Findings

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Parental Consent for Abortion

How Common Sense Measures Assure Safety for Minors

By James C. Lesnett, Jr. and Stephen Daniels

Should the law require parents to give consent before their teenage daughter has an abortion? In a country where the abortion controversy has polarized much of the nation into two opposing camps, the answer is an overwhelming yes.

Parental consent for abortion laws do not seek to undermine the current legal protections for abortion. Instead, they simply reinforce the widely accepted and fundamental principle that parents should be involved in any decision related to their own children, including those that involve an invasive surgery that carries with it potential medical and psychological risks. These laws are also a common sense way to ensure that young girls who may be facing a very difficult and potentially life changing decision do not undergo this medical procedure uninformed and without the counsel of their parents.

What Are These Laws About?

Parental consent and parental notification laws are both designed to encourage parental involvement in the abortion decision, but each has different requirements. Parental consent laws require that a parent and the child consent to the abortion before it can be given. In addition, several states require the consent of both parents before an abortion can be legally performed. In contrast, parental notification laws merely require that the parents be notified before or after the abortion takes place, but their consent to the procedure is not necessary.

Currently forty-two states, including North Carolina, have statutes on the books that require parental consent or notification. However, only thirty-two states have laws that are actually in effect. New Mexico does not enforce the law, and in nine other states, parental consent or notification laws are not in effect because they are under court injunction.[1]

North Carolina's parental consent law is in effect and is being enforced, however, a 1997 court ruling created an unfortunate loophole that has greatly weakened the law. This paper examines the law and explains what must be done in North Carolina to ensure that this law accomplishes its purpose of protecting young girls from making a life changing decision without parental guidance.

Parental consent laws exist as safeguards to protect young girls from making a lifelong decision without the wise counsel of their parents.

Why Parental Consent?

Parental consent requirements are not unique to the abortion issue. Parents must give consent for other medical procedures (excluding emergencies), including matters such as ear piercing or receiving aspirin at school. In light of this fact, it is odd that parental consent is not required in all states, considering the risks that the abortion procedure carries with it. No one would ever want a minor to have any major medical procedure without the permission of a parent. Imagine if a doctor decided to remove a child's tonsils without first gaining the parent's permission, there would be a justified outcry from the parents and the medical community. It is reasonable to expect that the same common sense parental consent measures that apply to every other medical procedure, should also apply to abortion.

The Politics of Abortion

The decision of whether or not to have an abortion could undoubtedly affect a teenager's short and long term physical, mental and emotional health. Therefore, it seems common sense would dictate that teens would need adult counseling in making this decision. And most would assume that this responsibility would naturally fall to the parents. So why, with all of these risks, is abortion so often granted protected status? It is because, to many, the issue is no longer a matter of health, but it has become mired in a political agenda.

Opponents sometimes argue that these laws may be unconstitutional because they regulate a woman's right to an abortion. However, this argument ignores the multitude of rulings to the contrary. Even in the infamous Roe v. Wade case, the Supreme Court did not say that the right to abortion was absolute. The court took into consideration the competing interests of privacy and state involvement. Throughout the decades since then, the Supreme Court has consistently ruled that parental consent or notification laws are constitutional as long as they contain a judicial bypass.[2]

The same has been found true of North Carolina's parental consent law. In 1997, the Fourth Circuit Court of Appeals found in *Manning v. Hunt*, that the state's law was constitutional and did not violate a woman's right to an abortion.[3] According to the ruling, North Carolina's law passes constitutional muster because it would allow a minor to bypass her parent's consent and appeal to a judge if necessary.

Despite the political rhetoric, parental consent laws exist as safeguards to protect young girls from making a lifelong decision without the wise counsel of their parents. They are not, as some claim, a veiled attempt to undo the current legal safeguards for abortion.

