

COMMENTS RE BYPASS OF PARENTAL CONSENT
(From reproductive rights attorneys working with the
American Civil Liberties Union of Utah)

The United States Supreme Court set forth basic constitutional requirements that a judicial bypass process must meet in Bellotti v. Baird, 443 U.S. 622 (1979) (plurality opinion) (“Bellotti II”). In particular, Bellotti II mandates that a young woman who elects to have an abortion without parental consent have access to an expeditious, confidential judicial procedure through which to obtain a bypass from the parental consent requirement. 443 U.S. at 643-44; accord, e.g., Lambert v. Wicklund, 520 U.S. 292, 295 (1997) (reaffirming requirements for judicial bypass articulated in Bellotti II). The comments set forth below suggest changes to the rules in order to protect young women’s constitutional right to access an expeditious and confidential bypass procedure.

**RULE OF JUVENILE PROCEDURE: URJP 60. JUDICIAL BYPASS
PROCEDURE TO AUTHORIZE MINOR TO CONSENT TO AN ABORTION.**

(a) Petition.

Because each minor has a constitutional and statutorily protected right to seek a confidential waiver of the consent requirement, the minor’s name should not appear in the caption because this could publicly identify the minor through, for example, a docket sheet or calendar call. Therefore, the rule should be modified to state that a pseudonym or initials will be used in the caption on all the court documents. See, e.g., Zbaraz v. Hartigan, 776 F. Supp. 375, 379-80 (N.D. Ill. 1991) (minor should be allowed to file using a pseudonym or only her initials, to protect her anonymity). The minor’s name should appear in only one place: in the body of the petition.

In addition, the rule should be modified to make it clear that, if the minor has an attorney by the time she files a petition, her attorney may sign and file the petition on her behalf. This change will lessen the burden on, and improve access to the procedure by, the minor, who may have difficulty in arranging confidentially to obtain the form, fill it out, and file it or to meet with the attorney in person prior to the petition being filed.

Suggested changes to (a):

Add new second and third sentences reading: “*The petitioner shall be referred to in the caption by a pseudonym or initials. The minor is only required to include her name in the body of the petition and not on any other court document. The petition may be signed and/or filed by someone acting on the minor’s behalf, including her attorney if she is already represented.*”

(a) Petition & (b) Filing.

Many minors may find it difficult to go confidentially to a juvenile court during the hours that it is open. To best ensure that minors are able to confidentially and expeditiously use the judicial bypass process, the rules should minimize the number of times that it is necessary for a minor to go to a courthouse. Therefore, the petition form should be among the forms provided on the courts’ website (www.utcourts.gov). That

way a minor can fill out the form before going to a courthouse or fill it out and have someone she trusts file the form for her.

The Instructions for Filing Petitions for Waiver of Parental Consent to Abortions Pursuant to Utah Code Ann. § 76-7-304.5 adopted by the Board of Juvenile Court Judges (“the Instructions”) provide that the petition can be filed in person, by mail, or by fax, but language on how the petition can be filed was omitted from subsection (b) of the rule. As in the Instructions and in the rule governing filing of the notice of appeal, the rule governing filing of the petition should specifically state that any of those methods of filing may be used.

Suggested changes to (a) and (b):

Re-word the third sentence in (a) to read: “Blank petition forms will be available at all juvenile court locations *and on the Utah State Courts website (www.utcourts.gov).*”

Add the following sentence to (b): “*The petition may be filed in person, by mail, or by fax.*”

(c) Appointment of Counsel.

The Instructions clearly state that each minor has “the right to be represented by an attorney” but the rule as now written does not make that clear. The rule should be amended to specifically state that an attorney will be appointed by the court if the minor does not already have an attorney representing her. The court should assume that an unrepresented minor cannot afford an attorney and should appoint one for the minor unless she expressly states that she does not want an attorney. Moreover, the rule should not refer to a guardian ad litem as if it is an alternative to an attorney for the minor. Rather, the rule should state that a guardian ad litem will be appointed only if the minor is determined to be mentally incompetent.

