

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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JUSTICE OWEN, concurring.

The Court has failed to give effect to the Legislature’s intent regarding the “best interest” prong of section 33.003(i) of the Family Code when minors seek to have an abortion. The Court has omitted any requirement that a trial court find an abortion to be in the best interest of the minor. The Family Code plainly directs that a trial court should not authorize an immature and insufficiently-informed minor to proceed with an abortion unless the court finds from a preponderance of the evidence that an abortion is in the best interest of the minor and that notification of a parent would not be in the best interest of the minor. I also disagree with the standard of review chosen by the Court for “best interest” determinations. Accordingly, I join in the Court’s judgment, but I join only Part VII of its opinion.

I

The Family Code provides that no physician in the state of Texas may perform an abortion on a minor unless he or she gives at least 48 hours notice to one of the minor’s parents or to her guardian. *See* TEX. FAM. CODE § 33.002(a)(1), (b). There are limited exceptions to this prohibition,

and those exceptions include judicial bypass provisions. *See id.* §§ 33.002(a)(2)-(3), 33.003, 33.004. The Legislature has set forth three bases on which a trial court can authorize a minor to consent to an abortion without notification of either of her parents or her guardian. One of these is if the court determines by a preponderance of the evidence that notification would not be in the best interest of the minor. *See id.* § 33.003(i).

If a court concludes that “notification would not be in the minor’s best interest,” the court is directed by section 33.003(i) to authorize the minor to proceed with an abortion. *Id.* The inquiry under the “best interest” provision is not simply whether notifying a parent that the minor is pregnant and is seeking an abortion would be in the minor’s best interest. The inquiry is whether *proceeding with an abortion* without notification of a parent is in the minor’s best interest. Thus, there necessarily are two interrelated considerations within the “best interest” provision: (1) whether an abortion is in the minor’s best interest and (2) whether notification of a parent that the minor is proceeding with an abortion would not be in the minor’s best interest.

This is the only reasonable construction of 33.003(i). A “best interest” determination will not be dispositive unless the court has concluded that the minor is not mature or sufficiently well informed to make the decision to have an abortion without notifying a parent and the court is unpersuaded that notifying a parent may lead to physical, sexual, or emotional abuse of the minor. Surely the Legislature did not intend for a minor to proceed with an abortion under the “best interest” aspect of section 33.003 when there has been no informed determination by a parent, a court, or the minor herself that the abortion is in her best interest.

The Court's interpretation of the "best interest" prong of section 33.003 is deficient because it focuses only on "notification." The Court does not inform trial courts that they can only conclude that "notification would not be in the best interest of the minor" if they also conclude that an abortion would be in the best interest of the minor. *See* TEX. FAM. CODE § 33.003(i). Instead, the Court says that a trial court "should weigh the advantages and disadvantages of parental notification." ___ S.W.3d at ___. None of the factors set forth by the Court seem concerned with whether *an abortion* without notification is in the minor's best interest.

That there must be a two-faceted inquiry in determining "best interest" is evident not only from sections 33.002 and 33.003(i), but from their origin and from decisions of the United States Supreme Court that construed similar provisions prior to the enactment of sections 33.002 and 33.003. The Supreme Court has concluded that a statute requiring parental consent before a minor can obtain an abortion must contain a bypass provision to be constitutional. *See City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 439-42 (1982) (*Akron I*) (holding parental-consent statute unconstitutional) (citing *Bellotti v. Baird*, 443 U.S. 622 (1979) (plurality opinion) (*Bellotti II*) with approval). The bypass mechanism set forth in *Bellotti II* contemplates that a court would determine whether an abortion is in a minor's best interest if it concluded that the minor was not sufficiently mature and well informed to make the decision to have an abortion:

A pregnant minor is entitled . . . to show either: (1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes; or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests.

Id. at 643-44.

Texas, like several other states, has enacted a parental-notification statute rather than a parental-consent statute. But similar to consent statutes, the Texas parental-notification scheme contains a judicial bypass mechanism that includes “best interest” as one avenue for a minor to obtain authorization for an abortion. The United States Supreme Court has considered “best interest” provisions that are virtually identical to those found in the Texas Family Code bypass provisions. See *Lambert v. Wicklund*, 520 U.S. 292, 295 (1997); *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 511-13 (1989) (*Akron II*). That Court refused to interpret “notification of a parent or guardian is not in the best interests of the [minor]” to mean that there was any separation between “the question whether parental notification is not in a minor’s best interest from an inquiry into whether abortion (without notification) is in the minor’s best interest.” *Lambert*, 520 U.S. at 298. The Supreme Court explained that “a judicial bypass procedure requiring a minor to show that *parental notification is not* in her best interests is equivalent to a judicial bypass procedure requiring a minor to show that *abortion without notification is* in her best interests.” *Id.* at 297-98 (emphasis in original) (explaining the Court’s holding in *Akron II*). The concurring opinion in *Lambert* specifically disagreed with the majority that “a young woman must demonstrate both that abortion is in her best interest and that notification is not.” *Id.* at 302 (Stevens, J., concurring in judgment).

