IN THE FIRST CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE

PLANNED PARENTHOOD ASSOCIATION OF NASHVILLE, INC., et al.,	)	
Plaintiffs,	)	
VS.	)	Case No. 92C-1672
NED R. MCWHERTER, et al.,	)	
Defendants.	)	

For the Plaintiffs

Barry Friedman
Irwin Venick
Elizabeth Thompson
Barbara E. Otten

For the State

Michael Catalano
Andy Bennett

On behalf of Drs. Anthony Trabue and Betty Neff

Russell Heldman

Hamilton Gayden, Jr.,
Circuit Court Judge

O P I N I O N

I. HISTORY

This case is not one of first impression, in that some of the issues involved have been brought before both the state and federal judiciaries on previous occasions. Tennessee's abortion statute was enacted by the Tennessee General Assembly in 1978, and its enactment was followed by an effort to block the enforcement of the two-day waiting period set out in T.C.A. § 39-15-202(6)(d)(1) through a lawsuit instigated by Planned Parenthood of Memphis. A Memphis court enjoined enforcement of the law until the General Assembly in 1979 amended the statute to provide an exception for a woman whose life would be at risk by delaying the abortion. In 1981, the same court, presided over by Judge Harry Wellford, barred the enforcement of the two-day waiting period altogether.

In 1983 and 1984, advisory opinions were issued by the state attorney general's office to the effect that the waiting period (along with other disputed provisions of the abortion law) should not be enforced. These opinions were the result of recent federal court rulings on abortion at that time.

Planned Parenthood of Pennsylvania v. Casey (1), a June 29, 1992, United States Supreme Court ruling, reaffirmed the basic right to first-trimester abortions, but the Court upheld a Pennsylvania abortion law which mandated a 24-hour waiting period requirement. This decision was interpreted by some in this state to give new impetus to the dormant Tennessee abortion statutes.

Meanwhile, in Tennessee, a Knoxville doctor was criminally indicted for allegedly performing a clinic abortion in 1990 on a 15-year-old girl who was more than three months pregnant. (2)

In 1992, Jane Emancipation v. State of Tennessee (3) was filed in the Chancery Court of Knox County, and was subsequently transferred by agreement to the Davidson County Chancery Court. Shortly after the Jane Emancipation case was filed in Knoxville, but before its transfer to Davidson County, the present case was filed in this Court. After disposing of numerous preliminary motions to consolidate the two Tennessee cases and/or transfer this case to Chancery Court, the trial on its merits proceeded in this Court.

INTRODUCTION

Plaintiffs are challenging five provisions of Tennessee's abortion statute, and although the state conceded the unconstitutionality of two of those provisions, this Court invited counsel to make offers of proof on the issue of residency and notification to parents with regard to minors. As this case developed, it became apparent to this Court that the provisions of the Tennessee abortion statute relating to minors should not be disposed of by

default, and the Court had to look at this provision also irrespective of the "no contest" position of the defendant.

This is a declaratory judgment action asking the Court to declare certain provisions unconstitutional. A declaratory judgment action is in the nature of a summary judgment proceeding, and the Court accepted into evidence affidavits as well as other evidence.

The plaintiffs are challenging the validity of four provisions that: (1) require physicians to give certain information about benefits and risks to every woman seeking an abortion; (2) make patients wait at least two days, exclusive of the day of the initial clinic visit, before having an abortion; (3) require second trimester abortions to be performed in a hospital; and (4) require notice to a minor's (age 18 or under) parents or guardian.

The attorney general is not defending the validity of the provisions that: (1) restrict abortions to residents of Tennessee; and (2) require that a minor's parents be notified before she receives an abortion. However, after the appointment of the four court-appointed experts, the Court pronounced that it would make a definitive ruling on all of the provisions of the statutes, including the residency requirement and parental notification provisions.

Since there is no proof in the record to support the residency requirement, the Court rules this provision unconstitutional by default. This provision is a blatant violation of the privileges and immunities clause of the federal Constitution; it also denies a woman equal protection under both the Tennessee and United States constitution.

O P I N I O N

THE COURT'S RULING

1) The Court declares the requirement that a woman seeking to procure an abortion in this state prove that she is a bonafide resident of Tennessee to be unconstitutional;

2) This Court will uphold the validity and constitutionality of Tennessee's abortion statute with regard to the informed consent provision, with broad construction as to some of the provisions, and with the exception of T.C.A. § 39-15-201(b)(4), which the Court finds to be misleading and untruthful if required in every case;

3) The Court finds that the provision requiring that second trimester abortions be performed in a hospital is not unconstitutional, after construing the term "hospital" to include "ambulatory surgical center" for the purposes of performing abortions up to eighteen (18) weeks from the first day of the last menstrual period, or 16 weeks from conception, after which abortions must be performed in a licensed hospital only;

4) This Court finds that the two (2) day waiting period is unconstitutional;

5) This Court finds that the requirement of notice to the parents of a pregnant minor woman is not unconstitutional, with broad construction to the term "health" in the "life and health" exception, and interpreting the word "parents" to not be intended to require notice to two parents. A waiting period for minors of 48 hours after parental or guardian notification is constitutional.

ISSUES IN DISPUTE

I. INFORMED CONSENT PURSUANT TO T.C.A. § 39-15-202:

This provision requires that written consent be obtained from the pregnant woman prior to the operation, and that this consent shall be given only **after** she has been orally informed by her **attending physician** of numerous facts, including (paraphrased):

(1) that she is indeed pregnant;

(2) the number of probable elapsed **weeks** since conception;

(3) that if more than twenty-four weeks have elapsed from the time of conception, her child may be viable, and that if such child is prematurely born alive in the course of an abortion, her attending physician has a legal obligation to take steps to preserve the life and health of the child;

(4) that abortion in a considerable number of cases constitutes "major surgery";

(5) that numerous public and private agencies and services are available to assist her during pregnancy and after birth if she chooses not to have an abortion, and that her physician will provide her with a list of such agencies and services if she so requests; **or**

(6) disclose and explain the benefits and risks involved in either continued pregnancy and childbirth or in abortion;

(7) inform the patient of the particular risks associated with her pregnancy and childbirth and the abortion or child delivery technique to be employed, and give a general description of the medical instructions to be followed after abortion or childbirth.

II. WAITING PERIOD PURSUANT TO T.C.A. § 39-15-202(6)(D)(1):

This provision mandates a two (2) day waiting period after the physician provides the required information, excluding the day on which such information was given (provides that the patient may return and sign a consent form on the third day following the day on which the information set forth in § 39-15-202 (1) through (6) was given). This subsection makes noncompliance by a physician a Class E

felony. The only exception to the required waiting period is where the waiting period would "endanger the life of the pregnant woman".

