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CHILDREN'S DECISION-MAKING AND THE LAW: EXPLORING A RIGHTS-BASED PERSPECTIVE

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ABSTRACT

This paper examines the legal frameworks shaping children's involvement in decision-making through three distinct models: the property/instrumentalist model, the welfare model, and the rights-based model. It critically analyzes contemporary legal practices regulating children's decision-making, evaluating them against the principles of a rights-based approach. The analysis focuses on three key areas: statutory minimum age requirements, presumptive age thresholds, and individual decision-making scenarios, particularly where the Gillick competency principle interacts with the court's parens patriae jurisdiction. The paper argues that a rights-based approach permits minimum age rules and presumptive limits under specific conditions, ensuring they align with children's evolving capacities. It also finds strong alignment between the rights-based approach and Gillick competency, offering a more nuanced framework for supporting children's decision-making throughout childhood. Furthermore, the rights-based approach provides fresh perspectives on evolving the parens patriae jurisdiction, traditionally rooted in protection, to better uphold children's rights and autonomy. By emphasizing children's status as rights-holders, this approach seeks to balance their protection with their capacity for self-determination, advocating for legal reforms that enhance their participation in decisions affecting their lives.

Keywords: ***children; decision making; human rights; Gillick competency; rights-based approach***

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1. INTRODUCTION

The legal frameworks governing children's decision-making are complex, often reflecting a tension between protecting children's vulnerability and recognizing their capacity for autonomy. A compelling case from 2013 in New South Wales, Australia, illustrates this challenge: A 17-year-old male, deemed competent, refused a blood transfusion, yet the Supreme Court of New South Wales prioritized the sanctity of life over his individual dignity, ordering the treatment (*X v. Sydney Children's Hospital Network*, 2013). Had this young person been eight months older, turning 18, the hospital would have lacked legal grounds to override his decision, and the court would have had no jurisdiction to intervene. At 18, his autonomy would have been paramount, and forced treatment would have constituted an unlawful assault. This case underscores the significance of age as a legal threshold in common law systems, where 18 marks the boundary beyond which the courts' parens patriae jurisdiction—a historically broad authority to act in a child's best interests—ceases to apply (Brereton, 2017).

The young man appealed the decision, but the Court of Appeal upheld the original ruling, asserting that both principle and precedent supported the court's authority to override his wishes (*X v. Sydney Children's Hospital Network*, 2013). The appellate court relied on a series of global legal precedents, reinforcing the principle that the parens patriae jurisdiction empowers judges to prioritize what they determine to be a child's best interests, regardless of the child's competence or understanding. This stance effectively communicates to young people: "You may be competent and understand the implications of your decision, but as a minor, your views can be overridden by an adult with legal authority." Such a principle raises critical questions about the role of age versus competence in shaping children's involvement in decisions affecting their lives, not only in medical contexts but across all domains, from education to family law.

This paternalistic approach is tempered by the principle of Gillick competency, established in the landmark case *Gillick v. West Norfolk and Wisbech Area Health Authority* (1986). This principle allows children with sufficient intelligence and understanding to consent to medical treatment, prioritizing their maturity over chronological age. However, the application of Gillick competency is not absolute. In high-stakes scenarios, such as life-saving treatments where refusal could lead to catastrophic outcomes, courts often hesitate to uphold a child's decision, reverting to a protective stance driven by adult perceptions of best interests (*Mercy Hospitals Victoria v D1 and Anor*, 2018). This inconsistency highlights a broader challenge: how to balance the need to protect children with the imperative to respect their evolving capacities.

The interplay between Gillick competency and the parens patriae jurisdiction encapsulates the dual objectives of common law systems in addressing children's decision-making. The parens patriae jurisdiction, rooted in 13th-century English law, emerged to safeguard vulnerable children, vesting courts with extensive authority to act as a "parent" to those in need (Brereton, 2017). Centuries later, the Gillick decision

introduced a progressive counterpoint, recognizing that children's capacities develop over time, enabling them to make informed decisions in certain contexts (*Gillick v. West Norfolk and Wisbech Area Health Authority*, 1986). These two pillars—protection and empowerment—frame the legal discourse on children's decision-making, yet their application often reveals tensions, particularly when adult authority overshadows a child's voice.

Rather than delving into a detailed analysis of Gillick competency or parens patriae, this paper seeks to provoke a broader reflection on what a principled approach to children's decision-making should entail. The focus extends beyond medical decisions to encompass all areas where children's agency is relevant, such as participation in care proceedings, marriage, or civic activities like voting. The central question is whether the current reliance on age-based thresholds and paternalistic principles aligns with a contemporary understanding of children as rights-holders. To address this, the paper advocates for a rights-based approach, grounded in the principles of the United Nations Convention on the Rights of the Child (UNCRC), which positions children as active participants in decisions affecting them (United Nations, 1989).

