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Constitutional Law and the Rights of Minors--Requiring Notice to Parents of Appointment of a Guardian Ad Litem

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the best of circumstances, the possibility of a high degreee of subjectivity in the use of informed opinion is always present. In addition, questions arise as to how measurement of contemporary attitudes concerning the offense is to be made.[87] On balance, however, Judge Seiler's proposed test contributes substantially to the establishment of an objective basis for making determinations in eighth amendment cases.

Mitchell does not portend well for future defendants charged with the sale of marijuana in Missouri. The decision blunts the effectiveness of the primary constitutional challenges. In the absence of conclusive proof of the harmlessness of marijuana, an argument based on equal protection grounds is likely to fail. A cruel and unusual punishment attack also is not a viable approach as long as subjective standards such as *Johnson* are applied and as long as Missouri appellate courts defer to the trial courts in sentencing. As a result, until the Missouri Supreme Court defines the evidence sufficient to constitute conclusive proof in regard to the harmlessness of marijuana or until it adopts a more objective approach in applying the eighth amendment, long sentences for marijuana offenses can be expected to continue in Missouri.

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CONSTITUTIONAL LAW AND THE RIGHTS OF MINORS—REQUIRING NOTICE TO PARENTS OF APPOINTMENT OF A GUARDIAN AD LITEM

M.S. v. Wermers[1]

M.S., an otherwise unidentified minor female, was denied prescription contraceptives by her county family planning clinic.[2] M.S., who was fifteen years of age and unmarried, was unable to obtain her parent's consent for such contraceptives.[3] She sought to bring a class action under sec-

87. One commentator has suggested that public sentiment in death penalty cases be ascertained through the use of random opinion surveys. *See* Thomas, *Eighth Amendment Challenges to the Death Penalty: The Relevance of Informed Public Opinion*, 30 VAND. L. REV. 1005 (1977).

1. 557 F.2d 170 (8th Cir. 1977).
2. Non-prescription contraceptives are available without parental consent. *Id.* at 173 n.1.
3. 557 F.2d at 176 n.5.

tion 1983[4] based on her right to privacy. Without deciding the merits of the underlying dispute, the district court held that a guardian ad litem was necessary and ordered her to notify her parents of the hearing on the appointment.[5] When she refused to notify her parents, the district court dismissed her case.[6]

M.S. appealed, claiming the court's dismissal was an abuse of discretion, both in refusing to let her proceed without a guardian ad litem and in dismissing the action for failure to give her parents notice of the hearing on the appointment. The Court of Appeals for the Eighth Circuit held that it was not an abuse of discretion to require the appointment of a guardian ad litem for a minor plaintiff,[7] but it was an abuse of discretion to dismiss her action for failure to notify her parents of the hearing. The order of dismissal was vacated and the case was remanded.[8]

The Eighth Circuit opinion does not mean that notice to the parents of a hearing for the appointment of a guardian ad litem will never be allowed. The court discouraged such an interpretation of its holding when it declined to decide the case on the basis of the language of the rule itself. Instead, the court based its holding on the unique factual situation present in M.S.'s case and thereby narrowly restricted the influence and scope of its decision.

The appointment of a guardian ad litem in federal court is governed by Federal Rule of Civil Procedure 17(c).[9] Unlike some state courts' rules,[10]

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4. 42 U.S.C. § 1983 (1970) provides:
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

5. 409 F. Supp. 312 (D.S.D. 1976).

6. 557 F.2d at 173 n.2.

7. *Id.* at 174.

8. *Id.* at 176.

9. FED. R. CIV. P. 17(c) provides:
Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed representative he may sue by his next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.

