SB

279

MEMORANDUM

**SENATOR FRED DYSON**

Date: February 27, 2008

To: Senator Bettye Davis, Chair
Senate Health, Education, and Social Services Committee

From: Senator Fred Dyson

Sub: Request for Hearing – SB 279 – Notice and Consent for a Minor's Abortion

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This memo is a request that you schedule SB 279 – "Notice and Consent for a Minor's Abortion" for a hearing in your committee at the earliest possible date.

I have attached a copy of the bill, a sponsor statement and bill packet for your use. Please contact Jeremy in my office if you have any questions (ex. 4729).

Thank you for your consideration. It is greatly appreciated.

# ALASKA STATE SENATE

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## Senator Fred Dyson

SPONSOR STATEMENT

SB 279 Parental Notification and Consent for a Pregnant Minor Aborting an Unborn Child

The issue of parental consent and the eleven-year struggle for protecting parental rights requires this complete picture for the legislature to address this subject.

On November 2, 2007 in *State of Alaska v. Planned Parenthood of Alaska*, the Alaska Supreme Court, in a 3 – 2 decision, has once again undermined a long line of case law, the intent of the Constitution, and the overwhelming support of the people of Alaska. SB 279 is a direct response to an active judiciary and an attempt to put this issue to rest once and for all.

Overriding the Governor's veto, the legislature passed the Parental Consent Act (PCA) in 1997. In July of that same year, Alaska Superior Court Judge Sen Tan ruled the law was unconstitutional because "the privacy clause of the Alaska Constitution protects minors as well as adults." The Superior Court did not address whether or not the PCA violated the privacy clause. The State appealed the decision and the Supreme Court ruled that the privacy clause extends to minors unless there is a compelling state interest using the least restrictive means available. The Supreme Court remanded the case back to Sen Tan to hold an evidentiary hearing to determine if PCA furthered a compelling state interest.

In January 2003 the Superior Court held a bench trial spanning almost three weeks to hear evidence regarding the constitutionality of the PCA. In October 2003, Judge Sen Tan ruled the PCA was unconstitutional because it did not further a compelling state interest while using the least restrictive means available. In January 2004 the Superior Court enjoined the State from enforcing the PCA declaring the PCA was unconstitutional under the equal protection and privacy clauses of the Alaska Constitution.

The primary purpose of the right to privacy is to protect Alaskans from **"unwarranted intrusions by the State"** (*Ravin,* P.2d 514). State law already requires parental consent for tattoos, immunization, school use of student information, body piercing, school travel for extra-curricular activities, marrying, entering the military, and all medical procedures except abortion. In the mental health profession, this is recognized as cognitive dissidence.

In its November 2, 2007 decision, the court agreed with the State that *"protecting minors from their own immaturity and aiding parents in fulfilling their parental responsibilities"* are *"compelling interests."* Therefore, the issue at hand for the court was whether the PCA was the least restrictive means of achieving the State's compelling interests.

SB 279 addresses the legal issues of parental consent in a practical manner based on the historical beliefs of our forefathers. The Parental Consent Act of 1997 was fully compliant with the U.S. Supreme Court precedent *Bellotti v. Baird,* (443 U.S. 622 1979). In essence, the Alaska Supreme Court in its November 2, 2007 decision struck down a decision of the U.S. Supreme Court. Justice Carpeneti eloquently wrote the dissenting decision stating the following:

> *"Because this court's rejection of the legislature's thoughtful balance is inconsistent with our own case law and unnecessarily dismissive of the legislature's role in expressing the will of the people, I respectfully dissent."*

The dissent opinion brought to light the lack of consideration or recognition in case law that *"children are not generally considered competent to consent to medical procedures."* It brought to light the four exemptions in the PCA, *"married minors, ... minors who have been legally emancipated, ...minors who have entered the armed services of the United States .and ...who have become employed and self-subsisting."* For those pregnant minors who did not fall into the four exempt categories a judicial bypass provision was provided for appropriate circumstances. It was a process designed to be speedy and cost-free to the child. The PCA called for a five-day response of the court; SB 279 calls for a three-day response. Failure by the court to respond in time would be construed as an act constructive authorization. The judicial bypass requires a sworn statement from the pregnant minor and an adult family member or state agent such as an Office of Children's Services caseworker or law enforcement officer.

