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Weber v. Stony Brook Hospital: Inconsistent Procedure, Contradictory Results

WEBER V. STONY BROOK HOSPITAL: INCONSISTENT PROCEDURE, CONTRADICTORY RESULTS

The Problem of Concurrent Jurisdiction in the "Baby Jane Doe" Case

INTRODUCTION

Weber v. Stony Brook Hospital,[1] widely publicized as the "Baby Jane Doe" case, demonstrates the conflicts that may arise when two courts have concurrent subject matter jurisdiction but are governed by independent statutes. Specifically, *Weber* involves the jurisdictional overlap between the New York State Family Court and Supreme Court. However, the problem does not arise from the existence of coextensive jurisdiction *per se*, but rather, from the existence of different procedural rules governing the two courts.

This Comment will illustrate through an analysis of the *Weber* decision, the differences between the Family Court Act (FCA) which controls procedure in the family court,[2] and the Civil Practice Law and Rules (CPLR) which govern procedure in the supreme court.[3] Although these statutes ostensibly govern only procedure, they may have a profound impact on the substantive rights of the parties. Moreover, the analysis focuses upon the differences in the manner of initiation of child protective proceedings,[4] and advocates

1. 95 A.D.2d 587, 467 N.Y.S.2d 685 (2d Dep't), *aff'd per curiam on other grounds*, 60 N.Y.2d 208, 456 N.E.2d 1186, 469 N.Y.S.2d 63 (1983). A related action arising out of the same controversy was heard at the federal level, United States v. University Hosp. of the State of N.Y., 575 F. Supp. 607 (E.D.N.Y. 1983), *aff'd on other grounds*, 729 F.2d 144 (2d Cir. 1984). *See infra* note 119. An analysis of the *Weber* case in the federal court system is beyond the scope of this Comment.

2. *See* N.Y. FAM. CT. ACT §§ 111-114 (McKinney 1983).

3. *See* N.Y. CIV. PRAC. LAW § 101 (McKinney 1972). "The civil practice law and rules shall govern the procedure in civil judicial proceedings in all courts of the state and before all judges, except where the procedure is regulated by inconsistent statute." *Id.*

4. Article 10 of the FCA governs child protective proceedings in the family court. *See* N.Y. FAM. CT. ACT §§ 1011-1074 (McKinney 1983 & Supp. 1984-1985). The procedural rules governing the representation of infants in the supreme court are found in Article 12 of the CPLR. *See* N.Y. CIV. PRAC. LAW & R. 1201-1211 (McKinney 1976 & Supp. 1984-1985).

the creation of uniformity in procedure in the family court and supreme court.[5]

Part I will present the factual setting of the *Weber* case. Part II explores the problems resulting from concurrent jurisdiction due to the differing procedures governing the family court and supreme court. Parts III and IV present and analyze the decisions of the Appellate Division, Second Department, and Court of Appeals respectively. Part V examines the limited precedential value of the *Weber* case.

I. THE WEBER CASE: PROTECTIVE PROCEEDINGS AT THE BEHEST OF A STRANGER

Baby Jane Doe was born at St. Charles Hospital in Port Jefferson, New York, on October 11, 1983, with multiple birth defects, the most serious of which were spina bifida,[6] microcephaly,[7] and hydrocephalus.[8] Within hours of the initial diagnosis, the infant was transferred to University Hospital at the State University of New York at Stony Brook, where the parents were advised of the extent of their child's combined disorders and the courses of medical treatment available.[9]

Specifically, the parents were informed that they could consent to a dual surgical procedure which would prolong the infant's life by attempting to correct her spina bifida and hydrocephalus.[10] In essence, the surgical team proposed to remove the sac of fluid and nerve endings on the spine and close the exposed area of the spinal column. Additionally, a surgical shunt could be implanted in order

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5. In order to deal with domestic problems in a concerted manner, there is a need for statutory clarification of the procedural uncertainties created by the procedural divergences of the supreme court and family court. *See generally* Samuels, *The Practical Uses of Family Court Procedures*, 45 N.Y. ST. B.J. 258 (1973) [hereinafter cited as Samuels].

6. Spina bifida is "a limited defect in the spinal column, consisting in absence of the vertical arches, through which the spinal membranes, with or without spinal cord tissue, may protrude." STEDMAN'S MEDICAL DICTIONARY 874 (24th ed. 1982).

7. Microcephaly refers to abnormal smallness of the head. *Id.* at 1315 (24th ed. 1982).

8. Hydrocephalus refers to a condition characterized by an accumulation of fluid in the cranial area. *Id.* at 663. The infant also exhibited complicating disorders, including a bilateral upper extremity spasticity, a prolapsed rectum and a malformed brain stem. 575 F. Supp. at 610.

9. 729 F.2d at 146. The parents did not refuse to consent to the surgery until after the transfer when they were advised that they could adopt a conservative course of treatment. Washburn, *A Stranger Intervenes*, EMPIRE ST. RPT., July, 1984, at 9, 10 [hereinafter cited as Washburn].

10. 729 F.2d at 146.

to reduce pressure caused by fluid build-up in the cranial cavity.[11] The surgery would not, however, provide any corrective relief for the remaining disorders, including her anticipated mental retardation.[12] Medical testimony of two physicians, a pediatric neurologist and a neurosurgeon, stated that the proposed procedure to implant the shunt and close the infant's spine constituted a high risk course of treatment.[13] In the alternative, the parents were told that they could adopt a conservative course of treatment in the form of aggressive antibiotic therapy in order to reduce the chance of infection.[14]

The parents were made aware of the hospital's policy not to dictate decisions or seek judicial intervention regarding extraordinary treatment of newborns with multiple birth defects.[15] Realizing that they were making a crucial decision under severe time restraints, the family engaged in extensive consultations with neurological experts, nurses, religious counselors and representatives of the Department of Social Services concerning the competing courses of treatment for their daughter.[16] After being advised of the consequences and risks of the proposed treatments, the parents elected to follow the conservative course of treatment.[17] This treatment was designed to reduce the risk of infection by administration of antibiotics, good nutrition and dressing the infant's spinal sac.[18]

On October 19, 1983, the United States Department of Health and Human Services received a complaint that the hospital was discriminating against Baby Jane Doe by denying her medically indicated treatment based on her handicap.[19] The complaint was referred to the New York State Child Protective Services for

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11. *Id.*

12. *Id.*

13. Justice Melvin Tannenbaum of the Supreme Court, Suffolk County, conducted a hearing to review the medical condition of the infant. Dr. George Newman, a neurosurgeon at University Hospital at Stony Brook, testified at the hearing that the infant's prognosis, with or without the surgery, was grim. Hentoff, *Baby Jane Doe and the Press*, EMPIRE ST. RPT., July 1984, at 12 [hereinafter cited as Hentoff]. Dr. Albert Butler, a neurosurgeon at University Hospital testified that since infection had already set in, surgery could not be performed until the infection was under control through antibiotic therapy. He stated that the family's choice of conservative treatment was a medically acceptable alternative to the surgery in order to stop the spread of infection. Washburn, *supra* note 9, at 11.

14. 95 A.D.2d at 589, 467 N.Y.S.2d at 686.

15. *See* Washburn, *supra* note 9, at 10.

16. 95 A.D.2d at 588, 467 N.Y.S.2d at 686.

17. *Id.* at 589, 467 N.Y.S.2d at 686.

18. 575 F. Supp. at 610. The medical testimony supported this course of treatment and the court found it was medically acceptable, in the best interests of the child, and thus provided no ground for judicial intervention. 95 A.D.2d at 589, 467 N.Y.S.2d at 687.

19. *See* Hentoff, *supra* note 13, at 12; 729 F.2d at 147.

investigation. Following a full review of the circumstances of the case, the agency issued a report stating that the allegations were without merit and, therefore, there was no reason for the state to intervene in the matter.[20] The investigators found no indication that the infant was subject to abuse, mistreatment or neglect as a result of the parent's choice to follow the conservative course of treatment for their child.[21]

Simultaneously, a "disinterested" third party,[22] A. Lawrence Washburn, Jr., attempted to challenge the family's decision to forego surgery by making a direct application to the Supreme Court, Special Term, Suffolk County.[23] In response to this application, the Attorney General of the State of New York representing the hospital, made a motion to dismiss the action.[24] Justice Melvyn Tannenbaum denied the motion and ordered a hearing to review the circumstances of the case. Thereafter, despite the medical testimony supporting the family's choice of treatment, the court ordered the hospital to immediately perform the surgery.[25]

In issuing the order, the trial court apparently realized that the usual guidelines to initiate child protective proceedings were not followed. Specifically, had these proceedings been conducted in accordance with the legislative scheme of the FCA, Washburn would have been statutorily barred from originating the matter because he was a legally disinterested party.[26] In order to remedy these "procedural irregularities," the court included in its order the appointment of William E. Weber to represent the infant as guardian *ad litem*[27]

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20. *See* Hentoff, *supra* note 13, at 13.

