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Book Review of The Best Interests of the Child in Healthcare

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THE BEST INTERESTS OF THE CHILD IN HEALTHCARE



by Sarah Elliston. New York: Routledge-Cavendish, 2007. 328pp. Hardback. \$190.00/£49.00. ISBN: 9781844720439. Paper \$53.95/£25.00. ISBN: 9781844720422.

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pp.605-609

Sarah Elliston, a lecturer in medical law at the University of Glasgow, has produced an accessible treatise-like work that should serve as a useful reference for British academics in law and medicine and as an engaging introduction to the law governing medical decision making for children for a general British audience. After an opening chapter in which she identifies many of the difficult ethical questions that arise with more serious medical interventions for children, Elliston presents five additional chapters, in each of which she summarizes the law and empirical literature relevant to answering one or more of these questions: when should children themselves have the power to decide whether they will receive medical care, how should decisions be made by others for a child who is too young to be given that power, when should a parent have the power to refuse treatment for a child against the recommendation of medical professionals, to what extent should genetically impaired infants receive life-prolonging treatment, and when is it permissible to use one child to benefit others – in particular, as research subjects or as organ donors?

These questions are perennial ones in the legal system, and doctrine is continually developing. I am an American legal academic not much familiar with UK law in this arena, so I cannot judge whether Elliston's book is the best reference on these topics, but she culls a great number of court decisions and offers plausible interpretations of UK statutes and of international legal texts. I was left with the impression that the book is thorough and reliable, and therefore that it will be useful to anyone who wish to know the current state of the law in the UK. Elliston does discuss some decisions of the European Court of Human Rights, which would be pertinent throughout Europe, but for domestic laws she generally confines herself to the UK, so the proper audience for her discussion of legal rules is limited to the UK. As a reference work for a UK audience, then, Elliston's book appears to be a success.

Elliston also aims to make the book something more than just a treatise. In the first, quite lengthy, chapter, Elliston undertakes to advance normative positions on the ethical questions she identifies, to establish a framework for evaluating the legal rules and decisions she discusses throughout the rest of the book. Normative analysis transcends geographical boundaries and legal jurisdictions, so success in this undertaking would make Elliston's book a worthwhile read for a much larger audience. In this respect, though, success is much more difficult to achieve, and I was not satisfied that Elliston had done so. The positions [606] Elliston takes, as to fundamental questions such as who has what moral rights in connection with medical decision making for children and what is a proper substantive rule for effectuating any rights of children, are plausible and, in fact, popular ones. She adds some gravity to them by her rich account of real world dilemmas. But ultimately she fails to back her positions with convincing arguments, and at times she simply asserts what her view is without offering reasons why others should share her view. Thus, readers who are well versed in the philosophical literature addressing parent-state conflicts over child rearing or who are looking for a serious theoretical analysis of the ethical issues raised by medical decision making for children are likely to find the normative aspect of Elliston's otherwise fine work disappointing.

Examining the largest of Elliston's normative claims will illustrate how I believe the book falls short in striving to be more than a treatise. At the outset of the book, Elliston attacks the best interests test as inappropriate for judicial adjudication of disputes between two parents or

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between a parent and medical professionals concerning medical interventions on children. Instead courts should “be concerned only with ensuring that significant interests of the child are not put at risk and that the decisions made by parents meet a reasonableness standard” (pp.2-3). Elliston thus appears to advocate a two-part legal test, authorizing courts to override parental wishes if they find either that parental wishes would put a child’s welfare at risk or that a parent is being unreasonable. Elliston suggests that her adopting a harm-to-child or parental-unreasonableness test is “heretical” (p.2), and it might seem so against the backdrop of the GILLICK decision and the Children Act of 1989 in the UK, which dictate that in matters involving the “care and upbringing of a child” the child’s welfare must be the “paramount consideration.” But many political theorists have asserted such a position, and numerous other court decisions in the English-speaking world reflect a harm or unreasonableness test rather than a best interests test. (Dwyer 1996). Elliston herself cites several British scholars who have taken this position and notes that such an approach “is already prevalent in healthcare practice” (pp.2-3).

Risk to significant interests has fairly concrete meaning, but what is “reasonableness” in this context? None of the theorists Elliston cites has spelled out and defended a particular conception of parental reasonableness, and Elliston does not either. If her target is just court decisions in which judges conclude that a parent’s wishes are reasonable but they are going to override those wishes anyway, then she might not need to supply her own definition of reasonableness. She can simply argue that parents’ views should receive deference when everyone agrees the views are reasonable, at least so long as courts are deploying a plausible notion of reasonableness, such as “not clearly contrary to the child’s overall welfare or best interests as determined by the courts after receiving evidence from all concerned parties.” Elliston is not likely to receive much resistance to a position that, when it is unclear which course of action is better for a child, courts should let parents decide. But that is rarely true in litigated cases; typically when judges rule against parents in conflicts between [607] them and medical professionals, they find that the parents’ wishes are clearly contrary to the child’s best interests and are ipso facto unreasonable. To criticize such rulings, Elliston would need to supply and defend her own, alternative definition of reasonableness, but she does not do so. The reasonableness prong of her test thus appears to be vacuous and/or of little practical significance.

