

October 1990

HOUSE RESEARCH

900852

Case Brief

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Parental Notification of Abortion

This case brief informs legislators on cases involving the constitutionality of state laws in Minnesota and Ohio requiring parental notification of a minor's abortion. The cases were decided by the U.S. Supreme Court on June 25, 1990.

1. Hodgson v. Minnesota, 110 S. Ct. 2926 (1990)
2. Ohio v. Akron Center for Reproductive Health, 110 S. Ct. 2972 (1990)

The Hodgson case upheld a portion of the Minnesota law and invalidated a portion of it (Minn. Stat. § 144.343). The Akron case upheld the Ohio law (Ohio Rev. Code Ann. §§ 2919.12; 2151.85; and 2505.073).

This case brief contains the following information on each case: case background (including a summary of the lower court decisions), a statement of the issues presented to the U.S. Supreme Court, and a discussion of the decision on each issue. The brief also reviews the implications of these cases for Minnesota law.

Hodgson v. Minnesota

Background on the Case

In 1981, the Minnesota Legislature enacted a law requiring physicians to notify both parents of an unemancipated minor at least 48 hours before the minor could undergo an abortion. (Minn. Stat. § 144.343, subds. 2-7.)

Subdivision 2 of the law required that notice to both parents be given on behalf of any unemancipated minor undergoing an abortion unless one of the following exceptions applied:

- (1) the abortion was necessary to save the life of the minor;
- (2) the parents had consented to the abortion; or
- (3) the minor was a victim of abuse and the abuse had been properly reported under state law.

Subdivision 2, as originally enacted and standing alone, did not provide for any other exceptions and hence became known as the "pure notice" provision.

However, in anticipation of court challenges to the constitutionality of this requirement, the law also provided that if this "pure notice" provision was ever temporarily or permanently enjoined (*i.e.* prevented from operating) by a judicial order, then an alternative "notice/judicial bypass" provision in subdivision 6 would take effect. Under this provision, a pregnant minor could choose between having her physician notify both parents under subdivision 2 or petitioning a court to authorize the abortion under subdivision 6 without notice to both parents. The court could authorize the abortion if it found either (1) that the pregnant minor was mature and capable of giving informed consent to the abortion; or (2) that, despite the immaturity of the minor, authorizing the abortion without notification would be in her best interests.

The entire law was challenged on July 31, 1981, before it took effect, and the federal district court for Minnesota entered a temporary restraining order preventing enforcement of subdivision 2, the "pure notice" provision of the statute. In March 1982, the same court issued a preliminary injunction against the "pure notice" provision. The result of these court orders was that subdivision 6 of the law, the judicial bypass procedure, became effective. Thus, an unemancipated minor in Minnesota could undergo an abortion without notifying both parents only if she either was covered by one of the three exceptions in the law or secured judicial approval pursuant to subdivision 6.

In 1986, after a trial on the merits, the District Court¹ issued an opinion in which it held that:

- (1) the "pure notice" requirement was unconstitutional and, therefore, was permanently enjoined;
- (2) the 48-hour waiting period applicable to a minor who chose to have her parents notified of her abortion decision was unreasonably long and, therefore, was an unconstitutional burden on her right to seek an abortion; and

¹ Hodgson v. State of Minnesota, 648 F. Supp. 756 (D.Minn. 1986).

- (3) the requirement that a minor either permit parental notification or seek judicial authorization for the abortion was constitutional; however the requirement that both parents be notified of the abortion decision in lieu of judicial approval was unconstitutional as applied to situations involving a noncustodial parent. Moreover, the Court held that it could not "sever" the two-parent notification requirement from the remainder of the statute. Therefore, it invalidated the notice/judicial bypass procedure in its entirety.

On appeal, the Eighth Circuit Court of Appeals² upheld that portion of the District Court's opinion invalidating the "pure notice" provision, but reversed the lower court's holding that the 48-hour waiting period and the notice/judicial bypass provision were unconstitutional. The Court of Appeals ruled that this part of the statute did not unreasonably burden abortion rights so long as an alternative judicial bypass procedure was available to a minor who chose not to give both parents 48 hours notice of her abortion.

This Eighth Circuit decision was appealed to the U.S. Supreme Court which, on July 3, 1989, agreed to hear the case. The District Court's injunction against operation of the entire law continued in force, pending the Supreme Court's decision.

Issues Presented to the Supreme Court

The following issues were presented to the U.S. Supreme Court:

Was it constitutional for the "pure notice" provision of subdivision 2 to require an unemancipated minor's physician to notify both of the minor's parents 48 hours before performing an abortion?

