

# IN THE SUPREME COURT OF TEXAS

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No. 00-0191  
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IN RE JANE DOE 2

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ON PETITION FOR REVIEW  
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## OPINION

JUSTICE ENOCH delivered the opinion of the Court, in which CHIEF JUSTICE PHILLIPS, JUSTICE BAKER, JUSTICE HANKINSON, JUSTICE O'NEILL, and JUSTICE GONZALES joined, and in which JUSTICE OWEN joined in Part VII.

JUSTICE OWEN filed a concurring opinion.

JUSTICE HECHT filed a dissenting opinion, in which JUSTICE ABBOTT joined.

### I.

The court of appeals affirmed the trial court's denial of a minor's request for waiver of parental notification to obtain an abortion. We vacate the judgments of the court of appeals and the trial court and remand to the trial court for proceedings consistent with this opinion.

### II.

Jane Doe is a pregnant, unemancipated minor. Under Family Code section 33.003, Doe applied to the trial court for an order allowing her to have an abortion without notifying her parents.<sup>1</sup>

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<sup>1</sup> See TEX. FAM. CODE § 33.003.

The trial court appointed her an attorney and, as the Family Code permits, also designated the attorney to serve as her guardian ad litem.<sup>2</sup> After a hearing the trial court denied the application and made the following factual findings: (1) that the minor was not mature and sufficiently well informed to decide to have an abortion without notifying either of her parents; (2) that it was in the minor's "best interest to notify her parents"; and (3) that there was "no evidence that notification of [the minor's] parents may lead to physical, sexual, or emotional abuse . . . ."

The trial court then concluded *sua sponte* that the judicial bypass provision of the parental notification law was unconstitutional for three reasons. First, the provision's two-day deadline for a trial court's determination infringed on the judicial function and, thus, violated the Texas Constitution's separation-of-powers clause.<sup>3</sup> Second, the statute's confidentiality provisions violated the Texas Constitution's open courts provision.<sup>4</sup> And third, the bypass provision's two-day time period violated fundamental due process.<sup>5</sup> Affirming, the court of appeals stated that its decision was based on the trial court's findings of fact, and that consequently it did not reach the trial court's constitutional questions. Here, Doe challenges all three of the trial court's factual findings. She also asserts that the court of appeals erred in not considering the bypass provision's constitutionality and that the provision is constitutional.

Because the hearing in this case was conducted before our opinion in *In re Jane Doe (Doe*

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<sup>2</sup> See *id.* § 33.003(e). We recognize that this dual capacity may create a conflict of interest. In this case, however, the record reveals no such conflict.

<sup>3</sup>T EX. CONST., art. II, § 1.

<sup>4</sup>T EX. CONST., art. I, § 13.

<sup>5</sup>T EX. CONST., art. I, § 19.

I),<sup>6</sup> and because this court has not previously considered section 33.003's best interests and potential abuse prongs, we vacate the judgments of the courts below and remand to the trial court for a new hearing in light of this opinion and *Doe I*.

### III.

Doe contends that the trial court erred in finding that she was not mature and sufficiently well informed to consent to an abortion without notifying either of her parents. In *Doe I*, which was decided after the trial court's hearing in this case, we set forth three showings that a minor must make to establish that she is sufficiently well informed. First, “she must show that she has obtained information from a health-care provider about the health risks associated with an abortion and that she understands those risks.”<sup>7</sup> Second, “she must show that she understands the alternatives to abortion and their implications.”<sup>8</sup> Third, “she must show that she is also aware of the emotional and psychological aspects of undergoing an abortion . . . .”<sup>9</sup> On the question of maturity, we held that if a court determines that the minor is not mature enough to decide to have an abortion without notifying her parents, “the court should make specific findings concerning its determination so that there can be meaningful review on appeal.”<sup>10</sup>

Because we delivered our opinion in *Doe I* after the hearing in this case, the *Doe I* factors

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<sup>6</sup> \_\_\_ S.W.3d \_\_\_, \_\_\_ (Tex. 2000).

<sup>7</sup> *Id.* at \_\_\_.

<sup>8</sup> *Id.* at \_\_\_.

<sup>9</sup> *Id.* at \_\_\_.

<sup>10</sup> *Id.* at \_\_\_.

were not available for the trial court to apply. For the same reason, the minor could not know the evidence to needed to meet the *Doe I* factors. On remand, the trial should consider at a subsequent hearing whether Doe was “mature and sufficiently well informed” in light of *Doe I*.

