

---

November 2015

## A Pregnant Mother's Right to Refuse Treatment Beneficial to Her Fetus: Refusing Blood Transfusions

James A. Filkins

Follow this and additional works at: <https://via.library.depaul.edu/jhcl>

---

### Recommended Citation

James A. Filkins, *A Pregnant Mother's Right to Refuse Treatment Beneficial to Her Fetus: Refusing Blood Transfusions*, 2 DePaul J. Health Care L. 361 (1998)

Available at: <https://via.library.depaul.edu/jhcl/vol2/iss2/6>

This Article is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Journal of Health Care Law by an authorized editor of Via Sapientiae. For more information, please contact [digitalservices@depaul.edu](mailto:digitalservices@depaul.edu).

# A PREGNANT MOTHER'S RIGHT TO REFUSE TREATMENT BENEFICIAL TO HER FETUS: REFUSING BLOOD TRANSFUSIONS

*James A. Filkins, M.D., Ph.D.\**

## INTRODUCTION

In the ordinary course of events, a woman, who chooses to carry her pregnancy to term, will strive to ensure the delivery of a healthy child. Occasionally, a pregnant woman may reject medical procedures recommended by her physician because of her religious beliefs, or her fears about the effects such procedures may have on her own well-being. Increasingly sophisticated medical technology has advanced the age of fetal viability, while extending the ability of physicians to diagnose and treat fetal diseases *in utero*.<sup>1</sup> These medical developments have in turn fostered the legal concept that a fetus has the right to begin life with a sound mind and body.<sup>2</sup> Applying this reasoning, some courts have held the fetus' right to begin life with a sound mind and body outweighs the pregnant woman's right to bodily integrity and religious freedom.<sup>3</sup> Medical advances permit the physician to treat the fetus directly, but the unique relationship between a pregnant woman and her unborn child inevitably means any procedure directed at the fetus will also be

---

\*Deputy Medical Examiner, Office of the Medical Examiner, County of Cook, Chicago, IL. B.A., McNeese State University, 1976; M.A., University of Illinois, 1977; Ph.D., University of Illinois, 1983; M.D., Southern Illinois University, 1990; J.D. (Cand.) DePaul University College of Law, 1999.

<sup>1</sup>Board of Trustees Report, *Legal Interventions During Pregnancy: Court-Ordered Medical Treatments and Legal Penalties for Potentially Harmful Behavior by Pregnant Women*, 264 JAMA 2663, 2663 (1990).

<sup>2</sup>Robin M. Trindel, *Fetal Interests vs. Maternal Rights: Is the State Going Too Far?*, 24 AKRON L. REV. 743, 743 (1991).

<sup>3</sup>*Id.*

performed on the mother.<sup>4</sup> A competent, pregnant woman's refusal of a medical procedure necessary to the survival of her unborn child presents the issue of whether the State may intervene to override her decision, and if so, under what circumstances does the state's interest outweigh that of the woman's.

A competent adult has the right to refuse medical treatment, even life-saving medical treatment.<sup>5</sup> This right is grounded in the common law doctrine of informed consent,<sup>6</sup> and a constitutional right to bodily integrity under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.<sup>7</sup> Additionally, a competent adult has the right to refuse medical treatment on the basis of religious beliefs under the First Amendment to the United States Constitution.<sup>8</sup> The right to refuse medical treatment has never been absolute.<sup>9</sup> Traditionally, courts have performed a balancing test to decide whether to override a competent adult's refusal of medical treatment.<sup>10</sup> Courts typically balance four State interests: preservation of life, prevention of suicide, protection of third parties and the integrity of the medical profession, against the patient's rights of bodily integrity and religious freedom.<sup>11</sup> The State's burden increases with the evasiveness or the risk of the procedure.<sup>12</sup> For example, a minimally invasive procedure, such as a blood transfusion, might support the assertion of the State's interest over the patient's right to refuse medical treatment.<sup>13</sup>

The situation most frequently arising in which courts have held the interests of the State outweigh the rights of the patient has been in the protection of third parties, particularly in matters concerning public health. For example, the courts have overridden religious-based refusals of

---

<sup>4</sup>*Legal Interventions*, *supra* note 1, at 2663.

<sup>5</sup>*Cruzan v. Missouri Dep't of Health*, 497 U.S. 261, 277 (1990).

<sup>6</sup>*Union Pac. Ry. v. Botsford*, 141 U.S. 250, 251 (U.S. 1891); *Schloendorff v. Society of N.Y. Hosps.*, 105 N.E. 92, 93 (N.Y. 1914). The latter decision is notable for Justice (then Judge) Cardozo's often quoted observation, "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body... ."

<sup>7</sup>*Cruzan v. Missouri Dep't of Health*, 497 U.S. 261, 271 (1990).

<sup>8</sup>*Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

<sup>9</sup>*Cruzan v. Missouri Dep't of Health*, 497 U.S. 262, 270 (1990).

<sup>10</sup>*Satz v. Perlmutter*, 362 So. 2d 160, 162-64 (Fla. Dist. Ct. App. 1978).

<sup>11</sup>*Id.*

<sup>12</sup>Alicia Ouellette, *New Medical Technology: A Chance to Reexamine Court-Ordered Medical Procedures During Pregnancy*, 57 ALB. L. REV. 927, 929-30 (1994).

<sup>13</sup>*In re Baby Doe v. Mother Doe*, 632 N.E.2d 326, 402 (Ill. App. Ct. 1994).

vaccinations because of public health concerns.<sup>14</sup> The need to maintain order and health among prison inmates is another State interest held to outweigh a patient's right to refuse medical treatment.<sup>15</sup> In such circumstances, where public health interests are at stake, a balancing test may be the best means of reconciling society's interests with those of the individual.

Some courts have held the State has an interest in the well-being of a patient's children that outweighs the right of the patient to refuse even invasive medical treatment, such as a Caesarian section, if her children would be deprived of a parent by the mother's refusal of treatment.<sup>16</sup> Other courts have held the well-being of the fetus outweighs the mother's right to refuse blood transfusions.<sup>17</sup> Applying a balancing test in these circumstances imposes upon a pregnant woman affirmative duties with regard to her living or unborn children that courts have declined to uphold regarding parents who are not pregnant,<sup>18</sup> while circumscribing the pregnant woman's rights to bodily integrity, autonomy, and religious freedom.<sup>19</sup>

*In re Fetus Brown*<sup>20</sup> represents a court's use of such a balancing test. The Appellate Court of Illinois, First Division, determined the state's interest in the well-being of a viable fetus outweighed the patient's right to refuse medical treatment for religious reasons.<sup>21</sup>

This article discusses Illinois' application of a balancing test to resolve the issue of whether a competent, pregnant adult may be compelled, over her religious objections, to receive a blood transfusion necessary for the survival of her fetus. The first section of this article will

---

<sup>14</sup>*Jacobson v. Massachusetts*, 197 U.S. 11 (1904).

<sup>15</sup>*Commissioner of Correction v. Myers*, 399 N.E.2d 452 (Mass. 1979). The court permitted the prison to compel an inmate to undergo hemodialysis.

