

# IN THE SUPREME COURT OF TEXAS

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No. 00-0193  
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IN RE JANE DOE 3

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APPEAL UNDER SECTION 33.004(F), TEXAS FAMILY CODE  
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## OPINION

JUSTICE GONZALES delivered an opinion concurring in the judgment, in which CHIEF JUSTICE PHILLIPS joined, and in which JUSTICE OWEN joined in Parts I and II.

JUSTICE ENOCH filed a concurring and dissenting opinion, in which JUSTICE BAKER, JUSTICE HANKINSON, and JUSTICE O'NEILL joined.

JUSTICE HECHT filed a dissenting opinion.

JUSTICE OWEN filed a dissenting opinion.

JUSTICE ABBOTT filed a dissenting opinion.

### I

Doe is pregnant, unmarried, and under the age of eighteen. Texas law provides that a physician may not perform an abortion on an unemancipated minor unless the physician gives forty-eight hours notice to one of her parents or her guardian, with certain exceptions. *See* TEX. FAM. CODE § 33.002(a). Among those exceptions is the right of the minor to apply to a court for an order authorizing her to consent to an abortion.

There are three possible bases on which a trial court could grant such an application. *See* TEX. FAM. CODE § 33.003(i). The trial court is directed by the Family Code to determine by a preponderance of the evidence:

[1] whether the minor is mature and sufficiently well informed to make the decision to have an abortion performed without notification to either of her parents or a managing conservator or guardian, [2] whether notification would not be in the best interest of the minor, or [3] whether notification may lead to physical, sexual, or emotional abuse of the minor.

*Id.*

Doe's application to the trial court asserted that all three grounds were present, except that she did not assert that notification may lead to her sexual abuse. In accordance with section 33.003(e) of the Family Code, the trial court appointed an attorney to represent Doe and also appointed a guardian ad litem. A hearing was held at which Doe testified in response to questions from her attorney, her ad litem, and the court. Her attorney and guardian ad litem also presented arguments to the court. At the conclusion of the hearing, the trial court failed to find that any of the three bases in section 33.003(i) for authorizing a minor to consent to an abortion without notifying a parent had been proven by a preponderance of the evidence. The trial court rendered judgment denying Doe's application, and the court of appeals affirmed that judgment without issuing an opinion. One justice in the court of appeals noted a dissent.

Doe has appealed to this Court pursuant to section 33.004(f). *See* TEX. FAM. CODE § 33.004(f). She contends that she conclusively established that she is mature and sufficiently well informed to make the decision to have an abortion without notifying one of her parents and that notification may lead to her physical or emotional abuse. For the reasons considered below, I disagree.

## II

Before undertaking a review of the record, a court must establish the appropriate standard of review. In *Doe I*, this Court held that a determination under section 33.003(i) of whether a minor

is “mature and sufficiently well informed to make the decision to have an abortion performed without notification to either of her parents” is reviewed for legal and factual sufficiency. *In re Jane Doe*, \_\_\_ S.W.3d \_\_\_, \_\_\_ (Tex. 2000)(*Doe 1*); TEX. FAM. CODE § 33.003(i). A trial court’s determination of whether notification may lead to physical or emotional abuse of the minor primarily involves fact finding and is therefore similar to a determination of “mature and sufficiently well informed.” *See Doe 1*, \_\_\_ S.W.3d at \_\_\_. Accordingly, a determination of whether notification may lead to physical, sexual, or emotional abuse of the minor is reviewed for legal and factual sufficiency. *In re Jane Doe 2*, \_\_\_ S.W.3d \_\_\_ (Tex. 2000)(*Doe 2*).

Because Doe bore the burden of proof, a reviewing court’s inquiry is not simply whether there was legally sufficient evidence to support the trial court’s judgment. In order for a court to reverse and render judgment in Doe’s favor, it must examine the record to determine if there is any evidence that supports the trial court’s failure to find for Doe. *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 reviewing court must still determine whether, based on the entire record, “the contrary proposition is established as a matter of law.” *Id.* Thus, when a party with the burden of proof seeks to establish a right to recover as a matter of law, 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.*

Accordingly, in this case, the Court cannot reverse the court of appeals’ judgment unless there was no evidence to support the trial court’s failure to find (1) that Doe was mature and sufficiently well informed, or (2) that notification of one of Doe’s parents may lead to her physical or emotional abuse. The evidence also must be undisputed and conclusive that Doe was mature and

sufficiently well informed or that notification may lead to her abuse.

