

Breaking the Logjam:
A Strategy for Enforcing the Illinois Parental Notice of Abortion Act of 1995

by

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Introduction

For more than thirty years, the Illinois General Assembly has tried to enact enforceable legislation requiring the consent of, or notice to, a pregnant minor's parents (or legal guardian) before she obtains an abortion. Between 1975 and 1995, the General Assembly enacted five different laws requiring parental consent, parental consultation or parental notice. To date, those efforts have been thwarted, first, by a series of federal court decisions holding the laws invalid on federal constitutional grounds, and, later, by the Illinois Supreme Court's failure (or refusal) to issue appropriate appeal rules necessary to implement those laws. As a result, Illinois is the only State in the Midwest not to have an enforceable parental consent or notice law in effect. The purpose of this paper is to review the history of Illinois' efforts to enact an enforceable parental consent or notice law, explain the current impasse in enforcing existing law and suggest how that impasse might be overcome in a manner that would allow the law to be enforced.

I. A History Of The Illinois General Assembly’s 30-Year Effort To Enact An Enforceable Parental Consent Or Notice Law

A. The Illinois Abortion Law of 1975

The first post-*Roe* Illinois abortion law, the Illinois Abortion Law of 1973,¹ did not contain a parental consent or notice requirement. In 1975, however, the General Assembly enacted a law that included, among other provisions, a parental consent requirement.² The law required the written consent of one parent (or person *in loco parentis*) of an unmarried minor under the age of 18 before a abortion could be performed, unless a physician certified that the abortion was “necessary in order to preserve the life or health of the mother.”³ The law, however, contained no mechanism by which a minor could go to court to obtain an order authorizing her to have an abortion without obtaining her parent’s consent.

A temporary restraining order, blocking enforcement of the law, was entered on November 22, 1975. This was followed by a preliminary injunction entered on December 2, 1975, and a permanent injunction on April 12, 1978.⁴ The permanent injunction was

¹ Public Act 78-225, effective June 19, 1973, ch. 38, ¶ 81-11 *et seq.* (1975).

² Public Act 79-1126, effective November 20, 1975, Ill. Rev. Stat. ch. 38, ¶ 81-23(4) (Supp. 1976).

³ *Id.*

⁴ *See Wynn v. Scott*, 449 F. Supp. 1302, 1317 (N.D. Ill. 1978).

issued on the basis of the Supreme Court’s decision in *Planned Parenthood of Central Missouri v. Danforth*.⁵ In *Danforth*, the Court held that the States could *not* confer on the parents of a minor an absolute veto power over her decision to obtain an abortion.⁶ Following *Danforth*, the State conceded that the Illinois parental consent law was unconstitutional. The law was later repealed.⁷

B. The Illinois Abortion Parental Consent Act of 1977

In 1977, the General Assembly enacted the Illinois Abortion Parental Consent Act.⁸ This act required the written consent of both parents (subject to certain exceptions) of an unmarried minor, her guardian or other person *in loco parentis*, before she could obtain an abortion.⁹ The act also imposed a 48-hour waiting period.¹⁰ Parental consent was not required if the abortion was “necessary for the preservation of the life of the mother.”¹¹ If the parental consent could not be obtained or was refused, the minor could

⁵ 428 U.S. 52 (1976).

⁶ *Id.* at 72-75.

⁷ See Public Act 81-1078, § 2, effective January 1, 1980.

⁸ Public Act 80-1139, effective January 1, 1978, Ill. Rev. Stat. ch. 38, ¶ 81-51 *et seq.* (Supp. 1977).

⁹ *Id.* ch. 38, ¶ 81-54(3).

¹⁰ *Id.* ch. 38 ¶ 81-54(2).