Appointment of an attorney:

As now worded, the rule states that “the juvenile court shall consider appointing an attorney under Utah Code Ann. § 78-3a-913 and/or the Office of Guardian ad Litem under § 78-3a-911.” The Petition form adopted by the Board of Juvenile Court Judges states “I understand I have the right to a court-appointed attorney and/or guardian ad litem.” The phrasing in the rule leaves it unclear whether the court definitely will appoint an attorney to represent a minor who does not yet have an attorney to represent her.

The standards for appointing an attorney under Section 78-3a-913 appear to clearly support appointing an attorney for a minor seeking a bypass. That statute provides that a competent minor shall be informed that she “ha[s] the right to be represented by counsel at every stage of the proceedings” and that “counsel shall be appointed by the court” if a minor requests an attorney and is found to be indigent. Utah Code Ann. § 78-3a-913(1)(a). Moreover, the court may appoint counsel without a request where “necessary to protect the interest of the minor.” *Id.* Where a minor is seeking court permission to obtain an abortion without parental consent, it clearly will not be feasible for the minor to seek help from a parent in paying for an attorney, nor for the court to take into account “the income and financial ability to retain counsel of the parents or guardian in determining the indigency of the child.” *See* Utah Code Ann. § 78-3a-913(1)(c). As the Seventh Circuit Court of Appeals has noted,

as a practical matter the choice for most minors will be between having a court-

appointed attorney or no attorney at all. The more under age eighteen a minor is, the less likely it is that the minor will have enough money of her own to be able to hire an attorney to represent her at the waiver hearing. Naturally, a minor seeking to avoid parental notification will not feel free to ask her parents to pay for her attorney.

Indiana Planned Parenthood Affiliates Ass'n v. Pearson, 716 F.2d 1127, 1137-38 (7th Cir. 1983).

Moreover, an attorney should be appointed for each unrepresented minor in light of the minor's constitutional right to have an effective opportunity to obtain a bypass. See, e.g., Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476, 461 n.16 (discussing the requirement that the judicial bypass procedure provide “an *effective* opportunity for an abortion to be obtained.”) (quoting Bellotti v. Baird, 443 U.S. 622, 644 (1979)) (emphasis added); Indiana Planned Parenthood Affiliates, 716 F.2d at 1138 (finding unconstitutional statute that allowed, but did not require, appointment of counsel for minor in bypass). Without a lawyer, a minor -- under the stress of dealing with an unwanted pregnancy and untrained in the law -- is likely to have great difficulty navigating the court process and presenting the evidence necessary to prove her case. See Indiana Planned Parenthood Affiliates, 716 F.2d at 1138 (“A minor, completely untrained in the law, needs legal advice to help her prepare her case Requiring an indigent minor to handle her case all alone is to risk deterring many minors from pursuing their rights because they are unable to understand how to navigate the complicated court system on their own or because they are too intimidated by the seeming complexity to try.”).

Appointment of a guardian ad litem:

The phrasings in both the rule and the petition form, noted above, imply that the court may appoint a guardian ad litem *instead of* appointing an attorney to represent the minor in a bypass. Given the different roles of an attorney for the minor and a guardian ad litem, the rule should be amended to make it clear that a guardian ad litem cannot be appointed in lieu of appointing an attorney. The rule should indicate that a guardian ad litem will be appointed only if the minor is determined to be mentally incompetent, in which case a guardian is needed to express the wishes and protect the interests of the minor.

The duties and responsibilities of a guardian ad litem and of an attorney for a minor “are not always coextensive,” as the Utah Supreme Court has noted. State v. Harrison, 24 P.2d 936, 942 n.4 (Utah 2001). Appointing a guardian ad litem for a minor seeking a judicial bypass would not satisfy the need to ensure that a minor is able to effectively pursue her constitutional right to seek an abortion without her parent's consent. An attorney for a minor is ethically bound to represent the client's interests as the client sees them and is prohibited from asserting a position contrary to the wishes of the client. Utah R. Prof. Conduct 1.2 (the attorney must “abide by a client's decisions concerning the objectives of representation” and “consult with the client as to the means by which [the objectives] are to be pursued.”) A guardian ad litem is not similarly bound. The guardian ad litem is charged with representing “the best interest of a minor” according to the view of the guardian ad litem, not the view of the minor: “[a] difference between the minor's wishes and the attorney [guardian ad litem]'s determination of best

interest may not be considered a conflict of interest for the attorney [guardian ad litem].” Utah Code Ann. 73-3a-912(8).