The Medical Risks of Abortion

In defending the right of women to have an abortion, advocates proceed on the premise that abortion is a safe procedure. However, study after study has shown that this is far from the truth. In fact, the results reveal that abortion is a very dangerous procedure because of its harmful physical and psychological effects. Over one hundred physical problems have been associated with abortion including infections, bleeding, fevers, chronic abdominal pain, gastro-intestinal disturbances, vomiting, ripping of the uterus, and hemorrhaging. Abortion can result in infertility and even death. Abortion has also been associated with severe psychological problems such as depression, drug abuse, sleep disorders, sexual dysfunction, flashbacks, and increased tendency to attempt suicide. Unfortunately, teenagers are at an especially high risk of having these physical and psychological problems.[4]

With these risks in mind, it is difficult to classify any abortion as an innocuous medical procedure, especially when a minor is the one having it. Therefore, the decision to have an abortion must be made within the confines of the family.

The Economics of Abortion

Abortion clinics profit financially from each abortion they perform. In fact, for many clinics, this is the only "service" they provide. Planned Parenthood Federation of America (which performs about 15 percent of all abortions in the U.S.) made $69 million in income from abortions in the year 2000. It has been estimated that Planned Parenthood has made over $815 million from abortions since 1977.[5] Obviously, groups like this have a financial and ideological incentive for keeping abortion legal and readily available, because if these procedures stop, the abortion industry and the income it generates, would suffer.[6]

To protect its business, the industry has not provided complete information about abortion. To the contrary, studies have shown that women do not receive adequate counseling prior to an abortion. One study found that 90 percent of women surveyed felt they did not have enough information to make an informed decision. Almost 80 percent of women surveyed believed they were misinformed or denied relevant information during their pre-abortion counseling.[7] If women do not believe they are being given enough information, it is likely that vulnerable and confused young girls are also not getting the information they need to make an informed decision. Thus, it is important that the parents be able to participate in their daughter's decision-making process and to ensure that she has wise counsel before making up her mind. Leaving the counseling to the abortion clinics, whose interest lie in supporting their own industry, presents a clear conflict of interest.

It is also crucial that the parent—not just another friendly adult—be the one who consents to a teen's abortion. Parents are in the best position to provide the doctor with the medical history of the teen, and this information could be important in weighing the possibility of complications. If an abortion is performed, parents who have knowledge of this fact can be sure that the teen receives the appropriate medical care if there are complications. Parents are also likely responsible for any medical bills that may result from any abortion complication, so it would seem only fair to make them aware of this possibility beforehand.

According to the court, a forged note by a minor seeking an abortion was sufficient to allow a doctor to perform the procedure.

A Risk to Youth?

Opponents of parental involvement laws frequently claim that these laws force teenagers to have illegal abortions rather than risk telling their parents. Although no statistical evidence is given to prove this claim, opponents often cite a 17 year-old Indiana teenager named Becky Bell, who many abortion supporters claim died from an illegal abortion after Indiana passed a parental consent law. However, according to the autopsy, Becky Bell did not die of an abortion, but instead had a miscarriage and later died of pneumonia.[8] Despite this fact, abortion advocates such as the ACLU and NARAL continue to mislead the public about this tragic death.[9] In truth, parental consent laws do not force young women into abortions. Instead, the Becky Bell case reinforces the view that these young women need a safeguard in place to insure that they do not seek an abortion without first consulting their parents.

Another common argument made by those who oppose parental involvement laws is that they could lead to abuse by angry parents or endanger teens that have been victimized by incest or rape at the hands of a family member. This argument ignores the fact that the U.S. Supreme Court has ruled that a judicial bypass must be included in any parental involvement law for just these reasons.[10] A minor who cannot obtain consent or does not want to ask for it may ask a judge, in a confidential hearing, to grant a bypass by taking into consideration factors such as maturity and the best interests of the teen.

Parental Rights Defended

Throughout history, parents have always been considered the rightful guardians of the future and well-being of their children. More than anyone else, parents have a vested interest in their child's success and good health. In order to ensure such things, parents must have the discretion to make choices that are in their child's best interest. This is relevant to any medical procedures that their child will undergo, including an abortion.