¹¹ *Id.* ch. 38, ¶ 81-54 (last sentence).

seek court authorized consent upon a showing that “the pregnant minor fully understands the consequences of an abortion to her and her unborn child.”¹² Notice of the hearing had to be sent to her parents at their last known address by registered or certified mail.¹³

A temporary restraining order was entered February 2, 1978, one month after the effective date of the law, blocking its enforcement.¹⁴ A preliminary injunction was entered on February 23, 1978.¹⁵ A permanent injunction was entered on September 25, 1978, and November 2, 1978.¹⁶ The Seventh Circuit thereafter affirmed the permanent injunction on the basis of its earlier opinion affirming the preliminary injunction.¹⁷ In that earlier opinion, the court of appeals held that the consent law was unconstitutional because, among other alleged defects, the law required parents to be notified whenever their minor daughter sought an abortion or requested a judicial bypass hearing; the law did not focus the scope of the issues in the hearing on whether the minor was mature

¹² *Id.*, ch. 38, ¶ 81-54 (third to the last paragraph).

¹³ *Id.*

¹⁴ The history of the litigation is set forth in *Wynn v. Carey*, 582 F.2d 1375, 1379 (7th Cir. 1978).

¹⁵ See *Wynn v. Scott*, 448 F. Supp. 997 (N.D. Ill. 1978), *aff'd sub nom. Wynn v. Carey*, 582 F.2d 1375 (7th Cir. 1978).

¹⁶ See *Wynn v. Scott*, 78 C 237, N.D. Ill., Sep. 25, 1978, Nov. 2, 1978.

¹⁷ See *Wynn v. Carey*, 599 F.2d 193, 196 (7th Cir. 1979), *aff'g Wynn v. Scott*, 78 C 237, N.D. Ill. Sep. 25, 1978, Nov. 2, 1978, and relying upon *Wynn v. Carey*, 582 F.2d 1375 (7th Cir. 1978) (affirming preliminary injunction).

enough to consent to an abortion without her parents' consent or whether, even if she was immature, an abortion without her parents' consent would be in her best interests: the law did not specify the procedures to be followed in seeking a judicial bypass; and the law did not provide for appointment of counsel for the minor, anonymity of the minor or an expedited review of the petition or its denial.¹⁸

C. Amendment to the Abortion Law of 1975

In 1979, the General Assembly, without amending the bortion Parental Consent Act of 1977, amended the parental consent provision of the 1975 law,¹⁹ replacing it with a “parental consultation” requirement.²⁰ This requirement was preliminarily enjoined,²¹ and was later repealed with the enactment of the Parental Notice of Abortion Act of 1983.²²

D. The Parental Notice of Abortion Act of 1983

In 1983, the General Assembly enacted the Parental Notice of Abortion Act.²³

¹⁸ 582 F.2d at 1386-90.

¹⁹ See ch. 38, ¶ 81-23(4) (Supp. 1976).

²⁰ See Public Act 81-1078, § 1, effective January 1, 1980; Ill. Rev. Stat. ch. 38, ¶ 81-23.3 (Supp. 1980). This law also applied to persons who had been adjudicated disabled and for whom a guardian had been appointed.

²¹ This litigation is recounted in *Charles v. Carey*, 627 F.2d 772, 775 n.2 (7th Cir. 1980).

²² See Public Act 83-390, § 9.

²³ Public Act 83-890, effective January 31, 1984, Ill. Rev. Stat. ch. 38, § 81-61 *et seq.* (Supp. 1984).

This act required “actual notice,” defined as “the giving of notice directly, in person or by telephone,”²⁴ to both parents (subject to certain exceptions) of an unemancipated minor (or an incompetent person), her guardian or other person *in loco parentis*, at least 24 hours before the abortion was to be performed.²⁵ Notice was not required in the case of a “medical emergency” which “so complicate[d] the pregnancy as to require an immediate abortion.”²⁶ Otherwise, a minor (or incompetent person) could petition the circuit court to waive notice; the court could waive the notice requirements if it determined that the minor (or incompetent) was “mature and well-informed enough to make the decision [to have an abortion] on her own,” or that notification “would not be in the best interests of the minor or incompetent.”²⁷

The Parental Notice of Abortion Act of 1983 was declared unconstitutional and its enforcement permanently enjoined in *Zbaraz v. Hartigan*.²⁸ The court of appeals held that, under the Supreme Court’s then recent decision in *City of Akron v. Akron Center for*

²⁴ *Id.* ch. 38, § 81-63(c) (defining “actual notice”).

