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Divided Supreme Court Issues New Guidelines for Bypass of Parental Notification Mandate

In four recent cases, the Texas Supreme Court has reviewed the decisions of trial-court judges who ruled against minors seeking to bypass the requirement that their parent or legal guardian be notified in advance of the minor's desire to obtain an abortion. The court issued new legal guidelines for lower courts to follow in such cases and required trial judges to make specific findings concerning their decisions. The court also established legal standards for appellate review of a trial judge's decision denying a minor's request to bypass the parental notification requirement.

Thus far, the high court has made six decisions involving application of the parental notification bypass provision in four separate cases: *In re Jane Doe 1 (I)* (No. 00-0140), issued February 25; *In re Jane Doe 1 (II)* (No. 00-0224), issued March 10; *In re Jane Doe 2* (No. 00-0191), issued March 7; *In re Jane Doe 3* (No. 00-0193), issued March 13; *In re Jane Doe 4 (I)* (No. 00-0213), issued March 22; and *In re Jane Doe 4 (II)* (No. 00-0317), issued April 11.

Existing law

SB 30 by Shapiro (Family Code, Chapter 33), enacted in 1999, requires the physician of an unmarried minor seeking an abortion to notify one of her parents or her court-appointed managing conservator or guardian and then wait 48 hours before performing the abortion. It does not require the consent of the parent or guardian. The law allows exceptions for medical emergencies or when the minor obtains a judicial bypass of the parental notification requirement by applying to a county court at law, a probate court, or a district court. The judge must grant the minor permission to consent to an abortion without parental notification if the judge determines by a preponderance of the evidence that:

- the minor is mature and sufficiently well informed to give consent;
- notification would not be in the minor's best interest; or
- notification might lead to physical, sexual, or emotional abuse.

The proceedings must be conducted expeditiously and must protect the minor's anonymity and confidentiality. If the judge denies permission, the minor may appeal to the court of appeals. If either the trial judge or the court of appeals fails to rule within two business days, permission is granted automatically. Under procedural rules issued by the Supreme Court in December 1999, a minor may appeal denial of a judicial bypass to the Supreme Court, but that court has no specific deadline other than to rule "as soon as possible." (See HRO *Interim News*, Number 76-1, January 14, 2000.)

In all four cases in which the Supreme Court has interpreted the parental notification statute, the court sent the case back to the trial judge to hold a new hearing using the new guidelines. It also ruled, in *Doe 1 (I)*, that unlike trial-level courts and courts of appeal, whose decisions in parental notification judicial-bypass cases are confidential and specifically cannot be published, the Supreme Court may publish its decisions in these cases to guide the lower courts and to give the Legislature the chance to change the law if it so chooses in light of the court's interpretation of the statute.

In the *Doe 1* case, which the Supreme Court returned to the trial court on February 25, the trial judge again denied the minor's request to

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bypass the parental notification requirement and, as the court had directed, issued specific findings. The court of appeals upheld the trial court's decision. On March 10, the Supreme Court, by a 5-4 vote, again reversed the decision of the court of appeals upholding the trial judge, and this time it granted the minor's application, saying it would issue an opinion later.

Divided decisions

The Supreme Court was divided in all of the *Doe* decisions. In *Doe 1 (I)*, written by Chief Justice Tom Phillips, six of the nine justices endorsed the guidelines the court issued for determining whether a minor was mature and sufficiently well informed, but only five agreed on legal and factual sufficiency as the standard for review. In *Doe 2*, written by Justice Craig Enoch, three of the nine justices disagreed with the standards for determining the minor's best interests. The court splintered in *Doe 3*, with no clear majority agreeing on a definition of abuse. In *Doe 4 (I)*, six justices supported the decision to return the case to the trial court for another hearing using the *Doe 1* and *Doe 2* guidelines. In *Doe 4 (II)*, all nine justices agreed to uphold the trial court, but two had different reasons.

Aside from disagreeing over legal guidelines, standards, and definitions, the court also has split over its interpretation of the basic purpose of SB 30 and the Legislature's intent in enacting it. In *Doe 3*, Justice Enoch, joined by Justices James Baker, Deborah Hankinson, and Harriet O'Neill, said that the Legislature had balanced two respective policy decisions in enacting SB 30: encouraging involvement by parents in their children's decision to terminate pregnancy and protecting children from the lasting and devastating consequences of physical, sexual, and emotional abuse. Judge Enoch said that it was "inappropriate for this Court to usurp the Legislative function by reconsidering the relative weight given by the Legislature to these policy considerations and then placing the Court's thumb on the scale."

