Gillick is more than a gimmick: the urgent need for a consistent approach to children's autonomy

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Do family courts adopt a consistent approach to children's autonomy? If not, should they? This article argues that the current judicial approach to children's autonomy in decisions concerning them is riddled with inconsistency. Courts struggle to apply a clear and uniform standard, and this often leads to unpredictable and contradictory rulings. This inconsistency undermines the core objectives of the family justice system, which seeks to protect and uphold children's rights and well-being. To ensure fairness and clarity, this article calls for a comprehensive reevaluation of judicial practices to ensure that children's autonomy is consistently respected.

Scope of discussion

Children's autonomy refers to the ability of children to make choices independently, to the extent possible, free from influence.[1] It manifests in various forms, including process autonomy (children deciding how they participate in decision-making) and outcome autonomy (decisions aligning with children's wishes and feelings). Autonomy also has a temporal dimension—present autonomy (children's current ability to make choices) and future autonomy (maximising their future opportunities and decision-making capacity). This article considers all these aspects of children's autonomy.

A consistent approach to children's autonomy means establishing a clear and reliable standard that judges can apply uniformly, both in principle and in practice. Without such consistency, judicial decisions risk being arbitrary, which undermines children's rights and the broader goals of the family justice system.

The existing (inconsistent) approach

The landmark case of *Gillick v West Norfolk and Wisbech Area Health Authority and Another* [1986] 1 FLR 224 was hailed as a turning point in recognising children's autonomy in law.[2] It concerns whether doctors should be able to provide contraceptive advice or treatment to girls under the age of 16 without parental consent. From *Gillick* alone, three potential judicial approaches to children's autonomy can be identified: (a) age, (b) capacity, and (c) welfare. Lord Fraser famously stated that a child under the age of 16 lacks the legal capacity to consent unless they possess 'sufficient understanding and intelligence'[3] and the decision is in their best interests.[4] Medical professionals are entrusted with the discretion to act in accordance with their assessment of the child's best interests, guided by Lord Fraser's five conditions.[5] Lord Scarman largely echoed Lord Fraser's reasoning but placed greater emphasis on children's capacity.[6] This article argues that none of these approaches – age, capacity, or welfare – provide a truly consistent standard, either in principle or in practice.

(a) Age

An age-based criterion could serve as a consistent approach by setting a specific

1 Daly, *Children, Autonomy and the Courts: Beyond the Right to Be Heard* (BRILL 2017) 9.
2 Fortin, 'The Gillick Decision – Not Just a High-water Mark' in Gilmore, Herring and Probert (eds), *Landmark Cases in Family Law* (Hart 2011) 208.
3 *Gillick* (n 2) 169–170.
4 ibid 173D.
5 ibid 174B-E.
6 ibid 188–189.

cut-off point (eg, 16) and asserting that children above this age should have their autonomy respected. However, this approach is problematic.

Firstly, it lacks practical consistency. Should an age-based criterion apply uniformly across all cases, from life-saving medical treatment to decisions about primary residence? If so, what age is appropriate, and how should the threshold be determined? If not, how can one draw consistent distinctions between cases where an age-based criterion should apply and those where it should not?

Secondly, age alone is an arbitrary measure of children's autonomy. The Supreme Court of Canada in *AC v Manitoba* cautioned that an age-based distinction, which does not factor in a child's actual decision-making capabilities, fails to reflect the realities of child development.[7] It is unrealistic to assume that once a child reaches 16, they magically possess full-fledged autonomy, and their wishes and feelings should automatically carry considerable weight. Judges have consistently overridden the autonomous decisions of 16- and 17-year-olds when deemed necessary, as seen in *Re W (A Minor) (Medical Treatment: Court's Jurisdiction)* [1994] 4 All ER 627. In that case, although s 8 of the Family Law Reform Act 1969 grants 16-year-olds the right to consent to surgical, medical, and dental treatment, the court exercised its inherent jurisdiction to override a competent 16-year-old's refusal of medical treatment for anorexia nervosa in her 'best interests'. This is just one of many cases that exemplify how an age-based distinction leads to inconsistency in practice, because age alone is an unreliable proxy for autonomy.

(b) Capacity

Alternatively, one might argue that children's autonomy should be respected if they demonstrate sufficient understanding and intelligence, regardless of age. However, this approach also proves inconsistent in practice.

