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January 19, 1990

The Honorable Nancy Randall Clark
State Senate
State House Station #3
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Dear Senator Clark:

This will respond to your inquiry as to the status of the Maine abortion parental notification statute that was declared unconstitutional in 1979, in light of the recent amendments to Maine's abortion statutes and the Supreme Court's most recent decision concerning abortion. For the reasons set forth below, it is the opinion of this Department that the Legislature has impliedly repealed the 1979 parental notification statute, 22 M.R.S.A. § 1597, and, accordingly, a court should not modify or vacate the injunction against that statute in light of subsequent decisional law.

I

In 1979, the Maine Legislature considered several bills that sought to impose restrictions on a woman's decision to terminate her pregnancy. On February 16, 1979, a bill entitled "AN ACT to Insure Parental Participation in a Minor's Decision to Have an Abortion" was introduced in the Maine Senate. L.D. 604 (109th Legis. 1979). When the bill re-emerged from committee, it was re-entitled "AN ACT to Require Parental

Notification of a Minor's Abortion," and was hotly debated in both the House and Senate. See 2 Legis. Rec. 1148-51, 1300-1302, 1355-60, 1470-72, 1528-30 (1979).

During the debate, both proponents and opponents debated the constitutionality of mandatory parental notification. Id. at 1148-50 (statements of Sens. Gill, Trafton, Devoe, Collins); id. at 1470 (statement of Rep. Sewall). Both the House and Senate considered and rejected amendments that would have eliminated the mandatory aspect of such parental notification. Specifically, the Legislature rejected amendments that would have excused a physician from notifying a minor's parents of the minor's decision to obtain an abortion if he or she concluded that parental notification was not in the minor's best interest. Id. at 1300-1303 (Senate); id. at 1355-60 (House).

On May 31, 1979, the Legislature finally enacted, and on June 12, 1979, the Governor approved, the bill providing for mandatory parental notification of a minor's abortion. P.L. 1979, ch. 413 (effective Sept. 14, 1979) (enacting 22 M.R.S.A. § 1597). The statute required a physician, prior to performing an abortion on an unemancipated minor who was less that 17 years old, to give actual notice to one of her parents or guardians at least 24 hours before performing the abortion. If actual notice could not be given, the physician was required to give written notice by certified mail to the last known address of the parent or guardian at least 48 hours before performing the abortion. If neither form of notice was possible, the physician was required to notify the Department of Human Services in writing at least 24 hours in advance of performing the abortion of his or her inability to give such notice. If, in the physician's judgment, the life or health of the minor would be endangered if the abortion was not performed immediately, the notice requirements did not apply, but the physician was required to notify a parent or guardian of the abortion within 24 hours after the abortion or notify the Department of Human Services of his or her inability to give such notice. Finally, the statute did not require the consent of parents or legal guardian to perform an abortion.

Almost immediately after the parental notification statute was enacted, a civil rights class action seeking declaratory and injunctive relief was instituted. Following a hearing on the plaintiffs' motion for a preliminary injunction, the United States District Court held that the plaintiffs were entitled to a preliminary injunction against the statute on the grounds that it was likely unconstitutional. Women's Community Health Center, Inc. v. Cohen, 477 F.Supp. 542 (D.Me. 1979). Accordingly, the court enjoined enforcement of the parental

notification statute, 22 M.R.S.A. § 1597. This decision was issued four days before the effective date of the statute, and therefore the mandatory parental notification statute did not take effect. No appeal was taken from the decision preliminarily enjoining the enforcement of this statute.

In a 1982 unpublished order, the United States Distict Court declared the mandatory parental notification statute unconstitutional and permanently enjoined its enforcement. Women's Community Health Center, Inc. v. Cohen, Civil No. 79-165-P (D.Me. Sept. 9, 1982). No appeal was taken from this final order. Thus, the mandatory parental notification statute has never been enforced in the 10 years since its enactment.

To date, no attempt has been made to modify the final order permanently enjoining the enforcement of 22 M.R.S.A. § 1597. The Legislature, however, has never expressly repealed this statute.

In 1989, the Legislature again considered the role of parents in a minor's decision to terminate her pregnancy. On March 3, 1989, a bill entitled "AN ACT to Require Parental Consent to a Minor's Abortion" was introduced in the Maine House. L.D. 622 (114th Legis. 1989). This bill was finally enacted by the Legislature on July 1, 1989, and approved by the Governor on July 11, 1989. P.L. 1989, ch. 573 (enacting 4 M.R.S.A. § 152(8), 22 M.R.S.A. § 1597-A).

