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March 29, 1988

ATTORNEY GENERAL OPINION NO. 88- 44

The Honorable Susan Roenbaugh
State Representative
One Hundred Fourteenth District
State Capitol, Room 170-W
Topeka, Kansas 66612

Re: Minors--General Provisions--Consent for Medical Care of Unmarried Pregnant Minor

Synopsis: In Bellotti v. Baird, 443 U.S. 622, 995 S.Ct. 3035, 61 L.Ed.2d 797 (1979) (plurality opinion) the United States Supreme Court held that the United States Constitution would permit a state to require a pregnant minor to obtain parental consent to an abortion if the state provided an alternative procedure whereby the minor could establish that she was mature enough to make the decision on her own or that it would be in her best interests to have the abortion. Since 1988 House Bill No. 2950 establishes such an alternative procedure, it is our opinion that its parental consent requirements would pass constitutional muster. Cited herein: 1988 House Bill No. 2950.

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Dear Representative Roenbaugh:

You request our opinion regarding the parental consent provisions in 1988 House Bill No. 2950. Specifically you ask whether, in light of our conclusions in Attorney General Opinion No. 87-66, the parental consent requirements of 1988 House Bill No. 2950 for a minor's abortion would be

unconstitutional. You inform us that House Bill No. 2950 was reported unfavorably and that the issue may return thus making our opinion desirable.

In Attorney General Opinion No. 87-66 we were asked whether a county health department could legally provide family planning services to minors without parental consent. In reviewing United States Supreme Court decisions regarding the constitutional rights of minors, we found that while minors are indeed protected by the Constitution and possess constitutional rights [Planned Parenthood of Central Missouri v. Danforth, 488 U.S. 52, 74, 96 S.Ct. 2831, 2843, 49 L.Ed.2d 788 (1976)], the State has somewhat broader authority to regulate the activities of children than of adults, id., and a restriction on minors' rights will be tolerated if it serves a significant state interest that is not present in the case of an adult. In Planned Parenthood of Central Missouri v. Danforth, 428 U.S. at 74, the Supreme Court held unconstitutional a Missouri statute which required the consent of a parent to the abortion of an unmarried minor because it constituted an absolute and arbitrary veto power over the decision of a minor regardless of the maturity or best interests of the minor. In balancing the State's interest against the constitutional rights of minors, the Court found that the State's interest in safeguarding the family unit and parental authority did not justify this degree of constitutional interference. Thus, we concluded in Opinion No. 87-66 that mandatory parental consent requirements for all contraceptive services to minors were unconstitutional because they imposed absolute third party veto powers over a minor's ability to obtain contraceptives.

In Opinion No. 87-66 we also discussed the United States Supreme Court's holding in Bellotti v. Baird, 443 U.S. 622, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979) (plurality opinion), hereinafter referred to as Bellotti II. In this case the court set forth three criteria to consider when determining the constitutional rights of minors:

> "[First,] although children generally are protected by the same constitutional guarantees against governmental deprivations as are adults, the State is entitled to adjust its legal system to account for children's vulnerability and their needs for 'concern, . . . sympathy, and . . . paternal attention.' [Id., at 635, citing McKeiver v. Pennsylvania,

> 403 U.S. 528, 550, 91 S.Ct. 1976, 29 L.Ed.2d 647 (1971).]
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> "Second, the Court has held that the States validly may limit the freedom of children to choose for themselves in the making of important, affirmative choices with potentially serious consequences. These rulings have been grounded in the recognition that, during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.
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> . . . .
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> "Third, the guiding role of parents in the upbringing of their children justifies limitations on the freedoms of minors." Bellotti II, 443 U.S. at 635, 636.

With these principles in mind, and acknowledging its previous holding that "a State may not impose a blanket provision . . . requiring the consent of a parent or person in loco parentis as a condition for abortion of an unmarried minor during the first twelve weeks of her pregnancy" regardless of her maturity or best interests [Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 74, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1979)], the Court held that a State which decides to require a pregnant minor to obtain parental consent to an abortion must also provide an alternative procedure whereby authorization for the abortion can be obtained. Bellotti II, 443 U.S. at 643.

> "A pregnant minor is entitled in such a proceeding to show either: (1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes; or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests. The proceeding in which this showing is made must assure that a resolution of the issue, and any appeals that may follow,

> will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained. In sum, the procedure must ensure that the provision requiring parental consent does not in fact amount to the 'absolute, and possibly arbitrary, veto' that was found impermissible in Danforth." Bellotti II, 443 U.S. at 643, 644.

The court thus reached a compromise between protecting the constitutional rights of minors and the State's interests in protecting those minors and preserving family integrity. This position was reaffirmed by the Court in Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 439, 103 S.Ct. 2481, 2496, 76 L.Ed.2d 687, 709 (1983) and Planned Parenthood Association of Kansas City v. Ashcroft, 462 U.S. 476, 490, 491, 103 S.Ct. 2517, 76 L.Ed.2d 733, 745 (1983).

It is evident from these decisions that the Supreme Court has concluded (not without dissent) that the Constitution would permit a state to require a pregnant minor to obtain parental consent to an abortion if the state provided a procedure whereby the minor could establish that she was mature enough to make the decision independently of her parent's wishes or that it would be in her best interests to have the abortion. See Planned Parenthood Association of Utah v. Matheson, 582 F.Supp. 1001, 1008 (D. Utah); H B v. Wilkinson, 639 F.Supp. 952, 953 (D. Utah 1986).

1988 House Bill No. 2950 contains the alternative procedure required by Bellotti II. Section 3(b)(1) provides that if neither of the parents is available to consent, if consent is refused, or if the minor elects not to seek such consent, the minor may petition any district court for a waiver of the consent requirement. Section 4 sets forth the procedure for obtaining judicial waiver of the consent requirement. It ensures anonymity, §4(b), establishes the minor's right to court-appointed counsel, §4(c), assures an expedited resolution of the issue, §§4(d) and (f), and provides that the court shall waive the consent requirement if it finds that the minor is mature and well informed enough to make the abortion decision on her own or the performance of the abortion would

be in the minor's best interests, §4(e)(3). We therefore conclude that the parental consent requirements of this bill are not unconstitutional.

Very truly yours,

Robert T. Stephan

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RTS:JLM:jm