Given the need for each minor to be represented by an attorney, the rule should delete the provision for appointment of a guardian ad litem, except for situations in which the court determines that the minor is mentally incompetent or the attorney assigned to represent her requests the appointment of a guardian ad litem because the attorney believes that the minor is mentally incompetent. There is no need for a competent minor represented by an attorney to be represented by a guardian ad litem as well. *Cf. State in Interest of D.M.*, 790 P.2d 562, 566 (Utah Ct. App. 1990) (ruling that trial court properly declined to appoint a guardian ad litem for dependency and neglect phases of proceeding where minors were represented by counsel).

Suggested changes to (c):

Amend the rule to read: “If the petitioner is not represented by a private attorney, the juvenile court shall ~~consider appointing~~ *appoint* an attorney under Utah Code Ann. § 78-3a-913 ~~and/or the Office of Guardian ad Litem under § 78-3a-911~~. The clerk shall immediately notify the attorney ~~and/or the Office of Guardian ad Litem~~ of the appointment. *Upon the application of the minor’s attorney or upon the court’s own motion, a guardian ad litem shall be appointed if the court determines that the minor is mentally incompetent.*”

(d) Expedited Hearing.

The rule should allow for the hearing to be held at a later date if the minor requests a longer time frame. In addition, the rule should allow for re-scheduling of the hearing if the minor is unable to attend the hearing at the scheduled time due to illness or some other reason. Although most minors will want to have a hearing as soon as possible after the petition is filed, in some cases a minor may need a later hearing date in order to be able to attend the hearing confidentially. Moreover, in some circumstances, a minor with the best of intentions will not be able to appear for a scheduled hearing because, for example, she cannot miss an exam being given at school that day or she cannot arrange transportation to the courthouse. Given the nature of the judicial bypass process and the mandate of confidentiality, it is imperative that the rule recognize that a minor may miss or need to postpone a scheduled hearing for a short period of time and mandate that a subsequent hearing date be promptly set.

In each instance, a minor should be represented by an attorney, but not also by a guardian ad litem, for the reasons set forth above. Therefore, the reference to “guardian ad litem” in this subsection should be deleted.

Suggested changes to (d):

Amend the first sentence to read: “Upon receipt of the petition, the court shall schedule a hearing to be held and the petition resolved within three judicial days, *unless the minor requests a longer time frame, in which case the hearing must be held and petition resolved within that time frame.*”

Add a new fourth sentence, reading: “*A minor who fails to appear at a hearing may request that the court reschedule her hearing and such a rescheduled hearing shall*

be held and the petition resolved within three judicial days of the minor's request, unless the minor requests a longer time frame, in which case the rescheduled hearing must be held and petition resolved within that time frame."

Amend current fourth sentence by deleting the phrase "the guardian ad litem."

(e) Findings and Order.

The rule should specifically state what it now implies: that at the conclusion of the hearing the minor and her attorney will receive an order granting or denying her petition. This should be made clear in the rule to ensure that the minor can promptly obtain her abortion or exercise her right to appeal if the petition is denied.

Suggested changes to (e):

Amend the first sentence to read: "The court shall enter an order immediately after the hearing is concluded *and hand deliver a copy of that order to the petitioner and her attorney at that time.*"

(f) Re "deemed granted" petitions

As discussed above, the rule should allow for a minor to request a delayed hearing or for a hearing to be re-scheduled if the minor was unable to attend. Therefore the rule should reflect those situations in addition to situations where the court continues a hearing.

In each instance where the petition is deemed granted, the clerk should prepare a certificate to that effect and provide a certified copy of that to the minor or her attorney. The minor should not be expected to make a request in order to obtain such a certificate. Moreover, having the clerk perform this function as a matter of course should actually be beneficial for the clerk's office, as it will eliminate the need for minors or their representatives to repeatedly check back with the clerk's office to determine if the necessary number of judicial days (including any continuations) has elapsed.

