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RECENT DECISIONS

DOMESTIC RELATIONS—DISCRETION OF THE CHILDREN'S COURT IN ORDERING MEDICAL CARE OVER PARENTAL OBJECTION.—A county health officer¹ sought an order of the Children's Court for therapy to rectify the harelip and split palate of a boy aged fourteen. The child and his father objected to surgery, expecting a cure through "forces of the universe." Under an interim order, experts attempted unsuccessfully to persuade the boy to accept treatment. A denial of the petition by the Children's Court was reversed by the Appellate Division. The Court of Appeals sustained the Children's Court, *holding* that the trial judge properly exercised discretion in refusing to order treatment where he expected an adverse psychological reaction would frustrate its benefits, and where there was no present emergency. *Matter of Seiferth*, 309 N.Y. 80, 127 N.E.2d 820 (1955).

The power of the state to protect infants is derived from its role as *parens patriae*.² As one of the sovereign's prerogative powers, it was exercised by courts of equity antecedently to any statutory authorization.³ A parent's primal right of custody was subject to intervention by the courts on behalf of the child's "real and permanent interests."⁴ He could not resist transfer of custody where he was unable or unwilling to execute his legal duty in the child's regard.⁵ This duty was deemed breached by neglect to provide medical care.⁶ Legislation safeguarding children against neglect first took the form of criminal statutes.⁷ A delinquent parent was made criminally liable

¹ Proceedings in Children's Court may be instituted on petition of any interested person who knows the child to be neglected or delinquent, or otherwise within the jurisdiction of the court. N.Y. CHILD. CT. ACT § 10. The Court has jurisdiction of physically handicapped children [*id.* § 6(1)(e)] whose defect incapacitates them, totally or partially, for education or gainful employment. *Id.* § 2(7). Local health officers have the duty of enforcing the Public Health Law [N.Y. PUB. HEALTH LAW § 324(1)(e)] and that law declares it state policy to provide services for the rehabilitation of handicapped children. *Id.* § 2580.

² See *Butler v. Freeman*, Amb. 301, 27 Eng. Rep. 204 (Ch. 1756).

³ *The King v. De Manneville*, 5 East. 221, 223, 102 Eng. Rep. 1054, 1055 (K.B. 1804) (dictum); see, e.g., *United States v. Green*, 26 Fed. Cas. 30, No. 15256 (C.C.D. R.I. 1824); *De Manneville v. De Manneville*, 10 Ves. Jun. 52, 32 Eng. Rep. 762 (Ch. 1804).

⁴ *Wilcox v. Wilcox*, 14 N.Y. 576, 578 (1856) (dictum); *Matter of Waldron*, 13 Johns. R. 418, 421 (N.Y. Sup. Ct. 1816) (dictum); see *United States v. Green*, *supra* note 3 at 31.

⁵ See *The King v. De Manneville*, *supra* note 3; *De Manneville v. De Manneville*, *supra* note 3.

⁶ *Heinemann's Appeal*, 96 Pa. 112 (1880).

⁷ Criminal liability for neglect of children was first proposed in New York

for failing to provide medical care whether the statute specifically prohibited such conduct,⁸ or condemned neglect in general terms only.⁹

Although criminal statutes still exist,¹⁰ the turn of the century witnessed the introduction of a more affirmative statutory protection of children's life and health in the form of the children's court acts.¹¹ The courts created by these statutes are vested with jurisdiction over neglected children to protect them through the exercise of the custody power.¹² Where the parent refuses necessary medical attention, the court will take jurisdiction of the child and order the care it deems necessary.¹³ The court will override parental objections to necessary therapy whenever the child's life is at stake.¹⁴ Where the child is in some lesser peril, the courts sometimes refuse to intervene because the prognosis of successful treatment is uncertain.¹⁵ More often, however, they order treatment.¹⁶

Under the New York Children's Court Act, a child is "neglected" where his parent neglects or refuses necessary medical care,¹⁷ or where, because of want, suffering, or improper guardianship, his health is injured or endangered.¹⁸ The act affords no standard for deter-

in Section 333 of the Draft of the Penal Code (1864). Such neglect was made a misdemeanor by the enactment of Section 288 of Chapter 676 of the Laws of New York 1881.

⁸ *E.g.*, N.Y. PENAL LAW § 482(1); IDAHO CODE § 18-1501 (1947); MINN. STAT. ANN. § 617.56 (1945); MONT. REV. CODE tit. 94, § 301 (1947).

⁹ *E.g.*, CONN. GEN. STAT. § 6416 (1918) [currently § 8586 (Revision of 1949)], State v. Moran, 99 Conn. 115, 121 Atl. 277 (1923); ILL. REV. STAT. c. 68, § 4 (1943) [currently c. 68, § 24 (1951)], People v. Booth, 390 Ill. 330, 61 N.E.2d 370 (1945).

¹⁰ See current statutes cited notes 8 and 9 *supra*.

