

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF BROWN

FIFTH JUDICIAL DISTRICT
CIVIL DIVISION

COURT FILE NO.: JV-09-68

In Re the Matter of the Welfare of
The Child of Colleen and Anthony Hauser

**RESPONDENTS' LEGAL
MEMORANDUM OF LAW**

INTRODUCTION

A parent has a constitutional right to free exercise of religion, as well as a constitutionally protected right to raise their child as they see fit. This legal memorandum will address the bases of the Hausers' defenses in this matter, and the legal bases for their belief that they should be allowed to choose the proper course of medical treatment for their son Daniel ("Danny").

ARGUMENT

I. CONSTITUTIONAL DEFENSES

A. *Free Exercise Clause*

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. CONST. amend 1. The First Amendment applies to the states through the due process clause of the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). The Fourteenth Amendment provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. XIV, § 1. The Free Exercise Clause protects parents from criminal liability if their child's death resulted from a decision to treat their child spiritually. *See Walker v. Superior Court*, 763 P.2d 852 (Cal. 1988); *People v.*

Rippberger, 283 Cal. Rptr. 111 (Cal. Ct. App. 1991); *State v. Norman*, 808 P.2d 1159 (Wash. Ct. App. 1991).

In a case virtually identical to the present case, *In Matter of Hofbauer*, 47 N.Y.2d 648, 393 N.E.2d 1009, 419 N.Y.S.2d 936 (1979), the issue involved whether a child suffering from Hodgkin's disease whose parents failed to follow the recommendation of an attending physician to have their child treated by radiation and chemotherapy, but, rather, placed their child under the care of physicians advocating nutritional or metabolic therapy, including injections of laetrile, is a "neglected child" within the meaning of section 1012 of the Family Court Act. The specific issue presented was whether the parents of a child afflicted with Hodgkin's disease had failed to exercise a minimum degree of care in supplying their child with adequate medical care by entrusting the child's physical well-being to a duly licensed physician who advocates a treatment not widely embraced by the medical community.

The relevant facts included: In October, 1977, Joseph Hofbauer, then a seven-year-old child, was diagnosed as suffering from Hodgkin's disease, a disease almost always fatal if left untreated. The then attending physician, Dr. Arthur Cohn, recommended that Joseph be seen by an oncologist or hematologist for further treatment which would have included radiation treatments and possibly chemotherapy, the conventional modes of treatment. Joseph's parents, however, after making numerous inquiries, rejected Dr. Cohn's advice and elected to take Joseph to Fairfield Medical Clinic in Jamaica where a course of nutritional or metabolic therapy, including injections of laetrile, was initiated.

Upon Joseph's return home to Saratoga County in November, 1977, a neglect proceeding was commenced by the Saratoga County Commissioner of Social Services. The petition alleged, in substance, that Joseph's parents neglected their son by their failure to follow the advice of Dr. Cohn with respect to treatment and, instead, chose a course of treatment for Joseph in the form of nutritional therapy and laetrile. *Id.* at 1012. A preliminary hearing was held and the court, finding "that there exists the probability of neglect of (Joseph) by his parents," ordered that

Joseph be temporarily removed from the custody of his parents and placed in St. Peter's Hospital in Albany.

Thereafter, Joseph's parents made an application to have Joseph returned to their custody. A hearing was duly commenced, but the proceeding was suspended for six months when a stipulation was entered into by the parties returning Joseph to the custody and care of his parents, and authorizing Joseph to come under the care of Dr. Michael Schachter, a physician duly licensed in New York who is a proponent of metabolic therapy. The stipulation further provided that at least one other physician would be consulted regularly, with medical reports to be submitted to the court periodically.

At the direction of the Appellate Division, a dispositional hearing on the merits of the case was conducted by Family Court. A review of the testimony adduced at the hearing revealed a sharp conflict in medical opinion as to the effectiveness of the treatment being administered to Joseph. The physicians produced by appellants testified, in substance, that radiation and chemotherapy were the accepted methods of treating Hodgkin's disease and that nutritional therapy was an inadequate and ineffective mode of treatment. In addition, two physicians, who by stipulation examined Joseph during the hearing, testified, in essence, that there had been a progression of the disease and denounced the treatment being rendered to Joseph as ineffective.