Was it constitutional for the notice/judicial bypass procedure of subdivision 6 to require an unemancipated minor to seek judicial authorization of her abortion in lieu of providing both parents with 48 hours advance notice of the abortion?

Decision of the Supreme Court

The Supreme Court's decision in this case was expressed through a number of written opinions. These opinions evidenced significant disagreements among the members of the Court, both as to the rulings in the case and as to the rationales for these rulings. This section of the case brief summarizes the Court's judgment and rulings.

Pure Notice Requirement

Ruling. A five-member majority of the Supreme Court ruled, for differing reasons, that the "pure notice" provision of subdivision 2 was unconstitutional.³ Four members of the Court dissented from this ruling.

² Hodgson v. State of Minnesota, 853 F.2d 1452 (8th Cir. 1988).

³ Justices Stevens, Brennan, Marshall, Blackmun, and O'Connor. Justice Stevens wrote the opinion. Justice O'Connor wrote a separate concurring opinion.

Rationale. The majority noted that, according to the Court's prior cases,⁴ women (including women who are minors) have a fundamental, constitutional right to choose an abortion. However, this right is not absolute: state regulations designed to further legitimate state interests may be imposed so long as they do not unduly burden fundamental rights.⁵ Prior cases involving minors have identified the following as legitimate state interests that may weigh against a minor's right to choose an abortion: (1) the state's interest in the minor's welfare; (2) the parent's interest in the child's upbringing; and (3) the family's interest in the welfare of its members.

The interest asserted by Minnesota to justify its "pure notice" provision was the state's interest in fostering parental involvement and communication with a minor pregnant child. However, the majority was not persuaded that this state interest was sufficient to justify the burden imposed on the minor's abortion rights by the two parent notice requirement. It pointed to the District Court's findings that the two parent notice did not always foster family communication and, indeed, could be harmful to both the minor and a custodial parent in situations where the parents were divorced or separated.

The majority, therefore, concluded that the requirement that both parents be notified, whether or not both wished to be notified or had assumed any responsibility for the upbringing of the child, was unconstitutional because it burdened the minor's fundamental right to choose an abortion without reasonably furthering any legitimate state interest.⁶ In her separate concurrence, Justice O'Connor gave a somewhat different rationale for invalidating this portion of the law. She found that the state had offered no legitimate justification for interfering with the family's decisionmaking process--particularly in situations where the minor and one of the minor's parents believe that notice to the other parent would not serve the minor's best interests.

Notice/Judicial Bypass Procedure

Ruling. A different five-member majority⁷ of the Supreme Court upheld the constitutionality of the notice/judicial bypass procedure contained in subdivision 6. Four Justices dissented from this ruling.

⁴ See e.g., Roe v. Wade, 410 U.S. 113 (1973); Bellotti v. Baird, 443 U.S. 622 (1979).

⁵ Although the Justices in the majority agreed on this outcome, they disagreed over which analytical test should be used to assess the constitutionality of the state regulation.

⁶ Two members of the majority reasoned that a minor child acting with the consent of a custodial parent had liberty interests in securing an abortion which outweighed the interests of an absent parent in receiving notice. The remaining three members of the majority believed that the minor's liberty interest, by itself, outweighed this asserted state interest.

⁷ Justices Kennedy, Rehnquist, White, Scalia, and O'Connor. Justice Kennedy wrote an opinion in which Rehnquist, White and Scalia joined. Justice O'Connor concurred with the judgment of the Court on this issue in a separate opinion.

Rationale. This majority based its ruling on earlier decisions of the Court,⁸ and principally on a Massachusetts case, Bellotti II⁹. The Bellotti case involved a constitutional challenge to a law requiring prior parental consent to a minor's abortion decision. The Court held in Bellotti that a parental consent law would be constitutional if the minor had the choice of securing judicial approval as an alternative to parental consent. In upholding the Minnesota parental notification law, Justice Kennedy reasoned that a parental notification law, by its nature, was far less intrusive than a parental consent law and, therefore, that the Minnesota notice/judicial bypass was clearly constitutional under Bellotti.

Justice Kennedy also relied on a second precedent in upholding the Minnesota judicial bypass procedure, H.L. v. Matheson.¹⁰ In the Matheson case, the U.S. Supreme Court upheld a Utah two parent notice statute (without a bypass) as applied to immature minors whose best interests would be served by the notice. Justice Kennedy reasoned that if a two parent notice law may be constitutional as applied to immature minors whose best interests are served by the law, but not as applied to minors who are mature or whose best interests are not so served, a judicial bypass is an expeditious and efficient means by which to separate the applications of the law which are constitutional from those which are not.¹¹

Justice O'Connor, in her separate concurrence, pointed out that the interference with a family's decisionmaking process (a basis for her decision to strike down the "pure notice" requirement) does not exist where the minor can avoid notifying one or both parents by going to court.