#### IV.

Doe also challenges the trial court's denial of her application on the ground that “notification would not be in [her] best interests . . . .”<sup>11</sup> Before we determine the merits of Doe's claim, we must first decide what standard of review applies to a trial court's “best interests” determination under this statute.

We conclude that an appellate court should review a trial court's determination regarding whether notification is in the minor's best interests under the abuse of discretion standard. Unlike the “mature and sufficiently well informed” determination, in which the trial court is solely making factual findings, determining the minor's best interests requires the trial court to balance the possible benefits and detriments to the minor in notifying her parents. This type of balancing necessarily involves the exercise of judicial discretion and should be reviewed on that basis.<sup>12</sup> Moreover, in many other family law contexts, such as custody,<sup>13</sup> adoption,<sup>14</sup> and child support,<sup>15</sup> we review a trial

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<sup>11</sup> TEX. FAM. CODE § 33.003(i).

<sup>12</sup> See *Doe I*, \_\_\_ S.W.3d at \_\_; *General Tire, Inc. v. Kepple*, 970 S.W.2d 520, 526 (Tex. 1998).

<sup>13</sup> See *Gillespie v. Gillespie*, 644 S.W.2d 449, 451 (Tex. 1982).

<sup>14</sup> See *In re W.E.R.*, 669 S.W.2d 716, 716 (Tex. 1984).

<sup>15</sup> See *Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990).

court's best interests findings for abuse of discretion. (We recognize, however, that courts of appeals have reviewed best interests determinations in termination-of-parental-rights cases<sup>16</sup> and juvenile justice matters<sup>17</sup> for legal and factual sufficiency.) Because of the discretionary nature of the trial court's determination and the similarity to review of best interests findings in other family law contexts, we hold that abuse of discretion is the proper standard of review.

Before setting out guidelines for the best interests determination, we note that the trial court specifically found that it would be in Doe's best interests to notify her parents. That is not the proper inquiry under the statute, which directs the court to consider whether “notification *would not* be in the best interests of the minor . . . .”<sup>18</sup>

To determine 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. Although the best interests determination necessarily involves evaluating whether notification could lead to abuse of the minor, that the Legislature included the potential for abuse as a separate reason for granting a bypass makes it clear that the best interests determination encompasses a broader concern for the minor's welfare. In *Holley v. Adams*,<sup>19</sup> we developed a list

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<sup>16</sup> See, e.g., *In re M.D.S.*, 1 S.W.3d 190, 200 (Tex. App.—Amarillo 1999, no pet.); *In re R.D.*, 955 S.W.2d 364, 368 (Tex. App.—San Antonio, pet. denied); *Edwards v. Texas Dep't of Protective and Regulatory Servs.*, 946 S.W.2d 130, 138 (Tex. App.—El Paso 1997, no writ); *Dupree v. Texas Dep't of Protective and Regulatory Servs.*, 907 S.W.2d 81, 86-87 (Tex. App.—Dallas 1996, no writ).

<sup>17</sup> See *In re S.A.M.*, 933 S.W.2d 744, 746 (Tex. App.—San Antonio 1996, no writ).

<sup>18</sup> EX. FAM. CODE § 33.003(i)(emphasis added).

<sup>19</sup> 544 S.W.2d 367 (Tex. 1976).

of non-exhaustive factors for determining a minor's best interests.<sup>20</sup> Four of these factors are relevant when adapted to the parental notification context, and a trial court should consider them in determining best interests: (1) the minor's emotional or physical needs; (2) the possibility of emotional or physical danger to the minor; (3) the stability of the minor's home and whether notification would cause serious and lasting harm to the family structure; and (4) the relationship between the parent and the minor and the effect of notification on that relationship.<sup>21</sup> An additional factor that courts in other jurisdictions have considered is whether notification may lead the parents to withdraw emotional and financial support from the minor.<sup>22</sup> This list is not exhaustive, and in making the best-interests determination the trial court should consider all relevant circumstances. We note, however, that a minor's generalized fear of telling her parents does not, by itself, establish that notification would not be in the minor's best interests.<sup>23</sup>

Also, as with the maturity determination, meaningful appellate review is possible only if the trial court makes specific findings about its determination that the minor has not shown that notification is not in her best interests.<sup>24</sup> Similarly, if the trial court's determination depends on its

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<sup>20</sup> See *id.* at 371-72; see also *In re Marriage of Bertram*, 981 S.W.2d 820, 822-23 (Tex. App.—Texarkana 1998, no pet.) (applying the *Holley* factors to determine best interests in a conservatorship proceeding).

