

## **Homeopathy, Holistic Medicine, and Parental Rights: What Role Should the Government Play in Regulating Parents' Rights to Choose Appropriate Care for Their Children?**

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### **Abstract**

Disjointed adjudications abound as courts attempt to distill the boundaries of the constitutional right of parents to direct the upbringing of their children, when those parents shun traditional medicine for their children in favor of complementary and alternatives measures, such as homeopathic remedies. Likewise, statutes governing these situations vary greatly from state to state, possibly explaining the vast incongruence of holdings elicited from the bench. Illustrating the gravity of this patchwork legal framework, many states provide for the possibility of removal if parents do not adequately provide medical care for their children. To adequately safeguard state governments and families under these circumstances, states need to enact statutes designed to take alternative medical practices, such as homeopathy, into account. This article examines the current framework of constitutional protection for parental rights, coupled with the relatively contemporary—and unknown—concept of complementary and alternative medicine. Additionally, this article explores examples, both reported in popular media as well as the courts, which illustrate the problem this framework creates when parents chose to forego traditional medical services in favor of various alternative remedies. Finally, through a discussion of the constitutionality of state intervention in such situations, this article seeks to propose possible best practices for states in crafting statutes to specifically address this arena of parental choice.

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## I. Constitutional Framework Surrounding Parental Choice

Examining the complicated relationship of courts interpreting statutory authority to govern parents' decisions to forego traditional medicine in favor of alternative and complementary medicinal remedies begins with understanding the constitutional protections afforded parents over their right to direct the upbringing of their children. The holding of the Supreme Court of the United States ("U.S.") in *Troxel v. Granville* provides that parents possess the fundamental right to raise their children.<sup>1</sup> It stated that "[t]he liberty interest at issue in this case – the interest of parents in the care, custody, and control of their children – is perhaps the oldest of the fundamental liberty interests recognized by this Court."<sup>2</sup> In that vein, the Supreme Court has emphasized that courts will not flippantly be granted the power to co-opt parental authority.<sup>3</sup> In fact, the Court emphatically stated that "[s]imply because the decision of a parent is not agreeable to a child or because it involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state."<sup>4</sup> Furthermore, a determination of unfitness must precede any parental termination.<sup>5</sup> The Supreme Court stipulated that the State bore this burden, stating that, "Until the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship."<sup>6</sup> These rules originate from common law, because the Constitution does not explicitly state that parents possess a fundamental right to raise their children. Protected under the liberties of the Fourteenth Amendment, all American citizens receive the guarantee that no State shall "deprive any person of life, liberty, or property, without due process of law."<sup>7</sup> Even further, Ninth Circuit precedent emphasizes the importance of strict scrutiny for statutes that affect certain parental rights.<sup>8</sup> It stated, "The rights to marry, have

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<sup>1</sup> *Troxel v. Granville*, 530 U.S. 57 (2000).

<sup>2</sup> *Id.* at 65 (supporting a mother's decision to limit paternal grandparents' visitation rights after the child's father had died).

<sup>3</sup> *Parham v. J.R.*, 442 U.S. 584 (1979).

<sup>4</sup> *Id.* at 603 (determining the constitutionality of allowing parents to admit their minor children to mental health institutions though no neutral fact finder had weighed the action).

<sup>5</sup> *Santosky v. Kramer*, 455 U.S. 745, 760 (1982).

<sup>6</sup> *Id.* (holding that to permanently sever the parental rights in a neglect proceeding, due process required that the state prove its allegations at least by clear and convincing evidence).

<sup>7</sup> U.S. CONST. amend. XIV, § 1.

<sup>8</sup> *P.O.P.S. v. Gardner*, 998 F.2d 764, 767-68 (9th Cir. 1993).

children, and maintain a relationship with one's children are fundamental rights protected by the Fourteenth Amendment's Due Process Clause. . . . Statutes that directly and substantially impair those rights require strict scrutiny."<sup>9</sup> Therefore, if any state wishes to intervene or terminate parentage based on parental choice of medical care for their children, it necessarily must adhere to these constitutional requirements.

## **II. Lack of Representation for Alternative Medicinal Treatments in Statutory Authority and Case Law**

In 2015, state legislatures enacted 425 laws geared towards the protection of children.<sup>10</sup> It is safe to say that laws enacted to protect children are abundant across the nation. While lacking in uniformity, states generally share the maxims of protecting children in accordance with the constitutional standards discussed previously. However, legal authority surrounding state intervention as a result of parental adherence to homeopathic, and other alternative, remedies is minimal. In a comprehensive survey of statutory law relating to termination of parental rights, only six states explicitly addressed parents' inability, or refusal, to adequately provide medical care for their children as a reason for termination.<sup>11</sup> This may be because of the relative infrequency of such issues arising, but it may also be because the trend towards alternative medicine is a newly reoccurring phenomena. Furthermore, the court cases that have dealt with the issues, and the media attention surrounding the subject, only complicate the analysis of the problem.

## **III. What Is Homeopathic Medicine, Where Did It Originate and What Characterizes the Practice Today?**

Though many people may think that trends in medicine, such as homeopathic remedies, are a sort of new-age revolution, homeopathic

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<sup>9</sup> *Id.* (citations omitted).

<sup>10</sup> *Child Welfare Enacted Legislation Database*, NAT'L CONF. OF ST. LEGISLATURES, <http://www.ncsl.org/research/human-services/2012-child-welfare-enacted-legislation-database.aspx>.