<sup>16</sup>*Jefferson v. Griffin Spalding County Hosp. Auth.*, 274 S.E.2d 457 (Ga. 1981), *In re A. C.*, 533 A.2d 611 (D. C. Cir. 1987), *rev'd en banc*, 573 A.2d 1235 (D.C. Cir. 1990).

<sup>17</sup>*Application of President and Dir. of Georgetown College*, 331 F.2d 1010 (D.C. Cir. 1964), *cert. denied*, 377 U.S. 978 (1964); *Raleigh Fitkin-Paul Morgan Mem'l Hosp. v. Anderson*, 201 A.2d 537 (N.J. 1964), *cert. denied*, 377 U.S. 985 (1964); *Crouse-Irving Mem'l Hosp v. Paddock*, 485 N.Y.S.2d 443 (N.Y. App. Div. 1985); *In re Jamaica Hosp.*, 491 N.Y.S.2d 898 (N.Y. App. Div. 1985); *Fosmire v. Nicoleau*, 551 N.E.2d 77 (N.Y. 1990).

<sup>18</sup>Janet Gallagher, *Prenatal Invasions & Interventions: What's Wrong with Fetal Rights*, 10 HARV. WOMEN'S L. J. 9, 23-24 (1987).

<sup>19</sup>*Id.* at 18.

<sup>20</sup>689 N.E.2d 397 (Ill. App. Ct. 1997).

<sup>21</sup>*Id.* At 398.

examine past appellate decisions reviewing cases in which courts have sought to compel competent, pregnant adults to receive medically necessary blood transfusions. The second section will examine the Illinois Appellate Court's holding in *In re Fetus Brown*.<sup>22</sup> Finally, this article will consider how the court's application of a balancing test in *Fetus Brown* may affect future situations in which pregnant women refuse medical treatment.

## BACKGROUND

Only a handful of appellate courts have considered the question of whether the State may override the decision of a competent patient to refuse a blood transfusion. The first case occurred in 1963.<sup>23</sup> On September 17, 1963, the President and Directors of Georgetown College, the corporate body owning Georgetown University Hospital, petitioned the United States District Court for the District of Columbia for an order to administer blood transfusions to save the life of Ms. Jesse Jones, the mother of a seven-year-old child.<sup>24</sup> Both Ms. Jones and her husband, as Jehovah's Witnesses, refused blood transfusions on religious grounds.<sup>25</sup> The attorneys representing Georgetown College appeared at the chambers of District Judge Edward Tamm on the afternoon of the seventeenth to request he sign an order permitting the administration of a blood transfusion to Ms. Jones.<sup>26</sup> As no complaint, petition, or written application had been filed, and as no proceeding was pending in the District Court, Judge Tamm denied the oral petition for an order.<sup>27</sup> Later that afternoon, the same attorneys appeared at the Chambers of Judge J. Skelly Wright of the U. S. Court of Appeals for the District of Columbia Circuit.<sup>28</sup> The attorneys had filed no written petition for a review of Judge

---

<sup>22</sup>*In re Fetus Brown*, 689 N.E.2d 397 (Ill. App. Ct. 1997).

<sup>23</sup>Application of President and Dir. of Georgetown College, 331 F.2d 1010 (D.C. Cir. 1964), cert. denied, 377 U.S. 978 (1964).

<sup>24</sup>*Id.* at 1011.

<sup>25</sup>*Id.* See generally Julie A. Koehne, *Witnesses on Trial: Judicial Intrusion Upon the Religious Practices of Jehovah's Witness Parents*, 21 FLA. ST. U. L. REV. 205 (1993) for a discussion of the legal problems confronting Jehovah's Witnesses regarding their practice of refusing blood transfusions.

<sup>26</sup>Application of President and Dir. Of Georgetown College, 331 F.2d at 1011.

<sup>27</sup>*Id.*

<sup>28</sup>Application of the President and Dir. of Georgetown College, 331 F.2d 1010, 1011 (D.C. Cir. 1964); cert. denied, 377 U.S. 978 (1964).

Tamm's denial. Impressing upon Judge Wright the urgency of Ms. Jones's condition, they requested he grant the order Judge Tamm denied.<sup>29</sup> Judge Wright spoke by telephone both with Ms. Jones's physician, who confirmed the gravity of her situation, and with Mr. Jones, who reiterated the couple's opposition on religious grounds to a blood transfusion.<sup>30</sup> Then, Judge Wright drove to the hospital where he interviewed Ms. Jones in her hospital bed.<sup>31</sup> By that point, Ms. Jones' condition had so deteriorated she could only reply "Against my will!" to Judge Wright's question of whether she would accept a transfusion.<sup>32</sup> Judge Wright signed the order and Ms. Jones' physicians immediately transfused her.<sup>33</sup>

On October 14, 1963, after Ms. Jones left Georgetown University Hospital, she filed a petition for a rehearing *en banc* asking, "whether a free adult citizen of the United States can be forced against her will to accept medical treatment to which she objects on both religious and medical grounds."<sup>34</sup> Ms. Jones argued the broad implications of her question both for constitutional rights and for the relationships between physicians, their patients, and hospitals warranted a rehearing by the full Court.<sup>35</sup> The court denied Ms. Jones' petition with dissenting opinions by Judges Burger and Miller.<sup>36</sup>

Although often cited as precedent for the principle a patient can be compelled in certain circumstances to undergo a blood transfusion or other medical procedure over religious objections, *Georgetown College* offers little guidance. The decision consisted simply of a denial of Ms. Jones' petition for a rehearing. Over the course of a desperate afternoon, a federal appellate court judge, acting in haste to save the life of a dying woman, ordered her to receive a blood transfusion against her will.<sup>37</sup> The Court of Appeals never addressed the constitutionality of Judge Wright's action. If *Georgetown College* stands for anything, it stands for the

---

<sup>29</sup>*Id.*

<sup>30</sup>*Id.*

<sup>31</sup>*Id.*

<sup>32</sup>*Id.*

<sup>33</sup>Application of the President & Dir. of Georgetown College, 331 F.2d 1010, 1011 (D.C. Cir. 1964), *cert. denied*, 377 U.S. 978 (1964).

<sup>34</sup>*Id.* at 1012.

<sup>35</sup>*Id.*

<sup>36</sup>*Id.* Both judges argued the case should have been dismissed for want of a justiciable controversy, rather than by denial of the petition for a rehearing *en banc*.

<sup>37</sup>*Id.*

obvious: in medical emergencies, people act quickly to save lives, not to elaborate constitutional guidelines. The lesson to be learned is that courts should settle the applicable constitutional guidelines before the next emergency, which the *Georgetown College* court failed to do.