Two physicians produced by respondents, however, testified that they prescribed nutritional therapy for cancer patients and considered such therapy as a beneficial and effective mode of treatment, although they did not preclude the use of conventional therapy radiation treatments and chemotherapy in some cases. In addition, a biologist testified as to a study which had been conducted which demonstrated significant regression in cancerous tumors in mice which had been treated with amygdalin (laetrile), vitamin A, and proteolytic enzymes. Dr. Schachter, the attending physician, then testified that in his opinion Joseph was responding well to the nutritional therapy and that both his appetite and energy levels were good. Dr. Schachter further stated that he had consulted with numerous other physicians concerning Joseph's

treatment, and that he never ruled out the possibility of conventional treatment if the boy's condition appeared to be deteriorating beyond control. Significantly, Joseph's father also testified that he would allow his son to be treated by conventional means if Dr. Schachter so advised. Both appellants' and respondents' witnesses testified as to the potentially dangerous side effects of radiation treatments and chemotherapy which could include, among other things, fibrosis of the body organs, swelling of the heart, impairment of the growth centers and leukemia.

At a preliminary hearing, the Family Court of Saratoga County, New York, held that the child was probably being neglected and therefore temporarily removed him from the custody of his parents. *Id.* at 1012. The court later returned the child to his mother and father, however, on the stipulation that a licensed physician who was also a proponent of metabolic therapy treat the child and that at least one other physician periodically submit a medical report to the court. *Id.*

At a fact-finding hearing, the family court acknowledged that medical opinions differed concerning the efficacy of laetrile and metabolic therapy. *Id.* At the same time, however, the court recognized that chemotherapy was the generally accepted method of treatment. *Id.* Most importantly, the family court noted that medical evidence indicated that the child was improving under metabolic treatment (*Id.*) and, moreover, that the child's father would allow conventional treatment if the son's present physician so advised. *Id.* The family court concluded that the child was not neglected, and the appellate division affirmed. *Id.* at 1012-13.

The New York Court of Appeals agreed with the lower court decisions. *Id.* at 1013. In so doing, the court recognized the “fundamental right” of the parents to rear their child and noted the “great deference” courts should accord the parental choice of medical treatment. *Id.* The court did note that the parental choice of treatment must be “adequate,” or, in other words, measured against the method that would be adopted by “an ordinarily prudent and loving parent, ‘solicitous for the welfare of his child and anxious to promote his child's recovery.’” *Id.* (quoting *People v. Pierson*, 176 N.Y. 201, 206, 68 N.E. 243, 244 (1903)).

Ultimately, the court concluded that the parents' choice of treatment was acceptable in light of all of the surrounding circumstances. *Id.* at 1014. Specifically, the court explained that the parents had provided treatment which was not totally rejected by all responsible medical authority, that numerous qualified doctors were contributing to the child's care, that the parents had justifiable concerns about the deleterious side effects of radiation treatment and chemotherapy, that the treatment being used controlled the child's condition and was not as toxic as conventional treatment, and, finally, that the father agreed to administer conventional treatment if it ever became necessary. *Id.*