Justice Nathan Hecht, joined by Justice Greg Abbott, said that the Legislature's purpose in enacting the parental notification law was, as he said in *Doe 4 (I)*, "to make it harder, not easier, for minors to obtain abortions without parental notification" and "to protect parents' rights to raise their children."

"Surely no friend or foe of the legislation who struggled through the two legislative sessions that it took to pass the statute had any idea that it would actually facilitate teenage abortion, yet that is how the Court has construed it: no application is to be denied," said Justice Hecht. He accused the court majority of "judicial activism" — substituting their views, which he characterized as a "deep-seated ideology that minors should have the right to an abortion without notice to their parents, free of any significant restriction," for those of the Legislature.

Determining whether a minor is mature and sufficiently well informed

The Supreme Court held in *Doe 1 (I)* that in determining whether a minor is mature and sufficiently well informed, a trial court should take into account the totality of circumstances the minor presents. It said that a minor should be considered mature and sufficiently well informed "when the evidence demonstrates that the minor is capable of reasoned decision-making and that her decision is not the product of impulse, but is based upon careful consideration of the various options available to her and the benefits, risks, and consequences of those options."

In view of standards adopted by other states with parental notification laws, the court said that in order to establish that she is sufficiently well informed, a minor must show, at a minimum, that:

- she has obtained information from a health-care provider about the health risks associated with an abortion and that she understands those risks, including those associated with the particular stage of the minor's pregnancy;
- she understands, and can demonstrate that she has given thoughtful consideration to, the alternatives to abortion, including adoption and keeping the child,

and their implications. She also should understand that the law requires the father to assist in the financial support of the child. She should not have to justify why she prefers abortion above other options, only that she is fully apprised of her options;

- she is aware of the emotional and psychological aspects of undergoing an abortion. She also must show that she has considered how this decision might affect her family relations. Although the minor need not obtain this information from licensed, professional counselors, she must show that she has received information about these risks from reliable and informed sources, so that she is aware of and has considered these aspects of the abortion procedure.

The court said that while a minor must demonstrate a knowledge and appreciation of the various considerations involved in her decision, she should not have to obtain information or other services from any particular provider. Nor should she have to meet with advocacy or religious groups or to review materials that they provide. The inquiry is whether she has obtained information on the relevant considerations from reliable sources of her choosing that enable her to make a thoughtful and informed decision.

The court said that a minor who can show that she is sufficiently well informed also may establish in the same process that she is mature, but that the determination of maturity necessarily involves more discretion on the part of the trial court. The court did not establish any test for determining maturity but did list certain facts that a trial court can and cannot consider in determining maturity. Trial courts should not make a blanket determination that all minors are too immature to make a decision about having an abortion or that an abortion never may be in a minor's best interests without parental approval. A child's age, educational background, or grades in school, while indicative of some level of maturity, are not conclusive on the issue of maturity, nor is participation in extracurricular activities or the minor's socioeconomic status.

The court also held that if a judge determines that a minor has not demonstrated that she is mature enough to make a decision to undergo an abortion, then the judge should make specific findings concerning that determination to allow meaningful review on appeal. Similarly, if a court concludes that a minor is not credible in some respect that directly relates to the determination of maturity, the court should make specific findings in that regard.

In his *Doe 1 (I)* dissenting opinion, Justice Hecht, joined by Justice Abbott, said that the standards set by the court for determining whether a minor was mature and sufficiently well informed were so low that "it is not much harder now for a minor to obtain an abortion without telling her parents than it was before the Parental Notification Act was passed." He said that this "trivializes" the abortion decision and renders the new law "almost meaningless." Justice Hecht criticized the court's guidelines for not requiring that the information obtained by a minor to show that she is well-informed be complete and balanced by the differing views of those who may oppose abortion. He said that to be entitled to an abortion without parental notification under the court's guidelines, "all a minor need tell the trial court is: that she has consulted with a clinician who told her that abortion presented insignificant physical risks to her, that some people regret having an abortion but not very often, and that she could always have the child and keep it or put it up for adoption; and that she carefully considered all the clinician said."

In *Doe 1 (I)*, Justice Priscilla Owen concurred with sending the case back to the trial court but said that minors and their counsel could meet too easily the "minimal" guidelines set by the court. She said that to be fully informed, the minor should demonstrate that she has sought and obtained meaningful counseling from a qualified source about the emotional and psychological impact of having an abortion, including an understanding of the impact of the procedure on the fetus. She also would require the minor to show that she had considered thoughtfully the potential impact on her relationships with her parents and other family members and on her future possible relationships with her husband or children, should they learn of the abortion. Information obtained from the Internet or anecdotal advice from untrained laypersons should not suffice, she said.

