

IN THE FIRST CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE

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

O P I N I O N

The Motion, brought by the Plaintiffs, came on to be heard Thursday, March 3, 1994. The Plaintiffs' Motion sought a Court Order invalidating the two day waiting period for minors seeking abortions and invalidating the parental notification requirement for minors seeking abortions. After hearing argument on March 3, 1994, the Court partially granted and partially denied the Plaintiffs' Motion. Specifically:

1) This Court declares the requirement that a minor seeking an abortion in Tennessee wait two days after first consulting an agency or medical care provider regarding the abortion is unconstitutional.

2) This Court upholds the validity and constitutionality of Tennessee's abortion statute requirement that the agency or health care provider to perform an abortion on a minor must notify one of the minor's parents, if feasible, prior to the procedure. This is consistent with the ACOG Standards and this Court's prior ruling in this case that the statutory term "health" in the "life or health" exception must be broadly construed.

DISCUSSION

A. Two Day Waiting Period for Minors

Pursuant to T.C.A. § 39-15-202(f)

The two day waiting period imposed upon a minor seeking an abortion under T.C.A. § 39-15-202(f) violates the Equal Protection Clause of the United States Constitution's Fourteenth Amendment.

The Equal Protection Clause prohibits the imposition of a two day waiting period for a minor seeking an abortion where adult women similarly situated are not required by the abortion law to wait for any period of time. Pursuant to this Court's prior ruling, no waiting period for adult women seeking abortions is mandated or allowed in Tennessee.

Since this Court has previously held that parents or legal guardians are not required to give consent and, thus, cannot withhold consent, to an abortion to be performed on a minor, no valid or constitutional reason exists for maintaining a waiting period for minors seeking abortions. Therefore, any direct or indirect references to waiting or notification periods contained in the Tennessee abortion statute relating to minors is hereby declared unconstitutional, including the phrase following "life or health" in T.C.A. § 39-15-202(f)(2)(B), specifically:

1. Pursuant to this opinion, the applicable statute, T.C.A. § 39-15-202(f)(1), shall hereafter read as follows:

The attending physician or agency performing an abortion upon a minor of less than eighteen (18) years of age shall inform the parent or legal guardian or such minor, or if the whereabouts of the parent cannot be determined and there is no other legal guardian, then the agency or other individual to whom the minor's custody has been transferred, prior to the operation that an abortion is to be performed upon such minor; provided, however, 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 the minor to proceed with the abortion.

2. Pursuant to this opinion, the applicable statute, T.C.A. § 39-15-202(f)(2)(B), shall hereafter read as follows:

Notice shall not be required 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.

Therefore, as to the two-day waiting period issue, the Plaintiffs' Motion is granted.

B. Notification to Parents of Minor

Pursuant to T.C.A. § 39-15-202(f)

At the hearing of the Plaintiffs' Motion, the Plaintiffs argued that the lack of a judicial bypass makes the notification provisions of the Tennessee abortion statute unconstitutional. This Court declares constitutional the requirement of T.C.A. § 39-15-202(f)(1) that a physician or agency to perform an abortion on a unemancipated female younger than eighteen years old must, prior to the abortion, notify one parent or legal guardian that the abortion is to be performed.

The Court relies upon and takes judicial notice of the Standards for Obstetric-Gynecologic Services of The American College of Obstetricians and Gynecologists [hereinafter ACOG Standards]. Under the ACOG Standards, the physician treating a pregnant minor female should counsel her about her options, i.e., (1) continuing the pregnancy and keeping the infant, (2) continuing the pregnancy and offering the infant for adoption, or (3) aborting the pregnancy. ACOG Standards, page 62. In addition, under the ACOG Standards, "[w]hen feasible, and with the patient's approval, the physician should offer this counseling to her partner and to her parents (if she is a dependent adolescent) before this difficult decision is made." ACOG Standards, page 62 [emphasis added]. Additionally, the ACOG Standards provide that "[w]hen the

physician recommends pregnancy termination for medical or psychiatric indications, consultation may be appropriate." ACOG Standards, page 62.

Further, under T.C.A. § 39-15-202(f)(2), the term "health" as used in the "life or health" exception to the parental notification (and the now invalidated two-day waiting period) requirements must be broadly interpreted. This Court has previously held in this case that "health" encompasses not only physical health but also emotional and psychological factors, whether actual or as perceived by the attending physician using his best medical judgment, considering 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 justifiable mental or physical reason to waive parental notification.

The "when feasible" language in the ACOG Standards, in conjunction with the interpretation of the statutory term "health," makes the notification decision a matter within the attending physician's discretion. The decision to waive parental notification must be a good faith physician decision, regulated by the medical ethics the physician must obey in his professional capacity. Additionally, the attending physician has discretion not only as to whether or not to give notice but also as to what means of notification will be employed in the particular circumstances.

The Court stresses that, under T.C.A. § 39-15-202(f)(2)(A)-(B) and § 39-15-202(h), the notice provisions are not applicable to minors emancipated by marriage or where a licensed physician determines that the abortion is necessary to preserve the life of the pregnant minor seeking the abortion.

Therefore, as to the portion of the Plaintiffs' Motion challenging the statute's notification requirements, the Plaintiffs' Motion is denied.

IT IS THUS ORDERED FROM THIS COURT:

1) That the provision mandating a two day waiting period for minors seeking abortions is unconstitutional.

2) That the provision mandating parental notice is constitutional.

IT IS SO ORDERED BY THIS COURT.

ENTERED ON THIS 7th DAY OF MARCH, 1994.


JUDGE HAMILTON GAYDEN

CERTIFICATE OF SERVICE

I certify on this, the 7th day of March, 1994, I sent by postage prepaid envelope through U.S. Mail a copy of the above to the following individuals and addresses: Mr. Barry Friedman, ACLU Foundation of Tennessee, Vanderbilt University School of Law, 21st Ave., S., Nashville, TN 37240; Louise Melling, Catherine Weiss and Steven Shapiro, American Civil Liberties Foundation, Reproductive Freedom Project, 132 W. 43rd St., New York, NY 10036; Barbara Otten, Roger Evans and Dara Klassel, Planned Parenthood Federation of America, Inc., 810 Seventh Ave., New York, NY 10019; Irwin Venick, Dobbins & Venick, 2100 West End Ave., #1160, Nashville, TN 37203; Elizabeth Thompson, Sherrard & Roe, 424 Church St., #2000, Nashville, TN 37219; Russell Heldman, 511 Union St., #600, Nashville, TN 37219; Charles W. Burson, Attorney General and Reporter for the State of Tennessee and Michael Catalano, Deputy Attorney General, 450 James Robertson Parkway, Nashville, TN 37243-0485.


JENNIFER CROFT