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Article 9

Note: Compulsory Medical Treatment for Minors and Religious Freedom

NOTES AND COMMENTS

NOTE: COMPULSORY MEDICAL TREATMENT FOR MINORS AND RELIGIOUS FREEDOM

On March 1, 1961, a child was admitted to a New Jersey hospital for treatment of a congenital heart disorder which had resulted in a reduction of the blood flow through the lungs and a chronic lack of oxygen. His parents had executed a written consent to the performance of surgery upon the boy and to all other necessary medical procedures with one reservation —they would not consent to a blood transfusion. Both father and mother were members of a religious sect known as Jehovah's Witnesses and maintained that, on religious grounds, they could not in conscience permit their child to be the subject of a blood transfusion.[1] The condition of the child deteriorated steadily and it was the considered opinion of the hospital physicians that unless a transfusion be performed, the child would probably perish, or, at the least, severe brain damage would result. Permission to administer a transfusion was requested from the parents, but they refused. The superintendent of the hospital made application to the Juvenile and Domestic Relations Court of New Jersey's Hudson County to have the parents adjudged guilty of neglecting the child and to have a special guardian appointed for the sole purpose of consenting to the administration of the necessary medical attention given to the child in the form of blood transfusions. At the hearing which took place on the night of March 3, two physicians testified that unless the transfusions were performed, it was probable that the child would die, and that even if the child should survive without the transfusion, the lack of oxygen would result in a severe impairment of his mental processes. The parents, testifying in their own behalf, restated their position that their religious convictions did not permit them to consent to the transfusion. The court adjudged the parents guilty of neglect, appointed the superintendent of the hospital guardian and authorized him to consent to the administration of a blood transfusion. The transfusion was performed. The child died.[2]

[1] See, *e.g.*, LEVITICUS 17: 10-14 (Douay Rheims): "If any man whosoever of the house of Israel, and of the strangers that sojourn among them, eat blood, I will set my face against his soul and will cut him off from among his people."; ACTS 15: 28, 29 (Confraternity): "For the Holy Spirit and we have decided to lay no further burden upon you but this indispensable one, that you abstain from things sacrificed to idols and from blood and from what is strangled and from immorality. . . ." The Jehovah's Witnesses interpret these passages, among others, as clearly indicating that blood transfusion is contrary to the word of God.

[2] State v. Perricone, Hudson Co. Juv. & Dom. Rel. Ct., June 23, 1961. The case is as yet unreported. It is one of novel impression and has been certified to the Supreme Court of New Jersey without being reviewed at the intermediate appellate level, indicating the significance with which it is regarded.

Aside from the unfortunate death of the child in the case discussed above, the determination of the court that the state should intervene in such case and direct that the necessary medical treatment be administered seems virtually unassailable — unless, of course, one happens to be a Jehovah's Witness. The overwhelming majority of persons discern few limitations on the extent to which they may avail themselves of medical techniques in order to preserve the life and health of themselves and their families.[3] In those instances where the religious beliefs of a particular sect prevent its members from availing themselves of a particular medical technique or procedure, the states have made it quite clear that their concern for the well-being of minor children is going to outweigh any reluctance regarding interference with the religious practices of the parents.

The primary questions which arise in the area of the state's action in removing the child from its parents and ensuring the performance of a medical procedure to which they cannot, in conscience, consent are relatively clear.

(1) Does the state have the authority to remove the child from the custody of the parent under such circumstances, and if so, what is the source of that power?

(2) Is such state action contrary to and violative of the Fourteenth Amendment of the United States Constitution since it appears to be an interference with the freedom of religion guaranteed by the first amendment?