10. MO. R. CIV. P. 52.02(c) provides:
Such appointment shall be made on the petition in writing of such minor if of the age of fourteen years and the written consent of the person proposed to be next friend. If such minor be under the age of fourteen years, the appointment of a next friend may be made upon the written applica-

the federal rules are silent concerning notice to the parents. The absence of any language requiring notice to the parents could be interpreted as meaning that it is not within the court's discretion to require notice. However, in light of centuries of strict parental control of children, it is not likely that Congress intended an interpretation forbidding notice to the parents. It is also doubtful that the rule should be interpreted as requiring notice to the parents in all cases. If Congress had intended such a result it would have included an express notice requirement, as several states have done. The federal rule does provide that the court must appoint a guardian ad litem for a minor or "shall make such other order as it deems proper for the protection of the infant." Apparently a court, relying on this portion of the rule, could require notice to the parents where the court in its discretion finds that such notice is necessary to protect the child.

The *Wermers* opinion fails to discuss the effect of the absence of an express notice requirement.[11] It simply states that notice is not necessary in this action. The court could have based its holding on an examination and interpretation of the language of the rule, concluding that the district court judge abused his discretion in requiring something not expressly provided for in the rule. In the alternative, the court might have examined the South Dakota rule,[12] also silent concerning notice, comparing it with a rule like that in Missouri which requires notice to the person with whom the minor resides if the minor is under fourteen years of age.[13] The court then could have concluded that notice to the parents should not be required since neither the federal rule nor the South Dakota rule contained a notice provision.[14]

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tion of a relative or friend of the minor, in which case a notice thereof must be given to the person with whom such minor resides.

See also N.Y. CIV. PRAC. LAW § 1202(b) (McKinney); WIS. STAT. § 803.01(3)(b) (1977); WYO. STAT. § 3-2-101 (1977).

11. The court considers whether the state or federal rule should control and concludes: "Regardless of whether state or federal law should be applied, the District Court was bound to consider the appointment of a guardian ad litem for the minor plaintiff and clearly had the power to appoint one in her behalf." 557 F.2d at 174. Further discussion is left to a footnote, wherein the court notes that notice to the parents is not expressly required under state or federal law. *Id.* at 176 n.6.

12. The relevant provisions of South Dakota law are S.D. COMPILED LAWS ANN. § 26-1-3 (1976 Revision) ("A minor may enforce his rights by civil action . . . in the same manner as a person of full age, except that a guardian must be appointed to conduct the same.") and S.D. COMPILED LAWS ANN. § 15-6-17(c) (1967) (with provisions substantially identical to the provisions of FED. R. CIV. P. 17(c)).

13. *See* note 10 *supra.*

14. For other state rules of procedure and statutes containing no notice provision, *see* FLA. R. CIV. P. 1.210(b); GA. CODE ANN. § 81A-117(c); IND. R. TRIAL P. 17(c); IOWA R. CIV. P. 12; NEB. REV. STAT. § 25-307 (1975); N.M. R. CIV. P. 17(c); VT. R. CIV. P. 17(b); VA. CODE § 8.01-9 (1977); WASH. REV. CODE § 4.08.050 (1962).

The Eighth Circuit took neither approach; they instead issued an opinion with little direct precedential value beyond the specific facts of the case decided. An interpretation of either the federal or state[15] rule to prevent the mandatory notice to parents would have had much broader impact; consideration of this issue was relegated to a footnote,[16] a disposition which can be read as a conscious attempt to leave resolution of the underlying issues for another day. The announced bases for the holding were the special subject matter of the case and the constitutional issues involved.

A minor's ability to bring suit without her parents' knowledge would involve two recognized constitutional rights: the right to bring suit inherent in due process[17] and the right of privacy.[18] A rule expressly or impliedly requiring notice to her parents of the appointment of a guardian ad litem would arguably infringe on these constitutional rights. However, the initial question is whether a minor is deemed to possess these rights to the same degree as an adult.

Until recently, a child's rights under the constitution have not engendered significant amounts of litigation.[19] The cases have arisen mainly from the juvenile court system[20] or the schools.[21] The United States

15. The federal rule is applied to the exclusion of the state rule in this case. 557 F.2d at 174 n.4.

16. *Id.* at 176 n.6.

17. U.S. CONST. amend. V provides: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ." The United States Supreme Court listed the right of access to the courts as a fundamental right guaranteed by the constitution in Belle Terre v. Boraas, 416 U.S. 1, 7 (1974).

