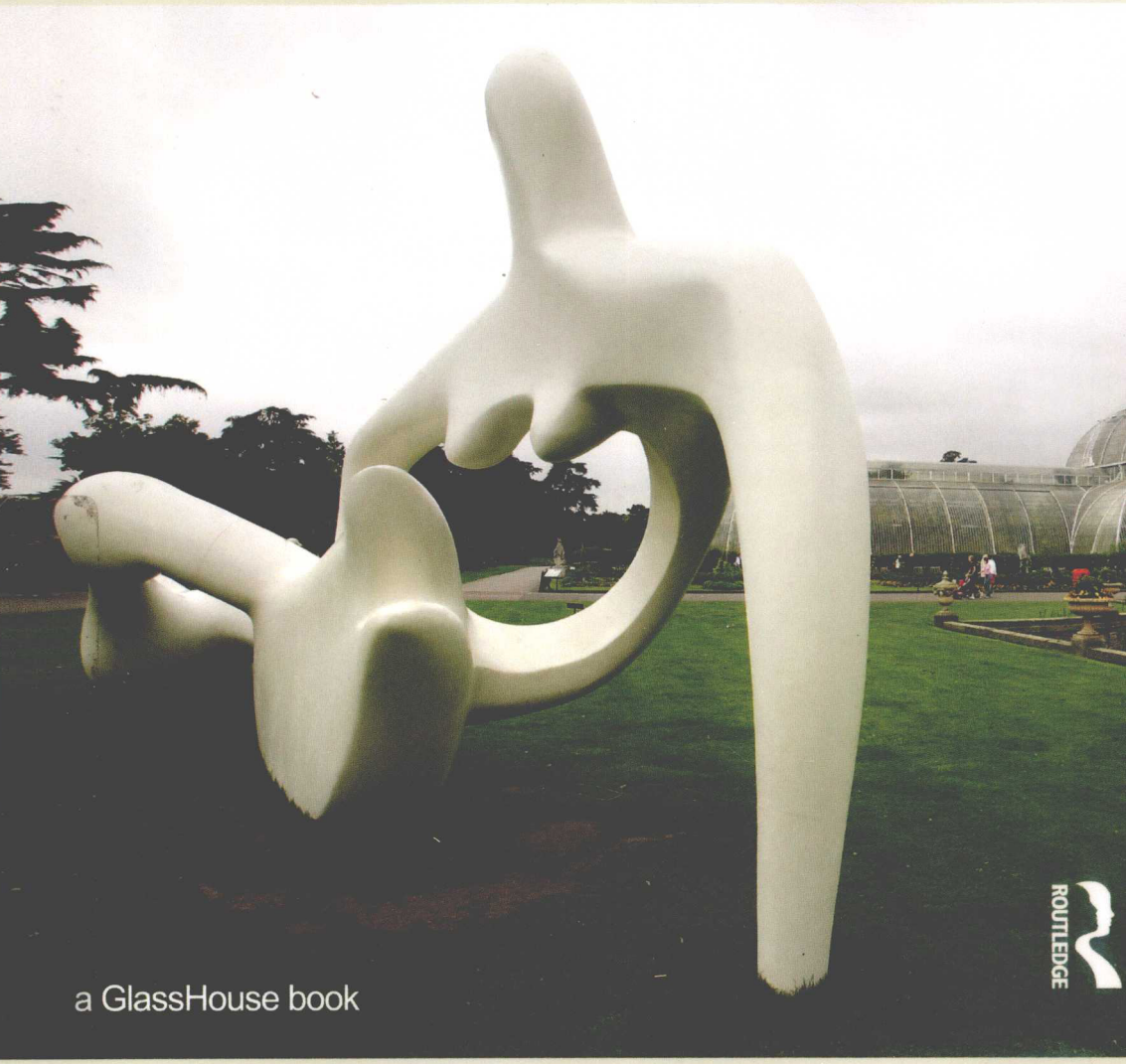
RIGHTS, GENDER AND FAMILY LAW

EDITED BY
JULIE WALLBANK, SHAZIA CHOUDHRY
AND JONATHAN HERRING



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ROUTLEDGE

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Edited by
Julie Wallbank, Shazia Choudhry
and Jonathan Herring

Routledge
Taylor & Francis Group
LONDON AND NEW YORK

First published 2010
by Routledge
2 Park Square, Milton Park, Abingdon, Oxon, OX14 4RN

