IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

PLANNED PARENTHOOD OF ALASKA,)
JAN WHITEFIELD, M.D., et al.)
)
Plaintiffs,)
)
v.)
)
STATE OF ALASKA,)
)
Defendant.)
_____)

Case No. 3AN-97-6014 CI

DECISION ON REMAND

I. INTRODUCTION

The plaintiffs Planned Parenthood of Alaska, *et al.* filed this lawsuit challenging the constitutionality of the Alaska Parental Consent Act, Alaska Statute 18.16.010 *et seq*. This court granted summary judgment, ruling that the act was unconstitutional. The State appealed and the Supreme Court remanded the case to this court for an evidentiary hearing. *State v. Planned Parenthood of Alaska*, 35 P.3d 30, 46 (Alaska 2001).

It is important to understand the issue presented on remand by the Alaska Supreme Court. The issue is not whether it is beneficial for loving and caring parents to assist and counsel their children through difficult situations. The answer to this question is always, "Yes." Further, the Act does not prohibit parents from fulfilling their parental responsibilities. Rather, the narrow question in view of the Supreme Court's determination that privacy is a fundamental constitutional right, is whether it is permissible to selectively burden the exercise of the privacy right by requiring women under age

17 to seek parental or judicial consent before obtaining an abortion.

Under the Alaska Constitution, minors have the same fundamental right to privacy over their reproductive choice as adult women. *Id.* at 40. Therefore, this court must evaluate whether the State has a compelling interest in enforcing the parental consent statute and whether the statute is properly tailored to promote the State's interest by the least restrictive means possible. *Id.* at 32.

In accordance with the Supreme Court's instruction to conduct an evidentiary hearing, this court has accumulated and considered a substantial body of evidence, and applied the well-defined equal protection standard articulated by the Supreme Court to the facts. Having evaluated the evidence, these are the court's "Findings of Fact and Conclusions of Law."

II. FINDINGS OF FACT

A. Introduction

The State asserts several state interests. Those identified in the Statement of Legislative Purpose are: (1) protecting minors against their own immaturity; (2) fostering the family structure and preserving it as a viable social unit; (3) protecting the rights of parents to rear children who are members of their household; and (4) protecting the health of minor women. Ch. 14, §1, SLA 1997.

In addition to the stated legislative purposes, the State contends that the legislation will: (1) protect the health of minor women by protecting them from their immature decision making; (2) protect the health of minors by ensuring minors make informed and

intelligent choices about their abortion providers; (3) protect the health of minors by ensuring minors give informed consent to abortions; (4) protect the health of minors by ensuring minors give complete and accurate medical histories; (5) protect the health of minors by ensuring minors receive adequate post-abortion support and observation; (6) protect the health of minors by protecting minor females from physical and sexual assault; (7) protect the constitutional rights of parents; (8) preserve the integrity of the family as a viable social unit; (9) preserve the rights of minors and/or parents to pursue a civil action; and, (10) promote the social benefits of reducing teenage high risk sexual activity.

Many of the interests that the State asserted at trial are interrelated, as they combine a means to achieving an interest with the interest itself. For instance, the State argues that there is an interest in obtaining accurate and complete medical histories, but also argues that complete and accurate medical histories are a means to achieving the end of protecting the physical, emotional and psychological health of minors. To the extent that some interests are related and dependent, they have been combined into a single category where appropriate.

Accordingly, this court will discuss the following State's interests: protecting minors from their own immaturity; protecting the health of minors; preserving the integrity of the family, including protecting the rights of parents; preserving the rights to a civil action; and, promoting the social benefits of reducing teenage high risk sexual activity. Lastly, the court will address the burdens imposed by the judicial bypass procedure.

Within each category of claimed state interest, this court has

made findings and conclusions relating to: (i) the nature and importance of the interest; and (ii) whether the Act appropriately furthers the interest.

B. Protecting minors from their own immaturity

i. The Nature and Importance of the Interest

This court finds that the State has a compelling interest in protecting minors from their own immaturity in making some decisions, based on the following findings:

1. In general, minors are less mature than adults and less likely to make decisions that take into account both short-term and long-term consequences.

2. Adolescence is a period when a person's emotional and intellectual abilities fluctuate. Minors tend to be more impulsive, more accepting of risk, and more self-centered. Brain mapping technology shows that the brains of adolescents are undergoing changes.

