D.A. 5-4-93

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IN THE SUPREME COURT
OF FLORIDA

CASE NO. 80,311

IN RE: PATRICIA DUBREUIL,

Petitioner,

VS.

SOUTH BROWARD HOSPITAL DISTRICT,

Respondent.

On Appeal From the District Court Of Appeal
For the Fourth District of Florida

BRIEF FOR AMICUS CURIAE, THE AMERICAN CIVIL LIBERTIES UNION OF FLORIDA FOUNDATION, INC.

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QUESTION PRESENTED

WHETHER THE FORCED TRANSFUSION OF A COMPETENT ADULT AGAINST HER WILL AND RELIGIOUS BELIEFS VIOLATES THE CONSTITUTIONAL RIGHTS TO PRIVACY AND RELIGION.

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FACTS

Amicus curiae, the American Civil Liberties Union Foundation of Florida, Inc., (hereinafter ACLU) adopts Petitioner's Statement of the Case.

SUMMARY OF ARGUMENT

A competent adult has the constitutional privacy right to control medical treatment, a right that includes refusing treatment. This privacy interest can only be overcome by state interests of the highest magnitude. In the present case Respondent argues that Dubreuil's refusal of the transfusion was effectively an abandonment of her children. The lower court, in accepting this argument, failed to recognize that the father of the children, alive and legally obligated to provide care, must be presumed capable of providing the necessary child care. The burden is on the state (and here the hospital) to establish that the father cannot. In the absence of this proof, the state has not met its burden of establishing a compelling interest.

Coupled with the right of privacy is the right to freely exercise religious beliefs. Again, the state has the burden of establishing a compelling reason for a religiously objectionable forced transfusion. The state has failed to meet that burden in the present case.

ARGUMENT

I. THE FORCED TRANSFUSION OF A COMPETENT ADULT WHO EXPRESSLY REJECTS TREATMENT VIOLATES THE FUNDAMENTAL RIGHT TO PRIVACY.

Florida has a strong and broad right of privacy as part of the State's constitution. Winfield v. Div. of Pari-Mutuel Wagering, 477 So. 2d 544 (Fla. 1985). Article I, section 23 provides

> Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein....

Art. I, § 23, Fla. Const.

This right of privacy has been declared by the Florida Supreme Court to be a fundamental right of self-determination. In re Browning, 568 So. 2d 4, 9-10 (Fla. 1990). Because the right of privacy is a fundamental right, the Florida Supreme Court has held that the right can be outweighed only by a compelling state interest. Winfield, at 547, Browning, at 9-10. The applicable test puts the burden on the state to demonstrate that the state's interest is compelling and is accomplished in the least intrusive way possible. Winfield at 547. This very strict standard has been reaffirmed by the Florida Supreme Court in Rasmussen v. South Florida Blood Service, 500 So. 2d 533, 535 (Fla. 1987), In re T.W., 551 So. 2d 1186, 1192 (Fla. 1989), Public Health Trust of Dade Co. v. Wons, 541 So. 2d 96, 98 (Fla. 1989) and in Browning, at 13-14.

In Florida, every person

> has a fundamental right to the sole control of his or her person.

Browning, at 10 (emphasis added).

A competent individual has the constitutional right to control medical treatment and that right includes both the right to consent to or refuse medical treatment, regardless of the individual's medical condition, id., citing Wons, the medical treatment in question, id. at 11, or the health decision to be made. Id. at 11. The right to make decisions about one's health is founded on the state constitutional right of privacy and therefore can only be outweighed by a compelling state interest. Id. at 9-11, 15. See also Winston v. Lee, 470 U.S. 753, 105 S.Ct. 1611, 84 L.Ed.2d 662 (1985) (state must have compelling interest justifying forced surgical intrusion seeking evidence).

The controlling case for the competent person's right to refuse a blood transfusion is Wons. Mrs. Wons, like Mrs. Dubreuil, is a Jehovah's Witness whose medical condition was such that she would likely have died without a blood transfusion. The hospital argued that the Wons children had a right to be raised by two loving parents and thus the state's interest in protecting innocent third parties would outweigh Mrs. Wons' constitutional right of privacy. The Florida Supreme Court agreed that it might be important for children to be raised by two parents, but that factor was not compelling enough to outweigh the fundamental constitutional right of privacy. Wons, at 97. In describing the importance of this constitutional right of privacy the Florida Supreme Court quoted the Third District's opinion:

> Surely nothing, in the last analysis, is more private or more sacred than one's religion or view of life, and

> here the courts, quite properly, have given great deference to the individual's right to make decisions vitally affecting his private life according to his own conscience. It is difficult to overstate this right because it is, without exaggeration, the very bedrock on which this country was founded.

