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# Maternal Rights v. Fetal Rights: Court-Ordered Caesareans

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# Maternal Rights v. Fetal Rights: Court-Ordered Caesareans

*In re A.C.*[1]

According to a recent national survey, from 1981 to 1986 there were fifteen instances where court orders were sought to authorize caesarean section interventions against a mother's wishes.[2] In thirteen of those instances the orders were granted.[3] *In re A.C.* is the first published decision in which an appellate court refused to affirm a trial court's order authorizing a caesarean section.[4] After examining this decision, this Note analyzes the three main arguments used by courts and commentators who favor the granting of orders for non-consensual caesareans: abortion law, child neglect law and the state's interest in third parties. The analysis then turns to the responses made by the *In re A.C.* court, and those responses available to the court, but not utilized in its opinion. Finally, the Note will focus on how Missouri courts might address the various issues if faced with a caesarean intervention case.

## I. FACTS

Angela C. was first diagnosed with cancer when she was thirteen years old.[5] She married at the age of twenty-seven and soon thereafter became pregnant.[6] At that time her cancer had been in remission for three years[7] and

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1. 573 A.2d 1235 (D.C. 1990) (en banc).

2. *Id.* at 1243 (citing Kolder, Gallagher & Parsons, *Court-Ordered Obstetrical Interventions*, 316 NEW ENG. J. MED. 1192, 1192-93 (1987)). Court-ordered caesareans were sought in eleven states: Colorado, Hawaii, Illinois, Maine, Michigan, Minnesota, Ohio, Pennsylvania, South Carolina, Tennessee and Texas. The orders were granted in every state but Maine. Kolder, Gallagher & Parsons, *supra* at 1193.

3. *In re A.C.*, 573 A.2d at 1243 (citing Kolder, Gallagher & Parsons, *supra* note 2, at 1192-93). *See, e.g., In re* Unborn Baby Kenner, No. 79 JN 83 (Colo. Juv. Ct. Mar. 6, 1979); Jefferson v. Griffin Spalding County Hosp. Auth., 247 Ga. 86, 274 S.E.2d 457 (1981); *In re* Baby Jeffries, No. 14004 (Jackson County, Mich. P. Ct. May 24, 1982); North Cent. Bronx Hosp. v. Headley, No. 1992-85 (N.Y. Sup. Ct. Jan. 6, 1986).

4. The only published decision from an appellate court upholding a trial court's order for a non-consensual caesarean is Jefferson v. Griffin Spalding County Hosp. Auth., 247 Ga. 86, 274 S.E.2d 457 (1981).

5. *In re A.C.*, 573 A.2d at 1238.

6. *Id.*

7. *In re* A.C., 533 A.2d 611, 612 (D.C. 1987), *vacated,* 539 A.2d 203 (D.C. 1988).

she "very much wanted the child."[8] During Angela's twenty-fifth week of pregnancy, an inoperable tumor was found in her lung.[9] She was admitted to George Washington University Hospital on June 11, 1987 and her condition was deemed terminal.[10]

On June 15, during Angela's twenty-sixth week of pregnancy, she agreed to medical treatment designed to extend her life past the twenty-eighth week of pregnancy.[11] Her physicians believed that the fetus' chances for survival were much better at twenty-eight weeks than at twenty-six.[12] Throughout the evening of the 15th, Angela's condition declined rapidly, making it necessary to perform a caesarean section promptly if the fetus were to have any chance of survival.[13]

The next morning, June 16, the hospital requested a declaratory judgment from the Superior Court of the District of Columbia as to whether it should intervene by caesarean section to save the life of the fetus.[14] The court met at the hospital that morning, appointing council for Angela and the fetus, respectively.[15] The District of Columbia was allowed to intervene for the fetus as *parens patriae*.[16] The court heard testimony that at twenty-six and one half weeks the fetus was viable and that any delay in delivery lessened its chances of survival.[17] There was also testimony that Angela was not competent at that time to consent to the surgery and that the operation might hasten her death.[18] There was "considerable dispute" as to whether Angela would have consented to a caesarean section on the date of the hearing.[19]

The trial court found that it was not clear what Angela's views were "with respect to the issue of whether or not the child should live or die."[20]

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8. *In re A.C.*, 573 A.2d at 1238.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* at 1239. A neonatologist testified that this particular fetus had a fifty to sixty percent chance of survival and a less than twenty percent chance of substantial impairment if delivered promptly. *Id.*

14. *In re A.C.*, 533 A.2d at 612.

15. *In re A.C.*, 573 A.2d at 1239.

16. *Id.*

17. *Id.*

18. *Id.* at 1239-40.

19. *Id.* Angela had previously indicated that when the fetus reached the gestational age of twenty-eight weeks, she would give up her life so the fetus could survive. There were, however, no discussions about what she would want if the choice were to present itself before that point in time. *In re A.C.*, 533 A.2d at 613.

