SUBJECT: Parental notification of a minor's intent to have an abortion

COMMITTEE: State Affairs — favorable, with amendment

VOTE: 12 ayes — Wolens, S. Turner, Alvarado, Brimer, Counts, Craddick, Hilbert, Hunter, Longoria, Marchant, McCall, Merritt

2 nays — Bailey, Danburg

1 absent — D. Jones

WITNESSES: *(On original version:)*
For — Ellen Justice

Against — Deirdre Feehan, American Civil Liberties Union of Texas; Jill Martinez and Judith Shure, Greater Dallas Coalition for Reproductive Freedom; Kae McLaughlin, Texas Abortion and Reproductive Rights Action League; Hannah Riddering, Buzzard Forum; Jamie Ann Sabino, Judicial Consent for Minors Lawyer Referral Panel; Patricia Hanley; Dave Kitterell, M.D.; Nancy Siefken; Frieda Werden

On — Dara Klassel, Texas Family Planning Association and Planned Parenthood Federation of America; Bruce A. Levy, Texas State Board of Medical Examiners; Peggy Romberg, Texas Family Planning Association; Susie Farley; Fred W. Hansen

BACKGROUND: The 1973 U.S. Supreme Court decision in the Texas case *Roe v. Wade*, 410 U.S. 113, generally established women's right to abortion. Female minors have the same right, but the high court has recognized that states may regulate minors' access to abortion by requiring some degree of parental involvement in the minor's decision.

Most state laws requiring parental consent or notification of a minor child's intent to have an abortion provide at least one alternative under which the minor may choose not to involve her parents in her decision — usually by judicial bypass, i.e., going to court.

In 1979, the Supreme Court decided in *Bellotti v. Baird* (*Bellotti II*), 443 U.S. 622, that a judicial bypass for a parental *consent* law must satisfy four criteria: the court hearing the young woman's request must authorize the abortion if she possesses the maturity to make her decision, regardless of her best interest; regardless of her maturity, her abortion must be permitted if it is in her best interest; the court proceedings must be confidential; and they must be expedient.

The Supreme Court decided two significant cases involving parental notification in 1990. In *Ohio v. Akron Center for Reproductive Health* (*Akron II*), 497 U.S. 502, the court upheld Ohio's one-parent notification law, which included judicial bypass, but did not rule specifically on whether a parental notification law must include judicial bypass.

The second parental notification case that year was *Hodgson v. Minnesota*, 497 U.S. 417, in which the court upheld only the section of that state's two-parent notification law that provided for judicial bypass.

Among the 14 states that enforce parental notification laws, all but Idaho, Maryland, and Utah allow judicial bypass. Maryland allows the primary physician to waive notice, while Idaho and Utah have no bypass.

In its most recent decision related to parental involvement, *Lambert v. Wicklund*, 520 U.S. 592 (1997), the Supreme Court upheld Montana's one-parent notification statute, which includes a judicial bypass in which the court must decide whether notification, rather than the abortion itself, is or is not in the minor's best interest. As in *Akron II*, the Supreme Court specifically declined to decide whether parental notification statutes must include some sort of judicial bypass to be constitutional. In February 1999, a state lower court struck down the Montana law, ruling that the state constitution's equal-protection clause required a more compelling justification for treating minors seeking abortion differently from minors who carry their pregnancy to term.

Family Code, sec. 32.003 allows a pregnant minor to consent to any surgical treatment involving pregnancy except abortion. This statute has the effect of a parental consent law, but Texas does not enforce it as written because the law fails to provide any means of bypass, leaving it open to possible constitutional challenge.

For more information concerning legal issues and other states' parental involvement laws, see HRO Focus Report 76-11, *Parental Involvement in Minors' Abortion Decisions*, April 30, 1999.

DIGEST:

CSHB 5 would require that if a minor consulted a physician to obtain a non-emergency abortion and the minor's parent, guardian, or court-appointed managing conservator was not present, the physician would have to notify the parent, guardian, or conservator before performing the abortion. The minor could bypass this requirement by obtaining approval from a court or by receiving certification from a licensed mental health professional or from the Department of Protective and Regulatory Services (DPRS) that notifying the parent or guardian would not be in the minor's best interest or that the minor was mature and capable of giving informed consent to an abortion.

