

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT – CHANCERY DIVISION

THE HOPE CLINIC FOR WOMEN
LTD., et al.,

Plaintiffs,

v.

BRENT ADAMS, Acting Secretary
of the Illinois Department of
Financial and Professional
Regulation, in his official capacity, *et*
al.,

Defendants.

No. 09 CH 38661

Judge Daniel A. Riley

Calendar 6

MEMORANDUM OPINION AND ORDER

This cause comes on the Defendant's Motion for Judgment on the Pleadings, or in the alternative, to Dismiss. The Court, having been fully advised on the premises, issues the following Memorandum Opinion and Order:

I. Background

In 1995, the Illinois legislature passed the current iteration of the Parental Notice of Abortion Act, 750 ILCS 70/1 *et seq.* The Act prohibits anyone from performing an abortion on a minor¹ unless he or she first gives at least 48 hours' notice to the minor's parent or legal guardian. *Id.* at §15. If a minor wishes to avoid notifying her parents, she may do so by (1) declaring in writing that she is a victim of sexual abuse, neglect or physical abuse by an adult family member; or (2) petitioning any circuit court for a waiver of the notice requirement. *Id.* at §§20, 25. The minor must show by a preponderance of evidence that either she is sufficiently mature to make the decision to undergo an abortion, or that notification would not be in her best interests. *Id.* at §25. The court hearing the minor's petition must issue written findings and legal conclusions within 48 hours, or the peti-

¹The Act actually applies to both unemancipated minors and incompetent women. Because the focus of the parties' litigation is minor women, this order uses the term "minor" to refer to both minor and incompetent women.

tion will be deemed granted. *Id.* The Act also guarantees the minor the right to file anonymously and to an expedited appeal. *Id.* The Act specifically requests the Illinois Supreme Court provide rules to ensure expeditiousness and confidentiality. *Id.*

The 1995 Act was the State's second try; an earlier version – passed in 1983 – was permanently enjoined by the U.S. District Court and Seventh Circuit Court of Appeals because of deficiencies rendering its implementation unconstitutional. *See Zbaraz v. Hartigan*, 584 F. Supp. 1452 (N.D. Ill. 1984), *aff'd* 763 F.2d 1532 (7th Cir. 1985); *Zbaraz v. Hartigan*, 776 F. Supp. 375 (N.D. Ill. 1991). Specifically, the Federal Courts were concerned that the Illinois Supreme Court had not issued adequate rules protecting a minor's anonymity and right to expedited appeal. *Id.*

After passage of the new Act in 1995, the plaintiffs in the federal action amended their complaint to challenge the new Act's constitutionality. The state agreed to an injunction of the Act until the Illinois Supreme Court promulgated new rules. In 1996, the Supreme Court announced that it would not promulgate rules as requested by the legislature, and the injunction was made permanent.

Ten years later, however, in September 2006, the Illinois Supreme Court adopted Rule 303A, *Expedited and Confidential Proceedings Under the Parental Notification of Abortion Act*. The federal litigation was again reopened, and this time the Act was upheld as meeting the requirements for parental notice laws under the U.S. Constitution. *Zbaraz v. Madigan*, 572 F.3d 370 (7th Cir. 2009).

The Current Lawsuit

On October 13, 2009, the Plaintiffs in the instant action filed a Complaint for declaratory relief and a Motion for Temporary Restraining Order and Preliminary Injunction with this Court. On October 29, 2009, this Court issued a TRO pending a hearing on a preliminary injunction. The Defendants filed their Motion for Judgment on the Pleadings or, in the Alternative, to Dismiss on November 12, 2009.²

The Defendants argue that judgment on the pleadings is appropriate because 1) the Plaintiffs are precluded from relitigating claims they already lost in the Federal Litigation; and 2) the Plaintiffs fail to state a valid, facial challenge to the Act.

² In October 2009, various State's Attorneys from Effingham, Henderson & Tazewell Counties petitioned to intervene. While the Court denied the putative intervener's motion for reconsideration, the State's Attorneys were allowed to submit their brief as *Amicus Curiae*.

The Plaintiffs' Complaint asks the Court to find the Act unconstitutional under the Illinois State Constitution. To do so, this Court must first find that the Illinois Constitution's right to privacy contains its own, distinct right to abortion that is greater than the right contained in the Federal Constitution.