The Texas Legislature enacted section 33.003(i), including the “best interest” provision, two years after the *Lambert* decision was handed down. Undoubtedly, the Legislature was aware of the interpretation the highest court in the land had given to the words “notification of a parent or guardian is not in the best interests” of the minor. See *Lambert*, 520 U.S. at 294, 300. And undoubtedly the Legislature intended for Texas courts to be guided by *Lambert* in construing the

“best interest” provision. Nevertheless, the Court today sides with *Lambert*’s concurrence rather than a majority of the Supreme Court.

II

I also find the factors that the Court has enumerated for determining “best interest” problematic. First, they are not particularly enlightening. For example, the Court lists “the minor’s emotional or physical needs.” ___ S.W.3d at ___. What does this mean in the context of a pregnant minor who wants to obtain an abortion without telling her parents? The Court also directs trial courts to consider “the stability of the minor’s home and whether notification would cause serious, and lasting harm to the family structure.” ___ S.W.3d at ___. Does this mean that an unstable home weighs in favor of or against an abortion for a minor? How is a court to weigh the fact that the minor has a stable home?

The Court makes no mention of considering how non-notification may affect the family structure. Similarly, when the Court cites as a factor “the relationship between the parent and the minor and the effect of notification on that relationship,” *id.* at ___, the Court does not consider the effect of non-notification. “Best interest” surely encompasses an examination of the ramifications of notifying as well as not notifying a parent.

Bellotti II was insightful when it observed that “the peculiar nature of the abortion decision requires the opportunity for case-by-case evaluations of the maturity of pregnant minors.” 443 U.S. at 643 n.23. The same is true when determining a minor’s best interest. This is the first case presented to our Court under the “best interest” provision in section 33.003(i). I do not think it wise to offer vague guidelines to trial courts when those guidelines, although not exhaustive, are

necessarily promulgated in a vacuum with no real-world experience under the Family Code. More importantly, I share JUSTICE HECHT’S concern that the Court’s standards for determining “best interest” are far lower than the Legislature intended.

III

The trial court in this case concluded that “it is in [Jane Doe’s] best interest to notify her parents.” I note that the Family Code does not require that both parents be notified, only that “a parent” be notified. TEX. FAM. CODE § 33.002(a)(1)(A); *see also id.* § 33.003(i) (referring to notification of “either of her parents”). The constitutionality of requiring a minor to notify *both* parents is questionable. *See Hodgson v. Minnesota*, 497 U.S. 417, 450-55 (1990) (striking down statute that required consent of both parents as unconstitutional).

But with regard to the ultimate merits, the trial court did not err in failing to find that “notification would not be in [Jane Doe’s] best interest.” TEX. FAM. CODE § 33.003(i). The only evidence in the record that even remotely relates to whether it would not be in Jane Doe’s best interest to notify one of her parents is as follows: Jane Doe lives at home with her parents. She is in high school and participates in extracurricular activities. She testified that she has been seeing the father of her unborn child for some time, and Jane Doe believes that during that time her mother has experienced health problems primarily from worry about this relationship. Jane Doe is concerned that her mother’s health might suffer further if she were told of her daughter’s pregnancy. Jane Doe also testified that she is scared of her father, that “[h]e’s never beat me, but he’s hit me. He has a—he has just like slapped me and he has a temper and he might, I don’t know, kick me out of the house or something.”

The Court holds today that the trial court’s failure to find that notification would not be in Jane Doe’s best interest must be reviewed for an abuse of discretion. As I explain in Part V, I would apply a legal sufficiency standard of review. There are two inquiries for a reviewing court when it applies that standard to a situation where, as here, a party bears the burden of proof and the factfinder fails to find for that party. *See Sterner v. Marathon Oil Co.*, 767 S.W.2d 686, 690 (Tex. 1989). First, the record must be examined for evidence that supports the factfinder’s failure to find for the party with the burden of proof. *See id.* Second, if there is no evidence to support the failure to make a finding, then, “the entire record must be examined to see if the contrary proposition is established as a matter of law.” *Id.*

There is evidence that would support the trial court’s failure to find that notification of one of Jane Doe’s parents would not be in her best interest. And Jane Doe did not establish as matter of law that notification of one of her parents would not be in her best interest or that obtaining an abortion would be in her best interest. Even if an abuse of discretion standard were applied, the factual record is not such that the trial court could reach but one conclusion. *See In re Epic Holdings, Inc.*, 985 S.W.2d 41, 56-57 (Tex. 1998) (explicating the abuse of discretion standard).

