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IN THE SUPREME COURT OF FLORIDA

CASE No. 69,970

THE PUBLIC HEALTH TRUST
OF DADE COUNTY, FLORIDA,

Petitioner,

vs.

NORMA WONS,

Respondent.
_____/

APPEAL FROM THE THIRD DISTRICT COURT OF APPEAL
CASE No. 86-985

PETITIONER'S REPLY BRIEF

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By

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THE RIGHT OF MINOR CHILDREN TO HAVE PARENTS OUTWEIGHS THE RIGHT OF A PARENT TO REFUSE A LIFESAVING BLOOD TRANSFUSION.

Contrary to the impression given by Amicus Curiae in its brief, the Court in Randolph v. City of New York, 501 N.Y.S. 2d 837 (1986) modified on other grounds, N.Y.L.J., Mar. 23, 1987 at 7, col. 1 (N.Y. Mar. 19, 1987), did not decide the constitutional issue presented to this Court. Nor did Randolph overrule any case. Brief of Amicus Curiae at page 27. The Randolph court reversed a $2.5 million dollar jury award for medical malpractice against a physician who did not administer a blood transfusion soon enough to a Jehovah's Witness who refused to consent to the procedure. The defendant doctor sought legal advice, and the delay proved fatal to the patient. The Randolph court, without overruling, or even citing any of the cases relied upon by the Public Health Trust, ruled that it was not medical malpractice to fail to transfuse the mother of minor children if another parent was available to care for the children. Id. at 841-42. The fault-finding posture of Randolph, along with the court's silence on the constitutional question, suggest that a different result might have been reached had the court been presented with the question raised by the instant case.

Amicus Curiae also attempts to diminish the persuasive substantive force of Application of the President and Directors

of Georgetown College, Inc., 331 F.2d 1000 (D.C. Cir.), reh'g denied, 331 F.2d 1010 (D.C. Cir.), cert. denied, 377 U.S. 978 (1964), by magnifying the procedural aspects of the decision. Brief of Amicus Curiae at pages 28-31. The logic of Georgetown College, is evident from the decisions of numerous courts that have followed its rationale. See Petitioner's Brief on the Merits at pages 12-15. Moreover, and this is seldom noted, it was the Georgetown College case which provided the four-part test that is used today by this Court and others to analyze refusal of treatment cases. E.g., Satz v. Perlmutter, 379 So. 2d 359 (Fla. 1980); Superintendent of Belchertown v. Saikewicz, 370 N.E. 2d 417, 425 (Mass. 1977).

The Trust does not dispute the assertion that religious liberty and the right to privacy are fundamental to American society. This recognition, however, does not resolve the weighing of the relative values presented to this Court by this case.

THE FAMILY

The cases show that few public interests are more important than the preservation of the parent-child bond that is at the core of the American family. The courts "protect the family because it contributes so powerfully to the happiness of individuals..." Bowers v. Hardwick, 478 U.S___,

106 S.Ct. 2841, 92 L.Ed.2d 140, 155 (1986). [1]

Amicus demands a showing of "empirical" evidence that the loss of a parent is "clearly" harmful and that such harm is "societally unacceptable." Brief of Amicus Curiae at pages 31, 35 and 41. The empirical evidence does, indeed, substantiate the claim that nothing can substitute for the care of a parent in a child's life:

> No other animal is for so long a time after birth in so helpless a state that its survival depends upon continuous nurture by an adult. Although breaking or weakening the ties to the responsible and responsive adults may have different consequences for children of different ages, there is little doubt that such breaches in the familial bond will be detrimental to a child's well-being. But "so long as a family is intact, the young

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[1] At the family's center is the bond that exists between parents and their children. "[T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' through the instruction of children." Smith v. Organization of Foster Families, 431 U.S. 816, 844, 97 S.Ct. 2094, 2110, 53 L.Ed.2d 14, 35 (1977), quoting, Wisconsin v. Yoder, 406 U.S. 205, 231-233, 92 S.Ct. 1526, 32 L.Ed.2d 15, 34-35 (1972). "It is cardinal ... that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include the preparation for obligations the state can neither supply nor hinder." Prince v. Massachussetts, 321 U.S. 158, 166, 64 S. Ct. 438, 442, (1944), citing, Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925). "The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." Wisconsin v. Yoder, supra, 406 U.S. at 231, 32 L.Ed.2d at 35.

> child feels parental authority is lodged in a unified body which is a safe and reliable guide for later identification."

Goldstein, Medical Care for the Child at Risk: On State Supervision of Parental Autonomy, 86 Yale L.J. 645, 649-50 (1977).[2/]

The glib contention that the state's interest in minor children is "easily met" when there is a surviving spouse flies in the face of common sense. Just as having one eye, one kidney, or one arm, is not as good as having two, it follows that having only one parent is not as good as having two.[3/] With regard to parents, there are two separate, yet

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2/ Quoting discussion with Anna Freud (notes on file with Yale Law Journal). See also, W. Gaylin, Caring 25-45, 172-175 (1976); Cohen, Granger, Provence & Solnit, Mental Health Services, in 2 Issues in the Classificaton of Children 88 (N. Hobbs ed. 1975); see generally, 3 A. Freud, The Writings of Anna Freud (1973).