In its holding, the *Hoftbauer* court stated: “It surely cannot be disputed that every parent has a fundamental right to rear its child. (*Matter of Bennett v. Jeffreys*, 40 N.Y.2d 543, 546, 387 N.Y.S.2d 821, 824, 356 N.E.2d 277, 281; *Quilloin v. Walcott*, 434 U.S. 246, 255, 98 S.Ct. 549, 54 L.Ed.2d 511, reh. den. 435 U.S. 918, 98 S.Ct. 1477, 55 L.Ed.2d 511.) While this right is not absolute inasmuch as the State, as *Parens patriae*, may intervene to ensure that a child's health or welfare is not being seriously jeopardized by a parent's fault or omission (*see Wisconsin v. Yoder*, 406 U.S. 205, 233-234, 92 S.Ct. 1526, 32 L.Ed.2d 15; *Prince v. Massachusetts*, 321 U.S. 158, 166-167, 64 S.Ct. 438, 88 L.Ed. 645, reh. den. 321 U.S. 804, 64 S.Ct. 784, 88 L.Ed. 1090; *Matter of Vasko*, 238 App.Div. 128, 263 N.Y.S. 552), great deference must be accorded a parent's choice as to the mode of medical treatment to be undertaken and the physician selected to administer the same.” *Id.* at 103. The Court quoted, “As we have only recently stated, ‘(t)he filial bond is one of the strongest, yet most delicate, and most inviolable of all relationships.’” *Id.* at 1013-14, citing *Matter of Corey L v. Martin L*, 45 N.Y.2d 383, 392, 408 N.Y.S.2d 439, 443, 380 N.E.2d 266, 271.)

Further, the court noted that the inquiry into whether the parents had chosen an acceptable course of medical treatment for their child, in light of *all the surrounding circumstances*, could not be posed in terms of whether the parent has made a “right” or a “wrong” decision, for the present state of the practice of medicine, despite its vast advances, very

seldom permits such definitive conclusions. *Id.* (Emphasis added). “Nor can a court assume the role of a surrogate parent and establish as the objective criteria with which to evaluate a parent's decision its own judgment as to the exact method or degree of medical treatment which should be provided, for such standard is fraught with subjectivity. Rather, in our view, the court's inquiry should be whether the parents, once having sought accredited medical assistance and having been made aware of the seriousness of their child's affliction and the possibility of 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.” *Id.*

The Court concluded that the State's charge that Joseph's parents had selected for their child a mode of treatment which is inadequate and ineffective, was a subjective determination. *Id.* Thus, the Court upheld the parents' right to choose the form of treatment they believed was most effective for their child. *Id.*

Similarly, in the present matter, the Hausers have a right to choose the form of treatment they believe is best for their child, and is one that comports with their spiritual beliefs. Respondents will present medical testimony to support their chosen form of treatment. Respondents have a constitutionally protected right to choose an alternative form of treatment to Chemotherapy for their son Danny.

B. Fundamental Rights of Parents: Fourteenth Amendment Due Process Clause

Respondents contend that their decision in this matter is protected by their fundamental right of parental autonomy guaranteed under the Due Process Clause of the Fourteenth Amendment. U.S. CONST. amend. XIV, § 1. The Due Process Clause provides that no state shall “deprive any person of life, liberty, or property, without due process of law.” *Id.*

In *Meyer v. Nebraska*, 262 U.S. 390 (1923), the United States Supreme Court announced,

While this Court has not attempted to define with exactness the liberty thus guaranteed [by the Fourteenth Amendment,] ... without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Id. at 399.

After the *Meyer* decision, the Court consistently has held that parenting decisions, including the right to direct the religious upbringing of a child, constitute a fundamental right protected by the Due Process Clause of the Fourteenth Amendment. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (affirming that parents have an interest in guiding the future religious and educational training of their children); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (“It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.”) (citation omitted); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (recognizing parental autonomy as a fundamental right). Indeed, the Court has said that “it is settled now ... that the Constitution places limits on a State's right to interfere with a person's most basic decisions about family and parenthood.” *Planned Parenthood v. Casey*, 505 U.S. 833, 849 (1992).

The Court's decision in *Wisconsin v. Yoder*, 406 U.S. 205 illustrates the wide latitude given to parental choices determining a child's education, choices that may involve religious preferences. In *Yoder*, Amish parents objected to a state law that required all children to attend a public or private school until age sixteen. *Id.* at 207-09. The law stood at odds with the Amish belief that formal education beyond the eighth grade “expose s Amish parents to the danger of the censure of the church community ... and also endanger s their own salvation and that of their children.” *Id.* at 209. After determining the state law to be an impermissible burden on the parents' free exercise of religion, *Id.* at 214-15, the Court found that Wisconsin had not demonstrated a compelling state interest to justify the burden and ordered the state to

accommodate the Amish parents' religious beliefs by exempting them from the compulsory school attendance law. *Id.* at 236.

