Administrative Office of the Courts

Chief Justice Christine M. Durham
Utah Supreme Court
Chair, Utah Judicial Council

Daniel J. Becker
State Court Administrator
Myron K. March
Deputy Court Administrator

MEMORANDUM

To: **Katie Gregory, Asst. Juvenile Court Administrator**

From: **Brent Johnson, General Counsel**

Re: **Abortion by Minor Rules**

Date: **August 3, 2006**

This memorandum is to provide you with some of my perspective on the recently enacted abortion rules, particularly as that perspective relates to the questions raised by the Committee on the Rules of Juvenile Procedure.

In reviewing the minutes from the Rules of Juvenile Procedure meeting, the issues with which the committee have struggled are the same with which we have struggled. The goals of the rule are to not only meet the provisions of HB 85, but to also give the rule the best chance of being considered constitutional. When in doubt about an issue we have leaned in the direction that is most likely constitutional.

One of the most difficult issues is parental notification. The reason the rule excludes parental notification is because case law leads to the conclusion that a minor has a constitutional right to have an abortion without either parental consent or parental notification. Some jurisdictions have recognized that, if parents are notified, those parents might make certain that the minor does not appear for a scheduled hearing, thus interfering with the constitutional right. We could have created a two-step process by which a minor files a petition for abortion without parental consent, and then files a motion to avoid parental notification, but the feeling was that that process would be too burdensome.

The question of court appointed counsel was discussed in significant detail and the rule was drafted to give judge's discretion to appoint an attorney or a GAL. This is the same authority that juvenile court judges have in every juvenile court case. It is ultimately up to the judge to decide whether an attorney should be appointed. Given that judges already have this authority, we did not think that this constituted the judiciary imposing an additional burden on the counties.

The question of venue was also significantly discussed. Case law leads to the conclusion that, when an individual seeks a court order for medical care, the request cannot be conditioned on residency or other similar requirements. Individuals are entitled to seek such orders in any court which might have jurisdiction over the medial care provider. Thus, we have stated that a petition may be filed in any county to ensure its constitutionality.

The rule provides a process for a minor to have a hearing before a judge. The hearing is ultimately the time at which the abortion decision will be made and it is up to a judge to conduct the appropriate inquiry. The legal issues surrounding abortions by minors are fairly complicated. The U.S. Supreme Court has stated that minors have a constitutional right to abortion, but states may require parental consent or notification as long as the state provides a procedure for the minor to bypass the consent and/or notification. The supreme court has stated that the standard for determining whether a minor can bypass parental involvement is whether the minor is capable of consent or the abortion is otherwise in the minor's best interest. In many ways, this is an illusory standard that has confusing bearing on the minor's constitutional rights. The bypass procedure recognizes that the minor's constitutional right cannot ultimately be impeded by parental involvement. However, if this is truly a constitutional right then the standards of "capable of consent" or "best interest" seem out of place. As a constitutional right, an abortion could only be denied if the state had a compelling interest in restricting a particular abortion. The standards therefore seem somewhat illusory and are difficult to apply in this context.

Although I am not available for the meeting, I will be happy to answer any questions before or after the meeting.

TO Katie

FROM THE DESK OF - ***MATTY BRANCH***

Date: 8/31/06

Just received this memo from Brent Johnson. Please provide it to the Juvenile Rules committee in connection with the further work requested by the Supreme Court.

Thanks,
Matty

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MEMORANDUM

To: **Supreme Court**

From: **Brent Johnson, General Counsel**

Re: **Abortion Bypass Procedure**

Date: **August 30, 2006**

This memorandum is a follow-up to my memorandum of July 26, 2006 concerning comments received on the abortion bypass rules. I have researched more case law in hopes of finding more definitive answers on some of the weightier issues. This memorandum is to provide you with a summary of my findings on those issues.

The U.S. Supreme Court has issued only a few decisions on abortions by a minor. The lower court case law is somewhat helpful on these issues, but, of course, there are different interpretations of what the U.S. Supreme Court requires. In looking at statutes and rules, it is evident that some states choose to come as close to the unconstitutional line as possible, while others steer as far away as possible. Unfortunately, this provides little direction on finding happy middle ground. I have researched five over-arching issues and will summarize my findings in each area below.

1. **Venue.** Although many jurisdictions have specifically stated that a petition may be filed in any county, some states limit petitions to the county of residence or the county in which the abortion will be performed. This would then accommodate both residents and non-residents who seek abortions within the state. Some judges and commentators have expressed concern that this might compromise confidentiality of minors who are required to seek permission in their own communities, but I have not found any courts which have struck down such venue limitations.

2. **Expedited Proceedings.** It is clear from the case law that the rules must provide specific time frames within which events must occur. We are not required to have a provision which automatically grants a petition if a hearing is not held, although many states have included such a provision to avoid constitutional infirmities. I do not think that we need to keep the

provision in and we can rely on extraordinary relief procedures and other mechanisms if a judge fails to hold a hearing within the appropriate time frames.

There is a point after which time frames will not be considered expeditious, although it is not certain what those time frames might be. Most states have enacted short time frames for hearings and appeals. I think that the court can rely on the thirty day time frame for filing an appeal, as long as the procedures provide for expedited handling of the appeal once it is filed. Once filed, the appeal should be handled within days, and not weeks.

3. **Confidentiality/Anonymity.** The Supreme Court requires "anonymity of the proceedings." To accommodate this, many states permit minors to file petitions using only initials or a pseudonym. However, as far as I can determine no court has specifically stated that a state must provide this procedure. Most important is to ensure that the minor's identity is protected from everyone except those who are entitled to participate in the bypass proceedings. I believe that we have the procedures in place to protect the confidentiality of minors at all stages of the proceedings. If an abortion case were appealed, similar to current practice, the case file would be sealed at the appellate court and the minor would only be identified through her initials in any published decision.

4. **Notice.** The U.S. Supreme Court has never specifically determined that a state must provide a judicial bypass for parental notification. However, the court has strongly hinted that such a bypass procedure is necessary. States must ensure that a parent cannot exercise a veto over a minor's abortion decision and states must not place other undue burdens on the minor. Lower courts have found parental notification bypass necessary because notification could effectively become a veto if a parent learns of a proceeding and makes certain that the minor does not attend. We could choose to be a test case and require either parental notification of the hearing or parental notification of any order. We would definitely be challenged on that issue. The safest course of action is to restrict notice to those who are directly participating in the proceeding - the minor, her attorney, and anyone invited by the minor - in order to preserve the confidentiality of proceedings and to prevent any parental veto. However, this is making a call beyond anything mentioned in H.B. 85.

5. **Right to Counsel.** Some jurisdictions have specifically held that a minor has a right to counsel in these proceedings and some jurisdictions provide for the appointment of a guardian ad litem to represent the best interest of the minor. The U.S. Supreme Court has stated that a minor must be able to effectively participate in the bypass proceedings and some jurisdictions have held that this means the appointment of counsel, because no minor can effectively navigate the judicial bypass proceedings without the assistance of counsel. I suppose the minor should be informed of the right to counsel, but it might not be necessary to appoint counsel in cases in which it is evident that the petition will be successful. The appointment of a GAL is more controversial, and should perhaps only occur if the minor is determined to be incompetent, but that may delay the proceedings. A trial court judge might decide that it is best to appoint at the beginning.

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