SUBJECT: Parental notification of abortions performed for minors

COMMITTEE: State Affairs — committee substitute recommended

VOTE: 11 ayes — Wolens, S. Turner. Brimer, Carter, Counts, Craddick, Hilbert, Hunter, D. Jones, McCall, Ramsay

1 nay — Danburg

3 absent — Alvarado, Longoria, Stiles

SENATE VOTE: On final passage, March 19 — 22-9 (Barrientos, Ellis, Gallegos, Luna, Moncrief, Shapleigh, Wentworth, West, Whitmire)

WITNESSES: For — Abigail Lundelius; Amy Hamilton; Christopher Maska; David Didlake; Emerald Fisher; Joshua Didlake; Judith Koeler; Karen Lewis; Kerry Beth Lundelius; Kimberly Pello; Lisa Blackwell; Patrick Pevoto; and 105 others registering in favor of the bill but not testifying

Against — Christine Jarvis; Dave Kittrell, San Antonio OB/GYN Society; Jill Martinez and Judith Shure, Greater Dallas Coalition for Reproductive Freedom; Kae McLaughlin, Texas Abortion and Reproductive Rights Action League; Natalie Wolk, Planned Parenthood of Houston; Peggy Romberg, Texas Family Planning Association; Shannon Noble, League of Women Voters of Texas; and 23 others registering against but not testifying

On — Don Wittig

BACKGROUND: A constitutional right to have an abortion under certain circumstances was recognized by the U.S. Supreme Court in 1973 in *Roe v. Wade*, 410 U.S. 1113. The Supreme Court, however, has also upheld a number of statutes requiring parental consent or parental notification before a physician may perform an abortion on a minor, in *Hodgson v. Minnesota*, 497 U.S. 417 (1990), upholding Minnesota's law requiring consent, but declaring unconstitutional provisions requiring both parents to be notified, and *Ohio v. Akron Center of Reproductive Health*, 497 U.S. 502 (1990), upholding Ohio's statute as constitutional.

DIGEST:

CSSB 86 would require a minor who wished to have a non-emergency abortion performed to have her physician give 48-hours notice, to the parent or guardian of the minor, receive a professional evaluation from another physician, or get approval from a court before an abortion could be performed.

Notice to parent or guardian. In order to perform an abortion on a minor, the physician would be required to give actual notice, in person or by telephone, to the parent or court-appointed managing conservator or guardian of the minor at least 48 hours before the abortion could be performed. If a parent or guardian could not be reached after reasonable effort, constructive notice could be accomplished by sending such notice by certified mail to the last known address of the parent or guardian at least 48 hours before performing the abortion.

Professional evaluation. An alternative to parental notification would be the determination by a physician, not located on the premises at which the abortion would be performed, that:

- parental notice could lead to physical, sexual or emotional abuse of the minor;
- the minor was mature and capable of giving informed consent; or
- the abortion would be in the best interest of the minor.

The determination of the physician would have to be certified in writing and included in the patient's medical record.

Medical emergency. If the physician of the minor determined that a medical emergency existed and that emergency prevented time for notice, the physician could perform the abortion without notice. The physician would be required to send notice to the State Board of Medical Examiners certifying the medical indications supporting the conclusion of a medical emergency. Such written certification would be considered confidential and privileged and could not contain personal identifying information about the minor.

Judicial approval. A pregnant minor wishing to have an abortion performed could file an application with a court requesting permission to have the abortion performed without providing notice to a parent or guardian. The application could be filed in a county court at law or district court in the county in which the minor resided, a county bordering that county, or the county in which the facility at which the abortion would be performed was located. A minor would be provided an attorney to serve as the minor's guardian ad litem if the minor had not already obtained an attorney. The costs of a judicial proceeding, including the cost of appointing an attorney ad litem, would be borne by the county.