21. *Id.*

22. This Comment refers to the petitioner, A. Lawrence Washburn, Jr., a Vermont resident, as "disinterested" in the limited sense that he had no direct personal knowledge of the facts relating to the infant's condition nor any relationship with the parents or patient. *See Weber*, 60 N.Y.2d at 211, 456 N.E.2d at 1187, 469 N.Y.S.2d at 64. The term "disinterested" is not meant to imply that Mr. Washburn lacked any personal interest in the matter, as indicated by his involvement since the early 1970's in "right to life" lawsuits. *See* Chambers, *Initiator of 'Baby Doe' Case Unshaken*, N.Y. Times, Nov. 13, 1983, at L45, col. 1.

23. *See* Hentoff, *supra* note 13, at 12.

24. 60 N.Y.2d at 211, 456 N.E.2d at 1187, 469 N.Y.S.2d at 64.

25. 95 A.D.2d at 588, 467 N.Y.S.2d at 686.

26. *See* N.Y. FAM. CT. ACT § 1032 (McKinney 1983). Pursuant to this section, those who may originate neglect proceedings are a child protective agency, or a person at the court's direction. *Id. See also id.*, commentary at 22 (McKinney Supp. 1984-1985). In the event a "disinterested" third party attempts to initiate proceedings, the court may order an investigation into the circumstances of the case to ascertain whether proceedings should go forward. *See* N.Y. FAM. CT. ACT § 1034(1)(b) (McKinney 1983).

27. "A guardian ad litem is a special guardian appointed by the court to prosecute or defend, in behalf of an infant, a suit to which he is a party. Such a guardian is considered an

pursuant to CPLR rule 1202.[28] Presumably, according to the Court of Appeals, Justice Tannenbaum believed that his reliance on the procedural provisions of the CPLR and his power to appoint a guardian *ad litem, sua sponte*, to protect the interests of the child, provided adequate authority to "ignore" the more restrictive provisions of the FCA.[29]

An appeal of the order was taken to the Appellate Division, Second Department, by the parents of Baby Jane Doe and Stony Brook Hospital.[30] The appellate court initially found that the special term properly entertained the proceeding under the doctrine of *parens patriae*.[31] However, the court reversed the order to perform the surgery on the ground that the parents' decision was medically reasonable under the circumstances.[32]

Weber pursued the matter to the New York Court of Appeals, seeking to reinstate the order to perform the surgery.[33] The Court affirmed the appellate division's dismissal of the action, but on different grounds. Specifically, the Court of Appeals held that the special term did not have the authority to entertain the proceeding inasmuch as the established guidelines of Article 10 of the FCA were not followed.[34] In basing its determination on the procedural "defects" of the action, the Court did not address the standard of medical care for newborns with birth defects.

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officer of the court to represent the interests of the infant in the litigation." Van Heuverzwyn v. State of N.Y. 206 Misc. 896, 897, 134 N.Y.S.2d 922, 923-24 (Ct. Cl. 1954) (citations omitted).

28. *See infra* text accompanying notes 75-77. Article 12 of the CPLR empowers the court to appoint a guardian *ad litem* if the court finds that the infant's interests are not adequately represented. The appointment made by special term in *Weber* was made without further investigation and despite the medical records detailing the conservative course of treatment. *See generally Weber*, 95 A.D.2d at 588, 467 N.Y.S.2d at 686.

29. *See infra* notes 125-27 and accompanying text of part *IV*.

30. 95 A.D.2d 587, 467 N.Y.S.2d 685 (2d Dep't 1983).

31. " 'Parens Patriae,' literally 'parent of the country,' refers traditionally to role of state as sovereign and guardian of persons under legal disability." BLACK'S LAW DICTIONARY 1003 (5th ed. 1979). The appellate division stated that under the doctrine of *parens patriae*, the state may constitutionally act as the general guardian of all infants. 95 A.D.2d at 588, 467 N.Y.S.2d at 686. *See generally* Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 257-60 (1970).

32. 95 A.D.2d at 589, 467 N.Y.S.2d at 686-87.

33. 60 N.Y.2d 208, 456 N.E.2d 1186, 469 N.Y.S.2d 63 (1983) (per curiam).

34. *Id.* at 213, 456 N.E.2d at 1188, 469 N.Y.S.2d at 65.

II. THE NEW YORK STATE FAMILY COURT AND SUPREME COURT: THE INCONSISTENCIES RESULTING FROM CONCURRENT JURISDICTION WHEN PROCEDURAL REQUIREMENTS DIFFER

In 1962, the New York State Legislature enacted the FCA[35] which established a family court in each county of the state as part of its unified court system.[36] In promulgating this Act, the legislature evinced its intent to create a specialized court, possessing unique capabilities and expertise to address problems arising out of sensitive areas of family life.[37]

The philosophical concept behind the family court marks a clear departure from the traditionally adversarial judicial system. At its inception, the family court was referred to as an "experimental court," and for that reason, the proposed legislation left "room for experimentation and look[ed] to improvements based on experience and observation."[38] The legislature believed that a broad range of family problems would be best resolved in a separate court, distinguished from the state supreme court in both its jurisprudence and procedure.[39] Accordingly, it advocated the creation of an informal

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35. The Joint Legislative Committee on Court Reorganization drafted the Family Court Act of New York pursuant to the Concurrent Resolution of the Senate and Assembly adopted on March 23, 1961. JOINT LEGIS. COMM. ON CT. REORGANIZATION REPORT No. 2 THE FAMILY COURT ACT (1962), *reprinted in* [1962] N.Y. Laws 3428 (McKinney) [hereinafter cited as JOINT LEGIS. COMM. RPT.].

36. N.Y. FAM. CT. ACT §§ 111-113 (McKinney 1983). The family court replaced the Children's Court in the State of New York, the Domestic Relations Court of the City of New York, and the Girls' Term Court of the City of New York on September 1, 1962. Ch. 688, § 1, [1962] N.Y. LAWS 3649 (McKinney); Goldberg & Lauer, *Court Reorganization: The New Family Court Act* (1962), *reprinted in* [1962] N.Y. LAWS 3694-(McKinney). The family court was one of twenty-two court reform measures enacted in 1962 to effect a constitutional mandate to revise the judicial machinery of the New York State court system. The new Judiciary Article of the State Constitution, adopted in the November, 1961, general election, provided for the creation of the "Unified Court System" now operating throughout the state. 1 R.E. COHEN, FAMILY TRIAL ADVOCACY 19 (1982).

37. JOINT LEGIS. COMM. RPT., *supra* note 35, at 3429. "[The family court] must deal with sensitive and difficult areas of life about which reasonable men and women differ." *Id.*

38. JOINT LEGIS. COMM. RPT., *supra* note 35, at 3429. *See also* Lydon v. Lydon, 110 Misc.2d 966, 966, 443 N.Y.S.2d 198, 199 (Family Ct. Onondaga County 1981) ("[T]he family court has evolved as a court which must eschew the experimental approach and adhere to its statutorily enunciated powers.").

39. In 1953, the New York State Legislature created a Temporary Commission on the Courts, commonly known as the Tweed Commission, to review the entire judicial system and make recommendations for its reorganization. Paulsen, *The New York Family Court Act*, 12 BUFFALO L. REV. 420, 421 (1962) [hereinafter cited as Paulsen]. The Commission issued a proposal indorsing the view that controversies pertaining to children and families should be handled by a specialized part of a regular trial court. *Id.* The proposal that there should be a

court, where families in crisis could be assisted by "fatherly" judges[40] acting in conjunction with auxiliary personnel trained in the area of social services.[41] Recognizing that the family unit may require immediate and personal attention, it charged the family courts

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separate family court met resistance from supreme court justices who viewed the incorporation of domestic matters into the supreme court as downgrading and having the impact of diminishing their prestige. Botein, *Court Reorganization in New York: The Role of Bernard Botein, 1958-1973*, 3 JUST. SYS. J. 126, 139 nn.34-35 (1977) [hereinafter cited as Botein]. In its final plan, the Tweed Commission abandoned the concept of consolidating these courts. Its proposal, therefore, was not adopted and the Commission was dissolved in 1958. *Id.* at 126. *See also* Paulsen, *supra* at 422.

