

CHILDREN'S RIGHTS OR PARENTAL PROPERTY

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“When I use a word,’ Humpty Dumpty said in a rather scornful tone, ‘it means just what I choose it to mean-neither more nor less.’”¹ Such a liberal approach to linguistics may occasionally be observed in judicial statements pertaining to legal concepts. A particularly apt illustration of this approach may be found in decisions relating to children where the term “in the best interests of the child” dominates the linguistic arena.

It is common knowledge (but not necessarily common practice) that the “best interests” principle is to prevail in the majority of decisions relating to a child’s upbringing; it specifically underpins the Children Act 1989. Section 1(1) of the Act directs the court to give paramount consideration to the welfare of the child. Section 1(2) elaborates on this principle and provides that the court should consider whether any delay in determining the issue is likely to prejudice the welfare of the child, whilst section 1(3) provides a check list for the court’s guidance. The first item on this check list² states that a child who is capable of forming his own views has a right to express them and have weight duly given to them in accordance with his age and maturity.³ Similar principles are laid down

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¹ Carroll, *Through the Looking Glass*, Ch. 6.

² S.1(3)(a) of the 1989 Act. Other items on the check list include s.1(3)(b) physical, emotional and educational needs; s.1(3)(c) the likely effect on him of any change in circumstances; s.1(3)(d) his age, sex, background and any characteristics of his which the court considers relevant; s.1(3)(e) any harm which he has suffered or is at risk of suffering; s.1(3)(f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs; s.1(3)(g) the range of powers available to the court under the Act and the proceedings in question.

³ S.1(3)(a). See also *Gillick v. West Norfolk and Wisbech Area Health Authority and the D.H.S.S.* [1986] A.C. 112 which established the principle of the competent child capable of self determination independent of parental involvement if of satisfactory age and of sufficient understanding of the matter in question. Cf. *South Glamorgan County Council v. W and B* [1993] 1 F.L.R. 574.

in Articles 3 and 12 of the United Nations Convention on the Rights of the Child, to which the United Kingdom is a signatory.⁴

Few would disagree about the importance of putting a child's best interests first but what those best interests are, may be difficult to discern in any particular instance. It has been suggested that identifying the best interests of a child involves an ideological minefield where "notions of protection and welfare jostle for position with those of natural justice and children's rights...best interests can quickly become a camouflage for vested interests..."⁵

Mnookin and Szwed have, persuasively, pointed out that the term, best interests:

"...is so idealistic, virtuous and high sounding that it defies criticism and can delude us into believing that its application is an achievement in itself. Its mere utterance can trap us into the self-deception that we are doing something effective and worthwhile. However, the flaw is that, what is best for any child...is often indeterminate, and speculative and requires a highly individualised choice between alternatives."⁶

⁴Art.3 provides that the best interests of the child must be the primary consideration in all actions concerning children; Art. 12 provides that children's views must be considered and taken into account in all matters affecting them. The United Kingdom ratified the Convention in December 1991 and it came into force in January 1992. There are no legal sanctions for breach of the UN Convention and it is exceptional for UK judges to take into account its provisions; however, the domestic legislation relating to children conforms to a certain extent with the Convention, see, *inter alia*, Van Bueren, The United Nations Convention on the Rights of the Child: The Necessity of Incorporation into United Kingdom Law, [1992] *Fam.Law* 373; Timms, *Children's Representation* (Sweet & Maxwell, 1995) at 43 ff. See also Arts. 8 and 12 of the European Convention on Human Rights.

⁵Timms, *ibid.* at 421 & 422. See also Freeman, Children's Charter and Children's Acts, Panel News, December 1989, Vol.9, *IRCHIN* where he intimated that children's rights rather than welfare should form the basis of decision making in this area; he argues that "...the framework for children's rights is very different from those of welfare, which provides protection, and is essentially paternalistic. A children's rights framework sees children as active participants in social processes. Rights are valuable commodities, important moral coinage. they enable us to stand with dignity, if necessary to demand what is our due without having to grovel, plead or beg. A world with claim rights is one which all persons are dignified objects of respect. Love, compassion, having the child's best interests in mind are important values but they are no substitute for rights."

