Michigan Law Review

Volume 64 | Issue 3

1966

Authorization of Involuntary Blood Transfusion for Adult Jehovah's Witness Held Unconstitutional--*In re Brooks' Estate*

Michigan Law Review

Authorization of Involuntary Blood Transfusion for Adult Jehovah's Witness Held Unconstitutional—*In re Brooks' Estate**

Despite serious illness, plaintiff requested, in accordance with her religious beliefs as a Jehovah's Witness,[1] that blood transfusions not be administered to her.[2] Upon the request of her physician and several assistant state's attorneys, a court-appointed guardian was authorized to consent to a blood transfusion for the plaintiff, and a transfusion was administered. On appeal of the court's action to the Supreme Court of Illinois, *held*, order reversed.[3] The authorization of a blood transfusion for an adult Jehovah's Witness who has only

* 205 N.E.2d 435 (Ill. 1965).

1. The belief that blood transfusions are a violation of the law of God is derived from a literal reading of such biblical passages as *Genesis* 9:3,4: "Only flesh with its soul—its blood—you must not eat," and *Leviticus* 17:13,14: "You must not eat the blood of any sort of flesh, because the soul of every sort of flesh is in its blood." WATCH TOWER BIBLE AND TRACT SOC'Y OF PA., BLOOD, MEDICINE AND THE LAW OF GOD 4 (1961).

2. The plaintiff and her husband also signed a document releasing her physician and the hospital from all civil liability that might result from the failure to administer blood transfusions to her. *In re* Brooks' Estate, 205 N.E.2d 435, 437 (Ill. 1965) (hereinafter cited as principal case).

3. Since the transfusion had been administered before the appeal was taken, the guardian argued that the appeal should be dismissed for mootness. The court disposed of this contention by quoting the language of an earlier Jehovah's Witness case, People *ex rel.* Wallace v. Labrenz, 411 Ill. 618, 622-23, 104 N.E.2d 769, 772 (1952): "[W]hen the issue presented is of substantial public interest, a well-recognized exception exists to the general rule that a case which has become moot will be dismissed on appeal. . . . Among the criteria considered in determining the existence of the requisite degree of public interest are the public or private nature of the question presented, the desirability of an authoritative determination for the future guidance of public officers, and the likelihood of future recurrence of the question." Principal case at 438.

adult children is an unconstitutional interference with the patient's right to the free exercise of her religion.[4]

In compliance with the state's duty as *parens patriae* to protect the welfare of minors,[5] the courts have consistently authorized the administration of blood transfusions to children whose parents have refused, on the basis of their religious beliefs as Jehovah's Witnesses, to consent to such treatment.[6] The courts' *parens patriae* jurisdiction

4. Although the question frequently arises, it is uncertain whether refusal to submit to a life-saving transfusion might constitute suicide. The uncertainty is due primarily to the distinction between misfeasance—suicide in the customary sense—and nonfeasance, the refusal of the transfusion. Moreover, the patient does not actively wish to die, but merely to live in accordance with his beliefs. If such an act does constitute suicide, and suicide is a crime in the particular jurisdiction, then one's religious beliefs would not be a defense. See Reynolds v. United States, 98 U.S. 145 (1878), where the Supreme Court held that the accused's religious beliefs were not a justification for polygamy. Although its status varies greatly among the states, suicide is not treated as criminal in most jurisdictions. See 40 N.C.L. REV. 323 (1963).

In this regard, it is interesting to note the relevant provisions of the 1961 District of Columbia Code. Section 6-1301 provides that cancer (including leukemia) and all other malignant growths be reported to the director of public health. However, persons suffering from these diseases cannot be compelled to submit to medical treatment. § 6-1303. Moreover, § 6-118 gives the Commissioners of the District of Columbia broad powers to prevent the spread of communicable diseases including the power, pursuant to § 6-119h, to order treatment. However, § 6-119i prohibits the authorities from compelling a person who relies in good faith on spiritual means or prayer in treatment of disease to submit to medical treatment. Thus, Congress has decided that, in the District of Columbia, medical treatment cannot be forced upon an individual against his will or against his religious beliefs, even though death may result from the lack of treatment.

