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State v. North Florida Women's Health & Counseling Services, Inc.: The Constitutionality of the Parental Notice of Abortion Act

Jesse Lieberman*

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I. INTRODUCTION

Christy is a seventeen-year-old pregnant girl.[1] She is a junior in high school and in the top of her class. Christy plans on going to college and law school and eventually becoming a lawyer. Christy has never been as stressed as she is now. She has her SATs coming up in one month, a math test on Friday, and must make the toughest decision of her life—whether she should get an abortion.

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* Jesse Alan Lieberman was born and raised in New York City. At the age of twenty-one, he graduated from the State University of New York at Binghamton, where he had majored in Mathematics. Mr. Lieberman attended Nova Southeasetern University, Shepard Broad Law Center in Florida and graduated *cum laude* in May 2001. While in law school, Mr. Lieberman won the Best Brief Award in the Freshman Moot Court competition. In the author's remaining two years at Nova, he served on both Law Review and Moot Court and was a teaching assistant of Torts. Currently at age twenty-four, Mr. Lieberman is a plaintiff's personal injury lawyer. He is engaged to Miss Andrea Heslekrants and resides in downtown Fort Lauderdale.

Jesse Alan Lieberman gives special thanks to his fiancée Andrea for her support and inspiration in writing this article. He would also like to thank his parents Evelyn and Eugene Lieberman and his dear friend Rachele Sannino for their encouragement and support.

1. This story is fictional, however, it demonstrates the practical effects of Florida's Parental Notice of Abortion Act.

She definitely does not want to have this baby. If she becomes a mother now, she will not be able to live the life she was planning to live. She will not be able to go to college because she will have to get a job to support her child. Christy will not even get to go on her junior trip to Disney World because she will have to stay home and take care of her child. She simply is not ready to become a mother!

In order for Christy to obtain an abortion, under Florida law, the physician performing the abortion must first notify one of Christy's parents.[2] Christy knows her parents hold strong views on the subject of abortion and will force her to carry the pregnancy to term against her will. She fears they will do whatever they can to prevent her from having an abortion, including confining her to the house. She fears the significant medical risks that carrying a pregnancy to term poses on minors. Such risks include, "hemorrhage; infection; worsening medical complications, such as a seizure disorder or hypertension; risks associated with a caesarian section; and aggravation of chronic diseases, such as bowel problems, colitis, and anemia."[3]

Christy has no idea what to do. The longer she delays this decision, the greater the risks in obtaining an abortion. She is now thirteen weeks pregnant. Her risk of mortality from an abortion is now nine times as great as it was five weeks ago. She knows that she must make a decision soon before it is too late to obtain an abortion. Christy is considering either going to another state that does not have this notice requirement or obtaining an illegal abortion in Florida.

Jennifer is Christy's friend and feels that she is in an even greater predicament. Jennifer is also a seventeen-year-old pregnant girl who has her SATs in a month, a math test on Friday, and wants to have an abortion. Jennifer fears that if one of her parents is notified that she is pregnant, her parents might force her to leave the house and will terminate financial support. She also fears that her parents will physically and emotionally abuse her if they find out that she was sexually active.

Tragically, the stories of Christy and Jennifer will be very similar to the stories of many minor girls in Florida if Florida's Parental Notice of Abortion Act ("Act")[4] is ultimately found constitutional. The Act provides:

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2. FLA. STAT. § 390.01115(3)(a) (2001).

3. Appellees' Supplemental Brief at 28, State v. N. Fla. Women's Health & Counseling Serv., Inc., 26 Fla. L. Weekly 419 (1st Dist. Ct. App. Feb. 9, 2001) (No. ID99-3279, ID99-3282, ID00-1983).

4. § 390.01115.

> [a] termination of pregnancy may not be performed or induced upon a minor unless the physician performing or inducing the termination of pregnancy has given at least 48 hours actual notice to one parent or to the legal guardian of the pregnant minor of his or her intention to perform or induce the termination of pregnancy.[5]

The Act further provides that notice is not required if: 1) an immediate abortion is medically necessary; 2) a parent or guardian waives notice; 3) the minor is "married or has had the disability of nonage removed;" 4) the minor has a minor child dependent on her; or 5) the minor has had the notice requirement removed through a judicial bypass procedure.[6]

This Act was supposed to become effective on July 1, 1999.[7] However, on June 15, 1999, physicians who perform abortions, clinics that provide abortion services, women's rights organizations, and some minor female members filed a complaint presenting a facial challenge to the Act, along with a motion for a temporary injunction enjoining the enforcement of the Act.[8] The circuit court granted the plaintiffs' motion for a temporary injunction on July 27, 1999.[9] On May 12, 2000, the circuit court granted a final judgment granting a permanent injunction and concluded that the Parental Notice of Abortion Act was unconstitutional.[10] On February 9,

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5. § 390.01115(3)(a).