3/ Petitioner finds unpersuasive the argument that the state has no interest in protecting the parent-child bond since it permits divorce and non-traditional families. Brief of Amicus Curiae at page 36. That the legislature has decided that loveless marriages may be dissolved does not compel the conclusion that the state has abdicated its interest in the parent-child bond. The best interests of the child have always been a key concern in dissolution proceedings. In Interest of W.D.N., 443 So. 2d 493 (Fla. 2d DCA 1984).

Additionally, Petitioner categorically rejects the extension of its position as one which would ultimately require a "Catholic woman to undergo an abortion for the sake of minor children." Brief of Amicus Curiae at pages 33, 34. There is nothing in the instant case which would permit another court to order the destruction of a human fetus for the well-being of existing children.

related, reasons why the foregoing is true. As long as there are two caring parents, there is a lesser likelihood that a child will be orphaned if something should happen to one parent. Additionally, no matter how capable and loving a single parent may be, two capable and loving parents complement each other, thus providing an enhanced environment in which to raise a child. [4]

RELIGIOUS LIBERTY AND THE RIGHT TO PRIVACY

The state may justify a limitation on religious activity to accomplish an overriding governmental interest.[5] Moreover, the state, in furtherance of important public interests, may compel the performance of affirmative acts

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[4] These observations relate to emotional considerations only, not financial ones.

[5] Bob Jones University v. United States, 461 U.S. 574, 103 S.Ct. 2017, 76 L.Ed.2d 157 (1983)(State's interest in erradicating racial discrimination outweighs tax burden on religious schools that engage in racial discrimination pursuant to sincerely held religious beliefs); Braunfeld v. Brown, 366 U.S. 599, 81 S.Ct. 1144, 6 L.Ed.2d 563 (1961) (State's interest in providing Sunday as a uniform day of rest from commercial activity outweighs the free exercise right of a businessman burdened by religiously compelled Saturday closing); Town v. State ex rel. Reno, 377 So. 2d 648 (Fla. 1979)(State's interest in curtailing the use of dangerous drugs outweighs right of sect members to use marijuana as religious sacrament).

which may offend a person's religiously or privately held beliefs.[6/]

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6/ Gillette v. United States, 401 U.S. 437, 91 S.Ct. 828, 28 L.Ed.2d 168 (1971)(compelled participation in an "unjust" war); United States v. Lee, 455 U.S. 252, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982)(compelled participation in the Social Security system); Wisconsin v. Yoder, supra, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972)(compelled school attendance); Hamilton v. University of California, 293 U.S. 245, 55 S.Ct. 197, 79 L.Ed 343 (1934) (compelled enrollment in R.O.T.C.); Goldman v. Weinberger, 475 U.S. ____, 106 S.Ct. 1310, 89 L.Ed.2d 478 (1986)(compelled removal of religiously required yarmulke); Bowen v. Roy, 476 U.S. ___, 106 S.Ct. 2147, 90 L.Ed.2d 735 (1986)(compelled assignment of Social Security number); Tony and Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290, 105 S.Ct. 1953, 85 L.Ed.2d 278 (1985)(compelled compliance with minimum wage laws); Jefferson v. Griffin Spalding County Hospital Authority, 274 S.E.2d 457 (Ga. 1981)(compelled medical treatment in order to same life of viable fetus); Wons v. Public Health Trust of Dade County, FL., 500 So. 2d 679 (Fla. 3d DCA 1987)(compelled blood transfusion when patient's children become wards of the state in the event of mother's death). Accord, In Re Osborne, 294 A. 2d 372 (D.C. Cir. 1972); St. Mary's Hospital v. Ramsey, 465 So. 2d 666 (Fla. 4th DCA 1985).

Petitioner rejects the argument that the least restrictive means test would prevent a court from ordering a blood transfusion for a Jehovah's Witness unless the patient's children would become wards of the state. Brief of Amicus Curiae at page 41-43. The least restrictive means test was not utilized in one of the Supreme Court's most recent free exercise decisions. Goldman v. Weinberger, supra, 89 L.Ed.2d at 498. (O'Connor, J., dissenting). In Town v. State ex-rel Reno, supra, 377 So. 2d at 652, this Court rejected the argument that the state's ability to impose reasonable time, place and manner restrictions on a dangerous religious practice compelled the state to accomodate the religous practice in question. Moreover, the instant case in fact does represent the least restrictive means. The narrow issue here is whether a parent of minor children, who seeks emergency medical treatment in a hospital, may refuse a lifesaving blood transfusion. No issue is raised on the State's power to regulate "life-style". Brief of Amicus Curiae at 34. The issue is confined to state intervention in an emergency, life-or-death medical decision of a person who presented herself at the hospital and requested treatment.

