

STATE OF TENNESSEE

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Opinion No. 04-127

DCS and Juvenile Court Authority Make Decisions About Children's Extraordinary Medical Care

QUESTIONS

1. Does the Tennessee Department of Children's Services (DCS) have authority to make decisions about extraordinary medical care, such as do-not-resuscitate orders, removal of life support, or organ donation, for children who are in DCS custody as the result of an emergency hearing or final adjudication, or for children who are in partial or complete DCS guardianship as the result of a termination of some or all parental rights?

2. In the absence of such decision-making authority in DCS or some other person or entity, does the juvenile court have the authority to make decisions about extraordinary medical care for children within its jurisdiction under the circumstances set out above?

OPINIONS

1. No.
2. Yes.

ANALYSIS

1. You have asked whether the DCS has the legal authority throughout four stages of legal proceedings under Titles 36 and 37 of the Tennessee Code to make decisions about extraordinary medical care, such as do-not-resuscitate orders, removing life support, or donating organs. The four stages of legal proceedings include two custody stages: when a child is in DCS' temporary legal custody as the result of an initial emergency hearing or when a child is in DCS' temporary legal custody as a result of a final adjudicatory hearing. The four stages also include two guardianship stages: when a child is in partial guardianship after fewer than all possible parents' rights have been terminated or when a child is in complete guardianship after all parents' rights have been terminated.

DCS is an administrative agency of the state. *See* Tenn. Code Ann. § 4-3-101(3). Its powers

are limited: “Administrative agencies derive their authority from the General Assembly. Thus, their power must be based expressly upon a statutory grant of authority or must arise therefrom by necessary implication.” *Wayne County v. Tennessee Solid Waste Disposal Control Bd.*, 756 S.W.2d 274, 282 (Tenn. Ct. App. 1988). Accordingly, in order to determine the scope of DCS’ authority to make decisions about extraordinary medical care under the circumstances described above, it is necessary to examine the express or implied authority that the General Assembly has granted a custodian or guardian in those circumstances. That authority is located in Title 37, which delineates custodial authority in juvenile court proceedings, and in Title 36, which delineates guardianship authority in termination of parental rights proceedings in juvenile court.

Title 37 defines the terms “custodian” and “custody” and sets out the authority of a legal custodian, which appears to be the same regardless of whether a child is in custody pursuant to an emergency hearing or a final adjudication of the child’s custody. “Custodian,” as relevant to your question, is defined as “a person, other than a parent or a legal guardian . . . to whom temporary legal custody of the child has been given by the order of a court.” Tenn. Code Ann. § 37-1-102(b)(7). “Custody,” as relevant here, is defined to mean “the control of actual physical care of the child and includes the rights to provide for the physical, mental, moral and emotional well-being of the child.” Tenn. Code Ann. § 37-1-102(b)(8). A separate statute more explicitly delineates those rights, providing, as relevant here:

A custodian to whom legal custody has been given by the court under this part has the right . . . to determine the nature of care and treatment of the child, including **ordinary** medical care . . . subject to the conditions and limitations of the [custody] order and the remaining rights and duties of the child’s parents or guardian.

Tenn. Code Ann. § 37-1-140(a) (emphasis added).

The Title 37 statutes relating to a custodian’s rights provide that a custodian has the right to provide physical care, including medical care. Without more, it might be argued that the right to provide medical care implicitly includes the right to make decisions about extraordinary medical care. That argument, however, is obviated by the explicit language in Tenn. Code Ann. § 37-1-140 limiting the custodian’s rights to determine only **ordinary** medical care, especially when a separate statute explicitly entrusts to the juvenile court, rather than to DCS, the authority to “order medical or surgical treatment of a child who is suffering from a **serious** physical condition or illness which requires prompt treatment.” Tenn. Code Ann. § 37-1-128(e) (emphasis added). Thus, the General Assembly has not in Title 37 provided to DCS either explicit or implicit authority to make decisions about extraordinary medical care for children in its custody.