Suggested changes to (f):

Amend the second sentence to read: "~~If the court continues a hearing for 24 hours under paragraph (d)~~ *If, as provided under paragraph (d), the hearing is held at a later date at the request of the minor or the court continues or re-schedules a hearing, the petition shall be deemed granted if the petition is not resolved by the expiration of the additional 24 hours within that time frame.*"

Amend the last sentence of subsection (f) to read: "*Upon expiration of the applicable period, the clerk of the juvenile court immediately shall prepare a certificate indicating that a hearing was not held and that the petition is deemed granted pursuant to this rule and shall provide a certified copy of that certificate to the petitioner, her attorney, and individuals designated by the petitioner.*"

(g) Confidentiality.

Additional safeguards are needed to protect the minor's confidentiality. As discussed with reference to paragraph (a), above, the minor should be allowed to file using a pseudonym or initials and her name should appear only in the body of the petition.

Moreover, the rule should specifically provide that documents must be maintained as sealed records and that all proceedings shall be scheduled and docketed in a manner designed to ensure the minor's confidentiality. At a minimum, any document containing the minor's name must be maintained as a sealed record.

Suggested changes to (g):

Amend the first sentence of paragraph (g) to read: "The petition and all hearings, proceedings, and records are confidential *and the entire record related to these proceedings shall be maintained under seal and shall be classified as "sealed" court records.*"

(h) Appeal.

The constitutional mandate of expedition is imposed on the state, to ensure that the minor has an effective opportunity to obtain an abortion: if the state imposes undue delay she may lose her ability to access an abortion. The expeditiousness requirement should not be applied to the minor's detriment: placing a high burden of expedition on the minor will impermissibly foreclose her "constitutional right to seek an abortion [without being] unduly burdened by state-imposed conditions upon . . . access to court." Bellotti v. Baird, 443 U.S. 622, 648 (1979); see also Planned Parenthood of Southern Arizona v. Neely, 804 F. Supp. 1210, 1216 (D. Ariz. 1992) (noting that 24 hour appeal window places a "truly onerous burden on the young woman seeking to exercise her constitutional rights," by, "[i]n essence, plac[ing] the burden on the minor to act expeditiously" (internal citation omitted)). Within the three day time frame for filing a notice of appeal, a minor must learn of the decision, receive a copy of the order, figure out how to appeal, prepare a notice of appeal, and file it with the court -- or forever lose her right to appeal. See Neely, 804 F. Supp. at 1217 (finding parental consent law unconstitutional due to vagueness and inadequate medical emergency exception, but expressing concern that statute also imposed undue burden by requiring that an appeal be filed within twenty-four hours of the minor receiving actual notice of the denial, due to difficulties faced even by represented minors). To avoid impermissibly burdening the minor's right to an abortion and violating her right to due process, the rule needs to be clarified and some additional safeguards need to be added. Cf. Manning v. Hunt, 119 F.3d 254, 275 (4th Cir. 1997) (upholding short time frame for filing notice of appeal because statute required appointment of an attorney if requested by the minor and rule required that minor be informed of the decision at the conclusion of the hearing).

The rule should specify that the time period runs from when the minor receives a copy of the court's order, not from when the order is entered. Along with requiring the prompt hand delivery of the order to the minor and her attorney at the conclusion of the hearing, as requested above, this change will ensure that the minor will have learned of the decision before the time the appeal window closes. These clarifications or additions are needed even if appointment of counsel on appeal is made mandatory, as requested below, because the minor could lose her right to appeal before such appointment was triggered. Requiring that the order be hand delivered to the minor and her attorney at the conclusion of the hearing will also reduce the burden on the minor by enabling her to file her appeal before leaving the courthouse, making another trip -- with increased risk of loss of confidentiality or arousing the suspicion of her parents or others -- unnecessary.

Moreover, the rule should require the appointment of an attorney not only for the reasons set forth above, but also because that will enable the minor to promptly exercise, and thus retain, her right to appeal. (Of course, if the rule does not require the appointment of an attorney, the time frame within which a notice of appeal must be filed should be expanded, as it could take the minor more than a week just to find an attorney or other assistance.)