<sup>21</sup> See *Holley*, 544 S.W.2d at 371-72; see also *In re Petition of Doe for Waiver of Notice*, 866 P.2d 1069, 1075 (Kan. Ct. App. 1994) (using similar factors for the best interests determination in applying a parental notification statute).

<sup>22</sup> See *In re Petition of Doe for Waiver of Notice*, 866 P.2d at 1075; *In re Complaint of Doe*, 615 N.E.2d 1142, 1143 (Ohio Ct. App. 1992) (per curiam).

<sup>23</sup> See *In re E.H.*, \_\_\_ S.E.2d \_\_\_, \_\_ (Ga. Ct. App. 1999); *In re T.P.*, 475 N.E.2d 312, 315 (Ind. 1985); *In re Anonymous 2*, 570 N.W.2d 836, 840 (Neb. 1997).

<sup>24</sup> See *Doe 1*, \_\_\_ S.W.3d at \_\_\_.

assessment of the minor's credibility, it should make specific findings on that issue.<sup>25</sup>

Upon reviewing this record, we cannot conclude that the trial court abused its discretion as a matter of law in finding that Doe had not established that notifying her parents would not be in her best interests. On remand, the trial court at a subsequent hearing should apply the standards we articulate in this opinion to determine whether notification would not be in the minor's best interest. The trial court should also make the specific findings necessary for its determination.

## V.

Doe also asserts that notifying her parents may cause them to abuse her emotionally or physically. Under the statute, the trial court must grant an order allowing the minor to consent to an abortion without notifying her parents if it finds by a preponderance of the evidence that “notification may lead to physical, sexual, or emotional abuse of the minor.”<sup>26</sup> In its findings of fact, the trial court found that there was “no evidence” that notifying the minor's parents would lead to abuse. We review this factual finding for legal sufficiency.<sup>27</sup>

Doe testified that she was afraid of her father, that he had a temper, and that he had slapped her, but that he had never beat her.<sup>28</sup> While Doe's testimony is not conclusive, it is some evidence of the potential for abuse. The record therefore does not support the trial court's finding that there was *no evidence* that notification may lead to abuse.

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<sup>25</sup> See *id.*

<sup>26</sup> TEX. FAM. CODE § 33.003(i).

<sup>27</sup> See *Doe 1*, \_\_\_ S.W.3d at \_\_\_; *Catalina v. Blasdell*, 881 S.W.2d 295, 297 (Tex. 1994).

<sup>28</sup> Where paraphrasing is sufficient to convey the gist of testimony from the application hearing, we will not quote the testimony because the statute mandates that the record remain confidential. See TEX. FAM. CODE § 33.003(k).

On remand the trial court must determine whether, based on all the evidence presented at the subsequent hearing, a *preponderance* of the evidence supports a finding that notification *may* lead to abuse. For meaningful appellate review the trial court must make specific findings concerning the potential for abuse.<sup>29</sup> Similarly, if the trial court determines that the minor's testimony about potential abuse is not credible, it should also make specific findings in that regard.<sup>30</sup>

That we have provided trial courts forms for making findings of fact and conclusions of law should not prevent them from making the specific findings we require for the maturity, best interests, and potential abuse determinations. These forms are analogous to our forms allowing minors to check off that they have satisfied one or more of the statutory requirements. A minor's testimony merely parroting the language on the form is not sufficient for a judicial bypass without testimony regarding her specific circumstances. Likewise, the mere fact that the trial court has checked a box on a form does not demonstrate that it has given the careful consideration necessary for such a significant decision. Moreover, the form itself contemplates more specificity, as it includes a place for comments under each of the three statutory requirements, in which the trial court can and should detail its findings.

## VI.

Although Doe has not established that she is entitled to a judicial bypass as a matter of law, we nevertheless vacate the judgments of the courts below and remand for another hearing. Our authority to do so comes from Texas Rule of Appellate Procedure 60.2(f), which allows us to “vacate

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<sup>29</sup> See *Doe 1*, \_\_\_ S.W.3d at \_\_\_.

