PARENTAL NOTIFICATION OF ABORTION AND MINORS' RIGHT OF PRIVACY UNDER THE FLORIDA CONSTITUTION

By: Mark A. Brionez
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I. How the "Right of Privacy" and "Abortion" Began.

A woman's right to terminate her pregnancy is found within the "zones of privacy" protected by the United States Constitution.[1] Although the United States Constitution "does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as Union Pacific R. Co. v. Botsford, 141 U.S. 250, 251, 11 S.Ct. 1000, 1001, 35 L.Ed. 734 (1891), the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution."[2]

Regardless of whether the right of privacy is found in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, or, as the District Court determined, in the Ninth Amendment's reservation of rights for the people; the right is broad enough to encompass a woman's decision to terminate her pregnancy. Thus, any regulation limiting these "fundamental rights" may only be justified by a compelling state interest that is narrowly tailored to express only the legitimate state interest currently at stake.[3]

However, this protection is not deemed to be absolute, and depends significantly upon whether the woman seeking the abortion is an adult. In fact, many of the proponents of parental notification statutes argued that Roe was limited to adults and did not apply to minors because of a minor's lack of maturity. States have long recognized the importance of protecting the immature minor and preserving the family unit.

In 1980, however, the Florida Legislature drafted House Joint Resolution Number 387. This Resolution proposed to amend ARTICLE I of the Florida Constitution by adding Section 23, addressing the Florida citizen's right of privacy. The proposed amendment was later passed by the citizens of Florida and declared a right of privacy for "all" citizens of the State of Florida; not just a right to privacy for adults. The amendment reads as follows:

ARTICLE I

DECLARATION OF RIGHTS

> Section 23. Right of Privacy. Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's

right to access to public records and meetings as provided by law.[4]

II. In Re T.W. and Florida's Parental Notification Statute.

In 1988, the legislature enacted Florida Statute §390.001 (1988).[5] This statute was entitled The Parental Consent Statute.[6] Under this statute, prior to undergoing an abortion, a minor must either obtain parental consent or convince a court that she is sufficiently mature to make the decision herself or, if she is immature, the abortion nevertheless is in her best interests.[7]

A. Factual and Procedural History

Pursuant to this procedure, T.W., a pregnant, unmarried, fifteen-year-old, petitioned the court for a waiver of parental consent via the judicial bypass provision on the grounds that: (1) she was sufficiently mature to give informed consent to the abortion procedure; (2) she had a justified fear of physical or emotional abuse if her parents were asked to consent; and (3) her mother was seriously ill and informing her of the pregnancy would be an added burden.[8] The trial court, then appointed counsel for T.W. and separate counsel for the fetus, and conducted a hearing.[9]

The relevant portions of the hearing consisted of T.W.'s uncontroverted testimony that she was a high-school student who participated in band and flag corps, worked twenty hours a week, baby-sat for her mother and others, planned to finish high school and attend vocational school or college, had observed an instructional video on abortion, had taken a sex education class at her school, would not put her child up for adoption, and had discussed her plans with the fetus's father who approved of the procedure.[10] Additionally, T.W. informed the court that because of her mother's illness, she had taken on extra duties at home that included caring for her sibling.[11] Furthermore, T.W. stated that if she told her mother about the abortion, "it would kill her."[12]

During the hearing, evidence was introduced showing that T.W.'s pregnancy was in the first trimester.[13] The guardian ad litem was accorded standing and allowed to argue that the judicial bypass portion of the statute was unconstitutionally vague and that parental consent must be required in every instance where a minor seeks to obtain an abortion.[14] The trial court ruled that the judicial bypass provision of the statute was unconstitutional because it failed to make sufficient provisions for challenges to its validity, was vague, and made no provision for testimony to

controvert that of the minor.[15] The court denied the petition for waiver and required T.W. to obtain consent from her parents under the remaining provisions of the statute.[16]

On appeal, the district court found the statute's judicial alternative to parental consent was unconstitutionally vague, allowing arbitrary denial of a petition, and noted several defects including the following: failure to provide for a record hearing, lack of guidelines relative to admissible evidence, a brief forty-eight hour time limit, and failure to provide for appointed counsel for the indigent minor.[17] The court then declared the entire statute invalid, quashed the trial court's order requiring T.W. to obtain parental consent, and ordered the petition dismissed.[18] The guardian ad litem then appealed to the Supreme Court of Florida.[19]

At this point, the Florida Attorney General was given permission to appear as amicus curiae.[20] Later, the guardian filed a number of motions to block the abortion but was unsuccessful and T.W. lawfully terminated her pregnancy[21], which would normally moot the issue of parental consent. However, because the questions raised by In Re T.W., were likely to recur, the Florida Supreme Court accepted jurisdiction despite T.W.'s abortion.[22]