The rights-based approach departs from traditional models that prioritize adult authority or welfare considerations. It emphasizes children's entitlement to express their views and have them given due weight, as articulated in Article 12 of the UNCRC (United Nations, 1989). This approach challenges the notion that age alone should determine decision-making authority, advocating instead for assessments of maturity and understanding, much like the Gillick principle. However, unlike Gillick competency, which is often narrowly applied to medical contexts, a rights-based approach offers a comprehensive framework applicable across diverse domains, from child protection to criminal justice. It also provides a lens to re-evaluate the parens patriae jurisdiction, traditionally a tool of protection, to better align with children's rights and autonomy (Tobin, 2023).

To explore these issues, the paper is structured in two main parts. First, it compares three models that have historically shaped the law's approach to children's decision-making: the property/instrumentalist model, which views children as extensions of parental interests; the welfare model, which prioritizes children's best interests; and the rights-based model, which recognizes children as rights-holders (Eekelaar, 1986). Each model reflects a distinct conception of childhood, influencing how children's views are valued or disregarded. The property model, rooted in historical notions of children as parental possessions, denies children agency, while the welfare model, though protective, often marginalizes their voices in favor of adult-determined outcomes (Eekelaar, 1998). The rights-based model, by contrast, seeks to empower children, aligning with international human rights standards (Tobin, 2013).

The second part of the paper evaluates common legal practices regulating children's decision-making against the standards of a rights-based approach. It examines three specific contexts: statutory minimum age rules, which set fixed

thresholds for activities like voting or marriage; presumptive age limits, which assume capacity at certain ages but allow for rebuttal; and individual decision-making scenarios, where Gillick competency and parens patriae jurisdiction interact (*Gillick v. West Norfolk and Wisbech Area Health Authority*, 1986; Brereton, 2017). By scrutinizing these practices, the paper assesses their compatibility with a rights-based framework, highlighting areas where current laws fall short and proposing pathways for reform.

The key arguments advanced are threefold. First, a rights-based approach permits minimum age rules and presumptive limits under specific conditions, provided they are justified by evidence and respect children's evolving capacities. Second, the principles underlying a rights-based approach align closely with Gillick competency but offer a more nuanced and expansive framework for supporting children's participation across childhood (Tobin, 2023). Finally, a rights-based approach provides innovative insights into reorienting the parens patriae jurisdiction, moving it from a welfare-centric model to one that prioritizes children's rights and decisional autonomy (Brereton, 2017). By adopting this approach, legal systems can better balance protection and empowerment, ensuring children are recognized as active participants in their own lives.

2. UNDERSTANDING A RIGHTS-BASED APPROACH

The legal treatment of children and their capacity to participate in decision-making can be understood through three primary models: the proprietary/instrumentalist model, the welfare model, and the rights-based model (Eekelaar, 1986). Each model reflects a distinct perspective on childhood, shaping how children's views are valued or disregarded in legal contexts. These perspectives influence not only the extent to which children are involved in decisions affecting them but also the broader conceptualization of their status under the law. This section examines these models, with a particular focus on the rights-based approach, highlighting its principles and implications for children's decision-making.

(a) Children as Property

Historically, children were viewed as possessions of their parents, particularly fathers, under the Roman doctrine of *patria potestas* (Eekelaar, 1986). This proprietary model positioned children as instruments to serve familial interests, primarily the transmission of property and the maintenance of family wealth (Eekelaar, 1986). Within this framework, children lacked independent interests or agency, and their involvement in decision-making was nonexistent. Their role was to advance the family's objectives, such as preserving landholdings, with no consideration for their personal desires or perspectives (Eekelaar, 1998).

Vestiges of this model persist in modern practices, albeit less overtly. For example, unlawful adoptions, forced marriages, and exploitative child labor practices in some jurisdictions reflect a lingering instrumentalist view of children. Even in common law systems, where explicit endorsement of children as parental property has waned,

remnants of this perspective remain. A notable illustration is a 2004 statement by Justice Gummow of the High Court of Australia, asserting that at common law, parents have a "right of possession" over children below the age of discretion, including the right to exercise physical control (Eekelaar, 1986).

This proprietary mindset has significant implications for practices like corporal punishment. In Australia, for instance, children can be subjected to physical discipline deemed "reasonably necessary" by adults, despite evidence of its ineffectiveness and harm (Australian Institute of Family Studies, 2021). Such practices contravene children's bodily autonomy, a fundamental legal protection afforded to adults, highlighting a double standard rooted in the proprietary model. Similarly, in family law disputes following parental separation, Australia's shared parenting presumption often prioritizes parental interests over children's preferences. Research indicates that children value the quality of time spent with parents over equal time allocation, yet the law frequently overlooks their views, treating them as divisible assets to satisfy adult agendas (Campo & Fehlberg, 2021; Smyth et al., 2014). Under this model, children's voices are silenced, and their agency is denied, perpetuating a view of them as extensions of parental authority.

(b) The Welfare Approach

The welfare model emerged as a response to the exploitative tendencies of the proprietary approach, recognizing children as individuals with interests distinct from those of their parents (Eekelaar, 1986). Central to this model is the *best interests principle*, which prioritizes children's well-being over adult interests. Originating in response to child labor abuses and formalized in England's *Guardianship of Infants Act 1925*, this principle was expanded through the courts' parens patriae jurisdiction (Eekelaar, 1986, pp. 167–168). It mandates that decisions concerning children prioritize their welfare, with parents and the state sharing responsibility to protect them when parental care is inadequate.

