

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

We all apparently agree that the Legislature unambiguously expressed an intent to encourage parental involvement in their child's decision to terminate her pregnancy.<sup>1</sup> It also expressed an intent to protect children from the lasting and devastating consequences of physical, sexual, and emotional abuse. Where I disagree with my Colleagues is in my view that when the Legislature made the potential for abuse an exception to parental notification, it balanced these respective policy considerations.<sup>2</sup> That balance is reflected in the Legislature's decision that when notice to the parents "*may* lead to the minor's . . . emotional abuse," the notice "*shall*" be waived.<sup>3</sup>

This case involves family violence - specifically, spousal abuse. If this were a case where the credibility of the minor were in issue, I could perhaps understand the reluctance of the Court to conclude that the abuse exception had been met as a matter of law in this case. I could perhaps also understand the position of my Colleagues who would affirm the trial court's denial outright. But the credibility of the minor isn't in issue — the trial court *believed* the minor. The trial court simply

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<sup>1</sup>See TEX. FAM. CODE § 33.002.

<sup>2</sup>See TEX. FAM. CODE § 33.003(i).

<sup>3</sup>TEX. FAM. CODE § 33.003(i)(emphasis added).

determined that, on balance, the abuse would be *worse* if the minor didn't tell her parents. Because under no stretch can I read the law as allowing the trial court to consider the relative severity of the abuses, I would reverse the lower courts' judgments and grant the minor's application. Therefore, I dissent. Under the circumstances of this case, with six Justices voting to set aside the judgments, but only four Justices voting to render judgment, *Twyman v. Twyman*<sup>4</sup> dictates that the matter be remanded and compels my concurrence in the judgment.

I fully embrace that "[a] minor's interests in these circumstances are not only immediate; they are profound and longterm."<sup>5</sup> I know that "a minor's concealment from her parents of so profound a decision, like the decision itself, may have lifelong, and unforeseen, consequences."<sup>6</sup> And I, too, believe that parents have "fundamental, constitutional rights to raise their children"<sup>7</sup> and "to provide children guidance in making difficult decisions."<sup>8</sup> Like the Legislature, I also recognize the severe and devastating consequences of physical, sexual, or emotional abuse. Unlike other Members of this Court, I think it is inappropriate for this Court to usurp the Legislative function by reconsidering the relative weight given by the Legislature to these policy considerations and then placing the Court's thumb on the scale.

Furthermore, under the current statutory scheme, it is highly unrealistic and inappropriate for the courts to differentiate among the perceived degrees or types of abuse that may occur or to

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<sup>4</sup>855 S.W.2d 619 (Tex. 1993).

<sup>5</sup>*In re Jane Doe 2*, \_\_ S.W.3d \_\_ (Tex. 2000) (HECHT, J., dissenting).

<sup>6</sup>*In re Jane Doe 1*, \_\_ S.W.3d \_\_ (Tex. 2000) (HECHT, J., dissenting).

<sup>7</sup>*Id.* at \_\_ (HECHT, J., dissenting).

<sup>8</sup>*Id.* at \_\_ (HECHT, J., dissenting).

consider whether the abuse would occur anyway so that one more instance doesn't matter. Abuse is abuse; it is neither to be trifled with nor its severity to be second guessed. Doe unequivocally testified that her father is an alcoholic, that in the past he has gotten intoxicated, overreacted, and taken anger over the children out on her mother and "become physical" with her mother. But JUSTICE HECHT, JUSTICE OWEN, and JUSTICE GONZALES begin by questioning what the minor meant by "physical."<sup>9</sup> JUSTICE GONZALES would also require proof of "serious emotional injury"<sup>10</sup> on top of the evidence already in this case, apparently because "[c]onduct that would be extreme and hurtful in one family would not in another."<sup>11</sup> JUSTICE HECHT and JUSTICE OWEN would go further and require Doe to demonstrate that the abuse equated to physical and sexual abuse and resulted in "material impairment in the child's growth, development, or psychological functioning."<sup>12</sup> And all three would require her to describe specific instances of abuse. Additionally, JUSTICE HECHT demands that Doe detail "when [the abuse] could occur, or over what issues, or how severe it was, or how it affected her mother."<sup>13</sup> (Members of this Court will no doubt reveal these details

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<sup>9</sup> \_\_ S.W.3d \_\_.

<sup>10</sup> \_\_ S.W.3d \_\_.

<sup>11</sup> \_\_ S.W.3d \_\_.

<sup>12</sup> \_\_ S.W.3d \_\_.

<sup>13</sup> \_\_ S.W.3d \_\_.

irrespective of admonitions that the record should remain confidential.<sup>14</sup>) This sort of parsing among types or degrees of abuse is not indicated anywhere in the statute.

To reach their conclusion, JUSTICE HECHT, JUSTICE OWEN, and JUSTICE GONZALES all rely, more or less, on Chapter 261 of the Texas Family Code. Chapter 261 of the Family Code is entitled "Investigation of Report of Child Abuse or Neglect." It mandates that certain persons report suspected abuse or neglect to specified reporting agencies, including law enforcement agencies. Section 33.008 of the parental notification statute requires a physician to report suspected physical and sexual abuse to the appropriate authorities, and refers to a definition in section 261.001.<sup>15</sup> But section 33.008 doesn't rely on section 261.001 to define physical or sexual abuse, it refers to section 261.001 only to define a "person responsible for the minor's care, custody, or welfare."<sup>16</sup> There just isn't any indication in Chapter 33 that the "abuse" definitions in Chapter 261 control a trial court's inquiry under section 33.003(i).