IV

The evidence that pertains to the third prong of section 33.003(i), which is “whether notification may lead to physical, sexual, or emotional abuse of the minor,” has been set forth above in the discussion of “best interest.” Jane Doe’s statement that her father had slapped her does not establish as a matter of law that she may be physically abused if one of her parents is notified that she is proceeding to obtain an abortion. Jane Doe did not explain when the slapping incident

occurred, its severity, or any of the circumstances surrounding it. Moreover, the Family Code only requires notice to one parent. The trial court was not required to assume that Jane Doe’s father rather than her mother would be notified. Similarly, under an abuse of discretion standard, the evidence is not such that the only conclusion that the trial court could reach was that Jane Doe may be physically abused if one of her parents is notified.

V

The Court holds that an abuse of discretion standard should be applied in reviewing determinations under the “best interest” prong of section 33.003(i). The Court reasons that determining best interest “requires the trial court to balance the possible benefits and detriments to the minor,” and that in “other family law contexts, such as custody, adoption, and child support,” an abuse of discretion standard is applied. __ S.W.3d at __ (authorities omitted).

The Court acknowledges that in parental-termination cases, our courts of appeals have applied legal and factual sufficiency. __ S.W.3d at __. Indeed this Court has applied that standard in termination cases in which the best interest of the child is an issue. *See Holley v. Adams*, 544 S.W.2d 367, 370-71, 373 (Tex. 1976) (applying the no evidence standard of review in a termination of parental-rights case and holding that there was no evidence that termination of mother’s parental rights was in the best interest of the child); *see also Richardson v. Green*, 677 S.W.2d 497, 501-02 (Tex. 1984) (applying the no evidence standard of review in a termination of parental-rights case); *In re M.D.S.*, 1 S.W.3d 190, 199-201 (Tex. App.—Amarillo 1999, no pet.) (same); *In re R.D.*, 955 S.W.2d 364, 368-69 (Tex. App.—San Antonio 1997, pet. denied) (same); *Edwards v. Texas Dept of Protective & Regulatory Servs.*, 946 S.W.2d 130, 138-39 (Tex. App.—El Paso 1997, no writ)

(same); *Dupree v. Texas Depot of Protective & Regulatory Servs.*, 907 S.W.2d 81, 83, 86-87 (Tex. App.—Dallas 1995, no writ) (same); *In re A.D.E.*, 880 S.W.2d 241, 245-46 (Tex. App.—Corpus Christi 1994, no writ) (same).

The determination of whether notification would not be in the best interest of a minor is more analogous to parental-termination cases than to custody decisions. In custody cases, the issues generally are how various rights and responsibilities for child rearing and support are to be allocated between the two parents. The trial court's decision is not irrevocable, and the court has continuing jurisdiction. That is not the case in either parental-termination or parental-notification matters.

But even in custody matters, at least two courts of appeals have applied the legal and factual sufficiency standard of review. *See In re Rodriguez*, 940 S.W.2d 265, 270, 271-74 (Tex. App.—San Antonio 1997, writ denied); *R.S. v. B.J.J.*, 883 S.W.2d 711, 714, 720 (Tex. App.—Dallas 1994, no writ). In those cases, the rights of the children's biological parents had not been terminated, but the trial courts nevertheless appointed non-parents as managing conservators.

This Court's treatment of the Family Code sections dealing with the "best interest" aspect of parental termination is inconsistent with its treatment of the "best interest" aspect of section 33.003(i). In applying a standard of review, this Court has not separated the "best interest" inquiry in the Family Code's parental-termination provisions from the other enumerated inquiries. *Compare* TEX. FAM. CODE § 161.001 (regarding termination of the parent-child relationship) *with id.* § 33.003(i) (regarding authorization of minors to obtain an abortion without notification of a parent or guardian). I find it anomalous that the Court is doing so with the parental-notification bypass provisions.

The statute itself should be the touchstone in deciding which standard of review should apply. Section 33.003 is distinguishable from statutes under which a trial court may or may not, in its discretion, make an award or reach a particular conclusion. For example, the Declaratory Judgment Act provides that a trial court “may” award attorney’s fees if it determines that to do so would be “equitable and just.” TEX. CIV. PRAC. & REM. CODE § 37.009; *see also Bouquet v. Herring*, 972 S.W.2d 19, 20-21 (Tex. 1998). The matter is left to the sound discretion of the trial court. By contrast, if a trial court makes one of the three possible findings under section 33.003(i), it “shall enter an order authorizing the minor to consent to the performance of the abortion without notification.” TEX. FAM. CODE § 33.003(i); *see also In re Jane Doe*, __ S.W.3d __, __ (Tex. 2000) (*Jane Doe I*). The trial court has no discretion in the matter. The Family Code further requires a trial court to make its determination based on a preponderance of the evidence, which is a more-likely-than-not proof requirement. That is different from a discretionary or “equitable and just” determination.