6. § 390.01115(3)(b)(1)–(5). In order for the notice requirement to be removed through a judicial bypass procedure, the minor must petition the court through clear evidence that she is sufficiently mature to decide whether to terminate her pregnancy, that there is parental abuse, or that notice is not in her best interest. The court shall hear evidence relating to the emotional development, maturity, intellect, and understanding of the minor. If the court does not make a ruling within forty eight hours after the petition is filed, the petition is granted and the notice requirement is waived. The minor has a right to appointed counsel, confidential proceedings, a full transcript of the proceedings, and an expedited appeal if necessary. § 390.01115(4).

7. Appellants' Initial Brief at 1, *N. Fla. Women's Health & Counseling Serv., Inc.*, 26 Fla. L. Weekly at D419.

8. *N. Fla. Women's Health & Counseling Serv., Inc.*, 26 Fla. L. Weekly at D420.

> Ordinarily only a person or family whose privacy rights are infringed or threatened has standing to assert the rights. But a "recognized exception" (citations omitted) applies where enforcement of a challenged restriction would adversely affect the rights of non-parties, and there is no effective avenue for them to preserve their rights themselves.

Id. at D420–21. This exception applies to physicians in the present case because physicians' own interests are at stake here. They are subject to discipline if they violate the notice provisions of the Act.

9. *Id.* at D420.

10. *Id.*

2001, the First District Court of Appeal of Florida reversed this decision and found the statute constitutional.[11]

This article discusses whether Florida's Parental Notice of Abortion Act is constitutional under the Florida Constitution by analyzing the case of *State v. North Florida Women's Health & Counseling Services, Inc.*[12] Section II of this article explores the circuit court's opinion, which found the statute to be unconstitutional.[13] Section II also discusses the case of *In re T.W.*,[14] since the circuit court held that case was controlling precedent.[15] Section III focuses on the appellants' arguments. Section IV addresses the appellees' arguments. Section V examines the opinion of the First District Court of Appeal of Florida, which found the statute constitutional and reversed the circuit court's ruling.[16] Section VI discusses why the first district's holding should be reversed. Finally, Section VII concludes this comment.

II. THE CIRCUIT COURT'S RULING

On May 12, 2000, the circuit court ordered a final judgment granting a permanent injunction and concluded that the Parental Notice of Abortion Act was unconstitutional.[17] The circuit court based its conclusions of law on the seminal case of *In re T.W.*[18] In *In re T.W.*, the Supreme Court of Florida ruled that a parental consent to abortion statute violated the Florida Constitution's right to privacy.[19] The circuit court applied the same legal principles in the present case as were discussed in the case of *In re T.W.*[20] This section examines the legal principles applied in the case of *In re T.W.*

11. *Id.*

12. 26 Fla. L. Weekly D419 (1st Dist. Ct. App. Feb. 9, 2001). This article only addresses whether the Florida Parental Notice of Abortion Act is consistent with the Florida constitutional right to privacy. FLA. CONST. art. I, § 23. However, plaintiffs in this case also made claims that the Act is not consistent with the Florida Constitution's Equal Protection Clause, that the Act violates minor females and physicians' due process rights, and that the Act is in violation of the United States Constitution.

13. Final Judgment Granting Permanent Injunction at 1, *N. Fla. Women's Health & Counseling Servs., Inc.*, No. 99-3202 (Fla. 2d Cir. Ct. App. May 12, 2000) [hereinafter Final Judgment Granting Permanent Injunction].

14. 551 So. 2d 1186 (Fla. 1989).

15. Final Judgment Granting Permanent Injunction at 8.

16. *N. Fla. Women's Health & Counseling Serv., Inc.*, 26 Fla. L. Weekly at D424.

17. Final Judgment Granting Permanent Injunction at 1.

18. *Id.* at 8.

19. *In re T.W.*, 551 So. 2d at 1196.

20. *See generally* Final Judgment Granting Permanent Injunction at 8–16.

After reviewing *In re T.W*, the Appellants' Arguments section, summarizes the reasons why appellants in the present case feel that the circuit court's holding should be reversed.

In *In re T.W.*, the Supreme Court of Florida first discussed how the United States Supreme Court has, for the most part, left the issue of privacy to the states, like protection of a man's property and his own life.[21] The court stated that "[w]hile the federal Constitution traditionally shields enumerated and implied individual liberties from encroachment by state or federal government, the federal court has long held that state constitutions may provide even greater protection."[22] The court then held that the Florida citizens opted for a greater protection of the right to privacy when they approved, by a general election in 1980, Article I, Section 23, of the Florida Constitution:[23] "Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law."[24] The court further discussed how the drafters of the amendment rejected the words "unreasonable" or "unwarranted" before the phrase "governmental intrusion," making the right to privacy an even stronger right for the citizens of Florida.[25]

After discussing the right to privacy in Florida, the court entertained the issue of whether this right is implicated in a woman's decision to continue her pregnancy.[26] The court found that the right is in fact implicated and held that "[t]he Florida Constitution embodies the principle that 'few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision . . . whether to end her pregnancy. A woman's right to make that choice freely is fundamental.'"[27]

The next question the court addressed was whether this freedom of choice concerning abortion extends to minors.[28] The court concluded that it does, based on the language of the amendment: "[t]he right of privacy

21. *Id.* at 1191.