⁶ See Mnookin and Szwed, "The Best Interests Syndrome and the Allocation of Power," in Geach and Szwed(eds.), *Providing Civil Justice for Children* (E.Arnold,1983) at 7.

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An analysis of recent decisions relating to the future upbringing of children reveals, most explicitly, the problematic nature of judicial interpretation of the "best interests" principle. The latest of these decisions, *Re M (Child's Upbringing)*, epitomises the predicament which appears to be inherent in this realm of decision making.⁷ In *Re M*, the Court of Appeal, was charged with the onerous responsibility of determining the future upbringing of a ten-year old child of Zulu origin who had been in the care of an English foster mother since he was eighteen months old. The Court ordered the child to be returned, against his vociferous and explicit wishes, to live with his biological parents in South Africa. The House of Lords refused leave to appeal, giving no reason for its refusal⁸ and an application was made under Rule 36⁹ to the European Commission of Human Rights in Strasbourg for a stay of the order on the grounds that it violated Article 12 of the European Convention on Human Rights. The Commission's request for an interim suspension of the order was refused by the Court of Appeal, which had reserved the case to itself, notwithstanding the statement of the Attorney General to the Court that the Government took a neutral approach to the request. The child was, therefore, forced to leave the English family with whom he had lived for the last eight and a half years and was taken, protesting vehemently, by police officers and deposited onto a plane en route to a most uncertain future in a South African township with a family whom he hardly knew and whose language he did not speak.¹⁰

⁷ [1996] 2 F.L.R. 441 .

⁸ See (1996) N.L.J. at 669 where concern was expressed at the failure of the House of Lords to give a reason for this refusal.

⁹ Rule 36 of the Commission's Rules provides that "the Commission, or where it is not in session, the President may indicate to the parties any interim measure the adoption of which seems desirable in the interest of the parties or the proper conduct of the proceedings before it. See generally, Merrills, *The Development of International Law by the European Court of Human Rights*, (2nd.ed., Manchester University Press,1993).

¹⁰ The child was handed over to the Official Solicitor by the appellant. He was so distressed that he could not, at first, be put on the flight; he had to be calmed down for 24 hours before eventually flying to his new home, see (1996) N.L.J. at 669; *The Daily Telegraph* 6th.May, 1996.

The circumstances in *Re M* are not uncommon.¹¹ They relate to a dispute between biological parents, who had entrusted their young child to a caretaker or foster mother of a different cultural origin to themselves, and that mother, who, by the time the conflict came before the court, had become emotionally attached to the child and *vice versa*. These situations raise complex questions regarding the cross cultural rights of such children when their best interests are under judicial consideration.

The facts in *Re M* are to be found in the judgment of Neill L.J.¹² The child in question, referred to as P, was born in South Africa, in 1986, to an unmarried Zulu woman who worked for the appellant, an English woman of South African descent. In 1987, P, aged eighteen months, was due to return to his mother's village in order to comply with the apartheid regulations then in force. The appellant and P had already formed a strong psychological attachment, as indeed, had the appellant and P's biological mother. With the explicit consent of both P's mother and father, the appellant took P, to live with her in her home as a member of her family and accepted responsibility for his upbringing and education. This type of informal guardianship arrangement where a wealthier family take on the responsibility of caring for and educating children of poorer families is not an uncommon state of affairs in many African societies.¹³ Meanwhile, P's mother continued to live in the servants' quarters attached to the appellant's house. P's father was a sporadic feature in P's life; he lived elsewhere, having formed a relationship with another woman by whom he had a child.

In 1992, the appellant became concerned about the political situation in South Africa. She wished to take P and his mother to England with herself and her family of three daughters. P's mother refused to leave South Africa but she and

¹¹ See e.g. *Re B (Minors)*, Unreported, Court of Appeal 24th.October,1996; *Re B (Adoption:Child's Welfare)* [1995] 2 F.C.R. 749; *J v.C* [1970] AC 668.

¹² *Supra.* n.7 at 442ff.