20. *In re A.C.*, 573 A.2d at 1240.

The court then determined that, because the fetus was viable, the District of Columbia had an "important and legitimate" interest in protecting its potential life.[21] Accordingly, the court ordered a caesarean section.[22]

Within an hour of the trial court's order, Angela's counsel requested a stay from the District of Columbia Court of Appeals.[23] A telephonic hearing was held before a three-judge motions division.[24] The court denied the stay based on the medical judgment that Angela would not live long and that the fetus had a chance of survival if delivered by caesarean section.[25] Shortly thereafter, the operation was performed.[26]

The District of Columbia Court of Appeals granted a petition for rehearing *en banc*.[27] In vacating the trial court's order, the highest court of the District of Columbia held that in virtually all cases when a pregnant patient with a viable fetus is near death, the caesarean section question is to be answered by the patient on behalf of herself and the fetus.[28] If the patient

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21. *Id.*

22. *Id.* The court expressly relied upon an earlier superior court decision, *In re* Maydun, 114 Daily Wash. L. Rptr. 2233 (D.C. Sup. Ct. July 26, 1986).

> *Maydun* involved a woman whose pregnancy had come to term and whose abnormally long labor placed the fetus at risk of death or brain damage. The woman refused her consent for a Caesarean section to be performed. The Superior Court ordered that the hospital take steps to 'protect the birth and safety of the fetus,' including a Caesarean section if necessary.

*In re A.C.*, 533 A.2d at 613.

23. Annas, *She's Going to Die: The Case of Angela C., 18* HASTINGS CENTER REP. 23 (1988).

24. *Id.*

25. *In re A.C.*, 533 A.2d at 613.

26. *In re A.C.*, 573 A.2d at 1241. The baby lived for just a few hours. Angela died two days later. *Id.*

27. *In re* A.C., 539 A.2d 203 (D.C. 1988). The court chose to hear this case, despite its apparent mootness, for two reasons. The first is that the resolution of the legal issues might affect a separate action between the parties, in that the personal representative of Angela's estate has filed a separate action against the hospital, based upon the events leading up to the trial court's order. The second reason is that what occurred in this case is "capable of repetition, yet evading review." *In re A.C.*, 573 A.2d at 1241-42.

28. *In re A.C.*, 573 A.2d at 1237. Judge Belson, the lone dissenter, believes more weight should be given to the state's interest in preserving life and the fetus' interest in survival. Judge Belson advocates the use of a balancing test in cases where a women is pregnant with a viable fetus. This balancing test would include such factors as the danger to the mother's physical or mental health, the mother's religious beliefs, the invasiveness of the treatment, the likelihood of the fetus's survival, the chances of the fetus entering life with a disability, and most importantly, the fetus's interest in life. Using this balancing test, Judge Belson concluded that the trial court did not err.

is not sufficiently competent to make an informed decision, her decision must be ascertained through a procedure known as substituted judgment.[29]

## II. THE INSTANT DECISION

The court laid its foundation by noting that every patient has the right to accept or refuse medical treatment.[30] This right to bodily integrity exists both under the common law and the Constitution.[31] The court further recognized that this right belongs both to competent and incompetent patients and the quality of a patient's life is not a relevant factor.[32]

The court then advanced the argument that courts will not compel a person to accept a significant intrusion upon his or her body to benefit the health of another person.[33] The court specifically rejected the theory that fetal cases are somehow different in that since a woman "has chosen to lend her body to bring [a] child into the world [she] has an enhanced duty to assure the welfare of the fetus, sufficient . . . to require her to undergo caesarean surgery."[34] The court's rationale was that a fetus does not have rights superior to those of a person who is already born.[35]

Another rationale advanced by the court is that court-ordered caesareans erode trust between a pregnant woman and her physician.[36] Without this element of trust, a patient may fear communication of relevant information relating to diagnosis and treatment.[37] In addition, women with a high risk of experiencing complications during pregnancy or childbirth may shy away

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*Id.* at 1253-59 (Belson, J., dissenting).

29. *Id.* at 1237.

30. *Id.* at 1247. This court and others, however, have recognized that this right is not absolute. *Id.* at 1245-46. *See, e.g., In re* Boyd, 403 A.2d 744 (D.C. 1979); *In re* Osborne, 294 A.2d 372 (D.C. 1972).

31. *In re A.C.*, 573 A.2d at 1243-45.

32. *Id.* at 1247.

33. *Id.* at 1243-44.

34. *Id.* at 1244.

35. *Id.*

36. *Id.* at 1248.

