FROM THE EDITOR

In an effort to increase dialogue about state court jurisprudence, the Federalist Society presents *State Court Docket Watch*. This newsletter is one component of the State Courts Project, presenting original research on state court jurisprudence and illustrating new trends and ground-breaking decisions in the state courts. These articles are meant to focus debate on the role of state courts in developing the common law, interpreting state constitutions and statutes, and scrutinizing legislative and executive action. We hope this resource will increase the legal community's interest in tracking state jurisprudential trends.

Readers are strongly encouraged to write us about noteworthy cases in their states which ought to be covered in future issues. Please send news and responses to past issues to Maureen Wagner at maureen.wagner@fed-soc.org.

CASE IN FOCUS

Pennsylvania Supreme Court Vacates Trial Court's Denial of a Minor's Application to Obtain an Abortion

by Steven J. Willis and Jordan E. Pratt

On December 22, 2011, in a case of first impression,[1] the Pennsylvania Supreme Court vacated a trial court's denial of a minor's judicial bypass application—an application to obtain an abortion without parental consent. In so doing, the court decided two issues of significance to both sides of the abortion debate: the standard of review on appeal and the relevance of a minor's failure to seek parental consent in determining whether to grant a judicial bypass. First, the court held that appellate courts must deferentially review—under an abuse of discretion standard—a trial court's denial of a minor's petition for judicial bypass. Second, the court held that a trial court may not rely on a minor's failure to seek her parents' consent when determining whether she has the requisite maturity and capacity to consent to an abortion.

This article provides background information on Pennsylvania's judicial bypass statute and summarizes both the trial court's order and the Pennsylvania Supreme Court's decision that vacated it in *In re Jane Doe*.[2] It concludes with an assessment of the case's significance.

I. Pennsylvania's Judicial Bypass Statute

The United States Supreme Court has interpreted the Fourteenth Amendment's Due Process Clause to require that states allow "mature" minors "capable" of giving informed consent the opportunity to terminate their pre-viability pregnancies without parental permission.[3] Like many states wishing to protect pre-born life to the fullest extent permitted by the Court, Pennsylvania generally requires minors seeking an abortion to obtain the consent of a parent,[4] but allows for "judicial bypass" of the parental consent requirement for minors found to be both mature and capable of consenting to an abortion.[5]

Pennsylvania's judicial bypass statute allows a minor to petition a court for an abortion when both her parents refuse consent, or when she chooses not to seek parental consent. To obtain judicial authorization for the abortion, she must demonstrate two things: the maturity and capacity to give informed consent to the abortion, and actual informed consent.[6] Notwithstanding a finding of immaturity, the statute directs trial courts to grant petitions if they are in the "best interests" of the minors.[7] To make these determinations, the statute directs trial courts to consider evidence regarding "the emotional development, maturity, intellect and understanding of the pregnant [minor], the fact and duration of her pregnancy, the nature, possible consequences and alternatives to the abortion and any other evidence that the court may find useful in determining whether the pregnant [minor] should be granted full capacity for the purpose of consenting to the abortion or whether the abortion is in the best interest of the pregnant [minor]."[8] The statute permits appeals when petitions are denied but does not specify what standard of review appellate courts should exercise.[9]

II. The Trial Court's Order

On or about March 19, 2010, a 17-year-old Pennsylvania girl filed an application for judicial

authorization of an abortion pursuant to Pennsylvania's judicial bypass statute.[10] The trial court held a confidential hearing regarding the application on the same day, and the girl testified she had been pregnant for ten weeks.[11] She testified that she had seen a physician who had explained the abortion procedure, the risks associated with it, and the available alternatives of adoption and raising the child herself. The girl testified that, having considered this information, she desired to proceed with an abortion.[12]

A high school senior with average grades, the girl informed the court that she planned to attend college and hoped to become a lawyer.[13] The girl still lived with her mother, on whom she depended for financial support.[14] According to her testimony, she lacked the fiscal means to support a child, and having to care for one would frustrate her educational plans.[15] In her own words, she was simply "not physically, mentally[,] or emotionally ready for this baby."[16]

The minor further testified that she had not attempted to procure her mother's consent for the abortion because she feared that her mother would "throw her out."[17] On further questioning, she revealed that both her brother and her sister had children through unplanned pregnancies and were struggling financially to provide for those children. Her mother was "happy" about those children, she explained, because unlike her, her siblings "were old enough and actually on their own already to have children."[18] Finally, the girl testified that although she knew that agencies could assist her in locating adoptive parents for the child, the abortion provider had not offered her printed materials listing such agencies.[19]