Firstly, what constitutes 'sufficient understanding and intelligence'? Lord Scarman said that a child meets this standard if they 'understand fully what is proposed'.[8] Meanwhile, Sir James Munby, in *Re X (A Child) (No 2)* [2021] EWHC 65 (Fam), clarifies that *Gillick*-competence differs from capacity, as it is 'tied to the normal development over time of the typical child' [73]. Taken together, these perspectives raise the question of how courts can establish a reliable and consistent metric for determining competence, particularly when the level of understanding required varies depending on the issue at hand.[9] How can judges consistently distinguish between contexts that demand a higher level of understanding and those with a lower threshold? This inconsistency is evident in *Re E (A Minor) (Wardship: Medical Treatment)* [1993] 1 FLR 386 (391), where a 15-year-old, whom the judge described as demonstrating 'obvious intelligence' and engaging in 'calm discussion of the implications,' was nevertheless deemed insufficiently competent to refuse a blood transfusion. If courts struggle to apply a capacity-based approach consistently, how can judges reliably determine sufficient competence?

One possible solution would be to delegate competence assessments to medical professionals, as suggested in *Gillick*. However, the feasibility of this remains questionable. It is impractical to expect doctors to assess every individual child's competence before considering their wishes and feelings. Otherwise, the debate would shift to determining a consistent standard for when a clinician's assessment is required and when it is not. Furthermore, are doctors best placed to make consistent judgements on competence? As *Re X* suggests, *Gillick*-competence and medical capacity

7 [2009] 2 SCR 181, [116].
8 *Gillick* (n 2) 189.
9 Gilmore and Herring, ' "No" is the hardest word: Consent and children's autonomy' (2011) 23 CFLQ 3, 10.

'have nothing very obvious in common'.[10] Given that doctors increasingly act as the final arbiters of a child's best interests,[11] closer scrutiny is needed regarding their ability to make consistent non-medical decisions that encompass children's holistic development, including their social and emotional well-being.

Secondly, even if one concedes that children's competence can be assessed using a reliable standard, how can we consistently determine when a *Gillick*-competent child's autonomy should be respected and when it should not?

An ostensibly consistent approach is the distinction between the right to consent and the right to refuse. In *Re R (A Minor) (Wardship: Consent to Treatment)* [1992] 1 FLR 190, the court ruled that while *Gillick*-competent children can consent to treatment, they cannot refuse it. If a child refuses treatment, consent can instead be provided by someone with parental responsibility or by the court. However, this distinction is untenable. If a child is deemed competent to consent to treatment, why should they not also be competent to refuse it?

In defending this distinction, Gilmore and Herring emphasise the difference between refusing consent altogether and refusing a (proposed) treatment.[12] While a child's capacity to consent requires only an understanding of the proposed treatment, a valid refusal of all treatment necessitates an appreciation of the full consequences of a complete failure to treat.[13] Therefore, if a child refuses all treatment, they must meet a higher threshold of capacity; if this threshold is not met, parents can step in to provide consent.

However, this justification fails to resolve the inconsistencies inherent in the capacity-based approach. Even Gilmore and Herring acknowledge that, in some cases, only one course of treatment is available. In such situations, it is unclear how the consent-refusal distinction can be applied consistently, as either decision ultimately leads to the same outcome.[14] Moreover, Cave and Wallbank question whether this approach can be applied consistently in real-life clinical practice. From a clinician's perspective, the decision is rarely a binary choice between accepting or rejecting a specific treatment; rather, there is often a range of options in between. Competence cannot always be judged solely in relation to a *specific treatment*, but must instead be assessed in relation to the child's *decision-making ability*.[15]

In response, Gilmore and Herring offer an analogy: if an individual is at risk of deep vein thrombosis and is given the choice of travelling by air (which would increase the risk) or by train (which would not), they do not need to understand the risks of air travel to consent to travelling by train.[16] With respect, this conclusion is mistaken. Surely, to make an informed decision, one must understand the alternative options available. Otherwise, the decision would be arbitrary. How can arbitrariness be equated with competence to consent? Thus, the consent-refusal distinction must be dismissed as inconsistent.

(c) Welfare

Section 1(1) of the Children Act 1989 stipulates that a child's welfare shall be the court's paramount consideration in cases concerning their upbringing, while s 1(3) requires judges to have regard to the 'ascertainable wishes and feelings of the child concerned.' This suggests that a potential welfare-based approach could involve respecting children's autonomy when doing so aligns with their best interests. In

10 *Re X* (n 11).
11 Fortin (n 3) 204.
12 Gilmore and Herring (n 12) 3.
13 ibid 13.
14 Cave and Wallbank, 'Minors' Capacity to Refuse Medical Treatment: A Reply to Gilmore and Herring' (2012) 20 MLR 423, 426.
15 ibid 438.
16 Gilmore and Herring, 'Children's refusal of treatment: the debate continues' (2012) 42 FL 973, 978.

fact, the Supreme Court of Canada in *AC v Manitoba* recognises the fine distinction between welfare and autonomy as one that often collapses altogether.[17] However, in practice, this approach does not hold up.