37. *Id.*

from the health care system to avoid the possibility of court—ordered caesareans.[38]

The court also voiced concern over the time constraints often present in judicial proceedings such as the one in this case.[39] These time constraints make communication between the pregnant patient and counsel difficult, and often impossible.[40] They also make it difficult for counsel to organize an effective defense of the patient's interests in liberty, privacy and bodily integrity.[41] The court stated that "[a]ny intrusion implicating such basic values ought not to be lightly undertaken when the mother not only is precluded from conducting pre-trial discovery . . . but also is in no position to prepare meaningfully for trial."[42] The court recognized that not only is the patient at a disadvantage, but the judge also is hindered in resolving this legal dilemma.[43]

The court concluded that only for "truly extraordinary or compelling reasons" will a patient's wishes be overridden.[44] The court emphasized that "such cases will be extremely rare and truly exceptional."[45] The court then found that extraordinary or compelling reasons did not exist in this case and Angela's wishes, whatever they may be, should prevail.[46]

Finally, the court prescribed procedures a trial judge should follow when similar cases arise in the future. The judge must determine whether the patient is competent to make an informed decision about medical treatment.[47] If the patient is competent and makes a decision, his or her wishes will control

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38. *Id.* For instance, in one case, when the court authorized a nonconsensual caesarean section, the mother went into hiding. In another, the mother left the hospital and had delivery at home with the help of a midwife. Both babies were delivered successfully. Rhoden, *Cesareans and Samaritans,* 15 LAW, MED. & HEALTH CARE 118, 123 (1987).

39. *In re A.C.*, 573 A.2d at 1248.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 1247.

45. *Id.* at 1252.

46. *Id.* The court did not foreclose the possibility that there may be a scenario in which a state's compelling interest would override a patient's wishes. The court refused to decide "whether or in what circumstances, the state's interests can ever prevail over the interests of a pregnant patient." *Id.* The court, however, added that "some may doubt that there could ever be a situation extraordinary or compelling enough to justify a massive intrusion into a person's body, such as a caesarean section, against that person's will." *Id.*

47. *Id.*

in "virtually all cases."[48] If the judge finds that the patient is not capable of making an informed decision, then the court must make a substituted judgment for the patient.[49]

## III. DISCUSSION

Courts overwhelmingly have authorized caesareans over the objections of the patient. This section examines various rationales used by courts and commentators to justify intervention. The discussion will then focus on how *In re A.C.* responds to the various arguments. Finally, this section will discuss additional arguments available in the *In re A.C.* fact situation.

### *A. Abortion Law*

*Roe v. Wade*[50] has been used by courts to justify orders for non-consensual caesareans.[51] A basic proposition under *Roe* is that a woman may elect to have an abortion prior to the viability of her fetus.[52] Once a fetus is viable, however, "the state's interest in potential life becomes compelling."[53] At that point the state may prohibit abortion, unless the woman's life or health is at issue.[54] When using *Roe* to justify a caesarean

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48. *Id.*

49. *Id.* This means the court, "as surrogate for the incompetent, is to determine as best it can what choice that individual, if competent, would make with respect to medical procedures." *Id.* at 1249 (citing *In re* Boyd, 403 A.2d 744, 750 (D.C. 1990)). In summarizing what factors should be considered when determining a patient's desires, the court stated that

> [a] court must consider the totality of the evidence, focusing particularly on written or oral directions concerning treatment to family, friends, and health-care professionals. The court should also take into account the patient's past decisions regarding medical treatment, and attempt to ascertain from what is known about the patient's value system, goals, and desires what the patient would decide if competent.

*Id.* at 1251.

50. 410 U.S. 113 (1973).

51. Rhoden, *supra* note 38, at 118-19. *See, e.g., In re* Unborn Baby Kenner, No. 79 JN 83, slip op. at 6-9 (Colo. Juv. Ct. Mar. 6, 1979); Jefferson v. Griffin Spalding County Hosp. Auth., 247 Ga. 86, 90, 274 S.E.2d 457, 460 (1981); North Cent. Bronx Hosp. v. Headley, No. 1992-85, slip op. at 5 (N.Y. Sup. Ct. Jan. 6, 1986).

52. Rhoden, *supra* note 38, at 119 (citing Roe v. Wade, 410 U.S. 113, 163-64 (1973)).

53. *Id.* For a discussion of state's interests, see Rush, *Prenatal Caretaking: Limits of State Intervention With and Without Roe*, 39 U. FLA. L. REV. 55 (1987).

54. Rhoden, *supra* note 38, at 119 (citing *Roe*, 410 U.S. at 163-64).

section, courts reason that "since states can prohibit the intentional termination of fetal life after viability, they can likewise protect viable fetuses by preventing vaginal delivery when it will have the same effect as abortion."[55]

The court in *In re A.C.* specifically stated that "this case is not about abortion."[56] Accordingly, the court made no attempt to address the abortion law rationale used by some courts to justify orders for non-consensual caesareans.[57] There is an argument, however, that the court may have used.