The trial court initially reserved judgment because of the provider's failure to give the girl printed materials regarding adoption agencies, which the court thought Pennsylvania law required.[20] But after the girl reviewed those materials during a recess, the court denied her application, finding that she lacked the requisite maturity and capacity to consent to an abortion, and that an abortion would not be in her best interests.[21]

In its order, the court cited several reasons for its findings. As to the girl's intelligence and experience, the court noted her average high school grades, improper use of English at the hearing, lack of work experience, unfamiliarity with personal finances, and lack of prior significant decision-making.[22] The court further found that the provider's failure to timely furnish printed

... continued page 9

Montana Takes on *Citizens United*

by Edward Greim and Justin Whitworth

From the Montana Supreme Court comes a potential challenge to the United States Supreme Court's landmark decision in *Citizens United v. Federal Election Commission* ("*Citizens United*"). The Supreme Court's 2010 decision ruled, 5-4, that corporations' and labor unions' independent spending in elections is political speech and does not corrupt the political process; therefore, a ban on such spending included in section 203 of the 2002 Bipartisan Campaign Reform Act ("BCRA") could not survive strict scrutiny under the First Amendment.[1]

Relying largely on Montana history, the majority of a divided Montana Supreme Court attempted to distinguish *Citizens United* in rejecting a similar challenge to the Montana Corrupt Practices Act of 1912 (the "MCPA"). The MCPA, the first ballot measure passed in Montana,[2] was characterized by the Montana court's majority as a reaction by the state's small residential population against out-of-state corporations that had historically controlled the state's natural resources, using corporate funds to elect compliant state legislators.[3] Among these natural resources were mining interests, which were controlled by what the court called "Copper Kings." For this reason, the court said, the MCPA requires corporations to make contributions and expenditures through a separate, segregated fund of voluntary contributions from shareholders, employees, and members.[4] Otherwise, corporations are absolutely prohibited from making expenditures or contributions "in connection with a candidate or a political committee that supports or opposes a candidate or a political party."[5] Like the federal independent expenditure ban invalidated in *Citizens United*, Montana's law prohibits corporations from using their own funds to make independent expenditures in candidate elections.

Constitutionality of Montana's Act Challenged

The case, originally styled *Western Tradition Partnership, Inc. v. Attorney General*,[6] was filed in a Montana District Court by three separate corporations operating in the state. The plaintiffs argued that the MCPA violated their free speech rights under the First Amendment and the Montana Constitution.[7] Western Tradition Partnership, Inc., is a "nonprofit ideological corporation,"[8] the Montana Shooting

Pennsylvania Supreme Court Vacates Trial Court's Denial of a Minor's Application to Obtain an Abortion

Continued from page 3...

materials regarding adoption directly impacted the girl's capacity to give informed consent.[23] The court also relied significantly on her failure to seek her mother's consent, discrediting her testimony that she feared her mother would "throw her out" if she learned of the pregnancy.[24] The court reasoned that her mother had already accepted the unplanned pregnancies of her siblings and that she could have displayed maturity by overcoming her fear and seeking the counsel of her mother. Failing to seek her mother's approval, the court reasoned, demonstrated a lack of the type of sound judgment needed to consent to an abortion.[25] Finally, the court found that an abortion would not be in the girl's best interests and denied her application.[26]

The minor's attorney then moved for reconsideration and sought to have the trial judge recused from hearing the motion because a pro-life organization had endorsed his candidacy for judicial office.[27] The trial court denied both motions.[28] On appeal, the superior court affirmed on the basis that the trial judge had not abused his discretion in denying the judicial bypass application.[29] The Pennsylvania Supreme Court then granted review.

C. The Pennsylvania Supreme Court's Opinion

In a 6-1 decision, the Pennsylvania Supreme Court vacated the order of the superior court that had upheld the trial judge's decision. While conceding that the case had become moot (the minor was no longer pregnant[30]), the court nevertheless proceeded to the merits of the case after applying an exception to the mootness doctrine.[31] The court first confronted the issue of what standard of review appellate courts should apply when reviewing a trial court's determination that a minor lacks the necessary maturity and capacity to consent to an abortion. As noted earlier, Pennsylvania's judicial bypass statute provides for the appeal of denials but does not specify a standard of review for those appeals. Both the appellant and amicus curiae ACLU urged that a de novo standard should apply,[32] but the Pennsylvania Attorney General (whom the court had invited to defend the trial court's order) and several pro-life amici curiae advocated a more deferential abuse of discretion standard.[33]