While the welfare model represents progress by acknowledging children's independent interests, it often emphasizes their vulnerability over their capacities. This focus on deficits can marginalize children's voices, as the model traditionally presumes they lack the ability to contribute meaningfully to decisions (Tobin, 2021). In its classic formulation, the welfare approach does not require children's participation, viewing them as passive recipients of adult-determined outcomes. Even in contemporary iterations, where children's views may be considered, their input is often secondary, with adults retaining ultimate authority to define their best interests (Gillam et al., 2012).

A stark example is the 2013 New South Wales case where a competent 17-year-old was compelled to undergo a blood transfusion against his wishes (*X v. Sydney Children's Hospital Network*, 2013). The court prioritized the sanctity of life over the young man's autonomy, reflecting a welfare-driven approach that sidelined his views. Similarly, under Australia's *Family Law Act 1975*, children's views are classified as an

"additional" rather than primary consideration in determining their best interests (Family Law Act, 1975, s60CC). This relegation underscores the model's tendency to treat children's perspectives as peripheral, reinforcing adult dominance in decision-making processes. While well-intentioned, the welfare approach often fails to empower children, focusing on protection at the expense of their agency.

(c) The Rights-Based Approach

In contrast, the rights-based approach fundamentally redefines children's status by recognizing them as holders of human rights, entitled to have their interests protected as legal entitlements (Tobin, 2013). Unlike the proprietary model, which subordinates children to parental interests, or the welfare model, which prioritizes adult-defined best interests, the rights-based approach elevates children's interests to the status of rights, imposing mandatory obligations on states to ensure their realization (Tobin, 2013). This approach is grounded in the United Nations Convention on the Rights of the Child (UNCRC), particularly Article 12, which mandates that states assure children capable of forming views the right to express them freely in all matters affecting them, with those views given due weight according to their age and maturity (United Nations, 1989).

Article 12 introduces several critical principles that distinguish the rights-based approach. First, the obligation to "assure" children's participation imposes a positive, non-discretionary duty on states, contrasting sharply with the proprietary model's exclusion of children's views and the welfare model's discretionary consideration (Lundy et al., 2019). This mandate requires states to establish age-appropriate mechanisms to facilitate children's expression, rejecting adult-centric processes that may marginalize their voices. As Iris Young notes, traditional discourse often privileges adult modes of expression, necessitating new, inclusive participation models that accommodate children's unique ways of communicating, such as through art, music, or gestures (Young, 2010; Thomas, 2007).

Table 1. The status of children's views under the 3 models.

Instrumentalist/Proprietary Approach	Welfare Approach	Rights-Based Approach
Children's views irrelevant under the law as the decision maker has an exclusive focus on the interests of adults—children neither seen (as individuals) nor heard	*Classic formulation*—children's views irrelevant under the law as children not considered to have the capacity to form views and offer insight into decisions concerning them—	Mandatory requirement recognised in law that children's views be heard and taken into account in all matters affecting them—children seen, their

Instrumentalist/Proprietary Approach	Welfare Approach	Rights-Based Approach
	children seen but not heard *Contemporary formulations*: may encourage a consideration of children's views but often only an ancillary or tokenistic consideration with the final determination of a child's best interests subject to the discretion of adults	views are heard, and taken seriously

Second, Article 12 applies to all children capable of forming views, challenging historical presumptions of incapacity. The assessment of capacity must avoid adult-centric biases, recognizing that children express views through diverse, non-verbal means (Lundy et al., 2019). Unlike competency, which requires a comprehensive understanding, capacity under Article 12 is a lower threshold, focusing on a child's ability to articulate a perspective, regardless of its sophistication. This broad interpretation ensures that even young children are included in decision-making processes, fostering their agency from an early age.

Third, the scope of "matters affecting them" is expansive, encompassing not only individual decisions, such as medical treatment or parental contact, but also broader issues impacting children as a group, like educational policies or public health measures (Committee on the Rights of the Child, 2009, para. 26). This inclusivity ensures that children's voices are relevant in both personal and societal contexts, amplifying their influence on decisions that shape their lives.

2.1. The Weight Accorded to Children's Views

A key feature of the rights-based approach is the requirement that children's views be given "due weight" based on their age and maturity (United Nations, 1989). The Committee on the Rights of the Child emphasizes that this entails serious consideration, rejecting uniform assumptions about children's understanding based solely on age (Committee on the Rights of the Child, 2009, para. 12). Maturity, though challenging to define, refers to a child's ability to comprehend and evaluate the implications of a matter and express views reasonably and independently (Committee on the Rights of

the Child, 2009, para. 30). Factors influencing this ability include lived experiences, education, intelligence, empathy, and the support provided by adults, such as parents, teachers, or social workers (Rogoff, 1990; Nutbrown, 2006).

