

# Part V

## Care of Special Patients

### Chapter 55

## Children as Patients

Joseph P. McMenamin, MD, JD, FCLM

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Although much of the law governing the medical care of children is indistinguishable from that governing the medical care of adults, certain features of the former are unique. These features arise in large part because minors are seen to need special protection from others and from themselves and are generally deemed incompetent to grant valid consent for their own treatment. The law's solicitude for the special needs of minors sometimes gives rise to poignant conflicts between the desires and values of parents, often inviolable in other settings, and those of the child or those of the state as *parens patriae*. Resolution of these conflicts often falls to the courts. In this chapter, some of the legal issues particular to the care of children are explored.

### STATE INTERVENTION

The standard of care applicable to parents obliged to provide medical attention for their children is analogous to the standard of care for physicians accused of malpractice. As the New York Court of Appeals wrote when construing a state statute, "[t]he standard is at what time would an ordinarily prudent person, solicitous for the welfare of his child and anxious to promote its recovery, deem it necessary to call in the services of a physician."<sup>1</sup>

In many jurisdictions, statutes permit the state to take custody of a *neglected* or *dependent* child, terms that are variously defined<sup>2</sup> but which have been construed to include a child deprived of medical services by his parents.<sup>3</sup> Such statutes have been upheld against attacks under the freedom of religion clauses of federal and state constitutions and under the due process clause of the United States Constitution.<sup>4</sup> In such circumstances, however, courts may instruct state authorities to respect the religious beliefs of the parents and to accede as much as possible to their

wishes without interfering by imposing court-ordered medical care.<sup>5</sup>

Although the precise limits of the requirement for the provision of medical care by parents are difficult to set, the construction of the Illinois statute at issue in *Wallace v. Labrenz*<sup>6</sup> may be fairly typical:

*[T]he statute defines a dependent or neglected child as one which "has not proper paternal care." . . . Neglect, however, is the failure to exercise the care that the circumstances justly demand. It embraces willful as well as unintentional disregard of duty. It is not a term of fixed and measured meaning. It takes its content always from specific circumstances, and its meaning varies as the context of surrounding circumstances changes . . . [I]t is of no consequence that the parents have not failed in their duty in other respects.<sup>7</sup>*

In many jurisdictions, a child treated in good faith solely by spiritual means in accordance with the tenets of a recognized religious body is exempt from the definition of a neglected child.<sup>8</sup> Such statutes do not necessarily prevent a court from concluding in a proper case that spiritual treatment alone is insufficient or from ordering conventional medical therapy where needed, including, if necessary, ongoing monitoring after the acute problem is rectified.<sup>9</sup> These statutes, however, may raise thorny equal protection, First Amendment, and other constitutional issues, because they may give preference to one group of potential offenders over others based on that group's self-proclaimed religious tenets and because they may involve the state in excessive entanglement with such questions as what a recognized religious body is, what its tenets are, and whether the accused acted in accord with such tenets.<sup>10</sup> Some courts, however, have no trouble finding that a parent's decision to "let God decide" if the child is to live or die" is not the kind of religious belief protected under such statutes.<sup>11</sup>

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It has also been held that where a parent suffers from a mental disorder or other cognitive impairment, courts are not prevented from making findings of abuse. In such cases, the courts reason that neither specific intent to injure nor specific motive need be proven for a finding of abuse to be made.<sup>12</sup>

Where medical intervention may be deemed elective, parental refusal of such intervention may be permitted if the court does not find neglect or dependency.<sup>13</sup> In some instances, courts have refused to intervene despite medically compelling circumstances. The Illinois Appeals Court, for example, declined to find a child neglected whose sibling had been sexually abused at home, who herself had twice gone into diabetic ketoacidosis probably because of “misuse of insulin” at home, and whose mother—suffering from a psychiatric disorder exacerbated by the stresses of child care—had a history of suicide attempts, sexual promiscuity, and placing the diabetic child in a foster home.<sup>14</sup>

Where, however, a parent’s refusal to provide medical care is deemed egregious, criminal liability may be found.<sup>15</sup> Religious beliefs are no defense to neglect of this magnitude.<sup>16</sup> Significant neglect, however, even including neglect sufficient to cause death, may not necessarily be sufficient to sustain a charge of manslaughter.<sup>17</sup> This appears to be particularly true where the neglect is not shown to be willful.<sup>18</sup>

### PARENS PATRIAE

The power that permits courts to intervene to mandate medical care for children whose parents fail to provide it is known as *parens patriae*.<sup>19</sup> This is distinct from the police power that justifies, for example, fluoridation of water:

*The rationale of parens patriae is that the State must intervene . . . to protect an individual who is not able to make decisions in his own best interest. The decision to exercise the power of parens patriae must reflect the welfare of society, as a whole, but mainly it must balance the individual’s right to be free from interference against the individual’s need to be treated, if treatment would in fact be in his best interest.*<sup>20</sup>

The *parens patriae* power allows the state to constitutionally act as the “general guardian of all infants.”<sup>21</sup> Its origins are found in antiquity:

*In ancient Times the King was regarded as “Parens Patriae” of orphaned or dependent infants . . . . Under our system of government the state succeeds to the position and power of the King. Both King and State exercise this power in the interests of the people. Society has a deep interest in the preservation of the race itself. It is a natural instinct that lives of infants be preserved.*<sup>22</sup>

Under the doctrine of *parens patriae*, courts are empowered to consent to treatment when the parents are unavailable to do so. Examples arise where the parents have abandoned the child<sup>23</sup> or where they are simply temporarily unavailable.<sup>24</sup> Court intervention in mandating therapy

need not be predicated on an immediate threat to life or limb.<sup>25</sup> Although the criteria vary, one frequently invoked standard is the substituted judgment test: “In this case, the court must decide what its ward would choose, if he were in a position to make a sound judgment. Certainly, he would pick the chance for a fuller participation in life rather than a rejection of his potential as a more fully endowed human being.”<sup>26</sup> Not only can the court overrule objections of both parent and child, but under the right circumstances it can overrule the objection of the surgeon who is to perform the procedure.<sup>27</sup>

