

Memorandum

Date: March 3, 2008

To: Tom Brejcha
President & Chief Counsel
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From: Paul Linton
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Re: Judge Coar's Feb. 28, 2008, Memorandum Opinion & Order Denying Attorney General Lisa Madigan's Motion to Dissolve the February 9, 1996, Permanent Injunction Order Against Enforcement of the Illinois "Parental Notice of Abortion Act of 1995," 750 ILCS 70/1 *et seq.*

Introduction

On February 28, 2008, Judge Coar issued a thirteen-page Memorandum Opinion & Order denying the Attorney General's motion to dissolve the permanent injunction that was issued on February 9, 1996, against enforcement of the Illinois "Parental Notice of Abortion Act." The permanent injunction was issued because the Illinois Supreme Court refused to issue the judicial bypass appeal rule(s) necessary to implement the Act. On September 20, 2006, the Illinois Supreme Court finally issued the necessary rule (Rule 303A) and the Attorney General moved to dissolve the permanent injunction. The plaintiffs objected on a variety of grounds, all but one of which were rejected by Judge Coar in his Memorandum Opinion & Order. Judge Coar, however, agreed with the plaintiffs that the Act is unconstitutional because, although the Act "authorizes the court to waive parental notification when it is in the 'best interest' of the child," it "does not authorize a method of consent for the abortion. Thus, under the statute, a 'best interest' minor who has waived parental notification is left without a mechanism to obtain consent for the abortion, and thus is in legal limbo." Mem. Op. & Order at 6.

Section 25(d) of the Illinois "Parental Notice of Abortion Act" provides:

Notice shall be waived [in a judicial bypass hearing] if the court finds by a preponderance of the evidence either:

- (1) that the minor or incompetent person is sufficiently mature and well enough informed to decide intelligently whether to have an abortion, or

(2) that notification under Section 15 of this Act would not be in the best interest of the minor or incompetent person.

750 ILCS 70/25(d).

Analysis

Judge Coar’s opinion seemingly assumes that a pregnant minor cannot obtain an abortion under Illinois law without the consent of her parent(s) or legal guardian (or other person designated by the Act). As a result, an order entered in a judicial bypass hearing waiving “notice” to a pregnant minor’s parent(s) or guardian (or other person designated by the Act) does not, by its terms, “authorize a method of consent for abortion.” This assumption misapprehends Illinois law in two critical respects.

First, the Act under review is a *notice* statute, *not* a *consent* statute. There is no requirement under the Act that a parent (or guardian) *consent* to the minor’s abortion, only that the parent (or guardian) be *notified*. Thus, once notice has been waived in a judicial bypass proceeding, the only impediment the Act places in the way of a minor seeking an abortion (notice to her parent, guardian or other person designated by the Act) has been removed and, insofar as the Act is concerned, the minor may obtain an abortion.

Second, there is *no* requirement in Illinois law that a pregnant minor obtain the consent of her parent(s) (or guardian) for any medical or surgical treatment related to her pregnancy. Indeed, Illinois law expressly authorizes a pregnant minor to consent to treatment, without the consent of her parent(s) or guardian. Section 1 of the “Consent by Minors to Medical Procedures Treatment Act,” 410 ILCS 210/0.01 *et seq.*, provides:

Consent by minor. The consent to the performance of a medical or surgical procedure by a physician licensed to practice medicine and surgery, an advanced practice nurse who has a written collaborative agreement with a collaborating physician that authorizes provision of services for minors, or a physician assistant who has been delegated authority to provide services for minors executed by a married person who is a minor, by a parent who is a minor, by a pregnant woman who is a minor, or by any person 18 years of age or older, is not voidable because of such minority, and, for such purpose, a married person who is a minor, a parent who is a minor, a pregnant woman who is a minor, or any person 18 years of age or older, is deemed to have the same legal capacity to act and has the same powers and obligations as has a person of legal age.

