

Faith versus Medicine: When a Parent Refuses a Child's Medical Care

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Issues surrounding parental denial of medical care for children in need has unexpectedly emerged as one of the most contentious issues in health law policy this year. Parents have cited religious reasons or personal preferences for alternative medical therapy as justification to refuse such treatment. Although the ability of a parent to consent to potentially life-saving medical therapy for a child is an established canon of family law,¹ the outer boundaries of a parent's right to refuse life-saving medical treatment for a child are ill-defined. The limits of parents' refusal to allow life-saving medical care is currently being tested in two cases – one in Wisconsin² and the other in Minnesota.³ Although the two cases differ significantly in the circumstances, venue, and medical outcomes,⁴ both cases raise the issue of when and how the state may intervene to save the life of a child over the express religious or medical beliefs, and conduct, of one or both parents.

Background for State Intervention During Public Health Concerns

Legal precedent and authority currently exists for a state to intervene when an individual parent's refusal to seek medical treatment for a child threatens the general public. Without question, for some diseases and some therapies parental refusals to allow their child to be medicated not only dramatically increases the likelihood of the child getting the disease,⁵ but also greatly increases the health risks to other children they may come into contact with.

For example, the government's ability to implement mandatory vaccination programs (e.g. for measles, polio, tetanus) is based on the 1905 United States Supreme Court ruling in *Jacobson v. Massachusetts*.⁶ The case addressed the issue of whether it was constitutional for a state to require mandatory smallpox vaccinations.⁷ The Court held that the states were justified in enacting mandatory vaccination programs based on the

¹ Kat Dailey, *Parents' Rights, Judges' Rules*, NEWSWEEK, May 19, 2009, <http://www.newsweek.com/id/198397>.

² Dirk Johnson, *Trials for Parents Who Chose Faith Over Medicine*, N.Y. TIMES, Jan. 20, 2009, available at <http://www.nytimes.com/2009/01/21/us/21faith.html>.

³ Assoc. Press, *Boy who fled chemo may be heading to Mexico*, MSNBC, May 21, 2009, <http://www.msnbc.msn.com/id/30824587/>.

⁴ In the Wisconsin case the child died from lack of medical therapy for a benign disease (diabetes mellitus) and the parents have already been arrested and charged in state criminal court. In the Minnesota case the child is still alive though yet to be treated for a highly curable cancer (lymphoma); the parents were told by local law enforcement authorities that they would not be charged after agreeing to return the child from Mexico to their home jurisdiction and the custody of the court. See also Assoc. Press, *Parents Agree to Chemo for Boy Who Fleed*, MSNBC, May 26, 2009, <http://www.msnbc.msn.com/id/30930715>.

⁵ Assoc. Press, *Vaccine refusal hikes whooping cough risks*, MSNBC, May 25, 2009, <http://www.msnbc.msn.com/id/30930593>.

⁶ 197 U.S. 11, 37-39 (1905).

⁷ *Id.*

inherent state police power to protect its citizens' public health, safety, and welfare.⁸

The ability of a state to enact reasonable, facially neutral legislation to promote the public health of its citizens is not without limits, however. It is based, in part, on whether the state action qualifies for the "public health justification" criterion announced in *Jacobson*.⁹ The Supreme Court revisited the *Jacobson* issue again in 1922 in *Zucht v. King*¹⁰ when a group of parents claimed a constitutional right to refuse vaccinations for their children. The Court rejected the parents' claims, and extended the original ruling in *Jacobson* to hold that school and public health officials could decide the manner and types of mandatory vaccinations.¹¹ Specifically, the Court found that "these [public vaccination] ordinances confer not arbitrary power, but only broad discretion required for the protection of public health."¹² Unlike the circumstances in *Jacobson* and *Zucht*, however, the current controversies in Wisconsin and Minnesota concern refusals to allow life-saving medical therapy for an individual child for illnesses which are neither infectious nor pose a risk to any other child.

General Rules or Individual Case-by-Case Decisions?

There are only a few cases in which parents have been charged, or threatened to be charged, with criminal conduct for refusing to allow their child to be treated for a potentially life-threatening medical conditions, and there is no clear consensus on the way in which prosecutors, judges, and juries shall deal with these difficult situations at the intersection of medical ethics and family law. There are currently no clearly-defined limits for when a parent's choices not to seek medical care for a child is deemed negligent.¹³

The facts and circumstances involved in the cases vary greatly – and these differences may ultimately be the deciding factors in determining the outcome of each case. The ages of the children in question differ as do their educational levels and the degree to which they likely understand the nature of their ailment, the therapy being denied, or all of the health implications of the denial of such therapy. There is also a great difference in the diseases the children possess. Some children have benign diseases, but potentially life-threatening if effective therapy is denied. Some have more aggressive forms of cancer, though some of the cancers are newly diagnosed and highly curable with chemotherapy, while others are cancer recurrences with a much lower probability of cure.

In the Wisconsin case¹⁴ the child died from what should have been a non-lethal disease after both parents denied life-saving medical care based upon their religious beliefs. In

⁸ *Id.*

⁹ *Id.*

¹⁰ 260 U.S. 174, 176-77 (1922).

¹¹ *Id.*

¹² *Id.*

¹³ Kate Dailey, *What Makes a Parent Negligent?*, NEWSWEEK, May 23, 2009, available at <http://www.newsweek.com/id/199093>.