¹³ Nelson Mandela, in his autobiography, describes being sent away from his mother, at the age of nine, to live with Chief Jongintaba Dalindyebo, a stranger to him, albeit a member of the same tribe. Mandela became a member of his family and was educated and cared for by the Chief who became his guardian and mentor. He rarely returned to the rural area in which he grew up until late in life. His family used to visit him in the Chief's house and for many years Mandela felt alienated from his rural cultural origins. (Mandela, *A Long Walk to Freedom*, at 13 ff). See also *The Guardian* 7th.May, 1996 at p.16; Forna, *The Independent* 12th.May, 1996 at p.10.

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P's father signed a document in which they specifically agreed that P could accompany the appellant to England.

After the family's arrival in England, the appellant contacted P's parents to discuss the possibility of adopting P. At first, P's mother was ambivalent but when formal adoption proceedings were instigated by the appellant, both she and P's father objected.

The case, at first instance, came before Thorpe J. who acknowledged that he was faced with a tragedy which the appellant and P's parents had unwittingly created, a child, with a strong emotional attachment to the appellant and her daughters, who during a very formative period of his life had neither lived with nor had had more than minimal contact with his biological parents for at least nine years.¹⁴ Thorpe J. recognised that he was faced with a choice between solutions all of which were unsatisfactory, and in some degree damaging or risking damage to P's welfare.

Thorpe J. had been urged to base his decision on the judicial principle advanced by Lord Templeman in *Re KD*, in which he stated that:

“The best person to bring up a child is the natural parent. It matters not whether the parent is wise or foolish, rich or poor, educated or illiterate, provided the child's moral and physical health are not endangered.”¹⁵

According to Thorpe J., the view espoused in Lord Templeman's speech begged the question of the identity of the natural parent when, as in *Re M*, a child like P, had two psychological parental figures both of whom were female and one of whom was also the biological parent. Although the concept of a psychological parent is a common term amongst child psychologists, it is unusual for a member of the judiciary to acknowledge this dual aspect of the parental role which may be divided between two individuals rather than united in one. ¹⁶ Having taken this somewhat liberal and enlightened approach, Thorpe J. emphasised that his decision must be made not on the basis of biological parenthood but on the basis

¹⁴ *Supra*.n.7 at 454.

¹⁵ [1988] A.C. 806 at 812.

¹⁶ See e.g Goldstein, Freud and Solnit, *Beyond the Best Interests of the Child*, (Free-Press; Collier-Macmillan,1973) at 12ff, where the term psychological parent is used and functional definitions of the concepts of biological and psychological parent-child relationships are discussed.

of the paramountcy of the child's welfare and on no other principle.¹⁷ In spite of this assertion, Thorpe J.'s judgment establishes that he, at least implicitly, proceeded to treat the matter as dependent on the contractual arrangement between the parties with respect to their perceived proprietary rights over P. P's parents maintained that the understanding between them and the appellant was that P would remain in England with the appellant for an approximate period of five years beginning in 1986, when the political unrest, perceived to exist at that time, might be expected to have stabilised. They further alleged that the arrangement was conditional on the appellant organising reciprocal visits between P and themselves and that as the appellant had broken the condition, P should be returned to them as soon as possible and they would take full joint responsibility for him. The appellant, however, claimed that the agreement was for an indefinite period but, at least, for the duration of P's education.

Thorpe J. readily understood the confusion between the parties perception of the nature of the agreement and suggested that reality lay somewhere between these two extremes. Nevertheless, he accepted P's parents version of the contract and the conditions laid down to preserve his links with them, his biological family, and his Zulu culture. He recognised that the appellant had not fulfilled these conditions and that she bore a heavy responsibility for this dereliction.

Such confusion between the parties' understanding of the arrangement may be indicative of the cultural differences and expectations of their respective societies. P's parents belong to a community where the term family has a broad meaning and children may be brought up by any member of the extended family, tribe or other patron, in a type of informal guardianship arrangement, whilst retaining some link with their biological parents.¹⁸ The appellant lives in a world where children are viewed, primarily, from both a social and legal standpoint as the responsibility of their biological, or adopted nuclear family;¹⁹ abdication of

¹⁷Although the appellant had applied for an adoption order which she subsequently withdrew in the course of the hearing, and a residence order, the case was considered from the outset under the Children Act 1989 and not the Adoption Act 1976. The wording of s.6 of the Adoption Act directs the court to give first, rather than paramount consideration to the welfare of the child throughout its childhood and, so far as is practical ascertain the child's own wishes and feelings about the decision, giving due consideration to them having regard to his age and understanding.