II. Analysis

Legal Standard for Judgment on the Pleadings

Judgment on the pleadings is proper where there is no issue of material fact presented by the pleadings, and the only remaining question is which party is entitled to judgment. *Daymon v. Hardin County General Hosp.*, 210 Ill. App. 3d 927, 932 (5th Dist. 1991). In deciding the motion, the trial court must examine all pleadings on file, taking as true the well-pleaded facts and reasonable inferences therein, to determine whether a material factual dispute exists or whether the controversy can be resolved strictly as a matter of law. *TDC Dev. Corp. v. First Fed. S. & L. Ass'n*, 204 Ill. App. 3d 170, 173 (1st Dist. 1990). If issues of material fact exist, evidence must be taken to resolve the issues, and the motion for judgment on the pleadings must be denied. *TDC Dev.*, 204 Ill. App. 3d at 173.

Res Judicata

The Defendants first contend that the federal litigation bars the Plaintiff's current action under the doctrines of *res judicata* and collateral estoppel. *Res judicata* prevents relitigation of the same cause of action between the same parties or their privies. *Rein v. David A. Noyes & Co.*, 172 Ill. 2d 325, 334-35 (1996). Where *res judicata* applies, it acts as a barrier "not only as to every matter which was offered to sustain or defeat the claim or demand, but as to any other matter which might have been offered for that purpose." *Housing Authority v. Young Men's Christian Ass'n*, 101 Ill. 2d 246, 251-52 (1984).

The Defendants argue that the Plaintiffs' privies should have raised a state constitutional challenge when they brought the federal litigation; since they did not, *res judicata* prevents them from bringing a claim now. This Court disagrees. *Res judicata* should not be so rigidly obeyed in the context of claim-splitting where fundamental unfairness would result from its strict implementation. See Restatement (Second) of Judgments §26. Specifically, where the subject matter jurisdiction of the original court would preclude litigation of part of the Plaintiff's case, *res judicata* should be ignored. *Id.* at §26(c).

At the time the Plaintiffs' privies both filed and reopened their federal suit, the case law in the Seventh Circuit precluded suits against non-consenting states on subject matter jurisdiction grounds. See *Jensen v. State Bd. of Tax Comm'rs*,

763 F.2d 272 (7th Cir. 1985); *Smith v. Wisc. Dep't of Agriculture, Trade and Consumer Protection*, 23 F.3d 1134 (7th Cir. 1994). While the Defendant argues this case law had changed by the 2006 reopening, counsel for the Defendant conceded at hearing on its motion that, had Plaintiffs brought their state court claims in the federal litigation, the State would have refused to waive its Eleventh Amendment Immunity.³ Thus, Plaintiffs would be required to litigate their claims in state court regardless. This court will not punish the Plaintiffs for their privies' thoughtful avoidance of frivolous federal litigation.

Collateral Estoppel

The Defendants next contend that, because Illinois analyzes constitutional provisions in "limited lockstep" with the federal courts, Plaintiffs' equal protection and due process issues were settled in the federal litigation, and they are estopped from relitigating those issues here. For collateral estoppel to apply, four elements must be met: 1) the issue must be identical to the issue involved in the prior action, 2) the issue must have been actually litigated, 3) determination of the issue must have been essential to the final judgment, and 4) the party raising the issue must have been fully represented in the previous matter. *La Preferida, Inc. v. Cerveceria Modelo, S.A. de C.V.*, 914 F.2d 900, 906 (7th Cir. 1990). The debate in this case is whether the equal protection and due process issues are identical to those litigated in the federal court. To decide these questions, the court must examine whether the state constitutional provisions at issue should be analyzed in lockstep with their federal counterparts.

When a provision in the Illinois Constitution is synonymous with a portion of the U.S. Constitution, courts should begin our analysis with federal constitutional law, moving only to state law if no answers are found there. *People v. Caballes*, 221 Ill. 2d 282, 309 (2006). To determine if separate analysis of the State's Constitution is warranted, courts must find that "a specific criterion – for example, unique state history or state experience – justifies departure from federal precedent." *Id.* at 309. This rule is known in Illinois as the "limited lockstep approach." *Id.* at 310.