At common law, the father's right to the care, custody and control of his minor children was regarded as virtually inviolable, and the courts would not intervene unless the parent had manifested unfitness to a degree where he could no longer claim the rights of a father toward the child.[4] The jurisdiction to divest the unfit parent of custody was exercised by the Court of Chancery, the arm of the King in acting as *parens patriae*.[5] As early as 1722, it was asserted that

> the King is protector of all his subjects; that in virtue of his high trust, he is more particularly to take care of those who are not able to take care of themselves, consequently of infants, who by reason of their nonage are under incapacities. . . .[6]

This equity jurisdiction was carried over to the United States, and the state, as sovereign, became the protector of those *non sui juris*.[7] Legislation, embodying the underlying principle of the state as *parens patriae*, was enacted in almost all states, and was generally of two types: (a) statutes imposing criminal sanctions on a parent or guardian who had neglected to furnish necessaries to his minor children when he had the means to do so; and (b) juvenile court acts providing the basis for a transferral of custody, either temporary or permanent, where the child was found to be neglected.[8]

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[3] The scope of this note is limited to the legal aspect of the problem. The moral implications in this area will be treated in a future issue of *The Catholic Lawyer*.

[4] See *In re* Agar-Ellis, 24 Ch. D. 317 (1883); *In re* Goldsworthy, 2 Q.B.D. 75 (1876).

[5] See Eyre v. Shaftsbury, 2 P. Wms. 103, 24 Eng. Rep. 659 (Ch. 1722). See also Comment, 28 ROCKY MT. L. REV. 235 (1956); 30 ST. JOHN'S L. REV. 94 (1955).

[6] See Eyre v. Shaftsbury, *supra* note 5, at 123-24, 24 Eng. Rep. at 666. But see 4 POMEROY, EQUITY JURISPRUDENCE § 1304 n.14 (5th ed., Symons 1941).

[7] See Arnold v. Arnold, 246 Ala. 86, —, 18 So. 2d 730, 734 (1944). See also Note, 41 GEO. L.J. 226, 227 (1953).

[8] Note, *supra* note 7, at 227.

In England, it was a misdemeanor for a parent to neglect to furnish his minor child with necessary medical care. Where the parent, however, had acted in good faith and resorted to prayer and trust in God instead of a physician to heal his ailing child, such omission was not considered so gross as to be criminal.[9] In 1868, upon the trial of a parent whose child had died when the parent refused medical care for him, the court charged the jury to the effect that if they believed the basis of the defendant's refusal to provide medical aid was his religious conviction that God would cure the child, they should find him not guilty. They did.[10] The social implications of this decision impelled the legislature to pass remedial statutes making it a misdemeanor for a parent wilfully to neglect to provide necessary medical aid for his child.[11] In 1894, the Prevention of Cruelty to Children Act was passed, Section 1 of which provided that "if any person . . . who has the custody, charge or care of any child . . . wilfully . . . neglects . . . such child . . . in a manner likely to cause such child . . . injury to its health . . . that person shall be guilty of a misdemeanor."[12] No reference was made expressly to a failure to furnish medical aid, and it remained doubtful whether the statute implied such failure. If so, was a parent's refusal based on religious grounds a good defense? The answer was not long in coming in the case of *Regina v. Senior,*[13] which remains today the leading English decision on this point.

[9] See Regina v. Wagstaffe, 10 Cox Crim. Cas. 530 (1868). See also 21 AM. & ENG. ENC. LAW 199 (2d ed. 1902).

[10] Regina v. Wagstaffe, *supra* note 9.

[11] See Cawley, *Criminal Liability in Faith Healing*, 39 MINN. L. REV. 48, 54 (1954).

[12] Prevention of Cruelty to Children Act, 1894, 57 & 58 Vict., c. 41, § 1.

[13] [1899] 1 Q. B. 283, 19 Cox Crim. Cas. 219.

The defendant Senior was indicted for manslaughter growing out of the death of his nine-month old child. The child had contracted pneumonia, but Senior, a member of a faith-healing sect known as the "Peculiar People," called in the elders to pray and anoint the child with oil. He refused to call in medical aid although seven of his twelve children had already perished under similar circumstances. The trial judge charged the jury that if they found that the defendant had done anything expressly forbidden by statute, he would be guilty of manslaughter, *regardless of his motive or state of mind.* Senior was convicted.

