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Abortion-Possible Alternatives to Unconstitutional Spousal and Parental Consent Provisions of Missouri's Abortion Law

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RECENT CASES

ABORTION—POSSIBLE ALTERNATIVES TO UNCONSTITUTIONAL SPOUSAL AND PARENTAL CONSENT PROVISIONS OF MISSOURI'S ABORTION LAW

Planned Parenthood v. Danforth[1]

Suit was brought in the United States District Court of Eastern Missouri challenging the constitutionality of Missouri's abortion statutes[2] and seeking injunctive and declaratory relief.[3] Plaintiffs were two Missouri physicians[4] and Planned Parenthood. The District Court declared the Act constitutional in part and unconstitutional in part; all parties appealed to the United States Supreme Court. The Court held that several sections of the Missouri Act were unconstitutional including those requiring spousal and parental consent[5] for first trimester abortions.[6]

The Court based the spousal consent ruling on three separate grounds. First, the provision violated the strictures in *Roe v. Wade*[7] which

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1. 96 S. Ct. 2831 (1976).
2. Regulation of Abortion, §§ 188.010-.085, RSMo (1975 Supp.).
3. Planned Parenthood v. Danforth, 392 F. Supp. 1362 (E.D. Mo. 1975).
4. Michael Freiman, M.D., performed abortions in a hospital and clinic in St. Louis and David Hall, M.D., supervised abortions at Planned Parenthood in Columbia.
5. 96 S. Ct. at 2841, 2843. Section 188.020, RSMo (1975 Supp.), provides:
   No abortion shall be performed prior to the end of the first twelve weeks of pregnancy except:
   . . . .
   . . . .
   (3) With the written consent of the woman's spouse, unless the abortion is certified by a licensed physician to be necessary in order to preserve the life of the mother.
   (4) With the written consent of one parent or person in loco parentis of the woman if the woman is unmarried and under the age of eighteen years, unless the abortion is certified by a licensed physician as necessary in order to preserve the life of the mother.
6. It is to be noted that § 188.025, RSMo (1975 Supp.), which requires parental and spousal consent subsequent to the first trimester, was not challenged. Therefore, a physician who performs a second trimester abortion without the required consents is still exposed to criminal penalties under § 188.025, RSMo (1975 Supp.).
7. 410 U.S. 113 (1973).

held that the state cannot regulate abortions in the first trimester of pregnancy;[8] the Court reasoned that since the state does not have the power to regulate abortions in the first trimester, it cannot delegate this power to the spouse.[9] Secondly, while the Court recognized the importance of the marital relationship,[10] it concluded that the relationship would not be strengthened by granting the husband an absolute veto in the abortion decision.[11] Finally, the Court decided that the woman's right to privacy takes precedence over the husband's interest in the fetus, saying, "Since it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor."[12] In making this ruling, the Court upheld the decisions of the majority of lower courts that had previously considered similar provisions.[13]

In declaring the requirement for parental consent unconstitutional, the Court reiterated the idea that the state cannot delegate regulatory power that it does not have.[14] Secondly, the Court said that, while minor's rights are not coextensive with those of adults, minors do have some constitutionally protected rights which may not be limited without a compelling state interest.[15] The Court concluded that the minor's right to privacy outweighed the interest of the parents and that the parental consent requirement violated the strictures of *Roe* and *Doe v. Bolton*.[16] This holding is the culmination of a line of lower court cases holding similar

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8. *Id.* at 163.

9. 96 S. Ct. at 2841.

10. The Court cited Griswold v. Connecticut, 381 U.S. 479 (1965), and Maynard v. Hill, 125 U.S. 190 (1888).

11. 96 S. Ct. at 2842.