Wons, at 98.

This Court declined to create a blanket rule for future cases and held that when a hospital wants to contest the patient's refusal of treatment, the hospital would have to file a court proceeding and the hospital would have to

> sustain the heavy burden of proof that the state's interest outweighs the patient's constitutional rights.

Id.

Chief Justice Ehrlich, in his concurring opinion stated that there must be evidence that the minor child would be abandoned for the state to have a compelling interest that would outweigh the competent patient's constitutional right to refuse treatment, id. at 99, and since there would not be an abandonment in the case, the supreme court was not deciding whether evidence of abandonment alone would be enough by itself to outweigh the competent patient's constitutional right to refuse treatment. Id., note 2.

In Wons there was evidence presented about the family structure and the care for the children if Mrs. Wons were to die. Wons at 97. There was no testimony in the instant case about the fate of the children if Mrs. Dubreuil died. Dubreuil, at 540. The trial court identified the applicable state interest as the state's interest in protecting innocent third parties and the

issue to be decided as whether the possibility of abandonment of the Dubreuil children was a compelling state interest. The court held that the state's interest in protecting innocent third parties outweighed Patricia Dubreuil's constitutional right to refuse the blood transfusion. The ruling was based on the fact that Mr. and Mrs. Dubreuil were separated. There was no testimony presented regarding who would care for their children if Mrs. Dubreuil died. Acknowledging that Wons was the controlling authority, the Fourth District Court of Appeal nevertheless agreed with the trial court in its distinguishing Mrs. Dubreuil's situation from Wons where there was testimony about the care of the children. Here the court found that

> in the absence of some suggestion or showing as to the availability of proper care and custody of the four minor children [] in the event of the death of Patricia Dubreuil[,] this court believes that the demands of the state (and society) outweigh the wishes of Patricia Dubreuil[,] ....

In re Dubreuil, 603 So. 2d 538, 541 (Fla. 4th DCA 1992).

The court then determined that without evidence regarding the care of the children, there is a presumption of abandonment. Id. The district court of appeal ruled that since Mrs. Dubreuil made no showing that the children would be cared for if she died, the trial court did not abuse its discretion. Id. at 542.

Such is clearly in error under Wons and is an abuse of discretion. The appellate court has shifted the burden to the patient which is clearly contrary to the compelling state interest test. The hospital has the burden of proving that the state interest asserted outweighs the patient's constitutional

right of privacy to refuse a blood transfusion. Wons at 98. Simply raising the possibility of abandonment (Dubreuil at 540. emphasis added) is not enough. Simply relying on the fact that Mr. and Mrs. Dubreuil were separated is not sufficient evidence of abandonment to meet the heavy burden of proof or to shift the burden to Mrs. Dubreuil.

The record reflects that Mr. Dubreuil is alive and is the natural father of his children. The court's ruling ignores the fact that under Florida law, Mr. Dubreuil is equally as responsible for his children as his wife. See § 61.13, 744.301 Fla. Stat. (1991). By raising the issue of abandonment in contesting Mrs. Dubreuil's competent refusal of a blood transfusion, the hospital has the burden of proving that the state's interest in protecting innocent third parties outweighs Mrs. Dubreuil's constitutional right to refuse the transfusion. Wons, at 98. Having two parents raise children is insufficient to override a fundamental constitutional right, Wons, at 97, citing St. Mary's Hospital v. Ramsey, 465 So. 2d 666 (Fla. 4th DCA 1985). The mere fact of the parents' separation should also be insufficient to override a fundamental constitutional right. The fact that the husband is not a member of Jehovah's Witnesses and did not agree with Mrs. Dubreuil's decision to refuse the transfusion does not constitute evidence of possible abandonment of his children and is insufficient to override Mrs. Dubreuil's fundamental constitutional right. The trial court abused its discretion when it relied solely on speculation to conclude that

if Mrs. Dubreuil died, the children would be abandoned. To affirm the trial court's decision would render hollow the right of privacy.

Massachusetts, in a case similar to Wons, adopted the Wons reasoning in holding that, without compelling evidence of abandonment of the child, the interest of the state in protecting innocent third parties would not outweigh a competent adult's right to refuse medical treatment. Norwood Hosp. v. Munoz, 409 Mass. 116, 129, 564 N.E.2d 1017, 1024 (1991). In the instant case, there is no such compelling evidence.

