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June 12, 2006

Board of Juvenile Court Judges
P.O. Box 140241
Salt Lake City, Utah 84114
Attn: Ray Wahl

Dear Mr. Wahl:

Attached are comments on the forms adopted by the Board of Juvenile Court Judges for processing requests for judicial waivers of the parental consent for abortion requirement, pursuant to Utah Code Section 76-7-304.5. These comments are being submitted on behalf of a group of reproductive rights attorneys working with the American Civil Liberties Union of Utah, including representatives of the Reproductive Freedom Project of the ACLU, the Center for Reproductive Rights, Planned Parenthood Federation of America, and the Massachusetts Judicial Consent for Minors Lawyer Referral Panel.

We appreciate the work and thought that has gone into the preparation of the forms. The changes that we are seeking are intended to further protect young women's constitutional right to access an expeditious and confidential bypass procedure and make the process clearer to the young women who seek a judicial waiver.

Very truly yours,

Margaret Plane
American Civil Liberties Union of Utah
801-521-9862, ext. 103

cc: Brent Johnson, Esq., Administrative Office of the Courts

COMMENTS RE FORMS FOR BYPASS OF PARENTAL CONSENT
(From reproductive rights attorneys working with the
American Civil Liberties Union of Utah)

GENERAL COMMENTS:

(1) Because each minor has a constitutional and statutorily protected right to seek a confidential waiver of the consent requirement, the minor's name should not appear in the caption because this could publicly identify the minor through, for example, a docket sheet or calendar call. Therefore, the forms should be modified to make it clear that a pseudonym or initials will be used in the caption on all the court documents. See, e.g., Zbaraz v. Hartigan, 776 F. Supp. 375, 379-80 (N.D. Ill. 1991) (minor should be allowed to file using a pseudonym or only her initials, to protect her anonymity). The minor's name should appear in only one place: in the body of the petition.

(2) None of the forms should include the word "abortion" in the caption, to enhance the confidentiality of the process.

(3) The petition form and the Instructions for Filing Petitions for Waiver of Parental Consent to Abortions Pursuant to Utah Code Ann. § 76-7-304.5 adopted by the Board of Juvenile Court Judges ("the Instructions") appropriately state that the minor has a right to a court-appointed attorney. However, many of the forms refer to a guardian ad litem and imply that a guardian ad litem may be appointed *instead of* an attorney to represent a minor in the bypass proceedings. All of the forms that include reference to a guardian ad litem should be revised to avoid confusing the role of an attorney with that of a guardian ad litem. The two roles differ in important ways, such that appointing a guardian ad litem does not provide the same protections for the minor as does appointing an attorney to represent her in the bypass process.

The duties and responsibilities of a guardian ad litem and of an attorney for a minor "are not always coextensive," as the Utah Supreme Court has noted. State v. Harrison, 24 P.2d 936, 942 n.4 (Utah 2001). Appointing a guardian ad litem for a minor seeking a judicial bypass would not satisfy the need to ensure that a minor is able to effectively pursue her constitutional right to seek an abortion without her parent's consent. An attorney for a minor is ethically bound to represent the client's interests as the client sees them and is prohibited from asserting a position contrary to the wishes of the client. Utah R. Prof. Conduct 1.2 (the attorney must "abide by [the minor's] decisions concerning the objectives of representation" and "consult with the client as to the means by which [the objectives] are to be pursued.") A guardian ad litem is not similarly bound. The guardian ad litem is charged with representing "the best interest of a minor" according to the view of the guardian ad litem, not the view of the minor: "[a] difference between the minor's wishes and the attorney [guardian ad litem]'s determination of best interest may not be considered a conflict of interest for the attorney [guardian ad litem]." Utah Code Ann. 73-3a-912(8).

Moreover, there is no need for a minor to be represented both by an attorney and a guardian ad litem. Cf. State in Interest of D.M., 790 P.2d 562, 566 (Utah Ct. App. 1990) (ruling that trial court properly declined to appoint a guardian ad litem for dependency and neglect phases of proceeding where minors were represented by counsel).

(4) As presently drafted, the petition form and Instructions indicate that the minor must have provided informed consent for the abortion prior to filing her petition. Such a requirement clearly exceeds the statutory requirements and therefore the forms and Instructions need to be amended.

