

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

IN RE: JANE DOE : APPEAL NO. C-050133
TRIAL NO. AB05-X
: *O P I N I O N.*

Civil Appeal From: Hamilton County Juvenile Court

Judgment Appealed From Is: Reversed and Application Granted

Date of Judgment Entry on Appeal: April 1, 2005

Jennifer L. Branch, for Appellant.

GORMAN, Judge.

{¶1} The appellant, Jane Doe, appeals, as provided in R.C. 2505.073, the judgment of the Hamilton County Juvenile Court denying her application to have an abortion without parental notification. The single issue for review is whether, as required by R.C. 2151.85(A)(4)(a) and (C)(1), she presented clear and convincing evidence that she “is sufficiently mature and well enough informed to decide intelligently whether to have an abortion without notification of her parents * * *.” We hold that the record

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clearly and convincingly supports her contention that she is sufficiently mature, and we accordingly reverse the judgment of the Hamilton County Juvenile Court.

{¶2} At the hearing before the juvenile court on February 22, 2005, Jane Doe testified that she is seventeen years old and lives with her parents. In ten weeks, she will be eighteen years old and can herself consent to an abortion. Then she will be twenty-three weeks' pregnant.

{¶3} She is a high-school senior who maintains a 3.2 grade point average. She has played the * * * redacted * * * since the fifth grade and has a weekly lesson. * * * redacted * * * She participates in marching-band competitions, clinics, and concerts. * * * * redacted * * * In this capacity, she is responsible for promoting two concerts a year and for selling tickets. * * * redacted * * * For the last three months, she has worked 26 to 35 hours per week as a clerk in a convenience store and is saving her money to pay for college tuition, room and board, and books.

{¶4} Upon graduation from high school, she plans to attend college. She intends to major in music education with a minor in electronic media. Her goal is a career as a music teacher and a band director. She has applied to three colleges and has received one acceptance, but must audition for the purpose of receiving financial assistance or a scholarship.

{¶5} When Jane Doe's parents are away, they leave her in charge of her younger brother and sister. When she was * * * redacted * * * she watched her brother and sister, * * * redacted * * *, during the summer while her mother and father were at work.

{¶6} At sixteen years of age, when medication did not resolve her * * * redacted * * * problem and her physician recommended surgery, her parents left the final decision to her. After conferring with her physician concerning the risks and benefits of surgery, she elected to have the surgery. Jane Doe has also been diagnosed with * * * redacted * * *. Her parents allowed her to decide for herself between a course of physical therapy or surgery. After discussing the options with her neurosurgeon, she accepted the recommendation that she first try the physical therapy.

{¶7} When she learned that she was pregnant, Jane Doe contacted the Planned Parenthood clinic. She testified that the pregnancy resulted from her second sexual encounter. In the first, a condom was used, but the second occasion was without protection. The father of the child favors an abortion and has, since being informed, abandoned Jane Doe. She told the juvenile court, “I’ve learned that one time without a condom can be enough.” She said that she intends to go on the pill.

{¶8} At Planned Parenthood, she talked to a counselor for an hour about her options. She was given a packet of written information addressing the options of having the baby, adoption, or abortion. She testified that when reviewing the information, she learned death was a risk of abortion. She called the counselor twice and further discussed by telephone for twenty minutes the risks and benefits as well as her options.

{¶9} Jane Doe testified that if her father learned that she had an abortion, she believed that he would not allow her to live at home when she turned eighteen and that he would not provide any financial assistance to her. She testified that the intense opposition to abortion of her mother and father was due to their political convictions rather than their religious beliefs. However, with a child and lacking her parents’

financial assistance, she determined that she could not enroll in college in August or September.

{¶10} The General Assembly has recognized the principle that most minors will benefit from the “guidance and understanding” of their parents, but that some are sufficiently mature to make the abortion decision alone. *Ohio v. Akron Center for Reproductive Health* (1990) 497 U.S. 502, 520, 110 S.Ct. 2972. Under R.C. 2151.85(A)(4)(a) and (C)(1), an unemancipated minor may have an abortion, bypassing notification to her parents, if the juvenile court finds by clear and convincing evidence that she “is sufficiently mature and well enough informed to intelligently decide to have an abortion without the notification of her parents, guardian, or custodian.” This requirement has been held to be constitutional on Fourteenth Amendment due-process grounds. See *In Re Jane Doe I* (1990), 57 Ohio St.3d 135, 137, 566 N.E.2d 1181, citing *Akron Center* at 520, 110 S.Ct. 2972.