¹⁸ See *supra*.n.11.

¹⁹One of the guiding principles of the Children Act 1989 is that wherever possible children should be brought up within their own families, see Timms, *supra*.n.4 at 6.

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this responsibility may lead to legal intervention. Furthermore, there is no guarantee that a foreign child will be allowed to remain in the United Kingdom, in the care of a non-biological parent, unless he is legally adopted by that parent.²⁰ English law and culture would appear to prefer neat and formal solutions.

Thorpe J. had the benefit of the expert evidence of a consultant child psychiatrist whom the Official Solicitor had been given leave to consult. The psychiatrist had identified three possible routes forward for P; first, adoption by the appellant; second, an immediate return to his parents; third, a phased preparation for an eventual return to South Africa, during which links between P and his parents would be restored, and any final decision about P's future would be postponed until the five-year period, found to have been agreed between the parties, came to an end. The psychiatrist favoured the latter solution. He was well aware of P's explicit desire to remain with his English family and whilst acknowledging that certain benefits would accrue to P from being united with his family of origin and his Zulu culture, he, nevertheless, stressed the potential damage of removing P from his English family in haste.²¹

Having reviewed the psychiatrist's evidence which he found persuasive, profound and wise, Thorpe J. was, nonetheless, unprepared to adopt, in its entirety, the psychiatrist's preferred solution. Thorpe J. rejected adoption, as indeed had the appellant who had abandoned that application, towards the end of the hearing, and continued with her application for a residence order. Thorpe J. also rejected an immediate return of P to his parents. He accepted the dangerous emotional and psychological consequences of forcing an immediate severance of P's relationship with the appellant. Nevertheless, he stressed the primacy of the arrangement between the parties, which he accepted envisaged a retention of P's Zulu links and decided that P should return to his parents in 1997 unless there was some totally unforeseen intervening event. He was not prepared to postpone what he saw was an inevitable outcome for P, a Zulu cultural future.²² On that basis he attempted to lay down a master plan to which the adults should work to re-establish links between P and his parents and culture and thereby preclude the need for further argument in 1997, when a review would take place to determine

²⁰ Had the appellant not stated that she wished to adopt P, the Immigration Authorities would have been unlikely to have granted P leave to enter and remain in the United Kingdom. See also *Re B supra*.n.11 at 783 & 785.

²¹ *Supra*.n.7 at 460ff.

²² *Ibid.* at 449.

the date and circumstances of P's return to South Africa. The appellant was ordered to pay for two return trips to South Africa for P; pay for Zulu language lessons for him and pay for a return trip for his mother to visit him in London once a year. In the meantime P was to remain a ward of court.

Certain anomalies in Thorpe J.'s judgment laid the basis for an appeal. At least three passages in the judgment suggested that, in 1997, it might be necessary to re-open the question of P's future. First, purporting to accept the principle embodied in section 1(3) of the Children Act 1989 that the wishes and feelings of the child should be taken into account, Thorpe J. had accepted that if, in two years time, the appellant remained prepared to educate P in London and P wished to remain, that would have to be taken into account. In his opinion any such professed wish on the part of P would have to be very stringently scrutinised to ensure that it was truly his and did not result from external influences. It is somewhat surprising, given the manner in which Thorpe J. had emphasised the importance of P's Zulu culture, that he was prepared to take this approach. It is even more astonishing that he acknowledged the need to look at P's wishes in 1997 but apparently ignored them in 1996. Second, Thorpe J. accepted that P's parents and the appellant might both wish to renegotiate for P to remain in England after 1997. Third, he recognised that there was a need for P's parents to prove the stability of their relationship and their material future in South Africa.

