

Published in *The Nassau Lawyer*, March 2007

**DUE PROCESS / FUNDAMENTAL RIGHTS
VERSUS
PARENS PATRIAE, THE ULTIMATE PARENT**

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Historically, the *Parens Patriae* power of the Court, literally the “father” or “parent of the country”, derives from the old English courts of equity where exercising the parental function of the Crown, a court could declare a child to be the ward of the crown.¹ The Chancellor in exercising his jurisdiction...does not proceed upon the theory that the petitioner, whether father or mother, has a cause of action against the other... He acts as *parens patriae* to do what is best for the interest of the child.”² For more than one hundred years, state courts including New York have relied on its *Parens Patriae* power as the authority to uphold custodial rights of non parents against claims of the parents, managing conflicted familial relations all in the best interests of the child.³

The expansion of the court’s parental authority to protect the child juxtaposes the best interests of the child determination in a variety of scenarios to the Due Process and Fundamental Rights of the litigants.

In the Matter of Shondel J. versus Mark D. decided last July by the New York Court of Appeals, the court created paternity by declaring a man a “de facto” parent and accountable for a child’s support despite a negative DNA test, and the factual misrepresentation by the mother during the family court paternity hearing wherein she denied sexual relations with any one other than the “de facto” father during the period of

¹ In the Matter of FEMALE.S a/k/a Vanessa S., 111 Misc.2d 313, 444 N.Y.S. 2d 829, (NY County, FamCt, 1981)

² *Finlay v Finlay*, 240 N.Y.429, 148 N.E. 624 (N.Y. 1925)

³ *Matter of Waldron*, 13 Johns.418, Supreme Court of Judicature of New York,

the child's conception.⁴ Nonetheless, the court was not dissuaded in its persistence to levitate the child's welfare to a higher plain; the decision left unresolved the fundamental rights or due process concerns of the "de facto" parent noting that the issue had not been raised at trial and the Court was without jurisdiction to address it on appeal.

Other cases involving a restriction of parental rights , such as the *Johnita M.D., versus David D.D.* , again demonstrate the court's use of the *Parens Patriae* power '... serving the important societal function of protecting children, even from their parents if necessary ...' such as here preventing the mother from smoking during visitation periods with her son.⁵ The principle set forth by the court and relied upon to reach their decision is that a child is a person with rights in as much as their adult parent(s), some of which are of constitutional magnitude. Conflicts arising between the best of interest of the child and the right of parental custody have usually given way to the superiority of the child's interest.

In the area of mental health, New York State has issued a recommendation that decisions to provide psychiatric medications to the child be made jointly – physician, parents and child, and that due weight be given to the child's opinion in light of his age and maturity. Further, if a disagreement arises between the parent and the child, then a judicial hearing should be granted the child as would be an adult.⁶

The U.S. Supreme Court over sixty years ago recognized the proposition that neither the (jealously guarded) rights of religion nor rights of parenthood are beyond the

⁴ 820 N.Y.S.2d 199

⁵ 191 Misc2d301,740 N.Y.S.2d 811, 2002 N.Y. Slip Op.22529

⁶ Susan L. Pollet, 'Psychotropic Drugs: How Do We Protect Our Children?', *The New York Law Journal*, January 29, 2007.

limitation of the state's *parens patriae* power in requiring school attendance, regulating or prohibiting the child's labor, etc.⁷

Not only the judiciary, but the legislature as *parens patriae* has acted affirmatively in limiting parental authority to permit a child to engage in certain activities deemed inappropriate:

Consumption of alcohol under age 21 outside of the home is not permitted.⁸

Child not permitted as passenger in vehicle unless seat belted, under age four, car seat required.⁹

Parent must submit child to a series of vaccinations.¹⁰

Parent not permitted to allow a child to marry under age fourteen, or less than sixteen, without permission of a judge.¹¹

From an historical perspective coupled with the modern trend of the courts of this state in recognizing the child as a person with all of the inherent fundamental rights and due process protections afforded an adult, it is not without due caution that a parent challenge the ultimate parental authority, *Parens Patriae*.

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⁷ Prince v Massachusetts (U.S. 1944)321 U.S. 158,64 S.Ct.438

⁸ Alcohol Beverage Control Law section 65-b

⁹ Vehicle and Traffic Law section 1229 (c)

¹⁰ Public Health Law section 2164

¹¹ DRL section 15, 15-a