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TO: Katie Gregory

FROM: Matty Branch MB

DATE: August 30, 2006

RE: Assignment for Advisory Committee on the Rules of Juvenile Procedure

The Supreme Court decided today that it was not going to make any amendments at this time to the judicial bypass rule (Rule 60). However, it has requested that the advisory committee again review the comments received and provide the court with specific recommendations as to amendments it believes are appropriate. The court suggested that the committee invite the ACLU representatives to meet with the committee to discuss their concerns as part of the committee's review. Any proposed amendments would need to be provided to the court by the end of the year.

Thanks to you and the committee for the assistance.

Attachment

MEMORANDUM

To: **Board of Juvenile Court Judges**

From: **Brent Johnson, General Counsel**

Re: **Abortion Bypass Procedure**

Date: **July 26, 2006**

The comment period for the Abortion Bypass Procedure rules and forms has ended. Attached to this memorandum you will find copies of the comments received. I will summarize the comments below. We have received comments from individuals who you can fairly state are on both sides of the abortion issue. The rules and forms do not completely satisfy either side which is often an indication that we have achieved an appropriate balance. However, based on the comments, there may be a need to make some changes.

1. David Cook

   - Mr. Cook is against both HB 85 and Rule 60. Mr. Cook states that minors are never mature and therefore the law is fundamentally flawed.
   - Mr. Cook is also against the secrecy of the proceedings and the automatic granting of a petition if action is not taken within a certain time.

2. Paul Wake

   - The rule creates substance and procedure beyond that contemplated by HB 85.
   - The phrase "three judicial days" should be changed to business days and the extension of time should not be 24 hours, but one business day.
   - The definition of minor should be consistent with the changes in the Utah Code.

- The appellate rule discusses forms being available at the juvenile court, but Rule 60 does not contain such a reference.

- HB 85 does not contemplate that a minor will be given a private place to complete the forms and therefore the provision should be struck. HB 85 also does not state that a minor may file in any county and that a filing fee may be waived and so those should be struck.

- There is no statutory provision for the taxpayers to support abortion by minors by paying for private counsel.

- The hearing should not be closed to those who might have an interest in the abortion, such as parents and the putative father.

- Instead of allowing a clerk to "authorize" a abortion, the minor should be permitted to appeal a failure to act in time.

- A minor should not be allowed to appear by telephone.

3. Kristin Brewer

   - The procedure should be changed to permit appointment of a guardian ad litem only if the minor is found incompetent.

4. James McCormick

   - Parents should be given notice of the petition and the hearing.

5. Hollis Hunt

   - There is no need for an expedited procedure and the proposed expedited procedures are another form of "judicial activism."

6. ACLU

   - A petitioner should be allowed to use a pseudonym or to use only initials on the petition.

   - The forms should be available on the website.

   - A petitioner should be allowed to file in person, by mail or fax.

   - The rule and forms should specially state that a minor has a right to an attorney.

- A GAL should not be appointed unless a minor is found mentally incompetent.
- The forms and the procedure should be changed to allow a minor to request a longer time for the hearing.
- The rule should be amended to specifically state that the order will be hand-delivered to the minor and her attorney.
- The "deemed granted" language should account for any continuances requested by the minor.
- There should be specific language "sealing" the case file.
- The appeal time should run from when the minor receives the order, and not when it is entered.
- The appellate rule should also allow filing by pseudonym or initials.
- A notice of appeal should be deemed filed if it is mailed within the time frame.
- The appellate rule should specify that a minor's attorney will receive a copy of the appellate court's order.
- The appellate court file should also be specifically "sealed."
- The rule should be amended to mandate appointing an attorney on appeal.
- The minor's name should not be found on the caption of the petition.
- The word "abortion" should be omitted from the caption of the pleadings to help protect confidentiality.
- The forms should be amended to mandate appointment of an attorney and to address the above GAL issue.
- The statute does not require informed "written" consent before filing a petition and that requirement should be omitted.
- Clarify on the form that providing an address is optional.
- Omit the provision on listing the people who can attend the hearing; the minor may not know all of the individuals at the time of filing the petition.

- The minor should not be required to list best interests, because a minor may not know all the reasons at the time of filing the petition.

Sarah Spencer has reviewed the ACLU's comments and has prepared a memorandum on her research. In the event that you have not received this memorandum, I am including this with the packet. The following is my general response to some of the comments that I think warrant the most discussion, although we will have further discussion at the meeting.

- The question of whether the rule goes beyond HB 85 is a tough one. The two most difficult issues are the notice to other interested persons and the language automatically approving a petition if a hearing is not held. I believe that the provisions in the rule are the most constitutionally sound. To remove the provisions may subject us to a legal challenge; to keep the provisions may subject us to legislative criticism.

- The issue of giving the parents and father notice have been debated before and I don't know that any of the comments changes the conclusion previously reached.

- The language about judicial days and 24 hours should be made consistent.

- The issue on appointing attorneys and GALs is difficult and has also been much discussed. The current language is discretionary. There may be many cases in which an attorney is not necessary as it will be evident that the minor is capable of consent or abortion is otherwise in her best interest and therefore counsel is not required. It may be best to leave this language as discretionary to appease both those who object to taxpayer money funding court appointed attorneys and those who will want attorneys appointed when necessary.

- I am not convinced that a minor must be allowed to file under a pseudonym or using initials. There has been some confusion in the case law as to whether both confidentiality and anonymity must be guaranteed. Confidentiality must definitely be provided, but anonymity is less certain. The case cited by the ACLU involved a court at which the records were not protected from the public and therefore it was suggested that anonymity be provided. In our situation we have rules and procedures in place to protect the confidentiality of the minor and therefore a pseudonym or initials may not be necessary.

- I think it would be appropriate to allow a minor to request time longer than the three days for a hearing. The rule should also be amended to change the "deemed granted" language to accommodate any continuances.

- There should be a provision in the rules which classifies these records. The appropriate place is probably the records access rules where these files could be specifically considered "sealed."

- The question of whether the appeal time should run from when the minor receives the order or from when the order is entered is difficult. In many, if not most, cases a minor might be hand-delivered an order before the order is officially entered into the case history. The appeal time therefore might be longer under the current language.

- I think the minor should still be required to list best interests in the petition because the court may need some preliminary information about best interests.

- It is true that the statute does not require "written" informed consent prior to filing a petition and a hearing. It is possible that a minor might have given oral informed consent prior to a petition, and will subsequently sign a written consent before the abortion is performed. The written consent is certainly the best evidence of consent. The difficulty with oral consent is that this is not a contested proceeding and the only testimony will be that of the minors. On the other-hand, the primary issue for the court is whether the minor is capable of giving informed consent. It is somewhat curious as to why the Legislature required the minor to give informed consent prior to a court determination that the minor is capable of giving such.

Rule 60. Judicial bypass procedure to authorize minor to consent to an abortion.

(a) Petition. An action for an order authorizing a minor to consent to an abortion without the consent of a parent or guardian is commenced by filing a petition. The petitioner is not required to provide an address or telephone number but must ~~state that she is a resident of Utah and~~ identify the county and state of residence. Blank petition forms will be available at all juvenile court locations. The court will provide assistance and a private, confidential area for completing the petition.

(b) Filing. The petition may be filed in any county. No filing fee will be charged.

(c) Appointment of Counsel. If the petitioner is not represented by a private attorney, the juvenile court shall consider appointing an attorney under Utah Code Ann. § 78-3a-913 and/or the Office of Guardian ad Litem under § 78-3a-911. The clerk shall immediately notify the attorney and/or the Office of Guardian ad Litem of the appointment.

(d) Expedited Hearing. Upon receipt of the petition, the court shall schedule a hearing to be held and the petition resolved within three judicial days. The court may continue the hearing for no more than 24 hours if the court determines that the additional time is necessary to gather and receive more evidence. The clerk shall immediately provide notice of the hearing date and time. The hearing shall be closed to everyone except the petitioner, the petitioner's attorney, the guardian ad litem, and any individual invited by the petitioner~~, the petitioner's attorney or the guardian ad litem~~. Upon request, the petitioner may be allowed to participate telephonically at court system expense. The hearing may be held in chambers if recording equipment or a reporter is available.

(e) Findings and Order. The court shall enter an order immediately after the hearing is concluded. The court shall grant the petition if the court finds by a preponderance of the evidence that one of the statutory grounds for dispensing with parental consent exists. Otherwise, the court shall deny the petition. If the petition is denied, the court shall inform the petitioner of her right to an expedited appeal to the Utah Court of Appeals. The court shall provide a copy of the order to individuals designated by the petitioner.

(f) If the court does not hold a hearing and resolve the petition within three judicial days, the petition shall be deemed granted. If the court continues a hearing for 24 hours under paragraph (d), the petition shall be deemed granted if the petition is not resolved by the expiration of the additional 24 hours. Upon request of the petitioner, the clerk of the juvenile court shall prepare a certificate indicating that a hearing was not held and that the petition is deemed granted pursuant to this rule.

