IN THE SUPREME COURT
OF FLORIDA

In Re: AMENDMENTS TO THE FLORIDA RULES OF JUVENILE PROCEDURE; FORMS FOR USE WITH RULES OF JUVENILE PROCEDURE; AND THE FLORIDA RULES OF APPELLATE PROCEDURE - JUDICIAL WAIVER OF PARENTAL NOTICE OF TERMINATION OF PREGNANCY

No. 05-950

AMENDED COMMENTS AND OBJECTIONS OF PLANNED PARENTHOOD OF SOUTHWEST AND CENTRAL FLORIDA REGARDING ADOPTION OF NEW FLORIDA RULES OF JUVENILE PROCEDURE 8.800, 8.805, 8.810, 8.815, 8.820, 8.825, 8.830, AND 8.835, FORMS 8.987, 8.988, 8.989, 8.990, AND 8.991, AND NEW SUBDIVISION (n) OF FLORIDA RULE OF APPELLATE PROCEDURE 9.110

Comes now, Planned Parenthood of Southwest and Central Florida, by and through undersigned counsel, and submits these comments pursuant to this Court's order of June 30, 2005, inviting interested parties to file comments concerning proposed new Rules of Juvenile Procedure 8.800, 8.805, 8.810, 8.815, 8.820, 8.825, 8.830, and 8.835, accompanying Forms 8.987, 8.988, 8.989, 8.990, and 8.991, and new subdivision (n) of Florida Rule of Appellate Procedure 9.110.

1. Planned Parenthood of Southwest and Central Florida ("Planned Parenthood") is a Florida not-for-profit corporation with headquarters in Sarasota. Planned Parenthood provides reproductive health care to women and men, including family planning counseling and services; gynecological examinations and treatment for minor gynecological disorders; testing and

treatment for sexually transmitted infections; pregnancy testing and counseling; male services, including vasectomies; and abortion up to 14 weeks lmp. Approximately 10% of Planned Parenthood's abortion patients are women under 18, some of whom have decided not to involve a parent or legal guardian in their decision to obtain an abortion.

2. Planned Parenthood firmly believes that the Florida statute requiring parental notification of abortion, Fla. Stat. § 390.01114 (Supp. 2005) ("the Act") is an unconstitutional invasion of minors' right to privacy and right to travel under the United States Constitution, as well as a violation of the due process rights of physicians who perform abortions in the state of Florida.

3. Planned Parenthood of Southwest and Central Florida is a plaintiff in the case of WomanCare of Orlando v. Agwunobi, No. 05-cv-222 (N.D. Fla., filed June 23, 2005), challenging the constitutionality of Fla. Stat. 390.01114, and makes these comments without prejudice to its rights in that case.

4. Planned Parenthood hereby submits the following comments.

I. Anonymity

5. Rules 8.805(b) and (c) and 8.835(a) allow a minor to file a pseudonymous petition, specify that the document containing the sworn statement including the minor's name and identifying information be kept under seal, and require that identifying information be kept confidential and the court file sealed. However, the rules fail to require with sufficient specificity that the minor's name and/or identifying information are not to be used by court personnel in documents that may not be contained within the sealed file. Planned Parenthood has received an anecdotal report that, since the statute went into effect, there has been at least one instance in which the minor's name was listed on a publicly available court docket. This

Court should clarify that court personnel are prohibited from using the minor's name and identifying information in any document or proceeding.

II. Confidentiality

6. Rule 8.820(e) specifies that the hearing "shall be closed to the public and all records thereof shall remain confidential" as provided by the statute, which in turn provides that identifying information is exempt from open records provisions of the Florida Code and Constitution. (*See* R. 8.820(e), 8.835(a), referencing Fla. Stat. § 390.01116.) In specifying that the hearing be closed to the public, the rule creates uncertainty as to who may attend the hearing. The Rule should specify the minor has the right to request that others be permitted to attend, such as a friend or other family member who has accompanied her to the hearing. In addition, all persons attending these hearings should be advised that the proceedings are anonymous, sealed, and confidential and that failure to conform with these requirements violates the petitioner's privacy rights.

7. No provision is made for assisting the minor in completing the petition, or for protecting the minor's privacy during the filing process. Rule 8.805(a) should be amended to require that the clerk of the court assist the minor in filing the petition, and that he or she do so in a setting that protects the minor's privacy.

