

Goold, Imogen , Jonathan Herring , and Cressida Auckland , ed. Parental Rights, Best Interests and Significant Harms: Medical Decision-Making on Behalf of Children Post-Great Ormond Street Hospital v Gard. Oxford: Hart Publishing, 2019. Bloomsbury Collections. Web. 23 Oct. 2023. <<http://dx.doi.org/10.5040/9781509924929>>.

Accessed from: www.bloomsburycollections.com

Accessed on: Mon Oct 23 2023 16:16:37 British Summer Time

Copyright © Rachel Taylor. All rights reserved. Further reproduction or distribution is prohibited without prior permission in writing from the publishers.

3

Parental Decisions and Court Jurisdiction: Best Interests or Significant Harm?

RACHEL TAYLOR

1. ‘Question of Principle of the Utmost Importance’

At its heart, *Gard* raises an acute dilemma as to the nature of parental authority and the relationship between parental responsibility and the supervisory jurisdiction of the courts. In the Supreme Court, his parents presented the case as raising a ‘question of principle of the utmost importance’, as yet ‘not answered in English law’, namely the

extent to which the state – [including] the court – may legitimately intrude into private and family life in the context of parental decisions ... that, but for the court’s intervention, parents would be able to make and would be completely free to make in respect of their child.¹

In order to characterise the problem in this way, the parents’ case drew a sharp distinction between two questions raised by the hospital’s application.² The first question concerned the lawfulness of the proposal by Great Ormond Street (GOSH) to cease providing treatment to Charlie, aside from palliative care. The second concerned the parents’ decision to seek alternative treatment and specifically to pursue nucleoside therapy in the United States. The parents accepted that the first question was properly before the court as GOSH was entitled to seek the approval and guidance of the court in discharging its own duties to Charlie.

¹ Richard Gordon QC, leave to appeal hearing Supreme Court, 8 June 2017. Author’s transcript of oral submissions, the hearing may be viewed at www.supremecourt.uk/news/permission-to-appeal-hearing-in-the-matter-of-charlie-gard.html.

² *Great Ormond Street Hospital for Children NHS Foundation Trust v Yates* [2017] EWCA Civ 410, [2018] 4 WLR 5, [84] (*Yates*).

Nonetheless, the parents argued, this did not give the court jurisdiction to consider the *parents'* decision to seek alternative medical treatment with another medical team. In respect of this question, they argued, GOSH owed no legal duty to Charlie, instead the question was one for his parents under their parental responsibility to Charlie. As Charlie's parents were agreed on the decision to pursue nucleoside therapy, and as their decision would have been lawful, were it not for the courts' intervention, they argued that the court had no jurisdiction to consider the second question unless it would cause Charlie significant harm. For the parents this was an important question of principle because if the court could obtain jurisdiction

simply by a party approaching the court and raising questions as to what is in the best interests of a child that would erode the whole concept of parental responsibility in fact it would shift the responsibility from parents to the state.³

As such, the parents' case raised a fundamental point of principle as to the nature of responsibility for children. From the parents' perspective, if the court's jurisdiction could be invoked without firm and clear limits, parental responsibility would essentially be held on gift from the state, a gift that could be revoked at any point. This would be a decisive shift from recognising parents as having primary responsibility for their children.

This chapter will not consider the detail of the decision in *Gard* itself. Instead it will consider the question raised by the parents in the context of the wider law on parental responsibility and decision-making beyond the medical context. Specifically, the chapter will consider when the courts may legitimately intrude into the, otherwise lawful, decisions of parents and those with parental responsibility. For the purposes of this chapter, the parents' characterisation of their decision to pursue nucleoside therapy as entirely separable from GOSH's duties to Charlie will be accepted.⁴ It will be argued that, even on this understanding, the courts were correct as a matter of law to determine Charlie's future on the basis of his best interests and to reject the parents' proposition that courts may only intervene in the mutual decisions of parents in cases of significant harm.⁵ Nonetheless, the parents' argument exposes underlying tensions between the roles of parents and the state in the law on decision-making for children.

³ Richard Gordon QC, (n 1).

⁴ Charlie's condition was of such severity that it is doubtful whether this stark distinction between GOSH's responsibility and that of the parents could be sustained. For the parents to implement their decision would require the intimate involvement of GOSH in facilitating Charlie's transfer and sustaining his life until the transfer could take place. In reality, the proposed alternative raised a complex intertwining of the responsibilities of GOSH and the parents. The distinction is accepted for the purposes of this chapter because of the importance of the question raised by the parents and because in other cases parents may be in a position to put their proposed plans into practice without active involvement from others with duty to the child.

⁵ The Court of Appeal in *Gard* considered that the parents' proposed treatment may reach the significant harm threshold, there was, however, no formal finding on this point.

2. The Nature and Limits of Parental Responsibility

To consider the parents' argument further it is first necessary to define the rights and responsibilities of parents. In both domestic and international law parental rights are subsumed into the broader concept of parental responsibility.⁶ There is, however, ambiguity as to the nature and limits of parental responsibility. As John Eekelaar has observed, parental responsibility 'can represent two ideas: one, that parents must behave dutifully towards their children; the other, that responsibility for child care belongs to parents, not the state'.⁷ Both of these meanings can be found in the Children Act 1989 and in the UN Convention on the Rights of the Child (CRC).⁸ Each of these propositions is important and the fault-line between them is at the heart of many of the most difficult questions of child law, including that in *Gard*. The tension is particularly acute where the parents' sincere view as to what is best for their child conflicts with that held by the majority in society or by professionals involved with the child. Charlie's parents sought to resolve this tension by arguing that the mere fact that the court disagreed with the parents' view was insufficient to permit the court to overrule them, instead the court could only intervene if the parents' decision would cause significant harm. To evaluate this argument, we must first consider the two meanings of parental responsibility in more detail.