B. The Holding

In an opinion written by Justice Shaw, where Justice's Barkett and Kogan concurred, the Florida Supreme Court held that §390.001 (4)(a) violates the Florida Constitution.[23] In so holding, the Court referred to the seminal case in United States abortion law, *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) and to Article I, Section 23 of the Florida Constitution.[24]

In reaching its decision, the Court established that in order for Fla. Sta. §390.001 (4)(a) to be held constitutional, the statute must pass muster under both the federal and state constitutions.[25] However, the Court noted that if they were to examine the statute solely under the federal Constitution, their analysis necessarily would track the decision of Roe.[26] The Court explained that Florida is unusual in that it is one of at least four states that has its own express constitutional provision guaranteeing an independent right to privacy . . . and the Court opted to examine the statute first under the Florida Constitution.[27]

The decision to examine the statute under the Florida Constitution was primarily due to the Court's interpretation of precedent case law that established that the states, not the federal government, are the final

guarantors of personal privacy.[28] "But the protection of a person's general right to privacy--his right to be let alone by other people--is, like the protection of his property and of his very life, left largely to the law of the individual States."[29]

In 1980, Florida voters by general election amended the state constitution to provide: Section 23 addressing the right of privacy, which states that every natural person has the right to be let alone and to be free from governmental intrusion into his private life.[30] Notably, the drafters of the amendment rejected the use of words such as "unreasonable" or "unwarranted" before "governmental intrusion" in order to make the privacy right as strong as possible.[31] Thus, the citizens of Florida opted for more protection from governmental intrusion when they approved article I, section 23, of the Florida Constitution.[32] Section 23 of Article I is an independent, freestanding constitutional provision, which declares the fundamental right to privacy. The right of privacy extends to "[e]very natural person," which obviously includes minors.[33]

Since Florida's right of privacy is a fundamental right, in order for this right to be infringed upon, the state must meet the strict scrutiny standard. Strict

scrutiny demands a compelling state interest that is narrowly tailored to achieve its purpose or goal. The test shifts the burden of proof to the state to justify an intrusion on privacy.[34] This burden can be met by demonstrating that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means.[35]

In T.W., the Court recognized that where parental rights over a minor child are concerned, society has recognized appropriate and legitimate state interests.[36] These interests include protection of the immature minor and preservation of the family unit.[37] However, in T.W., the Court found that even these interests were not sufficiently compelling to override Florida's privacy amendment.[38] In that case, five justices agreed that the statute as applied by the trial court was unconstitutional.[39]

III. Florida Statute §390.01115 and North Florida Women's. Health & Counseling Services, Inc. v. State of Florida.

Nearly fifteen years after the Florida Supreme Court decided T.W., the legislature had still taken little action to secure "every natural persons" rights guaranteed by the Florida Constitution. This was evident from the legislature's approval of Florida Statute §390.01115

(1999). The statute known as Florida's Parental Notice of Abortion Act provided that: "[a] termination of pregnancy may not be performed or induced upon a minor unless the physician performing or inducing the termination of pregnancy has given at least 48 hours' actual notice to one parent or to the legal guardian of the pregnant minor of his or her intention to perform or induce the termination of pregnancy."[40] The Act further provides that notice is not required if: 1) an immediate abortion is medically necessary; 2) a parent or guardian waives notice; 3) the minor is "married or has had the disability of nonage removed;" 4) the minor has a minor child dependent on her; or 5) the minor has had the notice requirement removed through a judicial bypass procedure.[41]

Florida's Parental Notice of Abortion Act was supposed to become effective on July 1, 1999.[42] However, on June 15, 1999, physicians who perform abortions, clinics that provide abortion services, women's rights organizations, and some minor female members filed a complaint presenting a facial challenge to the Act, along with a motion for a temporary injunction enjoining the enforcement of the Act.[43] The circuit court granted the plaintiffs' motion for a temporary injunction on July 27, 1999.[44] On May 12, 2000, the circuit court granted a final judgment granting a

permanent injunction and concluded that the Parental Notice of Abortion Act was unconstitutional.[45]

The circuit court based this decision on the seminal Florida case of In re T.W. As mentioned supra, in In Re T.W., the Supreme Court of Florida ruled that a parental consent to abortion statute violated the Florida Constitution's right to privacy.[46] On February 9, 2001, the First District Court of Appeal of Florida reversed this decision and found the statute constitutional.[47]

In North Florida Women's Health and Counseling Serv. Inc., the circuit court applied the same legal principles as were discussed in the case of In Re T.W. Namely, the court revisited Article I, Section 23 and stated that "[t]he citizens of Florida opted for more protection from governmental intrusion when they approved article I, section 23, of the Florida Constitution.[48] The court found that the challenged statute failed because it intruded upon the privacy of the pregnant minor from conception to birth.[49] Specifically, the court stated that such a substantial invasion of a pregnant female's privacy by the state for the full term of the pregnancy is not necessary for the preservation of maternal health or the potentiality of life.[50]