12. *Id.*

13. Poe v. Gerstein, 517 F.2d 787 (5th Cir. 1975), *aff'd mem.*, 96 S. Ct. 3202 (1976) (declared Florida's consent provision invalid); Wolfe v. Schroering, 388 F. Supp. 631 (W.D. Ky. 1974), *modified*, 541 F.2d 523 (6th Cir. 1976) (held the Kentucky provision invalid); Doe v. Rampton, 366 F. Supp. 189 (D. Utah), *vacated and remanded*, 410 U.S. 950 (1973) (invalidated the Utah consent provision).

14. 96 S. Ct. at 2843.

15. The Court cited several cases which have upheld the constitutional rights of minors, among which are Goss v. Lopez, 419 U.S. 565 (1975) (due process right of students suspended from high school to notice and a hearing upheld); Tinker v. Des Moines School Dist., 393 U.S. 503 (1969) (right to free speech violated by suspension from school for wearing arm band to protest Vietnam War); and *In re* Gault, 387 U.S. 1 (1967) (Right to procedural safeguards in juvenile proceeding upheld). The minor's right to privacy has also been upheld in Merriken v. Cressman, 364 F. Supp. 913 (E.D. Pa. 1973). In holding a school program to identify potential drug abusers unconstitutional, the court said,

> The fact that the students are juveniles does not in any way invalidate their right to assert their Constitutional right to privacy.

Id. at 918.

16. 96 S. Ct. at 2844. Roe v. Wade, 410 U.S. 113 (1973), and Doe v. Bolton, 410 U.S. 179 (1973), were the first cases in which the Court upheld the woman's right to abortion.

parental consent requirements unconstitutional.[17]

The Court's holdings on spousal and parental consent should not be construed as invalidating all forms of third party consent or notice requirements. In declaring the spousal consent provision unconstitutional, Justice Blackmun said in a footnote that the problem with Missouri's provision is that it gives the husband a veto rather than notice.[18] Stronger language in the majority opinion indicated that some form of parental consent or notice could constitutionally be required.[19] The Court reiterated that it objected only to the blanket veto of the parents.[20] The concurring opinion of Justice Stewart, joined by Justice Powell, agreed with the Court's holding on spousal consent, but said that the husband's possible interest in the fetus had not been given due consideration.[21] In discussing the parental consent requirement, Justice Stewart alluded to its blanket nature and noted that the state's goal of ensuring parental input in the minor's decision is constitutionally permissible.[22]

Justice White, writing for the dissent and joined by Chief Justice Burger and Justice Rehnquist, would have upheld the constitutionality of the spousal consent requirement because of the father's interest in the unborn fetus.[23] He stated that the parental consent provision should have been upheld because it would have protected the minor from her own improvidence.[24] Justice Stevens also dissented on the parental consent issue because he believed that the state's interest in the minor's welfare was a compelling interest outweighing the minor's right to privacy.[25] Thus, on spousal consent, three Justices would have upheld Missouri's provision and two who concurred with the majority opinion felt that the father's rights were inadequately considered. On the issue of parental consent, four Justices would have upheld Missouri's provision and two who concurred in

17. Foe v. Vanderhoof, 389 F. Supp. 947 (D. Colo. 1975); Poe v. Gerstein, 517 F.2d 787 (5th Cir. 1975), *aff'd mem.*, 96 S. Ct. 3202 (1976); State v. Koome, 84 Wash. 2d 901, 530 P.2d 260 (1975).

18. 96 S. Ct. at 2841-42 n.11:

> This section does much more than insure that the husband participate in the decision whether his wife should have an abortion. The State, instead has determined that the husband's interest in continuing the pregnancy of his wife always outweighs any interest on her part in terminating it irrespective of the condition of their marriage.

19. 96 S. Ct. at 2844. The Court said:

> We emphasize that our holding that § 3(4) [of the statute] is invalid does not suggest that every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy.

This would indicate that consent would have to come from the parents or the courts.

20. *Id.* at 2844.
21. *Id.* at 2850.
22. *Id.* at 2851.
23. *Id.* at 2852.
24. *Id.* at 2853.
25. *Id.* at 2857.

holding it unconstitutional said that they would accept *some* type of parental consent provision.

