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Domestic Relations: Custody: Refusal to Award Custody of Retarded Child to State Where Parents Would Not Permit Heart Surgery. (In re Phillip B.).

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NOTES

DOMESTIC RELATIONS — Custody — Refusal to Award Custody of Retarded Child to State Where Parents Would Not Permit Heart Surgery. *In Re Phillip B.*, 92 Cal. App. 3d 796, 156 Cal. Rptr. 48 (1979), *cert. denied sub nom. Bothman v. Warren B.*, 48 U.S.L.W. 3623 (1980).

INTRODUCTION

Two issues posing difficult questions for courts are: when, if ever, should a court take custody of a child from his parents; and, what extent of care should a mentally retarded person receive. *In re Phillip B.*[1] combined these questions. The California court was confronted with the issue of whether to remove custody of a twelve-year-old mentally retarded child from his parents to perform life-extending surgery after the parents refused to permit the operation. The issue was further complicated by the fact that Phillip had never lived in the home of his parents, and the supervisors at the care home where Phillip lived believed the operation should be performed.

Four legal considerations are addressed in discussing these two issues. The first is defining the standard or test for removal. The second is determining the constitutional right to habilitation. The third is whether quality of life is an appropriate factor for a court to consider; and the fourth is the conflict of interest problem. In spite of the difficulty of the questions here presented, the case does not draw the attention it deserves without a thorough understanding of the facts.[2]

I. PHILLIP B.

Phillip B. is a Down's syndrome child[3] who was placed in a

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1. 92 Cal. App. 3d 796, 156 Cal. Rptr. 48 (1979), *cert. denied sub nom.* Bothman v. Warren B., 48 U.S.L.W. 3623 (1980).

2. Proof of the fact that some of the issues in this case do not receive full consideration when digested is the headline of the case appearing in the Family Law Reporter. It stated, "Refusal to order life-extending but risky surgery for a minor is upheld." 5 Fam. L. Rep. 2593 (BNA 1979).

3. Down's syndrome is also referred to as Mongolism.

private care institution at birth. Mentally, he was tested as having an I.Q. that measured slightly under sixty.[4] Functionally, Phillip was able to dress himself and do chores at the private care facility. These chores included making his bed, helping clear the table, folding laundry, putting away groceries, and feeding the cat. Phillip was found to have good motor skills and good visual skills. It was likely that he would be placed in a sheltered workshop at some time in the future.

Shortly before 1973, doctors discovered that Phillip had a cardiac problem. In early 1973, Phillip was referred to a pediatric cardiologist for further diagnostic evaluation. The doctor made a clinical diagnosis of a ventricular septal defect (a hole between the two main pumping chambers of the heart) and elevated pulmonary artery pressure, a problem usually associated with a large defect. A cardiac catheterization was recommended. A catheterization is a simple, safe procedure to discover more about the problem, but Phillip's parents refused to allow it to be performed. They gave no reason for this decision.

In 1977, Phillip was again referred to the pediatrician, this time for evaluation before undergoing extensive dental work which was best performed under general anesthesia. The dentist wanted to know exactly the extent of Phillip's heart condition before performing the dental surgery. To ascertain this, a cardiac catheterization was done.[5] The pediatrician reviewed his findings with Phillip's parents and recommended an operation to cure the defect. This particular operation held a lower risk for younger patients, a risk which increased as the patient grew older. Eventually, a time would be reached when the risk would be so great that the procedure could no longer be done at all.[6] Mr. B.'s response, however, was to request more psychological information about Phillip, and Mrs. B. requested

4. Children with an I.Q. (Intelligence Quotient) over 50 are classified as mildly retarded. M. BEGAB, THE MENTALLY RETARDED CHILD (1964). The author stated, "[T]hose in the upper range of mild retardation can develop social and communication skills and are quite independent in self care." *Id.* at 28.

