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Recent Developments: Hodgson v. Minnesota: State Abortion Law Requiring Two-Parent Notification Prior to a Minor's Obtaining an Abortion Is Constitutional if a Judicial Bypass Procedure Is Provided

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meetings. The Court recognized that the possibility of student peer pressure would still remain, however, this pressure presented little risk of official endorsement or coercion because no formal classroom activities were involved and school officials could not actively participate. *Id.*

Finally, applying the *Lemon* entanglement prong, the Court concluded that the school did not risk excessive entanglement by complying with the Act. The Act prohibited faculty monitors from participating in the meetings, as well as non-school persons from directing or regularly attending the student religious meetings. Moreover, school "sponsorship" of religious meetings was prohibited. *Id.* The Court again relied on *Widmar,* stating that a denial of equal access might create greater entanglement problems through invasive monitoring to prevent religious speech at such meetings. *Id.* Accordingly, the Court held that the Equal Access Act did not violate the Establishment Clause. *Id.*

Two concurring opinions expressed a different establishment premise. Justice Kennedy concluded that the incidental benefits realized by allowing official recognition of a student religious club did not lead to an establishment of religion. He stated that nothing on the face of the Act or the *Westside* facts demonstrated the presence of pressure to participate in the religious club. *Id.* at 2376-77 (Kennedy, J., concurring). Justice Marshall offered a more cautious opinion, stating that the school must "fully disassociate" itself from the club's religious speech, activities, and goals. In his view, the school must also avoid the appearance of sponsoring or endorsing the club's goals. *Id.* at 2378 (Marshall, J., concurring).

The Supreme Court's holding in *Westside* will have an immediate impact on this country's school systems. Some school districts have waited for the *Westside* opinion before deciding whether to approve similar after-school student clubs. Now, student religious groups can demand equal access without fear of violating the first amendment.

— *Scot D. Morrell*

Hodgson v. Minnesota: STATE ABORTION LAW REQUIRING TWO-PARENT NOTIFICATION PRIOR TO A MINOR'S OBTAINING AN ABORTION IS CONSTITUTIONAL IF A JUDICIAL BYPASS PROCEDURE IS PROVIDED

In *Hodgson v. Minnesota,* 110 S. Ct. 2926 (1990), the United States Supreme Court upheld the constitutionality of a Minnesota statute requiring that a pregnant minor notify both of her parents before having an abortion. Although the Court found the notification requirement itself to be unconstitutional, the statute as a whole was saved because it provided the alternative of bypassing such notice by obtaining judicial approval.

The Minnesota statute provided that, with certain exceptions, an abortion could not be performed on a woman under 18 years of age until at least 48 hours after both of her parents were notified. *Hodgson,* 110 S. Ct. at 2930. This notice was mandatory unless 1) the attending physician certified the necessity of an immediate abortion to prevent the woman's death, 2) both of her parents had consented to the abortion in writing, or 3) the minor declared that she was a victim of parental abuse or neglect and notice of her declaration was given to the proper authorities. *Id.*

The statute provided that if the court enjoined the enforcement of the parental notice requirement, the same requirement would be effective unless the pregnant woman obtained a court order permitting the abortion. *Id.* To acquire such a court order, the minor had to convince a judge either that she was "mature and capable of giving informed consent" to the abortion or that an abortion without notice to both parents would be in her best interests. *Id.* at 2932-33.

A group consisting of pregnant minors, clinics, doctors, and the mother of a pregnant minor challenged the statute by filing suit in district court. The group alleged that the statute violated the Due Process and Equal Protection clauses of the fourteenth amendment. *Id.* at 2934. The district court found both the two-parent notification requirement and the 48-hour waiting period to be invalid, and therefore concluded that the statute was unconstitutional in its entirety and enjoined its enforcement. *Id.* The United States Court of Appeals, sitting en banc, reversed. The court determined that the two-parent notification requirement was unconstitutional unless, as in this case, a judicial bypass procedure was provided. *Id.* at 2935. The Supreme Court granted certiorari and affirmed. The Court held that the two-parent notification requirement was not reasonably related to legitimate state interests and was therefore unconstitutional, but agreed that the bypass procedure saved the statute as a whole. *Id.* at 2947.

The Court began its analysis by recognizing that the due process clause's constitutional protection against unjustified state intrusion into a woman's decision whether to bear a child extended to pregnant minors. *Id.* (citing *Planned Parenthood v. Danforth,* 428 U.S. 52 (1976)). Since the Minnesota statute placed obstacles in the pregnant minor's path to an abortion, the state had the burden of establishing its constitutionality; to wit, that the obstacles imposed were reasonably related to legitimate state interests. *Id.*.

In considering the constitutionality of the notification requirement, the Court recognized that similar statutes containing parental consent or notification requirements had previously been evaluated by the Court and were determined to be constitutional. The Court noted, however, that none of these cases had considered the significance of requiring the notification of two parents, rather than only one. *Id.* at 2938. Thus, the Court focused its analysis on this distinction.

In defending the statute, the state relied primarily on the state's interest in protecting the independent right of parents "to determine and strive for what they believe to be best for their children," and not on the best interests of the minor. *Id.* at 2946. While the Court recognized that such an interest may be legitimate, it found that it would be fully served by a requirement that the minor notify one parent. *Id.* at 2945.