The first important principle of parental responsibility is that the parental role is one of responsibility to children rather than proprietary rights over them. This understanding of the parental role was reflected in the 20th-century legislation and case-law that firmly established the primacy of the welfare of the child in judicial decisions concerning their upbringing.⁹ This fundamental principle is also recognised as a right and guiding principle of international children's rights law in the CRC.¹⁰ Although the Children Act 1989 states that courts must apply the welfare principle when making decisions concerning children's upbringing, its application to parents is less clear; there is no domestic equivalent to Article 18 CRC, directing *parents* to consider the child's best interests in decision-making. Nonetheless, the drafting of the Children Act 1989¹¹ was intended to reflect the approach to parental authority found in the seminal decision of the House of Lords in *Gillick v West Norfolk and Wisbech Area Health Authority*.¹² In *Gillick*, the House of Lords considered that parental authority was derived from duties towards children and

⁶ *Children Act 1989* s3(1).

⁷ J Eekelaar, 'Parental Responsibility: State of Nature or Nature of the State?' (1991) 13 *Journal of Social Welfare and Family Law* 37.

⁸ *Convention on the Rights of the Child* Article 18(1): 'Parents ... have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.'

⁹ See, eg: *J v C* [1970] AC 668. The modern law is found in *Children Act 1989* s1(1).

¹⁰ *Convention on the Rights of the Child* Article 3.

¹¹ Law Commission, *Review of Child Law, Guardianship and Custody* (Law Com No 172, 1988), [2.4].

¹² *Gillick v. West Norfolk and Wisbech Area Health Authority* [1986] AC 112 (*Gillick*).

that those duties defined the scope of that authority. In this way, the interests of children provided both the normative justification for parental authority and the limits on its acceptable use. This point was expressed by Lord Fraser:

[P]arental rights to control a child do not exist for the benefit of the parent. They exist for the benefit of the child and they are justified only in so far as they enable the parent to perform his duties towards the child, and towards other children in the family.¹³

Lord Scarman emphasised the role of welfare in providing the limits of that parental authority:

[W]hen a court has before it a question as to the care and upbringing of a child it must treat the welfare of the child as the paramount consideration in determining the order to be made. There is here a principle which limits and governs the exercise of parental rights of custody, care and control. It is a principle perfectly consistent with the law's recognition of the parent as the natural guardian of the child; but it is also a warning that parental right must be exercised in accordance with the welfare principle and can be challenged, even overridden, if it be not.¹⁴

The implication of this approach is that a parent who exercises parental decision-making in a manner that does not further the interests of the child is acting outside of the proper scope of their authority and is vulnerable to court intervention to restrain that excess. This is an important principle and vital to establishing the child as a person with their own rights and interests recognised and protected in law.

The second important principle of parental responsibility is that responsibility for children's upbringing lies primarily with parents rather than with the state. Reasonable people will frequently disagree on what is best for children; the fact that parents are obliged to exercise their authority in line with children's best interests does not often yield a single right answer to a particular decision. Instead, parents are generally granted a broad discretion to exercise their responsibilities as they see fit, for example in naming, educating, feeding and disciplining their children. There are many good reasons for giving parents this zone of discretion. Children have an interest in being able to trust that important decisions about their lives will be made by those adults who have an intimate and caring relationship with them and who are able to respond to them as an individual.¹⁵ If parents are to make decisions that respond to their child's individual needs and interests, they will need sufficient discretion and choice to be able to do so. More pragmatically, care for children places heavy demands on the time and resources of most parents. The reality for many parents is that they may have to compromise in some of the decisions that they make for their children in order to meet the competing interests of other family members and to balance demands on their resources.

¹³ *ibid*, 170; see also: *ibid*, 184 (Scarman LJ); *ibid*, 200 (Wilberforce LJ).

¹⁴ *ibid*, 184.

¹⁵ Failure to involve a parent in important decisions may sometimes amount to a breach of the child's rights: *Glass v UK* [2004] 1 FLR 1019.

Parents often need flexibility in order to meet all of these responsibilities in practice. There are also important considerations of freedom and diversity: in a free society, the state should be cautious in imposing a particular view as to what is best for children without good reason and clear evidence to support that view.¹⁶ This point was recognized by Baroness Hale in her well-known explanation of the law in *Williamson*:

Children have the right to be properly cared for and brought up so that they can fulfil their potential and play their part in society. Their parents have both the primary responsibility and the primary right to do this. The state steps in to regulate the exercise of that responsibility in the interests of children and society as a whole. But ‘the child is not the child of the state’ and it is important in a free society that parents should be allowed a large measure of autonomy in the way in which they discharge their parental responsibilities.¹⁷