<sup>11</sup> *See generally* Child Welfare Information Gateway, *Grounds for Involuntary Termination of Parental Rights*, U.S. DEP'T OF HEALTH AND HUM. SERVICES, CHILD.'S BUREAU (Jan. 2013), <https://www.childwelfare.gov/pubPDFs/groundtermin.pdf> (explaining how Alaska, American Samoa, Kentucky, Ohio, Pennsylvania, and Texas mention the provision of inadequate medical treatment as a reason for terminating parental rights, however "neglect" as a reason was mentioned in virtually all of the states' statutes in some way).

medicine actually boasts fairly ancient origins.<sup>12</sup> Dating back to Hippocrates,<sup>13</sup> homeopathy follows the “principle of treating ‘like with like,’” and “has been widely used worldwide for more than 200 years.”<sup>14</sup> More pointedly, “[h]omeopathy is based on two key principles: the ‘law of similar (‘let like cure like’) and the ‘law of infinitesimals’ (the more diluted the drug, the more powerful its effects).”<sup>15</sup> Samuel Hahnemann, a German doctor, concocted the methods now thought of as homeopathy in an attempt to find an alternative practice to the “harsh medical practices of the day,” among them “blood-letting, purging, and the use of poisons such as arsenic.”<sup>16</sup> According to the Society of Homeopaths’ website:

He began experimenting on himself and a group of healthy volunteers, giving smaller and smaller medicinal doses, and found that as well as reducing toxicity, the medicines actually appeared to be more effective the lower the dose. He also observed that symptoms caused by toxic “medicines” such as mercury, were similar to those of the diseases they were being used to treat e.g. syphilis, which lead to the principle he described as “like cures like.” Hahnemann went on to document his work, and his texts formed the foundations of homeopathic medicine as it is practiced today.<sup>17</sup>

The Society of Homeopaths comments further that “[a] BBC Radio 4 documentary aired in December 2010 described Hahnemann as a medical pioneer who worked tirelessly to improve medical practice, insisting that medicines were tested before use.”<sup>18</sup>

Transitioning to the modern day, while the BBC may have praised Hahnemann for his skepticism of traditional medicine, the consensus

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<sup>12</sup> *About Homeopathy*, THE SOCIETY OF HOMEOPATHS, [http://www.homeopathy-soh.org/index.php?option=com\\_content&view=article&id=1&Itemid=107](http://www.homeopathy-soh.org/index.php?option=com_content&view=article&id=1&Itemid=107) (last visited March 15, 2017).

<sup>13</sup> Henry B. Hemenway, *Modern Homeopathy and Medical Science*, 22 JAMA 11, 367 (1894) (many homeopaths believe that Hippocrates originated the concept of “like cures like” when he prescribed mandrake root to cure mania, knowing that it actually causes mania when ingested in much larger doses).

<sup>14</sup> THE SOCIETY OF HOMEOPATHS, *supra* note 12.

<sup>15</sup> Suzanne W. Junod, *An Alternative Perspective: Homeopathic Drugs, Royal Copeland, and Federal Drug Regulation*, 55 FOOD & DRUG L. J. 161 (2001).

<sup>16</sup> THE SOCIETY OF HOMEOPATHS, *supra* note 12.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

among medical professionals as to the efficacy of Hahnemann's methods remains anything but a settled matter.<sup>19</sup> First introduced in the U.S. in 1825 by Hans Birch Gram, the government did not seem to take notice of the practice until 1938, with the passage of the Federal Food, Drug, and Cosmetic Act (the "FDCA").<sup>20</sup> Yet, scrutinizing the FDCA itself, it appears that the inclusion of homeopathy in the bill seems to be more of a concession to the bill's sponsor – New York Senator, and former homeopath, Royal Copeland – than a real belief in the medicinal efficacy of homeopathy.<sup>21</sup> Still, some speculate that the inclusion of the Homoeopathic Pharmacopoeia of the U.S. (the "HPUS")<sup>22</sup> was an attempt to institute a measure that would allow the government to reduce the number of imposter homeopaths who prescribed drugs that may have actually been harmful.<sup>23</sup>

Regardless of the intentions, the HPUS wormed its way into the FDCA, and the Food and Drug Administration (the "FDA") now regulates and promulgates standards regarding the manufacture and distribution of homeopathic drugs, mainly through the HPUS as administered under section 400.400 of the FDA *Compliance Policy Guidance Manual*.<sup>24</sup> Accordingly, the FDA now defines "Homeopathy" as "The practice of treating the syndromes and conditions which constitute disease with remedies that have produced similar syndromes and conditions in healthy subjects."<sup>25</sup> Similarly, a "Homeopathic Drug" under FDA scrutiny, is:

Any drug labeled as being homeopathic which is listed in the Homeopathic Pharmacopoeia of the United States (HPUS), an addendum to it, or its supplements. The

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<sup>19</sup> Dana Ullman, *The Case For Homeopathic Medicine: The Historical and Scientific Evidence*, HUFFINGTON POST (Nov. 17, 2011, 9:02 AM), [http://www.huffingtonpost.com/dana-ullman/the-case-for-homeopathic\\_b\\_451187.html](http://www.huffingtonpost.com/dana-ullman/the-case-for-homeopathic_b_451187.html).

<sup>20</sup> Junod, *supra* note 15, at 161.