(g) Confidentiality. The petition and all hearings, proceedings, and records are confidential. Court personnel are prohibited from notifying a minor's parents, guardian, or custodian that a minor is pregnant or wants to have an abortion, or from disclosing this information to any member of the public.

(h) Appeal. A petitioner may appeal an order denying or dismissing a petition to bypass parental consent by filing a notice of appeal within three judicial days after entry of the order. The clerk shall immediately notify the clerk of the court of appeals that the notice of appeal has been filed.

(i) This rule supercedes all other procedural rules ~~for~~ that might otherwise apply to actions filed under § 76-7-304.5

Rule 60. Judicial bypass appeals.

(a) Scope. This rule applies to an appeal from an order denying or dismissing a petition filed by a minor to bypass parental consent to an abortion under Utah Code Ann. § 76-7-304.5. In such appeals, this rule supercedes the other appellate rules to the extent they may be inconsistent with this rule.

(b) Jurisdictional limitation. This rule does not permit an appeal to be taken in any circumstances in which an appeal would not be permitted by Rule 3.

(c) Notice of appeal.

(c)(1) A minor may appeal an order denying or dismissing a petition to bypass parental consent by filing a notice of appeal in the juvenile court within three judicial days after entry of the order. The notice of appeal may be filed in person, by mail, or by fax, and must be accompanied by a copy of the order from which the appeal is taken. No filing fee will be charged. The clerk of the juvenile court shall immediately notify the clerk of the court of appeals that the appeal has been filed.

(c)(2) The notice of appeal must indicate that the appeal is being filed pursuant to this rule, but the court will apply this rule to cases within its scope whether they are so identified or not.

(c)(3) Blank notice of appeal forms will be available at all juvenile court locations and will be mailed or faxed to a minor upon request. No fee will be charged for this service or other services provided to a minor in an appeal under this rule.

(d) Record on appeal. The record on appeal consists of the juvenile court file, including all papers and exhibits filed in the juvenile court, and a recording or transcript of the proceedings before the juvenile court. The clerk of the court of appeals shall request the record immediately upon receiving notice that the appeal has been filed. Upon receiving this request, the clerk of the juvenile court shall immediately transmit the record to the court of appeals by overnight mail or in another manner that will cause it to arrive within 48 hours after the notice of appeal is filed.

(e) Brief. A brief is not required. However, the minor may file a typewritten memorandum in support of the appeal. The memorandum shall be submitted within two judicial days after the notice of appeal is filed.

(f) Oral argument. If ordered by the court, oral argument will be held within three judicial days after the notice of appeal is filed. The court of appeals clerk will immediately notify the minor of the date and time for oral argument. Upon request, the minor will be allowed to participate telephonically at court system expense.

(g) Disposition. The court shall enter an order stating its decision immediately after oral argument or, if oral argument is not held, within three judicial days after the date the notice of appeal is filed. The clerk shall immediately notify the minor of the decision. The court may issue an opinion explaining the decision at any time following entry of the order. The opinion shall be written to ensure the confidentiality of the minor.

(h) Confidentiality. Documents and proceedings in an appeal under this rule are confidential. Court personnel are prohibited from notifying the minor's parents, guardian, or custodian that the minor is pregnant or wants to have an abortion, or from disclosing this information to any member of the public.

(i) Attorney. If the minor is not represented by an attorney, the court shall consider appointing an attorney or the Office of Guardian ad Litem to represent the minor in the appeal. If an attorney or the Office of Guardian ad Litem was appointed to represent the minor in the trial court, the appointment continues through appeal.

Rules - Comments

Comments: Bypass of Parental Consent

Please use the following comment to supersede what I have previously submitted as public comment on Juvenile Rule 60 and Appellate Rule 60.

THE PROBLEM WITH THE ABORTION RULES
Utah Rule of Juvenile Procedure 60 and Utah Rule of Appellate Procedure 60 establish legal procedures for carrying out a judicial bypass procedure under HB 85's abortion-related parental notification and parental consent requirements. These rules must be assessed in light of whether they properly do so: the rules must create functional procedures but must not effectively create non-procedural legislation, and they must not be out of harmony with HB 85 or other law governing abortion. Unfortunately, these rules go well beyond what was called for in HB 85, and appear to make it easier for a child to get an abortion, which is clearly contrary to the will of the legislature.

APPLICABLE LAW
State Law
Title 76, part 3 of the Utah Code deals with abortion. Section 76-7-301.1 states the intent of the legislature when it passed this law, which was largely to "protect and guarantee to unborn children their inherent and inalienable right to life as required by Article I, Sections 1 and 7, Utah Constitution." Article I is the Utah Constitution's "Declaration of Rights," and such state constitutional declarations are the primary source of stated rights in our system of federalism. In 2006, HB 85 amended title 76, part 3's provisions regarding parental notification and parental consent when a child seeks an abortion. Those amendment are part of a statutory scheme intended to protect unborn life.

Federal Law
Although in creating the U.S. Constitution the sovereign states created a national government of only limited enumerated powers, federal courts have frequently declared themselves able to dictate to the states how the states shall conduct themselves. The U.S. Supreme Court has opined that the U.S. Constitution describes an abortion right that states are obliged to respect. Therefore, it is also necessary to weigh HB 85's amendments and any related procedural rules against Tenth Circuit and U.S. Supreme Court abortion case law.

The relevant federal case law on children and abortions all comes from a handful of U.S. Supreme Court decisions. In 1979 the Bellotti plurality, following Danforth, said that a child can go to court without notifying a parent, in order to convince a court that she is mature enough to make an abortion decision on her own. If the court finds that she is sufficiently mature, she can make her own decision without parental notification or consent. If the court finds that she is not sufficiently mature, then (and only then) the court must look at whether an abortion would be in her best interests, and can authorize an abortion without parental notification or consent if it would be in the child's best interests. Bellotti made clear, though, that courts can decide that a child is not sufficiently mature to make such a decision without consulting with her parents, and in such cases the court can defer a decision until there is parental notification and consultation. In 1981 the Matheson case—which came from Utah—dealt specifically with when a child is not sufficiently mature to make an abortion decision on her own, and the court determined that parental notification in such cases does not violate the U.S. Constitution, and is a positive thing. In 1983 the court in Ashcroft said that protecting immature children is an important goal that allows for parental notification and consent, but added that there must be a judicial bypass procedure allowing a child to show sufficient maturity to have an abortion without letting her parents know she is having the surgery. In 1990, the Akron court observed that there had been no prior decision on judicial bypass as it pertains to parental notification statutes, and that it would not decide that question in that case, but stated that judicial bypass statutes regarding parental

consent—which would automatically suffice as parental notification bypass procedures also, if used for that purpose—require a decision regarding maturity, a decision regarding best interests if there is insufficient maturity, anonymity for the child (but not complete anonymity, since it is not necessary to allow use of initials or pseudonyms in bypass proceedings, just an appropriate protection of confidentiality), and an expedited procedure (interestingly, the court thought that "days" in a statute would most likely mean calendar days rather than business days). Akron specifically stated that constructive authorization (getting approval automatically if a judge does not timely decide a judicial bypass matter) and a burden of proof lower than "clear and convincing" are not constitutionally required. Casey reiterated that parental consent statutes are acceptable, but that states must include a judicial bypass process. The Casey court said that notice can be required to one parent but cannot be required to be sent to both parents, and observed it had not yet parsed the U.S. Constitution to see what the framers intended regarding whether consent must come from one or both parents. HB 85 and the new rules must be viewed in the light of these federal cases.

HB 85

Regarding parental notification, HB 85 states that at least 24 hours prior to having an abortion, a parent must be notified. There is an exception waiving 24 hour notification in medical emergencies, although in such circumstances there is a requirement that whatever notification can be made, must be made. There is also an exception waiving notification in cases involving rape, incest, or abuse by a parent (although reporting to DCFS is required in such cases), and for cases in which a parent has essentially abandoned taking care of a child; if there is parent who was not involved in rape, incest, abuse, or abandonment, then that parent must be notified. Nothing about these provisions appears out of step with the federal abortion case law described above. It is true that the ACLU of Utah argued that HB 85 is constitutionally deficient because a "myriad" of U.S. Supreme Court and other cases, including Bellotti and Hodgson, supposedly say there must be a judicial bypass procedure for parental notification. That conclusion seems incompatible with Akron, which (subsequent to these cases) said that it had not yet reached that issue (the ACLU even cited Akron for its proposition despite the fact that Akron said the opposite).