This statute prohibits a person from performing an abortion upon a pregnant minor unless consent is provided under the following alternatives: (a) the attending physician has obtained informed written consent of the minor and a parent, guardian, or adult family member; (b) the attending physician has obtained informed written consent of the minor and the minor is mentally and physically competent to give consent; (c) the minor has obtained counselling, and the physician has obtained informed consent of the minor and verification of the counselling; or (d) a court has approved the abortion.

The statute comprehensively regulates the manner in which consent may be given to a minor's abortion, the nature of information and counselling that must be provided to minors, and the manner in which judicial proceedings must be conducted. Finally, the statute contains a non-severability clause that provides in the event any portion of the statute is declared invalid, the entire statute is invalid.

The parental consent statute was vigorously debated in both the House and the Senate. The Legislature expressly considered and rejected limiting the consent to parents, and

making such parental consent mandatory. Legis. Rec. H-419 - H-430 (May 4, 1989) (House); Legis. Rec. S-590 - S-592 (May 9, 1989) (Senate).

Although the statute provided for parental consent, it is apparent that the Legislature was also concerned with fostering greater family involvement in a minor's abortion decision. Thus, some legislators referred to "parental consent" interchangably as "parental involvement," see Legis. Rec. H-418 (May 4, 1989) (statement of Rep. Paradis); id. at H-424 (statement of Rep. Anthony); id. at H-428 (statement of Rep. Farnsworth), while other legislators referred to "parental consent" interchangably as "parental communication" or "family communication." See id. at H-420 (statement of Rep. Carroll), id. at H-429 (statement of Rep. Rydell); Legis. Rec. S-562 (May 8, 1989) (statement of Sen. Hobbins); id. at S-567 (statement of Sen. Gauvreau). Under such circumstances, any distinction between parental consent and parental notification does not appear to be material for purposes of the present analysis.

This conclusion is underscored by the information and counselling provisions of the parental consent statute. The counsellor and the minor are required to:

> Discuss the possibility of involving the minor's parents, guardian or other adult family members in the minor's decision concerning the pregnancy and explore whether the minor believes that involvement would be in the minor's best interests[.]

22 M.R.S.A. § 1597-A(4)(5); see also id. § 1597-A(4)(B)(5) (similar). Accordingly, opponents attacked the proposal on the grounds that it did not go far enough in involving parents in a minor's decision to terminate her pregnancy. See, e.g., Legis. Rec. H-443 (May 5, 1989) (statement of Rep. Paradis). Unlike the 1979 parental notification statute, which mandated parental involvement, the recently enacted parental consent statute permitted, but did not require, parental involvement in a minor's decision to terminate her pregnancy.

Numerous legislators described the parental consent statute as a compromise or an attempt to find common ground. See Legis. Rec. H-426 (May 4, 1989) (statement of Rep. Richards); Legis. Rec. H-440 (May 5, 1989) (statement of Rep. Conley); id. at H-442, H-443 (statements of Rep. Hastings); Legis. Rec. S-563 (May 8, 1989) (statement of Sen. Hobbins); id. at S-570 (statement of Sen. Cahill); id. at S-573 (statement of Sen. Holloway). The conclusion that this compromise was designed to be comprehensive is reinforced by the non-severability clause.

As one legislator explained, this permitted both pro-choice and pro-life legislators to engage in "very, very careful drafting" and be certain that the resulting delicate equilibrium would not be upset. Legis. Rec. H-443 (May 5, 1989) (statement of Rep. Hastings). Against this historical backdrop, we consider whether the Legislature impliedly repealed the 1979 mandatory parental notification statute when it enacted 1989 parental consent statute.

II

Although the Legislature has never expressly repealed the mandatory parental notification statute, 22 M.R.S.A. § 1597 (1980), we conclude that the recently enacted parental consent statute, P.L. 1989, ch. 573 (enacting 4 M.R.S.A. § 152(8), 22 M.R.S.A. § 1597-A), has repealed by implication the mandatory parental notification statute. Although it is the exception and not the rule, it has long been established in Maine that statutes may be repealed by implication:

> There are two grounds upon which an existing statute may be thus repealed: when the later one covers the whole subject matter of the former, especially when additional remedies or penalties are added, and when the later one is inconsistent with, or repugnant to the former; when either of these conditions are found, the later act must be considered as declarative of the will of the legislature. This principle has become so well settled that a discussion of it is unnecessary.

Smith v. Sullivan, 71 Me. 150, 152-53 (1880) (citations omitted). Recent cases have reached the same conclusion:

> This court will find a repeal by implication when a later enactment encompasses the entire subject matter of an earlier act, or when a later statute is inconsistent with or repugnant to an earlier statute.

Blair v. State Tax Assessor, 485 A.2d 957, 959 (Me. 1984) (citations omitted); accord 1 N. Singer, Sutherland Statutory Construction, § 23.09 (4th ed. 1985) (standard on implied repeal). Applying these principles to the case at hand, it is plain that the Legislature repealed the mandatory parental notification statute when it enacted the parental consent statute.