III. **NOTIFICATION TO PARENTS OF MINOR PURSUANT TO T.C.A. § 39-15-202(F)(1):**

The attending physician or agency is required under this subsection, when the patient is less than eighteen (18) years of age to **inform** the "parents or legal guardians of such minor" that the abortion is to be performed two (2) days prior to the operation. This provision clearly indicates that parental **consent** is not required, and in fact, parental **objection** is inconsequential to the physician's right to perform the abortion procedure. Exceptions are: (1) emancipation; or (2) where the physician determines that the abortion is necessary to preserve the **life** or **health** of the patient and must be performed prior to the expiration of the two (2) day notice period.

IV. **SECOND TRIMESTER ABORTIONS TO BE PERFORMED IN A HOSPITAL PURSUANT TO T.C.A. § 39-15-201(c)(2):**

This subsection provides in pertinent part that after three (3) **months**, but before viability of the fetus, the procedure must be performed in a hospital.

RATIONALE

It should be noted that the Tennessee abortion statutes have been unenforced for over a decade. This Court is called upon to adjudicate a statutory scheme that in some respects may seem obsolete. However, in reviewing the universally accepted medical standards for abortions, many of the controversies are solved by reasonable interpretation. This decision - and this Court's interpretation, construction, and definitions - may be changed, altered, overruled or legislated away, and this Court comprehends

that process. The interpretations are thus subject to other possible developments; however, until such time as there is further action, these interpretations will be in full force and effect subject to appeal and/or legislative enactment.

The Court will, however, also issue a permanent injunction, the terms of which are effective immediately.

INFORMED CONSENT- INFORMATION GIVEN BY ATTENDING PHYSICIAN

T.C.A. § 39-15-202(b)(1 - 6)

When determining whether or not the requirements set forth in this informed consent provision of our statute are vague and uncertain or unconstitutional, this Court considers it appropriate and necessary to refer to the standards and guidelines implemented by the medical associations set forth in various medical journals and publications, with particular emphasis on the appropriate standards adopted by the American College of Obstetrics and Gynecology (referred to hereafter as **ACOG**) and the guidelines of the American Medical Association (referred to hereafter as **AMA**).

These ACOG and AMA standards are admissible in any judicial proceeding, whether administrative, civil or criminal; in fact, these standards generally serve as a check and balance on practicing physicians, and violation of such standards may establish a prima facia case of negligence or unprofessional conduct on part of the noncomplying physician in a medical malpractice lawsuit. Accordingly, the standards and guidelines adopted by the ACOG and AMA would be in full force and effect irrespective of the provisions of Tennessee's abortion statute.

Informed consent is a requirement that is imposed not arbitrarily nor prejudicially upon physicians performing the particular surgical procedure of abortions. Securing informed consent from a patient is a basic requirement for any surgical

procedure, whether that surgery be considered minor or major. Tennessee has a general informed consent statute set forth in T.C.A. § 29-26-118, which states:

> **Proving inadequacy of consent.** In a malpractice action, the plaintiff shall prove by evidence as required by § 29-26-115(b) that the defendant did not supply appropriate information to the patient in obtaining his informed consent (to the procedure out of which plaintiff's claim allegedly arose) in accordance with the recognized standard of acceptable professional practice in the profession and in the specialty, if any, and that the defendant practices in the community in which he practices and in similar communities."

There are abundant health and public policy reasons for this requirement. One reason is that every patient, with few exceptions, has the right of self-decision; that is, the patient should make his or her own determination on any treatment suggested by any physician. "The patient's right of self-decision can be effectively exercised only if the patient possesses enough information to enable an intelligent choice." **(4)**

Two questions are proposed to this Court by plaintiffs: (1) whether some or all of the facts set forth in the statute that are to be disclosed to the patient by the physician are confusing, misleading, or irrelevant; and (2) whether the requirement that the "attending physician" personally transmit this information to the patient is unduly burdensome for such physician.

At the outset, this Court notes that, to its knowledge, "irrrelevancy" is not a ground for declaring a forum's statute unconstitutional. This court is unable to find any case from a superior court that deals with the unconstitutionality of provisions on the grounds that these provisions are "irrelevant." However, constitutionality of a provision may be attacked where such provision is determined to be "misleading", "confusing", "vague", or "unduly burdensome".

In fact, the "undue burden" standard is "the most appropriate means of reconciling the state's interest with the woman's constitutionally protected liberty.(5) An undue burden is an unconstitutional burden (6). In the Court's opinion, an undue burden is imposed where a forum's statute places a "**substantial obstacle (emphasis added)** in the path of a woman seeking an abortion of a nonviable fetus." (7)

Even where a provision is designed to persuade a woman to choose childbirth over abortion, it will be upheld if it does not constitute an undue burden. Such regulations intended to foster the health of a woman seeking an abortion are valid, in that they are consistent with the state's interest in preserving the life of the unborn. Necessary health or safety regulations may be enacted by the State in abortion and any medical procedure. (8) Procreational autonomy by its own meaning may also encompass a patient-physician autonomous relationship; a sound procreational decision must be based on sufficient knowledge.

The state does have a substantial interest in potential life; hence, not all regulations are unwarranted.(9) The legislation, however, must be "calculated to inform the woman's free choice, not hinder it." (10) It follows that even if a state law does indeed further the interest in potential life, yet still places a substantial obstacle in the path of a woman's choice, its enforce ment cannot be permissible. (11)

A woman must understand the full consequences of her decision with regard to abortion (or any surgical procedure); in attempting to ensure that a woman be apprised of such consequences, a state may require that information that is not misleading or untruthful be given to her as a prerequisite for an abortion. In fact, any surgical procedure necessitates this same standard. Physicians are in the habit of explaining all benefits and risks of any treatment or surgical procedure, regardless of how minimal that risk may be

in comparison with the benefits. The state's requirements of the providing of some information to the woman furthers the legitimate purpose of reducing the possibility that a woman may discover at some time after the abortion that her decision was not fully informed, resulting in devastating psychological consequences. (12) Furthermore, "it cannot be questioned that psychological well-being is a facet of health." (13)

This Court is of the opinion that the standards set forth by both the AMA and the ACOG reasonably depict the ideal text of communication between physician and patient, posing no undue burden upon such physician.

