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LEGISLATIVE EFFORTS TO CONTROL CHILD ABUSE IN WASHINGTON

A newly-enacted Washington law¹ permits, and attempts to encourage, the reporting of cases of physical child abuse to law enforcement agencies by physicians and dentists. Upon receipt of such a report, it is made the "duty" of the law enforcement agency to investigate and refer the case to the juvenile court. The new law provides that any person making such a report shall be immune from civil liability that he might have otherwise incurred for reporting the incident. The new law further provides that the physician-patient communication privilege shall not be a ground for excluding evidence in any judicial proceeding resulting from a report pursuant to the act. The statutory requirement of consent before a husband or wife can testify against his or her spouse is also suspended as to criminal proceedings in which the spouse is accused of committing a crime against his or her child.

The new law amends Washington Revised Code section 5.60.060, which had read in part: "(4) A regular physician or surgeon shall not, without the consent of his patient, be examined in a civil action as to any information acquired in attending such patient, which was necessary to enable him to prescribe or act for the patient." The new law adds the following: "... but this exception shall not apply in any judicial proceeding regarding a child's injuries, neglect or sexual abuse, or the cause thereof." Prior to amendment, the statute—when read in conjunction with Washington Revised Code section 10.58.010²—was held to require an accused patient's consent before his physician could testify in a criminal action as to a confidential communication.³ Under the new enactment, a patient may no longer effectively object to a physician's testimony in any judicial proceeding resulting from a report made pursuant to the child abuse statute.

An additional amendment to section 5.60.060 allows one spouse to testify against the other in a criminal proceeding resulting from child abuse. The statute had provided that neither spouse, without the consent of the other, could be "examined as to any communication

¹ Wash. Laws 1965, ch. 13, at 71.

² This statute provides that the rules of evidence in civil actions "so far as practicable" shall apply in criminal prosecutions.

³ *State v. Miller*, 105 Wash. 475, 178 Pac. 459 (1919), discussed with approval in *State v. Sullivan*, 60 Wn.2d 214, at 223, 373 P.2d 474, at 479 (1962).

made by one to the other during marriage."⁴ The Washington Supreme Court has held that acts can be communications,⁵ and the beating of a child by one parent might well have been considered a privileged communication to the other.⁶ The possibility of such a result is foreclosed by the new statute.

Under Washington case law prior to enactment of the child abuse law, a report by a physician which falsely imputed to a parent or some other person the crime of assault would have been libelous per se.⁷ The child abuse law apparently grants the reporting physician immunity, even though the report be intentionally false.

In the past few years, the serious nature of the child abuse problem has become more and more widely recognized.⁸ At least twenty-one states have preceded Washington in some sort of legislative attempt to combat the problem.⁹ General agreement exists that some type of legislation is required; the only question is how to make the law most effective. Significantly, the Washington child abuse law is permissive, and does not *require* the physician or dentist to report. Three other bills relating to child abuse were introduced in the 1965 session of the

⁴ WASH. REV. CODE § 5.60.060, as amended, now reads in pertinent part:

(1) A husband shall not be examined for or against his wife, without the consent of the wife, nor a wife . . . without the consent of the husband; nor can either during marriage or afterward be, without the consent of the other, examined as to any communication made by one to the other during marriage. But this exception shall not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other, *nor to a criminal action or proceeding for a crime committed by said husband or wife against any child of whom said husband or wife is the parent or guardian.* (amendment italicized.)

⁵ State v. Robbins, 35 Wn.2d 389, 213 P.2d 310 (1950).

⁶ Cf. State v. Grasser, 60 Wn.2d 343, 374 P.2d 149 (1962), in which it was held that a wife could not testify against her husband, without his consent, in a criminal action charging him with non-support of minor children. In 1963 the legislature enacted WASH. REV. CODE § 26.20.071, which suspended the privilege against disclosure in non-support or family desertion actions. See Rieke, *Domestic Relations, Washington Legislation—1963*, 38 WASH. L. REV. 482 (1963).

⁷ See Ward v. Painters' Union, 41 Wn.2d 859, 252 P.2d 253 (1953).

⁸ See, e.g., FONTANA, *THE MALTREATED CHILD* 10 (1964); Oettinger, *Protecting Children from Abuse*, Parents Magazine, Nov. 1964, p. 12; *Symposium—The Battered Child Syndrome*, 181 A.M.A.J. 17 (1962).