<sup>21</sup> *Id.*

<sup>22</sup> John P. Borneman & Robert I. Field, *Regulation of homeopathic drug products*, HYLANDS (2017), <http://www.hylands.com/news/regulation.php> (officially recognized in the FDCA, the HPUS was published by the American Institute of Homeopathy, a physicians' organization at present, 1286 official homeopathic drug products are recognized in the HPUS, a publication in excess of 1600 pages).

<sup>23</sup> Junod, *supra* note 15, at 161.

<sup>24</sup> U.S. FOOD & DRUG ADMIN, COMPLIANCE POLICY GUIDE: CONDITIONS UNDER WHICH HOMEOPATHIC DRUGS MAY BE MARKETED § 400.400 (1995), <https://www.fda.gov/iceci/compliancemanuals/compliancepolicyguidancemanual/ucm074360.htm>.

<sup>25</sup> *Id.*

potencies of homeopathic drugs are specified in terms of dilution, i.e., 1x (1/10 dilution), 2x (1/100 dilution), etc. Homeopathic drug products must contain diluents commonly used in homeopathic pharmaceuticals. Drug products containing homeopathic ingredients in combination with non-homeopathic active ingredients are homeopathic drug products.<sup>26</sup>

Still, though homeopathic remedies now face regulation by the FDA, significant exemptions from traditional scrutiny create a sense that homeopathic medicine does not face the same rigors as traditional medicine.<sup>27</sup> For example, one commentator stated that “[t]heir products are exempt from good manufacturing practice requirements related to expiration dating and from finished product testing for identity and strength.”<sup>28</sup> Furthermore, “Homeopathic drugs in solid oral dosage form must have an imprint that identifies the manufacturer and indicates that the drug is homeopathic. The imprint on conventional products, unless specifically exempt, must identify the active ingredient and dosage strength as well as the manufacturer.”<sup>29</sup>

These interesting exemptions notwithstanding, homeopathic medicine does represent a not-insignificant market share of the U.S. economy.<sup>30</sup> According to the 2007 National Health Interview Survey (the “NHIS”),<sup>31</sup> administered by the National Center for Complementary and Alternative Medicine (the “NCCAM”), nearly three billion dollars were spent on homeopathic medicine in out of pocket costs.<sup>32</sup> In fact, according to the data collected, the thirty-three point nine (\$33.9) billion dollars spent on some form of complementary alternative medicine – of which homeopathic medicine is one alternative – “accounts for approximately

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<sup>26</sup> *Id.*

<sup>27</sup> Isadora Stehlin, *Homeopathy: Real Medicine or Empty Promises*, HOMEOWATCH, FDA CONSUMER (Dec. 1996), <http://www.homeowatch.org/articles/fdac2.html>.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *The Use of Complementary and Alternative Medicine in the U.S.: Cost Data*, NAT'L CTR. FOR COMPLEMENTARY AND ALTERNATIVE MED. (Apr. 24, 2012), <http://nccam.nih.gov/news/camstats/costs/costdatafs.htm>.

<sup>31</sup> *Id.* (According to the NCCAM, the NHIS, “is an annual survey in which tens of thousands of American are interviewed about their health – and illness – related experiences. The 2007 survey included questions on 36 types of CAM therapies commonly used in the U.S. – 10 practitioner-based therapies, such as acupuncture, and 26 other self-care therapies that do not require a provider, such as natural products.”).

<sup>32</sup> *Id.* at Figure 3 (“CAM Out-of-Pocket Spending: Self Care\* v. Practitioner Costs.”).



1.5 percent of total health care expenditures and 11.2 percent of total out-of-pocket expenditures on health care in the U.S.”<sup>33</sup>

Therefore, regardless of the actual science behind homeopathic remedies, which is beyond the scope of this paper, the principle of “like cures like” clearly resonates with a small sub-set of the U.S. population. As a result, the U.S. Government must play some sort of role in determining how the use of such “medicines” should be regulated, especially when use of such drugs affects one of the most vulnerable cross sections of our population, children.

#### **IV. Media Coverage and Popular Perception of Homeopathic Medicine**

Whether fair or not, headlines often shape the popular – and generally the public – perception of many trends within the U.S. Likewise, typically the more sensational a story, the wider berth it will be given in dissemination. Such is the case with news stories recounting the removal of children when parents opt to employ homeopathic remedies instead of seeking traditionally accepted avenues of medical care.

##### *A. State Removal of Katie Ross*

In a series of three articles run by the Las Vegas Sun, the story of Genie Ohrenschall perfectly illustrated the conflict between practitioners and followers of homeopathic medicine, traditional physicians, and the courts.<sup>34</sup> The story involved a mother’s decisions regarding care choices for her daughter and the swift actions of the court to separate the two after a medical emergency.<sup>35</sup> According to the news story, 16-year-old Katie Ross had battled colon problems for several years, and her mother, Genie Ohrenschall “sought recommended American Medical Association – endorsed drug treatments and later experimental homeopathic cures in an effort to avoid surgical removal of the teenager’s colon.”<sup>36</sup> The report goes on to state, “It’s alleged that Ohrenschall jeopardized her daughter’s life by seeking homeopathy treatments for her ulcerative colitis instead of opting for the operation sooner.”<sup>37</sup> A subsequent article asserts that “there

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<sup>33</sup> *Id.* at Figure 1 (“CAM Total Health Care Spending.”).