5. Phillip's parents permitted the procedure at this time so that dental work could be performed.

6. "Without the operation, Phillip will begin to function less physically until he will be severely incapacitated. . . . Without the surgery, Phillip may live at the outset 20 more years." 92 Cal. App. 3d at 799, 156 Cal. Rptr. at 50.

the names of parents of other Down's syndrome children so she might talk to them. Finally, they refused to let Phillip have the operation. Juvenile authorities brought an action to get custody of Phillip on the ground that the parents were not providing Phillip with the necessities of life. The trial court denied the petition, and the order was affirmed by the court of appeals.

II. LEGAL CONSIDERATIONS

A. *Standard for Removal From Parental Custody*

There are basically two points of view on the question of custody rights:

> [The] traditional view still followed by many states holds that a parent is *prima facie* entitled to the custody of the child unless shown to be unfit. Anyone who alleges the parent is unfit must establish the unsuitability of the parent. The remnants of the old concept of a parent's property rights in his child are operative under this rule. Under the more contemporary view, the prevailing criteria revolve around the "best interest of the child." Under this rule the court will award custody to the person or agency that the court finds will best promote the child's welfare.[7]

California follows the contemporary view using the criteria of "best interests of the child."[8] To determine if the parent-child relationship should be severed, the threshold question is: would allowing the child to continue in the parents' custody endanger the child's permanent welfare?[9] If so, the parents' rights must give way, their preservation being less important than the health, safety, morals, and welfare of the child.[10] While California law looks first to the welfare of the child, it is important to note that the court must determine both that removal is in the best interests of the child and that a clear

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7. Thomas, *Child Abuse and Neglect, Part I: Historical Overview, Legal Matrix and Social Perspectives*, 50 N.C. L. Rev. 293, 340 (1972).

8. Wisconsin takes a compromise approach using both views. Under WIS. STAT. § 48.40(2) (1977) there must first be a finding of neglect. Removal must then be determined to be in the child's best interest. *See* State *ex rel.* Lewis v. Lutheran Social Services, 68 Wis. 2d 36, 227 N.W.2d 643 (1975).

9. *In re* Imperatricis Guardianship, 182 Cal. 355, 188 P. 48 (1920).

10. 182 Cal. at 356, 188 P. at 50.

showing of harm is present.[11]

California recognizes the well-accepted general principle that parenting is a fundamental right which should only be disturbed in extreme circumstances.[12] But it also recognizes the exception that the parents' rights are limited by the fact that the child himself is a human being and, as such, is vested with rights entitled to protection.[13] Importantly, genuine love and concern for the child, coupled with a desire to help the child, does not defeat a clear showing of potential harm should the child remain in the parents' custody.[14] As a result, courts will not view parental behavior in a vacuum.[15]

Recent decisions emphasize that parental behavior must be viewed in the context of its effect on the child. *In re Custody of a Minor*[16] considered the situation of a twenty-month-old boy suffering from lymphocetic leukemia who was being treated by the only known effective treatment, chemotherapy. Doctors predicted a better than fifty percent chance of long-term survival with the chemotherapy, but the parents, concerned over side effects, wanted to remove the child from chemotherapy and treat him through prayer and dietary manipulation. Their genuine good motives were not important. The court intervened in the family relationship, but only to the extent necessary to insure that the child received the needed chemotherapy.

Several considerations justified such intervention. The treatment itself was not life-threatening, while the lack of

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11. *In re* B. G., 11 Cal. 3d 679, 699, 523 P.2d 244, 255, 114 Cal. Rptr. 444, 458 (1974).

12. *In re* Carmaleta B., 21 Cal. 3d 482, 579 P.2d 514, 146 Cal. Rptr. 623 (1978).

