Touro Law Review

Volume 8 | Number 1 Article 44

1991

Free Exercise of Religion

FREE EXERCISE OF RELIGION

N.Y. CONST. art. I, § 3:

The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all mankind . . . .

U.S. CONST. amend. I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .

COURT OF APPEALS

Fosmire v. Nicoleau[658]
(decided January 18, 1990)

Appellee, Denise Nicoleau, an adult Jehovah's Witness, claimed that a court order "allowing appellant hospital to administer blood transfusions against her will" violated her common-law, statutory and constitutional right to make her own medical decisions as well as her constitutional right to practice her religion free of governmental interference.[659] The court of appeals affirmed the appellate division's judgment that the supreme court should not have signed the involuntary treatment order without first giving appellee notice and an opportunity for, at the minimum, an informal hearing.

As to the merits, the court of appeals held that the patient had a common law and statutory right to make her own medical decisions. Finding that the hospital had not identified a superior state interest to override this right, it was not necessary to reach a constitutional determination on either the patient's right to make her own medical decision, or her constitutional right to the free exercise of her religion.[660]

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658. 75 N.Y.2d 218, 551 N.E.2d 77, 551 N.Y.S.2d 876 (1990).
659. *Id.* at 223, 551 N.E.2d at 79, 551 N.Y.S.2d at 878.
660. *Id.* at 225, 551 N.E.2d at 80, 551 N.Y.S.2d at 879.

Appellee suffered a significant loss of blood following a cesarean section. However, she refused blood transfusions based upon her religious beliefs and her fear of contracting a communicable disease via blood transfusions.[661] Hours after the operation, the hospital made an application to the court requesting a court order authorizing the transfusion. The application was supported by the attending physician's affidavit stating that, in his opinion, the transfusions were necessary to save the patient's life.[662]

The supreme court authorized the blood transfusions. However, neither the patient nor her family received prior notice of the application to the court. The application had been made about 9:00 a.m. and signed at noon the same day. Notice that the request had been granted, however, was not given until later the same day. Subsequently, the patient received two blood transfusions, the first at 6:00 p.m., the second, two days later.[663] The patient then applied for a vacatur of the order. The appellate division vacated the order[664] and the hospital brought this appeal to the court of appeals.

In holding that the *ex parte* order should not have been signed without notice to the patient and an opportunity to be heard, the court of appeals also determined that the supreme court "compounded the error by not providing that they be notified that the order had been signed so that they could seek prompt review before the transfusions were given."[665] The court found that the nine hour time lapse between the time the hospital's application was made and the time the first transfusion was given, allowed ample time for a hearing.[666] Consequently, the court noted its agreement with the appellate division's conclusion that Mrs. Nicoleau should have been afforded a hearing. Accordingly, the court reasoned that an "[a]pplication for court ordered medical treatment affect[s] important rights of the patient[] and should generally comply with due process requirements of notice and the

661. *Id.* at 223, 551 N.E.2d at 79, 551 N.Y.S.2d at 878.
662. *Id.*
663. *Id.*
664. *Id.*
665. *Id.*
666. *Id.* at 224-25, 551 N.E.2d at 80, 551 N.Y.S.2d at 875.

right to be heard before the order is signed."[667] The court noted, however, that emergency situations may be treated differently.[668]

On the merits, the court of appeals did not reach the constitutional issues of "whether . . . [t]he order violate[d] the patient's constitutional right to religious freedom or to determine the course of her own medical treatment."[669] Instead, the court found that the patient had a "personal common law and statutory right to decline the transfusion."[670] Relying on its previous holding in *Rivers v. Katz*,[671] the court noted that this fundamental common law right to refuse life sustaining medical treatment is coextensive with a patient's liberty interests, which are protected by the state constitution's due process clause,[672] and can be overcome only by a compelling state interest.