<sup>34</sup> Art Nadler, *Doctors back Ohrenschall on treatment*, LAS VEGAS SUN (Feb. 12, 1998), <http://www.lasvegassun.com/news/1998/feb/12/doctors-back-ohrenschall-on-treatment/>.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

was no dispute that Ohrenschall had let her daughter's weight drop from 90 pounds to less than 50 as the girl's ulcerative colitis took its toll over a two-year period."<sup>38</sup> In fact, the girl underwent emergency surgery "on New Year's Day when her colon perforated and she was just hours from death."<sup>39</sup>

The outcome of this saga was an initial ruling that Ohrenschall was "legally negligent by failing to provide timely medical care for her ailing daughter."<sup>40</sup> However, Ohrenschall had provided medical care for her daughter, just not the traditional care many believed she should have sought. The judge discussed this fact in the ruling, stating that "[t]he unreasonable and negligent conduct of Ms. Ohrenschall . . . was in delaying necessary hospitalization," and that "it wasn't because she had sought a variety of traditional and homeopathic remedies to avoid the inevitable surgery."<sup>41</sup> By not directly attacking Ms. Ohrenschall's choice of medical care for Katie Ross, the judge attempted to insulate herself from constitutional challenge: "The judge said that while the U.S. Constitution gives parents wide latitude in deciding how children should be raised, that right is not absolute and the state has the right to step in when parents fail to protect the welfare of their children."<sup>42</sup> Still, critics of the ruling could make a compelling argument that Ohrenschall delayed seeking the surgical care her daughter ultimately needed, solely because she believed that homeopathic remedies were a more appropriate method of treatment. Would that imply that her decision as a parent subjected her to liability for negligence, and does that comport with constitutional guarantees entitling parents to raise their children how they choose?

No matter the rationale for Ohrenschall's course of action, many saw this episode as an invasion by the state into the private lives of a family.<sup>43</sup> According to the Las Vegas Sun, "Edward Marshall said the decision by Juvenile Judge Gerald Hardcastle making 16-year-old Katie Ross a ward of the court is fraught with constitutional problems that he feels the Nevada Supreme Court should review."<sup>44</sup> As reported in the

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<sup>38</sup> Bill Gang, *Ohrenschall attorney to appeal ruling on daughter*, LAS VEGAS SUN (Mar. 17, 1998), <http://www.lasvegassun.com/news/1998/mar/17/ohrenschall-attorney-to-appeal-ruling-on-daughter/>.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

article, Ohrenschall “was accompanied outside the courtroom by an entourage of disgruntled, yellow-ribbon-wearing supporters that included Assemblyman Bob Price, D-North Las Vegas.”<sup>45</sup> In the end, after a “glowing report” by Child Protective Services some five months later, the court granted Ohrenschall custody of her daughter once again.<sup>46</sup> Yet, this account clearly depicts a rift between how state courts and parents are split on the ability of individuals to determine how best to raise their children. As Ohrenschall’s attorney stated after the close of the proceedings, “I still think . . . with all due respect, that this was a case of government intrusion and overreaching.”<sup>47</sup>

### *B. Court Intervention Regarding Daniel Hauser*

In many ways similar to, and in just as many ways distinct from, Katie Ross’s situation, the story of Daniel Hauser swept through the national media,<sup>48</sup> yet again revealing the necessity for judicial intervention when parents seek homeopathic and alternative medicines in the effort to provide care for their children. According to the court, 13-year-old Daniel Hauser was “medically neglected” by his parents.<sup>49</sup> Diagnosed with Hodgkins disease, doctors ordered chemotherapy for the boy, but after one round – of the six recommended by his physician – Hauser refused further treatment.<sup>50</sup> Instead, he and his parents sought homeopathic treatments, as one article states his mother had “been treating his cancer with herbal supplements, vitamins, ionized water, and other natural alternatives she learned about on the Internet – despite testimony from five doctors who agreed Daniel needed chemotherapy. Daniel told the judge during closed testimony that he has also been eating ‘green food’ such as broccoli and beans, as well as eggs and fruit.”<sup>51</sup> In the hearing, the judge noted that “state statutes require parents to provide necessary medical care for a child,” even making a point to assert that “[t]he statutes say alternative and

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<sup>45</sup> *Id.*

<sup>46</sup> Art Nadler, *Ohrenschall gets custody of daughter*, LAS VEGAS SUN (June 4, 1998), <http://www.lasvegassun.com/news/1998/jun/04/ohrenschall-gets-custody-of-daughter/>.

<sup>47</sup> *Id.*

<sup>48</sup> News sources such as Minnesota Public Radio, CNN, NBC, and a variety of health blogs all reported on the story at one point and time.

<sup>49</sup> Associated Press, *Judge rules family can’t refuse chemo for boy; Parents of 13 year old sought to treat his cancer with alternative medicine*, NBCNEWS.COM (May 19, 2009), [http://www.nbcnews.com/id/30763438/ns/health-childrens\\_health/t/judge-rules-family-cant-refuse-chemo-boy/](http://www.nbcnews.com/id/30763438/ns/health-childrens_health/t/judge-rules-family-cant-refuse-chemo-boy/).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

complementary health care methods aren't enough."<sup>52</sup> As stated in the article, the judge opined "If the Minnesota Legislature ever reconsiders the relevant statutes, I am confident that I join all of the others in this matter in hoping, and indeed in praying, that Daniel Hauser lives to testify at that hearing."<sup>53</sup> However, for the time being, "Rodenberg said, the state's interest in protecting the child overrides the constitutional right to . . . a parent's right to direct a child's upbringing."<sup>54</sup>

Despite the sympathies of Judge Rodenberg, this decision did not sit well with all of the parties involved. Philip Elbert, the family's court-appointed attorney "called the judge's decision unfortunate."<sup>55</sup> Even further, he stated that he felt the decision was "a blot to families," and that "[i]t marginalizes the decisions that parents face every day in regard to their children's medical care. It really affirms the role that big government is better at making our decisions for us."<sup>56</sup> While this statement may be fodder for healthy debate, the article does highlight one important point in the discussion surrounding the government's role in regulating parents' rights to determine their children's healthcare – the importance of statutory state backing and guidance.<sup>57</sup> The happenstance adjudications outlined below may very well be rectified if states employed a focused statutory framework aimed at actually regulating homeopathic – and other alternative – medical treatments.