While the state may, in most instances, constitutionally prohibit abortion after viability,[58] it does not follow that the state may go further and require major surgery to promote the life and health of the fetus.[59] There is a fundamental difference between prohibiting abortion and mandating major surgical intervention.[60]

In fact, one could argue that court-ordered caesarean sections are precluded by *Roe* and subsequent related decisions.[61] Those cases emphasize that any state interest in the potential life of a fetus must be subordinated to the health and safety of the pregnant woman;[62] thus, doctors cannot place the fetus' welfare above the woman's health.[63] Physicians cannot be required to make "trade-offs" between a woman's health and chances of a fetus' survival.[64] If a woman's life or health is threatened at any time during her pregnancy, including post-viability, she must be allowed to have an abortion.[65] In the typical case, a caesarean operation is performed for the sake of fetal health and not for the woman's welfare.[66] In fact, a caesarean

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55. *Id. See supra* note 51.

56. *In re A.C.*, 573 A.2d at 1245 n.9 (quoting *In re A.C.*, 533 A.2d at 614).

57. *See supra* note 51.

58. Roe v. Wade, 410 U.S. 113, 163-64 (1973).

59. Rhoden, *supra* note 38, at 119. *See* Note, *Jefferson v. Griffin Spalding County Hospital Authority: Court-Ordered Surgery to Protect the Life of an Unborn Child,* 9 AM J.L. & MED 83, 88 (1983).

60. Rhoden, *supra* note 38, at 119.

61. *Id.*

62. *See* Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 768-69 (1986); *Roe*, 410 U.S. at 163-64; *c.f.* Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476, 485 n.8 (1983).

63. Rhoden, *The Judge in the Delivery Room: The Emergence of Court-Ordered Cesareans,* 74 CALIF. L. REV. 1951, 1989-90 (1986). Cases have emphasized that health includes a wide range of factors, both physical and psychological. *Id.* at 1990. *See, e.g.,* Calautti v. Franklin, 439 U.S. 379, 400 (1979); Doe v. Bolton, 410 U.S. 179, 192 (1973); United States v. Vuitch, 402 U.S. 62, 72 (1971).

64. Rhoden, *supra* note 38, at 119. *See Thornburgh*, 476 U.S. at 769; *Calautti*, 439 U.S. at 400.

65. Rhoden, *supra* note 38, at 119 (citing *Roe*, 410 U.S at 163-64).

66. Rhoden, *supra* note 38, at 121.

section usually places the woman at greater risk, as the surgery "involves approximately four times the maternal mortality rate of vaginal delivery."[67] Therefore, under abortion law the state could not mandate caesarean delivery. This holds true "even in those cases where the fetus' health [is] seriously threatened by vaginal delivery, because the mother's health will still almost always be somewhat threatened by surgical delivery."[68]

In the instant case, there was testimony that the proposed caesarean section would have had a detrimental effect on the health of Angela;[69] therefore, under *Roe* she could have ordered her pregnancy terminated at any time prior to her death.[70] Certainly, if Angela could have authorized the termination in order to protect her health, she could also authorize the continuation of her pregnancy to protect her health.

### *B. Child Neglect / Fetal Neglect*

Many are troubled by the thought that a woman could, with impunity, cause or fail to prevent disabling defects of her child or terminate a viable fetus, especially when the reasoning of the patient is thought callous or irrational.[71] Most would agree there is a moral obligation for a woman to act

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67. *Id.* at 119 (citing NATIONAL INST. OF HEALTH, U.S. DEP'T OF HEALTH AND HUMAN SERVS., PUB. NO. 82-2067, CESAREAN CHILDBIRTH: REPORT OF A CONSENSUS DEVELOPMENT CONFERENCE 268 (Oct. 1981) [hereinafter CESAREAN CHILDBIRTH]). Maternal mortality in general was 9.9/100,000 in 1982, whereas caesarean section mortality was 40.9/100,000. CESAREAN CHILDBIRTH, *supra*, at 255; National Center for Health Statistics, *Advance Report of Final Mortality Statistics* 1982, 33 MONTHLY VITAL STATISTICS REP. 6 (No. 9 & Supp. Dec. 20, 1984). Other reasons why a woman may prefer vaginal delivery over a caesarean section include: vaginal delivery allows the mother to be a conscious participant during the delivery process while a caesarean section often leaves women feeling inadequate, guilty, and disappointed. A caesarean section "may interfere with early bonding between mother and infant, lead to medical complications and unappealing scars, require subsequent deliveries to be by cesarean section, and cost more money than vaginal delivery." Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405, 454 (citing CESAREAN CHILDBIRTH, *supra*, at 419-26). For further risks of caesarean delivery, see Rhoden, *supra* note 63, at 1957-59.

