IN THE SUPREME COURT OF TEXAS

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NO. 00-0140

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IN RE JANE DOE

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ON PETITION FOR REVIEW

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JUSTICE ENOCH, joined by JUSTICE BAKER, JUSTICE HANKINSON, and JUSTICE O'NEILL, concurring.

I join parts I, II, IV, V, and VI of the Court's opinion, and I join the Court's judgment remanding this appeal in the interests of justice. I disagree with parts III and VII for two reasons. One, I believe the standard of review on appeal in a proceeding under the parental notification act should be abuse of discretion, not factual or legal sufficiency. And two, I emphasize that in a proceeding under the parental notification act, our disposition today, remand, is inappropriate except in extraordinary circumstances. Because today we are construing the parental notification act for the first time, and because I agree it is in the interests of justice to give Jane Doe an opportunity to meet the statutory standard as the Court has construed it, I conclude this case presents exceptional circumstances warranting a remand.

I join the Court's construction of the statutory phrase "mature and sufficiently well-informed to make the decision to have an abortion performed without notification to either of her parents."[1] But I do not agree that the standard of review for appellate review of a trial court's decision that a

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[1]T EX. FAM. CODE § 33.003(i).

minor is not mature or sufficiently well informed is factual and legal sufficiency. Because of the nature of the unusual proceedings contemplated under sections 33.003 and 33.004 of the Family Code, I would conclude that the appropriate standard of review is abuse of discretion.

Unlike virtually any other judicial proceeding I am aware of, this proceeding is not only "non-adversarial," but notice to the very persons (besides the minor) likely to have the most interest in the outcome of the hearing — the parents who stand not to be notified of their minor child's decision — is prohibited. And the secrecy of the proceeding assures that the hearing will be entirely one-sided.

Because of the nature of this proceeding, then, all the evidence in the record will be undisputed. But the standard the Legislature chose for trial courts to apply in determining whether a minor is "mature and sufficiently well informed" — preponderance of the evidence — is typically associated with weighing conflicting evidence after an adversarial proceeding. Thus, we have an anomalous situation — the Legislature directs that the minor must demonstrate by a preponderance of the evidence (which generally means more likely than not) that she is mature and sufficiently well-informed, yet because the minor is the only party presenting evidence on these elements, there is no other evidence against which to weigh it to see if it is more likely than not.

A preponderance standard for trial court hearings cannot establish the standard of review on appeal, precisely because of the unique, unopposed nature of the proceedings. Since the hearing in the trial court is not adversarial and no weighing of disputed evidence can occur, there is no basis for appellate courts to defer to the trial courts' fact-finding function, as we would in any other ordinary appeal. In other words, unless the evidence in the record raises a question about the minor's credibility, the trial court is not free to simply disregard the undisputed facts provided by the minor.

Whether those undisputed facts demonstrate that the minor is "mature and sufficiently well informed to make the decision to have an abortion" is a legal question. And as we have said before, trial courts have no discretion in determining what the law is or in applying the law to the facts.[2]

Thus, in these unique, non-adversarial, parental notification proceedings, I would hold that Texas appellate courts must review a trial court's decision under an abuse of discretion standard. That is, did the trial court correctly apply the law to the undisputed facts in the record?

Moreover, again because of the unusual nature of the proceedings, I believe this Court should review the trial court's decision, rather than the court of appeals' ruling, for abuse of discretion because a case under the parental notification statute reaches us only when the court of appeals has affirmed the trial court's denial of a minor's application for waiver of parental notice. Thus, the focus in this Court should remain on whether the trial court misapplied the law to the undisputed facts.[3]

An abuse of discretion standard would not diminish the trial court's role under the statute. It remains the trial court's role to determine the witness's credibility, as the trial court hears the minor's testimony in person and is in the best position to assess the minor's credibility. But the trial court's discretion to make credibility determinations should not be unfettered. The trial court cannot simply disregard the minor's uncontested testimony. To decide otherwise — that a trial court is free to disregard the undisputed evidence despite no question of veracity — would put the trial court's legal decision beyond review. Consequently, whether the trial court can disregard the undisputed

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[2] *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992).