²⁵ *Id.* ch. 38, §§ 81-64(a), -(b).

²⁶ *Id.* ch. 38, § 81-66.

²⁷ *Id.* ch. 38, § 81-65.

²⁸ 584 F.Supp. 1452 (N.D. Ill. 1983), *aff’d in part and vacated in part on other grounds*, 763 F.2d 1532 (7th Cir. 1985), *aff’d by an equally divided Court*, 484 U.S. 171 (1987). The affirmance of a lower court decision by an equally divided Supreme Court is not a precedent of the Court and may not be cited as binding authority.

Reproductive Health,²⁹ the 24-hour waiting period was unconstitutional.³⁰ The court held further, however, that the waiting period was severable from the remainder of the statute.³¹ With respect to the balance of the law, however, the court enjoined enforcement of the parental notice act pending the Illinois Supreme Court's promulgation of rules to assure expeditious and confidential proceedings at trial and on appeal.³² The Illinois Supreme Court thereafter promulgated a rule for judicial bypass hearings and appeals,³³ which was found invalid by the district court in *Zbaraz v. Hartigan*,³⁴ because the rule did not provide for an *ex parte*, confidential proceeding at trial or on appeal.³⁵

E. The Parental Notice of Abortion Act of 1995

In 1995, the General Assembly enacted the Parental Notice of Abortion Act.³⁶ This act repealed both the Illinois Abortion Parental Consent Act of 1977,³⁷ and the

²⁹ 462 U.S. 416, 449-51 (1983).

³⁰ *Zbaraz v. Hartigan*, see n. 28, *supra*, 763 F.2d at 1535-39.

³¹ *Id.* at 1545.

³² *Id.*

³³ See Illinois Supreme Court Rule 307(a)(8), 307(e), amended June 19, 1989, effective August 1, 1989. 134 Ill.2d at 257-61.

³⁴ 776 F. Supp. 375 (N.D. Ill. 1991).

³⁵ *Id.* at 379-80, 382-84.

³⁶ Public Act 89-18, effective June 1, 1995, 750 Ill. Comp. Stat. Ann. 70/1 (1996).

³⁷ See 720 ILCS 515/1 *et seq.*, repealed by 750 ILCS 70/90 (1996).

Parental Notice of Abortion Act of 1983.³⁸ The 1995 act requires actual or constructive notice to “an adult family member,”³⁹ at least 48 hours before an abortion may be performed on an unmarried minor or incompetent person.⁴⁰ Notice is not required if “the minor or incompetent person is accompanied by a person entitled to notice[;]” “notice is waived in writing by a person entitled to notice[;]” “the attending physician certifies in the patient’s medical record that a medical emergency exists and there is insufficient time to provide the required notice[;]” “the minor declares in writing that she is the victim of sexual abuse, neglect, or physical abuse by an adult family member[;]” or notice is waived following a judicial bypass hearing.⁴¹ With respect to the last exception, notice

³⁸ See 720 ILCS 520/1 *et seq.*, repealed by 750 ILCS 70/95 (1996).

³⁹ “An adult family member” is defined as “a person over 21 years of age who is the parent, grandparent, step-parent living in the household, or legal guardian.” 750 Ill Comp. Stat. Ann. 70/10.

