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## SUPPLEMENTAL COMMENTS RE: URJP 60

### JUDICIAL BYPASS PROCEDURE TO AUTHORIZE MINOR TO CONSENT TO AN ABORTION.

The comments set forth below are meant to supplement and reiterate earlier comments regarding changes to the judicial bypass rules. These comments, like those submitted previously, address changes that will protect young women's constitutional right to access an expeditious and confidential bypass procedure. *See Bellotti v. Baird*, 443 U.S. 622, 643-44 (1979) (plurality opinion).

#### **I. Rule 60(c): Attorney/Guardian Ad Litem Provision**

##### **A. The rules must provide for the appointment of counsel to represent minors in judicial bypass proceedings.**

UTAH R. JUV. P. 60(c) provides that "[i]f 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." Section 78-3a-913(1)(a) makes clear that a competent minor appearing before the juvenile court must 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 she requests an attorney and is found to be indigent. Even if she does not request counsel after being told that she is entitled to representation, section 78-3a-913(1)(a) provides that the court may appoint counsel where "necessary to protect the interest of the minor."

Minors appearing before the juvenile court in judicial bypass cases should be appointed counsel as a matter of course, unless they expressly decline such representation, and Rule 60(c) should be drafted accordingly. The plain language of section 78-3a-913(1)(a), quoted above, directs the court to appoint an attorney to represent an indigent minor upon her request. Section 78-3a-913(1)(c) further states that in order to determine whether a minor is indigent, the court "shall take into account the income and financial ability to retain counsel of the parents or guardian of a child." However, it is unreasonable to expect a minor in a judicial bypass proceeding to be able to provide this information, and requesting it from the parents or guardian would violate the minor's confidentiality. Therefore, indigency should be presumed. If indigency is presumed, the Rule could be drafted to mandate the appointment of counsel, without violating the statute.

Not only must a lawyer be provided to the minor in order to guarantee her right to an effective bypass procedure, counsel must be appointed at no cost to the minor. Given minors'

lack of financial resources and inability in this instance to ask their parents for money to pay for an attorney, "as a practical matter, the choice for most minors will be between having a court-appointed attorney or no attorney at all." *Indiana Planned Parenthood Affiliates Ass'n v. Pearson*, 716 F.2d 1127, 1137; *see also Orr*, 1983 WL 1570, at \*1 ("The low earning capacity of most minors and the financial dependence of many minors upon their parents make the nonavailability of free legal counsel a genuine obstruction to the exercise of the right of choice of pregnant minors."). Even if indigency is not presumed, under section 78-3a-913, the court may use its discretion to appoint an attorney to protect the minor's interests. Leaving aside Rule 60's current direction that the court appoint an attorney and/or a guardian ad litem, section 78-3a-913(1)(a) clearly contemplates that a minor receive the assistance of an attorney.

Additionally, the United States Supreme Court has held that in order for a judicial bypass procedure to pass constitutional muster, it must provide "an effective opportunity for an abortion to be obtained." *Planned Parenthood Ass'n of Kansas City, Missouri, Inc. v. Ashcroft*, 462 U.S. 476, 491 n.16 (1983) (emphasis added) (quoting *Bellotti*, 443 U.S. at 644). Other courts have interpreted this command to require bypass procedures to provide for the appointment of counsel. *See, e.g., Indiana Planned Parenthood Affiliates Ass'n v. Pearson*, 716 F.2d 1127, 1138 (7th Cir. 1983) ("We believe [providing for the appointment of counsel] is necessary to ensure that the waiver hearing becomes an effective opportunity for the minor to obtain an abortion upon the proper showing."); *Orr v. Knowles*, Nos. CV81-O-301, CV81-L-167, 1983 WL 1570, at \*1 (D. Neb. Sept. 16, 1983) ("Proceeding without counsel would be more than reasonably could be expected of a pregnant minor."). As the Seventh Circuit has cogently explained,

Even adults, it must be recognized, who have had no prior need for the services of a lawyer, often display an ineptness in securing a lawyer to represent adequately their particular interests . . . . A minor, completely untrained in the law, needs legal advice to help her understand how to prepare her case, what papers to file, and how to appeal if necessary. 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.