In matters of equal protection, the Illinois Supreme Court has consistently held that federal constitutional standards apply to state questions as well. *See Wauconda Fire Prot. Dist. v. Stonewall Orchards, LLP* 214 Ill. 2d 417, 434 (2005). While the Court has been more willing to consider differences in state and

³ Even if Defendant's counsel wished to waive the State's Eleventh Amendment rights under more recent federal precedent, it is highly questionable whether current Illinois law would permit it. *See Civil Immunities Act*, 745 ILCS 5/1 (2009).

federal due process jurisprudence⁴, the clauses are nonetheless synonymous, and, under *Caballes*, specific criteria must exist somewhere in State history or law to justify departing from federal precedent. *Caballes*, 221 Ill. 2d at 309. This Court has not been presented with any such criteria and, therefore, finds that Plaintiffs' equal protection and due process issues were sufficiently and finally decided in the federal litigation. As such, they are precluded here.

Attention must now turn to the Plaintiffs two remaining claims: that the Act – on its face – violates the Illinois Constitution's rights to privacy and gender equality.

Legal Standard for Challenging an Act's Constitutionality on Its Face

First, there is disagreement among the parties as to the proper standard for analyzing a facial challenge to a law's constitutionality. The Defendants contend that the proper analysis is the “no set of circumstances” test. Under that analysis, a law is invalid on its face only if there is no set of circumstances under which it could possibly be constitutional. *See People v. Garvin*, 219 Ill. 2d 104, 116 (2006), *cert. denied*, 549 U.S. 876 (2006).

Alternatively, the Plaintiffs point to a test used in *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833 (1992). In *Casey*, the U.S. Supreme Court struck down a law requiring pregnant women to notify their husbands before undergoing an abortion because it would obstruct “a large fraction of cases in which [it] is relevant.” *Casey*, 505 U.S. at 895. While both parties have provided persuasive support for their positions, recent case law from the First District indicates that the “no set of circumstances” test is still the standard this court must follow. *See In re Jessica M.*, 2010 Ill. App. LEXIS 157 (1st Dist. Feb. 26, 2010) (“To successfully challenge a statutory provision on its face, respondent ‘must fulfill the difficult task of establishing the statute's invalidity under *any* set of facts.’”), *quoting Garvin*, 219 Ill. 2d at 117 (emphasis in originals).

The Privacy Clause

The Plaintiffs contend that the Parental Notice of Abortion Act violates the Illinois Constitution's express right to privacy. This right is found within the guarantee of freedom from unreasonable search and seizure. The pertinent section reads:

The people shall have the right to be secure in their persons,
houses, papers and other possessions against unreasonable

⁴ *See People v. Washington*, 171 Ill.2d 475 (1996) (regarding admissibility of freestanding innocence claims); *People v. Lindsey*, 199 Ill. 2d 460, 468 (2002) (under certain circumstances, Illinois Constitution's due process provision may be construed more broadly than its federal counterpart).

searches, seizures, *invasions of privacy* or interceptions of communications by eavesdropping devices or other means.

Illinois Const., Art. I, § 6. The parties agree, and rightly so, that the Illinois Constitution of 1970 has thus been interpreted separately from the Federal Constitution on the question of privacy of information, and privacy of physical characteristics. *See* Pl. Mem. at 26; Def. Mem. at 24. *See also* *People v. Caballes*, 221 Ill. 2d 282 (2006); *In re: May 1991 Will County Grand Jury*, 152 Ill.2d 381. Our Supreme Court has held that the privacy clause “goes beyond” individual liberties in the Federal Constitution. *Will County Grand Jury*, 152 Ill. 2d at 391; *King v. Ryan*, 153 Ill. 2d 449, 464 (1992); *Best v. Taylor Machine Works*, 179 Ill. 2d 367, 451 (1997). It is also well established that “a fundamental component” of the right to privacy of information is protection of an individual’s medical information, including information about reproductive choice. *Kunkel v. Walton*, 179 Ill. 2d 519, 537-39 (1997). The Plaintiffs argue that this jurisprudence clearly establishes a separate right to abortion under state law.

