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Blood Transfusions and Elective Surgery: A Custodial Function of an Ohio Juvenile Court

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Juvenile Court has traditionally been though of, within American jurisprudence, as an appendage of the state acting as *parens patriae.* This obligation dates back to the ancient role of the sovereign as protector of helpless children.[1] An abundance of case law has construed and reinterpreted this doctrine, but none has significantly deviated from the general definition. Therefore, the description given in *Black's Law Dictionary* that *parens patriae* refers ". . . to the sovereign power of guardianship over persons under disability . . . such as minors . . ." will suffice for the purposes of the ensuing discussion.[2] These individuals include delinquent, dependent, and neglected children.

In opposition to *parens patriae* is the feeling that a court should not invade the parents' sanctified right to care for their offspring. This is a natural right and a liberty within due process.[3] Another basis for criticism of *parens patriae* is that the family should not be transgressed as a socioeconomic unit by having a court place its child, temporarily or permanently, within a surrounding which only the court feels is more conducive to normal child development. Though "normalcy" is a subjective factor depending upon the facts of each case, a court will transcend family boundaries because the child is considered a citizen of the state. True, parents should raise their children as they deem proper.[4] However, since the state has acquired the sovereign's duty to oversee youth within its domain, the state has the responsibility to safeguard a minor's welfare and his ability to prosper in an environment devoid of social mores disdained by the majority of society. The state in a democracy has an obligation to protect the welfare of children, irrespective of any parental right.[5] Moreover, as stated in *In re Clark,*[6] parents do not own the bodies of their children, nor may they consider them their chattels. Nonetheless, parent-state relationships generally are not

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[1] Falkland v. Bertie, 2 Vern 342 (1696); *see* Eyre v. Shaftsburg, 2 P. Wms. 103, 24 Eng. Rep. 659 (1722).

[2] *See* Note, *The Parens Patriae Theory and Its Effect On the Constitutional Limits of Juvenile Court Powers,* 27 U. PITT. L. REV. 894 (1966).

[3] Nebraska v. Myers, 262 U.S. 390, 399 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1925).

[4] *See* Wisconsin v. Yoder, 406 U.S. 205, 233 (1972).

[5] Prince v. Massachusetts, 321 U.S. 158, 165 (1944).

[6] 90 Ohio L. Abs. 21, 25, 26, 185 N.E.2d 128, 131 (C.P. Lucas County 1962).

difficult to comprehend, for a substantial portion of juvenile decisions concern children whose parents are unable or unwilling to care for their offspring due to lack of financial support, cruel and abusive behavior, habitual intoxication, or the like. Such traits prostitute the minor's moral, physical, and mental well being.

One area wherein parent-state roles are not easily differentiated is that in which parents, willing and able to support their children, nevertheless subject them to certain religious beliefs. No better example exists than that of Jehovah's Witnesses who forbid their children to receive blood transfusions. Jehovah's Witness parents adhere to the principle that consumption of blood from others is scripturally prohibited.[7] Though there is no record of a court of chancery ordering medical treatment, modern tribunals have relied upon an English doctrine that medicine is a "necessary" of life. A child must be furnished necessaries of life, and since medicine is considered as such, the court under *parens patriae* power may order medical treatment. Courts have thus held that where a blood transfusion is necessary for the preservation of the child's life, religious beliefs will be disregarded.[8] This determination is in accord with three Supreme Court cases: *Reynolds v. United States*,[9] which holds that:

> Laws are made for the government of actions, and while they cannot interfere with mere religious beliefs and opinions, they may with practices . . . ;

Cantwell v. Connecticut,[10] which affirms that:

> the [first] Amendment embraces two concepts — freedom to believe and freedom to act. The first is absolute, but in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society . . . ;

and *Prince v. Massachusetts*,[11] wherein the Court stated:

> but the right to practice religion freely does not include liberty to expose . . . the child . . . to ill health.

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[7] Genesis 9:3, 4; Leviticus 3:17; 17:14; Deuteronomy 12:23; Acts 15:28, 29; I Samuel 14:32, 33.

[8] *In re* Vasko, 238 App. Div. 128, 263 N.Y.S. 552 (1933); Morrison v. State, 252 S.W.2d 97 (Mo. Ct. App. 1952); People *ex rel.* Wallace v. Labrenz, 411 Ill. 618, 104 N.E.2d 769 (1952), *cert. denied*, 344 U.S. 824 (1952); *In re* Clark, 90 Ohio L. Abs. 21, 185 N.E.2d 128 (C.P. Lucas County 1962); State v. Perricone, 37 N.J. 462, 181 A.2d 751, *cert. denied*, 371 U.S. 890 (1962); Jehovah Witnesses of Washington v. King County Hosp., 278 F.Supp. 488 (D. Wash. 1967), *aff'd*, 390 U.S. 598, *rehearing denied*, 391 U.S. 961 (1968). *See also In re* Brooks Estate, 32 Ill. 2d 361, 205 N.E.2d 435 (1965) which holds that an emergency patient with no minor children may not be compelled to have a blood transfusion where it violates her religious beliefs.