Several months after *Georgetown College*, the Supreme Court of New Jersey decided a case, *Raleigh Fitkin-Paul Memorial Hospital*, in which a pregnant woman refused a blood transfusion on religious grounds.<sup>38</sup> Willimina Anderson entered Fitkin Memorial Hospital in the thirty-second week of her pregnancy.<sup>39</sup> Her physicians told her she would likely hemorrhage during her pregnancy and would therefore require blood transfusions.<sup>40</sup> Ms. Anderson stated her religious beliefs as a Jehovah's Witness prohibited her from receiving blood transfusions.<sup>41</sup> Fitkin Memorial Hospital then petitioned the Chancery Division of the Superior Court of New Jersey for authority to give blood transfusions to Ms. Anderson, should a transfusion become necessary to save her life or that of her unborn child.<sup>42</sup> The court held the judiciary could not intervene, but the Supreme Court of New Jersey directed an immediate appeal of the hospital's petition because of the potential emergency.<sup>43</sup> Meanwhile, Ms. Anderson fled the hospital.<sup>44</sup>

The parties, nevertheless, requested the court to decide the issue because of the likelihood similar situations would recur.<sup>45</sup> The Supreme Court of New Jersey held the law's protection extended to an unborn child and, therefore, a court could validly order a hospital to administer a blood transfusion to a pregnant woman to save her life or the life of her unborn child.<sup>46</sup> In rendering its opinion, the New Jersey Supreme Court relied on two lines of case law in New Jersey. In the first line of cases, the New Jersey courts had ordered blood transfusions for infants over the religious objections of parents because of the State's interests in protecting

---

<sup>38</sup>*Raleigh-Fitkin-Paul Morgan Mem'l Hosp. v. Anderson*, 201 A.2d 537 (N.J. 1964), *cert. denied*, 377 U.S. 985 (1964).

<sup>39</sup>*Id.*

<sup>40</sup>*Id.*

<sup>41</sup>*Id.*

<sup>42</sup>*Id.*

<sup>43</sup>*Raleigh Fitkin-Paul Morgan Mem'l Hosp. v. Anderson*, 201 A.2d 537, 538 (N.J. 1964), *cert. denied*, 377 U.S. 985 (1964).

<sup>44</sup>*Id.*

<sup>45</sup>*Id.*

<sup>46</sup>*Id.*

children.<sup>47</sup> In the second line of cases, the New Jersey courts had permitted children standing to sue for injuries negligently inflicted upon them prior to birth.<sup>48</sup> The New Jersey court interpreted those precedents as conferring some rights on the unborn child.<sup>49</sup>

The Supreme Court of New Jersey agreed to decide the issue in *Raleigh Fitkin* expressly to provide guidance for future situations in which pregnant women refused medically necessary blood transfusions.<sup>50</sup> The court compared a fetus to a living child to justify compelling intervention.<sup>51</sup> The court's opinion offered no other guidance, such as the factors to consider in balancing the State's interest in protecting a fetus against the patient's right to refuse medical treatment.

No other cases compelling a blood transfusion for a competent, pregnant adult were decided at the appellate level until the 1980s. In *Jefferson v. Griffin Spalding County Hospital Authority*,<sup>52</sup> the hospital petitioned the Superior Court of Butts County, Georgia for an order authorizing the hospital to perform a Caesarian section and to administer any necessary blood transfusions for a woman in the thirty-ninth week of pregnancy.<sup>53</sup> The patient had been examined at Griffin Spalding Hospital on several occasions in the course of her prenatal care.<sup>54</sup> The woman's physicians informed her a Caesarian section was the only safe method for delivering her child because of placenta previa, a malpositioning of the placenta between the fetus and the birth canal.<sup>55</sup> Her physicians believed an attempt to deliver vaginally would almost certainly lead to the death of her unborn child and would substantially endanger the mother's life.<sup>56</sup> A Caesarian section begun before the onset of labor would almost certainly preserve the life of the unborn child and the mother.<sup>57</sup> Advised of these

---

<sup>47</sup>*Id.*

<sup>48</sup>*Raleigh Fitkin-Paul Morgan Mem'l Hosp. v. Anderson*, 201 A.2d 537, 538 (N.J. 1964) *cert. denied*, 377 U.S. 985 (1964).

<sup>49</sup>*Id.*

<sup>50</sup>*Id.*

<sup>51</sup>*Id.*

<sup>52</sup>*Jefferson v. Griffin Spalding County Hosp. Auth.*, 274 S.E.2d 457 (Ga. 1981).

<sup>53</sup>*Id.* at 459.

<sup>54</sup>*Id.* at 458.

<sup>55</sup>*Id.*

<sup>56</sup>*Id.*

<sup>57</sup>*Jefferson v. Griffin Spalding County Hosp. Auth.*, 274 S.E.2d 457, 458 (Ga. 1981).



risks, the mother, nonetheless, refused the Caesarian section on religious grounds.<sup>58</sup>

The court concluded the unborn child was viable and, therefore, entitled to protection under the Juvenile Court Code of Georgia.<sup>59</sup> The court further held the unborn child lacked proper parental care and subsistence necessary for survival.<sup>60</sup> Accordingly, the court awarded temporary custody of the unborn child to the Georgia Department of Human Resources and the Butts County Department of Family and Children Services.<sup>61</sup> The court granted the temporary guardians authority to order a Caesarian section and any necessary blood transfusions.<sup>62</sup> The parents moved to stay the order, but the Supreme Court of Georgia denied the stay.<sup>63</sup> The court held the State had a compelling interest in preserving the life of a viable fetus, particularly in circumstances when the risk of the compelled procedure, the Caesarian section, was significantly less than the alternative, a vaginal delivery complicated by placenta previa.<sup>64</sup>

In 1985, two New York courts ordered pregnant adults to receive blood transfusions. In *Crouse-Irving Memorial Hospital v. Paddock*,<sup>65</sup> the petitioner required a Caesarian section delivery because of various complications with her pregnancy.<sup>66</sup> Ms. Paddock consented to the Caesarian section and all other medical procedures, except blood transfusions, necessary to ensure a safe delivery.<sup>67</sup> Her attending physician, Dr. Robert Neulander, testified Ms. Paddock would probably lose a life-threatening amount of blood because of the Caesarian section and the need to incise her placenta, a site of extensive blood flow.<sup>68</sup> Aware of these risks, Ms. Paddock and her husband affirmed their opposition to any blood transfusions on the basis of their religious beliefs.<sup>69</sup> The court ordered the hospital to administer blood transfusions

---

<sup>58</sup>*Id.*

<sup>59</sup>*Id.* at 459.

<sup>60</sup>*Id.*

<sup>61</sup>*Id.*

<sup>62</sup>*Jefferson v. Griffin Spalding County Hosp. Auth.*, 274 S.E.2d 457, 459 (Ga. 1981).

<sup>63</sup>*Id.*

<sup>64</sup>*Id.*

<sup>65</sup>*Crouse-Irving Mem'l Hosp. v. Paddock*, 485 N.Y.S.2d 443 (N.Y. App. Div. 1985).

<sup>66</sup>*Id.* at 445.

<sup>67</sup>*Id.*

<sup>68</sup>*Id.*

<sup>69</sup>*Id.*

to Ms. Paddock as medically necessary.<sup>70</sup> The court held the interests of the State, as *parens patriae*, in protecting the health or welfare of a minor child overrode the right of the parent to refuse on First Amendment grounds necessary medical treatment for herself.<sup>71</sup> Additionally, the court held a patient could not place her physicians or a hospital in the untenable position of allowing them to undertake aggressive medical treatment on her behalf, while simultaneously denying them the authority to correct life-threatening problems arising from that treatment.<sup>72</sup> The court relied on *Georgetown College* for its ruling,<sup>73</sup> thereby undermining its holding given the weak precedential value of that case.

