



## **THE “CHILD CUSTODY PROTECTION ACT” AND THE INADEQUACY OF JUDICIAL BYPASS PROCEDURES**

The “Child Custody Protection Act,” introduced in Congress in 1999, would make it a federal crime for any person, other than a parent, to transport a minor knowingly across state lines for the purpose of obtaining an abortion if the young woman has not complied with her home state’s parental involvement law. Anyone, including a grandparent, aunt, or religious counselor, could be convicted under the proposed statute. The bill, if enacted, will have serious and harmful consequences for young women – consequences that are not ameliorated sufficiently by constitutionally required state judicial bypass procedures.

### **INTRODUCTION**

The Supreme Court has stated that, in order to be constitutional, a state statute requiring parental involvement must offer an alternative, such as a judicial bypass.<sup>1</sup> The Supreme Court has articulated three criteria for a judicial bypass procedure:

- first, the statute must allow the minor to show that she is mature enough to make her own decision regarding abortion or that the abortion is in her best interests;
- second, the bypass procedure must ensure the minor’s anonymity and confidentiality; and
- third, the bypass procedure must be conducted expeditiously.<sup>2</sup>

Notwithstanding these procedural requirements, judicial bypass proceedings pose formidable obstacles to young women facing crisis pregnancies. Some young women cannot maneuver the legal procedures required, or cannot attend hearings scheduled during school hours without sacrificing confidentiality. Others decline or delay availing themselves of a judicial bypass because they fear that the proceedings are not confidential, or that they will be recognized by people at the courthouse. Furthermore, many young women do not want to reveal intimate details of their personal lives to strangers.<sup>3</sup> Moreover, the time required to schedule the court proceeding also may result in a delay of a week or

more, thereby increasing the health risks of the abortion.<sup>4</sup> Some young women who overcome these obstacles and seek a hearing face judges who are vehemently anti-choice and who routinely deny petitions even if the minor can prove that she is mature or that an abortion is in her best interests.

In order to avoid all of these real and perceived obstacles to judicial bypass proceedings, some minors in states with parental involvement laws travel to a state that does not require parental involvement to obtain an abortion instead of trying to obtain a judicial bypass.<sup>5</sup> Thus, the availability of judicial bypass is not always sufficient to protect minors from the harm that would result from eliminating this last option to obtaining safe and legal abortion by prohibiting adults from assisting them to travel out of state.

### **JUDICIAL BYPASS PROCEDURES ARE INSUFFICIENT PROTECTIONS FOR MINORS SEEKING ABORTION**

The availability of a judicial bypass, although constitutionally required, is not always adequate to ensure that minors in states that require parental involvement in the abortion decision have a meaningful alternative. As this paper outlines, the principal shortcomings of judicial bypass are the following: obstacles to access to courts and providers; anti-choice judges; delays; and both real and perceived threats to confidentiality. As is demonstrated by the following examples, these deficiencies in judicial bypass proceedings greatly undermine the adequacy of this alternative to parental involvement.

#### **! ACCESS TO THE COURTS AND TO PROVIDERS IS DIFFICULT FOR MINORS**

Access to abortion providers in the United States is limited. Eighty-six percent of counties do not have an abortion provider.<sup>6</sup> For some women, a reproductive health facility in another state may be the closest to their home or the only one with the necessary services. For example, North and South Dakota each have only one city in which abortions are provided.<sup>7</sup>

Minors seeking abortions may have difficulty accessing courts due to both logistical problems and inability or unwillingness among court personnel to handle judicial bypass proceedings.