The fundamental right of parents to be involved in decisions regarding their own children has been consistently recognized by the nation's highest court. This principle led the U.S. Supreme Court in 2000 to conclude in *Troxel v. Granville* that "it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."[11]

The general public also shows overwhelming support for parental consent laws. A Los Angeles Times poll conducted in 2000 found that 82 percent of Americans agree that girls under the age of 18 should be required to obtain parental consent for an abortion. An earlier 1996 Gallop Survey found that 74 percent of Americans favored requiring parental consent for a minor's abortions.[12]

Effects of Parental Consent Laws

Several studies show that parental consent laws lead to a decrease in the abortion rate and teenage birth rate. A study that examined the impact of the Minnesota Parental Notification Law on abortion and birth found that the law led to a decrease of the teenage abortion rate by an average of 28 percent between the years of 1981-1986. The teenage birth rate also dropped an average of 10 percent during the same period.[13]

Another study that examined the effects of parental involvement laws in Minnesota, Missouri, and Indiana found that in each state, the in-state abortion rate for minors fell with no evidence "that the laws [drove] up birth rates for minors." Researchers did speculate, however, that the decrease of in-state abortions could be due to minors

traveling out of state for abortions.[14]

A third study that examined the effect of state abortion restrictions on minors' demand for abortions stated that "results suggest that parental involvement laws decrease minors' demand for abortions by 13 to 25 percent and state restrictions on Medicaid funding of abortions decrease minors' demand for abortions by 9 to 17 percent."[15]

Whose Best Interest?

After examining the flaws of all of the competing arguments, it becomes apparent that the debate over parental consent is not a debate over what is in the best interest of the child, but an extension of the abortion debate itself. Those who oppose parental notification laws are really not interested in the well-being of the children involved, but are fighting any limitation or regulation on the right to abortion. For these individuals, this is a political and ideological struggle that permeates any area that deals with reproduction. They see any regulation as a constraint on what they believe should be absolute sexual freedom. This is a goal they will pursue no matter what the cost to women, to children, or to society.

Legal History in North Carolina

On July 20, 1995, the North Carolina General Assembly ratified HB 481—Parental Consent for Abortion. Beginning October 1, 1995, it became illegal for a physician in North Carolina to perform an abortion on an unemancipated pregnant minor (under 18 years of age) without the written authorization of her parent, legal guardian, a parent with whom the minor is living, or a grandparent with whom the minor has been living for at least six months prior to the date of the written consent. The law also contains an exception to allow the minor to petition a judge for an abortion, if consent cannot be obtained or if the minor chooses to utilize the judicial waiver procedure.

The law, in its current form and as it was passed in 1995 reads as follows:

§ 90-21.7. Parental consent required
(a) No physician licensed to practice medicine in North Carolina shall perform an abortion upon an unemancipated minor unless the physician or agent thereof or another physician or agent thereof first obtains the written consent of the minor and of:

(1) A parent with custody of the minor; or
(2) The legal guardian or legal custodian of the minor; or
(3) A parent with whom the minor is living; or
(4) A grandparent with whom the minor has been living for at least six months immediately preceding the date of the minor's written consent.

(b) The pregnant minor may petition, on her own behalf or by guardian ad litem, the district court judge assigned to the juvenile proceedings in the district court where the minor resides or where she is physically present for a waiver of the parental consent requirement if:

(1) None of the persons from whom consent must be obtained pursuant to this section is available to the physician performing the abortion or the physician's agent or the referring physician or the agent thereof within a reasonable time or manner; or
(2) All of the persons from whom consent must be obtained pursuant to this section refuse to consent to the performance of an abortion; or
(3) The minor elects not to seek consent of the person from whom consent is required.[16]

The current parental consent for abortion law in North Carolina leaves minor girls with the ability to subvert a law which was designed to protect them.