III. Appellate Proceedings

8. In order to facilitate the Appellate Process, Planned Parenthood recommends that the Court adopt a Notice of Appeal form to be used specifically for judicial waiver proceedings. This form would omit irrelevant information currently contained in the caption and body of Rule 9.900(a) (Notice of Appeal), including the requirement that both a defendant and plaintiff be listed and designated as appellant or appellee. In addition, the form would contain a preprinted statement that "the nature of the final order" was "Final Order Dismissing Petition for Judicial

Waiver of Parental Notice of Pregnancy." Circuit judges and clerks should be instructed to attach a copy of this Notice of Appeal form to all orders dismissing petitions for judicial waiver. (Form 8.991)

9. While Rule 8.815 specifies that counsel is available for the minor in filing the petition in the first instance, and the Advisory Notice to Minor form (Form 8.989) states that she is entitled to appeal and to counsel on appeal, Rule 9.110(n), the rule governing the appeal process, does not specify that she is entitled to counsel on appeal. Rule 9.110(n) should be amended to specify that the minor has a right to counsel on appeal. In addition, the recommended Notice of Appeal form for judicial waivers should indicate that the name and contact information of the attorney need not be supplied if the minor is not represented, and further should state that the minor can request appointment of an attorney to represent her on appeal if she so desires.

10. Rule 9.110(n) currently provides that "briefs or oral argument may be ordered at the discretion of the district court of appeal." The Rule should be amended to make clear that the minor and her attorney have the right, which they may waive, to present a brief to the Court and to request oral argument. It should further provide that if the minor indicates she intends to file a brief, the Court will not issue a decision until after the date she has indicated unless an extension has been sought or the 10 day time limit for appellate court action would be exceeded. The recommended Notice of Appeal form should accordingly provide a check-off provision allowing the minor to indicate whether she intends to file a brief, and if so by what date, or to indicate to the Court that she does not intend to file a brief. The form should also make provision for the minor to request or waive oral argument.

11. Although the minor files the Notice of Appeal in the circuit court where she filed her initial petition, she must file her brief on appeal in the District Court of Appeal. Planned Parenthood recommends that this Court take steps to reduce delays that may result from the fact that the District Court of Appeal may be located a significant distance from the location of the circuit court where the minor filed her petition. Such steps could include allowing the minor to file the brief in a convenient circuit court location and requiring the clerk to transmit it to the District Court of Appeal, permitting filing by facsimile, and/or, where technically possible, allowing electronic filing.

12. Planned Parenthood further recommends the adoption of rules establishing expedited procedures for seeking review by this Court. The time limits and other procedural requirements in such a rule could parallel those for appeals to the District Court of Appeal. In addition, Planned Parenthood suggests that this Court develop a modified version of Rule 9.900(d) (Notice to Invoke Discretionary Jurisdiction of the Supreme Court), specifically for use in judicial waiver cases and consistent with the recommendations set forth above regarding a form for Notice of Appeal in judicial waiver proceedings.

IV. Contents of Petition as to Abuse Reporting

13. Current Form 8.987 requires the minor to list "reasons" that she meets the criteria necessary for granting a bypass, i.e. that she is sufficiently mature to decide whether to terminate her pregnancy, that she is a victim of child abuse or sexual abuse by a parent or guardian, or that notification of a parent or guardian is not in her best interests. With respect to the criterion of abuse, the form requires the minor to complete the following statement:

> "The minor is a victim of child abuse or sexual abuse by one or both of her parents or a guardian, for the following reason(s): _____"

The form thus appears to require the minor to list the reasons she has been abused — a result that is clearly not what this Court intended to require of minors who claim to have been victims of abuse. As drafted, the form will likely create confusion.

14. Minors should not be required to provide detailed information in petitions alleging abuse as grounds for judicial waiver. In advance of a hearing, a sworn statement on the petition that the minor has been abused should suffice to meet the requirement that she make a prima facie showing of abuse. The Form should be amended to conform to its previous articulation, allowing the minor to check a box next to the statement "The minor is a victim of child abuse or sexual abuse by one or both of her parents or a guardian," (See Repealed Fla. R. Civ. P. Form 1.999) without requiring any further explanation.