5. In England, the king was the *parens patriae*—the general guardian of all infants, incompetents, and insane persons. This sovereign prerogative and duty came to be exercised by Chancery on behalf of the crown. When the United States achieved its independence, this sovereign power of guardianship over persons under a disability devolved upon the states. Fontain v. Ravenel, 58 U.S. (17 How.) 369 (1854) (Taney, J., concurring). See Helton v. Crawley, 241 Iowa 296, 41 N.W.2d 60, 71 (1950); *In re* Turner, 94 Kan. 115, 121, 145 Pac. 871, 872 (1915); *In re* Hudson, 13 Wash. 2d 673, 126 P.2d 765, 777 (1942). A duty is thus imposed on the state to protect persons who are under a disability, such as minors, incompetents, and insane persons. Warner Bros. Pictures v. Brodel, 179 P.2d 57 (Cal. Ct. App. 1947); Johnson v. State, 18 N.J. 422, 430, 114 A.2d 1, 5 (1955); McIntosh v. Dill, 86 Okla. 1, 9, 205 Pac. 917, 925 (1922). For example, a child becomes a ward of the state whenever his life or health is endangered because of parental neglect, ignorance, poverty, or viciousness. *In re* Rotkowitz, 175 Misc. 948, 25 N.Y.S.2d 624 (Dom. Rel. Ct. 1941). Normally, the exercise of this power involves civil matters relating to contract and property rights of infants or incompetents and the supervision of the personal custody of infants when necessary. For examples of equity jurisdiction in cases involving custody of children, see Arnold v. Arnold, 246 Ala. 86, 18 So. 2d 730 (1944), and Helton v. Crawley, *supra*.

However, the state's power as *parens patriae* also extends to matters involving the personal liberty of persons who are under a disability such as infancy, incompetency, habitual drunkenness, or imbecility. This power is exercised whenever such persons could be a danger to themselves or to others if they were not held under the protective custody of the state. Johnson v. State, *supra*. Thus, the state may bring a minor child before a juvenile court for commitment to a state industrial school, *In re* Turner, 94 Kan. 115, 145 Pac. 871 (1915), or commit an insane person to an institution, *In re* Ryan, 47 F. Supp. 10, 12 (E.D. Pa. 1942).

6. *E.g.*, People v. Labrenz, 411 Ill. 618, 104 N.E.2d 769 (1952); Morrison v. State, 252 S.W.2d 97 (Mo. 1952); State v. Perricone, 37 N.J. 463, 181 A.2d 751, *cert. denied*,

over minors emanates from the statutory power of juvenile courts to provide for the protection and control of minors,[7] and allows the courts, under appropriate circumstances, to substitute their authority for that of a child's parents.[8]

Recognizing the utility of the *parens patriae* concept in this setting, the courts have not hesitated to extend the doctrine to save the lives of unyielding parents where minor children are involved. Thus, one court ordered that a transfusion be given a pregnant mother, despite her religious beliefs to the contrary, on the theory that the welfare of the mother and of the unborn child were so inseparable that it would be impractical to distinguish between them.[9] Then, in the landmark case of *Application of the President & Directors of Georgetown College*,[10] a United States Circuit Judge ordered a transfusion for an adult Jehovah's Witness who was the mother of a minor child.[11] Although the case differed from previous cases in that the transfusion was authorized to save only the life of the parent rather than that of the child, one of the primary bases for the decision was again the *parens patriae* doctrine; the judge expressed concern for the welfare of the minor child should its mother die, and for the parent's responsibility to the community to care for her child.[12]

In the principal case, the court faced a situation in which

371 U.S. 890 (1962); Hoener v. Bertinato, 67 N.J. Super. 517, 171 A.2d 140 (1961); *In re* Santos, 16 App. Div. 2d 755, 227 N.Y.S.2d 450 (1962); *In re* Clark, 90 Ohio L. Abs. 21, 185 N.E.2d 128 (1962); Raleigh Fitkin-Paul Morgan Memorial Hosp. v. Anderson, 42 N.J. 421, 201 A.2d 537, *cert. denied*, 377 U.S. 985 (1964).

7. See, *e.g.*, CAL. WELFARE CODE § 600; CONN. GEN. STAT. REV. § 17-59 (1958); ILL. REV. STAT. ch. 23, § 2001 (1963); MD. ANN. CODE art. 26, § 53 (1957); MO. REV. STAT. §§ 211.011, .031 (Supp. 1957); N.J. REV. STAT. § 2a:4-34 (1951); N.C. GEN. STAT. § 110-21 (1960); N.D. CENT. CODE § 27-16-10 (1960); OHIO REV. CODE ANN. §§ 2157.07, .33 (Page 1954). However, since the power of the state over children as *parens patriae* is derived from ancient chancery jurisdiction, the right of the state to exercise this guardianship does not depend solely on statutes conferring that power and thus is not limited by such statutes. *In re* Hudson, 13 Wash. 2d 673, 126 P.2d 765, 777 (1942).