[9] 98 U.S. 145, 166 (1878).

[10] 310 U.S. 296, 303-04 (1940).

[11] 321 U.S. 158, 166-67 (1944).

Of particular importance within these transfusion cases are juvenile court hearings involving "non-emergencies." A non-emergency is one where the impending danger to a child's life or limb would not occur even if the minor were not to receive immediate treatment.[12] The New York Family Court in *In re Sampson*[13] represents one of the very few jurisdictions to sustain an order of temporary custody so that a child whose life was not in peril could receive a transfusion. The child's mother was a Jehovah's Witness.

Kevin Sampson, fifteen years of age, suffered from neurofibromatosis, "Von Recklinghausen's disease." This ailment results in a massive facial and neck deformity that is grotesque and repulsive. Testimony established that this dermatologic abnormality did not affect Kevin's sight, hearing, or mental capacity. However, the mere sight of Kevin's disfigurement was apt to:

> . . . exert a most negative effect upon his personality development, his opportunity for education and later employment, and upon every phase of his relationship with his peers and others.[14]

The surgical procedure recommended by Kevin's attending physicians was risky, and not necessary to maintain his health. It could not cure the boy, but could improve his physical appearance. A blood transfusion was needed for the surgery.

Judicial analysis developed as follows. Jurisdiction of New York's Family Court extends to all children under eighteen years of age whose physical, mental, or emotional condition is impaired,[15] or children physically handicapped as defined in either Family Court Act § 232(c)[16] or Public Health Law § 2581.[17] In addition, Family Court Act § 232(b) provides: "Whenever a child within the jurisdiction of the court appears to the court to be in need of medical, surgical, therapeutic or hospital care or treatment, a suitable order may be made therefor."[18] The court read these provisions in light of Family Court Act § 414 giving Judges of the Family Court ". . .

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[12] *See* Pilpel and Zuckerman, *Abortion and the Right of Minors,* 23 CASE W. RES. L. REV. 779, 782 (1972).

[13] 65 Misc. 2d 658, 317 N.Y.S.2d 641 (Family Ct. 1970), *aff'd,* 37 App. Div. 2d 668, 323 N.Y.S.2d 253 (Sup. Ct. 1971), *aff'd per curiam,* 29 N.Y.2d 900, 278 N.E.2d 918 (1972). *Sampson's* principles received approval in *In re* Karwarth, 199 N.W.2d 147 (Iowa 1972). *See also In re D.,* 70 Misc. 2d 953, 335 N.Y.S.2d 638 (Family Ct. 1972); *In re* Comm'rs of Social Services, 72 Misc. 2d 428, 339 N.Y.S.2d 89 (Family Ct. 1972).

[14] 65 Misc. 2d 658, 660, 317 N.Y.S.2d 641, 644 (Family Ct. 1970).

[15] *See* N.Y. FAMILY COURT ACT §§ 1011-1013 (McKinney Supp. 1973).

[16] N.Y. JUDICIARY-COURT ACTS (McKinney Supp. 1973).

[17] N.Y.PUBLIC HEALTH LAW (McKinney 1971).

[18] N.Y. JUDICIARY-COURT ACTS (McKinney 1963).

wide discretion and grave responsibilities,"[19] and the recent revision of Article 10 [Family Court Act], bestowing upon the Family Court ". . . exclusive jurisdiction and ample authority to deal with . . . the neglected child."[20] From the latter, the Family Court felt that the legislature intended to confer upon the court ". . . the broadest power and discretion . . . ."[21] In other words, the court found Kevin to be physically handicapped, neglected, and in need of medical, surgical, therapeutic or hospital care and treatment. This finding was based upon Family Court Act §§ 1011, 1013, 232 and Public Health Law § 2581, none of which explicitly denied jurisdiction in non-emergencies. A liberal reading of section 232(b) also established the court's prerogative to order a blood transfusion where life was not in peril. Kevin received the transfusion.

The *Sampson* court relied upon varied judicial precedent in justifying its use of the *parens patriae* doctrine. In *In re Clark*[22] a male child suffered from second and third degree burns over forty per cent of his body. His parents were Jehovah's Witnesses and refused permission for a needed blood transfusion. Though an emergency did exist in *Clark* and not in *Sampson*, the language of *Clark* used by the *Sampson* court with regard to freedom of worship and parental right to care, seems applicable not only to emergencies, but to non-emergencies as well:

> . . . [T]his right [of religion] of [the parents] ends where somebody else's rights begins. Their child is a human being in his own right with a soul and body of his own. He has rights of his own — the right to live and grow up without disfigurement . . . . [The state has] the duty to protect his right to live and grow up with a sound mind in a sound body, and to brook no interference with that right by any person or organization.[23]

Sampson is a judicial maverick in proceedings wherein a child faces elective surgery. For example, *In re Tuttendario*[24] held that parents who refused to allow an operation upon their child for rickets were not so cruel or so maliciously neglectful as to authorize a court to take custody for purposes of an operation. A female minor in *In re Hudson*[25] suffered from an abnormally large arm resulting in undue stress upon the girl's heart. Medical experts testified that

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[19] 65 Misc. 2d 658, 670, 317 N.Y.S.2d 641, 657 (Family Ct. 1970).

