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Medical Aid for Children without Parental Consent

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MEDICAL AID FOR CHILDREN WITHOUT PARENTAL CONSENT

It has long been recognized, as a general statement of law, that a court possesses the power under certain conditions to substitute its authority for that of the authority of a child's parents.[1] The substantive considerations and procedures which a court employs to take temporary custody of a child for purposes of medical treatment remain a controversial segment of the law, though these substantive considerations and procedures spring from the ancient and unquestioned doctrine of parens patriae. Where a child is thought to be in need of immediate medical care, and the parents have failed or will not agree to provide treatment, it becomes crucial that the case be placed before the appropriate court or quasi-judicial body as soon as possible, and procedure assumes added importance.

Speaking in terms of substantive law, there are diverse reasons why medical treatment is not provided by parents, and dealing with these reasons becomes troublesome when they are advanced as affirmative defenses for the parent's failure to act. If the lack of medical treatment is simply a result of poverty or actual neglect, the courts have little trouble in disposing of the problem. However, if the lack of necessary medical care is the result of the religious or personal philosophies of otherwise attentive parents, the difficult question that confronts the courts is whether under those conditions lack of medical care constitutes neglect within the purview of the statutes dealing with juvenile problems. Further, the courts must answer the question of whether enforcement of medical treatment over the religious or personal objections of the parents conflicts with the constitutional guarantees of religious and personal freedom . Also to be taken into consideration is the seriousness of the child's illness and the degree of danger involved in treatment.

In order best to discuss the procedures and substantive considerations involved in judicial insistence upon medical care for children in the face of parental objection, it is necessary to view the problem in connection with the underlying parens patriae powers of the state. The state is considered an institution for the good of the citizen and his children, and the state as parens patriae may exercise parental care and authority in order that the child may best be prepared for citizenship and adult life.[2] Statutes to this end are an embodiment of the duty of the state as guardian and protector of children where other guardianship fails.[3] Absolute power is not implicit in parental right to the custody of the child, but this right is a trust placed in the parent by the state as parens patriae.[4] This power of the state is not unlimited, but equity courts have the power to intervene and take custody from the parents, under certain circumstances, and to

1. In re Rotkowitz, 175 Misc. 948, 25 N.Y.S.2d 624 (1941); Heinemann's Appeal, 96 Pa. 112, 42 Am.Rep. 532 (1880).
2. In re Turner, 94 Kan. 115, 145 Pac. 871, Ann.Cas. 1915E 1022 (1945).
3. Wisconsin Industrial School for Girls v. Clark County, 103 Wis. 651, 79 N.W. 422 (1899).
4. Gardner v. Hall, 132 N.J.Eq. 64, 26 A.2d 799 (1942).

place the minor in the custody of an institution or third person, the best interests of the minor being the most important consideration.[5]

The doctrine of parens patriae has been one of influence and vitality throughout the history of Anglo-American law, but its use as doctrinaire justification for taking temporary custody for the purposes of a medical operation or treatment is relatively new. In partial explanation of this somewhat late development it perhaps can be said that it was necessary for medical science to develop a substantial degree of reliability before a court having equitable powers felt justified in overriding parental dictates, especially when the treatment involved a degree of risk. Changing sociological concepts and public policy are further explanations for this change. The greater concern of the courts today in the health and well-being of infants is not evidence of increasing socialistic tendencies, but is rather an emphasis on benefit to the individual, with a benefit to the state accruing only as a secondary and inevitable result.

It is held that statutes under which medical treatment is given to children in the face of religious objections of the parents do not violate the constitutional right of freedom of religion.[6] Certain religious sects have interpreted passages in the Bible as being an injunction against various kinds of medical treatment.[7] In *Prince v. United States*,[8] a child was distributing religious pamphlets on the street. Although accompanied by her adult guardian, it was held that the right to practice religion freely does not include the liberty to expose the community or child to communicable disease or the child to ill health and death, and a state could prohibit such practices by statutes designed to protect the health and welfare of its citizens. The opinion stated:

> 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.[9]

Although this case does not bear directly on the issue of medical treatment when objected to by parents, it expresses a philosophy applicable to situations where religious convictions bar medical care. The *Prince* case was cited in an Illinois determination of this precise issue.[10] The parents of a child suffering from erythroblastosis fetalis[11] had refused, on religious grounds, to permit a blood transfusion which medical opinion considered necessary for the prevention of mental deficiency or possible death. The court held that the Juvenile Court Act,[12] providing for court aid upon a

5. Arnold v. Arnold, 246 Ala. 86, 18 So.2d 730 (1944).
6. In re Vasko, 238 App.Div. 128, 263 N.Y.Supp. 552 (1933).
7. For examples of Biblical passages interpreted as forbidding blood transfusions, see Leviticus 17:10-14 and Genesis 9:4, 5.
8. 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944).
9. 321 U.S. 158, 170.
10. People v. LaBrenz, 411 Ill. 618, 104 N.E.2d 769 (1951).
11. Commonly called the "RH blood condition."
12. Ill. Rev. Stat. § 23-190 to 23-220 (1951).

