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IS IT THE MINOR'S RIGHT: THE MINOR'S ABORTION DECISION IN VIRGINIA

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The Abortion Right

In the 1973 landmark decision of Roe v. Wade[1], the United States Supreme Court upheld the fundamental constitutional right of women to an abortion during the first trimester of pregnancy. Since that time "there has been a political backlash [at the state level] to limit and destroy that right."[2] In Virginia,

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[1] 410 U.S. 113 (1973).

2 Note, Restrictions on the Abortion Rights of Minors, 3 Harvard Womens Law Journal, 119 (1980). The case law denotes the backlash to the abortion decision in Roe v. Wade as well. Note: Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976), (court invalidated portions of a Missouri statute which imposed spousal and parental consent requirements). Beal v. Doe and Maher v. Roe, 432 U.S. 438 (1977), (companion cases on the question of medicaid funding of abortions). Bellotti v. Baird, 443 U.S. 622 (1979), (court held unconstitutional a Massachusetts statute requiring parental consent and absolute veto power over the abortion decision of a minor child). H.L. v. Matheson, 101 S.Ct. 1164 (1981), (state statute requiring physician to notify minor's parents before performing an abortion on their minor child held constitutional). City of Akron v. Akron Center for Reproductive Health, Inc., et al, 462 U.S. 416 (1983), (local ordinance requiring all abortions performed after first trimester to be performed in a hospital held unconstitutional, the section declaring all minors under age of 15 incapable of making an abortion decision as a mature person and providing that abortion is only in minor's best interest when parents' consent held unconstitutional, section requiring a waiting period of 24 hours held unconstitutional). Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476 (1983), (Missouri statute requiring all abortions after 12 weeks of pregnancy to be performed in a hospital held unconstitutional because it "unreasonably infringes on a woman's constitutional right to obtain an abortion." J. Powell at 476.). Simopoulos v. Virginia, 462 U.S. 506, (1983), (court upheld a Virginia abortion statute requiring all second trimester abortions to be performed in

attempts to regulate abortions have focused on minors and their procreation decisions. Generally, states have attempted to regulate minors' procreation decisions by restricting physicians from performing abortions on minors without parental consent or notification. Though unsuccessful in Virginia, parental consent bills have been proposed in the Virginia Assembly in both the 1985 and the 1986 sessions.[3]

Currently in Virginia a pregnant minor may go to any abortion clinic in the state and receive an abortion if she is still in the first trimester of her pregnancy and has the money to pay for the procedure. The minor is not required to have an adult present nor is she required to notify her parents or obtain their consent. Some clinics impose age restrictions and will accept young women under the age of 14 only if accompanied by a parent or legal guardian. Minors in the second trimester of pregnancy may also receive an abortion; but the procedure must be performed in a licensed hospital.[4] The hospital is not required to be a "general-acute care facility", a licensed outpatient clinic falls under the term hospital as provided by statute. The recently proposed legislation would force a pregnant minor to either: 1) have the consent of one of her parents or legal guardians for an abortion br 2) make application to the juvenile and domestic relations district court for that court to determine whether or not to authorize an abortion for the minor. The decision would be based upon a showing by the minor that she is

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licensed outpatient clinics because it was not an unreasonable infringement, unlike Akron and Ashcroft where abortions were required to be performed in "general, acute-care facilities.").

[3] 1985 Session, House Bill number 1364 "requirements for abortions for minors," proposed by Delegate Morrison, Passed House of Delegates. Senate Committee for Courts of Justice amended 1364. The House rejected the amendment by the Senate.

1986 Session, Senate Bill number 342 proposed by Senator Goode, killed in Senate Committee on Education and Health.

[4] See Simopoulos v. Virginia, supra at note 2.

"sufficiently mature and well informed"[5] or that the abortion is in the "best interest"[6] of the minor.

History of Children's Rights

At common law, minors had only limited personal rights other than general rights to receive minimal parental or state care.[7] Today, "[w]hile a child is not beyond constitutional protection simply because of minority, the court has traditionally acknowledged three reasons why the rights of minors cannot be equalled with those of adults: first, [it has recognized] the 'peculiar vulnerability' of children. Second, the court has limited freedom in those areas where children may be unable to make critical decisions in an informed manner. Third, the court... [has recognized] the parental role in child rearing, ... and found parental influence and authority over the child [to be] preferable to that of the state."[8] Historically minors were required to obtain parental consent for medical treatment[9] as it was presumed that a minor could not give such consent[10] because of his lack of "experience, knowledge, and maturity."[11] "Today this legal concept is reflected in many restrictions of minors'

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[5] 1986 Senate Bill Number 342 at 3.