The challenge for the law is how to accommodate these two important aspects of parental responsibility: recognising the primary role of parents whilst also requiring that they protect the interests of their children. As Baroness Hale observes, although parents have the primary role, the state also has a legitimate role in regulating parental decisions in the interests of children and society. The CRC similarly recognises that responsibility for children is collective: the primary role of parents is not an exclusive role, instead children and parents require the support of the state and wider community. This means that the state has important obligations to assist parents and provide the conditions for children to thrive.¹⁸ Further, whereas the CRC requires states to respect ‘the rights, responsibilities and duties of parents’,¹⁹ the parental role is to be exercised ‘in a manner consistent with the evolving capacities of the child’ and by guiding the child in the exercise of their rights. In this way, both domestic and international law recognise the importance of the primary parental role, but also the legitimacy of state intervention to protect children. As a result, the broad zone of parental discretion is circumscribed by legal obligations and restrictions such as the duty to ensure that the child receives a suitable education. A further important limit is found in the ‘significant harm’ test that must be passed before the court can make a compulsory child protection order through which the state can obtain control of the child’s upbringing.²⁰ The test means that some children will be left with parents who are not acting in their best interests, indeed with parents who are causing them harm, provided that that

¹⁶ See also: I Goold, ‘Evaluating Best Interests as a Threshold for Judicial Intervention’ in I Goold, J Herring and C Auckland (eds), *Parental Rights, Best Interests and Significant Harms: Medical Decision-Making on Behalf of Children Post-Great Ormond Street Hospital v Gard* (Oxford, Hart, Forthcoming).

¹⁷ *R (on the application of Williamson and others) v. Secretary of State for Education and Employment and others* [2005] UKHL 15; [2005] 2 All ER 1, [72]; further discussed below.

¹⁸ See, eg: *Convention on the Rights of the Child* Article 27, the obligation to assist parents in providing the conditions of living necessary for the child’s development.

¹⁹ *Convention on the Rights of the Child* Article 5.

²⁰ *Children Act 1989* s31, the welfare principle also applies. A similar test in s100(4) applies to an application by a local authority to invoke the court’s inherent jurisdiction.

harm is not ‘significant’. Mr Justice Hedley’s oft-quoted observations in *Re L* make this clear:

[S]ociety must be willing to tolerate very diverse standards of parenting, including the eccentric, the barely adequate and the inconsistent. It follows too that children will inevitably have both very different experiences of parenting and very unequal consequences flowing from it. It means that some children will experience disadvantage and harm, while others flourish in atmospheres of loving security and emotional stability. These are the consequences of our fallible humanity and it is not the provenance of the state to spare children all the consequences of defective parenting. In any event, it simply could not be done.²¹

This dictum was relied upon by Charlie’s parents in the Court of Appeal as a statement of principle in support of the proposition that it is the significant harm test, rather than welfare, that provides the legitimate point at which the state may intervene in the mutual decisions of parents.²² To assess this argument it is first necessary to consider the role of welfare in judicial control of parental decision-making.

3. Welfare and Parental Disputes

Education provides a good example of this broad but limited parental discretion. Parents are obliged to provide their children with a suitable, efficient and full-time education²³ but have considerable freedom in how they do so. This means that parents, at least to the extent that they have the resources and opportunity to do so, can choose the form of education that best suits their child and family, whether that is religious or secular, single-sex or mixed, selective or comprehensive, at school or at home. If parents disagree on how to discharge their mutual duties and take the dispute to court, the court will decide on the basis of its own assessment of the child’s welfare.²⁴ In so doing, the court will usually be choosing from a range of reasonable and lawful options that the parents may otherwise have chosen, and may well impose a solution with which at least one of the parents profoundly disagrees.

A good example of such a parental dispute can be seen in *Re G (Children)*,²⁵ which concerned the future education of five children, boys and girls between the ages of 3 and 11, whose parents had separated following their mother’s decision to leave the ultra-orthodox Jewish Chareidi community in which they had all been brought up. The mother wished to enrol the children in coeducational Modern Orthodox schools to give them the educational opportunities and future career

²¹ *Re: L (Care: Threshold Criteria)* [2007] 1 F.L.R. 2050, [50].

²² *Yates* (n 2), [65].

²³ *Education Act 1996* s7.

²⁴ *Children Act 1989* s1(1).

²⁵ *Re G (Children)* [2012] EWCA Civ 1233; [2012] 3 FCR 524.

prospects that were not available in their current Chareidi schools. The father wished to continue their current education in order to maintain the children's relationships with family and peers and equip them for life within the religious community. The options put forward by each parent were intimately connected to their respective religious beliefs and conceptions of the purposes of education. The court was clear that its role was not to determine which parent was correct but to assess the child's welfare from the standpoint of the 'generally accepted standards' of the 'reasonable' parent in modern society. As this 'reasonable parent' would value equality of opportunity, aspiration and bringing the child to the cusp of adulthood with the maximum opportunity to pursue their own vision of the good life, the court found in favour of the mother's proposed schools. In doing so it was careful to emphasise that the only reason that the state was involved in the decision was because the parents had brought their disagreement to the court.²⁶ There was no suggestion that the education favoured by the father would cause the children 'significant harm' that would warrant state intervention through care proceedings: parents who jointly decide to educate their children in Chareidi schools are free to do so.