The parental consent statute cannot possibly be read to require that a minor provide informed consent prior to filing the petition. Under the rule, the hearing may take place as many as five days (three judicial days plus intervening weekend) after the minor files her petition, or even longer if there is an intervening holiday or the court continues the hearing date for 24 hours. Requiring that the minor has given her informed consent (and provide written documentation to that effect) at the time she files her petition violates the authorizing statute, Utah Code Ann. § 76-7-304.5. In addition, it interferes with the minor's constitutional right to an expeditious bypass process, by imposing additional delays on the minor before she can obtain a judicial waiver.

Moreover, there is nothing in the statute that requires that, even at the hearing, the court have before it any specific written informed consent document that indicates that the minor "visited with" the physician who will perform the abortion. The statute simply requires that the court determine that the minor "has given her *informed consent* to the abortion." Utah Code Ann. § 76-7-304.5(2)(a) (emphasis added). The fact that the minor has given informed consent could be elicited through oral testimony. Moreover, even the Utah statute that has specific requirements for the elements of informed consent allows that consent to be obtained by a "referring physician," rather than only the physician who will perform the abortion. Utah Code Ann. § 76-7-305(2)(c).

(5) The Instructions reference a document entitled Certification of the Clerk which a minor will be able to bring to an abortion provider to show that her petition has been deemed granted. However, a sample form was not included in the set of forms. A proposed certificate is attached to these comments, which is worded to take into account the possible continuation of a hearing, as allowed by the rule.

PETITION FOR WAIVER OF PARENTAL CONSENT TO MINOR'S ABORTION PURSUANT TO UTAH CODE SECTION 76-7-304.5:

Name block in upper left hand corner: To protect the minor's confidentiality, she should not be required to put her name in the upper corner of the petition. Rather, she should be allowed to file using initials or a pseudonym in the caption and her name should appear only in the body of the petition. If that change is not made, at a minimum the form should be changed to delete the lines for "address," "city," and "telephone number." Although the form states that information is "optional," an unrepresented minor may fill in that information, thus jeopardizing her confidentiality. In accord with Utah R. Juv. Proc. 60, her county and state of residence should simply be provided in the body of the form.

¶ 2: The rule specifies that the petitioner need not provide her address on the form, but need only state her county and state of residence.

To make it clear on the petition that only that information is required, paragraph 2 should be re-worded as follows: "I am a resident of the following county _____ and state _____."

¶ 4: For the reasons discussed in the General Comments above, the form should be revised to avoid confusing the role of an attorney with that of a guardian ad litem. Specifically, paragraph 4 should be re-worded as follows:

"I understand that I have the right to a court-appointed attorney ~~and/or guardian ad litem~~ at no cost to me. (Check One)

_____ a. Please appoint an attorney ~~and/or a guardian ad litem~~ to represent me.

_____ b. I have an attorney to represent me. The attorney's name, address, and telephone number is _____.

_____ c. I do not want an attorney ~~or guardian ad litem~~.

¶ 5: For the reasons discussed in the General Comments above, the reference to "my guardian ad litem" should be deleted in the second sentence.

The minor should not be required to list the persons that she will want admitted to her hearing. There is no need for such a specification at the time the petition is filed. Many minors will not be represented prior to filing a petition and probably will not know whether there are persons who should attend to present evidence. Even if she has an attorney by the time her petition is filed, she and her attorney may not have had a chance to consult sufficiently to know whom, if anyone, they will want at the hearing. Moreover, the minor may unwittingly compromise her confidentiality or the confidentiality of others by listing persons before she has consulted with an attorney. Therefore, the last sentence of this paragraph should be omitted.

¶ 6: For the reasons discussed in the General Comments above, the reference to a "guardian ad litem" should be deleted in the third sentence.

In addition to asking for the name(s) and address(es) of additional contact people, the form should ask for their telephone number. Therefore, the last sentence should be amended to read "Name(s), telephone number(s), and address(es) _____."

¶ 7: For the reasons discussed in the General Comments above, subparagraph "a" should be re-written to make it clear that the minor need not have given informed consent to her abortion by the time that she files the petition. In particular, the parental consent law does not support a requirement that she attach a copy of a written consent document to the petition. Therefore, subparagraph "a" should be re-worded as follows: "_____ a. I have given my informed consent to the abortion, or will have done so by the time of my hearing, and I am mature and capable of giving informed consent for the performance of an abortion."