*Indiana Planned Parenthood*, 716 F.2d at 1137-38. For these reasons, the court must appoint an attorney to represent the minor, unless she expressly declines the assistance of counsel.

**B. A guardian ad litem is not an appropriate substitute for an attorney, and is unnecessary where a competent minor is represented by counsel.**

Rule 60(c) is currently constituted to allow the court to appoint an attorney and/or a guardian ad litem to represent the minor. As discussed above, in order for the bypass procedure to provide an effective opportunity for the minor to obtain an abortion, the court must appoint an attorney to represent her. A guardian ad litem should never be appointed as a substitute for an attorney, because their roles are markedly different. Moreover, Rule 60(c) should be redrafted to

provide that a guardian ad litem only be appointed if the minor is deemed mentally incompetent, in which case a guardian is needed to express the minor's wishes and protect her interests.

As the Utah Supreme Court has recognized, "it is universally accepted that the role of a guardian ad litem is to represent the best interests of those not legally competent to represent themselves, primarily children . . . . [T]he duties and responsibilities of a guardian ad litem are not always coextensive with those of an attorney representing a party in an action." *State v. Harrison*, 24 P.3d 936, 942 n.4 (Utah 2001). Similarly, in *Orr*, the court invalidated a parental notice statute that provided for the appointment of a guardian ad litem, but not an attorney, noting that "[t]he duties of a guardian ad litem . . . are not coextensive with those of an attorney who might represent a minor under [the statute]." *Orr*, 1983 WL 1570, at \*1. Therefore, as a matter of law, a guardian ad litem is not the same as an attorney-advocate for a minor. Further, although a minor has a constitutional right to argue to the court that she is either mature and capable of giving informed consent to the abortion, or that an abortion is in her best interests, *see Bellotti*, 443 U.S. at 643-44, a guardian ad litem represents what he or she believes is in the minor's best interests, and may actually impede the minor's arguments to the court. For that reason alone, a guardian ad litem is not an acceptable substitute for an attorney, and Rule 60(c) should not be drafted in a manner that allows the court to appoint an attorney *or* a guardian ad litem to represent the minor.

Where the minor is competent, it can be presumed that her attorney will adequately represent her before the court. A competent minor, aided by counsel, is capable of presenting her case to the court, and the court should be able to render a decision without obtaining the views of a guardian ad litem, just as it would render a decision in any other case involving a competent litigant represented by counsel. *Cf. State in Interest of D.M.*, 790 P.2d 562, 566 (Utah Ct. App. 1990) (holding that trial court properly declined to appoint a guardian ad litem for dependency and neglect proceedings where minors "had able representation"). Rule 60(c) should therefore be revised to allow the appointment of a guardian ad litem in addition to an attorney only in extreme cases, such as where the minor suffers from a severe mental impairment or developmental delay.

## **II. Rule 60(f): Petition Deemed Granted if Court Fails to Act**

The Utah Rules of Juvenile Procedure currently provide that if the court hearing a bypass petition fails to render its decision within three judicial days, or, if the time for decision is extended, at the close of the extension period, "the petition shall be deemed granted" and the petitioner may request that the juvenile court clerk "prepare a certificate indicating that a hearing was not held and that the petition is deemed granted pursuant to this rule." UTAH R. JUV. P. 60(f). A number of other states similarly provide that a judicial bypass petition is automatically granted if the court fails to issue a decision within a specified period of time. *See, e.g.,* COLO. REV. STAT. § 12-37.5-107(2)(f) ("If either the district court or the court of appeals fails to act within the time periods required by this subsection (2), the court in which the proceeding is pending shall immediately issue an order dispensing with the notice requirements of this article."); DEL. CODE tit. 24, § 1784(c) ("If the Court fails to rule within 5 calendar days of the time of the filing of the written application, the application shall be deemed granted; in which case, on the 6th day, the Court shall issue an order stating that the application is deemed

