

Recently, California voters rejected Proposition 73, a proposed constitutional amendment that would have required parental notification before an unemancipated minor could terminate her pregnancy. The proposition further imposed a mandatory 48-hour waiting period once notification was deemed to have occurred. In addition, the proposition mandated that each juvenile court report by judge, the number of petitions for judicial bypass filed, the number of petitions granted under a given reason, and the number denied under a given reason. The names of the judicial officers and their decisions were to be made publicly available.

The Supreme Court has upheld parental consent and two-parent notification laws as constitutional if they include an "alternative," such as a judicial bypass procedure, which waives the consent or notification requirement for those adolescent young women who cannot involve their parents. To benefit from the judicial bypass mechanism, a young woman must appear before a judge and prove either that she is mature enough to decide whether to have an abortion or, that despite her immaturity, an abortion would be in her best interests.

Discussing her pregnancy and personal details about her life before strangers in a courtroom can be stressful and humiliating for a minor. Moreover, many minors have no transportation to a courthouse and are unable to take time off from school or work in order to appear at a hearing. Furthermore, many minors find their confidentiality threatened. This is particularly true for those who reside in rural areas or small towns.

Stress and humiliation are not the only threats to the rights of those young women who seek judicial relief. A growing and significant risk to minors' access to the judicial bypass procedure appears in the form of judicial recusal, and/or arbitrary rejection of the minor's petition based on the judge's personal views about abortion. Judges in Tennessee, Alabama and Pennsylvania have recused themselves from hearing cases involving the states' parental consent laws.

The *New York Times* reported that, in June, 2005, Tennessee Circuit Court Judge John McCarroll declined to hear such a case and further refused to hear any similar cases ( *New York Times* , 9/4/05). Judge McCarroll told the *Times*

, "Taking the life of an innocent human being is contrary to the moral order [and] I could not in good conscience make a finding that would allow the minor to proceed with the abortion."

The *Times* also reported that other judges are now required to hear more cases of minors seeking abortions because J. McCarroll and four other judges in the nine-judge court routinely recuse themselves from these cases, leaving only four judges to hear such matters. In counties with a single judge who recuses himself, the minor's access to the court is further impeded; minors must seek transportation to another county judge who is willing to hear their petition.

In response, twelve professors of legal and judicial ethics sent a letter to the Tennessee Supreme Court and urged it condemn such recusals and take action to prohibit them. The scholars pointed out that these recusals put enormous pressure on every other Tennessee judge to "follow suit or risk facing uninformed charges that the judge somehow personally

favors abortion or at least is less morally repulsed by it than the recusing judges.

These recusals and public reporting requirements, such as those proposed by Proposition 73, have profound implications for the administration of justice. In the *Times* report, Judge D'Army Bailey, another judge on the circuit court in Memphis who has been hearing more than his share of minors' petitions since the recusals by other judges, voiced concern regarding political consequences, "I didn't swear to uphold all of the laws of Tennessee except for X, Y and Z .... You're sworn to uphold the law whether you agree with it or not. I hope that how I handle these questions of allowing these young women to get abortions does not lead to my defeat in the next election."

In the last two decades, there has been a surge in legislation mandating parental notification and consent. According to the Alan Guttmacher Institute:

- 44 states have passed parental involvement laws
  - In 9 of those states, the laws have been permanently enjoined by the courts
- 35 states require some form of parental involvement in a minor's decision to have an abortion
  - 21 of those states require consent of at least one parent
  - 2 states require consent of both parents
  - All of these states, except Utah, have some form of a judicial or other mechanism to bypass the consent or notice requirement.
- 20 states impose mandatory waiting periods for both minors and adults, in addition to parental involvement
  - The waiting periods may be as short as one hour or as long as 48 hours.

The majority of states that require parental involvement make exceptions under the limited circumstances of a medical emergency or in cases of abuse, assault, incest or neglect.

Most young women do notify their parents or guardians if they become pregnant. Some young women simply cannot. For those who are fearful of the consequences should their parents or guardians learn of their pregnancies or abortion decisions, judicial bypass must remain a real and available option. In these cases, judicial recusals unquestionably place an undue burden on minors' access to timely and appropriate reproductive health care. Their actions profoundly jeopardize the rights of these minors and the integrity of the judicial process.

From the *Health Advocate*, newsletter of the National Health Law Program, No. 222, Fall 2005.

