

# IN THE SUPREME COURT OF TEXAS

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No. 00-0224  
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IN RE JANE DOE

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APPEAL UNDER SECTION 33.004(F), FAMILY CODE  
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JUSTICE OWEN, dissenting.

Rather than conduct an appellate review to determine if there was evidence to support the lower courts' determination, this Court has usurped the role of the trial court, reweighed the evidence, and drawn its own conclusions. The Court has forsaken any semblance of abiding by principles of appellate review. I would affirm the judgment in this case because there is some evidence that (1) Jane Doe did not receive adequate counseling about alternatives to abortion and has not given thoughtful consideration to those alternatives, and (2) Doe does not have the maturity to make the decision to proceed with an abortion without notifying one of her parents.

But I dissent from far more than the judgment rendered in this particular appeal. I strongly dissent from the methods employed by the Court in rendering that judgment. The Court summarily reversed the lower courts, without an opinion and without the opportunity for considered, substantive deliberations. Now that the Court has, after the fact, issued an opinion, it has obliterated, with the stroke of a pen, more than fifty years of precedent regarding appellate review of a trial court's findings. The Court's actions raise disturbing questions about its commitment to the rule of law and to the process that is fundamental to the public's trust in the judiciary.

This is Doe's second appeal to this Court. On the first appeal, the Court did not find any error in the trial court's judgment denying her application or in the court of appeals' judgment affirming that denial. However, the Court remanded this matter to the trial court for further consideration in the interest of justice. *See In re Jane Doe*, \_\_ S.W.3d \_\_, \_\_ (Tex. 2000) (*Jane Doe I(I)*).

After the case was remanded, the trial court held a second hearing and again denied the application. The court of appeals again affirmed. The transcript of the trial court's second hearing was received by this Court during the evening on Wednesday, March 8, and other parts of the record were received on Thursday, March 9. The Court, by a vote of five to four, saw fit to render judgment in this case on Friday, March 10, summarily reversing the decisions of the two lower courts.

The Court's hasty rendition was remarkable for a number of reasons. I will not subject most of those reasons to the public scrutiny that they deserve out of an abundance of caution that to do so might violate the Code of Judicial Conduct.<sup>1</sup> I recount only facts that do not disclose the actual discussions or lack of discussions about this case. First, not even an abbreviated opinion, much less analysis, accompanied the Court's ruling. There was no explanation of the substantive grounds for the ruling, nor was there an explanation of the need to render final judgment without an opinion or at least a notation. *Cf. Republican Party v. Dietz*, 924 S.W.2d 932, 932 (Tex. 1996) (granting

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<sup>1</sup> Canon 3 provides in relevant part:

A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity. The discussions, votes, positions taken, and writings of appellate judges and court personnel about causes are confidences of the court and shall be revealed only through a court's judgment, a written opinion or in accordance with Supreme Court guidelines for a court approved history project.

TEX. CODE JUD. CONDUCT, Canon 3(B)(11).

emergency relief in an abbreviated opinion after hearing expedited oral arguments with a final opinion to follow). Second, the Court summarily reversed the lower courts and rendered judgment on March 10, less than forty-eight hours after it received the record at about 8:00 p.m. on March 8. When it rendered judgment, how likely is it that the Court had before it a draft of an opinion that carefully analyzed the evidence in the 125 pages of testimony from the second hearing? Third, even though every member of the Court recognized that expedition of this, Doe's second appeal, was essential, Doe did not so much as hint that immediate or summary disposition was necessary for a medical or any other reason. Doe's notice of appeal was typed onto the standard form this Court has promulgated for parental notification cases, and that printed form includes "ATTENTION CLERK: PLEASE EXPEDITE" on it. But Doe did not request that the Court rule on or before any particular date, nor was there any indication that Doe would suffer adverse consequences if the Court did not rule by March 10. Why then the rush to judgment? The Court does not and cannot legitimately explain why it did not wait until the following Monday, March 13, to issue its judgment accompanied by opinions.

The evidence is undisputed that on March 10, the day the Court summarily rendered judgment, Doe had been pregnant for fourteen weeks and that the following day was the beginning of her fifteenth week. The Court says that Doe might "be able to undergo the less risky suction curettage procedure" if it acted on March 10. \_\_\_ S.W.3d at \_\_\_. I must say in the strongest terms that this statement has *no basis whatsoever* in the evidence, argument of counsel to the trial court, or any of the briefing in any of the three courts that have considered this matter. On what, then, does the Court base its assertions?