The leading case in the United States in this area is *People v. Pierson.*[14] Pierson, a member of a faith-healing sect styled the Christian Catholic Church of Chicago, refused to call in a physician to treat his sixteen-month old adopted daughter who had contracted catarrhal pneumonia. The child died and Pierson was indicted for a misdemeanor growing out of the violation of Section 288 of the New York Penal Code, which provided that a person who wilfully omitted, without lawful excuse, to furnish medical attendance to a minor child was guilty of a misdemeanor. Pierson offered in defense that he was committed to the religious belief of divine healing, that he had no faith in doctors and that his religion dictated that the child would recover through prayer. The New York Court of Appeals, reversing the Appellate Division and affirming the conviction which had been adjudged in the trial court, stated that "full and free enjoyment of religious profession and worship is guaranteed, but acts which are not worship are not."[15] The

[14] 176 N.Y. 201, 68 N.E. 243 (1903).

[15] *Id.* at 211, 68 N.E. at 246.

decision reached in the *Pierson* case is the well-settled rule regarding parental liability for deaths resulting from a refusal to furnish medical attendance to a minor child on the ground of religious beliefs. Such beliefs are no defense.

The law, like people, learns from the pain of its mistakes and within a short time began to apply the old adage that "an ounce of prevention is worth a pound of cure" to the problem of medical care for minor children. Criminal sanctions imposed upon the parents could not return the life of a dead child and the state devised a different approach to the matter — juvenile court legislation. The first juvenile court in the world began its legal existence in Chicago on July 1, 1899 and was widely acclaimed as a revolutionary advance in the treatment of delinquent and neglected children.[16] Within a decade, twenty states and the District of Columbia had enacted juvenile court laws,[17] and by 1945, when Wyoming adopted such a law, all the states had enacted statutes providing either for separate juvenile courts or for specialized jurisdiction in children's cases in existing courts.[18] These acts which took root in the various states differed considerably in many areas, but almost all provided the court with authority to remove a minor child from the custody of its parents and to award such custody, either temporarily or permanently, to a guardian subject to the continuing order of the court.[19] The Children's Court Act of New York, for instance, provides, *inter alia,* that a neglected child is one "whose parent, guardian or custodian neglects or refuses, when able to do so, to provide necessary medical, surgical, institutional or hospital care for such child. . . ."[20] Furthermore, the statute provides that the court may, in its discretion, cause any child within its jurisdiction to be examined by a physician appointed by the court, and if the child appears to be in need of medical or surgical care, the court may make an order for such treatment.[21] *In the Matter of Vasko* challenged the constitutionality of this section of the act and upheld it.[22] *Vasko* involved a two-year old child who was suffering from a malignant growth of the eye which the medical experts agreed would undoubtedly cause her death. The court pointed out that

> it was the intention of the Legislature to invest the court with wide powers of discretion, to be exercised on the advice of competent medical or surgical authority, uninfluenced by the *whims* or *arbitrary determination* of parents or guardians, in advancing the well being of the child.[23]

The mother of the child, in refusing to permit the operation, had stated that "God gave her the baby and God can do what He wants."[24] It would appear that the Ap-

[16] Caldwell, *The Juvenile Court: Its Development and Some Major Problems,* 51 J. CRIM. L., C. & P.S. 493 (1961).
[17] *Id.* at 496.
[18] Note, 41 GEO. L.J. 226, 229 (1953).
[19] *Ibid.*
[20] N.Y. CHILDREN'S CT. ACT § 2 (4) (e).
[21] N.Y. CHILDREN'S CT. ACT § 24.
[22] 238 App. Div. 128, 263 N.Y. Supp. 552 (2d Dep't 1933). See also In the Matter of Rotkowitz, 175 Misc. 948, 25 N.Y.S.2d 624 (Child. Ct. 1941); *cf. In re* Seiferth, 127 N.Y.S.2d 63 (Child. Ct. 1954), *rev'd on other grounds,* 285 App. Div. 221, 137 N.Y.S.2d 35 (4th Dep't), *rev'd,* 309 N.Y. 80, 127 N.E.2d 820 (1955).
[23] In the Matter of Vasko, 238 App. Div. 128, 130, 263 N.Y. Supp. 552, 555 (2d Dep't 1933) (emphasis added).
[24] *Ibid.* See Cawley, *Criminal Liability in Faith Healing,* 39 MINN. L. REV. 48, 62-63 for the particularly moving account of the tragic death of an infant child involving a refusal by the par-

pellate Division of the Supreme Court of the State of New York did not agree.