[6] Ibid.

[7] supra note 2, 3 Harvard Womens Law Journal, at 122.

[8] Note, Statute requiring parental consent found to unconstitutionally burden right to abortion, Bellotti v. Baird, 18 Journal of Family Law 403, at 405.

[9] see generally Pilpel, Minor's Rights to Medical Care, 36 ALB. L. Rev. 462 (1972).

[10] see: Pilpel, supra note 8, Note, Sexual Privacy: Access of a Minor to Contraception, Abortion and Sterilization Without Parental Consent, 12 U. Richmond L. Rev. 221 (1977), Note, Minor's Rights of Privacy: Limitations on State Action After Danforth and Carey, 77 Colum. L. Rev. 1216, 1222 nn. 41 and 42.

[11] Note, The Minor's Right to Consent to Abortion: How Far is Oklahoma From Akron? 37 Okla. L. Rev. 780, 786 (1984).

rights that further the significant state interest[12] of compensating for a minor's incapacity."[13] Minors are not free to contract, vote, or work when and where they please. States and the federal government have imposed regulations to protect minors in the workplace. The freedoms guaranteed to all who are legally present in the United States[14] may be restricted with regard to minors.[15]

The court in In re Gault[16] extended to minors the guarantees of procedural due process.[17] In other areas such as school desegregation, the Court assumed that a child's constitutional right to equal protection of the laws was the same as adults.[18] Gault was a significant doctrinal advance because of the focus of the decision on the constitutionality of differing procedural

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[12] Note, Parental Notice Statutes: Permisible State Regulation of Minor's Abortion Decision, 49 Fordham L. Rev. 81, 96 (1980), citing (Bellotti v. Baird, 443 U.S. 622, 635-36 (1979) (Bellotti II); Wynn v. Carey, 582 F.2d 1375 (7th Cir. 1978).

[13] Ibid. citing generally, Planned Parenthood v. Danforth, 428 U.S. 52, 102 (1976) (Stevens, J. concurring in part and dissenting in part); Ginsberg v. New York, 390 U.S. 629, 650 (1968) (Stewart, J., concurring); J. Calamari & J. Perillo, The Law of Contracts 8-1, 8-4, at 230, 235 (2d ed. 1977); W. Prosser, Handbook on the Law of Torts 18, 134, at 102, 996-99 (4th ed. 1971) Note, Parent, Child, and the Decision to Abort: A Critique of the Supreme Court's Statutory Proposal in Bellotti v. Baird, 52 S. Cal. L. Rev. 1869, at 1871-72 (1979).

[14] See Bridges v. Wixon 326 U.S. 135 (1945), (all persons legally within the borders of the United States are subject to the guarantees of the Constitution).

[15] See generally Planned Parenthood v. Danforth, and Ginsberg v. New York, supra, note 12.

[16] 387 U.S. 1 (1967).

[17] Foye, supra note 11, at 97.

[18] Note, The Supreme Court and a Minor's Abortion Decision, 80 Colum. L. Rev. 1251, 1253 (1980), (citing at n. 9 Brown v. Board of Educ., 347 U.S. 483, 490-92 (1954)).

standards accorded adults and juveniles.[19] The court has also emphasized that "[a] minor's first amendment rights may be abridged or limited in ways not permissible if the rights of adults were involved."[20] The argument that constitutional rights may not be restricted solely because of age based restrictions is flawed however. "The Constitution itself recognized attainment of a certain age as a prerequisite to the exercise of some rights."[21]

The state has traditionally been granted great latitude in the regulation of minors' conduct. The question of when a state may permissibly restrict a minor's right to an abortion was not completely answered by the resolution of the parental consent issues in the Danforth[22] and Bellotti[23] cases.[24] In H.L. v. Matheson,[25] the court's holding concerning the constitutionality of a Utah statute that required parental notification by a physician prior to performing an abortion on a minor was limited to dependent, unemancipated minors who failed to make a showing of

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[19] Id. at 1253.