Regarding parental consent, HB 85 states that before getting an abortion, a child must obtain a parent's consent. There is an exception in the case of a medical emergency. There is also an exception for judicial bypass situations in which a child obtains a court order allowing her to consent to an abortion without parental involvement, if a judge finds by a preponderance of evidence that the minor is sufficiently mature to be able to give her own informed consent, or that it is in the best interests of the minor to have an abortion. Such proceedings are to be expedited, closed to the public, and the records kept confidential. Nothing about these provisions appears out of step with the federal abortion case law described above (although it could be made clearer in the rule that the best interests determination is to come only if the court does not first find the minor too immature to give informed consent). One thing the statute does not do, is add to the jurisdictional provisions of the Juvenile Court Act (Utah Code § 78-3a-104) a sentence about holding bypass hearings; that seems like an oversight.

ABORTION RULES

HB 85 calls for the courts to create procedural rules to provide for confidential expedited bypass proceedings, and for appeals. Utah Rule of Juvenile Procedure 60, and Utah Rule of Appellate Procedure 60, were implemented under emergency rulemaking power, and are now up for public comment. There are a few oddities in Juvenile Rule 60. It speaks of appointment of Guardian ad Litems but refers to Utah Code § 78-3a-911, dealing with the director of the GAL's office, rather than to section 78-3a-912, dealing with the actual appointments of GALs. That should be corrected. Also, it mentions something called a "judicial day," states that bypass hearings must be held within 3 judicial days, and then describes the allowed continuance in terms of hours (24 hours). For consistency, and to avoid the 24 hour provision from looking as if it does not exclude weekends and holidays, the 24 hours provision should have been described consistent with the rest of the rule as being one day. The "judicial day" should have been "day" or "business day," with there being either an express provision defining "day," or letting Rule 4 describe what "days" mean. In addition, the appellate rule describes juvenile courts having blank forms, but the juvenile rule itself doesn't say that, which is odd; that provision would more logically belong in the juvenile rule than in the appellate rule. Despite the apparent intention of HB 108 (redefining "child" and "minor" throughout much of the Utah Code, a task the Juvenile Rules Committee is also undertaking regarding the juvenile rules), the rule describes people under 18 as being "minors" rather than "children."

Like any procedural rules, these new rules should not make new law but only create procedures meant to implement democratically created law. Unfortunately, Utah Rule of Juvenile Procedure 60 goes well beyond what is required by HB 60 and by U.S. Supreme Court case law. HB 85 only requires a short rule stating that a child can file a confidential petition for an order authorizing the child to consent to an abortion, that a hearing be provided in an expedited fashion (some appropriate time frame would need to be stated), that the petition and the records of the proceeding be confidential, that an expedited appeal be available. Juvenile Rule 60 goes beyond this and states that a child should get help in a private place to complete a bypass request, but need not provide personal information beyond her name. It allowing filing in any county, without fee. It provides for appointment of a Guardian ad Litem or other attorney, presumably at state or county expense despite there being no statutory provision for imposing on taxpayers the burden of supporting such efforts to obtain an abortion. It allows children to phone in to a hearing for free, rather than appear. By limiting continuances to 24 hours, it suggests—especially in view of Akron—that it means 24 hours instead of one business day (a situation further confused by the rule's statement that it supersedes any other rule, perhaps including Rule 4). The rule closes the hearing to everyone but the minor, despite the statute only closing the hearing to the public; this rule would exclude someone with an interest in the minor or the unborn child who already knows about the hearing. Juvenile Rule 60 also requires a clerk to issue an order allowing a minor to have an abortion, if a judge misses the hearing deadline. Such things as requiring a clerk to authorize an abortion because a judge is late, are uncalled for by HB 85 or by relevant federal case law, and suggest that the current shape of the rule was formed with political considerations in mind, specifically a desire to streamline the abortion process beyond what the legislature intended.

SOLVING THE PROBLEM

Juvenile Rule 60 should be brought into conformity with HB 85, Utah Code § 76-7-301.1, and the minimum requirements of federal case law by paring it back to something like this (the provision regarding appealing a judicial failure to make a decision may be awkward, but it is better than forcing clerks to authorize abortions):

Rule 60. Judicial bypass procedure to authorize a child to consent to an abortion.

(a) Petition. An action for an order authorizing a child to consent to an abortion without the consent of a parent or guardian is commenced by filing a petition. Blank petition forms will be available at all juvenile court locations.

(b) Expedited hearing. Upon the filing of the petition, the court shall immediately schedule a hearing to be held within three days, and shall immediately provide the child with the hearing date. If at the hearing the court determines that additional time is necessary to gather and receive more evidence, the court may continue the hearing for up to one day. At the conclusion of the hearing, the court shall rule on whether the child is authorized by statute to consent to an abortion, and shall sign an appropriate order. If the petition is denied, the court shall inform the child of the right to an expedited appeal.

(c) Appeal. A child may appeal the denial of a petition, or may appeal if the court does not take action within the time frames established by this rule, by filing a notice of appeal at the juvenile court within three days of the court's order or within three days of the time in which the court should have held a hearing and issued an order. Blank appeal forms will be available at all juvenile court locations. The clerk shall immediately notify the clerk of the court of appeals when a notice of appeal has been filed.

(d) Confidentiality. The petition, hearing, and record are confidential.

Utah Rule of Appellate Procedure 60 should also be modified similarly:

Rule 60. Judicial bypass appeals.

(a) Scope. This rule applies to an appeal from an order denying or dismissing a petition, or from the failure to take action on a petition, filed by a child to bypass parental consent to an abortion under Utah Code § 76-7-304.5.

(b) Jurisdictional limitation. This rule does not permit an appeal to be taken in any circumstances in which an appeal would not be permitted by Rule 3.

(c) Notice of appeal. A minor may appeal an order denying or dismissing a petition or from the failure to take action on a petition to bypass parental consent, by filing a notice of appeal in the juvenile court within three days after entry of the order or within three days of the time in which the juvenile court should have held a hearing and issued an order. If the juvenile court issued an order, the notice of appeal must be accompanied by a copy of the order. The clerk of the juvenile court shall immediately notify the clerk of the court of appeals that the appeal has been filed.

(d) Record on appeal. The record on appeal consists of all papers and exhibits filed in juvenile court, and a recording or transcript of the proceeding before the juvenile court. The clerk of the court of appeals shall request the record immediately upon receiving notice that the appeal has been filed. Upon receiving this

request, the clerk of the juvenile court shall immediately transmit the record to the court of appeals by overnight mail or in another manner that will cause it to arrive within two days after the notice of appeal is filed.
(e) Brief. A brief is not required. However, the child may file a typewritten brief within two days after the notice of appeal is filed.
(f) Oral argument. If ordered by the court, oral argument will be held within three days after the notice of appeal is filed. The clerk of the court of appeals shall immediately notify the child of the date and time for oral argument.
(g) Disposition. The court shall enter an order stating its decision immediately after oral argument or, if oral argument is not held, within three days after the date the notice of appeal is filed. The clerk shall immediately notify the minor of the decision. The court may issue an opinion explaining the decision at any time following entry of the order.
(h) Confidentiality. The petition, hearing, and record are confidential.

Posted by Paul Wake June 14, 2006 12:31 PM

This is an additional comment, incorporating more things I've noticed about Utah Rule of Juvenile Procedure 60 since commenting two days ago.

The first sentence of the version I was originally sent did not have an "an" in front of "order." The online version does. The printed rule should keep the "an," since it makes the sentence clearer.

Shouldn't HB 85 have also added a jurisdictional provision to 78-3A-104? When the legislature adds other responsibilities to the juvenile court, it adds provisions there. Perhaps the Supreme Court should suggest that to the legislature.

As I indicated earlier, I doubt that the legislature saw HB 85 as a way to make abortions easier, but Utah Rule of Juvenile Procedure 60(d) is full of ways to do so. I should have provided a more complete list of the ways the rule does that. Some additional ways: HB 85 does not mention filing a petition for free, or getting a hearing date set on demand at the time of filing the petition, or being able to provide only minimal information about oneself (residency, etc.) while still getting a hearing, or being able to get a hearing in any county in Utah, or being able to phone in to a hearing for free, or having a Guardian ad Litem or other attorney appointed for free, or barring from the hearing the father of the child about to be killed (HB 85 does remove a spousal notification provision, so it seems clear that father notification is contraindicated, but nothing in the bill says a father who knows of the hearing should be barred from attending). Again, some of these provisions may well be appropriate, but adding all of these things to what I mentioned in my earlier coment makes it look as if Rule 60 does more to help the abortion industry than to implement procedural processes in support of HB 85.

Rule 60 should be revised to make it a simple rule providing a procedure for someone to appear before the judge to seek an order, without including in the rule such things as getting abortion approval from a clerk.

Posted by Paul Wake June 1, 2006 12:44 PM

In the version I was sent, 60(c) of the juvenile rule had "under" capitalized in the middle of a sentence. That isn't the case in the online version, so perhaps it is no longer a problem.