### III

I first consider Doe’s contention that she was mature and sufficiently well informed to make the decision to have an abortion without notifying her parents. In *Doe 1* we noted that the two concepts of “mature” and “informed” overlap to some extent but are also distinct. *See Doe 1*, \_\_\_ S.W.3d at \_\_\_. During the hearing, Doe testified briefly about her age, educational background, scholastic accomplishments, extracurricular activities, and plans for the future.<sup>1</sup> These are the types of things that we said in *Doe 1* weigh on the decision of whether a minor is mature. *Id.* at \_\_\_.

With regard to being “sufficiently well informed,” this Court held in *Doe 1* that at a minimum, the minor must make three showings. *Id.* at \_\_\_. First, that she has obtained information from a health-care provider about the health risks associated with the abortion and that she understands those risks. *Id.* at \_\_\_. Second, she must show that she understands the alternatives to abortion and their implications. This includes an understanding that the law requires the father to assist in the financial support of his child. *See id.* at \_\_\_. Third, she must show that she is aware of the emotional and psychological aspects of undergoing an abortion and that she has considered how this decision might affect her family relations. *See id.* at \_\_\_. Here, Doe made an attempt to prove she was sufficiently mature and well informed as a ground for waiving notification, but she failed to make the required showings as a matter of law.

Doe testified that she understood the abortion process and is not ready to become a mother.

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<sup>1</sup> Consistent with the parental notification statutes' confidentiality requirements, and with the practice recommended by the Court in *Doe 2*, \_\_\_ S.W.3d at \_\_\_, I paraphrase rather than quote Doe's testimony. *See* TEX. FAM. CODE §33.003(k).

She did not, however, establish that she has obtained information from a health-care provider about the health risks associated with an abortion and that she understood those risks. Nor was there evidence which established as a matter of law that she understood the risks associated with the particular stage of the her pregnancy.

Similarly, there was little evidence that Doe understood the alternatives to abortion and their implications or that she had thoughtfully considered her alternatives, including adoption and keeping the child. Doe testified that she had discussed certain things with her boyfriend, however, she did not indicate that she understood that the law requires a father to assist in the financial support of his child. Finally, Doe's testimony did not establish as a matter of law that Doe was aware of the emotional and psychological aspects of undergoing an abortion. From her testimony it appears that she talked with her boyfriend and with the court appointed guardian ad litem but, there is no testimony that she was aware of the emotional and psychological aspects of undergoing an abortion. While Doe adduced some evidence on the issue, she did not establish as a matter of law that she was mature and sufficiently well informed.

#### IV

Doe's second contention in this Court is that she established as a matter of law that notification of one of her parents of an impending abortion may lead to her emotional abuse. Before deciding the specific facts of this case, we should attempt to derive some sense of what the Legislature meant by allowing parental bypass if notification may lead to the minor's emotional abuse.

The Legislature has not defined the term "emotional abuse" and this Court has not had the opportunity to interpret the term for purposes of the parental notification statute. As Justice Hecht

notes, a definition for abuse appears in Chapter 261 the Family Code, containing some pertinent concepts:

In this Chapter:

- (1) 'abuse' includes the following acts or omissions by a person:
  - (A) mental or emotional injury to a child that results in an observable and material impairment in the child's growth, development, or psychological functioning.

TEX. FAM. CODE § 261.001(1)(A). I disagree that section 261.001 was meant to define abuse in all senses the term is used in section 33.003(i). First of all, the statute itself clearly provides that it defines abuse for Chapter 261 purposes, not broadly for the entire Family Code. Chapter 261 is entitled “Investigation of Report of Child Abuse or Neglect,” and establishes a duty on professionals and others to report suspected child abuse. *See* TEX. FAM. CODE §261.101. Secondly, subsection (1) only states that abuse “includes” certain acts and omissions, indicating that even within Chapter 261 the definitions of the word abuse used in that statute are not necessarily exclusive.