[20] 49 Fordham L. Rev., supra note 11, at 98. see n. 83 comparing Ginsberg v. New York, 390 U.S. 629, 637-40, 645 (1968) (cannot sell to minors certain obscene materials which can be sold to adults) with Tinker v. Des Moines Independent School District, 393 U.S. 503, 512-14 (1969) (minors first amendment right to wear black armbands to protest Vietnam war cannot be arbitrarily abridged). The Tinker court emphsized that minor's first amendment rights may not be arbitrarily restricted. Id. at 505-507.

[21] Ibid., citing at n. 82, U.S. Const. Art. I 2, cl. 2 (age of 25 to be a member of House of Representatives); U.S. Const. art. I 3, cl. 3 (age of 30 to be Senator); U.S. Const. Art. II, 1, cl. 5 (age of 35 to be President); see U.S. Const. amend. XXVI, 1 (right to vote afforded those 18 or older).

[22] 428 U.S. 52 (1976).

[23] 443 U.S. 622 (1979).

[24] Okla. L. Rev., supra note 10, at 796.

[25] H.L. v. Matheson, 450 U.S. 398 (1981).

maturity.[26] Obviously, determining the constitutionality of the proposed Virginia abortion consent legislation would be speculative. The Court has, however, enumerated several requirements that statutes must meet to be deemed constitutional. This paper will apply those standards to the proposed legislation and determine whether or not the proposed statutes fulfill the enumerated requirements.

Why Parental Consent?

Statutes requiring parental consent for a minor's abortion have been justified on several grounds. The Supreme Court has recognized that a state can restrict a minor's constitutional rights because of the minor's vulnerability, the minor's inability to make an informed decision, and the countervailing interests of the minor's parents.[27] In Planned Parenthood of Central Missouri v. Danforth, the court held that no state had the constitutional authority to give parents or any third party an absolute veto power over the decision of a doctor and the minor to terminate the minor's pregnancy.[28] However, the court also stated that the holding "does not suggest that every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy."[29]

As noted before, in Bellotti III the Court found unconstitutional a Massachusetts statute that required parental or judicial consent before an unmarried minor could have an abortion. The statute was struck down because it failed to allow mature minors to have an abortion without parental consent and it did not provide the minor with an opportunity to obtain a judicial determination that she was mature enough to consent to an

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[26] Id. at 407.

[27] Bellotti, 443 U.S. 622, 634.

[28] Danforth, 428 U.S. at 74.

[29] Id. at 75.

abortion or that, while not mature, the abortion would be in her best interest.[30] Recognizing the significant state interest in supporting the role of parents in child-rearing, however, the court stated that parental consent is a qualification that typically may be imposed on a minor's right to make important decisions.[31] The Court explained

> "as immature minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences, a state reasonably may determine that parental consultation often is desirable and in the best interest of the minor. It may further determine that such consultation is particularly desirable with respect to the abortion decision.... There can be little doubt that the state furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child."[32]

A young girl seeking an abortion is under a great amount of emotional stress. Frightened and confused she may be ill-equipped to make her decision without mature advice and support.[33] The court has expressed concern that if that advice does not come from her parents, the minor may not get it elsewhere. Abortion clinics would not likely provide adequate counsel since a decision not to abort would be contrary to their financial interest.[34]

The Supreme Court has frequently reaffirmed the significant state interest in protecting parental authority over the rearing of children.[35] This relationship between parent and child is

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[30] Bellotti, at 651.

[31] Id. at 640.

31 Id. at 640-641.

[33] Id. at 641.

[34] 49 Fordham L. Rev. 100, supra at note 11, at n. 96.

[35] Matheson at 410.

constitutionally protected.[36] In Matheson, the court restated that parents have an important guiding role to play in the upbringing of their children and that this includes counseling them on important decisions.[37]

Parental consent and notice statutes also serve a significant state interest by providing an opportunity for parents to supply essential medical and other information to a physician.[38] The decision to have an abortion, especially when the patient is immature, can have lasting medical, emotional and psychological consequences.[39] Parents can provide medical and psychological data that may be important to the physician. Parents may also be able to refer the physician to other sources of relevant data, such as a family physician.[40]

The recent Supreme Court decisions on the abortion issue show that constitutional justification for parental consent statutes is not lacking. They serve important state interests. The important issue to be considered is procedurally, how does a state preserve the minor's right and simoultaneously protect her interest when they may conflict.