A serious threat to life, however, is not *per se* grounds for the intervention of the court under the *parens patriae* doctrine. If, for example, an infant is born with myelomeningocele, microcephaly, and hydrocephalus, and failure to operate would not place the infant in imminent danger of death, surgery may not be ordered over parental objection despite its efficacy in significantly reducing the risk of infection. In *Weber v. Stony Brook Hospital* the court noted:

*[S]uccessful results could also be achieved with antibiotic therapy. Further, while the mortality rate is higher where conservative medical treatment is used, in this particular case the surgical procedures also involved a great risk of depriving the infant of what little function remains in her legs, and would also result in recurring urinary tract and possibly kidney infections, skin infections and edemas of the limbs.*<sup>28</sup>

The court concluded that the child was not neglected even though the parents had chosen the arguably riskier of two alternatives, both of which were considered valid choices by the available expert medical testimony.

### Life-Threatening Situations

The most commonly accepted situation in which medical therapy may be ordered for children over the wishes of their parents is where the life of the child is at stake.<sup>29</sup> In life-threatening situations, courts will generally find that the parents are violating state statutes concerning child neglect or endangerment if they withhold medical treatment.<sup>30</sup> Courts have concluded that the strong interests of the state, coupled with the best interests of the child, outweigh the parents’ religious beliefs and rights.<sup>31</sup> Such intervention may be ordered even when the likelihood of success is only 50%.<sup>32</sup>

Courts sometimes fail to intervene, however, even in the presence of disorders that are clearly life-threatening. In *In re Hofbauer*,<sup>33</sup> the parents of a 7-year-old boy with Hodgkin’s disease treated him not with radiotherapy and chemotherapy but with nutritional or metabolic therapy including laetrile.<sup>34</sup> The court heard expert testimony that laetrile is effective and the father indicated he would agree to conventional therapy if the physician prescribing laetrile advised it. Persuaded that the parents were concerned and loving and that the child was not neglected, the court held that “great deference must be accorded a parent’s choice as to the mode of medical treatment to be

undertaken and the physician selected to administer the same."<sup>35</sup> The statute at issue in *Hofbauer* allowed the following interpretation:

*"[A]dequate medical care" does not require a parent to beckon the assistance of a physician for every trifling affliction which a child may suffer . . . . We believe, however, that the statute does require a parent to entrust the child's care to that of a physician when such course would be undertaken by an ordinarily prudent and loving parent, "solicitous for the welfare of his child and anxious to promote [the child's] recovery."<sup>36</sup>*

The court refused to find that as a matter of law the boy's parents had undertaken no reasonable efforts to ensure that acceptable medical treatment was being provided him, given the parents' concern about side effects from medical management, the alleged efficacy of the nutritional therapy and its relative lack of toxicity, and the parents' agreement that conventional treatment would be administered to the child if his condition so warranted. So long as they had provided for their child a form of treatment "recommended by their physician and which has not been totally rejected by all responsible medical authority" as, implied by the court, was the case with laetrile, the parents' position would be upheld.<sup>37</sup>

A different approach was taken in *Custody of a Minor*.<sup>38</sup> Applying the best interests of the child rule, the court decided that the trial court was justified in concluding that "metabolic therapy was not only medically ineffective [in the management of leukemia] but was poisoning the child . . . [and] contrary to the best interests of the child."<sup>39</sup> This conclusion, in the court's opinion, justified the finding that the child was without necessary and proper medical care and that the parents were unwilling to provide the care required of them by the parental neglect statute.

### Non-Life-Threatening Situations

Parental refusals of medical intervention are most likely to be upheld where the child's condition is not life-threatening and where the treatment itself would expose the child to great risk.<sup>40</sup> Such refusals are sometimes upheld even where the proposed therapy would offer great benefit to the child.<sup>41</sup> The court may also stay its hand if it is persuaded that the child is antagonistic to the proposed therapy and that his or her cooperation would be necessary to derive any benefit from the treatment.<sup>42</sup>

The best interest of the child may justify intervention by a court even when life itself is not threatened, however, as illustrated by *In re Karwath*.<sup>43</sup> In *Karwath*, concern about possible hearing loss and rheumatic fever prompted the child's physician to recommend a tonsillectomy, but the father demanded that the surgery be withheld unless necessary beyond the shadow of a doubt.<sup>44</sup> Although the court's opinion does not elaborate on the point, this position was based on the father's religious faith. The father would agree to surgery as a last resort and only after the failure of chiropractic procedures and medicine. The father also requested that the court require second and third

opinions to confirm that the procedure was "necessary with reasonable medical certainty to restore and preserve the health of these wards of the State" before surgery could be undertaken.<sup>45</sup> Despite the father's wishes, the court ordered that the surgery be performed.<sup>46</sup> That the parents' objection was religiously based made no difference:

*Our paramount concern for the best interests and welfare of the children overrides the father's contention that absolute medical certitude of necessity and success should precede surgery. Nor is it required that a medical crisis be shown constituting an immediate threat to life and limb.<sup>47</sup>*

## TRANSFUSIONS

*Only flesh with its soul—its blood—YOU must not eat. And, besides that YOUR blood of YOUR souls shall I ask back. From the hand of every living creature shall I ask it back; and from the hand of man, from the hand of each one who is his brother, shall I ask back the soul of man.<sup>48</sup>*

*If anyone at all belonging to the house of Israel or the proselytes who reside among them eats any blood at all, against the person who eats blood I will set my face, and I will cut him off from his people; the life of every creature is identical with its blood.<sup>49</sup>*