The court would be required to issue written findings of fact and conclusions of law no later than 5 p.m. on the second business day after an application was filed. A minor could request an extension of time until 5 p.m. after the second business day after the minor informed the court that she was ready to proceed with the hearing. If a court failed to enter an order by the time required, the physician would be allowed to consider a lack of an order constructive permission to perform the abortion. A physician could enter an affidavit stating that, to the best information of the physician, a court had not made a ruling in the time required. That affidavit, entered into the patient's medical records, would have the same effect as if the court entered an order granting permission.

If a court did enter an order, the order would have to be based on the court's determination based on a preponderance of the evidence that:

- parental notice could lead to physical, sexual or emotional abuse of the minor;
- the minor was mature and capable of giving informed consent; or
- the abortion would be in the best interest of the minor.

A court would not be allowed to notify any person of a minor's pregnancy or the minor's desire to have an abortion. Court proceedings would have to be conducted in a manner protecting the anonymity of the minor, and all documents would be privileged, confidential, and not subject to discovery or subpoena. A minor would be allowed to file an application using a pseudonym or her initials.

A minor could appeal to a district court the decision of a county court at law denying the minor permission to have the abortion performed. An order of a district court denying a minor permission to have an abortion performed without parental notice could be appealed to a court of appeals. All such appeals would fall under the same time deadlines and include the same requirements of confidentiality.

If a physician performed an abortion without providing notice or satisfying one of the three alternatives provided by the bill, the physician would be subject to disciplinary action by the State Board of Medical Examiners.

A physician or court would be allowed to report sexual abuse of the minor based on information obtained during confidential consultations held pursuant to CSSB 86 to a local or state law enforcement agency, the Department of Protective and Regulatory Services, or a state agency certifying, registering, licensing or operating a facility at which the alleged abuse occurred.

CSSB 86 would take effect September 1, 1997, but would only apply to an abortion performed on or after January 1, 1998.

SUPPORTERS SAY:

Parental notification statutes are a constitutional method of ensuring parental involvement in a significant medical procedure. Statutes like the one proposed by CSSB 86 have been upheld by the U.S. Supreme Court and many other federal circuit and state supreme courts because they ensure the privacy of the minor and offer a reasonable alternative to parental notification.

In Texas in 1995 there were 87,501 abortions, 6,348 of which were performed on minors. According to abortion counselors, 75 percent of those minors had notified their parents. That means that nearly 1,600 abortions were performed on minors without their parents knowing anything about such procedures. Parents are notified, and in many cases must often give consent, for every other non-emergency or elective medical procedure performed on a minor. Even certain non-invasive procedures such as tattoos require parental consent. If a parent must be informed before a child can have almost every other medical procedure, why shouldn't that parent have a right to know about a dangerous and invasive medical procedure that

could place their daughter's life at risk? From a practical standpoint, notification allows the parent to pass on any important medical history information to the physician that could be helpful in performing such a serious medical procedure.

There is a legitimate state interest in protecting minor children from their own immaturity, inexperience and lack of judgment. The choice of whether or not to have an abortion is often one highly charged with conflicting emotions. The repercussions of such a choice can have emotional and psychological consequences on the woman for many years. Many minors may not have the ability to make a mature, rational choice. Allowing the minor the chance to think about the consequences of such a procedure and giving them the opportunity to discuss it with a parent can often help the minor make a better decision about what should be done with an unwanted pregnancy. Many teens are often surprised about how understanding and supportive parents can be in these situations. Even when the relations between parents and teens are strained, this issue can often bring them together and allow the parent to give the minor much needed advice and support.

Parental consent or notification laws are enforced in 27 states. Eleven other states have passed such laws, but they are currently under court challenge or are not currently enforced. CSSB 86 would conform with statutes determined to be constitutional and, in many instances, would add additional protection for the minor, including increased confidentially, quicker resolutions to the issue when using a judicial bypass, and the additional option of a professional evaluation as an alternative to parental notification.

The essential element of any parental consent or notification statute is that there is a meaningful alternative to consent through a judicial process and the doctor retains the ability to determine if an abortion must be performed as an emergency medical procedure. CSSB 86 would provide three alternatives to parental notification requirements: medical emergency, judicial bypass, and professional evaluation.