Section 33.003 also requires trial courts to issue written findings of fact and conclusions of law at the close of what is a final trial on the merits. *See* TEX. FAM. CODE § 33.003(h). Proceedings under section 33.003 should be treated no differently than any other bench trial. The trial court’s findings should be reviewed on appeal for legal and factual sufficiency.

As a practical matter, it makes virtually no difference in this Court whether we review “best interest” determinations under section 33.003(i) based on abuse of discretion or legal sufficiency. If there is some evidence to support the trial court’s determination, we must let it stand, as long as the law was correctly applied to the facts as found by the trial court. However, there is a material

difference in the courts of appeals. Under an abuse of discretion standard, courts of appeals do not have the option of remanding a case if the trial court's decision was supported by some evidence but was against the great weight and preponderance of the evidence. An appellate court may not attempt to reconcile disputed factual matters under an abuse of discretion standard. *See In re Epic Holdings*, 985 S.W.2d at 56-57. Under that standard, a "reviewing court must defer to the trial court's resolution of factual issues, and may not set aside the trial court's finding unless the record makes it clear that the trial court could reach only one decision." *Id.* at 56 (citing *Walker v. Packer*, 827 S.W.2d 833, 839-40 (Tex. 1992)).

Section 33.003 does not expressly or even implicitly foreclose a remand by a court of appeals for factual insufficiency. There is no indication that appeals under section 33.003 differ from traditional appeals in which the courts of appeals would have the authority to reverse a trial court's determination under the "best interest" prong of section 33.003(i) and to remand the matter to the trial court if the trial court's failure to find is against the great weight and preponderance of the evidence. Remanding for factual insufficiency will not unduly or unconstitutionally delay bypass proceedings.

VI

Finally, I would say more than the Court has said about potential conflicts of interest in bypass proceedings under section 33.003. The attorney appointed by the trial court to represent Jane Doe was also appointed as her guardian ad litem. At the beginning of the hearing, her attorney/guardian ad litem advised her that a conflict could arise because of the obligation to represent her and the obligation to assist the court. Jane Doe's attorney/guardian ad litem then asked

her if she nevertheless wished to proceed, and she said yes. I agree with the Court that the record does not reveal that an actual conflict materialized. But the trial court should not have appointed the same person to serve dual roles.

I recognize that the Family Code allows a trial court to appoint the same person as both the attorney and the guardian ad litem for a minor. *See* TEX. FAM. CODE § 33.003(e). But in many situations, an attorney cannot zealously represent the client and simultaneously discharge the ad litem’s obligations to the court. Once an ad litem has conferred with a minor and a conflict becomes apparent, a new ad litem will have to be appointed, unless the minor can and does waive the conflict. That is because counsel will be conclusively presumed to have had access to the minor’s confidences. *See NCNB Texas Nat’l Bank v. Coker*, 765 S.W.2d 398, 400 (Tex. 1989); *see also Phoenix Founders, Inc. v. Marshall*, 887 S.W.2d 831, 833 (Tex. 1994). In view of the very short time constraints within which section 33.003 proceedings must be conducted and the complex layer that conflicts and waiver issues could add, I think it imprudent for courts to appoint the same individual as attorney and ad litem.

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Because this Court has not previously addressed the “best interest” aspect of section 33.003(i), and because the hearing in this case was conducted before this Court issued its opinion in *In re Jane Doe*, ___ S.W.3d ___ (Tex. 2000) addressing “mature and sufficiently well informed,” I agree that it should vacate the judgments of the courts below and remand to the trial court for further proceedings in the interest of justice. *See Morrow v. Shotwell*, 477 S.W.2d 538, 541-42 (Tex. 1972); *see also* TEX. R. APP. P. 60.2(f) (providing that this Court may “vacate the lower court’s

judgment and remand the case for further proceedings in light of changes in the law”); TEX. R. APP. P. 60.3 (providing that our Court “may, in the interest of justice, remand the case to the trial court even if a rendition of judgment is otherwise appropriate”). *But see Scott v. Liebman*, 404 S.W.2d 288, 294 (Tex. 1966) (stating that under former Texas Rule of Civil Procedure 505, this Court did not have the discretion to reverse an errorless judgment and remand in the interest of justice).

Accordingly, I join in the judgment of the Court, but only Part VII of its opinion.

Priscilla R. Owen
Justice

OPINION DELIVERED: March 7, 2000