As noted above, in 1979 the Legislature expressly considered and rejected the possibility of excusing parental notification when it was not in the minor's best interest. On the other hand, in 1989 the Legislature expressly considered and rejected the possibility of mandating parental involvement in a minor's decision to terminate her pregnancy. Because mandatory parental involvement is inconsistent with permissive parental involvement, the two statutes are incompatible.

Since the 1989 parental consent statute was a compromise that permitted, but did not mandate, parental involvement in a minor's decision to terminate her pregnancy, it is scarcely likely that the Legislature intended that the 10-year-old, mandatory parental notification statute, which had been enjoined and never enforced, would also remain applicable. Furthermore, the non-severability clause and the repeated statements that the recent enactment was a compromise designed to regulate comprehensively a minor's abortion decision makes it highly likely that the Legislature intended to supplant completely the earlier law regulating a minor's abortion decision. Thus, under the well established standards of repeal by implication, the 1979 mandatory parental notification statute has been repealed.

III

Because Maine's 1979 mandatory parental notification statute has been repealed by implication, it is irrelevant whether the Supreme Court might someday overrule Roe v. Wade, 410 U.S. 113 (1973). Stated differently, whether or not a court might hold in the future that mandatory parental notification is constitutional -- which no court has yet done -- does not affect the 1979 statute because that statute has been repealed. Most statutes that are repealed, either expressly or by implication, are constitutional. Thus, even if a state could mandate parental notification of a minor's abortion decision, the 1989 legislation has supplanted the 1979 parental notification statute in Maine.

As of this date, the Supreme Court has neither overruled Roe v. Wade nor upheld the constitutionality of mandatory parental notification. Last Term, a bitterly divided Supreme Court upheld the constitutionality of several provisions of a Missouri statute regulating abortions. Webster v. Reproductive Health Services, 109 S.Ct. 3040 (1989). This decision was rendered eight days before the Governor approved the parent consent bill, P.L. 1989, ch. 573. None of the challenged provisions in Webster concerned the role of parents in a minor's decision to terminate her pregnancy.

Although the Supreme Court agreed in Webster to reconsider the holding of Roe v. Wade, 410 U.S. 113 (1973), that a woman had a constitutional right to terminate her pregnancy, it declined to overrule that decision. Chief Justice Rehnquist and Justices White and Kennedy "would modify and narrow" Roe v. Wade, but declined to overrule it. Id. at 3058. Justice O'Connor considered Roe v. Wade's trimester framework "problematic," but also declined to overrule its basic holding. Id. at 3063-64. Four justices vehemently dissented from any attempt to weaken or overrule Roe v. Wade. Id. at 3067-79 (Blackmun, J., dissenting in part); id. at 3079-85 (Stevens, J., dissenting in part). Only Justice Scalia took the position that the Missouri statute provided the proper vehicle to overrule Roe v. Wade. Id. at 3064-66. Thus, although a majority of the Court questioned Roe v. Wade, only one justice was prepared to overrule that decision in Webster.

This Term, several cases before the Supreme Court involve issues relating to parental notification or consent. See Akron Center for Reproductive Health v. Slaby, 854 F.2d 852 (6th Cir. 1988), cert. granted, 109 S.Ct. 3239 (1989); Hodgson v. Minnesota, 853 F.2d 1452 (8th Cir. 1988) (en banc), cert. granted, 109 S.Ct. 3240 (1989); cf. 57 U.S.L.W. 3851-52 (U.S. June 27, 1989) (quoting issues presented on appeal). However the Court rules, there will be no occasion to question the validity of the injunction entered in Women's Health Center, Inc. v. Cohen because of the implied repeal of the 1979 parental notification statute. Under the circumstances, it is unnecessary even to consider whether a party could satisfy the rigorous standard for vacating or modifying an injunction. See United States v. Swift & Co., 286 U.S. 106, 119 (1932) (Cardozo, J.) ("Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned."); cf. 11 C. Wright & A. Miller, Federal Practice and Procedure, §§ 2863, 2961 (1973) (standard for vacating or modifying injunctions).

* * *

The Maine Legislature enacted a parental notification statute in 1979 that was immediately enjoined and has never became effective. 22 M.R.S.A. § 1597. The Maine Legislature repealed that statute by implication when it enacted a parental consent statute in 1989. 22 M.R.S.A. § 1597-A. Accordingly, the Supreme Court's recent pronouncements concerning abortion do not provide a basis for modifying or vacating the permanent injunction against Maine's 1979 mandatory parental notification statute.

I hope that you find this information helpful. If you have any further questions, please feel free to inquire further.

Very truly yours,

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