18. The Supreme Court acknowledged the right of privacy in Roe v. Wade, 410 U.S. 113, 152 (1973):

> The Constitution does not explicitly mention any right of privacy. [But] the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment; in the Fourth and Fifth Amendments; in the penumbras of the Bill of Rights; in the Ninth Amendment; or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment. (Citations omitted.)

19. *See* Foster & Freed, *A Bill of Rights for Children*, 6 FAM. L.Q. 343, 345 (1972). *See also* authorities cited notes 33-35 *infra.*

20. *See In re* Winship, 397 U.S. 358 (1970) (requiring proof beyond a reasonable doubt for conviction of minors); *In re* Gault, 387 U.S. 1 (1967) (minors have a right in juvenile proceedings to notice, counsel, confrontation, cross-examination, and privilege against self-incrimination); Gallegos v. Colorado, 370 U.S. 49 (1962) (inadmissibility of involuntary confessions against minors).

21. *See* Goss v. Lopez, 419 U.S. 565 (1975) (establishing right to notice and informal hearing in school discipline context); Tinker v. Des Moines School Dist., 393 U.S. 503 (1969) (symbolic speech, upholding students' right to wear armbands in protest of Vietnam war); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (upholding child's right to remain silent during the pledge of allegiance).

Supreme Court has not precisely defined the scope of a minor's constitutional rights. In fact, the Court has refused to conclude that a minor has constitutional rights coextensive with those of an adult.[22] Recent criminal cases have guaranteed certain procedural rights to minors, but they have also clearly established that a minor does not have the same constitutional rights as an adult.[23] However, since the Court has dealt with juveniles' rights on a case by case approach, there is a possibility that a minor could convince the Court that she has a right in due process to bring suit identical to that of an adult.[24]

If a minor's right to bring suit were considered coextensive with that of an adult, it would be impermissible to condition that right upon parental consent. Whether or not it would be proper to require notice to the parents would depend upon the child's right of privacy. The Supreme Court has extended the right of privacy to minors in the areas of abortion[25] and birth control,[26] ratifying the positions of many lower federal courts.[27]

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22. *In re* Gault, 387 U.S. 1, 13 (1967). *See also* Kent v. United States, 383 U.S. 541, 556 (1966).

23. *Compare* McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (holding a state need not provide juveniles with a jury trial in the adjudicative phase of delinquency proceedings), *with In re* Winship, 397 U.S. 358 (1970) (holding a state must meet the standard of proof beyond a reasonable doubt in juvenile proceedings). Judge Henley points this out in his dissent, 557 F.2d at 177.

24. *See* authorities cited notes 20-23 *supra.*

25. Planned Parenthood v. Danforth, 428 U.S. 52, 75 (1976). The Court did not extend a blanket right of privacy to minors, using instead the following very limited language:

> It is difficult, however, to conclude that providing a parent with absolute power to overrule a determination, made by the physician and his minor patient, to terminate the patient's pregnancy will serve to strengthen the family unit. Neither is it likely that such veto power will enhance parental authority or control where the minor and the nonconsenting parent are so fundamentally in conflict and the very existence of the pregnancy already has fractured the family structure. Any independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant.
>
> We emphasize that our holding that § 3(4) is invalid does not suggest that every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy.

26. Carey v. Population Services Int'l, 431 U.S. 678 (1977). The Court cited its decision in Planned Parenthood v. Danforth, 428 U.S. 52 (1976), as authority for extending the right to privacy to minors in the area of birth control:

> Of particular significance to the decision of this case, the right to privacy in connection with decisions affecting procreation extends to minors as well as to adults . . . .
>
> Since the state may not impose a blanket prohibition, or even a blanket requirement of parental consent, on the choice of a minor to terminate her pregnancy, the constitutionality of a blanket prohibition of the distribution of contraceptives to minors is *a fortiori* foreclosed.

