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October 3, 1990

OPINION
OF
HAL STRATTON
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Opinion No. 90-19

TO: The Hon. John J. McMullan
State Representative
7109 Prospect Place, N.E.
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QUESTIONS:

1. What is the current legal status of New Mexico's criminal abortion law, NMSA 1978, §§ 30-5-1 to 30-5-3?

2. Under what circumstances would New Mexico's parental consent provision relating to minors be enforceable?

CONCLUSIONS:

1. See analysis.

2. See analysis.

ANALYSIS:

New Mexico's current criminal abortion statute, NMSA 1978, §§ 30-5-1 to 30-5-3 (Supp. 1990), was passed in 1969. Laws 1969, ch. 67. As written, § 30-5-1 prohibits the performance of abortions, except where the termination of the pregnancy is medically justified. "Justified medical termination" means (1) continuation of the pregnancy is likely to result in the death or grave impairment of the physical or mental health of the woman; (2) the child probably will have a grave physical or mental defect; (3) the pregnancy resulted from rape; or (4) the pregnancy resulted from incest. NMSA 1978, § 30-5-1(C).

The statute further provides that any such "justified medical termination" may only occur upon written certification by the members of a special hospital board that one of the four conditions noted above is present. Id. In addition, abortions may only be performed by a physician licensed by the State of New Mexico at a hospital accredited by the Health Services Division of the Department of Health and Environment. The statute further requires that any abortion either be performed only with the woman's consent or, if she is under eighteen years of age, then at the request of the minor and her then living parent or guardian. Id.

Section 30-5-2 specifically states that no hospital is required to perform abortions, nor to create a special hospital board. It further allows any person who is a member of, or associated with, the staff of a hospital, or any hospital employee, to refuse to participate in abortion procedures if that person has moral or religious objections. A refusal to participate "shall not form the basis of any disciplinary or other recriminatory action against such person."

Section 30-5-3 defines criminal abortion as producing or attempting to produce the untimely termination of a pregnancy, with the intent to destroy the fetus through any means. It is punishable as a fourth degree felony. The law also includes a severability clause. Laws 1969, ch. 67, § 4.

In 1973, the Supreme Court of the United States found a constitutionally based right to abortion. Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973). The constitutionality of the New Mexico statute has been addressed only once since that decision, in State v. Strance, 84 N.M. 670, 506 P.2d 1217 (Ct.App. 1973). In Strance, the New Mexico Court of Appeals ruled that the Roe v. Wade and Doe v. Bolton decisions rendered certain portions of the statute unenforceable.

Specifically, the Court of Appeals found that the provisions

relating to accredited hospitals, special hospital boards, and the four enumerated circumstances were all unacceptable limitations in light of Roe and Doe. 84 N.M. at 671-672, 506 P.2d at 1218-1219. The Court of Appeals also recognized, however, the significance of the severability clause and ruled the federal decisions required only a limitation of the definition of "justified medical termination," rather than a declaration of the entire statute as unconstitutional. 84 N.M. at 672-673, 506 P.2d at 1220. The Court of Appeals concluded that the law was enforceable to the extent that it was:

> a criminal statute penalizing the act of performing abortions on the unconsenting, or performing an abortion on a woman under the age of eighteen years without the consent of both the woman and her then living parent or guardian, or the performance of an abortion by a person who is not a physician licensed by the State of New Mexico.

84 N.M. at 673, 506 P.2d at 1220. Thus, under state law, and without more, it would be illegal for a doctor to perform an abortion on a minor under eighteen years of age without the consent of the minor's parent, guardian, or custodian.

The U.S. Supreme Court has since addressed the constitutionality of parental consent provisions. Bellotti v. Baird (Bellotti II), 443 U.S. 622 (1979)(plurality opinion); Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976). It is important to recognize the distinction between parental consent laws and parental notice laws. Consent laws require a parent's permission before an abortion can be performed upon a minor; notice laws require only that the parent be notified the abortion will be performed.

Recently, a six-justice majority of the Court discussed the current application of the Bellotti and Danforth decisions. Ohio v. Akron Center for Reproductive Health, ___ U.S. ___, 110 S. Ct. 2972, 111 L.Ed.2d 405 (1990). While Akron Center concerned a parental notice law, the Court expressly declined to decide whether that law was subject to any less stringent standard, because it met the constraints of existing parental consent jurisprudence. 110 S. Ct. at 2978, 111 L.Ed.2d at 418.

The Court observed that Danforth prevented any person from having an absolute veto power over a minor's decision to have an abortion. As a result, the State must provide some bypass procedure if it elects to require parental consent. 110 S. Ct. at 2979, 111 L.Ed.2d at 418. The Court then summarized Bellotti II as creating four criteria that a bypass procedure in a consent

statute must satisfy.