The American Medical Association, on the subject of informed consent, provides that:

> "The patient's right of self-decision can be effectively exercised only if the patient possesses enough information to enable an intelligent choice. The patient should make his or her own determination on treatment. The physician's obligation is to present the medical facts accurately to the patient or to the individual responsible for the patient's care and to make recommendations for management in accordance with good medical practice. The physician has an ethical obligation to help the patient make choices from among the therapeutic alternatives consistent with good medical practice. Informed consent is a basic social policy for which exceptions are permitted (1) where the patient is unconscious or otherwise incapable of consenting and harm from failure to treat is imminent; or (2) when risk-disclosure poses such a serious psychological threat of detriment to the patient as to be medically contraindicated. Social policy does not accept the paternalistic view that the physician may remain silent because divulgence might prompt the patient to forego needed therapy. Rational, informed patients should not be expected to act uniformly, even under similar circumstances, in agreeing to or refusing treatment." (I, II, III, IV, V). (14)

The ACOG standards are compatible with the standards of the AMA, stating that:

> "It is the physician's responsibility to inform the patient of the nature of the surgical or medical procedure being recommended. In most cases, the explanation should encompass the nature of the condition or illness that requires medical or surgical interven-

> tion, the recommended course of treatment and its alternatives, the risks and potential complications of the treatment, and its relative chances of success. The patient should have an adequate opportunity to ask questions in order to ensure that she understands the information. The physician should note in the patient's record that the proposed treatment and its risks have been explained and discussed with the patient and should document the patient's decision." **(15)**

The plaintiffs in the case before this Court challenge not only some of the facts required to be set forth to the patient seeking an abortion, but also the requirement that the physician him or her self, as opposed to a qualified assistant, provide this information to the woman. City of Akron v. Akron Center for Reproductive Health, Inc., et al., decided in 1983, **(16)** held that the state may not require that a physician, as opposed to a qualified assistant, provide information relevant to a woman's informed consent. However, Casey **(17)**, reconsidered this very holding, concluding that the requirement was not an undue burden, and that the federal Constitution "gives the States broad latitude to decide that particular functions may be performed only by licensed professionals, **even if an objective assessment might suggest that those same tasks could be performed by others." (18)** This Court adopts this reasoning, and thus disposes of plaintiff's argument that this requirement places an undue burden on physicians. To rule otherwise would render an anomalous situation whereby the legal standard for notification by an attending physician providing abortions would differ from the standard in all other uniformly-required informed consent by the attending physician in other types of operations, and would thus be a ruling inconsistent with the universally accepted medical standards. However, it is clear to the Court that the process of informed consent may and usually does begin with others, for example, with those on the attending physician's staff or even with another physician who originally diagnosed the patient's pregnancy. If the woman has received counseling elsewhere, the physician who is to perform the abortion must **verify** that such counseling has taken place **(19)**, and the physician must **confirm** that the patient is

fully aware of the items required to be imparted to her in order that she be fully informed by proper documentation on the patient's records. The ultimate question, however, to be addressed where an issue arises as to whether a patient gave her informed consent is whether or not the patient was actually supplied adequate information to enable her to make an autonomous decision; this requirement that physicians administer the information under this provision should not be used as a crutch by women litigants who have an abortion only to discover later that they made a decision contrary to their social or moral values, and are suffering emotional trauma and regret as a result of their personal decisions, and not as a result of ignorance of the risks, benefits, and available agencies.

As to the particular statutory requirements, it is necessary for the Court to approach each of the statements of fact set forth in T.C.A. § 39-15-202(b)(1-6) separately to determine whether any or all of these facts are misleading, confusing, or vague to the patient, or if any or all of the same are unduly burdensome for the physician.

Subsection (1) requires that the physician tell the patient that she is indeed pregnant. This requires little, if any, discussion, since it is undisputed that pregnancy is a necessary prerequisite for an abortion.

Subsection (2) of this provision is likewise of great relevance to a woman contemplating abortion, and requiring the physician him or her self to relate this information is in fact desirous, since the information may necessitate a distinction between conception and implantation, which is within the realm of the medical doctor's expertise;

Subsection (3) of this section, which has been met with great controversy, initially struck this Court as a possible attempt on behalf of the legislature to utilize "scare tactics" in influencing the woman to change her mind about an abortion, or in the alternative, to inflict emotional and psychological trauma on a woman considering such procedure. Some of the testimony in this case has indicated that this information (which discusses the possible viability of a 24 week-old fetus), when given to every woman, may be irrelevant, and merely serves to confuse and frighten the patient. However, conflicting testimony (20) demonstrated that this information <u>is</u> relevant in every circumstance, because a woman who is still undecided in her decision to have an abortion, may leave the physician's office in order to think about it, and in doing so, she may not reach her decision until days, even weeks, later.

If the woman is near the second trimester of her pregnancy, she certainly should be aware of the fact that she must have an abortion after 14 weeks from the first day of her last menstrual period (or 12 weeks from conception) in a hospital or free-standing qualified "ambulatory surgical center", as opposed to a physician's office or clinic, and that if she waits until 18 weeks (or 16 weeks from conception) from last menstrual period, the procedure may be performed only in a hospital, pursuant to ACOG standards. (The Court will discuss clinic-hospital limits herein.) She should also know that if her decision is not reached until closer to 24 weeks (or any other period which the physician determines to be accurate in the exercise of his or her medical judgment), there is a potentiality of a viable fetus, and in that case, the physician has the legal duty to preserve the life and health of the fetus to the best of his or her ability. Even if every woman is not approaching that stage of her pregnancy, the information certainly is necessary if she has not yet reached a decision, to confirm her understanding of the consequences should she wait too long. Furthermore, even if this information is not relevant to every patient, this Court will

not consider that irrelevancy a legitimate basis for declaring such requirement unconstitutional, as discussed previously. Moreover, this Court finds that the burden placed upon the physician by this requirement is outweighed by any benefits the information will cast upon a patient, even if only one patient is in fact affected by such information.

This Court perceives this information as being relevant and even necessary in more circumstances than indicated by testimony of plaintiff's experts. For example, if a woman is experiencing a difficult time in deciding whether or not to have an abortion, she obviously needs to be allowed to have a sufficient time to reflect. If this particular woman is sent away in order for her to contemplate further without any information regarding the time frame not only for the possibility of the fetus reaching viability, but also for the hospitalization requirement involved in a second trimester abortion, then her decision may come too late, either due to financial reasons or emotional reasons.

The requirement that the physician apprise all patients of this particular fact does not appear to be misleading or confusing to this Court, and would assist a woman in her decision-making process. Furthermore, if the primary purpose of this legislation is to protect the health and safety of the woman and the unborn fetus, a provision that appears to be overly restrictive to some physicians would better serve the state's purposes than an invalidation of that provision, which may ultimately defeat the very purpose for which is was enacted. In fact, the Court suggests that it makes complete sense for a physician to inform the patient during the giving of this information that the abortion process increases in risk as the pregnancy progresses.

Subsection (4), which requires the physician to state that an abortion in a considerable number of cases constitutes a major surgical procedure, may direct such physician to mislead his patient. Testimony has revealed that a first trimester abortion is

a relatively uncomplicated procedure of short duration (21) and may have, in fact, less risks than carrying the fetus to full term and childbirth. (22). Even perforation of the uterus may be considered merely a complication of a minor surgical procedure, rather than launching that procedure as a whole into a "major surgical procedure" classification (23). To this Court, the term "consider able number of cases" potentially carries with it an implication, particularly for an emotionally traumatized woman who is considering undergoing such operation, that the routine abortion procedure is more dangerous to the woman's health than it in fact is. Certainly any physician may include this information in his or her list of communications, but to mandate that a physician tell every patient this information is unconstitutional in that it is misleading and possibly untruthful. This information should, however, be communicated to the patient under the general AMA and ACOG guidelines where the unusual medical situation is such that it could, in fact, constitute major surgery.