22. *Id. See, e.g.*, Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980).

23. *In re T.W.*, 551 So. 2d at 1191. At the time this opinion was written, Florida was one of the few states in this country having its own express constitutional provision guaranteeing an independent right to privacy. *Id.* at 1190.

24. FLA. CONST. art. I, § 23.

25. *In re T.W.*, 551 So. 2d at 1191.

26. *Id.* at 1192–93.

27. *Id.* at 1193.

28. *Id.*

extends to '[e]very natural person.'"[29] The court held that minors are natural people and, therefore, the amendment clearly applies to them.[30] Even though the court held that the right extends to minors, a person's right to privacy is not absolute.[31] A governmental intrusion into a person's private life is lawful,[32] only if the following standard is met:

> [s]ince the privacy section as adopted contains no textual standard of review, it is important for us to identify an explicit standard to be applied in order to give proper force and effect to the amendment. The right of privacy is a fundamental right which we believe demands the compelling state interest standard. This test shifts the burden of proof to the state to justify an intrusion on privacy. The burden can be met by demonstrating that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means.[33]

In applying this standard, the Supreme Court of Florida reviewed every state interest that is implicated in a minor's abortion decision to determine whether any of these interests were compelling.[34] The court found two interests implicated in a minor's abortion decision, "the health of the mother and the potentiality of life in the fetus."[35] To determine whether these interests would be deemed compelling, the court used the same analysis that was used by the Supreme Court in *Roe v. Wade*.[36] Under *Roe v. Wade*,[37] the mother's health does not become a compelling state interest until immediately following the end of the first trimester and the potentiality of life in the fetus first becomes a compelling state interest when the fetus becomes viable.[38] The court in *In re T.W.* discussed how the parental consent to abortion statute intrudes upon the privacy of the pregnant minor from conception to birth.[39] The court thus concluded that the health of the mother

29. *Id.*
30. *In re T.W.*, 551 So. 2d at 1193.
31. *Id.*
32. *Id.*
33. *Id.* at 1192 (quoting Winfield v. Div. of Pari-Mutuel Wagering, 477 So. 2d 544, 547 (Fla. 1985)). This standard applies to everyone, regardless of age. In *Winfield*, this standard was applied to adults, and in *In Re T.W.*, the standard was applied to a minor.
34. *In re T.W.*, 551 So. 2d at 1193–95.
35. *Id.* at 1193.
36. *Id.*
37. 410 U.S. 113 (1973).
38. *Id.* at 163.
39. *In re T.W.*, 551 So. 2d 1186, 1193 (Fla. 1989).

and the potentiality of life in the fetus were not compelling state interests, because the statute's "invasion of a pregnant female's privacy by the state for the full term of the pregnancy is not necessary for the preservation of maternal health or the potentiality of life."[40]

The *T.W.* court found that two more state interests were implicated in a minor's abortion decision, "protection of the immature minor and preservation of the family unit."[41] To determine whether these interests were compelling, the court examined section 743.065 of the *Florida Statutes*.[42] The court then noted that "under this statute, a minor may consent, without parental approval, to any medical procedure involving her pregnancy or her existing child—no matter how dire the possible consequences—except abortion."[43] The court concluded:

> [i]n light of this wide authority that the state grants an unwed minor to make life-or-death decisions concerning herself or an existing child without parental consent, we are unable to discern a special compelling interest on the part of the state under Florida law in protecting the minor only where abortion is concerned.[44]

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40. *Id.* at 1194.

41. *Id.*

42. *See id.* at 1195. Section 743.065 of the *Florida Statutes* provides:

> Unwed pregnant minor or minor mother; consent to medical services for minor or minor's child valid.—
>
> (1) An unwed pregnant minor may consent to the performance of medical or surgical care or services relating to her pregnancy by a hospital or clinic or by a physician licensed under chapter 458 or chapter 459, and such consent is valid and binding as if she had achieved her majority.
>
> (2) An unwed minor mother may consent to the performance of medical or surgical care or services for her child by a hospital or clinic or by a physician licensed under chapter 458 or chapter 459, and such consent is valid and binding as if she had achieved her majority.
>
> (3) Nothing in this Act shall affect the provisions of s. 390.001 [the abortion statute].

FLA. STAT. § 743.065 (2001).

43. *In re T.W.*, 551 So. 2d at 1195.