## V. Judicial Determinations Relating to Child Treatment under Homeopathic Regimes

Much like the somewhat haphazard media depictions of these trials, reported and unreported decisions suggest that courts struggle with how to adequately adjudicate cases involving children, where one– or both–parent[s] opt for homeopathic treatments. For instance, the Florida Court of Appeals' determination of who should be able to direct medical treatment in a paternity action—*McGrath v. Mountain*—illustrates the incongruity present in such decisions.<sup>58</sup> In that case, the court upheld a trial court ruling granting a mother the right to make decisions regarding the child's immunization despite the fact that the mother was a

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> 748 So.2d 607 (Fla. Ct. App. 2001).

“chiropractor who use[d] holistic medicine and homeopathy in treating her son,” and who “opposed immunization.”<sup>59</sup> Throughout the decision the court made reference to no statutes, and only tentatively discussed the facts, choosing instead to award vast deference to the fact finder.<sup>60</sup> While the appellate division reversed the trial court’s grant to allow the mother unilateral control over the child’s medical care, the lack of statutory backing– or any real precedential grounds – evidences the thorny position occupied by the courts in these cases.<sup>61</sup>

Alternatively, the decision of *Winters v. Brown* presents this quandary on the opposite end of the spectrum.<sup>62</sup> Here, again the Florida Court of Appeals faced a parental disagreement about who should make the tantamount decisions with regard to the child’s medical care, the father or the mother, who was a “chiropractor and a proponent of holistic medicine.”<sup>63</sup> As reported in the opinion: “Father desires that the minor child receive traditional medical care, including well baby exams, blood draws, urinalysis, and vaccinations. The court held three hearings to determine responsibility for the minor child’s health care where multiple experts testified concerning the effectiveness of vaccinations.”<sup>64</sup> The court actually cited the *McGrath* ruling, stating that “[a] trial court’s determination as to which parent is to have the ultimate authority over a minor child’s immunizations will be upheld if it is supported by competent, substantial evidence.”<sup>65</sup> Resorting to a “best interests of the child” test, the court affirmed the trial court ruling that “it was in the best interests of the minor child to award Father ultimate responsibility to make decisions regarding the minor child’s health care and vaccinations.”<sup>66</sup> Still, this resort to a multi-factor test, while more intuitive than the *McGrath* ruling, does not present a precise and competent measure for determining what course of action courts should take in the future.

In the divorce proceeding of *Hill v. Hill*, the court determined that a mother was caring for her child in an appropriate manner, despite her reliance on homeopathic remedies, after hearing doctor testimony that the

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<sup>59</sup> *Id.* at 608.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> 51 So.3d 656 (Fla. Ct. App. 2011).

<sup>63</sup> *Id.* at 657.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* (citing *McGrath*, 748 So.2d at 608 (2001)).

<sup>66</sup> *Winters*, 51 So. 3d at 567-58.

child's ailments preceded application of the remedies.<sup>67</sup> Though the father complained about the non-traditional homeopathic medicinal care provided by the mother, the court never truly weighed this in its decision and chose instead to rely upon the doctor's statements as proof that the homeopathic remedies were harmless.<sup>68</sup>

Finally, the trial underlying the news story recounted above, *In re Hauser*, incorporates the most comprehensive discussion regarding the regulation of homeopathic and other non-traditional medical remedies.<sup>69</sup> According to the trial court, it sat to determine whether or not the State of Minnesota had "demonstrated a compelling state interest in the life and welfare of Daniel sufficient to override the fundamental constitutional rights of both the parents and Daniel to . . . the due process right of the parents to direct the . . . upbringing of their child."<sup>70</sup> In the findings of fact, the court noted that "[t]he family has a genuine and strong belief in the benefits of holistic medicine and, specifically, in Nemenhah. Nemenhah is based upon Native American healing practices. Daniel is deemed to be a 'medicine man' by Nemenhah and does not wish to receive any additional chemotherapy."<sup>71</sup> Ultimately, Minnesota's statutory trappings provided the necessary backing for the court to deliver what seems like an orderly and reasoned opinion.<sup>72</sup> For example, the court stated that "Minnesota has a long-standing statutory requirement that parents must provide 'necessary medical care' for a child and providing that 'complementary and alternative health care' is not sufficient."<sup>73</sup> Unlike previous opinions, which either floundered in their analysis of how the courts dealt with alternative health practices like homeopathy, or were mired in multi-factor tests, the Minnesota court wielded the applicable statute masterfully in order to protect Daniel Hauser.<sup>74</sup> Likewise, the court decided to leave Daniel in the care of his parents, so long as he received the care he needed.<sup>75</sup>

Furthermore, the court even considered the constitutionality of the Minnesota statute in the opinion, stating that "[t]he issue before the Court

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<sup>67</sup> No. 94CA22, 1995 WL 432616, at 1-2 (Ohio Ct. App. July 20, 1995).