On the grounds of these anomalies the appellant claimed that the 1997 review should be a general review of P's future and not be, merely, limited to the determination of the date and circumstances of his return to South Africa. P's parents cross-appealed for the immediate return of P or for a further review within the next few months on the grounds that the agreement relating to P's stay in England had been contravened. They maintained that undertakings with respect to the financing of visits had not been met; there had only been one visit by P to South Africa in September 1995; the appellant was now unemployed and in receipt of Income Support; she was not co-operating with them and P's links with his homeland had become tenuous.

In the Court of Appeal, Neill and Ward L.JJ. upheld the somewhat dubious principle, which has gained a substantial judicial following in recent years, that the natural parents of a child are accorded a special position in law.²³ They

²³ See e.g. the approach of Lord Donaldson in *Re H (a minor) (custody: interim care and control)* [1991] 2 F.L.R. 109 at 112 in which he stated that "... it is not a case of parental right opposed to the interests of the child, with an assumption that parental right prevails unless there are strong reasons in terms of the interests of the child...there is a strong supposition that, other

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concluded that this principle had not been given sufficient weight by Thorpe J.. They accepted the view, expressed by Waite L.J. in *Re K (A Minor) (Custody)*, that a court will not take away a natural parent's rights unless it is satisfied that the child's welfare requires it.²⁴ The term parental right, according to Waite L.J., is not a proprietary term but rather describes "the right of every child, as part of its general welfare, to have the ties of nature maintained wherever possible with the parents who gave it life."²⁵

The Court of Appeal also rejected Thorpe J.'s radical and informed interpretation of the term "natural parent" as inclusive of both psychological and biological parents and limited its meaning to biological parents.

The approach of the Court of Appeal, in upholding the primacy of the biological parents' rights, in *Re M*, is regrettably regressive; it is in sharp contrast to the leading case of *J v C* in which Lord MacDermott, more than twenty-five years ago, stated that "the child's welfare is to be treated as the top item in a list of items relevant to the matter in question."²⁶ The House of Lords upheld the decision of the trial judge and the Court of Appeal that biological parents have no unimpeachable rights. The House of Lords concluded that the first task of any court was to consider the child's welfare, at the time of the hearing and assess his needs. Only after that process had taken place could a decision be made with respect to the child's future caretakers. Thus, a ten-year

things being equal, it is in the interests of the child that it should remain with its natural parents." See also Cretney, *Principles of Family Law*, (6th.ed., Sweet & Maxwell, 1997) at 719; Timms *supra*.n.4 at 22ff.

²⁴ [1990] 2 F.L.R. 64 at 70. See also *In re H (A Minor) (Custody: Interim Care and Control) ibid.*; *In Re K (A Minor) (Wardship:Adoption)* [1991] 1 F.L.R. 57 at 62 where Butler Sloss L.J. stated that "[t]he mother must be shown to be entirely unsuitable before another family can be considered otherwise we are in grave danger of slipping into social engineering."; *In Re W (A Minor) (Residence Order)* [1993] 2 F.L.R. 625 at 633 where Balcombe L.J. held "...it is the welfare of the child which is the test, but of course there is a strong supposition that, other things being equal, it is in the interests of the child that it shall remain with its natural parents, but that has to give way to the particular needs in particular situations."

²⁵*Cf.* the approach of Lord Scarman in *Gillick v. West Norfolk and Wisbech Area Health Authority and the D.H.S.S. supra*.n.3 at 189 "... parental rights are derived from parental duty, and exist only so long as they are needed for the protection of the person and property of the child."

²⁶ *Supra*.n.11 at 710.

old child who had lived with his English foster parents for eight and a half years remained with them rather than being returned to his biological parents who were living in Spain.