44. *Id.* In *N. Fla. Women's Health & Counseling Serv., Inc.*, the circuit court also found that sections 384.30 and 394.4784 of the *Florida Statutes* were inconsistent with the Parental Notice of Abortion Act. Final Judgment Granting Permanent Injunction at 11–12, State v. N. Fla. Women's Health & Counseling Serv., Inc., 26 Fla. L. Weekly D419 (1st Dist. Ct. App. Feb. 9, 2001). These statutes provide that physicians, health care professionals, and health facilities "may examine and provide treatment for sexually transmitted diseases to any minor" without any parental involvement, and a minor age 13 or over may obtain mental health diagnostic and evaluative services and outpatient crisis intervention services without

Since the court found none of these interests compelling, the court held the statute requiring parental consent to abortion unconstitutional.[45]

III. APPELLANT'S ARGUMENTS

The appellants in *North Florida Women's Health & Counseling Services, Inc.* first argued that the case of *In re T.W.* was not precedent, and therefore, the circuit court had no right holding the case of *In re T.W.* as controlling precedent.[46] The appellants argued that "under the Florida Constitution, both a binding decision and a binding precedential opinion are created to the extent that at least four members of the Court have joined in an opinion and decision."[47] The appellants argued that *In re T.W.* was a plurality opinion and "[t]he views of the justices in *T.W.* were divided into five separate opinions, none of which garnered the four votes necessary to constitute a precedential 'opinion' under the Florida Constitution."[48]

The appellants next argued that even if *In re T.W.* is precedent, "[t]he *T.W.* holding should be limited to the parental consent statute under consideration by the Court in that case."[49] In making this argument, the appellants cited to mainly federal law.[50] Appellants argued that the courts have recognized a critical distinction between parental consent and parental notice statutes.[51] Appellants then quoted a United States Supreme Court opinion:

> [T]he difference between notice and consent [requirements] was apparent to us before and is apparent now. Unlike parental consent laws, a law requiring parental notice does not give any third party the legal right to make the minor's decision for her, or to prevent her from obtaining an abortion should she choose to have one performed. We have acknowledged this distinction as "fundamental"

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parental involvement. FLA. STAT. §§ 384.30, 394.4784 (2001).

45. *In re T.W.*, 551 So. 2d at 1196.

46. Appellants' Initial Brief at 22, State v. N. Fla. Women's Health & Counseling Serv., Inc., 26 Fla. L. Weekly D419 (1st Dist. Ct. App. 2001) (No. 1999-3279).

47. *Id.* (quoting Santos v. State, 629 So. 2d 838, 840 (Fla. 1984)).

48. *Id.* (quoting Jones v. State, 640 So. 2d 1084, 1091 (Fla. 1994)).

49. *Id.* at 23.

50. *Id.* at 23–25.

51. Appellant's Initial Brief at 23 (citing Lambert v. Wicklund, 520 U.S. 292 (1997); Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502 (1990) (Akron II); Hodgson v. Minnesota, 497 U.S. 417 (1990); H.L. v. Matheson, 450 U.S. 398, 407 (1981)).

> and as one "substantially modify[ing] the federal constitutional challenge."[52]

Appellants stated that, unlike a consent statute, "a parental notice statute has neither 'the purpose nor effect of placing a substantial obstacle in the path of a woman seeking an abortion.'"[53]

A third argument of appellants was that the circuit "failed to give deference to the Legislature's findings and conclusions as to the 'compelling state interest' for the Act."[54] They argued that legislative determinations of public purpose and facts should not be ignored and are presumed correct and entitled to deference, unless clearly erroneous.[55]

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52. Appellants' Initial Brief at 23–24 (quoting *Hodgson*, 497 U.S. at 496).

53. *Id.* at 24 (quoting Planned Parenthood v. Casey, 505 U.S. 833, 877 (1992)).

54. *Id.* at 20.

> The legislature made the following specific findings:
> 1) "immature minors often lack the ability to make informed choices that take into account both immediate and long-range consequences;" 2) the "unique medical, emotional and psychological consequences of abortion are sometimes serious and can be lasting, particularly when the patient is immature;" 3) the "capacity to become pregnant and the capacity for mature judgment concerning the wisdom of an abortion are not necessarily related;" 4) parents ordinarily possess "information essential to a physician's exercise of his or her best medical judgment concerning the child;" 5) parents who are "aware that their minor daughter has had an abortion may better ensure that she receives adequate medical attention after her abortion;" 6) "parental consultation is usually desirable and in the best interests of the minor;"
>
> As to the compelling state interests in the Act, the statute provides as follows:
>
> > The Legislature's purpose in enacting parental notice legislation is to further the important and compelling state interests of protecting minors against their own immaturity, fostering family unity and preserving the family as a viable social unit, protecting the constitutional rights of parents to rear children who are members of the household, . . . reducing teenage pregnancy and unnecessary abortion, . . . and ensur[ing] that parents are able to meet their high duty to seek out and follow medical advice pertaining to their children, stay apprised of the medical needs and physical condition of their children, and recognize complications that might arise following medical procedures or services, to preserve the right of parents to pursue a civil action on behalf of their child before expiration of the statute of limitation if a facility or physician commits medical malpractice that results in injury to a child, and to prevent, detect, and prosecute batteries, rapes, and other crimes committed upon minors.