68. Rhoden, *supra* note 38, at 119.

69. *See* text accompanying *supra* note 18.

70. Annas, *supra* note 23, at 24.

71. Robertson & Schulman, *Pregnancy and Prenatal Harm to Offspring: The Case of Mothers with PKU*, HASTINGS CENTER REP. 23 (1987). Although most women do consent to a necessary caesarean delivery, some refuse due to religious beliefs, eccentric preferences, individual weighing of values, fear of surgery, or desire not to have a child. Lieberman, Mazor, Chaim & Cohen, *The Fetal Right to Live*, 53

responsibly toward her fetus.[72] Others would go further and create a legal duty upon the mother to prevent fetal harm.[73]

Courts and commentators have relied upon child neglect laws in arguing that a court should override a mother's objections to caesarean delivery when the life or health of the fetus is at stake.[74] Parents are not allowed to refuse essential medical care for their children.[75] Consequently, a pregnant woman who has chosen to go to term cannot refuse care necessary for the well-being of her fetus.[76] To decline such care is the equivalent of child neglect.[77] If courts will not allow parents to deny medical care to their child, then they should not allow a pregnant woman to deny care to her viable fetus.[78]

This argument finds support in that virtually all states allow tort claims for prenatal injuries when a child, who otherwise would have been born healthy, is born with disabilities.[79] The recent trend toward lifting inter-family tort immunity permits such suits by children against parents who have caused the child avoidable injury.[80]

The *In re A.C.* court did not directly address the fetal neglect argument; however, the court did reject the notion that by going to term a woman has

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OBSTETRICS & GYNECOLOGY 515 (1979)); Robertson, *supra* note 67, at 455 (citing Bowes & Selgestad, *Fetal Versus Maternal Rights: Medical and Legal Perspectives*, 58 OBSTETRICS & GYNECOLOGY 209 (1981).

72. Robertson & Schulman, *supra* note 71, at 24.

73. *See* Robertson, *supra* note 67, at 456-57.

74. Rhoden, *supra* note 38, at 119-20. *See, e.g.*, Jefferson v. Griffin Spalding County Hosp. Auth., 247 Ga. 86, 88-89, 274 S.E.2d 457, 459-60 (1981); Myers, *Abuse and Neglect of the Unborn: Can the State Intervene?*, 23 DUQ. L. REV. 1, 26-31 (1984); Robertson, *The Right to Procreate and In Utero Fetal Therapy*, 3 J. LEGAL MED. 333, 352-53, 357-59 (1982).

75. Rhoden, *supra* note 38, at 119-120. *See, e.g.*, Morrison v. State, 252 S.W.2d 97 (Mo. Ct. App. 1952); *In re* Jensen, 633 P.2d 1302 (Or. Ct. App. 1981).

76. Rhoden, *supra* note 38, at 120. *See* Robertson, *supra* note 67, at 443-47.

77. Rhoden, *supra* note 38, at 120.

78. *Id.*

79. Johnsen, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE. L.J. 599, 601 (1986) (citing W. PROSSER & W. KEETON, THE LAW OF TORTS § 55, at 368 (5th ed. 1984) [hereinafter PROSSER & KEETON]); Robertson & Schulman, *supra* note 71, at 27.

80. Robertson & Schulman, *supra* note 71, at 27. *See, e.g.*, Grodin v. Grodin, 102 Mich. App. 396, 301 N.W.2d 869 (1980). *But see* Beal, *"Can I Sue Mommy?" An Analysis of a Woman's Tort Liability for Prenatal Injures to Her Child Born Alive*, 21 SAN DIEGO L. REV. 325, 326 n.8 (1984). For an account of the abrogation of inter-family tort immunity, see Note, *The Child's Right to "Life, Liberty, and the Pursuit of Happiness:" Suits by Children Against Parents for Abuse, Neglect and Abandonment*, 34 RUTGERS L. REV. 154 (1981).

an "enhanced duty to assure the welfare of the fetus, sufficient . . . to undergo caesarean surgery."[81] This statement seems to recognize the argument that fetal neglect and child neglect cannot be equated.