In 60(c), "78-3a-911" should be "78-3a-912," since section 911 deals with the director, and section 912 deals with the appointment of GALs in specific cases. That said, I was under the impression that the legislature has been restricting the range of what GALs do; for the court to give them responsibility by rule to help with abortions seems like something that would draw a second glance from the legislature.

In 60(d), what is a "judicial day?"

60(d) cannot be aimed at expediting hearings in emergency situations, since HB 85 allows doctors to make professional judgments in emergency situations without resorting to the judiciary. Yet 60(d) seems to eagerly provide a number of ways to streamline the path to the abortion clinic, as if it were an emergency process. HB 85 does not mention a three day maximum time to get a hearing, or a one day maximum continuance, or allowing a clerk to approve an abortion if a judge misses a deadline, or providing private areas with special help to fill out forms, or that a procedural rule related to HB 85 should take precedency over any other rule that might apply. Yet all of that is in 60(d). Some of it is appropriate to a procedural rule. However, taken together it makes the rule vulnerable to an argument that someone was in a hurry to get a politically correct law in place in the form of a rule, to correct what the legislature did.

60(h)'s expedited appeal process, ostensibly there to make things easy for a minor (a process that actually allows a child to get appellate approval for an abortion without even briefing or arguing the case, based on a transcript of a hearing below that would somehow immediately materialize), seems incongruent with the limitation on filing appeals to only the three days following the district court's decision. Three days isn't much time.

It seems odd that juvenile rule 60(h) would not include a statement that the juvenile court will have blank notice of appeal forms available, seeing as the appellate rule says that.

Posted by Paul Wake May 30, 2006 05:45 PM

The Office of the Guardian ad Litem has concerns regarding this Rule. The legislation itself does not call for the appointment of a guardian ad litem. The court placed a fiscal note on the legislation and the GAL office did not because under the statute we would not be involved. By providing for our appointment by rule, we are unable to receive any additional resources to address the time that will be spent by GALs appointed. We concede that the juvenile court has discretion to appoint a GAL in any matter pursuant to Utah Code Ann. Section 78-3a-912(1)(a)(i). The rule, however, is unclear about the role of the guardian ad litem.

It seems to us that the rule should be amended to state that the court would first determine whether the minor is competent. Only if the minor is determined incompetent should a guardian ad litem be appointment to ascertain and argue for the best interest of the minor seeking the judicial bypass.

Posted by Kristin Brewer, Director
Office of Guardian ad Litem

Posted by kristin brewer May 25, 2006 11:18 AM

I think this is a truly evil rule. It seems unreasonable to me that, as a parent (a) I must consent, appropriately, for any medical procedure to be done to my child, regardless of how trivial (administration of an aspirin at school, for example), but (b) that the court system may make it impossible for me, as a parent, to even be aware of my child's pregnancy and intent to kill my grandchild!

From my perspective as a lawyer, any rule which provides for any sort of remedy, let alone a remedy as drastic as the killing an unborn child, without at least the potential input of all parties with standing to the matter, including the juvenile's parents and the father of the unborn child, is totally inappropriate because the tribunal cannot get all of the information necessary to make a reasoned decision. Furthermore, this rule is an outrageous usurpation of not only parental responsibility and authority but also of legislative authority which has passed parental notification laws.

This rule should NOT be enacted!

Posted by Linda Barclay May 15, 2006 11:37 AM

As a parent and lawyer, I oppose bypassing and circumventing parental knowledge about their children, unless clearly required by strong, current, authoritative caselaw.

Posted by Robert R. Wallace May 9, 2006 10:25 AM

I'm sorry, but I cannot support a rule change to this extent. If the Court is able to protect the minor's rights--up to and including an abortion--the Court can certainly continue such protection even if the parents of the petitioner are given notice of the hearing and are allowed to attend. I recommend the proposed Rule 60 (Judicial and Appellate) changes be revised to allow notice to and appearance by parental representatives at such hearings.

Be assured that I have worked with a number of juveniles and been an advocate for victims rights for battered spouses and neglected or abused children throughout the past 25 years. I realize the problems involved in many (if not most) cases of juvenile pregnancy when parents are involved in the abortion decision. I'm sure that is what the whole concept of "hearing" is designed to accomplish in cases of pregnancy: to give the juvenile an opportunity to obtain an abortion without obtaining parental consent. I don't disagree with that opportunity in appropriate cases.

Nevertheless, parental objection to an abortion may be based on sound, important bases of physiology, sociology, law, and principle. The Court will never know if its decision is best if the Court--contrary to hundreds of years of common law tradition--purposefully excludes even the opportunity of hearing arguments in opposition to the proposed petition.

I know this is a difficult question. I know many parents are unable to be objective in such a situation. The same is just as true for a pregant teen, and the law has traditionally withheld rights to make most decisions from such underage teenagers because of their general lack of maturity in judgment . . . which, of course, may be the primary reason for the pregnancy in the first case.

Certainly the Court must protect minor teenagers and society in general. Furthermore, Courts are increasingly asked to evaluate when the unborn also require protection. In present circumstances, it appears to me that the Court best serves the interests of society as a whole when it specifically addresses the needs of the minor teenager (petitioner), but allows other interested parties WITH STANDING (i.e., parents, and perhaps the unborn's father) to present their arguments to the Court. If the Court is unable to find the "truth" because additional parties and arguments are present at the hearing, then our entire judicial system is suspect!

Shame on jurists who think to practice law based on trying to prove their similarity in thinking and practice to current trends of court elsewhere. This rule as now written is another example of judicial intervention that goes somewhat beyond the mark.

Posted by James N. McCormick May 4, 2006 03:42 PM

Why is there a need to "expedite" a minor's bypass of parental consent to an abortion. It appears that judicial activism strikes again to overturn the will of the legislature by effectively nullifying parental consent rules. Why is there a rush to authorize the killing of the unborn. It is deplorable enough that the Nazi-like act of abortion is legal at all, it is pathetic that so many jurists are anxious to overturn or ineffectualize the will of the people of this state to put reasonable controls on abortion.

Posted by Hollis R. Hunt May 4, 2006 01:55 PM

COMMENTS RE BYPASS OF PARENTAL CONSENT
(From reproductive rights attorneys working with the American Civil Liberties Union of Utah)

The United States Supreme Court set forth basic constitutional requirements that a judicial bypass process must meet in Bellotti v. Baird, 443 U.S. 622 (1979) (plurality opinion) ("Bellotti II"). In particular, Bellotti II mandates that a young woman who elects to have an abortion without parental consent have access to an expeditious, confidential judicial procedure through which to obtain a bypass from the parental consent requirement. 443 U.S. at 643-44; accord, e.g., Lambert v. Wicklund, 520 U.S. 292, 295 (1997) (reaffirming requirements for judicial bypass articulated in Bellotti II). The comments set forth below suggest changes to the rules in order to protect young women's constitutional right to access an expeditious and confidential bypass procedure.

RULE OF JUVENILE PROCEDURE: URJP 60. JUDICIAL BYPASS PROCEDURE TO AUTHORIZE MINOR TO CONSENT TO AN ABORTION.

(a) Petition.
Because each minor has a constitutional and statutorily protected right to seek a confidential waiver of the consent requirement, the minor's name should not appear in the caption because this could publicly identify the minor through, for example, a docket sheet or calendar call. Therefore, the rule should be modified to state that a pseudonym or initials will be used in the caption on all the court documents. See, e.g., Zbaraz v. Hartigan, 776 F. Supp. 375, 379-80 (N.D. Ill. 1991) (minor should be allowed to file using a pseudonym or only her initials, to protect her anonymity). The minor's name should appear in only one place: in the body of the petition.

In addition, the rule should be modified to make it clear that, if the minor has an attorney by the time she files a petition, her attorney may sign and file the petition on her behalf. This change will lessen the burden on, and improve access to the procedure by, the minor, who may have difficulty in arranging confidentially to obtain the form, fill it out, and file it or to meet with the attorney in person prior to the petition being filed.

Suggested changes to (a):
Add new second and third sentences reading: "*The petitioner shall be referred to in the caption by a pseudonym or initials. The minor is only required to include her name in the body of the petition and not on any other court document. The petition may be signed and/or filed by someone acting on the minor's behalf, including her attorney if she is already represented.*"

(a) Petition & (b) Filing.
Many minors may find it difficult to go confidentially to a juvenile court during the hours that it is open. To best ensure that minors are able to confidentially and expeditiously use the judicial bypass process, the rules should minimize the number of times that it is necessary for a minor to go to a courthouse. Therefore, the petition form should be among the forms provided on the courts' website (www.utcourts.gov). That

way a minor can fill out the form before going to a courthouse or fill it out and have someone she trusts file the form for her.