The assessment of a child's understanding requires evaluating their insight into the short-, medium-, and long-term impacts of their views, as well as their consideration of others' rights and practical constraints (Lundy et al., 2019). Unlike a binary concept of competency, understanding under Article 12 exists on a continuum, with greater weight accorded to views demonstrating deeper insight (Krappman, 2010). This nuanced approach avoids equating children's capacity with adult standards, recognizing their evolving abilities and fostering their gradual transition toward autonomous decision-making.

2.2. Can Children's Views Be Determinative?

Under the welfare model, children's views are never determinative, as adults retain ultimate authority to define best interests (Eekelaar, 1986). In contrast, the rights-based approach envisions scenarios where a child's views can be decisive, particularly when their capacity matches that expected of an adult (Tobin, 2013). This approach balances two objectives: protecting children's vulnerability, as mandated by Article 3's best interests principle, and recognizing their evolving autonomy under Article 12 (United Nations, 1989). The Committee on the Rights of the Child asserts that these articles are complementary, with Article 12 providing the methodology for achieving Article 3's objective by ensuring children's voices inform best interests determinations (Committee on the Rights of the Child, 2009, para. 74).

When a child's views reflect a level of maturity comparable to an adult's, they become determinative, as there is no moral or legal justification for differential treatment (Tobin, 2013). This principle aligns with the Gillick competency standard but extends beyond medical decisions to all contexts affecting children. For instance, a competent adolescent's decision to consent to medical treatment or participate in research should be respected, absent compelling reasons related to harm prevention. The rights-based approach thus empowers children as active rights-holders, ensuring their participation is not merely symbolic but substantive.

Implications and Alignment with Gillick Competency

The rights-based approach shares similarities with the Gillick competency principle, which recognizes a child's capacity to consent to medical treatment based on sufficient understanding (*Gillick v. West Norfolk and Wisbech Area Health Authority*, 1986). However, it offers a broader and more proactive framework. Article 12's obligation to "assure" participation requires states to implement systems that scaffold children's ability to express views, while Article 13 ensures access to information, enhancing their decision-making capacity (United Nations, 1989). Unlike the binary nature of Gillick competency, the rights-based approach supports a continuum of participation, from substituted to collaborative to independent decision-making, tailored to children's evolving capacities.

Furthermore, Article 5 of the UNCRC redefines the parental role, positioning parents as fiduciaries who guide children toward independent rights exercise, rather than as gatekeepers of consent (Tobin & Varadan, 2019). This contrasts with the welfare model's tendency to prioritize adult authority, as seen in cases like *Re Imogen* (2020), where judicial oversight trumped a competent child's decision due to parental disagreement. By emphasizing systemic support and inclusive processes, the rights-based approach fosters a legal environment where children's agency is respected across childhood, challenging paternalistic norms and promoting their status as rights-holders.

3. IMPLEMENTING A RIGHTS-BASED APPROACH IN PRACTICE

The theoretical foundations of the proprietary, welfare, and rights-based models provide a framework for understanding how children's decision-making is conceptualized in legal systems. While the proprietary model denies children agency and the welfare model prioritizes adult-defined best interests, the rights-based approach, grounded in the United Nations Convention on the Rights of the Child (UNCRC), emphasizes children's status as rights-holders with evolving capacities (Eekelaar, 1986; United Nations, 1989). This approach mandates that children's views be considered in all matters affecting them, with due weight given according to their age and maturity (United Nations, 1989, art. 12). However, translating these principles into practice requires scrutinizing existing legal mechanisms to determine their compatibility with a rights-based framework. This section evaluates three prevalent legal practices—statutory bright-line minimum age rules, age-based presumptive limits, and individual decision-making processes influenced by Gillick competency and parens patriae jurisdiction—assessing their alignment with a rights-based approach and proposing reforms to enhance children's participation and autonomy.

(a) Bright-Line Minimum Age Rules

Bright-line minimum age rules establish fixed age thresholds that restrict children from engaging in activities permitted to adults, such as voting, purchasing alcohol, marrying, or driving. In Australia, for instance, individuals must be 18 to vote, consume alcohol, or marry, and age-based restrictions also apply to obtaining a driver's license or working in certain industries (*Marriage Act 1961* [Cth]; *Electoral Act 1918* [Cth]). These rules typically do not account for individual capacity or maturity, raising questions about their compatibility with a rights-based approach, which emphasizes children's evolving capacities (United Nations, 1989).

At first glance, such rules may appear inconsistent with the UNCRC's definition of a child as anyone under 18, as they impose additional age-based restrictions that seem to undermine the recognition of children's agency (Archard & Tobin, 2019). However, the Committee on the Rights of the Child acknowledges the necessity of minimum age requirements in certain contexts to protect children from harm, such as early marriage, hazardous labor, or military service (Committee on the Rights of the Child, 1991). The critical question is whether these age thresholds are justified under a rights-based

approach, which requires that any restriction on rights be reasonable, proportionate, and evidence-based (Archard & Tobin, 2019).

