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Article 13

Adult Patient Compelled to Take Blood Transfusion Contrary to Religious Belief

lacked jurisdiction. In *Kantrowitz* the appellate division, for the first time, allowed an examination into the power of a foreign court to grant a divorce despite the fact that both parties appeared and submitted themselves to its jurisdiction. Consequently, *Kantrowitz* appears to follow the trend established in *Wood* and continued in *Rosenstiel.*

The underlying reasons for the failure of the appellate courts to question the plaintiff's domicile may be social and pragmatic ones. There are approximately 250,000[31] New Yorkers who have obtained such divorces. Many have remarried and raised children in subsequent marriages. To declare the foreign divorces void would render the subsequent "marriages" bigamous unions.[32] Furthermore, the rights of the parties under the laws of descent and distribution would be affected.[33]

While the appellate courts have granted comity to the bilateral Mexican decree, the lower courts[34] have recently tended to apply strict legal theory by requiring bona fide domicile as a condition to recognizing the foreign decree. The result is a state of confusion wherein reliance cannot be placed upon even the *bilateral* decree. An appellate confrontation with the question of whether domicile is the *sine qua non* of recognition would be desirable. Such a confrontation appears to be the proper means by which the prevalent confusion in the area could be clarified, since the problem is essentially a judicial one. An alternative means of clarifying the necessity of domicile as a condition to recognizing foreign decrees may be by legislative action, though this method is unlikely in view of the judicial character of the problem. Nevertheless, because of the many social interests involved, the requirement of domicile is deserving of some definitive interpretation.

[31] N.Y. Journal-American, Aug. 15, 1963, p. 3, col. 1.
[32] See Williams v. North Carolina (II), *supra* note 28.
[33] See N.Y. DECED. EST. LAW §§ 18, 83.
[34] Rosenstiel v. Rosenstiel, *supra* note 17; Wood v. Wood, *supra* note 17.

Recent Decision: Adult Patient Compelled to Take Blood Transfusion Contrary to Religious Belief

The petitioner, a Jehovah's Witness, refused a blood transfusion that was necessary to save her life since the consumption of human blood was violative of her biblical teachings. The hospital obtained an order authorizing the transfusion from Judge Wright of the United States Court of Appeals for the District of Columbia,[1] after having failed in its attempt in the district court on the same day. When the petitioner requested a rehearing, the Court, in a five to four decision, ordered the petition denied and *held* that the question had become moot since the petitioner had received the transfusion and had subsequently recovered. *Ap-*

[1] Application of the President and Directors of Georgetown College, 331 F.2d 1000 (D.C. Cir. 1964).

plication of the President and Directors of Georgetown College (D.C. Cir. Feb. 3, 1964).[2]

Courts have often been called upon to resolve conflicts between the constitutional guarantee of religious freedom[3] and the power of the state to protect the general welfare of its citizenry. In *Reynolds v. United States,*[4] a conviction for bigamy was upheld despite the fact that the illegal marriage was encouraged by the defendant's religious beliefs. As overt acts may be prohibited for the protection of society, the state may also require affirmative acts which may be opposed to certain religious beliefs. Thus, in *City of Manchester v. Leiby,*[5] an ordinance required anyone who wanted to distribute literature in a public place to wear an identification badge which was contrary to the tenets of the petitioner's religion. The court upheld the ordinance as being a valid and constitutional exercise of police power. In the interest of general welfare, therefore, the state may regulate the conduct of its citizens, even when contrary to an individual's religious beliefs,[6] but such restriction can be justified "only to prevent grave and immediate danger to interests which the state may lawfully protect."[7]

In addition to guarding the welfare of society in general, the state, as *parens patriae,* specifically protects the welfare of children. For the protection of the health and welfare of children it may pass laws which cannot be abrogated by a parent's religious beliefs.[8] In addition, the state may consider the religious beliefs of a parent when awarding custody of a child.[9]

The authority of the state to compel medical treatment emanates from two primary sources: the state as *parens patriae* and as protector of the general welfare. When considering the medical welfare of minors, "the state has the power to take permanent or temporary custody of children under its powers of *parens patriae* for the purpose of seeing that they receive needed medical treatment."[10] Courts may appoint special guardians for children who need blood transfusions in order to live, and the statutes which sanction this practice are not violative of the parents' rights guaranteed by both the first and fourteenth amendments.[11] However, where a mother, other-

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[2] This case is not officially reported, but is available as an appendix to the petition for certiorari to the United States Supreme Court, printed and distributed by The Watchtower Bible and Tract Society of New York. The petition was denied on June 15, 1964.

