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Parent and Child - State's Right To Take Custody of a Child in Need of Medical Care - State v. Perricone, 37 N.J. 463, 181 A.2d 751 (1962)

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curring opinions adequately resolves the dilemma because: (1) it is not always possible to determine which are borderline cases, and (2) it would appear to be rather difficult to judicially notice the standards of a large community like New York or Chicago. There was, however, a strong dissenting opinion which basically followed the California court's position,[25] citing the opinions of Justice Frankfurter and Justice Harlan in *Smith v. California*[26] as authority. This dissent indicated a dissatisfaction with the reasoning of the majority and a firm conviction that excluding the defendant's evidence in obscenity cases does violate due process.

As was pointed out previously, certain members of the Supreme Court of the United States and experts in the field of obscenity appear to be leaning more and more toward the position that the admissibility of comparable writings and/or expert testimony as evidence of the community standards is a constitutional guarantee. Indeed this position appears to be the more sensible one. The fact is, there is such a plethora of ideas and philosophies which compose present-day societies, that to extract a particular community standard from this mass is an extremely difficult task for any judge or jury to perform without the help of any guide lines. In light of the increasing strength gathering behind this position, and the fact that the New York court has a strong dissent, it would appear as though New York will ultimately have to change its position and admit such evidence in obscenity cases. In the meantime, the *Finkelstein* case represents the view opposed to the California position, and accounts for the split of authority on this problem to date.

[25] In re Harris, 56 Cal. 2d 879, 16 Cal. Rptr. 889, 366 P. 2d 305 (1961).

[26] 361 U.S. 147 (1959).

PARENT AND CHILD–STATE'S RIGHT TO TAKE CUSTODY OF A CHILD IN NEED OF MEDICAL CARE

John Perricone, a blue baby, was brought to the Bedford S. Pollack Hospital by his parents. When the infant was admitted, Mrs. Perricone consented to the performance of any surgical operations as the physicians of the hospital thought necessary for the welfare of the boy. However, she instructed that it be noted on the progress record "the parents are Jehovah Witnesses–request no usage of blood transfusions." Blood transfusions became necessary and they were refused by John's parents. Thomas J. Finn, superintendent of the hospital, brought an action in the Juvenile and Domestic Relations Court of Hudson County, Jersey City, New Jersey, to have a special guardian appointed for the purpose of administering the necessary transfusions. A special guardian was appointed

under New Jersey Statutes[1] providing for the Juvenile and Domestic Relations Court to take custody of a child who is neglected or whose parents are unfit. The Perricone's appealed from this order contending that the Juvenile and Domestic Relations Court did not have jurisdiction under the law because they were not unfit parents nor was the child neglected. The issue is whether the parents' refusal to consent to the giving of necessary blood transfusions to their infant son conferred jurisdiction upon the Juvenile and Domestic Relations Court to take custody of the child and appoint a special guardian to administer such transfusions. The Supreme Court of New Jersey in affirming the lower court's decision stated that the provisions under the New Jersey Statutes[2] conferring custody of a neglected child to the Juvenile and Domestic Relations Court, have as their prime purpose the welfare of infants. Such legislation has provided that the jurisdiction of the Juvenile and Domestic Relations Court shall extend to protect infants lacking in necessary medical care because of parental refusal of such care. In such instances the child shall be deemed neglected under the law and its parents unfit. *State v. Perricone*, 37 N.J. 463, 181 A.2d 751 (1962).

The jurisdiction exercised by the Juvenile and Domestic Relations Court was based on the principle of *parens patriae*, *i.e.* a sovereign right and duty to care for a child and protect him from neglect during his minority.[3] This principle regarding the state's interest in infants was specifically written into the statute establishing the jurisdiction of the Juvenile and Domestic Relations Court.

> It is hereby declared to be a principle governing the law of this state that children under the jurisdiction of said court are wards of the state . . . entitled to the protection of the state, which may intervene to safeguard them from neglect. . . .[4]

The holding in the *Perricone* case follows the majority of jurisdictions in the exercise of the sovereign right to take custody of a neglected child under *parens patriae*. The importance and reach of such a holding can be properly illustrated by showing how far other states have gone in taking

[1] 9 N.J.S.A. § 2-9, "Parents or custodian of child unfit; action in . . . Juvenile and Domestic Relations Court. When the parents of any minor child are . . . unfit . . . or shall neglect to provide the child with proper protection, . . . as to endanger the welfare of the child. . . . The court [Juvenile and Domestic Relations Court] may proceed in the action in a summary manner or otherwise." and 9 N.J.S.A. §6-1, "Neglect of a child shall consist in any of the following acts, by any one having the custody or control of the child: (a) willfully failing to provide . . . medical attention or surgical treatment, . . . for the child's physical or moral well being."

