Personal Opinion or the Law – Which Should Be the Basis for Judges’ Decisions on Minors’ Petitions for Abortion?

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In Memphis, Tennessee, a pregnant teenager recently filed a petition with the Shelby County Circuit Court requesting an abortion.\(^1\) The petition was filed pursuant to Tennessee’s Parental Consent for Abortions by Minors Act, which requires an unemancipated minor to obtain the written consent of one parent before having an abortion.\(^2\) In the alternative, if a parent refuses to consent to the abortion or the minor chooses not to confront her parents, the minor may seek a “judicial bypass” and petition the court for a waiver of the consent requirement in order to have the abortion without parental involvement.\(^3\) When the minor at issue in Memphis sought a judicial bypass, however, the Shelby County Circuit Court Judge scheduled to hear the pregnant minor’s case – the Honorable Judge John R. McCarroll – refused to hear her petition, as well as all future applications filed by minors seeking abortions, strictly for moral reasons.\(^4\) In fact, of the nine judges in the Shelby County Circuit Court, five have recused themselves from hearing any cases involving a minor seeking a waiver of the parental consent requirement.\(^5\)

Tennessee judges are not alone in their actions. Judges in Alabama and Pennsylvania, which have statutes similar to the Tennessee law, have also refused to hear minors’ petitions for abortions, and it is likely that judges in other jurisdictions will soon do the same.\(^6\) Despite the trend towards such judicial inaction, allowing judges to opt out of these cases on the basis of personal opinion may jeopardize not only the rights of the pregnant minor, but also the propriety of the judiciary.

In 1976, the United States Supreme Court first ruled on the constitutionality of a state’s parental consent and notification law in Planned Parenthood of Central Missouri v. Danforth.\(^7\) In finding Missouri’s one-parent consent requirement unconstitutional, the Supreme Court held that “the State may not impose a blanket provision . . . requiring the consent of a parent as a condition for abortion for an unmarried minor.”\(^8\) Three years

\(^2\) TENN. CODE ANN. § 37-10-303(a) (2005).
\(^3\) TENN. CODE ANN. §§ 37-10-303(b), -304(e).
\(^4\) Liptak, supra note 1. Judge McCarrall stated that “[t]aking the life of an innocent human being is contrary to the moral order.” Id.
\(^5\) Id.
\(^6\) Id.
\(^7\) Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976) (holding that states can encourage parental consultation in the abortion decision of teens, but they cannot give parents the unconditional power to veto that decision).
\(^8\) Id. at 74. The Court also held that “the State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto” over the abortion decision. Id. See also Helena Silverstein,
later, when the Supreme Court in *Bellotti v. Baird* was confronted with a Massachusetts statute requiring parental consent, the Court went even further in holding that “if the State decides to require a pregnant minor to obtain one or both parents’ consent to an abortion, it also must provide an alternative procedure, whereby authorization for the abortion can be obtained.” The Court went on to explain that “every minor must have the opportunity – if she so desires – to go directly to a court without first consulting or notifying her parents” and that “the constitutional right to seek an abortion may not be unduly burdened by state-imposed conditions upon initial access to court.” Accordingly, it is well-established law that the constitutionality of a state’s parental consent requirement is conditioned on the availability of a bypass alternative. However, a state’s mere inclusion of a bypass provision in its parental consent law does little to protect a pregnant minor’s constitutional rights, especially when the judges who are obligated to enforce the provision refuse to hear the minors’ abortion petitions.

When judges recuse themselves from hearing a minor’s application for abortion, they are limiting a minor’s access to the court and to an expeditious proceeding, ultimately failing to extend the minor full protection of her right to seek an abortion. For example, if several judges in a single county refuse to hear abortion applications, thereby leaving only a limited number of judges available for such hearings, a pregnant minor may have to wait longer for a hearing, especially if the remaining judges’ dockets are full. Although Tennessee requires that the initial hearing on a petition for abortion take precedence over other pending matters, the law does not require that such hearings take place within a requisite amount of time, or even at all. In fact, if the court has not ruled on the minor’s petition for abortion within 48 hours from the date of application, the petition will be denied regardless of whether or not a hearing was provided. Even though the statute affords the minor with an immediate right to appeal the denial and a right to an appellate hearing within five calendar days from the court’s docketing, the process is not that simple and further delays a ruling on the petition, which increases the incidence of minors having abortions later in pregnancy with greater risks to the minor’s health.

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10 Id. at 648.
12 Id. (stating that it may be possible for a statute to be formally consistent with legal precedent and for the state’s implementation of the statute to be inconsistent with precedent).
13 Liptak, *supra* note 1 (stating that one issue of the recusals has been the workload of the court).
14 TENN. CODE ANN. §§ 37-10-304(d).
15 Id. The only exception to this rule is when the minor asks the court for an extension of time so that a decision may be rendered after forty-eight hours. *Id.*
16 TENN. CODE ANN. §§ 37-10-304(d), (g)
Furthermore, when dealing with a small or rural county that has only one judge residing and that judge is unwilling to hear abortion petitions, the minor will be forced to travel to another county to file the petition in a court where a judge will actually hear it. Forcing a minor to travel to another county will not only further delay a hearing on the petition, but could also significantly deter minors from filing petitions altogether, especially those with no means of transportation. Accordingly, allowing judges to opt out of hearing abortion petitions creates additional burdens for the minor seeking an abortion to overcome.

In addition to burdening the minor, allowing a judge to recuse himself from hearing a petition for abortion threatens the propriety of the judicial system. Specifically, the standards imposed on the judiciary by most states providing a judicial bypass procedure require that a judge rule on a minor’s petition based on either (1) the maturity of the minor to make the abortion decision on her own or (2) what would be in the best interest of the minor. Accordingly, a judge is not permitted to rule based on his personal opinion or moral belief towards abortion. However, Judge McCarroll and his colleagues are doing just that when they refuse to hear minors’ abortion petitions.

While it is certainly not unlawful for a judge to express moral disagreement with the law, it is definitely unlawful for a judge to use moral grounds as a means to decline to enforce the law. The law is the law, and it should be enforced as written, regardless of whether or not a judge agrees with it. To hold otherwise would essentially render meaningless the purpose of the judicial system, as well as undermine the integrity and legitimacy of the court. Therefore, in order to protect the fundamental rights of a pregnant minor and preserve the legitimacy of the judiciary, it is essential that judges be prohibited from opting out of hearing minors’ abortion petitions on the sole basis of personal opinion.

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19 *Id.* at 118.
20 TENN. CODE ANN. § 37-10-304(e); 18 PA. CONS. STAT. § 3206(d) (2005); ALA. CODE § 26-21-4(f) (2005).