3. The capacity to become pregnant and the capacity to make mature decisions are not necessarily related.

4. Placing a minor in a position to make adult decisions puts them under stress. In general, the younger the minor, the greater the stress.

5. Although a rare occurrence, minors as young as 10 can get pregnant. An unplanned pregnancy is a stressful event for women. Decisions relating to an unplanned pregnancy will require the minor to make decisions that will have long-term consequences.

6. A minor is less able to evaluate the emotional, financial, and educational or vocational impacts associated with pregnancy or abortion, as well as the impacts on her relationship

with her family and the impregnating male.

7. The immaturity of minors is a cause of unplanned teenage pregnancy. Teenage pregnancy and teenage parents contribute to several social problems.

8. The maturity of a person is individualized, but generally the younger the minor, the less equipped the minor is to make important decisions.

9. Minors under age 17 are not equally mature or immature. For minors age 10 or 11, protecting the child from their own immaturity can be a compelling state interest. As the minor approaches the age of majority, the State interest is no longer as compelling but is still an important state interest.

ii. Does the Act Appropriately Further the Compelling State Interest?

Having found that protecting children from their immaturity is a compelling state interest, this court must next address whether the Parental Consent Act serves the State interest and is the least restrictive alternative to meet that end.

10. The Act applies to all unmarried, unemancipated minor women under the age of 17. It does not apply to emancipated or married women under age 17.

11. No persuasive evidence was presented to suggest that a material distinction exists between the maturity of 15, 16, 17, or 18-year olds. Furthermore, it is difficult to generalize about 11, 12, and 13-year olds because there is very little conclusive evidence in the lower age ranges addressing the pregnancy/abortion question or other medical decisions. Younger minors are less likely to get pregnant. Younger minors are more likely to voluntarily involve a

parent.

12. Generalizations about how an age group makes decisions are not necessarily an accurate predictor about how individuals within that age group will make a specific decision. Decision-making capability is domain specific. The pregnancy decision-making process is unique. The generalizations that minors are more impulsive, less future oriented, and more emotional in their decision-making are based on research and common experience not specifically targeted toward the pregnancy/abortion decision.

13. All pregnant minors make a decision as to their pregnancy. Some minors make affirmative decisions: to carry the pregnancy to term; to seek prenatal care; to involve their families or friends; or, to have an abortion. Other minors passively address the issues that surround pregnancy: not evaluating the options; not seeking prenatal care; and not involving parents and friends.

14. A minor's pregnancy will reach a stage where it becomes impossible for her to hide the fact that she is pregnant; although, in very rare instances, a woman may be able to hide signs of being pregnant until delivery, or until it is either medically unsafe or too late to get a legal abortion.

15. There is no qualitative difference between the maturity necessary to decide to carry a pregnancy to term and the maturity necessary to decide to have an abortion. The evidence does not support any difference between the maturity levels necessary to make either decision. Some support exists for the proposition that minors who act passively regarding their pregnancy are less mature than those who respond affirmatively.

16. The development of brain mapping technology is in its early

stages and no evidence exists that this technology has been applied to the pregnancy decision. The scientific community has not drawn any definite conclusions about how the still-developing brain of a minor affects the pregnancy/abortion decision.

17. The assistance of a conscientious and caring parent would be an asset to a minor making a pregnancy decision. A minor with a healthy parent-child relationship will more likely involve the parent in important decisions. Younger minors are also more likely to voluntarily involve parents in a pregnancy decision.

18. Not all parents are conscientious and caring or even able to help a child in making important decisions. Dysfunctional families exist in our society, including parents who are addicted to drugs and alcohol and minors who are the victims of physical, sexual, and emotional abuse.

19. Minors who do not voluntarily involve their parents in their decision to get an abortion tend to demonstrate traits such as being future-oriented, having greater sense of self, having some degree of financial independence, and being able to navigate the health care system and a judicial bypass system. These traits may be considered to be evidence of maturity.

20. The decision to carry the pregnancy to term has as much, if not more, long-term effects on the life of the minor than the decision to have an abortion. To the extent that minors are less mature than adults, they are less able to consider the long-term effects and demands of motherhood.

21. The Act treats the decision to have an abortion differently than the decision to carry the pregnancy to term because it only requires parental consent to have an abortion.

iii. Conclusion

Based on the preceding findings of fact, this court concludes that the Alaska Parental Consent Act is not the least restrictive alternative to further the compelling state interest of protecting minors from their own immaturity.