A. Appellant's and Appellee's Arguments

The appellants in North Florida Women's Health & Counseling Services, Inc. first argued that the case of In Re T.W. was not precedent because the Court did not reach a "majority opinion" in that case.[51] Therefore, the circuit court had no right holding the case of In Re T.W. as controlling precedent.[52] The appellants argued, "under the Florida Constitution, both a binding decision and a binding precedential opinion are created to the extent that at least four members of the Court have joined in an opinion and decision."[53] The appellants argued that In Re T.W. was a plurality opinion and "[t]he views of the justices in T.W. were divided into five separate opinions, none of which garnered the four votes necessary to constitute a precedential 'opinion' under the Florida Constitution."[54]

The appellants next argued that even if In Re T.W. was precedent, "[t]he T.W. holding should be limited to the parental consent statute under consideration by the Court in that case."[55] Appellants argued that the courts have recognized a critical distinction between parental consent and parental notice statutes.[56] Appellants then quoted a United States Supreme Court opinion: "[T]he difference between notice and consent [requirements] was apparent to us before and is apparent now. Unlike parental consent

laws, a law requiring parental notice does not give any third party the legal right to make the minor's decision for her, or to prevent her from obtaining an abortion should she choose to have one performed."[57] We have acknowledged the distinction as "fundamental" and as one "substantially modify[ing] the federal constitutional challenge."[58] Appellants stated that, unlike a consent statute, "a parental notice statute has neither 'the purpose nor effect of placing a substantial obstacle in the path of a woman seeking an abortion."[59]

Appellant's third argument was that the circuit court "failed to give deference to the Legislature's findings and conclusions as to the 'compelling state interest' for the Act."[60] The appellant's argued that legislative determinations of public purpose and facts should not be ignored and are presumed correct and entitled to deference, unless they are clearly erroneous.[61] Finally, appellants argued that minors do not share the same degree of privacy as adults and, therefore, the state may impose restrictions on minors' privacy interests less intrusive than that of parental consent.[62]

The Appellees argued that all the legal principles applied by the circuit court in North Florida Women's Health & Counseling Services, Inc. were espoused by a

majority of the justices in In Re T.W.[63] Furthermore, appellees contended that the Supreme Court of Florida has repeatedly recognized the precedential weight of the In Re T.W. decision, therefore, the circuit court was correct in applying this decision as controlling precedent.[64] In response to appellants argument that even if In Re T.W. is precedent, "[t]he T.W. holding should be limited to the parental consent statute under consideration by the Court in that case,"[65] appellees argued "that the parental notice law intrudes upon minors' right to choose abortion and is similar in effect to a consent law."[66]

Appellees averred that under both notice and consent laws, minors fear that telling their parents about an impending abortion would result in abuse, being expelled from the home, disturbing an already dysfunctional or troubled family situation, or a parent exercising a de facto veto power over the minor's decision by confining her to the house or threatening punishment.[67]

In response to appellant's third argument, that the circuit court failed to give deference to the legislature's findings and conclusions as to the "compelling state interest" for the Act, appellees claimed that the legislative findings contained in the Act did not satisfy the state's burden of demonstrating that the Act

furthers a compelling state interest.[68] Furthermore, appellees asserted that declaring a certain objective a compelling state interest is not enough. It must be demonstrated through comprehensive and consistent legislative treatment.[69]

Appellees then stated that "[i]f the state could meet the compelling interest standard by inserting the word 'compelling' into legislative findings, the protection of fundamental rights under Florida law would be eviscerated, because any statutory restriction on privacy could satisfy this standard by legislative self-proclamation."[70]

Finally, in response to appellant's argument that minors do not share the same degree of privacy as adults, appellees contended that "whether minors have the same right to privacy as adults, and whether the state may have compelling state interests that allow it to intrude on minors' privacy rights although not on the rights of adults," are two separate concepts.[71] Therefore, the fact that many laws prohibit or even restrict a minor's ability to make choices implicating privacy does not mean that the minor does not have a right to their privacy. Simply stated, it means that each of those statutes furthers a compelling state interest through the least intrusive means.[72]

B. The Holding

The majority upheld the trial court's ruling and faithfully followed the controlling law.[73] The Court reasoned as follows: "(1) This Court in T.W. held that the Parental Consent Act imposed a significant restriction on a pregnant minor's right of privacy. (2) The Court in T.W. further held that, in light of the Legislature's less restrictive treatment of minors in other comparable procedures and practices, the State failed to prove that the Parental Consent Act 'furthered' a compelling State interest. (3) In the present case, the Parental Notice Act also imposes a significant restriction on a pregnant minor's right of privacy. (4) In the intervening years since T.W. was decided, there has been no change in the Legislature's treatment of minors in other comparable procedures and practices. Accordingly, (5) the State similarly has failed to prove that the Parental Notice Act 'furthers' a compelling State interest."[74]

