

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

corrected

<b>DAVID ZBARZ, M.D., et al,</b>	)	
	)	
<b>Plaintiffs,</b>	)	
	)	
<b>vs.</b>	)	
	)	
<b>LISA MADIGAN, Attorney General of</b>	)	<b>NO. 84 C 771</b>
<b>Illinois, et al,</b>	)	<b>Hon. David H. Coar</b>
	)	<b>U.S. District Judge</b>
<b>Defendants.</b>	)	
	)	
<b>STEWART UMHOLTZ, State’s Attorney</b>	)	
<b>of Tazewell County, and EDWARD DETERS,</b>	)	
<b>State’s Attorney of Effingham County,</b>	)	
<b>Prospective Intervenors.</b>	)	

**MOTION TO RECONSIDER, ALTER OR AMEND  
THE COURT’S RULING OF FEBRUARY 28, 2008**

Stewart Umholtz, the State’s Attorney of Tazewell County, Illinois, and Edward Deters, the State’s Attorney of Effingham County, Illinois, both of whom are members of the defendant class of State’s Attorneys herein (“the movants”), move pursuant to Fed. R. Civ. Proc. 59 that this Court reconsider, alter and amend his decision, handed down on February 28, 2008, denying the defendants’ motion to lift the permanent injunction against enforcement of the Illinois Parental Notice of Abortion Act of 1995 (“the Parental Notice Act” or “the Act”).

The permanent injunction against the Act was issued over a decade ago – on February 9, 1996 – because the Illinois Supreme Court had declined to issue the judicial bypass rule(s) necessary to implement the Act. On September 20, 2006, the Illinois Supreme Court finally did issue the necessary rule (Supreme Court Rule 303A). Several months thereafter, the Attorney General moved to dissolve the permanent injunction. Plaintiffs objected on a variety of grounds, all but one of which were rejected by this Court in its Memorandum Opinion and Order (“Memo

Op.,” Dkt. No. 199, pp. 1-13). But the Court agreed with the plaintiffs’ contention that the Act must still be held unconstitutional because, even though it “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.” Therefore, this Court ruled, “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.” Memo Op., p. 6.

With respect, movants submit that the Court has overlooked or misapprehended Illinois law that is controlling and dispositive, rendering the Parental Notice Act both fully constitutional and enforceable. The Act must be read in light of 410 ILCS 210/0.01 *et seq.*, “Consent by Minors to Medical Procedures Treatment Act” (hereinafter the “Minors Consent Act”), a copy of which is appended hereto. As set forth below, the Minors Consent Act vests *all pregnant minors* of any age whatsoever with *full authority to refuse or consent to any medical or surgical procedure – including surgical or non-surgical abortions – without regard to their “maturity.”* There is, therefore, no “legal limbo” for so-called “best interests” minors or any other pregnant minors whom Illinois courts may rule to be entitled to a bypass of parental notice. No “mechanism to obtain consent” for said pregnant minors must be provided for in the Parental Notice Act because, under the applicable Illinois law, the pregnant minor herself may render the requisite consent.

Further in support, movants urge the following:

1. Section 25(d) of the Illinois Parental Notice 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 of 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 70/25d.

2. This Court's decision appeared to presuppose that a pregnant minor could not 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." But this presupposition misapprehended or overlooked the applicable Illinois law in two critical respects.

3. First, the Act under review is a *notice* statute, *not* a *consent* statute. Thus once any parental notice requirement has been waived in a judicial bypass proceeding, the only barrier that the Act places in the path of a minor who chooses abortion (*i.e.*, notice to her parent, guardian or other person designated by the Act) has been removed. Insofar as the Parental Notice Act is concerned, the pregnant minor may then proceed to obtain an abortion.

4. Second, there is *no requirement* in Illinois law that a pregnant minor obtain the consent of her parent(s) or guardian(s) 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(s). Section 1 of the Illinois Minors Consent 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*. [Emphasis supplied].

410 ILCS 210/1. [Copy attached hereto]. From the foregoing italicized language, it is patent and undeniable 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 crystal clear, therefore, that under Illinois law *a pregnant minor may consent to an abortion on her own*, without the consent of her parent(s) or legal guardian(s).

5. There is no Illinois case law interpreting the Illinois Minors Consent Act with regard to abortion, but the fact is that Illinois minors have been getting abortions without parental notice or consent for decades, before the Parental Notice Act was enacted and over the many years during which it has been federally enjoined. Indeed, the Minors Consent Act is transparently clear and explicit. Its authorization for pregnant minors to refuse or consent to medical treatment themselves is undeniable.