Strangely enough, the Supreme Court of the United States has never passed directly upon a case involving this problem, although there have been a number of such cases.[25] The nearest the Court has come to the issue was a denial of certiorari in the case of *People* ex rel. *Wallace v. Labrenz*,[26] a case involving a blood transfusion where the parents, Jehovah's Witnesses, had refused to consent. The mother of the child had testified

> we feel that we would be breaking God's commandment, also destroying the baby's life for the future, not only this life, in case the baby should die and breaks the commandment, not only destroys our chances but also the baby's chances for future life. We feel it is more important than this life.[27]

As always, the court took care to explain that "freedom of religion and the right of the parents to the care and training of their children are to be accorded the highest possible respect in our basic scheme,"[28] and then proceeded to override their objections. Quoting extensively from the case of *Reynolds v. United States*,[29] which affirmed the conviction of a Mormon for practicing polygamy, the court pointed out that

> laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?[30]

The obvious reply to both hypothetical questions is "no," for in a pluralistic society this would amount to permitting every citizen "to become a law unto himself,"[31] and no government survives in a state of anarchy. It is highly questionable, however, that hypothetical questions of the type put forth in the *Reynolds* opinion are of any aid in the resolution of a problem such as arises in the blood transfusion area. Both the hypotheticals involve *affirmative* acts, the *doing* of certain things which a government, in the interests of its own survival, can clearly prohibit. The cases with which we are now concerned involve *negative* conduct, the *not doing* of something. The law quite frequently tells a man what he may not do. It seldom tells him what he must do. In addition, neither of the hypothetical situations raised in the *Reynolds* case involved the parent-child relationship which so peculiarly colors this area. Lastly, both hypotheticals are extreme cases, clearly black in a problem situation which is really one of degree and where the facts can take on a decidedly grayish tint. It is of no assistance to offer the extremities of hypothesis and to pro-

ents to consent to a blood transfusion on religious grounds. In that case too, a mother had stated that "if the baby dies, that is God's will. I have no fear."

[25] See, *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. Ct. App. 1952); Mitchell v. Davis, 205 S.W.2d 812 (Tex. Civ. App. 1947).

[26] 411 Ill. 618, 104 N.E.2d 769, *cert. denied*, 344 U.S. 824 (1952).

[27] *Id.* at —, 104 N.E.2d at 772.

[28] *Id.* at —, 104 N.E.2d at 773.

[29] 98 U.S. 145 (1879).

[30] People *ex rel.* Wallace v. Labrenz, *supra* note 25, at —, 104 N.E.2d at 774, quoting Reynolds v. United States, 98 U.S. 145, 166 (1879).

[31] Reynolds v. United States, 98 U.S. 145, 167 (1879).

duce a result which is based upon them seem plausible. No Jehovah's Witness would argue that he can do whatever he wishes in the name of religion, but he will contend that he has the primary right to the custody of his minor child. He will insist that his refusal to permit a blood transfusion which he believes would defile that child does not render it "neglected" and that such a refusal is not a valid reason to make the child a ward of the state.

The court in the *Wallace* case proceeded to cite a passage from *Prince v. Massachusetts,*[32] which probably reflects the dominant judicial attitude in this area, although the latter decision was not concerned with medical care. The Court in the *Prince* case, almost as if it were deciding on the issue under discussion, stated that

> the right to practice religion freely does not include liberty to expose the . . . child to . . . ill health or death. . . . 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.[33]

The cases which have been discussed to this point have illustrated state intervention where the minor child was exposed to a serious threat to life by the refusal of its parents to permit the recommended medical treatment. The intervention of the state, however, has not been limited to circumstances presenting a risk of death. For instance, *In the Matter of Rotkowitz*[34] involved the plight of a ten-year old girl suffering from a deformed leg which had been caused by poliomyelitis. The mother of the child was anxious to have the needed surgery performed, but the father, for some unexpressed reason, would not approve. The hospital refused to operate without the consent of both parents, unless ordered to do so by the court. The life of the child was not in danger, but the court, in ordering the required surgery, stated that