Determining when notification would not be in the minor's best interests

The Supreme Court in *Doe 2* listed factors for a trial court to consider in determining what is not in a minor's best interests. It said that the trial court in this case did not make a proper inquiry when it denied a judicial bypass by finding that it would be in the minor's best interests to notify her parents. Instead, the statute directs the court to consider only whether notification would *not* be in the minor's best interests.

The court held that in determining whether notification would not be in the minor's best interests, the trial court should weigh the advantages and disadvantages of parental notification in the minor's specific situation and should consider these four factors:

- the minor's emotional or physical needs;
- the possibility of emotional or physical danger to the minor;
- the stability of the minor's home and whether notification would cause serious and lasting harm to the family structure; and
- the relationship between the parent and the minor and the effect of notification on that relationship.

The court noted that this list was not exhaustive and that additional factors, such as whether notification may lead the parents to withdraw emotional and financial support from the minor, could be considered. The "best interests" determination, the court said, necessarily involves evaluating whether notification could lead to abuse of the minor, even though potential for abuse also is a separate reason for granting a bypass. The court said that while the trial court should consider all relevant circumstances, a minor's generalized fear of telling her parents would not, by itself, establish that notification would not be in the minor's best interests.

As it did with the determination of maturity, the Supreme Court required the trial court to make specific findings if it determines that the minor has failed to show that notification would not be in her best interests. Similarly, if the trial court's determination depends on its assessment of the minor's credibility, it should make specific findings on that issue as well.

In his *Doe 2* dissenting opinion, Justice Hecht, again joined by Justice Abbott, said that "any competent lawyer can lead a reasonably coherent minor through the Court's simple checklist . . . The Act's bar to teenage abortions without parental notification is set ankle-high, according to the Court, and any minor who can hurdle it is, as a matter of law, entitled to have her application granted." He said that the court's new guidelines for determining whether notification is not in the minor's best interest amount to "really no more than that notification be potentially upsetting to the minor or her parents."

In *Doe 2*, Justice Owen concurred with sending the case back to the trial court, but said that the guidelines for determining the minor's best interest were too vague and minimal and that the courts also should consider how non-notification would affect the family structure.

The court in *Doe 4 (I)* discussed the weight that trial-court judges should give to the testimony of the minor in establishing whether notification would not be in the minor's best interests. The court said that because trial courts can view a witness's demeanor, they have great latitude in believing or disbelieving a witness's testimony, particularly when the witness, such as a minor requesting a parental notification bypass, is interested in the outcome. Nevertheless, if the minor's uncontroverted testimony is clear, positive, and direct and not impeached or discredited by other circumstances, the trial court must accept it as fact. The court noted that the minor's testimony would not be controverted because, since bypass proceedings are nonadversarial and confidential, no one is likely to present contrary evidence challenging the minor's assertions. If the trial court denies the minor's application based on circumstances tending to discredit the minor's testimony that are not apparent in the record, the trial court should make written findings detailing those circumstances.

In *Doe 4 (I)*, the minor cited her fear that her parents would react to being notified that she desired an abortion as they had reacted to her older sister in a similar situation in which, she said, her parents had kicked her sister out of the house and neither she nor her parents had spoken to her since. The court said that although the minor's testimony appeared direct and positive and not self-contradictory or otherwise suspect, it did not

establish clearly that her parents would abandon her and cut off all contact. Her testimony was not very detailed and left too many questions unanswered to provide clear evidence that she would suffer the same fate as her sister. While the court refused to overrule the trial court and grant the application, it returned the case to the trial court for another hearing so the trial court could follow the guidelines laid down in *Doe 1 (I)* and *Doe 2*.

Justices Owen, Hecht, and Abbott disagreed in *Doe 4 (I)* that if the minor were able to establish conclusively that her parents would withdraw their support and sever all contact, she would establish as a matter of law her right to an abortion without parental notification. Justice Owen wrote, "I cannot countenance a rule of law that would permit a minor to deceive her parents in order to avoid their expression of disapproval when those acts of disapproval are wholly within the parents' rights." They also said that the minor's efforts to show that she was mature and sufficiently well-informed fell so far short that there was no need to return the case to the trial court for another hearing using the new guidelines.

After a second hearing, the trial court again denied Jane Doe 4's application for a bypass and was upheld by the court of appeals. In *Doe 4 (II)*, the Supreme Court, in an opinion by Justice Hankinson, for the first time upheld a trial court's decision, determining that the minor had not established as a matter of law that she was mature and sufficiently well informed and that the trial court had not abused its discretion in failing to find that notification would not be in the minor's best interests. While the minor had visited a physician, she failed to demonstrate that she understood how a past medical problem would present special risks should she have an abortion. While there was evidence weighing for and against notification, the trial court could have determined that her medical problem outweighed any potential disruption of her family relationship. Justice Hecht, joined by Justice Owen, concurred in the result but said that the minor's testimony had fallen far short of the proof required for a bypass and that, in its reasoning, the court majority continued to minimize the importance of parental involvement and the trial court's role in assessing a minor's credibility.

