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1. CHILD PERMANENTLY COMMITTED TO CHILD WELFARE BOARD—ORDER OF JUVENILE COURT—BOARD THROUGH EXECUTIVE OFFICER MAY CONSENT UPON MEDICAL ADVICE, TO MEDICAL AND SURGICAL TREATMENT OF CHILD.

2. CHILD TEMPORARILY SO COMMITTED REMAINS UNDER JURISDICTION OF JUVENILE COURT—A WARD—UPON MEDICAL ADVICE, COURT MAY CONSENT TO MEDICAL AND SURGICAL TREATMENT OF CHILD.

3. COMPLAINT OR APPLICATION FILED WITH JUVENILE COURT—CARE OF CHILD—COURT PENDING SERVICE OF CITATION ON PARENTS MAY ORDER EMERGENCY MEDICAL OR SURGICAL TREATMENT UPON CERTIFICATE OF PHYSICIAN—SECTION 1639-28, G. C.

4. WHERE CHILD CARED FOR BY COUNTY WELFARE DEPARTMENT OR BOARD UPON AGREEMENT WITH PARENTS OR GUARDIAN, ONLY PARENTS MAY CONSENT UPON COMPETENT MEDICAL ADVICE TO MEDICAL OR SURGICAL TREATMENT OF CHILD.

5. STATUS WHERE CHILD RECEIVES CARE OR SERVICE IN CHILD'S HOME, HOME OF RELATIVE, FOSTER HOME, RECEIVING HOME, SCHOOL, HOSPITAL, CONVALESCENT HOME OR INSTITUTION—SECTION 3070-17, PARAGRAPH d, G. C.

6. INDIVIDUAL RESPONSIBILITY OF PHYSICIAN OR SURGEON WHO ADMINISTERS EMERGENCY MEDICAL OR SURGICAL TREATMENT IN ABSENCE OF CONSENT OF PARENTS OR GUARDIAN—SECTION 3070-17, PARAGRAPH g, G. C.

7. POTENTIAL LIABILITY IN TORT—PHYSICIAN OR SURGEON — MEDICAL OR SURGICAL TREATMENT TO MINOR CHILD WITHOUT PATIENT'S CONSENT OR LAWFUL AUTHORITY—ADVICE OF PRIVATE COUNSEL.

SYLLABUS:

1. Where a child has been permanently committed to a child welfare board by order of the juvenile court, such board, acting through its duly authorized executive officer, may properly consent, upon competent medical advice, to medical and surgical treatment of such child.

2. Where a child has been temporarily so committed, the child remains under the jurisdiction of the juvenile court and is a ward of such court; and such court may properly consent, upon competent medical advice, to medical and surgical treatment of such child.

3. When a complaint or application for care concerning a child has been filed with the juvenile court, such court may, pending service of a citation on the child's parents, guardian or custodian, order the provision of emergency medical or surgical treatment upon the certificate of one or more reputable practicing physicians, as provided in Section 1639-28, General Code.

4. Where a child is being cared for by a county welfare department or board of child welfare by agreement with the parents or guardian of such child, only such parents or guardian may properly consent, upon competent medical advice, to medical or surgical treatment of such child.

5. Where a child welfare board, under the provisions of paragraph (d), Section 3070-17, General Code, provides care or service to a child in the "child's own home, in the home of a relative or in a certified foster home, receiving home, school, hospital, convalescent home or other institution," unless such child, by finding of dependency, neglect or delinquency, has become a ward of the juvenile court, only the parents or guardian of such child may properly consent, upon competent medical advice, to medical or surgical treatment of such child.

6. Where a child welfare board, under the provisions of paragraph (g), Section 3070-17, General Code, provides temporary emergency care for a child without agreement of the parents or guardian and without commitment by the juvenile court, in the absence of consent by such parents or guardian, only emergency medical or surgical treatment immediately necessary to save the life or health of such child may properly be administered without the consent of the parent or guardian of such child; and the determination of such immediate necessity is the individual responsibility of the physician or surgeon who administers such treatment.

7. Where a physician or surgeon seeks to avoid potential liability in tort for the administration, without the patient's consent, of medical or surgical treatment to a minor child receiving care from a child welfare board, the question, in particular cases, of what person, organization or authority is competent to give such consent on behalf of such child, so as effectively to protect him from incurring such liability, is ultimately one for decision by the physician or surgeon concerned, upon advice of private counsel.