Judge Simons concurred in the judgment. He disagreed with the majority's determination that because no state statute or regulation was called into question, a state constitutional analysis was not necessary. He reasoned that a court could conclude that the state's interest in preserving the life of an otherwise healthy person, who was the parent of a minor child, could outweigh the common law right to refuse treatment,[673] thus, rendering an analysis of the constitutional issues necessary. Judge Simons' principal concern was that the court's analysis, while stating that the common law right to refuse medical treatment is subject only to overriding state interests, in reality, renders an individual's right to refuse medical treatment absolute.[674] This is because the court only considered the specific interests raised by the state in this case, while ignoring other considerations such as the

667. *Id.*

668. *Id.* at 225, 551 N.E.2d at 80, 551 N.Y.S.2d at 879; *see* N.Y. PUB. HEALTH LAW § 2504 (McKinney 1985).

669. *Fosmire*, 75 N.Y.2d at 225, 551 N.E.2d at 80, 551 N.Y.S.2d at 879.

670. *Id.*; *see* Schloendorff v. Society of N.Y. Hosp., 211 N.Y. 125, 105 N.E. 92 (1914) (Cardozo, J.).

671. 67 N.Y.2d 485, 495 N.E.2d 337, 504 N.Y.S.2d 74 (1986).

672. *Fosmire*, 75 N.Y.2d at 226, 551 N.E.2d at 81, 551 N.Y.S.2d at 880.

673. *Id.* at 231-33, 551 N.E.2d at 84-86, 551 N.Y.S.2d at 883-85 (Simons, J., concurring).

674. *Id.* at 234, 551 N.E.2d at 86, 551 N.Y.S.2d at 885.

"[s]tate's commitment to the sanctity of life . . . ."[675]

As a Jehovah's Witness, Mrs. Nicoleau refused blood transfusions based on religious beliefs and, therefore, the authorization to proceed with the transfusions infringed upon her constitutional right to free exercise of religion.[676] Before overriding her religious beliefs and thus interfering with her fundamental state constitutional rights, the state "must demonstrate under the strict scrutiny test that the treatment pursues an unusually important or compelling goal and that permitting her to avoid the treatment will hinder the fulfillment of that goal."[677] Although Judge Simons found that the state's interest in preserving the life of an otherwise healthy person, who was the parent of a minor child, could outweigh the common law right to refuse medical treatment, he concluded that it was not sufficient to constitute the compelling state interest necessary to overcome the constitutionally mandated right to free exercise of religion.[678] Because there was no evidence of such a compelling state interest, he would have affirmed the appellate division's decision.[679]

Judge Hancock concurred in the opinion because he agreed that notice and an opportunity to be heard were necessary in order to decide what the individual's and society's interests were in order to weigh them effectively. He stated that society's countervailing interests must be delicately balanced against the patient's rights. He also believed that Judge Simons' concurrence, while requiring a compelling state interest in order to constitutionally infringe upon the right to free religious exercise, in effect, rendered the patient's right absolute.[680]

Judge Hancock then proposed a list of factors to be considered in balancing the "competing individual and societal interests."[681]

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675. *Id.* at 232, 551 N.E.2d at 85, 551 N.Y.S.2d at 884.

676. U.S. CONST. amend. I; N.Y. CONST. art. I, § 3.

677. *Fosmire*, 75 N.Y.2d at 234, 551 N.E.2d 86, 551 N.Y.S.2d 691.

678. *Id.* at 232, 551 N.E.2d at 84-85, 551 N.Y.S.2d at 883-84.

679. *Id.* at 234, 551 N.E.2d at 86, 551 N.Y.S.2d at 885.

680. *Id.* at 235-39, 551 N.E.2d at 86-89, 551 N.Y.S.2d at 885-88 (Hancock, J., concurring).

681. *Id.* at 238, 551 N.E.2d at 88, 551 N.Y.S.2d at 887 (Hancock, J., concurring).

Judge Hancock stated that the court must consider:

> [T]he precise nature, extent and intensity of the patient's objection to the proposed medical treatment; the type, invasiveness and effects of that treatment; the nature of the patient's illness; the necessity or not of the treatment; the patient's prognosis with and without treatment; the age, maturity and understanding of the patient; the welfare of the patient's family, particularly their dependency on the patient and the impact on them if treatment is withheld.[682]

In *Winters v. Miller*,[683] the United States Court of Appeals for the Second Circuit addressed the issue raised in Judge Hancock's concurrence. In this case, a Christian Scientist refused basic medical treatment. The state hospital, however, medicated her involuntarily and based its decision on the state's *parens patriae* power. In so doing, the hospital failed to have the patient declared incompetent at a judicial hearing before administering treatment, as is required when a state seeks to exercise its *parens patriae* powers.[684] The court wrote that had the hospital given the patient a chance to testify before a tribunal, the patient could have convinced the court that she was competent and that other medical alternatives would have sufficed. "Under our Constitution there is no procedural right more fundamental than the right of the citizen, except in extraordinary circumstances, to tell his side of the story to an impartial tribunal."[685] Therefore, the patient should have been given the opportunity to be heard before being subjected to unwanted treatment which violated her constitutional right to free exercise of religion.