In *Re W*, the court remarked that, in considering the welfare of *Gillick*-competent children, 'the court must not only recognise but if necessary defend' their autonomy. It observed that, in most areas, disregarding a child's wishes would be both wrong and counterproductive, yet in medical treatment cases, the court *can* and sometimes *must* intervene.[18] This raises two concerns. Firstly, do judges consistently allow children's autonomy to prevail in all areas except medical treatment? Secondly, is the distinction between medical treatment and other areas justified? In short, the answer to both questions is 'No'.

Firstly, just two years after *Re W*, the Court of Appeal failed to uphold the children's autonomous decision to change their surname, despite the case not involving medical treatment. In *Re B (Change of Surname)* [1996] 1 FLR 791, the court ruled that children's wishes and feelings are not determinative in matters of surname change. This is because maintaining an enduring relationship with both parents, despite their separation, is in the children's best interests. This highlights the inconsistency in the welfare approach to children's autonomy in practice.

With regard to the second concern, the concept of children's 'future autonomy' may provide a potential justification for distinguishing between medical treatment cases and all other areas. In medical treatment cases, a child's life is at stake. Allowing a child to refuse treatment and potentially die would effectively eliminate their future opportunities to make choices (i.e. their future autonomy). According to *Re G (Education: Religious Upbringing)* [2012] EWCA Civ 1233, [2013] 1 FLR 677, judges must act as 'judicial reasonable parents', fostering aspiration and maximising the child's opportunities [80]. This aligns with Eekelaar's concept of 'dynamic self-determinism'[19] Children's future autonomy is best supported by placing them in environments that expose them to a broad range of influences, allowing them to draw upon these as they develop. Since life itself is an essential precondition for the exercise of future autonomy,[20] medical treatment cases, which threaten this precondition, must be distinguished from other areas where such a threat does not exist.

However, this justification is flawed. First, why is sacrificing a child's *present* autonomy for the potential exercise of *future* autonomy necessarily better? As Reece argues, '[this] makes the importance of childhood contingent on, and subordinate to, the importance of adulthood'.[21] Furthermore, Eekelaar's welfare approach leads to inconsistent results. Suppose the children in *Re B* were to suffer from depression or, worse, commit suicide if the court refused to change their surnames. Should their autonomy be respected now because their life interests are at stake? Or should their autonomy be disregarded because preserving their current surname reflects dynamic self-determinism, potentially facilitating a better relationship with their father and opening doors to familial and cultural opportunities? Both outcomes could be justified within Eekelaar's framework, so what answer would the welfare approach offer? Ultimately, it depends on the judges, and this is where inconsistency arises.

Moreover, when promoting a child's 'open future' (ie, future autonomy), the judge must understand the welfare appraisal 'in the widest sense', encompassing a wide range of

17 *Manitoba* (n 8) [84].
18 *Re W* (n 9) 648.
19 Eekelaar, 'The interests of the child and the child's wishes: The role of dynamic self-determinism' (1994) 8 IJoLPF 42, 47–48.
20 ibid 53.
21 Reece, 'The Paramountcy Principle: Consensus or Construct?' (1996) 49(1) CLP 267, 279.

considerations.[22] However, this approach is inconsistent in principle and in practice. In principle, the concept of 'future autonomy' is based on shaky judicial speculations. Judges cannot accurately predict the likely future outcomes of such diverse factors, let alone assess the probability of each one occurring.[23] In practice, it is difficult to imagine how judges, burdened with a busy schedule, could consistently apply this holistic welfare appraisal. They are unlikely to obtain all the necessary information to fully consider every aspect of the child's welfare.[24] Even if they did have the time, they would still be making inconsistent value judgments about which version of a future life would maximise the child's autonomy. In *Re G*, the refusal of blood transfusions and forced marriages do not align with the ideals of an open future that fosters children's future autonomy.[25] In reality, how can one draw consistent distinctions between what constitutes an autonomy-maximising future and what does not? A welfare approach to children's autonomy creates more inconsistency than it resolves.

The necessity of consistency in children's autonomy

Although the current approach to children's autonomy remains inconsistent, the pursuit of consistency must continue. This article argues that establishing a consistent approach to children's autonomy is crucial for achieving three fundamental objectives of the family justice system: (a) fulfilling its communicative function, (b) ensuring procedural clarity, and (c) delivering substantive justice.