As *Re G* makes clear, the welfare principle does not provide a purely objective test; instead it frequently depends on the values and assumptions by which it is assessed. Given that fact, the imposition of the court's values and assumptions requires justification. If the court's jurisdiction is invoked in a dispute between parents, each of whom has a duty to act to further the welfare of the child, the normative basis for the court's intervention is readily found in the parental decision to bring the dispute before the court. The court can only resolve that dispute by giving an authoritative determination of the child's welfare, the basis on which the parents are each obliged to carry out their responsibilities to their children. Similarly, parents who are not in dispute might seek the court's determination of the best course of action for the child when faced with a difficult decision that they feel unable to take for themselves.²⁷ The same normative basis can be found in relation to disputes between parents and those non-parents, such as healthcare professionals, who also owe duties to act in the child's best interests²⁸ and may seek the guidance of the court if they cannot agree on how those duties should be discharged.

The court's intervention is more difficult to justify if there is no dispute between duty-holders but instead a third party seeks to intervene in their decision.

²⁶ *ibid.*, [90]–[94].

²⁷ See, eg: the case reported in 'Judge Rules to Allow Severely Ill 11 Month Old to 'Die Peacefully'' (*the Guardian*, 13th Dec 2018) in which it appears that the parents did not object to the proposed withdrawal of treatment but did not wish to take the decision that would lead to their daughter's death themselves. The case does not yet appear to have been reported. I am grateful to Jonathan Herring for drawing this to my attention.

²⁸ This was the basis on which the court was entitled to resolve the dispute between GOSH and Charlie's parents as to how GOSH should discharge *its* duties to Charlie i.e. the first question identified above.

Take, for example, a person who is sincerely concerned that neighbouring children are being educated in a school that teaches a narrow religious curriculum such as that favoured by the father in *Re G*. Should the court permit the concerned neighbour to argue that the children's welfare would be better served by an alternative school that encouraged aspiration, equality of opportunity and secular achievement despite the fact that the children's parents were united and otherwise acting within the law? One might argue that parents who exercise their responsibility in a manner that is inconsistent with the vision of welfare favoured by the court are failing in their duty and that this would justify court intervention to maximise the interests of the child. There are, however, strong reasons to reject such an approach. To hold parents who are acting jointly and lawfully to the 'generally accepted standards' of 'reasonable parents' would amount to an oppressive imposition of majority values, rendering the decisions of all parents who did not subscribe to those values suspect and justifying draconian intervention in the freedoms of minority groups. If such intervention is warranted, it is better imposed through the general law where it will be subject to democratic scrutiny and will apply to all children, rather through ad hoc intervention. To hold parents to those standards through third-party litigation would make a mockery of the educational choices granted to parents in existing legislation. Such an approach would also undermine the second understanding of parental responsibility: the primacy of the parental role. Finally, it is quite clear that the law does not regard the courts as the sole arbiters of welfare or even as the best forum for determining children's interests. Reform of family law has long been directed at removing disputes from the judicial arena and instead encouraging parents to make their own agreements without recourse to the courts. This is also evident from the judicial approach to applications for consent orders embodying agreements between parents. In such cases the court is obliged to apply the welfare principle but will do so by checking that the agreement falls within the broad range of reasonable understandings of the child's welfare, rather than by conducting a full judicial assessment.²⁹ There are a range of strong reasons for shielding lawful and mutual parental decisions from judicial intervention on the basis of welfare.

The example of the busybody neighbour may seem fanciful; it might be hoped that there are few individuals with the resources and inclination to seek to intervene in the lives of others in such a manner. Nonetheless, the argument made on behalf of the parents in *Gard* effectively cast GOSH in a similar guise. On their analysis of the case, GOSH had no legitimate role in the decision to seek alternative treatment with a different medical team and was merely a third party seeking to intervene in the mutual and lawful decision of the parents. The question that Charlie's parents raised was therefore an important one. Few parents can be confident that all of their decisions would survive unscathed if subject to a forensic analysis against a judicially determined welfare standard. Parents routinely make decisions

²⁹ *AI v MT* [2013] EWHC 100 (Fam), [27]–[32] provides an interesting example of this approach.

that do not maximise their child's interests but are 'good enough' in the context of the needs, resources and wishes of all members of the family. In reality, much of parenting occurs within the gap between causing significant harm and maximising welfare. The 'question of principle' raised by Charlie's parents effectively asked how the law applied to parents within this gap: can parents be confident that they are immune from judicial intervention if they are acting jointly, within the law and without risking significant harm?³⁰

4. Parenting 'In the Gap': Jurisdiction and the Children Act

Charlie's parents sought to find the answer to their question of principle by imposing firm limits on the jurisdiction of the court to reflect words of Baker J in *Re King*:

[I]t is a fundamental principle of family law in this jurisdiction that responsibility for making decisions about a child rest [*sic*] with his parents. In most cases, the parents are the best people to make decisions about a child and the state – whether it be the court, or any other public authority – has no business interfering with the exercise of parental responsibility unless the child is suffering or is likely to suffer significant harm as a result of the care given to the child not being what it would be reasonable to expect a parent to give.³¹

This dictum captures the general principle of the primacy of the parental role and describes the ordinary experience of most parents. It is, however, not intended as a complete statement of the law and it would be a fallacy to treat it as such. Although the law generally operates to inhibit unwarranted intervention in family life, the court retains a protective jurisdiction that is not dependent on significant harm or parental disagreement. This is evident from considering the circumstances in which the Children Act 1989 permits judicial intervention in the exercise of parental responsibility.

