The Welfare Principle

Tom Sorell
University of Birmingham
Outline

• Legal welfare principle
• Two justifications for Legal welfare principle
• Legal welfare principle in separation
• Exceptionalism of application of Legal welfare principle
• Parental legal responsibilities outside legally disputed cases probably consistent with a certain amount of bad parenting
• Ethical welfare principle needed to narrow the gap between minimum discharge of responsibilities and good parenting
• The normative conception of parenting that the ethical welfare principle belongs to justifies the use of the welfare principle in post-separation, even where it goes against the interests of a parent
Outline 2

• CRC may widen the application of paramountcy principle outside cases that are brought to the courts

• CRC unlike ECHR
Outline (cont’d)

• Ethical welfare principle implies that the decision to separate is itself problematic, where that is not a response to harm

• Post separation disputes not, therefore, subject to the norms of fair dispute resolution simply

• Post-separation parental decisions can compound the wrong sometimes done to children by separating.
Legal Welfare Principle

• In legal disputes between third-parties affecting children, acceptable resolutions must benefit children as much as possible
  – Disputes between parents
  – Disputes between parents and welfare or health officials
  – Disputes between carers and others
Cases favourable to Welfare Principle

• Where settling a dispute in a certain way could severely harm or threaten the life of a highly dependent child, and the alternative does not

• Where settling a dispute in a certain way could drastically reduce the standard of living of a highly dependent child, and the alternative does not
Harder cases

• Where settling a dispute in a certain way could drastically lower merely the properly built up morale of a child, though the alternative does not

• Where settling a dispute in a certain way significantly raises the standard of living of a child from a present decent standard, though the alternative does not
Harder cases 2

- Where settling the dispute in a certain way reduces the morale or wellbeing of a crucial carer, and the alternative does not
  - Crucial carer: a carer whom the child strongly prefers to any other, and to whose morale the child’s morale is highly sensitive
Harder cases 3

• Where settling a dispute in a certain way radically improves the morale of a crucial carer, and marginally lowers the good standard of living of a highly dependent child
• Variations: more lowering within the range of a “decent” standard of living
• Life of a highly dependent child marginally prolonged at the cost of parental breakdown
Harder cases 4

- Where settling the dispute in a certain way overrides the wishes/rights of a nearly adult child (Fortin, *MLR* 2006)
Themes in the harder cases

- Interests of children are sometimes tied to a particular parent, and therefore the interests of that parent. This appears to double count that parent’s interests.
- Not all interests of children are vital interests; should far-less-than-vital-interests, when added up, outweigh more vital interests of a parent?
- Maybe what matters in weighing interests is whether thresholds are reached rather than whether one outcome would satisfy more interests (even far-from-vital-interests) of children.
- Not all children equally appropriate objects of paternalistic protections
A second thought

• When parents or their advocates complain that the interests of parents, or certain parents, are too easily outweighed they may be invoking norms of fair dispute resolution

• But in the cases to which the welfare principle applies, some of the presuppositions of the normal dispute –that the parties are independent and that their interests and responsibilities are independent, too– are not fulfilled.
Two justifications of the Welfare Principle

• Vulnerability Justification
• Parents’ responsibilities Justification
Vulnerability justification of Welfare Principle

1. The interests of all people who are affected by a decision should be given weight in reaching the decision

2. The interests of those who might be worst affected by a decision –who are vulnerable relative to the decision--deserve to be given more weight than the interests of those who are only slightly affected by it

3. In decisions affecting parents and children, children are often more vulnerable than parents; less audible than parents
Vulnerability Justification of Welfare Principle

4. So, other things being equal, children are likely to be worse affected by an important decision that affects them than adults.

5. So, other things being equal, the interests of children should be given more weight than the interests of the relevant adults, including parents.
Justification 2: Children as parent’s responsibilities

- Children are not just vulnerable people affected by court decisions that also affect their parents: children are the special responsibility of parents. They are often voluntarily brought into existence or adopted by parents; and are known in advance to be dependent.
- Parent’s basic responsibilities to feed, clothe, shelter, educate, and provide health care, for children are not overridden if fulfilling them conflicts with improving a parent’s personal welfare, or even if fulfilling them involves considerable hardship.
- Welfare principle reflects the priority of basic responsibilities to children: these always outweigh conflicting parental interests.
- But welfare principle does not only refer to interests corresponding to basic responsibilities: Is there any reason why further interests should be given weight?
- Yes, in the case of post-separation decisions: this is because of what separation typically does to children.
Welfare principle in separation and post-separation

- Separation itself is often hard or damaging for children
- Separation is the responsibility of the parents
- So parents often enter post separation legal decisions as damagers of their children
- Welfare principle justified as a kind of compensation for the damage already inflicted, and the prevention of further damage
Exceptionalism in invocation of welfare principle

• In England courts are not to settle disputes in day-to-day matters concerning the child
  – Re P (a Minor) (Parental Responsibility Order) 1994 1 FLR 578 as interpreted by Herring 1999 (in What is a Parent?)