[2] *Ibid.*

[3] Johnson v. State, 18 N.J. 422, 114 A. 2d 1 (1955); Lippincott v. Lippincott, 97 N.J. Eq. 517, 128 Atl. 254 (1925).

[4] 2A N.J.S.A. § 4-2.

custody of a neglected child in those situations where the child is in need of medical care and the parents refuse to permit such care to be given. There are two situations where the courts have taken custody of a child to administer necessary medical care under the doctrine of *parens patriae*. The first is where such medical care is required to preserve the life of the child. The second exists when medical care is necessary for the general health of the child.

The ensuing three cases illustrate the state's right to take custody of a child in need of medical care where failure to provide such by the parents will almost certainly result in the death of the child. In *People ex rel. Wallace v. Labrenz*,[5] an Illinois case, the parents of an infant, suffering from a rare blood disease, refused its receiving necessary blood transfusions to save its life. The court held the child neglected and appointed a guardian to administer the necessary transfusions. The jurisdiction exercised by the court was based on the government's responsibility under the doctrine of *parens patriae*, to care for and protect infants from neglect.[6] Relying on the *Labrenz* decision the Court of Appeals of New York[7] held that parents refusal to consent to a blood transfusion for their child, where the child's life was in jeopardy, warranted finding that the child was neglected within the terms of the Family Court Act of New York.[8] The act defines a neglected child as one who is not adequately supplied with medical or surgical care by its parents. In *Morrison v. State*,[9] an infant child was affected with erythroblastic anemia and competent medical opinion was that the child would die if it was not given a blood transfusion. The court held that the paramount right of a parent to the custody of his child need not be considered if the life of the child is at stake and said:[10]

> [E]very human being is endowed by God with the inalienable right to live. The fact that the subject is the infant child of a parent who, arbitrarily, puts his own theological belief higher than his duty to preserve the life of his child cannot prevail. . . .[11]

[5] 411 Ill. 618, 104 N.E. 2d 769 (1952).

[6] ILL. REV. STAT. ch. 23, §§ 2001–15 (1961).

[7] In the Matter of Santos, 16 App. Div. 2d 755, 227 N.Y.S. 2d 450 (1962).

[8] N.Y. COURT REORGANIZATION ACT §§ 311–313. This act is designed to provide due process of law for determining whether a child is neglected, and the Family Court has exclusive original jurisdiction over proceedings involving a child alleged to be neglected under the act.

[9] 252 S.W. 2d 97 (Kansas City Ct. of Appeals 1952).

[10] *Ibid.* and 12A V.A.M.S. 211.010, the Juvenile Court shall have jurisdiction over a child who is alleged to be neglected because its parents refuse to provide necessary medical, surgical or hospital care for such child.

[11] 252 S.W. 2d 97, 101 (1952).

Now what of those situations, where the child is not in need of emergency medical care to save its life, when the general health of the child is concerned and the parental care given is insufficient? The succeeding cases will examine the state's right in taking custody of a child in order to provide medical treatment for its general health. To order medical treatment the court need not find it necessary to save the life of the child. It need only be shown that the health, limb, person or future of the child be in jeopardy.[12] In *In re Vasko,*[13] it was held that, where parents refused to permit the removal of the eye of a two year old child as recommended by medical experts, the court was authorized to order such operation. Similarly in *Mitchel v. Davis,*[14] where a child was suffering from arthritis and the mother refused medical treatment but relied solely upon the effects of prayer, the child was considered neglected and proper medical care was ordered.