In May of that year, the Governor of New York authorized the Judicial Conference to study the existing court structure and offer recommendations. The Conference's "Recommendations for Modernization of the Court Structure in the State of New York" advocated the creation of a separate family court, but only after making several compromises to appease the justices of the supreme court. Accordingly, although the family court was vested with full power over the crucial aspects of domestic life, jurisdiction over divorce, custody and alimony would remain with the supreme court. Additionally, the Conference agreed that both the supreme court and the surrogate's court could retain their power to appoint guardians. *See* Botein, *supra* at 127-29.

40. Besharov, *Family Court Handling of Child Protective Cases*, 53 N.Y. ST. B.J. 113, 113-14 (1981) [hereinafter cited as Besharov]. The original concept behind the family court was to deal with the family unit in an informal setting, in contrast with the traditional adversarial system commonly used in other tribunals. The informality of protective proceedings in particular, however, gave rise to claims that the parties affected were being denied impartial consideration of allegations made against them. In response to these charges, the legislature created child protective agencies in each county of the state and limited the parties who could originate protective proceedings. *See id.* Moreover, in 1970, the skeletal procedural provisions of Article 10 of the FCA, which govern protective proceedings, were "fleshed-out," and thereafter the statute assumed a restrictive character. Besharov, *State Intervention to Protect Children: New York's Definitions of "Child Abuse" and "Child Neglect,"* 26 N.Y.L. SCH. L. REV. 723, 727 (1981).

41. The family court relies upon child protective agencies, police, other agencies and interested parties to bring cases of child abuse and neglect to its attention. N.Y. FAM. CT. ACT § 1011, commentary at 220 (McKinney 1983). Almost 80% of all child abuse and neglect cases are received, investigated, and disposed of by the child protective system established by the Child Protective Services Act of 1973. *Id.* at 218. *See* N.Y. SOC. SERV. LAW §§ 411-428 (McKinney 1983). The purpose of the Child Protective Services Act is expressed in section 411 which states:

> Abused and maltreated children in this state are in urgent need of an effective child protective service to prevent them from suffering further injury and impairment. It is the purpose of this title to encourage more complete reporting of suspected child abuse and maltreatment and to establish in each county of the state a child protective service capable of investigating such reports swiftly and competently and capable of providing protection for the child or children from further abuse or maltreatment and rehabilitative services for the child or children and parents involved.

Id. § 411.

For a critical discussion of the family court's integration into the social services system, see Whisenand & McLaughlin, *Completing the Cycle: Reality and the Juvenile Justice System in the State of New York*, 47 ALB. L. REV. 1, 24-28 (1982).

One author has suggested that where allegations of child neglect are made, the court should make all community resources available to the family, including pediatric, psychological, psy-

with the responsibility of coordinating their cases with the appropriate social work agencies and utilizing the latters' investigatory teams when necessary.[42] Additionally, in order to promote effective judicial handling of actions rooted in family relations, this court was vested with exclusive and original jurisdiction[43] over many aspects of family life, including, *inter alia*, abuse and neglect proceedings, support proceedings and cases involving family offenses.[44]

However, in advocating the creation of specialized courts at the state level, the New York State Legislature was constrained by the constitutional grant of original jurisdiction to the supreme court to hear all causes of action in law and equity[45] as they then existed or were later recognized.

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chiatric, and social welfare services. *See* Hansen, *Suggested Guidelines for Child Abuse Laws*, 7 J. FAM. L. 61, 63 (1967).

42. Berman, *The Family Court: A New Frontier*, 44 N.Y. ST. B.J. 27, 30 (Jan. 1972).

43. Section 114 of the FCA states in pertinent part: "When used in this act, 'exclusive original jurisdiction' means that the proceedings over which the family court is given such jurisdiction must be originated in the family court in the manner prescribed by this act." N.Y. FAM. CT. ACT § 114 (McKinney 1983). The family court was established pursuant to the provisions of the New York State Constitution. *See* N.Y. CONST. art. 6, § 13(a).

44. The provisions of the FCA are restricted by the New York State Constitution which defines the classes of actions and proceedings over which the family court may have jurisdiction. *See* N.Y. CONST. art. 6, § 13(b) (1974). Thus, "[t]he Family Court is a court of limited jurisdiction with power to entertain only such applications as are specifically enumerated in the Constitution or in an appropriate statute." Mouscardy v. Mouscardy, 63 A.D.2d 973, 974-75, 405 N.Y.S.2d 759, 761 (2d Dep't 1978). Furthermore, the family court lacks any equitable jurisdiction. Eden M. v. Ines R., 97 Misc.2d 256, 257, 410 N.Y.S.2d 997, 998 (Family Ct. Kings County 1978). *See, e.g.*, Kleila v. Kleila, 50 N.Y.2d at 277, 282, 406 N.E.2d 753, 756, 428 N.Y.S.2d 896, 899 (family court lacks equitable power to modify terms of a separation agreement).

Section 115 of the FCA lists matters such as paternity, custody, persons in need of supervision, and juvenile delinquency, over which the family court has exclusive original jurisdiction. N.Y. FAM. CT. ACT § 115(a)(i-vii) (McKinney 1983). Additionally, section 115(b) provides:

> The family court has such other jurisdiction as is set forth in this act, including jurisdiction over habeus corpus proceedings and over applications for support, maintenance, a distribution of marital property and custody in matrimonial actions when referred to the family court by the supreme court, conciliation proceedings, and proceedings concerning physically handicapped and mentally defective or retarded children.

Id. § 115(b). The Act also provides for jurisdiction "as is provided by law." *Id.* § 115(d). This section "only hints at the broad and extensive jurisdiction that the Family Court is given . . . in laws *other than* the Family Court Act." N.Y. FAM. CT. ACT § 115, commentary at 19, 20 (McKinney 1983) (emphasis in original). Examples of other acts conferring jurisdiction on the family court are the Social Services Law, Education Law, Domestic Relations Law, the Public Health Law and the Interstate Compacts on Juveniles and the Placement of Children. *Id.* at 20-24.

45. N.Y. CONST. art. 6, § 7(a). The existence of the Supreme Court of New York was recognized by the first Constitution of the state in 1777. *In re* Steinway, 159 N.Y. 250, 53 N.E. 1103 (1899) (citing N.Y. CONST. of 1777, § 35). The Constitution of 1846 mandated that there "be a Supreme Court having general jurisdiction in law and equity." 159 N.Y. at

> If the legislature shall create new classes of actions and proceedings, the supreme court shall have jurisdiction over such classes of actions and proceedings, but the legislature may provide that another court or other courts shall also have jurisdiction and that actions and proceedings of such classes may be originated in such other court or courts.[46]

Accordingly, although the FCA reflects a legislative policy judgment that a specialized court is the most effective method of dealing with crucial issues in family relations,[47] the provisions of the FCA in no way impair the unlimited jurisdiction of the supreme court.[48]

However, "[a]lthough the supreme court may not be divested by statute of its constitutionally derived jurisdiction, 'it need not exercise it if the legislature has given to other tribunals the requisite jurisdiction.' "[49] Thus, the supreme court has the power to transfer an action or proceeding to a court with concurrent subject matter jurisdiction.[50] "[T]he Supreme Court must exercise its discretion as to whether it would be appropriate to transfer a particular matter to a court . . . possessing unique, specialized capabilities and expertise."[51] The Court of Appeals has noted that such a transfer, in many cases, would be the better practice.[52]

The case of *Weber v. Stony Brook Hospital* illustrates the dramatic consequences that may result when there is a failure to reconcile anomalies created by coextensive jurisdiction where procedural standards differ. The overlapping jurisdiction of these courts, in ad-

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257, 53 N.E. at 1105 (citing N.Y. CONST. of 1846, art. 6, § 3 and art. 14, § 8). The Constitution of 1894 abolished the superior city courts in New York and their original and appellate jurisdiction was vested in the supreme court. N.Y. CONST. of 1894, art. 6, § 5. Moreover, the supreme court retained its "general jurisdiction in law and equity." *Id.* § 1. "The theory was to simplify the judicial system by reducing the number of high courts and to embed those retained so thoroughly in the fundamental law that they could not be changed or abolished without amending the Constitution." Koch v. Mayor of N.Y., 152 N.Y. 72, 78, 46 N.E. 170, 172 (1897).