The “evidence” comes from Planned Parenthood pamphlets that were offered to show what Doe had reviewed in deciding to have an abortion. Even that “evidence” belies the Court’s claims that it had to act by March 10. The “fact sheet” given to Doe by the Planned Parenthood clinic where she sought counseling says that vacuum aspiration or suction curettage is offered by Planned Parenthood “through the end of the 13<sup>th</sup> week of pregnancy.” According to Doe’s testimony at the hearing, the end of her thirteenth week of pregnancy was March 3, seven days before the Court rendered judgment. Doe testified that a sonogram was performed on February 19 and that she was told that, on that day, the stage of her pregnancy was eleven weeks and one day. The pamphlets from which the Court quotes also say that abortions in the “second trimester (14 through 24 weeks of pregnancy) . . . are more complicated procedures but are also quite safe.” The Court’s “evidence” thus says that by March 11, the first day that Doe could conceivably have obtained an abortion after the Court rendered judgment at the close of business on March 10, Doe was already in her fifteenth week of pregnancy and was already well beyond the stage at which a vacuum aspiration or suction curettage would be performed.

The Court cites a *court decision* in support of its statement that “[e]vidence admitted at the hearing indicated that the ‘safest method’ for performing an early abortion, a suction curettage or vacuum aspiration procedure, is used until the fourteenth week of pregnancy.” \_\_\_ S.W.3d at \_\_\_. That decision, *Women’s Medical Professional Corp. v. Voinovich*, 130 F.3d 187, 198 (6<sup>th</sup> Cir. 1997), which the Court says indicates that “[s]uction curettage can sometimes be performed up to the fifteenth week of pregnancy,” was not mentioned in the trial court or any of the briefing in this or the court of appeals. \_\_\_ S.W.3d at \_\_\_. And a statement in a court opinion is not a substitute for competent medical evidence. But even accepting the statement in *Voinovich* at face value, it says

only that suction curettage is sometimes performed *up to* the fifteenth week. Doe was beginning her fifteenth week when the Court rendered judgment. The point that cannot be overemphasized is that there is no indication in the record in this case that Doe could obtain an abortion by means of suction curettage or vacuum aspiration during her fourteenth week of pregnancy, much less her fifteenth week, and absolutely no indication from *any source* that issuing a decision on March 13 or even 14 or 15 would have placed Doe in any greater risk. Doe did not so much as hint that she would be at greater risk unless the Court acted on or before March 10. Indeed, she had sought and obtained a seven-day continuance in the court of appeals just before coming to this Court.

The other reasons offered by the Court to explain its hasty rendition are that “we had to also consider that any additional delay might call into question whether the proceedings were sufficiently expeditious to pass constitutional muster,” and that the Court must rule as “soon as possible” under our rules of procedure. \_\_\_ S.W.3d at \_\_\_. If those were the motivating factors behind the Court’s actions, how then does it explain its treatment of *Jane Doe 4*, \_\_\_ S.W.3d \_\_\_, \_\_\_ (Tex. 2000)? *Jane Doe 4*’s appeal languished in this Court for fifteen days before a decision was announced in an opinion of the Court. *Jane Doe 1*’s proceeding was in the Texas court system for thirty-one days from the day she filed her application, *Jane Doe 4*’s for twenty-seven.

Bluntly put, the Court has manufactured reasons to justify its action. Equally troubling is the lack of process accorded in this case. Once judgment had issued, and presumably Doe had proceeded with an abortion without the knowledge or consultation of either of her parents, how likely was it that any member of the Court who voted to summarily reverse the court of appeals’ and trial court’s judgments and render judgment for Doe would be inclined to give studied consideration to writings offered by dissenting members? How likely was it that on consideration of written

analyses, any of the five members of the Court who voted to hastily issue a judgment would change his or her mind and correspondingly, his or her vote?

## II

Doe contends that she has demonstrated as a matter of law one of the three grounds under section 33.003(i) of the Family Code that would entitle her to proceed with an abortion without notifying a parent. TEX. FAM. CODE § 33.003(i). It is her position that she is “mature and sufficiently well informed to make the decision to have an abortion performed without notification to either of her parents.” *Id.* The trial court was unpersuaded and ruled against her. The court of appeals affirmed that judgment.

One of the many remarkable statements in the Court’s opinion attempting to justify its reversal and rendition in this case is that because the trial court did not make a specific finding that Doe had not shown maturity, the Court is empowered to presume that Doe is mature. *See* \_\_ S.W.3d at \_\_. The Court thus overrules more than fifty years of precedent.