⁴⁰ *Id.* § 70/15. “Actual notice” is defined as “the giving of notice directly, in person, or by telephone.” *Id.* § 70/10. “Constructive notice” is defined as “notice by certified mail to the last known address of the person entitled to notice with delivery deemed to have occurred 48 hours after the certified notice is mailed.” *Id.*

⁴¹ *Id.* § 70/20. “Medical emergency” is defined elsewhere in the act as “a condition that, on the basis of the physician’s good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function.” *Id.* § 70/10. When notice is waived because of an allegation of sexual or physical abuse or neglect, and the abuse or neglect must be reported to public authorities under other laws of the State, the physician performing the abortion need not make the required notification until after the abortion has been performed in accordance with the provisions of the act. *Id.* § 70/20(4).

may be waived by a court if the pregnant minor (or incompetent person) is able to demonstrate in a judicial bypass hearing that she is “sufficiently mature and well enough informed to decide intelligently whether to have an abortion,” or, in the alternative, that “notification . . . would not be in [her] best interests.”⁴²

Section 25(f) of the act specifies that “An expedited confidential appeal shall be available, *as the* [Illinois] *Supreme Court provides by rule*, to any minor or incompetent person to whom the circuit court denies a waiver of notice.”⁴³ Section 25(g) of the act “respectfully requested” the supreme court “to promulgate any rules and regulations necessary to ensure that proceedings under this Act are handled in an expeditious and confidential manner.”⁴⁴ The General Assembly asked the supreme court to provide the rule(s) requested by §§ 25(f) and (g) because, under the Illinois Constitution, the court has the *exclusive* authority to adopt rules for appeals,⁴⁵ and *concurrent* authority (with the legislature) to adopt other rules of procedure.⁴⁶

⁴² *Id.* § 70/25.

⁴³ *Id.* § 70/25(f) (emphasis added). An order allowing a waiver of notice is *not* appealable.

⁴⁴ *Id.* § 70/25(g).

⁴⁵ *See* ILL. CONST. art. VI, § 16 (last sentence). *See People ex rel Stamos v. Jones*, 40 Ill.2d 62, 66, 237 N.E.2d 495, 498 (1968).

⁴⁶ *See* ILL. CONST. art. VI, § 16 (first sentence). Where rule-making authority is concurrent, a judicial rule prevails over a conflicting statute. *See O’Connell v. St. Francis Hospital*, 112 Ill.2d 273, 281, 492 N.E.2d 1322, 1326 (1996).

On December 12, 1995, Daniel Pascale, the Administrative Director of the Administrative Office of the Illinois Courts, sent a one-page letter to Attorney General Jim Ryan regarding the status of the promulgation of the court rule(s) requested by § 25 of the act. In that letter, Pascale informed General Ryan that he had been directed by members of the supreme court to advise Ryan that the court had decided *not* to promulgate the rule(s) requested by the Illinois Parental Notice of Abortion Act of 1995.⁴⁷ Pascale further advised Ryan that, effective December 1, 1995, the court rescinded Rule 307(a)(8) and 307(e), which had been promulgated pursuant to the 1983 Parental Notice of Abortion Act.⁴⁸ As previously noted, Rule 307(e) had been held unconstitutional by the federal district court.⁴⁹ Pascale's letter provided no explanation for the court's refusal to promulgate the rule(s) required to implement the 1995 act.

Apparently in response to inquiries from the Attorney General's Office, the media and the public, Pascale, on January 25, 1996, sent a five-page letter to Attorney General Ryan purporting to explain the supreme court's reasons for not promulgating the rule(s)

⁴⁷ See Letter of December 12, 1995, from Daniel Pascale, Administrative Director of the Illinois Courts, to Attorney General Jim Ryan, reprinted in Appendix A.

⁴⁸ *Id.*

⁴⁹ See *Zbaraz v. Hartigan*, n. 34, *supra*.

required by the 1995 act.⁵⁰ Because the Illinois Supreme Court refused to promulgate the rule(s) necessary to implement the 1995 act, the act was permanently enjoined by Judge Plunkett on February 9, 1996.⁵¹

II. The Current Impasse—Analysis Of The Illinois Supreme Court’s Refusal To Issue The Judicial Bypass Appeals Rule(s)

In his letter of January 25, 1996 (see Appendix B), purporting to explain why the Illinois Supreme Court had refused to issue the judicial bypass appeal rules, Daniel Pascale made a number of statements regarding state and federal constitutional law for which there is no support.