First, the procedure must allow the minor to show that she possesses the maturity and information to make her abortion decision, in consultation with her physician, without regard to her parents' wishes. Second, the procedure must allow the minor to show that, even if she cannot make the decision by herself, the desired abortion would be in her best interests. 110 S. Ct. at 2979, 111 L.Ed.2d at 418-419. Third, the procedure must insure the minor's anonymity. Fourth, the procedure must be expedited to allow the minor an effective opportunity to obtain the abortion. 110 S. Ct. at 2979-2980, 111 L.Ed.2d at 419-420. The Court also noted that "[a]bsent a demonstrated pattern of abuse or defiance, a State may expect that its judges will follow mandated procedural requirements." 110 S. Ct. at 2981, 111 L.Ed.2d at 421. New Mexico's criminal abortion law does not provide for such a bypass, as required by existing U.S. Supreme Court precedent.

The New Mexico Court of Appeals also found the special hospital board requirement, and the requirement that abortions only be performed in state-licensed hospitals to be unenforceable. The Supreme Court has ruled that licensed-hospital requirements are constitutional, so long as they are (1) related to ensuring adequate staffing and services necessary to protect maternal health, (2) consistent with acceptable medical practices, (3) broad enough to include outpatient surgical hospitals and clinics, and (4) are not applied to first trimester abortions. Simopoulos v. Virginia, 462 U.S. 506, 519 (1983); Doe v. Bolton, 410 U.S. at 194-195. While the New Mexico law appears to meet these criteria, the Court of Appeals has nonetheless expressly found the licensed-hospital requirement to be unenforceable. It is clearly constitutional, however for the State to allow only licensed physicians to perform abortions. Connecticut v. Menillo, 423 U.S. 9 (1975)(per curiam).

The necessary narrowing construction of "justified medical termination" results in NMSA 1978, § 30-5-1 being currently enforceable only against the act of performing an abortion on an unconsenting woman, or the performance of an abortion by a person who is not a physician licensed by the State of New Mexico. The penalty provision, NMSA 1978, § 30-5-3, is equally limited.

The New Mexico Court of Appeals in State v. Strance ruled that NMSA 1978, § 30-5-2 was constitutional, and the section has not since been challenged in any reported court decision. In addition, the U.S. Supreme Court in Doe v. Bolton specifically approved of protections providing that a physician or any other hospital employee had the right to refuse, for moral or religious reasons, to participate in abortion procedures. 410 U.S. at 197-198. It is our conclusion, therefore, that § 30-5-2 remains fully in force.

The second question presented concerns the circumstances under which New Mexico's parental consent provision might be enforceable. This could occur either through amendments to the existing law, or through a change in federal abortion jurisprudence. As to the first point, Ohio v. Akron Center for Reproductive Health is again the most instructive case.

The Ohio law makes it a criminal offense, except in four specific circumstances, for anyone to perform an abortion on an unmarried and unemancipated woman under eighteen years of age. 110 S. Ct. at 2977, 111 L.Ed.2d at 416. The first exception requires the physician to provide at least twenty-four hours actual notice, in person or by telephone, to one of the minor's parents, guardian or custodian, or in certain circumstances, other family members. If the physician cannot give notice "after a reasonable effort," he may perform the abortion after "at least forty-eight hours constructive notice" by both ordinary and certified mail. Id.

The second exception permits an abortion if one of the minor's parents, or guardian or custodian has consented in writing. The third exception allows a physician to perform an abortion without parental notice or consent if a juvenile court has issued an order authorizing it. The fourth exception provides for "constructive authorization" if there is inaction on the part of a juvenile court or court of appeals. Id. The bypass procedure requires the minor to file a complaint in the juvenile court, stating that (1) she is pregnant; (2) she is unmarried, and under eighteen years of age; (3) she desires to have an abortion without notifying one of her parents; (4) she has sufficient maturity and information to make an intelligent decision whether to have an abortion without such notice, or one of her parents has engaged in a pattern of abuse against her, or notice is not in her best interests; and (5) she has or has not retained an attorney. Id.

The Ohio law further provides for expedited court hearings, and requires a court to render its decision immediately after the conclusion of the hearing. Failure to comply with the provision results in constructive authorization. 110 S. Ct. at 2977-2978, 111 L.Ed.2d at 417. At the hearing the court must appoint a guardian ad litem, and an attorney to represent the minor if she has not retained her own counsel. The minor must prove her allegation of maturity, pattern of abuse, or best interests by clear and convincing evidence, and the juvenile court must conduct the hearing to preserve the anonymity of the complainant, keeping all papers confidential. 110 S. Ct. at 2978, 111 L.Ed.2d at 417. The law also provides for expedited appellate review; failure by the court of appeals to comply results in constructive authorization. Id.