In *Phillip B. v. Bothman*, 92 Cal. App. 3d 796, 156 Cal. Rptr. 48 (1979), cert. denied, 445 U.S. 949 (1980). twelve year-old Phillip suffered from both Down's Syndrome and a congenital heart defect. *Id.* at 800. The heart defect was of the kind that would inevitably cause death if uncorrected. *Id.* Consequently, Phillip's cardiologist recommended corrective heart surgery. *Id.* Phillip's parents, however, refused to permit the surgery on nonreligious grounds. *Id.* at 799. Without the operation, Phillip faced a life of only twenty more years at the most, during which the heart defect would increasingly impair his energy and finally lead to a "bed-to-chair" existence. *Id.* at 800. With the surgery, Phillip faced possible complications, including the risk of death. *Id.* at 802.

In an attempt to compel heart surgery, a juvenile probation department brought a neglect proceeding against the parents. *Id.* at 799. The department alleged that Phillip's parents failed to provide him with the "necessities of life," as required of parents under the California Welfare and Institutions Code. *Id.* The juvenile court dismissed the department's petition. *Id.* at 799.

The California Court of Appeal affirmed the juvenile court's ruling. *Id.* at 803-04. In its decision, the appellate court recognized that the guarantee of liberty in the fourteenth amendment extends to privacy rights over the family. *Id.* at 801. Although this protection is not absolute, the court acknowledged that the state must satisfy a "serious burden" in order to justify an abridgment of parental autonomy. *Id.* at 801-02. According to the court, the state usually should defer to parental wishes. *Id.*

In the process of reaching its decision, the appellate court weighed several factors. *Id.* at 802. Specifically, the court noted that: (1) the operation would involve greater than usual risks because Phillip had pulmonary vascular changes; (2) children with Down's Syndrome have more postoperative problems than normal children, including a five to ten percent chance of mortality;

and (3) Phillip might require a pacemaker subsequent to the operation. *Id.* Ultimately, the court concluded that the state failed to satisfy its burden of justifying any intervention. *Id.* at 803.

The right to direct the religious upbringing of their child constitutes a fundamental right protected by the Due Process Clause of the Fourteenth Amendment, and is a right the Hausers have chosen to exercise in this matter. This Court must uphold this fundamental right of Respondents’.

II. RELIGIOUS FREEDOMS

Courts have long recognized parents' rights to provide their children with religious training and to encourage them in the practice of religious beliefs without undue state interference. *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972) (“[A] State's interest in universal education ... is not totally free from a balancing process when it impinges on fundamental rights and interests, such as ... the traditional interest of parents with respect to the religious upbringing of their children ...”); *West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943)(holding that to compel Jehovah's Witness children to salute the flag as part of a daily school exercise “transcends constitutional limitations on [local school authorities'] power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment ... to reserve from all official control”); *Pierce v. Society of Sisters*, 268 U.S. 510, 534 -35 (1925) (finding that Oregon law prohibiting parents from sending their children to parochial school “interferes with liberty of parents ... to direct the upbringing and education of [their] children”).

In *Sherbert v. Verner*, 374 U.S. 398 (1962), the state denied a Seventh-Day Adventist unemployment benefits because she refused, based upon religious beliefs, to accept employment that required her to work on Saturday. *Id.* at 399-400. The Supreme Court found that the statute, which denied her benefits, unconstitutionally burdened religious exercise because the state could show no compelling interest to justify its infringement upon religious practice. *Id.* at 406-409.