Columbus, Ohio, November 6, 1951

Hon. Mathias H. Heck, Prosecuting Attorney,
Montgomery County, Dayton, Ohio

Dear Sir:

Your request for my opinion reads as follows:

> "We have been requested for an opinion relative to certain questions concerning the need for signed medical statements for children who are being maintained by our Child Welfare Board. The question has been asked as to just what the position of the child welfare board would be where they are unable to obtain a signature of a parent, guardian, etc., who normally would sign such a consent form. Because of the importance which we feel surrounds these questions, this office is of the opinion that it should be forwarded to your office so that if similar requests are made or similar situations arise among child welfare boards of other counties, some definite method of procedure could be maintained.
>
> "This office is enclosing the request made by our local child welfare board. The exact questions have been raised in their letter for which an opinion is requested. We are directing your attention to Section 3070-17 O. G. C., which sets out the powers and duties of the Board, with particular reference to subsections D and G of said statute.
>
> "We shall appreciate whatever assistance your office may be able to render in helping to clarify these problems."

The memorandum submitted with your request indicates the specific questions here presented to be as follows:

1. Where the parent of a child who is being cared for by a county welfare board fails or refuses to consent to the administration of medical or surgical treatment to such child, who is the proper person to give such consent?

2. In such case is a consent required for the administration of clinical tests and preventive serums to such child?

I am unable to find any statutory provision which would require in any case that a consent to the administration of medical or surgical treatment be given by the patient or by some person authorized to act for him. In these circumstances I must assume that the consent to which

you refer is given solely for the protection of the physician or surgeon concerned against a possible future claim against him on the ground that the administration of such medical or surgical treatment was made without the consent of the patient. It is, of course, well settled that in the absence of such consent the administration of such treatment is a technical battery for all the consequences for which the physician will be liable in tort. The rule on this point in Ohio is stated in 31 Ohio Jurisprudence, 464, Section 205, and is in harmony with the majority decisions in the United States. 41 American Jurisprudence, 220, Section 108.

It would appear, therefore, that the questions here presented are such as must ultimately be decided in each individual case by the physician himself upon advice of private counsel. I appreciate, however, that the questions here presented do pose a very real practical problem in the conduct of the activities of a child welfare board, and therefore deem it appropriate to afford the board in this instance the benefit of a discussion of the applicable law.

The general rule on who may consent on behalf of the patient to the administration of medical and surgical treatment is discussed in 41 American Jurisprudence, 223, Section 111.

With respect to minors, the following statements are found in this discussion:

> "As a general proposition, except in the event of an emergency, a surgeon will be liable for an assault where he operates on a child without the consent of the latter's parents.
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> "* * * It would seem to be a matter of sound precaution for a surgeon to obtain the father's consent before operating on his minor child, but it has been held that in special circumstances a surgeon is not bound at his peril to obtain the father's consent before operating on a minor who is mentally competent and of understanding age and who has consented to the operation, or on a child of more tender years when an emergency existed threatening the life of the child."

Since in many instances in the situation here involved the parents have failed or refused to consent to medical treatment of children under the care of the child welfare board, the problem is to ascertain whether the status of such children is such that by operation of law some person or organization has been substituted in the place of the parent and so could by reason of such relationship supply the needed consent.

At this point it is appropriate to observe the function of a child welfare board and certain of its statutory powers. The establishment of a child welfare board is provided for in Section 3070-1, General Code, enacted effective January 1, 1946, in House Bill No. 418, 96th General Assembly. The Title of this act indicates that its purpose was "to clarify and supplement existing statutes relating to county care of dependent, neglected, delinquent and handicapped children and to provide for the unification of county services to children." Although the board is empowered under the provisions of Section 3070-17, General Code, to make investigations relative to any child deemed by the board to be in need of public care or protective services, and to provide divers services for such children in certain circumstances, including the provision of temporary emergency care for any child the board deems to be in need of such, it appears that in the usual case the children in the physical custody of the board are so placed either by agreement with the parents or guardian or by commitment by the juvenile court.

Section 3070-17, General Code, reads in part as follows:

"The child welfare board shall, subject to the rules, regulations and standards of the division, have the following powers and duties for and on behalf of children in the county deemed by the board to be in need of public care or protective services:

"(a) To make an investigation concerning any child reported to be in need of care, protection or service.

"(b) To enter into agreements with the parent, guardian or other person having legal custody of any child, or with the division, or another department or any certified organization within or outside the county or any agency or institution outside the state, having legal custody of any child, respecting the custody, care or placement of any such child or any other matter, deemed to be in the interests of such child, provided that the permanent custody of a child shall not be transferred by a parent to the board without the consent of the juvenile court.

"(c) To accept custody of children committed to the board by a court exercising juvenile jurisdiction.