The Supreme Court found that these limitations upon a minor's ability to procure an abortion were constitutional, 110 S. Ct. at 2978, 111 L.Ed.2d at 418, specifically approving the State's placing of the burden upon the minor to prove maturity, pattern of abuse, or best interests by clear and convincing evidence. 110 S. Ct. at 2981, 111 L.Ed.2d at 421. An amendment to New Mexico's criminal abortion law which adheres to these provisions should render the parental consent provisions enforceable.

The second way New Mexico's existing parental consent law could become enforceable is through a modification of federal abortion jurisprudence by the U.S. Supreme Court. The Supreme Court could well make any determination as to retroactive application. See, e.g., Lemon v. Kurtzman, 411 U.S. 192, 198-199 (1973)(plurality opinion). The New Mexico Court of Appeals based its ruling in State v. Strance solely upon the Supreme Court's rulings in Roe v. Wade and Doe v. Bolton, and thus absent direction from the Supreme Court, the common law would apply.

The common law is the rule of decision in New Mexico, NMSA 1978, § 38-1-3 (1990 Supp.), unless changed by the Legislature, Southern Union Gas Co. v. City of Artesia, 81 N.M. 654, 657, 472 P.2d 368, 371 (1970), or judicial decision, Lopez v. Maes, 98 N.M. 625, 629-630, 651 P.2d 1269, 1273-1274 (1982). The New Mexico Supreme Court has adopted the common law rule that:

> when a statute is repealed which repealed a former statute, the first act is revived, and again becomes effective without any formal words on the part of the Legislature to that effect. This is always true in the absence of a contrary legislative intent expressly declared or necessarily to be implied from some legislative expression.

Gallegos v. Atchison, Topeka & Santa Fe Ry. Co., 28 N.M. 472, 476, 214 P. 579, 581 (1923). See, e.g., United States v. Philbrick, 120 U.S. 52 (1887); State v. Biddle, 45 Del. 244, 71 A.2d 273 (1950); People v. Mitchell, 166 P.2d 10, 27 Cal.2d 678 (1946); Cruz v. Puerto Rican Society, 106 Ill.Dec. 867, 154 Ill.App.3d 72, 506 N.E.2d 667 (1987); State v. Chadeayne, 323 S.W.2d 680 (Mo. 1959); General Electric Co. v. Packard Bamberger & Co., 14 N.J. 209, 102 A.2d 18 (1953); Manchester v. Wayne County Commissioners, 257 Pa. 442, 101 A. 736 (1917); Lagoon Jockey Club v. Davis County, 72 Utah 405, 270 P. 543 (1928); Ex Parte Williamson, 116 Wash. 560, 200 P. 329 (1921). But see, Morgan v. Johnson County, 187 Ark. 582, 61 S.W.2d 68 (1933). Cf., In re Matter of Hoover's Estate, 251 N.W.2d 529 (Iowa 1977).

The common law further treats a court's ruling of an act as

unconstitutional as merely suspending enforcement, rather than abolishing or repealing it. Jawish v. Morlet, 86 A.2d 96 (D.C.App. 1952); Liberty Mutual Ins. Co. v. Crist, 86 Ga.App. 584, 71 S.E.2d 910 (1952); Strand v. Village of Watson, 72 N.W.2d 609 (Minn. 1955); Home Utilities Co., Inc. v. Revere Copper & Brass, Inc., 209 Md. 610, 122 A.2d 109 (1956); Howard County Metro. Comm'n v. Westphal, 232 Md. 334, 193 A.2d 56 (Md.App. 1963); State v. Zarinsky, 143 N.J. Super. 35, 362 A.2d 611 (1976), aff'd, 75 N.J. 101, 380 A.2d 685 (1977); Shephard v. Wheeling, 30 W.Va. 479, 4 S.E. 635 (1887). See also, 39 U.S. Att'y Gen. Op. 22 (1937); Md. Att'y Gen. Op. No. 89-45 (Nov. 30, 1989). Cf., United States ex rel. Clark v. Anderson, 502 F.2d 1080 (3d Cir. 1974); Arnold Engineering, Inc. v. Industrial Comm'n, 20 Ill.Dec. 573, 72 Ill.2d 161, 380 N.E.2d 782 (1978); Fortson v. Clarke County, 97 Ga.App. 429, 103 S.E.2d 597 (1958); Pompei Winery, Inc. v. Bd. of Liquor Control, 167 Ohio St. 61, 146 N.E.2d 430 (1957).

We therefore conclude that under current law, NMSA 1978, § 30-5-2 is entirely enforceable, and §§ 30-5-1 and 30-5-3 are enforceable only to the extent that they criminalize and punish the act of performing an abortion on an unconsenting woman, or the performance of an abortion by a person who is not a physician licensed by the State of New Mexico. We further conclude that New Mexico's parental consent provision may become enforceable either through legislative enactment of the amendments discussed above or, under certain circumstances, through modification of current federal abortion jurisprudence. We stress that any of these conclusions may be subject to change in light of future decisions of the Supreme Court of the United States.

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