Subsection 5 requires that the physician tell the patient that numerous agencies and services are available to assist her during her pregnancy and afterward if she chooses to continue pregnancy and either keep her child or place that child for adoption, and that the physician will provide her with a list of such agencies and services if she so requests.

This Court again adopts the Court's holding in Casey, which suggests in pertinent part:

> "...requiring that the woman be informed of the availability of information relating to fetal development and the assistance available should she decide to carry the pregnancy to full term is a reasonable measure to insure an informed choice, one which might cause the woman to choose childbirth over abortion. This requirement cannot be considered a substantial obstacle to obtaining an abortion, and it follows, there is no undue burden." (24)

However, the Court gives the word "numerous" a generic definition: It is only when a patient requests specific references that a physician would then be required to list only those agencies reasonably known by the physician. For instance, a physician's

knowledge of agencies in the Memphis area may be different from those in a detached area, such as those in another state or even city. It makes sense to restrict the physician's "numerous" reference to only existing agencies in the surrounding area of the physician's location of practice, since the physician may have little or no knowledge of the availability level of agencies in other geographical areas.

The Court acknowledges that the word "or" was placed in the statute between subsections (5) and (6) by editorial mistake. (See exhibit 45.) The word "or" is therefore stricken from the statute.

Subsection 6 requires the physician to tell the patient that numerous benefits and risks are attendant either to continued pregnancy and childbirth or to abortion, and to explain the risks and benefits applicable to her particular situation with specific detail to the best of his or her knowledge and ability.

This provision, even more so than subsection 5 discussed above, is not misleading to the patient, does not require the physician to be untruthful, and does not pose an undue burden on the physician. Without question, the risks and benefits applicable to each particular patient should be discussed at length with the patient, in an effort to ensure that the woman is fully informed of all of the risks and benefits not only inherent in an abortion procedure, but also those that are specific to her personal health and risk factors.

Finally, the Court finds that the pre-abortion procedures, counseling, and educational process offered to patients by Family Planning meets a high standard of professionalism; nothing herein is intended to discourage that process which would assuredly facilitate the job of the attending physician in the area of informed consent.

THE WAITING PERIOD
T.C.A. § 39-15-202(d)(1)

The next provision of our state's law on abortion set forth is T.C.A. § 39-15-202(d)(1), which reads:

> "There shall be a two (2) day waiting period after the physician provides the required information, excluding the day on which such information was given. On the third day following the day such information was given, the patient may return to the physician and sign a consent form."

Subsection (d)(3) of this provision further states:

> " This subsection shall not apply when the attending physician, utilizing his experience, judgment, or professional competence, determines that a two (2) day waiting period or any waiting period would endanger the life of the pregnant woman. Such determination made by the attending physician shall be in writing and shall state his medical reasons upon which he bases his opinion that the waiting period would endanger the life of the pregnant woman. This provision shall not relieve the attending physician of his duty to the pregnant woman to inform her of the facts under subsection (b)."

First, in this Court's opinion, the issue of the waiting period has been decided previously by a federal district court of this state, thus possibly binding upon this Court with respect to this issue. Judge Harry Wellford, Judge of the United States District Court for the Western District of Tennessee, rendered an opinion as to this identical provision in 1981 in Planned Parent hood of Memphis, et al. v. Lamar Alexander, et al. (25). This Court has been unable to determine that there has been a decision from an appellate court in this case to serve as a reversal or modification of that decision. If no such opinion was rendered, and if the legislature failed to amend the statute after 1981 (and there is no showing in the record of any such amendment), then there is an outstanding permanent injunction, barring enforcement of the waiting period as sought by the plaintiffs in that case, which decision could be characterized as the "law of the case" and thus binding on this Court.

While the Tennessee Supreme Court is technically not bound by federal district court opinions or federal rules, "there is merit in uniformity , and a difference between a rule of law followed in federal trial courts and Tennessee's own state courts is always

undesirable. (26)"

However, in an attempt to establish a record for purposes of an appeal, this Court will go further and address the validity or invalidity of such waiting period as tested by the United States Constitution and the Constitution of Tennessee.

The Court is not convinced that the state's interest is reasonably served by requiring a rigid two day waiting period.

The Supreme Court's 1983 decision in Akron I struck down a 24-hour waiting period, finding that the state's interest that the woman's decision be informed was not reasonably served by such requirement, and in fact imposed a "significant obstacle", in that it increased costs and decreased availability of abortion services. That case rejected the state's contention that the requirement is a reasonable health regulation. (27)

However, as previously noted, Casey (28) upheld a similar provision of Pennsylvania's abortion statute, specifically rejecting the Court's reasoning in Akron I, finding the statute's exception where there is a medical emergency sufficient to uphold its validity, and concluding that a 24-hour delay does not create any "appreciable health risk". (29)

Referring to Judge Wellford's decision in Planned Parenthood of Memphis, it must be mentioned that the plaintiffs in that case, similar to the plaintiffs in the case at hand, testified that the waiting period "resulted in some increased risk, inflicted psychological stress and/or imposed unnecessary social and economic hardships upon the woman"(30). The state's argument was that its interest in unborn human life may be furthered by the waiting period, since some women will change their mind and decide childbirth over abortion if they have adequate time to consider it; the state further proposed that such wait may insure that the decision is thoroughly considered and "may prevent post-decisional regret". (31)

This Court now must decide whether the state, with the imposition of a two-day waiting period (exclusive of the day on which the relevant information is provided to the patient), has thrown a significant obstacle or undue burden on the woman's right to choose an abortion "as a protected liberty" within the meaning of Roe v. Wade (32). In Mahoning, the Court interpreted the law in this area as a determination of whether or not there is a "significant restraint" on the "woman's autonomy" and that of her physician, concluding that the regulation of **first-trimester abortions** (emphasis added) is constitutionally suspect (33).

The Court in the afore-mentioned case relied on Charles v. Carey (34), which explained:

> "If the interference is sufficiently substantial and not de minimus, the State has to show the compelling basis for the law, that is, that the burden is not "undue" or unjustifiable...the State must justify the impact of the law on this fundamental right by a demonstrable compelling interest."

The waiting period prescribed by the Tennessee abortion statute would either be two or three days, 48 or 72 hours, depending on one's interpretation. In any respect, the time frame would be at least twice that of the 24-hour waiting period required in the Pennsylvania statute. This Court holds that a 48-hour waiting period is unduly burdensome under federal constitutional standards and is unconstitutional.