431 U.S. at 693-94.

27. Noe v. True, 507 F.2d 9 (6th Cir. 1974); T ___ H ___ v. Jones, 425 F.

The *Wermers* court might have been affected by the many federal court decisions upholding minors' rights to privacy in the context of birth control. Particularly important is *Carey v. Population Services International*,[28] which held unconstitutional a New York statute prohibiting access to contraceptives to minors below the age of sixteen as a violation of their right to privacy.[29] The *Wermers* case also involved a minor's right to birth control, yet the minor was prevented from establishing her right to contraceptives based on the right to privacy when the district court dismissed her case for her refusal to notify her parents of the hearing on a guardian ad litem. The Eighth Circuit might have been especially hesitant to affirm an order which effectively precluded a minor from establishing her right to privacy which had only recently been recognized by the Supreme Court.

It is also probable that the *Wermers* court was influenced by the Supreme Court decisions in the abortion area, especially *Planned Parenthood v. Danforth*,[30] which declared unconstitutional a Missouri statute requiring parental consent for abortions. The Court in that case specifically held that the state's interest in the "safeguarding of the family unit and of parental authority" did not outweigh the minor's right to privacy in her decision to terminate her pregnancy.[31] The Eighth Circuit could have interpreted this holding to extend to a minor's right to privacy in bringing suit.[32]

Supp. 873 (D. Utah 1975); Doe v. Exon, 416 F. Supp. 716 (D. Neb. 1975); Planned Parenthood Ass'n v. Fitzpatrick, 401 F. Supp. 554 (E.D. Pa. 1975); Foe v. Vanderhoof, 389 F. Supp. 947 (D. Colo. 1975); Wolfe v. Schroering, 388 F. Supp. 631 (W.D. Ky. 1974), *modified*, 541 F.2d 523 (6th Cir. 1976); Coe v. Gerstein, 376 F. Supp. 695 (S.D. Fla. 1973), *appeal dismissed and cert. denied*, 417 U.S. 279, 280 (1974), *aff'd in part on other grounds*, 417 U.S. 281 (1974), *aff'd sub nom.* Poe v. Gerstein, 517 F.2d 787 (5th Cir. 1975); Doe v. Rampton, 366 F. Supp. 189 (D. Utah 1973).

28. 431 U.S. 678 (1977).

29. However, the statute in *Carey* did not deal with parental consent but imposed a blanket prohibition on distribution of contraceptives to minors under the age of sixteen. *See also* T __ H __ v. Jones, 425 F. Supp. 873 (D. Utah 1975) (enjoining enforcement of state regulations requiring parental consent before a minor may obtain state family planning services).

30. 428 U.S. 52 (1976).

31. *Id.* at 75.

32. The Supreme Court in *Planned Parenthood* did not hold that notice to the parents of a minor's abortion would violate the minor's right to privacy. It held that a complete and arbitrary veto power in the parent violated the minor's right to privacy. As to whether notice would be a violation, see the concurring opinion of Justice Stewart, *id.* at 90, and the companion case of Bellotti v. Baird, 428 U.S. 132 (1976). These suggest that a statute which did not impose parental consent as an absolute condition upon the minor's right, but would assure consultation between the parent and child, would present a materially different constitutional issue.

Even if a minor child establishes her rights under the constitution,[33] she still might not prevail where her rights are in conflict with another's rights. The leading cases which have dealt with a minor's rights have involved a conflict between the child and the state.[34] Most of the cases which have extended to a minor the same due process, first amendment, and privacy rights enjoyed by an adult have involved situations where the parent and child had a unity of interest.[35] The significant fact in *Wermers* is that the child's interest conflicts with the interest of her parents and a balancing of their competing rights is required.[36] Our system of jurisprudence contains a strong tradition of the self-governing family unit and parental control within that unit.[37] The parents are deemed to have a natural right to the custody, care and control of their children. This right is inherent in our social system, it is not delegated from the state,[38] and it cannot be usurped by the state unless the parents are found to be abusing or neglecting their obligation to support and care for the child.[39] If the child were granted a constitutional right in due process to bring suit with-

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33. For analysis of a minor's rights under the constitution, *see* Note, *Parental Consent Requirements and Privacy Rights of Minors: The Contraceptive Controversy*, 88 HARV. L. REV. 1001 (1975); Note, *A Minor's Right to Contraceptives*, 7 U. CALIF. D. L. REV. 270 (1974); Note, 28 U. MIAMI L. REV. 251 (1973); Note, *The Minor's Right to Abortion and the Requirement of Parental Consent*, 60 VA. L. REV. 305 (1974).