The Children Act 1989 provides the framework by which parental responsibility is allocated and the primary means by which a court can supervise its exercise. The most serious form of intervention is through its compulsory child protection provisions, the gateway to which is found in the significant harm test described above.³² Outside of these provisions, judicial intervention is primarily through section 8, which gives the court the power to make orders concerning the child's living and contact arrangements and to control the exercise of parental responsibility through specific issue and prohibited steps orders.³³ The welfare principle

³⁰ See generally: Goold (n 16).

³¹ *Re Ashya King* [2014] EWHC 2964 (fam); [2014] 2 FLR 855.

³² *Children Act 1989* s31.

³³ Discussed in more detail in R George, 'The Legal Basis of the Court's Jurisdiction to Authorise Medical Treatment of Children' in Goold et al (eds) (n 16).

provides the test by which a court is to decide any case brought under section 8. The Act imposes rules on who can apply for an order to limit the excessive intervention in family life that might be wielded through specific issue and prohibited steps orders.³⁴ These rules draw a clear distinction between parents and others with parental responsibility, who are entitled to apply for an order, and those without parental responsibility, who must obtain the leave of the court before they do so.³⁵ This sharp distinction can be seen as reflecting the justification considered above: those with legal responsibility to act in the child's welfare are entitled to bring disputes to the court to determine how that duty should be discharged; those who do not must show good cause before they may question the decisions of parents. The leave requirement is not, however, intended to pose a substantial hurdle to those who raise genuine concerns. An applicant for leave need not demonstrate that there is any likelihood of harm to the child or that the application will further the child's welfare. Instead the court has a discretion to grant leave having considered a number of factors, including the applicant's connection to the child and whether the application is likely to cause harmful disruption to the child's life.³⁶ Applications for leave are not restricted to individuals, they may also be made by institutions, including state authorities such as local authorities³⁷ and NHS Trusts. Indeed, in *Gard* GOSH obtained leave to apply for a specific issue order in addition to its application under the inherent jurisdiction.³⁸ The threshold for third parties to challenge the decisions of parents is therefore not significant harm but the far lower threshold of leave, even if that party is a public authority.

Courts also have the jurisdiction to make section 8 orders to further the welfare of the child in any family proceedings, regardless of whether an application to do so has been made.³⁹ For example, in a recent dispute between a known sperm donor and the child's parents, the judge considered that the child would benefit from contact with the donor's parents and ordered that such contact take place, despite the fact that they had not sought that order and the child's parents opposed their involvement. The Court of Appeal rejected the parents' argument that this undermined the system of leave and refused to restrict the court's power to further the child's welfare through section 8 orders.⁴⁰ The power for the court to make orders of its own volition is an important aspect of the court's protective

³⁴ HL Deb on the Children Bill 6 December 1988, *Hansard*, col 491, (MacKay LC).

³⁵ *Children Act 1989* s10(2) and (4).

³⁶ *Children Act 1989* s10(9).

³⁷ There are additional restrictions on local authority applications to prevent applications that circumvent the child protection process: *Children Act 1989* s9(5)(b).

³⁸ In *JM (A Child)* [2015] EWHC 2832 (Fam) (*JM*); [2016] 2 FLR 235 (Mostyn J), reaffirmed that specific issue orders provided the appropriate route for the resolution of disputes between parents and healthcare professions over children's medical treatment. For procedural reasons, the court recommended that serious cases, especially those involving deprivation of liberty, should be pursued through both the inherent jurisdiction and section 8, see esp. paras 25–28. This was the route followed by GOSH in making their application in *Gard*.

³⁹ *Children Act 1989* s10(1)(b).

⁴⁰ *Re G (A Child)* [2018] EWCA Civ 305, [21].

jurisdiction concerning children. This power would have permitted the court in *Gard* to restrict the parents' decision to pursue alternative treatment, regardless of whether that issue had been raised by GOSH.

There is nothing in the Children Act 1989 to suggest that the jurisdiction of the court is limited in the manner proposed on behalf of Charlie Gard's parents. Instead the Act facilitates the court's use of its protective jurisdiction in order to protect the welfare of the child. The significant harm test is not the boundary that demarcates legitimate court intervention into mutual parental decisions; instead it is the boundary that must be crossed to allow ongoing state involvement in the life of the child, and particularly to allow local authorities to obtain ongoing discretionary authority over the child's life through a care order. This may, however, appear a rather fine distinction to parents seeking to resist state intervention in the treatment of their terminally ill child. As Mostyn J noted in *JM (A Child)*,⁴¹ section 8 was primarily drafted to address parental disputes rather than cases in which the state sought to impose medical treatment against the wishes of the child's parents. Nonetheless, the balance between the two aspects of parental responsibility comes not through restrictions on the jurisdiction of the court but through judicial restraint and sensitivity to the important role of parents in securing their children's welfare. This self-restraint takes on even greater importance in cases involving the court's inherent jurisdiction.

5. The Inherent Jurisdiction

The application in *Gard* was primarily brought under the inherent jurisdiction. The powers of the court under the inherent jurisdiction are far broader than those contained in the Children Act, extending beyond control of parental responsibility and granting the court powers that are not available to parents. The breadth of the inherent jurisdiction derives from its origins, as Lord Donaldson MR explained in *Re R*: 'This jurisdiction is not derivative from the parents' rights and responsibilities but derives from, or is, the delegated performance of the duties of the Crown to protect its subjects and particularly children who are the generations of the future.'⁴²

The jurisdiction is often described as 'theoretically limitless'⁴³ and in the memorable words of a seminal article on the subject as 'so amorphous and ubiquitous and so pervasive in its operation that it seems to defy challenge to determine its quality and establish its limits.'⁴⁴ These characteristics mean that

⁴¹ *JM* (n 38), [25]. This case is discussed further by George (n 33).