46. N.Y. CONST. art. 6, § 7(b) (amended 1977).

47. *See* People v. Keller, 37 Misc.2d 122, 123, 234 N.Y.S.2d 469, 470 (Dist. Ct. Nassau County 1962) ("A dominant purpose of the Family Court Act was to get all of the problems of a family in one forum. Fragmentation was found to be a serious handicap in treating such problems."). *See also* Kagen v. Kagen, 21 N.Y.2d 532, 540, 236 N.E.2d 475, 479, 289 N.Y.S.2d 195, 202 (1968) (Jasen, J., dissenting).

48. *See* N.Y. FAM. CT. ACT § 114 (McKinney 1983).

49. People v. Davis, 27 A.D.2d 299, 305, 278 N.Y.S.2d 750, 755 (1st Dep't 1967) (quoting *In re* Runk, 200 N.Y. 447, 460, 94 N.E. 363, 368 (1911)).

50. N.Y. CONST. art. 6, § 19(a); *see* N.Y. CIV. PRAC. LAW § 325(a) (McKinney 1972).

51. Kagen v. Kagen, 21 N.Y.2d at 538, 236 N.E.2d at 479, 289 N.Y.S.2d at 200; *see also* Vasquez v. Vasquez, 26 A.D.2d 701, 273 N.Y.S.2d 12 (2d Dep't 1966).

52. 21 N.Y.2d at 538, 236 N.E.2d at 479, 289 N.Y.S.2d at 200.

dition, may serve to encourage the practice of forum shopping[53] and to frustrate the intent of the legislature in promulgating the FCA. In order to fully understand the potential for such conflicts, it is necessary to first examine the statutory scheme of the FCA, which is characterized by detailed procedures designed to protect the rights and interests of the family unit. One must also examine Article 12 of the CPLR, which provides for broad judicial supervisory authority over infants and incompetents in civil proceedings.[54]

III. STATUTORY SOURCES

A. Article 10 of the Family Court Act

The purpose of Article 10 of the FCA is expressed in section 1011 of the Act, which states:

> This article is designed to establish procedures to help protect children from injury or mistreatment and to help safeguard their physical, mental, and emotional well-being. It is designed to provide a due process of law for determining when the state, through its family court, may intervene against the wishes of a parent on behalf of a child so that his needs are properly met.[55]

A cornerstone provision of Article 10 which gives this purpose effect is section 1032 which expressly limits parties who may originate protective proceedings.[56] This section evinces the intent of the legislature to exercise rigorous control over the class of parties who have standing to initiate actions which could potentially displace parental decisions.[57]

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53. Forum shopping, as used here, "occurs when a party attempts to have his action tried in a particular court or jurisdiction where he feels he will receive the most favorable judgment or verdict." BLACK'S LAW DICTIONARY 590 (5th ed. 1979). *See* Rosenstiel v. Rosenstiel, 278 F. Supp. 794, 800 (1967) ("[The concept of forum shopping] implies existence of two forums having jurisdiction over the dispute.").

54. *See infra* part III *B.*

55. N.Y. FAM. CT. ACT § 1011 (McKinney 1983). Due process of law requires that a careful scrutiny of the evidence, such as the medical records and history of the infant, be conducted in order to determine if there is a pattern of child abuse or neglect. *In re* S., 66 Misc.2d 683, 685-86, 322 N.Y.S.2d 170, 173 (Family Ct. Richmond County 1971).

56. N.Y. FAM. CT. ACT § 1032 (McKinney 1983). *See infra* text accompanying note 62.

57. *See* Humphrey v. Humphrey, 103 Misc.2d 175, 178, 425 N.Y.S.2d 759, 761 (Family Ct. Steuben County 1980) ("The purpose and intent of the law are designed to prevent spurious and malicious suits and intrusions into the privacy of the family brought by disgruntled third parties who may not approve of the life style of the parent or the manner in which the child is being raised.").

Section 1032 of the FCA was amended in 1973 to bar indiscriminate initiations of protective proceedings. Only a child protective agency is permitted to originate such matters and all other

The power to order investigations into allegations of child neglect[58] is consistent with the family court's philosophy to incorporate social science principles into its law making process.[59] Moreover, by routinely referring these matters to the appropriate child protective agency,[60] the family's privacy rights are protected by precluding parties with no relationship to the family from making a direct application to the court.[61]

Specifically, section 1032 of the FCA limits those who may originate protective proceedings to either a child protective agency or a person at the court's direction.[62] The procedure for determining the appointment of a person at the court's direction under section 1032(b) is governed by section 1033 which provides that a person seeking to file a petition shall have access to the court for the purpose of making an *ex parte* application.[63] The family court judge is not prevented from requiring such a person to initially report to a child protective agency.[64] Furthermore, section 1034 of the FCA channels allegations of neglect to the proper authorities, who conduct inquiries and report their findings to the court. These reports, usually

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persons seeking to file a neglect petition with the family court require prior authorization by the court. Such authorization is usually conditioned upon an investigation into the circumstances of the case by the protective agency. N.Y. FAM. CT. ACT § 1032, commentary at 345-46 (McKinney 1972). Prior to the effective date of section 1032, many cases were initiated without the benefit of a child protective agency investigation. *Id.* at 346.

58. *See infra* note 66 and accompanying text.

59. *See supra* note 41.

60. Section 1012(i) provides in pertinent part that " '[c]hild protective agency' means any duly authorized society for the prevention of cruelty to children or the child protective service of the appropriate local department of social services or such other agencies with whom the local department has arranged for the provision of child protective services under the local plan for child protective services." N.Y FAM. CT. ACT § 1012(i) (McKinney 1983).

61. *See supra* note 57.

62. N.Y. FAM. CT. ACT § 1032 (McKinney 1983).

63. *Id.* § 1033.

64. *Id.* The practice commentary to section 1033 expresses the legislature's intent to limit those who may initiate child protective proceedings. N.Y. FAM. CT. ACT § 1033, commentary at 351 (McKinney 1983). Specifically, "[section 1033] codifies the practice of a limited number of judges who denied potential petitioners the automatic right to initiate a proceeding." *Id.* However, the commentary does note that the requirements of an investigation are not mandatory in every case. "If the evidence presented at [an] *ex parte* hearing is sufficiently *serious*, the court may authorize the *immediate* filing of a petition." *Id.* (emphasis added). Although this language seems to indicate a relaxation of the restrictive scheme of the FCA, it is further noted that "most applications are merely referred to a child protective agency for investigation and handling." *Id.* Thus, it appears that only in life threatening situations will the court allow the petition to go forward without first ordering an investigation by a child protective agency. To illustrate, the Court of Appeals in *Weber* determined the circumstances at bar were not sufficiently serious to justify foregoing the requirement of an investigation by a child protective agency. 60 N.Y.2d at 213, 456 N.E.2d at 1188, 469 N.Y.S.2d at 65.

prepared by the local department of social services, are reviewed by the court in order to determine whether an Article 10 proceeding should go forward.[65] If the court decides that such proceedings are necessary, standing to advance the petition is once again controlled by the restrictive provisions of FCA section 1032.

In light of this statutory scheme of checks and balances, a "disinterested" third party seeking to originate neglect proceedings under the FCA would be barred by statute from having standing to intervene into the sensitive areas of family life. If, however, the court believed that a child's physical, emotional or mental well-being was in danger, it could act on the information provided by the interloper to the extent that it may order an investigation into his allegations by the proper authorities. If the report alerted the court that the child was in fact a victim of parental neglect within the meaning of the statute,[66] the proceedings would go forward under the supervision of the reporting agency or a qualified person acting in conjunction with such an agency at the direction of the court. It can be seen, therefore, that a "disinterested" third party is not permitted to conduct an inquiry, that would be recognized by the court, into the circumstances of the case nor is he permitted to indiscriminately file a petition alleging that the child is being subjected to parental neglect.

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65. N.Y. FAM. CT. ACT § 1034 (McKinney 1983). Section 1034 states in pertinent part:

> 1. A family court judge may order the child protective service of the appropriate department of social services or request any other appropriate child protective agency to conduct a child protective investigation as described by the social services law and report its findings to the court:
>
> (a) in any proceedings under this article, or
>
> (b) in order to determine whether a proceeding under this article should be initiated.

Id. Although the language of the statute on its face is permissive, if the information before the court reasonably suggests that a child is abused or neglected, it may be an abuse of discretion not to order further inquiry into the matter. The FCA notes that "[a]ny family court judge who in good faith issues process in any proceeding under this act shall not be liable therefor unless it is shown that his action in so doing was malicious or a deliberate abuse of his discretion." *Id.* § 145.