In proceedings for determination of whether the minor child is without proper care, paramount consideration is not limited to whether an emergency exists in terms of the life or death of the child but also extends to whether it is being provided proper medical and surgical care necessary for its health.[15] In the case of *In re Seifert,*[16] a father had arbitrarily refused permission for an operation on his twelve year old son's harelip and cleft palate, the New York Court of Appeals held that the act[17] empowering the Children's Court to make an order for surgical care of a neglected child enables the court to order the operation notwithstanding the parents' objection. So far as to give the court custody of a child where the natural custodian had failed to provide the necessary medical or surgical care, there need not be an emergency. The preserving of the general health and welfare of the child is all that is required.[18]

The rationale behind the state taking custody of a neglected child under the doctrine of *parens patriae,* in those specific instances where the parents refuse to provide necessary medical care, is based upon the state's police power.[19] Such police power is vested in a state to establish laws and ordinances for the purpose of securing the peace, good order, morals and

[12] *In re* Kronjaeger, 166 Ohio 172, 140 N.E. 2d 773 (1957).

[13] 238 App. Div. 128, 263 N.Y.S. 552 (1933).

[14] 205 S.W. 2d 812 (Texas Ct. of Civil Appeals 1947).

[15] 238 App. Div. 128, 263 N.Y.S. 552 (1933).

[16] 285 App. Div. 221, 137 N.Y.S. 2d 35 (1955).

[17] N.Y. CHILDREN'S COURT ACT §§ 2(4)(e), 6(1)(e, g), 24. A neglected child is one whose parents "neglect or refuse . . . to provide necessary medical, surgical, institutional or hospital care for such child."

[18] In re Snyder, 328 Mich. 277, 43 N.W. 2d 849 (1950); In re Du Mond, 196 Misc. 16, 92 N.Y.S. 2d 805 (1949); Walsh v. Walsh, 146 Misc. 604, 263 N.Y.S. 517 (1933).

[19] State v. Perricone, 37 N.J. 463, 181 A.2d 751 (1962).

health of the community.[20] Under this power, the control over children for the protection of their health by the state seems almost limitless.[21] In fact the police power of the state has been extended to cover a case involving an unborn child. In *Hoener v. Bertinato*,[22] parents of an unborn child refused to consent to a blood transfusion for the child to be given immediately after birth. Medical opinion and history of past pregnancies of the mother indicated that the transfusion would be essential to save the infant's life. The court held that the parents were neglecting to provide the child with proper protection, and ordered that the blood transfusions be administered. This unborn child's right to life and health entitled it to legal protection.

The purpose of the law allowing a state to take custody of a child, where the child is in need of medical care and its parents refuse to permit such care to be given, is to insure the health, welfare and well being of the child. Any parental action which would jeopardize this objective constitutes such a violation of duty as to forfeit the right of custody.

[20] Prince v. Massachusetts, 321 U.S. 158 (1944); Klein v. Klein, 8 App. Div. 2d 844, 190 N.Y.S. 2d 402 (1959).

[21] Limitations have been set down in these cases relying on the Washington Supreme Court Decisions in *In re* Hudson, 13 Wash. 2d 673, 126 P. 2d 765 (1942). The court held that it does not have authority to take custody and subject a minor child to surgical operation over the objection of its parents. The mere fact that a court is convinced of the necessity of subjecting a minor child to a surgical operation will not sustain a court order which deprives the parent of the responsibility and the right to decide the ultimate welfare of the child. These limitations, however, have been confined to instances arising within the State of Washington. In re Frank, 41 Wash. 2d 294, 248 P.2d 553 (1952); In re Petrie, 40 Wash. 2d 809, 246 P. 2d 465 (1952); Wade v. State, 39 Wash. 2d 744, 238 P. 2d 914 (1951).

[22] 67 N.J. Super. 517, 171 A.2d 140 (1961).

PATENT LAW–FUNCTION OF THE APPARATUS REJECTION–INCONSISTENT WITH THE PATENT ACT OF 1952

Appellant, Loren G. Symons, filed a patent application[1] claiming as his invention both a method of and apparatus for grinding[2] in a *Rotating and Gyrating Ball Mill.* The method sought to be patented comprised the operative steps performed by the apparatus in effecting the grinding operation. The Patent Office Examiner reviewing the application, made a

[1] Serial No. 511,655 filed May 27, 1955, issued as Patent No. 3,042,322 on July 3, 1962.

[2] Method or process, and apparatus, are separate classes of subject matter recognized by statute as patentable. 35 U.S.C.A. § 101 (1953).