The minor should not be required to state her reasons for alleging that an abortion would be in her best interest. Many minors will not be represented prior to filing a petition and cannot be expected to fully understand which of their circumstances might establish that an abortion would be in their best interest. Even if she has an attorney by

the time her petition is filed, the minor and attorney may not have had a chance to consult fully about the minor's circumstances. The determination whether an abortion is in the minor's best interest will be made by a judge, based on evidence presented at the hearing. Therefore, requiring listing of reasons at the time the petition is filed serves no purpose and might be detrimental to the minor, particularly if she is unrepresented. The form should be modified as follows: "_____ b. An abortion is in my best interest."

Signature line: Some minors will be represented by attorneys at the time their petitions are filed and therefore the form should make it clear that attorneys may sign the petition, by stating under the signature line "Petitioner or Petitioner's Attorney" rather than "Petitioner". This change will lessen the burden on, and improve access to the procedure by, the minor, who may have difficulty in arranging confidentially to obtain the form, fill it out, and file it or to meet with the attorney in person prior to the petition being filed.

INSTRUCTIONS FOR FILING PETITIONS FOR WAIVER OF PARENTAL CONSENT TO MINOR'S ABORTION PURSUANT TO UTAH CODE SECTION 76-7-304.5:

Introductory paragraph:

The Instructions overstate which minors are subject to the parental consent requirement, by failing to refer to the exemption for emancipated minors. In addition, using the term "minor" in the Instructions is not as clear as stating the relevant age would be. To be accurate and clear, the first sentence should be amended to read: "If you are a pregnant, unmarried and unemancipated and will not have reached the age of 18 at the time of your planned abortion, Utah Code Ann. § 76-7-304.5 requires written consent from one of your parents or your guardian or from a court for you to obtain an abortion."

To make the extent of confidentiality clearer to the minor, the Instructions should specifically note that information will not be disclosed to the minor's parents. Amend the fourth sentence in the introduction to read: "No information about you or your petition will be available to your parents, guardian, or any member of the public."

Section 1:

As discussed above in the General Comments, this section incorrectly states that a minor seeking a waiver on the grounds that she is mature and informed must have met with the physician who will perform the abortion and must have provided informed consent for the procedure before she files her petition.

Furthermore, as written, this section risks giving the minor the incorrect impression that she must be ready to present her case before she has filed her petition, which may be before she even has spoken to an attorney.

To address these concerns, this section should be re-written as follows: Delete the current section 1, insert the following between the current sections 3 and 4, and re-number sections 2 and 3 as "1" and "2", respectively: "3. **Prior to the hearing.** If you are claiming that you are mature and capable of giving informed consent to the abortion without the consent of a parent or guardian, you will have to show the judge at the hearing that you have given informed consent to your abortion. Therefore, prior to the hearing, you need to obtain information about the abortion procedure, its risks, and its alternatives."

¶ 2: To help the minor access the courts, a list of the addresses, telephone numbers, and fax numbers of the juvenile courts in each county should be attached to the Instructions.

The last sentence should make it clear that the minor who faxes a petition to the court and does not receive a Notice of Hearing within 48 hours also should contact the court, by adding “or faxing” between the words “mailing” and “the petition.”

¶ 3: For the reasons discussed in the General Comments above, the phrases “or guardian ad litem” and “and/or guardian ad litem” should be deleted from the second and third sentences.

¶ 4: The third sentence in the first paragraph should also reference faxed petitions, so the words “or fax” should be inserted between “If you mail” and “your petition.”

In some circumstances, despite the best of intentions, a minor will not be able to appear for a scheduled hearing because, for example, she cannot miss an exam being given at school that day or she cannot arrange transportation to the courthouse. Therefore, a sentence should be added after the fifth sentence in the first paragraph, reading: “If you are unable to appear for your scheduled hearing date, you or your attorney must promptly contact the clerk of the court to request that the court reschedule your hearing.”

To make the attorney’s role and the confidentiality of the proceedings clearer to the minor reading the Instructions, the second paragraph should be re-written by replacing the third sentence with the following: “You and your attorney have the right to and will be able to present evidence to the judge concerning those issues. Both the judge and your attorney may ask you questions. All of the questions and your answers will be recorded, by tape or by a court employee (called the court reporter), but the recording will be kept confidential by the court.”