⁴² *Re R (A Minor) (Wardship: Consent to Treatment)* [1992] Fam 11, 25. As this dicta makes clear, the inherent jurisdiction is not limited to the protection of children and also extends to adults who require its protection.

⁴³ *ibid.*

⁴⁴ IH Jacob, 'The Inherent Jurisdiction of the Court' (1970) 23 *Current Legal Problems* 23.

the inherent jurisdiction provides an extraordinarily useful means of dealing with difficult and new problems for which there is no adequate existing legislative solution and through which the court can intervene to protect children in ways that would not otherwise be possible. The jurisdiction has, for example, been used to protect children from being taken abroad to join terrorist groups⁴⁵ and from sexual exploitation.⁴⁶ Broad as the inherent jurisdiction is, it is not a 'lawless void'⁴⁷ permitting complete free rein in the name of improving child welfare. One important limitation on the jurisdiction is that it is residual, in that it may not be invoked in circumstances where there is already a statutory route to achieve the protection in question.⁴⁸ Further, the ability of local authorities to invoke the jurisdiction is specifically limited by statute to prevent it from being used to circumvent the Children Act 1989 procedure.⁴⁹ Local authorities may only apply under the inherent jurisdiction if they obtain leave, which they may only do if they are able to show that there are reasonable grounds to believe that the child is likely to suffer significant harm if the jurisdiction is not exercised.⁵⁰ Although at first sight this might appear to support the parents in *Gard* in their argument that the significant harm test provides the boundary of court intervention in parental decisions, other applicants are not so constrained and may apply if they have a 'genuine interest in the child' with no need to obtain leave or demonstrate risk of harm. This allows the court to consider applications from a broad range of people who need not have any relationship or legal duty to the child. For example, in *Re D (A Minor) (Wardship: Sterilisation)*⁵¹ an educational psychologist successfully challenged the decision of a mother and her doctors to sterilise an 11-year-old child with significant learning disabilities. The case is a good example of the court intervening in the medical decisions of parents at the behest of third parties in order to promote the welfare of the child, without the need to first overcome the significant harm test that formed the basis of the parents' argument in *Gard*.

The inherent jurisdiction remains a breathtakingly broad route to extensive intervention and control of children's lives on the basis of the court's interpretation of best interests. Parents who find their decisions challenged under the jurisdiction might be forgiven for thinking that the law does indeed regard the child as the child of the state, despite Baroness Hale's assurances to the contrary. The courts are aware of the need for restraint in deploying these powers. The question of when those powers might be used to prevent parents from seeking

⁴⁵ *Re M (Children) (Wardship: Jurisdiction and Powers)* [2015] EWHC 1433 (Fam), [2016] 1 FLR 1055.

⁴⁶ *Redbridge London Borough Council v A* [2015] EWHC 2140 (Fam), [2015] 3 WLR 1617.

⁴⁷ *ibid*, [36].

⁴⁸ Practice direction 12D 1.1. The limitations on the use of the inherent jurisdiction are discussed in more detail by George (n 33).

⁴⁹ *Children Act 1989* s100(2).

⁵⁰ *Children Act 1989* s100(3) and (4).

⁵¹ *Re D (A Minor) (Wardship: Sterilisation)* [1976] Fam 185.

experimental treatment for their child is an important one and one that appears to becoming more common as parents are able to seek out treatments and make connections abroad via the Internet.⁵² The argument that the court should only permit intervention in such cases if significant harm is shown is, however, clearly unsupported by current law. The inherent jurisdiction is a protective jurisdiction that is routinely and invariably deployed on the basis of the 'best interests' test. As each of the courts in *Gard* agreed, there was simply no authority for the argument that a significant harm test should apply. To the extent that the court had the freedom to choose to introduce further self-restraint in the cases that it would receive under the jurisdiction, there was little to commend the use of significant harm as the means of doing so. The legislative choice to use significant harm as a threshold for local authority applications but not for other parties would seem to be clear indication that Parliament did not intend to impose that limit on the jurisdiction. Further, such a test would be inconsistent with the approach of the Children Act 1989 which, as we have seen, reserves significant harm for the threshold at which local authorities might acquire ongoing discretionary authority over the life of the child. Given that cases routinely combine applications under the Children Act and the inherent jurisdiction,⁵³ it would be undesirable to apply substantially different tests in those applications, particularly as limitations placed on the use of the inherent jurisdiction could usually be circumvented through the application under the Children Act.⁵⁴

A further reason for rejecting the significant harm test is that it would be unnecessarily cruel and combative to require loving and sincere parents to defend themselves against a test based on harm unless required to do so. Court proceedings over a child's medical treatment almost inevitably indicate that the relationship between the parents and healthcare professionals has already seriously broken down. The significant harm test is unlikely to be conducive to salvaging that vital relationship, particularly as the test also provides the gateway to coercive action by the state through child protection proceedings and so raises the spectre of the parents being further excluded from their child's care. Any legal process should aim, so far as it is possible to do so, to recognise the importance of partnership between parents and others caring for the child in striving to find the best outcome for the child.⁵⁵

⁵² A development considered in more detail in: S Fovargue, 'Preserving the Therapeutic Alliance: Court Intervention and Experimental Treatment Requests' in Goold et al (eds) (n 16).