48-Hour Waiting Period

Ruling. A majority¹² of the Supreme Court also voted to uphold the provision in the Minnesota law requiring unemancipated minors to wait 48 hours after parental notification before having an abortion.

Rationale. As noted earlier, four Justices (Kennedy, Rehnquist, White and Scalia) dissented from the ruling that the "pure notice" provision was unconstitutional and would have upheld the "pure notice" requirement in its entirety, including its 48-hour waiting period. Moreover, in a portion of his opinion joined by Justice O'Connor, Justice Stevens stated that because the waiting period does not operate in those cases where parental or judicial consent to the abortion has been obtained, the 48-hour delay imposes only a minimal burden on the minor's right to decide whether or not to terminate her pregnancy.

⁸ See Planned Parenthood Assn. of Kansas City, Mo. v. Ashcroft, 462 U.S. 476 (1983); Ohio v. Akron Center for Reproductive Health, 110 S. Ct. 2972 (1990).

⁹ Bellotti v. Baird, 443 U.S. 622 (1979).

¹⁰ 450 U.S. 398 (1981).

¹¹ Hodgson v. Minnesota, 110 S. Ct. 2926, 2971 (Kennedy, J., concurring in the judgment in part and dissenting in part).

¹² See Hodgson v. Minnesota, 110 S. Ct. 2926, 2944 (part VI of the Stevens, J. opinion in which O'Connor, J. concurred); and id., at 2969 (part IIIB of the Kennedy, J. opinion, concurring in the judgment in part and dissenting in part).

Under Minnesota law, therefore, if a minor chooses not to use the judicial bypass alternative and, instead, chooses to notify both parents of her abortion decision, she is required to wait 48 hours before the abortion can be performed. On the other hand, if the minor chooses to use the judicial bypass alternative, she is not subject to any waiting period.

Effect of Hodgson on current Minnesota law. As a result of the Supreme Court's decision, the Minnesota parental notification law, with judicial bypass as an alternative to two parent notification, became operative again on August 27, 1990.

Ohio v. Akron Center

Background on the Case

In November 1985, the Ohio Legislature enacted a law making it a criminal offense to perform an abortion on an unmarried and unemancipated minor, except in certain circumstances. (Ohio Rev. Code Ann. §§ 2919.12; 2151.85; and 2505.073.) The law permitted an abortion if:

- (1) The physician provided 24 hours advance notice to one of the minor's parents; or
- (2) The physician notified a near relative of the minor who filed an affidavit with the juvenile court that the minor feared parental abuse; or
- (3) Written consent was provided by a parent or guardian; or
- (4) The minor opted to use a judicial bypass procedure and obtained juvenile court permission for the abortion. This judicial process contained several procedural requirements, including a requirement that the minor prove by clear and convincing evidence (the highest civil standard of proof) either that she was mature or that the abortion was in her best interests.

The Ohio law also provided that if the juvenile court failed to act on the minor's petition within certain timelines, the court was deemed to have authorized the abortion (*i.e.* "constructive consent").

In March 1986, before the law took effect, its constitutionality was challenged by a pregnant minor and certain abortion providers. The federal District Court for the Northern District of Ohio issued a preliminary and, subsequently, a permanent injunction against enforcement of the statute.¹³

This decision was appealed to the Sixth Circuit Court of Appeals, which affirmed the ruling of the lower court.¹⁴ The Appeals Court ruled that the Ohio law unconstitutionally imposed undue burdens on the abortion rights of minors due to the following defects:

- (1) The judicial bypass procedure did not operate fast enough.
- (2) The guarantee of anonymity to the minor was insufficient.
- (3) The constructive consent authorization provision was flawed because the absence of an explicit court order might deter a physician from performing an abortion.
- (4) The requirement that a minor prove maturity or best interests by clear and convincing evidence was too burdensome.

¹³ 633 F. Supp. 1123 (N.D. Ohio 1986).

¹⁴ 854 F.2d 852 (6th Cir. 1988).

- (5) The complex pleading requirements of the judicial bypass procedure were too burdensome for the minor.
- (6) The requirement that the physician personally give notice to one of the minor's parents was unconstitutional.

The Sixth Circuit's decision was appealed to the U.S. Supreme Court.

Issues Presented to the Supreme Court

The following issues were presented to the U.S. Supreme Court:

Does the Ohio parental notification requirement, in conjunction with the judicial bypass procedure, impose an unconstitutional burden on the right of minor women to obtain an abortion?