Carpeneti discussed the fact that the Court quickly recognized that there was a compelling State interest but failed *to "look closely at the nature of the state's and parents' interests"* leaving *"its constitutional 'balance' one-sided."* Carpeneti continues in his dissent to outline case law that creates a judicial history of *"treating minors differently from adults," "protecting twelve-year-olds from older teenagers and from their own immaturity in choosing to participate in harmful activity,"* prohibiting minors from making contract to *"smoke cigarettes or drink alcoholic beverages or consent to sexual intercourse. Without a parent's consent they may not become licensed drivers or get married or obtain general medical or dental treatment."*

> *"In sum, the Alaska Parental Consent Act appears to be the product of a concerted effort to make certain that those pregnant girls who are sufficiently mature to make the decision to obtain an abortion on their own are allowed to do so while those who are not sufficiently mature either obtain a parent's consent or, in the case of parental abuse, a judicial determination that the procedure is in their best interest."*

In his dissenting opinion, Carpeneti uses the litmus test for parental consent that is required for participation in school field trips to demonstrating the extent to which the State must go to terminate parental rights is his argument:

*"In addition to society's interest in protecting children from their own immaturity, we have long held that parents have a fundamental right in raising of their children."*

Carpeneti's dissenting opinion determines that the State's compelling interest does outweigh the equal protection and privacy clauses because:

*"In sum, the norm in American, and Alaskan, life and law is that the parents are a child's first and most important resource for assistance in decision-making. For that reason, the state's interest in protecting children from the consequences of their own immaturity, and in so doing protecting the health of its children, and its interest in supporting parents' right and duty to guide the upbringing of their children is particularly compelling."*

SB 279 enacts the notification process that the Court determined is the least restrictive means of achieving the State's compelling interest but further continues to require parental consent unless the minor chooses a judicial bypass. It leaves intact the four exemptions from parental consent: *married minors, minors who have been legally emancipated, minors who have entered the armed services of the United States, and minors who have become employed and self-subsisting.*

I believe parental consent should be a part of Alaska Public Policy that recognizes the State's compelling interest in *"protecting minors from their own immaturity and aiding parents in fulfilling their parental responsibilities."* In addition to **parental consent**, SB 279 provides for a judicial bypass for sexual abuse cases using a ***lower standard than the 1997 PCA Act's clear and convincing*** provision, and a **provision prohibiting the parents from coercing a pregnant minor to have an abortion**.

In an era where government intrusion continues to be an issue with infr. gement on parental rights, it is time to reverse the trend and protect those principles our forefathers rooted in government to preserve our freedom and support traditional and essential parental rights.

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Senator Fred Dyson

**SB 279 Penalties, Parental Notice, Parental Consent, and Judicial Bypass for an Abortion**

SECTIONAL ANALYSIS

*** Section 1.** Adds a notice requirement to the consent requirement in AS 18.16.010(a). Section 3 sets out specific requirements for notice and consent

***Sec. 2.** AS 18.16.010(g) is reenacted to shift the burden of proof for prosecution of a physician who performs an abortion to the State. With the new statutory language all it takes to determine the standard for whether or not an abortion is required because of a medical emergency is the doctor's good faith, clinical judgment. The doctor should make one of the following findings:

(1) an immediate abortion of the minor's pregnancy is necessary to avert the minor's death; or

(2) a delay in providing an abortion will create a serious risk of medical instability due to a substantial and irreversible impairment of a major bodily function of the pregnant minor.

***Sec. 3.** Requires the physician performing the abortion or the referring physician to give actual notice to one legal parent or the legal guardian or custodian of the possible abortion. Is notice must be in person or by telephone. If in person, the parent or guardian must provide a government issued I.D. and provide documentation of their legal relationship with the minor requesting an abortion. If the notice is by telephone, the call must be initiated by the physician and the physician must take reasonable steps to verify the true identity of the person receiving notice and his or her relationship to the minor.

If the physician has exhausted efforts for notice in person or by phone, the physician can send written notice to the parent or guardian at the last known legal mailing address. This bill adjusts the waiting period to 48 hours after actual notice or 48 hours after the letter is deemed received. A letter is deemed received 48 hours after it is mailed, so that would be 96 hours. If the doctor actually talks to a parent, the waiting period would only be 48 hours.
One of the minor's parents or the minor's legal guardian or custodian has consented in a notarized writing to the performance or inducement of the abortion

Notice and consent is not required if the minor and a brother or sister of the minor who is over the age of 21, or a law enforcement officer, or a representative of state Child Protective services, or a grandparent, or a stepparent specified by the minor signs a notarized written statement certifying their personal knowledge of the abuse against the minor by a parent or guardian or sexual abuse by another person.

The other exceptions to notice and consent would be if a court issues an order under AS 18.16.030 authorizing the minor to proceed with the abortion without notice to the parent, guardian, or custodian or if a court, by its inaction under AS 18.16.030, constructively has authorized the minor to proceed with the abortion without notice to the parent, guardian, or custodian.

If the physician proceeds with the abortion proceeds after receiving notarized declarations of abuse, the physician performing or inducing the abortion must certify in the patient's medical record that he or she has received the written declarations of abuse or neglect abuse to and must report the abuse to OCS. Any physician who relies in good faith on written statements declaring abuse and who reports the abuse to Child Protection authorities shall not be civilly or criminally liable for failure to give notice to or to obtain consent from a parent, guardian or custodian. If the minor's pregnancy was the result of a sexual assault on the minor, the physician performing or inducing the abortion must retain, and take reasonable steps to preserve, the products of conception following the abortion for use by law enforcement authorities in any subsequent criminal prosecution of the assailant.