⁵³ As discussed in more detail in: George (n 33).

⁵⁴ The cases in which the Children Act is not available are primarily concerned with children who are already subject to a care order. Children Act 1989 s9(1) prevents the court from making a specific issue order in such cases. It is difficult to see why applications to treat these children should be subject to an additional test of significant harm when compared to children in a similar position who are not under a care order.

⁵⁵ For further consideration of establishing this partnership in practice, see: E Harrop, 'Setting the Scene – Supporting and Informing Shared Decision Making at the Bedside: Avoiding and De-escalating Conflict between Clinicians and Families' in Goold et al (eds) (n 16).

6. Children's Welfare and Valuing Parents

The discussion so far has demonstrated that the jurisdiction of the court to intervene in mutual parental decisions is not limited to cases of significant harm. Instead, the court retains a broad protective jurisdiction over children's welfare both in statute and the inherent jurisdiction. For third parties, other than local authorities seeking ongoing involvement in the child's life, there are minimal procedural barriers to invoking that jurisdiction, meaning that a sincere applicant who raises a genuine concern is likely to be heard by the court. This conclusion may be alarming to parents, who might object that to allow the court's jurisdiction to be invoked at the behest of a third party undermines their role and, as was argued in *Gard*, shifts responsibility for children from parents to the state. This argument is particularly important given the malleability of the meaning of welfare discussed above. The current law appears to allow the court to impose the values of the 'reasonable person' to restrict the lawful decisions of parents, simply because a stranger to the decision has raised a question that the court is willing to consider. This would permit draconian interference in parental discretion, particularly if the court's jurisdiction were invoked by an institution of the state, such as an NHS Trust, with far greater access to resources than the parents. These are genuine concerns but the answer to them is found not in the limits of the courts' jurisdiction, but in the courts' respect for the importance of parental decisions.

The role of the courts might be more easily justified if a clearer distinction were drawn between those cases in which there is a dispute between duty-holders, such as parents, and those in which a third party seeks to intervene. The duty to act in the child's best interests provides both the legal justification for parental authority and the limits on its acceptable use. The same reasoning also applies to other duty-holders such as health professionals. Although there may be a spectrum of reasonable and lawful interpretations of the child's welfare in any one case, in a case brought by duty-holders, the court must give an authoritative assessment of the impact of the decision on the child's welfare in order to give the parties clarity on the basis on which they should discharge their responsibilities to the child. In cases of third-party intervention in parental decisions the justification for the court's intervention is different. The court has a residual role and may intervene to prevent parents from acting outside of the proper scope of their authority. But parents have the primary responsibility for their children and a wide discretion in discharging that responsibility. Provided that parents are acting within the broad spectrum of reasonable and lawful approaches to their child's welfare, the court has no need to intervene merely because it, or a third party, would prefer a different interpretation.

This distinction is not clearly articulated in the case-law, perhaps because there are relatively few cases in which the mutual decisions of parents are challenged. It does, however, provide a good explanation for the way in which the

courts approach welfare in those cases that do come before them. The case of Ashya King,⁵⁶ relied upon by the parents in *Gard*, is one such example. In that case the parents wished to pursue a relatively new form of proton therapy to treat their son's brain tumour and had raised funds to do so, the treating medical team had advised the use of conventional radiotherapy but by the time the case came to court did not oppose the parents' plan. Despite the fact that there was no active dispute, the court was involved because Ashya had been made a ward of court in the midst of previous uncertainty as to his whereabouts and safety. As a result, court approval was required for Ashya to travel for treatment in Prague and that approval could only be given on the basis of Ashya's welfare. Rather than considering the evidence and making an entirely independent analysis of that welfare as would be the case in resolving a dispute, Baker J found that 'there was no reason to stand in the way of the parents' proposal'.⁵⁷ Contrasting the case with those where parents sought a 'wholly unreasonable course of treatment', Baker J justified his approach on the basis that: 'Both courses are reasonable and it is the parents who bear the heavy responsibility of making the decision. It is no business of this court, or any other public authority, to interfere with their decision'.⁵⁸

In this way, the court's own obligation to act in Ashya's best interests was discharged by recognising the parents' primary responsibility and respecting their reasonable decision on his welfare. A similar approach can be seen in *BC v EF*.⁵⁹ This case had started as a parental dispute over vaccination, and the court had found that it would be in the children's best interests to be vaccinated as the father wished. Unusually, after the conclusion of the case the father changed his mind and the parents sought to vary the order whereas the children's guardian sought to have it enforced. Despite the finding that vaccination was in the children's best interests, the court declined to enforce the order, deciding that it was now a matter for the parents' joint responsibility. These cases illustrate the reluctance of the court to intervene in the joint decisions of parents as to the welfare of their child. Although the test for the court remains the welfare principle, rather than the reasonableness of the parents,⁶⁰ the court will decline to intervene if the parents are jointly committed to a reasonable understanding of the child's welfare.

