



S. 403 — Child Custody Protection Act

Calendar No. 16

Read for the second time on February 17, 2005, and placed on the Senate Legislative Calendar under General Orders.

Noteworthy

- Under a unanimous consent agreement reached July 18, the Senate will proceed to the consideration of S. 403 on Thursday, July 20, 2006.
- S. 403 was introduced on February 16, 2005 and has 40 cosponsors. It prohibits transporting a minor across state lines to obtain an abortion if doing so abridges a parental notification or consent statute in the minor's residing state; an exception is provided if the abortion is necessary to save the minor's life.
- The House passed H.R. 748, the Child Interstate Abortion Notification Act—a similar bill with additional liability provisions for doctors—on April 27, 2005, by a vote of 270-157. It also approved different versions of the bill in 1998, 1999, and 2002.
- Such legislation has never received an up-or-down vote on the Senate floor, although a similar bill, S. 1645, underwent a cloture vote in the 105th Congress. (Cloture failed by a vote of 54-45; see Roll Call vote number 282, Sept. 22, 1998.)
- At least 37 states have enacted statutes imposing legal obligations on pregnant minors to notify or gain the consent of their parents before getting an abortion. S. 403 does not supersede or otherwise alter any of those laws, nor does it impose any parental notice or consent requirement on any state.
- The bill would only give effect to a state's parental involvement law if that law is constitutional; therefore, any state parental consent law given effect under this bill must contain a "judicial bypass" provision, which allows a minor girl to petition a judge to waive the parental notification requirement.
- Proponents of S. 403 contend that the bill would protect the health and safety of pregnant minors, as well as the rights of parents to be involved in the medical decisions of their minor daughters who wish to cross state lines to obtain an abortion.

Background

The Child Custody Protection Act (CCPA) seeks to protect individual states' ability to enforce laws governing parental notification and consent relating to minors' abortions. **The bill does not supersede or otherwise alter any existing state law, nor does it impose any requirement on any state.** Instead, the CCPA is strictly intended to prevent the evasion of existing state notification and consent laws where minors (voluntarily or involuntarily) are brought to another state for the purpose of getting an abortion.

The background for this bill is examined in detail in a report prepared by the House Judiciary Committee, H. Rept. 109-51 (although that report also discusses provisions that were not included in the narrower Senate bill). This brief section will provide an overview of existing state parental involvement laws, will note widespread public support for such measures, and will discuss the prevalence of parental consent requirements for activities much less consequential than abortion. In short, this bill has been proposed to protect the health and safety of young women, as well as the rights of their parents, by preventing the circumvention of valid and constitutional state parental involvement laws.

A Real Need for Parental Involvement in Minors' Abortion Decisions

Proponents contend that without the CCPA, parental rights with regard to the "care, custody, and control of their children," described by the Supreme Court as "perhaps the oldest of the fundamental liberty interests," will be severely undermined.¹ The Supreme Court has said, "[t]he law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions."² Thus, a parent's guidance could be instrumental in a minor's initial decision to seek an abortion. In some cases, however, that parental guidance may influence a minor *not* to seek an abortion. In those cases where parental guidance results in a minor's decision to abort a pregnancy, the need for continued parental involvement remains.

Perhaps in no other circumstance is the need for parental guidance more important than when a child requires medical care. Indeed, a minor's need for parental guidance is only magnified by the physical and emotional risks that accompany an abortion procedure. Proponents argue that parents are in the best position to provide a child's relevant medical and psychological history and can provide valuable information such as medicinal allergies and/or tendencies toward depression. They also contend that parental involvement helps ensure that post-abortion complications do not go unnoticed or untreated and that any residual emotional issues may be tended to and resolved.

Widespread Support for Parental Involvement Laws

Under the standards recently affirmed by the Supreme Court, there is a national consensus supporting parental consent and notification laws. While the Supreme Court does not even require a bare majority of states as evidence of a national consensus,³ 45 states have enacted laws restricting

¹ *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

² *Parham v. J.R.*, 442 U.S. 584, 602 (1979).