Although the Court of Appeal asserted that the so-called rights of P's biological parents were not determinative of P's future upbringing and maintained the paramountcy of the welfare principle, its decision belies this view. Ward L.J. considered P's welfare in the light of the psychiatrist's report.²⁷ He maintained that he was under no illusions whatever about the harm that would result if P were to be returned to South Africa. He would be forced to exchange the comforts of life, in Maida Vale, with the appellant, for the comparative discomforts of the township of Brakpan in South Africa. He would have to face the uncertainties about the stability of his biological parents' marital relationship; their housing conditions; their economic security and personal safety. In the light of these concerns, Ward L.J. expressed the rather vain conviction that he was "sure that P would cope with all of that." These risks apart, Ward L.J. proceeded to voice, in the words of the psychiatrist, the real harm which he accepted might befall P:

" [i]f you take him away now from the (appellant's) family against his will, then the risk is that he will go downhill emotionally, he will go downhill psychologically, he will pine for (the appellant) and (her girls), he will get grumpy and disagreeable, he will not quickly grasp Ndelele and Afrikaans, he will be a bit of an outsider with the group when he gets there and everything may go horribly wrong... To remove him in the middle of a turmoil of disagreement would be very profoundly damaging, to such an extent that the boy might never recover his poise and psychological well-being and confidence."²⁸

This recognition of the strong likelihood of serious emotional harm resulting to P if he were to return to South Africa did not deter Ward L.J. from reaching the rather astounding conclusion that P should be sent back immediately. Ward L.J. believed that there was no realistic hope of achievement of the psychiatrist's optimistic expectations that a delay in deciding the future of P would be

²⁷ *Supra*.n.7 at 456.

²⁸ *Ibid.* at 460.

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beneficial for all parties and might even help the parties to reach an amicable arrangement whereby they could all participate in P's future. Indeed, Ward L.J. stated that any delay in determining P's future was likely to prejudice his welfare but did not specify how.²⁹

It is of note that both Thorpe J., at first instance, and Neil and Ward L.J.J., in the Court of Appeal, attached immense significance to the importance of P's retaining his cultural links with his perceived Zulu heritage. They also stressed the appellant's responsibility for weakening these links. The child psychiatrist's report had expressed the belief that:

“[f]or P to have the gain of an education in England carries with it the weakening of his Zulu identity, his knowledge of the Zulu language and culture If he is brought up in the Zulu culture, he has the gain of identity with his family of origin... .
...for P to be living in London he is separated from his linguistic culture and racial roots... .
...P's cultural Zulu heritage is of great importance to this little boy and is going to be central to his identity as he grows up in adulthood... P should continue to grow up knowing himself to be a Zulu boy, identified with Zulu traditions, knowing that he is South African and feeling identified and confident about that country.”³⁰

Even if it was a legitimate concern of the court to prevent P's loss of contact with his cultural origins, such a concern cannot be ameliorated at the expense of a child's, well documented, need for unbroken continuity of affectionate and stimulating relationships with an adult if he himself is to achieve adult emotional stability.³¹ Placing greater emphasis on the importance of cultural identity rather than emotional security may even lead to the very situation the court wished to avoid, P's cultural estrangement. Children who are denied emotional security may respond to this threat “with fantastic anxieties, denial, or distortion of reality, reversal or displacement of feelings...”³²

In any event, it should be noted that P had spent the major part of his life in a

²⁹ See s.1(2) of the Children Act 1989.

³⁰ *Supra*.n.7 at 461.

³¹ See e.g Goldstein, Freud and Solnit, *supra*.n.16 at 6.

³² *Ibid*. at 12.

non-Zulu world, even during his early years in South Africa. His parents had consented to P being brought up, by the appellant, in her household, in a culture very different from theirs. They had also been willing to accept that, even if the appellant had kept to their view of the original arrangement and returned to South Africa, P would have remained with the appellant to be educated by her in a white middle class suburb. In such circumstances he would inevitably have become alienated, to a considerable degree, from Zulu culture.

The Court of Appeal, by concentrating its attention on the agreement between P's parents and the appellant, and the issue of P's cultural heritage, failed to consider the reality of the situation facing P at the time of the hearing and make an order which took into account all factors relevant to his future well being. It is not the task of the court, in decisions relating to children, to attempt to reverse the wrongs done by adults to each other or to artificially impose cultural links at the expense of a child's emotional stability. Political correctness has no part to play in child care decisions.³³

Goldstein, Freud and Solnit maintained, as long ago as 1973, that the law has been slow to acknowledge the importance of a child's psychological well-being. They advance the view that the courts accept the paramountcy principle over all other principles when a child's physical well-being is in jeopardy; in other circumstances, however, the courts:

“subordinate, often intentionally, his psychological well being to, for example, an adult's right to assert a biological tie. Yet both well-beings are equally important and any sharp distinction between them is artificial.”³⁴

The decision in *Re M* confirms this observation.