> it was the intention of the Legislature to give power to the Justices of this Court to order an operation not only in an instance where the life of the child is to be saved but also in instances where the health, the limb, the person or the future of the child is at stake.[35]

There was language in the *Rotkowitz* opinion which was to bear fruit in another New York case some eleven years later. In *Rotkowitz,* the court had stated that there were certain psychological consequences present where a child with a deformed limb was involved. Such child "cannot have a sense of security," but "feels itself different from others" and "suffers from a sense of rejection."[36] In 1952, *In re Carstairs*[37] was presented to the Children's Court of New York's Bronx County. It involved a minor child whose conduct had indicated that he was "suffering from some emotional instability or some emotional disturbance which causes him to do all these things."[38] The mother of the child had been informed frequently of such conduct but had not attempted to have him treated by a psychiatrist. The reason for such failure does not appear in the opinion. The court found that the mother had neglected the boy although there was nothing physically wrong with him, and ordered the child to a mental hospital for psychiatric

[32] 321 U.S. 158 (1944).
[33] *Id.* at 166, 170.
[34] 175 Misc. 948, 25 N.Y.S.2d 624 (Child. Ct. 1941).
[35] *Id.* at 950, 25 N.Y.S.2d at 627.
[36] *Id.* at 950, 25 N.Y.S.2d at 626.
[37] 115 N.Y.S.2d 314 (Child. Ct. 1952).
[38] *Id.* at 316.

examination, stating that "if there is nothing the matter with him no harm will be done."[39] This appears to be a rather cavalier approach to the matter since if nothing was wrong with the boy, the mother had been deprived of the custody of her child even though her judgment of the situation had been the correct one, and the "neglect" upon which the court had taken custody did not in fact exist. Hadn't *some harm* been done?

The New York courts had progressed from the *Rotkowitz* case, involving a purely physical defect with no danger to life, to *In re Carstairs* involving a suspected psychological problem. In 1954, the Children's Court of New York's Erie County was to be faced with a case blending both the physical and the psychological.[40] The child, a twelve-year old boy, was afflicted with a congenital hare-lip and severe cleft palate which gave him an ugly appearance and caused a marked speech defect. It was stated that the child was emotionally and psychologically sensitive to his condition. There was no danger of death or physical health involved. The father objected to the recommended surgery because of "religious beliefs" and on the ground that the child's fear of doctors, which grew out of the "religious beliefs" passed on to him by the father, would vitiate the benefits of the operation.

The court pointed out that the father's objections to the surgery were philosophical, not religious, since there were no moral implications in his position. It went on to state that had the case arisen earlier, it would have ordered the surgery without hesitation. The child, however, had been so well indoctrinated in the philosophical beliefs of his father regarding the curative power of "natural forces" that "to arbitrarily force this child to submit to surgery, which he has been 'conditioned' to fear, might do more harm than good."[41] The court ordered that the child be instructed regarding the benefits which would accrue to him from the medical treatment and that the child then be given the opportunity of making his own decision.

The Appellate Division, two justices dissenting, reversed, holding that the lower court had abused its discretion. The boy had received the instructions ordered by the lower court regarding the benefits of surgery, but had decided to try for some time longer to cure the defect through "natural forces." The appellate court stated that "it is a serious error to permit this twelve-year old boy, a victim of his father's *delusions,* to make such a choice for himself" because "he does not appreciate the nature of the operation or the consequences of the alternative."[42] The court ordered the relief requested, reasoning that the possible psychological danger of a forced operation was outweighed by the certain psychological effect of permitting the child to enter adolescence with such a deformity and handicap.

The Court of Appeals, three judges dissenting, reversed, stressing the psychological handicap the boy faced in overcoming the teachings of his father and that time

[39] *Id.* at 317.

[40] *In re* Seiferth, 127 N.Y.S.2d 63 (Child Ct. 1954), *rev'd on other grounds,* 285 App. Div. 221, 137 N.Y.S.2d 35 (4th Dep't), *rev'd,* 309 N.Y. 80, 127 N.E.2d 820 (1955); see Comment, 12 WASH. & LEE L. REV. 239, 241-45 (1955); 4 BUFFALO L. REV. 346 (1955); 16 OHIO ST. L.J. 629 (1956); 6 SYRACUSE L. REV. 373 (1955).