Determining whether notification might lead to abuse

The court in *Doe 2* did not establish specific guidelines for courts to use in determining whether notification might lead to physical, sexual, or emotional abuse of the minor. It did, however, review the trial court's finding that there was "no evidence" that notifying the minor's parents would lead to abuse, despite Doe's testimony that she was afraid of her father, that he had a temper, and that he had slapped her, but that he never had beaten her. The court said that while Doe's testimony was not conclusive, it provided some evidence of the potential for abuse. In returning the case, the court directed the trial court to determine whether, based on all the evidence presented at the subsequent hearing, a preponderance of the evidence supported a finding that notification *may* lead to abuse.

As with the determination of the minor's maturity and best interests, the court required trial courts to make specific findings concerning the potential for abuse. Similarly, if the trial court determines that the minor's testimony about potential abuse is not credible, it also should make specific findings in that regard.

In *Doe 3*, a majority of the court found that the case should be returned to the trial court but failed to agree on the definition of emotional abuse. In this case, the minor had testified that her father was an alcoholic and that while he never had abused her, he had taken out his anger over his children's actions by getting "physical" with her mother. Three justices (Hecht, Abbott, and Owen), for varying reasons, said that courts should be guided by the definition of abuse in Family Code, sec. 261.001, which includes "mental or emotional injury to a child that results in an observable and material impairment in the child's growth, development, or psychological functioning."

Six justices agreed that sec. 261.001 should not be used as the exclusive definition of abuse. Four (Enoch, joined by Baker, Hankinson, and O'Neill) rejected the definition outright, saying that "abuse is abuse" and that the courts should not "differentiate among the perceived degrees or types of abuse that may occur" or "consider whether the abuse would occur anyway so that one more instance doesn't matter." They contended that evidence

that parental notification likely will lead to physical abuse of another in the minor's household at least is some evidence that notification may lead to emotional abuse of the minor. The four justices determined as a matter of law that the minor should have received a judicial bypass. They said the court should not usurp the Legislature's decision to balance the equally strong societal interests of having parents guide their children's decisions and prohibiting child abuse by holding that "regardless of the language used in the statute, abuse should be tolerated in the name of parental rights — just not too much."

Two justices (Alberto Gonzales, joined by Chief Justice Phillips) used sec. 261.001 and other statutes as a guide to craft a definition of emotional abuse as including unreasonable conduct, including that by a third party, that causes serious emotional injury. Some degree of familial discord is to be expected from parental notification, but "the hard question," they said, "is deciding when the reaction crosses the line from parental interaction, guidance, and discipline into conduct that may lead to serious emotional injury." This finding would depend on the individuals involved. Evidence that the minor would be upset or have short-term feelings of guilt or anxiety would not be enough, they said, but evidence of prior physical or emotional abuse in the home causing the minor, if she notified her parents, to become severely depressed or self-destructive clearly would establish abuse. Reviewing the specific case, the justices found that the minor had not established conclusively a case for abuse with such reasonable certainty that the trial court's finding should be overturned as a matter of law. Nevertheless, they agreed that the case should be returned for another hearing so the trial court could use the new guidelines established in *Doe 1 (I)* and subsequent cases.

Standards for appellate review

In *Doe 1 (I)* and *Doe 2*, the Supreme Court set varying standards for appellate review of trial-court decisions denying a minor's request for a judicial bypass.

For the determination of whether the minor is "mature and sufficiently well informed," the standard of review is *legal and factual sufficiency* rather than abuse of discretion. The court said that the trial court's role in making this determination only is to weigh the evidence and determine the credibility of the minor or other witnesses, not to weigh competing policy considerations and to balance interests. The trial court has no discretion because, under the statute, if it finds the minor mature and sufficiently well informed to decide for herself whether to have an abortion, it must grant the order allowing the minor to consent to an abortion without notifying either of her parents. (Four justices disagreed, saying that the standard of review should be abuse of discretion.)

For the determination of whether notification would not be in the minor's best interests, the court decided that the standard of review for the trial court's decision should be *abuse of discretion*. Unlike the "mature and sufficiently well informed" determination, which is solely a factual finding, determining the minor's best interests requires the trial court to exercise judicial discretion in balancing the possible benefits and detriments to the minor in notifying her parents.