Simultaneously published in the USA and Canada
by Routledge
270 Madison Ave, New York NY 10016

A GlassHouse book
Routledge is an imprint of the Taylor & Francis Group, an informa business

Transferred to Digital Printing 2010

Typeset in Times New Roman by
Taylor & Francis Books

British Library Cataloguing in Publication Data
A catalogue record for this book is available from the British Library
Library of Congress Cataloguing in Publication Data
Rights, gender, and family law / edited by Julie Wallbank, Shazia Choudhry and Jonathan Herring.
p. cm.
ISBN 978-0-415-48267-7
1. Domestic relations–English-speaking countries. I. Wallbank, Julie A. II. Choudhry, Shazia. III. Herring, Jonathan.
K670.R545 2010
346.01'5–dc22
2009013226

ISBN10: 0-415-48267-4 (hbk)
ISBN10: 0-415-58958-4 (pbk)
ISBN10: 0-203-86947-8 (ebk)

ISBN13: 978-0-415-48267-7 (hbk)
ISBN13: 978-0-415-58958-1 (pbk)
ISBN13: 978-0-203-86947-5 (ebk)

Rights, Gender and Family Law

There has been a widespread resurgence of rights talk in social and legal discourses pertaining to the regulation of family life, as well as an increase in the use of rights in family law cases, in the UK, the US, Canada and Australia. *Rights, Gender and Family Law* addresses the implications of these developments – and, in particular, the impact of rights-based approaches upon the idea of welfare and its practical application. There are now many areas of family law in which rights- and welfare-based approaches have been forced together. But while, to many, they are premised upon different ethics – respectively, of justice and of care – for others, they can nevertheless be reconciled. In this respect, a central concern is the 'gender-blind' character of rights-based approaches, and the ontological and practical consequences of their employment in the gendered context of the family. *Rights, Gender and Family Law* explores the tensions between rights-based and welfare-based approaches: explaining their differences and connections; considering whether, if at all, they are reconcilable; and addressing the extent to which they can advantage or disadvantage the interests of women, children and men. It may be that rights-based discourses will dominate family law, at least in the way that social policy and legislation respond to calls of equality of rights between mothers and fathers. This collection, however, argues that rights cannot be given centre stage without thinking through the ramifications for gendered power relations, and the welfare of children. It will be of interest to researchers and scholars working in the fields of family law, gender studies and social welfare.

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Shazia Choudhry, Jonathan Herring and Julie Wallbank

INTRODUCTION

This book is concerned with critically examining the various approaches which have been adopted in family law, understood herein as an institution, a set of practices but also as an academic and theoretical endeavour. The aim of this chapter is to assess some of the broad themes which will run through this book. We will focus on approaches to family law based on welfare, rights and an ethic of care and evaluate the various merits and demerits of each approach. Throughout our analysis we place gender centrally and draw upon the rich body of feminist contributions to the study of family law. What we are concerned with here is the shifting social and legal constructions of gendered power relations and with how the various case studies examined in this book offer important insights into the discursive constitution of masculinity and femininity in relation to the main themes covered, i.e. rights, responsibilities, welfare and care.[1]

This collection of essays therefore adopts a case-study approach to the use and usefulness of rights in family law. The effects of rights and the associated gendered discourses upon the power relations between parents and between children is a central focus of the book. The contextual analysis adopted herein is particularly useful for understanding how rights can have important ontological and practical consequences for the balance of power between women as mothers and men as fathers and for children's welfare. As such, the book offers some critical reflections on the increasing significance of the relationships between rights, responsibility and welfare in family law and social policy.

The case-study approach to gender is important precisely because it allows for an in-depth understanding of the workings of gendered power in small-scale studies. We are therefore concerned with the interplay between socially and legally

[1] The case study approach to gender and power in law and social policy undoubtedly owes a debt to the work of M. Foucault, e.g. *Discipline and Punish* (A. Sheridan trans.) Harmondsworth: Peregrine, 1977; *History of Sexuality* Vol. 1 (R. Hurley trans.) London: Penguin, 1981 and to the critical or socio-legal studies communities.

constructed gender identities and the interrelationship between the production of gender sameness/difference and the construction and relative power effects on gender of the adoption of and weight given to the values of rights, responsibilities, welfare and care in the elected contexts. In addition, other cultural categories of analysis have been drawn upon, including class, ethnicity, sexuality, age, disability. Fortunately, we have available to us a wide range of theoretical commentary on the various approaches to family law. Not all this work emanates from within feminism but it offers critical and important insights into the various approaches, both in a theoretical and practical sense. It is not the aim of the chapter to come down on the side of one approach over another. Rather, our chapter seeks to offer some justification for the book's subject matter by flagging up the importance of keeping a critical eye on the potential and actual gendered impacts of the adoption of each of the approaches. Before looking at these theoretical approaches, the basic legal principles will briefly be introduced.

