests and the child's own views. In those cases where a child's views concur with adult judgements of best interests there need be no great attention given to the child's views, nor to whether or not the child is of sufficient maturity. In the Norwegian custody case 1 where a nine-year-old girl wanted visitations with her father and the Court agreed that this was in her best interest, there was a lack of concern with the girl's opinion and her competency. It is likely that since the Court concurred with the child's opinion about the best outcome, it saw no reason to explore further the child's reasons and maturity.

But where the judgement of best interests and the child's own view disagree it may be easier to see how the latter is viewed. If the child is deemed insufficiently mature to make her own decisions why should her views matter? It may be that they matter only because their content and the strength with which they are held will indicate the costs of enforcing the contrary judgement of best interests. This seems to be the approach taken in the English cases.

Or it could be that they matter just because they are the child's own views and because any court (or forum) making a decision about a child's future ought to take account of what the child herself thinks. It is here that the terms of Article 12.1 are relevant. We are enjoined only to take account of the views of a child who is capable of forming her own opinions, and we must listen to the child as a matter of right. In other words we are obliged to hear the expression of the child's views because they come from someone who has views. If it is a child's right to express her views then their expression must be an ineliminable feature of any process in which children and adults together determine what should be done for the child. Their expression is not only of instrumental value in helping adults work out what is best.

Nor need the child be expressing her views as part of the case she might make to be treated as an adult entitled to make her own decisions. Fixing any age as the dividing point – between adulthood with its entitlements and childhood – is vulnerable to charges of arbitrariness (why does this rather than that age mark the

difference between competence and incompetence?), and to charges of unfairness (there are those below the age who are clearly competent and those above it who are clearly incompetent) (Archard, 2004: Chapter 6). Now we could respond to these charges in the following way. X is the age dividing adulthood from childhood. Nevertheless we allow that those below the age of X could demonstrate the maturity necessary to make, as adults are permitted to do, their own decisions. Thus the denial of an authoritative status to the views of children, those below the age of X, is only presumptive. If a child can show that he or she is mature enough then his or her views become authoritative. We might say that there is a threshold of maturity which can be reached by those below the age of X and whose views would otherwise only have consultative status. In the English cases children are assessed as being either 'Gillick competent', and above the threshold, or below it.

Making provision for this revision of status would meet the charge of unfairness. Yet Brighouse meets this charge by commenting that, 'The state is not equipped to judge all individual cases, and so has to have a general rule about when agency rights activate' (Brighouse, 2003: 703). Article 12.1 accords *any* child a right to express his or her views on '*all* matters affecting the child' (emphasis added). That might suggest that the state is required to allow each and every child the opportunity to show in respect of all matters affecting the child that she was mature enough to make her own decisions. And that would indeed impose an intolerable burden on the state. However that is not the point of according children capable of forming a view a right to express it on any matter affecting them. That is a right each child has because she has a view. It is not a right to persuade adults of her maturity.

Norway legally obliges adults to hear the views of children over seven, an age well below that at which the child might be thought to be sufficiently mature to make her own decisions, but clearly an age deemed to be one at which a child is capable of forming a view. In other words a child of seven must be listened to just because she can express a view, and not because she is possibly mature enough to have that view count. For it is only when twelve that a child's view must be accorded a significant weight. The important underlying presumption is that a child capable of forming a view must be listened to insofar as she has a view and not simply inasmuch as the content of that view should be taken seriously.

In sum the right of children who can form opinions to express them is not just the right to be consulted where this means an entitlement to have those views guide adults as to what is for the best; nor is it a right to try to show that they are mature enough to be self-determining agents. It is a basic right of individuals who have their own views (who are capable of forming them) to express those views. It is a right of all individuals to be involved in a process whereby their own future is determined even if their view of that future has no weight in any final determination of matters; and even if they cannot hope to persuade others of

their ability to make their own decisions. Thus an interpretation of the child's opinion as either authoritative or consultative does not capture all the reasons for hearing the child.