The stance taken by the Court of Appeal in *Re M*, is illustrative of judicial

³³ Weyland, “Attachment and the Welfare Principle” [1996] *Fam.Law* 686 at 688 suggests that “[t]he publicity surrounding *Re M* might have discouraged a decision which would have been perceived by many as an endorsement of a modern form of colonialism.”

The International Bar Association's Report on Foreign Adoptions (1991) highlighted the U.K.'s obstruction of foreign adoptions. It suggested that hostility from UK authorities is fuelled by a prevailing policy in favour of placing children for adoption with parents of the same race, culture and ethnic group, even where the child has had minimal contact from birth with his biological parents culture.

³⁴ See *supra*.n.16 at 4.

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ambivalence with respect to the welfare principle. It also draws attention to the problems which may arise when there is an implicit substitution of the principle of the primacy of the biological parent's rights for the paramountcy of the welfare principle accompanied by a subtle and dangerous reinterpretation of the meaning of parental rights. This approach relegates to second place the lodestar principle of the overriding importance of the child's welfare enshrined in the Children Act 1989. It elides the rights of children with the interests of their biological parents even when, as here, the child vociferously rejected the right to be permanently reunited with his biological parents;³⁵ Children's rights are thereby negated. In such circumstances the child's views become, at best, a secondary factor and, at worst, irrelevant. A child who is of sufficient competence to make his views known that he does not wish to live with his biological parents, cannot be said to have a right to have "the ties of nature maintained." In these circumstances, there is a direct conflict between the best interests of the child and the so-called rights, however interpreted, of the biological parents. Although it may not always be appropriate to allow a child's wishes to prevail, it is of vital importance that they are taken into account and that the child is made aware that the judiciary is sensitive to his desires. P was an intelligent, articulate ten year old, well aware of the crisis in his life and also cognizant of life in an African township; he had spent one month in 1995 visiting his biological family.

P's future was decided without any real participation on his part in the decision making process. The court's decision was made about him rather than with him; such an approach to the best interests of the child is more likely to result in a child feeling punished by the court rather than cared for. It has been claimed that:

"Involving children in decision making increases their sense of identity, self esteem and personal autonomy. It enhances their sense of direction and gives them some sense of control of what are often distressing and traumatic events..."³⁶

³⁵P wrote to the Queen to ask her to intervene. He explained his concern: "I am going to be adopted but then the judge said that I have to go to South Africa. My Mum (sic) in London is fighting for me very hard and I told the judge I want to stay in London. I am nine years old and the judge thinks that he can think for me and that is wrong and you know that. I am asking you to help me fight back."

³⁶ See Timms, *supra*.n.4 at 440.

Moreover, children who have been involved in decision making, even if it does not ultimately result in their preferred outcome are more likely to feel engaged with the plan for their future. Success rather than failure is the more likely consequence.

The Court of Appeal's attitude in *Re M*, suggests that certainty, clarity, immediacy and simplicity are all valued by the judiciary. Certainly, these values are inherent in its implicit espousal of the concept of the primacy of the rights of the natural parents; a rapid unchallengeable decision can be reached. Any serious consideration of the concept of the real welfare of the child and the possibility of self determination by the child, involves the court in a discretionary, lengthy, more onerous and uncertain process which may be more easily open to challenge, a process for which it may not have the requisite training.³⁷ The child psychiatrist had recognised that an immediate, clean, surgical decision to send P back might be convenient for stopping the litigation, but less beneficial to P. Indirectly, it would also have been less helpful to P's natural parents who would have to deal with the distressing emotional consequences which were likely to result to P from such a decision. Had the Court followed the recommendations of the psychiatrist, P would, at least, have had two further years of stable family life. Even if, at that time, no amicable resolution had been reached between the parties, he would be slightly more mature and, maybe, more able to cope with a planned return to his biological parents' culture.