[41] *In re* Seiferth, *supra* note 40, at 65.

[42] In the Matter of Seiferth, 285 App. Div. 221, 225, 137 N.Y.S.2d 35, 38-39 (4th Dep't 1955) (emphasis added).

was not of the essence. The court pointed out that the trial court had been keenly aware of the various psychological factors, had seen and heard the parties and had not abused its discretion in refusing to order the surgery. The dissenting opinion sharply disagreed, stating that "it is the court . . . that has a duty to perform . . . and it should not seek to avoid that duty by foisting upon the boy the ultimate decision to be made."[43]

While there were no religious objections raised regarding the medical treatment recommended in the *Rotkowitz, Carstairs* and *Seiferth* cases, it would appear that such objections would not have met with any success had they been presented. The judicial attitude in regard to cases of this type is almost unanimously one of approval.[44] Religious beliefs which would lead to conduct or an omission to act, which would be contrary to public policy, may not be permitted. The *Seiferth* case would seem to indicate that, in New York at least, the desire of the parents *and* the child that the operation not take place will not be overridden without some hesitation, but the sharpness of the split in the court would lead one to wonder if the same result would be reached today.

In summary, it might be worthwhile to see briefly where we have been, where we now are and where we may be going. We have traced the power of the King as *parens patriae,* guardian of those *non sui juris,* into the state as sovereign. We have observed the transition from the English common law, where a refusal to furnish medical attention to a minor child because of religious convictions was a valid defense in a criminal action, to the present state of the law, where parents and those who counsel them may be convicted of involuntary manslaughter should the child die because of the failure to provide the needed treatment. We have pointed out the unanimous enactment of juvenile court legislation, permitting the state to take custody of the child and to order the necessary medical attention; at first only where there was a risk of death, then in cases where there was a physical defect although no risk of death, and onward to the point where neither a threat to life nor a physical defect was involved, but simply a suspicion of emotional disturbance.

The essential questions, of course, are clear. Has the state, in its anxiety to protect minor children from what it considers to be ignorance and superstition which would deny them necessary medical treatment, gone past the point of merely intervening to protect our children? Has it begun to intrude aggressively, to substitute the judgment of the doctors and scientists for that of the parents? Do such cases as those involving blood transfusions result as they do because an unpopular minority

[43] In the Matter of Seiferth, 309 N.Y. 80, 87, 127 N.E.2d 820, 824 (1955) (dissenting opinion).

[44] See cases cited note 25 *supra. But see In re* Tuttendario, 21 Pa. Dist. 561 (1911) holding that the refusal of the parents to consent to an operation because they feared the child would not survive did not amount to such neglect as to authorize the court to award custody of the child to the Society for the Prevention of Cruelty to Children. The court stated that "we have not yet adopted as a public policy the Spartan rule that children belong, not to their parents but to the state. . . ." *Id.* at 563. Pennsylvania has since seen a statutory change which would remove the authority of the *Tuttendario* decision. PA. STAT. ANN. tit. 11, §243(5) (Purdon 1939). See also *In re* Hudson, 13 Wash. 2d 673, 126 P.2d 765 (1942) holding that the refusal of a mother on other than religious grounds to allow the amputation of a deformed arm which posed a threat to the life of her child was not sufficient to justify a conclusion that the child was neglected and to permit the court to order the operation.

sect is involved? Would any public official, be he legislator or judge, dare to outrage a large segment of the electorate by overruling its religious beliefs? One advocate of the position that the courts have gone too far has stated that

> . . . civil and religious liberties are being broken down. The consequence is an eroding away of the principles upon which the democratic state stands, and ultimate damage to the nation and all its people . . . . to sacrifice principle for expediency creates precedent that breaks down the whole fibre of principle and personal responsibility upon which the welfare of the nation depends. Frankly, the price is too high. . . .[45]

[45] How, *Blood Transfusion — A Legal, Religious and Medical Issue*, 3 CAN. B.J. 365, 419 (1960).