

**SUMMARY MINUTES (DRAFT)
SUPREME COURT'S ADVISORY COMMITTEE
ON THE
RULES OF JUVENILE PROCEDURE
Administrative Office of the Courts
450 South State Street
Judicial Council Room (3rd Floor AOC)
Salt Lake City, Utah
September 29, 2006**

Present

Carol Verdoia
Judge Lindsley
Jeff Noland
Paul Wake
Narda Beas-Nordell
Claudia Page
Nelson Abbott
Kristin Brewer
Brent Bartholomew

Excused

Pam Vickery
Ed Peterson
Alan Sevison
Matty Branch
Judge Steele

Staff

Katie Gregory

Guest

Margaret Plane

Carol Verdoia called the meeting to order and introduced a guest presenter, Margaret Plane, Legal Director of the Utah ACLU. Ms. Plane was invited to discuss the ACLU's comments and position on Utah Rule of Juvenile Procedure 60, regarding judicial bypass procedures for minor's seeking an abortion. The committee received and reviewed the ACLU's comments to Rule 60 at the URJP meeting held on August 4, 2006. Ms. Plane explained that the comments were drafted by the ACLU, Planned Parenthood, the Center for Reproductive Rights and others.

Ms. Plane explained the process used by her organization to research and prepare its comments and the testimony that the ACLU presented to the legislature last session. In June the ACLU held a training for approximately 28 attorneys in the Salt Lake area who are willing to represent minors in this area. The ACLU also invited representatives from the Utah clinics that provide abortions or guidance to minors on the issue. The clinics reported to the ACLU this week that minors seeking an abortion are still coming in with their parents, despite the new law and rule.

Katie Gregory distributed a handout with supplemental comments prepared by the ACLU on four items of concern expressed previously by the URJP committee. These items were:

- Whether to appoint a GAL or other attorney to represent the minor
- Venue provisions
- Whether the minor's request should be deemed granted if the court fails to act
- The timing for filing a notice of appeal

The following issues were then addressed:

Deemed Granted

Judge Lindsley discussed concerns with whether “deemed granted” orders would be considered valid by clinics, physicians, etc. Ms. Plane said the clinics are trained on this issue and are very careful. She believes they will deal with such orders appropriately and that the deemed granted clause would be a rarely used, but necessary protection for a minor. The committee agreed that a court’s refusal to hold the hearing or avoidance of a timely hearing would raise a separate judicial conduct issue. Discussion followed regarding whether a deemed granted provision is constitutionally required. The national ACLU has not encountered a case where the court failed to rule and the state lacked a deemed granted provision. It was assumed that the minor would have to continue using available court process such as an extraordinary writ or appeal.

Confidentiality

On behalf of her clerks, Judge Lindsley raised the issue of how to deal with confidentiality when listing and using phone numbers. The clerks need to contact the minor if a hearing is being set. Ms. Plane suggested training for clerks on the sensitivity of making calls, leaving messages, etc. The group debated methods of obtaining an alternative number for the minor such as a cell phone or text message and whether this should be in the rule or a training issue. Kristin Brewer suggested leaving the phone number off the petition, but allowing the minor to fill out a separate sheet at the counter with a contact phone number. The sheet would then be kept separate and confidential in some manner.

Venue

The committee earlier clarified that venue cannot be limited in proceedings involving a decision to seek medical treatment. Generally, abortions are only available in Salt Lake and the Wasatch Front. While a minor could go to any court for a bypass, it would probably be more convenient to seek the court order and consult a physician/clinic at the same time in Salt Lake City.

Appointing an Attorney/GAL

The ACLU’s position is that minor’s have a right to counsel and the court should appoint an attorney. The ACLU realizes that court appointment may not be realistic in Utah, so the ACLU gave the list of trained attorneys to local clinics to give to minors. The ACLU prefers that attorneys be court appointed rather than pro bono because this would insure that the appointment would happen every time. Kristin asked if the ACLU’s list of trained attorneys could be given to the Juvenile Board to be distributed statewide. Ms. Plane clarified that the attorneys on the list are currently from the Salt Lake City area. It was unclear whether the attorneys on the list would provide pro bono of services or charge a fee.