These and other scriptural passages<sup>50</sup> provide the theological underpinnings for the belief held by some religious groups that blood transfusions are contrary to the law of God. Since transfusions are a well-accepted component of the therapeutic armamentarium, many cases have examined the right of the state as *parens patriae* to protect the health of children within its jurisdiction as against the right of parents to raise their children according to their religious beliefs. *Parens patriae* has been the basis in a number of cases for compelling transfusions where the parents objected on religious grounds.<sup>51</sup> As we have seen in other instances, the courts distinguish between religious beliefs and opinions, which are held inviolable, and "religious practices inconsistent with the peace and safety of the state."<sup>52</sup> One court, in justifying such a decision, wrote:

*[I]t was not ordered that he eat blood, or that he cease to believe it is equivalent to the eating of blood. It is only ordered that he may not prevent another person, a citizen of our country, from receiving the medical attention necessary to preserve her life.<sup>53</sup>*

A party seeking court intervention to authorize transfusion over parental objection is not exposed to civil liability.<sup>54</sup>

As in other areas where religious beliefs and children's welfare may conflict, a court may stay its hand "where the proposed treatment is dangerous to life, or there is a difference of medical opinion as to the efficacy of a proposed treatment, or where medical opinion differs as to which of two or more suggested remedies should be followed."<sup>55</sup> At least one court has refused to order transfusions where the patient had no minor children, the patient had notified the physician and hospital of his belief that acceptance of transfusion violated the laws of God, the patient had

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executed documents releasing the doctor and hospital from civil liability, and there appeared to be no clear and present danger to society.<sup>56</sup> Even where a child is involved, a court may refuse to order transfusions if the child is not faced with a threat to his or her life:

*If we were to describe the surgery as "required" like the Court of Appeals, our decisions would conflict with the mother's religious beliefs. Aside from religious considerations, one can also question the use of that adjective on medical grounds since an orthopedic specialist testified that the operation itself was dangerous. Indeed, one can question who, other than the Creator, has the right to term certain surgery as "required." The fatal/nonfatal distinction also steers the courts of this Commonwealth away from a medical and philosophical morass: If spinal surgery can be ordered, what about a hernia or gall bladder operation or a hysterectomy? . . . As between a parent and the state, the state does not have an interest of sufficient magnitude outweighing religious beliefs when the child's life is not immediately imperiled by his physical condition.<sup>57</sup>*

A court will be most inclined to order a transfusion when life is threatened. In some situations, this has been done even when the patient was an adult.<sup>58</sup> As a general matter, the willingness of the court to intervene increases in the case of a minor,<sup>59</sup> notwithstanding parents' arguments on due process<sup>60</sup> and free exercise grounds.<sup>61</sup> Although courts are generally more reluctant to order a transfusion for adults, when the adult is an expectant mother the court may well ignore the question of the right to transfuse the adult and proceed with the transfusion order based on the right to treat the child.<sup>62</sup>

Where a child's life is in danger, the court may adopt streamlined procedures to preserve life that would not be tolerated under other circumstances. For example, a transfusion can be ordered first and the hearing over the propriety of the order may be held later.<sup>63</sup> A hearing may be held in advance of the need for transfusion, for instance, where a mother near term has a history of Rh incompatibility and has given birth in the past to other children with erythroblastosis fetalis requiring transfusion.<sup>64</sup> Even in a state where a statute provides immunity from criminal prosecution for parents treating their children in accordance with their religious beliefs, the state may nevertheless appoint a guardian to approve transfusions when necessary to save the life of the child.<sup>65</sup>

While courts ordinarily find neglect only where parents abandon their children or otherwise fail to provide for their basic needs, courts can, and often do, find that a transfusion is required over the religious objections of parents, notwithstanding the sincerity and depth of the parents' beliefs. For example, in *State v. Perricone*,<sup>66</sup> a child was afflicted with congenital heart disease that, from the court's description, suggests tetralogy of Fallot.<sup>67</sup> Transfusions were required for proper management of his condition. The parents, who were Jehovah's Witnesses, refused to permit such transfusions, and they were found guilty of neglect of their son even though the court found them to have "sincere parental concern and affection for the child."<sup>68</sup>

A group of Jehovah's Witnesses in the state of Washington brought a class action seeking to have declared unconstitutional a state statute that declared a child dependent, and hence eligible for appointment of a guardian, where transfusion was or could be vital to save the patient and the parents refused to permit it.<sup>69</sup> The court upheld the statute as constitutional, and the Supreme Court of the United States affirmed per curiam.<sup>70</sup> That parents "have not failed in their duty to the child in other respects" provided them no more shelter under such a statute "than does the sincerity of their religious beliefs."<sup>71</sup>

A threat to the very life of a child is not always deemed necessary for a court to order transfusion over parental objection. Where brain damage was threatened by rising bilirubin in a child with erythroblastosis fetalis, the court found sufficient grounds to order a transfusion, even though no mention was made of an actual threat to life.<sup>72</sup> In *In re Sampson*,<sup>73</sup> the parents did not oppose plastic surgery required for palliation of massive disfigurement of the right side of the face and neck secondary to von Recklinghausen's disease (neurofibromatosis) in a 15-year-old boy;<sup>74</sup> they did, however, object to the transfusions that such extensive surgery would require. Although there was no threat to life and although the physicians advised delay until the boy was old enough to consent in order to diminish surgical risks, the trial court ordered surgery and was upheld on appeal. The court rejected as too restrictive the argument that it could intervene only where the life of the child is endangered by a failure to act. The Court of Appeals distinguished its earlier opinion in *In re Seiferth*,<sup>75</sup> noting that the *Seiferth* decision turned on the question of a court's discretion and not the existence of its power to order surgery in a case where life itself was not at stake.<sup>76</sup> The court had no trouble finding that religious objection to transfusion does not "present a bar at least where the transfusion is necessary to the success of the required surgery."<sup>77</sup>

Where a child is approaching the age of maturity, and where his or her life is not in imminent danger, the minor patient may have the right to express an opinion about the morality of transfusions and his or her willingness to submit to them. In *In re Green*, a 16-year-old boy with scoliosis required surgery to prevent his eventually becoming bedridden.<sup>78</sup> His parents, Jehovah's Witnesses, opposed the use of the transfusions that the surgery would necessitate. The record did not disclose whether the patient himself was a Jehovah's Witness or planned to become one. The court concluded that as "it is the child rather than the parent in this appeal who is directly involved . . . we believe that [the child] should be heard."<sup>79</sup>