A. Is A Bypass Mechanism Constitutionally Required?

Pascale first speculated that a one-parent notice of abortion law would not require a bypass mechanism of any kind.⁵² There is little, if any, basis for this speculation. Although the Supreme Court has not squarely decided whether a *one*-parent notice of abortion law requires a bypass mechanism,⁵³ the Eighth Circuit has held that a one-parent

⁵⁰ See Letter of January 25, 1996, from Daniel Pascale, Administrative Director of the Illinois Courts, to Attorney General Jim Ryan, reprinted in Appendix B.

⁵¹ See *Zbaraz v. Ryan*, No. 84 CV 771 (N.D. Ill. 1996) (the district court held that the law was “incomplete” because the bypass appeal rules had not been adopted).

⁵² See Appendix B (second and third pages).

⁵³ See *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 510 (1990) (not deciding whether a judicial bypass is necessary in order to uphold the constitutionality of a one-parent notice statute),

notice law *does* require a judicial bypass.⁵⁴ The Supreme Court later denied *certiorari* to review this decision.⁵⁵ Pascale counted Justice Stevens as one of five justices who would uphold a one-parent notice statute without a bypass, but ignored his statement in the *Akron Center* case that “the State must provide an adequate mechanism for cases in which the minor is mature or notice would not be in her best interests.”⁵⁶ The denial of *certiorari*, while technically importing nothing in regard to the merits of the underlying decision, is not an encouraging sign. The Fourth Circuit has suggested that a one-parent notice of abortion law does *not* require a judicial bypass mechanism for mature minors,⁵⁷ but that suggestion was mere *dicta* and not a holding of the court.

Regardless of the relative merits of Pascale’s speculation regarding the constitutionality of a one-parent notice of abortion law without a judicial bypass, the Parental Notice of Abortion Act of 1995 contains a *non-severability* provision with respect to the judicial bypass mechanism. Section 50 states, in part, that “Section 25 [the judicial bypass] is inseverable to the extent that if all or any substantial part of Section 25

⁵⁴ See *Planned Parenthood v. Miller*, 63 F.3d 1452, 1458-63 (8th Cir. 1995) (striking down a South Dakota one-parent notice of abortion law that did not have a judicial bypass mechanism).

⁵⁵ See *Janklow v. Planned Parenthood, Sioux Falls Clinic*, 517 U.S. 1174 (1996).

⁵⁶ See n. 53, *supra*, 497 U.S. at 522 (Op. of Stevens, J.).

⁵⁷ See *Planned Parenthood of Blue Ridge v. Camblos*, 155 F.3d 352, 374-84 (4th Cir. 1998) (*en banc*), *cert. denied*, 525 U.S. 1140 (1999).

is held invalid, then the entire Act is invalid.”⁵⁸ This language was included at the insistence of Governor Edgar who was opposed to a pure notice (without judicial bypass) notice law. Because of the inclusion of this non-severability language, the 1995 act stands or falls depending upon the existence of a valid judicial bypass, which requires rules for an expedited, confidential appeal. Without proper appeal rule(s), the judicial bypass provided by § 25 of the Act is incomplete and the law may not be enforced.

B. Must Judicial Bypass Proceedings Be Confidential And *Ex Parte*?

Pascale next stated that judicial bypass proceedings under parental notice (or consent) statutes need not be confidential or *ex parte*.⁵⁹ Pascale cited no support for this statement. The Supreme Court’s jurisprudence in this area clearly contemplates that judicial bypass proceedings be confidential and *ex parte*. Under binding Supreme Court precedent, neither the parents nor the legal guardian of a minor seeking a judicial bypass may be given notice of or participate in the bypass hearing.⁶⁰ The whole point of judicial bypass proceedings is to *avoid* giving notice to (or, in the case of consent statutes, obtaining consent from) the minor’s parent(s) or legal guardian. If the bypass proceedings are not confidential and *ex parte*, they would fail to meet federal constitutional standards.