To assess the legitimacy of a bright-line rule, three criteria must be met: (1) the rule must be established by valid law, (2) it must pursue a legitimate aim, and (3) the measures must be proportionate, with a rational connection to the aim and no less restrictive alternatives available (Archard & Tobin, 2019). For example, Australia's minimum driving age of 17 in most states is justified by the aim of protecting public safety, supported by evidence that younger adolescents lack the neurological and physical maturity required for safe driving (Steinberg & Icenogle, 2019). The rule is enshrined in legislation, pursues a legitimate aim of reducing road fatalities, and is proportionate, as individualized assessments of driving capacity for younger children would be impractical due to the high volume of potential applicants and the need for standardized regulations (Lansdown, 2005).

However, the proportionality of bright-line rules varies by context. In the case of marriage, Australia's *Marriage Act 1961* permits individuals aged 16 to marry under exceptional circumstances with court approval, demonstrating flexibility that aligns with a rights-based approach by allowing individualized assessments (*Marriage Act 1961* [Cth], s 12). This contrasts with voluntary assisted dying laws, which restrict access to individuals 18 and older, even if they meet competency criteria (*Voluntary Assisted Dying Act 2017* [Vic]). Such a blanket prohibition assumes children lack the capacity to make end-of-life decisions, reflecting a welfare-oriented perspective that prioritizes protection over autonomy (White & Willmott, 2014). A rights-based approach would challenge this assumption, advocating for case-by-case evaluations of competency, as seen in jurisdictions like the Netherlands and Belgium, where competent children with parental consent can access assisted dying (White & Willmott, 2014).

The challenge arises when a child demonstrates exceptional maturity below the minimum age threshold. For activities like driving or alcohol consumption, where mass exemptions could strain administrative systems, states may reasonably argue that individualized assessments are unfeasible (Lansdown, 2005). However, for less common practices, such as marriage or medical decisions, the administrative burden is lower, making rigid age limits less defensible. A rights-based approach thus tolerates bright-line rules only when they are justified by evidence, pursue legitimate aims, and are proportionate, with flexibility for individualized assessments where feasible.

(b) Age-Based Presumptive Limits

Age-based presumptive limits establish a threshold at which children are assumed to have decision-making capacity, subject to rebuttal. These differ from bright-line rules by allowing flexibility to assess individual maturity, aligning more closely with the rights-based emphasis on evolving capacities. In Australia, historical provisions under the *Family Law Act 1975* presumed that children aged 14 or older could express wishes that courts should generally respect, unless special circumstances dictated otherwise

(Australian Law Reform Commission, 2019). Although repealed, this provision illustrates a presumption favoring adolescent autonomy. Similarly, South Australia's *Consent to Medical Treatment and Palliative Care Act 1995* allows individuals aged 16 and older to make medical decisions as adults, with provisions for younger children to consent if they demonstrate understanding and the treatment is deemed in their best interests (*Consent to Medical Treatment and Palliative Care Act 1995*).

Such presumptions can advance a rights-based approach by challenging traditional assumptions of children's incapacity, encouraging decision-makers to consider their views seriously. However, their compatibility with a rights-based framework depends on the age threshold and the flexibility of the presumption. High age limits, such as 16 for medical consent, may perpetuate stereotypes that younger children are inherently incapable, undermining Article 12's mandate to include all children capable of forming views (United Nations, 1989; Lundy et al., 2019). For instance, in the English case *Bell v. Tavistock* (2020), the Divisional Court initially ruled that children under 13 were "highly unlikely" to be Gillick-competent to consent to puberty blockers, and those aged 14–15 were "very doubtful," reflecting adult-centric assumptions about capacity (*Bell v. Tavistock*, 2020). The UK Court of Appeal overturned this, affirming the need for individualized assessments, consistent with a rights-based approach that prioritizes evidence over generalizations (*Bell v. Tavistock*, 2021).

The South Australian medical consent law exemplifies both strengths and limitations. It allows children under 16 to consent to treatment if they understand its nature, consequences, and risks, aligning with the rights-based focus on capacity (*Consent to Medical Treatment and Palliative Care Act 1995* [SA], s 12). However, the additional requirement that a doctor confirm the treatment is in the child's best interests introduces a welfare-oriented safeguard, allowing adult judgment to override a competent child's decision (Mathews & Smith, 2023). This dual test dilutes the child's autonomy, as it permits a doctor's perception of best interests to prevail, contrary to the rights-based principle that competent children should have determinative views (Tobin, 2013).

To fully align with a rights-based approach, presumptive limits should adopt a lower or no age threshold, presuming all children capable of expressing views unless proven otherwise. Scotland's *Children (Scotland) Act 2020* exemplifies this by removing the presumption that only children aged 12 and older are mature enough to express views, instead requiring decision-makers to assume capacity unless contradicted by evidence (*Children (Scotland) Act 2020*). This model ensures compliance with Article 12 by prioritizing children's participation across all ages, avoiding arbitrary cutoffs that marginalize younger voices (Lundy et al., 2019). By creating rebuttable presumptions that favor capacity, legal systems can foster an environment where children's agency is respected, consistent with their evolving capacities.

(c) Individual Decision-Making

In the absence of specific legislative frameworks, individual decision-making for children in common law jurisdictions is governed by the principle of Gillick competency and, in disputes, the parens patriae jurisdiction or specialized family court powers. These mechanisms shape how children's views are considered in contexts like medical treatment, gender-affirming care, or family law disputes, offering opportunities to align with a rights-based approach but also revealing persistent welfare-oriented biases.