This argument needs no analysis; it has already been decided. In *Family Life League v. Dep’t of Public Aid*, 112 Ill. 2d 449 (1986), citing the privacy clause, our Supreme Court stated unequivocally that the “fundamental right of privacy which encompasses a woman’s decision of whether to terminate her pregnancy...was also secured by the drafters of the 1970 Constitution of the State of Illinois.” However, there is no reason to believe that the state privacy clause affords *greater* protection than the federal right to abortion. In fact, the Court’s statement in *Family Life League* specifically equates the State’s abortion right with that found in the “right of privacy guaranteed by the penumbra of the Bill of Rights of the United States Constitution.” 112 Ill. 2d at 454.⁵

This reading of the State’s constitutional abortion right is understandable when the privacy clause is viewed in light of “the debates and committee reports of the constitutional convention.” *Caballes*, 221 Ill. 2d at 310. Notably, the privacy clause was “stated broadly” and offered “no definition of [the] types of privacy” protected. Ill. Const. 1970, art. I, §6, Constitutional Commentary, 522. The Bill of Rights Committee report accompanying the proposed privacy clause stated that its purpose was to “guarantee[] a zone of privacy in which [a person’s] thoughts and highly personal behavior were not subject to disclosure or review.”

⁵ The *Family Life League* Opinion also cites to federal case law to extend the fundamental right to include consultation with a physician. 112 Ill. 2d at 454-55, citing *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983).

Sixth Illinois Constitutional Convention, Committee on Bill of Rights Proposal No. 1, p. 31-32.

When the privacy clause was discussed at the constitutional convention, a question was posed to Elmer Gertz, the Chairman of the Bill of Rights Committee, about whether the privacy clause was meant to address abortion. Mr. Gertz responded that the clause “has nothing to do with the question of abortion.”³ Record of Proceedings of the Sixth Illinois Constitutional Convention 1537. Indeed, when other language regarding abortion was proposed at the convention, it was rejected. The proceedings indicate that the Drafters of the 1970 Constitution did not see fit to address abortion one way or the other. *See* 3 Proceedings 1505-1523 (debate regarding language adding protection for “the unborn” in the due process clause);

Thus, at its inception, the Illinois Constitution’s privacy provision was not meant to create a separate right to abortion. In 1970, when the Illinois Constitution was ratified, the country was still three years away from acknowledging such a right. *See Roe v. Wade*, 410 U.S. 113 (1973). The practice was still criminal in an abundance of states. *Id.* at 174 (J. Rehnquist, dissenting). To find such an explicit, expansive right arising from a state constitution ratified before *Roe* would require more direct actions by the drafters than is present in the language of the privacy clause or the Record of Proceedings of the Constitutional Convention.

Given this context, this Court finds that, while the right of a woman to terminate her pregnancy is guaranteed by the Illinois Constitution, that right does not extend beyond the reach of its federal counterpart.

Reasonableness

The Supreme Court has also noted that “[t]he text of our constitution does not accord absolute protection against invasions of privacy. Rather, it is *unreasonable* invasions of privacy that are forbidden.” *Kunkel v. Walton*, 179 Ill. 2d 519, 538 (Ill. 1997) (emphasis in original). *Accord Burger v. Lutheran General Hosp.*, 198 Ill. 2d 21 (2001). To find the law facially unconstitutional, then, there must not be any circumstance under which the restriction of the minor’s right to abortion is reasonable. *People v. Cornelius*, 213 Ill. 2d 178, 194 (2004).

First, it is important to note that nothing in the express language of the Act forecloses a minor’s ability to undergo an abortion. Instead, the Act requires that a physician notify the minor’s parent or other legal guardian at least 48 hours before the procedure is to be performed. 750 ILCS 70/15. Also, when coupled with Supreme Court Rule 303A, a minor can anonymously avoid this notice in that

same time span by petitioning a court for a declaration that she is either mature enough to make the decision without parental involvement, or that notice would otherwise not be in her best interest. 750 ILCS 70/25; IL S. Ct. Rule 303A.

There are numerous U.S. Supreme Court decisions detailing the legitimacy of a state's interest in the health and well-being of unemancipated minors, and upholding more stringent parental notice and consent laws than the Act. *See, e.g., H.L. v. Matheson*, 450 U.S. 398 (1980); *Bellotti v. Baird*, 443 U.S. 622 (1979); *Hodgson v. Minnesota*, 497 U.S. 417 (1990); *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833 (1992); *Ohio v. Akron Ctr. For Reproductive Health*, 497 U.S. 502 (1990); *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476 (1983). The Illinois legislature's interest, as described in Section 5 of the Act, comports – and sometimes aligns directly – with the language of these decisions.⁶

The Plaintiffs argue that the Act's implementation will have a purely negative effect on minors seeking abortions who do not desire parental involvement. The court finds that the Act will encumber a minor's choice to terminate her pregnancy, and will lead to disclosure of confidential information about her sexual history and reproductive choices to adult members of her immediate family. Moreover, this court finds that, for many minor women, disclosure will result in worse results, including physical and emotional abuse. These are clear infringements on constitutional rights of pregnant minors, which carry disconcerting implications. However, this court cannot find from the facts presented by the Plaintiffs that these are the only circumstances that will arise under the Act.