8. The most common example of this intervention is court-authorized medical treatment for a neglected child. *E.g.*, *In re* Rotkowitz, 175 Misc. 948, 25 N.Y.S.2d 624 (Dom. Rel. Ct. 1941) (surgery on a deformed foot); *In re* Vasko, 238 App. Div. 128, 263 N.Y.S. 552 (1933) (removal of eye infected with malignant growth); Mitchell v. Davis, 205 S.W.2d 812 (Tex. Civ. App. 1947) (medical treatment for arthritis and rheumatic fever); see Scheib, *Compulsory Medical Attention*, 13 N.Y.U. INTRA. L. REV. 79 (1957); 13 WYO. L.J. 88 (1959).

9. Raleigh Fitkin-Paul Morgan Memorial Hosp. v. Anderson, 42 N.J. 421, 201 A.2d 537 (1964). *Cf.* Gordon, *The Unborn Plaintiff*, 63 MICH. L. REV. 579 (1965).

10. 331 F.2d 1000 (D.C. Cir. 1964), *petition for rehearing en banc denied*, 331 F.2d 1010 (D.C. Cir. 1964), *cert. denied sub nom.* Jones v. President & Directors of Georgetown College, Inc., 377 U.S. 978 (1964).

11. The *Georgetown* decision has been the subject of extensive comment. See generally 60 NW. U.L. REV. 399 (1965); 113 U. PA. L. REV. 290 (1964); 9 UTAH L. REV. 161 (1964). The procedural aspects of the case are noted in 64 MICH. L. REV. 324 (1965); 39 N.Y.U.L. REV. 706 (1964).

12. Application of President & Directors of Georgetown College, Inc., 331 F.2d 1000, 1008 (1964).

an adult Jehovah's Witness having no minor children refused a blood transfusion on the basis of her religious beliefs.[13] Since no minor children were involved, the court distinguished *Georgetown*[14] and, having thus eliminated the *parens patriae* argument, faced the question of whether the free exercise clause of the first amendment prohibits compelling such an adult to submit to a blood transfusion.

The historical background of the first amendment indicates that its framers intended to prevent the civil magistrate from becoming the arbiter of religious convictions, for fear he would inevitably make his own beliefs the standard of judgment and impose them on others.[15] Realizing that complete freedom in the exercise of religious convictions was untenable, however, Jefferson felt that this right could be restricted if the individual's religious acts were injurious to others.[16]

The Supreme Court has adopted a balancing approach in first amendment cases, weighing the importance of the right to the free exercise of one's religious beliefs against the demands of other compelling interests. Thus, in 1878 in *Reynolds v. United States*[17] the Court determined that although the government cannot interfere with religious beliefs, it can interfere with certain religious practices.[18] In attempting to define the extent of the right to the free exercise of religion, the Court has held that activities in pursuit of that right may be restricted only when they endanger "peace and good order"[19]

13. The court indicated that this question was one of first impression. Principal case at 438. However, Erickson v. Dilgard, 44 Misc. 2d 27, 252 N.Y.S.2d 705 (Sup. Ct. 1962) reached the same conclusion on the same issue in a terse, one-page opinion.

14. Principal case at 440.

15. Reynolds v. United States, 98 U.S. 145, 163 (1878); PADOVER, THE COMPLETE MADISON 300 (1953).

16. PATTERSON, THE CONSTITUTIONAL PRINCIPLES OF THOMAS JEFFERSON 182 (1953).

17. 98 U.S. 145 (1878).

18. *Id.* at 166. The court implied in *Reynolds* that the government could interfere to prevent a human sacrifice which was required as part of a religious ceremony, or to prevent a wife from burning herself upon the funeral pyre of her dead husband in accordance with the dictates of her religion. These hypotheticals are distinguishable from the situations presented in the principal case and in *Georgetown*; to the Jehovah's Witnesses, death is not a religiously-commanded goal but rather an undesirable side effect of adherence to a religious tenet. See Application of President & Directors of Georgetown College, Inc., 331 F.2d 1000, 1008 (D.C. Cir. 1964). The faith of the Jehovah's Witness does not demand his death but rather emphasizes the primacy of life. See WATCH TOWER BIBLE AND TRACT SOC'Y OF PA., *op. cit. supra* note 1, introduction by publisher (1961).

19. "In the preamble of this act [Jefferson's 'Bill for Establishing Religious Freedom'] . . . after a recital 'that to suffer the civil magistrate to intrude his powers into the field of opinion, . . . is a dangerous fallacy which at once destroys all religious liberty,' it is declared 'that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order.' In these two sentences is found the true distinction between what properly belongs to the church and what to the state." Reynolds v. United States, 98 U.S. 145, 163 (1898).