The bill would not require parental notification in the case of a pregnant minor who had had the disabilities of minority removed under Family Code, sec. 31.001. Such minors are state residents who are 17 years of age, or at least 16 and living separate and apart from their parents, managing conservator, or guardian, and who are self-supporting and managing their own financial affairs.

Notice to parent, guardian, or family member. To perform an abortion on a minor who was unaccompanied by her parent, guardian, or managing conservator, the physician would have to give actual notice, in person or by telephone, to the parent, guardian, or conservator or actual notice to a grandparent, adult sibling, or adult aunt or uncle of the child at least 24 hours before performing the abortion. If a parent or adult family member could not be reached after a reasonable effort, the physician would have to give 72 hours constructive notice by certified mail sent to the last known address of the parent or adult family member before performing the abortion. The physician would have to document the notification in the minor's medical records.

If the physician had reason to believe that notification might subject the minor to physical or sexual abuse, the physician would have to refer the minor to DPRS for an evaluation. DPRS could not conduct an investigation or other action that would result in disclosing to the minor's parents that the minor was pregnant or was seeking an abortion.

Independent evaluation. A physician could perform an abortion without notifying a parent or adult family member if a licensed mental health professional certified in writing to the physician that notification would not be in the minor's best interest or that the minor was mature and capable of giving informed consent to an abortion. The bill would define a licensed mental health professional as a psychiatrist or a licensed or certified psychologist.

The physician would have to include a copy of the certification in the minor's medical record. The licensed mental health professional could not be located in or affiliated with the facility where the abortion was to be performed. If the mental health professional found that the minor had been subject to physical or sexual abuse, the minor would have to be referred to DPRS for services or intervention.

Any certification would be confidential and not subject to open records or public records laws, discovery, subpoena, or other legal process. If the minor failed to obtain certification, the minor still would have the right to pursue judicial approval or administrative evaluation.

Administrative evaluation. A physician could perform an abortion without notifying a parent or adult family member if DPRS certified that notifying the parent would not be in the minor's best interest or that the minor was mature and capable of giving informed consent to an abortion. DPRS could communicate the certification to the physician by telephone or electronically, but would have to provide the physician with a written copy.

The DPRS board would have to develop procedures for accepting an application for certification, for timely evaluation and investigation by appropriately trained personnel, and for issuing or denying certification. The rules would have to require completion of the evaluation, investigation, and issuance or denial not later than 5 p.m. of the second business day after the date the application was filed, unless the minor requested an extension. No fee could be imposed for certification.

If DPRS denied the certification, the minor could request review of the determination by an administrative law judge in accordance with the board's rules. Board rules would have to require review not later than 5 p.m. of the second business day after the request for review was filed, unless the minor requested an extension. The final determination of the administrative law

judge could not be appealed, but the minor still could pursue judicial approval or certification by a licensed mental health professional.

A certification by DPRS would be confidential and not subject to open records or public records laws, discovery, subpoena, or other legal process. DPRS could not notify anyone except the minor's physician that the minor was pregnant and seeking an abortion.

The board would have to develop the certification procedure not later than December 15, 1999.

Judicial approval. A pregnant minor wishing to have an abortion performed without notification of a parent or adult family member could apply to a court for authorization to have the abortion performed. The minor could file the application in a county court at law, a court having probate jurisdiction, or a district court having family jurisdiction in any county. The application, under oath, would have to state that the minor was pregnant, unmarried, under 18 years of age, had not had minority status removed, and wanted to have an abortion without notifying a parent or adult family member. If the minor had an attorney, the application would have to include the attorney's name, address, and telephone number.

If the minor had not retained an attorney, the court would have to appoint one for her. In a county with a nonprofit volunteer court advocate program, the court could appoint a program volunteer as an advocate for the minor. The costs of a judicial proceeding, including the cost of appointing an attorney ad litem, would be borne by the state from funds appropriated to the Texas Department of Health (TDH) for family planning.

The court would have to keep a record of all testimony and other oral proceedings and would have to enter a judgment immediately after the hearing was concluded. The court would have to issue written findings of fact and conclusions of law not later than 5 p.m. on the second business day after the application was filed. A minor could request an extension until 5 p.m. after the second business day after the minor informed the court that she was ready to proceed with the hearing.