On the standard of review issue, the court sided with the Attorney General and cited three reasons for its holding. First, a trial court's maturity and capacity determination does not concern a pure question of law, but rather constitutes a fact-intensive inquiry deserving substantial deference.[34] Second, the court previously had declined to adopt a de novo standard of review in "other appeals where constitutionally protected family concerns are implicated," such as the appeals of cases involving child custody matters and the involuntary termination of parental rights.[35] Third, as the court noted, "[S]ome states which have employed a *de novo* standard of appellate review in judicial bypass cases have done so as part of the legislative scheme."[36]

Although it accorded a great degree of deference to the trial court's decision, the Pennsylvania Supreme Court nevertheless ultimately concluded that the trial court abused its discretion when it considered the appellant's failure to seek parental consent as evidence of her lack of maturity and capacity. The court reasoned that the judicial bypass statute expressly allows minors to get an abortion without seeking the consent of their parents as long as they obtain judicial authorization.[37] Thus, as the court observed, the purpose of a judicial bypass hearing is to afford minors who have not obtained—or even sought—the consent of their parents an independent determination of whether they have the maturity and capacity to give informed consent to an abortion.[38] If trial courts could premise their denials of authorization on the failure of minors to seek the guidance or approval of their parents, the legislature's policy choice not to require parental consent would be frustrated, the court explained.[39]

For the foregoing reasons, the Pennsylvania Supreme Court vacated the order of the superior court that had upheld the trial judge's decision.[40] Even though the trial judge had impermissibly considered the appellant's failure to seek her mother's consent, the court did not reverse the order because the trial court had also relied on a variety of other factors.[41] The court expressed no opinion as to the correctness of the trial court's overall determination that the appellant lacked the maturity and capacity to consent to an abortion.[42]

In a separate concurring and dissenting opinion, Justice Orie Melvin agreed that appellate courts must review judicial bypass determinations for abuses of discretion, but disagreed with the majority's conclusion that the trial court abused its discretion in this case. Justice Melvin argued that the trial court had considered the *reason* for the appellant's choice not to seek her mother's

consent, not the *fact* of her failure to seek her mother's consent.[43] Although Pennsylvania's judicial bypass statute allows minors to obtain abortions without parental approval, the statute also empowers trial judges to consider any evidence they find "useful."[44] Certainly the *reasons* a minor chooses not to seek parental permission for an abortion bear on her maturity and capacity to consent to an abortion, Justice Melvin explained.[45] She argued that a minor who fears informing her parents about her pregnancy because of the potential for domestic abuse is more mature and capable of consenting to an abortion than one who simply desires secrecy or the avoidance of embarrassment.[46]

D. Significance of this Case

Despite its technical holding in favor of the appellant, this case is a modest win for pro-life advocates because of its command that appellate courts deferentially review judicial bypass denials. Since 1982 only a few judicial bypass petitions have been denied in Pennsylvania, and many pro-life groups feared that the state's bypass law had led to "rubber stamp" secret teen abortions.[47] By clarifying that judicial bypass determinations will be accorded great deference on appeal, pro-life groups anticipate that the Pennsylvania Supreme Court's ruling will encourage trial judges to undertake a more thorough review of judicial bypass petitions without feeling pressure to approve them mechanistically.[48] Although the court specified one way in which trial courts may not make their determinations, it nevertheless stated that those determinations carry weight on appeal.

From a national perspective, states with similar judicial bypass statutory regimes may look to this decision—and the decisions of other states that have considered the issue—when determining what level of appellate review to apply. With the high courts of Alabama,[49] Mississippi,[50] and now Pennsylvania having decided to defer to trial courts' maturity and capacity determinations, this case may mark a continued national trend toward rejecting the notion that all teenage girls are categorically "mature" enough to get abortions without involving their parents in the decision.

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Endnotes

1 Never before had the Pennsylvania Supreme Court publicly ruled on a judicial bypass determination. *See* Bobby Kerlik, *Pa. Supreme Court Upholds 'Judicial Bypass'*, Pittsburgh Tribune-Review (Dec. 23, 2011), *available at* http://www.pittsburghlive.com/x/pittsburghtrib/news/regional/s_773405.html; Steven Ertelt, *Pennsylvania Court Rules on Rubber Stamp Teen Abortions*, LifeNews.com (Dec. 26, 2011), *available at* http://www.lifenews.com/2011/12/26/pennsylvania-court-rules-on-rubber-stamp-teen-abortions/; Bobby Kerlik, *Abortion Opponents Heartened by Pennsylvania High Court Ruling*, Pittsburgh Tribune-Review (Dec. 24, 2011), *available at* http://www.pittsburghlive.com/x/pittsburghtrib/news/s_773601.html.

2 *In re* Jane Doe, J-108-2010 (Pa. 2011), *available at* http://www.pacourts.us/OpPosting/Supreme/out/J-108-2010mo.pdf.