The State has given a valid legislative reason for enacting the statute, and there are circumstances in which notification of a pregnant minor's adult family members will be both reasonable and in her best interest. This is all that is necessary to defeat the Plaintiff's facial challenge to the Act's infringement on privacy rights.

⁶ Section 5 of the Act reads:

The General Assembly finds that notification of a family member as defined in this Act is in the best interest of an unemancipated minor, and the General Assembly's purpose in enacting this parental notice law is to further and protect the best interests of an unemancipated minor.

The medical, emotional, and psychological consequences of abortion are sometimes serious and long-lasting, and immature minors often lack the ability to make fully informed choices that consider both the immediate and long-range consequences.

Parental consultation is usually in the best interest of the minor and is desirable since the capacity to become pregnant and the capacity for mature judgment concerning the wisdom of an abortion are not necessarily related.

750 ILCS 70/5.

Gender Equality

The Plaintiffs' final challenge to the Act's constitutionality arises from the State Constitution's prohibition of discrimination based on sex. Ill. Const. 1970 art. I, §18. The clause mandates that "[t]he equal protection of the laws shall not be denied or abridged on account of sex by the State[.]" *Id.* The Plaintiffs point to federal law which has held the phrase "because of sex" includes discrimination of women or men who did not comport adequately to gender stereotypes. See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004); *Back v. Hastings on Hudson Union Free School Dist.*, 365 F.3d 107 (2d Cir. 2004).

The Plaintiffs' contend that, although the gender equality clause has traditionally been used to invalidate laws that improperly distinguished between men and women, it comes into play whenever a law discriminates "on account of gender." Pl. Resp. at 44. According to the Plaintiffs, the Act discriminates against minor women who "deviate from [the] stereotype...that, for women, childbirth is natural and unremarkable, while choosing not to bear a child is unnatural and improper." Pl. Resp. at 45. This court disagrees.

Regardless of the extent of the gender equality clause, the Plaintiff's claim fails because nothing in the language or history of the Act leads this Court to find that its interest is maintaining life or imposing stereotypical views of womanhood on minors. Rather, the Act's articulated interest is in ensuring that those minor women who are not capable of understanding the implications inherent in choosing whether or not to terminate a pregnancy do so with the counsel of a parent.

While certainly expanding the "because of sex" analysis beyond laws distinguishing between men and women, the federal case law cited by the Plaintiffs⁷ involves discrimination against individuals for displaying characteristics and mannerisms stereotypically associated with the opposite sex. Nothing in the Plaintiffs' evidence shows that the decision to terminate a pregnancy implicates these stereotypes. As a result, Plaintiffs' challenge on gender equality grounds also fails.

⁷ There is no state case law conforming the gender equality clause to the form the Plaintiff seeks here.

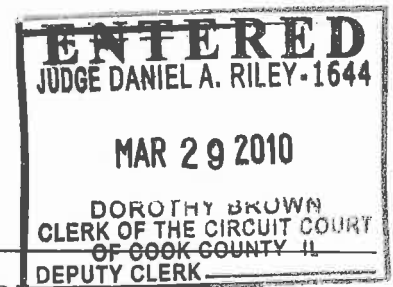
ORDER

Notwithstanding Plaintiffs' compelling evidence that parental notification of abortions for minors will often expose minors seeking an abortion to increased risks and anxieties, this Court, for the reasons set forth herein, is compelled to find the Act is Constitutional.

Accordingly, the Defendants' Motion for Judgment on the Pleadings is granted and this case is dismissed with prejudice. Further, the temporary restraining order entered on October 29, 2009 shall be dissolved.

IT IS FURTHER ORDERED that this Order and the dissolution of the temporary restraining order are stayed for 60 days in order to allow Plaintiffs an opportunity to appeal this Order.

Entered:



Judge Daniel A. Riley
Circuit Court of Cook County, Illinois
County Department, Chancery Division