

Linda Willard

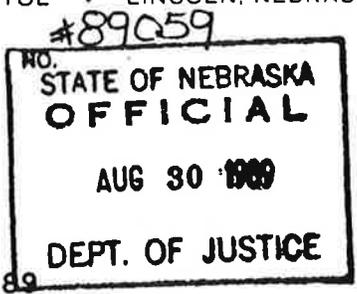
DEPARTMENT OF JUSTICE

STATE OF NEBRASKA

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DATE: August 30, 1989

SUBJECT: Enforceability of Neb.Rev.Stat. §28-347(1)(2)(3) (Reissue 1985); requirement for notice to parent or legal guardian prior to abortion upon a minor.

REQUESTED BY: Senator Bernice Labeledz  
Nebraska State Legislature

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

SUMMARY OF ANSWERS TO QUESTIONS ASKED BY SENATOR LABEDZ

The legal questions addressed here relate to Nebraska Legislation requiring a minor to notify one of her parents before obtaining an abortion. The legal implications of this legislation are complicated and difficult. Therefore, this summary of our reasoning and conclusions may be helpful.

This is where we are now on the legality of Nebraska legislation on parental notification by minors before abortion:

(1) The Nebraska U.S. District Court has ruled Nebraska legislation (Neb.Rev.Stat. §28-347) requiring parental notification by a minor before abortion unconstitutional.

(2) The Eighth Circuit Court of Appeals has ruled similar Minnesota legislation constitutional. This Eighth Circuit Court ruling, which is now on appeal to the U.S. Supreme Court, has the effect of overruling the Nebraska U.S. District Court decision. If the U.S. Supreme Court affirms the Eighth Circuit Court, the Nebraska parental notification legislation is constitutional.

(3) The result right now is that this parental notification issue is in legal limbo. The Eighth Circuit Court has said such legislation is constitutional, but its conclusion will soon be either upheld or reversed by the U.S. Supreme Court. In short, as of this moment the Nebraska legislation is constitutional, but we won't have the final answer until the U.S. Supreme Court acts on the current appeal before it.

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Detailed Analysis and Response to  
Questions Asked by Senator Labeledz

QUESTION 1: Neb.Rev.Stat. §28-347 which required notice to a parent or legal guardian prior to an abortion upon a minor was held unconstitutional by U.S. Judge Warren Urbom. Does his decision render the statute unenforceable to any plaintiff even though the Legislature never repealed it?

CONCLUSION: Yes.

QUESTION 2: Assuming section 28-347 subsections (1) and (2) are unenforceable, is subsection (3), which was not specifically addressed in Judge Urbom's decision, enforceable?

CONCLUSION: No.

In 1981, the Nebraska State Legislature enacted Neb.Rev.Stat. §28-347. Section (1) requires notice to one of the parents or the legal guardian of a minor prior to abortion upon that minor. Section 2 provides for a "judicial by-pass" to the extent that a court could order a waiver of the notice requirements in the best interests of the minor. Section 3 provides for non-application of the statute where an emergency provides an immediate and grave risk to the life or health of the pregnant minor.

In 1983, the United States District Court for Nebraska declared §§28-347 (1) and (2) unconstitutional, and permanently enjoined the state from enforcing those sections. Orr v. Knowles, CV-81-0-301 (D. Neb. September 19, 1983). However, this decision is no longer controlling because of two cases presently before the U.S. Supreme Court, Hodgson v. Minnesota, 88-1125 and Minnesota v. Hodgson, 88-1309. These two consolidated cases are on appeal to the U.S. Supreme Court from a 1988 Eighth Circuit Court holding (in 853 F.2d 1452) that Minnesota may constitutionally require a minor to give both parents 48 hours notice of an intent to have an abortion if it also provides an alternative bypass procedure. The Eighth Circuit upheld the statute against several constitutional challenges including equal protection.

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The Nebraska statute requires notice to only one parent. The Eighth Circuit Court in Hodgson emphasized that the Minnesota statute did not require consent but rather just notice to two parents. Language from the Eighth Circuit Court in Hodgson is particularly significant as we compare the Nebraska and Minnesota statutes and the subsequent Court rulings. The Eighth Circuit Court concluded that the two-parent notice requirement imposed in conjunction with a bypass option did not unduly burden the right of a minor to have an abortion and was, therefore, constitutional. Hodgson (at 1464). It logically follows that if a two parent notice with a judicial bypass is constitutional, then certainly a one parent notice with a judicial bypass also is constitutional.

Therefore, we conclude that the 1983 opinion in the U.S. District Court of Nebraska has been effectively overruled. If the U.S. Supreme Court had not accepted the appeals in Hodgson the Nebraska injunction against enforcement of §28-347 (1) and (2) could have been set aside as the issue would then have been settled law in the Eighth Circuit. However, we do not believe that §28-347 (1) and (2) could be successfully enforced now because a court would await the pending U.S. Supreme Court decision before allowing enforcement.

Section (3) of §28-347 was not specifically enjoined by the U.S. District Court of Nebraska. Section (3) states that §28-347 shall not apply where an emergency situation exists and continuation of the pregnancy provides an immediate and grave risk to the life and health of the minor. Subsection (3) provides the exception to the application of subsections (1) and (2). Absent subsection (1) and (2), independent enforcement of subsection (3) serves no purpose. It is neither logical nor reasonable to assume the legislature would have passed subsection (3) independent of subsections (1) and (2).

Therefore, we conclude that subsection (3) is not severable from subsection (1) and (2) and that §28-347 (1) (2) (3) as a whole is not enforceable under the terms of the U.S. District Court injunction. However, as we have described above, the validity of this U.S. District Court ruling will be finally determined by the U.S. Supreme Court in the Hodgson cases it is reviewing now.

The opinion from the U.S. Supreme Court in the Hodgson cases will resolve this. If Hodgson is affirmed before enactment of new Nebraska legislation, our office should file a motion in the United

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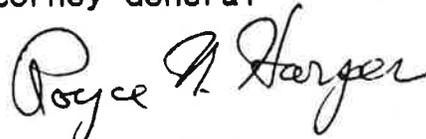
States District Court of Nebraska to vacate the September 19, 1983, order which permanently enjoined enforcement of section (1) and (2) of §28-347.

It is important for us to keep on top of the current developments taking place in this crucial area of the law. Therefore, should you desire, we will be pleased to advise you of our further conclusions after the U.S Supreme Court rules in the Hodgson cases.

Respectfully Submitted,



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Royce N. Harper  
Assistant Attorney General

cc: Patrick J. O'Donnell  
Clerk of the Legislature