{¶11} In his dissent in *Jane Doe I*, Justice Herbert R. Brown observed that juvenile and appellate courts have struggled in these so-called bypass cases to determine if the minor is sufficiently mature. See id. at 142, 566 N.E.2d 1181. In his dissent, Justice Andy Douglas commented, “While some would like to make this case one of pro-abortion versus anti-abortion or pro-choice versus pro-life, it is nothing of the sort. What we have before us is a case of statutory interpretation—and *only* statutory interpretation.” Id. at 140, 566 N.E.2d 1181.

{¶12} Although the majority opinion in *Jane Doe I* declined to adopt and articulate factors indicative of a minor’s maturity on grounds that such factors are a legislative function, four justices agreed that judicially created standards are required, as

the term “sufficiently mature” is not defined in R.C. 2151.85. See *id.* at 139, 566 N.E.2d 1181.

{¶13} Justice Brown concluded that the issue of the minor’s maturity should be based “on how she has conducted her entire life and not just on the events which have brought her to court.” *Id.* at 143, 566 N.E.2d 1181. He proposed a seemingly comprehensive list of factors to determine if the minor is sufficiently mature: “(1) the minor’s age, (2) overall intelligence, (3) emotional stability, (4) credibility and demeanor as a witness, (5) ability to accept responsibility, (6) ability to assess the future impact of her present choices, (7) ability to understand the medical consequences of abortion and apply that understanding to her decision, and (8) any undue influence by another on the minor’s decision.” *Id.* at 143, 566 N.E.2d 1181 (footnote omitted).

{¶14} The juvenile court’s dismissal of Jane Doe’s application in this case is to be scrutinized on a case-by-case basis under an abuse-of-discretion standard. See *id.* at syllabus. “The term ‘abuse of discretion’ connotes more than an error of law or of judgment; it implies that the court’s attitude is unreasonable, arbitrary or unconscionable.” *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (citations omitted), cited in *Jane Doe I*, 57 Ohio St.3d at 137, 566 N.E.2d 1181.

{¶15} The juvenile court found that Jane Doe is physically mature and intelligent, and that “her demeanor was appropriate.” It dismissed her application for two reasons: (1) “[s]he has not considered that her parents might be supportive of her,” and (2) “[s]he has not had the benefit of discussing her medical condition and the risks of having the baby versus the risks of having an abortion with a doctor who is aware of her medical history.”

{¶16} The finding that Jane Doe has not considered that her parents might be supportive of her decision to terminate her pregnancy is speculative and clearly erroneous. She testified that her father was vehemently opposed to abortion. She observed her father's unfavorable reaction to television programs about the subject. She said that her parents were reluctant to discuss abortion in her presence. Although she believed her mother might be supportive, her father would not. She testified that she believed her mother would "follow him." If she had an abortion, she believed that her father would not allow her to live at home and would provide no financial assistance for her college education.

{¶17} Jane Doe did not offer evidence that she had discussed the risks of an abortion with a physician who knew of her physical condition. However, Exhibit 1, "Fact Sheet for Early Surgical Abortion," given to her by the Planned Parenthood counselor, shows that a doctor will decide if an abortion can be performed based on the results of Jane Doe's medical history, physical examination, blood test and lab results, and ultrasound, as part of Planned Parenthood's routine procedure. Admittedly, Jane Doe testified about concerns about her immune system. Her main concern, however, is that if she is to have the baby, she must delay or jeopardize college and her music career. She expressed concern that she cannot financially support a child and attend college. Furthermore, she knows that an abortion can be performed in the twenty-fourth week, when she is eighteen, and while it would be statistically safe, she testified that she knows the risk of death is seven times greater than for a first-trimester abortion. Still, she intends to have an abortion if she is unsuccessful in obtaining bypass approval.

{¶18} We are mindful of the presumption that the juvenile court's findings are correct because generally the trial court is best able to view the witnesses and observe their demeanor, gestures, and voice inflections, and use these observations in assessing credibility. See *Jane Doe I*, 57 Ohio St.3d at 138, 566 N.E.2d 1181.

