

Institution: University of Oxford
Unit of Assessment: 20 - Law
Title of case study: Redefining ‘children’s welfare’ in the English courts
1. Summary of the impact <p>In many aspects of family law, courts are required to take account of ‘children’s welfare’. The courts have struggled with what this includes and, in an important case, turned to research on children’s welfare by Professor Jonathan Herring for a better understanding of that concept. In <i>Re G (Children)</i> [2012], the Court of Appeal ruled on a dispute between the mother and father of five children over their residence, religion and education. Munby LJ discussed the concept of welfare of children in detail, citing work by Herring with his Oxford colleague, Charles Foster, on the issue. [R2]. Drawing on this research, the court held that it is only by considering the child’s network of relationships that their well-being can be properly determined. This ruling changed the law governing important family interests throughout England and Wales.</p>
2. Underpinning research <p>Jonathan Herring, Professor of Law, has been working at Oxford University since 1999. He conducts research into criminal, family and medical law. In a series of works of doctrinal and theoretical analysis, Herring brought to bear ideas from branches of feminist ethical theory that elaborate an ‘ethic of care’ and emphasise ‘relational’ values. An early test of the application of these concepts in the law was published in his noted paper ‘The Human Rights Act and the Welfare Principle in Family Law – Conflicting or Complementary’ [1999] [R6], which was then followed by a series of articles, and finally culminated in a comprehensive treatment in his recent monograph, <i>Caring and the Law</i> (2013) [R1]. Charles Foster is a Fellow of Green Templeton College, Oxford, a Research Associate at the Ethox and HeLEX Centres, University of Oxford, and a practising barrister. He collaborated with Herring in writing the paper [R2] which built on Herring’s individual research, and was later relied on by the Court of Appeal.</p> <p>The concepts of ‘welfare’ and ‘best interests’ play a central role throughout medical and family law. The conventional view has been that the courts are expected to make best interests determinations by looking <i>solely</i> at the interests of the child, ignoring the impact of the decision on anyone else. Herring’s research argues that, even though welfare is commonly presented in individualistic terms and seems to require the court to promote the interests of a child or incompetent adult without reference to the interests of others, this is misleading. Properly understood, ‘best interests’ and ‘welfare’ can be, and should be, taken as concepts that recognise the importance of relational interests, the performance of obligations, and even the cultivation of other-regarding virtues, such as altruism. Moreover, Herring shows that this is not only a more defensible view, it is also one that is available to the courts, and is consistent with the animating principles of English law in this area [R1, R6].</p> <p>The precise aim of Herring’s research was to make explicit which conceptions of welfare were, could be, and should be used by the courts. This work includes analyses of (i) a person’s well-being and whether it requires decisions to be made which will primarily</p>

benefit only him or benefit (or appear primarily to benefit) another person; and (ii) whether the well-being of a person can be assessed in isolation, or should be considered in the context of the network of relationships within which a person lives [R2, R5]. Herring and Foster's deployment of this theory challenged the prevailing assumption that deciding what is in a person's welfare or best interests involves considering solely matters relating to them, or the impact of the decision on them [R2]. Herring's account is defended on the basis of normative and conceptual arguments that are shown to be compelling in principle and doctrinally available. In the leading case examined here, these arguments met with judicial approval and helped shape the key ruling.

3. References to the research

[R1] *Caring and the Law* (Oxford: Hart Publishing, 2013).

[R2] 'Welfare means rationality, virtue and altruism', (2012) 32 *Legal Studies* 480-498 (with C. Foster).

[R3] 'Losing it? Losing what? The law and dementia' (2009) 21 *Child and Family Law Quarterly* 3-29.

[R4] 'Caregivers in Medical Law and Ethics' (2008) 25 *Journal of Contemporary Health Law and Policy* 1-37.

[R5] 'Farewell welfare?' (2005) 27 *Journal of Social Welfare Law* 159-171.

[R6] 'The Human Rights Act and the Welfare Principle in Family Law – Conflicting or Complementary' (1999) 11 *Child and Family Law Quarterly* 223-235.

The journals are peer-reviewed publications of international standing.