Both the Illinois and the United States Supreme Courts stopped short of imposing their authority when an unborn child's life was endangered because the mother refused, on religious grounds, to undergo a cesarean section. The Illinois Supreme Court declined to review an appellate court decision that upheld a Pentecostal's right to refuse a cesarean section delivery, even though physicians deemed it essential for her unborn child's survival, and the United States Supreme Court, in *Baby Boy Doe v. Mother Doe*,<sup>80</sup>

followed suit by declining to order the lower court to convene an emergency hearing in the case.<sup>81</sup>

Recently, the Court of Appeals of Indiana held that parents may be forced to pay for medical treatment of their child, provided over parental objections on religious grounds.<sup>82</sup> In addition, the Supreme Court of Nevada has upheld the appointment of a hospital as the temporary guardian to make medically necessary, life-saving treatment for a child when his parents refused to consent to such treatment on religious grounds.<sup>83</sup>

## POLICE POWER

Certain public health measures are enacted pursuant to police power and upheld by the courts despite various parental objections. In the health care arena, the two best examples of this practice are the vaccination of school-children and fluoridation of water supplies, performed primarily for the benefit of children. *Police power* is an umbrella term not readily susceptible to precise definition:

*While it is perhaps almost impossible to frame a definition of the police power which shall accurately indicate its precise limits, so far as we are aware, all courts that have considered the subject have recognized and sanctioned the doctrine that under the police power there is general legislative authority to pass such laws as it is believed will promote the common good, or will protect or preserve the public health. And the power to determine what laws are necessary to promote or secure these objects, rests primarily with the general assembly, subject to the power of the courts to decide whether a particular enactment is adapted to that end.*<sup>84</sup>

Often, regulations are promulgated not by the legislature but rather by a municipality, a board of public health, or some other arm of the state. In general, the courts will give deference to determinations made by these bodies.<sup>85</sup>

## VACCINATIONS

Some health professionals today may be surprised to learn that there is a long history of disputes, continuing to fairly recent times, concerning the validity of state and local regulations that require vaccination of school children as a prerequisite for attendance in public schools.<sup>86</sup> A number of early decisions upheld these regulations only because epidemics of smallpox in some communities warranted vaccination as an emergency measure.<sup>87</sup> In some cases the constitutionality of the vaccination requirement was upheld only because the court construed it to mean not that vaccination was mandated but rather that school attendance without vaccination was not permitted.<sup>88</sup> More recently, it has been held that a child has no absolute right to enter school without immunization, and the school board has full authority to compel it.<sup>89</sup>

Questions of federal constitutionality, at least, were essentially laid to rest in the case of *Jacobson v. Massachusetts*.<sup>90</sup> In *Jacobson*, an adult who apparently feared side effects as a consequence of a bad experience

with immunization as a child refused to submit to vaccination under a compulsory vaccination law. The court upheld his conviction, finding that:

*[t]here is, of course, a sphere in which the individual may assert the supremacy of his own will, and rightfully dispute the authority of any human government . . . to interfere with the exercise of that will. But it is equally true that in every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations as the safety of the general public may demand.*<sup>91</sup>

The court found no violation of equal protection in the statute's exception favoring children who are medically unfit to be vaccinated, despite the absence of such an exception for adults in like condition, both because there was no reason to suspect that an unfit adult would be required to submit to vaccination and because regulations appropriate for adults are not always safely applied to children.<sup>92</sup> Few cases before and apparently no cases after *Jacobson* have found vaccination requirements to be unconstitutional.<sup>93</sup> The courts have rejected constitutional attacks on both equal protection and due process grounds.<sup>94</sup>

Despite the special solicitude of the courts for First Amendment rights, compulsory vaccination has been upheld even when it conflicts with the religious beliefs of citizens.<sup>95</sup> This is true even where, under state law, a board of education was empowered, although not required, to exempt a child whose parents object to immunization on religious grounds.<sup>96</sup> Personal liberty, including freedom of religion, is a relative, not an absolute, right, and it must be considered in the light of the general public welfare.<sup>97</sup> The right to practice religion freely does not include liberty to expose the community or the child to communicable diseases or the latter to ill health or death.<sup>98</sup> Nevertheless, some courts, generally in earlier cases, have found it necessary to point out that vaccination requirements do not prevent children from attending schools, and children who are thereby excluded are excluded by their own consciences.<sup>99</sup> In other cases the courts have questioned whether the plaintiff's religious beliefs really did compel the conclusion that vaccination was immoral.<sup>100</sup> Clearly, the courts have enforced the state's strong public policy interest in universal vaccination, an interest that may need even more vigilant protection today as a result of unfounded concerns about alleged ill-effects from vaccination.<sup>101</sup>

Where, however, a statute provides an exemption for members of a recognized church or religious denomination whose tenets conflict with the practice of vaccination, a mother's opposition based on her personal belief in the Bible and its teachings was held sufficient to entitle her and her children to the exemption.<sup>102</sup> A similar statute was held not applicable to a man objecting to immunization because one of his children had earlier contracted hepatitis secondary to a diphtheria shot. In so holding, the court found no violation of equal protection or due process.<sup>103</sup>

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Where exemptions are enacted for persons religiously opposed to vaccination, a local school board may not be given discretion to determine who qualifies for the exception.<sup>104</sup>

The vaccination regulations have been repeatedly upheld as a reasonable exercise of the police power.<sup>105</sup> There need not be evidence of an epidemic,<sup>106</sup> nor even of a single case,<sup>107</sup> to warrant imposition of the regulation. Such regulations do not involve the state in the practice of medicine.<sup>108</sup> Evidence impugning the value of vaccination need not even be considered by the courts because such evidence is more appropriately presented to the legislature or its duly constituted agencies, such as the state board of health.<sup>109</sup>