¹⁴ Johnson, *supra* note 2.

the most recent Minnesota case¹⁵ a somewhat sheltered child was taken to another jurisdiction by only one of two parents for reasons which had less to do with religion than with a misguided believe in totally unproven, alternative or "natural" method to cure a cancer which has a 90 percent cure rate with conventional chemotherapy. Lastly, the legal actions taken by authorities have also differed, perhaps driven in large part by the degree to which the child has suffered. In the Wisconsin case,¹⁶ the child died as a direct result of parental actions and the parents were arrested and charged with murder. In the Minnesota case,¹⁷ the mother who absconded with her ill child was promised immunity from prosecution if she returned home with the child. Though the court temporarily ordered that the child be removed from the parents' home once he was back in his home jurisdiction, the child was soon thereafter returned to his parents after they agreed to resume his potentially curative chemotherapy.

No Clear Federal or State Laws But Some Case Law

Family law is not federal, and differs from state to state. There are currently no laws in any state which spell out specific guidelines as to what medical decisions parents may or may not make for particular life-threatening illnesses. And, as noted, there is currently no clear pattern from the few civil or criminal cases at hand which provide firm guidance based on child's age, level of understanding, type of disease as well as curability by the withheld therapy.

Although the right to reproduce is considered a fundamental right which cannot be abridged by government unless there is a sufficiently narrowly tailored remedy serving a compelling state interest, the same cannot be said of parental rights. Parents can lose their rights to maintain custody, and decision-making capacity, for their children in a wider array of circumstances. In the medical arena this can occur when medical issues affecting a child's life arise.

Not All Parental Conscience Claims May be Equally Valid

Some judges have set limits on parental conscience claims; in particular, the type of claim the parent is making may be of great significance to courts. While parents may be entitled to believe whatever they want to believe from a religious point of view, denials of life-saving medical care to their children quickly cross over from mere belief into conduct, and this is not protected to the same degree. Put another way, parents are generally not allowed to sacrifice the lives of their children whose health interests they are supposed to protect before the children are legally old enough to be able to make their own decisions. The cases at hand are a classic confrontation between religion¹⁸ and medical ethics.¹⁹

¹⁵ Assoc. Press, *supra* note 3.

¹⁶ Johnson, *supra* note 2.

¹⁷ Assoc. Press, *supra* note 3.

¹⁸ Assoc. Press, *Leader defends church at center of chemo case*, MSNBC, May 22, 2009, <http://www.msnbc.msn.com/id/30893871>.

¹⁹ Arthur Caplan, *Opinion: Court has to right to insist on chemo*, MSNBC, May 22, 2009, <http://www.msnbc.msn.com/id/30889308>.

Laws in some states (Texas, for example), clearly recognize the rights of minors to request medical care independent of their parents' wishes. Children can consent to physical examination (in cases of suspected child abuse, for example) even if the parents refuse, and minors can request and consent to psychiatric care even if their parents are opposed to such treatment or institutionalization.

If the reasons for the parental refusal to allow medical care for their child is not based on religious conviction, but rather on the parent or parents' personal medical philosophy (i.e. doctors just give too much chemotherapy, or herbal therapy is believed to be superior to conventional pharmacological therapy even though there is no substantive medical data to support such a claim) then the decision to withhold medical therapy may be granted significantly less deference by a court.²⁰ This may explain some of what has happened in the on-going Minnesota case. The reason for the mother's denial of established chemotherapy known to be effective was not religious in nature, but rather based on the mother's preference for spontaneous, "natural" healing and unproven alternative therapies. Competent individuals of legal age have a well-established right to refuse conventional medical therapy for themselves, but do not have an unfettered right to make such decisions for their children, particularly if their refusal is not based on religious grounds.

Where Things Are Headed

The clash between parental preference for medical treatment for their children and the fiduciary obligations of the medical profession to protect the health interests of pediatric patients is not new, despite the recent spate of a couple of highly-publicized cases. At present, there is a lack of individual state legislative action. Cases are being adjudicated one at a time with no over-arching judicial doctrine emerging. As with family law, there may be regional variations in how such cases are handled though at least one general comment may be possible at present.

Just as with pharmacists' and physicians' claims that they can refuse to provide medical care to select adult patients because such care conflicts with their religious beliefs or their conscience became more commonplace²¹ as a result of political empowerment of the religious right,²² so too there seems to be a rise in similar claims made by parents for denials of care for their children. Children, however, are different than adults, and it appears based on the small number of cases thus far that even if a cultural climate which may be more conservative, the ability to refuse care may have much firmer limits when the care involves children. Both state and the federal government appear to be more willing to intervene when a child's life is threatened. Parents may legally be allowed to sacrifice their own lives for religious or conscience reasons, but not their children's.

²⁰ Assoc. Press, *Judge rules family can't refuse chemo for boy*, MSNBC, May 15, 2009, <http://www.msnbc.msn.com/id/30763438>.

²¹ Julie D. Cantor, *Conscientious Objection Gone Awry – Restoring Selfless Professionalism in Medicine*, 360 NEW ENG. J. MED. 1484 (2009).

²² John King, *Christian doctors' group protests rolling back 'conscience' rule*, CNN, Apr. 9, 2009, <http://www.cnn.com/2009/POLITICS/04/08/conscience.clause/index.html>.

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