Judicial Consent

It is clear from the decision of the Court in Bellotti that a state may require parental consent if it also provides a judicial or administrative procedure that the minor could use without first notifying her parents.[41] The court stated, "[w]e conclude...that every minor must have the opportunity - if she so

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[36] Id. at 410.

[37] Id. at 410.

[38] Id. at 411.

[39] Id. at 411.

[40] Id. at 411.

[41] Bellotti v. Baird, at 647.

desires - to go directly to a court without first consulting or notifying her parents."[42] Justice Stevens, however, questioned the Powell model.[43] There is a strong argument that "[t]he burden of initiating judicial proceedings would raise formidable obstacles to the exercise of abortion rights by minors, who generally are among those with 'little access to legal help'."[44]

This argument may not be as meritorious as it first appears. Those physicians and clinics that perform abortions are professional, and should be very familiar with judicial procedures. They would inform a minor that she must have either parental or judicial consent before an abortion may be performed. The clinics, for business purposes, would surely keep all of the forms and petitions that would be necessary to commence judicial proceedings. Thus, the obstacle of knowing how to initiate proceedings and initiating those proceedings in fact could be circumvented or hurdled by the clinics themselves. The proposed Virginia statutes also provide that the minor or next friend shall make application to the Juvenile and Domestic Relations Court, and the clerk, on request, will assist in preparing the petition and notices.[45] It may therefore be the case that a judicial proceeding is not in fact an unconstitutional burden on the child bearing minor.

There are however more compelling arguments that a judicial proceeding is a formidable obstacle unconstitutionally impeding the right of minors to abort. We must view these obstacles with the recollection that "...a regulation which impinges on the abortion decision without unduly burdening it will survive

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[42] Ibid.

[43] (Stevens, J. concurring at 656 n. 4).

[44] Note, The Supreme Court and the Minor's Abortion Decision, 80 Colum. L. Rev. 1251, 1261 (1980) (citing at n. 58; Fuentes v. Shevin, 407 U.S. 67, 83 n. 13 (1972). See also Duchesne v. Sugarman, 566 F.2d 817, 828 (2nd Cir. 1977) (noting "the burden of initiating judicial review")).

[45] Senate Bill Number 342, at 3.

constitutional attack if it reasonably furthers a proper state purpose."[46]

Many commentators note the importance of timing in abortion procedures. It is quite possible that a delay in the abortion process to allow for a judicial determination could potentially deny a minor her constitutional right to abort during the appropriate trimester. The proposed Virginia statute however requires a hearing on the merits "...as soon as possible but no later than five days after the filing of the petition."[47] Further, the proposed legislation requires that the Court render a decree "...within forty-eight hours of the hearing."[48]

This statute thus grants the Court a total of seven days to dispense of a minor's petition for an abortion. Though this may be a burden on the minor's right to abort, it appears to be a permissable burden. The Court in Bellotti by requiring a judicial alternative surely envisioned that this alternative would require at least some delay in the abortion process. The Virginia proposal strictly specifies that the Court shall hear the petition and render a decree - "as expeditiously as possible"[49] and further places an absolute time limitation on the court. It thus strictly denotes that time is a critical factor in the abortion process and speaks to limit the burden placed on the minor by the judicial determination. For these reasons, it appears that the proposed statute does not create an impermis-

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[46] Note, State statute requiring both parental consent and court order for unmarried minors seeking abortions and spousal notification and consultation for married women seeking abortions held unconstitutional, 19 Journal of Family Law 149, 151 (1980). Note cites Scheinberg v. Smith, 482 F. Supp. 529 (S.D. Fla. 1979).

[47] Senate Bill Number 342, at 3.

[48] Id. at 4.

[49] Id. at 3,4.

sable delay in the abortion process.[50]

The proposed statute conforms to Justice Powell's suggested model of a judicial alternative set forth in Bellotti.[51] It specifically states what three decisions the court may reach. The court may find that the minor is mature and "grant majority rights for the purpose of consenting to the abortion"[52], or the court may find that an abortion is in the "best interest"[53] of the minor and give judicial consent for the abortion. The court may also deny the petition, but the statute requires that the Court set forth the grounds for the denial.[54]

It has been suggested that there is no basis for assuming the improvidence of a minor, and that without that assumption there is inadequate constitutional justification for imposing upon her the burden of proving her entitlement to the exercise of a constitutional right.[55] However, as has previously been discussed in this article, the law has traditionally limited the scope of minors' rights on the presumption of their incapacity.