(i) Gillick Competency

The Gillick competency principle, established in *Gillick v. West Norfolk and Wisbech Area Health Authority* (1986), allows children with sufficient understanding and intelligence to consent to medical treatment, independent of parental approval (*Gillick v. West Norfolk and Wisbech Area Health Authority*, 1986). This principle aligns with a rights-based approach by recognizing children's evolving capacities, prioritizing maturity over age, and empowering them to make autonomous decisions in medical contexts. For example, in *Bell v. Tavistock* (2021), the UK Court of Appeal upheld Gillick competency, rejecting age-based presumptions and requiring individualized assessments for children seeking gender-affirming treatment (*Bell v. Tavistock*, 2021). Similarly, a 2022 Queensland Supreme Court decision affirmed that a Gillick-competent child nearing 17 should not be denied gender-affirming treatment due to parental disagreement, citing the child's human rights and autonomy (Jowett & Kelly, 2021).

Gillick competency's alignment with a rights-based approach is evident in its application to diverse medical decisions, such as reproductive health services or vaccinations opposed by parents. In these cases, a competent child's decision should prevail, reflecting the rights-based principle that maturity, not age, determines autonomy (Tobin, 2023). However, Gillick competency is not without limitations. Its binary nature—either a child is competent or not—lacks the nuance of a rights-based approach, which supports a continuum of participation from collaborative to independent decision-making (Lundy et al., 2019). Moreover, its focus on medical consent limits its applicability to other contexts, such as education or child protection, where a rights-based approach demands broader participation.

A critical question is whether Gillick competency adequately addresses future capacity in present decisions. A rights-based approach advocates deferring decisions until a child can make them autonomously, particularly in cases involving irreversible interventions, such as medical procedures for children with variations in sex characteristics (Tobin, 2021b). In *Marion's Case* (1992), the Australian High Court endorsed this principle, stating that irreversible procedures should be delayed if a child may later acquire the capacity to decide, unless urgent health needs dictate otherwise (*Secretary, Department of Health and Community Services v JWB and SMB* [Marion's Case], 1992). This aligns with a rights-based approach's emphasis on preserving future

autonomy, contrasting with welfare models that prioritize early intervention based on adult norms (Eekelaar, 1994).

Despite its alignment with rights-based principles, Gillick competency's application is inconsistent. In high-stakes scenarios, such as refusals of life-saving treatment, courts may override competent children's wishes, as seen in *X v. Sydney Children's Hospital Network* (2013), where a 17-year-old's refusal was set aside (*X v. Sydney Children's Hospital Network*, 2013). This reflects a welfare-oriented bias that a rights-based approach seeks to overcome by requiring robust consideration of children's views and human rights (Tobin, 2013).

(ii) Parens Patriae Jurisdiction

The parens patriae jurisdiction empowers superior courts to act as the "supreme parent," making decisions in a child's best interests (Brereton, 2017). Historically welfare-oriented, this jurisdiction often marginalizes children's views, as seen in *X v. Sydney Children's Hospital Network* (2013), where a competent 17-year-old's refusal of a blood transfusion was overridden despite his maturity, with the court citing his religious upbringing as a limiting factor (*X v. Sydney Children's Hospital Network*, 2013, paras. 39–41). The absence of reference to the UNCRC or human rights underscores the jurisdiction's welfare focus, prioritizing protection over autonomy.

However, recent cases suggest a shift toward a rights-based application. In the 2022 Queensland case, the Supreme Court exercised parens patriae* jurisdiction to uphold a Gillick-competent child's right to treatment, questioning why a mature adolescent's autonomy should be curtailed by parental dissent (Jowett et al., 2022). This decision reflects a rights-based approach by integrating human rights considerations, though it stops short of detailing specific rights, indicating a need for clearer judicial reliance on the UNCRC (Tobin, 2023). Such progressive interpretations suggest the parens patriae jurisdiction can evolve to prioritize children's autonomy, but its application remains jurisdiction-dependent, creating disparities in outcomes.

(iii) Family Court Jurisdiction

In Australia, the *Family Law Act 1975* grants the Federal Circuit and Family Court authority over children's welfare, prioritizing their best interests (*Family Law Act 1975* [Cth], s 60CA). Primary considerations include maintaining parental relationships and protecting children from harm, while children's views are an "additional" factor, weighted by maturity (*Family Law Act*, s 60CC). This structure reflects a contemporary welfare model, where children's voices are acknowledged but not determinative, as seen in *Re Imogen* (2020), where a competent child's decision for gender-affirming treatment was subject to judicial oversight due to parental disagreement (*Re Imogen*, 2020). Critics argue this approach discriminates against children seeking gender-affirming care, as other medical decisions by Gillick-competent children avoid such scrutiny, and delays can harm their well-being (Dimopoulos, 2022; Jowett & Kelly, 2021).

