THE NATURE OF PARENTAL AUTONOMY AND JUSTIFICATION OF ITS LIMITATION IN CASE OF IMMEDIATE MEDICAL INTERVENTION

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ABSTRACT
In ideal circumstances, parents are the most devoted advocates for their children. They have first-hand information about their children and care passionately about their welfare. Therefore, the law recognizes parents as guardians of children’s welfare and gives them substantial autonomy in making the decision for their children. Sometimes the actions of well-meaning parents, as in the case of the immediate medical intervention, could be a subject of testing limits of parental autonomy. It is especially noticeable when parental decisions represent a risk for child well-being, and the state has to intervene in order to protect it. However, the decision whether the state intervention into the parent-child relationship is legitimate is quite difficult since it is necessary to take into account a specific legal character of the parent-child relationship and balance between the parental autonomy and the best interest of the child. With an aim to evaluate the legitimacy of limiting parental autonomy in case of immediate medical intervention, the author will analyse the extent to which parental autonomy should be free of coercive intrusion of the state.

Keywords: parental autonomy, the best interest of the child, harm standard, fiduciary character of the parent-child relationship

INTRODUCTION
Parents have a significant role in their children’s lives. They have automatically granted guardianship over their child at birth and hence the legal right to make nearly all major and minor decisions for their children.[1] Under the framework given by the law, parents are immune from interventions of others in their relationship with the child and can autonomously make decisions concerning their child as long as the child’s welfare is not endangered. However, the parents have their own needs, interests, and desires that may not always correspond to the best interests of their child or even may not be consistently and exclusively motivated by its child’s best interest. There is also a general tendency for parents to interpret reality in ways biased towards their own wishes which affect the way they interpret child interests.[1] By interpreting child’s interests in a manner consistent with their own wishes, regardless if these interpretations are meaningfully true or not, the parents are not achieving legally recognized protectionist aims toward the best interest of the child.[1] Hence, the decisions that are based on the vindication of parental personal autonomy interests in the child’s
interests should not be interpreted as decisions that are made in the best interest of the child. Moreover, they should be taken as the legal ground for the state intervention into the parent-child relationship, especially if they are linked to the chronic and severe abuse or neglect of the child’s welfare. However, protection of the child’s best interest and with it related wellbeing is quite an onerous task as it requires from the state to prove that the parental decisions are based on their personal autonomy interests which are causing harm to the child.\[2a]\,[3]

In order to analyse the source of parental autonomy and distinguish it from personal autonomy of parents, the first chapter will deal with the nature of the parent-child relationship. The second chapter will analyse when parental autonomy can be legitimately limited. In the third and fourth chapter, the discussion will concentrate on some aspect of parental autonomy and its limitations in Croatia. In the final chapter, the author will offer guidance to the decision-making process that would lead to legitimate limitation of parental autonomy by the state in the cases of the immediate medical interventions.