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[50] See Zbaraz v. Hartigan, 763 F.2d 1535 (7th Cir. 1985) (Illinois parental consent statute providing district judicial consent alternative to minor upheld. Time requirements inherent in process not deemed unconstitutional burden on minors rights. Section of act imposing a twenty-four hour waiting period held unconstitutional and severable from act) Act cited at Zbaraz v. Hartigan, 584 F. Supp. 1452, 1455 (N.D. Illinois, E.D. 1984).

[51] See Bellotti v. Baird, 443 U.S. 622 (1979), at 643-647.

[52] Senate Bill number 342 at 4.

[53] Ibid.

[54] Ibid.

[55] 80 Colum. L. Rev. 1251, supra at note 43, at 1262, citing at n. 60 (Speiser v. Randall, 357 U.S. 513, 525 - 26 (1958) (unconstitutional obstruction of a fundamental right though the state's allocation of the burden of proof in litigation regarding the right); cf. Addington v. Texas, 441 U.S. 418, 423-24 (1979) (determination of standard of proof on basis of importance of the interests of the litigants affected by the judgment). Compare Shuttlesworth v. Birmingham, 394 U.S. 147, 154-55 (1969), with Niemohko v. Maryland, 340 U.S. 268, 276-86 (1951) (Frankfurther, J., concurring) (constitutionality of administrative denials of permission to exercise constitutional rights)).

The fact that the Court has placed the burden on a minor to prove either that she is mature or that an abortion is in her best interest is adequately justified. This ruling reflects the traditional notion that during the formative years, "minors often lack the experience, perspective, and judgement to recognize and avoid choices that could be detrimental to them."[56] If the state may constitutionally restrict this right, and the minor falls in the category of restricted persons, it is proper that she bear the burden of showing why this constitutional restriction should not apply.

The proposed Virginia statutes appear to be constitutional. Their purpose is to protect the states' interest in the parent, the minor, the fetus, and the family. The states' interests are served when a minor's best interests are protected, and her health is not placed in jeopardy. "[T]he state has a parens patriae interest in preventing improvident decisions by minors."[57]

Recent Development

On June 11, 1986, the United States Supreme Court in a 5-4 vote decided Thornburgh v. American College of Obstetricians.[58] At issue in the case was the Pennsylvania Abortion Control Act of 1982. This act attempted to strictly regulate abortion procedures in the state and was held unconstitutional because the legislation was overbroad, it did not serve a legitimate state interest, it constituted an invasion into the privacy of the intimately personal abortion decision, and it had an overall "chilling effect" on the exercise of a constitutional right. The

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[56] Bellotti v. Baird, 443 U.S. 622, 635 (1979).

[57] Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 73, 75 (1976).

[58] Thornburgh v. American College of Obstetricians, No. 84-495 (U.S. June 11, 1986) (available June 15, 1986, on LEXIS, Genfed library, U.S. file).

Court cited its previous decisions in Ashcroft[59], Simopoulos[60], Roe v. Wade[61], Danforth[62], and Akron[63]; and it relied on the precedents established in these decisions to declare the Pennsylvania Abortion Control Act unconstitutional.

The court in Thornburgh clarified its earlier decisions. It announced that state ordinances that "raised a spectre of public exposure and harrassment of women who choose to exercise their personal, intensely private, right,..."[64] would not be tolerated. The Court further ruled that no statute may require a physician to make a "...'trade-off' between the woman's health and fetal survival, and [all abortion control statutes must] require that maternal health be the physician's paramount consideration."[65]

The crux of the decision lay in the dicta of the opinion. The court emphatically spoke to the question of whether abortion was a freedom guaranteed by the Constitution. It noted that those rights publicly afforded to women by the Roe v. Wade decision, though morally objectionable to some, were within the "certain private sphere of individual liberties that will be kept largely beyond the reach of government."[66] Therefore, though the court did not attempt to invalidate all state restrictions concerning the abortion rights of women and minors, it plainly and with unmistakable language informed states that they must guarantee and protect these freedoms women enjoy. Any regulation

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[59] See supra note 2.

[60] See supra note 2.

[61] See supra note 1.

[62] See supra note 2.

[63] See supra note 2.

[64] See supra note 58, slip op. at 16-18.

[65] See supra note 58, slip op. at 18-22.

