IN THE FIRST CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE

PLANNED PARENTHOOD ASSOCIATION, OF NASHVILLE, INC., et al,

Plaintiffs,

VS.

NED R. McWHERTER, Governor of the State of Tennessee, et al.,

Defendants.

Case No. 92C-1672

Candy Rucker

M E M O R A N D U M

On November 19, 1992, this Court issued a lengthy memorandum and judgment in this case, which was litigated over a period of one week. The Plaintiffs in this action now request that this Court alter or amend its original decision, judgment, and injunction, and amend some of its findings of fact or make additional findings of fact. The Plaintiffs have also filed a motion for a stay of the injunction issued by this Court on that same date.

The Court will address each area raised by the Plaintiffs in an attempt to expedite this matter.

The Plaintiffs first allege that T.C.A. 39-15-201(a)(2) and (b)(2), which makes it a crime for any provider to "attempt to procure a miscarriage", is vague and "nonsensical", since the term "miscarriage" has been defined by medical expert testimony to mean "spontaneous abortion", that is, an abortion that occurs naturally with no human intervention, and is not synonymous with the word "abortion". Plaintiffs thus contend that this statement of the statute is unconstitutionally vague.

This Court is of the opinion that the phrase "attempt to procure a miscarriage" is not unconstitutionally vague and requires no clarification. "Attempting to procure" obviously changes the ordinary meaning of the word "miscarriage", making it clear that the statute is prohibiting the same intentional act, whether it be termed "miscarriage" or "abortion".

The second issue raised by Plaintiffs is under T.C.A. 39-15-201(a)(1), in that the term "pregnant" as used is also unconstitutionally vague, and that if the pregnancy is measured from any time other than implantation, this section makes the use of intrauterine devices ("IUDs") and morning after pills illegal.

This Court will not strike this section; however, the Court is of the opinion that the legislature clearly meant to exclude from its scope birth control devices that prevent implantation; thus, this Court finds that under section 39-15-201(a)(1), the use of intrauterine devices and/or morning after pills is not illegal.

This Court rejects the argument of Plaintiff that section 39-15-202(c) is unconstitutionally vague, and that the Court's prior interpretation of section 39-15-202(b)(6) renders subsection (c) redundant and unnecessary. To the contrary, the Court finds that subsection (c) is not redundant nor is it unconstitutionally vague.

Plaintiffs have also asked for a clarification of its interpretation of what the physician is required to tell a woman with regard to the possible viability of a fetus, as provided by section 39-15-202(b)(3). Although the Court feels that its earlier opinion clearly expressed its interpretation, it is sufficient to say that the Court did mean to give the doctor latitude to tell a woman that a fetus could be viable at whatever point the doctor believes to be the case in general, for all fetuses, based on the doctor's medical judgment, whether it be twenty-four weeks, or any other time period less than that believed to be appropriate by that particular physician. The Court agrees with defendant's position that T.C.A. 39-15-202(b)(3) "provides a minimum amount of information required to be given by a doctor in order for a woman to obtain an abortion"... and that if..."a physician feels that viability may occur at an earlier time, the physician may in his medical judgment... provide such additional information to the woman indicating that viability may be earlier."

Plaintiff's argument that clarification of this Court's opinion regarding T.C.A. 39-15-202(b)(5) (the "numerous" agencies aspect of Informed Consent) is needed is rejected; the Court finds this argument to be without merit and finds a clarification to be unnecessary.

With regard to the Court's definition of pregnancy, the Court will clarify that "first trimester" means fourteen (14) weeks from the first day of a woman's last menstrual period or twelve (12) weeks from conception.

Turning to the Minor Consent provisions, this Court will not disturb its ruling on any of these issues, but will clarify that the Court was merely suggesting that a two-physician opinion be obtained and documented when it stated that it "recommends that a second opinion from another physician be procured immediately if the attending physician determines" that he should not notify the parent(s) of the minor. The Court's recommendation should not be misconstrued to impose a like requirement.