(a) Communicative function

A consistent approach to children's autonomy sends a powerful symbolic message to the public. It reflects the law's commitment to giving children's autonomy the 'keener appreciation'[26] it deserves, rather than allowing paternalistic judges to dismiss children's wishes and feelings at will. The clarity and certainty this approach offers aligns with the family courts' transparency efforts, making their decision-making process more accessible.[27]

Importantly, consistent legal terminology surrounding children's autonomy can shape societal norms and attitudes.[28] It helps parents, medical professionals, and other stakeholders adjust their approach to children as they mature.[29] In particular, medical practitioners would gain a clearer understanding of their roles and responsibilities when dealing with children seeking medical care. The medical field tends to take judicial guidance seriously, as shown by the significant influence of *Gillick* on how young patients are treated.[30] A consistent approach would enable doctors to know when to seek court involvement for vulnerable children, particularly those on life support, and when to rely on their own judgment. This reduces concerns over legal liability, empowering them to make more efficient, child-centred decisions.

However, some might argue that adopting a blanket, consistent approach to children's autonomy in judicial decisions risks judicial overreach. In *Bell and Another v The Tavistock and Portman NHS Foundation Trust (University College London Hospitals NHS Foundation Trust and Others, Intervening)* [2021] EWCA Civ 1363, [2022] 1 FLR 69, the court warned against making general, age-related conclusions about children's capacity to consent, emphasising that this should be left to professionally regulated clinicians, who can assess capacity on a case-by-case basis [89]–[93]. Douglas and Gilmore also express

22 *Re G* (n 25) [27].
23 Taylor, 'Secular Values and Sacred Rights: *Re G (Education: Religious Upbringing*' [2013] CFLQ 336, 340.
24 ibid 348.
25 *Re G* (n 25) [40]–[42].
26 *Mabon v Mabon* [2005] EWCA Civ 634, [26].
27 Sir Andrew McFarlane, 'Confidence and Confidentiality: Transparency in the Family Courts' (2021).
28 Herring, 'Farewell Welfare?' (2005) 27(2) JoSWFL 159, 168.
29 Fortin (n 3) 210.
30 ibid 212.

concern about the legitimacy of guideline judgments in this context.[31] A consistent approach to children's autonomy may exceed the legislative limits set out in the Children Act 1989, as judges could give undue weight to children's wishes and feelings, either more or less than required in the welfare assessment. Given the influence that guideline judgments can have on case outcomes[32] – particularly in family law, where judges have significant discretionary power – there is a risk that such an approach could undermine the legislature's intentions and steer the law in an unintended direction.

Nevertheless, this concern is somewhat overstated. Adopting a consistent approach does not automatically elevate it to the status of a guideline judgment. Even if it does, guideline judgments concerning children's autonomy are not inherently illegitimate. In fact, they can serve a vital communicative function by stimulating dialogue with the legislature and highlighting the need for legislative intervention in the area of children's autonomy.

(b) Procedural clarity

A consistent approach to children's autonomy 'creates a climate of expectation' among litigants, children, and parents, clarifying the circumstances in which children will be consulted and how their wishes and feelings will be considered in judicial decisions.[33] Without such consistency, it becomes unclear why and how judges arrive at their conclusions, particularly within a discretion-based framework. It also makes it more difficult to hold judges accountable for their role in facilitating children's process autonomy. As Daly notes, there is no clear understanding of what constitutes an adequate weight for children's wishes.[34] This is particularly concerning, as children's wishes are often overlooked in cases directly affecting their upbringing.[35] Given that it is rare for children to provide evidence in court proceedings, the 'silent invisibility' of the child needs a counterbalance. A consistent approach to their autonomy could be the panacea.[36]

A consistent approach to children's autonomy must require judges to base their legal reasoning on a standardised framework in all decisions, rather than routinely hiding behind ambivalent language descriptors like 'capacity', 'welfare' or 'age'. Such an approach promotes procedural clarity by compelling judges to be explicit and transparent when considering children's wishes. It could avoid situations like *Re T (Wardship: Medical Treatment)* [1997] 1 FLR 502, where the judge conflated the parent's interests with the child's by stating that 'the welfare of the child depends on the mother'. The court's failure to acknowledge that this is a case where parental interests are prioritised over the child's reflects the dangers of an inconsistent approach. This lack of candour and the strained reasoning in applying the welfare principle effectively 'hide the real issues' that family courts must confront.[37]