In *In the Matter of Jamaica Hospital*,<sup>74</sup> an emergency similar to that in *Georgetown College* arose requiring a judge to visit a patient in her hospital bed.<sup>75</sup> The patient was eighteen weeks pregnant and bleeding from esophageal varices, a life-threatening condition in which the veins in the esophagus are prone to rupture.<sup>76</sup> The patient's physicians warned the judge the patient and her unborn child would likely die without a transfusion.<sup>77</sup>

The judge ordered the transfusion, holding the State had a "highly significant interest"<sup>78</sup> in protecting the life of a mid-term fetus, an interest which outweighed the mother's right to refuse a blood transfusion on religious grounds.<sup>79</sup> The judge also suggested the patient's responsibility to her ten living minor children might have offered a justification for ordering the transfusion.<sup>80</sup> The judge cited *Georgetown College* as precedent.<sup>81</sup>

---

<sup>70</sup>Crouse-Irving Mem'l Hosp. v. Paddock, 485 N.Y.S.2d 443, 445 (N.Y. App. Div. 1985).

<sup>71</sup>*Id.*

<sup>72</sup>*Id.*

<sup>73</sup>*Id.*

<sup>74</sup>*In re Jamaica Hosp.* 491 N.Y.S.2d 898 (N.Y. App. Div. 1985).

<sup>75</sup>*Id.* at 898.

<sup>76</sup>*Id.*

<sup>77</sup>*Id.*

<sup>78</sup>*Id.*

<sup>79</sup>*In re Jamaica Hosp.*, 491 N.Y.S.2d 898, 898 (N.Y. App. Div. 1985).

<sup>80</sup>*Id.*

<sup>81</sup>*Id.*

The facts of *Mercy Hospital v. Jackson*,<sup>82</sup> also decided in 1985, differed from those of the preceding cases in that the mother's refusal to consent to a blood transfusion never endangered her fetus.<sup>83</sup> The patient entered Mercy Hospital in premature labor in the twenty-fifth or twenty-sixth week of pregnancy. Ms. Jackson's physicians urged a Caesarian section delivery because of problems with the position of the fetus and her previous abdominal surgery.<sup>84</sup> Ms. Jackson consented to the Caesarian section, but warned she would refuse any blood transfusions because of her religious beliefs.<sup>85</sup> Her physicians explained the risks of blood loss from the Caesarian section and the likelihood of her death, but Ms. Jackson persisted in her refusal.<sup>86</sup>

Mercy Hospital, believing the risk to Ms. Jackson to be unacceptable, petitioned the circuit court for Baltimore to appoint a guardian for Ms. Jackson with authority to order a blood transfusion.<sup>87</sup> The judge convened a hearing at Ms. Jackson's hospital bed, but both Ms. Jackson and her husband reaffirmed their opposition to a blood transfusion.<sup>88</sup> The judge denied the petition for guardianship.<sup>89</sup> Mercy Hospital appealed, but the appellate court upheld the dismissal.<sup>90</sup> The court held a competent, pregnant adult had the right to refuse a blood transfusion for religious reasons, when her decision posed no risk to her unborn child.<sup>91</sup>

The First Amendment issue of religious freedom defined the arguments of the cases from the 1960s and the 1980s. When did the State's interest in protecting a viable fetus override a patient's right to refuse medical treatment on the basis of her religious beliefs? As the cases have shown, the answer is when the fetus achieved viability. The courts compared the fetus to a child, and asserted an interest for the State, as *parens patriae*, in protecting the fetus. Thus, the *Mercy Hospital* court

---

<sup>82</sup>*Mercy Hosp. v. Jackson*, 489 A.2d 1130 (Md. Ct. App. 1985). See generally David H. Baumberger, *Mercy Hosp. v. Jackson: A Recurring Dilemma for Health Care Providers in the Treatment of Jehovah's Witnesses*, 46 MD. L. REV. 514 (1987) for a discussion of the case.

<sup>83</sup>*Mercy Hosp. v. Jackson*, 489 A.2d 1130, 1131 (Md. Ct. App. 1985).

<sup>84</sup>*Id.*

<sup>85</sup>*Id.*

<sup>86</sup>*Id.*

<sup>87</sup>*Id.*

<sup>88</sup>*Mercy Hosp. v. Jackson*, 489 A.2d 1130, 1131 (Md. Ct. App. 1985).

<sup>89</sup>*Id.*

<sup>90</sup>*Id.* at 1132.

<sup>91</sup>*Id.*

could affirm Ms. Jackson's right to refuse a blood transfusion, because her refusal did not endanger her fetus. The courts' choice of language in comparing a fetus to a child was telling. The decisions in the cases reviewed preferred the term "unborn child" to "fetus," a term more consistent with the courts' justification for extending rights to the fetus. By the 1990s, both the courts' emphasis and language began to change. "Bodily integrity" and "right to privacy," under the Due Process Clause of the Fourteenth Amendment, became the primary protections of the patient's right to refuse treatment. First Amendment considerations, although still very important, assumed a secondary role. In the language of the courts' opinions, "fetus" began to replace "unborn child." This semantic change emphasized the position of the fetus as a part of the mother's body, rather than a separate entity.

In *Fosmire v. Nicoleau*,<sup>92</sup> the patient entered Brookhaven Memorial Hospital in Suffolk County, New York in premature labor.<sup>93</sup> Her physicians performed a Caesarian section and delivered a healthy baby boy.<sup>94</sup> Following the delivery, Ms. Nicoleau began to bleed from the uterus, thus making another surgery necessary.<sup>95</sup> Over the course of her second surgery, Ms. Nicoleau lost a substantial amount of blood requiring replacement by transfusions.<sup>96</sup> Ms. Nicoleau refused any blood transfusion, although her physicians advised her she would die without one.<sup>97</sup> The hospital sought a court order authorizing it to order transfusions on Ms. Nicoleau's behalf, if medically necessary.<sup>98</sup>

The superior court issued an order granting the hospital the authority to administer blood transfusions on Ms. Nicoleau's behalf.<sup>99</sup> Later that day, Ms. Nicoleau received the first of two transfusions.<sup>100</sup> The patient and her husband appealed to the appellate division to vacate the order.<sup>101</sup> Ms. Nicoleau argued her fears about the medical dangers of blood transfusions, as well as her religious beliefs motivated her refusal

---

<sup>92</sup>*Fosmire v. Nicoleau*, 551 N.E.2d 77 (N.Y. 1990).

<sup>93</sup>*Id.* at 78.

<sup>94</sup>*Id.* at 79.

<sup>95</sup>*Id.*

<sup>96</sup>*Id.*

<sup>97</sup>*Fosmire v. Nicoleau*, 551 N.E.2d 77, 79 (N.Y. 1990).

<sup>98</sup>*Id.*

<sup>99</sup>*Id.* at 79.