[20] *Id.* at 671, 317 N.Y.S.2d at 654.

[21] *Id.*

[22] 90 Ohio L. Abs. 21, 185 N.E.2d 128 (C.P. 1962).

[23] *Id.* at 27-28, 185 N.E.2d at 132.

[24] 21 Pa. Dist. 561 (Super. Ct. 1912); *See* Annot., 30 A.L.R. 2d 1138-41 (1953).

[25] 13 Wash. 2d 673, 126 P.2d 765 (1942).

amputation of the arm was indicated, although such an operation posed a risk to the child's life. Her parents believed in faith healing. The court refused to find the child neglected, since the evidence did not suggest that the child's life was in danger, since there was no indication that her parents otherwise improperly cared for her, and since the law views parents as the natural guardians of their minor children, entitled to custody and control.[26] *Sampson* has even departed from precedent set forth in prior New York decisions.[27]

Similarly, by a four-three vote, the Pennsylvania Supreme Court in *In re Green*[28] reversed their superior court's custody order for sixteen-year-old Ricky Ricardo Green. He suffered from poliomyelitis and paralytic scoliosis. The latter resulted in ninety-four degree curvature of the spine, and as a consequence Ricky was unable to stand or ambulate. He would become a bed patient if a spinal fusion were not performed. Though the operation was dangerous, his mother conditionally consented to it. However, she objected to a needed transfusion, because her beliefs as a Jehovah's Witness forbade. it. The court concluded:

> . . . as between a parent and the state, the state does not have an interest of sufficient magnitude outweighing a parent's religious beliefs when the child's life is *not immediately* imperiled by his physical condition [emphasis by the court].[29]

In addition to giving prominence to the custodial rights of parents, the Pennsylvania Supreme Court remanded the case for an evidentiary hearing to determine whether Ricky himself would accept or reject surgery.[30] The hearing is similar to the one conducted in

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[26] *Id.* at 676, 679, 707, & 711, 126 P.2d at 768, 769, 781, & 783.

[27] The lower court in *In re* Seiferth, 285 App. Div. 221, 137 N.Y.S.2d 35 (Sup. Ct. 1955) was reversed in its decision ordering an operation for a male child over the objection of his father, a faith healer. 309 N.Y. 80, 127 N.E.2d 820 (1955). Though the boy suffered from cleft palate and congenital hair lip, the court said his life was not in peril and therefore not neglected. The court did consider the extreme antagonism of the boy toward the operation before making its decision. *But see In re* Rotkowitz, 175 Misc. 948, 950, 25 N.Y.S.2d 624, 627 (Dom. Rel. Ct. 1941) (". . . the Justices of this Court [may] 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."); and *In re* Vasko, 238 App. Div. 128, 263 N.Y.S. 552 (Sup. Ct. 1933) (emphasis added).

[28] 220 Pa. Super. 191, 286 A.2d 681 (1971), *rev'd*, 448 Pa. 338, 292 A.2d 387 (1972), *dimissal aff'd upon rehearing*, 452 Pa. 313, 307 A.2d 279 (1973).

[29] 292 A.2d 387, 392 (1972).

[30] At the hearing, the boy answered all questions without hesitation and seemed to understand both the benefits that he might receive from the operation and the possible consequences of not having it. He said he had been in the hospital for a long period already and that no one would guarantee that the operation would be successful. Dismissal was affirmed in *In re* Green, 452 Pa. 373, 307 A.2d 279 (1973).

Seiferth.[31] It would appear that by requiring a child's opinion, the parents' natural right of custody will not be as highly regarded as will the request of the mature minor.[32] Additionally, seeking the minor's concurrence diminishes state authority, by the court's favor of the individual child's opinion over the state's as *parens patriae. Quaere,* whether a mature child can better judge his own medical condition than can the state, in its position as an objective third party. Parents are one party and their offspring, as represented by a state agency, the other. Neither parent nor child could be objective in comprehending the signficance of the custodial proceeding. The parents are concerned with exercising independent judgment as their natural custodial role would dictate, whereas the child is not only concerned with his medical prognosis, but also with the conflict between recognizing his parents' authority, and realizing his own best interests.

The language in *Green* ordering a hearing to determine the minor's wishes is similiar to that used by (then) Judge Cardozo in *Schloendorff v. Society of New York Hospital.*[33] Judge Cardozo concluded that individuals of adult years and sound mind have a right to determine what will be done with their bodies. However, in *Sampson* the Family Court decided that to place upon the boy the responsibility for making a choice would be neither expedient nor proper.[34] This is consistent with the principle of *parens patriae,* under which the state, not the child, makes the decisions regarding that child.