Id. at 20–21.

55. Appellants' Initial Brief at 21 (citing State v. Division of Bond Fin., 495 So. 2d 183 (Fla. 1986); Miami Home Milk Producers Ass'n v. Milk Control Bd., 169 So. 541

Finally, appellants argued that minors do not share the same degree of privacy as adults and, therefore, the state may impose restrictions on minors' privacy interests less intrusive than that of parental consent.[56] They argued that "the right to privacy of an unemancipated minor is more limited than that of an adult."[57] Appellants asserted that the

> Florida Legislature has in numerous areas prohibited or restricted a minor's ability to make choices implicating privacy, including marriage without parental consent (§ 741.04(1), donating body parts (§ 381.0041), consenting to sexual intercourse with an adult (§ 800.04), receiving a permanent tatoo (§ 877.04), obtaining a driver's license (§ 322.09), using a tanning facility (§ 381.89(7)), entering into contracts (Chapter 743), or remaining in public places during certain hours (§ 877.22).[58]

IV. APPELLEE'S ARGUMENTS

Among the appellants' arguments against the circuit court's holding was the claim that the circuit court should not have held the case of *In re T.W.* as controlling precedent, since *In re T.W.* was only a plurality opinion.[59] In response, appellees argued that all the legal principles applied by the circuit court in *North Florida Women's Health & Counseling Services, Inc.* were espoused by a majority of the justices in *In re T.W.*[60]

(1936)).

56. *Id.* at 25.

57. *Id.* at 26.

58. *Id.*

59. *Id.* at 22.

60. Appellees' Answer Brief at 20–21, State v. N. Fla. Women's Health & Counseling Serv., Inc., 26 Fla. L. Weekly D419 (1st Dist. Ct. App. Feb. 9, 2001). These legal principles include:

> 1. Florida's State Constitution, . . . establishes a right of privacy that is stronger and more broad in scope than the right to privacy found in the federal constitution. [*See In re* T.W., 551 So. 2d 1186, 1190–92, 1197 (Fla. 1989)]
>
> 2. This right to privacy protects a woman's right to freely choose whether or not to continue her pregnancy without interference from government or third persons. [*See id.* at 1192–93,1197]
>
> 3. This right to choose to terminate extends to minors. [*See id.* at 1193, 1197]
>
> 4. It is a right so fundamental that the State may intrude upon it only if it can demonstrate (a) a compelling state interest in doing so; and (b) seeks to accomplish it through the least intrusive means. [*See id.* at 1192, 1197]

Furthermore, appellees contended that the Supreme Court of Florida has repeatedly recognized the precedential weight of the *In re T.W.* decision, and therefore, the circuit court was correct in applying this decision as controlling precedent.[61]

Another argument of the appellants was that even if *In re T.W.* is precedent, "[t]he *T.W.* holding should be limited to the parental consent statute under consideration by the Court in that case."[62] Appellees responded to this argument by claiming "that the parental notice law intrudes upon minors' right to choose abortion and is similar in effect to a consent law."[63] Appellees averred that:

> Under both notice and consent laws, minors fear that telling their parents about an impending abortion will result in abuse, being expelled from the home, disturbing an already dysfunctional or troubled family situation, or a parent exercising a de facto veto power over the minor's decision by, for example, confining her to the house or threatening punishment.[64]

A third argument of the appellants was that the circuit court failed to give deference to the legislature's findings and conclusions as to the "compelling state interest" for the Act.[65] In response to this argument, appellees claimed that the legislative findings contained in the Act do not satisfy the state's burden of demonstrating that the Act furthers a compelling state interest.[66] Appellees asserted that declaring a certain objective a

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5. Neither the health of the mother nor the potentiality of life in the fetus can be a compelling state interest justifying an intrusion on the right to choose if it applies to terminations of pregnancies within the first trimester. [*See id.* at 1193–94, 1197–98]

6. The State's interests in protecting an immature minor and fostering the integrity of the family, while important and worthy, do not justify restricting a minor's right to choose abortion where similar restrictions are not imposed on comparable choices or decisions. [*See id.* at 1194–95, 1198–99]

Id.

61. Appellees' Answer Brief at 22 (citing B.B. v. State, 659 So. 2d 256, 258 (Fla. 1995); Jones v. State, 640 So. 2d 1084, 1086–87 (Fla. 1994); Post-Newsweek Stations v. Doe, 612 So. 2d 549, 552 (Fla. 1992)).