Since the decision in *Gillick*³⁸ and the implementation of the Children Act 1989, there has been an ambivalent, paternalistic backlash with respect to children's participation in decisions about their future upbringing. An explanation for this reaction has been advanced, suggesting that the concept of children's participation in decision making:

“arouses anxiety in adults who fear this can only serve to complicate already complex and onerous problems associated with determining matters of children's welfare. The majority of those

³⁷See Goldstein, Freud, Solnit, *supra*.n.16 at 6 "... [The law] is confronted with a highly complex decision which involves implicitly, if not, explicitly, a predictor about who, among available alternatives, holds most promise for meeting the child's psychological needs. Psychoanalytic theory confirms the substantial limitations on our capacity to make such a prediction. Yet it provides a valuable body of generally applicable knowledge about a child's needs, knowledge which may be translated into guidelines to facilitate making decisions that inevitably must be made.”

³⁸ *Gillick v. West Norfolk and Wisbech Area Health Authority and the D.H.S.S.* *supra*.n.3.

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currently in authority over children have few personal experiences of being allowed to participate in key decisions made about their lives as children ... Many of those adults, if pressed, have only a passing intellectual commitment to the concept of children's rights and participation. Deep down, their emotional reality is that children benefit from more control ... and that adults generally, and genuinely, know best. It is easier to engage in intellectual discussions about the competence of the child than to embrace a philosophy and model of service provision which may necessitate a searching reappraisal of one's own childhood and child rearing practices.³⁹

Since the ratification of the UN Convention on the Rights of the Child in 1991, the UK government has a duty to produce a regular report on its achievements and shortcomings in the field of children's rights. The first report in 1994 was somewhat self satisfied and self congratulatory.⁴⁰ In particular it maintained that the principles in the Children Act 1989 relating to the paramountcy of the welfare of the child and the right of the child to have its voice heard, conformed with Articles 3 and 12 of the Convention. In the light of P's experiences and the precedents cited in the decision to determine his future, such self satisfaction is unwarranted. The Children's Rights Development Unit set up by the Government to monitor the implementation of the UN Convention would share this view. In 1994 it published 14 reports. The reports drew attention to the shortcomings, in certain areas, relating to children's rights in the United Kingdom. Report 11 stressed the right to be consulted to a nationality and identity. It suggested that the Scottish Law Commission's proposal, that:

“...before a person reaches a major decision which involves fulfilling parental responsibility, or exercising a parental right, the person shall, so far as is, ascertain the views of the child concerned regarding the decision and shall give due consideration to those views taking account of the child's age and maturity”⁴¹

³⁹ Timms, *supra*.n.4 at 106.

⁴⁰ *The U.K.'s First Report to the UN Committee on the Rights of the Child* (February 1994) HMSO.

⁴¹ *Report on Family Law*, Scottish Law Commission, No.135, (HMSO, 1992).

should be incorporated into United Kingdom legislation. ⁴² This has now been done in Scotland at least.⁴³

Many western societies have set up institutions to oversee policy, legal and practical issues relating to children. ⁴⁴ Proposals have been made to create a Children's Rights Commissioner in the United Kingdom. The task of the commissioner would be, *inter alia*, to ensure that children's rights and interests are taken into account to a greater degree than at present and to secure redress for children whose rights have been infringed. ⁴⁵ The proposals have not been implemented.

In the meantime, what has happened to P? His future continues to remain unresolved; he has been unable to adapt to life in South Africa. His biological parents have recognised his emotional distress and on 6th. December, 1996, they sent him back to live with his English foster mother and her family in London.

⁴²*UK Agenda for Children* (Children's Rights Development Unit, 1994) para. 4.7.9 at 41..

⁴³ See s.6 of the Children (Scotland) Act 1995.

⁴⁴ See Timms, *supra*.n.4 at .51.

⁴⁵ Rosenbaum and Newall, *Taking Children Seriously: A Proposal for a Children's Rights Commissioner* (Caloustie Gulbenkian Foundation, 1991) at 5.