V

In conclusion, we offer the following useful checklist of questions that need to be asked about the way in which jurisdictions combine their explicit commitments to the two principles of best interests and hearing the child's views. We offer them as the basis for further discussion of the issues we have identified, and as a way of assessing the actual practices of courts, and other relevant institutions, in honouring these two important principles. We also intend that the way in which they are framed makes it clear what we consider to be the best interpretation of the two principles and thus an indication of best practice:

1. How is the judgement of best interests or welfare made and by whom?
2. What assumptions are made by those who make these judgements?
3. What opportunities are there for clearly, openly and fully contesting the judgements and the assumptions on which they may rest?
4. Is a perspicuous distinction made between empirical matters of fact and normative questions of what is best or better?
5. How are the views of the child sought? And how are they represented within the relevant tribunals?
6. What steps are taken to ensure that the child's views are his or her own views and are genuinely held by the child?
7. How and by whom is the age and maturity of the child determined? Is such a determination always evidently made in a way that does not follow from a prior judgement of the prudence or imprudence of the child's views?
8. Do the same people who judge what is best for the child also make a judgement of the child's maturity?
9. Is the maturity of the child simply thought of as falling above or below a particular threshold of competency? Or is there a calculation of maturity along a continuous scale?
10. Is the child required to display a maturity which it would also be reasonable to expect of most competent adults? Is the principle of equity—*a child should not be judged against a standard of competence by which even most adults would fail*—observed?
11. How is the judgement of best interests balanced against the child's own views when they do not coincide?
12. How are the child's own views weighted when they do coincide with the judgement of best interests?

13. Why are the views of the child sought? Is it in order to demonstrate the child's possible competence to decide for herself? Do they play a consultative role in helping adult decision-makers judge what is in the overall best interests of the child? Or, is the expression of the child's views seen as having an independent value as an essential element in the decision-making process?
14. In consequence and in sum, how exactly are the commitments – to hear the child and to act in the child's best interests – honoured?

References

- Alston, P. (ed.), *The Best Interests of the Child: Reconciling Culture and Human Rights* (Oxford: Clarendon Press, 1994).
- Archard, D., *Children: Rights and Childhood*, 2nd revised edition (London: Routledge, 2004).
- Brighouse, H., "How Should Children Be Heard?" *Arizona Law Review*, Fall 2003, 691-711.
- Elster, J., *Solomonic Judgements, Studies in the Limitations of Rationality* (Cambridge: Cambridge University Press, 1989), Section III: 'Solomonic Judgements: Against the Best Interests of the Child';
- Fortin, J., "Accommodating Children's Rights in a Post Human Rights Act Era", *The Modern Law Review* 2006 (69(3)), 299-326.
- Fundudis, T., "Consent Issues in Medico-Legal Procedures: How Competent Are Children to Make Their Own Decisions", *Child and Adolescent Mental Health* 2003 (8(1)), 18-22.
- Kopelman, L.M. "The Best-Interests Standard as Threshold, Ideal, and Standard of Reasonableness", *The Journal of Medicine and Philosophy* 22 (1979), pp. 271-289.
- Mnookin, R.H., "Foster Care – In Whose Best Interests", in O. O'Neill and W. Ruddick (eds.), *Having Children: Philosophical and Legal Reflections on Parenthood* (Oxford: Oxford University Press, 1979).
- Piper, C., "Assumptions about Children's Best Interest", *Journal of Social Welfare and Family Law* 2000 (22(3)), 261-276.
- Speece, M.W. and Brent, S.B., "Irreversibility, Non-Functionality, and Universality. Children's Understanding of Three Components of a Death Concept", in J.E. Schowalter, P. Buschman, P.R. Patterson, A.H. Kutscher, M. Tallmer and R.G. Stevenson (eds.) *Children and Death: Perspectives from Birth through Adolescence* (New York: Praeger, 1987).
- Thomas, N. and O'Kane, C., "When Children's Wishes and Feelings Clash with their Best Interests", *International Journal of Children's Rights* 1998 (6), 137-154.
- UNCRC: United Nations Convention on the Rights of the Child <http://www.unhcr.ch/html/menu3/b/k2crc.htm>