Passing the parental consent law to protect minors from their own immaturity arbitrarily treats the decision to terminate a pregnancy differently than the decision to carry to term. The maturity level necessary to make either decision is the same, and the Parental Consent Act is under-inclusive. If a minor is too immature to evaluate her pregnancy choices, then she is too immature regardless of what decision she makes.

Furthermore, the Act is over-inclusive in making a distinction between the maturity level of 15 and 16-year olds, and the maturity level of 17-year olds. As evidenced by the judicial bypass provision, the legislature acknowledges that some minors may be mature enough to make a pregnancy decision. In states with judicial bypass procedures, judges approve nearly all of the petitions because the minors are mature enough to make their own decision.[1]

Although this court finds that protecting minors from their own immaturity in making important decisions is a compelling state interest, the Parental Consent Act is not narrowly tailored to achieve that interest.

C. Protecting the health of minors

i. The Nature and Importance of the Interest

a. The Physical, Emotional and Psychological Health of Minors

This court finds that the State has a compelling interest in

protecting the physical, emotional, and psychological health of minors, based on the following findings:

22. Physical risks associated with abortions are numerous. Preexisting maternal health conditions can complicate the procedure. Short-term physical risks associated with abortion include: bleeding, infections, damage to internal organs, retained products of conception, anesthesia related complications, and death.

23. Long-term physical risks associated with abortion include risks in subsequent pregnancies of pre-term babies, low birth weight babies, placenta previa, sterility or loss of fertility. Other associated risks include an increased risk of breast cancer, an increased risk of death by homicide, and an increased risk of death by accident. It is difficult to generalize the long-term risks associated with abortion because of intervening factors.[2]

24. Similarly, it is difficult to generalize the emotional and psychological risks of abortions. Physiological and emotional risks of abortion include: depression, post-traumatic stress, suicidal ideation, increased risk of suicide, psychiatric admissions, and substance abuse.

25. Physical risks associated with pregnancy and childbirth are numerous. Preexisting maternal health conditions such as diabetes, seizure disorders, bleeding disorders, hypertension, heart disease, and asthma, can complicate pregnancy. Also, complications can arise during pregnancy including: gestational diabetes, pregnancy-induced hypertension, over-distension of the uterus, postpartum hemorrhage, and respiratory conditions. It is difficult to generalize the physical risks of pregnancy and childbirth because the risks are numerous and are influenced by preexisting and post-

pregnancy health conditions.

26. For the same reason, it is difficult to generalize the emotional and psychological risks associated with pregnancy and childbirth. Women who carry a pregnancy to term are at risk of psychiatric illness such as postpartum depression. A full-term pregnancy is also associated with depression. The emotional and psychological risks from an unwanted pregnancy are higher than for a desired pregnancy. Forcing a woman to carry an unwanted pregnancy to term may have negative emotional and psychological consequences. The children of unwanted pregnancies are at high risk for abuse, neglect, mental illness, and deprivation of the quality of life

27. Having parental involvement may or may not be beneficial. Many minors tend to inaccurately predict their parents' reaction to stressful news. Many parents are supportive, loving, and helpful to minor children in stressful situations. On the other hand, there are parents who are not supportive and who are abusive, and a minor's fear of telling her parents about a pregnancy is often legitimate.

28. Forcing a minor to consult someone who is abusive or not supportive may have negative consequences. Forcing a minor to carry a pregnancy to term against her wishes may have negative consequences. Forcing a minor to go through the judicial bypass system may have negative emotional consequences because it may cause her to feel as though she does not have control over the decision, compromise her privacy, and/or stigmatize her decision.

29. The need for post-abortion or post-operative care is directly related to the State's interest of caring for the physical health of the minors. It is important that patients follow abortion

post-procedure instructions and monitor themselves for complications. This applies both to abortion and for other invasive medical procedures.

30. When patients delay seeking care for complications following an invasive medical procedure, it could result in hospitalization and/or could be life-threatening. This generalization applies to abortion.

31. Minors who do not tell their parents about the abortion and then experience complications may delay seeking medical care and may try to hide complications from the abortion. Delays in seeking treatment may increase the severity of the complications, particularly in the case of infection and bleeding. These complications can have serious long-term consequences including sterilization and possibly death.