[3] *See, e.g., Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 918 (Tex. 1985).

evidence should depend on whether the record before the court raises a significant, legitimate question about the minor's veracity.

As mentioned, the parental notification statute prohibits not only general notice of the proceeding, but specific notice to the very people who likely would have the greatest interest in the minor's application — her parents.[4] It appears to me, therefore, that the Legislature intended for these proceedings to be unopposed in all circumstances. That means that the Legislature did not intend for the trial courts to assume the role of an opposing party and reject the undisputed evidence in the absence of a reasonable, factual basis to question the minor's credibility. Under similar circumstances, other courts have also concluded that the trial court may not simply choose to discredit the evidence offered by the minor unless it is "improbable or unreasonable or is shown to be untrustworthy."[5] In the case before us, for example, if the record revealed that, despite her testimony that she had conducted Internet research, Doe did not have access to a computer, the record itself would raise a significant, legitimate question about her veracity. (Of course, no such questions appear in this record.)

Furthermore, I note that throughout the Family Code a trial court makes decisions bearing on the best interests of a child. And appellate courts review those decisions under an abuse of discretion standard.[6] This fact strengthens my conviction that an abuse of discretion standard should

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[4] *See* TEX. FAM. CODE § 33.003(k).

[5] *In the Matter of the Petition of Jane Doe*, 866 P.2d 1069, 1074 (Kan. Ct. App. 1994).

[6] *See Gillespie v. Gillespie*, 644 S.W.2d 449, 451 (Tex. 1982); *Green v. Remling*, 608 S.W.2d 905, 908 (Tex. 1980).

apply here. In this case, the best interests of the child is the subject of two of the three inquiries that the statute sets forth. The same level of review should apply to the trial court's decisions regardless of the provision under review. But the Court would apply a different level of review to the trial court's decision relating to maturity and adequacy of information. This cannot but lead to confusion and inconsistency.

Nonetheless, having concluded that the standard of review should be abuse of discretion, I cannot say that the trial court in this case demonstrably acted "without regard to guiding legal principles."[7] The primary reason for this is that we have not before had the opportunity to provide guiding legal principles. That this trial court may not have properly comprehended what the Legislature meant by the phrase "mature and sufficiently well informed" does not equate to an abuse of discretion in this instance, where no published appellate decision existed to guide the trial court. Thus, this case presents just such an exceptional circumstance and a remand in the interest of justice is warranted.[8]

But now that this Court has announced the guiding legal principles, trial courts are not free to disregard those principles and substitute their own for determining whether a minor demonstrates that she is mature and sufficiently well informed to make this most difficult of decisions. And while the possibility exists that other exceptional circumstances in some future situation might also warrant

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[7] *Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998).

[8] *See* TEX. R. APP. P. 60.3.

a remand, I emphasize that such a result is contemplated neither by the statute[9] nor by our rules.[10] The time-sensitive nature of the proceedings and the constitutional implications of the specter of protracted hearings and appeals counsel very strongly against remand as an appellate disposition. And our rules expressly preclude a court of appeals from remanding.[11]

But here, where the minor has presented a record that demonstrates a high level of maturity, and where neither the minor nor the trial court had the benefit of guidance from this (or any other appellate decision) on the meaning of the phrase "mature and sufficiently well informed," I believe that it is in the best interest of justice to allow the minor the opportunity to meet the test the Court elaborates today for waiver under the act of notification to her parents to consent to the procedure. Thus, I join the Court's judgment.

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Craig T. Enoch
Justice

Opinion Delivered: February 25, 2000

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[9] *See* TEX. FAM. CODE § 33.004(b).

[10] *See* TEX. PARENTAL NOTIFICATION RULES & FORMS 3.3(b).

[11] *See id.* ("The court of appeals . . . must issue a judgment affirming or reversing the trial court's order denying the application. If the court of appeals reverses the trial court order, it must also state in its judgment that the application is granted.").