The effect of the lower court's decision prohibits a competent adult from exercising her right to make a very personal choice about her medical treatment. As noted in Fosmire v. Nicoleau, 75 N.Y.2d 218, 551 N.Y.S.2d 876, 551 N.E.2d 77 (Ct. App. 1990):

> The State does not prohibit parents from engaging in dangerous activities because there is a risk that their children will be left orphans. [W]e know of no law in this State prohibiting individuals from participating in inherently dangerous activities or requiring them to take special safety precautions simply because they have minor children. There is no indication that the State would take a more intrusive role when the risk the parent has assumed involves a very personal choice regarding medical care. On the contrary, the policy of New York, as reflected in the existing law, is to permit all competent adults to make their own personal health care decisions without interference from the State.

Id. at 230, 551 N.Y.S.2d at 883, 551 N.E.2d at 84.

If the lower court's decision is allowed to stand, the state has dictated to Mrs. Dubreuil that her fundamental constitutional right to make health care decisions will be limited simply

because she is a parent. Fosmire, at 883.

The court of appeal noted that there was no evidence about Mr. Dubreuil or his parenting abilities, Dubreuil, at 541, while in the preceding paragraph acknowledging that the hospital has the burden of proving abandonment and that a "heavy burden" is placed on the court. Id. To then find that the hospital met its burden, to conclude that the presumption would be that the children would be abandoned absent an affirmative showing by Mrs. Dubreuil to the contrary, id. at 541, 542, is an abuse of discretion.

Mr. Dubreuil's relationship with Mrs. Dubreuil is used inconsistently. First, despite the fact the Dubreuils were separated, the hospital relied on Mr. Dubreuil's consent to transfuse Mrs. Dubreuil. Id. at 539. Then the issue of abandonment is raised because the Dubreuils are separated. The applicable principles of law appear to be reversed.

There was no issue raised that Mrs. Dubreuil was not competent at the time she made the decision to refuse the transfusion. A competent individual has the right to make medical decisions, including the right to refuse medical treatment. Browning, at 11. Thus, Mr. Dubreuil had no right to consent to the blood transfusion. Even if Mrs. Dubreuil were not competent at the time she refused the blood transfusion, Mr. Dubreuil would still not have had the legal authority to consent to the transfusion. Florida is a substituted judgment state and if Mr. Dubreuil were to make a medical decision for Mrs.

Dubreuil, he would have had to make the decision she would make- to refuse the transfusion, nothing more. Id. at 13. He can not decide for her what he would do if it were he, or what is in her best interest -- he had to make the decision she would make, and her decision is clear.

Secondly, the issue of abandonment is raised as the basis for the state's interest in protecting innocent third parties to outweigh Mrs. Dubreuil's fundamental constitutional right of privacy to make a medical decision. Of great concern to the court in support of the possibility of abandonment was the Dubreuils' separation. Yet, Mr. Dubreuil's legal obligation to his children under Florida law is ignored. Mr. Dubreuil's status can not be used both ways.

The burden on the hospital is heavy. Wons, at 98. The trial court had no indication of what would happen if Mrs. Dubreuil died. Instead, the possibility of abandonment was raised.

> Sweeping claims about the need to preserve the lives of parents with minor children have an emotional appeal that facilely avoids both the constitutionally required scrutiny of the state's authority to act and the search for less restrictive alternatives.

Wons, at 99 (Ehrlich, C.J. concurring).

Because here there was no evidence of abandonment, the state's interest does not outweigh Mrs. Dubreuil's constitutional right.

II. FORCED TRANSFUSIONS OVER RELIGIOUS OBJECTIONS VIOLATE THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 3 OF THE FLORIDA CONSTITUTION.

The First Amendment to the United States Constitution

specifically provides that "no laws" shall be made "prohibiting the free exercise [of religion]." U.S. Constitution, amend. 1. Article I, section 3 of the Florida Constitution likewise prohibits the State from "penalizing the free exercise [of religion]." At least since 1940, when the Supreme Court decided Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed.2d 1213 (1940), the first amendment has been applied to limit the states' authority to restrict religious freedom.