<sup>30</sup> See *id.*

the lower court's judgment and remand the case for further proceedings in light of changes in the law.”<sup>31</sup> Although we have never used this rule to remand for a new hearing in the trial court,<sup>32</sup> the rule's plain language does not preclude us from doing so. This rule is particularly well-suited to situations such as this one, where courts must apply the requirements of a unique or novel statutory scheme. Here, remanding for a subsequent hearing is appropriate because the trial court conducted its hearing before we decided *Doe I*, in which we established the factors for the “mature and sufficiently well informed” determination, and before we had considered the best interests and potential for abuse prongs. Our disposition thus allows Jane Doe to present evidence based on *Doe I* and this opinion and allows the trial court to evaluate that evidence based on these two opinions.

## VII.

Finally, we consider the trial court’s determination that Chapter 33 of the Family Code is an unconstitutional violation of the separation-of-powers clause,<sup>33</sup> the open courts provision,<sup>34</sup> and due process.<sup>35</sup> The trial court raised this issue *sua sponte* without benefit of argument or briefing. Doe argues that the statute is constitutional and that the trial court erred in addressing these constitutional

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<sup>31</sup> TEX. R. APP. P. 60.2(f).

<sup>32</sup> See, e.g., *Bacon v. General Devices, Inc.*, 830 S.W.2d 106, 107 (Tex. 1992); *Welex, A Div. of Halliburton Co. v. Broom*, 816 S.W.2d 340 (Tex. 1991) (both remanding to the court of appeals for reconsideration in light of changes in the law).

<sup>33</sup> TEX. CONST. art. I, § 2.

<sup>34</sup> TEX. CONST. art. I, § 13.

<sup>35</sup> TEX. CONST. art. I, § 19.

questions in this case. We agree that the trial court erred in addressing the constitutional issues and express no opinion on them.

We have previously cautioned that the constitutionality of a statute should be considered only when the question is properly raised and such determination is necessary and appropriate to a decision in the case.<sup>36</sup> The presumption is that a statute enacted by our Legislature is constitutional,<sup>37</sup> and attacks on that presumption should generally be raised as an affirmative defense to enforcement of the statute.<sup>38</sup> In the absence of an appropriate pleading raising the issue of unconstitutionality, the trial court is generally without authority to reach the issue.<sup>39</sup>

The minor could raise a constitutional challenge herself, but time constraints often may make such a challenge impractical. Chapter 33 provides for an expedited, confidential, and nonadversarial hearing for determining whether the minor may obtain an abortion without parental notice. In other states, similar parental notification bypass provisions have been challenged by interested parties through declaratory judgment actions.<sup>40</sup>

Under the circumstances of this case and in the context of this unique proceeding, we

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<sup>36</sup> See *Wood v. Wood*, 320 S.W.2d 807, 813 (Tex. 1959) (“constitutionality of a statute will be considered only when the question is properly raised and a decision becomes necessary and appropriate to the disposal of the case and no statute should be overruled without careful and mature consideration”).

<sup>37</sup> See *Sax v. Votteler*, 648 S.W.2d 661, 664 (Tex. 1983).

<sup>38</sup> See *State v. Scott*, 460 S.W.2d 103, 107 (Tex. 1970).

<sup>39</sup> See *Houston Chronicle Pub. Co. v. City of Houston*, 531 S.W.2d 177, 183 (Tex. Civ. App.--Houston [14th Dist.] 1975), *writ ref'd n.r.e.*, 536 S.W.2d 559 (Tex. 1976); *cf. Dreyer v. Greene*, 871 S.W.2d 697, 698 (Tex.1993) (“a claim, including a constitutional claim, must have been asserted in the trial court in order to be raised on appeal”).

<sup>40</sup> See, e.g., *Lambert v. Wicklund*, 520 U.S. 292 (1997)(physicians who perform abortions filed declaratory judgment action challenging Montana statute); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976)(physicians challenging Missouri statute).

conclude that the trial court erred in both raising and deciding the constitutional issue. Accordingly, we reverse that part of the trial court's judgment determining the statute to be unconstitutional and, without reference to the merits, vacate that part of its judgment.

## VII.

For the above reasons, we remand Jane Doe's application to the trial court for proceedings consistent with this opinion. The proceedings in the trial court must be concluded as if Doe's application had been filed the next business day after our opinion issues. In the event that Doe requires additional time after issuance of this opinion to prepare for a hearing, she may request an extension of time.<sup>41</sup>

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Craig T. Enoch  
Associate Justice

Opinion delivered: March 7, 2000

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<sup>41</sup> See TEX. FAM. CODE § 33.003(h).