Until today, it had been well-settled law that when a trial court makes findings of fact and conclusions of law, an appellate court must presume that the evidence supports “not only the express findings . . . but also any omitted findings which are necessary to support the judgment,” unless the record does not support the judgment. *Wisdom v. Smith*, 209 S.W.2d 164, 166-67 (Tex. 1948); *Page v. Central Bank & Trust Co.*, 548 S.W.2d 802, 804 (Tex. Civ. App.—Eastland 1977, no writ); *Gulf States Theatres v. Hayes*, 534 S.W.2d 406, 407 (Tex. Civ. App.—Beaumont 1976, writ ref’d n.r.e.); *Go Int’l, Inc. v. Big-Tex Crude Oil Co.*, 531 S.W.2d 208, 210 (Tex. Civ. App.—Eastland 1975, no writ); *Ives v. Watson*, 521 S.W.2d 930, 934 (Tex. Civ. App.—Beaumont 1975, writ ref’d n.r.e.); *see also In re Anglin*, 542 S.W.2d 927, 930 (Tex. Civ. App.—Dallas 1976, no writ); *In re Herd*, 537

S.W.2d 950, 954 (Tex. Civ. App.—Amarillo 1976, writ ref'd n.r.e.); *Allied Bldg. Credits, Inc. v. Grogan Builders Supply Co.*, 365 S.W.2d 692, 695 (Tex. Civ. App. Houston—1963, writ ref'd n.r.e.). Our rules of procedure have long provided that when a trial court finds one or more elements of a ground of recovery or defense, omitted elements “will be supplied by presumption in support of the judgment” if supported by the evidence and no request to make findings regarding the omitted elements has been made. TEX. R. CIV. P. 299.<sup>2</sup>

I recognize that given the short time periods prescribed by section 33.003, the procedures set forth in our rules of procedure that complement Rule 299 conflict with section 33.003 and that the detailed process for requesting additional findings of fact and conclusions of law does not apply. *See generally Johnstone v. State*, \_\_\_ S.W.3d \_\_\_, \_\_\_ (Tex. 2000) (holding that TEX. R. CIV. P. 329b, requiring a motion for new trial to preserve factual sufficiency challenges, conflicted with TEX. HEALTH & SAFETY CODE § 574.070, which required a notice of appeal from an order of temporary commitment to a mental health facility to be filed within ten days). But the fact that Rule 299 cannot be applied in parental notification cases does not mean that the Legislature intended to override well-established common-law principles regarding appellate review. *See Cates v. Clark*, 33 S.W. 1065, 1066 (Tex. 1931) (citing the “well-recognized rule of law” that, if the trial court has made findings of fact and the evidence in the record supports the trial court’s judgment, it is presumed that all facts

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<sup>2</sup> Rule 299 provides in its entirety:

When findings of fact are filed by the trial court they shall form the basis of the judgment upon all grounds of recovery and of defense embraced therein. The judgment may not be supported upon appeal by a presumed finding upon any ground of recovery or defense, no element of which has been included in the findings of fact; but when one or more elements thereof have been found by the trial court, omitted unrequested elements, when supported by evidence, will be supplied by presumption in support of the judgment. Refusal of the court to make a finding requested shall be reviewable on appeal.

TEX. R. CIV. P. 299.

were found in support of the judgment); *Lincoln Nat'l. Life Ins. Co. v. Anderson*, 71 S.W.2d 555, 559 (Tex. Civ. App. — Waco 1934.), *modified on other grounds*, 80 S.W.2d 294 (Tex. Comm'n App. 1935) (reasoning that if a trial court failed to expressly find a fact in support of the judgment, then that fact may be inferred if supported by the record); *cf. Central Tex. Ice Co. v. Thomas*, 45 S.W.2d 181, 182 (Tex. Comm'm App. 1932, holding approved) (holding that, because the evidence supported the trial court judgment, the court of appeals' affirming of the trial court's judgment did not violate the rule that an appellate court cannot presume a fact in support of a judgment that the record shows was not a fact); Henry Finch Holland, *Appeal and Error — Non Jury Trial — Presumption as to Omitted Findings*, 14 TEX. L. REV. 518, 519-22 (1936).

The Legislature directed trial courts to make findings of fact and conclusions of law. *See* TEX. FAM. CODE § 33.003(h). The trial court in this case did so. Under well-established precedent, a reviewing court must presume that the trial court's judgment in this case is supported not only by its express finding that Doe was not sufficiently well informed, but also by its implied finding that Doe was not mature enough to make the decision to have an abortion without notification of a parent. Doe had the burden of establishing both elements of that ground for proceeding with an abortion without notification. Nothing in the Family Code indicates that the Legislature intended to override the appellate principle that an omitted finding on one ground for relief will be presumed to support the judgment.