Child neglect is the failure of a parent to perform the legal duties owed to the child.[82] The term "fetal neglect" implies that parents have legally enforceable duties to fetuses.[83] Historically, though, women have not been held to have legally enforceable duties to fetuses,[84] and currently there are no fetal neglect statutes.[85]

A child must be treated because parents have a legal obligation to provide necessary medical care for their children, and treatment does not compromise the bodily integrity of the parent.[86] Children can easily be treated despite parental objection.[87] Fetuses, however, are a physical part of the mother and cannot be treated without invading her body.[88] No court would require a mother to undergo major surgery for the benefit of a born child no matter how serious the potential consequences of refusal.[89] There is a basic difference between ordering medical treatment for a child and compelling a woman to undergo surgery for the benefit of a fetus.[90] Because of the unique physical relationship between the mother and her fetus, the simplistic child neglect/fetal neglect analogy should not be utilized.[91]

### *C. State's Interest in Third Parties*

In most medical care refusal cases, a court holds that a patient's right to privacy overrides the state's interest in preserving life, especially if the patient's life is the only one at stake.[92] This remains true even if the result

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81. *In re* A.C., 573 A.2d 1235, 1244 (D.C. 1990).
82. Rhoden, *supra* note 38, at 120.
83. *Id.*
84. *Id.*
85. Annas, *supra* note 23, at 24.
86. *Id.*
87. Rhoden, *supra* note 38, at 120.
88. *Id.*
89. Annas, *supra* note 23, at 25.
90. Rhoden, *supra* note 63, at 1952.
91. Rhoden, *supra* note 38, at 120.
92. Rhoden, *supra* note 63, at 1972. *See, e.g.*, Bouvia v. Superior Court, 179 Cal. App. 3d 1127, 225 Cal Rptr. 297 (1986); Lane v. Candura, 6 Mass. App. Ct. 377, 376 N.E.2d 1232 (1978); *In re* Farrell, 108 N.J. 335, 529 A.2d 404 (1987); *In re* Quackenbush, 383 A.2d 785, 156 N.J. Super. 282 (1978); *In re* Melideo, 88 Misc. 2d 974, 390 N.Y.S.2d 523 (N.Y. Sup. Ct. 1976).

would mean death.[93] In most of these instances, however, there is no direct and material effect upon a third party's life or health.[94] Because a mother's refusal to undergo a caesarean operation has a potentially devastating effect upon the fetus, courts may recognize that the state has a compelling interest in preserving the third party's life, which overrides the patient's right to privacy.[95]

Courts frequently have acted to safeguard the interests of third parties, whether to protect them from physical harm or to preserve their emotional welfare.[96] For example, courts have overridden the refusal by parents of dependent children, usually Jehovah's Witnesses refusing blood transfusions, in order to protect the emotional and financial welfare of children.[97] Some courts are willing to override a Jehovah's Witness' refusal even when a fetus is involved.[98] If a patient's right to privacy can be overridden to spare a child emotional or financial loss, then surely it can be overridden to prevent the child's death or serious injury.[99] Courts may be willing to override a pregnant patient's refusal, acknowledging that, although a caesarean section involves some risk to the mother, the benefits to the fetus are quite substantial.[100]

The *In re A.C.* court addressed this argument by noting that a court will not compel a person to submit to a significant bodily intrusion to benefit the health of another.[101] The court cited *McFall v. Shimp*,[102] in which a court refused to order a defendant to donate bone marrow to save the life of a cousin.[103] Bone marrow extraction is not major surgery, but it is painful.[104] The *McFall* court emphasized there is no legal duty to give aid to

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93. Rhoden, *supra* note 63, at 1972.

94. *Id.*

95. *Id. See* Jefferson v. Griffin Spalding County Hosp. Auth., 247 Ga. 86, 274 S.E.2d 457 (1981).

96. Rhoden, *supra* note 38, at 120.

97. *Id. See In re* President of Georgetown College, 331 F.2d 1000, 1008 (D.C. Cir. 1964), *cert. denied*, 377 U.S. 978 (1964); Powell v. Columbia Presbyterian Medical Center, 49 Misc. 2d 215, 267 N.Y.S.2d 450 (N.Y. Sup. Ct. 1965).

98. *See* Jefferson v. Griffin Spalding County Hosp. Auth., 247 Ga. 86, 274 S.E.2d 457 (1981); Raleigh Fitkin-Paul Morgan Memorial Hosp. v. Anderson, 42 N.J. 421, 201 A.2d 537 (1964), *cert. denied*, 377 U.S. 985 (1964); *In re* Jamaica Hosp., 128 Misc. 2d 1006, 491 N.Y.S.2d 898 (N.Y. Sup. Ct. 1985).

99. Rhoden, *supra* note 38, at 120.

100. Robertson & Schulman, *supra* note 71, at 35-36. *See* Robertson, *supra* note 67, at 456-57.

101. *In re A.C.*, 573 A.2d at 1243-44.

102. 10 Pa. D. & C.3d 90 (C.P. Allegheny County 1978).

103. *Id.* at 90.