An introduction to key legal principles

The welfare principle

The Children Act 1989 opens in s. 1 with one of the central principles of English family law:[2]

> 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.

When a judge is considering what is in the welfare of the child s 1(3) provides a checklist of factors to consider. There has been considerable debate over the meaning of the word 'paramount' in s 1(1). The accepted interpretation is that it means that the welfare of child is the sole consideration.[3] The interests of adults and other children are only relevant in so far as they may impact on the welfare of the child.[4]

[2] A detailed analysis of the welfare principle and its interpretation can be found in J. Herring, *Family Law*, Harlow: Pearson, 3rd edn 2008; Ch 9.

[3] UN Convention on the Rights of Children, in Art 3, states that the child's welfare should be the primary consideration. This appears to place slightly less weight on children's interests than s 1 of the Children Act 1989.

[4] Lord Hobhouse in *Dawson* v *Wearmouth* [1999] 1 FLR 1167. Although see J. Herring, 'The welfare principle and the rights of parents', in A. Bainham *et al. What is a Parent?* Oxford: Hart, 1999 for an argument that despite this the courts have in fact found means of giving weight to parents and other children.

The Human Rights Act 1998

The implementation of the 1998 Human Rights Act has added a new layer of analysis to family law cases. It is designed to ensure the protection of individuals' rights under the European Convention on Human Rights (ECHR) in two main ways. First, s 3 requires judges to interpret domestic legislation in a way which complies 'so far as is possible' with the ECHR. If the court is unable to interpret a statute in line with the Convention rights, then it must apply the statute as it stands and issue a declaration of incompatibility in order that Parliament can consider whether the legislation needs amending.[5]

Second, s 6 requires public authorities to act in a way which is compatible with the Convention rights. Failure to do so gives a cause of action under s 7 of the Human Rights Act 1998 which provides a wide range of remedies.

Family law cases often involve a clash between competing rights of the children and adults. The European Court on Human Rights (ECtHR) and English and Welsh courts are still developing the jurisprudence on how to deal with such clashes but some clarification is emerging. As Shazia Choudhry and Helen Fenwick point out, one way in which the welfare principle could be interpreted compatibly with Convention rights is to interpret 'paramount' to mean 'primary'.[6] In other words, the interests of the child will be the most important consideration for the court but will not inevitably determine the outcome, particularly where there are weighty countervailing interests.[7] On this interpretation, the welfare principle can be read compatibly with the approach of the ECHR which requires a balancing exercise between all of the rights involved, but with particular importance given to the rights and interests of the child.[8]

The nature of this balancing exercise in cases where rights of individuals conflict has produced some complex jurisprudence. A popular view is that the courts must undertake a 'parallel analysis'[9] of the rights involved. The starting point is to look at the interests of each individual and consider

[5] See *Bellinger* v *Bellinger* [2003] UKHL 21 for an example of a case where a declaration of incompatibility was issued.

[6] S. Choudhry and H. Fenwick, 'Taking the rights of parents and children seriously: Confronting the welfare principle under the Human Rights Act' (2005) 25 *Oxford Journal of Legal Studies* 480.

[7] For another way of reconciling the welfare principle and the HRA see J. Herring, 'The Human Rights Act and the welfare principle in family law – conflicting or complementary?' [1999] *Child and Family Law Quarterly* 223.

[8] There is a debate as to whether it is the interests of the child or her rights that should be given particular weight in the ultimate balancing exercise and, indeed, whether the child's interests and rights can be separated in any meaningful way, see J. Fortin, 'Accommodating Children's Rights in a Post Human Rights Act Era' (2006) 69 *Modern Law Review* 299.