In response to plaintiff's allegation that the statute lacks an emergency exception sufficient to pass constitutional muster, the defendants argue that this Court's interpretation can be understood to include a non-life threatening medical emergency exception for the statute. The Court is in agreement with the position taken by the defendants, relying on the language from its opinion:

> "neither the requirement of Informed Consent, the explanation of risks or benefits, the list of agencies and services, parental notice, any waiting period, nor any of these provisions herein mentioned, would be triggered if the life of the woman, whether immediate or not, is threatened." (Emphasis added.)

The statute is clearly intended to carve out an exception where the health as well as life of the mother is at stake.

The judgment was drafted to be in accordance with the [illegible] of the statute which

interpreted by the Court in that preceding Opinion. The Court finds any suggested deletions or additions to be unnecessary.

The remaining issues raised by the plaintiffs in their motion have been considered; however, this Court does not feel inclined to respond to these, as they are not well-taken by the Court.

Plaintiff's request for a stay of the Injunction entered on November 19, 1992, although a moot request at this stage, is also to be denied.

The certified copy of the Order in the case of Planned Parenthood of Memphis, et al. v. Ray Blanton, et. al., filed by the defendants as a late-filed exhibit, is to be made a part of the record and marked as Exhibit number 55.

After this Court's decision, Dr. Frank Boehm, the court-appointed expert submitted by Planned Parenthood wrote, in part:

"Confronted by the state's request to require a 48-hour waiting period after initial counseling for an abortion to allow a woman time to reflect on this important issue, Gayden agreed with Planned Parenthood's argument that this would be 'unduly burdensome under the federal constitutional standards.' But he went a step further by putting this important and complex issue back into the hands of the one individual who can best determine the need for a waiting period: the doctor.

"Gayden wisely ruled that physicians should decide what is a sufficient time for reflection by each woman who seeks an abortion. In addition, he affirmed parental notification prior to an abortion on a minor. However, he again turned to the one individual who can best handle this sensitive matter and allow for a fair and timely process.

"Gayden allowed a physician 'acting in good faith to consider physical, psychological and familial factors in exercising his or her best medical judgment. This may include reasonable fear of abuse, incest, rape, harassment or ridicule, threat of suicide, hysteria, or any other mental or physical justifiable reason to waive the notification.

"Although most Americans agree with this rule, many feel that some minors are placed in a very difficult position by this parental notification ruling.

"Previously, women who were in their second trimester (more than 12 weeks) of pregnancy were required to have abortions only at hospitals which met equipment and staffing standards set by the American College of Obstetricians and Gynecologists. While Planned Parenthood argued for approval to do second trimester abortions in clinics, Gayden found a compromise by broadening the definition of hospital to include licensed ambulatory surgical centers.

"Finally, on the issue of the state's argument that only a physician can give informed consent to women requesting an abortion, Gayden ruled that trained, sensitive and caring non-professional personnel could obtain informed consent from patients as requested by Planned Parenthood. However, he added that physicians 'confirm' that a woman has been appropriately informed."

Although Dr. Boehm did not appear to testify at the hearing, the Court accepts this post-trial statement of Dr. Frank Boehm, as published in The Tennessean on December 9, 1992, (Dr. Boehm was a court-appointed expert chosen by Planned Parenthood) and takes judicial notice of such newspaper article, making it part of the record as Exhibit No. 56.

Any issues raised by the plaintiffs not addressed by the Court in this memorandum were ignored not by inadvertence, but because the Court chose not to address those issues it viewed as being an overt effort to completely deregulate the abortion process; and in all due respect, abortion ultimately needs statutory regulation to preserve the health of the woman and the fetus, and to protect the physicians who perform these procedures.

Entered on this 5th day of February, 1993.

Hamilton Gayden

JUDGE HAMILTON GAYDEN