Similarly, where personal autonomy - a privacy right similar to family autonomy - is at stake, the Supreme Court has required that state intervention satisfy the compelling state interest test. For example, in *Roe v. Wade*, 410 U.S. 113 (1973), modified by *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989), and *Webster v. Reproductive Health Services*, 109 S.Ct. 3040 (1989), the Supreme Court recognized that the compelling state interest test governs the permissibility of state intervention regarding women's pregnancies. The Supreme Court, however, has not explicitly articulated whether a compelling state interest, or a lesser state interest, is required before the state can constitutionally interfere with family autonomy.

Recently, in *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegeta*, 546 U.S. 418 (2006), the United States Supreme Court held that the government had the burden of demonstrating a compelling state interest in banning a religious sect's use of hoasca, a tea containing a hallucinogen, in religious ceremonies, and that the Government had failed to demonstrate this compelling interest in barring the sacramental use of hoasca. In analyzing the Religious Freedom Restoration Act of 1993 ("RFRA"), the Court noted that it required the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law "to the person"-the particular claimant whose sincere exercise of religion is being substantially burdened. 42 U.S.C. § 2000bb-1(b). *Id.* at 419-420. Section 2000bb(b)(1) expressly adopted the compelling interest test of *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15. There, the Court looked beyond broadly formulated interests justifying the general applicability of government mandates, scrutinized the asserted harms, and granted specific exemptions to particular religious claimants. *Gonzales*, 546 U.S. at 420, citing *Yoder*, 406 U.S. at 213, 221, 236, 92 S.Ct. 1526; *Sherbert*, *supra*, at 410, 83 S.Ct. 1790. In *Sherbert*, the Court upheld a particular claim to a religious exemption from a state law denying unemployment benefits to those who would not work on Saturdays, but explained that it was not announcing a constitutional right to unemployment benefits for "all persons whose religious convictions are

the cause of their unemployment.” 374 U.S., at 410, 83 S.Ct. 1790 (emphasis added). Outside the Free Exercise area as well, the Court has noted that “[c]ontext matters” in applying the compelling interest test, *Grutter v. Bollinger*, 539 U.S. 306, 327, 123 S.Ct. 2325, 156 L.Ed.2d 304, and has emphasized that strict scrutiny's fundamental purpose is to take “relevant differences” into account, *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 228, 115 S.Ct. 2097, 132 L.Ed.2d 158.

The Supreme Court also noted that the cases relied upon by the State did not embrace the notion that a general interest in uniformity justified a substantial burden on religious exercise, but instead scrutinized the asserted need and explained why the denied exemptions could not be accommodated. *Gonzales*, 546 U.S. at 421, citing, e.g., *United States v. Lee*, 455 U.S. 252, 258, 260, 102 S.Ct. 1051, 71 L.Ed.2d 127.

In light of *Sherbert* and the cases that followed it, it appears the Court requires a compelling state interest to legitimize state intervention in situations involving claims of religious exercise. Therefore, the state must show a compelling interest when parents raise claims of both religious exercise and parental autonomy.

Here, the issue is not one of a *refusal* to treat based on religious grounds. Rather, it is the right to choose an *alternative* form of treatment, i.e., that of nutritional services. A review of Respondents’ Offer of Proof: Statement of Nemenhah Religious Principles outlines the various tenants to which Respondents, and Danny, prescribe. A copy of this document is attached as *Exhibit A*. Specifically, this Offer of Proof states Respondents’ religious view of chemotherapy: “Chemotherapy does harm, by definition. It kills the cancer, and hopefully does not kill the patient. Conventional medicine attempts to bring the patient back to health. Without doubt, chemotherapy can kill the patient.” *Id.* at ¶ 2. Further, “The proposed action by the state of Minnesota enforcing Danny Hauser to undertake chemotherapy is considered the extinguishment of Native American religion and culture.” *Id.* Thus, this Court must not prohibit Respondents’ right to exercise their religious freedom and the principles to which they subscribe.