Based on the foregoing, the Court reaffirmed In re T.W., 551 So.2d 1186 (Fla.1989), and quashed State v. North Florida Women's Health & Counseling Services, Inc., 26 Fla. L. Weekly D419 (Fla. 1st DCA 2001).[75] The Court found that in the final analysis of T.W., the Court opinion authored by Justice Shaw garnered a total of four votes except for

on the definition of "viability," upon which Chief Justice Ehrlich disagreed.[76] Thus, in all respects, except for the definition of "viability," Justice Shaw's opinion in T.W. was the majority opinion of the Court and is binding precedent.[77]

Furthermore, the Court found that the doctrine of stare decisis, is grounded on the need for stability in the law and has been a fundamental tenet of Anglo-American jurisprudence for centuries. Thus, before overruling a prior decision of this Court, we traditionally have asked several questions, including the following: "(1) Has the prior decision proved unworkable due to reliance on an impractical legal 'fiction'? (2) Can the rule of law announced in the decision be reversed without serious injustice to those who have relied on it and without serious disruption in the stability of the law? And (3) have the factual premises underlying the decision changed so drastically as to leave the decision's central holding utterly without legal justification?"[78]

IV. When must a court follow the doctrine of stare decisis?

The question of when a court must follow precedent or when a court may overrule a prior decision has recently become a significant issue of national interest, primarily

due to changes in the personnel on the United States Supreme Court.[79] A significant case that addressed the issue head on was that of Planned Parenthood v. Casey, 505 U.S. 833 (1992).[80] However, even before the Planned Parenthood decision, Justices Lewis Powell and John Paul Stevens had already written articles addressing their positions on stare decisis.[81] In their view, adhering to precedent was an important part of how the law should apply.[82]

In addition, the two justices also thought that in order to overrule constitutional precedent, some justifiable reason should exist over and above the conclusion that the law was erroneous.[83] As Justice Stevens aptly put it:

> [T]he question *whether a case should be overruled is not simply answered by demonstrating that the case was erroneously decided* and that the Court has the power to correct its past mistakes. The doctrine of *stare decisis* requires a separate examination. Among the questions to be considered are the possible significance of intervening events, the possible impact on settled expectations, and the risk of undermining public confidence in the stability of our basic rules of

> law. Such a separate inquiry is appropriate not only when an old rule is of doubtful legitimacy ... but also when an old rule that was admittedly valid when conceived is questioned because of a change in the circumstances that originally justified it.[84]

Subsequently, the majority in Planned Parenthood applied the above view of precedent and refused to overturn Roe v. Wade.[85] In Planned Parenthood, the justices explained that a special reason, such as a change in factual circumstances had to exist before overruling Roe could be justified.[86] Ultimately, the Court in Planned Parenthood upheld Roe because neither the factual underpinnings of Roe's central holding had changed and because no other indication of weakened precedent had been shown.[87] As a result, the Court stated that it could not pretend to re-exam the prior law with any justification beyond a present doctrinal disposition to come out differently from the Court of 1973.[88]

On the opposite side of the precedent debate in Planned Parenthood, were Justice's Rehnquist, White, Scalia, and Thomas. These Justice's believed that stare decisis did not need to be followed when ruling on a constitutional issue.[89] However, once again, Justice Scalia

had earlier expressed his belief that stare decisis need not be followed or adhered to in constitutional cases. Justice Scalia expressed this by stating that it would be a violation of his oath to adhere to what he considers a plainly unjustified intrusion upon the democratic process in order to follow the Court's previous decisions.[90]

V. Other than arguing against stare decisis, how can the law in Florida be changed to require parental notification for minors seeking an abortion?

Since Florida's Constitution gives minors such strong privacy rights, in order to require parental notification, Florida citizens would have to amend their Constitution. Currently, there are three bills being proposed by the House and Senate. These include House Joint Resolution 1, Senate Joint Resolution 2178, and Senate Bill 3066.

HJR 1 proposes the creation of section 22, Art. X of the Florida State Constitution to provide that the Legislature may, notwithstanding the state constitutional right of privacy, enact legislation requiring notification of a parent or guardian of a minor prior to the performance of an abortion on the minor. The amendment provides that the Legislature shall not limit or deny the privacy rights guaranteed to minors under the United States Constitution as interpreted by the United States Supreme Court.