32. The risk of post-abortion complications is relatively small. Of the minors who will choose to have an abortion without voluntarily informing their parents, very few will suffer post-abortion complications. Of those, even fewer will neglect to seek prompt medical treatment for the complications.

b. Informed Consent

This court finds that the State has a compelling interest in ensuring that doctors obtain informed consent from their minor patients contemplating pregnancy-related decisions, based on the following findings:

33. The parties presented extensive evidence on the topic of informed consent. Regarding informed consent, all invasive medical procedures, including abortion, carry some level of risk. Doctors explain the risks of procedures during the informed consent process.

The patient needs to understand these risks in order to give informed consent to the procedure.

34. The medical community generally regards abortion as a very safe procedure. The risks to the health of the minor are significantly less for abortion than they are for carrying the pregnancy to term and giving birth.

35. Doctors do not inform their patients of every risk that could possibly be associated with a procedure. They select those risks that are significant enough to warrant consideration. This practice is a commonly accepted exercise of professional judgment.

36. Both sides presented extensive evidence on the risks or lack thereof of abortion. This court concludes that it is not capable of quantifying the risks of the abortion procedure. Furthermore, this court concludes professional judgment and professional ethics of medical doctors should govern which risks should be discussed. In reality there are many potential risks, and it is not appropriate to discuss the entire litany of possibilities. It is for the doctors and not this court to prioritize the risks for individual patients and discuss those that are medically warranted. [3]

37. The Alaskan doctors who testified in this case were subjected to extensive cross-examination on the subject of what risks they do or do not disclose to patients. This court is satisfied these doctors reasonably exercise their professional judgment and professional ethics in obtaining informed consent.

38. The skill and competency of the abortion provider may be a risk factor in any abortion procedure.

39. Specialized training is not required to perform abortions;

any medical doctor may perform an abortion. Hospitals and doctors are not required to report abortion complications.

40. No evidence suggests that doctors performing abortions in Alaska do not meet or exceed all medical requirements or are in any way incompetent. Thus, in Alaska, patients would be unable to meaningfully differentiate between the qualifications of abortion providers.

c. Obtaining Medical History

This court finds that the State does not have a compelling interest in receiving complete and accurate medical histories from minors who wish to obtain abortions, based on the following findings:

41. Doctors, or their staff, take a medical history of a patient before performing an abortion. Indeed, doctors take a medical history from all patients they treat.

42. It is common for patients of every age to give inaccurate or incomplete medical information relating to their medical history. Doctors do not rely solely on a medical history to obtain important information.

43. Doctors who perform abortions review medical histories for specific information that relates to the abortion procedure. Doctors also conduct tests, review medical records, and speak to the patient’s treating physician to discover this information.

44. Many of the conditions that would increase the risk of an abortion also pose an increased risk if the patient carried the pregnancy to term. For example, doctors who perform abortions are concerned about a history of bleeding disorders. Doctors are also concerned about bleeding disorders when performing an amniocentesis or c-section or delivering the child.

45. The medical doctors agree that more information about the patient may be helpful. At times, parents may be helpful in assisting a minor with providing a full medical history. However, there is no evidence that the failure to obtain complete and accurate medical histories has substantially increased the risks of abortions or pregnancy-related care.

d. Sexual Abuse

This court finds that the State has a compelling interest in protecting minors from sexual abuse, based on the following finding:

46. Physical abuse and sexual assault are related to the health and safety of minors. Some minors have older partners who have committed statutory rape.

ii. Does the Act further the interests involved in protecting the health of minors?

a. The Physical, Emotional and Psychological Health of Minors

Having found that protecting the health of minors is a compelling state interest, this court must next address whether the Parental Consent Act serves that interest in the least restrictive means possible. This court concludes that it does not, based on the following findings:

47. In addressing physical risks, abortion is a low risk procedure in comparison to pregnancy and childbirth. The physical risks from abortion may be compared to other invasive procedures used to treat STD's or administer prenatal care such as cone biopsy and amniocentesis. Full-term pregnancy and childbirth present a greater risk to the health of the mother than abortion, particularly if the abortion is performed early in the pregnancy. The risks to the

mother increase as the period of gestation increases.

48. There are medical conditions that place the mother's life and the fetus' viability at risk. This court considered evidence by the doctors regarding what is a medical emergency and found a difference of opinion regarding what level of risks must be present before an emergency arises. This court finds that a medical emergency is a question of judgment by medical professionals and not subject to precise definition.