<sup>100</sup>*Id.*

<sup>101</sup>*Id.*

to consent to a blood transfusion.<sup>102</sup> Compelling her to submit to a blood transfusion, she argued, violated not only her right to religious freedom, but also her right to make her own medical decisions.<sup>103</sup>

The appellate division vacated the order.<sup>104</sup> A majority of the court held the state had an interest in preserving life, but noted no showing had been made demonstrating non-blood alternatives would have failed.<sup>105</sup> The court held the State's interest in preventing the loss of parental support was not compelling because the father and extended family agreed to take care of their minor child should Ms. Nicoleau die.<sup>106</sup>

The *Fosmire* court's threshold inquiry asked whether an identifiable state interest existed.<sup>107</sup> If an identifiable state interest did exist, the next level of inquiry required an examination of whether the State's interest was sufficiently substantial to outweigh the patient's rights to bodily integrity and religious freedom.<sup>108</sup> The court applied a balancing test adding to the factors to be considered "the extent to which the State has manifested its commitment to that interest through legislation or otherwise is a significant consideration."<sup>109</sup> Thus, the *Fosmire* court offered the possibility the State could tip the balance between State interests and patient rights through legislation.<sup>110</sup> The court did acknowledge a distinction between conduct injurious to one's self and conduct injurious to third parties: the former conduct, the court noted, is usually protected; the latter conduct is rarely, if ever, protected.<sup>111</sup>

The hospital argued the State has a compelling interest in preserving the life of the mother for the benefit of the child.<sup>112</sup> Just as the State, as *parens patriae*, will not permit a parent to abandon a child, neither should it permit "this most ultimate of voluntary abandonments."<sup>113</sup> The appellate court held, although the State will not permit abandonment of a child, neither will it intervene in every parental

---

<sup>102</sup>*Fosmire v. Nicoleau*, 551 N.E.2d 77, 79 (N.Y. 1990).

<sup>103</sup>*Id.*

<sup>104</sup>*Id.*

<sup>105</sup>*Id.*

<sup>106</sup>*Id.*

<sup>107</sup>*Fosmire v. Nicoleau*, 551 N.E.2d 77, 79 (N.Y. 1990).

<sup>108</sup>*Id.*

<sup>109</sup>*Id.*

<sup>110</sup>*Id.*

<sup>111</sup>*Id.*

<sup>112</sup>*Fosmire v. Nicoleau*, 551 N.E.2d 77, 80 (N.Y. 1990).

<sup>113</sup>*Id.*

decision potentially jeopardizing the family structure.<sup>114</sup> The State's concern for family integrity is not one enforced at the expense of all personal rights.<sup>115</sup> Accordingly, the court upheld the appellate court's denial.<sup>116</sup> Nevertheless, the court's decision upheld the principle of a balancing test and introduced the possibility that state legislation could alter the balance.

In *In re: Matter of Patricia Dubreuil*,<sup>117</sup> the Supreme Court of Florida overturned a lower court's order compelling a woman to undergo a blood transfusion to which she objected for religious reasons.<sup>118</sup> Ms. Dubreuil entered Memorial Hospital in an advanced state of pregnancy.<sup>119</sup> Her physician performed a Caesarian section, delivering a boy.<sup>120</sup> During the surgery, Ms. Dubreuil lost a considerable amount of blood making a blood transfusion necessary to save her life.<sup>121</sup> As a Jehovah's Witness, Ms. Dubreuil refused any transfusions.<sup>122</sup> Memorial Hospital contacted her estranged husband, who granted permission for a blood transfusion, which the hospital then gave.<sup>123</sup> When Ms. Dubreuil's physician realized additional blood transfusions would be necessary, the hospital sought an emergency declaratory judgment to determine the hospital's authority to administer blood transfusions to Ms. Dubreuil as medically indicated.<sup>124</sup>

The trial court granted the hospital's petition permitting Memorial Hospital to administer transfusions to Ms. Dubreuil as medically indicated.<sup>125</sup> The court based its ruling on the State's interest in preventing the abandonment of Ms. Dubreuil's four minor children, should she die.<sup>126</sup> Mr. and Ms. Dubreuil had separated, with the four

---

<sup>114</sup>*Id.*

<sup>115</sup>*Id.*

<sup>116</sup>*Id.*

<sup>117</sup>*In re Matter of Patricia Dubreuil*, 629 So. 2d 819 (Fla. 1993). See generally Jennifer L. Bamonte & Cathy Bierman, *In Re Dubreuil: Is an Individual's Right to Refuse a Blood Transfusion Contingent on Parental Status?*, 17 NOVA L. REV. 517 (1992) for a discussion of the case.

<sup>118</sup>*In re Matter of Patricia Dubreuil*, 629 So. 2d 819 (Fla. 1993).

<sup>119</sup>*Id.* at 820.

<sup>120</sup>*Id.*

<sup>121</sup>*Id.*

<sup>122</sup>*Id.*

<sup>123</sup>*In re Matter of Patricia Dubreuil*, 629 So. 2d 819, 829 (Fla. 1993).

<sup>124</sup>*Id.* at 822.

<sup>125</sup>*Id.*

<sup>126</sup>*Id.*

children staying with their mother.<sup>127</sup> Mr. Dubreuil had indicated he would not care for the children in the event of Ms. Dubreuil's death.<sup>128</sup> Ms. Dubreuil sought discretionary review from the Supreme Court of Florida, arguing the trial court's decision violated her constitutional rights to privacy, bodily self-determination, and religious freedom.<sup>129</sup>

The court held a patient's rights to religious freedom and bodily integrity must be upheld absent a compelling state interest carried out by means narrowly tailored in the least intrusive manner possible to the person's rights.<sup>130</sup> A balancing test must be employed weighing whether Ms. Dubreuil's refusal of a blood transfusion constituted a risk of abandonment of her children amounting to a compelling state interest sufficient to override her rights to religious freedom and bodily integrity.<sup>131</sup> The court held the State failed to prove by clear and convincing evidence Mr. Dubreuil would not assume responsibility for the children.<sup>132</sup> The court concluded the trial court erred in holding that the State presented sufficient evidence of abandonment to justify overriding the patient's constitutional freedoms.<sup>133</sup> The court cautioned that each case should be decided on an individual basis.<sup>134</sup> In some circumstances, the court continued, abandonment could constitute a compelling interest.<sup>135</sup>

The two appellate decisions from the 1990s examining the right of a competent, pregnant adult to refuse a blood transfusion necessary to the survival of her fetus each applied a balancing test in upholding the patient's right to refuse treatment. Although one can argue the *Fosmire* and *Dubreuil* courts decided the cases correctly, their preservation of the balancing test left open the possibility State interests, in certain circumstances, could outweigh the patient's right to bodily integrity and religious freedom. In particular, the *Fosmire* court's dictum that the degree of the State's commitment to a substantial State interest can be

---

<sup>127</sup>*Id.*

<sup>128</sup>*In re* Matter of Patricia Dubreuil, 629 So. 2d 819, 822 (Fla. 1993).

<sup>129</sup>*Id.* at 820.

<sup>130</sup>*Id.*

<sup>131</sup>*Id.*

<sup>132</sup>*Id.*

<sup>133</sup>*In re* Matter of Patricia Dubreuil, 629 So. 2d 819, 820 (Fla. 1993).

<sup>134</sup>*Id.* at 822.

<sup>135</sup>*Id.*

inferred through its legislation, and therefore, can, on that basis, be a "significant consideration" invites legislative intervention.