[66] See supra note 58, slip op. at 25, (emphasis added).

imposed on women that restricts their access or the desirability of having an abortion must rationally and legitimately serve proper state goals.

Conclusion

The proposed Virginia legislation provides every alternative that the court requires, and includes no provision previously invalidated. The legislation denotes the unique nature and the special medical problems of pregnancy and abortion. The proposed statutes would not apply where a medical emergency exists that complicates the pregnancy and threatens the life of the mother to the extent that in the physician's best medical judgement an abortion is warranted.[67] The statute also does not allow a judicial veto of an abortion decision of a minor after the minor has been declared mature and capable of consent.[68] It therefore appears that the proposed legislation is constitutional under current case law.

This work however discusses solely the legal ramifications of abortion consent statutes. The moral, ethical, and practical considerations of children bearing children are problems of much greater magnitude. Abortion rights are hotly debated in our society today, and it appears that the current membership of the United States Supreme Court affirm that right. Women's activists fear that state restriction of the abortion right will lead to a return to the days of "back alley abortion clinics" which brought horror and destruction to the lives of innocent young women. These are the moral, political, and ethical questions that face Virginians in the consideration of proposed consent statutes. This policy decision by the General Assembly will determine whether or not a consent statute becomes law in Virginia.

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[67] Senate bill number 342, at 4.

[68] Ibid. See also Baird v. Bellotti, 450 F. Supp. 997, at 1001 (D. Mass. 1978) (Bellotti III) (upon a finding of maturity and informed consent, state is no longer entitled to impose restriction upon the young woman's decision).

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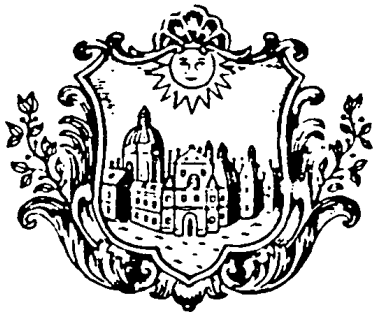

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VIRGINIA'S INTERMEDIATE COURT OF APPEALS: THE NEW COURTS SCOPE AND POWER

D.E. Barney*

The Scope of the Problem: Appellate Inundation

The increased number of lawsuits brought in state trial courts in the past quarter century has strained the capacity of state supreme courts to hear all valid appeals. Meritorius petitions for appeal meet denial or cursory decisions which fail to develop important legal doctrine. As a result, many states have enacted legislation creating intermediate appellate courts to reduce the burden on the state supreme court in order that that tribunal might fulfill its obligation to settle developing areas of law. In general, the intermediate courts in the various states hear appeals that turn on reversible error in the trial judgment. Harder questions of constitutional, statutory, and common law interpretation pass to the state supreme court for hearing. Weisberger, pp. 239-240.

The Virginia Legislature created the Court of Appeals, effective January 1, 1985, in response to a fourfold increase in the number of petitions to the Supreme Court during the past two decades. Brissette, p. 209. Some controversy surrounded the reformation of the appeals process, including practitioners' concerns over the increased costs of more frequent and dual appeals. Some fear existed that important cases worthy of consideration by the Supreme Court might meet final judgment in the lower court. Scalia and Lilly, pp. 56-60. The statutory scheme promulgated by the Legislature finesses these difficulties

by granting the Court of Appeals broad jurisdiction and power of finality while reserving to the Supreme Court discretionary review of all Court of Appeals decisions. Va. Code Sect. 17-116.05-.08. At this early date in the Court of Appeals' history, the new Court appears ready to manage the flood of petitions for appeal with minimum disruption of Virginia litigation.

The Court of Appeals' Jurisdiction and Discretionry Review

The Intermediate Court of Appeals has original jurisdiction in matters of contempt, injunctions, writs of mandamus, prohibition and habeas corpus. The statute grants appellate jurisdiction for appeals from Circuit Courts' review of administrative agency determinations, final decisions of the Industrial Commission of Virginia, and final judgments from the Circuit Courts concerning all domestic relations cases. Further, all convictions for crimes or traffic infractions are appealable to the new court, except where the death penalty arises. (Death sentences are appealable directly to the Virginia Supreme Court.) Va. Code Sect. 17-116.04-.05.1. These appeals are of right. Va. Code Sect. 17-116.05.2. The statutory scheme provides that the decision of the Court of Appeals shall be final, without appeal of right to the Supreme Court in traffic and misdemeanor convictions having no jail sentence, administrative or Industrial Commission cases, or domestic relations cases. Va. Code Sect.-17-116.07.