¶ 6: Given that most minors should have an attorney at the time the notice needs to be filed (except for those who declined to have one appointed or need to change attorneys), the section should be re-written slightly to make the support that the attorney can provide to the minor clearer. A new first sentence should be added to the second paragraph and what is now the first sentence of that paragraph should be re-worded as follows: “Your attorney may file an appeal for you. Your attorney or you should fill out a Notice of Appeal form and file it with the juvenile court clerk.”

The rule provides that the Notice of Appeal may be filed in person, by mail, or by fax and the Instructions refer to the first two methods. To make the Instructions clearer and to match the rule, a sentence should be added after the first sentence in the second paragraph, reading “You may file the petition in person at the court, or by mail or by fax.” (And, as suggested above with reference to ¶ 2, a list with the addresses and fax numbers of the juvenile courts should be attached to the Instructions.)

The Instructions as currently written contemplate that the Notice of Appeal will not include contact information for the minor generally, but will if the minor mails the notice to the court. As suggested below with reference to the Notice of Appeal form, the Instructions should make it clear that the minor will provide contact information on the Notice, rather than the court relying on the contact information provided in the petition.

This is especially appropriate because the minor may not have had an attorney at the time she filed the petition and therefore she now might want to designate that she be contacted c/o her attorney. The Notice of Appeal should be changed as noted below and the third and fourth sentences in the third paragraph in ¶ 6 of the Instructions should be replaced with the following: "If the court of appeals schedules a hearing, the court of appeals clerk will contact you with that information using the means designated on the Notice of Appeal."

¶ 7: The Instructions should make it clear to the minor that, if oral argument is scheduled, her attorney will represent her at the argument. Therefore, the second sentence should be re-worded as follows: "If the court schedules oral argument, your attorney will present argument on your behalf and you may attend in person or by telephone, if you wish to do so."

ORDER APPOINTING AN ATTORNEY AND/OR GUARDIAN AD LITEM FOR A MINOR:

For the reasons discussed in the General Comments above, the references to "guardian ad litem" should be deleted from this document and it should be used only for the appointment of an attorney to represent the petitioner.

NOTICE OF HEARING:

As noted above, in some circumstances, a minor will not be able to appear for a scheduled hearing and will need to ask for a new hearing date. Therefore, a sentence should be added to the paragraph above the clerk's signature line, reading: "If you are unable to appear for your scheduled hearing date, you or your attorney must promptly contact the clerk of the court to request that the court reschedule your hearing."

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

For the reasons discussed in the General Comments above, "the minor's guardian ad litem" should be deleted from the list of those possibly present at the hearing.

NOTICE OF APPEAL:

¶ 4: The form should make it clear to the minor that she may appear at oral argument through her attorney, by adding the following choice:

“ My attorney will appear on my behalf.”

New ¶ 5: As noted above regarding the Instructions, the Notice of Appeal form should ask the minor to provide contact information. Therefore, the following paragraph (comparable to one on the petition) should be added:

"I understand that court personnel will not send any papers to or try to call me at my home without my consent. I would like to be informed of the court's decision in the following way (list address, cell phone number, e-mail address, fax number, or other):

I request the following person(s), in addition to my attorney, be contacted and given papers in my case:

Name(s), telephone number(s), and address(es) _____”

Signature line: The form should make it clear that attorneys may sign the notice, by stating under the signature line “Petitioner or Petitioner’s Attorney” rather than “Petitioner”.

NOTICE OF ARGUMENT ON APPEAL:

¶ 2: Because the term “argument” is used everywhere else on the form, the term “hearing” should be replaced with the term “argument” in this paragraph, to avoid the risk of confusion.

[Form to document that petition has been deemed granted]
[caption]

CERTIFICATION OF THE CLERK

The Petitioner in this matter has filed a Petition for waiver of parental consent pursuant to Utah Code Section 76-7-304.5. According to Utah Rule of Juvenile Procedure Rule 60, if the court has not held the hearing on the petition and issued a ruling within the time frame required by the Rule, the petition is deemed to have been granted and the consent requirement is waived. The clerk of this court hereby certifies as follows:

1. The petition in this matter was filed on _____, 200____, at _____ o'clock ____ .m.
2. The court was required to hold a hearing and issue a ruling on or before _____, 200____, at _____ o'clock ____ .m.
3. No ruling in this matter was issued within the time required by Rule 60.

Therefore, the petition is deemed granted.

DATED: _____

Clerk of the Juvenile Court