AN EDUCATIONAL UPDATE FROM
THE SOUTHEAST LAW INSTITUTE™, INC.

To: **Interested Persons**
Date: **September 2017**
From: **A. Eric Johnston**
Re: **Recent Parental Consent for Abortion Cases**

In August, there were two significant decisions involving Alabama's Parental Consent Law. In 1987, the Alabama Legislature enacted a statute, conforming to federal law requirements, to permit a minor girl to have an abortion without a parent's consent, but done through a judicial bypass procedure. In other words, if the minor girl wanted to obtain an abortion and not tell her parents, she could go to a judge and get permission.

Not much has changed since the original U.S. Supreme Court case of *Bellotti v. Baird*, 443 U.S. 622 (1979) which found a minor had the right to obtain the abortion without parental consent, so long as there was a judicial bypass procedure. The factors required by *Bellotti* still restrict states from reasonably protecting the tender years of a minor girl, not to mention the unborn life within her. Much like the original *Roe v. Wade* decision, *Bellotti* remains the law of the land and has no regard for the unborn child. The controlling language is that a minor girl can seek a judge's approval if she can prove that she is mature enough to make the decision on her own or the court determines it is in her best interest. These are two separate grounds for permitting the abortion.

When Alabama's Parental Consent Law, §§ 26-21-1, *et seq.*, 1975 *Code of Alabama* was enacted, it had to conform to the very strict *Bellotti* standards. In 2014, after about 27 years of state court jurisprudence, the Alabama Legislature amended the Parental Consent Law to strengthen provisions related to the judicial bypass process. Alabama courts were virtually rubberstamping hearsay based decisions to permit minor abortions, based essentially on a finding that the abortion would be granted simply because the girl was seeking the bypass permission. The 2014 amendments intended to avoid these weaknesses by requiring admissible probative evidence in support of the girl's claims, requiring the local district attorney to participate in the hearing to be sure facts were elicited in support of the state's value of life and permitting a guardian *ad litem* or the girl's parents (if they were aware of the situation) to participate in the hearing.

Reproductive Health Services v. Attorney General Steve Marshall, Case No. 2:14-CV-1014-SRW, was decided by U.S. Magistrate Susan Russ Walker[1] on July 28, 2017, holding most of the 2014 amendment unconstitutional. The magistrate's ruling was overly restrictive and had the usual myopic misguided view of the law. Adhering to the old uninformed abortion rights view, she ruled essentially that only the court, a girl and her lawyer could participate in the bypass procedure. Obviously, knowing the girl's lawyer is favoring her abortion it makes it virtually impossible for the judge to make an informed, rational and proper decision. By permitting the district attorney to elicit admissible evidence, the true interests of the minor girl are protected. In drafting the law, we were extremely careful to maintain the girl's confidentiality, but the court ignored this. Federal law will not permit decisions to be made on the basis of the unborn life. Even without considering the unborn life, at stake is the life and future of the minor girl.

Even with the 2014 amendments to the Alabama law, there is still not great strength. For example, on July 12, 2017, *In the Matter of Anonymous*, Case No. 2160759, was decided by the Alabama Court of Civil Appeals, upholding a minor girl's right to abortion. The trial court followed the 2014 amendments, allowing the district attorney to participate at the trial level and appeal the adverse decision advocating for no abortion. Remember, courts are still bound by the requirements that they determine whether the girl is mature enough to make the decision or whether the abortion is in her best interest. Bad facts make for bad decisions. In this case, the minor girl was only twelve years old, abused, her mother was aware of her condition, impregnated by a relative, and in the custody of DHR.

The real problem comes down to the court's finding the abortion is in her best interest. This presumes passive if not actual support for abortion. These courts cannot consider the personhood of the unborn child. As long as the U.S. Supreme Court permits abortion and restricts the states in regulating abortion, this recent Court of Appeals decision is likely to be the outcome of minor judicial bypass abortion cases.

The federal magistrate's decision makes it even more difficult to protect young girls. Fortunately, Attorney General Steve Marshall has appealed the magistrate's decision. Hopefully, the Eleventh Circuit Court of Appeals will see the wisdom of providing a more definitive trial court procedure in order to elicit real facts for making a determination. Fortunately, the magistrate left standing some of the 2014 amendments, including: requirements for the minor and parents (if giving consent for the abortion) to give certifiable proof of identity; requirements for admissible and probative evidence (though some hearsay is still permitted); and the statutory requirements that the girl simply asking for the bypass is not alone sufficient to find maturity for making the judicial abortion decision. The enhanced criminal and professional penalties were also left intact.

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[1] Magistrates are appointed by the local federal trial court judges. The Middle District of Alabama is a hostile place for protection of life where the judges and lesser magistrates, consistently strike down efforts to protect women's rights and the unborn.