Ohio Law: Jurisdiction

Despite *In re Clark,* Ohio courts have never adjudicated the situation of a child who requires a transfusion necessary for elective surgery, but whose parents are Jehovah's Witnesses. However, the groundwork for deciding these facts has been laid. The thrust of this discussion shall be to now apply precedent and interpretation with applicable provisions of the Ohio Revised Code in order to decide custody of such a minor were he to come before an Ohio juvenile court. For sake of brevity, it will be assumed as a hypo-

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[31] *Supra* note 27. Despite the antagonism displayed by the child in *Seiferth,* Judge (now Chief Judge) Field, in dissent, stated:

> Every child has a right, so far as is possible, to lead a normal life and, if his parents, through viciousness or ignorance, act in such a way as to endanger that right, the courts should, as the legislature has provided, act on his behalf . . . . It is quite true that the child's physical life is not at peril — as would be the situation if he had an infected appendix or a growth on the brain — but it may not be questioned . . . . 'What is in danger is his chance for a normal useful life.' 309 N.Y. 80, 86, 127 N.E.2d 820, 823 (1955).

[32] *See* Pilpel and Zuckerman, *supra* note 12, at 804.

[33] 211 N.Y. 125, 105 N.E. 92 (1914). *See also* Natanson v. Kline, 186 Kan. 393, 350 P.2d 1093 (1960).

[34] *See* 65 Misc. 2d 658, 672, 317 N.Y.S.2d 641, 655 (Family Ct. 1970).

thetical that both parents are Jehovah's Witnesses, that they are the natural parents of the child, that their child is economically dependent upon them, and that the child is residing in their home.

An Ohio juvenile court may take jurisdiction over any child under eighteen years of age who is either dependent, deliquent, unruly, a juvenile traffic offender, or neglected.[35] Where the child's life is in immediate danger, the court is empowered to order temporary custody for purposes of emergency medical treatment.[36] However, where the child's health is not in danger, but his parents refuse a transfusion necessary for elective surgery (even for religious reasons), juvenile court must first find the child neglected.[37] This section includes as neglected any child ". . . whose parents, guardian, or custodian neglects or refuses to provide him with proper or necessary . . . medical or surgical care . . . necessary for his health, morals or well being . . . ." Reference might be made to Ohio Revised Code § 2151.03(E) which states that a child treated through prayer and spiritual means of a recognized religion instead of through standard medical or surgical care is not a neglected child for that reason alone. This provision, however, refers to Christian Scientists, not Jehovah's Witnesses.

To state that Jehovah's Witness parents neglect their child under a literal reading of § 2151.03(C) for not granting their consent to a blood transfusion would be a harsh interpretation. Ohio case law is deficient on this point. For example, *In re Minton*[38] defined "neglect" as including parents who are indifferent or manifest wilfulness toward their offspring. The court in *In re Burkhart*[39] stated that "neglect" is demonstrated by evidence reflecting faults parents possess which render them unfit and unsuitable to have custody and care of their children, since they are incapable of extending proper parental care to such children. Jehovah's Witness parents who otherwise provide a stable environment for their children should not fall within either

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[35] OHIO REV. CODE ANN. §§ 2151.011(B)(1), 2151.23 (Page Supp. 1969).

[36] OHIO REV. CODE ANN. § 2151.33 (OHIO RULES JUV. PROC. [ORJP] 13 [eff. July 1, 1972]).

[37] OHIO REV. CODE ANN. § 2151.03(C) (Page Supp. 1969) The child might also be a "dependent child" as defined in OHIO REV. CODE ANN. § 2151.04(Page Supp. 1969). This section is not defined in terms of parental fault, but in terms of the child who lacks proper care or support through the mental or physical condition of his parents. A "dependent child" is also a child whose condition or environment is such as warrants the state, in the best interests of the child, to take guardianship. This statute is quite broad and open to many interpretations. Normally, a juvenile court confronted with the child of Jehovah's Witness parents will find him neglected before ordering the transfusion. *Accord, see infra* note 49.

[38] 112 Ohio App. 361, 176 N.E.2d 252 (1960).

[39] 15 Ohio Misc. 170, 175, 239 N.E.2d 772 (Juv. Ct. Warren County 1968).

of these definitions,[40] as believing in biblical scriptures does not render them indifferent, wilful, or incapable of extending proper care.