⁵⁸ 750 Ill. Comp. Stat. Ann. 70/50.

⁵⁹ See Appendix B (fourth page).

⁶⁰ See *Bellotti v. Baird*, 443 U.S. 622, 647-48 (1979); *Ohio v. Akron Center for Reproductive Health*, *supra*, n. 53.

C. Must Judicial Bypass Proceedings Be Open To The Public And The Press?

Pascale then suggested that confidential judicial proceedings do not comport with the requirement of the First Amendment that all judicial proceedings be open to the public (or at least the press).⁶¹ Quite obviously, the proceedings would *not* be confidential if the press were allowed to attend. To state that the proceedings must be *both* confidential (as Supreme Court precedent requires) *and* open to the press (as Pascale suggested) is to say that they could not take place at all (“squaring the circle”). Developing this suggestion further, Pascale opined that *ex parte*, confidential judicial proceedings do not comport with either the federal or state constitution because, apparently, all judicial proceedings must be open to the press (if not also the public) and must be adversarial.⁶² Not surprisingly, Pascale provided no authority in support of this opinion, either.

Although more than two-thirds of the States have enacted parental involvement laws with judicial bypass mechanisms, no state supreme court has refused to issue rules implementing the statutes on the grounds set forth in Pascale’s letter.⁶³ Moreover, there

⁶¹ See Appendix B (fourth page).

⁶² *Id.*

⁶³ In one case, a state supreme court judge dissented from an order affirming, as modified, the denial of a bypass petition on the grounds that the bypass hearing did not present a justiciable “case or controversy” under the state constitution because the proceedings were non-adversarial, an issue that had not been raised by the minor. See *In re Petition of Anonymous*, 558 N.W.2d 784, 791-93 (Neb. 1997) (Caporale, J., dissenting). The majority rejected this argument. *Id.* at 789-91.

are a variety of judicial proceedings which are confidential, *ex parte* or both. Proceedings involving juveniles are clearly confidential;⁶⁴ probate proceedings may be non-adversarial;⁶⁵ and many other judicial proceedings are both confidential and *ex parte*, including grand jury proceedings,⁶⁶ applications for arrest warrants and search warrants,⁶⁷ applications for emergency orders of protection,⁶⁸ applications for non-consensual electronic interceptions⁶⁹ and applications to seize books and records and/or freeze assets of persons or entities suspected of terrorist activities.⁷⁰ Pascale's letter betrayed no

awareness of any of these statutes, all of which undermine his thesis. Providing an *ex*

⁶⁴ See 705 ILCS 405/1-5(6) (West Supp. 2004) (juvenile court proceedings); 705 ILCS 405/1-8 (West Supp. 2004) (juvenile court records). See *In re A Minor*, 149 Ill.2d 247, 595 N.E.2d 1052 (1992) (press has no absolute right to attend juvenile court proceedings)..

⁶⁵ See 755 ILCS 5/5-1 *et seq.* (West 1992).

⁶⁶ See 725 ILCS 5/112-6 (West 1992).

⁶⁷ See 725 ILCS 5/107-9 (West 1992) (arrest warrants); 725 ILCS 5/108-3, 108-4 (West 1992) (search warrants).

⁶⁸ See 725 ILCS 5/111-8 (West 1992) (authorizing *ex parte* orders of protection to prohibit domestic violence); 320 ILCS 20/9.5 (West 2001) (authorizing *ex parte* orders of protection to prevent elder abuse).

⁶⁹ See 720 ILCS 5/108B-1 *et seq.* (West 1992 & Supp. 2004) (granting chief judge of circuit court authority to enter *ex parte* order authorizing interception of private oral communication based upon a showing of probable cause).