13. Campbell v. Wright, 130 Cal. 380, 62 P. 614 (1900).

14. *In re* Randy B., 62 Cal. App. 3d 89, 132 Cal. Rptr. 720 (1976). Other courts support this view. *See generally* Prince v. Massachusetts, 321 U.S. 158 (1944) (Neither the rights of parenthood nor the rights of religion are beyond limitation. The state's authority is not nullified because the parents ground their claim to control the child's course of conduct in religion.); State v. Perricone, 37 N.J. 462, 181 A.2d 751 (1962) (The sincere affection and concern of Jehovah's Witnesses parents for their child were not controlling in finding neglect of the child for the purpose of appointing a guardian.).

15. California statutory law also emphasizes that the first consideration must be the child's welfare. The Civil Code provides for removal of custody on a finding "that an award of custody to a parent would be detrimental to the child, and an award to a non-parent will be in the best interests of the child." CAL. CIV. CODE § 4600(c) (West 1980).

16. 4 FAM. L. REP. 2432 (BNA 1978).

treatment was certain to result in death. This fact distinguished this case from cases where the court refused to intervene when the treatment itself threatened life, but the lack of treatment would not cause death.[17] Generally, courts will require treatment only where an imminent risk of death exists.[18] In very limited situations, courts have ordered surgery where the child's condition could not cause death, but where permanent disfigurement was sure to result.[19]

A New York Court of Appeals decision contemporaneous with the California Court of Appeals decision of *In re Phillip B.*, added an additional consideration when removal of custody was sought for medical treatment. In the New York case, *In re Hofbauer*,[20] the parents of a seven-year-old child suffering from Hodgkin's disease wanted to remove their child from traditional radiation and chemotherapy treatments to put him under the care of a physician who advocated nutritional therapy including laetrile injections. The Court allowed the parents to do this because the alternative was supported by the opinion of responsible physicians.[21]

The United States Supreme Court has held that decisions related to medical feasibility should be made by medical practitioners. The Court has stated: "[W]e do not accept the notion that the shortcomings of specialists can always be avoided by shifting the decision from a trained specialist using traditional tools of medical science to an untrained judge."[22] This decision reflects the high credibility given to ex-

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17. *Id.* at 2435. *See generally In re* Green, 448 Pa. 338, 292 A.2d 387 (1972); *In re* Seiferth, 309 N.Y. 80, 127 N.E.2d 820 (1955); *In re* Hudson, 13 Wash. 2d 673, 126 P.2d 765 (1942).

18. *See* State v. Perricone, 37 N.J. 463, 181 A.2d 751 (1962); People v. Labrenz, 41 Ill. 618, 104 N.E.2d 769 (1952) *cert. denied*, 344 U.S. 824 (1952).

19. *In re* Sampson, 29 N.Y.2d 900, 328 N.Y.S.2d 686 (1972); *In re* Rotkowitz, 175 Misc. 948, 25 N.Y.S.2d 624 (1941).

20. 47 N.Y.2d 648, 419 N.Y.S.2d 936 (1979).

21. Specifically, the court held:

> The court's inquiry should be whether the parents once having sought accredited medical assistance and having been made aware of the seriousness of the child's affliction and the possibility of a cure if a certain mode of treatment is undertaken, have provided for their child a treatment which is recommended by their physician and which has not been totally rejected by all responsible medical authority.

47 N.Y.2d at 652, 419 N.Y.S.2d at 940-41.

22. Parham v. J.R., 442 U.S. 584 (1979).

pert medical testimony.

In the case of *In re Phillip B.*, the medical experts testified that Phillip's heart condition would cause his death at any time within the next two to eighteen years, but surgery to repair the problem could only be performed at the present time. The trial court[23] ruled, however, that the surgery was not life-saving and that there was no clear and convincing evidence of detriment to the child. In its decision, the court noted that medical experts have made mistakes before.