The Court determined that in functioning families, where the parents communicate with each other, notice to one parent would normally constitute notice to both and the two-parent notification requirement would therefore be unnec-

essary and would not serve any legitimate state interest. *Id.* Moreover, in "dysfunctional" families, where the parents were divorced or the second parent otherwise did not participate in the upbringing of the child, the Court found that the requirement actually disserved the state's interest in protecting and assisting the minor. *Id.* The Court noted that the record revealed the two-parent notification requirement to often result in major trauma to the child as well as the parent, and to violate the privacy of the parent and child even when they suffered no other physical or psychological harm. *Id.* The Court wrote: "The state has no more interest in requiring all family members to talk with one another than it has in requiring certain of them to live together... [n]or can any state interest in protecting a parent's interest in shaping a child's values and lifestyle overcome the liberty interests of a minor acting with the consent of a single parent or court." *Id.* at 2946. The Court found that the separate interest of one parent combined with the minor's privacy interest outweighs the separate interest of the second parent. The Court therefore held the two-parent notification requirement, standing alone, to be unconstitutional. *Id.* at 2947.

The Court concluded, however, that the bypass procedure provided in the statute rendered the entire statute constitutional. *Id.* The Court noted the district court's finding that the bypass procedure produced fear and anxiety among minors and that, of the judges who adjudicated 90% of the bypass petitions in 1981, none identified any positive effects of the law. *Id.* at 2940. However, the Court followed precedent set by earlier cases wherein the Court determined that statutes requiring parental consent to a minor's abortion would be upheld so long as they provided an alternative procedure "whereby a minor may demonstrate that she is sufficiently mature to make the abortion decision herself or that, despite her immaturity, an abortion would be in her best interests." *Id.* at 2948 (citing *Planned Parenthood Ass'n of Kansas City, Mo., Inc. v. Ashcroft,* 462 U.S. 467, 491 (1983); *Bellotti v. Baird,* 443 U.S. 622, 643-644 (1979)).

Turning to the constitutionality of the statute's 48-hour waiting period, the Court recognized concerns expressed by the district court that such a waiting requirement might delay the abortion and thereby increase the risk of the abortion procedure, but found the waiting period itself to be reasonable and to impose a minimal burden on the mother's right to decide whether to terminate the pregnancy. The Court stated:

> "The brief waiting period provides the parent the opportunity to consult with his or her spouse and a family physician, and it permits the parent to inquire into the competency of the doctor performing the abortion, discuss the religious or moral implications of the abortion decision, and provide the daughter needed guidance and counsel in evaluating the impact of the decision on her future."

Id. at 2944.

Through this decision, the Supreme Court has authorized states to impose upon a minor seeking an abortion the additional burden of either notifying both of her parents, regardless of whether one is alienated or disinterested, or obtaining the approval of a judge who has little or no knowledge of her circumstances. In that the Supreme Court has approved the mechanism of a judicial bypass procedure to render an otherwise invalid statute constitutional, one may only speculate as to future unconstitutional statutory obstacles which may be placed in a pregnant minor's path so long as similar judicial alternatives are provided.

— *Rikke Davis*

Maryland v. Craig: MARYLAND STATUTE ALLOWING ONE-WAY CLOSED CIRCUIT TELEVISION TESTIMONY OF CHILD ABUSE VICTIMS DID NOT VIOLATE THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT

In *Maryland v. Craig,* 110 S. Ct. 3157 (1990), the United States Supreme Court upheld a Maryland statute providing for one-way closed circuit television testimony by an alleged child abuse victim. The decision overruled the Court of Appeals of Maryland, which held that the State's showing of the necessity to prevent eye-to-eye confrontation was insufficient to invoke the statute's protection.

Sandra Ann Craig was indicted in October, 1986 by a Maryland grand jury on various counts of child and sexual abuse. Six year old Brooke Etze, the named victim in each count had attended a preschool and kindergarten center owned and operated by Craig.

Prior to the case proceeding to trial, state prosecutors attempted to invoke a Maryland statutory procedure that allowed a judge to permit testimony of an alleged child abuse victim by one-way closed circuit television. Section 9-102 of the Courts and Judicial Proceedings Article provided that the trial judge must first "determin[e] that the testimony by the child victim in the courtroom [would] result in the child suffering serious emotional distress such that the child [could not] reasonably communicate." *Id.* at 3161 n.1 (quoting Md. Cts. & Jud. Proc. Code Ann. § 9-102(a)(1)(ii) (1989)). Once such a determination was made, the child witness, the state prosecutor, and the defense counsel would proceed to a separate room while the judge, the jury, and the defendant remained in the courtroom. The child witness would then be subject to direct examination by the state's attorney, cross-examination by the defendant's attorney, and any questions the judge might wish to ask the child. The examination would be recorded by a video monitor which simultaneously displays the witness' testimony in the courtroom. According to the procedure, the defendant would remain in communication with his attorney, but not with the child witness. Any objections made by either attorney would be ruled on by the judge in the courtroom.

In support of its invocation of the statutory procedure, the state's attorney offered expert testimony that Brooke, testifying in Craig's presence, would have suffered the required serious emotional distress such that she could not have reasonably communicated. Craig objected, arguing that the procedure violated the Confrontation Clause of the Sixth Amendment to the United States Constitution. The trial court rejected that challenge, stating that while the procedure took away the physical confrontation between the witness and the accuser, the statute preserves the "essence" of the constitutional right. The procedure allowed the defendant the right to observe, cross-examine, and