granted.”); KAN. STAT. § 65-6705(f) (“If the court fails to rule within 48 hours, excluding Saturdays and Sundays, of the time of the filing of the minor’s application, the application shall be deemed granted.”); MISS. CODE § 41-41-55(3) (“for any reason the court fails to rule within seventy-two (72) hours of the time the application is filed, the minor may proceed as if the consent requirement of Section 41-41-53 has been waived.”); MONT. CODE § 50-20-212(3) (“If the court fails to rule within 48 hours and the time is not extended, the petition is granted and the notice requirement is waived.”). Furthermore, like Utah, at least two other states explicitly provide for the clerk of the court to issue an order when the court has failed to make a timely ruling, stating that the petition is deemed granted. See FLA. R. JUV. P. 8.820(d)(3) (“If the court fails to rule within the 48-hour period and an extension has not been requested by the minor, the petition shall be deemed granted and the clerk shall issue the minor a certificate indicating the notice requirement is waived pursuant to 390.01114(4)(b), Florida Statutes.”); TEX. PARENTAL NOTIFICATION R. 2.2(g) (“If the court fails to rule on an application within the time required by Section 33.002(g) and (h), Family Code, upon the minor’s request, the clerk must issue a certificate to that effect, stating that the application is deemed by statute to be granted.”).

The other state statutes cited above demonstrate that the “deemed granted” portion of the Utah rule is not an anomaly, but rather, a common provision in laws governing petitions to bypass parental consent and notification requirements. Many states include this type of provision because it safeguards minors’ right to expeditious bypass proceedings. See *Bellotti*, 443 U.S. at 644 (holding that judicial bypass proceedings must “be completed with . . . sufficient expedition to provide an effective opportunity for an abortion to be obtained.”). As the Supreme Court explained in *Bellotti*, expedition is an integral part of the bypass process because “[a] pregnant adolescent . . . cannot preserve for long the possibility of aborting, which effectively expires in a matter of weeks from the onset of pregnancy.” *Id.* At 642. A deemed granted provision ensures that the minor will not lose her ability to exercise her constitutionally protected right to obtain an abortion simply because the bypass court has delayed in ruling on the petition. In other words, a deemed granted provision ensures that the court’s delay or inaction will not have a punitive effect on the minor.

The deemed granted provision is necessary to protect the minor’s right to an effective bypass procedure. Likewise, the mandate that the clerk of the court prepare an appropriate order at the minor’s request is necessary as a practical matter, because it ensures that the minor has proof that her petition was granted. When the minor goes to the abortion provider, she will need to present a paper showing that her petition was indeed granted. Without a certificate from the clerk, in a deemed granted situation the minor would have no evidence to support her claim that she was granted a waiver of the parental consent requirement. For this reason, where the court fails to issue a timely decision, Rule 60(f) properly requires the clerk to prepare a document showing that the minor’s petition has been granted.

If there is a concern that the existence of the deemed granted provision will cause courts to abdicate their responsibility to hold hearings and issue rulings on judicial waiver petitions, then perhaps it is appropriate to sanction courts that fail to exercise their duties under the parental consent statute. However, concern over noncompliant courts is not a justification for placing the onus of a delayed or nonexistent ruling on minors, who have a constitutional right to expeditious

judicial bypass proceedings that “provide an effective opportunity for an abortion to be obtained.” *Id.* at 644.