62. Appellants' Initial Brief at 23.

63. Appellees' Answer Brief at 27.

64. *Id.* at 27–28.

65. Appellants' Initial Brief at 20.

66. Appellees' Answer Brief at 29–31.

compelling state interest is not enough.[67] It must be demonstrated through comprehensive and consistent legislative treatment.[68] Appellees then stated that "[i]f the state could meet the compelling interest standard by inserting the word 'compelling' into legislative findings, the protection of fundamental rights under Florida law would be eviscerated, because any statutory restriction on privacy could satisfy this standard by legislative self-proclamation."[69]

Finally, appellants argued that minors do not share the same degree of privacy as adults, and therefore, the state may impose restrictions on minors' privacy interests less intrusive than that of parental consent.[70] In reply, appellees contended that "whether minors have the same right to privacy as adults, and whether the state may have compelling state interests that allow it to intrude on minors' privacy rights although not on the rights of adults," are two separate concepts.[71] Therefore, the fact that many laws prohibit or restrict a minor's ability to make choices implicating privacy, does not mean that a minor does not have a right to privacy. It simply means that each of those statutes furthers a compelling state interest through the least intrusive means.

V. THE FIRST DISTRICT COURT OF APPEAL'S RULING

The court began its analysis by pointing out that the Florida constitutional right to privacy has been interpreted more broadly than any right to privacy guaranteed under the federal Constitution.[72] The court then cited to *In re T.W.* for the proposition that the "Right to Privacy is implicated when the Legislature imposes restrictions on the ability, even of minors, to obtain abortions."[73] The court also cited the plurality opinion of *In re T.W.* for the proposition that while minors' rights to privacy include "freedom of choice concerning abortion," they are not coextensive with adults' rights to privacy and "that a minor's rights are not absolute."[74]

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67. *Id.* at 29.
68. *Id.*
69. *Id.* at 30.
70. Appellants' Initial Brief at 25–26.
71. Appellees' Answer Brief at 24.
72. State v. N. Fla. Women's Health & Counseling Serv., Inc., 26 Fla. L. Weekly D419, D421 (1st Dist. Ct. App. Feb. 9, 2001).
73. *Id.* at D421.
74. *Id.* (citing *In re T.W.*, 551 So. 2d at 1193).

The court then noted that since the Act requires that a minor's parent or guardian be notified that [the minor] intends to undergo an abortion, the Act plainly interferes with "the right to be let alone and free from governmental intrusion into the person's private life."[75] The court therefore concluded that in order to withstand a constitutional challenge, the Act must serve a compelling state interest and do so by the least intrusive means practicable.[76] The court then discussed whether the Act does in fact serve a compelling interest.[77] The court noted that it does not have the authority to strike down the Parental Notice of Abortion Act even if the state only establishes that one interest is a compelling state interest and the Act furthers that interest by the least intrusive means.[78] The First District Court of Appeal then held that the Act does establish at least one compelling state interest and accomplishes this interest through the least intrusive means:

> [b]y facilitating the ability of parents and guardians to fulfill their duty to provide appropriate medical care for their daughters or wards, the Act serves a compelling state interest. Parents are legally responsible for their minor children's health insofar as it is in their power to foster it. They have a duty to stay alert to their minor children's medical needs, and to secure appropriate medical assistance if they are able to do. *See* § 827.03(3)(a)1., Fla. Stat. (1999) (defining neglect as including the failure to provide necessary medicine and medical services); *see also* Finn v. Finn, 312 So. 2d 726, 730 (Fla. 1975) ("[A] parent has the obligation to nurture, support, educate, and protect his minor children and the child has the right to call on him for the discharge of this duty.")[79]

In coming to this conclusion, the First District Court of Appeal cited *In re T.W.*, and held that "[a]n important step in gauging whether an interest should be deemed compelling is ascertaining whether the Legislature has acted consistently in protecting the interest."[80] The court then held that, since it is necessary for a minor child to obtain consent before that child can receive medical treatment (and therefore the parent must receive notice), the

75. *Id.*
76. *Id.*
77. *N. Fla. Women's Health & Counseling Serv., Inc.*, 26 Fla. L. Weekly at D421.
78. *Id.* at D422.
79. *Id.*
80. *Id.*

legislature has acted consistently in protecting the state's general interest in facilitating adult assistance in managing medical problems.[81]