Constitutionality

In *Doe 2*, the trial court had decided on its own that the judicial bypass provision of the parental notification law was unconstitutional. It said that the two-day deadline set by the Legislature for the trial-court decision infringed on the judicial function and therefore violated the Texas Constitution's separation-of-powers clause and also fundamental due process. It also said that the confidentiality requirements in SB 30 violated the Constitution's open-courts requirement. Both the court of appeals and the Supreme Court determined that the trial court erred in addressing these issues and expressed no opinion on them.

Lone Locality Opts Out of Sales-Tax Holiday

The city of Sunset Valley in Travis County was the only local taxing authority that chose to opt out of this year's sales-tax holiday. In 1999, the Legislature in SB 441 established the first weekend in August as an annual sales-tax holiday, during which individual articles of clothing and footwear priced at less than $100 are exempt from state and local sales taxes. All cities, counties, transit authorities, and special districts levying a local sales tax had to observe the first sales-tax holiday in 1999, but beginning this year, they could choose to opt out and continue to collect local sales taxes on all items during the three-day holiday period. This year's sales-tax holiday will be August 4-6.

The state sales-tax rate is 6.25 percent. Cities, counties, transit authorities, and certain other special districts may levy a local sales tax, but the combined total tax rate may not exceed 8.25 percent.

Of 1,280 local taxing authorities that levy a sales tax, only the city of Sunset Valley exercised its option not to participate in the 2000 sales-tax holiday. The 6.25 percent state sales tax still will not be charged on items sold in Sunset Valley during the three-day holiday, but the city's 1.5 percent local sales tax will continue to apply.

Sunset Valley, a city of 376 surrounded by Austin, includes some large shopping centers within its city limits and has no city property tax, deriving almost all of its revenue from sales taxes. Almost all people shopping in the city are nonresidents, and the city determined that these shoppers should continue to help pay the cost of wear and tear on local streets, police, and other city services during the sales-tax holiday. In 1999, Sunset Valley raised $2.8 million in sales-tax revenue, a 43 percent increase over 1998, and first quarter 2000 revenues were up 18 percent compared to first quarter 1999.

Texas and Florida last year joined New York in observing a sales-tax holiday, which is geared toward low-cost items sold during the period when children are returning to school. The Texas exemption, found in Tax Code, sec. 151.326, applies only to articles of clothing and footwear that are not primarily designed nor normally worn for athletic activity or protective use.

The Comptroller's Office has issued detailed lists of the items that are and are not exempt during the holiday. For example, golf cleats and football pads are not exempt because they are used exclusively for athletic purposes, while tennis shoes, jogging suits, and swimsuits qualify for the exemption because they commonly are worn for purposes other than athletic activity. Accessories such as jewelry, handbags, luggage, umbrellas, wallets, watches, and similar items carried on or about the body, are not exempt, nor is rented clothing or footwear, such as formal wear, costumes, uniforms, diapers, and bowling shoes. Repair and maintenance items and services for clothing and footwear, such as fabric, yarn, buttons, snaps, hooks, and zippers, also are not exempt.

The Comptroller's Office estimated that during the first sales-tax holiday last year, taxpayers saved a total of $32.6 million, including $25.6 million in state taxes and $7 million in local taxes. The comptroller projects a revenue loss from this year's sales-tax holiday of $36.6 million for the state and $8.5 million for localities.

Tax Code, Chapter 326 allows a local taxing authority to repeal a sales-tax exemption, but only if the statute creating the exemption specifically provides for local-option repeal. SB 441 allowed local taxing authorities to repeal the sales-tax holiday after January 1, 2000, but required them to abide by the first sales-tax holiday last year. The governing body of the local taxing authority must adopt an order or ordinance repealing the exemption by majority vote after a public hearing and must inform the comptroller before the first day of a complete calendar quarter before the repeal takes effect. The Comptroller's Office needs an entire calendar quarter's warning before a local authority makes sales-tax changes because the comptroller collects sales taxes on a quarterly basis. Because the sales-tax holiday occurs in August, during

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the third calendar quarter, the deadline for notifying the comptroller of any local-option repeal was March 31, before the start of the second calendar quarter.

Any local taxing authority that desires to reinstate a tax exemption must follow the same procedure as for its repeal. Several cities, including Beaumont and San Marcos, considered repealing the sales-tax holiday exemption this year, but only Sunset Valley actually did so.

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Capitol Extension
Room E2.180

P.O. Box 2910
Austin, Texas 78768-2910

(512) 463-0752
FAX (512) 463-1962

www.capitol.state.tx.us/hrofr/hrofr.htm

Staff:

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