¹¹ The first juvenile court was established in Cook County (Chicago), Illinois, in 1899. The first state-wide system of such courts was established in Utah in 1908. See NEUMEYER, JUVENILE DELINQUENCY IN MODERN SOCIETY 340-42 (1950). "Prior to the adoption of the Children's Court Act of the State of New York in 1922 [Laws of N.Y. 1922, c. 547], resting upon constitutional edict, there existed no affirmative statutory power to exercise direct control over the physical welfare of a child." Matter of Vasko, 238 App. Div. 128, 129, 263 N.Y. Supp. 552, 554 (2d Dep't 1933).

¹² See NEUMEYER, *op. cit. supra* note 11, at 343; Matter of Hudson, 13 Wash.2d 673, 126 P.2d 765 (1942). In the *Hudson* case, an order of the children's court for an operation to save a child's life was vacated. This determination resulted from the fact that, while the trial court *could have found the parents unfit* because they had refused medical aid needed by the child, it had not so found, and had not deprived them of custody.

¹³ N.Y. CHILD. CT. ACT § 24.

¹⁴ Matter of Vasko, *supra* note 11; People 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).

¹⁵ See Note, 41 GEO. L.J. 226, 235 (1953) [quoting Matter of Tuttendario, 21 Pa. Dist. Rep. 561 (1911)]; 39 MINN. L. REV. 118 (1954).

¹⁶ See, *e.g.*, Matter of Carstairs, 115 N.Y.S.2d 314 (Child. Ct. 1952); Matter of Rotkowitz, 175 Misc. 948, 25 N.Y.S.2d 624 (Child. Ct. 1941); Mitchell v. Davis, 205 S.W.2d 812 (Tex. Civ. App. 1947).

¹⁷ N.Y. CHILD. CT. ACT § 2(4)(e).

¹⁸ *Id.* § 2(4)(g).

mining *when* medical care is necessary and, prior to the instant case, the courts had evolved no rule of universal application. In the *Vasko* case,¹⁹ the Appellate Division upheld an order for removal of a child's eye affected with a tumor which threatened her life, although the surgery involved a fifty per cent risk of life. In the *Rotkowitz* case the court stated that it had power under the Children's Court Act to order an operation ". . . in instances where . . . *the future of a child is at stake.*"²⁰ In that case surgery was ordered to arrest progress of a foot deformity resulting from polio. The court found that the order was warranted because the deformity ". . . will become worse as time goes by unless operative correction is had *now.*"²¹ More recently, the Children's Court, in ordering psychiatric examination,²² held a child neglected because his parent failed to obtain psychiatric guidance for him.²³ The child was not physically ill, but his conduct suggested a need for such treatment.

In addition to the difficult task of evaluating physical and psychological factors in the child's condition, the court may have the further responsibility of passing upon objections which invoke the constitutional guarantee of religious liberty.²⁴ Parents often assert that by consenting to the medical intervention proposed they would violate their religious duty.²⁵ While the Supreme Court has never determined the status of religious objections where the health of an individual child was the sole issue,²⁶ state appellate courts have regularly overruled such contentions.²⁷ In New York, the merit of religious objections has never been passed upon in proceedings for neglect under the Children's Court Act. In one case, the Appellate Division dismissed as whimsical and arbitrary a mother's objection expressed in terms of religious obligation.²⁸ In the instant case, the Court of

¹⁹ Matter of Vasko, 238 App. Div. 128, 263 N.Y. Supp. 552 (2d Dep't 1933).

²⁰ Matter of Rotkowitz, *supra* note 16 at 950, 25 N.Y.S.2d at 627 (emphasis added).

²¹ *Id.* at 951, 25 N.Y.S.2d at 627 (emphasis added).

²² "The court in its discretion, either before or after a hearing, may cause any person within its jurisdiction to be examined by a physician, psychiatrist or psychologist appointed or designated for the purpose by the court." N.Y. CHILD. CT. ACT § 24.

²³ Matter of Carstairs, 115 N.Y.S.2d 314 (Child. Ct. 1952).

²⁴ See *People 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).

²⁵ See, *e.g.*, *People v. Labrenz*, *supra* note 24. The father of the Labrenz child stated, ". . . it is my belief that the commandment given us in Genesis, Chapter 9, Verse 4 . . . [signifies] that any use of the blood is prohibited. . . ." 104 N.E.2d at 771. The mother testified that if the baby died after the proposed blood transfusion, that treatment ". . . not only destroys our chances but also the baby's chances for future life. We feel it is more important than this life." 104 N.E.2d at 772.

²⁶ Certiorari was denied in the *Labrenz* case, *supra* note 24.

²⁷ See, *e.g.*, *People v. Labrenz*, *supra* note 24; *Morrison v. State*, *supra* note 24; *Mitchell v. Davis*, 205 S.W.2d 812 (Tex. Civ. App. 1947).

²⁸ See Matter of Vasko, 238 App. Div. 128, 263 N.Y. Supp. 552 (2d Dep't 1933).

Appeals adopted the distinction between philosophy and religion which had been made in the courts below.²⁹ The father's objection that a cure should be effected only through the "forces of the universe" was dismissed as merely philosophical. However, in a criminal prosecution for parental neglect, a defense predicated upon religious grounds was directly overruled.³⁰ Unlike many other jurisdictions, New York gives explicit legislative recognition to a parent's right to reject, on religious grounds, certain health services prescribed by law for children.³¹ Yet, in the provisions of the Children's Court Act for the protection of neglected children, there is no such statutory safeguard of parental religious belief.