Elliston better articulates and defends her position that courts should override parental wishes only to avoid risk to significant interests, rather than on the basis of a best-interests analysis. The arguments she offers for the position have had sufficient currency in legal scholarship to justify characterizing them as familiar. The first rationale is that applying a best interests test “usurps the legitimate authority and function of parents” (p.3). Elliston’s primary reason for adopting this test is not, therefore, the child-centered one that courts should override a parental decision only to avoid significant harm to the child because otherwise the cost of intervention for the child (e.g., parental anxiety, litigation expenses for the family, delayed resolution of stressful situations, and so on) would exceed the benefit. Such a child-centered rationale would be an entirely plausible – indeed, arguably irrefutable – rationale. In fact, if one assumes such costs for the child are always present, a risk-to-significant-interests test might in practice be indistinguishable from a best-interests test. Depending on how great one thinks those costs are, one might even think Elliston’s test as quoted above is insufficiently deferential to parents even from a child welfare perspective, for it seems unlikely that a parent-parent or parent-doctor dispute would ever end up in court unless a parent’s wishes clearly threaten some significant health interest of a child. For example, within a best-interests framework, a court might well conclude that it should not order Christian Scientist parents to have their child receive certain vaccinations, because doing so would cause all members of the family (including the child) to experience great anxiety about the fate of the child’s soul. But a court applying Elliston’s risk-to-significant-interests test might well conclude that it should override the parents’ religious objection, because failing to receive vaccinations straightforwardly creates a risk of serious disease for the child. Elliston appears not to have thought through how exactly her test differs from a best-interests test, but on the surface her test appears unacceptably incomplete, focusing only on the potential costs of non-intervention and ignoring the potential costs of intervention. Elliston also is not consistent in articulating the test, for at other points she expresses it in terms of “significant risk of serious harm,” which would likely produce in many cases outcomes different from what a “risk to significant interests” test would produce.

Elliston’s rationale for her test, though, is adult-centered rather than child-centered, appealing to parents’ “legitimate authority and function.” In fact, she states outright that parents should be empowered to compromise children’s welfare in order to vindicate the parents’ “own rights to determine the values that are important to them in raising their children” (p.37). Elliston never

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identifies the source of such a parental entitlement to effectuate their values through control of a child's life, [608] nor does she explain why a court should view parents' authority and function as encompassing a power to do what the court believes to be clearly detrimental (though not "seriously" so) for the child. There seems implicit an invocation of some natural right of parents to sovereignty over their offspring. Elliston's repeated use of the term "parental autonomy," which is actually an oxymoron (because "parental" means "related to directing the life of a child" and "autonomy" means "power to direct one's own life"), suggests that she views children as mere extensions or appendages of their parents rather than as persons in their own right. The notion of a natural parental right of dominion over offspring remains a popular notion, to be sure, but in the face of serious critiques of natural rights in general and of parental entitlement in particular in the contemporary philosophical literature, anyone aiming to defend a normative position like Elliston's today would need to make such an invocation explicit and engage the philosophical literature. (Dwyer 1998, ch.3)

Elliston also maintains, by way of support for a harm test, that best-interests decision making is indeterminate. It is too uncertain, she maintains, what a child's welfare entails, and "[g]iven the unavoidable lack of precision in this area, the values and preferences of decision-makers are bound to enter into the equation in judging whether the predicted outcomes are what are best for the child" (p.17). She cites by way of authority for this criticism several notables of family law scholarship, such as John Eekelaar, Robert Mnookin, and Jonathan Herring. I have responded at length elsewhere to criticisms of the best-interest test (Dwyer 2006, ch.7), but rather than reiterate the defense here, I will simply note that Elliston's proposed substitute test is hardly more determinate. Courts are to assess in part whether parents' decisions are "reasonable," yet as noted above, Elliston provides little clue as to what that amorphous term means. She suggests in one passage that parents act reasonably when they balance the child's welfare against competing interests within the family, including the parents' own (p.37). But surely the parents would have to do this balancing in a rational and fair manner to deem it reasonable. If judges therefore must assess whether parents have done a rational and fair balancing, then in practice judges would still have to assess what is in the child's best interests (to know whether and to what degree the parental choice compromises it), and in addition would need to determine independently what is in the interests of other family members (some of whom might also be children) and also what weight should be given to other family members' interests. That would simply multiply the opportunities for judges' subjective views and biases to infect decision making. The best interests test, by comparison, limits judicial discretion by narrowing the proper focus to one person's welfare. Likewise, asking judges to decide when a parental decision poses "a risk" to "significant interests," or poses a "significant risk" or "unacceptable risk" of "serious harm," calls upon them to make highly subjective decisions. Do children have a significant interest in not getting the chicken pox, thus authorizing a court to order vaccination against the disease despite parental objection? Is a pregnant teen seriously harmed by being forced to carry the baby to term? [609]

By way of further condemnation of the best-interests test, Elliston makes the common criticism that, in applying a best interests test, judges in practice sometimes covertly let other considerations, and in particular the interests of other parties infect the decision making (p.22). The most common example might be the sympathy many judges feel for mothers who manifest great distress at the prospect of having to spend much time away from their children. Such sympathy might be some part of the explanation for why primary paternal custody is rather rare. But it is a non sequitur to reason from the premise that courts do not fully apply a best interests standard to a conclusion that they should instead apply some other standard, one that ostensibly invites judges (by virtue of a "serious harm" standard) to subordinate the child's welfare more often to the feelings and desires and interests of parents, and one that encourages judges (by virtue of a parental reasonableness test) to focus on the parents' state of mind instead of on the child.

In sum, the normative discussion in the first chapter of this book is underdeveloped and does not add to the extant theoretical literature addressing state limitations on parental discretion. The strength of the book is rather in supplying a useful reference for a UK audience and in pointing to concrete decision making contexts in which it is especially difficult for courts to apply a best interests test. Hopefully the shortcomings of the normative dimension of the book will not prevent readers from benefiting from the rich legal and empirical presentations.

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