The *Clay v. Dallas* (2022) case further illustrates this welfare bias. A 15-year-old's desire for a COVID-19 vaccine was supported by professionals, but the Family Court of Western Australia treated her views as a significant but not decisive factor, failing to assess her Gillick competency (*Clay v. Dallas*, 2022). This contrasts with a rights-based approach, which would prioritize her autonomy, especially given her demonstrated maturity. The *Family court's* legislative framework, which subordinates children's views to adult judgment, underscores the need for reform to align with Article 12's mandate for equal consideration of mature views (Lundy et al., 2019).

Toward a Rights-Based Reform

The analysis of bright-line rules, presumptive limits, and individual decision-making reveals a legal landscape where welfare principles often overshadow children's rights. Bright-line rules are permissible under a rights-based approach if evidence-based and proportionate, but flexibility is essential for individual assessments in less regulated contexts. Presumptive limits should adopt a universal capacity assumption, as in Scotland, to avoid marginalizing younger children. Individual decision-making processes must prioritize Gillick competency and reorient parens patriae jurisdiction toward rights-based principles, ensuring competent children's views are determinative.

Reforms should include legislative updates that mandate children's participation across all contexts, training for judges on assessing maturity, and revising family law to make children's views a primary consideration. By embedding Article 12 principles, legal systems can empower children as active rights-holders, fostering a balance between protection and autonomy that respects their evolving capacities.

4. CONCLUSIONS: THE IMPERATIVE FOR ADULTS TO ADAPT THEIR PERSPECTIVES

The rights-based approach to children's decision-making, as outlined in the United Nations Convention on the Rights of the Child (UNCRC), offers a transformative framework that recognizes children as rights-holders with evolving capacities. This approach challenges traditional legal models that prioritize adult authority or welfare considerations, advocating for children's active participation in decisions affecting their lives. However, its effective implementation requires a fundamental shift in how adults—parents, judges, and policymakers—perceive and engage with children's agency.

The analysis of legal practices reveals that bright-line minimum age rules, presumptive age limits, and individual decision-making processes often reflect welfare-oriented biases that marginalize children's voices. While some mechanisms, like Gillick competency, align with a rights-based approach by prioritizing maturity over age, their application is inconsistent, particularly in high-stakes scenarios where courts revert to paternalistic interventions. To fully realize a rights-based framework, adults must evolve their capacities to respect children's autonomy, moving beyond entrenched assumptions of incapacity.

This evolution involves embracing Article 12's mandate to give due weight to children's views based on their age and maturity. It requires creating inclusive processes that accommodate diverse forms of expression, such as art or gestures, and ensuring children have access to information to make informed decisions. Legal reforms should mandate children's participation across all contexts, lower presumptive age thresholds, and reorient the parens patriae jurisdiction to prioritize rights over protection. Training for decision-makers is essential to assess maturity without adult-centric biases, fostering a culture where children's agency is valued.

Ultimately, the rights-based approach demands that adults relinquish traditional power dynamics, recognizing children as partners in decision-making. By doing so, legal systems can balance protection with empowerment, ensuring children's voices shape their futures. This shift is not merely a legal obligation but a moral imperative to uphold children's dignity as rights-holders.

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Conflicts of Interest

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REFERENCES

1. Archard, D., & Tobin, J. (2019). Article 1: The definition of a child. In J. Tobin (Ed.), The UN Convention on the Rights of the Child: A commentary (pp. 21–40). Oxford University Press.
2. Australian Institute of Family Studies. (2021). Physical punishment legislation: CFCA resource sheet—August 2021. https://aifs.gov.au/sites/default/files/publication-documents/2107_physical_punishment_resource_sheet_0.pdf
3. Australian Law Reform Commission. (2019). Family law for the future: An inquiry into the family law system (Report No. 135). Commonwealth of Australia.
4. Bell v. Tavistock and Portman NHS Foundation Trust, [2020] EWHC 3274 (Admin) (Eng.).
5. Bell v. Tavistock and Portman NHS Foundation Trust, [2021] EWCA Civ 1363 (Eng.).
6. Brereton, P. (2017). The origins and evolution of the parens patriae jurisdiction. Supreme Court of New South Wales. https://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2017%20Speeches/Brereton_050517.pdf
7. Campo, M., & Fehlberg, B. (2021). The meaning of home for children and parents after parental separation: Recent insights from a qualitative study. Australian Journal of Family Law, 34, 163–187.
8. Children (Scotland) Act 2020 (ASP 4). (Scotland).
9. Clay v. Dallas, [2022] FCWA 167 (Austl.).
10. Committee on the Rights of the Child. (1991). Guidelines for periodic reports (CRC/C/5). United Nations.
11. Committee on the Rights of the Child. (2009). General comment no. 12: The right of the child to be heard (CRC/C/GC/12). United Nations Office of the High Commissioner for Human Rights. https://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-GC-12.pdf
12. Consent to Medical Treatment and Palliative Care Act 1995 (SA). (South Australia).
13. Dimopoulos, G. (2022). Decisional privacy and the rights of the child. Routledge.
14. Eekelaar, J. (1986). The emergence of children's rights. Oxford Journal of Legal Studies, 6(2), 161–182. https://doi.org/10.1093/ojls/6.2.161
15. Eekelaar, J. (1994). The interests of the child and the child's welfare: The role of dynamic self-determinism. International Journal of Law and the Family, 8(1), 42–61. https://doi.org/10.1093/lawfam/8.1.42
16. Eekelaar, J. (1998). Children's rights: From battle cry to working principle. In M.-T. Meulders-Klein (Ed.), Droit comparé des personnes et de la famille (pp. 197–207). Bruylant.
17. Electoral Act 1918 (Cth). (Australia).
18. Family Law Act 1975 (Cth). (Australia).
19. Gillick v. West Norfolk and Wisbech Area Health Authority, [1986] AC 112 (UK).
20. Guardianship of Infants Act 1925 (15 & 16 Geo. 5 c. 45). (United Kingdom).
21. Gillam, L., Hewitt, J., & Warne, G. L. (2012). Ethical principles for the management of children with disorders of sex development: A systematic approach for individual