- In many states, courts are not open in the evenings or on weekends, which are times that minors could attend bypass procedures without missing school and arousing suspicion about their absence.<sup>8</sup>

In Indiana, lawyers and clinics routinely refer teenagers out of state because local judges either refuse to hold hearings or are widely known to be anti-choice.<sup>9</sup>

- A number of judges in Massachusetts refuse to handle judicial bypass petitions.<sup>10</sup> The U.S. Supreme Court found that in Minnesota, many judges refuse even to hear bypass proceedings.<sup>11</sup>
- A study of Pennsylvania courts found that at least 40 of the state's 60 judicial districts are totally unprepared to handle judicial bypass inquiries. When asked how a minor could obtain a judge's permission to have an abortion without involving her parents, court personnel gave the following responses:<sup>12</sup>
  - < One-third suggested that the minor secure a private attorney, even though Pennsylvania's parental involvement law specifically entitles minors to court-appointed counsel.
  - < Some court contacts referred the minor to anti-choice crisis pregnancy centers, which attempt to dissuade women from having abortions.
  - < One court administrator said, "I think this person should tell her parents. . . . If it was a mistake, it was a mistake, it wouldn't help having a person make two mistakes."
  - < Another court contact responded, "I can tell you that it's a very stupid thing to do and you'd have to live with it for the rest of your life."

! **ANTI-CHOICE JUDGES OFTEN IGNORE THE STANDARDS SET FORTH BY THE SUPREME COURT AND DENY A BYPASS PETITION DESPITE ITS MERITS**

In his dissent in *Hodgson v. Minnesota*, Justice Marshall commented that "[i]t is difficult to conceive of any reason, aside from a judge's personal opposition to abortion, that would justify a finding that an immature woman's best interests would be served by forcing her to endure pregnancy and childbirth against her will."<sup>13</sup> Unfortunately, as Justice Marshall's comment forecasted, judges' personal views opposing abortion, in fact, do influence their decisions.

- Some judges in Massachusetts focus inappropriately on the morality of abortion and are insulting and rude to the minors and their attorneys.<sup>14</sup> One Massachusetts judge told a minor who was seeking permission for an abortion to keep her legs crossed and tell her boyfriend to keep his pants on.<sup>15</sup>
- After denying a bypass petition to a 15-year-old high school girl who

participated in extracurricular activities, worked 20 hours a week, and babysat regularly for her mother, a Florida judge suggested that he, as a representative of the court, had standing to represent the state's interest to oppose granting the bypass when the minor appealed his initial denial.<sup>16</sup>

- A 17-year-old Ohio girl who testified that her father beat her was denied a judicial bypass. At the time, she was a senior in high school with a 3.0 average who played team sports, worked 20-25 hours a week, and paid for her own automobile expenses and medical care.<sup>17</sup>
- In denying the petition of one young woman, a Missouri judge stated: “[D]epending upon what ruling I make I hold in my hands the power to kill an unborn child. In our society it’s a lot easier to kill an unborn child than the most vicious murderer. . . . I don’t believe that this particular juvenile has sufficient intellectual capacity to make a determination that she is willing to kill her own child.”<sup>18</sup>
- A judge in Toledo, Ohio denied permission to a 17 ½-year-old woman, an “A” student who planned to attend college, and who testified she was not financially or emotionally prepared to take on both college and motherhood at the same time, stating that the girl had “not had enough hard knocks in her life.”<sup>19</sup>
- In Louisiana, a judge denied a 15-year-old’s bypass petition “after asking her a series of inappropriate questions including what the minor would say to the fetus about her decision.” Her request was granted only after a rehearing by six appellate court judges.<sup>20</sup>
- A North Carolina Superior Court denied the bypass petition of a mature 16-year-old girl who did well in school, participated in extracurricular activities, and had a part-time job. Despite the judge’s findings that she was mature, had given informed consent, and was aware of the risks of the abortion procedure, he concluded that the petitioner was not “well-informed enough” to make the abortion decision on her own. The appellate court eventually reversed the lower court decision, but this delay increased the medical risks of the abortion.<sup>21</sup>

#### **JUDICIAL BYPASS PROCEDURES DELAY MINORS’ ACCESS TO ABORTION, THEREBY INCREASING THE MEDICAL RISKS OF THE PROCEDURE**

Although abortion is far safer than childbirth, the risk of death or major complications significantly increases for each week that elapses after eight weeks.<sup>22</sup> The American Medical Association concluded in a 1992 study that parental consent and notice laws “increase the gestational age at which the induced pregnancy termination occurs, thereby also increasing the risk associated with the procedure.”<sup>23</sup>