If a court failed to enter an order in the time required, the physician could consider the lack of an order constructive permission to perform the abortion.

The physician would have to execute an affidavit stating that the minor had made an application to the court, that the court had not made a ruling in the time required, that the minor had not requested an extension, and that the physician had not been notified that the court had denied the application or appeal. That affidavit, entered into the patient's medical records, would have the same effect as if the court had entered an order granting permission. The Texas State Board of Medical Examiners (BME) would prescribe the form of the affidavit to be used.

These proceedings would have to be given precedence over other pending matters to ensure that the court reached a decision promptly.

An order entered by the court would have to result from a determination, based on a preponderance of the evidence, that notifying the parent or guardian would not be in the minor's best interest or that the minor was mature and capable of giving informed consent. If the court found either of those two things to be true, the court would have to authorize the minor to consent to the abortion without notifying the parent or adult family member. If the court found neither of those things to be true, the court could not authorize the minor to consent to the abortion without notification. If the court found that the minor had been subjected to physical or sexual abuse, the court would have to refer the minor to DPRS for services or intervention.

A court could not notify any person of a minor's pregnancy or desire to have an abortion. Court proceedings would have to be conducted so as to protect the minor's anonymity, and all documents would be privileged, confidential, and not subject to discovery or subpoena. A minor could file an application using a pseudonym or her initials. The clerk of the Texas Supreme Court would have to prescribe the application form to be used by the minor, and a filing fee or court costs could not be assessed against a minor.

A minor could appeal to a court of appeals the decision of a court denying the minor permission to have the abortion performed. All such appeals would fall under the same time deadlines and would include the same requirements of confidentiality and expediency.

The Supreme Court would have to issue rules necessary to ensure that the judicial approval process would be conducted confidentially and promptly.

Medical emergency. If the minor's physician determined that a medical emergency existed and that this emergency prevented time for notice, the physician could perform the abortion without parental notification. The physician would have to send notice to the BME on a prescribed form, certifying the medical indications supporting the conclusion of a medical emergency. Such written certification would be considered confidential and privileged and could not contain personal identifying information about the minor.

Physician's duties and penalties for violation. A physician who received a request from a minor for an abortion would have to give the minor a form telling her about her rights and how she could obtain consent for the abortion. The BME would have to prescribe this form.

A physician who violated the parental notification requirements would be subject to disciplinary action under the Medical Practices Act. The BME would have to review information relating to a violation and could initiate action. Discipline could include denial of application for a license, public or written reprimand, denial, suspension, limitation, restriction, or revocation of the physician's license or authorization to practice medicine, counseling, education, practice under direction of another physician, public service, or a combination of those measures.

The BME would have to adopt the forms to be used for medical emergencies, informing the minor, and the physician's affidavit not later than December 15, 1999.

CSHB 5 would take effect September 1, 1999, and would apply only to an abortion performed on or after January 1, 2000.

SUPPORTERS SAY:

Parental notification statutes are a constitutional method of ensuring parental involvement in a significant medical procedure, abortion on a minor. The U.S. Supreme Court and many other federal circuit and state supreme courts have upheld statutes similar to the one proposed by CSHB 5 because these laws

ensure the privacy of the minor and offer reasonable alternatives to parental notification.

In Texas, 5,523 abortions were performed on minors in 1997. According to TDH, 39 percent of those minors did not involve their parents. In other words, about 2,154 abortions probably were performed on minors without their parents knowing anything about such procedures. For none of those abortions was any family member of the minor required to be involved.

Parents are notified for most other non-emergency or elective medical procedures performed on a minor. The minor should have the support of a parent or family member when she makes her decision to have a dangerous and invasive medical procedure that could place her life at risk. From a practical standpoint, notification allows the parent to pass on to the physician any important medical history information that could be useful in performing this serious medical procedure. Allowing another adult family member to be involved in the minor's decision would allow the minor to go to whomever she trusted, and that adult family member very likely would help the minor to involve her parents in her decision.

A parental notification law would reduce the number of abortions performed on minors. As shown in Minnesota, Massachusetts, and other states, in-state abortion rates have dropped for girls under 18 after the enactment of parental notification or consent laws. From 1981 to 1986, when Minnesota's parental notification law was in effect, the abortion rate for minors fell by one-third. Although abortion rates also fell in age groups unaffected by the law, those rates declined much less than for minors. Teen pregnancy and teen birth rates also fell in Minnesota during the same period. Minors had fewer abortions because the pregnancy rate decreased, which in turn occurred because minor females and their sexual partners knew about the notification law and behaved more responsibly. Minors who did not want to tell their parents about their sexual activity educated themselves and acted more responsibly.