### IN RE FETUS BROWN

#### Facts of the Case

Recently, the Appellate Court of Illinois, First Division, decided a case in which a competent, pregnant adult refused, on the basis of her religious beliefs, blood transfusions necessary to the survival of her fetus.<sup>136</sup> The State of Illinois asserted that its interests in the well-being of a viable fetus outweighed the patient's rights to refuse medical treatment.<sup>137</sup>

Darlene Brown, a twenty-six year old Jehovah's Witness, entered Ingalls Memorial Hospital on June 26, 1996 for the removal of a urethral cyst.<sup>138</sup> At the time of her admission, the woman was between thirty-four and thirty-seven weeks pregnant.<sup>139</sup> The attending physician, Dr. Robert Walsh, estimated Brown would lose approximately 100 cubic centimeters of blood during the surgery.<sup>140</sup> However, she eventually lost 700 cubic centimeters of blood.<sup>141</sup> At that point, Dr. Walsh ordered three units of blood for transfusion, but Ms. Brown, who was fully conscious, refused the blood, explaining she was a Jehovah's Witness.<sup>142</sup> Believing Ms. Brown to be competent to refuse the blood, Dr. Walsh completed the surgery using other means to control her bleeding.<sup>143</sup> By the end of the surgery, Ms. Brown had lost approximately 1500 cubic centimeters of blood.<sup>144</sup>

Post-operatively, Ms. Brown's hemoglobin level, an indirect indication of the amount of blood in her body, decreased to 4.4 grams per deciliter, a dangerously low level.<sup>145</sup> When Ms. Brown's hemoglobin continued to decrease, Dr. Walsh warned her both she and her fetus could

---

<sup>136</sup>*In re Fetus Brown*, 689 N.E.2d 397 (Ill. App. Ct. 1997).

<sup>137</sup>*Id.* at 398.

<sup>138</sup>*Id.* at 399.

<sup>139</sup>*Id.*

<sup>140</sup>*Id.*

<sup>141</sup>*In re Fetus Brown*, 689 N.E.2d 397, 399 (Ill. App. Ct. 1997).

<sup>142</sup>*Id.*

<sup>143</sup>*Id.*

<sup>144</sup>*Id.*

<sup>145</sup>*Id.*



die.<sup>146</sup> After consulting other physicians and attempting other medical procedures, Dr. Walsh failed to increase Ms. Brown's hemoglobin level.<sup>147</sup> Dr. Walsh estimated without a blood transfusion Ms. Brown's chances of survival, as well as those of her fetus, were less than five percent.<sup>148</sup>

On June 28, 1996, the State of Illinois filed a petition for adjudication of wardship and a motion for temporary custody of Baby Doe, a fetus, pursuant to the Illinois Juvenile Court Act of 1987.<sup>149</sup> The court held a hearing that same day appointing, over objection, the Public Guardian of Cook County to represent the fetus.<sup>150</sup> Uncertain as to jurisdiction under the Juvenile Court Act, the court declined to continue under the State's petition for adjudication of wardship.<sup>151</sup> The State responded by invoking the court's equitable powers to file a petition for hearing on whether a temporary custodian could be appointed to consent to a medical procedure; namely blood transfusion.<sup>152</sup>

At the hearing, the State called Dr. Walsh, and Kurt Johnson, the Chief Operating Officer of Ingalls Memorial Hospital.<sup>153</sup> Dr. Walsh testified to the need, for Ms. Brown to have the blood transfusion.<sup>154</sup> Mr. Johnson testified he knew of Ms. Brown's medical condition and of Dr. Walsh's opinion regarding the necessity of the blood transfusion.<sup>155</sup> Mr. Johnson stated his willingness to accept temporary custody of the fetus for the purpose of consenting to the blood transfusion.<sup>156</sup> The parties stipulated Lester Brown, the husband of the patient, would confirm Ms. Brown's understanding of the risks to herself and her fetus of refusing the blood transfusions.<sup>157</sup> Further, the parties stipulated Mr. Brown would testify he would continue to care for his two stepdaughters should Ms. Brown die.<sup>158</sup>

---

<sup>146</sup>*In re Fetus Brown*, 689 N.E.2d 397, 399 (Ill. App. Ct. 1997).

<sup>147</sup>*Id.*

<sup>148</sup>*Id.*

<sup>149</sup>*Id.*

<sup>150</sup>*Id.*

<sup>151</sup>*In re Fetus Brown*, 689 N.E.2d 397, 399 (Ill. App. Ct. 1997).

<sup>152</sup>*Id.*

<sup>153</sup>*Id.*

<sup>154</sup>*Id.*

<sup>155</sup>*Id.* at 399-400.

<sup>156</sup>*In re Fetus Brown*, 689 N.E.2d 397, 400 (Ill. App. Ct. 1997).

<sup>157</sup>*Id.* at 400.

<sup>158</sup>*Id.*

The trial court granted the State's petition by appointing Mr. Brown as temporary custodian of Fetus Brown with the right to consent to one or more blood transfusions for Darlene Brown when advised of the necessity by any attending physician.<sup>159</sup> Subsequently, Ms. Brown's physicians transfused her with six units of packed red blood cells from June 28, 1996 through June 29, 1996.<sup>160</sup> On July 1, 1996, Ms. Brown delivered a healthy baby.<sup>161</sup>

Following a status hearing, the trial court vacated the temporary custody order, dismissed the State's petition, and closed the case.<sup>162</sup> Ms. Brown filed a notice of appeal to challenge the circuit court's order appointing a temporary custodian with the power to consent, on behalf of Darlene Brown, to transfusions for her fetus.<sup>163</sup> The Public Guardian appealed the court order vacating temporary custody and dismissing the State's petition, as well as challenging the order appointing the Public Guardian to represent the interests of the fetus.<sup>164</sup> The State of Illinois, as appellee, challenged the issues raised on appeal by Darlene Brown.<sup>165</sup>

The appellate court noted, although the factual issues had become moot, the legal issues satisfied the public policy exception to the Illinois mootness doctrine.<sup>166</sup> Because the issue required authoritative determination for the future guidance of public officials, particularly given the emergency nature of such proceedings, the appellate court agreed to review the case.<sup>167</sup>

### The Holding

*In re Fetus Brown* presented the issue of whether a competent, pregnant adult's right to refuse medical treatment could be overridden by the State's substantial interest in the welfare of a viable fetus.<sup>168</sup> The mother, Darlene Brown, argued she had an absolute right as a competent adult to refuse

---

<sup>159</sup>*Id.*

<sup>160</sup>*Id.*

<sup>161</sup>*In re Fetus Brown*, 689 N.E.2d 397, 400 (Ill. App. Ct. 1997).

<sup>162</sup>*Id.*

<sup>163</sup>*Id.*

<sup>164</sup>*Id.*

<sup>165</sup>*In re Fetus Brown*, 689 N.E.2d 397, 400 (Ill. App. Ct. 1997).