Further, the amendment provides that the right to notification shall not apply to minors emancipated by general law. Under the amendment, the Legislature is not prevented from creating a judicial bypass process containing exceptions to parental notification, including, but not limited to, cases involving pregnancies caused by the father, stepfather, or legal guardian of the minor.[91] The House approved this resolution on April 15, 2004.[92]

SJR 2178 proposes to add a constitutional amendment to authorize the Legislature to require by general law for notification to a parent or guardian of a minor before terminating the minor's pregnancy.[93] The proposal provides that the Legislature shall not limit or deny privacy rights guaranteed to minors under the United States Constitution as interpreted by United States Supreme Court.[94] This resolution creates section 22, Art. X. of the Florida Constitution.[95] The last activity on this resolution was on April 14, 2004 where it was laid on the table.[96]

SB 3066 proposes a constitutional amendment to require that a parent or guardian of a minor be given prior notice of a physician's intent to perform or induce termination of a pregnancy when the minor is younger than 16 years of age.[97] This bill would amend section 22, Art. X.[98] This particular bill has not seen action since March 31, 2004.[99]

VI. Conclusion

As it stands now, in Florida, every natural person has a right to privacy. This right extends to those of tender age, including minors. If there was ever any question as to whether In Re T.W. was legal precedent, that question has now become moot because of the opinion in State v. North Florida Women's Health & Counseling Services, Inc., which affirmed In Re T.W. If those interested in protecting the youth by requiring notice and/or consent from parents before allowing a minor to obtain an abortion they must do so by amending Florida's Constitution. Although there are currently House and Senate Resolutions working towards this goal, the Florida voters will have the ultimate say. However, until then, any restrictions placed on a minor's right to obtain an abortion must meet the strict scrutiny standard.

[1] Roe v. Wade, 410 U.S. 113, 152-54 (1973); See also Planned Parenthood v. Casey, 505 U.S. 833 (1992).

[2] Id. at 152.

[3] Id. at 153.

[4] Fla. Const. art. I, § 23.

[5] Section 390.001(4)(a), Florida Statutes (Supp. 1988), provides:

> 1. If the pregnant woman is under 18 years of age and unmarried, in addition to her written request, the physician shall obtain the written informed consent of a parent, custodian, or legal guardian of such unmarried minor, or the physician may rely on an order of the circuit court, on petition of the pregnant unmarried minor or another person on her behalf, authorizing, for good cause shown, such termination of pregnancy without the written consent of her parent, custodian, or legal guardian. The cause may be based on: a showing that the minor is sufficiently mature to give an informed consent to the procedure; the fact that a parent, custodian, or legal guardian unreasonably withheld consent; the minor's fear of physical or emotional abuse if her parent, custodian, or legal guardian were requested to consent; or any other good cause shown. At its discretion, the court may enter its order ex parte. If the court determines that the minor is sufficiently mature to give an informed consent to the procedure, the court shall issue an order authorizing the procedure without the consent of her parent, custodian, or legal guardian. If the court determines that the minor is not sufficiently mature, the court shall determine the best interest of the minor and enter its order in accordance with such determination.
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> 2. The court shall ensure that a minor who files a petition pursuant to this paragraph will remain

> anonymous. The minor may participate in proceedings in the court on her own or through another person on her behalf. Court proceedings brought pursuant to this paragraph are confidential and shall be given the priority necessary for the court to reach a decision promptly. The court shall rule within 48 hours after the petition is filed; but the 48-hour limitation may be extended at the request of the minor. An expedited anonymous appeal shall be made available to a minor who files a petition pursuant to this paragraph.
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> 3. The Supreme Court may promulgate any rules it considers necessary to ensure that proceedings brought pursuant to this paragraph are handled expeditiously and are kept confidential.

[6] Section 390.001 (4)(a), Florida Statutes (Supp. 1988).

[7] In Re T.W., 551 So.2d 1186, 1189 (1989).

[8] Id.

[9] Id.

[10] Id.

[11] Id.

[12] Id.

[13] Id.

[14] Id.

[15] Id.

[16] Id.

[17] Id.

[18] Id.

[19] Id.

[20] 551 So.2d at 1189.

[21] Id.

[22] Id.

[23] 551 So.2d at 1196.

[24] Id. The Court noted that in Roe, "the United States Supreme Court ruled that a right to privacy implicit in the fourteenth amendment embraces a woman's decision concerning abortion. Autonomy to make this decision constitutes a fundamental right and states may impose restrictions only when narrowly drawn to serve a compelling state interest. The Court recognized two important state interests, protecting the health of the mother and the potentiality of life in the fetus, and ruled that these interests become compelling at the completion of the first trimester of pregnancy and upon viability of the fetus (approximately at the end of the second trimester), respectively." Id. at 1190.

[25] Id.

[26] Id.

[27] Id.

[28] Id. at 1197. Also See Katz v. Unites States, 389 U.S. 347, 350-51 (1967).

[29] Id. Also See Katz v. Unites States, 389 U.S. 347, 350-51 (1967).

[30] Fla. Const. art. I, § 23.