"(d) To provide care of all kinds which the board may deem to be for the best interests of any child whom the board may find to be in need of public care or service. Such care shall be provided by the board by its own means or through other available resources, in such child's own home or in the home of a relative or in a certified foster home, receiving home, school, hospital, convalescent home or other institution, public or private, within or outside the county or state.

"* * * (g) To provide temporary, emergency care for any child deemed by the board to be in need thereof, without agreement or commitment. * * *"

We may first properly consider that class of cases involving children who are received by the board by commitment by the juvenile court.

The jurisdiction of the court in cases of this kind is stated in Section 1639-16, General Code, which reads in part as follows:

"(a) The court shall have exclusive original jurisdiction under this chapter or under other provisions of the General Code:

"1. Concerning any child who is (1) delinquent, (2) neglected, (3) dependent, crippled, or otherwise physically handicapped.

"2. To determine the custody of any child not a ward of another court. * * *"

The powers of the court relating to the disposition of a child found to be delinquent, neglected or dependent are set out in Section 1639-30, General Code, which reads in part as follows:

"The court may conduct the hearing in an informal manner, and may adjourn the hearing from time to time. In the hearing of any case the general public may be excluded and only such persons admitted as have a direct interest in the case. All cases involving children shall be heard separately and apart from the trial of cases against adults. The court, at its discretion, may excuse the attendance of the child at the hearing in cases involving neglected, dependent or crippled children. The court shall hear and determine all cases of children without a jury. If the court shall find that the child is delinquent, neglected, or dependent, it may by order duly entered proceed as follows:

"1. Place the child on probation or under supervision in its own home or in the custody of a relative or in an institution or in a certified foster home, wherever situate, upon such terms as the court shall determine; provided, however, that the court may place delinquent children on a free or wage basis in uncertified foster homes.

"2. Commit the child temporarily or permanently to the division of social administration of the state department of public welfare, or to a county department, board or certified organization, or to any institution or to any agency in Ohio or in another state authorized and qualified to provide or secure the care, treatment or placement, required in the particular case.

"3. * * *

> "4. Make such further disposition as the court may deem to be for the best interests of the child, except as herein otherwise provided.
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> "5. In case of a male child over sixteen years of age who has committed an act which if committed by an adult would be a felony, the judge may commit such child to the Ohio state reformatory.
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> "* * * With respect to a crippled or otherwise physically handicapped child, who is neither delinquent, neglected or (nor) dependent, the court may commit the child temporarily to the division or to any agency in Ohio, authorized and qualified to provide or secure the care, treatment or placement required in the particular case."

The termination of the court's jurisdiction in such cases is provided for in Section 1639-35, General Code, which reads as follows:

> "When a child is committed to the boys' or girls' industrial school, or to the Ohio state reformatory, or to the permanent custody of the state department of public welfare, the division of social administration in said department, a county department, board or a certified organization, the order shall state that such commitment is permanent and the jurisdiction of the court in respect to the child so committed shall cease and terminate at the time of commitment; except that if the division or any county department, board or certified organization having such permanent custody make application to the court for the termination of such custody, the court upon such application, after due notice and hearing and for good cause shown, may terminate such custody at any time prior to the child becoming of age. The court shall make disposition of the matter in whatever manner will serve the best interests of the child. All other commitments made by the court shall be temporary and shall continue for such period as designated by the court in its order, or until terminated or modified by the court, or until a child attains the age of twenty-one years."

Although by statute, Section 10507-8, General Code, the parents are made the natural guardians of their minor children and are charged with their care, nurture, welfare and education, it is obvious that this natural guardian relationship is superseded in the case of children who are found by the juvenile court to be delinquent, neglected or dependent. Especially is this the case where the court makes an order committing such children to the care, custody and control of an authority, organization or person other than the parent.

It has been judicially held that where proceedings are regularly had in the juvenile court, in which there is a finding that a child is delinquent, such child thereby becomes a ward of the court. Home v. Fetter, 90 Ohio St., 110, 127. See also Ex Parte McDermott, 246 P. 916, 208 Cal. 725, and 43 Corpus Juris Secundum, 263, Sec. 101. By analogy it would follow that the same rule is applicable in the case of dependent and neglected children.

An obvious corollary to this proposition, in my opinion, is that the status as a ward of the court will continue for as long as the court has jurisdiction of a particular child. This jurisdiction continues, as provided in Section 1639-35, General Code, until the child is committed to the boys' or girls' industrial school, or to the Ohio state reformatory, or to the *permanent* custody of the state department of welfare, the division of social administration in said department, a county department, board, or a certified organization. It is further provided in this section that all other commitments made by the court shall be temporary and shall continue for such period as the court may designate or until terminated or modified by the court or until the child attains the age of twenty-one years.