34. Wisconsin v. Yoder, 406 U.S. 205 (1972) (holding that the right of Amish parents to direct the religious training of their offspring prevailed over the state's interest in compulsory school attendance until the age of sixteen); Pierce v. Society of the Sisters of the Holy Names, 268 U.S. 510 (1925) (holding that a statute requiring children to attend public schools was invalid because it restricted the parents' liberty to direct their children's upbringing); Meyer v. Nebraska, 262 U.S. 390 (1923) (invalidating a statute which prohibited the teaching of foreign languages).

35. Note, *Parental Consent Requirements and Privacy Rights of Minors: The Contraceptive Controversy*, 88 HARV. L. REV. 1001, 1013 (1975); Note, *The Minor's Right to Abortion and the Requirement of Parental Consent*, 60 VA. L. REV. 305, 321 (1974). *See* note 40 *infra*.

36. Planned Parenthood v. Danforth, 428 U.S. 52, 72-74 (1976) (conflict of parents' and child's interests discussed).

37. For discussions of this tradition and the basis of the right in the parent to control within the family unit, *see* Dobson, *The Juvenile Court and Parental Rights*, 4 FAM. L.Q. 393 (1970); Foster & Freed, *A Bill of Rights for Children*, 6 FAM. L.Q. 343 (1972); Hafen, *Puberty, Privacy, and Protection: The Risk of Children's "Rights,"* 63 A.B.A.J. 1383 (1977); Kleinfeld, *The Balance of Power Among Infants, Their Parents and the State: Parental Power* pt. 2, 4 FAM. L.Q. 410 (1970); Note, *Counseling the Counselors: Legal Implications of Counseling Minors Without Parental Consent*, 31 MD. L. REV. 332 (1971). *See also* the dissent in *Wermers*, 557 F.2d at 177. "Judicial decisions have enveloped the sanctity of the family and parental authority with constitutional protection because the institution of the family has long been recognized as a cornerstone of our law."

38. Hafen, *supra* note 37, at 1388.

39. Foster & Freed, *supra* note 37, at 395-96.

out her parents' consent, the parents' right to control the child would be effectively diminished. If the child were granted a constitutional right of privacy to bring suit without her parents' knowledge, the parents' right to counsel and influence their child would also become a nullity. These considerations make it unlikely that there will arise an absolute right in a minor to bring suit without notice to her parents.[40]

Regardless of the merits of upholding a minor's privacy and due process rights to sue without notice generally, the *Wermers* court's holding was correct under the rather unique factual situation presented. At issue was the minor's right to privacy, not as to the underlying issue of her access to contraceptives, but as to notice to her parents of her pending suit. The effect of the district court's requirement that she notify her parents would be to destroy the right she was seeking before she had a chance to establish that right.[41] The Eighth Circuit concluded, "[a]ppellant brought this action anonymously, and to require her to disclose her participation to her parents at this stage would substantially nullify the privacy right she seeks to vindicate."[42]

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40. Two recent Supreme Court decisions have granted a limited right to privacy in minors. *See* notes 25 & 26 *supra*. The concurring and dissenting opinions in *Planned Parenthood* strongly suggest that the interests of the parents and child are not in conflict in that case. 428 U.S. at 90-95, 103-05. *See also* the concurring opinion of Justice Powell in Carey v. Population Services Int'l, 431 U.S. at 703-09.