• Suggests that law assumes that parents normally able and willing to reach reasonable agreement on matters affecting child welfare

• Law assumes that most parents willing and able to feed, clothe children, get them to school and to medical aid when necessary: law assumes, in other words that most parents reach the threshold for discharging basic parental responsibility
What Basic Parental Responsibility Does not Exclude

- Parental coldness, bad temper leading to fear
- Parental stinginess
- Parental fundamentalism at some cost to educational development
- Parental favouritism
- Parental laziness
- Parental prioritization of activity not involving children but with no costs to safety of children
Basic Parental Responsibility and Good-Enough Parenting

- Bare fulfilment of basic parental responsibility compatible with bad parenting, even though the child/ren involved is/are not at risk of physical harm
- Intolerable vs (just) Tolerable parenting
- Tolerable vs Good-Enough Parenting
  - Fulfilment of basic responsibilities (Tolerable)
  - Fulfilment of basic responsibilities plus a bit of parent-supplied “development” (Good enough)
Good-enough vs Good parents

• Good parents of dependent children vs good-enough parents of dependent children
• The good parent/bad parent borderline
  – Parents at the “good” end of bad parenthood
  – Good parents of very young children vs bad parents of teenagers
  – Parents of variable conscientiousness
  – Parents who are good in a crisis, but bad at routine parenting
Morally defective parents vs morally defective people

- Parents (typically) have responsibilities (for a time) to the highly dependent
- Parents often take on these responsibilities freely and with good information
- Parents could usually have chosen the less morally demanding lives of non-parents; when they are held to a higher standard, that is the foreseeable consequence of unforced decisions
Morally defective parents vs morally defective people 2

• The moral standards people expose themselves to by becoming parents raise their chances of being defective in the role:
  – Long term commitment calling for different skills at different times
  – People can be bad judges of their abilities to fulfill long term commitments (marriage)
  – Parents not only protect from harm (child-minding) but develop potential and teach skills
  – Parents can lack skills their children need –literacy, numeracy, financial management etc
Defectiveness and ethical welfare principle

• The fact that it is easy to be a defective parent without breaking the law means that there is a point to a relatively demanding ethical welfare principle

• The ethical welfare principle requires people to understand and be able to fulfil the interests of children as a condition of acquiring and keeping the status of a parent
Normative conception of parenting

• The drive to a very normative conception of parenthood
  – No-one should be an accidental parent
  – No parent should provide a dependent child with less than full-time care
  – No parent should put less than vital or defining personal interests before the vital and developmental interests of their dependent children
  – No-one should avoidably do something that can be foreseen to damage or traumatize a dependent child
Normative conception of parenting and separation

• Since separation often predictably damages a dependent child, is it morally defensible to go through with a separation? That depends
  – Separation as a means of avoiding harm to self or child
  – Separation as a means of self-development, fulfilment

• Postponing separation until the children leave home as a common response to foreseeable damage
Is Normative conception of parenthood too demanding?

• The demandingness of the parental role is made less severe by the fact that people tend to love their children and therefore to want to protect them and develop their capacities.

• Love is connected with prioritizing the objects of love. Loved ones are the first and primary beneficiaries of what is valuable in one.

• The distress of loved ones comes first.
Is Normative conception of parenthood too demanding? 2

- Moral demandingness is also reduced by there being elaborate, deeply entrenched traditions for child-rearing and for recognizing good parenting
Ethical welfare principle

• Vs Living [only] for one’s children
• Ethical welfare principle does allow non-vital interests of children to be outweighed
• Allows Williamsesque interests of crucial carers not automatically to be outweighed
• Probably does not apply when child is no longer dependent
Two issues

• Can dependent children’s interests outweigh parents’ where they conflict, given parents choose to be parents (Welfare Principle in English law)

• Are children’s interests weighty in relation to adults generally (CRC)
  – Some human rights might be realized primarily in children –e.g. education
Vital and defining interests

- Williamsesque, probably given weight in practice
- Communitarian
  - Williamsesque and Communitarian arguably weak
- Human Rights (objective)
- Human Rights (negotiated)
Human rights

• CRC (Alston et al):
  -- child’s interests matter outside custody
  -- can be outweighed
  -- can in practice be given more weight than custom
  -- some of the relevant customs human rights violating
    – Customs not really mentioned by CRC; so best interests principle has to dominate (alston and gilmour-walsh, 39)
CRC cttee

• Gives great weight to interests of child in resource allocation