Looking at state law, the time frame is nonetheless a burden in too many probable medical and psychological profiles of women who have no need to wait, and who do not want to wait. A rigid time period is an affront to the patient-physician autonomous relationship and a woman's right not to procreate.

What is a proper measure for a patient-physician autonomous decision? The time frame set forth under ACOG standards is "a sufficient time for reflection"(35), and is purposely variable and

flexible in order that the physician, in counsel with the patient, can best judge what would be a sufficient amount of time as a part of the autonomous physician-patient relationship.

To fix an inflexible amount of time in every case is to predefine the autonomy of the decision, and thus, the decision would not be time-voluntary. In many cases, this may be medically and/or psychologically inadvisable.

The Court is of the opinion that any inflexible time waiting period other than a sufficient amount of time poses an undue burden upon the right of privacy standard of a patient and her right to procreational autonomy as defined in the case of Davis v. Davis **(36)** and is violative of the Constitution of the State of Tennessee. In addition, this Court holds that an essential part of a patient's procreational autonomy is her right to enter into a flexible patient-physician autonomous relationship and to mutually determine what is a sufficient amount of time for her to reflect in order to make an informed decision.

This Court is also of the opinion that the requirement of a two-day waiting period does not further the state's interest in informed consent, at least not enough to override the woman's right to autonomy and to be free of unwarranted governmental intrusion when making such decision, and is likewise unconstitutional under the constitution of the State of Tennessee.

This Court concedes that a woman contemplating an abortion should be allowed "sufficient time for reflection" before she makes an informed decision. **(37)** However, a "sufficient amount of time" varies with each individual woman, and the inflexibility of a two-day waiting period as it applies to every woman except in a medical emergency situation requires its invalidation. The majority of the expert testimony seemed to acquiesce in the fact that most women have seriously contemplated their decision before making their

appointment with a clinic or physician's office; several of the witnesses testified that many of the patients at Planned Parenthood were referred by other private physicians, indicating that the woman already has at the very least a basic understanding of her situation and the decisions now before her. To mandate that she wait even longer insults the intelligence and decision-making capabilities of a woman, where a woman has shown that she has thought about her options and is ready to proceed. This would not relieve the physician from informing her of all the requirements in 39-15-202 (b)(1-6) [excluding (4)]; however, if upon hearing all of the relevant information provided by the physician, the woman insists that she is fully informed of the risks, benefits, and alternatives to her decision, an imposition of an additional delay would serve as a "substantial obstacle" to her decision to have an abortion. Certainly, if a woman is uncertain or is displaying signs of emotional instability or uncertainty, the physician may require that the woman take additional time (which amount of time would vary in each individual case) to consider the consequences of her decision. To require that every woman wait for a minimum of two days without flexibility, except where there is a medical emergency, is unconstitutional.

The Court points out that its declaration of unconstitutional ity with regard to this particular provisional waiting period is independent of the 48-hour waiting period imposed upon a minor who is seeking an abortion under T.C.A. § 39-15-202(f), and this Court has not, in its decision regarding a waiting period, declared the waiting period applicable to minors unconstitutional.

HOSPITAL AND CLINIC RESTRICTIONS

T.C.A. § 39-15-202(c)(2)

T.C.A. § 39-15-201(c)(2) requires that abortions during the second trimester be performed in a licensed hospital. Plaintiffs have challenged this restriction on the ground that it limits the availability of abortion services for those who may not be able to afford the costs associated with hospitalization, and on the ground that it is vague.

The Court is of the opinion that since this restriction "does not prevent anyone who has waited until the second trimester from having an abortion, but only regulates where the abortion can occur", it does not place an undue burden upon a woman's right to choose an abortion, and in fact furthers the purpose supporting the legislation - that of protecting the health and safety of a woman seeking an abortion.

The second trimester hospitalization requirement is not inconsistent with the ACOG standards (38), which provides that abortions in the physician's office or outpatient clinic should be limited to those performed within 14 weeks from the first day of the last menstrual period (or 12 weeks from conception), and those performed within 18 weeks from that date (or 16 weeks from conception) should be performed in a hospital-based or free-standing surgical facility.

In fact, testimony has indicated that the reason that second trimester abortions are less available in Nashville is not due to the requirement that they be performed in a hospital (which significantly increases the cost), but because very few physicians are willing to perform them due to the increased risks - both to the woman's health and to the potential liability to the physician resulting from performance of such procedure - that are involved (39).

This Court, subject to appellate review and/or legislative enactment, will interpret any vagueness with regard to what exactly constitutes a second trimester, which is defined as "a period of 3 months; one-third of the length of a pregnancy", **(40)** by construing the meaning of "the first three months of pregnancy" to be synonymous with "the first trimester". This would allow a physician to rely upon his own medically accepted method of dating a pregnancy, pursuant to his own medical judgment, from the first day of a woman's last menstrual period, conception, or implantation, without being subjected to criminal liability under the provision. **(41)**

This Court notes that the proof in this case is that second-trimester abortions are performed in the Nashville community in "ambulatory surgical centers", which are not licensed as hospitals and as such would appear to go beyond the intent of the legislature. However, this Court defines a "ambulatory surgical center" as a hospital for the purpose of an abortion procedure up to eighteen (18) weeks from the first day of the last menstrual period (or 16 weeks from conception). This appears to be in conformity with universally accepted medical practice as provided by the ACOG standards **(42)**.

The licensing procedures for "ambulatory surgical centers", which are primarily medical service centers that came into existence after the Tennessee abortion statute was enacted, is a separate matter. These centers have resulted from advanced medical technology and care, and are also the product of an attempt to lower costs to patients. The Court cannot determine which of these centers may qualify as such facilities, and it relies upon the standards set forth by ACOG with regard to the qualification as such, which state that the:

> "instruments, equipment, and supplies used in the ambulatory surgical facility should be equivalent to those used for similar procedures in an accredited hospital"

RESTRICTIONS ON MINORS
T.C.A. § 39-15-202(f)(1)

Finally, this Court is faced with the question of whether or not the requirement under **T.C.A. § 39-15-202(f)(1)**, which requires that a physician who is to perform an abortion on a minor of less than eighteen years of age to inform the parents or legal guardians two days prior to the abortion that the abortion is to be performed, is a violation of the minor's privacy, and is unduly burdensome to the parties. This notification requirement does not apply if the minor is emancipated by marriage, or if the attending physician determines that, in his best medical judgment, the abortion is necessary to preserve the life or health of the pregnant woman and must be performed prior to the expiration of the two (2) day period. The Court points out that the statute requires that notice be given to parents, but consent of parents is not required, and in fact, parents are not authorized to object to, prevent, or alter the decision of the minor to proceed with the abortion.