The Instructions for Filing Petitions for Waiver of Parental Consent to Abortions Pursuant to Utah Code Ann. § 76-7-304.5 adopted by the Board of Juvenile Court Judges ("the Instructions") provide that the petition can be filed in person, by mail, or by fax, but language on how the petition can be filed was omitted from subsection (b) of the rule. As in the Instructions and in the rule governing filing of the notice of appeal, the rule governing filing of the petition should specifically state that any of those methods of filing may be used.

Suggested changes to (a) and (b):

Re-word the third sentence in (a) to read: "Blank petition forms will be available at all juvenile court locations *and on the Utah State Courts website (www.utcourts.gov).*"

Add the following sentence to (b): "*The petition may be filed in person, by mail, or by fax.*"

(c) Appointment of Counsel.

The Instructions clearly state that each minor has "the right to be represented by an attorney" but the rule as now written does not make that clear. The rule should be amended to specifically state that an attorney will be appointed by the court if the minor does not already have an attorney representing her. The court should assume that an unrepresented minor cannot afford an attorney and should appoint one for the minor unless she expressly states that she does not want an attorney. Moreover, the rule should not refer to a guardian ad litem as if it is an alternative to an attorney for the minor. Rather, the rule should state that a guardian ad litem will be appointed only if the minor is determined to be mentally incompetent.

Appointment of an attorney:

As now worded, the rule states that "the juvenile court shall consider appointing an attorney under Utah Code Ann. § 78-3a-913 and/or the Office of Guardian ad Litem under § 78-3a-911." The Petition form adopted by the Board of Juvenile Court Judges states "I understand I have the right to a court-appointed attorney and/or guardian ad litem." The phrasing in the rule leaves it unclear whether the court definitely will appoint an attorney to represent a minor who does not yet have an attorney to represent her.

The standards for appointing an attorney under Section 78-3a-913 appear to clearly support appointing an attorney for a minor seeking a bypass. That statute provides that a competent minor shall be informed that she "ha[s] the right to be represented by counsel at every stage of the proceedings" and that "counsel shall be appointed by the court" if a minor requests an attorney and is found to be indigent. Utah Code Ann. § 78-3a-913(1)(a). Moreover, the court may appoint counsel without a request where "necessary to protect the interest of the minor." Id. Where a minor is seeking court permission to obtain an abortion without parental consent, it clearly will not be feasible for the minor to seek help from a parent in paying for an attorney, nor for the court to take into account "the income and financial ability to retain counsel of the parents or guardian in determining the indigency of the child." See Utah Code Ann. § 78-3a-913(1)(c). As the Seventh Circuit Court of Appeals has noted,

as a practical matter the choice for most minors will be between having a court-

> appointed attorney or no attorney at all. The more under age eighteen a minor is, the less likely it is that the minor will have enough money of her own to be able to hire an attorney to represent her at the waiver hearing. Naturally, a minor seeking to avoid parental notification will not feel free to ask her parents to pay for her attorney.

Indiana Planned Parenthood Affiliates Ass'n v. Pearson, 716 F.2d 1127, 1137-38 (7th Cir. 1983).

Moreover, an attorney should be appointed for each unrepresented minor in light of the minor's constitutional right to have an effective opportunity to obtain a bypass. See, e.g., Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476, 461 n.16 (discussing the requirement that the judicial bypass procedure provide "'an *effective* opportunity for an abortion to be obtained.'") (quoting Bellotti v. Baird, 443 U.S. 622, 644 (1979)) (emphasis added); Indiana Planned Parenthood Affiliates, 716 F.2d at 1138 (finding unconstitutional statute that allowed, but did not require, appointment of counsel for minor in bypass). Without a lawyer, a minor -- under the stress of dealing with an unwanted pregnancy and untrained in the law -- is likely to have great difficulty navigating the court process and presenting the evidence necessary to prove her case. See Indiana Planned Parenthood Affiliates, 716 F.2d at 1138 ("A minor, completely untrained in the law, needs legal advice to help her prepare her case . . . . Requiring an indigent minor to handle her case all alone is to risk deterring many minors from pursuing their rights because they are unable to understand how to navigate the complicated court system on their own or because they are too intimidated by the seeming complexity to try.").

Appointment of a guardian ad litem:

The phrasings in both the rule and the petition form, noted above, imply that the court may appoint a guardian ad litem *instead of* appointing an attorney to represent the minor in a bypass. Given the different roles of an attorney for the minor and a guardian ad litem, the rule should be amended to make it clear that a guardian ad litem cannot be appointed in lieu of appointing an attorney. The rule should indicate that a guardian ad litem will be appointed only if the minor is determined to be mentally incompetent, in which case a guardian is needed to express the wishes and protect the interests of the minor.

The duties and responsibilities of a guardian ad litem and of an attorney for a minor "are not always coextensive," as the Utah Supreme Court has noted. State v. Harrison, 24 P.2d 936, 942 n.4 (Utah 2001). Appointing a guardian ad litem for a minor seeking a judicial bypass would not satisfy the need to ensure that a minor is able to effectively pursue her constitutional right to seek an abortion without her parent's consent. An attorney for a minor is ethically bound to represent the client's interests as the client sees them and is prohibited from asserting a position contrary to the wishes of the client. Utah R. Prof. Conduct 1.2 (the attorney must "abide by a client's decisions concerning the objectives of representation" and "consult with the client as to the means by which [the objectives] are to be pursued.") A guardian ad litem is not similarly bound. The guardian ad litem is charged with representing "the best interest of a minor" according to the view of the guardian ad litem, not the view of the minor: "[a] difference between the minor's wishes and the attorney [guardian ad litem]'s determination of best

interest may not be considered a conflict of interest for the attorney [guardian ad litem]." Utah Code Ann. 73-3a-912(8).

Given the need for each minor to be represented by an attorney, the rule should delete the provision for appointment of a guardian ad litem, except for situations in which the court determines that the minor is mentally incompetent or the attorney assigned to represent her requests the appointment of a guardian ad litem because the attorney believes that the minor is mentally incompetent. There is no need for a competent minor represented by an attorney to be represented by a guardian ad litem as well. Cf. State in Interest of D.M., 790 P.2d 562, 566 (Utah Ct. App. 1990) (ruling that trial court properly declined to appoint a guardian ad litem for dependency and neglect phases of proceeding where minors were represented by counsel).

Suggested changes to (c):

Amend the rule to read: "If the petitioner is not represented by a private attorney, the juvenile court shall ~~consider appointing~~ *appoint* an attorney under Utah Code Ann. § 78-3a-913 ~~and/or the Office of Guardian ad Litem under § 78-3a-911~~. The clerk shall immediately notify the attorney ~~and/or the Office of Guardian ad Litem~~ of the appointment. *Upon the application of the minor's attorney or upon the court's own motion, a guardian ad litem shall be appointed if the court determines that the minor is mentally incompetent.*"

(d) Expedited Hearing.

The rule should allow for the hearing to be held at a later date if the minor requests a longer time frame. In addition, the rule should allow for re-scheduling of the hearing if the minor is unable to attend the hearing at the scheduled time due to illness or some other reason. Although most minors will want to have a hearing as soon as possible after the petition is filed, in some cases a minor may need a later hearing date in order to be able to attend the hearing confidentially. Moreover, in some circumstances, a minor with the best of intentions will not be able to appear for a scheduled hearing because, for example, she cannot miss an exam being given at school that day or she cannot arrange transportation to the courthouse. Given the nature of the judicial bypass process and the mandate of confidentiality, it is imperative that the rule recognize that a minor may miss or need to postpone a scheduled hearing for a short period of time and mandate that a subsequent hearing date be promptly set.

In each instance, a minor should be represented by an attorney, but not also by a guardian ad litem, for the reasons set forth above. Therefore, the reference to "guardian ad litem" in this subsection should be deleted.

Suggested changes to (d):

Amend the first sentence to read: "Upon receipt of the petition, the court shall schedule a hearing to be held and the petition resolved within three judicial days, *unless the minor requests a longer time frame, in which case the hearing must be held and petition resolved within that time frame.*"

Add a new fourth sentence, reading: "*A minor who fails to appear at a hearing may request that the court reschedule her hearing and such a rescheduled hearing shall*

be held and the petition resolved within three judicial days of the minor's request, unless the minor requests a longer time frame, in which case the rescheduled hearing must be held and petition resolved within that time frame."

Amend current fourth sentence by deleting the phrase "the guardian ad litem."

(e) Findings and Order.

The rule should specifically state what it now implies: that at the conclusion of the hearing the minor and her attorney will receive an order granting or denying her petition. This should be made clear in the rule to ensure that the minor can promptly obtain her abortion or exercise her right to appeal if the petition is denied.