A problem inherent in dividing appellate jurisdiction between an intermediate court and the supreme court of a state arises because relative importance of legal issues cannot be consistently based upon dollar amount or subject matter. "All tort cases are not of negligible social importance; nor are all cases raising constitutional issues of general public concern--if for no other reason than that the issue is frivolous." Scalia and Lilly, pp. 47-50. Any type of case can present a legal issue

worthy of determination of the state supreme court. Intermediate court jurisdiction must not preclude discretionary high court review of socially important cases. Judge Scalia and Professor Lilly suggested in 1971 that two factors be considered in weighing the "importance" of a case for discretionary review of the intermediate court's decision. First, the significance of the appeal to the entire legal system, such as a case where limited private interests turn on an unsettled point of state law, needs to be considered. Secondly, the importance of the appeal to the involved parties should affect the high court's discretionary review. An appealed death sentence or huge civil damages award may turn on only a factual distinction, but the weighty individual interests involved may merit review in the state's highest court. id. The Virginia Legislature allowed for certification of appeals to the Supreme Court on motion of the Court of Appeals or on the motion of the high court itself, within the Supreme Court's discretion. Va. Code Sect. 17-116.06. This statutory feature ensures that important cases meriting high court review are not blocked by an overly deterministic legislative scheme.

Placing final review of all appeals within the discretion of the Virginia Supreme Court alleviates the burden on litigants of repeated appeals as of right. Resistance to this type of appellate reform arises from the ranks of trial attorneys as the spectre of protracted appeals clogs the courts and delays final decisions. Allowing a second appeal to the Supreme Court only when that body determines such review warranted in the particular situation makes the vast majority of Court of Appeals decisions final, while assuring that important cases are certified to the Supreme Court. This is the model suggested by the American Bar Association, and followed by the majority of states which have an intermediate division. Brissette, p. 224. This model also allows appellate development of factual and legal issues in specific cases before the Supreme Court passes judgment on the significance of the case. id. at 229. The Florida scheme allows

parties to petition the intermediate court to bypass that court and appeal directly to the Florida Supreme Court. If the intermediate court determines that the appeal merits high court review, they grant the bypass petition. This scheme runs the risk that legally significant appeals may be held in the intermediate court by that tribunal, without oversight by the highest court. id. at 225. The Virginia statute ensures that all petitions will be examined for merit by the Supreme Court, while maintaining the docket control of channeling through the Intermediate Court of Appeals.

Finally, the statutory scheme enacted in Va. Code Sect. 17-116 provides the element of control required by the late expansion of Virginia's judicial process. The crucial discretionary oversight of all appeals heard in the Court of Appeals provides a simple and direct method of certifying legally significant appeals to the Supreme Court. The granting of appellate jurisdiction in the Court of Appeals creates an organized management of an ever-increasing number of appeals of trial judgments within the Commonwealth. This reformed appellate process ensures ordered control of a burgeoning docket while vesting final judgment in what is legally significant in Virginia case law firmly in the Virginia Supreme Court.

VIRGINIA'S INTERMEDIATE COURT OF APPEALS: KEY TO TEXTUAL NOTES

Brissette, The Virginia Judicial Council's Intermediate Court Proposal, 16 U. Rich. L. Rev. 209-234 (Fall 1981).

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The author wishes to apologize for the informal nature of these notes. Production exigencies required that these be presented in this format.

MARITAL RAPE: THE LEGISLATIVE BATTLE

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Introduction

Society recognizes rape as one of the most serious violent crimes, one which scars its victims emotionally as well as physically. Despite its seriousness, it has been only recently that state lawmaking bodies have given attention to the widespread crime of marital rape.

Marital rape has the potential to be even more traumatic to a victim than rape by a stranger. Indeed, "when you are raped by a stranger you have to live with a frightening memory. When you are raped by your husband, you have to live with your rapist."[1] Although there are few statistics reporting the incidence of marital rape, it is believed that 14% of all married women are victims of this crime.[2] There is no consensus among sociologists as to why marital rape occurs; however, it is agreed that state statutory marital rape exemptions may contribute to the acceptance of this conduct.