The individual's refusal to serve on a jury because of his religious beliefs does not constitute a "breaking out into overt acts against peace and good order." United States

or present a "grave and immediate danger"[20] to the "safety, health or morals of the community;"[21] only when such activities endanger paramount interests may they be limited.[22] The court in the principal case therefore reasoned that the patient had a constitutional right to refuse to submit to a blood transfusion, since the interest of the state in protecting the free exercise of religion was not overcome by the existence of any grave and immediate danger to a community interest requiring the state to intercede.[23]

Still another element was added to the balancing process as it relates to compulsory blood transfusions in *United States v. George*,[24] a case identical on its facts with *Georgetown*. Although the court reached the same conclusion, ordering a transfusion for the parent of minor children, it slighted the constitutional issue by saying that *Georgetown* presented some helpful guidelines; *Georgetown*'s rationale, where applicable, was adopted. In addition to the factors weighed in *Georgetown*, however, the court added that in such circumstances the constitutional right of free exercise of religion did not justify requiring a doctor to ignore the mandates of his conscience and his professional oath.[25] The court was unclear as to the actual weight to be given this interest. Assigning it sufficient importance to outweigh the right to the free exercise of religion would require reversal of the decision in the principal case, regardless of the inapplicability of the *parens patriae* doctrine. The fallacy of such a

v. Hillyard, 52 F. Supp. 612, 615 (E.D. Wash. 1943); see *In re* Jenison, 267 Minn. 136, 125 N.W.2d 588 (1963), *following remand of* 375 U.S. 14 (per curiam), *vacating* 265 Minn. 96, 120 N.W.2d 515 (1963).

20. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). The "grave and immediate danger" statement of *Barnette* is a restatement of the "clear and present danger" test enunciated by Mr. Justice Holmes in Schenck v. United States, 249 U.S. 47 (1918). State *ex rel.* Holcomb v. Armstrong, 39 Wash. 2d 860, 239 P.2d 545 (1952). To permit a Christian Scientist to enter a university without having a chest X-ray would present a grave and immediate danger to the rest of the students, State *ex rel.* Holcomb v. Armstrong, *supra*, but the refusal of a pupil, on the basis of his religious beliefs, to stand for the singing of the national anthem presents no clear and present danger to the community and consequently cannot be restricted. Sheldon v. Fannin, 221 F. Supp. 766 (D. Ariz. 1963).

21. An individual cannot refuse compulsory vaccination, required for the protection of the public health, on religious grounds. Prince v. Massachusetts, 321 U.S. 158, 166-67 (1944). A statute prohibiting the sale of magazines on a specific street on Saturday during hours in which the street was particularly congested has been held not to violate the first amendment rights of individuals selling religious pamphlets, since the statute was sufficiently necessary for the public safety so as to outweigh the right to exercise one's religion in this manner. Jones v. City of Moultrie, 196 Ga. 526, 27 S.E.2d 39 (1943).

22. "It is basic that no showing merely of a rational relationship to some colorable state interest would suffice in this highly sensitive constitutional area. '[O]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.' Thomas v. Collins, 323 U.S. 516, 530 [1945]." Sherbert v. Verner, 374 U.S. 398, 406 (1963).

23. Principal case at 442.

24. 239 F. Supp. 752 (D. Conn. 1965).

25. *Ibid.*

result is obvious in view of established precedent. In the *parens patriae* situation, the courts say in effect that the interest of society in the welfare of minors outweighs its interest in the free exercise of religion. It cannot be asserted, however, that the interest of society in the canons of ethics of any particular profession outweighs its interest in the "canons" of the Constitution. Furthermore, the doctor's nonfulfillment of his professional oath cannot be viewed as a danger equivalent to those found to be sufficiently "grave and immediate" in previous cases so as to override first amendment guarantees.

It is arguable that in certain situations the *parens patriae* concept, as applied in the *Georgetown* decision, at least inferentially provides bases for court-ordered transfusions even to adult patients having no minor children. It was stated in *Georgetown* that where the patient is *in extremis* and *non compos mentis*, it may be the duty of the court, even though aware of his religious objections, to assume guardianship of him to the extent of authorizing treatment to save his life.[26] Such a doctrine, however, might lead a doctor to wait until the patient had become so weak as to be incompetent to render a considered decision, and then apply for the necessary court order. This means of circumventing the constitutional guarantee should not be permitted, especially where the patient, before becoming so weak as to be adjudged incompetent, had requested that no transfusions be administered. Of course, in an emergency, if the doctor were unaware of the patient's religious beliefs he would be entitled to presume that the patient had no religious objections to the administration of blood transfusions.