The trial judge's method of reaching a finding of fact about the effect of Phillip B.'s heart condition is contradictory to the United States Supreme Court opinion in *Parham v. J.R.*[24] The judge simply ignored uncontradicted testimony that without surgery, Phillip B.'s heart condition would cause his death. By doing this, the judge made a decision as to Phillip's future by focusing primarily on his parents' genuine concern rather than on the best interests of the child. On appeal, the California Court of Appeals affirmed the trial court's decision on the basis that Phillip's condition was not immediately life-threatening, but the corrective surgery might be.[25]

B. The Constitutional Right to Habilitation

Phillip B. had been institutionalized from birth. Any person confined to a mental institution has a constitutional right to habilitation.[26] In such cases no distinction is made between the mentally ill and the mentally retarded.[27] Courts defining habilitation have determined it to be "medical treatment, education, and care suited to residents' needs regardless of age, degree of retardation and handicapping condition."[28] The purpose of such a requirement is to allow the individual to lead a more useful and meaningful life and return to society. Adequate and effective treatment is constitutionally required because absent such treatment, the hospital is transformed into a penitentiary where one could be held indefinitely for no con-

23. *In re* Phillip B., No. 66103 (Superior Court, Santa Clara Co., April 27, 1978).

24. 442 U.S. 584.

25. *See* 92 Cal. App. 3d at 802, 156 Cal. Rptr. at 51.

26. Wyatt v. Stickney, 344 F. Supp. 387 (M.D. Ala. 1972), *modified on other grounds*, 503 F.2d 1305 (5th Cir. 1974).

27. 344 F. Supp. at 390.

28. *Id.* at 396.

victed offense.[29] One court has summed up the right to habilitation as follows:

> The constitutional right to treatment is a right to a program of treatment that affords the individual a reasonable chance to acquire and maintain those life skills that enable him to cope as effectively as his own capacities permit with the demands of his own person and of his environment and to raise the level of his physical, mental, and social efficiency.[30]

While the courts have defined the constitutional right to habilitation, implementation of the right is not automatic — particularly when other rights overlap. *In re Phillip B.* illustrates this. Phillip B. was placed in a private institution at birth, and seven years later when his heart condition was discovered, his parents, by exercising their custody rights, prevented evaluation through a simple, safe heart catheterization. The catheterization was finally agreed to when Phillip was 12 years old as a prerequisite to dental surgery. At that time it was discovered that the condition was operable, but the operation would have to be done immediately because of progressive deterioration. The parents were supported in their decision not to operate by the California Court of Appeals which claimed the surgery was now too risky.[31] In effect, the parents foreclosed the right to habilitation by preventing the earlier evaluation at which time surgery would have involved a lower risk. One commentator noted:

> [T]he greatest danger to the mentally retarded child lies in the institutional setting — in this case because it affords the parents the opportunity to "distance" themselves from the child and deal with the situation in an abstract manner, namely, in the doctor's office instead of at home where the cries of the child are a constant call to the normal parental instincts and an impetus to reconsider the decision not to operate.[32]

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29. Ragsdale v. Overholser, 281 F.2d 943, 950 (D.C. 1960).

30. Gary W. v. Louisiana, 437 F. Supp. 1209, 1219 (E.D. La. 1976).

31. 92 Cal. App. 3d at 802, 156 Cal. Rptr. at 48. Paradoxically, the appeals court also stated the surgery was too risky since children with Down's syndrome have more problems in the postoperative period. In other words, Phillip was institutionalized because he was retarded, but surgery, a recognized habilitation right, was now denied Phillip since his parents had not permitted it when it would have been safe.

32. Murdock, *Civil Rights of the Mentally Retarded: Some Critical Issues*, 48

The problem for a court is to determine when one right should take precedence over another conflicting right. The California Supreme Court has defined custody as "the sum of parental rights with respect to the rearing of a child. It includes the right to the child's services and earnings, and the right to direct activities and make decisions regarding his care, control, education, health, and religion."[33] When parents permanently institutionalize a child, they actually surrender a major portion of their custody rights. In such a situation, it must be questioned whether the parents are in a position to determine best interests of the child.