6. Moreover, courts in other states have been uniform in interpreting similar language to permit a minor to obtain an abortion without the consent of her parent(s) or guardian(s). *See, e.g., 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, 245-56 (Md. Ct. Spec. App. 1972). Neither the Parental Notice Act nor any other Illinois statute limits or qualifies a pregnant minor’s authority to consent to any medical or surgical procedure. Viewed in context of the entirety of the

applicable Illinois law, therefore, it is apparent that there was no need for the General Assembly, when it enacted a parental *notice* statute, to “authorize a method of consent for an abortion.” The pregnant minor *already* had that authority under Illinois law. Once the requirement of parental notice has been waived, there remains no obstacle or impediment to the minor’s obtaining an abortion.

7. It must be noted, moreover, that at least three other parental notice laws in effect in other states do *not* contain the additional language that this Court believed necessary in order that the Parental Notice Act withstand constitutional scrutiny (*i.e.*, language authorizing *consent* to the abortion, as distinguished from simply waiving notice to parent(s) or guardian(s)). *See*, Colo. Rev. Stat. Ann., sec. 12-37.5-107(2)(a); Georgia Code Ann., sec. 15-11-114(c)(1), -(2); Iowa Code Ann., sec. 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 (11<sup>th</sup> 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.”

8. Neither the plaintiffs nor this Court cited to any federal or other authority holding or even stating that a *notice* statute, as distinct from a *consent* statute, must empower a court in a judicial bypass hearing to authorize the minor to *consent* to an abortion. We believe that there is no such authority. We could find none to that effect. And in Illinois, it is clear beyond

peradventure that the pregnant minor already has the authority to consent to an abortion, pursuant to the Illinois Minors Consent Act, as detailed *supra*, and nothing in the Parental Notice Act purports to limit that authority in the slightest.

9. Further, although the Illinois Supreme Court holds that a "mature" minor may consent or refuse consent to medical procedures on her own, the court specifically acknowledges that a minor who is pregnant need not meet the "mature" minor standard in order to consent to medical procedures on her own, because "the legislature has provided otherwise" through the Minors Consent Act. *In re E.G., a Minor*, 133 Ill. 2d 98, 110, 549 N.E.2d 322, 327 (citing the "Consent by Minors to Medical Operations Act," which is the predecessor to the Minors Consent Act). A critical, pivotal passage of the Illinois Supreme Court's opinion in *In re E.G.*, makes this indisputably clear:

The trial judge must determine whether a minor is mature enough to make health care choices on her own. An exception to this, of course, is if the legislature has provided otherwise, as in the Consent by Minors to Medical Operations Act (Ill. Rev. Stat. 1987, ch. 111, par. 4501 *et seq.*).

What controls here is that the legislature *has provided otherwise* in cases where the minor is pregnant.

10. The Parental Notice Act does not require a "best interests" petitioner to request or a court to make a finding that a pregnant minor is not "mature." 750 ILCS 70/25(d)(2). Moreover, the Act requires that, "Court proceedings under this Section shall be confidential....All court proceedings under this Section shall be sealed." 750 ILCS 70/25(c). Any purported finding that a pregnant minor is not "mature" is not divulged to an abortion doctor, who relies in good faith on the waiver of notice provided a "best interests" petitioner. 750 ILCS 70/45.

11. With or without the Parental Notice Act, if an "immature" minor tells her parents

that she is having an abortion, she may seek and consent to that abortion. The requirement of notice under the Parental Notice Act does not limit the ability of that pregnant minor to consent to the abortion procedure.

12. Finally, even apart from the foregoing analysis, the Court’s February 28, 2008, decision apparently overlooks Section 25(f) of the Parental Notice Act. That provision recites *inter alia* that “[a]n order authorizing an abortion without notice shall not be subject to appeal.” 750 ILCS 70/25(f)(last sentence). The *only* reasonable interpretation of section 25(d) of the Act in light of this language in section 25(f) is that a waiver of parental notice is, in effect, “[a]n order authorizing an abortion ....” All provisions of this statute must be read together. When sections 25(d) and 25(f) are read together, it is fully apparent that an order waiving notice is an order “authorizing an abortion without notice ....”

WHEREFORE, movants respectfully submit that the Court should reconsider, alter and amend its ruling of February 28, 2008, withdrawing same and, in lieu thereof, ruling that the permanent injunction against enforcement of the Illinois Parental Notice Act be lifted and dissolved; and that movants have all other relief to which they may be entitled on the premises in accordance with law.

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s/ Thomas Brejcha

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s/ Peter Breen

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