Imposing a short time frame for appeals without clearly providing the safeguards set forth above unduly burdens minors and violates their due process rights, while failing to serve any legitimate state interest.

Suggested changes to (h):

Amend the first sentence to read: “A petitioner may appeal an order denying or dismissing a petition to bypass parental consent by filing a notice of appeal within three judicial days after ~~entry of the order~~ *receipt of the order*.”

RULE OF APPELLATE PROCEDURE: URAP 60. JUDICIAL BYPASS APPEALS.

(c) Notice of appeal.

As with the petition, minors should be allowed to file a notice of appeal using a pseudonym or initials in the caption, in order to best protect their confidentiality. Therefore, as discussed above, the rule should specify that the minor need not include her name on the notice of appeal.

Subsection (1): As discussed above, greater procedural safeguards are needed in order to protect the minor’s constitutional rights. The rule should be amended to clarify that the court will consider a notice to be filed timely if it is mailed within the specified deadline.

Suggested changes to (c):

Add new subsection reading: “*The minor is not required to include her name on the notice of appeal, but instead shall be referred to in all parts of the notice, including the caption, by a pseudonym or initials.*”

The first sentence of subsection (1) should be amended to read: “A minor may appeal an order denying or dismissing a petition to bypass parental consent by filing a notice of appeal in the juvenile court within three judicial days after ~~entry of the order~~ *receipt of the order*.”

A new third sentence should be added to subsection (1), reading: “*The notice of appeal is timely filed if it is mailed to the clerk of the juvenile court on or before the last day for filing.*”

(g) Disposition.

The rule should specify that the minor’s attorney will be provided with a copy of the appellate court’s order and, if one is issued, opinion.

Suggested changes to (g):

Amend the second sentence in paragraph (g) to read: “The clerk shall immediately notify the minor of the decision *and immediately shall provide her attorney with a copy of the court’s order.*” An additional sentence should be added at the end of the paragraph: “*If the court issues an opinion, the clerk immediately shall provide the minor’s attorney with a copy of it.*”

(h) Confidentiality.

Additional safeguards are needed to protect the minor’s confidentiality. As discussed with reference to paragraph (c), above, the minor should be allowed to omit her name from the notice of appeal.

Moreover, the rule should specifically provide that the documents must be maintained under seal and that all proceedings shall be scheduled and docketed in a manner designed to ensure the minor’s confidentiality.

Suggested changes to (h):

Amend the first sentence of paragraph (h) to read: “Documents and proceedings in an appeal under this rule are confidential *and the entire record related to these proceedings shall be maintained under seal and shall be classified as “sealed” court records.*”

(i) Attorney.

As discussed above with reference to the trial court process, the rule should be amended to make it clear that an attorney will be appointed by the court if the minor does not already have an attorney representing her on the appeal and to delete references to the appointment of a guardian ad litem. If the Court does keep references to guardians ad litem, the rule should not refer to guardians ad litem as if they are an alternative to an attorney for the minor.

As at the bypass hearing stage of the process, the court should ensure that a minor appealing denial of her petition is represented by an attorney, in light of the minor’s constitutional right to have an effective opportunity to obtain a bypass. Clearly a minor whose petition has been denied is likely to have great difficulty prevailing on appeal without the help of an attorney. As discussed above, a guardian ad litem is not a substitute for an attorney representing the minor. If the minor is mentally incompetent, a guardian ad litem will have been appointed at the juvenile court stage of the process.

The rule should allow for the appointment of a different attorney in some situations, in order to ensure the minor effective representation on appeal.

Suggested changes to (i):

Amend paragraph (i) to read: “If the minor is not represented by an attorney, the court shall ~~consider appointing~~ *appoint an attorney or the Office of Guardian ad Litem* to represent the minor in the appeal. If an attorney ~~or the Office of Guardian ad Litem~~ was appointed to represent the minor in the trial court, the appointment continues through appeal, *unless the minor requests otherwise or there is other good cause for a different appointment.*”