In *Quilloin v. Walcott*,[34] the United States Supreme Court held that the state may consider the parents' past commitment to the child's development in determining the extent to which their parental rights will be recognized. Where there has been little ongoing parental commitment, parental rights diminish accordingly. On the basis of this decision, courts may be able to give less weight to the medical decision of parents who have surrendered actual custody. Therefore, a court may enforce the right of habilitation when a child has been placed in an institutional setting even where the parents opt not to grant permission for life-saving or even life-extending surgery.

C. *Quality of Life Consideration*

The trial court in *In re Phillip B.* considered quality of life in reaching its decision. The court received testimony about the quality of Phillip's life: Phillip B.'s father admitted that he felt Phillip would be better off dead than alive.[35] But, two fundamental issues arise concerning this testimony: (1) May a court ever consider quality of life testimony? and, (2) If so, under what circumstances is it proper to consider quality of life testimony?

NOTRE DAME LAW. 133, 142 (1972) [hereinafter cited as Murdock].

33. Burge v. City and County of San Francisco, 41 Cal. 2d 608, ___, 262 P.2d 6, 12 (1953).

34. 434 U.S. 246, 256 (1978).

35. In closing argument, the attorney stated, "If I might paraphrase what I think seems the Becker's position . . . it seems to be that it would be preferable that Phillip's life end early, instead of going through a full life with what is obviously an extremely serious handicap." *In re* Phillip B., No. 66103, at 134 (Super. Ct., Santa Clara Co., April 27, 1978), (trial transcript).

In re Quinlan[36] is a case in which the court examined a portion of this issue. Medical testimony predicted that the young woman would never regain cognitive life and would need intensive care throughout the day. The extraordinary circumstances of this case necessitated the court's decision and it must be viewed accordingly. The court appointed the parents as guardians knowing they would exercise their choice to refuse medical treatment for their daughter.[37]

The decision is much more difficult when a person is capable of cognitive life. Few courts have considered the issue,[38] though it is a major consideration for parents of physically disabled, mentally retarded newborns.[39] In *Maine Medical Center v. Houle*,[40] the court held that quality of life should not be considered and that the only proper consideration is medical feasibility.

There are several significant reasons for not considering quality of life. First, if a court determines that it will consider such a factor, it is put in a position of determining that some point exists at which life is no longer worth living. Second, there is the problem of "ascertaining another's wishes . . . (with) . . . the proxy's bias to personal or culturally relative interests, and the unreliability of predictive criteria."[41] Third, given the historical abuse that the concept "lives without value" has engendered,[42] courts are hesitant to create precedent in this area. Fourth, most legal commentators who have discussed terminating life-sustaining treatment feel that it is not legal.[43] Finally, there is the constitutional consideration that denial of treatment because of mental defect is in viola-

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36. 70 N.J. 10, 355 A.2d 647, *cert. denied*, 429 U.S. 922 (1976).

37. 70 N.J. at ___, 355 A.2d at 664.

38. *See Birth-Defective Infants: A Standard for Nontreatment Decisions*, 30 STAN. L. REV. 599, 601 n.13 (1977).

39. *See* Robertson, *Involuntary Euthanasia of Defective Newborns: A Legal Analysis*, 27 STAN. L. REV. 213 (1975) [hereinafter cited as *Involuntary Euthanasia*].

40. Civil No. 74-145 (Super. Ct., Cumberland City, Maine, Feb. 14, 1972).

41. *Involuntary Euthansia, supra* note 39, at 255.

42. *See generally* United States v. Greifelt, Nuremberg Military Tribunals, Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, 599 (1950).

43. *See* Horan, *Euthanasia, Medical Treatment and the Mongoloid Child: Death As a Treatment of Choice?* 27 BAYLOR L. REV. 76 (1975); Nolan-Haley, *Defective Children, Their Parents, and the Death Decision*, J. LEGAL MED., Jan. 1976, at 9; *Involuntary Euthanasia, supra* note 39.

tion of equal protection.