[3] U.S. CONST. amend. I.

[4] 98 U.S. 145 (1878).

[5] 117 F.2d 661 (1st Cir.), *cert. denied,* 313 U.S. 562 (1941).

[6] The Supreme Court of the United States has held that freedom of religion involves both "freedom to believe and freedom to act. The first is absolute, but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society." Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940).

[7] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943).

[8] Prince v. Massachusetts, 321 U.S. 158, *rehearing denied,* 321 U.S. 804 (1944).

[9] Courts may consider religious beliefs as preventing proper medical care for the child. *E.g.,* Battaglia v. Battaglia, 9 Misc. 2d 1067, 172 N.Y.S.2d 361 (Sup. Ct. 1958); Derr v. Derr, 148 Pa. Super. 511, 25 A.2d 769 (1942). For a comprehensive discussion of religion as an element in determining the custody of children, see Annot., 66 A.L.R.2d 1410 (1959).

[10] Note, *Medical Aid for Children without Parental Consent,* 13 WYO. L.J. 88, 93 (1958); see also 39 AM. JUR. *Parent and Child* § 46 (1942).

[11] *E.g.,* People *ex rel.* Wallace v. Labrenz, 411 Ill. 618, 104 N.E.2d 769, *cert. denied,* 344 U.S. 824 (1952); Morrison v. State, 252 S.W.2d 97 (Mo. App. 1952); State v. Perricone, 37 N.J. 463, 181 A.2d 751 (1962).

wise a suitable parent, objected to an operation for her child because she thought it might result in his death, a court of equity refused to take custody of the latter.[12] In the recent New Jersey case of *Anderson v. Fitkin Memorial Hosp.*,[13] a pregnant woman was compelled to take a blood transfusion and, in addition, a special guardian was appointed for the protection of the unborn child. Where the medical treatment is not a necessity, but will correct a condition affecting the child's psychological well-being as well as his future welfare, the court may leave the decision to the child with proper guidance and without parental interference.[14]

Aside from the protection of children, the state may require medical treatment on the basis of its general welfare power. In the case of *Jacobson v. Massachusetts*,[15] it was held that individuals may be compelled to take smallpox vaccinations although they believed that spiritual and not medical means were required under God's command. It has since been determined that compulsory vaccination may be made a prerequisite to admission into public schools, whether or not the regulation is passed during an epidemic.[16] A requirement that each student of a state university have an x-ray examination for the detection of tubercular infection has been held valid.[17] Likewise, compulsory hospitalization and isolation of tubercular patients has been upheld on the ground that the resulting health advantages to the public outweigh the restriction on freedom of religion.[18] In regard to blood transfusions for adult patients, however, the New York Supreme Court has recently held that there is no basis for compelling such treatment if the adult is competent and "the individual who is the subject of that medical decision has the final say."[19]

In the instant case, Judge Wright viewed the issue as justiciable and his act of issuing the original order as authorized, since he felt that a refusal to judicially determine the question would result in a legal vacuum. The learned judge believed his order was sanctioned by statutory law in that it was decreed pursuant to the power of an appellate judge to issue an injunction or order "appropriate to preserve the status quo."[20] He argued that by preserving the patient's life the order prevented the issue from becoming moot because of the death of the patient. However, Judge Washington, in his concurring opinion, stated that the question became moot upon the expiration of the order which occurred when the patient recovered.

The dissenting judges held that the order issued by an individual judge was unauthor-

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[12] *In re* Hudson, 13 Wash. 2d 674, 126 P.2d 765 (1942).

[13] N.Y. Times, June 18, 1964, p. 1, col. 4.

[14] *In re* Seiferth, 127 N.Y.S.2d 63 (Child. Ct. 1954).

[15] 197 U.S. 11 (1904).

[16] During an epidemic: *e.g.*, Vennegut v. Baun, 188 N.E. 677 (Ind. 1934); City of New Braunfels v. Waldschmidt, 109 Tex. 302, 207 S.W. 303 (1918). No epidemic existing: *e.g.*, Sadlock v. Board of Educ., 137 N.J.L. 85, 58 A.2d 218 (1948); State *ex rel.* Dunham v. Board of Educ., 154 Ohio St. 469, 96 N.E.2d 413, *cert. denied*, 341 U.S. 915 (1951).

[17] State *ex rel.* Holcomb v. Armstrong, 39 Wash. 2d 860, 239 P.2d 545 (1952).

[18] Moore v. Draper, 57 So. 2d 648 (Fla. 1952).