- A Minnesota district court judge found that “scheduling practices in

Minnesota courts typically require minors to wait two or three days between their first contact with the court and the hearing of their [bypass] petitions. This delay may combine with other factors to result in a delay of a week or more. A delay of this magnitude increases the medical risk associated with the abortion procedure to a statistically significant degree. Even a shorter delay may push the minor into the second trimester, when the abortion procedure entails significantly greater costs, inconvenience, and medical risk.<sup>24</sup>

- Many teens recognize the physical signs of pregnancy later than do older women and, thus, might not discover their pregnancy until the second trimester.<sup>25</sup>
- A Montgomery, Alabama teenager who sought a judicial bypass petition to obtain an abortion without her mother's consent was granted the petition after it was too late to get an abortion in Montgomery County. The only clinic that could perform the abortion in the state was in Birmingham. Because the court order was only valid in Montgomery County, the minor had to repeat the court process, which caused another week to pass before she was able to terminate pregnancy. As a result of the delay, the procedure was riskier and more costly than it would have been when she first sought the abortion.<sup>26</sup>

#### **MINORS FEAR THAT THE JUDICIAL BYPASS PROCEDURE DOES NOT ADEQUATELY PRESERVE THEIR CONFIDENTIALITY**

- The American Medical Association noted that “[b]ecause the need for privacy may be compelling, minors may be driven to desperate measures to maintain the confidentiality of their pregnancies. They may run away from home, obtain a ‘back alley’ abortion, or resort to a self-induced abortion. The desire to maintain secrecy has been one of the leading reasons for illegal abortion deaths since . . . 1973.”<sup>27</sup>
- Young women’s concern about confidentiality is especially acute in rural areas. For instance, in one case a minor discovered that her bypass hearing would be conducted by her former Sunday school teacher.<sup>28</sup>
- In Minnesota, judicial bypass petitions have been moved to the courthouse bathroom in order to maintain the minor’s anonymity.<sup>29</sup>

- A California social worker testified that adolescents perceive the court as a place where criminals go and that the intimate details they reveal to the judge will be used against them in the future.<sup>30</sup>
- Because “even a perceived lack of confidentiality in health care regarding sexual issues deters them [minors] from seeking services,” the American Academy of Pediatrics criticizes parental involvement statutes for delaying medical care to pregnant minors.<sup>31</sup>

## **CONCLUSION**

Judicial bypass procedures are inadequate to protect minors from the harmful consequences of the “Child Custody Protection Act.” Minors face several obstacles when seeking judicial consent for abortions, including:

- limited access to reproductive health care providers and courts;
- anti-choice judges presiding over hearings;
- delayed access to abortion; and
- actual and perceived threats to confidentiality.

Thus, judicial bypass proceedings are insufficient to mitigate the additional burdens that would be imposed if the “Child Custody Protection Act” were enacted.

