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1. Introduction

Writing in 2000, Michael Freeman argued that, whilst much had been achieved for children in the 20th century, it had not been the century of the child (2000: 553-554). He expressed the hope that the next century would turn out otherwise (ibid: 555). In this chapter, I explore the extent to which we are now able to realise this ambition in relation to decision-making affecting children. The need for some measure of state regulation of decision-making about children is beyond doubt. Not all children can make significant decisions for themselves, and we cannot assume that families will always be intact or agree sufficiently to make such decisions for children. This is the case even if we assume that ‘families’ generally make decisions in their children’s ‘best interests’. The issue then arises as to the shape of this regulation. The legal decision-making framework employed is critical because it determines both the scope of decisions that can be made without state scrutiny or supervision and the weight that can be placed on particular factors they can take into account, such as religious or cultural concerns.

* I began thinking about what the debate over the legal regulation of children might learn from virtue ethics whilst I was Assistant Professor of Law at the University of Alberta, and am grateful to former colleagues for the lively discussion. I discussed ideas in this chapter in particular at the International Academy for the study of the Jurisprudence of the Family’s fifth international symposium at Cardozo Law School, Yeshiva University (10-11 June 2013) and the Law and Michael Freeman Colloquium at University College London’s Faculty of Laws (1-2 July 2013); I thank participants for their feedback.

1 This assumption, which underpins the current law and the child protection threshold for intervention, is itself open to debate insofar as it arises from the acquisition of legal parental status at birth. Dwyer, for example, argues that additional hurdles should be imposed on all parents seeking to acquire legal recognition of the parent-child connection; see Dwyer (2006: ch 8.1).
In order to make this a century of the child, I suggest that we need to reach a common understanding of the reasons why it is important to regard children as a ‘special case’, whether this is implemented by thinking of children as rights-holders, by prioritising children through a ‘best interests’ or welfare perspective, or by focusing on the duties adults owe to children. These three types of approach should be taken together for this purpose because, I argue, they are simply tools – language descriptors, ways of framing individual considerations, processes and frameworks – for working with the same substantive content. Once we have agreed upon the reasons why it is important to treat children as a special case, we need to assess which of these three ways of interacting with the substantive content of decisions affecting children makes achieving these aims most likely. It is the substantive outcome for affected children that holds critical importance. Which approach we prefer or emphasise (where multiple approaches co-exist in any particular context) should thus depend on how well it guides decision-makers towards or makes more likely better outcomes for affected children.

After briefly outlining why current conceptions of children’s rights cannot meet this test, I explain why a welfare or ‘best interests’ approach is no better suited towards achieving this end. The remainder of the chapter explores the potential for a duty-based approach. I argue that duty can have three roles: as a tool to give specificity and resolve conflicts in current rights- and welfare-based decision-making; as a theoretical framework, focused on the decision-maker; and as part of the justification for adopting a virtue-inspired understanding of the aim for legal decision-making affecting children – to enable children to flourish on their own terms. I conclude by exploring the practical implications of a duty-based argument and discuss three key examples, namely the Court of Appeal’s decision in Re A (Conjoined Twins: Surgical Separation) [2001] 1 Fam 147, the United Nations’ Convention on the Rights of the Child (20 November 1989, 1577 U.N.T.S. 3 [UNCRC]) and private law disputes concerning children.

2 For my argument to this effect, see section 2, below.
3 Freeman’s (2007b) articulation of such reasons in the context of a rights-based approach is both classic and compelling. For the purpose of my argument, the will and interest theories of rights are taken together as ‘rights-based’ approaches insofar as they are both ways of trying to articulate what it means to say that children have children’s rights. This is not to suggest that the differences between the theories are irrelevant, just that they both, even in modified form, fail to present a coherent vision of children’s rights, as I have argued elsewhere: Ferguson (2013).
4 For present purposes, ‘best interests’ and the ‘welfare principle’ may be treated as interchangeable. This view has been endorsed judicially. See, for example, Re A (Male Sterilisation) [2000] 1 FLR 549, Thorpe LJ: 560, cited with approval: Portsmouth NHS Trust v. Wy-att [2005] 1 FLR 21, Hedley J: [26]; Re A (Conjoined Twins: Surgical Separation) [2001] 1 Fam 147, Walker LJ: 242H. Only where I use ‘welfare’ or ‘welfare-based approach’ to reference the framework for decision-making is it interchangeable with the ‘welfare principle’; otherwise, it may also refer to individual competing considerations operating within a different framework.
5 This includes the rejection of a relational welfare approach, such as that argued for by Herring (2005) and Herring and Foster (2012).