41. *See* NAACP v. Alabama, 357 U.S. 449, 459 (1958) ("To require that it be claimed by the members themselves would result in nullification of the right at the very moment of its assertion."). *See also* Roe v. Ingraham, 364 F. Supp. 536, 541 n.7 (S.D.N.Y. 1973) ("Here, however, if plaintiffs are required to reveal their identity prior to the adjudication on the merits of their privacy claim, they will already have sustained the injury which by this litigation they seek to avoid.").

42. 557 F.2d at 176. For a recent case where the court weighed the parent's right to know against the minor's right to privacy, *see* Doe v. Irwin, 428 F. Supp. 1198 (W.D. Mich.), *vacated and remanded*, 559 F.2d 1219 (6th Cir. 1977), which held that a state-funded family planning clinic's practice of distributing prescription contraceptives to unemancipated minors without notice to their parents violated parental rights protected by the first, fifth, ninth, and fourteenth amendments. In that case, the parents were the plaintiffs and the court's holding dealt with notice, not consent. On remand, the district court distinguished Carey v. Population Services Int'l, 431 U.S. 678 (1977):

> [A] close reading of *Carey* indicates a majority of the Supreme Court would support a state statute requiring prior parental notice and consultation before *non-prescriptive* contraceptives are distributed to unemancipated minors. The present case differs substantially from *Carey*, but the differences are such that *Carey* provides additional support for the position previously reached by this court. The instant case involves the distribution of *prescriptive* contraceptives and the many dangerous medical complications attendant thereto. The result reached in the instant case in no way would prevent unemancipated minors from obtaining contraceptives—it would only require prior parental notifica-

The court also pointed out that her parents would not be appropriate guardians ad litem in this case. M.S. submitted an affidavit stating that her parents would not consent to her receipt of contraceptives.[43] Therefore they would be ill-suited to guide her in a suit wherein she challenged the policy of parental consent for minors in obtaining contraceptives. The court thus held that "it was equally inappropriate and unnecessary to condition the further progress of the lawsuit upon notification to the parents of the hearing on the appointment."[44] The Eighth Circuit supported this conclusion by citing the "obvious chilling effect"[45] which the district court's order had already had on M.S.'s effort to establish her constitutional right, since she had suffered dismissal rather than notify her parents.

The dissenting opinion also seeks to balance the interests of the parents and child. Judge Henley felt that a minor's right to litigate in private does not outweigh the parents' right to advise and protect the child. He based his decision on the right of the parent to counsel the child and the fear that the court would be participating in a deception which would undermine "family solidarity."[46] The language of his opinion indicates that he examined the merits of the underlying dispute rather than restricting consideration to the procedural issues raised on appeal.

It is unlikely that the holding of the Eighth Circuit in *Wermers* will be given the broad interpretation that minors may sue under Rule 17(c) just as adults may. The rule still provides that the court may decide whether a guardian ad litem should be appointed for a minor. A broad reading of the case would clearly be beyond the expectations of the *Wermers* court. Although the court held that this minor could bring suit without her parents' knowledge, it did not hold and surely did not intend that a minor could in all circumstances sue in federal court without notice to her parents.

Instead the Eighth Circuit's holding should be given a narrow interpretation, strictly limited to the facts of this case. Notice to a minor's parents of the appointment of a guardian ad litem cannot be required

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tion and the opportunity for consultation before that civil right, which surely implicates the capacity of the minor, is exercised.

Doe v. Irwin, 441 F. Supp. 1247, 1260 (W.D. Mich. 1977) (footnote omitted). *See also* Roe v. Rampton, 394 F. Supp. 677 (D. Utah 1975), *aff'd*, 535 F.2d 1219 (10th Cir. 1976) (denying injunctive relief from a state statute requiring the physician to notify the husband or parents of a woman on whom an abortion is to be performed).

43. Judge Henley's dissent in M.S. v. Wermers, 557 F.2d at 176 n.5, points out the "crucial distinction between appointing parents to serve as guardians ad litem and notifying them that their minor child is involved in serious litigation for which a guardian ad litem may be appointed."

44. 557 F.2d at 176.

45. *Id.*

46. *Id.* at 178.