[9] H. Rodgers and H. Tomlinson, 'Privacy and expression: Convention rights and interim injunctions' [2003] *European Human Rights Law Review* 37.

whether they engage a right under the ECHR. The point being that not every interest an individual has is necessarily protected by a right under the ECHR. If the interest does engage a right, then the court will need to consider whether an infringement of that right is justified. So, a parent may have a right under Art 8(1) to have contact with a child, but under Art 8(2) it may be permissible to interfere with that right if necessary in the interests of the child. It would be necessary to consider the right of each party involved (each parent and the child) and consider in each case whether the rights and interests of others are sufficiently strong to justify an interference with that right. This process will provide the solution, if there is only one person's right which cannot be justifiably interfered with.[10]

However, the above process may produce a clash between two rights for neither of which can justifiably be infringed. The ECtHR, to date, has offered little guidance on how to resolve such a stalemate. We will mention a couple of options.

One is to privilege the rights of children. According to the ECtHR when considering the competing rights of adults and children the rights of children should be regarded as being of crucial importance.[11] Although the ECtHR has referred to the child's interests as being paramount, it has only done so very rarely[12] and usually describes children's interests as being of crucial importance.[13] Shazia Choudhry and Helen Fenwick[14] have suggested that, in accordance with the ECtHR's approach, once the competing rights of all concerned have been considered, the rights of children should be 'privileged' even if that means going against the interests of either of the adult parties. However, Jane Fortin[15] complains that this is too vague and believes that it needs to be explained how the interests of children are privileged. However, in Choudhry and Fenwick's article the authors do, in fact, go into some detail as to how in a contact dispute their analysis would apply and have suggested that in a case of clashing rights the court should look at the values underpinning the right. For example, in the case of Art 8, which is the most common right used in family cases, the underlying value may be that of

[10] For a detailed application of the 'parallel analysis' to such a dispute see S. Choudhry and H. Fenwick, 'Taking the rights of parents and children seriously: Confronting the welfare principle under the Human Rights Act' (2005) 25 *Oxford Journal of Legal Studies* 453.

[11] See, e.g. *Yousef* v *The Netherlands* [2000] 2 FLR; *Sahin* v *Germany* [2003] 2 FCR 619; *Hasse* v *Germany* [2004] 2 FCR 1.

[12] *Yousef* v *The Netherlands* [2000] 2 FLR; *Kearns* v *France* (App No 35991/04) [2008] ECHR {35991/04}, para 79.

[13] See, e.g. *Haase* v *Germany* (App No 11057/02) [2004] 2 FLR 39, para [93].

[14] S. Choudhry and H. Fenwick, 'Taking the rights of parents and children seriously: Confronting the welfare principle under the Human Rights Act' (2005) 25 *Oxford Journal of Legal Studies* 453.

[15] J. Fortin, 'Accommodating children's rights in a post Human Rights Act era' (2006) 69 *Modern Law Review* 299.

autonomy: the right to pursue your vision of the 'good life'.[16] A judge could consider the extent to which the proposed order would constitute a blight on each of the party's opportunities to live the good life and make the order which causes the least blight.

As will be clear from this discussion, the exact relationship between the welfare principle and the Human Rights Act is still being worked out. Under the welfare principle it is only the interests of children which count.[17] The welfare principle is capable of restricting any parental right in order to maximise the welfare of the child, no matter how small increase in welfare.[18] While under a human rights analysis a balancing between the different rights of the parties is required. Despite these differences, the English courts have denied that there is any difference between an approach based on the welfare principle and one based on rights. For example, in *Payne* v *Payne*[19] Lord Justice Thorpe considered that:

> [the HRA] requires no re-evaluation of the judge's primary task to evaluate and uphold the welfare of the child as the paramount consideration, despite its inevitable conflict with adult rights.[20]

Lord Justice Thorpe went on to deny any conflict between the welfare principle and an approach based on the ECHR. That view has received little, if any, support from academics.[21] There are two key differences between the welfare principle and the ECHR approach. First, the ECtHR has clearly stated that in cases involving conflicting interests it is engaged in an exercise balancing the rights of the parties. The welfare principle does not involve a balancing exercise as parental interests are only relevant if they affect the welfare of the child. There is no balancing because all that matters is the welfare of the child. Second, the ECHR approach implies that the interests of the child will not always override those of the parent.

The welfare-based approach to family law has been well entrenched since the Children Act 1989 and this may explain the reluctance to accept that it

[16] This seeks to develop dicta of Lord Steyn in *Re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593 para 17 which refers to the need to consider the values underlying the right when considering cases of clashing rights.