The Court's decision in *Bellotti v. Baird*[26] hints at what type of provision for parental consent would be acceptable to the Court. This case involved a challenge to a Massachusetts abortion statute which required parental consent for a minor's abortion but provided for a possible judicial override of a parental veto for "good cause shown."[27] According to one possible construction, the provision would permit a mature minor to get judicial consent for an abortion without informing her parents of the pregnancy.[28] The Court refused to rule on the statute's constitutionality on the ground that the Massachusetts Supreme Judicial Court should first have an opportunity to construe it because it was capable of a construction which would either render it constitutional or "substantially modify the federal constitutional challenge."[29] This language, coupled with a reference to *Bellotti* in the majority opinion of Justice Blackmun in *Planned Parenthood*[30] and in the concurring opinion of Justice Stewart[31] demonstrates a favorable attitude of a majority of the Court toward this type of provision.[32]

The asset of the *Bellotti* provision is that, while it ensures the input of a third party in the minor's decision, it does not give the parents the objectionable "absolute, and possibly arbitrary, veto."[33] The objectionable features of this type of statute are threefold. It would place an additional burden on the minor when she is already under stress by forcing her to go to court to override her parent's veto. This might be an undue burden such as that held unconstitutional in *Doe v. Bolton*.[34] Another difficulty is that of time. The proceeding would have to be quick and efficient or the delay might force the minor into either a second trimester abortion which is

26. 96 S. Ct. 2857 (1976).

27. MASS. GEN. LAWS ANN. ch. 112, § 12P(1) (1974):

(1) If the mother is less than eighteen years of age and has not married, the consent of both the mother and her parents is required. If one or both of the mother's parents refuse of a judge of the superior court for good cause shown, after such hearing as he deems necessary. Such a hearing will not require the appointment of a guardian for the mother.

28. 96 S. Ct. at 2866.

29. *Id.*

30. 96 S. Ct. at 2844.

31. *Id.* at 2851.

32. It is to be noted that the Court continues to enjoin enforcement of the Massachusetts statute pending its construction by the Massachusetts Supreme Judicial Court. *Motion to vacate denied*, 97 S. Ct. 251 (1976) (No's 75-73, 75-109).

33. 96 S. Ct. at 2843.

34. 410 U.S. 179 (1973). In State v. Koome, 84 Wash. 2d 901, 530 P.2d 260 (1975), a doctor was charged with performing an abortion in spite of a veto by the parents where that veto had been overriden by the juvenile court. The court said that, even if there were an established court proceeding, the added burden to the minor was impermissible. They added that the costs and delays were of the same type held unconstitutional in *Bolton*.

more dangerous and expensive[35] or into not having an abortion at all if the second trimester had expired.[36] Finally, there is case authority to the effect that juvenile courts may not override the refusal of a parent to consent to an operation on their minor child unless the operation is necessary to save life or limb.[37]

A second legislative alternative that might be constitutional would require notification of the parents of a minor by the physician in order to allow the parents an opportunity to seek an injunction prohibiting the proposed abortion. For such an injunction to issue, the parents would have to prove that the contemplated abortion is not in their daughter's best interests. This type of provision, suggested in *State v. Koome*,[38] is not, to the author's knowledge, in effect in any state. Here, if the parents could prove that the abortion would be detrimental to the minor's physical or mental health, the judge could order the physician not to perform the abortion. The asset of this type of provision is that it ensures the participation of the parents in the minor's decision-making while denying them a veto. It also removes from the minor's shoulders what the *Koome* court thought to be an impermissible burden[39] by requiring that the parents initiate judicial proceedings if they wish to prevent the abortion. Any provision of this type should set out clear guidelines for the court to use in deciding whether the parents have made the required showing in order to avoid conflicting, and possibly arbitrary, decisions on the part of individual judges. The potential difficulty is that, as in the Massachusetts type of provision, there might be an undue delay.