66. Section 1012 of the FCA states in relevant part that a neglected child is "[one] whose physical, mental, or emotional condition has been impaired or is in imminent danger . . . as a result of failure of his parent . . . to supply medical . . . or surgical care." *Id.* § 1012(f)(i)(A) (McKinney 1983). *See, e.g., In re* Sampson, 37 A.D.2d 668, 323 N.Y.S.2d 253 (3d Dep't 1971), *aff'd*, 29 N.Y.2d 900, 278 N.E.2d 918, 328 N.Y.S.2d 686 (1972) (child in need of surgery found to be neglected, within the meaning of the FCA, by his mother, a Jehovah's Witness, who refused to consent to a blood transfusion).

B. Article 12 of the CPLR

As a derivation of its general jurisdiction at law and equity,[67] the supreme court is vested with the inherent power to care for infants and incompetents.[68] This power is codified in part in Article 12 of the CPLR which provides for the appointment of a guardian *ad litem*.[69]

CPLR section 1201 provides that an infant[70] must appear in a proceeding by the guardian of his property, a parent or other person or agency having legal custody.[71] However, notwithstanding the availability of these persons, the court, upon a showing of conflict of interest or "other cause,"[72] is permitted to appoint a guardian *ad litem*. "Because the infant is a ward of the court, it takes little 'other cause' to prompt appointment of a guardian ad litem."[73]

Rule 1202 provides the procedure for the appointment.[74] Specifically, rule 1202(a) states that the court may appoint the guardian *ad litem* at any stage of the action upon its own initiative, upon the motion of an infant party over the age of 14,[75] or upon the motion of a relative, friend, guardian, committee of the property or conservator.[76] The appointment becomes effective only after the proposed guardian has submitted to the court a written consent and an affidavit stating facts showing his ability to answer for any damage which may be sustained by his negligence or misconduct.[77] Although the court is vested with wide discretion to act in the best interests of the party in need of representation,[78] it is incumbent upon the judge, in determining the necessity and propriety of the appointment, to "await the proper application by persons entitled to move for such appointment . . . [T]he designation should then be made only after

67. N.Y. CONST. art. 6, § 7(a).

68. *In re* McGuinness, 290 N.Y. 117, 118, 48 N.E.2d 286, 287 (1943); Moore v. Flagg, 137 A.D. 338, 347, 122 N.Y.S. 174, 180 (1st Dep't 1910); *In re* Scrivani, 116 Misc.2d 204, 206, 455 N.Y.S.2d 505, 508 (Sup. Ct. Spec. T. New York County 1982) (citing *In re* Berman, 24 A.D.2d 432, 260 N.Y.S.2d 736 (1st Dep't 1965)).

69. N.Y. CIV. PRAC. R. 1202 (McKinney Supp. 1984-1985).

70. " '[I]nfant' . . . means a person who has not attained the age of eighteen years." N.Y. CIV. PRAC. LAW § 105(j) (McKinney Supp. 1984-1985).

71. *Id.* § 1201.

72. *Id.*

73. D. SIEGEL, HANDBOOK ON NEW YORK PRACTICE § 193, at 232 (1978).

74. N.Y. CIV. PRAC. R. 1202 (McKinney Supp. 1984-1985).

75. *Id.* 1202 (a)(i).

76. *Id.* 1202 (a)(2).

77. *Id.* 1202 (c) (McKinney 1976).

78. *In re* Berman, 24 A.D.2d at 433, 260 N.Y.S.2d at 738.

due consideration of any proper recommendation for the appointment."[79]

In *Weber*, it appears that the special term must have classified Washburn as a "friend" under CPLR rule 1202 as he was neither a relative, guardian nor committee. Since the term "friend" does not preclude persons having no relationship to the infant,[80] it is clear that an application under rule 1202 is not construed in the same restrictive light as that of a party initiating a child protective proceeding in the family court. Thus, the statute empowers the court to appoint a guardian *ad litem, sua sponte*, without first ordering an investigation, regardless of the source of the information.[81] Simply put, the CPLR has no provision that mirrors the FCA's statutory scheme to channel data received from "disinterested" third parties to the appropriate investigatory authorities.

III. THE APPELLATE DIVISION DECISION: "BYPASSING" THE PROCEDURAL RULES TO RULE ON THE MERITS

In *Weber v. Stony Brook Hospital*, the Appellate Division, Second Department, held that the trial court properly allowed the action to go forward under the doctrine of *parens patriae*.[82] However, the court reversed the order on the merits, and dismissed the action upon a finding that the parents acted in the best interests of their daughter.[83] Although the court did not directly address the conflicting requirements of Article 12 of the CPLR and Article 10 of the FCA, the court held that the state may "constitutionally act as the 'general guardian of all infants' and may direct medical treatment of a minor, in appropriate circumstances, over parental objection."[84] In reference to the exclusive original jurisdiction of the family court to

79. Trippe v. Trippe, 35 A.D.2d 944, 944, 316 N.Y.S.2d 579, 580-81 (1st Dep't 1970).

80. *See Appointing Guardian Ad Litem for Infant at Behest of Stranger, Without Ascertaining Need for Outside Representation, Abuses Judicial Discretion*, N.Y. ST. L. DIG., Nov., 1983, at 1 (" 'Friend' should not be narrowly construed to exclude all who have no relationship to the infant or the family. . . .") [hereinafter cited as *Appointing Guardian Ad Litem*].

81. *See* N.Y. CIV. PRAC. R. 1202 (McKinney Supp. 1984-1985).

> [T]he court need not wait for someone to make a "motion" before exercising its power to appoint a guardian ad litem in pursuit of such a protective mission . . . . Whenever a court has power to act "upon its own initiative," the source of the data that prompts the court to exercise that initiative would seem irrelevant, or in any event incidental.

Appointing Guardian Ad Litem, supra note 80, at 1.

82. 95 A.D.2d at 588, 467 N.Y.S.2d at 686.

83. *Id.* at 589, 467 N.Y.S.2d at 687.

84. *Id.* at 588, 467 N.Y.S.2d at 686 (citations omitted).

entertain matters pertaining to child abuse and neglect, the court stated:

> Quite aside from any statutory authority (see Family Court Act § 1013), a court of equity "has both the power and responsibility to care for and protect all those persons who, by virtue of some legal disability, are unable to protect themselves" and may "upon its own initiative whenever it deems necessary" appoint a guardian to do so.[85]

In so holding, the appellate division rejected the argument that the provisions of the FCA superseded the more discretionary procedures to be followed by the supreme court under the CPLR. At first blush, this holding appears to countermand the intent of the state legislature in creating a specialized court to hear cases dealing with problems arising from family conflicts, including the initiation of child protective proceedings.[86] However, upon closer review, it may be seen that the appellate division sought to actually fulfill the integral intent of the legislature by rendering an adjudication on the merits of the case. That is, although the court did not adhere to the procedural tenets of the FCA, it did resolve the issues in *Weber* by considering the findings that would have been initially revealed by an investigation by a child protective agency.

In order to substantiate the argument that the appellate division's decision on the merits of *Weber* actually satisfied the intent of the legislature in promulgating Article 10 of the FCA, it is necessary to review the dual determinations of the court. Specifically, the decision stated that (1) the proceeding was properly entertained by the supreme court under the doctrine of *parens patriae*,[87] and (2) that the parents' decision to forego the surgery was medically reasonable and provided no basis for judicial intervention.[88]

A. Reliance on the Doctrine of Parens Patriae

The Appellate Division, Second Department, held that the trial court had the constitutional authority to act in its capacity of *parens patriae* as the "general guardian of all infants."[89] This doctrine is derived from the English common law system, where the sovereign retained certain duties and powers referred to as "royal preroga-

85. *Id.* Section 1013 provides that the family court has exclusive original jurisdiction over abuse and neglect proceedings. N.Y. FAM. CT. ACT § 1013(a) (McKinney 1983).

86. *See supra* notes 37-41 and accompanying text.

87. 95 A.D.2d at 588, 467 N.Y.S.2d at 686.

88. *Id.* at 589, 467 N.Y.S.2d at 687.