49. The Alaska Parental Consent Act allows doctors to perform abortions on minors without parental consent or judicial approval if the situation is a "medical emergency," which is defined as a condition that "so complicates the medical condition of a pregnant minor that (1) an immediate abortion of the minor's pregnancy is necessary to avert the minor's death; or (2) a delay in providing an abortion will create serious risk of substantial and irreversible impairment of a major bodily function of the pregnant minor." See section 18.16.010(g).

50. A minor cannot, however, consent to an abortion to avoid a "medical emergency."[4] Under the Act, the minor must wait until the situation becomes a "medical emergency," a delay that will increase the health risks of the abortion. In other words, a minor can make the decision to put her own life at risk without parental consent, but the same minor cannot choose to avoid putting her life at risk by electing an abortion without parental consent.

51. It is difficult to measure the long-term emotional and psychological effects of pregnancy and abortion. First, there is no way to separate the effect of the unwanted pregnancy from the effect of the abortion, making it difficult to say that the abortion was the

event that caused any existing emotional and psychological problems. Second, it is difficult to study the long-term effects of any single event because there are so many intervening events in a person's life.

52. The evidence does not prove that there is a causal relationship between abortion and emotional problems. Women who have unwanted pregnancies experience a number of complex emotional reactions, regardless of whether they decide to terminate the pregnancy. Most of these responses are considered clinically normal responses and not psychiatric illnesses. The predominant emotional response experienced by minors after an abortion is a sense of relief.

53. Because it is undetermined how an abortion or a pregnancy will adversely impact the emotional or mental health of a minor, it is difficult to assess whether the Alaska Parental Consent Act would have a positive, negative, or nonexistent impact on the emotional and psychological health of the minor.

54. The Act is not narrowly tailored toward ensuring minors receive post-procedure care. The Act allows for a judicial bypass procedure. Once a judicial bypass is completed, there is no further monitoring by a judicial officer. A parent could be of assistance to the minor if the parent was notified about the abortion after the fact.

55. Parents are not required to consent to other medical procedures posing risks of complications that may become serious if not treated expeditiously.

56. The Act does not require that a minor have parental consent to receive prenatal care, nor does it require parental notification

of a positive pregnancy test to ensure that the minor receives adequate prenatal care. Prenatal care can be crucial to monitoring pregnancy complications and protecting the health of the mother during the pregnancy. Delay in seeking prenatal care could increase the risk to the minor if the mother has any number of preexisting medical conditions. These risks may manifest themselves during the time when the pregnancy is not obvious.

b. Informed Consent

Having found that ensuring doctors obtain informed consent is a compelling state interest, this court must next address whether the Act serves the interest in the least restrictive means possible. This court finds that it does not, based on the following:

57. The evidence does not show that the Act will promote informed consent. Parental consent, or in the alternative, having a judicial bypass procedure, will not foster informed consent. It will remove the right of the patient to consent and place that consent with a third party. The interest at issue here is related to the interest expressed in the immaturity of some minors. For those minors deemed "immature," having an adult consent may facilitate informed consent to make sure that the child understands the risks. The evidence supports that doctors, as adults, perform that function.

58. Doctors are able to obtain informed consent from minors for other invasive procedures related to pregnancy including amniocentesis and STD treatment. Other statutes provide that minors are the decision-makers who provide informed consent for other medical procedures. See AS § 25.20.025 and AS § 08.65.140.

59. Regarding informed selection of a medical provider, an

abortion may not be performed unless "the abortion is performed by a physician or surgeon licensed by the State Medical Board." See AS § 18.16.010. The State could directly address the qualifications of abortion providers to meet their concern.

c. Medical Histories

Having found that the State does not have a compelling interest in receiving complete and accurate medical histories, no further discussion is necessary as a less than compelling interest is insufficient to burden a fundamental constitutional right.

d. Sexual Abuse

Having found that the State has a compelling interest in protecting minors from sexual abuse, this court must next address whether the Act achieves this end in the least restrictive means possible. This court finds that it does not, based on the following findings:

60. There is direct legislation requiring health care providers to report abuse. Many victims of sexual abuse have intercourse not resulting in a pregnancy.