Despite the limitations imposed by the principal case,[27] it is unclear how broadly the courts are willing to construe the *parens patriae* doctrine in order to preserve a life in similar situations. The possibility of further extension arises from the fact that the *parens patriae* authority of the state encompasses not only minors but also any adult who is under a disability.[28] Emphasizing the welfare of the child, the judge in *Georgetown* acted to preserve the life of the parent.[29] Under this approach, a broad reading of the *parens patriae*

26. Application of President & Directors of Georgetown College, Inc., 331 F.2d 1000, 1008 (1964).

27. Although *parens patriae* is not mentioned in the principal case, the court clearly relied on it to distinguish *Georgetown* on the ground that minor children were involved in that case. Principal case at 440.

28. See note 5 *supra*.

29. "The state, as *parens patriae* will not allow a parent to abandon a child, and so it should not allow this most ultimate of voluntary abandonments. The patient had a responsibility to the community to care for her infant. Thus the people had an interest in preserving the life of this mother." Application of President & Directors of Georgetown College, Inc., 331 F.2d 1000, 1008 (1964).

It is interesting to consider whether this language might not provide authority for a court order, based upon the interest of the state, as *parens patriae*, in the welfare of

concept could lead to the conclusion that whenever any person under a disability, such as an incompetent adult child, is dependent upon the adult patient, the court could order the transfusion to protect the welfare of the person under the disability.

The court in the principal case, rather than emphasizing the welfare of the child, felt that the overriding interest of the state arises from the fact that, if the parent does not live, the child may become a ward of the state.[30] Many states have statutes[31] which, in order to relieve the public of the burden of caring for disabled persons, impose a duty upon individuals to maintain relatives who are incapable of supporting themselves.[32] Thus, it has been held that a parent is obligated to support an adult child who is incapable of self-support.[33] Where such an obligation to care for another is imposed by statute, as well as in the *parens patriae* setting, the state may have an overriding interest in preserving the life of the patient if upon his death the person for whom he is responsible might become a ward of the state.

Even in the absence of any *parens patriae* argument, the tendency of the courts to dispose of these cases on their particular facts could lead to circumstances in which the interest of the state in the life of a particular individual might outweigh the state's interest in protecting the free exercise of religion. For example, if the patient were an atomic scientist directing a project of strategic significance equal to that of the Manhattan Project, or a virologist nearing the perfection of a vaccine which would have an impact comparable to that of the Salk vaccine, would the public safety and health justify authorizing a transfusion for such an individual against his will? It is arguable that in such a case the real danger lies in the emphasis on the general welfare at the expense of the individual, particularly in

---

her other children, to save the life of a Roman Catholic mother rather than that of her child where the choice is necessitated in childbirth.

30. Principal case at 440.

31. *E.g.*, N.J. REV. STAT. § 44:1-140 (1934), which provides that the father, grandfather, mother, grandmother, children, grandchildren, and husband or wife of a poor, old, lame, or blind person shall at their expense maintain the poor person. See also N.J. REV. STAT. § 44:1-141 (Supp. 1953), which provides that if any relative mentioned above fails to support the poor person or if the poor person is supported at public expense, the relative may be required to pay such sum as will maintain him and relieve the public of that burden and that the county may recover any money due for relief of the poor person.

32. In Department of Mental Hygiene v. Kirchner, 60 Cal. 2d 716, 388 P.2d 720 (1964), *vacated and remanded*, 380 U.S. 194, *on remand*, 43 Cal. Rptr. 329, 400 P.2d 321 (1965), a California statute making a child liable for the support of his parent in a state institution was held unconstitutional. Since mental hospitals serve a public function, it is a denial of the equal protection of the laws within the meaning of the fourteenth amendment to burden arbitrarily one class of society, *e.g.*, an incompetent's children, with the patient's expenses. See 63 MICH. L. REV. 562 (1965).

33. Strom v. Strom, 13 Ill. App. 2d 354, 142 N.E.2d 172 (1957).

the sensitive area of religious freedom.[34] Moreover, the standards for such considerations might well be too vague, and the discretion of the court too great, in a situation in which clearly defined standards are necessary because a life is ebbing away with the passing of every moment devoted to argumentation and deliberation. Furthermore, it is questionable whether the civil magistrate should be permitted to be the judge of the relative value to society of individual lives.

Thus, although it would appear that the decision in the principal case is constitutionally correct, there may well be factors present in other cases involving an adult patient with no minor children which would lead to the authorization of a blood transfusion in violation of the religious beliefs of the patient.

34. "We can have intellectual individualism and the rich cultural diversities which we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. . . . [The real test of the freedom to differ is] the right to differ as to things which touch the heart of the existing order." West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).