⁹ ARIZ. REV. STAT. § 13-842.01 (Supp. 1964); WEST'S CAL. PEN. CODE § 11161.5 (Supp. 1964); COLO. REV. STAT. ch. 22, art. 13; FLA. STAT. ANN. § 828.041; IDA. CODE §§ 16-1624 to 16-1643 (Supp. 1965); BURNS IND. STAT. §§ 52-1419 to 52-1425 (Supp. 1965); Kentucky Acts 1964, ch. 85; CODE OF MD. art. 27 § 11A (Supp. 1964); MICH. COMP. LAWS, ch. 722 (Mason's Ann. 1964); Minnesota Laws 1965, ch. 759; NEW JERSEY STAT. ANN. §§ 19:6-8.1 to 19:6-8.7 (Supp. 1964); MCKINNEY'S CONS. LAWS § 483-d (Supp. 1964); PAGE'S REV. OHIO CODE § 2151.42.1 (Supp. 1964); OKLA. STAT. ANN. § 843 (Supp. 1964); ORE. REV. STAT. §§ 146.710 to 146.740; PURDON'S PENN. STAT. ANN. § 4728; R.I. GEN. LAWS 40-13.1 (Supp. 1964); South Dakota Laws 1964, ch. 90; TENN. CODE § 36-601 (Supp. 1964); WEST'S WIS. STAT. ANN. § 325.21 (Supp. 1965); WYO. STAT. §§ 14-28.1 to 14-28.6 (Supp. 1963). See *Recent Legislation, An Exception to Use of the Physician-Patient Privilege in Child Abuse Cases*, 42 U. DET. L.J. 88, 94, note 56 (1964).

Washington legislature. One of these bills would have made a doctor's failure to report a suspected case of child abuse or neglect a misdemeanor,¹⁰ while the other two bills would have made such a failure a gross misdemeanor.¹¹ A few states have already made criminal a physician's failure to report suspected child abuse.¹² Insufficient experience with the new statutes makes it hazardous to generalize, but the Washington legislature apparently believed that results can be achieved without imposing criminal sanctions on doctors. In any event, the creation of a new and passive crime, complete with mere knowledge, at the expense of physicians, who treat rather than inflict the injuries, is of questionable desirability at best.¹³

The exception to the physician-patient communication privilege created by the new law, while highly commendable in purpose, is of doubtful significance. The present statutory privilege was intended for the benefit of the *patient* so that he would be encouraged to disclose his ailments to a physician in order to receive proper treatment.¹⁴ This rationale does not support application of the privilege in aid of a defendant's efforts to suppress communications from the victim of the crime to his physician, and the court would have been unlikely to approve such an application.¹⁵ If, however, information imparted by an *accused* is desired to be made available, Washington Revised Code section 10.52.020—unchanged by the child abuse law—still shields a physician from being compelled to testify as to any information received, by virtue of his profession, from a defendant. To the degree that the new law does make testimony from doctors more readily available, there can be little meaningful objection on the basis of the physician-patient privilege. This privilege has been the subject of much criticism,¹⁶ and thirteen states have no such provision.¹⁷

Perhaps the most significant innovation of the new law is the immunity granted the reporting physician from civil liability for defamation. This provision, properly publicized, could be effective in encouraging

¹⁰ S.B. 88.

¹¹ S.B. 113; H.B. 67.

¹² *E.g.*, MICH. COMP. LAWS § 722.575 (1964).

¹³ See Nation, Apr. 6, 1964, p. 339, which raises serious doubts about the desirability of a proposed mandatory New York statute.

¹⁴ See *State v. Fackrell*, 44 Wn.2d 874, 271 P.2d 679 (1954).

¹⁵ The weight of authority is opposed to such an application. See *Recent Legislation, An Exception to Use of the Physician-Patient Privilege in Child Abuse Cases*, 42 U. DET. L.J. 88 (1964).

¹⁶ See, *e.g.*, 8 WIGMORE, EVIDENCE § 2380a (McNaughton rev. 1961).

¹⁷ Alabama, Delaware, Florida, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, Rhode Island, South Carolina, Tennessee, Texas, and Vermont. See Rappaport, *Psychiatrist-Patient Privilege*, 23 MD. L. REV. 39, 43 n. 5 (1963).

reports of child abuse.¹⁸ Reporting will lead to investigation and, if necessary, prosecution. The ultimate result should be to decrease the incidence of the phenomenon of the battered child.¹⁹

¹⁸ "Without legislation, many doctors are fearful of reporting cases in which they suspect child abuse because they may face criminal or civil suit on the part of the parent or caretaker. Adequate legislation will protect them from this threat." Oettinger, *Protecting Children from Abuse*, Parents Magazine, Nov. 1964, p. 12.

¹⁹ The phenomenon of the battered child is startlingly common:

In 1962 alone, the American Humane Association found 662 newspaper reports of parents who beat, burned, drowned, stabbed and suffocated their children with weapons ranging from baseball bats to plastic bags. Most of the victims were under four; one-quarter died. If all such cases were reported, say some experts, the total would reach 10,000 a year. Many doctors suspect that more U.S. children are killed by their parents than by auto accidents, leukemia or muscular dystrophy.

Time, Jan. 8, 1965, p. 43. See also *Preface* to FONTANA, *THE MALTREATED CHILD* at xi (1964); *Symposium—The Battered-Child Syndrome*, 181 A.M.A.J. 17 (1962).