The medical emergency option would allow physicians to use their own professional judgment in determining whether the procedure must be performed because of a medical emergency. This would protect the

professional judgment of the physician and ensures that in emergency circumstances physicians would not be hindered by a notification statute.

The profession evaluation option to parental notification has not been considered by the Supreme Court, but because it would follow the same standards as that for judicial bypass — allowing a decision to be made based on the maturity of the minor, what is in the minor's best interest, or the possibility of notice leading to harm to the minor — it would likely be upheld as constitutional. The professional evaluation would be the equivalent of a second opinion performed by an independent physician. It would provide the same protection to a minor as a judicial proceeding by allowing an independent third party to determine if the minor was mature and well-informed enough to undergo the procedure or if there were reasons to not notify a parent. The professional evaluation procedure, however, would alleviate some of the fear, intimidation and stigma of having to go to court to petition for the ability to avoid parental notification. It would also, if used extensively, significantly help to reduce the cost of the judicial bypass procedure.

A judicial bypass procedure, one that allows a minor to ask a court for permission to have an abortion performed without informing the minor's parents, is an essential requirement of any parental consent or notification procedure. It ensures that the due process rights of the minor are not violated by being denied the right to perform a legal act without a legal recourse. Any constitutional judicial bypass procedure must have certain elements, including a showing by the minor that she is sufficiently mature and well-informed to make a decision, abortion would be in the minor's best interest, or notification would not be in the minor's best interest. The procedure must protect the anonymity of the minor, and the process must be able to be concluded in a reasonably short period of time.

CSSB 86 would ensure all constitutional requirements of a judicial bypass procedure were met. The court could make a decision to permit the minor to have an abortion without notification for either of the two reasons required by the court as well as if the court determined that notification could lead to emotional, physical or sexual abuse of the minor. Unlike other statutes, the court need not find a past pattern of such abuse.

CSSB 86 would include additional protections of confidentiality, ensuring the anonymity of the minor. Like other constitutional statutes, the minor could file an application using a pseudonym or initial, although the Supreme Court has ruled such procedures are not necessary to ensure anonymity of the minor. The timeline for making a judicial bypass decision would also be faster than others upheld by the Supreme Court. The two-day decision deadline would ensure that the performance of an abortion would not be delayed or stalled by a court. The two-day period would conform to the time a minor would have to wait anyway when informing her parents.

CSSB 86 also would add a provision allowing for constructive approval by a court. If a court chose not to make a ruling within the time required, the application would be deemed authorized. This constructive approval would ensure quick resolution of the petitions and allow courts that do not wish to rule on such issues pass them through without being forced to make a ruling. The inclusion of the affidavit by the physician would provide the physician as much protection in cases of constructive rulings as they would have had if the court made a decision.

The notice option allowed by CSSB 86 would also be more permissive than others found constitutional by the Supreme Court because it would allow someone other than the physician to inform the parent. The physician or a clinic could employ a counselor to perform such notifications. The counselor or the physician would be able to provide information to the parent and could help them to deal with their own questions so that the parent could provide support and advice to their child. Allowing doctors to give notice by certified mail would ensure that the procedure was not held up by inability to reach parents and that doctors would not spend all of their time trying to track down the parents.

By reducing the penalty on doctors performing abortions without notice to professional discipline, CSSB 86 would ensure that this measure was really about the best interests of the child and not criminalizing a legal medical procedure. Holding doctors to professional misconduct standards would be the same discipline required if the physician failed to inform a minor's parents before performing any other type of surgery.

While this legislation would make it slightly more difficult for a minor to get an abortion, it is designed to include safeguards for the protection of the minor to help her make an informed choice. Abortion is very invasive procedure and can have lifelong emotional and psychological effects. Many minors may not be mature enough or well informed enough to make a rational decision on their own and need the advise of someone whom they should be able to trust. If the minor is sufficiently mature or the minor's parents would not be of any help because of the possibility of physical or emotional abuse, the procedure could still be performed without notification.