Suggested changes to (e):

Amend the first sentence to read: "The court shall enter an order immediately after the hearing is concluded *and hand deliver a copy of that order to the petitioner and her attorney at that time.*"

(f) Re "deemed granted" petitions

As discussed above, the rule should allow for a minor to request a delayed hearing or for a hearing to be re-scheduled if the minor was unable to attend. Therefore the rule should reflect those situations in addition to situations where the court continues a hearing.

In each instance where the petition is deemed granted, the clerk should prepare a certificate to that effect and provide a certified copy of that to the minor or her attorney. The minor should not be expected to make a request in order to obtain such a certificate. Moreover, having the clerk perform this function as a matter of course should actually be beneficial for the clerk's office, as it will eliminate the need for minors or their representatives to repeatedly check back with the clerk's office to determine if the necessary number of judicial days (including any continuations) has elapsed.

Suggested changes to (f):

Amend the second sentence to read: "~~If the court continues a hearing for 24 hours under paragraph (d)~~ *If, as provided under paragraph (d), the hearing is held at a later date at the request of the minor or the court continues or re-schedules a hearing,* the petition shall be deemed granted if the petition is not resolved ~~by the expiration of the additional 24 hours~~ *within that time frame.*"

Amend the last sentence of subsection (f) to read: "*Upon expiration of the applicable period,* the clerk of the juvenile court *immediately* shall prepare a certificate indicating that a hearing was not held and that the petition is deemed granted pursuant to this rule *and shall provide a certified copy of that certificate to the petitioner, her attorney, and individuals designated by the petitioner.*"

(g) Confidentiality.

Additional safeguards are needed to protect the minor's confidentiality. As discussed with reference to paragraph (a), above, the minor should be allowed to file using a pseudonym or initials and her name should appear only in the body of the petition.

Moreover, the rule should specifically provide that documents must be maintained as sealed records and that all proceedings shall be scheduled and docketed in a manner designed to ensure the minor's confidentiality. At a minimum, any document containing the minor's name must be maintained as a sealed record.

Suggested changes to (g):

Amend the first sentence of paragraph (g) to read: "The petition and all hearings, proceedings, and records are confidential *and the entire record related to these proceedings shall be maintained under seal and shall be classified as "sealed" court records.*"

(h) Appeal.

The constitutional mandate of expedition is imposed on the state, to ensure that the minor has an effective opportunity to obtain an abortion: if the state imposes undue delay she may lose her ability to access an abortion. The expeditiousness requirement should not be applied to the minor's detriment: placing a high burden of expedition on the minor will impermissibly foreclose her "constitutional right to seek an abortion [without being] unduly burdened by state-imposed conditions upon . . . access to court." Bellotti v. Baird, 443 U.S. 622, 648 (1979); see also Planned Parenthood of Southern Arizona v. Neely, 804 F. Supp. 1210, 1216 (D. Ariz. 1992) (noting that 24 hour appeal window places a "'truly onerous burden on the young woman seeking to exercise her constitutional rights,'" by, "[i]n essence, plac[ing] the burden on the minor to act expeditiously" (internal citation omitted)). Within the three day time frame for filing a notice of appeal, a minor must learn of the decision, receive a copy of the order, figure out how to appeal, prepare a notice of appeal, and file it with the court -- or forever lose her right to appeal. See Neely, 804 F. Supp. at 1217 (finding parental consent law unconstitutional due to vagueness and inadequate medical emergency exception, but expressing concern that statute also imposed undue burden by requiring that an appeal be filed within twenty-four hours of the minor receiving actual notice of the denial, due to difficulties faced even by represented minors). To avoid impermissibly burdening the minor's right to an abortion and violating her right to due process, the rule needs to be clarified and some additional safeguards need to be added. Cf. Manning v. Hunt, 119 F.3d 254, 275 (4th Cir. 1997) (upholding short time frame for filing notice of appeal because statute required appointment of an attorney if requested by the minor and rule required that minor be informed of the decision at the conclusion of the hearing).

The rule should specify that the time period runs from when the minor receives a copy of the court's order, not from when the order is entered. Along with requiring the prompt hand delivery of the order to the minor and her attorney at the conclusion of the hearing, as requested above, this change will ensure that the minor will have learned of the decision before the time the appeal window closes. These clarifications or additions are needed even if appointment of counsel on appeal is made mandatory, as requested below, because the minor could lose her right to appeal before such appointment was triggered. Requiring that the order be hand delivered to the minor and her attorney at the conclusion of the hearing will also reduce the burden on the minor by enabling her to file her appeal before leaving the courthouse, making another trip -- with increased risk of loss of confidentiality or arousing the suspicion of her parents or others -- unnecessary.

Moreover, the rule should require the appointment of an attorney not only for the reasons set forth above, but also because that will enable the minor to promptly exercise, and thus retain, her right to appeal. (Of course, if the rule does not require the appointment of an attorney, the time frame within which a notice of appeal must be filed should be expanded, as it could take the minor more than a week just to find an attorney or other assistance.)

Imposing a short time frame for appeals without clearly providing the safeguards set forth above unduly burdens minors and violates their due process rights, while failing to serve any legitimate state interest.

Suggested changes to (h):

Amend the first sentence to read: "A petitioner may appeal an order denying or dismissing a petition to bypass parental consent by filing a notice of appeal within three judicial days after ~~entry of the order~~ *receipt of the order*."

RULE OF APPELLATE PROCEDURE: URAP 60. JUDICIAL BYPASS APPEALS.

(c) Notice of appeal.

As with the petition, minors should be allowed to file a notice of appeal using a pseudonym or initials in the caption, in order to best protect their confidentiality. Therefore, as discussed above, the rule should specify that the minor need not include her name on the notice of appeal.

Subsection (1): As discussed above, greater procedural safeguards are needed in order to protect the minor's constitutional rights. The rule should be amended to clarify that the court will consider a notice to be filed timely if it is mailed within the specified deadline.

Suggested changes to (c):

Add new subsection reading: "*The minor is not required to include her name on the notice of appeal, but instead shall be referred to in all parts of the notice, including the caption, by a pseudonym or initials.* "

The first sentence of subsection (1) should be amended to read: "A minor may appeal an order denying or dismissing a petition to bypass parental consent by filing a notice of appeal in the juvenile court within three judicial days after ~~entry of the order~~ *receipt of the order*."

A new third sentence should be added to subsection (1), reading: "*The notice of appeal is timely filed if it is mailed to the clerk of the juvenile court on or before the last day for filing.*"

(g) Disposition.

The rule should specify that the minor's attorney will be provided with a copy of the appellate court's order and, if one is issued, opinion.

Suggested changes to (g):

Amend the second sentence in paragraph (g) to read: "The clerk shall immediately notify the minor of the decision *and immediately shall provide her attorney with a copy of the court's order.*" An additional sentence should be added at the end of the paragraph: "*If the court issues an opinion, the clerk immediately shall provide the minor's attorney with a copy of it.*"

(h) Confidentiality.

Additional safeguards are needed to protect the minor's confidentiality. As discussed with reference to paragraph (c), above, the minor should be allowed to omit her name from the notice of appeal.

Moreover, the rule should specifically provide that the documents must be maintained under seal and that all proceedings shall be scheduled and docketed in a manner designed to ensure the minor's confidentiality.

Suggested changes to (h):

Amend the first sentence of paragraph (h) to read: "Documents and proceedings in an appeal under this rule are confidential *and the entire record related to these proceedings shall be maintained under seal and shall be classified as "sealed" court records.*"

(i) Attorney.

As discussed above with reference to the trial court process, the rule should be amended to make it clear that an attorney will be appointed by the court if the minor does not already have an attorney representing her on the appeal and to delete references to the appointment of a guardian ad litem. If the Court does keep references to guardians ad litem, the rule should not refer to guardians ad litem as if they are an alternative to an attorney for the minor.

As at the bypass hearing stage of the process, the court should ensure that a minor appealing denial of her petition is represented by an attorney, in light of the minor's constitutional right to have an effective opportunity to obtain a bypass. Clearly a minor whose petition has been denied is likely to have great difficulty prevailing on appeal without the help of an attorney. As discussed above, a guardian ad litem is not a substitute for an attorney representing the minor. If the minor is mentally incompetent, a guardian ad litem will have been appointed at the juvenile court stage of the process.

The rule should allow for the appointment of a different attorney in some situations, in order to ensure the minor effective representation on appeal.