showing that the child was "neglected" (one which "has not proper parental care") was constitutional. The lack of medical care, even though a result of the parent's religious beliefs, constituted the child neglected and she therefore lacked proper parental care as defined in the statute. The test of proper parental care has been said to be that which a reasonable and prudent parent would do under the same or similar circumstances.[13] In a Texas case,[14] under a similarly worded statute,[15] a child suffering from what was thought to be arthritis or complications following rheumatic fever was not given medical aid by its mother. The mother did not think orthodox medical care was necessary because of her prayers and religious ministrations. The court held that what an individual may consider a higher authority must yield to the law of the land where a duty to provide medical treatment is involved; peculiarities of belief as to proper forms of treatment, however honestly entertained, are not necessarily a lawful excuse. The appellate court did not disturb the jury finding of neglect, and affirmed the award of custody to the Chief Juvenile Officer so that medical aid could be given. The court pointed out that the award was not permanent, but would yield to changing conditions; for example, reasonable cooperation by the parent.

The case of *In re Hudson*[16] held that if parents show unfitness and the child is exposed to immoral or debasing conditions, the court can take custody; however, the court has no right to intercede over the objections of the parents and force medical treatment when these objections are based on the parents' belief that the operation might result in the child's death. Denial of medical treatment under these conditions did not constitute the child "destitute" or its home "unfit" by reason of neglect of the parents, within the meaning of the statute.[17] In the *Hudson* case the appellate court declined to order an amputation without parental consent for a twelve year old girl whose congenitally malformed arm was ten times its normal size. Medical opinion in the case revealed that there was a fair degree of risk, but amputation was recommended. The size of the malformed arm, it was testified, caused a generally weak condition which made the girl prone to infection due to the demands on her heart. The mother objected because of what she considered to be the risk involved, although the father seemed willing to let the court assume his responsibility for a decision. The appellate court, in a four to three decision, reversed the lower court's order directing amputation. The majority reasoned that although the mother objected to the operation because she felt it was too dangerous, the mother was otherwise a fit parent, and a court of equity had no power to take custody over such objections and subject the child to an operation that might result in death. The court implied that such power could lead to a court order permitting euthanasia or mercy killing.

13. In re Rotkowitz, 175 Misc. 948, 25 N.Y.S.2d 624 (1941).
14. Mitchell v. Davis, 205 S.W.2d 812 (Tex. 1947).
15. Tex. Civ. Stat. § 2230 et. seq. (1948).
16. 13 Wash.2d 674, 126 P.2d 765 (1942).
17. Rev. Code of Wash. § 13-04.010 (1956).

The lower court in the *Hudson* case had held that this failure to provide medical treatment came within the purview of the Washington statute which contains a requirement similar to that of Texas and Illinois.

The dissenting opinion in the *Hudson* case stressed that parental duty had been shirked in two ways: first, in failure to provide medical care; and second, in failure to heed the advice of professional men. Medical attention, said the dissent, is a necessary[18] without which a child is destitute within the meaning of the statute. The minority of the court felt that the clearly apparent psychological effect caused by the malformed arm and the child's inability to participate in normal life were strong arguments for ordering the amputation where such operation did not involve more than a fair degree of risk.

The outlook for the success or failure of the proposed operation is perhaps the most powerful factor that the court must consider. In England in 1914, relatively early in the history of modern surgical technique, the court held that parental refusal to allow an adenoid operation could have been found to constitute a failure to provide adequate medical aid. The father of the child objected because of a certain amount of risk involved. This was held to be no excuse where in actuality the operation was minor and the risk was negligible.[19] In the case of *Morrison v. State*,[20] reliable medical opinion indicated that death would inevitably result from lack of medical care, and the parents would not consent to the giving of a blood transfusion because of religious beliefs and the risk involved. The court did not hesitate to order that the necessary medical care be furnished, pointing to the fact that a blood transfusion, done by a competent technician, is almost devoid of any risk to life. A greater degree of risk was involved in the proposed amputation of the malformed arm in the *Hudson* case, but it should be born in mind that the expert testimony described this as only a fair degree of risk and recommended surgery. The problem seems to resolve itself into the question of whether the court should weigh most heavily the opinion of medical witnesses or the opinions and wishes of the parents. The court in the *Morrison* case specifically declined to follow the *Hudson* decision, and relied most heavily on the medical prognosis given by the expert witnesses. Thus it can be seen that the two cases are distinguishable on more than merely the differing degree of risk involved. In dealing with the question of outlook for success or failure, the Washington court was apparently willing to give more weight to the opinion and wishes of the parents than to the expert testimony of physicians, even where risk of death was not substantial and continued life without an attempt at treatment was doubtful.