Such definitions of "neglect" and the individual words composing Ohio Revised Code § 2151.03 indicate that Ohio tribunals are at the mercy of vague subjective tests implied from reading Code § 2151.03 *in toto*. Yet, most neglect statutes, including § 2151.03, intend to encompass the physical, emotional, social, and physiological deterioration of the child.[41] It is the breadth and spirit of these statutes which must be challenged. Even though Jehovah's Witness parents possess the ability to raise their children, since Ohio Revised Code § 2151.03(C) specifically refers to a neglected child as one denied health and medical attention, "neglect" should be construed with a broader perspective, and defined as ". . . the failure to exercise the care that circumstances justly demand." It should not be a term of fixed and measured meaning.[42]

Furthermore, selected provisions of Ohio's Juvenile Court Act were revised in 1969. This revision included Ohio Revised Code § 2151.03. Despite the unavailability of legislative history on the revised portion of the Act, it is apparent that the 1969 revisions were based in part upon the New York Family Court Act,[43] and the Uniform Juvenile Court Act (July, 1968 draft).[44]

The Uniform Juvenile Court Act does not refer to a child as "neglected," but rather as "deprived." A "deprived child" is one

> . . . without proper parental care or control . . . or other *care necessary* for his physical, mental or emotional health . . . (emphasis added).[45]

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[40] This is particularly so, for the child's health is not in danger. Also, *quaere* whether under OHIO REV. CODE § 2151.03, belief in holy scriptures that contradict sound medical procedures is a "fault" of the parents. *See also supra* note 37.

[41] *See Comment, Montana's Child Neglect Law — A Need for Revision,* 13 MONT. L. REV. 201, 205 (1969). On medical neglect within neglect statutes, *see, e.g.,* PA. STAT. ANN. (Purdon, tit. 11 § 243(c) (1965); WISC. STAT. ANN. §§ 48.13(1)(e), 48.53(1)(d) (1957). Neglect in Missouri is defined as failure to provide necessary medical care, ". . . except that reliance by a parent, guardian, or custodian upon remedial treatment other than medical or surgical treatment for a child shall not be construed as neglect when treatment is recognized or permitted under the laws of this state." MO. REV. STAT. § 211.031(a) (1959). *See* MO. REV. STAT. § 211.181.

[42] Gill, *The Legal Nature of Neglect,* 6 N.P.P.A.J. 1, 6 (1968); Sullivan, *Child Neglect: The Environmental Aspects,* 29 OHIO ST. L. J. 85, 91 (1968); *see* Young, *The Problem of Neglect — The Legal Aspects,* 4 J. FAM. L. 29 (1964); 31 AM. JUR. *Juvenile Courts* § 37. *See also supra* note 41.

[43] *See* section 141 of N.Y. FAMILY COURT ACT, *supra* note 18, and accompanying text.

[44] 42 OHIO BAR 1390 (November 10, 1969). *See* NATIONAL COUNCIL ON CRIME AND DELINQUENCY, GUIDES TO THE JUDGE IN MEDICAL ORDERS AFFECTING CHILDREN, 109-120 (April 1968); and the Juvenile Court Acts of California (CALIFORNIA WELFARE AND INSTITUTIONS CODE 500 *et seq.* (West 1972)) and Colorado (COLO. REV. STAT. Title 37 (1963)).

[45] NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, HANDBOOK, UNIFORM JUVENILE COURT ACT (1968 Draft), 249 (1968).

The official comment to this section emphasizes that the definition focuses upon the *needs* of the child regardless of fault.[46] Further, where the health and physical condition of the child is in issue, the child's health should be the controlling factor.[47] By referring to statutes used as foundation for the 1969 revision, and other interpretations focusing upon the dimension of "neglect,"[48] an Ohio juvenile court would have little difficulty in finding jurisdiction over a minor in the hypothetical.[49]

The Juvenile: Treatment by Ohio Courts

After acquiring jurisdiction, the juvenile court must ultimately decide whether the religious freedom of our hypothetical Jehovah's Witness parents should be subordinated to the state's interest in meeting its responsibility as *parens patriae*. Other considerations, however, include the right of Jehovah's Witnesses to exercise their beliefs in Ohio; whether parental care and custody includes the prerogative to refuse a transfusion where no emergency exists; the impact of *parens patriae* on Ohio tribunals; and the child's right and ability to be the guardian of his own body.

First, with respect to religious freedom, Ohio courts recognize the first amendment right as enunciated in art. I, § 7 of the Ohio constitution. However, Ohio jurisprudence has developed within the scope of *Reynolds v. United States*[50] and principles established in *Cantwell v. Connecticut*[51] and *Prince v. Massachusetts*.[52] *In re Clark*[53] is determinative of the Ohio view as it states:

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[46] *Id.* at 250. *See supra* note 37.

[47] 27 AM. JUR. *Infants*, § 108; *See* Note, *Montana's Child Neglect Law, supra* note 41, and Pyfer, *The Juvenile's Right to Treatment*, 6 FAM. L. Q. 279, 317 (1972).

[48] Note, *Montana's Child Neglect Law, supra* note 41. "[Neglect is] not only a failure to provide necessaries of life — sustenance, clothing, shelter, food and warmth — but a failure to care, to look after, to guide, to superimpose and . . . to direct the activities of a child . . . [W]hen a parent . . . is appraised of the physical ailments of the child and does nothing about correcting the conduct or correcting the condition which produced the physical ailment, that would constitute neglect." Pilpel and Zuckerman, *supra* note 12, at 790, *quoting In re* Carstairs, 115 N.Y.S.2d 314, 316 (Dom. Rel. Ct. 1952).