⁷⁰ See 720 ILCS 5/29D-65(a) (West 2003) (granting court authority to enter *ex parte* order authorizing Attorney General or State's Attorney to freeze or seize all of the assets of any person when there is probable cause to believe that such person has used or intends to use the property in an act of terrorism); 460/9.5(b) (West 2004) (granting court authority to enter *ex parte* order authorizing Attorney General, upon a showing of probable cause, to seize books and records and freeze assets of any charity engaged in terrorist acts).

parte, confidential judicial proceeding in which to consider a bypass petition does not violate either the First Amendment or any other provision of either the United States or Illinois Constitution.

D. Could Bypass Hearings Be Held Before Nonjudicial Officers?

Finally, Pascale suggested that bypass hearings could be held before administrative, not judicial, officers.⁷¹ The Supreme Court has not yet ruled on the constitutionality of such a procedure.⁷² But this suggestion would not necessarily avoid the concerns Pascale expressed regarding non-adversarial judicial hearings. Normally, a party aggrieved by a final judgment or order of an administrative agency or official has the right to obtain judicial review of that judgment or order. This right is a component of federal procedural due process.⁷³ Final judgments and orders of administrative agencies are ultimately reviewable in the courts, either by statute or common law writ of *certiorari*.

Thus, establishing a procedure under which bypass hearings are conducted, in the first instance, by administrative hearing officers would not avoid the “problem” Pascale

⁷¹ See Appendix B (fourth page).

⁷² See *Bellotti v. Baird*, *supra*, n. 60, 443 U.S. at 643 n.22, and *Planned Parenthood Ass’n of Kansas City, Missouri, Inc. v. Ashcroft*, 462 U.S. 476, 492 n.20 (1983).

⁷³ See *DeBlasio v. Zoning Board of Adjustment*, 53 F.3d 592, 597 (3rd Cir. 1995) (state provides “adequate procedural due process” when it “affords a full judicial mechanism with which to challenge the administrative decision in question”) (citation and internal quotation marks omitted). See also *Rumph v. State Workmen’s Insurance Fund*, 964 F.Supp. 180, 188 (E.D. Pa. 1997) (“An administrative appeal mechanism *followed by judicial review* is constitutionally sufficient”) (emphasis added).

identified in his letter (*i.e.*, a court being required to decide an issue in an *ex parte*, non-adversarial setting); it would only delay the problem until the matter reached a court following the denial of a bypass petition. In any event, “When the legislature has expressly chosen a judicial forum for the resolution of these issues [*i.e.*, determination of maturity and best interests in a judicial bypass hearing], it is not this court’s province to rewrite the statute or suggest alternate or additional procedures to be utilized in this context, unless the judicial bypass statute violates . . . the state [c]onstitution, . . . the federal [c]onstitution (or any federal law made pursuant thereto), or . . . a federal treaty.”⁷⁴ The Illinois Parental Notice of Abortion Act of 1995 does not violate either the state or federal constitution, federal law or any treaty.

III. Overcoming the Impasse

It has been more than ten years since the Illinois Supreme Court refused to issue the judicial bypass appeal rule(s) necessary to implement the Parental Notice of Abortion Act of 1995. During that time, tens of thousands of Illinois minors have obtained abortions without having to notify their parents.⁷⁵ In addition, many minors from bordering States have come into Illinois to evade the parental consent or notice laws of their own States. This continuing evasion of the law of Illinois must be stopped. But that

⁷⁴ *In re Petition of Anonymous*, see n. 63, *supra*, 558 N.W.2d at 790.

⁷⁵ According to the Illinois Department of Public Health, almost 40,000 abortions were performed on minors (women under the age of 18) between 1995 and 2004, the last year for which statistics are available.

will not happen unless the state supreme court fulfills its obligation under the law and adopts the judicial bypass appeal rule(s) necessary to implement the act. How can that be achieved?