[17] Although if the interest of an adult affects the welfare of the child it can thereby become relevant.

[18] A point emphasised in J. Eekelaar, 'Beyond the Welfare Principle' [2002] *Child and Family Law Quarterly* 237.

[19] *Payne* v *Payne* (2001) EWCA Civ 166, [2001] 1 FLR 1052, paras 35–37 (Thorpe LJ) and para 82 (Butler Sloss LJ).

[20] Ibid, para 57.

[21] E.g. S. Harris-Short, 'Family law and the Human Rights Act 1998: judicial restraint or revolution' [2005] CFLQ 329, 355; S. Choudhry and H. Fenwick, 'Taking the rights of parents and children seriously: Confronting the welfare principle under the Human Rights Act' (2005) 25 *Oxford Journal of Legal Studies* 453.

may be challenged under an HRA analysis.[22] As well as the practical issues of how the tests should be used in particular cases, questions have been raised about the theoretical relationship between the two approaches, which can be said to contain two different sets of ethics.[23] There are now many areas of family law in which the two strands of rights and utility have been forced together and the chapters of Julie Wallbank and Jo Bridgeman, for example, examine the ways in which the courts have reconciled the two approaches. Although there has been a good deal of debate about the link between rights and welfare, as illustrated by the above discussion, there has been rather less discussion in respect of the relationship and the category of gender which this book seeks to rectify.[24]

Welfarism

Welfarism is at the heart of s 1 of the Children Act 1989. At its simplest it involves a desire to protect children and promote their best interests. It is motivated by a concern that all too often children's interests are overlooked and children end up being used by adults or regarded as their property. Elevating the interests of the child to the paramount position ensures that the most vulnerable parties to a family dispute are given the highest possible level of protection.

Arguments seeking to justify the welfare principle

There are several justifications for the welfare principle which we outline below.[25] It sends an important symbolic message emphasising the value, importance and vulnerability of children. It also recognises, that without a particular focus on them, children's interests are easily lost from the picture. In family disputes children are the ones with the least social, emotional and financial capital to deal with the aftermath of a family breakdown. It is

[22] See S. Choudhry and H. Fenwick, 'Taking the rights of parents and children seriously: Confronting the welfare principle under the Human Rights Act' (2005) 25 *Oxford Journal of Legal Studies* 456 and S. Harris-Short, 'Family law and the Human Rights Act 1998: Judicial restraint or revolution' [2005] CFLQ 329, 329.

[23] S. Parker, 'Rights and utility in Anglo-Australian family law' (1992) 55 *Modern Law Review* 311. For a discussion of whether or not it is significant to make a distinction between children's rights and welfare see A. Bainham, 'Can we protect children and protect their rights?' (2002) 32 *Family Law* 279 and J. Herring, *Family Law*, Harlow: Pearson, 3rd edn 2008, pp 405–6.

[24] A recent exception being an essay by Carol Smart in respect of her discussion about 'rights talk' and 'welfare talk' ('The ethics of justice strikes back: changing narratives of fatherhood', in A. Diduck and K. O'Donovan, *Feminist Perspectives on Family Law*, Routledge: London, 2006.

[25] The following paragraphs draw from J. Herring, 'Farewell welfare?' (2005) 27 *Journal of Social Welfare and Family Law* 159.

therefore appropriate that their interests are at the forefront of a court's concern. This message has significance not only for legal language, but also the wider social discourse. It encourages parents to focus on their children rather than their own rights and interests. It has support worldwide and is central to international conventions promoting children's rights and interests.[26]

The welfare principle is particularly important in respect of legal disputes when children's voices are rarely heard in courts.[27] It centralises the importance of looking at the dispute from the perspective of the child.[28] It also is sufficiently broad to enable courts to fashion the best response for the particular child in question, rather relying on abstract rights or generalisations about what is good for families or children.

Criticisms of welfarism: indeterminacy

Probably the most common criticism of welfarism is that its application is unpredictable.[29] It can be difficult enough to predict what factors the courts will weigh up, let alone predict what the result will be. The welfare principle requires the court to predict the possible outcomes for a child. That is extremely difficult; not least because the courts and professionals are required to assess parents at a time of life when they are in emotional turmoil. Even if the outcomes were known and calculable, there might still be much uncertainty over which outcomes a court would think was in the best interests of the child.