89. *Id.* at 588, 467 N.Y.S.2d at 686 (citing Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 257 (1972)).

tives"[90] which empowered him to act as "father of the country."[91] The nature of the doctrine as passed to the United States has been greatly expanded and invoked freely by the courts to exercise its duty to protect the general welfare of its citizens.[92] The interpretation of which causes of action reflect the state's interest in the general welfare of its citizens has been historically broad.[93] These include actions pertaining to damage to the general economy of the state,[94] violations of antitrust laws,[95] environmental pollution,[96] and conflicts concerning interstate water rights.[97]

More traditionally, under the doctrine of *parens patriae*, the sovereign may act as a guardian to protect the welfare of its citizens who are incompetent and unable to make decisions regarding their medical care.[98] Despite the broad scope of power granted to the state

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90. Malina & Blechman, *Parens Patriae Suits for Treble Damages Under the Antitrust Laws*, 65 NW. U.L. REV. 193, 197 (1970) [hereinafter cited as Malina & Blechman].

91. *Id.*

92. *See generally* Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 257-60 (1972); Note, *The Original Jurisdiction of the United States Supreme Court*, 11 Stan. L. Rev. 665, 671-85 (1959) [hereinafter cited as *Original Jurisdiction*]; Note, *State Protection of its Economy and Environment: Parens Patriae Suits for Damages*, 6 COLUM. J.L. & SOC. PROBS. 411 (1970).

93. *See generally* Malina & Blechman, *supra* note 90.

94. *See, e.g.*, Georgia v. Pennsylvania R.R. Co., 324 U.S. 439 (1945) where the Supreme Court granted leave to the state of Georgia to sue under the doctrine of *parens patriae* as the protector of her people against a continuous wrong done to them. Specifically, Georgia acted in her capacity to redress wrongdoings suffered by the state as the owner of a railroad, where there was an alleged conspiracy in restraint of trade and commerce causing a detriment to the general economy of the state.

95. *See, e.g.*, Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251 (1972) where the state of Hawaii, acting in its capacity of *parens patriae*, sought to repair harm to its quasi-sovereign interests by seeking to recover damages pursuant to section 4 of the Clayton Act. In addressing the question of whether the injury asserted by Hawaii, in its *parens patriae* count, was an injury to the state's business or property, the Court found that the state could sue in its proprietary capacity for treble damages as a result of the alleged anti-trust violations.

96. The Supreme Court adopted a broad interpretation of the states' use of *parens patriae* to avert general injury to her citizens in a series of cases involving environmental pollution. *See, e.g.*, Missouri v. Illinois and the Sanitary Dist. of Chicago, 180 U.S. 208 (1901) (Missouri permitted to sue on behalf of her citizens to enjoin the discharge of sewage into her rivers); Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907) (Georgia entitled to enjoin a copper plant across her border in order to prevent its fumes from injuring land in the state); New York v. New Jersey, 256 U.S. 296 (1921) (New York permitted to enjoin New Jersey's discharge of pollution into the New York Harbor).

97. *See, e.g.*, Kansas v. Colorado, 185 U.S. 125, 142 (1902) (The Supreme Court determined that substantial interests of Kansas were injured as a result of the diversion of an interstate stream and therefore Kansas had authority to sue in *parens patriae* to enjoin Colorado from diverting the stream).

98. *See* Buchanan, *The Limits of Proxy Decisionmaking for Incompetents*, 29 UCLA L. REV. 386, 390 (1981) ("[T]he traditional doctrine of *parens patriae* . . . accords the state broad authority to act in the incompetent's best interest."). *See also In re* Storar, 52 N.Y.2d 363, 380-81, 420 N.E.2d 64, 73, 438 N.Y.S.2d 266, 275 (1981) ("[T]he parent's decision

to act in its capacity as *parens partriae*, this doctrine must be viewed in light of the parties affected by the action. Specifically, where the state seeks to override a parental decision regarding their child's medical treatment, the court is constrained by its obligation to balance the right of the family to be free from undue influence by the state, and the power of the state to determine what is in the best interest of the infant who may be in danger.[99] Moreover, before invoking the doctrine of *parens patriae* the state must show by clear and convincing proof[100] that the alleged injury was actual,[101] imminent,[102] and of serious magnitude.[103] In addition, if the state seeks to

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[regarding medical care] . . . must yield to the State's interests, as *parens patriae*, in protecting the health and welfare of the child.") (citations omitted); Finlay v. Finlay, 240 N.Y. 429, 433, 148 N.E. 624, 626 (1925) ("[The court functions] as *parens patriae* to do what is best for the interest of the child.").

99. *See In re* Hofbauer, 47 N.Y.2d 648, 363 N.E.2d 1009, 419 N.Y.S.2d 936 (1979).

> It surely cannot be disputed that every parent has a fundamental right to rear its child. While this right is not absolute inasmuch as the State, as *parens patriae*, may intervene to ensure that a child's health or welfare is not being seriously jeopardized by the parent's fault or omission, 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.

Id. at 655, 393 N.E.2d at 1013, 419 N.Y.S.2d at 940 (citations omitted). *Cf. In re* Weberlist, 79 Misc. 2d 753, 756, 360 N.Y.S.2d 783, 786 (Sup. Ct. Spec. T. New York County 1974).

Moreover, the broad discretionary power of the family court judge to exercise its power as *parens patriae* has been further limited by the adoption of detailed rules governing the disposition of cases pertaining to juveniles. Although it was the original intent of the legislature to establish informal tribunals which recognized rehabilitation and reconciliation, *see, e.g.*, Note, *Parens Patriae and Statutory Vagueness in the Juvenile Court*, 82 YALE L.J. 745, 748-49 (1973) [hereinafter cited as *Parens Patriae and Statutory Vagueness*], the FCA also recognizes the need for due process protection for the parties involved. *See generally* Note, *Child Neglect: Due Process for the Parent*, 70 COLUM. L. REV. 465 (1970). Accordingly, it falls upon the judge to balance the need for procedural orderliness through standardized practice in light of the need to insulate families in crisis from the traditional adversarial system. *See Parens Patriae and Statutory Vagueness, supra*, at 758-67.

100. Where a state appears in an action under the doctrine of *parens patriae*, it has the burden of demonstrating that the threatened invasion of rights is of serious magnitude by a standard of clear and convincing evidence. Connecticut v. Massachusetts, 282 U.S. at 669; New York v. New Jersey, 256 U.S. at 309. *See Original Jurisdiction, supra* note 92, at 676. In application to Weber, where the state seeks to circumvent parental rights in cases alleging child neglect, the facts must convincingly show unfitness on the part of the parent. *See In re* Gonzalez, 51 A.D.2d 527, 379 N.Y.S.2d 87 (1st Dep't 1976).

101. To support a bill of complaint under the doctrine of *parens patriae*, there must be a justiciable controversy where the complaining state has actually suffered a wrong or where the state can demonstrate that a sister state's acts imminently threaten to interfere with her interests. *See* Massachusetts v. Missouri, 308 U.S. 1, 15 (1939); *Original Jurisdiction, supra* note 92, at 675.

102. *See* Massachusetts v. Missouri, 308 U.S. at 15; *Original Jurisdiction, supra* note 92, 675. Similarly, In Pennsylvania v. West Virginia, 262 U.S. 553 (1923), the Supreme Court recognized the rights of neighboring states to sue in *parens patriae* to protect their schools whose gas supply was imminently threatened by a proposed interference with the interstate

intervene and regulate the filial bond, the family's right to privacy must also be considered and given great deference.[104]

Bearing these prerequisites in mind, it may be argued that the determination of the appellate division in *Weber* that special term properly entertained the action under its authority to act as *parens patriae* was reached in a logically inconsistent manner. The original petitioner, A. Lawrence Washburn, Jr., and the appointed guardian *ad litem*, William E. Weber, asserted that the parents' decision to forego surgery placed the child in a life-threatening situation and constituted parental neglect.[105] The Supreme Court, Special Term, supported this position and determined that the child would be in imminent danger without the surgery.[106] However, the appellate division's review of the record found no support for this finding and its examination of the medical testimony led it to conclude that the proposed surgery, in light of the great potential for complications, would involve equally as great a risk to the infant's life as the conservative course of treatment chosen by the parents.[107]

Thus, it appears that the existence of "imminent danger" which gave the court jurisdiction to act, was refuted by the appellate court's ruling based on the merits. In particular, the court's invocation of the *parens patriae* doctrine theoretically required a finding that the child was in imminent danger. Indeed, the decision stated that "the record confirms that failure to perform surgery will not place the infant in imminent danger of death."[108]

Through their reliance on the doctrine of *parens patriae*, the appellate division implicitly acknowledged that the supreme court is

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current. The injury alleged was deemed imminent and supported the invocation of the doctrine.