The committee discussed some of the differences between appointing counsel generally and appointing a GAL to represent the minor’s best interest. Children are appointed a GAL when their interests are adverse to their parents (such as abuse or neglect), which is not the case here. Jeff Noland explained that he sometimes represents teens who have children at risk of removal

by DCFS. He is representing them as their attorney, not as a GAL.

Ms. Plane noted that courts are reluctant to make a best interests finding because it seems to say “go and have an abortion,” where finding the minor is mature gives her a piece of paper and says “take this and make your own decision.” The ACLU takes the position that these proceedings are unique and appointed counsel can represent the minor at all points in the proceeding, even the best interest part of the proceeding.

Discussion followed to compare: 1) the minor’s competency with the competency of adults with a mental disability or diminished capacity to make a similar decision; and 2) the right to counsel in other proceeding such as delinquency. Some members noted that occasionally a child has an attorney and a GAL. The right to a bypass proceeding is a protected liberty interest under the 14th Amendment and a question exists as to whether appointing a GAL may impinge on that interest.

The committee revisited briefly its discussion regarding the difference between appointing a GAL pursuant to 78-3a-912 and appointing counsel pursuant to 78-3a-913. It was unclear if Brent Johnson had analyzed whether a rule that requires a GAL is constitutional. While minor’s constitutional rights vary from adults, they still have a liberty interest in bypassing parental consent. Discussion followed that the bypass proceeding does not have adversarial parties and is more like an ex parte proceeding. No independent fact gathering occurs. An attorney’s duty is to marshal facts that support the client’s position. A GAL, on the other hand, would have to present information regarding the minor’s best interest. The court could ask additional questions if the judge feels that not all the relevant evidence was presented, or appoint a GAL to investigate further.

Deemed Granted

The committee returned to the discussion of whether the bypass should be “deemed granted” if the court fails to hold a hearing within three days. The committee had previously voted against the deemed granted provision, feeling it was inappropriate for a clerk to enter the order in the absence of judicial action. The ACLU favors deemed granted provisions because they have worked in other states and protect the minor. Alternatives were discussed such as allowing the right to appeal if the court took no action in 3 to 5 days, or allowing the minor to file a writ. While the writ is time consuming, the committee agreed that filing a writ would send a clear message if an abuse is occurring. Brent Johnson’s memo said the provision is not constitutionally required, but Brent feels removal of the provision could pose a problem. Members asked if the bypass applies to notice as well as consent. The ACLU believes it should, since the doctor still has to give notice to the parent(s). An Idaho case was discussed in which a reporting requirement was declared unconstitutional because it put the parents on notice.

Timing of Notice of Appeal

The committee explained its concern to Ms. Plane regarding the 3 day requirement to file an appeal and whether this was too difficult for the minor. Ms. Plane was comfortable with extending the time for filing as long as the court’s consideration process is expedited.

Venue

Brent Bartholomew returned to the venue question. He proposed that venue be limited to one of the following, to avoid forum shopping:

Where the abortion is to be performed;

The minor's residence; or

The closest juvenile court to where the minor resides.

The committee took no action, based on its earlier decision to leave the venue provisions as is.

Ms. Plane agreed to speak to ACLU contacts nationally regarding the committee's questions about "best interest" versus attorney appointment and will communicate any information she obtains to Katie. Kristin suggested that it might be analogous to consider whether counsel is appointed for an incompetent adult who needs an abortion.

Carol thanked Ms. Plane for joining the discussion. Kristin reflected that ultimately, any constitutional attack on rule is most likely to come from groups such as the ACLU, so it is important for the URJP to analyze the ACLU's comments and concerns.

The committee will continue its discussion of Rule 60 at its next meeting on October 20, 2006. Katie agreed to invite Brent Johnson to the next meeting.

The committee also plans to continue its discussion of the definitions of minor and child. Carol reported that Judge Steele contacted JJS and JJS representatives agreed to review proposed rule changes based on the new definitions of minor and child and give the committee its comments.

The meeting adjourned.