[31] 551 So.2d at 1191.

[32] Id. at 1192.

[33] Id. at 1193.

[34] Id.

[35] Id.

[36] Id. at 1194.

[37] 551 So.2d at 1194.

[38] Id. The Court also addressed Florida Statute §743.065, which gives unwed pregnant minors the right to consent to medical services. The Court stated that under this statute, a minor may consent, without parental approval, to any medical procedure involving her pregnancy or her existing child—no matter how dire the possible consequences—except abortion. Some of the justice's argued that if a minor could make these decisions without parental consent or notification then she should also be able to have an abortion without notification. However, Justice Grimes stated that Section 743.065 was designed to permit doctors to avoid liability for providing medical services to minors without parental consent and to ensure that emergency treatment would be available. The decision to have an abortion is clearly different than the decision to undergo other medical or surgical care with respect to pregnancy, and the legislature has a right to determine that different criteria should be followed with respect to consenting to an abortion.

[39] Justice's Shaw, Barkett, Kogan, Overton, Ehrlich, and Grimes agreed that the statute as applied by the trial court was unconstitutional. Justice McDonald on the other hand dissented with his own opinion. Justice Overton, Ehrlich, and Grimes also wrote separate opinions in the case. Justice Overton concurred in part and dissented in part and expressed that while he agreed that section 390.001(4)(a), Florida Statutes (Supp. 1988), was unconstitutional as it was interpreted and applied by the trial court, he would not declare the statute unconstitutional *vel non* but would interpret the statute so that it could be applied in accordance with the principles set forth by the United States Supreme Court in Bellotti v. Baird, 443 U.S. 622, 99 S. Ct. 3035, 61 L. Ed. 2d 797 (1979). In Bellotti, the United States Supreme Court approved this type of statute and stated that: "[t]he [judicial alternative] procedure must ensure that the provision requiring parental consent does not in fact amount to the 'absolute, and possibly arbitrary, veto' that was found impermissible in Danforth," but must "provide an effective opportunity for an abortion to be obtained." Justice Overton's concern here was that the parental

notification/consent statue gave the parents too much power so as to veto any request a teenager may have had for an abortion. While notifying parents may not be so bad, giving them the power to outright disallow an abortion is too much. Chief Justice Ehrlich concurred specially and stated that he generally concurs with the majority opinion and the result it reaches. However, Justice Ehrlich wrote only to express disagreement with the definition of 'viability' adopted by the majority and to elucidate his views. Specifically, he noted that the privacy provision was added to the Florida Constitution by amendment in 1980, well after the decision of the United States Supreme Court in *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). He opined that it therefore could be presumed that the public was aware that the right to an abortion was included under the federal constitutional right of privacy and would therefore certainly be covered by the Florida privacy amendment. Justice Grimes concurred in part and dissented in part. Justice Grimes stated that in 1980, the Florida Constitution was amended to specifically guarantee persons the right to privacy. However, this did not mean that Florida voters had elected to create more privacy rights concerning abortion than those already guaranteed by the United States Supreme Court. By 1980, abortion rights were well established under the federal Constitution, and Justice Grimes believed that the privacy amendment had the practical effect of guaranteeing these same rights under the Florida Constitution. Consequently, Justice Grimes agreed with the analysis contained in parts I and II of the majority opinion, which Justice Grimes read as adopting, for purposes of the Florida Constitution, the qualified right to have an abortion established in Roe v. Wade. Justice Grimes addressed the recognized status of minors under the law and stated that their status is unique in many respects including nonage and inmaturity.

[40] Fla. Stat. §390.01115(3)(a) (1999).

[41] Fla. Stat. §390.01115(3)(b)(1)-(5) (1999). In order for the notice requirement to be removed through a judicial bypass procedure, the minor must petition the court through clear evidence that she is sufficiently mature to decide whether to terminate her pregnancy, that there is parental abuse, or that notice is not in her best interest. The court shall hear evidence relating to the emotional development, maturity, intellect, and understanding of the

minor. If the court does not make a ruling within forty-eight hours after the petition is filed, the petition is granted and the notice requirement is waived. The minor has a right to appointed counsel, confidential proceedings, a full transcript of the proceedings, and an expedited appeal if necessary. Fla. Stat. §390.01115(4) (1999).

[42] 26 Nova L. Rev. 545, State v. North Florida Women's Health & Counseling Services, Inc., Winter, 2002.

[43] State v. North Fla. Women's Health And Counseling Ser., 852 So.2d 254, 258 (Fla. 1st DCA 2001). "Ordinarily only a person or family whose privacy rights are infringed or threatened has standing to assert the rights. But a 'recognized exception' (citations omitted) applies where enforcement of a challenged restriction would adversely affect the rights of non-parties, and there is no effective avenue for them to preserve their rights themselves." Id. In the instant case, this exception applies to physicians because physicians' own interests are at stake. The physicians are subject to discipline if they violate the notice provisions of the Act. Id. Also See 26 Nova L. Rev. 545, State v. North Florida Women's Health & Counseling Services, Inc., Winter, 2002.