The instant decision seems to establish a criterion for determining when medical treatment will be ordered. The Court recognized that the boy's condition created a drastic situation. However, it found that no *present emergency* existed, since an operation performed in future years would be substantially as effective as one performed at the present time. The Court further decided that where the post-surgical phase of treatment³² required the child's cooperation, his expected adverse psychological reaction to the operation justified the trial judge, in exercising his discretion, to refuse the order. Though the Court denied the order, it adopted the view expressed by the lower courts in the instant case, and in earlier cases,³³ that psychological factors may be considered in determining whether or not a drastic situation exists. It was further recognized that a physical defect will warrant remedial intervention when it appreciably impairs a function notably significant in social and economic life.

The Court interpreted *necessity* of medical care for children as including not mere survival, but the physical and psychological capacity to meet the exigencies of daily living. This view notably fulfills equity's traditional concern for the welfare of children. However, where psychological assistance is deemed necessary to correct a child's conduct pattern, the area of possible conflict between therapy and

²⁹ See *Matter of 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 1955).

³⁰ See *People v. Pierson*, 176 N.Y. 201, 68 N.E. 243 (1903).

³¹ N.Y. PUB. HEALTH LAW § 2583 (exempts from the mandates of Sections 2580-2583 [medical care of the handicapped] a child whose parents object because they rely exclusively for healing on the practice of the religious tenets of a church); N.Y. EDUC. LAW § 3204(5) (permits a child to be excused from health classes in the schools if the instruction conflicts with the religion of the child or his parent). In New Jersey, the exemption of religious healing extends not only to the enactments on handicapped children, but to all provisions respecting neglected children. N.J. STAT. ANN. tit. 9, § 9:6-1.1 (Supp. 1954).

³² After the surgery, repair of the split palate would be completed through use of dental appliances. The boy would then have to be trained in the proper use of his palate and mouth, in order that he could speak clearly.

³³ See *Matter of Carstairs*, 115 N.Y.S.2d 314 (Child. Ct. 1952); *Matter of Rotkowitz*, 175 Misc. 948, 25 N.Y.S.2d 624 (Child. Ct. 1941).

religion is enlarged.³⁴ It is submitted that a definitive determination of the status of parental religious objections should be written into the Children's Court Act.³⁵ It may be noted finally that the indoctrination of a child for the purpose of securing his consent to surgery, here ordered to forestall adverse psychological consequences,³⁶ is a novelty in the reported cases.



DOMESTIC RELATIONS — PARENT HAVING CUSTODY PERMITTED TO REMOVE CHILDREN FROM STATE.—Respondent-mother, who had obtained custody of her two infant children in a habeas corpus proceeding, intended to remarry and remove with them to another state. She petitioned the Court to modify the custody order so as to permit such removal. Appellant-father cross-motivated for the children's custody and to restrain the mother from removing them. The Court of Appeals, without opinion, affirmed a determination of the Supreme Court¹ which *held* that, under the circumstances presented, the mother's petition should be granted, with provisos.² *Freed v. Freed*, 309 N.Y. 668, 128 N.E.2d 319 (1955).

The jurisdiction of a state to determine the custody of infants within its territory has its origin in the protection that is due the incompetent or helpless.³ In England, it was first absorbed by chancery through the delegation by the crown of its prerogative, as *parens patrie*, to care for infants.⁴ In the United States, though an original bill in equity may still be brought,⁵ statutes have been enacted which

³⁴ Religious considerations are more likely to arise in regulating children's conduct than in making a choice of remedy for their physical ills. The methods and recommendations of an individual psychiatrist diagnosing or treating a conduct problem might very well conflict with religious precepts or prohibitions.

³⁵ A provision based upon conflict with religion (*cf.* N.Y. EDUC. LAW § 3204), and saving the requirements of law as to the control of communicable disease, would seem preferable to a narrower exemption predicated upon preference for religious healing (*cf.* N.Y. PUB. HEALTH LAW § 2583).

³⁶ Under the interim order, the boy and his father were shown the results obtained in various cases through the treatment proposed and the method of treatment was explained in detail. While they professed themselves impressed, their opposition was not diminished.

¹ *Matter of Freed*, 133 N.Y.S.2d 849 (Sup. Ct.), *aff'd mem.*, 284 App. Div. 892, 134 N.Y.S.2d 595 (2d Dep't 1954).

² The Court provided for a substantial enlargement of the father's custody and visitation rights.

³ *Finlay v. Finlay*, 240 N.Y. 429, 431, 148 N.E. 624, 626 (1925) (dictum); see JACOBS AND GOEBEL, *DOMESTIC RELATIONS* 943 (3d ed. 1952).

⁴ See JACOBS AND GOEBEL, *op. cit. supra* note 3, at 943.

⁵ *Finlay v. Finlay*, *supra* note 3 at 433, 148 N.E. at 626 (dictum).