In light of the general rule against considering quality of life in making medical treatment determinations, any court which receives testimony on such an issue and bases its decision even partially on this testimony should be considered to have abused its discretion. Such testimony was considered in the case of *In re Phillip B.* Nevertheless, the appeals court refused to find an abuse of discretion in this case. By finding that the surgery would be risky,[44] the court skirted the real issue of *how* the decision was reached. However, the court added, "Legal judgments regarding the value of childrearing patterns should be kept to a minimum so long as the child is afforded the best available opportunity to fulfill his potential in society."[45] While the quote indicates that the appeals court would agree with the general rule of not considering quality of life, it is difficult to reconcile its decision to affirm the trial court. How is Phillip to have the opportunity to fulfill his own potential when he is not to be given the opportunity for medical treatment to preserve that life?

D. Conflict of Interest Problem

The court determined the controversy by using the test of best interests of the child.[46] The controversy under the conflict of interest problem concerns not *what* the standard or test is, but *who* is to decide what is in the child's best interests. If there is a conflict of interest, the court may determine that the parents can no longer decide.

The potential conflict of interest between the parent's values and what is best for the child has been recognized in the decision to institutionalize the child.[47] The nature of the conflict to institutionalize was summarized in the amici brief of *Wyatt v. Stickney*:

> The parent may be motivated to ask for such institutionalization for a variety of reasons other than the best interests of the child himself, i.e., the interests of other children in the family, mental and physical frustration, economic stress,

44. 92 Cal. App. 3d at 802, 156 Cal. Rptr. at 51.
45. *Id.* at 801, 156 Cal. Rptr. at 51.
46. *See* text accompanying note 9 *supra.*
47. Murdock, *supra* note 32, at 139.

> hostility toward the child stemming from the added pressures of caring for him, and perceived stigma of mental retardation. The retarded child's best interests may well be in living with his family and in the community, but theirs may not be in keeping him.[48]

When a child has been institutionalized, the parents must deal with the child's concerns in the abstract, and they may not always be aware of the needs of such a child.[49]

A close legal parallel exists between the position of the mentally retarded children in need of physical care and the situation involving medical care for children of the Jehovah's Witnesses.[50] Courts have ordered blood transfusions for children over their parents' religiously based objections because the child's best interests require it and harm would otherwise result.[51] In such cases the parents faced the conflicting demands of their faith and the needs of their child. Where treatment is suggested that violates their religious beliefs, it is the parents' religious responsibility to see that no member of the family receives treatments which are considered immoral. If a family member receives such treatments, the parents fear spiritual harm to the family member and themselves.[52]

"Parents have a duty of care, and if they grossly abuse it, religious objections stand as no excuse,"[53] though reasonable attempt must be made to accommodate the belief.[54] When a parent has a serious conflict of interest, the parent should not be allowed to be the sole decision-maker regarding medical care for the child.[55] While courts have shown an awareness of a conflict of interest in cases involving religious beliefs, it is clear that a conflict can exist for other than first amendment

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48. *Id.* at 139.

49. *Id.*

50. *Id.* at 142.

51. *See e.g.*, Jehovah's Witnesses in Wash. v. King County Hosp. Unit No. 1 (Harborview), 278 F. Supp. 488 (W.D. Wash. 1967), *aff'd per curiam*, 390 U.S. 598 (1968); State v. Perricone, 37 N.J. 463, 181 A.2d 751 (1962), *cert. denied*, 371 U.S. 890 (1962); Hoerner v. Bertinato, 67 N.J. Super. 517, 171 A.2d 140 (1961).