[44] Id.

[45] Id.

[46] 551 So. 2d at 1196.

[47] Id.

[48] 866 So. 2d 612, 620 (2003).

[49] Id.

[50] Id.

[51] Id. at 636.

[52] Appellants' Initial Brief at 22, State v. N. Fla. Women's State v. North Fla. Women's Health And Counseling Ser., 852 So.2d 254, 258 (Fla. 1st DCA 2001). Also See 26 Nova L. Rev. 545, State v. North Florida Women's Health &

Counseling Services, Inc., Winter, 2002.

Appellants' Initial Brief at 22, State v. N. Fla. Women's State v. North Fla. Women's Health And Counseling Ser., 852 So.2d 254, 258 (Fla. 1st DCA 2001). Also See 26 Nova L. Rev. 545, State v. North Florida Women's Health & Counseling Services, Inc., Winter, 2002.

[54] Id.

[55] Id. at 23.

[56] Appellant's Initial Brief at 23 (citing Lambert v. Wicklund, 520 U.S. 292 (1997); Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502 (1990) (Akron II); Hodgson v. Minnesota, 497 U.S. 417 (1990); H.L. v. Matheson, 450 U.S. 398, 407 (1981)). Also See 26 Nova L. Rev. 545, State v. North Florida Women's Health & Counseling Services, Inc., Winter, 2002.

[57] Appellants' Initial Brief at 23-24 (quoting Hodgson v. Minnesota, 110 S. Ct. 2926, 2969 (1990)). Also See Nova L. Rev. 545, State v. North Florida Women's Health & Counseling Services, Inc., Winter, 2002.

[58] Id. Also See 26 Nova L. Rev. 545, State v. North Florida Women's Health & Counseling Services, Inc., Winter, 2002.

[59] Id. at 24 (quoting Planned Parenthood v. Casey, 505 U.S. 833, 877 (1992)).

[60] Id. at 20. The legislature made the following specific findings:

> 1) "immature minors often lack the ability to make informed choices that take into account both immediate and long-range consequences;" 2) the "unique medical, emotional and psychological consequences of abortion are sometimes serious and can be lasting, particularly when the patient is immature;" 3) the "capacity to become pregnant and the capacity for mature judgment concerning the wisdom of an abortion are not necessarily related;" 4) parents ordinarily possess "information essential to a physician's exercise of his or her best medical judgment concerning

> the child;" 5) parents who are "aware that their minor daughter has had an abortion may better ensure that she receives adequate medical attention after her abortion; 6) "parental consultation is usually desirable and in the best interests of the minor;" As to the compelling state interests in the Act, the statute provides as follows: The Legislature's purpose in enacting parental notice legislation is to further the important and compelling state interests of protecting minors against their own immaturity, fostering family unity and preserving the family as a viable social unit, protecting the constitutional rights of parents to rear children who are members of the household, . . . reducing teenage pregnancy and unnecessary abortion, . . . and ensur[ing] that parents are able to meet their high duty to seek out and follow medical advice pertaining to their children, stay apprised of the medical needs and physical condition of their children, and recognize complications that might arise following medical procedures or services, to preserve the right of parents to pursue a civil action on behalf of their child before expiration of the statute of limitation if a facility or physician commits medical malpractice that results in injury to a child, and to prevent, detect, and prosecute batteries, rapes, and other crimes committed upon minors. Id. at 20-21. 26 Nova L. Rev. 545, State v. North Florida Women's Health & Counseling Services, Inc., Winter, 2002.

[61] Appellants' Initial Brief at 21 (citing State v. Division of Bond Fin., 495 So. 2d 183 (Fla. 1986); Miami Home Milk Producers Ass'n v. Milk Control Bd., 169 So. 541 (1936)). Also See 26 Nova L. Rev. 545, State v. North Florida Women's Health & Counseling Services, Inc., Winter, 2002.

[62] Id. at 25. Interestingly, this argument was contrary to Justice Shaw's opinion in In Re T.W. where the Justice Shaw's opinion clearly expressed that the right of privacy extends to "[e]very natural person," including minors.