It is the subject of the state's compelling interest that causes the difference in opinion between the First District Court of Appeal and the circuit court. The lower court noted that, according to the Parental Notice of Abortion Act, notice is required to a parent or guardian of a minor before that minor may obtain an abortion.[82] Yet, the circuit court also noted that under Florida law, notice is not required to a parent or guardian of a minor before that minor may obtain pregnancy treatment other than an abortion.[83] Further, the circuit court held that, under Florida law, notice is not required to a parent or guardian of a minor before that minor may obtain treatment for sexually transmitted diseases.[84] The circuit court thus concluded that the legislature's treatment of a minor's decision to choose an abortion is inconsistent with its treatment of comparable decisions by a minor; hence, it found the Parental Notice of Abortion Act unconstitutional.[85] The First District Court of Appeal rejected the contention that the laws regarding pregnancy related treatment and treatment of sexually transmitted diseases substantiate a legislative discounting of the importance of adult assistance in managing minors' post-surgical care.[86] The court stated that "[t]here are obvious and important differences between sexually transmitted diseases, pregnancies that go to term, and abortions and these differences logically account for the differential statutory treatment."[87]

The court noted that the incidence of sexually transmitted diseases is rising at an alarming rate.[88] The court further stated that

> rather than risk a (larger) epidemic, the Legislature has made a clearly rational decision to minimize barriers to treatment for sexually transmitted diseases. Not requiring minors to notify their parents or guardians in order to obtain medical treatment for sexually transmissible diseases evinces a public policy which in no way undermines or discredits the state's interest in trying to assure the

81. *Id.*

82. Final Judgment Granting Permanent Injunction at 1, State v. N. Fla. Women's Health & Counseling Serv., Inc., (Fla. 2d Cir. Ct. 2000) (No. 99-3202).

83. *N. Fla. Women's Health & Counseling Serv., Inc.*, 26 Fla. L. Weekly, at D422.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. State v. N. Fla. Women's Health & Counseling Serv., Inc., 26 Fla. L. Weekly D419, D422 (1st Dist. Ct. App. Feb. 9, 2001).

> adequacy of minors' care while they are recovering from surgery, including abortions.[89]

The First District Court of Appeal of Florida then gave its reason why it felt that pregnancies that go to term were treated differently by the legislature than abortions.[90] The court reasoned that absent abortion, pregnancy-related treatment is by no means always surgery.[91] "Such surgery as is necessary commonly occurs at the time of birth. By then most minors' pregnancies are likely to be known to a parent or guardian so that a formal, legal requirement to give notice would not meaningfully advance any state purpose."[92]

VI. THE SUPREME COURT OF FLORIDA SHOULD REVERSE THE HOLDING OF THE FIRST DISTRICT COURT OF APPEAL

The first district agreed with the circuit court that: 1) the Florida constitutional right to privacy is greater than the federal constitutional right to privacy;[93] 2) the right to privacy is implicated when the legislature imposes restrictions on the ability to obtain abortions;[94] 3) minors also enjoy rights to privacy under the Florida Constitution;[95] 4) in order to withstand a constitutional challenge, the Act must serve a compelling state interest and do so by the least intrusive means practicable;[96] and 5) an important step in gauging whether an interest should be deemed compelling is ascertaining whether the legislature has acted consistently in protecting the interest.[97] The first district only disagreed with the circuit court in that the circuit court found that the Act does not serve a compelling state interest and the first district found that it does.[98] Therefore, the first district reversed the circuit court's holding solely because the first district found that the Act serves a compelling state interest. Consequently, the first district's holding should be reversed if its reasoning that the Act serves a compelling state interest is

89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *N. Fla. Women's Health & Counseling Serv., Inc.*, 26 Fla. L. Weekly at D421.
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. *N. Fla. Women's Health & Counseling Serv., Inc.*, 26 Fla. L. Weekly at D421.

illogical. With that in mind, the following discussion attempts to show that the court's reasoning here is, in fact, illogical.

In the first district's opinion, the court cited to the case of *In re T.W.* on numerous occasions and clearly recognized the precedential weight of the *In re T.W.* decision. However, the first district ruled completely against the Supreme Court of Florida when it found that the Act serves a compelling state interest. In *In re T.W.*, the Supreme Court of Florida found that the Parental Consent to Abortion Act was unconstitutional, because the legislature had not acted consistently in protecting the immature minor and the family unit.[99] The Supreme Court of Florida found that, under Florida law, a minor may consent, without parental approval, to any medical procedure involving her pregnancy, except abortion.[100] The court then found that:

> In light of this wide authority that the state grants an unwed minor to make life-or-death decisions concerning herself or an existing child without parental consent, we are unable to discern a special compelling interest on the part of the state under Florida law in protecting the minor only where abortion is concerned.[101]

In the present case, the first district held, in complete contrast to *In re T.W.*, that "[f]or parental notification purposes, the legislature also has a legitimate basis for distinguishing between abortion and other pregnancy-related medical treatments."[102] The court reasoned that, absent abortion, pregnancy-related treatment is by no means always surgery.[103] "Such surgery as is necessary commonly occurs at the time of birth. By then most minors' pregnancies are likely to be known to a parent or guardian so that a

99. *In re T.W.*, 551 So. 2d 1186, 1195 (Fla. 1989).