61. Furthermore, minor women impregnated by adult sexual partners are more likely to carry their pregnancy to term.

62. The State does not require parental consent for contraception or pregnancy tests.

63. The Act is over-inclusive. Many minors are impregnated by legal consensual sex with partners their own age, yet these minors are included in the Act.

iii. Conclusion

Many medically invasive procedures related to reproductive health can be consented to by a minor. A minor who is not

emancipated, but who is living apart from his or her parent may give consent for medical and dental services. AS § 25.20.025 (a)(1). A minor who is the parent of a child may give consent to medical or dental procedures for the minor or the child. AS § 25.20.025(a)(3). A minor may give consent for the diagnosis, prevention or treatment of pregnancy, and for diagnosis and treatment of venereal disease. AS § 25.20.025(a)(4). A pregnant minor who is sixteen or older can consent to have a delivery by a midwife. AS § 08.65.140 (17).

With regard to protecting the physical, emotional, and psychological risks of minors, the Parental Consent Act is under-inclusive. Again, the Act only burdens one set of medical risks, the risks associated with abortions. The Act does not burden other sets of medical risks, among them the risks associated with pregnancy and childbirth. The risks to the health of the mother that are associated with pregnancy and childbirth are higher than the risks associated with abortion. If the purpose of the Act is to protect the health of pregnant minors, it is incongruous to burden the decision to choose the safer procedure, but allow minors to choose the more dangerous course without parental consent.

Regarding informed consent to a medical procedure and protecting minors from sexual abuse, the Act is not the least restrictive means of achieving those compelling state interests.

D. Preserving the integrity of the family, including protecting the rights of parents to raise their children

i. The Nature and Importance of the Interest

This court finds that the State does have many interests, some of them compelling, in fostering and protecting the family structure,

based on the following findings:

64. In asserting a compelling interest of fostering and protecting the family structure, the State did not specify what they mean by "family structure." The term "family structure" is broad.

65. In Alaska, other than the intact nuclear family, there are many divorced families, single parent families, and minors raised by surrogate parents who do not have legal guardianship. There are also extended family structures and clans that are part of Alaskan cultures. These family structures are all different.

66. Related to the interest of the family structure is the interest of parents to raise their children, including assisting minors to make decisions. Again, this interest is difficult to define and categorize. As discussed, different people have diverse ideas about the family structure and the parental role. There is no question, however, that the role is very different in the life of a very young child than it is for minors of childbearing age. When the child is younger, the State's interest is surely more compelling, and as the minor moves toward adulthood the role changes, and although the parental role is still very important, it may no longer be compelling. This interest and dynamic was fully explored in the section dealing with the maturity of minor women to make decisions.

ii. Does the Act Appropriately Further the State Interest?

Having identified a broad interest, looking at the specific Act, the State has an important interest in preserving the integrity of the family and the parental role; nevertheless, the following findings are made in relation to the means-to-end fit:

67. In a highly functional family with children living in a

supportive environment, with open communications with parents, the parents and the child would consult on all important matters including pregnancy and abortion. In such a family, the Parental Consent Act would be irrelevant and redundant.

68. On the other end of the spectrum, there are highly dysfunctional families, where the child has, in effect, no adequate parent, perhaps because of the parent's alcoholism, drug addiction, or emotional disability. In such circumstances, the parent may be abusive to the minor. In such a situation, the Parental Consent Act would not promote the purpose of improving "the parental role" and may be detrimental to the minor.

69. There are also families in the middle, where the law may encourage a child to seek parental advice, and where a child may misjudge a parent's reaction. In those instances where the reaction is positive, the Parental Consent Act may foster a parent-child relationship. In certain instances, where the reaction is negative, the Parental Consent Act may adversely impact the parent-child relationship.

70. The evidence does not support the conclusion that parental consent would improve the family structure or the parental role in the least restrictive way possible.

iii. Conclusion

The family structure is diverse. Many variables influence family dynamics. Fostering and preserving a healthy family structure is obviously important, but it is effectuated in very different ways in different families. The State does not have a "compelling interest," which would justify intrusion into every family and the pregnancy choice of every minor woman. The Parental Consent Act

would only peripherally further preservation of the family structure and parental role, and then only in certain families.

E. Protecting the rights to a civil action

i. The Nature of the Interests

This court finds that protecting rights to a civil action is a compelling State interest.

ii. Does the Act Appropriately Further the Interest?

Having found that preserving rights to civil actions is a compelling State interest, this court must next ask whether the Parental Consent Act furthers this interest in the least restrictive means possible. This court finds that the statute does not further the interest, based on the following:

71. The State did not show that people have a difficult time suing doctors for malpractice for abortion procedures.

72. The legislature can create causes of action and extend statutes of limitation as necessary. No evidence supports the notion that the Parental Consent Act will further the interest of protecting the right to bring a civil cause of action.

iii. Conclusion

The Parental Consent Act does not further the rights to a civil action.