The requirement to notify a parent is waived if the minor's life or health is in jeopardy. The statute does not provide for a judicial bypass - a procedure allowing the minor to obtain court approval if the child can show to such court that there is a legitimate need to make the decision without parental notification.

The plaintiffs argue that the lack of a judicial bypass is determinative of the unconstitutionality of this provision; the Attorney General has declined to defend this statute for that very reason. However, during the course of the proceedings, the Court determined that it has the duty and power to make a declaration concerning the constitutionality of this statute, pursuant to the Tennessee Declaratory Judgment Act, despite the fact that the Attorney General has chosen not to defend such. It became apparent

to the Court that it should consider the constitutionality of the parental notification provision (as well as the in-state residency requirement of T.C.A. § 39-15-201[d]), and not just the statutory provisions which were being contested by Plaintiffs and defended by the Attorney General.

On October 1, 1992, the Court invited the Court-appointed expert witnesses for the Defendants and also the Plaintiffs, through counsel, to submit written offers of proof to the Court prior to trial, including affidavits and exhibits on the issue of the parental notification statute, as well as the in-state residency statute. On October 7, 1992, the Court also notified Plaintiffs, Defendants, and the court-appointed expert witnesses, through counsel, that the Court would permit the examination of witnesses in question and answer form at trial on the parental notification issue if any of the participants at trial chose to do so, and that it would allow private counsel on behalf of Drs. Anthony Trabue and Betty Neff to participate fully in the examination of witnesses on this issue. The Court invited briefs on reasons advanced for the constitutionality or unconstitutionality of this provision. Drs. Trabue and Neff, through their counsel, accepted the Court's invitation to submit proof on the issue of constitutionality of the parental notification statute. The Court realized that Drs. Trabue and Neff, two Court-appointed experts who previously sought to intervene as parties to defend this statute, were in fact defending the parental notification statute. Therefore, the Court turned its attention to that statute.

Accordingly, the Court received into the record exhibits and affidavits, along with memoranda of law, from the Court-appointed expert witnesses Drs. Trabue and Neff and Plaintiffs, addressing the constitutionality of the parental notification requirement. Upon review, it appeared to the Court that Plaintiffs had included the issue of the parental notification statute in their questioning of Dr. Trabue during the taking of his discovery deposition. The Court therefore considered these exhibits and affidavits as

evidence, the testimony at trial and the entire record in this cause in making its determination on the parental notification issue.

According to the testimony of both physicians appointed by the Court, it is consistent with the current standard of medical care in Tennessee concerning the performance of surgical procedures upon minors for the physician performing an abortion to notify at least one parent before performing such a procedure upon a minor.

The term "health" as used in the "life and health" exception must be given broad meaning, not only to include cases involving physical health, but also to encompass emotional and psychological factors, whether actual or as perceived by the attending physician pursuant to his best medical judgment, deduced from objective or subjective history or evidence. This may include reasonable fear of abuse, incest, rape, harassment or ridicule, threats of suicide, hysteria, or any other mental or physical justifiable reason to waive the notification, and thus the 48-hour waiting period.

Although this ruling appears to afford the physician great latitude in making the decision to notify or not to notify either parent, the Court points out that this must be a good faith decision of the physician, and the discretion given such physician may be abused and subject to scrutiny if there is any indication that the physician chose not to notify at least one of the parents in the absence of exigent circumstances.

With regard to the word "parents" instead of "parent", which is used in this provision when it refers to notification, this Court finds that the statute may be reasonably and constitutionally construed to require notice to one parent or to either parent based upon consideration of the legislative debates and history concern ing this statute (48). As construed as a one parent notification statute, the statute is constitutional without an accompanying

judicial by-pass procedure. If the Court were to construe "parents" as requiring notification to two or both parents in all circumstances, then the Court would likely have to conclude under that the statute is unconstitutional. The ultimate resolution of this issue is one of statutory interpretation as set forth in State v. Netto (49), which states that:

> "Courts should, if possible, sustain the validity of a statute and should not construe it in a manner which would defeat it...In construing a statute, all sections are to be construed together in light of the general purpose, plan, evil to be remedied, and object to be attained, and if the language is susceptible of more than one construction, the statute should receive the construction that will effect rather than defeat its purpose."

It is the duty of the courts to hold acts of the legislature constitutional if it is possible to do so, resolving every reasonable doubt in favor of constitutionality. (50)

When a statute may be given more than one reasonable interpretation, and one construction would render the statute constitutional and one would not, we must choose that construction which validates the provision. The Court in Mitchell v. Mitchell, (51) held:

> "We will not declare a statute unconstitutional when we are reasonably able to do otherwise -- to preserve its meaning and purpose through a constitutionally correct construction."

The Court finds that the term "parents", as well as "guardians," may be given a reasonable interpretation which would constitutionally validate this statute under the case law herein above enumerated. Thus, the term "parents" will receive construction in order to "effect rather than defeat its purpose." (52)

Therefore, the Court declares that the term "parents" in T.C.A. § 39-15-202(f) means one parent or either parent. In declaring that the term "parents" means the singular of the term "parent", the Court further declares that T.C.A. § 39-15-202(f) requires the attending physician or agency performing the abortion to notify only one parent or either parent. The same is true for

the term "guardians", unless there is but one parent or guardian.

The Court reaches this conclusion upon consideration of the following:

1. At the time that the Tennessee Legislature enacted T.C.A. § 39-15-202(f) in 1989, it had already enacted T.C.A. § 36-1-201, et seq., concerning adoption and medical assistance of minors. Article III(4) of T.C.A. § 36-1-201 defines "parents" as meaning "either the singular or plural of the word 'Parent'".

2. Also at the time the Tennessee Legislature enacted T.C.A. § 39-15-202(f) in 1989, there was already enacted and codified T.C.A. § 37-10-301 through § 37-10-307, and Act requiring "parental consent for abortions by minors." That law specifically required consent of "both" parents and to specify the intent of the Legislature that the consent of "both" parents was required, the word "both" was inserted before "parents" in T.C.A. § 37-10-303(a). Therefore, the Court concludes that had it been the explicit intent of the Legislature to require notice to "both" parents in T.C.A. § 39-15-202(f), the word "both" would have been inserted before "parents" therein.