[19] Meadowbrook Hosp. v. Dilgard (N.Y. Supreme Court, Nassau County, Oct. 1, 1962); this case is not officially reported, but is available as an appendix to the petition for rehearing in the instant case.

[20] FED. R. CIV. P. 62(g).

ized since by statute[21] such a determination could be made only by a separate division consisting of three judges, or by the court en banc. They contended that the provisions authorizing the issuance of necessary or appropriate writs[22] and declaratory judgments[23] did not justify the order, because they referred to the powers of courts and not of individual judges. Furthermore, they maintained that the original action presented no justiciable controversy, since "the affirmative enforcement of a right growing out of a possible moral duty of the hospital toward a patient does not seem to meet the standards of justiciability."[24] The argument that the status quo could be maintained only by issuing the order was refuted by Judge Miller, who stated that it

> completely changed the *status quo ante* by granting fully and finally all of the relief sought, thus disposing of the matter on its merits. This fact is confirmed, perhaps unwittingly, by the majority's order denying the petition for rehearing *en banc*, which implicitly relies on mootness.[25]

In the past, state interference with freedom of religion had been sustained because it was necessary to protect the public from communicable diseases or protect the welfare of children, who were not mature enough to make critical determinations. This decision, however, appears to provide judicial precedent for compelling blood transfusions without reference to the general welfare or the right of the state as *parens patriae*. Previously, courts had implied that adults could not be restricted in their choice concerning medical treatment unless society was endangered. The Supreme Court of the United States has upheld a statute for the protection of the health of children by stating:

> Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.[26]

Even in the *Anderson*[27] case, the court-ordered blood transfusion to a pregnant woman was justified specifically by the state's power as *parens patriae*. In addition, two well-known medical authorities expounded the doctrine that a power based solely on *parens patriae* cannot be used to restrict adults. They stated, "a patient has the right to withhold his consent to lifesaving treatment."[28] However, the reasoning of the instant case is in opposition to this premise, and it appears that in the District of Columbia a patient is no longer free to be a martyr himself.

The mootness argument, heavily relied on by the majority in the principal case, provides a convenient expedient for the courts to avoid the issues involved.[29] Once a court-ordered medical treatment is admin-

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[21] 28 U.S.C. § 46(b) (1958).
[22] 28 U.S.C. § 1651(a) (1958).
[23] 28 U.S.C. § 2201 (1958).
[24] Application of the President and Directors of Georgetown College (D.C. Cir. Feb. 3, 1964).
[25] *Ibid.*
[26] Prince v. Massachusetts, *supra* note 8, at 170.
[27] Anderson v. Fitkin Memorial Hosp., N.Y. Times, June 18, 1964, p. 1, col. 4.
[28] STETLER & MORITZ, DOCTOR AND PATIENT AND THE LAW 141 (4th ed. 1962). C. Joseph Stetler is General Counsel and Director of the Legal and Socio-Economic Division of the American Medical Association; Alan R. Moritz is the Director of the Institute of Pathology at Western Reserve University.
[29] But it has been stated that where illegal activity is voluntarily discontinued, the courts may nevertheless issue an injunction to prevent its recur-

istered, and the patient recovers *or* dies, the issue of conflicting rights becomes moot. Refusal to hear a case for this reason greatly enlarges a judge's authority since, upon the issuance of an order, he would know that his reasoning or authority would not be subject to review by reason of future mootness. Such actions are not infrequently attempted, as Mr. Justice Douglas has stated:

> History shows that governments bent on a crusade, or officials filled with ambitions have usually been inclined to take short-cuts . . . the demand for quick and easy justice mounts. These short-cuts are not as flagrant perhaps as a lynching. But the ends they produce are cumulative; and if they continue unabated, they can silently rewrite even the fundamental law of the nation.[30]

In the area of the conflicting interests of the religious freedom of the individual and the police power of the state, there appears to be an increasing need for the higher courts to formulate definitive standards, thereby providing concrete guidelines for the lower courts to follow. Movement toward such clarity will only be hampered or stagnated by the mootness argument, and can be defeated by "short-cuts" or "quick and easy justice" on the part of a judge issuing an order compelling medical treatment. Historical and constitutional precedent would seem to require that courts determine that it is only within the areas of general welfare and *parens patriae* in which the state may order medical treatment against the wishes of an adult patient.

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rence, especially if public rights are concerned. ROBERTSON & KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES 520 (1951); see also 5 C.J.S. *Appeal and Error* §§ 1354 (1), (3) (1958).

[30] Douglas, *A Challenge to the Bar,* 28 NOTRE DAME LAW. 497-98 (1953).