First, one or more public officials with enforcement responsibilities under the act should be persuaded to petition the supreme court to adopt appropriate judicial bypass appeal rule(s). These officials would include, among others, each of the State's Attorneys in Illinois.⁷⁶ The basis for their interest in petitioning for adoption of such rule(s) (their "standing," in legal parlance) may be found in the penalties provision of the act.⁷⁷

Section 40(a) provides:

Any physician who willfully fails to provide notice as required under this Act before performing an abortion on a minor or an incompetent person shall be referred to the Illinois State Medical Disciplinary Board for action in accordance with Section 22 of the Medical Practice Act of 1987.⁷⁸

Section 40(b) provides:

⁷⁶ The State's Attorney is the elected, county official responsible for enforcing the criminal laws of the State and, in certain instances, civil laws, as well.

⁷⁷ See 750 ILCS 70/40 (West 1999).

⁷⁸ *Id.* § 40(a).

Any person, not authorized under this Act, who signs a waiver of notice for a minor or incompetent person seeking an abortion, is guilty of a Class C misdemeanor.⁷⁹

With respect to § 40(b), the State's Attorneys have general jurisdiction to prosecute criminal offenses, including violations of the parental notice act. With respect to § 40(a), the Medical Practice Act of 1987 authorizes the Illinois State Medical Disciplinary Board to take disciplinary action against a physician for willful failure to comply with the Parental Notice of Abortion Act of 1995.⁸⁰ Another section of the Medical Practice Act expressly authorizes any State's Attorney to report to the Board for possible disciplinary action any physician who has willfully failed to comply with the parental notice act.⁸¹ Thus, the standing of State's Attorneys to enforce the Parental Notice of Abortion Act of 1995, either by referral of a physician for disciplinary action under § 40(a) or initiation of criminal prosecution under § 40(b), is clear.

This critically important first step has been taken. With the support of the pro-life community, Du Page State's Attorney Joseph Birkett filed a petition with the supreme court on June 28, 2006, asking the court to adopt an appeal bypass rule that would allow the act to go into effect. The court is not in session during the summer, but is expected to

⁷⁹ *Id.* § 40(b).

⁸⁰ 225 ILCS 60/22(A)(40) (West 1998).

⁸¹ *Id.* § 60/23(A)(4).

take up Birkett's petition in the fall.

What are the prospects that the supreme court will adopt the rule (or rules) necessary to implement the parental notice act? That is unknown at this time. It should be noted, however, that six of the seven current justices on the Illinois Supreme Court—Chief Justice Thomas and Justices Burke, Fitzgerald, Garman, Karmeier and Kilbride—were not on the court when it refused to promulgate the rule(s) required by the 1995 act. Only Justice Freeman was on the court in 1995. There is reason to believe, therefore, that the present court may be willing to take a fresh look at this issue.

Second, although Du Page County State's Attorney Birkett has petitioned the supreme court to adopt a rule to implement the parental notice act, it would be helpful if other State's Attorneys in Illinois, particularly ones in counties that have abortion clinics, joined his petition.⁸² Grassroots pro-life organizations could be very helpful in persuading other State's Attorneys to add their voices to that of DuPage County State's Attorney Birkett's. This is not a political issue (State's Attorneys are elected only in presidential elections) or even a lobbying one (it does not concern the enactment of

⁸² According to the Department of Public Health, seventeen counties reported 150 or more abortions performed on Illinois residents (of all ages) in 2004. In descending order, those counties were Cook (21,786); DuPage (1,989); Lake (1,195); Will (949); St. Clair (747); Kane (650); Madison (594); Winnebago (584); Peoria (497); McHenry (458); Champaign (448); Sangamon (357); McLean (276); Tazewell (196); La Salle (174); DeKalb (164); and Macon (151). These seventeen counties accounted for 31,215 abortions, almost 82% of the 38,151 abortions performed on Illinois residents in 2004.

legislation, but only adoption of a judicial rule).

Third, pro-life organizations and individuals may wish to write to the Illinois Supreme Court, expressing their support of State's Attorney Birkett's petition. Such communications would be entirely proper as they do not relate to an ongoing case or controversy before the supreme court (or any other court).

Finally, the Thomas More Society Pro-Life Law Center will support State Attorney Birkett's petition with a comprehensive analysis of the issues, based on this paper, and submit it to the Illinois Supreme Court at the appropriate time.