It has been held that statutes providing for compulsory vaccination are constitutional. The case of *Jacobson v. Massachusetts*[21] declared that

18. For collected cases holding that medical attention is a necessary, see 71 A.L.R. 227.
19. Oakey v. Jackson, 1 K.B. 216 (1914).
20. 252 S.W.2d 97 (Mo. 1952).
21. 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643, 3 Ann.Cas. 765 (1904).

provision for compulsory small-pox vaccination is a legitimate exercise of the police power of the state. The penalty for non-compliance with this statute requiring medical treatment in the form of immunization against small-pox was a monetary fine. In later cases,[22] statutes and resolutions of school and health boards requiring vaccination before the child will be permitted to attend school have been upheld.[23] The withholding of the privilege to attend school is an example of a coercive remedy that in most cases will work without resort to any court action. Part of the reasoning behind such statutes is that parents will consent to vaccination if to object means a deprivation of their children's right to education.

The procedure for judicial termination of parental rights is generally well established by statute.[24] Once the substantive questions as discussed in the paragraphs above are resolved in favor of medical treatment, and life depends on quick medical aid, the procedures must necessarily be speedy. In Wyoming, a petition is filed in the district court by the county attorney or other interested party alleging that the child has been abandoned or that the parent is unfit by reason of his or her neglect.[25] A jury trial may be demanded by any parent, child, or interested party, and constructive service may be had against any non-resident parent, although no judgment or decree can be entered without a hearing.[26] The Wyoming statute further provides that upon determining that it is in the best interests of the child, the rights of the parents are terminated and a suitable person is appointed to serve as guardian. Further, upon the application of any parent, the court may order transfer of the permanent care and custody of the child. Thus it is the parent's option to make the transfer a permanent status. Jurisdiction in these proceedings is based on residence of the child.[27] Illustrating the flexibility of the decree, under Illinois statutory provisions similar to those of Wyoming, a guardian was appointed with orders to see that the medical treatment was performed. After treatment, the guardian was discharged and the child was returned to its parents.[28] As a further illustration of procedural fexibility, it has been held that the child, where mentally old enough to understand what benefits the treatment would provide, be acquainted with the benefits of

22. Mosier v. Barren County Board of Health, 309 Ky. 829, 215 S.W.2d 967 (1948); Sadlock v. Board of Education, 137 N.J.L. 85, 58 A.2d 218 (1948).
23. Resolution of the Board of Education of Borough of Carlstadt, Bergen County, based on New Jersey statutes: "A board of education may exclude from school any teacher or pupil who has not been successfully vaccinated or revaccinated, unless the teacher or pupil shall present a certificate signed by the medical inspector appointed by the board of education that the teacher or pupil is an unfit subject for vaccination."
24. For representative statutes, see: Ill. Rev. Stat. § 23-190 (1951); N.D. Rev. Code § 27-1608 (1943); Rev. Code of Ohio § 2151.03 (1953).
25. Wyo. Comp. Stat. § 58-701 to 58-706 (1945).
26. In Texas, an order can be entered where the parents did not have notice of the proceedings, but it is subject to the allowance of a subsequent hearing, and if it is found in the subsequent hearing that the parent neglected the child within the meaning of the statute, the original order is valid though no actual notice was had by the parents. Dewitt v. Brooks, 143 Tex. 687, 182 S.W.2d 687 (1944).
27. Accord, ex parte Kernon, 272 N.Y. 560, 4 N.E.2d 737 (1936).
28. People v. LaBrenz, 411 Ill. 618, 104 N.E.2d 769 (1951).

the operation by a reasonable number of qualified persons and be permitted to decide for himself, the parent being restrained from interfering with such discussions. Also, the expenses incurred were to be charged to the father if he was found to be financially able to pay.[29]

The situation may be summarized as follows: generally speaking, the state has 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. Statutes under which this power is exercised, even in the face of parental objection based on religious belief, are constitutional. Denial of medical care constitutes neglect; peculiarities of belief as to proper treatment are not necessarily a lawful excuse. The possibility of success or failure of the proposed treatment is a powerful consideration. Where medical opinion indicates that treatment involves a substantial degree of risk, there is a conflict of authority as to whether the decision should be left to the parents. However, where continued life without treatment is doubtful, the opinion of expert witnesses, though in no way binding, is carefully weighed and is usually persuasive. Statutes denying education privileges to students unless the students comply and submit to vaccination have been upheld. Such statutes are an example of a coercive remedy through which the treatment is usually accomplished without resort to the courts.

Once neglect has been established, the judge has much discretion in ordering the kind of treatment to follow. Generally, an order for treatment contemplates the return of the child to its natural parents when medical care has been accomplished. Ordinarily a county or court officer is appointed as guardian and given the responsibility of seeing that the treatment is carried out.

Although unreasonable publicity should not be given to individual cases, it is of great importance that it be made known to the public its responsibility to call to the attention of the court the fact that a child is being neglected.

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29. In re Seiferth, 127 N.Y.S.2d (1954).