In other states that have such laws there has been a noticeable decrease in minor abortions, showing that once these young women know the consequences of their actions and are certain that their parents will find out, they are forced to act more sexually responsible and cut down on the number of unwanted pregnancies. The most often asked question of minors performing any sexually-related medical procedures, from tests to surgical procedures, is whether their parents would be informed. Once teens are told up front that the answer to that question is yes, they may act more responsibly when engaging in sexual conduct.

OPPONENTS SAY:

CSSB 86 is a thinly veiled attempt to discourage abortion by setting up hurdles that a minor would have to clear to get an abortion. A primary purpose of the legislation is to discourage legal abortion as a viable alternative to an unwanted pregnancy. Parental notification statutes increase the risk of harm to pregnant minors, both from repercussions at home due to notice and additional complications caused by delays, but serve no legitimate state interest in protecting the health of the minor.

Parental notification is virtually the same as parental consent because if the parents were notified and they wished to stop their daughter from getting an abortion, they could place all sorts of obstacles in her way. The least of these obstacles would be counselling her against an abortion even though such a decision is an entirely personal choice, not one that should be made by committee, even a committee made up of family members. Some parents could prevent the child by more drastic means, from restricting her movements to physically abusing her.

According to current information, 75 percent of minors getting abortions inform their parents already. The other 25 percent are obviously in an environment where such notification would likely do more harm than good; otherwise, they would already have informed their parents. This legislation is couched in terms of promoting communication between a parent and a child, but if communication were already so bad that the child did not feel she could tell a parent on her own free will, forcing notification would only worsen the situation. Minors who are faced with the choice of informing their parents or going before a judge or other doctor could decide that they would have to find another way to terminate an unwanted pregnancy than a legal abortion. Such alternatives, including self-abortions or illegal abortions, could pose a serious health risk to the minor.

CSSB 86 would force a minor to wait 48 hours after notice was given to have the abortion performed. The obvious intent of this waiting period is to give the parents time to talk the minor out of having the abortion performed. No other interest would be served by delaying a medical procedure by that amount of time. In fact, a delay could lead to further complications in the procedure. While the risks of an abortion are still lower than the risk involved in childbirth, each day the procedure is delayed adds to the risk involved. Statistics in states with notification laws have shown that there has been an increase in second trimester abortions among minors after such statutes were imposed. Minors often wait as long as possible before having such procedures performed to begin with, but the added threat of a confrontation with her parents over the issue can often force a minor to delay the procedure until well past the average time when most abortions are performed. Second trimester abortions are not only more medically risky but are also more costly.

CSSB 86 is aimed at stopping doctors from performing abortions. Such doctors already have significant risks, often because of death threats from anti-abortion advocates. CSSB 86 would also set a number of procedural traps for doctors performing such abortions, the violation of which could cause the loss of the doctor's license to practice medicine. One question that doctors would have to address would be what effort would constitute reasonable effort in attempting to contact the parents of a minor before sending constructive notice.

The technical requirements of CSSB 86 resulting in severe penalties could also discourage doctors who only perform abortions occasionally from continuing to do so. The doctors who perform abortions only occasionally are often family practitioners who have developed a relationship with the minor and have knowledge of the minor's medical history. If these doctors were discouraged from performing this medical procedure, minors would be forced to go to a clinic and be subjected to possible harassment from protestors, as well as unfamiliarity with the physician who would perform the procedure.

While the professional evaluation option could help to alleviate some of the problems with the Senate-passed version of SB 86 by allowing the minor to discuss her decision with another doctor and not be forced to go to court, the necessary question is how would such a procedure be handled. In most cases, the minor would not be aware of such an option unless the doctor performing the abortion informed the minor, and often that doctor would have to find a second doctor to make that opinion. Getting the professional evaluation would obviously add to the cost of performing the abortion and could force more minors who have limited financial resources to seek other alternatives to legal abortions.