103. Connecticut v. Massachusetts, 282 U.S. at 669; New York v. New Jersey, 256 U.S. at 309.

104. The philosophy of restricted intervention based on the right to privacy is summarized by Justice Brandeis, who stated that "[t]he makers of our Constitution . . . sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." Olmstead v. United States, 277 U.S. 438, 478 (1928). This policy of limited intervention demands an even stricter interpretation where the state attempts to circumvent parental rights. The state may not intervene under the doctrine of *parens patriae* unless the facts clearly demonstrate "convincing proof of unfitness on the part of the parent [to the detriment of] the child." *In re* Gonzalez, 51 A.D.2d at 527, 379 N.Y.S.2d at 87 (quoting *In re* Cole, 212 A.D. 427, 429, 208 N.Y.S. 753, 755 (4th Dep't 1925)).

105. 95 A.D.2d at 588, 467 N.Y.S.2d at 686.

106. *Id.*

107. *Id.* at 589, 467 N.Y.S.2d at 686-87.

108. *Id.*, 467 N.Y.S.2d at 686.

not bound by the provisions of the FCA.[109] Nevertheless, the decision served a useful purpose by subjecting the content of the special term's order to appellate review. Had the appellate panel merely found that the Attorney General's motion to dismiss the action should have been granted by Justice Tannenbaum, the family of the infant never would have had the opportunity to have their rights vindicated by a higher court.

B. The Court's Finding on the Standard of Reasonable Medical Care

In deciding that the supreme court had acted properly when it allowed the proceeding to go forward, the appellate division had the opportunity to address the standard of adequate medical care for incompetent patients. The appellate court relied on section 1012 of the FCA in making its determination that the infant was not neglected within the legal definition of the term.[110] Thus, the court decided that for procedural purposes, the FCA did not control; the trial judge was not obligated to order an investigation by a child protective agency. However, the decision was reached in accordance with case law pertaining to that very act. Therefore, the court put itself in a position to decide the substantive issues of *Weber* in accordance with the underlying principles of the FCA as codified in section 1011.[111] In particular, the decision advocated a case-by-case review of any challenge to a family's choice of medical treatment for an incompetent relative. This case-by-case examination, however, is governed by certain established principles derived from Article 10 of the FCA where the health and well-being of a child are at issue.[112] The appellate division acknowledged the controlling authority of the FCA in neglect proceedings through its reliance on *In re Hofbauer*. Therein, the issue before the New York Court of Appeals was whether the parent of a child with Hodgkins disease exercised the degree of medical care mandated by Article 10 of the FCA. Writing for the court, Judge Jasen stated the factors upon which parents

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109. 60 N.Y.2d at 213, 456 N.E.2d at 1188, 469 N.Y.S.2d at 65.

110. *See supra* note 66.

111. *See supra* text accompanying note 55.

112. *See* N.Y. FAM. CT. ACT § 1012(f)(i)(A) (McKinney 1983). *See also In re* Hofbauer, 47 N.Y.2d 648, 393 N.E.2d 1009, 419 N.Y.S.2d 936.

> A reading of [section 1012 of the FCA] makes clear that the Legislature has imposed upon the parents of child the nondelegable affirmative duty to provide their child with adequate medical care. What constitutes adequate medical care, however, cannot be judged in a vacuum free from external influences, but, rather, each case must be decided on its own particular facts.

Id. at 654-55, 393 N.E.2d at 1013, 419 N.Y.S.2d at 940.

should base their decisions concerning choice of treatment for their children.[113] So as not to violate the provisions of the Act and in order to avoid a neglect proceeding, the parents must seek accredited medical advice, be aware of the seriousness of the illness and the possibility of cure through a certain mode of treatment, and must pursue a treatment for their child that is recommended by their physician and not rejected by responsible medical authority.[114]

In *Weber*, the appellate division applied these criteria and determined that Baby Jane Doe was not subject to parental neglect through her parents' refusal to consent to the proposed surgical procedures.[115] Specifically, the court's review of the infant's medical records revealed that the parents were fully aware of the seriousness of their daughter's condition and based their decision on medically acceptable advice from the hospital physicians and staff.[116]

Although a case-by-case determination may create uncertainty among the judiciary as to the precise application of the standard of adequate medical care, it may ultimately serve to protect the patient and family. *Weber* is illustrative of the two considerations the courts must weigh when called upon to review medical decisions regarding the care of newborns with birth defects. The first factor the court must consider is the need for uniformity in the procedural rules promulgated by the legislature which determine the proper course to be taken in initiating child protective proceedings.[117] Next, the court must consider the reasonableness of the choice of treatment under the totality of the circumstances.

As to the first consideration, in *Weber* it is clear that there was no procedural uniformity. Accordingly, the appellate division was faced with a dilemma. It could reverse the order on a purely procedural ground and not address the merits of such a controversial case, or it could go forward with the case and weigh the second consideration by addressing the substantive issues. The court chose to follow the second alternative and rendered a decision on the standard of acceptable medical care where a family is faced with competing choices of treatment.

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113. *Id.* at 655-56, 393 N.E.2d at 1014, 419 N.Y.S.2d at 940-41.

114. *Id.* at 656, 393 N.E.2d at 1014, 419 N.Y.S.2d at 941.

115. 95 A.D.2d at 589, 467 N.Y.S.2d at 687.

116. *Id.*

117. For a general discussion advocating the consolidation of judicial authority over family matters in a family court, see generally Samuels, *supra* note 5.

Thus, the appellate division attempted to consolidate the judicial authority as to what constitutes legal neglect in accordance with the legislative scheme of the FCA.

In sum, aside from the procedural aspect of the case, the court sought to fairly balance the substantive issues which included the child's right to be protected from abuse or neglect, the parents' fundamental right to rear their child, and the state's authority to intervene if the welfare of the child is jeopardized by parental fault or omission.[118]

IV. THE COURT OF APPEALS DECISION: FAILURE TO RESOLVE PROCEDURAL UNCERTAINTIES

Petitioner Weber pursued the matter on appeal to the New York Court of Appeals, which affirmed the appellate division's dismissal of the case.[119] The Court rejected, however, the relaxed interpretation

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118. Custody, care and nurture of the child rests first with the parents, whose primary function and freedom include obligations that the state can neither supply nor hinder. The judiciary must respect the "private realm" of family life and therefore the state cannot intervene without a showing of clear or present danger. *Cf.* Prince v. Massachusetts, 321 U.S. 158, 166-69 (1944).

119. 60 N.Y.2d at 213, 456 N.E.2d at 1188, 469 N.Y.S.2d at 64. Shortly after the New York Court of Appeals decision was rendered, the United States brought an action in federal district court for an order directing Stony Brook Hospital to allow the Department of Health and Human Services access to the medical records of the infant. United States v. University Hosp. of the State of N.Y., 575 F. Supp. 607 (E.D.N.Y. 1983). Plaintiff contended that release of the records was necessary to determine whether the hospital, in failing to perform the surgery on Baby Jane Doe, violated the provisions of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794 which provides, in pertinent part:

> No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . .

575 F. Supp. at 609. Although the Court found the federal statute applicable, it held that the defendant University Hospital was not in violation thereof. The Court reasoned that

> the defendant University Hospital has complied with a request made by a handicapped child's parents regarding the medical treatment of that child, not merely out of choice, but also in obedience to the legal requirement that said Hospital not perform operations upon a child without the consent of the child's guardians. Consequently, the failure of the defendant University Hospital to perform the surgical procedures cannot possibly be regarded as a violation of the Rehabilitation Act.

Id. at 614. The Court gave deference to the state proceedings and found the parents' decision was based on "due consideration of the medical opinion available and upon a genuine concern of the child." *Id.* at 615.

