

The guardianship of infants act law family essay

Law



The aim of the Children Act 1989 Act was to simplify the law relating to children, making it both more consistent and flexible, whilst ensuring that the welfare of the child was at the forefront. It consolidated and repealed much of the existing legislation, in effect removing some of the confusion which abounded in family law. Hester[1] went so far as to state that the Act re-defined child care law, introducing new measures for working with children and families in both public and private family law. Of the many things the Act did, perhaps the two most important were the introduction of the notion of parental responsibility[2] and, more importantly, it placed on a statutory footing the welfare principle[3]. The welfare principle as set out in section 1(1) of the CA requires that the interests of the child are treated as paramount and so the interests of parents, or other parties, must be subordinated to those of the child. S1 (1) states: "... the child's welfare shall be the court's paramount consideration." This principle was already in existence throughout case law, as seen prior to the CA when Lord McDermott stated that the welfare principle 'connote[s] a process whereby when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child's welfare'.[4] In *H v H* (Residence order: leave to remove from jurisdiction) [1995] 1 FLR 529[5], Wall J, agreeing with Bracewell J in *M v A* 2 FLR 98[6], said that the Act did not "change the test but merely emphasised that the checklist is to be applied when considering welfare.[7]" Nearly ten years later in 1998 the UK enacted the Human Rights Act, giving effect to the Convention on Human Rights. Under this Act, domestic law is to be read in such a way as to give effect to the Convention. Article 8 allows for a qualified right to respect for

<https://assignbuster.com/the-guardianship-of-infants-act-law-family-essay/>

private and family life and the prohibition against unwarranted interference with these rights. The approach from the view of an adult's right to family life would appear to be in direct conflict with the child-centred approach under the Children Act and it could be argued that the two are incompatible.

Herring referred to the tension ' between the wish to promote the welfare of the child and the concern to protect the rights of family members' and argues that, ' in the light of the Human Rights Act and the centrality of the welfare principle in the Children Act, the courts are going to be forced to develop some kind of synthesis between the two approaches'. Such conflict was clearly seen in the case of *Re K D (Minor) (Ward: Termination of Access)* ([1988] 2 WLR 398)[8]. Lord Oliver was asked to consider whether a termination of a mother's right of access to her child would breach her Article 8 rights and found that parental privileges " Parenthood [confers]... on parents the exclusive privilege of ordering... the upbringing of children of tender age ... That is a privilege which ... is circumscribed by many limitations ... When the jurisdiction of the court is invoked for the protection of the child the parental privileges do not terminate. They do, however, become immediately subservient to the paramount consideration ... the welfare of the child." The foremost concern appears to have been that the Convention would not provide adequately for the rights of children and focus on the rights and duties of adults instead. Jane Fortin voiced this when she stated " It is of fundamental importance that the judiciary shows a willingness to interpret the European Convention in a child-centered way, as far as its narrow scope allows. It would be unfortunate in the extreme, if such a change heralded in an increased willingness to allow parents to pursue their own rights under the Convention at the expense of those of their

<https://assignbuster.com/the-guardianship-of-infants-act-law-family-essay/>

children.'^[9]It is submitted however that whilst there are no provisions that deal explicitly with children, they are provided the same protection under the convention as adults^[10], and can in fact bring applications before the European Court of Human Rights,^[11]though it has been criticised for handling the independent rights of children inadequately.^[12]It is clear though from paragraph 2 of article 8 that interference with family life may be permitted by a public authority if it is in pursuance of a legitimate aim, is proportionate and necessary. This includes preserving the rights and welfare of children^[13]. As seen the difficulty for the European court lies in balancing the rights of a child against those of its parents. When faced with conflicting interests, the court has stated that regard must be had to striking a fair balance between competing interests.^[14]There is no assumption that the welfare of the child will take precedence over the rights of the parents but in *Johansen v Norway*^[15]it was held that ' the court will attach particular importance to the best interests of the child, which depending on their nature and seriousness may override those of the parent. In particular ... the parent cannot be entitled under Art 8 of the Convention to have such measures taken as would harm the child's health and development'. Though in *L v Sweden* (Application 10141/82 40 D&R 140) (a case concerning contact with children in care), the Commission determined that the crux of these cases was not only about proposing the best solution for the child. It was stated that under Article 8, " an interference with the right of the parents to continue to take care of their child cannot be justified simply on the basis that it would be better for the child to be taken care of by certain foster parents." In other words, for the court to justify any such interference the State must demonstrate " sufficient reasons" for the decision to remove

<https://assignbuster.com/the-guardianship-of-infants-act-law-family-essay/>

a child from its parents and place it into foster care. The reasoning behind any decision in this respect falls within the phrase, 'necessary in a democratic society'. This clearly demonstrates that the rights of the child, in order to supercede that of the other parties to the case, would have to be of considerable importance in order to be justifiable. However unless a clearly unbalanced approach is taken the ECHR has stated that matters should be dealt with by the national courts. In *Olsson v Sweden (No 2)*((1994) 17 EHRR 134) it was held that "[T]he interests as well as the rights and freedoms of all concerned must be taken into account, notably the children's interests and their rights under Article 8 of the Convention. Where contacts with the natural parents would harm those interests or interfere with these rights, it is for the national authorities to strike a fair balance." At first glance this appears to be in direct conflict with the welfare principle. As far as this relates to contact applications under S8 of the Children Act, s1(3) and s10(9) of the Act give the statutory criteria under which applications for leave to apply for contact orders are to be considered. This is open to interpretation under the HRA and could well be read in such a way as to take account of the Article 8 rights of those applying for the orders[16]. In such a case it is then open to the court to take the same 'balancing' approach taken by the European Court. This would clearly give the court a wider scope to balance conflicting interests, such as those between parents and grandparents for example. However, when making the substantive decision as to whether such orders are to be granted, the court has a statutory duty[17]to give paramountcy to the welfare of the child when resolving disputes involving contact. As mentioned, domestic law is to be read in such a way as to give effect to the Convention or a declaration of incompatibility must be made.