THE NATURE OF THE PARENT-CHILD RELATIONSHIP

The relationship between parents and their child has a unique nature as it aims to ensure the child’s best interest, which is necessary for his development into a healthy, productive adult.\[4\] The parents are autonomous in the protection of the child’s best interest, which means according to Hohfeldian normative relations, that they are immune from outside interference in allocating responsibilities according to the needs of the child and to their abilities and availability.\[5\],[6] This kind of parent-child relationship is based on the idea that the children are legal actors that are not fully autonomous as they are not able to make un-coerced choices and actions of the right-holder according to their conception of the good life.\[5\] It is because the children lack factual competencies, such as physical or cognitive one, and consequently full legal capacity for agency.\[7\] Therefore, the parent-child relationship can be observed as a relationship where the law entrusted the parents with powers to make the decisions for the benefit of the child as the child at varying points of his development does not have the factual competencies required to hold a power to enforce the claims regarding the enforcement of his rights.\[8\],[9],[10] Instead, the temporarily powerless child can enforce his claims only if someone else will enforce it on his behalf.\[8\] It means that the power to enforce or waive claims lies outside the child as the claim-holder, with the state, a designated institution or an individual.\[8\] The separation between claim and power logically allows that a child lacking the competency to hold power is not excluded from holding a right that aims to protect his interests.\[10\],[11],[12] Thus, the parents have legal powers to enforce rights instead of the child in order to protect his best interests. Those legal powers are traditionally referred to as parental rights.\[9\] Parental rights are considered to be the legal prerogatives that only parents have in regards to their child. On the ground of parental rights, the parents can decide where their child lives, what school he goes to, what religion he will be brought up in, and even what medical interventions can be taken in order to preserve his health.\[9\] However, the parents do not have rights over their child nor the child could be the resource that belongs to the parents.
The parents have more managerial capacity that includes an extensive range of decisions that affect the interests of their child as the principals. Thus described the relationship between parents and child suggest that the relationship is most closely analogous to the fiduciary relationships which are a subset of agency relationships where one party undertakes to perform a service for another. A key goal in the regulation of fiduciary relationships is that the fiduciary needs to serve in the best interests of his principal. This is because the fiduciary is the one who holds the relevant decision-making power. If we relate that to the parent-child relationship it means that the parents like fiduciaries hold the power to make decisions relating to the child’s best interests for and on behalf of the child. On the other hand, if the parents are making the decisions that are not perceived to be in the best interests of the child, the parental decisions will be set aside, as in general fiduciary law.

This means that parents cannot act contrary to the general law, whatever they may think is in the child’s best interests. In Hohfeldian terms, the parents have duties that must be carried out for the benefit of the child. Those duties are analogue to the duties of care, skill and diligence that is presumptively owed by all fiduciaries. Like fiduciaries generally, the parents are obliged to meet an objective standard of care. For example, if the child is ill and the parents decide to treat him with natural remedies, the parents are actually failing to provide the necessities of life to their child. Moreover, they are breaching the duty to care about the child’s interests with reasonable diligence and loyalty as they are placing their personal interests to treat a child with natural remedy above child’s interests to be treated with the available achievements of the modern medicine.

In that case, as in general fiduciary law, the parents as fiduciaries can be removed and replaced by the state, designated institution or some other individual, although they are presumed to be the “first best” caretakers that are preferred to all other potential caretakers.

THE LIMITATION OF PARENTAL AUTONOMY AND THE CHILD’S BEST INTEREST

The child who has been brought into being should be continuously supported throughout his childhood by parents, as the child is incapable of taking care of himself “during the imperfect state of childhood”. This parental support, as it was mentioned previously, is nothing but the power and duty of taking care of the offspring that arise from the idea that parents should furnish their children with love, attention and security without interference from others. The parental autonomy in ensuring the welfare of the child is immune from the interference of others, so long as the parents are performing their powers and duties in the best interests of the child. It means that the parental immunity regarding taking care of the child’s best interests without interference is not shielded from state’s power as the state is under a duty to refrain from interfering only if the parents are not performing their parenting tasks adequately. However, the legal basis for the limitation of parental autonomy should not be any misconduct in performing parental powers and duties. There must be serious neglect or other misconduct that will justify the standpoint where withdrawal of the child from the authority of their parents is in the best interests of the children.

What would be the best interest of a child is hard to determine, as it requires judge-
ment whether the best interest is the interest that is determined by child’s parents or it is the interest that is imposed by the state against the parents’ wishes.\textsuperscript{2a,15} Therefore, the limitation of parental autonomy should not be taken lightly and interference in the parent-child relationship should be strongly justified.

The cases in which the child is a subject of a medical treatment show us the complexity of the problem regarding the limitation of parental autonomy. For example, if we want to estimate, which medical treatment is the most favourable for a child it is easy to make decisions when a child’s life is jeopardized and where death can be averted with easy, safe, and effective treatment.\textsuperscript{2a} However, little controversy exists when the results of the medical treatment are followed by risk to the child’s health as therapy have its negative aspects. It is especially noticeable when the therapy at the same time can cause further damage to health and decrease the child’s chance of survival. In the situation of refusal of the medical treatment, it may be difficult to determine whether refusal is based only on parental wishes which affect the way they interpret child interests. For example, the parents could be exclusively motivated by their wish that child does not suffer from any side effects as they are not sure in the quality of therapy or do not believe that therapy could help the child to get well or improve his chances for survival. Undoubtedly, if the decision regarding medical treatment is motivated only by parental wishes based on the internal valuation without taking into account the interests of the child to get well, parents are abusing the parental autonomy.