Finally, there is no violation of the right to a free public education, nor is it a violation of state compulsory education laws, to make vaccination a prerequisite to school attendance. “[H]ealth measures prescribed by local authorities as a condition of school attendance do not conflict with statutory provisions conferring on children of proper age the privilege of attending school, nor with compulsory education laws.”<sup>110</sup> This is true even though such regulations lead to the exclusion of children whose physical condition precludes vaccination.<sup>111</sup> It has been held that, where a father did nothing to prevent the vaccination of his son, the child was not neglected under a regulation that barred him from school because he was unvaccinated.<sup>112</sup> More often, however, failure to provide for vaccination of a child may warrant a finding of parental neglect and the resultant appointment of a guardian to consent to and arrange vaccination.<sup>113</sup>

## PARENTAL NOTIFICATION

Parental notification statutes have been a source of controversy in several states. Specifically, several statutes that require a minor to notify a parent before undergoing an abortion procedure have been challenged in court.<sup>114</sup> Because several of these cases are still in the various stages of the litigation and appellate process, the status of the law in this area may continue to change over the next few years.

When trying to determine the law regarding parental notification in a particular state, several items should be researched and considered. First, what is the general age of consent for a minor? This may be below the age of 18 in some circumstances.<sup>115</sup> Second, is there a parental notification law in effect and, if so, what are the particulars of that law? Some laws require permission of a parent while others simply require notification.<sup>116</sup> Statutes may be all-encompassing regarding the procedures for which a parent must be notified, or they may concern abortion procedures only.<sup>117</sup> Also note that the age where notification is necessary for an abortion procedure is often not the same as the age of consent.<sup>118</sup> It has generally been held that requiring both parents to be notified is not constitutional.<sup>119</sup> Even so, a few states still maintain two-parent notification laws.<sup>120</sup>

The Supreme Court has ruled that notification statutes must have a clear exemption for situations where it is

medically necessary that the procedure be performed immediately.<sup>121</sup> A bypass procedure should also be included in the statute that allows notification to be withheld in cases where abuse is likely. These procedures are often overseen by a judicial body.<sup>122</sup>

## MUNCHAUSEN'S SYNDROME BY PROXY (MSP)

MSP is generally characterized by parent-produced symptoms of illness. The child is frequently subjected to many unnecessary and potentially harmful medical procedures.<sup>123</sup> Diagnosis of MSP is difficult.<sup>124</sup> Symptoms may seem inconsistent with a previously rendered diagnosis or fail to respond to treatment. Test results may be bizarre or clinically impossible. Puzzling symptoms may spontaneously disappear whenever the child is separated from the parent.<sup>125</sup> The child may be overdependent.<sup>126</sup> The child's mother is often depressed.<sup>127</sup> The offending parent may seem very concerned, articulate, knowledgeable, and supportive. Other siblings may have perplexing illnesses, or a sibling may have died under unexplained circumstances. The array of symptoms possible is very broad and includes failure to thrive, seizures, apnea, vomiting, diarrhea, irritable bowel syndrome, osteomyelitis, and blood-borne infections.

In *People v. Phillips*,<sup>128</sup> a mother deliberately manipulated her adopted infant daughter's electrolyte levels by adding sodium bicarbonate to the baby's formula. The child aspirated and died. Not until a second adopted infant began to develop identical symptoms did the medical staff become suspicious. The two girls, after all, were unrelated. Typically, courts react to MSP by making the child a ward of the state.<sup>129</sup> Foster care is an alternative, but not free of risk.<sup>130</sup>

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## Endnotes

1. *People v. Pierson*, 68 N.E. 243, 244 (N.Y. 1903).
2. See, e.g., Ala. Code §12-15-1 (10) (2005); see also *Jehovah's Witnesses v. King County Hosp. Unit No. 1*, 278 F. Supp. 488 (W.D. Wash. 1967), *aff'd*, 390 U.S. 598 (1968).
3. See, e.g., *In re Marsh*, 14 A. 2d 368 (Pa. Super. Ct. 1940) (finding child to be neglected where parents denied him a smallpox vaccination); *State v. Perricone*, 181 A. 2d 751 (N.J. 1962) (holding that parents' right to their religious beliefs did not include the liberty to expose their minor child to ill health or death); *In re Santos*, 227 N.Y.S. 2d 450 (N.Y. App. Div. 1962), *appeal dismissed*, 185 N.E. 2d 904 (N.Y. 1962) (finding child neglected where parents refused to permit blood transfusion required for surgery to correct congenital heart disease); *Custody of a Minor*, 393 N.E. 2d 836, 846 (Mass. 1979) (holding that parents may not withhold chemotherapy from a child suffering from malignancy); *Jefferson v. Griffin Spalding County Hosp. Auth.*, 274 S.E. 2d 457 (Ga. 1981) (holding that mother must submit to surgery