3. Excerpts from the Senate and House Legislative sessions concerning Senate Bill No, 933, House Bill 831, in 1979, also support the conclusion that the term "parents" in the statute can reasonably be given a construction as meaning one or either parent. **(53)**. In the Senate on April 25, 1979, co-sponsor of the original Senate Bill No. 933, Senator Douglas Henry, Jr., states: "Now, Mr. Speaker, I'd like to deal with Senate Bill 933, House Bill 831. All right, Mr. Speaker, the House Amendment to Senate Bill 933, a Bill we passed calling for the abortionist to inform **the parent** of a minor that the abortion was to be performed." **(54)** On May 10, 1979, Senator Curtis Person, Jr., states in the Senate as follows: "This is a Bill that stated that before an abortion can be

performed on a minor that notice had to be given to the parent or the guardian." (55)

In the House sessions, the co-sponsor, Rep. Richard R. Clark, on April 10, 1979, states: "It only requires that notification be given to the parent. It doesn't in any way say that the parent can stop the abortion." (56). Furthermore, on April 19, 1979, Rep. Clark states that this law "specifically provides as amended that the parent cannot object to the abortion, it just requires that the parent be notified of the proposed abortion." He later states: "Ladies and Gentleman of the House, the only thing I wanted to do is remind you that all this Bill does is provide for parental notification of a minor child before she attempts an abortion 48 hours prior to that abortion. It does not in any way and specifically prohibits the parent from being able to prevent or object or stop the abortion in any way..."(57)

4. The statute and legislators use the term "parental." "Parental" has been defined as "of or pertaining to a parent" and "proper to or characteristic of a parent." (58) The Court goes further, and perhaps more importantly, to construe the exception provision of subsection (f)(2)(B) in light of the testimony of Dr. Terrance Ackerman and the U.S. Supreme Court interpretations of "medical judgment" provisions in Doe v. Bolton (59). Dr. Ackerman testified that the phrase "in his best medical judgment" in T.C.A. § 39-15-202(2)(B) may include "not just fairly technical physiological matters, but psychological and social, as well as ethical considerations as well." (60)

In H.L. v. Matheson (61), the Court upheld against a vagueness attack a "best medical judgment" provision in the Utah statute requiring the physician to "Notify, if possible, the parents or guardian of the woman upon whom the abortion is to be performed" if the woman is a minor. The U.S. Supreme Court observed that the Utah "best medical judgment" provision "expressly incorporates the factors we identified in Doe v. Bolton (62) as pertinent to the

exercise of a physician's best medical judgment in making an abortion decision. In Doe, we stated :

> "We agree with the District Court...that the medical judgment may be exercised in light of **all** factors -- **physical, emotional, psychological, familial and the woman's age -- relevant to the well-being of the patient.** All of these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment." **(63)**

"It cannot be questioned that psychological well-being is a facet of health." **(64)**

Thus, the Court construes "health" in T.C.A. § 39-15-202(f)(2)(B) to include both physical and psychological health. The Court will declare the reasonable meaning of "in his best medical judgment": the phrase "in his best medical judgment" allows the attending physician, acting in good faith, to consider physical, psychological and familial factors in exercising his or her best medical judgment. Justifications for determining that notice is not required to a parent include abandonment of the child, incest, physical or mental abuse, actual or perceived, rape or any other similar circumstance that would cause the physician performing the abortion, **in a good faith exercise of his or her medical judgment,** to make a determination under T.C.A. § 39-15-202(f)(2)(B) irrespective of whether the Department of Human Services is involved. Drawing from another accepted standard adopted in Tennessee, the child must evidence to the physician a **substantial likelihood** of physical or mental abuse that may reasonably result from having to notify a parent, whether that evidence be subjective, objective, actual or reasonably perceived, before that physician in good faith, using his or her medical training and judgment, can make the determination under this provision necessary to waive notification. The Court further recommends that a second opinion from another physician be procured immediately if the attending physician determines that this is the case; it is recommended that both opinions be documented.

Of course, if the minor has more than one accessible parent or guardian, the attending physician must make a good faith determination under T.C.A. § 39-15-202(f)(2)(B) as to **each** parent or guardian **before** the physician may determine that notice is not required to **any** parent or guardian. Otherwise, the Court's ruling would undermine the statutory purpose.

In H.L., etc. v. Matheson, et al. **(65)** the Court discussed the judicial determination of a minor's right of self-consent, and noted that making an abortion decision of a minor subject to parental consent, without affording the pregnant minor an opportunity to receive an independent judicial determination that she is mature enough to consent or that an abortion would be in her best interests, is indicative of a fatally-flawed statute **(66)**. However, the Court pointed out that a statute setting out a "'mere requirement of parental **notice'** [emphasis added] does not violate the constitutional rights of an immature, dependent minor." In Ohio v. Akron Center for Reproductive Health [Akron II] **(67)** the United States Supreme Court noted that "although our cases have acquired by-pass procedures for parental consent statutes, we have not decided whether parental notice statutes must contain such procedures....We leave the question open..."**(68)**

The Court in Akron II explained that the Court had previously "established" that "in order to prevent another person from having an absolute veto power over a minor's decision to have an abortion, a State must provide some sort of by-pass procedure if it elects to acquire parental **consent**" **(69)**. However, the Court further noted that "**notice** statutes are not equivalent to consent statutes because they do not give anyone a veto power over a minor's abortion decision," **(70)**. In H.L. Matheson, the Court upheld the constitutionality of a Utah statute requiring the physician to "Notify, if possible, the parents or guardian" of a minor woman upon whom an abortion is to be performed **(71)**. The Utah statute did not contain a judicial by-pass procedure.

In analyzing T.C.A. § 39-15-202(f), the Court finds that it is not equivalent to a consent statute because it specifically provides "that the provisions of this section shall in no way be construed to mean, provide for, or authorize parental objection to, in any way, prevent or alter the decision of a minor to proceed with the abortion." It is the opinion of the Court that in specifically providing that a parent has no veto power over the minor's abortion decision, the Legislature sought to provide a mere parental notification statute that was not to be construed in the nature of a "consent" statute.

Ohio v. Akron Center for Reproductive Health, a 1990 Supreme Court case **(72)** held that "a State may require the physician himself or herself to take reasonable steps to notify a minor's parent because the parent often will provide important medical data to the physician." **(73)** The Court went on to explain that an adequate medical and psychological case history is especially important with regard to a minor, and that parent(s) can generally provide that information more accurately than the minor; that a detached physician can assist the parent in approaching the problem in a mature and balanced way; and that "this access may benefit both the parent and child in a manner not possible through notice by less qualified persons."**(74)**

The Court finds that important medical reasons supporting a single parent notice requirement as set forth in Hodgson v. Minnesota and Akron II were supported by the testimony of Dr. Anthony Trabue at trial. Dr. Trabue, in the opinion of the Court, and as admittedly conceded by Plaintiffs' counsel in closing argument, was an "extraordinarily credible witness, and the Court has placed great weight upon his testimony in rendering its decision.

In Roe v. Wade (75) the Court concluded that there is a right of privacy, implicit in the liberty secured by the Fourteenth

Amendment, that is "broad enough to encompass a woman's decision whether or not to terminate the pregnancy." But the Court went on to say that fundamental right is not absolute or unqualified, and "must be considered against important state interests in the health of the pregnant woman and in the potential life of the fetus."