Legislatures have been reluctant to change or abolish the traditional marital rape exemptions of state law. As recently as 1980, 44 states through their marital rape exemption statutes recognized the right of a husband to force his wife to have

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[1] Dr. David Finkelhor in testimony supporting New Hampshire H.B. 516, eliminating the marital rape exemption to sexual offenses, to the Judiciary Committee, New Hampshire State Legislature (Mar. 25, 1981).

[2] D. Russell, Rape in Marriage, 2 (1982); this author received funding from the National Institute of Mental Health to conduct a study on the incidence of marital rape.

sexual relations. In the past six years, however, in response to both judicial decisions struggling with the implications of marital rape exemptions and increasing public recognition of the problem of marital rape, more than 17 states have modified their rape statutes to allow for prosecution of spousal rape.

Historical Justifications of the Marital Rape Exemption

Marital rape exemptions in this country were adopted from the English common law exemption, first articulated in 1736 by English Chief Justice Matthew Hale in History of the Pleas of Crown:

> :"[T]he husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband which she cannot retract.... [I]n marriage she hath given up her body to her husband..."[3]

This matrimonial consent theory was justified by common law assumptions that upon marriage, a wife became the property of her husband or that the spouses became one entity. Legally, then, a husband could not be guilty of assaulting or raping chattel, or in the latter case, himself. Although these assumptions were effectively invalidated by the Married Women's Property Acts adopted in the 1800's, marital rape exemptions were not contemporaneously abolished. In addition, proponents began to advance more practical arguments in support of the marital rape exemption.

The possibility of fabricated complaints is an often cited reason for retaining the exemption, however, the danger of false charges is apt to arise in the context of any statutory crime.

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[3] 1 Hale, Pleas of the Crown, 628-29 (1736).

Furthermore, the stigma associated with rape discourages marital rape victims in particular from fabricating complaints. Practitioners favoring the exemption also point to the evidentiary problems associated with proving lack of consent, but this difficulty is inherent to all rape prosecutions, not just those of marital rape. Courts have similarly dismissed these legal rationales for the marital rape exemption.[4]

Defendants of the exemption have also attemtped to justify it based on the argument that allowing prosecution of husbands for rape would disrupt or impede reconciliation of troubled marriages.[5] As the Virginia Supreme Court observed, [i]t is hard to imagine how charging a husband with the violent crime of rape can be more disruptive to marriages than the violent act itself."[6]

As commentators have noted, both the antiquated notion of male supremacy in marriage and the various policy arguments advanced in support of the marital rape exemption cannot be accepted in contemporary American society.[7]

Toward Nationwide Reform

State courts have only recently challenged the arguments for

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[4] See e.g. People v. Stefano, 467 N.Y.S.2d 506, 515, 121 Misc. 2d 113 (1983).

[5] Comment, Rape and Battery Between Husband and Wife, 6 Stan. L. Rev. 719, 725 (1954).

[6] Weishaupt v. Virginia, 227 Va. 389, 315 S.E.2d 847 (1984).

[7] See e.g. S. Barry, Spousal Rape: The Uncommon Law 66 A.B.A. J. 1088 (1980).

retaining the marital rape exemption and state legislatures have been slower to take the cue. State rape laws presently run the gamut from barring prosecution of "voluntary social companions" to total abolition of the marital rape exemption. [See North Dakota Code XXXXX and New Jersey Code XXXXX.]

A majority of amended statutes allowing prosecution of the crime of marital rape include requirements of separation or "living apart" at the time the offense was committed. [See Colorado Code XXXXX.] Some of these states have gone a step further, and require that one party have made a filing for divorce. [See Wisc. Stat. Ann. 940.225(6).] Other states have combined these requirements and have taken the approach that prosecution may be had if the parties were living apart or if one party had filed for divorce when the alleged rape occurred.

The various statutes allowing prosecution of marital rape also impose time limitations for reporting of the crime by the victim, and in some cases, require that the complainant prove serious bodily injury. [See California Code XXXXX and W. Va. Code Ann. 61-8B-6 (1984).]

Although these statutory requirements are intended to circumvent the problems with marital rape prosecutions, they operate in some cases as severe prosecution limitations and may also cause interpretation problems for the courts. However, this progress in modifying the statutory bar to marital rape prosecutions is a step toward the larger goal of ensuring that rape laws protect a woman's bodily autonomy.