F. Promoting the social benefits of reducing teenage high-risk sexual activity

i. The Nature of the Interest

This court finds that regulating sexual behavior is an important, not compelling, interest and separate from the compelling state interest of protecting the health and safety of minors. This is based on the following finding:

73. Reducing sexual activities of minors may have benefits, by reducing the social and societal costs of pregnancies, births, abortions, and STD exposure.

ii. Does the Act Appropriately Further the Interest?

Having found that the State does not have a compelling interest in promoting the social benefits of reducing teenage sexual activities, this court does not need to reach the question of whether the Act furthers this end in the least restrictive means possible. Nonetheless, this court makes the following findings with respect to the means-end fit of this important interest:

74. The evidence suggests that teens in other states with parental involvement laws did not know about the law until after they became pregnant. The evidence does not show that the Act will reduce incidents of unprotected teenage sex or have an affect on the teen pregnancy rate or the rate of STD exposure or infection.

75. There are other means available to the State that would be more directly tailored toward achieving these goals. The State could address these problems with laws or funding to educate male and female minors about safe sex and birth control.

76. The evidence does show that the number of abortions dropped in the states with parental consent or notification laws after the enactment of the law. There is evidence that some minors in these states traveled to states without parental notification laws. It is difficult to determine whether the teen abortion rate dropped for minors from states with parental involvement laws, or whether the teen abortion rate dropped inside the borders of the states with parental involvement laws.

77. There is evidence that teen pregnancy rates dropped after

the enactment of parental involvement laws in other states. However, the drop in the teen pregnancy rates in states with parental involvement is consistent with a national trend in the reduction of teen pregnancy rates. The causal connection has not been established.

iii. Conclusion

The interests involved are not compelling and the Act does not further the interest by the least restrictive alternative.

G. Judicial Bypass

The Alaska Parental Consent Act contains a judicial bypass procedure as an alternative to parental consent. This court finds that the judicial bypass mechanism infringes upon a minor's right to privacy and treats pregnant teens within Alaska differently, without any corresponding benefits to the governmental interests discussed above, based on the following:

78. Minors in Alaska who decide to have an abortion face obstacles to obtaining that abortion. These obstacles may, among others, be cultural, emotional, financial, or geographical. Additionally, the evidence does show that a minor living in a village in the Alaskan Bush faces more onerous obstacles to obtaining an abortion than a minor living in a city such as Anchorage.

79. If a minor desires an abortion and she decides not to speak to her parents, or if the parents decline to consent, she will need approval from a Superior Court Judge.

80. These minors they will need to negotiate the judicial bypass procedure. It is likely that non-governmental organizations such as Planned Parenthood will assist her to overcome the obstacles. She will need to file the petition and decide if she

needs the assistance of a court-appointed attorney to help her through the court process. A few days later, she will have a judicial bypass hearing. She will need to discuss her decision to have an abortion with a Superior Court Judge. The hearing will likely take about 15 minutes. Experience from other states shows that these applications are rarely denied. The minor will then go to a clinic to have her abortion.

81. The procedures for judicial bypass are more readily accessible in Alaska's population centers such as Anchorage, Fairbanks, and Juneau.

82. It will be more difficult for a minor in a Bush community to obtain a bypass. She will have a more difficult time accessing the judicial bypass forms, accessing the court system, accessing her attorney, and participating in the judicial bypass hearing. The Act does allow a minor to participate by phone. However, the minor will need to find a private phone connection. Minors in the Bush already face logistical obstacles to obtaining an abortion. The judicial bypass system will increase these problems, delay the abortion, and increase the probability that the minor may not be able to receive a safe and legal abortion.

83. A minor from the Bush will have to travel to a major population center to get an abortion, pay for the abortion, and keep her choice private. Throughout the process, she may have to miss school. Some public school districts may have a specific attendance policy that allows a minor to miss class to attend a judicial bypass procedure and get an abortion. However, she will need to disclose her decision to someone in the school administration or get a court order that gives her permission to miss school. Most likely, the

health care professionals, court personnel, OPA attorney, Superior Court Judge, and school administration officials will keep the minor's decision 'confidential.' However, the judicial bypass procedure will infringe on the minor's privacy, as she will have to reveal her decision to numerous strangers. In smaller communities within Alaska, it will be very difficult to keep the decision private.