<sup>68</sup> *Id.*

<sup>69</sup> No. JV-09-068, 2009 WL 1421504 (Minn. Dist. Ct. May 14, 2009).

<sup>70</sup> *Id.* at 2.

<sup>71</sup> *Id.* at 3.

<sup>72</sup> *Id.* at 4.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

is whether Daniel Hauser is in need of protection or services as that term is defined by statute and whether the application of the Minnesota statutory scheme is unconstitutional.”<sup>76</sup> In doing so, the court discussed the budding prospects of the homeopathic, and holistic remedies, sought by the Hausers: “‘Complementary and alternative health care’ is already considered a valuable part of cancer treatment . . . . From the testimony in this trial, it seems probable that advances in such alternative care in the future can be expected,” but the statutory scheme seems to enlighten the court’s discussion, as it reasons that, “[t]he fact is, however, that Minnesota does not permit exclusive reliance on ‘complementary and alternative health care’ for minor children.”<sup>77</sup> In the end, the court stated, “Brown County has demonstrated a compelling state interest, embodied in multiple legislative enactments providing for the welfare of the children of this state, sufficient to override the constitutional claims of the parents and Daniel.”<sup>78</sup>

Clearly, the Minnesota court’s reasoning benefitted greatly because of the comprehensive statutory scheme which takes into account, not only traditional medicine, religious care, and a complete failure of parents to provide care, but which also draws a distinction between traditional medicine and alternatives to such care, including but not limited to homeopathic remedies. The veracity and thoughtfulness of the opinion only adds credence to claims that supplementing the statutory framework of many other states would better equip them to handle situations like the one presented by *In re Hauser*.

The preceding examples are only a few of the many instances concerning the conflict of parental choice and the law regarding alternative medicines. While not all of them dealt with the health and well being of the children involved in as grave a matter as the *Hauser* decision, the cases still serve as an excellent depiction of the inconsistent approaches employed by states as they attempt to grapple with parental choice and homeopathic treatments.

## **VI. Clash Between Public Opinion, Constitutional Concern and Case Adjudication**

Noted throughout the articles detailing the court’s interruption of the lives of Katie Ross and Genie Ohrenschall, many people belied the

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<sup>76</sup> *Id.* at 12.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

constitutional foundation precipitating the court's decision to remove Ross from her mother's care.<sup>79</sup> However, simply stating that a court did not have the constitutional authority to take specific measures, and supporting that claim with legal proof, are two separate acts. Regardless, clearer guidelines for courts in these instances could decrease the fervor behind agitators' voices. One possible option is for states to institute a "best interests of the child" standard in situations where a parent's refusal to subject their child to traditional medicine may be potentially harmful. This was the method chosen by the Florida Court of Appeals in the *Winters* decision.<sup>80</sup> The "best interests of the child" test, as codified in Tennessee statute, states as follows:

(i) In determining whether termination of parental or guardianship rights is in the best interest of the child pursuant to this part, the court shall consider, but is not limited to, the following:

(1) Whether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interest to be in the home of the parent or guardian;

(2) Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;

(3) Whether the parent or guardian has maintained regular visitation or other contact with the child;

(4) Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;

(5) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological and medical condition;

(6) Whether the parent or guardian, or other person residing with the parent or guardian, has shown brutality, physical, sexual, emotional or psychological abuse, or neglect toward the child, or another child or adult in the family or household;

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<sup>79</sup> Nadler, *supra* note 46.

<sup>80</sup> *Winters*, 51 So. 3d at 567-58.



(7) Whether the physical environment of the parent's or guardian's home is healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol, controlled substances or controlled substance analogues as may render the parent or guardian consistently unable to care for the child in a safe and stable manner;

(8) Whether the parent's or guardian's mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing safe and stable care and supervision for the child; or

(9) Whether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to § 36-5-101.<sup>81</sup>

Such a standard would provide courts with a flexible alternative to simply deciding haphazardly which route to take in regards to removal of children from the home. Though the test is typically employed in determinations regarding whether or not to terminate parental rights, such a test could also aid state courts in adjudicating matters of parental choice of medical treatments. Amending the nine-factor test language in that manner could resolve discrepancies like those found between *Winters* and *McGrath* would be a potential option. Still, this solution alone does not adequately prepare the courts to face situations like the decision between traditional healthcare versus alternative and homeopathic remedies, because the issues are fraught with such technical, unique and sophisticated facts. This is where a revision, or simply an addition, to many statutory codes within states could quell the potential outburst from detractors, and serve to further clarify the constitutional support for court decisions.