The district court's decision was affirmed on different grounds by the Court of Appeals, Second Circuit. 729 F.2d 144 (2d Cir. 1984). After careful review of the legislative history of section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794, the court determined that there was no statutory authority to justify ordering the release of the infant's medical records. "Our review of the legislative history has shown that congress never contemplated

of the controlling procedural rules and held that the original motion to dismiss the case by the Attorney General in Supreme Court, Special Term, should have been granted.[120] Based on the trial court's failure to meet the statutory criteria of FCA section 1012, and its failure to order an investigation under FCA section 1034, New York's highest court found it was an abuse of discretion for special term to entertain the action.[121] By resolving the matter in accordance with procedural principles, the Court found "no useful purpose" to review the issue of acceptable medical care and confined its decision to the "fundamental legal principles" of the case.[122]

In *Weber*, the Court of Appeals held that the appointment of a guardian *ad litem* without further investigation was not consistent with the existing legislative scheme of the FCA.[123] In support of this ruling, the Court reviewed the circumstances of the proceeding below. In brief, Justice Tannenbaum permitted a "disinterested" third party to make a direct application to the supreme court to originate neglect proceedings. Upon the initiation of this proceeding, Washburn, the original petitioner, did not satisfy the provisions for standing in FCA section 1032 because he had no relationship with the family or hospital, nor did he seek the assistance of the local Department of Social Services.[124] The attempt to remedy this procedural irregularity by appointing a guardian *ad litem* was rejected by the Court of Appeals.[125]

In rejecting this tactical maneuver,[126] the Court refused to relax the procedural rules of the FCA because such rules are designed to

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that section 504 of the Rehabilitation Act would apply to treatment decisions involving defective newborn infants when the statute was enacted in 1973, when it was amended in 1974, or at any subsequent time." 729 F.2d at 161. The court stated: "[W]e cannot presume that by enacting section 504, congress intended the federal government to enter the field of child care, which . . . has traditionally been occupied by the states. Had congress intended to displace state police power functions, it surely would have made that intention explicit." *Id.* at 160 (citations omitted).

120. The court stated that the broadly grounded motion to dismiss the proceeding by the Attorney General on behalf of the hospital, the initial respondent, should have been granted by the trial court. 60 N.Y.2d at 211, 456 N.E.2d at 1187, 469 N.Y.S.2d at 64.

121. *Id.* at 210-11, 456 N.E.2d 1187, 469 N.Y.S.2d at 64.

122. *Id.* at 211, 456 N.E.2d at 1187, 469 N.Y.S.2d at 64.

123. *Id.* at 213, 456 N.E.2d at 1188, 469 N.Y.S.2d at 65.

124. *See id.* at 212-13, 456 N.E.2d at 1188, 469 N.Y.S.2d at 65.

125. *Id.* at 211, 456 N.E.2d at 1187, 469 N.Y.S.2d at 64.

126. It should be noted that Article 2 of the FCA provides for the appointment of a guardian *ad litem*. *See* N.Y. FAM. CT. ACT § 241-249-a (McKinney 1983). In not pursuing the matter in the family court, the Court of Appeals referred to special term's appointment of Weber as guardian *ad litem* as an attempt to remedy a "procedural deficiency." 60 N.Y.2d at 211, 456 N.E.2d at 1187, 469 N.Y.S.2d at 64 . The surrogate's court is the only other New

protect the substantive rights of the families involved. The Court stated:

> To accept the position of the guardian would have far-reaching implications. As the guardian conceded on oral argument, acceptance of the proposition he espouses would be to recognize the right of any person, without recourse to the strictures of the Family Court Act, to institute judicial proceedings which would catapult him into the very heart of a family circle, there to challenge the most private and most precious responsibility vested in the parents for the care and nurture of their children and at the very least to force the parents to incur the not inconsiderable expenses of extended litigation.[127]

V. THE LIMITED PRECEDENTIAL VALUE OF THE WEBER CASE

The significance of the Court of Appeals' decision in *Weber* on future cases where a "disinterested" third party seeks to improvidently intrude into family matters is limited by two aspects of the decision. First, the basis of the ruling is inherently contradictory and, therefore, the decision is subject to varying interpretations. Second, the decision as to when the supreme court is required to apply the FCA is unclear.

Initially, it may be argued that the decision was reached in a contradictory manner. First, the Court held that there was legislation covering child protective proceedings in Article 10 of the FCA.[128] Moreover, it held that Washburn was statutorily barred from originating the matter,[129] and that it was an abuse of discretion to allow the case to go forward without ordering an investigation into the circumstances.[130] However, the Court also adopted the position that not all child protective proceedings inititated in the supreme court are governed by the procedures of the FCA.[131] Thus, the *Weber* decision created a paradox by adopting a strict application of the FCA, and then refuting this view by stating that its procedural provisions were not to be uniformly enforced. This contradiction was made more apparent by the Court's silence on the circumstances under which the procedures of Article 10 would not be controlling.

York court empowered to appoint a guardian *ad litem*. *See* N.Y. SURR. CT. PROC. ACT § 403 (McKinney 1967 & Supp. 1984-1985).

127. 60 N.Y.2d at 213, 456 N.E.2d at 1188, 469 N.Y.S.2d at 65.

128. *Id.* at 211-12, 456 N.E.2d at 1187, 469 N.Y.S.2d at 64.

129. *Id.* at 211, 456 N.E.2d at 1187, 469 N.Y.S.2d at 64.

130. *Id.* at 210-11, 456 N.E.2d at 1187, 469 N.Y.S.2d at 64.

131. *Id.* at 213, 456 N.E.2d 1188, 469 N.Y.S.2d at 65.

The failure to clearly articulate and resolve the issues in *Weber*, including the circumstances under which the FCA does not apply, is the second factor that limits the precedential value of the decision. The Court of Appeals expressly stated that it was not attempting to define the extent of the obligation to order an investigation or to consult with a child protective agency when such a proceeding is initiated in the supreme court.[132] The Court noted that "[t]here may be occasions when it is appropriate for the court to act without making further inquiry of this nature. On this record, however, no such circumstances are evident."[133]

By limiting the impact of the ruling to the circumstances of *Weber*, the precedential value was limited to the creation of an implied duty to order an investigation where an appointment of a guardian *ad litem* is made at the behest of a "disinterested" third party. Simply stated, the Court of Appeals held that it *may* be an abuse of discretion not to order an investigation in such cases.[134] The situations where it would not be an abuse of discretion to ignore the legislative scheme of the FCA were never explained. By failing to construe these circumstances, there is a possibility that a stranger may once again be permitted to unwarrantedly displace parental authority.

Due to the decision's seemingly inconsistent reliance on the statutory scheme of the FCA, the *stare decisis* value of the *Weber* case remains uncertain. The Court appears to state that the source of the information is not critical in determining whether to order an investigation or to refer the matter to a child protective agency. Conversely, the focus appears to be on whether the judge is satisfied that the infant is truly "friendless" before appointing a guardian *ad litem*.[135] These concerns, however, were never clearly stated in the court's brief opinion and therefore the ruling may be subject to other interpretations.

Given the importance of this issue and the tremendous impact that unauthorized intervention can have on the privacy rights of the family, the Court of Appeals should have more directly addressed the question of when an outside individual can appropriately be appointed a guardian *ad litem* and under which circumstances a court should order an investigation. By failing to do so, there is a risk of a

132. *Id.*

133. *Id.*

134. The Court noted, however, that "[t]here may be occasions when it is appropriate for the court to act without making further inquiry [into the validity of the allegations]." *Id.*

135. *See Appointing Guardian Ad Litem, supra* note 80, at 2.

recurrence of what the Court referred to as "offensive" and "unusual" activities disinterested parties seeking to usurp parental responsibilities.[136] The *Weber* analysis left open the opportunity for a judge to act without making further inquiry, despite the determination that special term must heed the legislative command of the FCA.

CONCLUSION

In view of the procedural differences between the FCA and the CPLR regarding the initiation of child protective proceedings, a litigant's choice of forum can have a profound impact on the substantive rights of the parties. Since Washburn, a stranger to Baby Jane Doe, did not meet the statutory criteria of FCA section 1032, he should have been barred from initiating an Article 10 petition at the trial court level. Moreover, prior to appointing a guardian *ad litem* to protect the infant's interests, Justice Tannenbaum should have referred the case to the local department of social services for investigation. The results of that inquiry would have shown that Baby Jane Doe was not neglected within the statutory definition, and consequently, the proceedings should not have gone forward.

Weber v. Stony Brook Hospital is a dramatic example of how the legislature's experiment in creating a specialized family court with "exclusive original jurisdiction" has not had the practical effect of simplifying and consolidating the law and philosophy pertaining to child protective proceedings. A more satisfying decision, which would have given the lower courts and the bar better guidance, would have been to clearly hold that the FCA codifies and reflects principles of substantive law that should be applied in what was essentially a child protective proceeding. In weighing whether or not Supreme Court, Special Term, should have exercised its discretion to appoint a guardian *ad litem*, it should have acted in accordance with the legislative intent underpinning the FCA. The special term should have declined to exercise its jurisdiction over a matter which would have been more appropriately analyzed in the family court.

136. 60 N.Y.2d at 211, 456 N.E.2d at 1187, 469 N.Y.S.2d at 64.