*** Sec. 4.** This amends AS 18.16.030, **Judicial bypass for minor seeking an abortion.** (a) A woman who is pregnant, unmarried, under 17 years of age, and unemancipated who wishes to have an abortion without notice to and without the consent of a parent, guardian, or custodian may file a complaint in the superior court requesting the issuance of an order authorizing the minor to proceed with the abortion without notice to the parent, guardian or custodian and/or to consent to the performance or inducement of an abortion without the consent of a parent, guardian, or custodian.

In the interest of shortening any delays in the process of obtaining the judicial bypass, subsection (c) reduces from five to three days the time in which Superior Court must render a decision on a judicial bypass. If the court does not issue a decision in three days the inaction will be considered a constructive order.

*** Sec. 5.** Adds notice to process for filing for judicial bypass without notice to and the consent of a parent, guardian, or custodian.

***Sec. 6.** Requires the court to hold a hearing not later than the third business day after a judicial bypass complaint has been filed. This reduces the deadline from five to three days for expediency purposes.

**Sec. 7.** Amends provisions for an appeal to a dismissed complaint for judicial bypass by adding notice language and reducing the timeline from four to three days the superior court has to deliver a copy of the appeal to the supreme court.

**Sec. 8.** Provides for a minor requesting a judicial bypass can request the superior court issue an order directing the minor's school allow the minor to attend a judicial bypass hearing and prohibits the school from notifying the parents, guardian, or custodian

***Sec. 9.** This is a new section of the law prohibiting a parent, guardian, custodian, or any other person from coercing a pregnant minor to have an abortion performed. If a minor is denied financial support by the minor's parents, guardian, or custodian due to the minor's refusal to have an abortion performed, the minor shall be deemed emancipated for the purposes of eligibility for public assistance benefits, except that such benefits may not be used to obtain an abortion. As used in this Section, "coercion" means restraining or dominating the choice of a minor female by force, threat of force, or deprivation of food or shelter.

Requires physicians to submit monthly reports to the Department Health and Social Service on forms prescribed by the department reporting the following:

1. the number of consents obtained under this law
2. the number of times in which exceptions were made to the consent requirement under this law
3. the type of exception, the minor's age
4. the number of prior pregnancies and prior abortions of the minor

No patient names are to be used on the forms. The Department is required to make a compilation of the data reported available to the public on an annual basis.

***Sec. 10.** Direct court rule change adding notice to consent provisions of Rule 220(a) Rules of Appellant Procedure, scope of judicial bypass appeals. It also contains language cleanup from revisor that replaces "parental consent" with consent of a parent, guardian, or custodian.

***Sec. 11.** Direct court rule change adding notice to consent provisions of Rule 220(c)(1) Rules of Appellant Procedure, notice of judicial bypass appeals. It also contains language cleanup from revisor that replaces "parental consent" with consent of a parent, guardian, or custodian.

***Sec. 12.** Direct court rule change amending Rule 220(a) Rules of Appellant Procedure, constructive order of judicial bypass appeals. It reduces from five to three days the deadline for the appellant to receive a constructive order because the court did not enter an order on an appeal.

***Sec. 13.** Direct court rule change adding "notice" to consent language in Rules of Probate Procedure Rule 20(a), Petition for Judicial Bypass Procedure to Authorize Minor to Consent to an Abortion.

***Sec. 14.** Direct court rule change adding notice to consent provisions of Rule 20(e) Rules of Probate Procedure, Findings and Order of Judicial Bypass Procedure to Authorize Minor to Consent to an Abortion.. It also contains language cleanup from revisor that replaces "parental consent" with consent of a parent, guardian, or custodian.

***Sec. 15.** Direct court rule change adding notice to consent provisions of Rule 20(f) Rules of Probate Procedure, Findings and Order of Judicial Bypass Procedure to Authorize Minor to Consent to an Abortion. It reduces from five to three days the deadline for the appellant to receive a constructive order because the court did not enter an order on an appeal.

***Sec. 16.** Indirect court rule amendment of Rules of Civil Procedure Rule 24(a) Right to Intervention by providing of a legislative right to intervention in Section 18.

***Sec. 17.** Severability clause.

***Sec. 18.** This new provision of law allows the Legislature, by joint resolution or by and through the Legislative Council, to appoint one or more of its members who sponsored or co-sponsored this Act, as a matter of right and in his or her official capacity, to intervene to defend this law in any case in which its constitutionality is challenged.

***Sec 19.** The enactment of Section 18, legislative right to intervention, is contingent on a two-thirds vote approval on indirect court rule amendment of Rules of Civil Procedure Rule 24(a) Right to Intervention.

***Sec. 20.** This Act takes effect within thirty (30) days of its enactment.

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