³ *See Atkins v. Virginia* 536 U.S. 304 (2005)(finding that as few as 18 states could constitute a national consensus, where 18 of 38 states that had the death penalty did not allow execution of the mentally retarded).

the rights of minors to make their own decisions regarding abortion.⁴ Thirty-seven of those statutes are pure parental involvement laws, meaning that they strictly require *parental* (as opposed to another adult or family member) consent/notice or, alternatively, judicial bypass.⁵ Eight of the 45 enacted laws have been invalidated by state or federal courts, and one attorney general is refusing to enforce another,⁶ but the will of the citizens in each of those states has been made clear through the legislative enactments. Only Hawaii, New York, Oregon, Vermont, Washington, and the District of Columbia have declined to enact laws requiring some form of parental involvement.⁷

Moreover, in addition to these legislative acts, public opinion polls consistently confirm widespread support for these statutes — with less than 20 percent of Americans opposing parents' involvement in their children's abortion decisions.⁸

Requiring minors to consult their parents before making consequential decisions is not an unusual trend in this country. In fact, many states have laws requiring parental consent even before making relatively innocuous choices. Currently, 27 states have laws requiring parental consent before minors under 18 can get tattoos, and 27 states have laws requiring parental consent before minors under 18 can get body piercings. Furthermore, six states flatly prohibit minors under 18 from getting tattoos, regardless of whether they have parental consent. One state has completely banned minors under 18 from getting body piercings, regardless of whether they have parental consent.⁹ Moreover, several states require parental consent for *ear* piercings.¹⁰

The Available Evidence of Interstate Evasion of Parental Involvement Laws

Although it is impossible to quantify exactly how many minors are transported across state lines each year in order to obtain abortions, some have estimated the numbers to be in the thousands.¹¹ Statistics suggest that teenage girls who seek abortions from out-of-state providers who do not require parental notice or consent are most in need of guidance from their parents. National studies show that “[a]most two-thirds of adolescent mothers have partners older than 20

⁴ See National Right to Life Committee, Inc., *Parental Involvement Statutes*, June 15, 2006, available at <http://www.nrlc.org/Federal/CCPA/ParentalLawsFS.pdf>.

⁵ See National Right to Life Committee, Inc., *Parental Involvement Statutes*, *supra* note 4 (Only 29 pure parental involvement laws are currently in effect.)

⁶ See Planned Parenthood Federation of America, *Laws Requiring Parental Consent or Notification for Minors' Abortions*, *supra* note 3.

⁷ Planned Parenthood Federation of America, *Laws Requiring Parental Consent or Notification for Minors' Abortions*, *supra* note 3.

⁸ See Ayres, McHenry & Assoc., poll from Mar. 6-9, 2005, available at <http://www.ayresmchenry.com/docs/JudicialMessageMemo.pdf> (finding only 17 percent support for *no* notification), Quinnipiac University, poll from Mar. 2-7, 2005, available at www.pollingreport.com (finding only 18 percent opposition to “requiring parental notification before a minor could get an abortion”), and CNN/Gallup, poll from Jan. 10-12, 2003, available at <http://www.pollingreport.com/abortion.htm> (finding 24% opposition to a “law requiring women under 18 to get parental consent before any abortion”).

⁹ See statutes compiled at <http://www.ncsl.org/programs/health/bodyart-1.htm>.

¹⁰ See, e.g., Ohio, R.C. § 3730.06; Arizona, A.R.S. § 13-3721; Tennessee, T. C. A. §§ 62-38-301, 305; Virginia, Va. Code Ann. § 18.2-371.3.

¹¹ Gloria Feldt, past president of the Planned Parenthood Federation of America, has estimated that the CCPA would affect thousands of teenage girls. See *AGOP Moves to Bolster Rights of Parents in Teen Abortions*, THE WASHINGTON TIMES, May 12, 1998. Additionally, Kathryn Kolbert, then an attorney with the Center for Reproductive Law and Policy, said that thousands of adults help minors cross state lines to circumvent parental involvement requirements. See *Woman Charged in Secret Abortion*, PHILADELPHIA INQUIRER, Sept. 16, 1995. Kolbert has also said that “there are thousands of minors who cross state lines for an abortion every year and who need the assistance of adults to do that.” *Labor of Love is Deemed Criminal*, THE NAT'L LAW JOURNAL, Nov. 11, 1996.