Respect for the importance of the parental role can also be seen in cases in which there is a conflict between parents and third-party duty-holders. This is well illustrated by the developing case-law on local authority decision-making for children in care. A care order grants parental responsibility to the local authority

⁵⁶ *Re King* [2014] EWHC 2964 (Fam); [2014] 2 FLR 855.

⁵⁷ *ibid.*, [34].

⁵⁸ *ibid.*

⁵⁹ *BC v EF (Parental Responsibility: Immunisation)* [2017] EWFC 49. With thanks to Jonathan Herring for drawing this case to my attention.

⁶⁰ *Re T (A Minor)* [1997] 1 WLR 242.

that obtains it⁶¹ and although parents retain their parental responsibility, the local authority is granted the power to determine the way in which the parents may exercise that responsibility.⁶² This appears to give clear statutory authority to the local authority to impose its will over that of parents on almost all decisions, provided that it is acting to promote the child's welfare. Nonetheless, the courts have stressed that for important decisions all of those with parental responsibility should be able to contribute to the decision and that disagreements should be referred to the court, rather than by relying on the controlling position granted to local authorities in the Children Act. Hence, for example, in *Re C (Children) (Child in Care: Choice of Forename)*⁶³ a local authority wished to prevent a mother from naming her twin children Cyanide and Preacher. The local authority had an interim care order which gave them ostensible power to prevent her from doing so, but the fundamental importance of naming children meant that the approval of the court had to be sought, particularly as to overrule the mother without judicial oversight would engage her rights under Article 8 of the European Convention on Human Rights (ECHR). Similarly, local authorities have been required to obtain judicial approval in disagreements with parents over vaccination⁶⁴ and medical treatment of children in care.⁶⁵ These illustrate two important points. First, the court encourages collaboration in protecting the welfare of the child rather than merely relying on the technical hierarchy of decision-making authority on the face of the statute.⁶⁶ Second, the parental role is considered to be of great importance, even in cases where there has been a risk of significant harm, both because the parent is often best placed to know the child and because the parent-child relationship is protected through Article 8 ECHR.⁶⁷

The importance of parents' responsibility for their children is recognised in law not by hard barriers to prevent judicial intervention but by careful respect for the relationship between parents and children in determining children's welfare. It is in this way that the tension between the two meanings of parental responsibility, identified at the start of this chapter, is best reconciled by the courts.

⁶¹ *Children Act 1989* s33(3)(a). This responsibility is subject to a small number of statutory restrictions primarily concerned with safeguarding the fundamental elements of the child's identity and connection to family: *Children Act 1989* s33(6)–(8).

⁶² *Children Act 1989* s33(3)(b), s33(4) imposes the condition that this control may only be imposed to the extent necessary to safeguard or promote the child's welfare.

⁶³ *Re C (Children)* [2016] EWCA Civ 374; [2016] 3 WLR 1557.

⁶⁴ *London Borough of Barnet v SL* [2017] EWHC 125 (Fam), [49].

⁶⁵ *Re Jake (A Child)* [2015] EWHC 2442 (Fam); [2016] 2 FCR 118. see also: *Re AB* [2018] EWFC 3 in which the application for a care order was withdrawn with the approval of the court, which made it clear that it would usually be inappropriate and ineffective for a local authority to apply for a care order for the purpose of consenting to medical treatment against the wishes of parents esp. at para. 24.

⁶⁶ A similar point may be made in relation to disputes between parents on medical treatment. Despite the fact that the consent of one parent appears to be sufficient in statute, disputes in serious cases may require court authorisation rather than relying on technical parental responsibility: *An NHS Trust v SR* [2012] EWHC 3842.

⁶⁷ Goold (n 16).

7. Conclusion

This chapter has considered the question asked by the parents in *Gard* as to when the state, especially the courts, may legitimately intrude onto the mutual and otherwise lawful decisions of parents concerning their children. The parents sought to find the answer to that question in imposing limits on the courts' jurisdiction through the test of significant harm. This argument was rightly rejected at each stage of the judicial process: the significant harm test is reserved in legislation for situations in which local authorities seek to obtain ongoing discretionary authority to intervene in the life of the child. Outside of that specific situation, the court will resolve cases concerning the child's upbringing through the welfare principle, with no additional need to demonstrate harm. The limit of this jurisdiction is found in the need for the applicant to obtain leave or to demonstrate genuine interest in the child, regardless of whether the applicant is an individual or a state institution such as an NHS Trust. It is through these mechanisms that the court may filter out vexatious or unwarranted applications, but they provide no substantial hurdle to the applicant with genuine welfare concerns. This answer may surprise many parents, whose ordinary experience is that they are free to act as they wish provided that they do so within the law and without risking significant harm to the child. Fundamentally, however, the law regards the upbringing of children not as a matter of exclusive parental rights, to be defended unless forfeited, but as a collaborative responsibility in which parents take the leading role. The argument in *Gard* sought to make parents the sole arbiters of their child's welfare within firm boundaries designed to limit judicial oversight. That argument challenged the foundations of child law and was justifiably rejected by each court that considered it. There are understandable concerns that this rejection undermines parental freedom but the law recognizes that value by emphasizing the primary role of parents in determining their child's welfare rather than by carving out decisions in which parents are immune from challenge. The court will rarely intervene if the parents jointly adopt a reasonable interpretation of their child's welfare. The tragedy in *Gard* was there was no viable treatment that offered a reasonable alternative in Charlie's interests despite the strenuous efforts of his sincere and loving parents.