1/4/2001

## Notes:

1. *Hodgson v. Minnesota*, 497 U.S. 417, 420 (1990) (requiring a bypass procedure for a two parent notification statute); *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 510 (1990) (requiring bypass procedures for parental consent statutes).
2. *Akron*, 497 U.S. at 511-13.
3. *Hodgson v. Minnesota*, 648 F. Supp. 756, 763-64 (D. Minn. 1986).
4. *Hodgson*, 648 F. Supp. at 763.
5. Charlotte Ellertson, □Mandatory Parental Involvement in Minors□ Abortions: Effects of the Laws in Minnesota, Missouri, and Indiana, □ *American Journal of Public Health*, vol. 87, no. 8 (Aug. 1997): 1371-72; Virginia G. Cartoof and Lorraine V. Klerman, □Parental Consent for Abortion: Impact of the Massachusetts Law, □ *American Journal of Public Health*, vol. 76, no. 4 (Apr. 1986): 397-400.
6. Stanley K. Henshaw, □Abortion Incidence and Services in the United States, 1995-1996, □ *Family Planning Perspectives*, vol. 30, no. 6 (Nov./Dec. 1998): 263.
7. Written statement from Tammi Kromenaker, Director of Red River Women□s Clinic, to NARAL (Dec. 21, 2000) (on file with NARAL); Written statement from Sally Ward, RN Clinical Services Director, Planned Parenthood of Minnesota/South Dakota, to NARAL (Jan. 4, 2001) (on file with NARAL).
8. See, e.g., Patricia Donovan, □Judging Teenagers: How Minors Fare When They Seek Court-Authorized Abortions, □ *Family Planning Perspectives*, vol. 15, no. 6 (Nov./Dec. 1983): 259.
9. Tamar Lewin, □Parental Consent to Abortion: How Enforcement Can Vary, □ *New York Times*, May 28, 1992, p. A1.
10. Donovan, □Judging Teenagers, □ 259.
11. *Hodgson*, 497 U.S. at 475.
12. Helena Silverstein, "Road Closed: Evaluating the Judicial Bypass Provision of the Pennsylvania Abortion Control Act," *Law and Social Inquiry*, vol. 24 (Winter 1999): 73-96.
13. *Hodgson*, 497 U.S. at 475.
14. Donovan, □Judging Teenagers, □ 259.
15. Center for Reproductive Law and Policy, "Tell it to the Judge: Teens Face Hard Times," *Reproductive Freedom News*, vol. VIII, no. 8 (Sept. 1999), <http://www.crlp.org/rfnviii08.html>.
16. *In re T.W.*, 551 So. 2d 1186, 1188-90 (Fla. 1989).
17. *In re Jane Doe 1*, 57 Ohio St. 3d 135, 135 (Ohio 1991).
18. *T.L.J. v. Webster*, 792 F. 2d 734, 738-39 n.4 (1986) (reversing the decision of the St. Charles County Juvenile Court).
19. Tamar Lewin, □Parental Consent, □ p. B8.
20. National Abortion Federation (NAF) and the National Women□s Law Center, □The Judicial Bypass Procedure Fails to Protect Young Women□ (undated) (factsheet).

21. *In re Doe*, 485 S.E.2d 354, 355-56 (N.C. Ct. App. June 3, 1997), *review denied*, 492 S.E.2d 21 (N.C. 1997).
22. Willard Cates, Jr. and David Grimes, "Morbidity and Mortality of Abortion in the United States," *Abortion and Sterilization*, Jane Hodgson, ed. (New York: Grune and Stratton, 1981), 158; Rachel Benson Gold, *Abortion and Women's Health: A Turning Point for America?* (New York: Alan Guttmacher Institute (AGI), 1990), 28-30, *citing additional sources*.
23. American Medical Association (AMA), "Induced Termination of Pregnancy Before and After *Roe v. Wade*, Trends in the Mortality and Morbidity of Women," *Journal of the American Medical Association (JAMA)*, vol. 268, no. 22 (Dec. 1992): 3238.
24. *Hodgson*, 648 F. Supp. at 763.
25. Jeannie Rosoff, Stanley Henshaw, and Jennifer Van Vort, "What's Happening to Abortion Rates?" *Sexuality and American Social Policy* (New York: Henry J. Kaiser Family Foundation, 1996), xvii.
26. NAF & Planned Parenthood Federation of America, "Undue Burdens: the States' Experiences," 1993 (factsheet).
27. Council on Ethical and Judicial Affairs, AMA, "Mandatory Parental Consent to Abortion," *JAMA*, vol. 269, no. 1 (Jan. 6, 1993): 83.
28. *Memphis Planned Parenthood v. Sundquist*, 2 F. Supp. 2d 997, 1005 (M.D. Tenn. 1997), *rev'd*, 175 F.3d 456 (6<sup>th</sup> Cir. 1999).
29. Donovan, "Judging Teenagers," 264.
30. *American Academy of Pediatrics v. Lungren*, 940 P.2d 797, 845 (Cal. 1997).
31. Committee on Adolescence, American Academy of Pediatrics (AAP), "The Adolescent's Right to Confidential Care When Considering Abortion," *Pediatrics*, vol. 97, no. 5 (May 1996): 749.