Moreover, adopting a consistent approach to children's autonomy fully supports the UK's commitment to Art 12 of the United Nations Convention on the Rights of the Child. Such an approach ensures that children's views are consistently and explicitly considered, with their wishes and feelings integrated into decisions that affect them. This procedural clarity also provides practical value to litigants, particularly child-litigants. Given that family court decisions are primarily based on judicial discretion, appellate courts often defer to

31 Douglas and Gilmore, 'The (Il)legitimacy of Guideline Judgments in Family Law: The Case for Foundational Principles' (2020) 31(1) KLJ 88.
32 ibid 117.
33 Gilmore and Glennon, *Hayes and Williams' Family Law* (OUP 2020) 482.
34 Daly (n 1) 8.
35 Taylor (n 30) 344.
36 Herring (n 35) 168.
37 Herring, 'The Welfare Principle and the Rights of Parents' in Bainham, Sclater and Richards (eds), *What is a Parent?* (Hart 1999) 95.

first-instance judges, making appeals in family law cases more challenging. By adopting a consistent approach to children's autonomy, appellate courts would have a reliable benchmark to evaluate the reasoning of lower courts. This would enhance access to justice and ensure that children's process autonomy is truly upheld.

(c) Substantive justice

Finally, a consistent approach to children's autonomy provides greater legal certainty, which is fundamental to achieving substantive justice for children. Adopting Ferguson's understanding, substantive justice is attained when courts conduct a child-centred evaluation, maximising opportunities for the child's future, within the limits set by the child's own evolving wishes as they grow.[38]

This legal certainty reduces ambiguities in decision-making, thus helping to avoid delays and ensuring the best outcomes for the child. Uncertainty makes care precarious; a consistent approach enables parents, medical professionals, and judges to engage in more informed discussions about what truly serves the child's best interests. Bridgeman has highlighted that conflicts among those responsible for the child's care can divert attention from the child's needs, which is contrary to the child's welfare.[39]

The case of 15-year-old Joshua McAuley illustrates how uncertainty stemming from an inconsistent approach to children's autonomy can undermine children's interests. Joshua was reportedly the first child in England whose refusal of treatment (a blood transfusion) was accepted, resulting in his death. His parents supported his decision, and the actions of the medical professionals were not deemed unlawful. However, this case was not brought before the courts. Gilmore and Herring suggest that the decision not to approach the courts may have been due to perceived legal uncertainty or lack of confidence in the existing law.[40]

Therefore, a consistent approach to children's autonomy is crucial for instilling public confidence and trust. Children in critical conditions who must make life-or-death decisions may avoid the court system due to fears of legal uncertainty. While this outcome aligns with Joshua's wishes and feelings, other parents or medical professionals might exploit such uncertainty to override a child's autonomy, or even make decisions on their behalf that could result in significant harm – all without the court's scrutiny. This situation is far from achieving substantive justice for children.

Notably, adopting a consistent approach to children's autonomy does not undermine the family court's goal of achieving individualised justice. Rather, it provides a framework and a starting point for reasoned judicial discussion.[41] A consistent approach remains flexible, yet strict in preventing the influence of judicial preferences and prejudices.

The pursuit continues

In conclusion, an analysis of the prevailing approaches – age, capacity, and welfare – reveals a troubling lack of consistency in how children's autonomy is handled in judicial decisions. This inconsistency must not be accepted as the status quo. However, it is beyond the scope of this article to provide a definitive answer to this difficult conundrum. While the author continues to seek a feasible solution for the future, it is hoped that this article sheds light on the importance of consistency in the judicial approach to children's autonomy. Only through a consistent approach can we ensure that children's voices are genuinely heard and respected in the decisions that shape their futures.

38 Ferguson, 'The Jurisprudence of Making Decisions Affecting Children: An Argument to Prefer Duty to Children's Rights and Welfare' in Diduck, Peleg, and Reece (eds), *Law in Society: Reflections on Children, Family, Culture and Philosophy – Essays in Honour of Michael Freeman* (Brill 2015) 153.

39 Bridgeman, 'Leaving no stone unturned': contesting the medical care of a seriously ill child' [2017] CFLQ 63, 74; 82.

40 Gilmore and Herring (n 12) 7.

41 Eekelaar, 'The Role of the Best Interests Principle in Decisions Affecting Children and Decisions about Children' (2015) 23 IJoCR 3, 25.

Written under the supervision of Sarah Tyler.

For further reading on a child's autonomy, see 'Tom: a child seeking to litigate' by Mark Chaloner on p 605 of this issue.