Some authors think that the best interest of a child is not always easy to determine and explain it as a matter of values. So the limitation of parental autonomy should be estimated by some standard which as the general legal criteria requires judiciary decision making.\textsuperscript{16} For example, Diekema thinks that the harm standard is superior to best interests when judging whether intervention is justified against parental refusals of medical treatment.\textsuperscript{2a,2b} Elliston argues that intervention against parental decisions should only be based on harm if the parental decisions are unreasonable and lead to child’s harms.\textsuperscript{17} Shah advocated limitation of parental autonomy in cases where parental decision-making is exposing children to some unjustified risk of significant harm.\textsuperscript{18} Similarly, de Vos et al claim that parental requests for withdrawal of life-sustaining treatment should be allowed if they do not increase the risk of preventable harm.\textsuperscript{19}

Confirmation of the idea that the harm as standard provides a basis for identifying the threshold for state interference in parental autonomy finds its further justification in the Mills argument that „the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others”.\textsuperscript{2a} Feinberg, as well, has further refined the notion of autonomy that can be applicable to restriction of parental autonomy by arguing that restrictions on an individual’s freedom are justified only if they are effective at preventing the harm.\textsuperscript{2a}

Therefore, if we consider children as the most vulnerable members of the community that should enjoy the protection of their best interests, interference into a parent-child relationship should only be justified in cases when parental actions or decisions impose a risk to the best interest of a child and moreover if they present a significant risk of serious preventable harm.\textsuperscript{2a}
THE PARENTAL AUTHORITY AND PROTECTION OF THE CHILD’S HEALTH IN CROATIAN LEGAL SYSTEM

The parental autonomy found a legal base in the Constitution of the Republic of Croatia (Official Gazette of the Republic of Croatia, No. 56/90, 135/97, 113/00, 28/01, 76/10 i 5/14; hereinafter: CRC) and in the Family Act (Official Gazette of the Republic of Croatia, No. 103/15; hereinafter: FA) as one of the basic principles that gives special value to the parent-child relationship. According to Article 64 paragraph 1 of the CRC parents have the right and freedom to make independent decisions concerning the upbringing of their children. Thus, according to Article 6 of the FA no one has the power to interfere in the parent-child relationship unless the assistance is needed in order to protect the rights of a child. However, parents are not only having the right to live with their children and to take care of them, but they also have some duties and responsibilities.

In other words, parental freedom to rule the life of their children is limited by individual rights of children and the state’s power to intervene on behalf of the children. One of the fundamental rights that limit parental autonomy is the right to health, which is guaranteed in Articles 6 and 24 of the Convention on the Rights of the Child (20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3). The right to health is also recognized as a fundamental right of a child in Article 84 paragraph 1 of the FA, which gives the child an entitlement to adequate care for his health.

Importance of care for a child’s health is huge as endanger of health may result in death and present violation of the child’s right to live.[20a] Therefore, in Article 92 paragraph 1 of the FA, Croatian legislature determined to care for a child’s health as one of the basic contents of parental care which reflects in the parental duty to protect children’s right on health and development. Thus, the parents are, according to the Article 93 paragraph 1 of the FA, obliged and responsible to take care of the child’s health and to enable him to use measures that aim to preserve and improve health, as well to heal illness in accordance with norms that are regulating health care and the requirements of medical science.[21a], [21b] Those measures consider involvement not only the parents but the involvement of a wider social community as well.[20b] They aim to help parents to exercise their autonomy regarding the child’s health, but they also aim to protect the child’s right to health if the interests of parent and child are in conflict. Thus, according to Article 5 paragraph 1 and Article 6 of the FA the state is entitled to assist and intervene in the parent-child relationship in order to limit the parental autonomy when the best interest of a child needs it. It specifically means that the state agent’s, such as courts and public administrative bodies, are authorized to intervene on behalf of the child in all proceedings that are carried in front of them in order to protect the endangered right to health.