Nor did I understand the Court's decision in *Jane Doe 1(I)* to overrule or disapprove of the foregoing decisions when the Court suggested that trial courts make specific findings regarding maturity or credibility to aid appellate review. *Jane Doe 1(I)*, \_\_\_ S.W.3d at \_\_\_. But today's decision dispenses with that long-standing law.

The Court says that a finding regarding maturity was not necessary to the judgment. *See* \_\_\_ S.W.3d at \_\_\_. The Court misunderstands the law. One basis on which a trial court may grant authorization for a minor to proceed with an abortion without notifying a parent is if she is mature and sufficiently well informed. Thus, there are two necessary elements to this ground for relief. Appellate review of a failure to find that a minor was entitled to an abortion on this ground is the same as any other failure to find for a party who has the burden of proof on a particular ground for relief, such as negligence. If a trial court found that there was no negligence, for example, but an appellate court concluded that negligence per se had been established as a matter of law, that conclusion, standing alone, would not authorize the appellate court to reverse the trial court's judgment. The appellate court must presume that the trial court also failed to find proximate cause even if there were no express finding on that element of the plaintiff's cause of action. If there were evidence that the negligence did not proximately cause the plaintiff's injury, the appellate court would be required to uphold the trial court's judgment based on the implied finding of no proximate cause. Here, since the Court concludes that Doe established as a matter of law that she was sufficiently well informed, it must imply a finding in support of the judgment on the other element that Doe must prove, which is maturity. The Court must then determine if there is any evidence to support the trial court's failure to find that Doe was mature. I turn to the evidence in the record regarding Doe's maturity.

### III

Doe is a senior in high school and still lives at home. Her parents provide for substantially all her needs. They recently purchased a new vehicle for her use now and when she goes to college in the fall. Although some of Doe's earnings from a part-time job help to defray the cost of

insurance, Doe's parents are paying for this vehicle. Doe also contemplates that her parents will pay for her college education. When asked why she did not want to tell either of her parents that she was pregnant and intended to have an abortion, Doe testified that it would upset them because they do not "believe in abortion." A pregnant minor's desire not to upset her parents is not a basis for concluding as a matter of law that she is mature. *See In re T.P.*, 475 N.E.2d 312, 315 (Ind. 1985).

But the more telling testimony is that Doe said that she feared that her parents would no longer provide financial assistance to her if they knew that she had an abortion. She testified that she intended to tell them some day that she had an abortion "when she was ready." A reasonable inference from this testimony is that after Doe's parents have paid most of her living, transportation, and education expenses over the next few years, she will tell them the truth, when there will be fewer consequences to face. This is some evidence that Doe is not mature enough to accept responsibility for her actions or her future. She intends to continue to seek and take support from her parents in virtually all aspects of her life, but not with regard to her decision to have an abortion. The trial court could reasonably find that Doe was not mature enough to make the abortion decision without telling one of her parents.

#### IV

The Court's analysis of whether Doe was sufficiently well informed is also incorrect. If the Court were to follow well-established law, it would consider evidence in the record that *supports* the trial court's judgment rather than disregard that evidence. Doe bears the burden of proof in this case. *See* TEX. FAM. CODE § 33.003. In order for the Court to reverse and render judgment in her favor, it must examine the record to determine if there is any evidence that supports the trial court's failure to find that Doe was sufficiently well informed. *See Sterner v. Marathon Oil Co.*, 767 S.W.2d 686,

690 (Tex. 1989). If there is no evidence to support the trial court's failure to make an affirmative finding, then the Court must still determine whether, based on the entire record, "the contrary proposition is established as a matter of law." *Id.* The evidence must be such that reasonable minds can draw only one conclusion. *See Collora v. Navarro*, 574 S.W.2d 65, 68 (Tex. 1978). There must be no evidence of probative force to raise a material fact question. *See id.* Although this is a close case, there is some evidence from which a trial court could reasonably conclude that Doe was not sufficiently well informed to make the decision to have an abortion without notification of a parent.

There is some evidence that the counseling Doe received about alternatives to abortion was inadequate and that Doe had not thoughtfully considered her alternatives. Doe said that she had received information about adoption or keeping her child from three sources other than a family member, the teenage father of her unborn child, and other teenage friends. Those were (1) an unlicensed counselor at the clinic where she intended to have an abortion, (2) pamphlets that she was given at the clinic, and (3) her home economics teacher who also teaches parenting to students other than Doe.