410 ILCS 210/1. It is apparent from the foregoing emphasized language, that a pregnant minor may consent to the performance “of a medical or surgical procedure” by a licensed physician, and that her consent “is not voidable because of [her] minority,” and, further, that she “is deemed to have the same legal capacity to act and has the same powers and obligations as has a person of legal age.” It is (or should be) crystal clear that, under this statute, a pregnant minor *may* consent to an abortion on her own, without the consent of her parent(s) or her legal guardian. Although there is no Illinois case law interpreting § 1 of the “Consent by Minors to Medical Procedures Act” with respect to the issue of abortion, courts in other States have uniformly interpreted comparable language to permit a minor to obtain an abortion without the consent of her parent(s) or guardian. *See Ballard v. Anderson*, 484 P.2d 1345, 1348-53 (Cal. 1971); *In re Diane*, 318 A.2d 629, 631 (Del. Ch. 1974); *In re Smith*, 294 A.2d 238, 245-46 (Md. Ct. Spec. App. 1972). Neither the Parental Notice of Abortion Act of 1995 nor any other Illinois statute limits or qualifies the pregnant minor’s authority to consent to a medical or surgical procedure. In light of the foregoing, it is apparent that there was no need for the General Assembly, in enacting a parental *notice* statute, to “authorize a method of consent for an abortion.” The pregnant minor has that authority under Illinois law. Once the requirement of notice has been waived, there is no remaining legal impediment to her obtaining an abortion.

It must be noted in this regard that at least three other state parental notice statutes do *not* contain the language that Judge Coar believes to be necessary in a parental notice statute (*i.e.*, language authorizing *consent* to the abortion, as opposed to simply waiving notice to the parent(s) or legal guardian). *See* COLO. REV. STAT. ANN. § 12-37.5-107(2)(a); GEORGIA CODE ANN. § 15-11-114(c)(1), -(2); IOWA CODE ANN. § 135L.3(3)(e)(1), -(2). The Colorado, Georgia and Iowa statutes are all in force and the Georgia statute was upheld by the Eleventh Circuit in *Planned Parenthood Ass’n of the Atlanta Area, Inc. v. Miller*, 934 F.2d 1462 (11th Cir. 1991).

In *Miller*, the plaintiff argued that “physicians [would] be unwilling to perform abortions even if a constructive order issues (the court having failed to act within the statutory time frame) because the [Georgia] Act does not require the court to confirm in writing that an abortion is authorized.” 934 F.2d at 1477. The Eleventh Circuit rejected this argument, finding “no constitutional infirmity in this provision of the Georgia Act.”

Curiously, Judge Coar cites no federal authority stating that a *notice* statute, as opposed to a *consent* statute, must empower a court in a judicial bypass hearing to authorize the minor to *consent* to an abortion. The pregnant minor already has that authority under Illinois law (as shown above) and nothing in the “Parental Notice of Abortion Act of 1995” purports to limit that authority.

Finally, even assuming that the foregoing analysis is wrong, an assumption which is compelled by no legal authority, Judge Coar's reading of the Illinois laws is mistaken. Section 25(f) of the Act provides, *inter alia*, that "[a]n order authorizing an abortion without notice shall not be subject to appeal." 750 ILCS 70/25(f) (last sentence). Given this language, the *only* reasonable interpretation of § 25(d) is that a waiver of notice *is*, in effect, "[a]n order authorizing an abortion" All provisions of a statute must be read together. When § 25(d) and § 25(f) are read together, it is apparent that an order waiving notice is an order "authorizing an abortion without notice"

Conclusion

Judge Coar's analysis of the Illinois "Parental Notice of Abortion Act of 1995" appears to be vulnerable on either of two grounds: First, there is no need for the *notice* statute to authorize "a method of consent for [an] abortion," because the pregnant minor already has that authority under the "Consent by Minors to Medical Treatment Act." Second, assuming that such authority is required, it is necessarily implied by the language of § 25(f) of the Act. On either basis, Judge Coar's ruling would appear to be erroneous.