## **VII. Potential Inadequacies and Holes to Fill in Current Statutory Construction**

Judges adjudicating instances like those noted previously could be assisted by more comprehensive statutory authority that takes into account alternative and complementary medical treatment plans. Beginning with Florida, as both the *Winters* and *McGrath* decisions hail from that state, the Florida Code Annotated defines medical neglect as:

(41) “Medical neglect” means the failure to provide or the

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<sup>81</sup> TENN. CODE ANN. § 36-1-113(i) (West 2013).

failure to allow needed care as recommended by a health care practitioner for a physical injury, illness, medical condition, or impairment, or the failure to seek timely and appropriate medical care for a serious health problem that a reasonable person would have recognized as requiring professional medical attention. Medical neglect does not occur if the parent or legal guardian of the child has made reasonable attempts to obtain necessary health care services or the immediate health condition giving rise to the allegation of neglect is a known and expected complication of the child's diagnosis or treatment and:

- (a) The recommended care offers limited net benefit to the child and the morbidity or other side effects of the treatment may be considered to be greater than the anticipated benefits; or
- (b) The parent or legal guardian received conflicting medical recommendations for treatment from multiple practitioners and did not follow all recommendations.<sup>82</sup>

Examining the statute in light of alternative medicinal treatments, it fails to adequately define two key concepts: (i) what constitutes a "health care practitioner," and (ii) what the court will determine qualifies as "timely and appropriate medical care for a serious health problem that a reasonable person would have recognized as requiring professional medical attention."<sup>83</sup> A parent employing homeopathic remedies could very well assert that they had consulted a "health care practitioner" in their local registered homeopath, and the parent could likewise argue that this satisfied the need to seek professional medical attention.<sup>84</sup> Still, this parent could find themselves on the wrong side of the law, just like Ohrenschall.

As a broader example, Mississippi does not differentiate between neglect and medical neglect when discussing children. The statute states:

- (l) "Neglected child" means a child:
  - (i) Whose parent, guardian or custodian or any person responsible for his care or support, neglects or refuses, when able so to do, to provide for him proper and necessary care or support, or education as required by law, or

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<sup>82</sup> FLA. STAT. ANN. § 39.01(41) (West 2014).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

medical, surgical, or other care necessary for his well-being; however, a parent who withholds medical treatment from any child who in good faith is under treatment by spiritual means alone through prayer in accordance with the tenets and practices of a recognized church or religious denomination by a duly accredited practitioner thereof shall not, for that reason alone, be considered to be neglectful under any provision of this chapter; or

(ii) Who is otherwise without proper care, custody, supervision or support; or

(iii) Who, for any reason, lacks the special care made necessary for him by reason of his mental condition, whether the mental condition is having mental illness or having an intellectual disability; or

(iv) Who, for any reason, lacks the care necessary for his health, morals or well-being.<sup>85</sup>

Here the inclusion of the phrase “necessary for his well-being” in reference to the “medical, surgical or other care,” could seemingly encompass the distinction between traditional medicine and alternative remedies, but enforcing such a distinction against a parent exercising their right to direct the upbringing of their child as they see fit, seems a somewhat draconian outcome, especially if the parent wholeheartedly believes that what they are doing is the correct course of action.<sup>86</sup>

With added specificity, the California Code carves out an exception to accommodate religious beliefs, as other states have likewise provided, but it does not provide any recourse for individuals practicing homeopathic, or other, alternative methods:

(b) “General neglect” means the negligent failure of a person having the care or custody of a child to provide adequate food, clothing, shelter, medical care, or supervision where no physical injury to the child has occurred.

For the purpose of this chapter, a child receiving treatment by spiritual means as provided in Section 16509.1 of the Welfare and Institutions Code or not receiving specified

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<sup>85</sup> MISS. STAT. ANN. § 43-21-105(1) (2013).

<sup>86</sup> *Id.*

medical treatment for religious reasons, shall not for that reason alone be considered a neglected child. An informed and appropriate medical decision made by parent or guardian after consultation with a physician or physicians who have examined the minor does not constitute neglect.<sup>87</sup>

The section referenced providing for solely spiritual methods states that “No child who in good faith is under treatment solely by spiritual means through prayer in accordance with the tenets and practices of a recognized church or religious denomination by a duly accredited practitioner thereof shall, for that reason alone, be considered to have been neglected within the purview of this chapter.”<sup>88</sup> This language fully exonerates the religious practitioner, because to rule otherwise would almost certainly subject the state to liability for violation of the freedom of religion. However, a provision such as this is likely too lenient to address the concerns posed by the current inquiry. Regulations requiring parents to choose effective and appropriate medical care must have more teeth.

Similarly, the Minnesota legislature provides that medical neglect occurs in various situations:

Subd. 6. Child in need of protection or services. “Child in need of protection or services” means a child who is in need of protection or services because the child:

(5) is medically neglected, which includes, but is not limited to, the withholding of medically indicated treatment from a disabled infant with a life-threatening condition. The term “withholding of medically indicated treatment” means the failure to respond to the infant’s life-threatening conditions by providing treatment including appropriate nutrition, hydration, and medication which, in the treating physicians’ reasonable medical judgment, will be most likely to be effective in ameliorating or correcting all conditions, except that the term does not include the failure to provide treatment other than appropriate nutrition, hydration, or medication to an infant when, in the treating physician’s or physicians’ reasonable medical judgment:

- (i) the infant is chronically an irreversibly comatose;
- (ii) the provision of the treatment would merely prolong

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<sup>87</sup> CAL. PEN. CODE ANN. § 11165.2 (2014).