### III. Rule 60(b): Venue

The Utah rules currently permit a minor to file her petition “in any county.” UTAH R. JUV. P. 60(b). Having an open-ended venue provision is important because, as courts have held, it ensures the minor’s confidentiality and ability to make use of the judicial bypass procedure. *See, e.g., Planned Parenthood of Idaho, Inc. v. Lance*, No. 000-0353-S-MHW (D. Idaho Dec. 20, 2001) (unpublished decision) (holding unconstitutional provision that limited venue for bypass to minors’ home county or county where abortion provider located), *aff’d in part on other grounds, Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908 (9th Cir. 2004) (striking down parental consent statute on grounds that it contained inadequate medical emergency exception, without reaching venue issue); *Memphis Planned Parenthood, Inc. v. Sundquist*, 2 F. Supp. 2d 997, 1005 (M.D. Tenn. 1997) (holding that rule’s “restriction of a minor’s petition to her home county or the county in which her abortion is to be performed likely constitutes an undue burden,” because of confidentiality and access to courts issues), *rev’d on other grounds*, 175 F.3d 456, 464 (6th Cir. 1999) (holding, without deciding constitutionality of rule’s restrictive venue provision, that unrestricted venue provision in statute superceded rule). A venue provision that restricts the minor to filing in her home county or district “substantially risks compromising [her] confidentiality and deterring her exercise of her right to a bypass petition,” because “[i]f a minor files her petition in her home county, she may encounter family or friends who will question her purpose there.” *Memphis Planned Parenthood*, 2 F. Supp. 2d at 1005. There is a very real possibility, “[p]articularly . . . in small, rural communities,” that some minors may know or be related to court personnel, or may be otherwise detected at the nearest courthouse. *Id.* For that reason alone, minors should not be limited to filing their petitions in the judicial district for their home county.

Additionally, a minor seeking to bypass the parental consent requirement is already under a great deal of pressure, and negotiating the court system is a daunting experience for most minors. Minors often have difficulty leaving home or school to attend court without alerting a parent. They may also have trouble with transportation, which can impede their ability to attend court. For these reasons, “minors need to have considerable flexibility in seeking access to their state court system in a convenient manner,” and courts have held unconstitutional venue provisions that geographically limit minors’ access to the courts. *Planned Parenthood of Idaho*, slip op. at 12 (citing *Indiana Planned Parenthood Affiliates*, 716 F.2d at 1142); *see also Memphis Planned Parenthood*, 2 F. Supp. 2d at 1005 (“[T]he Court is persuaded that [the minor’s] ability to choose where to have her case heard is more conducive [to] balancing her needs for anonymity and relative convenience.”).

For some minors, it may be easier to file their bypass petitions in the Salt Lake City area, where all of the state’s abortion providers are located. For other minors, the closest and most accessible juvenile court may not be in the judicial district for their home county. For example, a minor residing in Kanab lives in the Sixth Judicial District, which has juvenile courts in Richfield and Manti, approximately 150 and 190 miles away, respectively. However, there are Fifth Judicial District juvenile courts located in St. George and Cedar City, each approximately

80 miles away from Kanab. Similarly, at the opposite end of the state, a minor that resides in Woodruff lives in the First Judicial District, with a juvenile court in Logan 80 miles away. However, there is a Second District juvenile court located in Ogden, which is 20 miles closer to Woodruff. A minor who wishes to should be able to file her petition in the juvenile court that is closest to her home, regardless of whether that court is in the same judicial district as her county of residence. *See Planned Parenthood of Idaho*, slip op. at 12-14 (holding that the state had “no legitimate state interest in restricting minors” to filing petitions in their home county or the county where abortion provider was located).

**IV. Rule 60(a), (d): Confidentiality and Unrepresented Minors’ Phone Numbers**

If a minor unrepresented by counsel appears at the court seeking to file a petition, she should not be required to give the court a phone number. A call from the court is extremely likely to jeopardize the minor’s confidentiality, because it may result, at a minimum, in intense questioning by the minor’s parents, which may compromise her ability to proceed with the bypass petition. At worst, it may jeopardize her privacy or even her safety.

In order to protect the confidentiality of unrepresented minors who cannot provide their home phone number, the court should be prepared to assign a hearing date and time when these minors appear to file their petitions, alleviating the need for the court to contact the minor via telephone. The court should also refer unrepresented minors to a qualified attorney who can serve as the contact for the minor.

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