A third alternative is to require notification, if possible, of the spouse or the parents of the unmarried minor. This type of statute, currently in effect in Utah,[40] might be acceptable to the Court. It provides for the participation of the husband and the parents of the minor in the abortion decision while denying them any veto power. These parties, who do have interests recognized by the Court, have an opportunity to protect their interests, at least to the extent of making their views known to the woman. One difficulty with this type of provision is that to "notify, if possible"[41] might be unconstitutionally vague in that it does not define how much effort must be expended by the physician in trying to ascertain who and

35. Section 188.025, RSMo (1975 Supp), requires that all second trimester abortions be performed in a hospital, thus making the procedure more expensive.

36. Section 188.030, RSMo (1975 Supp.), prohibits abortions after the second trimester unless necessary to preserve the life or health of the mother.

37. Green Appeal, 448 Pa. 338, 292 A.2d 387 (1972); *In re* Hudson, 13 Wash. 2d 673, 126 P.2d 765 (1942).

38. 84 Wash. 2d 901, 530 P.2d 260 (1975).

39. *Id.* at 914, 530 P.2d at 270.

40. 1974 UTAH LAWS ch. 33, § 76-7-304, provides in part:

(2) Notify, if possible, the parents or guardian of the woman on whom the abortion is to be performed, if she is a minor or the husband of the woman, if she is married.

41. *Id.*

where the interested parties are. An additional problem is that the Court in *Planned Parenthood* was emphatic in declaring the interests of the husband to be less compelling than those of the wife. It might be concluded that even notification infringes the wife's right to privacy.

The last alternative is that of statutory silence; the state enacts no provision as to spousal or parental consent. Without a statutory consent requirement, physicians would not face serious risk of civil liability by performing abortions without the husband's consent. However, there are two theories on which the husband might attempt to recover from the physician. The first, rejected by the courts, is that he has lost the right to the procreative potential of the wife.[42] The second theory is recovery based on damage to the husband's interest in the fetus.[43] Since the Court has held that the husband's interest in the fetus is not sufficient for criminal enforcement of consent provisions, it is unlikely that courts will permit civil redress.[44]

Even without a statutory mandate, many doctors will continue to require the parent's consent before they perform an abortion on a minor. This stems from the possibility of civil liability for assault and battery. Every surgical procedure is an unpermitted and offensive touching and thus a battery unless the surgery is consented to by someone competent to consent.[45] The general rule is that the minor is not competent to give such consent[46] unless so empowered by statute or some common law exception.[47] Missouri has a statute which empowers minors to consent to some types of medical treatment; the statute, however, specifically excludes abortion.[48] Missouri does not appear to recognize the "mature minor" exception[49] which might cover a significant number of abortions. This

42. Murray v. Vandevander, 522 P.2d 302 (Okla. App. 1974). A spouse unsuccessfully sued a physician for an hysterectomy performed on his wife to which he did not consent.

43. The only case found in which a husband sued the doctor after the abortion was performed is Touriel v. Benveniste, No. 776790 (Cal. Sup. Ct., Oct. 20, 1961). The court upheld the father's right to sue; the decision however, emphasized that abortions at that time were illegal in California.

44. New York Times Co. v. Sullivan, 376 U.S. 254 (1964), indicated that, at least in libel, the state may not do with a civil action that which it is not permitted to do by criminal statute. Civil liability of the doctor for an unconsented to abortion would chill the woman's right to privacy.

45. W. PROSSER, HANDBOOK OF THE LAW OF TORTS, § 18 (4th ed. 1971).

46. Bonner v. Moran, 126 F.2d 121 (D.C. Cir. 1941), says, at 122, "The general rule is that the consent of the parent is necessary for an operation on a child".

47. For a discussion of these exceptions see Dunn, *The Availability of Abortion, Sterilization, and Other Medical Treatment for Minor Patients*, 44 U.M.K.C.L. REV. 1 (1975).

48. § 431.061, RSMo (1975 Supp.).

49. This rule permits the minor who is close to majority to consent to a non-serious operation that is performed for her benefit.