Suggested changes to (i):

Amend paragraph (i) to read: "If the minor is not represented by an attorney, the court shall ~~consider appointing~~ *appoint an attorney* ~~or the Office of Guardian ad Litem~~ to represent the minor in the appeal. If an attorney ~~or the Office of Guardian ad Litem~~ was appointed to represent the minor in the trial court, the appointment continues through appeal, *unless the minor requests otherwise or there is other good cause for a different appointment.*"

COMMENTS RE FORMS FOR BYPASS OF PARENTAL CONSENT
(From reproductive rights attorneys working with the American Civil Liberties Union of Utah)

GENERAL COMMENTS:

(1) Because each minor has a constitutional and statutorily protected right to seek a confidential waiver of the consent requirement, the minor's name should not appear in the caption because this could publicly identify the minor through, for example, a docket sheet or calendar call. Therefore, the forms should be modified to make it clear that a pseudonym or initials will be used in the caption on all the court documents. See, e.g., Zbaraz v. Hartigan, 776 F. Supp. 375, 379-80 (N.D. Ill. 1991) (minor should be allowed to file using a pseudonym or only her initials, to protect her anonymity). The minor's name should appear in only one place: in the body of the petition.

(2) None of the forms should include the word "abortion" in the caption, to enhance the confidentiality of the process.

(3) The petition form and the Instructions for Filing Petitions for Waiver of Parental Consent to Abortions Pursuant to Utah Code Ann. § 76-7-304.5 adopted by the Board of Juvenile Court Judges ("the Instructions") appropriately state that the minor has a right to a court-appointed attorney. However, many of the forms refer to a guardian ad litem and imply that a guardian ad litem may be appointed *instead of* an attorney to represent a minor in the bypass proceedings. All of the forms that include reference to a guardian ad litem should be revised to avoid confusing the role of an attorney with that of a guardian ad litem. The two roles differ in important ways, such that appointing a guardian ad litem does not provide the same protections for the minor as does appointing an attorney to represent her in the bypass process.

The duties and responsibilities of a guardian ad litem and of an attorney for a minor "are not always coextensive," as the Utah Supreme Court has noted. State v. Harrison, 24 P.2d 936, 942 n.4 (Utah 2001). Appointing a guardian ad litem for a minor seeking a judicial bypass would not satisfy the need to ensure that a minor is able to effectively pursue her constitutional right to seek an abortion without her parent's consent. An attorney for a minor is ethically bound to represent the client's interests as the client sees them and is prohibited from asserting a position contrary to the wishes of the client. Utah R. Prof. Conduct 1.2 (the attorney must "abide by [the minor's] decisions concerning the objectives of representation" and "consult with the client as to the means by which [the objectives] are to be pursued.") A guardian ad litem is not similarly bound. The guardian ad litem is charged with representing "the best interest of a minor" according to the view of the guardian ad litem, not the view of the minor: "[a] difference between the minor's wishes and the attorney [guardian ad litem]'s determination of best interest may not be considered a conflict of interest for the attorney [guardian ad litem]." Utah Code Ann. 73-3a-912(8).

Moreover, there is no need for a minor to be represented both by an attorney and a guardian ad litem. Cf. State in Interest of D.M., 790 P.2d 562, 566 (Utah Ct. App. 1990) (ruling that trial court properly declined to appoint a guardian ad litem for dependency and neglect phases of proceeding where minors were represented by counsel).

(4) As presently drafted, the petition form and Instructions indicate that the minor must have provided informed consent for the abortion prior to filing her petition. Such a requirement clearly exceeds the statutory requirements and therefore the forms and Instructions need to be amended.

The parental consent statute cannot possibly be read to require that a minor provide informed consent prior to filing the petition. Under the rule, the hearing may take place as many as five days (three judicial days plus intervening weekend) after the minor files her petition, or even longer if there is an intervening holiday or the court continues the hearing date for 24 hours. Requiring that the minor has given her informed consent (and provide written documentation to that effect) at the time she files her petition violates the authorizing statute, Utah Code Ann. § 76-7-304.5. In addition, it interferes with the minor's constitutional right to an expeditious bypass process, by imposing additional delays on the minor before she can obtain a judicial waiver.

Moreover, there is nothing in the statute that requires that, even at the hearing, the court have before it any specific written informed consent document that indicates that the minor "visited with" the physician who will perform the abortion. The statute simply requires that the court determine that the minor "has given her *informed consent* to the abortion." Utah Code Ann. § 76-7-304.5(2)(a) (emphasis added). The fact that the minor has given informed consent could be elicited through oral testimony. Moreover, even the Utah statute that has specific requirements for the elements of informed consent allows that consent to be obtained by a "referring physician," rather than only the physician who will perform the abortion. Utah Code Ann. § 76-7-305(2)(c).

(5) The Instructions reference a document entitled Certification of the Clerk which a minor will be able to bring to an abortion provider to show that her petition has been deemed granted. However, a sample form was not included in the set of forms. A proposed certificate is attached to these comments, which is worded to take into account the possible continuation of a hearing, as allowed by the rule.

PETITION FOR WAIVER OF PARENTAL CONSENT TO MINOR'S ABORTION PURSUANT TO UTAH CODE SECTION 76-7-304.5:

Name block in upper left hand corner: To protect the minor's confidentiality, she should not be required to put her name in the upper corner of the petition. Rather, she should be allowed to file using initials or a pseudonym in the caption and her name should appear only in the body of the petition. If that change is not made, at a minimum the form should be changed to delete the lines for "address," "city," and "telephone number." Although the form states that information is "optional," an unrepresented minor may fill in that information, thus jeopardizing her confidentiality. In accord with Utah R. Juv. Proc. 60, her county and state of residence should simply be provided in the body of the form.

¶ 2: The rule specifies that the petitioner need not provide her address on the form, but need only state her county and state of residence.

To make it clear on the petition that only that information is required, paragraph 2 should be re-worded as follows: "I am a resident of the following county _____ and state _____."

¶ 4: For the reasons discussed in the General Comments above, the form should be revised to avoid confusing the role of an attorney with that of a guardian ad litem. Specifically, paragraph 4 should be re-worded as follows:
"I understand that I have the right to a court-appointed attorney ~~and/or guardian ad litem~~ at no cost to me. (Check One)

_____a. Please appoint an attorney ~~and/or a guardian ad litem~~ to represent me.

_____b. I have an attorney to represent me. The attorney's name, address, and telephone number
is_____.

_____c. I do not want an attorney ~~or guardian ad litem~~.

¶ 5: For the reasons discussed in the General Comments above, the reference to "my guardian ad litem" should be deleted in the second sentence.

The minor should not be required to list the persons that she will want admitted to her hearing. There is no need for such a specification at the time the petition is filed. Many minors will not be represented prior to filing a petition and probably will not know whether there are persons who should attend to present evidence. Even if she has an attorney by the time her petition is filed, she and her attorney may not have had a chance to consult sufficiently to know whom, if anyone, they will want at the hearing. Moreover, the minor may unwittingly compromise her confidentiality or the confidentiality of others by listing persons before she has consulted with an attorney. Therefore, the last sentence of this paragraph should be omitted.

¶ 6: For the reasons discussed in the General Comments above, the reference to a "guardian ad litem" should be deleted in the third sentence.

In addition to asking for the name(s) and address(es) of additional contact people, the form should ask for their telephone number. Therefore, the last sentence should be amended to read "Name(s), telephone number(s), and address(es) _____."

¶ 7: For the reasons discussed in the General Comments above, subparagraph "a" should be re-written to make it clear that the minor need not have given informed consent to her abortion by the time that she files the petition. In particular, the parental consent law does not support a requirement that she attach a copy of a written consent document to the petition. Therefore, subparagraph "a" should be re-worded as follows: "_____a. I have given my informed consent to the abortion, or will have done so by the time of my hearing, and I am mature and capable of giving informed consent for the performance of an abortion."

The minor should not be required to state her reasons for alleging that an abortion would be in her best interest. Many minors will not be represented prior to filing a petition and cannot be expected to fully understand which of their circumstances might establish that an abortion would be in their best interest. Even if she has an attorney by

the time her petition is filed, the minor and attorney may not have had a chance to consult fully about the minor's circumstances. The determination whether an abortion is in the minor's best interest will be made by a judge, based on evidence presented at the hearing. Therefore, requiring listing of reasons at the time the petition is filed serves no purpose and might be detrimental to the minor, particularly if she is unrepresented. The form should be modified as follows: "_____ b. An abortion is in my best interest."

Signature line: Some minors will be represented by attorneys at the time their petitions are filed and therefore the form should make it clear that attorneys may sign the petition, by stating under the signature line "Petitioner or Petitioner's Attorney" rather than "Petitioner". This change will lessen the burden on, and improve access to the procedure by, the minor, who may have difficulty in arranging confidentially to obtain the form, fill it out, and file it or to meet with the attorney in person prior to the petition being filed.

INSTRUCTIONS FOR FILING PETITIONS FOR WAIVER OF PARENTAL CONSENT TO MINOR'S ABORTION PURSUANT TO UTAH CODE SECTION 76-7-304.5:

Introductory paragraph:

The Instructions overstate which minors are subject to the parental consent requirement, by failing to refer to the exemption for emancipated minors. In addition, using the term "minor" in the Instructions is not as clear as stating the relevant age would be. To be accurate and clear, the first sentence should be amended to read: "If you are a pregnant, unmarried and unemancipated and will not have reached the age of 18 at the time of your planned abortion, Utah Code Ann. § 76-7-304.5 requires written consent from one of your parents or your guardian or from a court for you to obtain an abortion."