In the face of complaints of indeterminacy, some supporters of the welfare principle argue that court decisions are far more predictable than is often assumed. In many cases it would not be difficult to predict the result. This is because the welfare principle operates against a background of widely accepted norms.[30] Solicitors are very familiar with informing clients that the courts will never make the order they seek. For example, it is widely assumed that contact is in the child's interests and this acts as a widely accepted norm. Courts reach decisions by drawing upon this norm and also upon the acceptance that children's outcomes are improved by it. Therefore, it will only be in exceptional cases, such as extreme domestic violence or child abuse that courts will not make an order. Despite this, it is a commonly heard complaint that the welfare principle means that the outcome of the case depends on the personality or mood of the judge, rather than any legal principle.

[26] E.g. the United National Convention on the Rights of the Child.

[27] A. L. James, A. James and S. McNamee 'Constructing Children's Welfare in Family Proceedings' [2003] 33 *Family Law* 889.

[28] Ibid, however, James *et al.* point out that the legal system should also rely on other means to ensure the child's voice is heard.

[29] E.g. R. Mnookin, 'Child-custody adjudication: judicial functions in the face of indeterminacy' (1975) 39 *Law and Contemporary Problems* 259.

[30] C. Schneider, 'Discretions, rules and law', in K. Hawkins (ed) *The Uses of Discretion*, Oxford: Oxford University Press, 1993.

Criticisms of welfarism: feminism and gender

Feminist critics of welfarism have been alert to the potential for welfare discourses to have gendered dimensions and application in the family law context. In respect of contact disputes, for example, the application of the welfare principle has meant that children and fathers' interests potentially become one. This is due to the great emphasis placed on the alleged benefits to children of being in contact with their fathers (see further Julie Wallbank's chapter). This causes problems for mothers who have strong concerns about it. Where mothers object to contact, the strength of the assumption that contact benefits children's welfare is so strong that only in the most exceptional cases will courts refuse to order it. Further, because women are more usually the resident parent, the sometimes onerous burden of maintaining contact more frequently falls upon them.[31] Therefore, although the law's formal approach to child welfare is gender neutral, there will be cases where the responsibility for ensuring child welfare lodges squarely with women.

As this discussion shows, there is a danger that the welfare discourse, with its focus on the child in isolation from those caring for him, disguises the burdens that can be placed on mothers. Notably, welfare is now increasingly drawn upon by fathers' rights activists as a framing mechanism in order to stake their claims to either shared residence or contact.[32] As Smart maintains:

> parents are obliged to frame their disputes in terms of which parent has the welfare of the child most closely at heart. It is therefore little more than a rhetorical device; yet if it is absent, then parents are seen as making illegitimate claims.[33]

Looking at the Canadian context Susan Boyd has noted how fathers' rights activists have aligned their claims with the welfare of children 'in order to ensure their [children's] psychological well-being'.[34] Although child welfare is central to family law and difficult to resist in a theoretical and practical

[31] H. Reece, 'UK women's groups' child contact campaign: 'So long as it is safe' (2006) 18 *Child and Family Law Quarterly* 538.

[32] See further C. Smart, 'The Ethic of Justice Strikes Back: Changing narratives of Fatherhood' in A. Diduck and K. O'Donovan, *Feminist Perspectives on Family Law* Routledge-Cavendish: London, 2006, pp 132–3.

[33] Ibid, p 133.

[34] S. Boyd, '"Robbed of their Families"? Fathers' Rights Discourses in Canadian Parenting Law Reform Processes', in R. Collier and S. Sheldon (eds) *Fathers' Rights Activism and Law Reform in Comparative Perspective*, Oxford: Hart, 2006, p 29. See also S. Gilmore, 'Contact/shared residence and child well-being: Research evidence and its implications for legal decision-making' (2006) 20 *International Journal of Law, Policy and the Family* 344 for a demonstration of the lack of empirical evidence for the claims often made surrounding the benefits of contact.

sense, feminists concerned with the gendered implications of both the rhetorical and practical force of welfare-based frameworks need to continue to be vigilant about the gender discriminatory implications.

These concerns are bolstered by looking back to the past and the way that the welfare principle has led to various forms of discrimination – as a means of reinforcing patriarchal power over women and children;[35] as working in a way that is prejudicial to gay and lesbian parents;[36] and as working against the interests of minority cultures.[37] Although developments in family law have to a great extent eliminated many forms of discrimination, it is imperative that sexuality and gender are kept to the forefront of the analysis of the application of the welfare principle to ensure that discrimination is kept at bay.