- necessary to save the life of a fetus). *But see Newmark v. Williams*, 588 A. 2d 1108 (Del. 1991) (holding that parents could not be required to consent to chemotherapy for ill child).
4. See *State v. Perricone*, *supra* note 3, at 757; see also *Levitsky v. Levitsky*, 190 A. 2d 621 (Md. 1963). *But see Osier v. Osier*, 410 A. 2d 1027 (Me. 1980).
  5. See *In re Hamilton*, 657 S.W. 2d 425 (Tenn. Ct. App. 1983).
  6. *People ex rel. Wallace v. Labrenz*, 104 N.E. 2d 769 (Ill. 1952).
  7. *Id.* at 773.
  8. See, e.g., *In re Eric B.*, 235 Cal. Rptr. 22 (Cal. App. 1987).
  9. *Id.* The court need not “hold its protective power in abeyance until harm to a minor child is not only threatened but actual. The purpose of dependency proceedings is to prevent risk, not ignore it.” *Id.* at 26; see also *In re Ivey*, 319 So. 2d 53 (Fla. Dist. Ct. App. 1975); *In re Jensen*, 633 P. 2d 1302 (Or. Ct. App. 1981).
  10. See *State v. Miskimens*, 22 Ohio Misc. 2d 43 (Ohio Com. Pl. 1984).
  11. See, e.g., *In re Application of Cicero*, 421 N.Y.S. 2d 965, 966 (N.Y. Sup. Ct. 1979).
  12. See *In the Matter of Anesia E.*, 791 N.Y.S. 2d 867 (Fam. Ct. N.Y. 2004).
  13. See, e.g., *Newmark*, *supra* note 3; *In re Frank*, 248 P. 2d 553 (Wash. 1952).
  14. See *In re Gonzales*, 323 N.E. 2d 42, 46–47 (Ill. App. Ct. 1974); see also *People in the Interest of D.L.E.*, 614 P. 2d 873 (Colo. 1980).
  15. See, e.g., *State v. Dumlao*, 491 A. 2d 404 (Conn. App. Ct. 1985); *Pennsylvania v. Barnhart*, 497 A. 2d 616 (Pa. Super. Ct. 1985), *appeal denied*, 538 A. 2d 874 (Pa. 1988); *Faunteroy v. U.S.*, 413 A. 2d 1294 (D.C. App. 1980); *State v. Waff*, 373 N.W. 2d 18 (S.D. 1985).
  16. See cases cited *supra* note 15.
  17. See, e.g., *Eversley v. State*, 748 So. 2d 963 (Fla. 1999).
  18. See *Howell v. State*, 350 S.E. 2d 473 (Ga. App. 1986); *In re Appeal in Chochise County*, 650 P. 2d 459 (Ariz. 1981). *But see State v. Clark*, 261 A. 2d 294 (Conn. Cir. A.D. 1969); *State v. Williams*, 484 P. 2d 1167 (Wash. Ct. App. 1971).
  19. *Parens patriae* empowers the state to “care for infants within its jurisdiction and to protect them from neglect, abuse, and fraud . . . . That ancient, equitable jurisdiction was codified in our Juvenile Court Act, which expressly authorizes the court, if circumstances warrant, to remove the child from the custody of its [sic] parents and award its custody to an appointed guardian.” *Wallace*, *supra* note 6.
  20. *In re Weberlist*, 360 N.Y.S. 2d 783, 786 (N.Y. Sup. Ct. 1974).
  21. *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 257 (1972).
  22. *Morrison v. State*, 252 S.W. 2d 97, 102 (Mo. Ct. App. 1952).
  23. See *Commissioner of Social Servs. re D.*, 339 N.Y.S. 2d 89 (N.Y. Fam. Ct. 1972); *Karin T. v. Michael T.*, 484 N.Y.S. 2d 780 (Fam. Ct. 1985). *But see Pamela P. v. Frank S.*, 443 N.Y.S. 2d 343 (Fam. Ct. 1981), *aff’d* 59 N.Y. 2d 1 (1983).
  24. See *Browning v. Hoffman*, 111 S.E. 492 (W.Va. 1922).
  25. See, e.g., *Comm’r of Social Servs.*, *supra* note 23; *In re Tanner*, 549 P. 2d 703 (Utah 1976); *Weberlist*, *supra* note 20.
  26. *Weberlist*, *supra* note 20, at 787.
  27. *In re Sampson*, 317 N.Y.S. 2d 641, 658 (N.Y. Fam. Ct. 1970), *aff’d*, 323 N.Y.S. 2d 253 (N.Y. App. Div. 1971), *appeal denied*, 29 N.Y. 2d 486 (1971).
  28. *Weber v. Stony Brook Hospital*, 467 N.Y.S. 2d 685, 686–87 (N.Y. App. Div. 1983), *aff’d*, 60 N.Y. 2d 208 (1983).
  29. *In re Eric B.*, 235 Cal. Rptr. 22 (Cal. Ct. App. 1987); *People ex rel. D.L.E.*, 645 P. 2d 271 (Colo. 1982); *In re Willmann*, 493 N.E. 2d 1380 (Ohio Ct. App. 1986).
  30. See, e.g., *People ex rel. D.L.E.*, *supra* note 29 (interpreting a Colorado state statute and holding that an epileptic child was neglected when her mother failed or refused to provide medical care because of the mother’s religious beliefs).
  31. See *In re McCauley*, 565 N.E. 2d 411, 414 (Mass. 1991).
  32. See *In re Vasko*, 263 N.Y.S. 552 (N.Y. App. Div. 1933).
  33. *In re Hofbauer*, 393 N.E. 2d 1009 (N.Y. 1979).
  34. *Id.*
  35. *Id.* at 1013.
  36. *Id.* (quoting *Pierson*, *supra* note 1).
  37. *Id.* at 1014.
  38. *Custody of a Minor*, *supra* note 3.
  39. *Id.* at 845.
  40. See *In re Hudson*, 126 P. 2d 765 (Wash. 1942); accord *Custody of a Minor*, 379 N.E. 2d 1053 (Mass. 1978).
  41. See *Custody of a Minor*, *supra* note 40, at 1062.
  42. See *In re Seiferth*, 127 N.E. 2d 820, 822 (N.Y. 1955).
  43. *In re Karwath*, 199 N.W. 2d 147 (Iowa 1972).
  44. *Id.* at 149.
  45. *Id.* at 150.
  46. *Id.*
  47. *Id.*
  48. Genesis 9:4–5 (quoted in *Perricone*, *supra* note 3, at 756).
  49. Leviticus 17:10–14 (quoted in *Morrison*, *supra* note 22, at 99).
  50. See, e.g., Leviticus 3:17, 7:26, 27; Deuteronomy 12:23; 1 Chronicles 11:16–19; 2 Samuel 23:15–17; Acts 15:28, 29, 21:25; 1 Samuel 14:32, 33 (cited in *Sampson*, *supra* note 27, at 646).
  51. See *Perricone*, *supra* note 3, at 758; see also *Hoener v. Bertinato*, 171 A. 2d 140 (N.J. Juv. & Dom. Rel. Ct. 1961).
  52. *Hoener*, *supra* note 51, at 143.
  53. *Morrison*, *supra* note 22, at 100.
  54. See *Harley v. Oliver*, 404 F. Supp. 450 (W.D. Ark. 1975), *aff’d*, 539 F. 2d 1143 (8th Cir. 1976); see also *Staelens v. Yake*, 432 F. Supp. 834 (N.D. Ill. 1977).
  55. *Morrison*, *supra* note 22, at 102.
  56. See *In re Brooks’ Estate*, 205 N.E. 2d 435 (Ill. 1965).
  57. *In re Green*, 292 A. 2d 387, 392 (Pa. 1972), *appeal after remand*, 307 A. 2d 279 (Pa. 1973).
  58. See *Application of President & Dirs. of Georgetown Col., Inc.*, 331 F. 2d 1000 (D.C. Cir. 1964), *reh’g denied*, 331 F. 2d 1010 (D.C. Cir. 1964), *cert. denied*, 377 U.S. 978 (1964). *But see In re Conroy*, 486 A. 2d 1209, 1224 (N.J. 1985).
  59. See *Wallace*, *supra* note 6; see also *Application of Brooklyn Hosp.*, 258 N.Y.S. 2d 621 (N.Y. Sup. Ct. 1965); *In re Clark*, 185 N.E. 2d 128 (Ohio C.P. 1962); see also *Perricone*, *supra* note 3.
  60. See *In re Clark*, *supra* note 59.
  61. *Id.*
  62. See *Raleigh Fitkin-Paul Morgan Mem. Hosp. v. Anderson*, 201 A. 2d 537 (N.J. 1964), *cert. denied*, 377 U.S. 985 (1964).
  63. See *In re Clark*, *supra* note 59.
  64. See *Hoener*, *supra* note 51.
  65. See *Perricone*, *supra* note 3.
  66. *Id.*
  67. *Id.*
  68. *Id.* at 759.
  69. See *Jehovah’s Witnesses*, *supra* note 2.
  70. *Id.*
  71. *Hoener*, *supra* note 51, at 143.
  72. *Muhlenberg Hosp. v. Patterson*, 320 A. 2d 518 (N.J. Super. Ct. Law Div. 1974).