52. Jehovah's Witnesses in Wash. v. King County Hosp. Unit No. 1 (Harborview), 278 F. Supp. 488, 502 (W.D. Wash. 1967).

53. Bennett, *Allocation of Child Medical Care Decisionmaking Authority: A Suggested Interest Analysis*, 62 VA. L. REV. 285, 324 (1976), [hereinafter cited as Bennett].

54. Sherbert v. Verner, 374 U.S. 398 (1963).

55. Bennett, *supra* note 52, at 324.

reasons which have just as valid a basis and which prevent the parents from being qualified to determine the best interests of the child.

Though such conflict was expressed in the case *In re Phillip B.*, the court expressed no concern about it.[56] Since those who lived with Phillip on a day-to-day basis felt Phillip needed the operation and brought suit seeking custody, the court should have considered the parental conflict of interest as a significant factor. However, the court failed to consider this factor and, therefore, never confronted the important issue of *who* is to decide the child's best interests when such a conflict exists.

The appeals court recognized that parental autonomy is not absolute but also stated that the state "has a serious burden of justification before abridging parental authority."[57] When there is a conflict of interest such as the one in Phillip's case, the "serious burden" is met and the parents should be relieved of their power as sole decision-maker over the child's medical care.

III. SUMMARY

A case such as *In re Phillip B.* is disturbing because it demonstrates that the law remains inconsistent and unsettled in dealing with the medical rights of mentally retarded children. Courts have held that an institutionalized child has a right to habilitation, but statutes allow that right to be circumvented. *In re Phillip B.* is a decision that is particularly difficult to rationalize. Legally, the parent is the person whose decision is almost completely dispositive regarding the medical care of his child. Clear and convincing evidence is needed to remove the child from the custody of his parents and override the parent's decision. However, when the parents have institu-

56. The trial transcript in *In re Phillip B.* indicates that the Beckers institutionalized Phillip because, ironically, they felt he would get better health care, and also because they were worried about how his presence in the home could affect their other children. After stating that Phillip would be better off dead, Mr. Becker said he based this belief on what he thought was best for Phillip and for the rest of the family. Also, Mr. Becker expressed concern that if Phillip outlived him and his wife, he would become a burden on his brothers. This illustrates the conflict with which Murdock was concerned.

57. 92 Cal. App. 3d at 802, 156 Cal. Rptr. at 51.

tionalized the child from birth and visit the child for several hours on the average of once every two months, it is hard to justify allowing the parents to retain the same dominant power over health care decisions as they would if the child were living at home. Such parents are not in as good a position to judge the best interests of the child as those who have become the "psychological parents"[58] making the day-to-day custodial decisions for the child. The parents should make medical decisions when they are qualified to do so. However, as the United States Supreme Court indicates, when their commitment to the child has been less than that of the day-to-day parent, a lesser emphasis should be placed on their decisions.[59]

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TRADEMARKS — Trademarks and Tradenames — Actions for Infringement of Technical Marks Equated with Those for Infringement of Nontechnical Marks Which Have Acquired a Secondary Meaning. *First Wisconsin National Bank of Milwaukee v. Wichman*, 85 Wis. 2d 54, 270 N.W.2d 168 (1978). In the recent case of *First National Bank of Milwaukee v. Wichman*,[1] the Wisconsin Supreme Court abolished the traditional common-law distinctions between actions brought for infringement of technical trademarks[2] and those commenced to protect nontechnical trademarks[3] which had acquired a secondary meaning.[4] By its decision, the court expanded the scope of protection available to nontechnical marks with secondary meaning and eliminated the necessity of a plaintiff's proving

58. *See* J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 17-21 (1973).

59. Quilloin v. Walcott, 434 U.S. 246 (1978).

1. 85 Wis. 2d 54, 270 N.W.2d 168 (1978).

2. 3 R. CALLMAN, THE LAW OF UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES (3d ed. 1969), § 66.1, at 21-22 [hereinafter cited as 3 R. CALLMAN].

3. *Id.*

4. 25 MO. L. REV. 100, 101 (1960).