Criticisms of welfarism: child welfare knowledge

A further criticism of welfarism is that the courts' understanding of what is in the best interests of the child is sometimes lacking. There are cases where a court has boldly declared what was in the child's best interests but which are now regarded as clearly wrong and discriminatory. For example, cases stating that children were harmed when raised by same-sex parents because they were not part of a 'normal family' are now read with shock, anger or shame.[38] Over time, well-accepted psychological or social theories fall into disrepute. For example, in the 1970s a predominantly held view was that contact with non-resident parents may not benefit children.[39] Despite the development of an extensive knowledge base in respect of child welfare and contact there remains little agreement about the issue and the research findings are far from conclusive.[40]

Criticisms of welfarism: children's rights

Another major challenge to welfarism is that it fails adequately to take account of children's rights. Welfarism is paternalistic and leaves children as

[35] E.g. S. Maidment, *Child Custody and Divorce*, London: Croom Helm, 1984.

[36] E.g. H. Reece, 'The paramountcy principle: Consensus or construct?' (1996) 49 *Current Legal Problems* 267.

[37] S. Toope, 'Riding the fences: Courts, charter rights and family law' (1991) 9 *Canadian Journal of Family Law* 55.

[38] E.g. H. Reece, 'The paramountcy principle: Consensus or construct?' (1996) 49 *Current Legal Problems* 267.

[39] J. Goldstein, A. Freud and A. Solnit, *Beyond the Best Interests of the Child*, New York: Free Press, 1973.

[40] See, e.g. the disputes over the benefits of contact, usefully summarised in S. Gilmore, 'Contact/shared residence and child well-being: Research evidence and its implications for legal decision-making' (2006) 20 *International Journal of Law Policy and the Family* 344, p 347.

little more than objects of adult concerns, to be simultaneously controlled and protected. Early child liberationists argued for children having exactly the same rights as adults. In recent times, those who support children's rights have made more moderate claims. Much has been written on children's rights, and the issues are discussed in several chapters of this book, but here we will focus on whether an advocate of children's rights must necessarily reject the welfare principle in order to protect children's legal rights.

One important point worth making is that most leading exponents of children's rights include a powerful element of paternalism or welfarism within their accounts of rights. For example, John Eekelaar, Michael Freeman and Jane Fortin have all argued that children's rights are not to be used in ways that seriously harm children.[41] It is also important to note that the framework employed by the ECHR and the HRA does not preclude the consideration of welfare issues in relation to claims made under the qualified articles.[42] This means that in many cases a welfare and rights approach will produce the same result. For example, in cases concerning child protection, the same legal response is likely, regardless of whether resolved by a rights or welfare approach. The kinds of cases which divide those taking a rights or a welfare approach are cases where the welfare calculation is finely balanced, and those involving children's autonomy.[43] So, in cases where the welfare calculation is finely balanced, the right of an adult may prevail, with there being insufficient justification in the name of the child's welfare for its infringement. By contrast a welfare-based approach would never allow an adult's interests to trump a child's. Similarly a rights-based approach may allow a child to make a decision which causes the child a small amount of harm, while a welfare-based approach might not. However, the extent of the differences between the approaches depends, in part, on how one interprets welfare and rights.

A children's rights proponent can readily accept that children's choices should be restricted in order to promote their welfare. Indeed, it would be quite possible for a children's rights advocate to be less willing than a child welfarist to allow children to make their own decisions. For example, where

[41] For a full discussion see, e.g. M. Freeman, *The Rights and Wrongs of Children*, London: Frances Pinter, 1983; J. Eekelaar 'The interests of the child and the child's wishes: The role of dynamic self-determinism' (1992) 8 *International Journal of Law, Policy and the Family* 42; J. Fortin, 'Accommodating children's rights in a post Human Rights Act era' (2006) 69 *Modern Law Review* 299.

[42] This is because the ECHR is not a purely deontological instrument by virtue of the inherently consequentialist qualifications that are present in Arts 8–11. See S. Choudhry and H. Fenwick, 'Taking the rights of parents and children seriously: Confronting the welfare principle under the Human Rights Act' (2005) 25 *Oxford Journal of Legal Studies* 453.

[43] J. Eekelaar, 'The interests of the child and the child's wishes: The role of dynamic self-determinism' (1992) 8 *International Journal of Law, Policy and the Family* 42.