III. DANNY HAUSER'S RIGHT TO CHOOSE

The Supreme Court has held that minors are entitled to constitutional protection in a number of circumstances. For instance, the Court has extended to minors the fundamental rights of privacy and bodily integrity in the contraception (*See, e.g., Carey v. Population Servs. Int'l*, 431 U.S. 678, 681-82 (1977)(striking down a New York statute that prohibited the distribution of nonmedical contraceptives to persons age 16 or over except through a licensed pharmacist and that entirely prohibited their distribution to persons under 16 years of age) and abortion contexts. *See, e.g., Bellotti v. Baird*, 443 U.S. 622, 651 (1979)(invalidating a Massachusetts statute requiring parental consent or court order before an abortion can be performed on an unmarried woman under the age of 18); *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976)(holding that a state “may not impose a blanket provision ... requiring the consent of a parent or person in loco parentis as a condition for abortion of an unmarried minor during the first 12 weeks of her pregnancy”). In keeping with this trend of affording children greater protection under the Constitution, a competent minor's right to make certain medical decisions for himself should receive protection in most instances as well. If a minor has the right to choose to undergo such an invasive procedure as an abortion, (*See Bellotti*, 443 U.S. at 651; *Danforth*, 428 U.S. at 74), then certainly he should have the right to refuse or accept other forms of medical treatment on his own behalf.

Competence -- which is an integral part of being able to make medical treatment decisions -- lies at the heart of the doctrine of informed consent. Informed consent is the treatment authorization given by a patient to the physician. Nancy M.P. King & Alan W. Cross, *Children as Decision Makers: Guidelines for Pediatricians*, 115 J. Pediatrics 10, 11 (1989).

The law imposes on physicians a legal duty to provide the patient, prior to treatment, with information about (1) the particular procedures and treatments; (2) the benefits of the proposed treatment; (3) any significant risks associated with such treatment; and (4) feasible alternatives.

Id. The physician must convey this information to the patient in a manner that the patient

understands and under circumstances that allow the patient to reflect on the proposed treatment and ask follow-up questions. *Id.* Equally importantly, the physician must communicate to the patient that the patient possesses the right and responsibility to make the final decisions about treatment. *Id.*

Despite the presumption that children lack the capacity to give informed consent, empirical research within the last decade has demonstrated that some children have a much greater capacity to provide informed consent than the legal community has recognized. *See* Wallace J. Mlyniec, A Judge's Ethical Dilemma: Assessing a Child's Capacity to Choose, 64 *Fordham L. Rev.* 1873, 1881-83 & nn.37-54 (1996)(citing studies demonstrating that adolescent decision making does not differ significantly from adult decision making); Richard E. Redding, Children's Competence to Provide Informed Consent for Mental Health Treatment, 50 *Wash. & Lee. L. Rev.* 695, 708 (1993). For example, one study examined the developmental differences between children and adults when making medical and psychiatric treatment decisions. Lois A. Weithorn & Susan B. Campbell, The Competency of Children and Adolescents to Make Informed Treatment Decisions, 53 *Child Dev.* 1589 (1982). The researchers found that although significant differences existed between nine-year-old children and adults in decision-making capacity, little or no difference in competence existed between fourteen-year-old adolescents and adults. *Id.* at 1595-96; *see also* Thomas Grisso & Linda Vierling, Minors' Consent to Treatment: A Developmental Perspective, 9 *Prof. Psychol.* 412, 423 (1978) (finding that minors age 15 and above are no less competent to provide consent than are adults, that no assumptions can be made about the ability of minors age 11-14 to consent to treatment, and that minors below age 11 generally do not have the intellectual ability to satisfy a legal standard for competent consent). Another study showed that children as young as ten or eleven appear to have a factual understanding and appreciation of the risks and benefits of psychotherapy. Nancy Kayser-Boyd et al., Minors' Ability to Identify Risks and Benefits of Therapy, 16 *Prof. Psychol.: Res. & Prac.* 411, 416 (1985). Finally, a third study demonstrated that even children as young as nine years

old appear to understand many basic aspects of medical treatment, including differences between various diagnoses and prognoses, as well as treatment risks and benefits. See Michael C. Roberts et al., Children's Perceptions of Medical and Psychological Disorders in Their Peers, 10 J. Clinical Child Psychol. 76, 77-78 (1981). Thus, it appears that a consensus has emerged that “children are capable of quite a lot, if you just let them participate in the decision-making process.” Redding, *supra*, at 708.