As mentioned earlier, the Fourth Circuit Court of Appeals upheld North Carolina's law in 1997 as constitutional.[17]

The Problem

On October 23, 1995, Mukeshia Jackson, a sixteen-year old, sought an abortion at A Woman's Choice Inc., an abortion clinic in Raleigh, North Carolina. Jackson provided the clinic with a handwritten note that she forged alleging her mother's consent to the abortion. The clinic, however, made no attempt to confirm the validity of the note, other than asking Jackson if her mother had written it. The clinic performed the abortion, and subsequently Mukeshia and her parents sued the abortion clinic. The parents claimed that the clinic intentionally or negligently inflicted emotional distress upon them and their daughter in performing an abortion upon their daughter. The Wake County Superior Court dismissed the case, ruling the clinic had complied with the requirement to obtain parental consent.[18] The N.C. Court of Appeals affirmed the Superior Court's order to dismiss the case stating that the unknowing and unintentional failure to obtain actual parental consent was not a violation of § 90-21.7.[19] On November 5, 1998, the N.C. Supreme Court denied a petition for discretionary review of the Court of Appeals' decision, essentially upholding the Court of Appeals' ruling.[20]

The Court of Appeals' decision left the current North Carolina law regarding parental consent for abortion with a potential loophole in it. According to the court, a forged note by a minor seeking an abortion was sufficient to allow a doctor to escape prosecution for performing the procedure without verifying the parental consent as being valid. In their ruling, the court stated that the law "contains no requirement, express or implied, that the physician conduct an investigation into the circumstances of a purported written parental consent for an abortion to determine the validity of the writing. Criminal sanctions are imposed only upon an intentional and knowing violation of the consent statute, evidencing a legislative intent against imposing liability upon health care providers who act in good faith."[21]

The court, by saying a forged note of consent was sufficient for a doctor to proceed with an abortion on a minor, has weakened the statutory mechanisms of North Carolina's parental consent law. Although doctors who do not verify the authenticity of written consent may not be at risk of prosecution, there is not doubt that the General Assembly meant that a minor should in fact obtain a valid written consent. With this in mind, it is clear that the statute needs to be tightened in order to insure the integrity of North Carolina's parental consent law.

A Remedy

In the aftermath of the Court of Appeals' ruling, the current parental consent for abortion law in North Carolina leaves minor girls with the ability to subvert a law which was designed to protect them.

In order to close this legal loophole, the current law must include a clear requirement for the minor seeking an abortion to obtain consent legitimately. This could be accomplished by requiring that the parent's consent be given at the location where the abortion will be performed or that the note

of consent be notarized.

Legislation was introduced in the General Assembly to fix the current statute. The following language is from HB 526—Abortion-Parental Consent Notarized introduced in the 2001 legislative session:

> *(a1) The written consent required by subsection (a) of this section shall be either signed at the facility where the abortion is to be performed or acknowledged before a notary public. The physician shall retain in the medical records of the minor a copy of the documentary evidence from which the physician determined that the adult who gave consent for the abortion was authorized to give that consent under subsection (a) of this section.*[22]

Requiring the parent to sign their consent at the abortion facility or requiring the consent to be notarized would prevent forgery and require a minor to obtain legitimate consent from their parents.

Conclusion

Parental consent for abortion laws are a common sense approach to protecting young girls from making a potentially life changing decision without involving the people who most care for their well-being—their parents. It is important for any woman to enter a decision on this procedure with all the necessary information. And it is equally important for minor girls, who are often vulnerable and confused by their circumstances, to have the safeguard of counsel and support from their parents.

Unfortunately, this state's measure to protect young girls has been left vulnerable by a judicial loophole. To restore the protective intent of the law, steps must be taken to tighten the statutory language and ensure that consent is legitimate. As a result, young women who are considering an abortion would be protected from making the decision without their parent's counsel, and the parent's rightful position as primary caretaker of their child would be preserved.

James C. Lesnett, Jr. was a legal intern from the Alliance Defense Fund's Blackstone Fellowship who worked with the North Carolina Family Policy Council during summer of 2002. Stephen Daniels is the Director of Research for the North Carolina Family Policy Council.

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