Beside the best interest of a child, which is widely recognized in FA as ground for state intervention, the Patient Protection Act (Official Gazette of the Republic of Croatia, No. 169/04, 37/08; hereinafter: PPA) points out the importance of harm as a standard that should state the agent’s use if they want to intervene in a parent-child relationship. The harm standard is limited to cases of immediate medical interventions. Interpreting the Article 18 of the PPA the child as a patient may be sub-
jected to a diagnostic or therapeutic procedure without the consent of a parent as the legal guardian, only if it is threatened by serious and immediate danger of severe damage to his health. However, according to the interpretation of the same Article the procedure can be carried out without the consent of a parent as the legal guardian, only until the child’s health remains in danger.

THE EXAMPLE OF THE LIMITATION OF THE PARENTAL AUTHORITY IN CROATIAN CASE OF IMMEDIATE MEDICAL PROCEDURE

If we observe the recent Croatian case of a mother who refused to provide chemotherapy to her 10-year old child with an explanation that chemotherapy is not a medicine that will heal the bone cancer, we may see that the interests of a parent and the child are in conflict. In this particular example, the mother demanded that her child should be treated with experimental medical treatment that is used on patients in Germany and Turkey instead of receiving traditional treatment in Croatia that may have a serious side effect to the health. However, the child’s physician claimed that treatment with chemotherapy is immediate and that the mother doesn’t understand the importance of treatment. The physician’s claim of the urgency of the treatment excluded the need for consent from the mother that is usually requested for medical procedures, according to Article 17 paragraph 1 of the PPA. As the child’s health and life were in danger, according to the Article 18 of the PPA, physician undertook chemotherapy as an immediate therapeutic procedure, while the mother was deprived of her right to parental care. The applied chemotherapy resulted in a number of side effect on a child’s health and mother claims that treatment is only spreading the illness.

It is quite clear that harm standard is used to justify physician decision and leaves no place for discretion in making a decision whether to undertake the medical procedure or not. However, in this case the question is whether harm standard can be applied, as the interference of state’s agents into parental autonomy seems justified only if the denial of medical procedures would mean serious and immediate danger or severe damage to the child’s health. As the mother suggested alternative treatment that is available and did not deprive a child of an opportunity for gaining health again, coercive intervention by the state doesn’t seem justified. Therefore, it should be examined whether harm standard should be justified against the parental refusal of aggressive medical treatment with potentially serious side effects.

A dilemma of whether to apply traditional or experimental therapy contains complex value judgments that require from the state to capture all the considerations that need to be analysed in order to decide to limit parental autonomy. If we advocate harm standard as one that is only acceptable for making the decision in this case of immediate medical treatment, we are facing a dilemma whether the exclusion of experimental treatment in favour of traditional one is making less harm to the child’s health and life. In case where the application of traditional treatment prevails, limitation of parental autonomy is justified only if medical profession agrees that expected outcomes of chemotherapy would correlate with “perception of normal healthy growth toward adulthood or a life worth living that is widely accepted in society” while those expectations wouldn’t be acceptable in case of the experimental treatment. In the case of a mother that refused chemotherapy for her child, it is hard to find justification for
traditional treatment and coercive intrusion into the parental autonomy, as traditional treatment has its side effect and doesn’t guarantee that a child will have normal healthy growth toward adulthood or a life worth living that is widely accepted in society.\[23\] Unfortunately, the result of traditional treatment such as chemotherapy might result in death, which we may claim for an experimental treatment. That brings us to the conclusion that physicians should not use the power of the state to impose their personal preferences regarding the treatment yet to choose the available medical options that optimally promote a child’s welfare.\[23\] Such an attitude brings us back to the notion of the best interest of the child, which should not be specified by using only harm standard. Instead, the best interest of the child should combine the harm standard with the parental value of a good life. Thus, in search for the best interest of a child, it would be desirable to choose between those treatments that at the same time are avoiding harm and ensuring the good life for the child. Practically, it means that in the best interest of a child it would be the treatment that is the best among actually available medical options, not idealized and unavailable medical options.\[24\]