Contrary to my Colleagues' assertions, the stronger argument is that the Legislature didn't intend for a minor to have to prove "mental or emotional injury . . . that results in an observable and material impairment in the child's growth, development, or psychological functioning"<sup>17</sup> to obtain a parental notification waiver. For had the Legislature intended that result, JUSTICE HECHT would

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<sup>14</sup>See TEX. FAM. CODE § 33.003(k); TEXAS PARENTAL NOTIFICATION RULES AND FORMS, Rule 1.4(effective January 1, 2000); *but see In re Jane Doe*, \_\_\_ S.W.3d \_\_\_ (Tex. 2000)(HECHT, J., dissenting); *In re Jane Doe 2*, \_\_\_ S.W.3d \_\_\_ (Tex. 2000) (HECHT, J., dissenting); *In re Jane Doe 3*, \_\_\_ S.W.3d \_\_\_ (Tex. 2000) (HECHT, J., dissenting).

<sup>15</sup>TEX. FAM. CODE § 33.008.

<sup>16</sup> TEX. FAM. CODE § 33.008; *see also* TEX. FAM. CODE § 261.001(5).

<sup>17</sup> \_\_\_ S.W.3d \_\_\_, citing TEX. FAM. CODE § 261.001(1)(A).

not have had to read all the way to section 33.008 to find it. Instead, the relevant part of the parental notification statute, section 33.003(i), would read "If the court finds that . . . notification may lead to physical, sexual, or emotional abuse of the minor, *as defined by section 261.001 . . .*" But it doesn't.

Everyone seems to agree that evidence that parental notification will likely lead to physical abuse of another in the minor's household is at least some evidence that notification "may lead to . . . emotional abuse of the minor."<sup>18</sup> That is precisely what the minor testified to in this case, and that is precisely what the trial court believed. Doe testified that, in the past, her father has blamed her mother for problems he has had with his children and has physically abused her mother as a result. Doe also testified that she does not want to tell her mother about her decision to have an abortion because her mother would tell her father and her father would become angry and physically take it out on her mother. Although JUSTICE OWEN suggests that the trial court need not "assume" that Doe's mother would tell her father, Doe's testimony was unequivocal — her mother *will* tell her father. And the trial court must have believed her because the trial court concluded that Doe's mother would be abused whether her father found out about her circumstances now or later.

It further troubles me that Members of this Court permit the trial court to pile one presumption upon another. First, the trial court presumed that Doe's parents would inevitably find out if Doe has an abortion, and then it presumed that the abuse would be worse if the parents found out after the fact. The trial court itself first raised the issue of whether Doe's parents would find out by simply stating it as a fact, saying, "You know, you realize that even if I give you permission that eventually [your mother] will find out?" Then the trial court denied waiver of parental notification

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<sup>18</sup> TEX. FAM. CODE § 33.003(i).

because on balance it presumed the abuse would not be so bad if it happened before Doe had an abortion.

Indeed, the apparent impossibility of a minor ever proving that notification may lead to emotional abuse is exemplified in the following passage contained in JUSTICE HECHT's opinion today: "The closest Doe came to stating that her father had physically abused her mother was in the following exchange:

[By Doe's attorney]: One of the reasons she's here is to avoid that, having to witness it's her fault that **her mother becomes physically abused by her father in a drunken rage** because of something that she got into.

THE COURT: Apparently, that happens, right? So other things trigger that off, right?

DOE: Yes."<sup>19</sup>

In light of the Legislature's pronouncement that if "notification *may* lead to . . . emotional abuse of the minor"<sup>20</sup> the trial court "*shall* enter an order authorizing the minor to consent to the performance of the abortion without notification to either of her parents,"<sup>21</sup> how can this not be enough? Setting aside for the moment that the minor confirmed in her own words the truth of her attorney's statement, it is not enough to say that the attorney's words are not evidence.<sup>22</sup> Even JUSTICE HECHT has written that the attorney's words have "special significance."<sup>23</sup>

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<sup>19</sup> \_\_\_ S.W.3d \_\_\_ (emphasis added).

<sup>20</sup>TEX. FAM. CODE § 33.003(i)(emphasis added).

<sup>21</sup>*Id.* (emphasis added).

<sup>22</sup> \_\_\_ S.W.3d \_\_\_ (GONZALES, J., concurring).

<sup>23</sup>*United States Government v. Marks*, 949 S.W.2d 320, 326 (Tex. 1997); *see also Banda v. Garcia*, 955 S.W.2d 270, 272 (Tex. 1997).

The Legislature has balanced the admittedly strong societal interest in having parents guide the decisions of their children with the equally strong societal interest in prohibiting child abuse. It is a usurpation of that action for this Court to interject itself in that process by reweighing these interests, essentially holding that regardless of the language used in the statute, abuse should be tolerated in the name of parental rights — just not too much. I respectfully dissent.

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Craig T. Enoch  
Justice

Opinion delivered: March 13, 2000