Davis v. Davis, (76) recognized that the..."right to privacy is not specifically mentioned in either the federal or the Tennessee state constitution, and yet there can be little doubt about its grounding in the concept of liberty reflected in those two documents." The Court goes on to hold that "the right of procreation is a vital part of an individual's right to privacy"(77), and states that federal law is to the same effect.

While the "constitutional protection against unjustified state intrusion into the process of deciding whether or not to bear a child extends to pregnant minors as well as adult women" (78), it has been recognized that the State has somewhat broader authority to regulate the activities of children than of adults. In doing so, however, the state must demonstrate that there is a "significant state interest" that is distinguishable from cases involving adult women. (79) The ultimate holding in Danforth (80) was that "any independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant."

This Court disagrees with the holding in Danforth. "There is no logical relationship between the capacity to become pregnant and the capacity for mature judgment concerning the wisdom of an abortion."(81). This Court agrees that "as immature minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences, a State reasonably may determine that parental consultation often is desirable and in the best interest of the minor." (82)

"In addition, 'constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society.' " **(83)**

Finally, the Court again refers to Matheson **(84)** in:

> "That the requirement of notice to parents may inhibit some minors from seeking abortions is not a valid basis to void the statute as applied... The Constitution does not compel a state to fine-tune its statutes so as to encourage or facilitate abortions. To the contrary, state action 'encouraging childbirth except in the most urgent circumstances' is 'rationally related to the legitimate governmental objective of protecting potential life.'" **(85)**

In Planned Parenthood v. Casey **(86)**, although a parental notification statute was not at issue, the United States Supreme Court in discussing "guiding principles" concerning the constitutional right to an abortion held as follows:

> "What is at stake is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so. Regulations which do no more than create a structural mechanism by which the state, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose.

The Court concludes that T.C.A. § 39-15-202(f), as so reasonably construed, is constitutional under the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution and is constitutional under the Tennessee Declaration of Rights and Constitution of Tennessee, including the right to procreational autonomy recognized in Davis v. Davis **(87)**. As stated in Davis v. Davis, the "right to procreational autonomy" has been indicated by the United States Supreme Court cases "concerning parental rights and responsibilities with respect to children" and "that parental autonomy is basic to the structure of our society because the family is the institution by which we inculcate and pass down many of our most cherished values, morals and culture." **(88)**.

Construing the intent of the legislature with respect to the two-day waiting period following notification to the parent as a means of giving the parent an opportunity to counsel with that minor regarding her decision, it follows that there would be no requirement of a delay for a minor is she were accompanied by or had the consent of one parent or guardian, or if the physician determines that the "life or health" exception is applicable to such minor.

In light of the above discussion, this Court must uphold the provision requiring the notice to parents (or parent) of a minor pregnant woman, with broad construction being given to the term "health" in applying the "life and health" decision in order to avoid both the notice provision and the waiting period.

Finally, since the Attorney General has chosen not to defend T.C.A. § 39-15-202(f) in the appellate courts should this issue be appealed by Plaintiffs. Therefore, the Court finds that for purposes of any appellate proceedings in this cause, Drs. Anthony E. Trabue and Betty K. Neff are hereby made proper parties for such limited purpose as a matter of Tennessee statutory law under T.C.A. § 29-14-107(a), which states:

> "When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceedings."

The Court also takes judicial notice of the fact that Drs. Trabue and Neff are parties intervenors by Order of August 28, 1992, General Minute Book 173, Page 485, Chancery Court for Davidson County, Tennessee, Part II, in the case of Jane Emancipation, et al. v. Ned R. McWherter, et al., (89) wherein the Emancipation plaintiffs challenge the constitutionality of T.C.A. § 39-15-202(f). By said order, Drs. Trabue and Neff have leave to defend T.C.A. § 39-15-201(c) and § 39-15-202. Drs. Trabue and Neff

have also filed, on September 11, 1992, in that cause, a permissive crossclaim affirmatively seeking a declaration under the Tennessee Declaratory Judgment Act that T.C.A. § 39-15-202(f) is constitutional under the Constitution of Tennessee and the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution.

In light of the foregoing, and upon consideration of the entire record in this cause, the Court finds that Drs. Trabue and Neff have or claim interests which are affected by the Court's declaration in this cause concerning T.C.A. § 39-15-202(f). Also, if not now made parties for any future appellate review of the Court's declaration herein concerning T.C.A. § 39-15-202(f), Drs. Trabue and Neff may be prejudiced. Therefore, the Court declares Drs. Trabue and Neff limited parties at this juncture in these proceedings for any defense of the Court's declaration concerning the parental notification statute on appeal. The Court does this pursuant to T.C.A. § 29-14-107(a) and § 29-14-110(a). To the extent that this ruling may be inconsistent with the Court's Orders of September 2, 1992, and September 10, 1992 in this cause, said Orders are so amended or modified consistent with what the Court has just ruled herein. **(90)**

T.C.A. § 39-15-202(h) states:

"The provisions of this section shall not apply in those situations where an abortion is certified by a licensed physician as necessary to preserve the life of the pregnant woman",

Briefly addressing this provision, the Court upholds that provision as constitutional as written, since it is logical that the application of any or all of these provisions would be contrary to the medical standards in this state and in America where the life of a woman was in danger. Thus, neither the requirement of informed consent, the explanation of risks or benefits, the lists of agencies and services, parental notice, any waiting period, nor any of these provisions not herein mentioned, would be triggered if the life of the woman, whether immediate or not, is threatened.

THE COURT'S RULING

1) This Court will uphold the validity and constitutionality of Tennessee's abortion statute with regard to the informed consent provision, with exception of T.C.A. § 39-15-201 (b)(4), which the Court finds to be misleading and untruthful;

This Court finds that it is the duty of the attending physician to personally present the requirements of T.C.A. § 39-15-202(b)(1-6, except 4) in a manner in which the patient is fully informed of these provisions or the patient confirms to the physician that she is fully informed of each of the provisions.

2) This Court finds that the provision requiring that second-trimester abortions be performed in a hospital is not unconstitutional, after construing the term "hospital" to include "ambulatory surgical center";

3) The word "or" is stricken from the statute as inserted between subsections (5) and (6) of the informed consent provision of T.C.A. § 39-15-202 (b)(1-6);

4) This Court finds that the two-day waiting period is unconstitutional;

5) This Court finds that the requirement of notice to the parents of a pregnant minor woman is not unconstitutional, with broad construction to the term "health" in the "life and health" exception, and interpreting the word "parents" to not be intended to require notice to two parents.

This Court will issue and injunction against the State, barring enforcement of the waiting period in Tennessee;

The Court hereby provides for the payment of attorney's fees and court-appointed expert fees that have accrued as of date, and also for those which will accrue in the future as a result of future litigation in this matter.

ENTERED ON THIS 19th DAY OF NOVEMBER, 1992.

JUDGE HAMILTON GAYDEN, SR.