CONCLUSION

Children are vulnerable human beings and their developmental process between infancy and adulthood depends mainly on the parents. The parents promote the well-being of their child and they are safeguarding him from never-ending risks. The parents also have the autonomy to make important decisions regarding every aspect of a child’s life with an aim to promote and meet the child’s best interest. In other words, the parents have responsibilities toward their child. In terms of Hohfeldian normative relations, the parental responsibilities consist of duties that the parents must carry out in the interest of the child, including the special legal powers to control major aspects of the child’s life. In Hohfeldian terms, the parental autonomy means that the parents have the immunity from the interference of others, including the state, as long as they are performing the parental powers and duties in the best interest of the child. In its broadest sense, the best interest of the child would mean that the parents should perform the powers and duties with reasonable diligence and without placing their personal interests above the interests of the child. In other words, to protect the best interest of the child the parents should act as fiduciaries in law that carry a heightened legal duty to serve the interests of their principal or beneficiary.

Such a goal would be easy to achieve if the notion of the child’s best interest is not hard to define considering it depends on the interpretation of different values that we accept in our life. The parents may have values about quality of the child’s life that may differ from one that child’s physician has or the one that the child has. For example, in case of the immediate medical intervention, the parents may refuse some treatment due to its side effects that could, according to their estimation, negatively reflect on the quality of the child’s life. If such parental decision is endangering the child’s life the parents are not acting in the best interest of the child and their parental autonomy may become a subject of the limitation. As the limitation of parental autonomy should not be unlawful, it is important to find some standards that should help to justify the intervention of the state into the parent-child relationship.

The harm standard was recognized as the one that serves the best in cases of immediate medical intervention when parental decisions conflict with the best interest for a child’s health. It specifies that
the best treatment for a child in case of immediate medical intervention is the one that doesn’t harm the child in sense to make him worse or leads him to death. Although this standard seems rational and applicable as a quick formula for finding the best medical treatment, it is not always the case. This is especially recognizable in the case of Croatian mother that refused chemotherapy for her child, as she wanted to provide a child with an experimental therapy. This case showed us that harm standard could not serve it’s purpose in every case and that it has to be questioned on a case-to-case basis. In this particular case, the mother refused chemotherapy as she wanted to prevent negative side effects of treatment that could make her child worse and consequently lead to death. As experimental therapy was not accessible in Croatia it was not even considered as an alternative therapy to chemotherapy and the state limited mother’s autonomy by taking into account only the notion that not receiving therapy at all would mean the violation of the parental duty to care about the child’s best interest.

This example is showing us that the application of the harm standard to the problem of violation of the parental duty is complex as it considers taking into account not only notion whether medical treatment is causing harm but as well the values that one has in order to estimate the quality of life. Thus the harm standard should not be treated as the formula by which we could easily justify the limitation of parental autonomy if the medical treatment is not causing more harm in sense of making the child worse or even causing his death. If we imagine the situation where the parents have to choose between several treatments they would certainly choose the treatment that would not make their child worse or lead him to death. However, they would as well take into consideration the side effects of each treatment with an aim to eliminate the treatment that could negatively reflect on the child’s life during the phase of healing from illness. This possible parental standpoint is only showing us that in the best interest of a child could be the treatment that would optimally protect and promote the overall welfare of the child, by maximizing life quality while avoiding harm. It means that in cases where the state is deciding to limit the parental autonomy, legitimacy of it’s limitation should be dependable on the application of the harm standard and evaluation of values that are attributable to sense of what makes the life good. Therefore, the decision regarding the limitation of the parental autonomy should not be only based on physician professional knowledge which treatment causes less harm, but as well on the parental assessment of treatment value for child health and life. This will certainly prevent that the state becomes the crude instrument that limits the parental autonomy by only taking into account the physician’s opinion without estimation whether the life during treatment will be of sufficient quality to justify it’s application. Although, the terminal illness may require aggressive treatment with a lot of negative side effects, in the best interest of the child would be to choose the treatment that offers the higher chance for healing and surviving the illness with fewer side effects, if possible.

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REFERENCES