100. *Id.*

101. *Id.* In *N. Fla. Women's Health & Counseling Serv., Inc.*, the circuit court also found that sections 384.30 and 394.4784 of the *Florida Statutes* were inconsistent with the Parental Notice of Abortion Act. Final Judgment Granting Permanent Injunction at 11–12, State v. N. Fla. Women's Health & Counseling Serv., Inc., 26 Fla. L. Weekly D419 (1st Dist. Ct. App. Feb. 9, 2001). These statutes provide that physicians, health care professionals, and health facilities "may examine and provide treatment for sexually transmitted diseases to any minor" without any parental involvement, and a minor aged thirteen or over may obtain mental health diagnostic and evaluative services and outpatient crisis intervention services without parental involvement. FLA. STAT. §§ 384.30, 394.4784 (2000).

102. *N. Fla. Women's Health & Counseling Serv., Inc.*, 26 Fla. L. Weekly at D422.

103. *Id.*

formal, legal requirement to give notice would not meaningfully advance any state purpose."[104]

The first district also held that the state has an interest in encouraging minors to seek treatment for sexually transmitted diseases, but has no such interest in encouraging abortions.[105]

These alleged differences are no different now than when *In re T.W.* was decided and the Supreme Court of Florida in *In re T.W.* obviously considered them insignificant when the court held that the Florida Legislature had acted inconsistently in protecting the immature minor and the family unit.[106]

For the foregoing reasons, the holding of the First District Court of Appeal of Florida is inconsistent with the Supreme Court of Florida's holding in *In re T.W.* Furthermore, it is illogical, and therefore, should be reversed.

VII. CONCLUSION

The issue of the constitutionality of the Parental Notice of Abortion Act is far from over. There are many possibilities of what the future may hold. One slight possibility is that the plaintiffs will choose not to do anything at all and, in effect, surrender. If this happens, trial courts throughout the state will have to obey the first district's holding that the Act is constitutional.[107]

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104. *Id.*

105. *Id.*

106. Final Judgment Granting Permanent Injunction at 12, *N. Fla. Women's Health & Counseling Serv.*, Inc., 26 Fla. L. Weekly at D419.

107. This will be the result, because the issue of whether the Parental Notice of Abortion Act is constitutional has not been addressed by any other District Court of Appeal in Florida. *State v. Hayes* was the first case in Florida to address this issue. This case held that in absence of a contrary Fourth District Court of Appeal opinion a Palm Beach County circuit court was bound to follow an opinion of the First District Court of Appeal.

> In Florida the District Courts of Appeal are courts of final appellate jurisdiction except for a narrow classification of cases made reviewable by the Florida Supreme Court (citations omitted). The District Courts of Appeal are required to follow Supreme Court decisions. As an adjunct to this rule it is logical and necessary in order to preserve stability and predictability in the law that, likewise, trial courts be required to follow the holdings of higher courts District Courts of Appeal. The proper hierarchy of decisional holdings would demand that in the event the only case on point on a district level is from a district other than the one in which the trial court is located, the trial court be required to follow that decision (citations omitted). Alternatively, if

A more likely possibility is that plaintiffs will file a motion to stay the issuance of the mandate from the First District Court of Appeal, pending review by the Supreme Court of Florida.[108] If the first district grants a stay pending review by the Supreme Court of Florida, then the Parental Notice of Abortion Act will not become effective until the Supreme Court of Florida has made a ruling on the case. However, the Supreme Court of Florida might make a ruling not to make a ruling. In other words, they might deny certiorari. This is unlikely, and the Supreme Court of Florida will most likely hear this case, because it raises questions of great public importance that are likely to recur.[109] It is hard to make a prediction on how the Supreme Court of Florida will rule, but if it affirms the decision of the First District Court of Appeal, this case is most likely over. Even if the United States Supreme Court would decide to hear this case, it would most likely hold the Parental Notice of Abortion Act constitutional. The reason for this is that in *Lambert v. Wickland*,[110] the United States Supreme Court upheld a Montana notice statute that is very similar to the statute in the present case.[111]

No matter what happens in the future of this case, the issues raised will forever be debated. This is because, in some cases, it is extremely beneficial for a parent to receive notice before his or her daughter obtains an abortion, while in other cases, it is very detrimental. This makes it very hard for us to decide on the constitutionality of a law that requires notice for the whole state of Florida. Fortunately, we do not need to make this decision. We leave this to the courts, for judges have and will continue to struggle with cases involving such difficult issues.

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the district court of the district in which the trial court is located has decided the issue, the trial court is bound to follow it.

State v. Hayes, 333 So. 2d 51, 53 (Fla. 4th Dist. Ct. App. 1976).

108. *Id.* at 54.

109. *Id.*

110. 520 U.S. 292 (1997).

111. *Id.* at 299.