[49] The Honorable Angelo J. Gagliardo, Judge, Cuyahoga County, Ohio Juvenile Court, believes the failure of parents to provide medical or surgical care necessary for the health, morals or well-being of a minor would constitute neglect under Ohio law. This is irrespective of the child's physical condition. Letter from Judge Angelo J. Gagliardo to M. J. Zaremski, October 27, 1972. The Honorable John J. Toner, Judge, Cuyahoga County, Ohio Juvenile Court, substantially concurs with his colleague's viewpoint. Letter from Judge John J. Toner to M. J. Zaremski, November 2, 1972.

[50] 98 U.S. 145 (1878).

[51] 310 U.S. 296 (1940).

[52] 321 U.S. 158 (1944).

[53] 90 Ohio L. Abs. 21, 185 N.E.2d 128 (C.P. 1962).

> . . . religious doctrines and dogmas, be they . . . sound . . . may not control. [The parents' right to worship as they please] ends where somebody else's right begins.[54]

Second, as a general principle of Ohio law, the natural parents' interest is paramount to that of the state in the care and protection of their children.[55] Yet, where custody of the minor child must be litigated, Ohio courts of general jurisdiction adopt the "best interests" rule.[56] Juvenile courts also follow this doctine.[57] One facet of the best interests rule is the court's obligation to listen to the child. This duty is often employed in determining custody incident to a divorce proceeding; subject to court approval, a child fourteen years of age or older may decide with which parent he wishes to live.[58] These choices are not limited to divorce actions.[59]

Neither parent nor state may jeopardize or deny a child's right to life, liberty, and the pursuit of happiness. For parents to refuse permission for a blood transfusion where no emergency exists is not to deny their offspring the right of life or personal freedom, at least when interpreted literally. Such a denial may, however, amount to interference with their child's right to health, personal freedom from the medical ailment, and thus to happiness. An analysis of any depth must surely recognize that life and happiness cannot be mutually exclusive.[60] The latter is probably the paramount element to enjoying the former. Indeed, safeguarding health is enmeshed within the concept of life and personal freedom vis-a-vis the fifth and fourteenth amendments.[61] A child cannot respond to his environment by growing up as an invalid, or by living with an abnormality if surgery can reasonably mend it. One type of happiness is the ability to live without fear of scorn, not having to hide one's disfigurement, and not being secluded in some outcast residence. To experience the joys and pleasures of youth is an essential liberty of humanity; being respected by one's peers is an experience to be personally enjoyed, not merely one to be possessd by others. Where total or partial cure exists, compassion and sympathy for being physically disabled, and respect for the sanctity of Holy Scriptures, cannot be substituted.

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[54] *Id.* at 27, 185 N.E.2d at 132.

[55] *In re* Devore, 111 Ohio App. 1, 167 N.E.2d 381 (1959); OHIO REV. CODE § 3101.01 (consent to marry); *In re* Clark, 90 Ohio L. Abs. 21, 55 (C.P. Lucas County 1962).

[56] OHIO R. CIV. P. 75 (P); *cf.* OHIO REV. CODE ANN. § 3109.04 (Page 1973); Harper v. Harper, 98 Ohio App. 359, 129 N.E.2d 471 (1954); 41 OHIO JUR. 2D, *Parent and Child* 16; UNIFORM MARRIAGE AND DIVORCE ACT 402.

[57] *See* Clark v. Bayer, 32 Ohio St. 299 (1877); 33 OHIO JUR. 2D, *Juvenile Courts* 50.

[58] OHIO REV. CODE ANN. § 3109.04 (Page 1973).

[59] *In re* Custody of Smelser, 22 Ohio Misc. 41, 44, 257 N.E.2d 769 (Juv. Ct. Preble County 1969).

[60] Pilpel and Zuckerman, *supra* note 12, at 801.

[61] *Id.* at 804.

Third, *parens patriae* is as equally important a doctrine as custodial rights of parents. If the roles of parent and state were looked upon as interlocking circles, the portion common to both would include the parent-state conflict inherent in all of the cases in this area. For example, the Uniform Marriage and Divorce Act, § 402, determines custody in accordance with the child's best interest by considering, among other factors, the parents' opinions, as well as the mental and physical health of all individuals concerned. Section 402 appears to be a microcosm of decisions Ohio juvenile courts must make when confronted with religious scruples in an elective surgery situation. That is, in theory, the choice of parents qualified and competent to furnish the requisite care for their minor child should be as important to the court as the interests of a child whose life is not perilously in danger.[62] Though the weight given either side of this dichotomy rests upon the evidence of each case, two viewpoints remain apparent. As applied to the child in the hypothetical case set out earlier in this work, if Ohio law were construed as inflexible and trailing social mores and individual needs, beliefs of Jehovah's Witness parents would be of primary importance, the assumption again being that they are able to care and provide an adequate environment for their child. Also, the more conservative, traditional view would be that parents who have educated, supported, nourished, clothed, and loved their child, possess the right to deny permission for a transfusion. Alternatively, if justice is to serve individualistic requirements, as reflected by society's norms,[63] and not the family unit, then the action of a juvenile court should be in accord with carrying out the state's role as *parens patriae*. For a court to so act is not to adjudicate such Jehovah's Witness parents as unfit under Ohio law. A juvenile court could permit the child to remain with his parents, subject to such conditions as the court prescribed, including supervision directed by the court for the protection of the child.[64]