In Cantwell the Court struck down a local official's refusal to issue a license to a Jehovah's Witness who wished to solicit contributions. The Court concluded that the state's interests in preserving peace, safety and order could be better achieved by "a statute narrowly drawn to define and punish specific conduct." 310 U.S. at 311. Hence, Cantwell reflects the Court's first application of exacting judicial scrutiny to free exercise claims. The Florida Supreme Court has likewise employed this exacting scrutiny when analyzing free exercise claims. See Wons, 541 So.2d 96.

The last 50 years have witnessed the continuing application of strict scrutiny to free exercise claims. In Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), for example, South Carolina's refusal to grant unemployment compensation to a Seventh Day Adventist who was discharged for not working on Saturday was held violative of the First Amendment. The Court found that no compelling interest justified the state's refusal. 374 U.S. at 403.

More recent examples of the Court's strict judicial scrutiny

can be found in Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) (holding mandatory attendance requirement for high school unconstitutional), Thomas v. Review Board, 450 U.S. 707, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981) (holding unconstitutional state's refusal to provide Jehovah's Witness unemployment compensation when discharged for not working on Saturday), and Hobbie v. Unemployment Appeals Comm'n of Florida, 480 U.S. 136, 107 S.Ct. 1046, 94 L.Ed.2d 190 (1987) (applying Sherbert and Hobbie to newly formed religious belief). From these cases can be distilled the principle that a state's interference with sincerely held and central religious beliefs can be justified only by compelling concerns. Moreover, these concerns must be implemented in the least intrusive way.

All save one of the United States Supreme Court's opinions over the course of the last decade fit the terms of this principle. In United States v. Lee, 455 U.S. 252, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982), the Court applied strict scrutiny to a claim that the social security tax laws unduly burdened the Amish religion. The Court found a compelling interest justifying the law. Likewise, in Hernandez v. Commissioner of Internal Revenue, 490 U.S. 680, 109 S.Ct. 2136, 104 L.Ed.2d 766 (1989), a compelling interest was found to support the IRS's denial of a tax deduction to the Church of Scientology. See, also Jimmy Swaggart Ministries v. Board of Equalization, 493 U.S. 378, 110 S.Ct. 688, 107 L.Ed.2d 796 (1990) (finding no need to apply strict scrutiny because religious beliefs did not include prohibition on paying taxes); Bowen v. Roy, 476 U.S. 693, 106

S.Ct. 2147, 90 L.Ed.2d 735 (1986) (use of social security number by government did not interfere with religious beliefs because did not force individual to do anything); Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 108 S.Ct. 1319, 99 L.Ed.2d 534 (1988) (incidental burden on person's religious beliefs caused by government's conduct of its own affairs does not deny free exercise); Bob Jones University v. United States, 461 U.S. 574, 103 S.Ct. 2017, 76 L.Ed.2d 157 (1983) (the government has a compelling interest in eradicating racial discrimination and thus may constitutionally deny tax exempt status to religious organization that discriminates); Goldman v. Weinberger, 475 U.S. 503, 106 S.Ct. 1310, 89 L.Ed.2d 478 (1986) (military has compelling interest in uniformity).

Only in Employment Division v. Smith, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), has the Court departed from this model. In Smith two drug and alcohol rehabilitation counselors were fired from a private clinic after disclosing that they ingested peyote during religious ceremonies. They were subsequently denied unemployment compensation under a state law that disqualified workers discharged for misconduct.

After being instructed that peyote use was criminal under state law, see 485 U.S. 660, 108 S.Ct. 1444, 99 L.Ed.2d 753 (1988) (remanding to state court for determination of criminal status of peyote use), the Supreme Court ruled that the state's refusal to award unemployment compensation was constitutional. Rather than apply strict scrutiny in Smith, the Court ruled that the First Amendment does not require that states afford religious

exemptions from generally applicable criminal laws. 494 U.S. at 879. Importantly, the Court distinguished the facts in Smith from those present in Sherbert, Yoder, Hobbie, Thomas, and all other religion cases. Id. at 883. None of these cases were overruled.

Smith is inapplicable in the present situation for at least two reasons. First, no generally applicable criminal law is relevant to Dubreuil's conduct. It is not a crime in the State of Florida to refuse medical treatment, nor is it a crime to commit suicide. Second, coupled with Petitioner's religious claim is her fundamental privacy claim. See supra at 3. The Court in Smith noted that it would have applied strict scrutiny if the religious claim raised there were "in conjunction with other constitutional protections." 494 U.S. at 872-73.