V. Venue

15. The Act provides that "[a] minor may petition any circuit court in a judicial circuit within the jurisdiction of the District Court of Appeal in which she resides for a waiver of the notice requirement." Fla. Stat. § 390.01114(4)(a). Rule 8.805 currently states that "proceedings for a judicial waiver of parental notice of termination of pregnancy shall be commenced by the filing of a petition in any circuit court within the appellate district in which the petitioner resides."

16. Planned Parenthood recommends that the Court amend Rule 8.805 to permit minors to file for judicial waiver in any circuit court in the State. This suggestion is based on the use of the word "may," rather than "shall" in the venue provision, which indicates that the provision does not affirmatively restrict a minor's choice of venue.

17. Planned Parenthood's proposed amendment to Rule 8.805 is consistent with the position of the Solicitor General, the Florida Department of Health, and the Speaker of the

Florida House of Representatives as to the proper construction of the venue provision. In a pending lawsuit in Federal District Court of the Northern District of Florida challenging the constitutionality of the Act, the Solicitor General, representing the State of Florida, through the defendant Secretary of the Department of Health John Agwunobi, has taken the position that the use of the word "may" in Fla. Stat. § 390.01114(4)(a) makes this provision permissive as to venue, and therefore a minor is "free under the general venue statute to petition any circuit court located anywhere in the state." Defendant Agwunobi's Memorandum of Law in Opposition to Plaintiffs' Motion for Temporary Restraining Order and/or Preliminary Injunction at 20 (Attached hereto as Exhibit A). Allan G. Bense, in his official capacity of Speaker of the Florida House of Representatives, submitted a brief adopting this position as well. See Memorandum of Law of Defendant Bense in Opposition to Plaintiffs' Motion for Temporary Restraining Order and/or Preliminary Injunction at 10-11 (Attached hereto as Exhibit B).

18. Amending Rule 8.805 to allow minors to file in any circuit court would cure a significant defect in the Act and the Rule. The Act makes no provision for minors who do not "reside" in Florida, nor does it define "resides," and the Rule fails to cure this defect. By failing to provide a venue for non-resident minors seeking abortions in Florida to petition for a judicial bypass of the notice requirements, both the Act and Rule 8.805(a) impermissibly limit medical care to out-of-state residents (including those that live, but do not "reside," in Florida) that is available to Florida residents, thus violating the right to interstate travel.

19. The right to interstate travel is one of the personal or fundamental rights protected by the federal constitution. See, e.g., Saenz v. Roe, 526 U.S. 489, 498 (1999) (reaffirming that the right of interstate travel is "a virtually unconditional personal right, guaranteed by the Constitution to us all," which is "firmly embedded in [the Supreme Court's] jurisprudence")

(internal quotation omitted); Califano v. Torres, 435 U.S. 1, 4 n.6 (1978) (contrasting the "virtually unqualified" right to interstate travel with the more limited right to international travel). This constitutional right "protect[s] persons who enter [a state] seeking the medical services that are available there." Doe v. Bolton, 410 U.S. 179, 200 (1973). See also Indiana Planned Parenthood Affiliates Ass'n, Inc. v. Pearson, 716 F.2d 1127, 1141-42 (7th Cir. 1983) (finding that a statute restricting nonresident minors' access to judicial bypass of a notification requirement would be unconstitutional, but ultimately upholding the law because a court rule permitted cases to be commenced in any county).

20. Moreover, the purpose of venue provisions is to protect defendants in adversary actions from being inconvenienced by the plaintiff's choice of filing location. See Kilpatrick v. Boynton, 374 So. 2d 557 (Fla. Dist. Ct. App. 1979). Because there is no defendant in judicial bypass proceedings, there is no justification for limiting venue to the area surrounding a minor's residence. See, e.g., Doe, 410 U.S. at 200 (state failed to identify any sound policy interest limiting abortions to Georgia residents).

21. In a recent opinion issued in the pending Federal District Court challenge to the Act, Judge William Stafford found that Florida circuit courts have jurisdiction to hear waiver petitions, and that, under Florida's general venue statute, non-resident minors "may petition for a waiver of the Act in any Florida county." WomanCare of Orlando, 05-cv-0280, slip op. at 24 (N.D. Fla. July 18, 2005) (Attached hereto as Exhibit C).

22. Based on the construction of the Act endorsed by the State and the Speaker, and the need to clarify that nonresident minors may seek judicial waivers, Planned Parenthood urges this Court to amend Rule 8.805 to state that "proceedings for a judicial waiver of parental notice

of termination of pregnancy shall be commenced by the filing of a petition in any circuit court in the state."