Fourth, the duty to perform in *Sampson* precluded an obligation to foist the ultimate decision upon the child.[65] However, no matter how great the burden, when a minor child has the capacity and

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[62] This is especially true of the child unable to make an intelligent decision, and one who is unemancipated.

[63] Though conceding "normalcy" to be subjective, it is presumed that readers have acquired the knowledge and experience to define the boundaries of normal childhood development. Furthermore, a technical discussion of child psychology and child development would not be useful in determining the issues presented by this discussion.

[64] OHIO REV. CODE ANN. § 2151.353(A) (Page Supp. 1969); *accord*, Santos v. Goldstein, 12 N.Y.2d 672, 233 N.Y.S.2d 465, 185 N.E.2d 904 (Ct. App. N.Y. 1962). *Contra*, People *ex rel* Wallace v. Labrenz, 411 Ill. 618, 104 N.E.2d 769 (1952), *cert. denied*, 344 U.S. 824 (1952); *In re* Tuttendario, 21 Pa. Dist. 561 (1911). *See* GUIDES TO THE JUDGE IN MEDICAL ORDERS AFFECTING CHILDREN, *supra* note 44, at 117-19.

[65] *In re* Sampson, 65 Misc. 2d 658, 317 N.Y.S.2d 641, 656 (Ulster County Fam. Ct. 1970).

maturity to understand the nature and potential consequences of the medical procedure about to be undertaken for his benefit, the minor's wishes will be honored and binding.[66] *Lacey v. Laird*[67] appears to stand for this principle in Ohio. Although jurisdiction of juvenile court extends to any child under eighteen,[68] it is an arbitrary standard to consider age in determining one's maturity vis-a-vis understanding the implications of a surgical procedure. For instance, a fourteen-year-old who can express his preference for the parent with whom he wishes to live[69] may or may not be able to determine the future of his health.[70] Despite the court's use of age as a guideline, only evidence in each case will determine whether the child has obtained the requisite intelligence and maturity to rationally consider his medical state. In making the decision, a juvenile court may want to consider other medico-legal areas wherein the necessity for parental consent is insignificant. Specific reference is made to the forty-four states and the District of Columbia that allow treatment of veneral disease in minors without parental consent.[71] Prior to the Supreme Court's decision in *Doe v. Bolton,*[72] state statutes also varied in their requirements for an unemancipated minor to request an abortion. Eleven states permitted minors to obtain abortions

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[66] Pilpel and Zuckerman, *supra* note 12, at 782-83.

[67] 166 Ohio St. 12, 139 N.E.2d 25 (1956); *accord,* Pratt v. Davis, 224 Ill. 300, 79 N.E. 562 (1906); RESTATEMENT (SECOND) OF TORTS § 59 (1934); Pilpel and Zuckerman, *supra* note 12, at 781.

[68] OHIO REV. CODE ANN. §§ 2151.011(B)(1), 2151.23 (Page 1969).

[69] OHIO REV. CODE ANN. § 3109.04 (Page 1969).

[70] *Cf.* HANDBOOK OF . . . COMMISSIONERS ON . . . STATE LAWS, *supra* note 45. Age recognition of Lacey, 166 Ohio St. 12, 139 N.E.2d 25 (1956), is not unique. In Illinois, a person eighteen years of age or older, a married minor, or a pregnant woman who is a minor may consent to medical or surgical procedures. ILL. REV. STAT. ch. 91 § 18.1 (Smith-Hurd Cum. Supp. 1971). An unemancipated minor in Mississippi of sufficient intelligence to understand and appreciate the proposed medical or surgical procedure may effectively consent. MISS. CODE ANN. § 7129.81 (Supp. 1971). The emancipated minor is not considered here. *See* text accompanying note 34, *supra.* In Ohio, a child living with his parents is presumed unemancipated. Bagyi v. Miller, 3 Ohio App. 2d 371, 210 N.E.2d 387 (1965). *See also* OHIO REV. CODE ANN. § 2111.181 (Page 1969). The fact that an unemancipated child resides with his parents does not mean that he is automatically a Jehovah's Witness. A Jehovah's Witness must be spiritually mature (Heb. 6:1-3, 2 Tim. 2:15), and maturity requires sound knowledge of the Scriptures (Heb. 6:1, Phil. 1:9-11). A child must be trained in the teachings of Jehovah (Deut. 6:6, 7, Eph. 6:4); be obedient to his parents as a Divine Requirement (Eph. 6:1, Col. 3:20); and be baptized in the name of the Father (Matt. 28:19, Ps. 83:18, 2 Ki. 19:15, Isa. 33:22). *Make Sure of All Things-Hold Fast To What Is Fine,* 41, 73, 342, 420 Watch Tower Bible and Tract Society of Pennsylvania (1965). A baptized minor child must not be a wrongdoer. If reproof and discipline do not curtail wrongdoing, such as gross, loose conduct or fornication, then the child shall be disfellowshipped. Even a nonbaptized minor associated with a Jehovah's Witness congregation must adhere to the tenets of Jehovah. Organization for Kingdom-Preaching and Disciple-Making, at 174, 175 Watch Tower Bible and Tract Society of Pennsylvania (1972).

