Linda Willard

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#90024

NO. STATE OF NEBRASKA
OFFICIAL
MAR 26 1990
DEPT. OF JUSTICE

ROBERT M. SPIRE
Attorney General
A. EUGENE CRUMP
Deputy Attorney General

DATE: March 26, 1990

SUBJECT: The Constitutionality of LB 854 with special emphasis on a 24-hour waiting period and the requirement of presenting to a woman information on the development of the fetus.

REQUESTED BY: Senator Arlene Nelson
District #35

WRITTEN BY: Robert M. Spire, Attorney General
Royce N. Harper, Senior Assistant Attorney General

SUMMARY OF ANSWERS TO QUESTIONS ASKED BY SENATOR NELSON

The legal questions addressed here relate to Legislative Bill 854 which contains the following requirements:

1) A twenty-four hour waiting period from the time the woman signs an informed consent statement before an abortion can be performed.

2) The requirement of furnishing a woman information on anatomical and physiological characteristics of the fetus at the gestational point of development at the time the abortion is to be performed.

Your request for an opinion indicated that there was information presented at the public hearing which indicated that such provisions have been consistently struck down by the courts as unconstitutional. You referred to two specific U.S. Supreme Court Cases and two U.S. District Court cases which were mentioned at the hearing as being relevant to the constitutionality of this bill.

Based on the cases you cited, namely, City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983); Thornburg v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986), Women's Services P.C. v. Thone, 690 F.2d 667 (1982); and Planned Parenthood of Southeast Pennsylvania v. Casey, 686 F.Supp. (E.D. Pa. 198) it would be our opinion that the two provisions, Section 1.(8)(d) and Section 2 would be constitutionally suspect.

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You further requested any pertinent information regarding this question which would have some bearing on the issue. Pursuant to this request it is of interest that there is a related issue as to delay imposed by a Minnesota requirement of parental notification by a minor obtaining an abortion presently before the U.S. Supreme Court from the Eighth Circuit Court of Appeals. Hodgson v. Minn. 88-1125 and Minn. v. Hodgson, 88-1309 (853 F.2d 1452).

In 1983 the Nebraska U.S. District Court ruled Nebraska Legislation requiring parental notification by a minor before an abortion unconstitutional. The court reasoned that the delay generated by such notice was an unreasonable impediment to the decision. However, in Hodgson, the Circuit Court concluded that a two-parent notice requirement imposed in conjunction with a judicial by-pass option, did not unduly burden the right of the minor to have an abortion and was, therefore, constitutional. Granted in Hodgson, the issue involved parental interest as to a minor, whereas, this statute covers adults as well as minors. But it appears then that the Eighth Circuit did not see the delay in that case as an unreasonable impediment as did the District Court of Nebraska in Orr v. Knowles, CV81-O-301, in 1983.

Therefore, it is reasonable to conclude that there is a possibility that the Eighth Circuit might now not consider the twenty-four hour delay and the informational requirement as an unreasonable impediment to an informed decision by an adult. However, until Hodgson is decided by the U.S. Supreme Court we cannot say whether the more restricted holding of the Eighth Circuit will be affirmed. We do know that in Webster, 109 S.Ct. 3040 (1989), the U.S. Supreme Court upheld a Missouri statute which to some degree rolled back the viability period of twenty six weeks to twenty weeks and which prohibited public funds for abortion.

In August 1989, we issued Opinion No. 89059 to Senator LaBedz on the status of Neb.Rev.Stat. § 28-347 which required parental notification by minors for abortion and which was declared unconstitutional by the U.S. District Court for Nebraska in 1983. At that time, we stated that the matter was in "limbo" until the U.S. Supreme Court rules on Hodgson.

Here, it would appear that the two cases, you cited of 1983 to 1986 make Legislative Bill 854 suspect, but the sequence of the holdings cited here would indicate a possible swing by the courts toward not seeing the delay as an unreasonable restriction, or an undue burden on the women's decision.

Detailed Analysis and Response to
Questions Asked by Senator Nelson

QUESTION 1: Is the provision in Legislative Bill 854 (Section 1.(8)(d) which requires a twenty-four hour waiting period following the signing of an informed consent statement for abortion constitutionally suspect.

CONCLUSION: Yes. This provision is constitutionally suspect based on previous U.S. Supreme Court holdings.

QUESTION 2: Is the provision in Legislative Bill 854 (Section 2) which contains an informational requirement as to the characteristics of the fetus at the time of the abortion constitutionally suspect.

CONCLUSION: Yes. This provision is suspect based on previous U.S. Supreme Court holdings.

City of Akron and Thornburg, supra basically affirmed Roe v. Wade, 410 U.S. 113 (1973), that the State's interest in maternal health becomes compelling only after the first trimester and the regulation may be upheld only if it is reasonably designated to further that State's interest.

In Akron, the law required: (a) prohibited physician from performing an abortion until twenty-four hours after the pregnant woman signs a consent form. (b) the attending physician to inform his patient of the status of her pregnancy, the development of her fetus, the date of possible viability, the physical and emotional complications that may result from an abortion and the availability of agencies to provide her with assistance with respect to birth control, adoption, and child birth, . . . and also inform her of particular risks associated with her pregnancy and the abortion technique to be employed.

Language form Akron on the requirements of a twenty-four hour delay and the furnishing of a fetus development information is appropriate here:

> . . . Akron has failed to demonstrate that any legitimate state interest is furthered by an arbitrary and inflexible waiting period. There is no evidence that the abortion procedure will be performed more safely. Nor does it appear that the State's legitimate concern that the woman's decision be informed is reasonably served by requiring a twenty-four hour delay as a matter of course. P. 449-451.