To make the extent of confidentiality clearer to the minor, the Instructions should specifically note that information will not be disclosed to the minor's parents. Amend the fourth sentence in the introduction to read: "No information about you or your petition will be available to your parents, guardian, or any member of the public."

Section 1:

As discussed above in the General Comments, this section incorrectly states that a minor seeking a waiver on the grounds that she is mature and informed must have met with the physician who will perform the abortion and must have provided informed consent for the procedure before she files her petition.

Furthermore, as written, this section risks giving the minor the incorrect impression that she must be ready to present her case before she has filed her petition, which may be before she even has spoken to an attorney.

To address these concerns, this section should be re-written as follows: Delete the current section 1, insert the following between the current sections 3 and 4, and re-number sections 2 and 3 as "1" and "2", respectively: "3. **Prior to the hearing.** If you are claiming that you are mature and capable of giving informed consent to the abortion without the consent of a parent or guardian, you will have to show the judge at the hearing that you have given informed consent to your abortion. Therefore, prior to the hearing, you need to obtain information about the abortion procedure, its risks, and its alternatives."

¶ 2: To help the minor access the courts, a list of the addresses, telephone numbers, and fax numbers of the juvenile courts in each county should be attached to the Instructions.

The last sentence should make it clear that the minor who faxes a petition to the court and does not receive a Notice of Hearing within 48 hours also should contact the court, by adding "or faxing" between the words "mailing" and "the petition."

¶ 3: For the reasons discussed in the General Comments above, the phrases "or guardian ad litem" and "and/or guardian ad litem" should be deleted from the second and third sentences.

¶ 4: The third sentence in the first paragraph should also reference faxed petitions, so the words "or fax" should be inserted between "If you mail" and "your petition."

In some circumstances, despite the best of intentions, a minor will not be able to appear for a scheduled hearing because, for example, she cannot miss an exam being given at school that day or she cannot arrange transportation to the courthouse. Therefore, a sentence should be added after the fifth sentence in the first paragraph, reading: "If you are unable to appear for your scheduled hearing date, you or your attorney must promptly contact the clerk of the court to request that the court reschedule your hearing."

To make the attorney's role and the confidentiality of the proceedings clearer to the minor reading the Instructions, the second paragraph should be re-written by replacing the third sentence with the following: "You and your attorney have the right to and will be able to present evidence to the judge concerning those issues. Both the judge and your attorney may ask you questions. All of the questions and your answers will be recorded, by tape or by a court employee (called the court reporter), but the recording will be kept confidential by the court."

¶ 6: Given that most minors should have an attorney at the time the notice needs to be filed (except for those who declined to have one appointed or need to change attorneys), the section should be re-written slightly to make the support that the attorney can provide to the minor clearer. A new first sentence should be added to the second paragraph and what is now the first sentence of that paragraph should be re-worded as follows: "Your attorney may file an appeal for you. Your attorney or you should fill out a Notice of Appeal form and file it with the juvenile court clerk."

The rule provides that the Notice of Appeal may be filed in person, by mail, or by fax and the Instructions refer to the first two methods. To make the Instructions clearer and to match the rule, a sentence should be added after the first sentence in the second paragraph, reading "You may file the petition in person at the court, or by mail or by fax." (And, as suggested above with reference to ¶ 2, a list with the addresses and fax numbers of the juvenile courts should be attached to the Instructions.)

The Instructions as currently written contemplate that the Notice of Appeal will not include contact information for the minor generally, but will if the minor mails the notice to the court. As suggested below with reference to the Notice of Appeal form, the Instructions should make it clear that the minor will provide contact information on the Notice, rather than the court relying on the contact information provided in the petition.

This is especially appropriate because the minor may not have had an attorney at the time she filed the petition and therefore she now might want to designate that she be contacted c/o her attorney. The Notice of Appeal should be changed as noted below and the third and fourth sentences in the third paragraph in ¶ 6 of the Instructions should be replaced with the following: "If the court of appeals schedules a hearing, the court of appeals clerk will contact you with that information using the means designated on the Notice of Appeal."

¶ 7: The Instructions should make it clear to the minor that, if oral argument is scheduled, her attorney will represent her at the argument. Therefore, the second sentence should be re-worded as follows: "If the court schedules oral argument, your attorney will present argument on your behalf and you may attend in person or by telephone, if you wish to do so."

ORDER APPOINTING AN ATTORNEY AND/OR GUARDIAN AD LITEM FOR A MINOR:

For the reasons discussed in the General Comments above, the references to "guardian ad litem" should be deleted from this document and it should be used only for the appointment of an attorney to represent the petitioner.

NOTICE OF HEARING:

As noted above, in some circumstances, a minor will not be able to appear for a scheduled hearing and will need to ask for a new hearing date. Therefore, a sentence should be added to the paragraph above the clerk's signature line, reading: "If you are unable to appear for your scheduled hearing date, you or your attorney must promptly contact the clerk of the court to request that the court reschedule your hearing."

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

For the reasons discussed in the General Comments above, "the minor's guardian ad litem" should be deleted from the list of those possibly present at the hearing.

NOTICE OF APPEAL:

¶ 4: The form should make it clear to the minor that she may appear at oral argument through her attorney, by adding the following choice:

"___ My attorney will appear on my behalf."

New ¶ 5: As noted above regarding the Instructions, the Notice of Appeal form should ask the minor to provide contact information. Therefore, the following paragraph (comparable to one on the petition) should be added:

"I understand that court personnel will not send any papers to or try to call me at my home without my consent. I would like to be informed of the court's decision in the following way (list address, cell phone number, e-mail address, fax number, or other):

_____

I request the following person(s), in addition to my attorney, be contacted and given papers in my case:

Name(s), telephone number(s), and address(es)_____
_____."

Signature line: The form should make it clear that attorneys may sign the notice, by stating under the signature line "Petitioner or Petitioner's Attorney" rather than "Petitioner".

NOTICE OF ARGUMENT ON APPEAL:

¶ 2: Because the term "argument" is used everywhere else on the form, the term "hearing" should be replace with the term "argument" in this paragraph, to avoid the risk of confusion.

[Form to document that petition has been deemed granted]
[caption]

CERTIFICATION OF THE CLERK

The Petitioner in this matter has filed a Petition for waiver of parental consent pursuant to Utah Code Section 76-7-304.5. According to Utah Rule of Juvenile Procedure Rule 60, if the court has not held the hearing on the petition and issued a ruling within the time frame required by the Rule, the petition is deemed to have been granted and the consent requirement is waived. The clerk of this court hereby certifies as follows:

1. The petition in this matter was filed on_____,200_____, at _____o'clock ___.m.

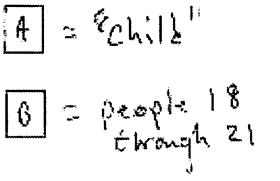
2. The court was required to hold a hearing and issue a ruling on or before _____,200____, at _____o'clock____.m.

3. No ruling in this matter was issued within the time required by Rule 60. Therefore, the petition is deemed granted.

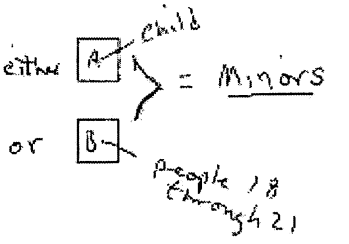
DATED:_____

_____
Clerk of the Juvenile Court

Hypothetical



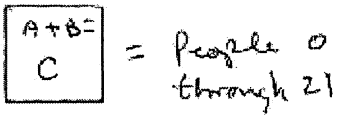
I have this statute I want to apply to "minors." In other words it will apply to either a "child" or a person 18 through 21 years old. Does it apply to a person defined as a "child" or does it apply to a person not defined, but who is of the age 18 through 21? We do not know. It could be either A or B. Maybe it is A - maybe it is B.



Some argue it applies to both A and B and in some way run together "EitherOr" as if by doing so makes it conjunctive. It is argued that you say "EitherOr" not "either" ..... "or." No matter how you slur it, "either A or B" is disjunctive. We can see the function of the disjunctive in a simple syllogism from a primer on logic.

> A **disjunctive syllogism**, also known as **modus tollendo ponens** (literally: *mode which, by denying, affirms*) is a valid, simple argument form:
>
> A or B
>
> Not A
>
> Therefore, B (http://en.wikipedia.org/wiki/Disjunctive_syllogism)

To get to B, you have to eliminate A. If the conjunctive is intended why not say "A and B."



Why not define

Child - a person 18 or younger
Minor - a person younger than 22
Adult minor - a person 18 through 21

or something similar.