[71] *See* Pilpel and Zuckerman, *supra* note 12, at 786, 800.

[72] 410 U.S. 179 (1972), *rehearing denied,* 410 U.S. 959 (1973).

without parental consent.[73] In a recent decision[74] the California Supreme Court held that unmarried pregnant minors could obtain therapeutic abortions without their parents' consent.[75]

Juvenile courts should further bear in mind that minor children have been accorded a status which commands protections guaranteed by the Bill of Rights.[76] The impact of decisions such as *In re Gault*,[77] *Kent v. United States*,[78] and *In re Winship*[79] is that some constitutional safeguards once applicable to adults in criminal proceedings must now extend to minors. By having the Supreme Court recognize children as a class rather than as devoid of any legal status, their importance and recognition as individuals has transcended obscurity. From the significance of these opinions and by extrapolating judicial analyses from other medico-legal areas requiring consent,[80] the choice of a mature child, whatever the age, would be paramount in deciding whether the state will take temporary custody of him. Only where the court has factually determined that the child cannot comprehend the importance of his physical deficiency and medical prognosis will the parent-state conflict reassert itself.

Conclusion

From examining religious freedom as applied to Jehovah's Witnesses, the ability of those parents to refuse permission for their child's transfusion, the doctrine of *parens patriae*, and child consent, one conclusion is inescapable: the decision of a mature child of Jehovah's Witness parentage, faced with a choice for or against elective surgery, should be binding upon all parties. When the situation includes a minor *lacking* the prerequisites for maturity, the result is not so simply stated. The dilemma in discerning the child's welfare from his parents' right to worship is whether there is a point along some continuum where *parens patriae* must cease to dominate the court. In other words, as the *Green* court asked itself, ". . . if spinal surgery can be ordered, what about a hernia or gall bladder or a hysterectomy?" Such a question cannot be precisely answered. Innumerable medical ailments, if left untreated, can lead to long term dis-

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[73] Pilpel and Zuckerman, *supra* note 12, at 787.

[74] Ballard v. Anderson, 4 Cal. 3d 873, 95 Cal. Rptr. 1, 484 P.2d 1345 (1971).

[75] *Id.*, at 884, 95 Cal. Rptr. at 9, 484 P.2d at 1345.

[76] *In re* Gault, 387 U.S. 1 (1967).

[77] *Id.*

[78] 383 U.S. 541 (1966).

[79] 397 U.S. 358 (1970).

[80] On consent and constitutional protections accorded minors, *see* Pilpel and Zuckerman, *supra* note 12, at 795-96. Judge Schwart, visiting juvenile court judge (Cuyahoga County Juvenile Court) from Fayette County, Ohio, believes from his twelve years experience on the bench that the 1969 revisions to Ohio's Juvenile Court Act have superceded the impact of *Gault*. Interview with Judge Schwart, Dec. 12, 1972.

ability. However, for a juvenile court to order custody when time is not of the essence would be imprudent. For example, the parents are told their child is suffering from some sort of cardiac insufficiency which could be normalized by medicine, but that an operation of moderate risk, requiring a transfusion, could alleviate the difficulty now. Without the surgery, debilitating effects might occur two years hence, but not such as to place the child's life in danger. Given these facts, the juvenile court should abide by the parents' religious beliefs. The present effect upon the child by not having the surgery is not in such conflict with the state's self-perpetuating interest, for the court to do otherwise. Yet, after a year's time should the child have difficulty in performing his daily chores, attending class, or even become semi-ambulatory because of his heart condition, then the state's interest in protecting the child would be sufficiently great for a custody order to be issued and the transfusion given.

Green and *Sampson* should also be used cautiously as precedent in Ohio. The *Sampson* court should have asked for the child's preference, even though further delay would neither alleviate his facial deformity nor impair his health. The *Green* majority required that Ricky be heard, but failed to place sufficient emphasis on his asthenic medical and physical condition. Thus, for an Ohio juvenile court to reject the significance of either case to the exclusion of the other would be to jaundice the perspective of *parens patriae* in light of religious freedom.