It is thus to be seen that the children received by a county welfare board by commitment by the juvenile court are of two classes, viz., those permanently committed and those temporarily committed. In the case of children who are temporarily committed, the child being a ward of the court, it must follow that only the court would be authorized to give such consent as circumstances may require in place of the parent, for the administration of medical and surgical treatment.

In the case of children permanently committed to a "county department, board or certified organization," the problem presents no real difficulty. Former Section 3093, General Code, was repealed effective January 1, 1946, in House Bill 418, 96th General Assembly. In this same act there were enacted Sections 3070-1 to 3070-35, General Code, which sections relate to the county care of dependent, neglected or delinquent children and which provide for the establishment of county welfare boards. The section so repealed read:

> "All wards of a county or district children's home, or of any other accredited institution or agency caring for dependent children who by reason of abandonment, neglect or dependence have been committed by the juvenile court to the permanent care of such home, or who have been by the parent or guardian volun-

tarily surrendered to such an institution or agency, shall be under the sole and exclusive guardianship and control of the trustees until they become of lawful age. The board of trustees may by contract or otherwise provide suitable accommodations outside of the home and may provide for the care of any child under its control by payment of a suitable amount of (for) board, to a competent person, whenever the interests of such child require such an arrangement. Children committed for temporary care or received by arrangement with parent or guardian shall be considered under the custody and control of the trustees only during the period of such temporary care, except as hereinafter provided. Whenever a child has been received upon agreement of parent to pay a stipulated sum for his support and such parent is in arrears for a period of six months or more, the trustees may institute proceedings in the juvenile court to ascertain whether such child has been abandoned. The judge of the juvenile court shall after hearing the case make such order for the future care of the child as in his judgment is just and proper for the best interest of the child."

Statutory provisions somewhat analogous to former Section 3093 are found in present Sections 3070-19 and 3070-20, which read:

Section 3070-19, General Code:

"(1) The board shall have the capacity possessed by natural persons to institute proceedings in any court.

"(2) When appointed by the court exercising jurisdiction in adoption proceedings, the executive secretary may act as next friend of any child and perform the duties of such next friend according to law.

"(3) When appointed by the probate court in lieu of guardian in accordance with the provisions of section 10507-5 of the General Code the executive secretary may act as trustee of the estate of any ward, provided such an estate does not exceed $500 in value. The executive secretary may also act as trustee, on behalf of any ward, of periodic payments of not more than $10.00 per week to which such ward may be entitled as a claimant pursuant to the terms of any insurance policy, annuity, pension, benefit or allowance, governmental or private. He shall administer all trusteeships in accordance with the laws relating to fiduciaries; the funds of any trusteeship shall not be mingled with other moneys of the board or of the county; the cost of any such trusteeship shall be paid out of the funds of the trust, but no fee shall be allowed to the executive secretary as such trustee. At least once a year, or more often if required by the probate court, the executive secretary shall make a full and complete report and accounting to the board or the county department of welfare as

to the disposition of any and all trust funds administered by him during the year."

Section 3070-20, General Code:

"The board shall, before entering into any agreement obligating the board with respect to the care of any child, determine the ability of the child, parent, guardian or other person to pay for the cost of such care, having due regard for other dependents. Such determination shall, if accepted by the parent, guardian or other person, be made a part of such agreement. If the executive secretary has been appointed in lieu of guardian and is acting as trustee of the estate of the child, such determination shall be subject to the approval of the probate court."

The provisions of these sections make it clear that the guardian of a child is not necessarily the legal custodian of the person of such child and that the right of a guardian, like that of a natural parent, to exercise custody and control of the minor is subject to judicial control. This view is entirely in harmony with the majority of American rule as stated in 27 American Jurisprudence, 828, Section 107, in the following language:

"Ordinarily the father has the right to the custody of an infant as the natural guardian of the child's person. Prima facie, the right to custody of a minor child is in the parents until a guardian is appointed, and is then in the guardian; but the right of neither is absolute, each being subject to the control of the court."

In Ohio this judicial control is exercised by the juvenile court. As previously noted, Section 1639-16, General Code, defining the jurisdiction of the juvenile court, gives that court express authority to determine the custody of any child not a ward of any other court. In the exercise of this power, the court, under the provisions of Section 1639-30, General Code, may in its discretion permanently commit a minor "to a county department, board or a certified organization." The jurisdiction of the juvenile court, as observed above, is thereby terminated and it must necessarily follow that the child's status as a ward of the court ceases. This, however, does not operate in any way to restore the rights of the parent or guardian to the custody and control of such child. Indeed, it is quite clear that the custody and control of the person of such child is lodged in the custodian designated in the court's order of commitment, to the exclusion by necessity of the continuation of such right in the parent or guardian. In these circumstances it follows that the custodian thus designated by the

court has the right and duty of determining, upon competent medical advice, whether medical or surgical treatment of such child is proper in any particular case.