<sup>166</sup>*Id.*

<sup>167</sup>*Id.*

<sup>168</sup>*Id.* at 401.

medical treatment.<sup>169</sup> The State of Illinois argued that its substantial interest in the well-being of a viable fetus outweighed the minimal invasion imposed by the blood transfusion.<sup>170</sup> Ms. Brown argued no balancing test should apply.<sup>171</sup> The state argued a balancing test should be used to weigh state interests against patient rights.<sup>172</sup>

The State grounded its argument in a 1994 case, *In re Baby Doe*, in which the State asked the appellate court to apply a balancing test weighing the rights of a fetus against the right of a woman to refuse a Caesarian section.<sup>173</sup> Two distinctions existed between *Baby Boy Doe* and *Fetus Brown*. First, *Fetus Brown* asserted the rights of the State in protecting a viable fetus, while *Baby Boy Doe* asserted the rights of the fetus itself. Second, *Baby Boy Doe* involved an invasive surgery, a Caesarian section, while *Fetus Brown* required only blood transfusions through an intravenous catheter already in place and to which the patient had already consented.<sup>174</sup>

The *Baby Boy Doe* court relied on the opinion of the Illinois Supreme Court in *Stallman v. Youngquist*,<sup>175</sup> in which the court held a fetus cannot have rights superior to its mother.<sup>176</sup> Accordingly, the Stallman court ruled a pregnant woman owes no legally cognizable duty to her fetus.<sup>177</sup> Following *Stallman*, the *Baby Boy Doe* court applied a balancing test to maternal and fetal rights ruling a woman's refusal of an invasive procedure such as a Caesarian section, even at peril to her fetus, should be honored.<sup>178</sup> The *Baby Boy Doe* court applied the rationale in Stallman, stating the woman's right to refuse medical treatment derived from her rights to privacy, bodily integrity, and religious freedom.<sup>179</sup> The court held the potential impact on her fetus of her refusal of medical treatment to be irrelevant.<sup>180</sup> *The Baby Boy Doe* court left open the

<sup>169</sup>*Id.*

<sup>170</sup>*In re Fetus Brown*, 689 N.E.2d 397, 401 (Ill. App. Ct. 1997).

<sup>171</sup>*Id.*

<sup>172</sup>*Id.*

<sup>173</sup>*In re Baby Boy Doe*, 632 N.E.2d 326, 326 (Ill. App. Ct. 1994).

<sup>174</sup>*In re Fetus Brown*, 689 N.E.2d 397, 401-02 (Ill. App. Ct. 1997).

<sup>175</sup>*Stallman v. Youngquist*, 531 N.E.2d 355 (Ill. 1988).

<sup>176</sup>*In re Fetus Brown*, 689 N.E.2d 397, 401 (Ill. App. Ct. 1997) (citing *Stallman v. Youngquist*, 531 N.E.2d 355, 359 (Ill. 1988)).

<sup>177</sup>*Id.* (citing *Stallman v. Youngquist*, 531 N.E.2d 355, 359 (Ill. 1988)).

<sup>178</sup>*In re Baby Boy Doe*, 632 N.E.2d 326, 333 (Ill. App. Ct. 1994).

<sup>179</sup>*Id.*

<sup>180</sup>*Id.*

question of whether relatively non-invasive and risk-free procedures, such as blood transfusions, could be ordered in such circumstances.<sup>181</sup>

As noted, Darlene Brown argued a competent adult has an absolute right to refuse medical treatment.<sup>182</sup> Qualifying the patient's choice to refuse treatment, Ms. Brown undermined the patient's authority to make a competent, informed decision.<sup>183</sup> Illinois only recognizes a common law right of competent adults to refuse medical treatment.<sup>184</sup> Although the United States Supreme Court has suggested the right to refuse medical treatment has support in the Due Process Clause of the Fourteenth Amendment to the Constitution,<sup>185</sup> the Illinois Supreme Court has declined to construe the Illinois Constitution to include a right to refuse medical treatment.<sup>186</sup> The Illinois Supreme Court has recognized religious-based objections to medical treatment under the First Amendment,<sup>187</sup> but has never recognized an absolute right to refuse medical treatment.<sup>188</sup>

Courts, as noted earlier, tend to consider four state interests in deciding whether to override a competent patient's refusal of medical treatment: the preservation of life, the prevention of suicide, the protection of third parties and the integrity of the medical profession.<sup>189</sup> The circuit court agreed with the medical testimony that the preservation of the life of Ms. Brown and her fetus required blood transfusions.<sup>190</sup> Considering the four state interests, the circuit court held prevention of suicide was not an issue, because Ms. Brown stated her willingness to accept medical treatment apart from transfusions.<sup>191</sup> The court reasoned the ethical integrity of the medical profession would be upheld, because the transfusion could be accomplished through a catheter already in place, requiring minimal bodily invasion.<sup>192</sup> The court acknowledged a strong state interest in protecting third parties because of Ms. Brown's two minor

---

<sup>181</sup> *Id.*

<sup>182</sup> *In re Fetus Brown*, 689 N.E.2d 397, 402 (Ill. App. Ct. 1997).

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Cruzan v. Missouri Dep't of Health*, 497 U.S. 561, 577 (1990).

<sup>186</sup> *In re Fetus Brown*, 689 N.E. 397, 401 (Ill. App. Ct. 1997).

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *In re Fetus Brown*, 689 N.E. 397, 403-04 (Ill. App. Ct. 1997).

<sup>192</sup> *Id.*

children.<sup>193</sup> The court also acknowledged the State's interest in preserving both the life of Ms. Brown and the well-being of her fetus,<sup>194</sup> but noted, following *Baby Boy Doe*, that interest only attaches to the life of the decision-maker.<sup>195</sup> The State's interest in preserving life is lessened when the decision-maker is the person who competently and knowledgeably refuses medical care.<sup>196</sup> Although the State has an interest in preserving life, the State also has an interest in protecting personal autonomy.<sup>197</sup> Illinois statutorily recognizes a competent adult's right to refuse medical treatment.<sup>198</sup> Accordingly, the *Fetus Brown* court held balancing the State's interest in preserving Darlene Brown's life against its interest in protecting her individual autonomy could not be determinative.<sup>199</sup> The court also held, absent evidence Ms. Brown's children would be abandoned by her death, neither could the issue of third party protection be determinative.<sup>200</sup>

The *Fetus Brown* court held the determinative issue was the State's interest in protecting the viable fetus.<sup>201</sup> Following *Planned Parenthood v. Casey*,<sup>202</sup> the court asserted the State maintains a "substantial interest" in potential life throughout pregnancy.<sup>203</sup> In regard to abortion, the State's interest becomes compelling at viability.<sup>204</sup> However, both the Illinois Supreme Court and the Illinois Constitution have remained silent on the State's interest in a viable fetus.<sup>205</sup> The Illinois Abortion Act of 1975 defines an unborn child as a human being from the moment of conception,<sup>206</sup> but because *Fetus Brown* was not an abortion case, the court held the State could not assert a compelling interest in protecting a

<sup>193</sup>*Id.*

<sup>194</sup>*Id.*

<sup>195</sup>*Id.*

<sup>196</sup>*In re Fetus Brown*, 689 N.E.2d 397, 403 (Ill. App. Ct. 1997) (*citing* Norwood Hosp. v. Munoz, 564 N.E.2d 1017, at 1023 (1991)).

<sup>197</sup>*In re Fetus Brown*, 689 N.E.2d 397, 403 (Ill. App. Ct. 1997).

<sup>198</sup>*Id.*

<sup>199</sup>*Id.*

<sup>200</sup>*Id.*

<sup>201</sup>*Id.* at 404.

<sup>202</sup>*Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).