104. Rhoden, *supra* note 63, at 1977.

another, and stated that to require such a duty "would change every concept and principle upon which our society is founded."[105] The *In re A.C.* court concluded that a fetus does not have rights superior to that of a person who has already been born.[106]

In the typical case, a caesarean section will benefit the fetus, but the mother will be placed at a greater risk.[107] Thus the question becomes: Can a state override a person's treatment refusal and impose a risk upon them in order to benefit the life or health of another person?[108] As the *In re A.C.* court indicated,[109] the law of rescue is a suitable analogy and provides a useful model for analysis.[110]

Our law imposes no general duty to aid others.[111] Exceptions to this rule include special relationships, most important in this analysis that of parent and child.[112] Even in instances where "a special relationship gives rise to a duty to rescue, there is still no duty to undertake *risky* rescues."[113] A limited number of states have created a statutory duty to rescue, but they require "only such assistance as can be rendered without danger to the rescuer."[114] To require risky rescues, even by a parent, would mean a drastic revision of this country's laws.[115] As stated by the *McFall* court, for the law to "sink its teeth into the jugular vein or neck of one of its members and suck from it sustenance for *another* member, is revolting to our hard-wrought concepts of jurisprudence. . . . Such would raise the spectre of the swastika and the Inquisition, reminiscent of the horrors this portends."[116]

As expressed by one commentator, "[o]rdering a cesarean to save the fetus is just as extraordinary as ordering a parent to donate bone marrow to save a child. . . . In each case, a parent is refusing an invasive and somewhat risky procedure without which his or her child will die or suffer serious

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105. *McFall*, 10 Pa. D. & C.3d at 91.

106. *In re A.C.*, 573 A.2d at 1244.

107. For a discussion of the risks associated with a caesarean delivery, see *supra* text accompanying notes 66-67.

108. Rhoden, *supra* note 38, at 121.

109. *In re A.C.*, 573 A.2d at 1243-44.

110. Rhoden, *supra* note 63, at 1952.

111. Rhoden, *supra* note 38, at 121 (citing PROSSER & KEETON, *supra* note 79, at 376-77).

112. *Id.* *See* G. FLETCHER, RETHINKING CRIMINAL LAW 612 (1978).

113. *Id.* (emphasis in original).

114. Rhoden, *supra* note 63, at 1977 (citing MINN. STAT. ANN. § 604.05.01 (West Supp. 1986); VT. STAT. ANN. tit. 12, § 519(a) (1973)).

115. Rhoden, *supra* note 63, at 1977.

116. *McFall*, 10 Pa. D. & C.3d at 92 (emphasis in original).

harm."[117] If a court is not prepared to order a bone marrow donation, and currently they are not, then a court should not be willing to order a caesarean section.[118]

## IV. MISSOURI LAW

To anticipate how a Missouri court would decide a given issue from another jurisdiction is a difficult task, especially when there is an absence of case law on the subject. Missouri courts never have heard a case factually similar to *In re A.C.*. There are, however, certain statutes and cases we can look to for guidance. All indications are that Missouri courts would not hesitate to order a caesarean section against a mother's wishes to protect the life and health of a viable fetus.

### *A. Statutes*

Any Missouri analysis in the area of fetal rights must begin with two statutes: Missouri Revised Statute section 188.010,[119] which announces the "intention of the General Assembly of Missouri to grant the right to life to all humans, born and unborn," and Missouri Revised Statute section 1.205,[120] which states:

> 1. The general assembly of this state finds that:
> (1) The life of each human being begins at conception;
> (2) Unborn children have protectable interests in life, health and well-being;
> (3) The natural parents of unborn children have protectable interests in the life, health, and well-being of their unborn child.
>
> 2. Effective January 1, 1988, the laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to other persons . . . .
>
> 3. As used in this section, the term **"unborn children"** or **"unborn child"** shall include all unborn child or children or the offspring of human beings from the moment of conception until birth at every stage of biological development.

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117. Rhoden, *supra* note 63, at 1979.

118. *Id.* To this date, courts faced with a caesarean intervention question have not equated the two. *Id.*

119. MO. REV. STAT. § 188.010 (1986).

120. *Id.* § 1.205 (emphasis in original).

> 4. Nothing in this section shall be interpreted as creating a cause of action against a woman for indirectly harming her unborn child by failing to properly care for herself or by failing to follow any particular program of prenatal care.

These two statutes send a clear signal that the legislature intends to protect fetal life.[121] Yet, the disclaimer found in the fourth paragraph of section 1.205 muddies the water. These statutes leave questions which must be addressed by a Missouri court facing a caesarean intervention case.