3 Planned Parenthood v. Casey, 505 U.S. 833, 899 (1992) (plurality); Planned Parenthood v. Ashcroft, 462 U.S. 476, 491–93 (1983) (plurality opinion); Bellotti v. Baird, 443 U.S. 622, 643 (1979) (plurality); Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976).

4 18 Pa.C.S. § 3206(a).

5 *Id.* § 3206(c).

6 *Id.* § 3206(c).

7 *Id.* § 3206(d).

8 *Id.* § 3206(f)(4).

9 *Id.* § 3206(h).

10 *In re* Jane Doe, J-108-2010, at 3 (Pa. 2011).

11 *Id.*

12 *Id.*

13 *Id.*

14 *Id.* at 4.

15 *Id.* at 4-5.

16 *Id.* at 5.

17 *Id.* at 4.

18 *Id.*

19 *Id.*

20 *Id.* at 5.

21 *Id.*

22 *Id.* at 6-7.

23 *Id.* at 6, 7.

24 *Id.* at 5-7.

25 *Id.* at 7.

26 *Id.* at 8.

27 *Id.*

28 *Id.*

29 *Id.* at 8-9.

30 After the trial court's ruling, at least one of the girl's parents consented to the abortion. *See* Ertelt, *supra* note 1.

31 *Doe*, J-108-2010 at 9.

32 *Id.* at 10-11, 11 n.11.

33 *Id.* at 12, 12-13 n.12. The pro-life amici included the Pennsylvania Family Institute and the Pennsylvania Pro-Life Federation. *Id.* at 12 n.12.

34 *Id.* at 13.

35 *Id.* at 14.

36 *Id.* at 15.

37 *Id.* at 19.

38 *Id.*

39 *Id.* at 20.

40 *Id.* at 22.

41 *Id.* at 21.

42 *Id.* at 22.

43 *Id.* at 4 (concurring and dissenting ops.), *available at* http://www.pacourts.us/OpPosting/Supreme/out/J-108-2010codo.pdf.

44 *Id.* at 3 (majority op.).

45 *Id.* at 4.

46 *Id.* at 4 n.1.

47 *See* Torsten Ove & Marylynne Pitz, *Teen Rights to Abortion in Dispute*, Pittsburgh Post-Gazette (Feb. 18, 2011), *available at* http://old.post-gazette.com/pg/11049/1126272-455.stm.

48 *See* Ertelt, *supra* note 1; *see also* Kerlik, *Abortion Opponents Heartened by Pennsylvania High Court Ruling*, *supra* note 1.

49 *See Ex Parte* Anonymous, 806 So. 2d 1269 (Ala. 2001) (declining to adopt de novo appellate review of maturity and capacity determinations).

50 *See In re* R.B., 790 So. 2d 830 (Miss. 2001) (adopting an abuse of discretion standard of appellate review).

Montana Takes on *Citizens United*

Continued from page 4...

Montana High Court Reverses and Distinguishes the Case from *Citizens United*

Attorney General Bullock immediately appealed to the Montana Supreme Court. "[T]he issue isn't a matter of overturning *Citizens United*," he argued, "but rather looking at Montana's unique historical circumstances and why people passed the initiative to impose the ban [on independent corporate expenditures.]"[17]

In a December 30, 2011, decision, the court by a 5-2 majority reversed Judge Sherlock and ruled that the MCPA's corporate expenditure ban was, in fact, constitutional.[18] Writing for the majority, Chief Justice Mike McGrath appeared concerned that American tradition was engaged in "a multi-front attack" both on contribution restrictions and "the transparency that accompanies campaign disclosure requirements."[19] Justice McGrath found that this danger distinguished the case from *Citizens United*.

Citizens United could be distinguished, the majority found, on at least two other grounds. First, setting up a Montana PAC is less burdensome than complying with analogous federal law.[20] Second, the risk of corruption from corporate contributions is much greater in Montana than in federal elections.[21] Judge McGrath cited Montana's unique history from the turn of the nineteenth century as well as recent evidence of corporate involvement in Montana ballot measure elections, but did not cite any evidence of actual corruption stemming from recent corporate contributions or expenditures in Montana. Finally, citing canons of Montana's Code of Judicial Conduct, the majority stated that the independence of Montana's judiciary, which is elected, would be imperiled by independent corporate contributions.[22] Montana corporations, Judge McGrath wrote, could "effectively drown out all other voices" by making independent expenditures in judicial elections.[23]

Ultimately, the majority concluded that Montana had proved a compelling state interest—the avoidance of corruption—and that the ban was narrowly tailored.[24] With an eye to the United States Supreme Court, the Montana court agreed emphatically with the Attorney General's argument that *Citizens United* is applicable only to instances that are factually similar involving federal statutes and elections.[25]