Doe did not explain the substance of the counseling she received at the abortion clinic about her alternatives besides abortion, other than to say that "[w]e basically went over making sure there is no pressure on me by anybody; making sure that I am aware of every decision I have; making sure that this is right for me and this is truly what I want." Doe did not, or was not able to, explain what she understood might be involved in an adoption. She expressed concern that if her child were placed for adoption, she would not be able to determine if it was placed in a loving home and given adequate care. Doe was clearly uninformed about the screening required before a child is placed in the home of prospective parents or the continued supervision after the child is placed. Similarly, she

did not exhibit any understanding about open adoption, even though a witness from Planned Parenthood whom Doe had never met or talked to testified at the hearing that open adoption was an option.

The Court says that the counselor with whom Doe did speak at the clinic “told Doe what would happen if she decided to keep the child.” \_\_\_ S.W.3d at \_\_\_. This, like other of the Court’s statements, finds no support in the record. Moreover, it is clear from Doe’s testimony that she had not been counseled about or had not considered all her options if she kept her child. The Court says “adoption was not a realistic option for [Doe] because she would grow emotionally attached to the child after birth and would be unwilling to give the child up.” \_\_\_ S.W.3d at \_\_\_. This is an accurate paraphrase of the testimony, but it reveals that Doe did not consider whether her parents would help her raise the child or raise it themselves if she decided to carry her baby to term. Similarly, Doe expressed concern about her ability to provide financial support for her child, but she did not indicate that she had considered whether her parents would support her and her child if she decided to have it.

Doe did not relate any information that she received from her home economics teacher about alternatives to abortion. Doe said that she does not know if her teacher supports her decision, “but she [her teacher] feels like if I feel this is the best thing for me that it is not a problem. She understands the circumstances.” The issue was not what Doe’s teacher understands, but what Doe understands.

The pamphlets that Doe received and read “several times” from the clinic where her abortion presumably has now been performed focus almost exclusively on the abortion procedure and potential complications. The pamphlets did not provide adequate information about adoption or

parenting. There was no information about safeguards for the child during the adoption process or about open adoption. The Court’s statement that a section in one of the pamphlets “explains the procedure” is not borne out by the record. More importantly, reading the sparse information contained in the pamphlets about adoption or raising a child is not the equivalent of meaningful counseling from a qualified source. While the pamphlets do say, as the Court notes, that information about pregnancy care, parenting skills, and sources of financial help for pregnant women *could* be provided, there is no evidence that such information *was* provided to Doe.

Finally, the record indicates that Doe did not seek advice or counseling from anyone who was inclined to thoroughly explore with her the adverse emotional and psychological impact that an abortion may have. Doe affirmatively avoided counseling from any source who might cause her to seriously examine her decision in a meaningful way, as notifying one of her parents may have caused her to do.

The question in this case is not whether this Court would have ruled differently when confronted with all the evidence that the trial court heard. The question is whether legally sufficient evidence supports the trial court’s judgment. The answer to this latter question is yes. Longstanding principles of appellate review and our Texas Constitution do not permit this Court to substitute its judgment for that of the trial court and or to ignore the evidence, as it has done.

#### IV

The Court says that “judges’ personal views may inspire inflammatory and irresponsible rhetoric” and that the “highly-charged nature [of abortion issues] does not excuse judges who impose their own personal convictions into what must be a strictly legal inquiry.” \_\_\_ S.W.3d at \_\_\_. To which judge or judges does the Court refer? To the judge of the trial court, who saw and heard Doe

testify in person during the course of two hearings and made findings that are supported by the record? To the three justices on the court of appeals who reviewed the record and wrote a thoughtful opinion that cannot be characterized as inflammatory or as containing irresponsible rhetoric? To one or more of the justices on this Court?

I challenge the Court to state plainly how any judge's personal convictions have entered into analyzing what is strictly a legal issue in this case. That issue is whether there was some evidence to support the trial court's failure to find by a preponderance of the evidence that Doe was mature and sufficiently well informed to make a decision to have an abortion without notifying one of her parents. It is the Court who has acted irresponsibly in this case by summarily rendering judgment without careful consideration of the record, by manufacturing reasons to support its actions, and by ignoring the evidence that supports the trial court's judgment.

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I dissent from the Court's judgment in this case and from the manner in which this appeal has been resolved. The Court has disregarded the law and has trampled the process on which the legitimacy of our law depends.

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Priscilla R. Owen  
Justice

OPINION DELIVERED: June 22, 2000