Further it is of interest to note additional language from Akron as to necessity of furnishing particular information:

> (a) The validity of an informed consent requirement rests on the State's interest in protecting the pregnant woman's health. But this does not mean that a State has unreviewable authority to decide what information a woman must be given before she chooses to have an abortion. A State may not adopt regulations designed to influence the woman's informed choice between abortion or childbirth. P. 442-444.
>
> (b) Section . . . attempts to extend the State's interest in ensuring "informed consent" beyond permissible limits, and intrudes upon the discretion of the pregnant woman's physician. While a State may require a physician to make certain that his patient understands the physical and emotional implications of having an abortion, § . . . goes far beyond merely describing the general subject matter relevant to informed consent. By insisting upon recitation of a lengthy and inflexible list of information, the section unreasonably has placed obstacles in the path of the physician. P. 444-445.
>
> (c) With respect to . . . requirement that the "attending physician" must inform the woman of the specified information, it is unreasonable for a State to insist that only a physician is competent to provide the information and counseling relevant to informed consent. P. 446-449.

Both the delay and the informational requirements were held to be unconstitutional in Akron. The provisions for delay and informed consent in Legislative Bill 854 are sufficiently similar to the Ohio statute that, in our opinion the bill is constitutionally suspect.

In your letter you mentioned Planned Parenthood of Southeast Pa v. Casey, 686 F.Supp. 1089 (E.D. Pa 1988). This was an action challenging amendments to the Pennsylvania Abortion Control Act of 1982. The District Court held that:

> (1) operation or implementation of judicial by-pass procedure for parental consent requirement for minors would be enjoined until the state Supreme Court promulgated rules which would assure that the petition was sealed immediately upon filing; (2) state officials were enjoined from disclosing or otherwise making available for public inspection and copying any report filed by facility which had received state appropriation funds during the 12-calendar month period preceding the filing of the report; (3) requirement that name of performing physician be reported was not enjoined; and (4) requirement that physician make determination as to

viability of fetus prior to performing any abortion after 19th week of pregnancy was enjoined.

Thus, the issues in Planned Parenthood of Southeast Pa., were not directly definitive to your request as they were in Akron but the opinion did cite Akron and Thornburg on the basic principle reaffirmed by the Supreme Court of a woman's fundamental right to choose whether to terminate her pregnancy. Further, the case cited Roe v. Wade, at 164 for the proposition that at the approximate beginning of the second trimester of pregnancy, the State's interest in protecting the health of the mother becomes compelling and may justify regulation which significantly burden the woman's right to terminate her pregnancy.

In the summary at the beginning of this opinion, we indicated that Hodgson v. Minnesota which is presently on appeal to the U.S. Supreme Court from the Eighth Circuit will be definitive as to Neb.Rev.Stat. § 28-347 which provides for notice to one parent and also provides for a judicial by-pass to the extent that a court could order a waiver of the notice requirement in the best interest of the child. This statute was declared unconstitutional by the U.S. District Court for Nebraska in 1983.

In opinion No. 89059 issued by this office on September 30, 1989, we concluded that the ruling of the U.S. District Court of Nebraska on #28-347 had been effectively overruled by the Eighth Circuit in Hodgson. The Eighth Circuit concluded that the two-parent by-pass option did not unduly burden the right of a minor to have an abortion and was, therefore, constitutional.

One of the reasons we believe that Hodgson would have a bearing on the twenty-four hour delay in Legislative Bill 854 is the fact that the U.S. District Court for the District of Nebraska in Orr v. Knowles held that any delay was significant in that a judicial by-pass increased that delay. Thus, it follows that if the U.S. Supreme Court affirms the Eighth Circuit in Hodgson, it could be inferred that the court is saying that a delay can be justified where there is a compelling state interest.

Certainly there was no way to predict that an affirmation of Hodgson which requires parental notice or a judicial by-pass with the attendant delay for a minor, would in anyway be dispositive of, or even affect a ruling on Legislative Bill 854 which attaches the delay and the information requirement to an adult decision. However, since you did request any information pertinent to the question at hand, we feel that it is best to set it out for your consideration.

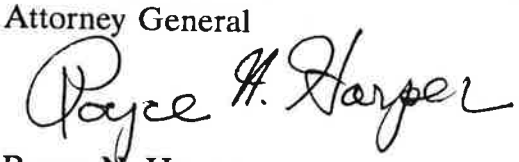
In our summary above, we mentioned Webster v. Reproductive Health Services, 109 Supreme Court 3040 (1989), because it is certainly of interest to all legislatures on the subject of abortion. In Webster state employed health care professionals offering abortion

counseling and services brought a class action seeking declaration and injunctive relief challenging the constitutionality of state statutes regulating abortions. The U.S. Supreme Court held: (1) That it need not pass on the constitutionality of the statute's preamble which set forth legislative "findings" that life begins at conception and that unborn children have protectable interests in life, health and well-being in that the preamble does not regulate or restrict health professionals in any concrete way; (2) The statutory ban on use of public employees and facilities for performance or assistance of nontherapeutic abortions did not contravene the Constitution; (3) The issue of constitutionality of statute's prohibition on use of public funds to encourage or counsel women to have nontherapeutic abortions was moot; and (4) The provision of the statute that require physicians to perform such tests as are necessary to determine fetal viability for any fetus believed to be at least 20 weeks gestational age does not unconstitutionally infringe right to abortion.

Although Webster is a landmark case and arguably could be considered by some as a sign of retreat from Roe v. Wade, in our opinion it is not definitive of any issues raised in your request.

Respectfully submitted,

ROBERT M. SPIRE
Attorney General



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APPROVED BY:

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cc: Patrick J. O'Donnell
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