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73. *Sampson*, supra note 27.
74. *Id.*
75. See *In Re Seiferth*, supra note 42.
76. *Id.*
77. *In re Sampson*, 278 N.E. 2d 918 (N.Y. 1972); see also *Santos v. Goldstein*, 227 N.Y.S. 2d 450 (N.Y. App. Div. 1962), appeal dismissed, 12 N.Y. 2d 642 (N.Y. 1962).
78. *Green*, supra note 57.
79. *Id.* at 392.
80. *Baby Boy Doe v. Mother Doe*, 632 N.E. 2d 326 (Ill. App. Ct. 1994), cert. denied, 510 U.S. 1168 (1994).
81. *Id.*
82. *Schmidt v. Mutual Hosp. Serv., Inc.*, 832 N.E. 2d 977 (Ind. Ct. App. 2005).
83. *In re Guardianship of L.S. & H.S.*, 87 P. 3d 521 (Nev. 2004).
84. *State ex rel Milhoof v. Board of Educ.*, 81 N.E. 568, 569 (Ohio 1907).
85. *DeAryan v. Butler*, 260 P. 2d 98, 102 (Cal. Ct. App. 1853), cert. denied, 347 U.S. 1012 (1954).
86. See, e.g., *McCartney v. Austin*, 293 N.Y.S. 2d 188 (N.Y. Sup. Ct. 1968), aff'd, 298 N.Y.S. 2d 26 (N.Y. App. Div. 1969); *In re Elwell*, 284 N.Y.S. 2d 924 (N.Y. Fam. Ct. 1967); *State ex rel. Mack v. Board of Educ.*, 204 N.E. 2d 86 (Ohio Ct. App. 1963); *State ex rel. Dunham v. Board*, 96 N.E. 2d 413 (Ohio 1951), cert. denied, 341 U.S. 915 (1951).
87. See *Hagler v. Lerner*, 120 N.E. 575 (Ill. 1918); *Hill v. Bickers*, 188 S.W. 766 (Ky. 1916); *State ex rel. Freeman v. Zimmermann*, 90 N.W. 783 (Minn. 1902); *City of New Braunfels v. Waldschmidt*, 207 S.W. 303 (Tex. 1918); see also *Rhea v. Board of Educ.*, 171 N.W. 103 (N.D. 1919).
88. See, e.g., *McSween v. Board of Sch. Tr.*, 129 S.W. 206 (Tex. Civ. App. 1910).
89. *Mack*, supra note 86.
90. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).
91. *Id.* at 29.
92. *Id.* at 30, 39.
93. See, e.g., *French v. Davidson*, 77 P. 663 (Cal. 1904); *Hagler*, supra note 87; *Board of Educ. v. Maas*, 152 A. 2d 394 (N.J. Super. Ct. App. Div. 1959), aff'd, 158 A. 2d 330 (N.J. 1960), cert. denied, 363 U.S. 843 (1960); *Sadlock v. Board of Educ.*, 58 A. 2d 218 (N.J. 1948); *State ex rel. Milhoof v. Board of Educ.*, 81 N.E. 568 (Ohio 1907); *Field v. Robinson*, 48 A. 873 (Pa. 1901); *Commonwealth v. Pear*, 66 N.E. 719 (Mass. 1903), aff'd sub nom. *Jacobson v. Massachusetts* 197 U.S. 11 (1905); see also *Ritterband v. Axelrod*, 562 N.Y.S. 2d 605 (N.Y. Sup. 1990).
94. See, e.g. *Maas*, supra note 93.
95. See, e.g., *Mosier v. Barren County Bd. of Health*, 215 S.W. 2d 967 (Ky. 1948) (chiropractors); *Mannis v. State ex rel. DeWitt Sch. Dist.*, 398 S.W. 2d 206 (Ark. 1966); cert. denied, 384 U.S. 972 (1966) (members of the General Assembly and Church of the First Born); see also *Wright v. DeWitt Sch. Dist.*, 385 S.W. 2d 644 (Ark. 1965); *Dunham*, supra note 86.
96. See *Maas*, supra note 93.
97. See *Sadlock*, supra note 93.
98. See *Pierson*, supra note 1; accord *In re Whittmore*, 47 N.Y.S. 2d 143 (N.Y. Dom. Rel. Ct. 1944); *Wright*, supra note 95; *Cude v. State*, 377 S.W. 2d 816 (Ark. 1964).
99. See *Staffel v. San Antonio*, 201 S.W. 413, 415 (Tex. Civ. App. 1918).
100. See *Maas*, supra note 93; see also *McCartney v. Austin*, supra note 86; *In re Elwell*, 286 N.Y.S. 2d 740 (N.Y. Fam. Ct. 1967).
101. See, e.g., Bernard, et al., *Autism: A Novel Form of Mercury Poisoning*, 56 Med. Hypothesis 462 (2001). Among many articles that have demonstrated the fallacies in the Bernard article is Nelson & Bauman, *Thimerosal & Autism?*, 111 Pediatrics 674 (2003).