Is it unconstitutional to require that a physician personally notify the parent of a minor before performing an abortion on the minor?

Decision of the Supreme Court

A six-member majority¹⁵ of the Supreme Court reversed the Sixth Circuit and upheld the Ohio statute in its entirety. The Court ruled that the Ohio statute, on its face,¹⁶ did not impose an undue or unconstitutional burden on a minor's right to choose an abortion. This section of the case brief summarizes the main points of the Court's opinion.

Validity of Parental Notification Requirement

Ruling and rationale. The Court ruled that Ohio's requirement that a minor's physician notify one of the minor's parents before performing an abortion was not an undue burden on the minor's abortion rights because the statute also provided the alternative of judicial authorization. However, a majority of the Court specifically refused to decide the issue of whether such a one-parent parental notification requirement, without a court alternative, would likewise be constitutional.¹⁷

¹⁵ Justices Kennedy, Rehnquist, White, Stevens, O'Connor, Scalia. Justice Kennedy wrote the opinion of the Court. Justice Stevens wrote a separate concurring opinion. Justices Blackmun, Brennan and Marshall dissented.

¹⁶ In his separate concurrence, Justice Stevens pointed out that the Ohio law has never been operative and that there is no actual evidence that the judicial bypass process fails adequately to protect the abortion rights of minors. He emphasized, however, that if the bypass, in operation, failed to provide an adequate mechanism for a minor to demonstrate either her maturity or that the abortion is in her best interests, the notification law would, in his view, become an unconstitutional burden on the minor's abortion right.

¹⁷ Compare Hodgson v. Minnesota, 110 S. Ct. 2926 (1990) (two-parent notification requirement with no judicial bypass is unconstitutional).

Validity of the Judicial Bypass Process

Ruling and rationale. The majority ruled that the judicial bypass procedure required by the Ohio statute conformed with the standards set forth in Bellotti II.¹⁸ That case had established the following four criteria for judicial bypass procedures in a parental consent statute:

- (1) The process must allow the minor to show that she is capable of making an abortion decision without parental involvement.
- (2) The process must allow the minor to show that, even if she is not mature enough to make the decision, the decision is nonetheless in her best interests.
- (3) The procedure must ensure the minor's anonymity.
- (4) The procedure must operate to assure a speedy resolution.

The majority in this case ruled that the process employed by Ohio was sufficiently quick and confidential and, therefore, that it complied with Bellotti and the due process clause of the Fourteenth Amendment.

The majority also ruled that the constructive consent provisions, the clear and convincing evidentiary standard, and the pleading requirements of the Ohio judicial bypass procedure did not deprive a minor of due process rights and, hence, were constitutional.

Physician Notice Requirement

Ruling and rationale. Finally, the majority ruled that it was constitutional for Ohio to require the physician, in the absence of a judicial hearing, to notify the parent of a minor seeking an abortion. This ruling was based on the Court's earlier decision in H.L. v. Matheson¹⁹ and on its finding that the requirement furthered the legitimate state goal of fostering communication on medical issues between the minor's physician and her parents.

Effect of Akron on current Ohio law. In summary, the Court held that the procedures for parental notice/judicial bypass in the Ohio statute conformed to standards set forth in earlier decisions of the Supreme Court, that the criteria set forth in these earlier cases were sufficient, and that the Ohio statute was, therefore, constitutional.

¹⁸ Bellotti v. Baird, 443 U.S. 622 (1979); also see discussion of this case on page 5.

¹⁹ 450 U.S. 398 (1981).

Implications for Minnesota Law

Based on the holdings in Hodgson and Akron, the following conclusions can be drawn about Minnesota's parental notification law:

- (1) Minn. Stat. § 144.343, subd. 2, the "pure notice" provision, is unconstitutional and the state is permanently enjoined from enforcing it.
- (2) The injunction against the two parent notice requirement with judicial bypass procedure of Minn. Stat. § 144.343, subd. 6 is lifted and that provision is in force as of August 27, 1990. Thus, a minor seeking an abortion must now either have notice sent to both parents 48 hours before the abortion is performed or secure judicial approval of the abortion.

Because of the holding in the Akron case, Minnesota could enact a one parent notification law with a judicial bypass procedure. Such a law would be clearly constitutional as long as it complies with the Bellotti procedural requirements listed in the preceding section of this case brief.

However, it is not clear whether the Supreme Court would uphold a one parent notice law without a judicial bypass. The question of such a statute's constitutionality was explicitly left open by the Court in the Akron case and it is not clear from the opinions filed in that case whether a majority of the Court would vote to uphold such a law if the question were squarely presented to it.