4. Details of the impact

Herring and Foster's work was relied on by the Court of Appeal in *Re G (Children)* [2012] EWCA Civ 1233 (*Re G*) to broaden the legal definition of 'children's welfare' to include relational values, the pursuit of worthwhile goals, and even the cultivation of certain virtues. The research influenced the outcome of this case, but not only that. It also provided the basis for a judicial widening of the applicable definition of 'children's welfare' in relevantly similar cases. The decision therefore also exerts force in cognate areas of law. The influence of Herring's research also extended beyond its impact on legal authority. In the professional media and in a variety of blogs, the decision and the new idea of children's welfare were debated by lawyers and others, leading to a better informed discussion of a difficult and sometimes controversial area of social policy.

In *Re G*, involving the upbringing of five children, Lord Justice Munby in the Court of Appeal gave reasons with which Sir Stephen Sedley and Lord Justice Kay agreed. The children's families had for generations been part of the Hassidic or Chareidi Jewish community. The marriage broke down; as a result, the father wanted the children to attend an ultra-orthodox school, whilst the mother wanted the children to attend a non-orthodox school from which they would be able to pursue higher education and have greater opportunities. Both mother and father accepted that the mother's decision would lead to a significant change of lifestyle.

A Child and Family Court Advisory and Support Service (CAFCASS) report was produced, which concluded it was in the best interests of the children to live with the mother, and to attend the schools of her choice. Judge Copley, at Willesden County Court, accepted the CAFCASS report. In the Court of Appeal the father argued that the Judge had attached too much weight to educational opportunity, and failed to take account of the Chareidi lifestyle. Munby LJ, quoted from Herring and Foster's work, upheld the judge's decision, and dismissed the father's appeal. Citing [R2] he held:

'The well-being of a child cannot be assessed in isolation. Human beings live within a network of relationships. Men and women are sociable beings. (...) As Herring and Foster comment, relationships are central to our sense and understanding of ourselves. Our characters and understandings of ourselves from the earliest days are charted by reference to our relationships with others. It is only by considering the child's network of relationships that their well-being can be properly considered. So a child's relationships, both within and without the family, are always relevant to the child's interests; often they will be determinative.' [C1,para 30]

The Court also notices and uses the other strand of argument developed in the research and set out in [R2]. At [C1 para 28] Munby LJ wrote:

'Herring and Foster have argued persuasively ('Welfare means rationality, virtue and altruism', (2012) 32 Legal Studies 480), that behind a judicial determinations of welfare there lies an essentially Aristotelian notion of the 'good life'. What then constitutes a 'good life'? There is no need to pursue here that age-old question. I merely emphasise that happiness, in the sense in which I have used the word, is not pure hedonism. It can include such things as the cultivation of virtues and the achievement of worthwhile goals, and all the other aims which parents routinely seek to inculcate in their children [C1 para 28].

This represents a very significant modification of a central concept in family (and medical) law. It is rare enough for English judges to make such explicit reliance on academic writing and research, but rarer still for them to make use of research that is very recent and that draws extensively on interdisciplinary materials. The court's use of Herring's research received comment in journals directed primarily at a practitioner audience (see [C2], [C3]), and the significance of the ruling itself, obvious on its face, was also widely acknowledged by lawyers and commentators online and in the social media (see [C4], [C5], and [C6]). Throughout England and Wales, courts must now take account of the whole network of relationships when they consider what would be in the 'best interests' or the 'welfare' of children.

5. Sources to corroborate the impact

[C1] Re G (Children) [2012] EWCA Civ 1233.

[C2] Family Law Journal (M Gill, 'Opposing views' (2012) Fam LJ 19).

[C3] Solicitors Journal ('Children's welfare should be judged 'by 2012 standards' (2012) Solicitors Journal 156).

[C4] <http://ukhumanrightsblog.com/tag/re-2012-ewca-civ-1233/>.

[C5]<http://timesandotherthings.blogspot.co.uk/2012/10/religion-and-education-re-g-children.html>

[C6]<http://www.no18barristerschambers.com/articles/2012/11/11/my-second-article.html>),