Section 261.001's definition of “abuse” is mentioned in Chapter 33 of the Family Code, but only to say that a physician who has reason to believe the minor is subject to sexual or physical abuse must report it. *See* Tex. FAM. CODE § 33.008(a). Chapter 33 of the Family Code has its own section of defined terms. If the Legislature intended the definition of abuse in Chapter 261 to apply generally to Chapter 33, it could have easily said so in the definitions set out at section 33.001.

While I do not believe that the Legislature intended Chapter 261 as the exclusive definition of abuse under section 33.003(i), I take from that definition and similar statutes that emotional abuse contemplates unreasonable conduct causing serious emotional injury. *See, e.g.,* TEX. HUM. RES. CODE § 48.002(2) (defining “abuse” for the chapter of the Human Resources Code concerning

elderly protective services). Also, the Legislature's placement of emotional abuse alongside physical abuse and sexual abuse in section 33.003(i) contemplates unreasonable conduct by a third party that causes serious emotional injury. Some degree of familial discord is to be expected whenever an unwed minor notifies her parents or guardian that she is pregnant. The hard question is deciding when the reaction crosses the line from parental interaction, guidance, and discipline into conduct that may lead to serious emotional injury.

Moreover, whether conduct may cause serious emotional injury depends to some measure on the individuals involved. Conduct that would be extreme and hurtful in one family would not in another. The difficulty in ascertaining the severity of the emotional injury is analogous to our attempts to formulate a standard for mental anguish as an element of damages in a civil lawsuit. In *Parkway Co. v. Woodruff*, 901 S.W.3d 434, 444 (Tex. 1995), we noted the difficulty of distinguishing between disappointment and severe disappointment, between embarrassment and wounded pride, between anger and indignation. *Id.* at 444 (holding that compensable mental anguish requires proof of "more than mere worry, anxiety, vexation, embarrassment, or anger"). Likewise with this ground, courts must, for example, distinguish between embarrassment and cruel humiliation. They must distinguish the minor who merely wants to avoid parental disappointment and disapproval from the minor who is at risk of serious emotional injury.

Proof of this ground would not necessarily require testimony from a professional confirming emotional abuse, and could be based solely on the testimony of the minor. But there must be evidence in the record of some character that notification may lead to serious emotional injury. Mere evidence that the minor would be upset or have short term feelings of guilt or anxiety would not establish emotional abuse. At the other extreme, evidence of prior physical or emotional abuse

in the home which caused the minor to become severely depressed or self-destructive, if causally linked to notification, would almost certainly establish this ground.

## V

I now turn to the facts of this case. In Doe's application for waiver of parental notification form, she placed a checkmark on the ground that "Telling my parent(s), managing conservator or guardian that I want an abortion may lead to physical or emotional abuse of me." At the hearing, Doe did not claim physical abuse and testified that neither parent had physically abused her.<sup>2</sup> But she testified that her father is an alcoholic who, rather than confront the children with his disapproval, would take it out on the mother. Doe answered affirmatively when asked if the father has been physical with the mother. Doe's attorney ad litem did not attempt to get her to elaborate on what she meant by her characterization of her parent's conduct or relate a specific incident, even in the broadest terms. Doe's guardian ad litem asked her if she believed she would be subject to emotional abuse if she had to tell her parents, and she answered affirmatively. The guardian did not explain what emotional abuse meant in the context of her question or ask the minor to elaborate on her answer.

In discussions with the trial court, Doe's attorney ad litem made clearer statements about the severity of the father's possible conduct and its potential emotional effect on Doe, but it is not clear that the attorney was making representations of fact or arguing for an interpretation of the facts. In any event, the attorney was not sworn as a witness and her statements are not evidence. *See Banda v. Garcia*, 955 S.W.2d 270, 272 (Tex. 1997) (holding that unsworn statements of attorneys are not normally evidence); *United States Gov't. v. Marks*, 949 S.W.2d 320, 326 (Tex. 1997) (holding that

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<sup>2</sup> Again, I note that Doe's testimony is paraphrased. *See supra*, \_\_\_ S.W.3d at \_\_\_ n. 1.

argument of attorney is not evidence but may have significance in certain circumstances).