<https://assignbuster.com/the-guardianship-of-infants-act-law-family-essay/>

Swindells[18] has questioned ' how parental rights can be subordinated to the interests of the child under the welfare paramountcy test' in light of the HRA. However, it may be possible to justify the welfare principle itself as being necessary in a democratic society in order to protect the children involved in such cases. When considering the welfare of the child, the court is required to apply the statutory checklist of factors contained in s. 1 (3) of the Children Act 1989. All these factors are focused on the welfare of the child, and it is submitted that Richards' assertion that the ' moral' worth of a parent is the focus of decisions is flawed. S1(3)(f) asks ' 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'. Clearly then, the position of the carer is a matter to be taken into account, but this is just one of the list of factors the court have to consider. It may also be more a matter of practicality than morals as was seen in *Re M (Handicapped Child: Parental Responsibility)* [2001] 3 FCR 454. Also to be considered are the wishes and feelings of the child[19], his physical, emotional and educational needs[20], the effect of a change in circumstances[21], any characteristics the court considers relevant[22], risk of harm[23] and the range of powers available to the court[24]. With a residence order comes automatic parental responsibility,[25] thus the issue before the court is not just one of where the child will live. The starting position for the courts will be that if one parent has residence, then the other should have contact and thus will usually issue a contact order for the non-resident parent. The fact that both parents should have contact as being in the best interests of the child has been a long held view of the courts. In *Re R (a minor) (Contact)* [1993] 2 FLR[26] L J Butler Sloss stated that ' It is the right of a child to have a relationship with

<https://assignbuster.com/the-guardianship-of-infants-act-law-family-essay/>

both parents wherever possible' when parents divorce the parent with whom the child does not live has a continuing role to play'. In the recent case of *Re A (Residence Order)* [2009] EWCA Civ 1141 the judicial commitment to ensuring that both parties have contact, unless there are clear overriding reasons why this should not be the case, is clear. Though overturned on appeal, the court at first instance removed custody of 3 children from the mother and awarded residency to the father, after she had failed to allow regular contact. It is submitted however that whilst the ECHR's approach is one of balancing conflicting rights, the decisions indicate that the Court will find interference with Article 8 rights legitimate if it is necessary for the child's welfare. This supports Lord Oliver's view that there is in reality no conflict and that the relationship between parent and child should only be interfered with ' if the Welfare of the child dictates.' In *K and T v Finland*[27]the court made it clear that ' consideration of what is in the best interest of the child is in every case of crucial importance. And in deciding that restrictions on access did not violate Art. 8, the court reached its findings ' in the light of the present-day interests of the children' . Herring has suggested, and this writer agrees, that " we do children no favours by regarding their interests as the only relevant ones"[28]. The child-focused approach under the welfare principle in s1(1) does not seek to arrive at an outcome which achieves the best result for family members, but only the best result for the child. It has been criticised as preventing proper weight being given to the interests of participants other than the child, who may play a very important role in his or her upbringing. Reece suggests that " the paramountcy principle must be abandoned, and replaced with a framework which recognises that the child is merely one participant in a process in

<https://assignbuster.com/the-guardianship-of-infants-act-law-family-essay/>

which the interests of all the participants count." [29] Herring's view however, is that whilst the two approaches appear initially in conflict, the courts have managed to ensure that, even when adhering to the individualistic approach of the welfare principle, the parents rights have not fallen by the wayside. However, he is critical of how this has been achieved, suggesting that in doing so the courts have 'hidden' the true issues involved. [30] It is submitted that Lord Oliver's views in the original quote are to be supported. We have clearly seen that the approach taken by the European Courts is one of balancing the rights of the child against those of the adult in question. Whilst the welfare of the child is given considerable weight it is not to be assumed that this will always override the rights of the parent. In reality however where the welfare of a child is at issue this will likely be the case. In *Hokkanen v Finland* [31] the court accepted that in a state where a child's welfare was emphasised, a child's interests would satisfy the test under article 8(2). This rights-based approach would initially appear to be in conflict with domestic law which requires that the welfare of the child is paramount under s1 and in *Payne v Payne* [2001] EWCA Civ 166, [2001] 1 FLR Butler Sloss stated: "The HRA requires some revision of the judicial approach to safeguard the parent's rights under the ECHR, it required no re-evaluation of the judge's primary task which was to evaluate and uphold the welfare of the child as the paramount consideration despite its inevitable conflict with the adult rights." The approaches may take different paths but it is clear that the welfare of children will be paramount, whomever is making the decision.

Word Count: 2110