<sup>203</sup>*In re Fetus Brown*, 689 N.E. 2d 397, 404 (Ill. App. Ct. 1997) (*citing* *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 876 (1992)).

<sup>204</sup>*In re Fetus Brown*, 689 N.E.2d 397, 404 (Ill. Ct. App. 1997) (*citing* *Roe v. Wade*, 410 U.S. 113, 162 (1973)).

<sup>205</sup>*In re Fetus Brown*, 689 N.E.2d 397, 404 (Ill. App. Ct. 1997).

<sup>206</sup>*Id.*

viable fetus under this law.<sup>207</sup> In addition, although viable fetuses may be considered persons in regard to injuries inflicted upon them by third parties, this principle does not apply to the mother.<sup>208</sup> Finally, under the Illinois Juvenile Protection Act, the fetus is not a minor.<sup>209</sup> Thus, the *Fetus Brown* court concluded, without a legislative determination to place fetuses within the Illinois Juvenile Protection Act, balancing the mother's right to refuse medical treatment against the State's interest in protecting a viable fetus, reflected in existing statutes, the State may not override a competent woman's decision to refuse treatment.<sup>210</sup> The court also held a transfusion was an invasive procedure.<sup>211</sup> Accordingly, the appellate court held the circuit court erred in ordering a transfusion for Darlene Brown and reversed.<sup>212</sup>

### CONCLUSION

The *Fetus Brown* court applied the balancing test between the State's interest in a viable fetus and a competent, pregnant adult's right to refuse medical treatment.<sup>213</sup> In holding a blood transfusion is "an invasive procedure that interrupts a competent adult's bodily integrity,"<sup>214</sup> the court scaled the balance in favor of a pregnant woman's right to refuse medical treatment. "[W]e cannot impose a legal obligation upon a pregnant woman to consent to an invasive medical procedure for the benefit of her viable fetus."<sup>215</sup> In rendering its decision, the court did not consider gradations of evasiveness. For the purposes of its discussion of a patient's right to refuse medical treatment, the court held a blood transfusion to be as invasive as a Caesarian section.<sup>216</sup> More significantly, the court failed to consider the distinction between medical procedures simultaneously benefitting both the pregnant woman and her fetus, such as the blood

---

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.* at 405.

<sup>210</sup> *In re Fetus Brown*, 689 N.E. 2d 397, 405 (Ill. App. Ct. 1997).

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *In re Fetus Brown*, 689 N.E.2d 397, 405 (Ill. App. Ct. 1997).

<sup>216</sup> *Id.* While often safe, blood transfusions are not risk free. See generally P.L. MOLLISON ET AL., BLOOD TRANSFUSION IN CLINICAL MEDICINE, chs. 16 & 17 (5<sup>th</sup> ed. 1987) for a discussion of the hazards of blood transfusion.

transfusion at issue in *Fetus Brown*, as compared to procedures intended to benefit the fetus, but risking harm to the patient.<sup>217</sup>

In preserving the balancing test, the decision in *Fetus Brown* left the State free to counterpoise its interest in preventing the abandonment of minor children against the patient's right to refuse medical treatment.<sup>218</sup> The court declined to consider that issue because no evidence indicated Ms Brown's minor children would be abandoned in the event of her death.<sup>219</sup> Some basis for concern arises about the preserving of the balancing test by the court's apparent invitation to the Illinois legislature to place fetuses within the Illinois Juvenile Protection Act.<sup>220</sup> Presumably, such an action by the legislature would give the state of Illinois a greater interest in the protection of a viable fetus than it now possesses.

In *Jefferson v. Griffin Spalding County Hospital Authority*, the Georgia Supreme Court ruled the Juvenile Court Code of Georgia protected a viable fetus.<sup>221</sup> On that basis, the court granted temporary custody of a fetus to the Georgia Department of Human Resources and Butts County Department of Family and Children Services with the authority to order a Caesarian section.<sup>222</sup> The Court of Appeals of New York, in *Fosmire v. Nicoleau*, held "the extent to which the State has manifested its commitment to that interest [intervening in a competent patient's refusal of medical treatment] through legislation or otherwise is a significant consideration."<sup>223</sup>

Following this precedent, the placing of fetuses within the Illinois Juvenile Protection Act could make court-ordered interventions during pregnancy easier to obtain. This would have several consequences. Readily available court ordered interventions could easily lead to an expansion of physician and hospital liability.<sup>224</sup> If a pregnant adult has legally enforceable obligations to her fetus, physicians may be required to obtain court orders to enforce treatment in any situation in which the

---

<sup>217</sup>*In re Fetus Brown*, 689 N.E.2d 397, 403, 405 (Ill. Ct. App. 1997).

<sup>218</sup>*Id.* at 404.

<sup>219</sup>*Id.*

<sup>220</sup>*Id.*

<sup>221</sup>*Jefferson v. Griffin County Hosp. Auth.*, 274 S.E.2d 457, 459 (Ga. 1981). *See also* Nancy K. Rhoden, *The Judge in the Delivery Room: The Emergence of Court-Ordered Obstetrical Caesarians*, 74 CAL. L. REV. 1951, 1962 (1986).

<sup>222</sup>*Jefferson v. Griffin County Hosp. Auth.*, 274 S.E.2d 457, 459 (Ga. 1981).

<sup>223</sup>*Fosmire v. Nicoleau*, 551 N.E.2d 77, 81 (N.Y. 1990).

<sup>224</sup>Board of Trustees Report, *supra* note 1, at 2666.

woman's choice conflicts with the physician's judgment of the fetus' needs.<sup>225</sup> In theory, a physician could be civilly<sup>226</sup> or even criminally liable for failing to seek a court order in situations in which a woman's refusal of medical treatment led to the death or impairment of her fetus.<sup>227</sup>

A corollary of this problem is the extent to which a physician would become responsible for enforcing any court ordered treatment.<sup>228</sup> This could in turn transform the physician-patient relationship into an adversarial relationship leading to distrust of physicians by their patients.<sup>229</sup> Distrust of physicians would undermine public policy goals of improved obstetrical, prenatal, and maternal care.<sup>230</sup> Unfortunately, many of the women upon whom court-ordered obstetrical interventions have been imposed are poor or members of minorities.<sup>231</sup> Thus, the individuals in greatest need of prenatal and obstetrical care would be the individuals most likely to avoid medical care, because they feared easily available court-ordered interventions would be imposed.<sup>232</sup> Court-ordered interventions would not necessarily end with obstetrical interventions. Bringing the fetus within the protection of the Illinois Juvenile Protection Act could lead to court-ordered prenatal screening tests and restrictions on the diet and activities of the pregnant woman.<sup>233</sup>

---

<sup>225</sup>*Id.*

<sup>226</sup>*Id.*

<sup>227</sup>*Id.*

<sup>228</sup>*Id.*

<sup>229</sup>Board of Trustees Report, *supra* note 1, at 2666.

<sup>230</sup>Veronika E.B. Kolder et al, *Court-Ordered Obstetrical Interventions*, 316 NEW ENG. J. MED. 1192, 1196 (May 7, 1987).

<sup>231</sup>*Id.*

<sup>232</sup>*Id.*

<sup>233</sup>*Id.* at 1995-96.