years of age.¹² Moreover, in a study of over 46,000 pregnancies by school-age girls in California, researchers found that “71%, or over 33,000, were fathered by adult post-high school men whose average age was 22.6 years.”¹³ Some have characterized these incidents as the result of “predatory practices” by older men.¹⁴ Perhaps it is because of these men, some of whom may be subject to statutory rape charges, that in 58 percent of cases where parents have not been informed about their minor daughter’s pregnancy, it is the girl’s boyfriend who accompanies her for the abortion.¹⁵ This information suggests that there is ample evasion of parental involvement laws.

Constitutional Considerations

Article I, Section 8 of the United States Constitution establishes legislative power to regulate interstate commerce and provides the constitutional basis for this bill. The proposed law is modeled on the Mann Act, which criminalizes the transportation of any person across state lines for the purposes of prostitution.¹⁶ The Supreme Court has upheld the Mann Act on more than one occasion and has held specifically that “Commerce among the states...includes...a movement of *persons* as well as of property.”¹⁷ Like the Mann Act, the CCPA is a constitutional exercise of Congress’s power to regulate the interstate movement of persons.

As previously discussed, nothing in the CCPA would impose any substantive abortion-related law on any state; the purpose of the proposed law is to ensure that the existing laws governing each state’s citizens are respected. To be given effect under the CCPA, a state’s parental involvement law must be constitutional. To be constitutional, a consent law must contain a “judicial bypass” provision, which would allow a minor girl to petition a judge to waive the parental notification requirement. This judicial bypass is necessary to “ensure that the provision requiring parental consent does not in fact amount to an ‘absolute, and possibly arbitrary, veto.’”¹⁸ Although a judicial bypass is not required by the Supreme Court for parental *notification* cases, nearly all states with a parental notification provision that is currently being enforced also have a judicial bypass option.¹⁹ The CCPA would only provide criminal penalties for evasion of *constitutional* state parental involvement laws.

¹² American Academy of Pediatrics Committee on Adolescence, *Adolescent Pregnancy—Current Trends and Issues: 1998*, 103 PEDIATRICS 516, 519 (1999).

¹³ Mike A. Males, *Adult Involvement in Teenage Childbearing and STD*, LANCET 64 (July 8, 1995).

¹⁴ Mike Males, *Adult Involvement in Teenage Childbearing and STD*, *supra* note 13.

¹⁵ Stanley Henshaw and Kathryn Post, *Parental Involvement in Minors’ Abortion Decisions*, FAMILY PLANNING PERSPECTIVES, Vol. 24, No. 5 (September/October 1992).

¹⁶ See 18 U.S.C. § 2421.

¹⁷ *Hoke v. United States*, 227 U.S. 308, 320 (1913); See also *Caminetti v. United States*, 242 U.S. 470, 491 (1917) (“[T]he authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question.”).

¹⁸ *Bellotti v. Baird*, 443 U.S. 622, 644 (1979)(quoting *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976)).

¹⁹ See National Right to Life Committee, Inc., *Parental Involvement Statutes*, *supra* note 4 (Utah requires judicial bypass for its consent requirement, but not for its notice requirements.)

Bill Provisions

S. 403 contains one operative title, proposed 18 U.S.C. § 2431. The operative statutory language is found in the bill's section 2(a):

[W]hoever knowingly transports a minor across a State line, with the intent that such minor obtain an abortion, and thereby in fact abridges the right of a parent under a law requiring parental involvement in a minor's abortion decision, in force in the State where the minor resides, shall be fined under this title or imprisoned not more than one year, or both.

The bill provides an exception to this operative language if abortion is necessary to save the life of a minor and prohibits prosecution or fine of a transported minor and her parents.²⁰

Administration Position

At press time, the Administration had not issued a Statement of Administration Policy (SAP) for S. 403. The President did, however, issue a SAP “strongly support[ing]” H.R. 748,²¹ the House companion bill that passed in April 2005. In that Statement, the Administration espoused its view that “parents’ efforts to be involved in their children’s lives should be protected,” and that the bill was consistent with “the widespread belief among authorities in the field that the parents of pregnant minors are best suited to provide them with counsel, guidance, and support.”

