



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

March 21, 1983

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
ANTITRUST: 296-5299

ATTORNEY GENERAL OPINION NO. 83- 39

Honorable Roy M. Ehrlich
Senator, Thirty-Fifth District
Room 138-N, State Capitol
Topeka, Kansas

Re: Infants--General Provisions--Consent to Receive
Medical Services

Public Health--Healing Arts--Treatment of Minors

Synopsis: The existence of statutes which provide that persons who have attained a prescribed age can give informed consent to receive medical treatment under certain circumstances, or which expressly relieve a physician or other health care provider from civil liability for competently furnishing certain medical services to minors, does not preclude the possibility that a particular minor may be capable of giving informed consent to receive other medical services or contraceptives. However, absent a statute which prescribes that all persons of a prescribed age can give informed consent to receive contraceptives or medical treatment, or which expressly relieves a physician or other health care provider from liability for providing contraceptives or medical treatment to persons less than the statutorily-prescribed age of majority, it would be a question of fact for the trier of facts to determine whether informed consent could be given by a particular person and whether such consent indeed had been given. Cited herein: K.S.A. 38-101, 38-123b, 65-2891, 65-2892, 65-2892a.

*

*

*

Honorable Roy M. Ehrlich
Page Two

Dear Senator Ehrlich:

You and Senators James L. Francisco, William "Bill" Mulich, August Bogina, Jr., and Edward J. Roitz have signed and sent to this office a letter seeking an opinion on whether, "under Kansas law, a minor can provide informed consent (without parental consent being given) to receive medical contraceptive services."

You state that several statutes have been enacted granting minors the authority to consent to certain medical treatment, and cite as examples K.S.A. 38-123b, 65-2891, 65-2892 and 65-2892a. Then, you state: "Apparently, then, minors cannot consent to medical treatment in Kansas unless specific statutory authority to give consent has been provided."

Please be advised, first, that, in our judgment, the statement that no minor can give informed consent to receive any medical treatment unless a statute confers upon all minors the authority to grant such consent is incorrect. We note that, in regard to particular medical treatment, minors may be capable of giving consent, even where a statute attempts to preclude this possibility. See: Bellotti v. Baird, 443 U.S. 662, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979) and Planned Parenthood of Missouri v. Danforth, 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976). We also note the Kansas Supreme Court case of Younts v. St. Francis Hospital & School of Nursing, 205 Kan. 292 (1970), wherein our Supreme Court ruled that a minor female, although not married or otherwise emancipated, was capable of giving consent to receive medical treatment, had in fact given such consent and, thus, was denied recovery of civil damages for receiving unauthorized treatment. Thus, based upon the above cited cases, we believe that, under the common law, at least some persons, although having not attained the statutorily-prescribed age of majority [i.e., 18 years of age in Kansas (K.S.A. 38-101)], or not having become emancipated, nonetheless may be capable of giving informed consent to receive medical treatment.

Futhermore, our opinion is not affected by the statutes you reference. Generally, those statutes do nothing more than protect a hospital, physician or other health care provider from being held liable for civil damages, if the hospital, physician or other health care provider competently furnishes medical treatment to minors, when certain circumstances, such as an emergency, exist or when a particular treatment is provided. All of these statutes, however, merely recognize, and waive, the general rule that medical treatment cannot be provided to a minor without the consent of the minor's parent or legal guardian, without the person rendering the treatment being subject to civil damages for unauthorized

Honorable Roy M. Ehrlich
Page Three

treatment. See Younts v. St. Francis Hospital & School of Nursing, supra, at Syl. ¶s 6 and 7. Thus, these statutes merely provide a legal defense to a hospital, physician or other health care provider in the event it is sued for providing medical services to persons who have not attained the statutorily-prescribed age of majority. The existence of these statutes, however, in our judgment, does not preclude the possibility that particular minors may be capable of giving informed consent to receive other medical treatment, thereby providing a legal defense to a claim of unauthorized treatment.

However, absent a statute which prescribes that all persons of a certain age can give informed consent to receive contraceptives or medical services, or which expressly relieves a physician or other health care provider from liability for providing contraceptives or medical treatment to persons less than the statutorily-prescribed age of majority, it would be a question of fact for the trier of facts to determine whether informed consent could be given by a particular person and whether such consent indeed had been given.

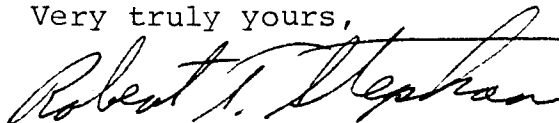
Thus, whether a particular individual is capable of giving informed consent to receive contraceptives or medical treatment is a question of fact to be determined on a case-by-case basis. Factors identified by the courts as being relevant to the determination of this issue include the age and maturity of the individual, the marital status of the individual, the degree to which the minor is dependent upon his or her parents or others for support, the familial situation of the minor, and the degree of potential health hazards associated with the particular contraceptive or medical treatment provided. See: H. L. v. Matheson, 450 U.S. 398, 101 S.Ct. 1164, 67 L.Ed.2d 388 (1981); Bellotti v. Baird, supra; Planned Parenthood of Missouri v. Danforth, supra; Eisenstadt v. Baird, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972); Younts v. St. Francis Hospital & School of Nursing, supra, and 61 C.J.S., Physicians, Surgeons, Etc., §178.

In light of the foregoing facts, I trust you understand it is not possible for us to state, as a matter of law, that any particular minor (i.e., any person who has not attained the age of 18 years), can or cannot give informed consent to receive contraceptives or


Honorable Roy M. Ehrlich
Page Four

medical treatment. Facts relating to the particular individual would have to be considered and a judgment made based upon those facts.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Rodney J. Bieker
Assistant Attorney General

RTS:BJs:RJB:jm
cc: Senator James L. Francisco
Senator William Mulich
Senator August Bogina, Jr.
Senator Edward J. Roitz