In addition to social science research, the medical literature appears to support the practice of obtaining informed consent from minors and inviting their participation in their own health care decisions to the greatest extent possible. King & Cross, *supra*, at 10. Physicians believe that:

Informed consent . . . is more than just a legal obligation, imposed on the physician by society, to give information to patients . . . about their condition and proposed treatment, and to obtain consent before proceeding with treatment. It also has a moral basis fundamental to human relationships: the recognition of individual autonomy, dignity, and the capacity for self-determination.

Id. The medical community remains faithful to the notion that individual autonomy and fairness require that children receive greater opportunity to participate in their own health care decisions when they possess the capacity to do so. *Id.* at 10-11.

Further, physicians and psychologists maintain that many benefits result from allowing children to participate in medical decision making. Recognition of a child's decision-making capacities often results in improved patient care and treatment effectiveness. *Id.* at 10.

Participation by children in treatment decisions may also serve to reduce the stress of treatment. Gary B. Melton, Children's Participation in Treatment Planning: Psychological and Legal Issues, 12 Prof. Psychol. 246, 250 -51 (1981); see also Gary B. Melton, Decision Making by Children: Psychological Risks and Benefits, in Children's Competence to Consent, 21, 31 (Gary B. Melton et al. eds., 1983)(stating that children's participation in decision making may serve as an “inoculation” against the stress involved in making the decision). Additionally, children may have better attitudes about their treatment if they participate in the decision-making process,

which, in turn, leads to more successful treatment because children will often be more willing to cooperate. Rochelle T. Bastien & Howard S. Adelman, Noncompulsory Versus Legally Mandated Placement, Perceived Choice, and Response to Treatment Among Adolescents, 52 J. Consulting & Clinical Psychol. 171, 177 (1984). Finally, since minors usually have had limited experience with exercising their rights, permitting minors to exercise their right to make treatment decisions may actually assist them in developing decision-making competence with respect to legal issues and life choices, enabling them gradually to assume adult responsibilities. Redding, *supra*, at 709.

In the present case, Danny Hauser, at age 13, is considered to be a “medicine man” in the Nemenhah Band and Okleveuha Native American Church of Sanpete. *See* Offer of Proof: Statement of Nemenhah Religious Principles. “He has achieved the age of accountability. He has been accepted into the seminary. Danny Hauser is a minister of the Nemenhah church. This is an honored position within the church. Danny Hauser is also an elder. By accepting to walk this spiritual path, he embraces a spiritual condition that he shall do no harm.” *Id.* at ¶ 2.

Referring to the Offer of Proof, outlined by Phillip R. “Cloudpiller” Landis, it states, “Danny Hauser has been very explicit with me on his position concerning chemotherapy. He has stated: I would rather not take chemotherapy, and die, and live with the angels, rather than taking poison, die, and go live with the doctors and devils in hell.” *Id.* As such, and given that Danny’s wishes align with his parents in this matter, Danny should be given a say in the form of his medical treatment. Failure to do so takes away not only Danny’s parents’ freedom of choice and freedom of religion in this matter, but takes away Danny’s freedoms as well.

CONCLUSION

For all of the reasons set forth above, the undersigned, on behalf of Colleen and Anthony Hauser, respectfully requests that this Court grant the Hausers the right to choose the course of medical treatment that Danny Hauser will undergo for cancer. Respondents have a constitutional right to free exercise of religion, as well as a constitutionally protected right to raise and/or treat

their child as they see fit.

Dated this ____ day of _____, 2009

Respectfully Submitted,

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