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ARIZONA COURT OF
APPEALS DIV. TWO

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ARIZONA COURT OF APPEALS

JEFFREY P. HANDLER
CLERK

STATE OF ARIZONA, DIVISION 2

DIANA H,)
)
 Petitioner,)
)
 vs.)
)
 HON. STEPHEN M. RUBIN, Pima)
)
 County Superior Court Judge,)
)
 Respondent,)
)
 ARIZONA DEPARTMENT OF)
)
 ECONOMIC SECURITY,)
)
 Real Parties in Interest.)
)
)

No. **2 CA-SA** 07 - 0085

Superior Court of Pima County
No. 18180900

Oral Argument Requested
Stay Requested

PETITION FOR SPECIAL ACTION

Jeffrey Paul Judge
 Judge Law Firm
 1647 North Alvernon, Ste. 1
 Tucson, Arizona 85701
 (520) 388-5665
 State Bar No. 015834
 Attorney for Petitioner

Diana H., mother, petitions the Arizona Court of Appeals, Division 2 to review Judge Rubin's decision to authorize the Department of Economic Security to vaccinate the petitioner's child in violation of her First Amendment right to religious freedom and Arizona's immunization exemption statutes.

I. Issues Presented for Review:

Whether Judge Rubin can authorize Child Protective Services to immunize the petitioner's dependent child over the parent's religious objections and in violation of Arizona's immunization exemption statutes, which respect the parent's religious objections.

II. List of Additional Issues Presented to But Not Decided by Court of Appeals Which May Need to Be Decided If Review is Granted.

Appellant is unaware on any other issues to be decided if review is granted.

III. Jurisdiction and Standard of Review

Court of Appeals have "jurisdiction to hear and determine petitions for special action ... without regard to its appellate jurisdiction." ARS 12-201.21 (4). This case presents a purely legal question which involves a matter of first impression and which is of statewide significance. *State ex. Rel. Pennartz v. Olcavage*, 200 Ariz. 582, 30 P.2d 649 (App. 2001). The potential injury presented in this case is the immunization of a child over the religious objections of her parent. Once the

CPS vaccinates the child, the injury is irreversible, and the issue moot. Therefore, there is no other plain, speedy and adequate remedy available to the Mother.

IV. Statement of Facts

On March 26, 2007, Child Protective Services, a division of the Arizona Department of Economic Security, (“CPS”) took temporary legal custody of the petitioner’s child. On April 4, 2007, at the preliminary protective conference, Diana H., mother, gave the Department of Economic Security a signed exemption from immunization requirements.

On May 24, 2007, CPS filed a motion to authorize them to immunize the child over the petitioner/parent’s religious objections and signed exemption. On July 31, 2007, Judge Rubin held an evidentiary hearing on this issue and took the matter under advisement. On August 17, 2007, Judge Rubin ordered that the motion to authorize immunization was granted. See Minute Entry Dated August 17, 2007, attached as Exhibit A.

This Petition for Special Action follows.

V. LAW

The United States Supreme Court held that the states have the power to enact compulsory vaccination laws but only the legislature, not the court, may decide

whether vaccinations provide the best means for protect public health. Jacobson v. Massachusetts, 197 U.S. 11, 49 L.Ed 643, 25 S. Ct. 358 (1905).

A number of State Courts have held that the child may be excused from otherwise mandatory state or local vaccination based on the parent's religious beliefs. See Bowden v. Iona Grammar School, 726 N.Y.S.2d. 685 (App. Div. 2 Dep't 2001) (New York law); Hanzel v. Arter, 625 F. Supp. 1259 (S.D. Ohio 1985)(applying Ohio law). A number of states have held the opposite. See Cude v. State, 237 Ark. 927 ((1964) (Arkansas law).

The Arizona Courts have not addressed this issue but the Arizona Legislature has enacted a mandatory immunization scheme for school children that specifically allows for an immunization exemption respecting the parent's personal beliefs. See ARS §§ 15-871 to 15-874 and ARS §36-883.

VI. Argument

Judge Rubin's order authorizing CPS to immunize the child over the religious objections of the parent fails to follow the statutory framework crafted by the Arizona State Legislature. Though State Legislatures may enact mandatory immunization for school children, the Courts may not. Jacobson , 25 S. Ct. 358. The Arizona Legislature has clearly created a mandatory immunization but carved a specific exemption for personal beliefs of the parent. Judge Rubin's order

ignores the legislature's statutory framework which respects the religious beliefs of parents and puts the court in the position of mandating immunization. This ruling sharply departs from the U.S. Supreme Courts express prohibition that mandatory vaccinations are the province of legislatures and not courts. Therefore, Judge Rubin's order authorizing CPS to immunize the child over the parent's religious objections is an abuse of discretion because it violates the statutory framework crafted by the State Legislature and also takes the Court into realm prohibited by the U.S. Supreme Court.

VII. CONCLUSION

Petitioner requests that Judge Rubin's order authorizing the vaccination of her child over her religious beliefs be vacated with instructions to the lower court to follow the legislative framework which respects the parent's religious beliefs.

RESPECTFULLY SUBMITTED this 20th day of August 2007.

By



Jeffrey Paul Judge
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that the original of Mother's Petition for Special Action was filed with six copies on August 20th, 2007 to the Court of Appeals, Division Two, and on the same day a copy was hand-delivered/mailed to:

Hon. Stephen M. Rubin
Superior Court of Pima County
Juvenile Division
2225 E Ajo Way
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Respondent

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By



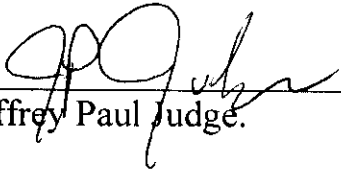
Jeffrey Paul Judge
Attorney for Petitioner

CERTIFICATE OF COMPLIANCE

Jeffrey Paul Judge being first duly sworn states:

1. I am the attorney for the Petitioner in the above-entitled matter.
2. The Petition for Special Action uses the appropriate proportionately spaced typeface, together with the typeface, point size, and word count in accordance with the Arizona Rules of Procedure for Special Actions.

DATED this 20th day of August, 2007.



Jeffrey Paul Judge.

EXHIBIT A

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA
JUVENILE DIVISION

HON. STEPHEN M. RUBIN

CASE NUMBER: 18180900

DATE: August 17, 2007

IN THE MATTER OF:

[REDACTED]
(dob: 01-08-95)

UNDER ADVISEMENT RULING

The Court, having taken the matter under advisement,

ORDERS that the Motion to Authorize Immunization is granted.

IT IS FURTHER ORDERED that the request for stay pending special action made by Mother's counsel is denied.

The Court bases its ruling on the medical testimony of Dr. Peterson as well as the Court's finding that the Mother's request for exemption was invalid, having been executed after the Court had ordered that the Department of Economic Security have temporary legal custody and physical custody of the minor.

THE COURT FINDS that the immunizations are in the child's best interest and are necessary for the child's safety.



HON. STEPHEN M. RUBIN

Distribution:
DES: Gary Sundell / Richard Maldonado
Dependency Unit / Calendar Office
Attorney General: Jason Corley, Esq.
Roster Care Review Board
Charles Lagattuta, Esq.
Jeffrey Judge, Esq.
Cedric Hopkins, Esq.
Under AdviseMENT Clerk

Kathryn McReynolds, JAA