VI. Child Abuse Reporting Requirement

23. Planned Parenthood recommends that this Court issue a Rule or opinion making clear that the Act does not change the mandatory reporting obligations of judges hearing bypass petitions. The Act creates ambiguity in this regard in that it provides that "[i]f the court finds evidence of child abuse or sexual abuse of the minor petitioner by any person, the court shall report the evidence of child abuse or sexual abuse of the petitioner, as provided in § 39.201." Fla. Stat. § 390.01114(4)(d). "Sexual abuse of a child" is defined to include a broad range of sexual conduct, without regard to whether the perpetrator is a parent, guardian or caregiver, without regard to whether the acts are consensual, and without regard to whether there is any age difference between the participants. Fla. Stat. §§ 390.01114(2)(e)); 39.01(63). Under this broad definition of "sexual abuse," any minor who is pregnant will, by definition, have been the victim of "sexual abuse . . . by any person."

24. Under Fla. Stat. § 39.201, judges and other mandatory reporters are required to report "abuse[] . . . or neglect[] by a parent, legal custodian, caregiver, or other person responsible for the child's welfare." "Abuse" in this context is defined to mean acts that cause or are likely to cause harm to the child. Fla. Stat. § 39.01(2).

25. Due to the incorporation of the phrase "by any person" in the reporting requirement, and the broad definition of sexual abuse, the Act could be interpreted to expand the reporting obligations of judges to require reporting of all minors seeking judicial waivers. Planned Parenthood recommends that this Court clarify that the Act does not require judges to report conduct that is not currently required by 39.201. Indeed, it appears that this Court has

tacitly come to that conclusion. Current Form 8.990 (Final Order Granting Petition for Judicial Waiver of Parental Notice of Termination of Pregnancy) only indicates that a circuit court will report abuse when "[t]he minor has proven by a preponderance of evidence that she is the victim of child abuse or sexual abuse *by one or both parents or a guardian . . .*" Fl. R. Juv. P. Form 8.990 (emphasis added).

26. In addition, the State has taken the position in the pending federal litigation that the Act, and specifically the phrase "as provided in s. 39.201," should be construed to only require reporting of abuse by a parent or caregiver, and not of cases involving consensual sex between minors. (See Ex. C at 18-19.)

27. Clarification that the Act does not alter the mandatory reporting obligations of judges will avoid unnecessary and impermissible compromise of the confidentiality of minors seeking judicial waivers. A judicial bypass process "must assure that a resolution of the issue . . . will be completed with anonymity. . . ." Bellotti v. Baird, 443 U.S. 622, 644 (1979) (plurality opinion). To meet this standard, the minor "must have a confidential bypass option that does not result in a report to another government agency." Planned Parenthood v. Lance, No. Civ. 00-0353, slip op. at 24 (D. Idaho Dec. 20, 2001) (unpublished opinion, attached hereto as Exhibit D) (citing Hodgson v. Minnesota, 497 U.S. 433, 426-27 & nn. 7, 9 (1990) (other citations omitted)). See also Wicklund v. Lambert, 979 F. Supp. 1285, 1288 (D. Mont. 1997).[1]

28. In order to protect minors' right to a confidential bypass proceeding, this Court should make clear that the Act does not alter or expand the substantive requirements of the mandatory reporting statute in the judicial waiver context, but rather simply highlights the

[1] Planned Parenthood has received anecdotal reports that the Department of Children and Families and the office of the guardian *ad litem* have been notified of judicial waiver petitions in cases in which the minor was not alleging abuse as a grounds for waiver.

current obligations of judges to report abuse by "a parent, legal custodian, caregiver, or other person responsible for the child's welfare."

VII. Computation of Time

29. In recognition of the need for expedition throughout the bypass process, Planned Parenthood urges this Court to adopt a rule stating that all time limits provided in the applicable rules shall run consecutively, without extension due to intervening weekends or holidays. Planned Parenthood recommends that the Court make this rule explicit in all rules governing judicial waivers of parental notice.

Respectfully submitted this ___ day of September, 2005.

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CERTIFICATE OF SERVICE

I, Richard E. Johnson, hereby certify that on September __, 2005, a true and correct copy of the foregoing was served by United States Mail on the following:

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