Other Views

The primary objections to the Child Custody Protection Act are discussed in the dissenting views filed by House Judiciary Committee members in H. Rept. 109-51. Those concerns are summarized below.

The CCPA would result in adverse health consequences for teenage girls. Opponents argue that by making parental notification requirements harder to circumvent, the CCPA would force teens to seek unsafe, illegal abortions. They also argue that the bill would force pregnant teens to choose to cross state lines alone for an abortion, instead of subjecting another person to criminal prosecution. Supporters, however, point to evidence showing that increases in the number of illegal abortions do not necessarily follow as a result of parental involvement laws.²² They say that by ensuring minors obtain consent from a parent, the CCPA actually promotes better medical care for pregnant teens by

²⁰ S. 403, 109th Cong. § 2 (2005), proposed 18 U.S.C. §§ 2431(b)(1), (2).

²¹ Statement of Administration Policy, April 27, 2005, available at <http://www.whitehouse.gov/omb/legislative/sap/109-1/hr748sap-h.pdf>.

²² Jamie Sabino, chair of the Massachusetts Judicial Consent for Minors Lawyer Referral Panel, testified in 1999 that there had been no increase in illegal abortions in the 18 years that the MA law had been in effect. See Teresa Stanton Collett, *Symposium: Science, Politics, and Reproductive Rights: Transporting Minors for Immoral Purposes: The Case for the Child Custody Protection Act and the Child Interstate Abortion Notification Act*, 16 HEALTH MATRIX 107 (Winter 2006), citing Hearings on Tex. H.B. 623 before the H.R. Comm. on State Affairs, 76th Leg., R.S. 13 (Apr. 19, 1999). Likewise, a 1989 memo by Minnesota Attorney General Hubert Humphrey III states that, five years after his state passed a parental involvement law, “the evidence does not disclose a single instance of abuse...for any Minnesota minor.” State of Minnesota, Office of the Attorney General, “Background Briefing Concerning the Minnesota Parent Notification Law,” 1989 (quoted in Collett, *supra*, at 125-26.).

involving their parents in their child’s decision-making process, medical care, and their physical and psychological recovery.

Parental notification could subject girls who have abusive parents to physical violence.

Opponents argue that some young women would face physical abuse by their parents if forced to reveal a pregnancy. Thus, by making those consent laws hard to circumvent, the CCPA could lead to violence against some pregnant minors. Supporters counter that state legislatures have adequately accounted for this concern by providing a judicial bypass alternative to parental involvement requirements. All of the state parental involvement laws that are currently being enforced contain this option, despite the fact that the Supreme Court has only explicitly required it for parental consent statutes. Thus, supporters would argue that because state legislators have been proactive in addressing this potential problem, the CCPA would never create a situation whereby the only avenue for permissible consent is through an abusive parent.

The CCPA is unconstitutional. Opponents suggest that Congress lacks the power to restrict minors’ travel to states with no consent law. They also argue that the CCPA is impermissibly extra-territorial, in that it authorizes one state to exert its laws outside of its own territory.

On the first point, supporters note that the Constitution grants Congress power over commerce among the several states.²³ Additionally, they would point to the Supreme Court’s repeated validation of the Mann Act, the legislation on which the CCPA was modeled. On the latter point, supporters would cite a 1978 Eighth Circuit Court of Appeals case upholding a Mann Act conviction in Nevada, despite the fact that prostitution (for purposes of which interstate transportation was a federal crime) was legal in that state.²⁴

Possible Amendments

No formal list of amendments was available as this Legislative Notice was being prepared. Five amendments were offered and defeated in the House Judiciary Committee when H.R. 748 was marked up (See H. Rept. 109-51), but it is unclear if any of those amendments will be offered on the Senate floor. *The RPC will release detailed amendment descriptions to Republican Senate offices when amendments are formally offered on the floor.*

²³ *United States v. Hoke*, 227 U.S. 308, 322 (1913)(“Congress has power over transportation among the several states; that the power is complete in itself.”)(citation omitted).

²⁴ See *United States v. Pelton*, 578 F.2d 701 (8th Cir. 1978).