This case also involves the right of privacy. In Florida, the state is "accorded wide lattitude in constitutional privacy terms to safeguard health." State v. Powell, 497 So. 2d 1188, 1193 (Fla. 1986), citing Whalen v. Roe, 429 U.S. 589, 51 S.Ct. 869, 51 L.Ed.2d 64 (1977)(Upholding constitutionality of statute authorizing medical examiners to remove corneas during autopsies when needed for transplantation). In Maisler v. State, 425 So. 2d 107 (Fla. 1st DCA 1982), pet. for rev. den., 434 So.2d 888 (Fla. 1983), the First District held that the state's interest in protecting against the use of dangerous narcotics outweighed a person's right to the private possession of cannabis. This Court has stated "[n]either federal nor state privacy provisions protect an individual from every governmental intrusion on one's private life." State v. Powell, supra, at 497 So. 2d at 1193. In Doe v. State, 409 So. 2d 25 (Fla. 1st DCA 1982), pet. for rev. den., 418 So. 2d 1280 (Fla. 1982), the First District held that a defendant may be forced to undergo the surgical removal of a bullet from his leg if it is evidence needed to ascertain how a murder was committed. See also Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966).

Amicus Curiae contends that the right of privacy protects decisions implicating fundamental liberties "deeply rooted in this Nation's history and tradition." Bowers v. Hardwick, supra, 92 L.Ed.2d at 146. Petitioner submits, however, that the decision to die on religious grounds is not one of those fundamental decisions basic to American history

and tradition. On the contrary, the United States Supreme Court has expressly rejected the argument:

> Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice. Or if a wife religiously believed it was her duty to burn herself upon the funeral pile [sic] of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief in to practice?

Reynolds v. United States, 98 U.S. 145,166, 25 L.Ed. 244,250 (1878).

On the other hand, the state's interest in preserving life is well-established in case law, evident in a tradition of state regulation in favor of the public health, safety and welfare, and in statutes protecting against suicide. Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); §782.08 Fla. Stat. (Supp. 1986); Note, Compulsory Medical Treatment and the Free Excercise of Religion, 42 Ind. L.J. 386 (1967).

Amicus suggests that the right to bodily integrity and self-determination indicates that it is the individual who ultimately has the power to consent to medical treatment and determine what treatment is in his best interest. Brief of Amicus Curiae at pages 21-25. This Court, however, has already decided that medical treatment decisions which might result in the death of a patient are limited by the state's interest in preserving life, protecting minors, preventing

suicide and promoting the integrity of the medical profession. Satz v. Perlmutter, supra, 379 So. 2d at 360.

The Jehovah's Witnesses have described their beliefs regarding blood transfusions as "nonnegotiable." See Brief of Amicus Curiae, Attachment 2, at page 15. It is interesting to note, however, that the state's medical treatment in these circumstances often appears to be the Jehovah's Witness' only vehicle for saving his or her life while, at the same time, honoring his or her beliefs. The complexity of the issue has not escaped the commentators:

> Matters may get much more complicated when we deal with the kind of ambivalence expressed in some Jehovah's Witness cases where an adult seems to be saying "I can never consent to a blood tranfusion, but a court-ordered transfusion would not be on my conscience." It is not clear whether that is a signal to the health care professionals, the hospital administrators, the lawyers and others who may be involved to intervene on the patient's behalf. Is it in part a request, while at the same time a statement that "I cannot consent"? We have to face such problems when we try to respect people, because people are very complex.

Childress, Refusal of Lifesaving Treatment by Adults, 23 J. Fam. L. 191, 208 (1984).

Respondent Wons appears to fall in the category of Jehovah's Witnesses who feel that God will not blame them personally if they are compelled to submit to a court-ordered blood transfusion against their wishes. Whited, "Woman's Belief is Now Her Right - No Transfusion," Miami Herald, January 19, 1987, 1A, col. 6. (Appendix to this Brief).

CONCLUSION

For the reasons and upon the authorities cited herein, this Honorable Court should reverse the opinion of the Third District and hold that a parent of minor children may not refuse a lifesaving blood transfusion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Petitioner's Reply Brief and Appendix was mailed to: JOHN KELNER, Esquire, KELNER AND KELNER, Attorneys at Law, at 2215 Amerifirst Building, One S. E. Third avenue, Miami, FL 33131; DONALD R. RIDLEY, Esquire, Watchtower Bible and Tract Society of New York, Inc., at 25 Columbia Heights, Brooklyn, New York, 11201, and MARTIN G. BROOKS, Esquire, of MARTIN G. BROOKS, P.A., at 300 Hollywood Federal Building, 4600 Sheridan Street, Hollywood, FL 33021, this 7th day of May, 1987.

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