Consequently, the test that must be applied in the present case is strict scrutiny. No issue has been raised in this case regarding the sincerity and centrality of Mrs. Dubreuil's religious beliefs. Indeed, the central teachings of the Jehovah's Witnesses are well-documented. The questions in the current case thus are (1) whether the state has a compelling reason justifying a forced transfusion, and (2) whether the state has employed the most narrowly tailored means available to achieve its objective.

The state's asserted interest in the present case is preventing Mrs. Dubreuil from abandoning her child. As previously argued, however, abandonment is not even at issue in this case. See supra at 5. Mrs. Dubreuil's husband is capable

of caring for his children, and is under a legal obligation to do so. See § 744.301, Fla. Stat. That he and Mrs. Dubreuil previously had separated is irrelevant. Separation does not terminate parental responsibilities. Even if abandonment were truly at issue, the least intrusive mechanism for avoiding abandonment would be to force Mrs. Dubreuil's husband to fulfill his parental obligations. Forcing Mrs. Dubreuil to accept a transfusion is the most intrusive mechanism imaginable.

To the extent the District Court's decision reflects a preference for maternal child care it stands as a rather bald act of gender discrimination. Indeed, one might imagine a court's refusal to force a father's transfusion because the mother is alive and well, while at the same time forcing the mother to forfeit her religious beliefs "for the good of the children." Society has hopefully evolved beyond such a stereotypical and patronizing position. See § 61.13, Fla. Stat. (both parents responsible for support and care of children).

The argument that children are entitled to two parents (and that the state has an ancillary interest in two-parent families) was, of course, wisely rejected in Wons, 541 So.2d at 98. That argument simply proves too much. As pointed out in Fosmire v. Nicoleau, 75 N.Y.2d 218, 551 N.Y.S.2d 876, 551 N.E.2d 77, 84 (1990), states normally allow divorce and adoption, prosecute (and imprison) parents for unlawful activities, and even condone fathers' and mothers' hazardous occupations and activities. "[T]he State's concern with maintaining family unity and parental ties is not an interest which it enforces at the expense of all

personal rights or conflicting interests." 551 N.E.2d at 84. Thus, an interest in preserving two-parent households, selectively asserted, can hardly be deemed "compelling."

Recent decisions in New York, Illinois and Ohio support rejection of the State's claim. In Fosmire, 551 N.E.2d 77, the New York Court of Appeals refused to order the transfusion of a Jehovah's Witness following a Cesarian birth. The court concluded that the state's interest in avoiding abandonment was insufficient to overcome the mother's personal and religious right to refuse treatment. In In re E.G., 161 Ill. App. 3d 765, 515 N.E.2d 286 (1987), the court found that even a Jehovah's Witness under the age of majority has a first amendment right to forego a blood transfusion. And in In re Milton, 29 Ohio St.3d 20, 505 N.E.2d 255 (1987), the Ohio Supreme Court refused to order a faith healer to undergo treatment that might have extended her life.

* * * * *

A competent individual's privacy and first amendment rights give way only in the face of the most compelling of governmental interests. Contagious diseases, see, e.g., Moore v. Draper, 57 So. 2d 648 (Fl. 1952), and other threats of immediate physical harm to others, see, e.g., Wons, 541 So. 2d at 101 (Ehrlich, C.J., concurring) (mentioning snake-handling), certainly present compelling concerns that perhaps overcome privacy and religious beliefs. In the present case, however, the State falls far short of making out such a compelling claim.

CONCLUSION

> Every human being of adult years and sound mind has a right to determine what shall be done with his own body....

Browning, at 10 citing Schloendorf v. Society of New York Hosp., 211 N.Y. 125, 105 N.E. 92, 93 (1914).

The state has the duty to ensure that a person's medical treatment decision is honored. That obligation protects an individual's constitutional right of privacy from invasion by all but a compelling state interest. There was no compelling state interest here that outweighs Mrs. Dubreuil's constitutional rights.

For the foregoing reasons, the American Civil Liberties Union Foundation of Florida respectfully urges this Court to reverse the decision of the Fourth District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that copies of this Brief were mailed with first-class postage affixed to Cynthia L. Greene, Suite 2100, Courthouse Tower, 44 West Flagler Street, Miami, FL 33130, Attorney for Petitioner, and Clarke Walden, Office of General Counsel, Memorial Hospital, Five East Tower, Room 533, 3501 Johnson Street, Hollywood, FL 33021, Attorney for Respondent, this 17th day of February, 1993.

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