{¶19} We conclude, however, that (1) Jane Doe's testimony about her desire to avoid a potential and probable conflict with her parents; (2) her academic standing and intelligence; (3) her musical talent and desire to teach music; (4) her participation in extracurricular school activities; (5) her acceptance by a college; (6) her part-time employment and saving for college expenses; (7) her counseling about the options other than termination of pregnancy; (8) her consideration and understanding of the risks and benefits of abortion or foster care and the options to abortion; and (9) her introspection and freedom from coercion related to the consequences of her decision, is clear and convincing evidence that she is sufficiently mature and well informed to have an abortion without notification of her parents. We are convinced that the counseling by Planned Parenthood informed Jane Doe of the options other than abortion and the associated risks of this medical procedure, and that she has expressed a rational concern about the consequences of notifying her parents that she intends to terminate her pregnancy.

{¶20} This case has similarities to our decision of *In re Doe*, 1st Dist. No. C-020443, 2002-Ohio-3926. There, we held that the juvenile court had abused its discretion in finding that a seventeen-year-old who had graduated from high school with a 4.1 grade point average, had a full academic college scholarship, had participated in various extracurricular activities, and desired to protect her relationship with her family from potential conflict lacked sufficient maturity to decide whether to have an abortion.

Moreover, the evidence of Jane Doe's maturity in this case is similar to the evidence in *In Re Complaint of Jane Doe* (1992), 83 Ohio App.3d 904, 615 N.E.2d 1142, and *In Re Complaint of Jane Doe* (1999), 134 Ohio App.3d 569, 731 N.E.2d 751. After reviewing the transcript of Jane Doe's testimony, we cannot perceive what other evidence she could have offered to establish her maturity.

{¶21} Finally, we must mention that the guardian ad litem, appointed by the juvenile court, was vehemently opposed to granting Jane Doe's application. The juvenile court, however, did not refer to the guardian ad litem's statement to the court or state that the guardian's remarks had influenced its decision to dismiss the application. Although the guardian ad litem presented several reasons justifying her opposition, it is questionable whether they conform to the maturity standard contemplated by R.C. 2151.85(A)(4)(a) and (C)(1). In discussing whether Jane Doe was sufficiently mature, the guardian ad litem said, "I think she comes across as being well articulate and intelligent, but I do question whether or not she is near the maturity level."

{¶22} "And the reason I do that is because she had a one-time casual sexual encounter that was unprotected without using birth control and it makes me wonder whether or not she has the maturity level at her age and her years and almost being a senior, just a few months short of eighteen."

{¶23} "Because I believe she understood the possible consequences, that she could potentially be pregnant or get pregnant by having sex. She was aware of that."

{¶24} "So I question whether she really has the maturity level that her age indicates * * *."

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{¶25} Though the guardian ad litem was well intentioned, the standard she used as a gauge for maturity has no relevance under the statute. It would disqualify minors at seventeen simply because they should have known better.

{¶26} Accordingly, we hold that the judgment of the Hamilton County Juvenile Court is unreasonable and thus an abuse of discretion. See *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.* (1990), 50 Ohio St.3d 157, 161, 553 N.E. 2d 597. The assignment of error is sustained.

{¶27} It is therefore ordered that the judgment of the trial court be reversed and that the application of Jane Doe be granted. Jane Doe is hereby authorized to consent to the performance or inducement of an abortion without the notification of a parent, guardian, or custodian.

{¶28} If Jane Doe believes that this opinion may disclose her identity, she has a right to appear and argue at a hearing before this court. She may perfect this right to a hearing by filing a motion for a hearing within fourteen days of the date of this decision.

{¶29} The clerk is instructed that this decision is not to be made available for release until (1) twenty-one days have passed from the date of the decision and appellant has not filed a motion, or (2) if appellant has filed a motion, after this Court has ruled on the motion.

Judgment accordingly.

PAINTER, J., concurs.
SUNDERMANN, J., dissents.

PAINTER, J., concurring.

{¶30} This case is not about whether abortion should be legal, or whether Jane Doe should choose to have one. The only issue under the statute is whether she is sufficiently mature to make that decision. With the evidence viewed dispassionately—which we are sworn to do—no other decision is possible on this record.

{¶31} The dissent talks of requiring “exceptional circumstances” to grant these applications. But that is not the law. Here, the only issue is maturity. Certainly, having sex can lead to pregnancy and is some evidence of immaturity—but every person who petitions in these cases has obviously had sex. If that were the standard, we would not have this law.