The state has a legitimate interest in protecting minor children from their own immaturity, inexperience, and lack of judgment. The choice of whether or not to have an abortion often is highly charged with conflicting emotions. The repercussions of such a choice can have emotional and psychological effects on the woman for many years. Many minors do not have the ability to make a mature, rational choice. Giving the minor a chance to think about the consequences of such a procedure and an opportunity to discuss it with a parent, grandparent, aunt, or sister, if the minor has not talked with them already, can help the minor make the right decision in regard to her

pregnancy. Many teens are surprised at how understanding and supportive parents can be in these situations, and an adult relative can help the minor understand that. Even when the relations between parents and teens are strained, this issue often can bring them together and allow the parent to give the minor much-needed advice and support.

Thirty states enforce parental involvement laws. Nine other states have such laws, but they are under court challenge or are not enforced. HB 5 would conform with statutes determined to be constitutional and would require additional options for the minor, including judicial bypass, evaluation by a licensed mental health professional, and an administrative evaluation by DPRS as an alternative to parental notification.

It is important to ensure that girls who are pregnant and looking for options have access to trustworthy and understanding adults with experience in abortion counseling. CSHB 5 would provide other options if the minor did not want a parent to be notified and also was scared of or uneducated about the judicial system. Going to court and making this very personal request to a judge could be intimidating and even traumatic for minors. CSHB 5 would provide alternatives to safeguard the minor and help those who legitimately would fear their parents' knowledge of their abortion decision.

A judicial bypass procedure is intended to ensure that the due-process rights of the minor are not violated by being denied the right to perform a legal act without a legal recourse. Constitutional judicial bypass procedures for parental *consent* must have certain elements, including a showing by the minor that she is sufficiently mature and well-informed to make a decision or that abortion would be in her best interest. The procedure must protect the anonymity of the minor, and the process must be able to be concluded in a reasonably short period of time.

The bill's judicial bypass procedure would require the judge to determine whether the minor was mature and capable of giving informed consent or whether notifying her parent would not be in her best interest. The U.S. Supreme Court recently upheld similar judicial bypass provisions in Montana's parental notification law in *Lambert v. Wicklund*. The same standards would be used for the mental health professional and administrative evaluation alternatives to parental notification under CSHB 5.

HB 5 would ensure confidentiality and protect the minor's anonymity. The minor could file an application using a pseudonym or initials. The two-day decision deadline would ensure that the performance of an abortion would not be delayed or stalled by a court.

The alternative evaluations would provide the same protection as a judicial proceeding by allowing an independent third party to determine if the minor was mature and well-informed enough to consent to the procedure or if there were reasons not to notify her parent. These evaluation procedures might alleviate some of the minor's fear, intimidation, and the stigma of having to go to court to petition for the ability to avoid parental notification. Also, if used extensively, these alternatives would help to reduce the cost of the judicial bypass procedure significantly.

Other states have similar bypass options for minors. Maine has a one-parent consent law that includes judicial and a "counseling" bypass. Counselors are defined, among other titles, as psychiatrists or licensed psychologists. West Virginia has a one-parent notification law that includes judicial bypass and a second physician alternative. Maryland has a one-parent notice allowing the physician to waive the notification requirement under certain conditions. Connecticut has no parental involvement law but requires every minor under 16 who seeks an abortion to receive counseling.

HB 5 would not criminalize doctors for violating the law but would subject physicians to what they would face for any other violation of medical statute: investigation and action by the BME. This would ensure that this measure was really about ensuring the best interests of the child and not criminalizing a legal medical procedure. Holding doctors to professional misconduct standards would be the same discipline required if the physician failed to inform a minor's parents before performing any other type of surgery.

While this legislation would somewhat restrict a minor's ability to get an abortion compared to the process an adult must follow, the distinction is justified. The procedures in CSHB 5 are designed to protect the minor by helping her make an informed choice. Abortion is a very invasive procedure and can have lifelong emotional and psychological effects. Many minors may not be mature or informed enough to make rational decisions on their own and may need the advice of someone whom they should be able to trust. If the

minor is mature enough or would be at risk if one or more parents were notified, the procedure still could be performed without parental notification.