We come now to the case of a child who is being cared for by a county board of welfare by agreement with the parents. It is quite clear in such case that the child, not having been placed with such board by order of the juvenile court, and not being found by such court to be a "dependent, neglected or delinquent" child, is not subject to the jurisdiction of such court and is not a ward of such court. This being so, it necessarily follows that the legal custody of such child remains in the parents as natural guardians; and only such parents (or guardian if there be one appointed) have the right and the duty to determine, upon competent medical advice, whether medical and surgical treatment of the child is proper in a particular case.

Another category of cases with which a child welfare board may be concerned will be noted in those instances where a complaint involving a child has been made under the provisions of Section 1639-23, General Code, but where there has not yet been any citation issued to the necessary parties nor any hearing had on such complaint. In such cases the following provisions of Section 1639-28, General Code, are applicable.

> "Pending hearing and service of citations, the court may make such temporary disposition of any child as it may deem best. Upon the certificate of one or more reputable practicing physicians, the court may summarily provide for emergency medical and surgical treatment as appears to be immediately necessary, for any child concerning or in behalf of whom complaint or an application for care has been filed, pending the service of a citation upon its parents, guardian or custodian. * * *"

It is obvious that in this class of cases the juvenile court, as to *emergency* medical and surgical care, may act in lieu of the parents in deciding upon what are proper measures and in consenting to them.

In another category of cases, the child welfare board may be concerned with children in what may be designated "service" cases. With respect to these cases, the board is ordinarily acting under the provisions of subparagraph (d) of Section 3070-17, supra.

It is clear that if the parents in "service" cases request the service or consent to it, such parents retain the authority to determine the propriety

of medical and surgical care of the children concerned. On the other hand, if such parents do not consent to the extension of such service by the board, it can be extended only upon order of the juvenile court; and the court in such case would have jurisdiction to make such order only (a) after complaint, in which case only emergency medical and surgical care could be ordered by the court under the provisions of Section 1639-28, supra, or (b) after complaint, hearing and a finding of dependency, neglect or delinquency, in which case, the child being a ward of the court, the court would have authority to determine, upon competent medical advice the propriety of medical and surgical treatment as in other cases involving wards of the court.

Finally we may consider that category of cases in which a county welfare board is authorized, under the provisions of subparagraph (g), Section 3070-17, General Code, "to provide temporary, emergency care for any child deemed by the board to be in need thereof, without agreement or commitment." For the purpose of this discussion it is assumed that in none of the cases in this category has there been a complaint filed with the juvenile court under the provisions of Section 1639-23, supra. In such case, in the absence of either an agreement or a judicial commitment, it is quite clear that the parent or guardian is the legal custodian of the person of the child and would, therefore, retain all the rights and duties relative to the control of the child as are incident to the status of natural guardianship. Obviously, in such cases only the parent or guardian would be authorized to consent on behalf of the child to the administration of medical or surgical treatment.

It is to be observed, however, that we are concerned, in this instance, with *emergency* care. For the purpose of this discussion it is assumed that your inquiry, as to this class of cases, relates only to emergency medical or surgical care. In cases of this sort we have already observed that no express consent is required, the law in such cases deeming the consent to be implied by the circumstances. 31 Ohio Jurisprudence, 464, Section 205; 41 American Jurisprudence, 221, Section 109; 76 A. L. R., 562. In such cases, therefore, where the consent of parent or guardian cannot be obtained, the responsibility must necessarily devolve upon the physician or surgeon concerned to decide whether the emergency is such as to require immediate professional treatment to save the life or health of the patient and so to imply a consent on the part of such patient or his parents or guardian thereto.

The remaining question concerns the classification of the administration of clinical tests and preventive serums as medical or surgical care with respect to the necessity of securing a parental consent to such administration. Here, too, the matter is ultimately one for determination by the physician or surgeon concerned, since the whole purpose of procuring such consent is to afford him protection against claims based on unauthorized treatment. On this point I conclude without difficulty that the administration of such tests and serums falls within the field of medical practice. If, therefore, the physician or surgeon concerned should deem it desirable in such case to secure the consent of the authority, organization or person having legal custody of patients who are minors, the rules set out above with respect to medical and surgical treatment generally would, in my opinion, be applicable.

Respectfully,

C. WILLIAM O'NEILL
Attorney General