{¶32} The dissent makes much of the observation that of the evidence comes from Jane Doe herself. Well, that’s the nature of these proceedings. The trial court found her to be “credible,” so she is to be believed. Did she make up playing in a band, having a 3.2 academic average, working part-time, and being trusted with money? Hardly. To question her credibility is grasping at straws to justify dissenting in a clear case.

SUNDERMANN, J., dissenting.

{¶33} I dissent from the majority’s decision. It is the duty of the applicant to demonstrate by clear and convincing evidence that she is sufficiently mature and well enough informed to decide intelligently to proceed with an abortion without the required notice to her parents, or that notifying her parents would not be in her best interest. The juvenile court held a hearing on these issues and found that she had not met her burden.

{¶34} The standard of review for this court is abuse of discretion in not granting her application. An abuse of discretion is more than an error of law or judgment; the court’s decision must be unreasonable, arbitrary or unconscionable. It is the trial court that heard the witnesses, observed their demeanor, and was in the best position to assess their credibility. We must defer to the trial court to make these judgments unless we find within the record one of the recognized bases for abuse of discretion. My review of the record does not reveal any abuse of discretion by the trial court.

{¶35} The majority makes a number of findings upon which they base their decision that Jane Doe is sufficiently mature. They point to her academic standing, her intelligence, her participation in extracurricular activities, her admission to college, and her part-time employment. But the only proof of these matters in the record is the testimony of Jane Doe herself. There is nothing in the record independent of her testimony to support or prove any of these facts. As the trial court said in its opinion, “[I]t is difficult to judge credibility without an adversarial procedure.” The majority is persuaded that her testimony provides evidence of a potential conflict with her parents if she were to inform them of her plans to abort her child. Her own testimony was that she does not really know how her parents feel about this issue save for how they comment while watching television shows that mention abortion. She also said that her mother would probably be supportive, but that her father might “tease her.” Her testimony that her father might cease to allow her to live at home or to support her financially is pure speculation on her part. This hardly meets the clear-and-convincing standard necessary to sustain her application.

{¶36} What evidence is there of a lack of maturity? First, Jane Doe engaged in unprotected sex at age seventeen. An unwanted pregnancy was not unpredictable. She has never discussed this issue with her parents. Apparently she has had two medical procedures in the past, and her parents were helpful and let her make up her own mind on what she would do. This shows the value in consulting with her parents and is evidence of their acceptance of her judgment rather than her contention of the opposite. On the day of the argument, she had still not seen a doctor. This is perhaps the most convincing factor evidencing a lack of maturity. If one were to plan to have a medical operation or procedure, consulting a doctor would be the first thing to do. If a young girl came to her parents with this problem, seeing a doctor would be their first step. Jane Doe spent one hour with a Planned Parenthood counselor and then made one or two phone calls. None of these contacts involved consulting with a medical doctor. The court-appointed guardian ad litem found that Jane Doe did not meet the required maturity level.

{¶37} All of the facts evidencing a lack of maturity are true; they are not just speculation or unsubstantiated claims by the petitioner. The failure to see a medical doctor was admitted at argument. The facts in favor of maturity are not verified. If this case were decided upon a preponderance-of-the-evidence standard, the weight of the evidence would be in favor of immaturity. But when Jane Doe has to prove her case by clear and convincing evidence, and we can only reverse the trial court by finding its decision to be unreasonable, arbitrary or unconscionable, I cannot understand this court doing anything other than affirming the decision of the trial court.

{¶38} Aborting her child is a major decision for a young girl, perhaps the biggest one yet in her life. This is why Ohio law wisely requires that a minor must notify her

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parents so that they can all discuss the situation and decide what is best as a family. A minor cannot get any medical procedure done without the parent's input; this practice should certainly be followed in the case of something as serious as an abortion. The law also provides for an exception to that notification in special circumstances. But these circumstances do not exist here. There is no evidence that the parents will physically abuse Jane Doe or otherwise mistreat her if she should counsel with them about her situation, and she has not proved the requisite maturity level. Any parent would want to be the primary counselor to a daughter in a situation like this. We should not take this right away from parents except in the most exceptional of circumstances. This case clearly does not involve those exceptional circumstances.

Please Note:

The court has placed of record its own entry in this case on the date of the release of this Opinion.