102. See *Dalli v. Board of Educ.*, 267 N.E. 2d 219, 223 (Mass. 1971); accord *Maier v. Besser*, 341 N.Y.S. 2d 411 (N.Y. Sup. 1972); see also *Kolbeck v. Kramer*, 202 A. 2d 889 (N.J. Super. Ct. 1964); *Davis v. State*, 451 A. 2d 107 (Md. 1982); accord *Campain v. Marlboro Cent. Sch. Dist.*, 526 N.Y.S. 2d 658 (N.Y. App. Div. 1988).
103. See *Itz v. Penick*, 493 S.W. 2d 506 (Tex. 1973); appeal dismissed, 412 U.S. 925 (1973), reh'g denied, 414 U.S. 882 (1973).
104. See *Avard v. Dupius*, 376 F. Supp. 479 (D.N.H. 1974).
105. See, e.g., *Zucht v. King*, 260 U.S. 174 (1922); *Duffield v. Williamsport Sch. Dist.*, 29 A. 742 (Pa. 1894); *Hartman v. May*, 151 So. 737 (Miss. 1934); *State v. Hay*, 35 S.E. 459 (N.C. 1900); *McSween*, supra note 88.
106. See *Maas*, supra note 93; *Mosier*, supra note 95; *Hartman*, supra note 105.
107. See *Maas*, supra note 93, at 405; *Pierce v. Board of Educ.*, 219 N.Y.S. 2d 519 (N.Y. Sup. Ct. 1961).
108. See *State v. Drew*, 192 A. 629 (N.H. 1937).
109. See *Seubold v. Fort Smith Special Sch. Dist.*, 237 S.W. 2d 884 (Ark. 1951); *Wright*, supra note 95.
110. *Maas*, supra note 93, at 408; accord *Viemeister v. White*, 72 N.E. 97 (N.Y. 1904); *Blue v. Beach*, 56 N.E. 89 (Ind. 1900); *Hartman*, supra note 105; *McSween*, supra note 88.
111. See *Hutchins v. School Comm.*, 49 S.E. 46 (N.C. 1904).
112. See *State v. Dunham*, 93 N.E. 2d 286 (Ohio 1950).
113. See *Elwell*, supra note 100; *Cude*, supra note 98; *In re Marsh's Case*, 14 A. 2d 368, 371 (Pa. Super Ct. 1940); *Mannis*, supra note 95.
114. Over 40 states have enacted some form of legislation on the topic. See, e.g., Code of Ala. §26-21-4.
115. The age of consent is 16 in many states, and even lower in others.
116. See, e.g., Pa. C.S. §3206; Fla. Stat. §390.01114. Pennsylvania requires consent, Florida requires notice.
117. *Id.* The Florida statute specifically pertains to abortion.
118. The age where notification is not necessary is 16 in Delaware and 17 in South Carolina, but 18 in most states.
119. *Hodgson v. Minnesota*, 497 U.S. 417 (1990) (holding that the two-parent notification required in Minnesota was not sufficiently related to state interests and was therefore unconstitutional).
120. See e.g. Utah Code Ann. §76-7-304. The Utah statute states that both parents should be notified when possible.
121. See *Ohio v. Akron Ctr. for Reproductive Health*, 497 U.S. 502 (1990).
122. *Id.*
123. Donald et al., *Munchausen's Syndrome by Proxy: Child Abuse in the Medical System*, 150 Arch. Ped. & Adolesc. Med. 753 (1996).
124. Mott et al., *Nursing Care of Children in Families*, 600 (2d ed., Addison-Wesley Nursing Publications, 1990).
125. See, e.g., *In the Interest of B.B.*, 500 N.W. 2d 9 (Iowa 1993).
126. Woollcott et al., *Doctor Shopping with the Child as Proxy Patient: A Variation of Child Abuse*, 101 J Pediatr. 297 (1982).
127. Parker & Barrett, *Factitious Patients with Fictitious Disorders: A Note on Munchausen's Syndrome*, 155 Med. J. Aust. 772 (1991). See *In the matter of Aaron S.*, 625 N.Y.S. 2d 786 (N.Y. Fam. Ct. 1993).
128. *People v. Phillips*, 175 Cal. Rptr. 703 (Cal. Ct. App. 1981).
129. See, e.g., *In the Matter of Jessica Z.*, 135 Misc. 2d 520 (N.Y. Fam. Ct. 1987).
130. *In re Colin R.*, 493 A. 2d 1083 (Md. Ct. Spec. App. 1985) (discussing a mother who attempted to continue abuse of her child by mailing food to him after he was placed with a foster family)