[63] Appellees' Answer Brief at 20-21, State v. N. Fla. Women's Health & Counseling Serv., Inc., 26 Fla. L. Weekly

D419 (1st Dist. Ct. App. Feb. 9, 2001). These legal principles include:

> 1. Florida's State Constitution, . . . establishes a right of privacy that is stronger and more broad in scope than the right to privacy found in the federal constitution. [See In re T.W., 551 So. 2d 1186, 1190-92, 1197 (Fla. 1989)]
> 2. This right to privacy protects a woman's right to freely choose whether or not to continue her pregnancy without interference from government or third persons. [See Id. at 1192-93,1197]
> 3. This right to choose to terminate extends to minors. [See Id. at 1193, 1197]
> 4. It is a right so fundamental that the State may intrude upon it only if it can demonstrate (a) a compelling state interest in doing so; and (b) seeks to accomplish it through the least intrusive means. [See Id. at 1192, 1197]
> 5. Neither the health of the mother nor the potentiality of life in the fetus can be a compelling state interest justifying an intrusion on the right to choose if it applies to terminations of pregnancies within the first trimester. [See Id. at 1193-94, 1197-98]
> 6. The State's interests in protecting an immature minor and fostering the integrity of the family, while important and worthy, do not justify restricting a minor's right to choose abortion where similar restrictions are not imposed on comparable choices or decisions. [See Id. at 1194-95, 1198-99] 26 Nova L. Rev. 545, State v. North Florida Women's Health & Counseling Services, Inc., Winter, 2002.

[64] Appellees' Answer Brief at 22. Also See 26 Nova L. Rev. 545, State v. North Florida Women's Health & Counseling Services, Inc., Winter, 2002.

[65] Appellants' Initial Brief at 23. Also See 26 Nova L. Rev. 545, State v. North Florida Women's Health & Counseling Services, Inc., Winter, 2002.

[66] Appellees' Answer Brief at 27. Also See 26 Nova L. Rev. 545, State v. North Florida Women's Health & Counseling

Services, Inc., Winter, 2002.

[67] Appellees' Answer Brief at 27-28. Also See 26 Nova L. Rev. 545, State v. North Florida Women's Health & Counseling Services, Inc., Winter, 2002.

[68] Appellees' Answer Brief at 29-31. Also See 26 Nova L. Rev. 545, State v. North Florida Women's Health & Counseling Services, Inc., Winter, 2002.

[69] 26 Nova L. Rev. 545, State v. North Florida Women's Health & Counseling Services, Inc., Winter, 2002.

[70] Id. Also See Appellees' Brief at 30.

[71] Id. at 556.

[72] Id.

[73] State v. North Florida Women's Health & Counseling Services, Inc., 866 So.2d 612, 639 (2003).

[74] Id.

[75] Id.

[76] Id. at 636.

[77] Id.

[78] Id. at 637-638. Interestingly, after the Court affirmed In Re. T.W. by its majority opinion in State v. North Florida Women's Health & Counseling Services, Inc., the issue of whether T.W. was precedent became moot.

[79] Perez v. State, 620 So. 2d 1256, 1259 (1993) (J. Overton concurring).

[80] At issue in Planned Parenthood v. Casey, were five provisions of the Pennsylvania Abortion Control Act of 1982: § 3205, which required that a woman seeking an abortion give her informed consent prior to the procedure, and specifies that she be provided with certain information at least 24 hours before the abortion is performed; § 3206, which mandated the informed consent of one parent for a minor to obtain an abortion, but provides a judicial bypass

procedure; § 3209, which commands that, unless certain exceptions apply, a married woman seeking an abortion must sign a statement indicating that she has notified her husband; § 3203, which defines a "medical emergency" that will excuse compliance with the foregoing requirements; and §§ 3207(b), 3214(a), and 3214(f), which imposed certain reporting requirements on facilities providing abortion services. Before any of these provisions took effect, five abortion clinics and a doctor representing himself and a class of other doctors who provided abortion services filed suit claiming that the provisions were unconstitutional and contrary to the principles set forth in Roe v. Wade. See 505 U.S. 833 (1992).

[81] 620 So. 2d at 1259.

[82] Id.

[83] Id.

[84]John P. Stevens, *The Life Span of a Judge-Made Rule,* 58 N.Y.U.L.Rev. 1, 9 (1983) (emphasis added) (footnotes omitted). See also Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint,* J.S.Ct. History, 1991, at 13. Also See 620 So. 2d at 1259.

[85] 620 So. 2d at 1259.

[86] 620 So. 2d at 1259. Justices O'Connor, Kennedy, and Souter jointly wrote about the importance of precedent, with Justices Stevens and Blackmun concurring. Also See 505 U.S. at 836.

[87] Id. at 1259-1260. Also See 505 U.S. at 836.

[88] Id. Also See 505 U.S. at 836.

[89] Id. at 1260.

[90] Id.

[91] Fla. Government, Florida House of Representatives, Bills, <http://www.myfloridahouse.com/> (accessed Apr. 20, 2004).

[92] Id.

[93] Fla. Government, Florida House of Representatives, Bills, <http://www.myfloridahouse.com/> (accessed Apr. 20, 2004).

[94] Id.

[95] Id.

[96] Id.

[97] Id.

[98] Id.

[99] Id.