Minors who were unable to afford or are not aware of a professional evaluation option would be forced to go before a judge whom they did not know and petition to exercise their right to have a legal medical procedure performed. This situation could often be just as intimidating as going before a parent. Statistics from other states that have parental notification statutes show that less than one half of one percent of petitions to a court are denied. Because the rate of denial is so low, it would seem obvious that the interest served by the judicial process is not the weeding out of those minors who are not mature enough to make an informed choice, but to simply add one more hurdle that a woman must clear in order to have a legal procedure performed.

The two-day deadline for judicial bypass decisions could be harmful to a minor for whom any delay could increase the risk of complications, but it could also be harmful to the normal procedure of a court that would presumably have to delay all other pending business to deal with these issues forcing a backlog of other judicial proceedings. The cost of these

proceedings could also be significant as the county would be required to pay the cost of the court as well as an appointed attorney ad litem for any minor who did not already have her own counsel.

While in urban counties, minors would have the opportunity to appear before a number of different judges and could be advised if any judge had a predisposition for denying such petitions, in smaller rural counties, there may only be one district judge and one county judge to whom a minor can turn. In certain situations, the judges may also know the family of the minor and be unable to deliver an impartial ruling. While CSSB 86 allows a minor to travel to an adjacent county, such a trip would be yet another unnecessary imposition on the minor.

If the purpose of parental notification is to give the minor the opportunity to discuss the procedure with an adult who could give them advice and support, why must that adult be the child's parent? In many cases another relative or an adult friend may be more appropriate and may already be involved in the minor's decision. There is no legitimate reason to ensure that a parent is informed when the minor can receive advise and support from another adult with whom they feel more comfortable discussing the issue. In most cases in which the minor consults another adult, it is often because she feels she can receive better advice and support than she could receive from her parents.

OTHER OPPONENTS SAY:

The professional evaluation option included in CSSB 86 would allow doctors to completely ignore the parental notification requirement and make this legislation meaningless in promoting communication between parents and children. Any doctor who wished to perform an abortion could find another doctor to state their medical option that the abortion would be in the best interest of the minor. Such a decision would be left entirely to the judgment of the physician and could rarely be disputed. Abortion clinics would likely set up arrangements with off-premises doctors to evaluate minors. There is no requirement in the bill that the other doctor not be an employee of the clinic, simply that the doctor not be located on the premises where the abortion would be performed.

Parental notification is a step in the right direction, but what is necessary in Texas is a statute requiring parental consent to perform an abortion on a

minor. Such statutes have been upheld as constitutional and simply seek to ensure that the parent has the right to determine what medical procedures would be performed on their child no matter what the procedure is.

CSSB 86, because it would fail to impose any serious penalties on physicians who violated the law, would lack sufficient penalties to ensure compliance. The Senate-passed version would have made performing an abortion without notification or judicial bypass a class A misdemeanor to ensure compliance. By removing the criminal penalty, doctors may feel free to ignore the requirement and plead their case to the Board of Medical Examiners.

NOTES:

The Senate-passed version of SB 86 differed from the committee substitute by:

- establishing a definition of abortion, CSSB 86 would use the definition currently included in the Medical Practice Act;
- defining medical emergency, CSSB 86 would use the definition included in the Medical Practice Act;
- not including the alternative of obtaining a profession evaluation instead of obtaining parental notice;
- making the performance of an abortion by a physician a class A misdemeanor, maximum penalty of one year in jail and a $4,000 fine;
- including a provision giving the guardian ad litem or attorney ad litem the same immunity from suit as the appointing judge; and
- requiring the costs of judicial proceeding conducted pursuant to the bill to be paid for from funds appropriated to the Department of Health for family planning.

SB 411 by Nelson requiring parental consent before a doctor could perform an abortion for a minor, has been reported favorably by the Senate Health and Human Services Committee.

SB 83 by Shapiro, a similar bill introduced in the 74th Legislature was reported favorably by the Senate Health and Human Service Committee but was withdrawn form the Intent Calendar.