OPPONENTS SAY:

HB 5 would unjustifiably inhibit young women in getting an abortion by setting up hurdles they would have to clear in order to exercise their constitutional right. The result would be to discourage legal abortion as an alternative to an unwanted pregnancy. Parental notification statutes increase the risk of harm to pregnant minors, both from repercussions at home after the notice and from additional complications caused by delays. These laws serve no legitimate state interest in protecting the health of the minor.

Requiring minors to notify parents or to jump through other hoops when they have made the decision to have an abortion would not reduce the number of abortions. The number of in-state legal abortions may drop after a state enacts a parental involvement law, but pregnant minors who are ashamed or afraid to tell their parents will find a way around the law, either by using the bypass procedure or by obtaining illegal or out-of-state abortions. After Minnesota enacted its parental notification law, the number of abortions declined for all women of childbearing age, not only for minors. The decrease in abortions for minors may have occurred in part because girls seeking abortions traveled to other states, obtained illegal abortions, or lied about their age. Also, the birth rate did not go up after enactment of the law. Minnesota began a statewide sex education program at the same time the law took effect, and that program deserves some credit for reducing the number of teen pregnancies, thereby reducing both birth and abortion rates.

HB 5 would endanger young women's health by forcing some to turn to illegal or self-induced abortions or by requiring a waiting period that delayed the procedure, increasing the medical risk. If parental notification were mandatory, some minors — even those who have close relationships with their parents — would seek "back-alley" abortions, which can kill young women, maim them for life, or render them infertile.

A mandatory waiting period should not be presumed to allow the girl to do more soul-searching or to seek more information. To assume that she has not done this already is insulting. The obvious intent of this mandatory waiting period is to give the parents time to talk the minor out of having the abortion. No other interest would be served by delaying the medical procedure.

Many young women who are pregnant wait as long as possible before seeking medical care and are likely to put off their decisions even longer if required to notify a parent. Any delay increases the medical risk for a pregnant girl, and the risk grows as the pregnancy progresses. While the risks of an abortion are still lower than the risk involved in childbirth, each day the procedure is delayed adds to the risk involved. Statistics in states with notification laws have shown that second trimester abortions have increased among minors after such statutes were imposed. Second trimester abortions are not only more risky medically but are also more costly.

Judicial bypass usually delays access to abortion by between four days and several weeks, because a girl must travel to the courthouse once and at least twice to the abortion provider, and she may even have to appeal to a higher court. The two-day deadline for judicial bypass decisions could be harmful to a minor for whom any delay could increase the risk of complications. It also would disrupt the normal proceeding of a court, which presumably would have to delay all other pending business to deal with these issues, creating a backlog of other judicial proceedings.

Although some parents may believe that a parental involvement law establishes their right to know, such laws do not prevent a pregnant minor from obtaining an abortion. If the minor is assured of confidentiality, as now is the case, she will be more likely to seek a safe, clean, legal abortion rather than resort to an illegal and unregulated one. In Texas and most other states, minors are assured of confidentiality when they seek sensitive medical services such as pregnancy and delivery, treatment of sexually transmitted disease, and therapy for drug abuse. These conditions often entail greater health risk than abortion, yet the decision is left to the minor and remains confidential.

National data indicate that the great majority of all pregnant girls who obtain an abortion involve at least one parent in the decision before doing so. The younger the minor, the more likely she is to notify her parents. But even a girl who has an open, honest relationship with her mother may not want to discuss sexuality, and especially pregnancy and abortion.

This legislation is couched in terms of promoting communication between a parent and a child, but if communication already were so bad that the child did not feel she could tell a parent of her own free will, forcing notification

could only worsen the situation. While family relationships generally benefit from voluntary and open communication, forcing a girl to notify a parent could prove harmful if the parent was abusive.

Requiring parental notification would be virtually the same as requiring parental consent, because if the parents were notified and they wished to stop their daughter from getting an abortion, they could place all sorts of obstacles in her way. The least of these obstacles would be counseling her against an abortion, even though such a decision is an entirely personal choice, not one that should be made by committee, even a committee of family members. Some parents might take other measures to prevent the child from having the abortion, from restricting her movements to physically abusing her.