The scant direct evidence from Doe, combined with reasonable inferences, might be sufficient to support a finding on this issue in favor of Doe, if that were our task. But the trial court failed to find the facts in Doe's favor on issues she had the burden to prove. Before we can overturn a fact finding against Doe and render judgment, we must be able to hold that she conclusively established that notification may lead to emotional abuse. Here the evidence fails to establish vital facts, as a matter of law, because the evidence does not conclusively show what Doe meant when she said she would suffer emotional abuse. As we instructed in *Doe 2*, merely parroting terms from the statute or language from the forms promulgated by this Court is not sufficient for judicial bypass without testimony regarding the minor's specific circumstances. *Doe2*, \_\_\_ S.W.3d at \_\_\_.

Doe failed to adduce any evidence of her emotional response to her father's conduct aside from her description of that response as emotional abuse. While that statement supports the conclusion that Doe will suffer some adverse emotional response, her statement does not explain what she means by emotional abuse. Without that explanation, the trial judge could reasonably conclude that her emotional response, which she calls emotional abuse, could be less than serious emotional injury. Without other evidence, I cannot say Doe established as a matter of law that her response would be emotional abuse.

Establishing this ground as a matter of law requires only reasonable certainty, not the degree of specificity or explicitness Justice Enoch attributes to my opinion. While it might be tempting to lower the standards for disregarding fact findings due to the sensitive nature of the subject matter, there is no justifiable basis for doing so in these proceedings. Chapter 33 proceedings are non-adversarial and confidential, and an attorney is appointed to help the minor present her evidence to

satisfy the standards we announced in *Doe 1*, \_\_\_ S.W.2d at \_\_\_ (setting out the showings necessary to conclusively establish that the minor is sufficiently mature and well informed), *Doe 2*, \_\_\_ S.W.3d at \_\_\_ (holding that meaningful appellate review requires the trial court to make specific findings about the potential for abuse), and today.

## VI

The hearing on Doe’s application was held the Tuesday following the Friday on which this Court issued its decision in *Doe 1*. That decision dealt with factors to be considered in determining whether a minor is “mature and sufficiently well informed to make the decision to have an abortion” within the meaning of section 33.003(i). I would vacate the judgment of the court of appeals and remand this case to the trial court for further proceedings in light of that opinion and the opinions today. See 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”); *Doe 2*, \_\_\_ S.W.3d at \_\_\_.

Justice Hecht’s dissent takes issue with remanding this matter and the Court’s decision to remand in *Doe 1* and *Doe 2*. Justice Hecht’s dissent says that in so doing, “the Court has demonstrated its intention to substitute its judgment for the trial court’s in every parental notification case that is appealed to us.” \_\_\_ S.W.3d at \_\_\_. That is, of course, not the case. In remanding this and the two other parental notification cases that have come before this Court, the Court has given the trial court and the parties an opportunity to consider opinions of this Court on issues of first impression. It will be the trial courts, not this Court, that will consider the evidence on remand and reach a judgment. More importantly, there is no principled basis in matters of this nature for allowing every minor who comes before a court in a section 33.003 proceeding the opportunity to

present their cases with the benefit of the construction of section 33.003 by the highest court in this state except the minors in *Doe 1*, *Doe 2*, and *Doe 3*. As noted in *Doe 2*, the parental notification and judicial bypass provisions of the Family Code are unique and novel. There is no other procedure in our jurisprudence from which the attorneys and their clients could draw fair notice of the proceeding's requirements. Within a short time this rule will not excuse the failure to comply with the standards announced in *Doe 1* and *Doe 2*. Therefore, a remand to the trial court under Rule 60.2(f) is appropriate.

Justice Owen contends that Doe should not receive the benefit of a remand, concluding that Doe did not attempt to demonstrate that she was sufficiently mature and well informed to make the decision to obtain an abortion. While her proof relating to the three showings required in *Doe 1* is abbreviated, it is clear from the record that she presented her application without the benefit of that opinion's instruction. Accordingly, I concur with the Court's judgment to set aside the court of appeals' judgment and remand this matter to the trial court for further proceedings.

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Alberto R. Gonzales  
Justice

OPINION ISSUED: March 13, 2000