### *B. Cruzan ex rel. Cruzan v. Harmon*[122]

There are no cases dealing with caesarean intervention in Missouri. There are, however, cases which may indicate how a Missouri court would rule. *Cruzan* is such a case. Nancy Cruzan was involved in an automobile accident which left her in a persistent vegetative state.[123] She was neither dead nor terminally ill, but would "never interact meaningfully with her environment again."[124] Nancy's parents (co-guardians) requested that the hospital terminate her artificial hydration and nutrition, which were keeping her alive.[125] The hospital refused to do so without a court order, so the Cruzans filed an action for a declaratory judgment.[126]

The Missouri Supreme Court ultimately held, for various reasons, that Nancy's co-guardians did not have authority to order the withdrawal of hydration and nutrition.[127] Some of the rationale used by the *Cruzan* court is applicable to caesarean intervention cases. For instance, the court began its analysis by looking to see whether there is a constitutional right to refuse treatment. The court noted that under the Missouri Constitution, there is "no unfettered right of privacy . . . that would support the right of a person to refuse medical treatment in every case."[128] The court also found no express

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121. For an in-depth discussion of the two statutes, see Special Project, *"Of Winks and Nods"—Webster's Uncertain Effect on Current and Future Abortion Legislation*, 55 MO. L. REV. 163 (1990).

122. 760 S.W.2d 408 (Mo. 1988), *aff'd sub nom.*, Cruzan *ex rel.* Cruzan v. Director of Mo. Dep't of Health, 110 S. Ct 2841 (1990).

123. *Id.* at 410-11.

124. *Id.* at 411, 422.

125. *Id.* at 410.

126. *Id.*

127. *Id.* at 427.

128. *Id.* at 417. *See* State v. Walsh, 713 S.W.2d 508, 513 (Mo. 1986).

right of privacy under the federal constitution.[129] The court did, however, find that there is a common law right to refuse medical treatment.[130]

The court then pointed out that the common law right to refuse medical treatment is not absolute.[131] It must be balanced against, among other things, the state's interests in life and protecting innocent third parties.[132] The court then noted that the state has a very high interest in preserving life in cases where a life can be saved, as when the patient has a curable affliction.[133] The interest is lower when a life is not at stake, as in the case where the patient will die despite treatment.[134] The *Cruzan* court concluded in the case before it that the right to refuse medical treatment is outweighed by the state's interest in life.[135]

Though factually dissimilar to *In re A.C.*, *Cruzan* is still a good indicator of how Missouri courts may view the privacy interests of patents in medical care refusal cases. *Cruzan* balances the state's interests with the patient's interests.[136] The court seems to view the state's interest in life as being high, especially when a life can be saved, while taking a narrow view of the patient's privacy interest. In a caesarean conflict the court may, as it did in *Cruzan*, "choose to err on the side of life."[137]

### *C. Tort Law*

In Missouri, a child may bring an action against a tortfeasor for prenatal injuries, provided that the child is subsequently born alive and the injuries occurred after viability.[138] Parents of a viable fetus may also maintain a wrongful death action should the fetus expire before birth.[139] At the present time, Missouri recognizes the parental immunity doctrine. Thus, parents are not liable to their children in tort for injuries.[140] The Missouri Supreme Court has agreed, however, to hear a case which may abrogate the parental

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129. *Cruzan*, 760 S.W.2d at 417.
130. *Id.* at 416-17. *See* Brophy v. New England Sinai Hosp., 398 Mass. 417, 497 N.E.2d 626 (1986).
131. *Cruzan*, 760 S.W.2d at 419.
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.* at 424.
136. *Id.*
137. *Id.* at 427.
138. Steggall v. Morris, 363 Mo. 1224, 258 S.W.2d 577 (1953).
139. O'Grady v. Brown, 654 S.W.2d 904 (Mo. 1983) (en banc).
140. Baker v. Baker, 364 Mo. 453, 263 S.W.2d 29 (1953).

immunity doctrine.[141] If the supreme court does abolish parental tort immunity, then the following argument could be made to a Missouri court: if the courts are going to allow a child to sue his or her parents for injuries caused before birth, the court ought to be able to step in and prevent the injuries. This reasoning, though somewhat tortured, might be used in Missouri to justify a non-consensual caesarean section.

## V. CONCLUSION

Cases such as *In re A.C.* involve complex legal, moral and ethical questions, only some of which have been addressed in this Note. No matter which side a court takes, the resulting decision will be a tragic one. Within a short amount of time, a judge must make a weighty choice. Should he or she order a competent woman to undergo major surgery, against her will, for the benefit of another? Alternatively, should the judge allow the woman to refuse, with the possible result of a child being born with birth defects or not at all? An ideal answer does not exist.

Courts must be very careful in dealing with cases such as *In re A.C.*. The trend toward recognizing fetal rights has resulted in a woman being placed at odds with her fetus. In the end, a court must chose between a woman's right to autonomy and privacy and the well-being of her fetus. No matter which side is taken, the court will be left with an uneasy feeling.

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141. Sykes v. Sykes, No. WD 42183 (Mo. Ct. App. July 31, 1990).