In cases where the minor has become pregnant through statutory rape, rape, incest, or sexual abuse, state law already requires the doctor, judge, or anyone who suspects abuse to report this to law enforcement or to child protective enforcement officials.

HB 5 is aimed at stopping doctors from performing abortions. Such doctors already bear significant risks, often because of death threats from anti-abortion advocates. HB 5 would set a number of procedural traps for doctors performing such abortions, the violation of which could cause the loss of the doctor's license to practice medicine. One question that doctors would have to address would be what would constitute reasonable effort in attempting to contact the minor's parent or adult family member before sending them constructive notice.

The technical requirements, forms, and affidavits required of physicians in HB 5 also could discourage doctors who perform abortions only occasionally from continuing to do so. These doctors are often family practitioners who have developed a relationship with the minor and have knowledge of the minor's medical history. If these doctors were discouraged from performing abortions, minors would be forced to go to clinics and be subjected to possible harassment from protestors, and they would be unfamiliar with the physician who would perform the procedure.

While the alternative evaluation options could help alleviate some problems of the impersonal and often frightening judicial bypass procedure, the added difficulty would arise when the girl had to find a licensed mental health

professional willing to evaluate her without charge, or when she had to contact someone who knew DPRS procedures. With each contact the minor is forced to make, her confidentiality is in jeopardy. Minors who could not afford an evaluation by a licensed mental health professional likely would have to go before a judge whom they did not know and petition to exercise their right to have a legal medical procedure performed.

OTHER OPPONENTS SAY:

The alternative evaluation options and family member bypass included in CSHB 5 would allow doctors to ignore the parental notification requirement, which would render this legislation meaningless for promoting communication between parents and children. Any doctor who wished to perform an abortion could find a licensed mental health professional to state their medical opinion that notification would not be in the best interest of the minor. Abortion clinics likely would set up arrangements with off-premises licensed mental health professionals to evaluate minors.

This bill has good intentions to help the pregnant minor make the right decision about abortion, but it would not help the girl have a discussion with her parents, who may want to be involved. Allowing the alternative of notice to an adult family member, including grandparents, siblings, aunts, or uncles, would too easily defeat the purpose of ensuring parental involvement in this important decision and could even create dissension within families.

NOTES:

The committee substitute removed language from the original bill that would have identified specific counties in which the minor could apply for judicial bypass and replaced this language with “in any county.”

Another parental notification bill, SB 30 by Shapiro, passed the Senate by 23-8 on March 18. The House State Affairs Committee considered SB 30 in a public hearing on April 19, but left the bill pending. SB 30 differs from CSHB 5 primarily in that it would require notification of the parent, guardian, or managing conservator only and would allow the minor no form of bypass other than through the courts. Other significant differences are:

- SB 30 would require that only the parent, guardian, or managing conservator be notified. CSHB 5 would require that the parent, guardian, or managing conservator, grandparent, adult sibling, or adult aunt or uncle be notified.
- SB 30 would allow the only option to notification to be through the court.

CSHB 5 would allow notification bypass through the court, a licensed mental health professional, or DPRS.

- SB 30 would require the physician to wait for 48 hours after actual notice before performing the abortion. CSHB 5 would not require a wait after actual parental notice and would require a 24-hour wait after family member notification.
- SB 30 would require a 48-hour wait before the physician performed an abortion after the notice had been sent to the parent by certified mail. CSHB 5 would require a 72-hour wait after constructive notice.
- SB 30 would allow certain courts in the county where the minor resided or where the abortion facility was located to authorize a minor to consent to an abortion. CSHB 5 would allow certain courts in any county to authorize a minor to consent to an abortion.
- SB 30 would make an offense by a physician punishable by a Class A misdemeanor, punishable by up to one year in jail and/or a maximum fine of $4,000. CSHB 5 would make a physician subject to disciplinary action by the Texas State Board of Medical Examiners, which could lead to revocation of a medical license, if a physician violated the bill.
- SB 30 would not require the physician to provide an information form to the minor about her rights under the bill, as CSHB 5 would.

A parental notification bill introduced in the 1997 legislative session, SB 86 by Shapiro et. al., passed the Senate, but died in the House on a point of order.