The United States Supreme Court and lower federal courts have held that due process requires notice and an opportunity to be heard before a prisoner is moved to a mental facility,[686] before a mentally retarded adult is involuntarily committed to an

682. *Id.* at 238, 551 N.E.2d at 88-89, 551 N.Y.S.2d at 887-88 (Hancock, J., concurring).

683. 446 F.2d 65 (2d Cir. 1971).

684. *Id.* at 710.

685. *Id.*

686. Vitek v. Jones, 445 U.S. 480 (1980).

institution,[687] and before an involuntarily committed mentally ill patient is medicated over objection.[688]

In the area of religious freedom, addressed by both Judges Simons and Hancock in their concurrences, the United States Supreme Court has stated that where substantial pressure is placed upon "an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists."[689]

In *Winters v. Miller*,[690] where the court addressed the issue of refusal of basic medical treatment based upon religious grounds, the court stated that infringement of one's right to free exercise of religion can only take place "to prevent grave and immediate danger . . . ."[691] Although the *Fosmire* court addressed only procedural due process rights, the *Winters* court compared the standard of review to be used when scrutinizing a state's infringement upon substantive due process protections as opposed to a state's infringement upon the first amendment right to free exercise of religion:

> Much of the vagueness of the due process clause disappears when the specific prohibitions of the First [amendment] become its standard. The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds.[692] Thus, the *Winters* court recognized the extremely difficult burden the state has in sustaining an infringement upon the free exercise of religion in favor of administering basic medical treatment.

Other federal courts, however, have been inconsistent when

687. Doe v. Austin, 848 F.2d 1386 (6th Cir. 1988).

688. Rennie v. Klein, 476 F. Supp. 1294 (D.N.J. 1979).

689. Hobbie v. Unemployment Appeals Comm'n of Florida, 480 U.S. 136, 141 (1987) (*citing* Thomas v. Review Bd. of Indiana Employment Div., 450 U.S. 707, 717-18 (1981)).

690. 446 F.2d 65 (2d Cir. 1971).

691. *Id.* at 69 (quoting West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943)).

692. *Winters*, 446 F.2d at 69 (quoting *Barnette*, 319 U.S. at 639).

determining whether the state may authorize life sustaining medical treatment, contrary to a patient's religious based objection, when death is imminent. In 1964, a United States Court of Appeals supported state interference with the free exercise of religion because the patient's life "hung in the balance."[693] The plaintiff was considered incompetent to make a reasoned treatment decision and therefore, the state acted properly in requiring the hospital to provide life sustaining medical treatment.[694] On the other hand, in 1972, the same court supported a judge's decision to reject state intervention when a Jehovah's Witness rejected life sustaining blood transfusions on religious grounds.[695] Since the patient was competent to make a treatment decision, the court agreed that there was no sufficient basis for state intervention.[696]

Thus, although the *Fosmire* court decided the case upon Mrs. Nicoleau's common law and statutory right to refuse life sustaining medical treatment, the constitutional issues raised by Mrs. Nicoleau have received a significant amount of attention by the federal courts. Judge Hancock's concurrence, stressing the vital nature of notice and an opportunity to be heard before being medicated involuntarily, is supported by a wide range of federal case law. On the other hand, the issue of religious freedom as the motive to refuse life sustaining medical treatment has received less consistent treatment among the federal courts.

693. *In re* President and Directors of Georgetown College, 331 F.2d 1000, 1009 (D.C. Cir. 1964).

694. *Id.* at 1008.

695. *In re* Osborne, 294 A.2d 372 (D.C. Cir. 1972).

696. *Id.* at 375.