84. In some situations, the judicial bypass procedure may be detrimental to the physical health of the minor. The judicial bypass procedure will cause some delay in obtaining an abortion. The amount of delay will vary depending on the individual circumstance of each minor. Generally, it would cause more delay for minors living in the Bush. The thought of going to court and discussing their decision with strangers may unnerve some minors and because of cultural differences, may have a greater impact on a minor in the Bush. This may cause the minor to delay initiating the judicial bypass procedure. Depending on the length of the delay, it may be medically significant.

85. The mechanics of the judicial bypass procedure may also cause some minors not to seek an abortion.

86. The experiences of other states such as Massachusetts, Minnesota, and Texas indicate that for those minors able to negotiate the system, the vast majority obtain judicial consent. In many instances, the procedure is *pro forma*.

III. EVAUALTION OF THE EVIDENCE

A large body of evidence was presented, most of it scientific and technical, in the form of expert opinions. Lay witnesses with

expertise in particular fields also appeared before this court.

While much of the testimony was helpful in understanding the dispute, no one witness or opinion was dispositive of the issue. It is interesting to note that many of the same experts have testified in other jurisdictions where the parental consent issue has been litigated.

As a general matter, the witnesses are all credible, to the extent that they all believed in the opinions they presented. Unfortunately, on both sides, the opinions were uniformly politicized. What was striking was the bias many of the witnesses have for either the pro-life or pro-choice position. This bias, reflected in many of the opinions presented, affected the weight that should be given to a particular opinion.[5] Lastly, there are many opinions expressed by the many well-qualified experts. Indeed, this court has not in any other case come across such an all-star roster of learned witnesses. Even so, the parties had experts to counter each opposing opinion. In many instances, the subject matter is complex and the variables many; the best conclusion this court can come up with is that the opinions on either side are inconclusive.

In weighing the evidence, this court placed greater weight on the testimony of qualified experts who have conducted independent research, or qualified experts who by training and experience have formed opinions based on personal knowledge.[6] Next are the lay experts that have some basis for their opinions.[7] Lastly, of least weight are the personal experiences of witnesses that weigh in on one side or the other.[8] These witnesses recount an event that happened in the past, and from the specific experience, have attempted to extrapolate a specific event into a general occurrence.

IV. CONCLUSION

Applying the standard set forth by the Alaska Supreme Court, this court concludes that the Alaska Parental Consent Act and Judicial Authorization Act fails to further compelling state interests, using the least restrictive means.

Therefore, under *State v. Planned Parenthood of Alaska,* 35 P.3d 30 (Alaska 2001), the Alaska Parental Consent Act and Judicial Authorization Act is unconstitutional.

Dated October 13, 2003.

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SEN K. TAN
Superior Court Judge

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[1] See Section G.

[2] The term “associated” does not mean that a causal relationship has been established.

[3] The legislature has created a cause of action for medical malpractice on the basis of lack of informed consent. See AS § 09.55.556. It is a defense to any action for medical malpractice based upon an alleged failure to obtain informed consent that the risk is too remote to require disclosure. See AS § 09.55.556(b).

[4] Plaintiff raised the legal issue regarding the medical emergency provision. This court relies on its summary judgment order on this issue.

[5] Many articles were presented, and the court admitted those portions relied on by the experts. To assist appellate review, this court tried as best as it could to highlight those paragraphs cited in the court's copy of exhibits. The appellate court may want to review the copy as a guide and reference.

[6] This category includes Dr. Lemagie, Dr. Henshaw, Dr. Shadigan, Dr. Stotland, Dr. Richey, Judge Martin, Dr. Whitefield, Judge Cooke, Dr. Tsao-Wu, Dr. Josephson, Dr. Uhlenberg, Dr. Calhoun, Dr. Anderson, Dr. Figley, Professor Collett, Dr. Zabin, Dr. Sachdev, Dr. Brind, Dr. Palmer, Dr. Elkind, Dr. Greene, and Dr.

Adler.

[7] This category includes Ms. Reichard, Ms. Patkotak, Ms. Miller, Ms. Foster, Ms. Sabino and Mr. Arndt.

[8] This category includes Ms Christiansen, Ms. Lane, Ms. Farley, Ms. Murphy, Ms. Roberts, Mr. Zielinsky, Mr. Zangri, Ms. Everett, and Ms. Hood.