<sup>88</sup> *Id.*

dying, not be effective in ameliorating or correcting all of the infant's life-threatening conditions, or otherwise be futile in terms of the survival of the infant; or

(iii) the provision of the treatment would be virtually futile in terms of the survival of the infant and the treatment itself under the circumstances would be inhumane.<sup>89</sup>

In the alternative, as a supplement to this general provision, the statute employed by the *Hauser* court provides a potential roadmap for how to structure an additional maxim that will regulate the use of homeopathic and other alternative medicinal remedies, while still preserving some sort of reasoned understanding of the beneficial nature of such methods. That statute provides:

Nothing in this chapter shall restrict the ability of a local welfare agency, local law enforcement agency, the commissioner of human services, or the state to take action regarding the maltreatment of minors under section 609.378 or 626.556. A parent who obtains complementary and alternative health care for the parent's minor child is not relieved of the duty to seek necessary medical care consistent with the requirements of section 609.378 and 626.556. A complementary or alternative health care practitioner who is providing services to a child who is not receiving necessary medical care must make a report under section 626.556, subdivision 3.<sup>90</sup>

Here, Minnesota legislators clearly acknowledge that parents' decisions to consult "complementary and alternative health care" practitioners do not constitute grounds for state intervention, in and of themselves, but it places an affirmative duty on the part of the parents to seek out care necessary to the child's well-being in the event that the alternative health care provider makes a report.

## **VI. Proposed Solution; Intervention Only When Unavoidable**

Courts faced with the aforementioned issue are dealing with parents who likely believe that they are making correct judgment calls. These parents do not want their children to suffer. They are not intentionally trying to harm their children by not taking them to see

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<sup>89</sup> MINN. STAT. ANN. § 260C.007(6) (2014).

<sup>90</sup> MINN. STAT. ANN. § 146A.025 (2014).

physicians that for various reasons they either do not trust, or do not believe in as strongly as they value the services of alternative medicine providers. Instead, the parents are simply holding on to belief in a form of medicine, which for whatever reason is not adequately meeting their children's needs. In situations like this, the government should not be exceedingly quick to drastically intervene, but should give a level of deference to the parents to choose the appropriate form of treatment for their children. Therefore legislators should craft some statutory provision like the one employed by Minnesota, stating that parents have the option to seek complementary and alternative forms of medical care as the primary form of treatment for their children. However, at the point that either their homeopathic physician, or another individual subject to a reporting requirement, recommends that they seek traditional assistance, the parents should be then placed under some affirmative duty to actually procure that level of care. Failure to seek such care will be deemed "medical neglect per se," as it will be in direct violation of the statute providing that a parent must follow the recommendation of the reporting authority. State courts enforcing a statutory framework like the one discussed above would then be able to refer to the statutes as they make their pronouncements. It would create a system of checks and balances. If the parent chooses to seek out complementary and alternative remedies – homeopathy being a largely popular one – then they are not committing any act of wrongdoing, and the law will recognize the benefit of such measures. If they persist in this course of treatment against the recommendations of those charged with the responsibility of reporting issues of neglect, then they will bear the burden of proving why they have not committed "medical neglect per se" under a proposed "preponderance of the evidence" standard.

This will give parents an opportunity to defeat the neglect charge through a thorough examination of the facts, thereby allowing every case to be decided on an individualized basis. Likewise, the relatively lax standard demonstrates that the level of deference allotted to parents' choice to pursue alternative medical routes is substantial. Also, this statutory system would discourage those with reporting requirements from flippantly making recommendations. A combination of the relatively low bar of the preponderance of the evidence standard, and the potentially severe blowback from the government and community for treating parents harshly, could create such reservations. Legislators would still need to promulgate guidelines for these procedures, which provide indications of how severe the medical need of the child must be prior to such a reporting authority lodging a recommendation.

At the same time, a charge of medical neglect would provide a level of indemnity to state courts that opt to force intervention by clearly presenting the state with enough authority to meet the standard articulated by the Court in *Troxel* when it stated that “the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a ‘better’ decision could be made.”<sup>91</sup> Even further, such procedural measures would likely quell any complaints that the state in question did not meet the standard articulated in Justice Thomas’s concurrence in that same case, when he stated that “[c]onsequently, I agree with the plurality that this Court’s recognition of a fundamental right of parents to direct the upbringing of their children resolves this case . . . but curiously none of them articulates the appropriate standard of review. I would apply strict scrutiny to infringements of fundamental rights.”<sup>92</sup> Medical neglect surely represents a “compelling government interest,” for purposes of strict scrutiny analysis.<sup>93</sup> Furthermore, this set of proposed laws would certainly be “narrowly tailored” to achieving that goal or interest.<sup>94</sup>

### Conclusion

As we have seen, the intersection of longstanding constitutional protections afforded parents with the relatively contemporary concept of complementary and alternative medicine presents a problem on incongruence. Multiple case studies, both in popular media as well as the courts illustrate this issue, often with dramatic consequences for those the court system is seeking to protect. Indeed, removing children from their parents’ care remains a serious consequence for parents who shun traditional medicine in favor of alternative avenues. Additionally, because of the constitutional limitations on such state intervention, legislators may prefer to approach this issue proactively.

Potential penalties for not providing adequate health care to children can be devastating to families. For this reason, states need more comprehensive statutory procedures in order to create uniformity in judicial determinations surrounding parental rights and complementary and alternative measures of health care, such as homeopathic remedies. Slight alterations, additions, and refinements to current statutory codes

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<sup>91</sup> *Troxel*, 530 U.S. at 72-73.

<sup>92</sup> *Id.* at 80 (Thomas, J. concurring).

<sup>93</sup> *Id.*

<sup>94</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 928 (1992) (citing *Griswold v. Conn.*, 381 U.S. 479, 485 (1965)).

could provide added safeguards to both state courts that feel they must intervene on behalf of endangered children, and to the families that believe their adherence to alternative medicine is justifiable.