Similarly, Title 36 does not provide DCS authority to make decisions about extraordinary medical care for children in either partial or complete guardianship after a termination of some or all parental rights. “Guardian” is defined, as relevant to your question, to include “a person or entity appointed as guardian as the result of a . . . termination of parental rights.” Tenn. Code Ann. § 36-1-102(1)(24)(B). “Guardianship” means “a person or entity . . . which is responsible for the provision

of supervision, protection, and assistance to the person of a child.” Tenn. Code Ann. § 36-1-102(1)(24)(D). The powers and duties of complete guardianship differ from those of partial guardianship in some respects. However, both complete and partial guardianship include the right to provide care pursuant to the provisions of Tenn. Code Ann. § 37-1-140 or otherwise to the extent permitted by court order. Tenn. Code Ann. § 36-1-102(1)(24)(C)(ii) and (D)(ii).

As noted above, Tenn. Code Ann. § 37-1-140 authorizes only ordinary medical care and thus would not authorize DCS, as a guardian, to make decisions about extraordinary medical care. While Tenn. Code Ann. § 36-1-102(1)(24)(C)(ii) and (D)(ii) add that a complete or partial guardian’s powers to provide medical care pursuant to Tenn. Code Ann. § 37-1-140 may be otherwise extended by court order, it does not appear that a court could supply DCS with authority greater than what the General Assembly has explicitly or implicitly supplied. *See State v. Medicine Black Bear White Eagle*, 63 S.W.3d 734, 769-771 (rejecting a trial court’s extrapolation from statutes of authority for a state agency to intervene in a case when the statutes did not explicitly provide for or necessarily imply such authority). Since the General Assembly, as set out above, has neither explicitly nor implicitly supplied DCS with the authority to make decisions about extraordinary medical care, the juvenile court may not unilaterally confer such authority upon DCS.¹

2. The juvenile court has the statutory authority to make decisions about extraordinary medical care for a child within its jurisdiction. As a statutorily created tribunal, a juvenile court has “jurisdiction over matters relating to the care, control and custody of infants, but can exercise such jurisdiction and powers only as have been conferred on [it] by the statute creating [it].” *Hyatt v. Bomar*, 358 S.W.2d 295, 296 (quoting 43 C.J.S. *Infants* § 6 p. 109 (now found at 43 C.J.S. *Infants* § 7 (1978))). The Tennessee Supreme Court has noted, “Great powers are lodged in the juvenile court in its particular field, and proceedings there should be conducted according to the mandates of the statute.” *Juvenile Ct. of Shelby County v. State ex rel. Humphrey*, 201 S.W. 771, 773 (Tenn. 1918).

Among those great powers, the General Assembly has provided:

During the course of any proceeding, the court may order the child examined at a suitable place by a physician regarding the child’s medical condition, and may order medical or surgical treatment of a child who is suffering from a **serious** physical condition or illness which requires prompt treatment, even if the parent, guardian or other custodian has not been given notice of a hearing, is not available, or without good cause informs the court of such person’s refusal to consent to the treatment.

Tenn. Code Ann. § 37-1-128(d) (emphasis added). While not every serious condition may require extraordinary medical care, it is reasonable to assume that extraordinary medical care would be

¹This opinion does not address whether the juvenile court could confer such additional authority upon a guardian other than DCS.

required by only a serious condition. Accordingly, the statute supplies the juvenile court with the authority to make decisions about extraordinary medical care of a child,² particularly in the absence of a parent or other person or entity who independently holds such authority.³

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²The juvenile court in some cases may have an obligation to see that some such decisions are made as to children within its jurisdiction, as the Court of Appeals has indicated that even an incompetent person has a fundamental and inherent right to refuse medical treatment, pointing to, among other mechanisms available to vindicate that right, judicial appointment of a conservator pursuant to Title 34. *See San Juan-Torregosa v. Garcia*, 80 S.W.3d 539, 541-545 Tenn. Ct. App. (2002).

³The juvenile court's decision-making authority, of course, may be independently limited by statutes and implementing rules governing extraordinary medical treatment and procedures. *See, e.g.*, Tenn. Code Ann. § 68-140-601 et seq. (setting out procedures for do-not-resuscitate orders); Tenn. Code Ann. § 68-30-101 et seq. (the Uniform Anatomical Gift Act, setting out procedures for organ donation); Tenn. Code Ann. § 68-11-224 (governing universal do-not-resuscitate orders). Such limitations are outside the scope of this opinion and involve an inestimable number of imaginable factual and legal scenarios.