cases. In J. M. Hutson, G. L. Warne, & S. R. Grover (Eds.), Disorders of sex development: An integrated approach to management (pp. 149–153). Springer.
22. Jowett, S., & Kelly, F. (2021). Re Imogen: Step in the wrong direction. Australian Journal of Family Law, 34, 31–50.
23. Jowett, S., Dimopoulos, G., & Kelly, F. (2022). Reforming the law on consent to medical treatment for trans youth: A renewed call for legislative intervention. Laws, 11(4), Article 56. https://doi.org/10.3390/laws11040056
24. Krappman, L. (2010). The weight of the child's view (Article 12 of the UN Convention on the Rights of the Child). International Journal of Children's Rights, 18(4), 501–513. https://doi.org/10.1163/157181810X12659851024315
25. Lansdown, G. (2005). The evolving capacities of the child. UNICEF.
26. Lundy, L., Tobin, J., & Parkes, A. (2019). Article 12: The right to respect for the views of the child. In J. Tobin (Ed.), The UN Convention on the Rights of the Child: A commentary (pp. 397–434). Oxford University Press.
27. Marriage Act 1961 (Cth). (Australia).
28. Mathews, B., & Smith, M. (2023). Children and consent to medical treatment. In B. White, F. J. McDonald, & L. Willmott (Eds.), Health law in Australia (pp. 1–56). Thomson Reuters.
29. Mercy Hospitals Victoria v D1 and Anor, [2018] VSC 519 (Austl.).
30. Nutbrown, C. (2006). Threads of thinking: Young children learning and the role of early education (3rd ed.). Sage.
31. Re Imogen, [2020] FamCA 617 (Austl.).
32. Rogoff, B. (1990). Apprenticeship in thinking: Cognitive development in social context. Oxford University Press.
33. Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case), [1992] HCA 15 (Austl.).
34. Smyth, B., Chisholm, R., Rodgers, B., & Son, V. (2014). Legislating for shared time parenting after parental separation: Insights from Australia? Law and Contemporary Problems, 77(1), 109–149.
35. Steinberg, L., & Icenogle, G. (2019). Using developmental science to distinguish adolescents and adults under law. Annual Review of Developmental Psychology, 1, 21–40. https://doi.org/10.1146/annurev-devpsych-121318-085105
36. Thomas, N. (2007). Towards a theory of children's participation. International Journal of Children's Rights, 15(2), 199–218. https://doi.org/10.1163/092755607X206489
37. Tobin, J. (2013). Justifying children's rights. International Journal of Children's Rights, 21(3), 395–441. https://doi.org/10.1163/15718182-02103004
38. Tobin, J. (2021a). From emerging rights to enduring relevance: The legacy of John Eekelaar's work on children's rights. In J. Scherpe & S. Gilmore (Eds.), Family matters: Essays in honour of John Eekelaar (pp. 689–704). Intersentia.
39. Tobin, J. (2021b). Medical interventions for children born with variations in their sex characteristics: What's the rights approach? Monash Bioethics Review, 39(Suppl 1), S55–S77. https://doi.org/10.1007/s40592-021-00132-8
40. Tobin, J. (2023). Law and children's decision making: What is the rights approach? Laws, 12(4), Article 71. https://doi.org/10.3390/laws12040071

41. Tobin, J., & Varadan, S. (2019). Article 5: The right to parental direction and guidance consistent with a child's evolving capacities. In J. Tobin (Ed.), The UN Convention on the Rights of the Child: A commentary (pp. 161–198). Oxford University Press.
42. United Nations. (1989). Convention on the Rights of the Child. United Nations Treaty Series, 1577, 3. https://treaties.un.org/
43. Voluntary Assisted Dying Act 2017 (Vic). (Victoria, Australia).
44. White, B., & Willmott, L. (2014, February 17). Belgium's child euthanasia law—Implications for Australia. The Conversation. https://theconversation.com/belgiums-child-euthanasia-law-implications-for-australia-23165
45. X v. Sydney Children's Hospital Network, [2013] NSWCA 320 (Austl.).
46. Young, I. M. (2010). Inclusion and democracy. Oxford University Press.