

# 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 HECHT, dissenting.

After decisions from this Court in four parental notification cases in two weeks, it should by now be obvious that a majority of the MEMBERS of this Court are ideologically opposed to any meaningful requirement that a minor tell her parents before she has an abortion. So they have taken the standards prescribed by the Parental Notification Act for bypassing notice to parents of a minor child's intent to have an abortion<sup>1</sup> and set those standards so low that the Act cannot achieve its purposes, which are to protect parents' rights to be involved in their children's lives and encourage that involvement, and to discourage teenage pregnancy and abortion. And they have accorded trial courts' factual determinations in denying minors' applications almost no respect, assuming for

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<sup>1</sup> "The court shall determine by a preponderance of the evidence 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, whether notification would not be in the best interest of the minor, or whether notification may lead to physical, sexual, or emotional abuse of the minor. If the court finds that the minor is mature and sufficiently well informed, that notification would not be in the minor's best interest, or that notification may lead to physical, sexual, or emotional abuse of the minor, the court shall enter an order authorizing the minor to consent to the performance of the abortion without notification to either of her parents or a managing conservator or guardian and shall execute the required forms." TEX. FAM. CODE §§ 33.003(i).

themselves the authority to decide whether a minor has met her burden of proof. To substitute judicial intent for legislative intent, and Supreme Court findings for trial court findings, is judicial activism.

The various opinions that have issued are laden with rhetoric denying these charges, but the Court's actions speak louder than words. Two weeks ago in *In re Doe 1(I)*,<sup>2</sup> the Court reversed the trial court's denial of the minor's application, even though the Court found no error in the trial court's ruling. The Court remanded the case "in the interest of justice" to allow the minor a second opportunity to prove her case.<sup>3</sup> When the trial court on remand again denied the minor's application and the court of appeals again affirmed, the Court last week summarily ordered that the application be granted in *In re Doe 1(II)*.<sup>4</sup> Earlier last week in *In re Doe 2*,<sup>5</sup> the Court concluded as it did in *Doe 1* that the trial court had not erred in denying the minor's application. This time the Court decided, contrary to *Doe 1*, that it did not have the power to reverse an errorless judgment after all, so instead it *vacated* the trial court's judgment and remanded the case "in the interest of justice" for a second hearing — a procedure the Court has never before used in any other case and by its own admission will probably never use again.<sup>6</sup> Today, in *In re Doe 3*, the Court again vacates the trial

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<sup>2</sup> \_\_\_ S.W.3d \_\_\_ (Tex. 2000).

<sup>3</sup> *Id.* at \_\_\_.

<sup>4</sup> 43 TEX. SUP. CT. J. \_\_\_ (Mar. 10, 2000).

<sup>5</sup> \_\_\_ S.W.3d \_\_\_ (Tex. 2000).

<sup>6</sup> *Id.* at \_\_\_ ("Although we have never used [Texas Rule of Appellate Procedure 60.2(f)] to remand for a new hearing in the trial court, 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*." (emphasis added)).

court's ruling and remands for a second hearing. It may simply be that no trial court or court of appeals in the State of Texas can manage to get one of these cases right enough to have it affirmed, or it may be that the Court in defiance of the Parental Notification Act intends to prod and prod the lower courts until they surrender their own judgment and grant minors' applications instead of denying them. We shall see. *In re Doe 4* is pending before us. The Court's decision in that case and the ones that will surely follow should prove illuminating.

Today's decision is especially notable in that four JUSTICES — JUSTICE ENOCH, JUSTICE BAKER, JUSTICE HANKINSON, and JUSTICE O'NEILL — explain that they would hold that this minor was absolutely entitled to an abortion without telling her parents and that the trial court had no choice but to grant her application. Why? Because Doe testified that her father takes things out on her mother and might do it again if he knew that Doe was pregnant and wanted an abortion. That meager evidence, say the four JUSTICES, conclusively proves that the father physically abuses his wife and emotionally abuses Doe and will do so if he is told that Doe wants an abortion. These JUSTICES wholly disregard the fact that the trial court had the opportunity to view Doe, to hear her voice and watch her manner, and to discuss her concerns with her, her attorney, and her guardian at some length. The trial court concluded, in what Doe's guardian acknowledged was a "tough case", that Doe had failed to prove by a preponderance of the evidence that she should have an abortion without notice to her parents. JUSTICE ENOCH and the three JUSTICES who join him would hold that no reasonable person could come to the same conclusion.<sup>7</sup>

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<sup>7</sup> See *Collora v. Navarro*, 574 S.W.2d 65, 68 (Tex. 1978).

The Court's adamant determination to set aside every denied application for one reason or another encourages an appeal in every case and threatens to overwhelm the Court's resources. For over three weeks the entire Court has worked on nothing but parental notification cases. Four cases have been decided, one with opinions to follow; another is pending, and no end is in sight, unless, that is, the trial courts and courts of appeals give up, which they cannot do and still exercise their own judgment. We must even use sequential Arabic numerals to distinguish the many *Doe*s, and Roman numerals to show whether they are here for the first or second time — *Doe 1(I)*, *Doe 1(II)*, *Doe 2*, *Doe 3*, etc., etc.. An ideological majority has sown the wind and reaped the whirlwind.

In this case, as in *Doe 1(I)*, *Doe 1(II)*, and *Doe 2*, there was evidence to support the trial court's denial of the application in this case, and I would affirm that ruling. Accordingly, I dissent.

## I

Jane Doe, 17, applied to the trial court for authorization to have an abortion without telling her parents, as permitted by section 33.003 of the Texas Family Code. She filed a standard form application<sup>8</sup> with check marks beside the following three assertions:

I am mature enough to decide to have an abortion without telling my parent(s) . . . .  
I also know enough about abortion to make this decision.

Telling my parent(s) . . . that I want an abortion is not in my best interest.

Telling my parent(s) . . . that I want an abortion may lead to physical or emotional abuse of me.

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<sup>8</sup>P ARENTAL NOTIFICATION RULES, FORM 2A.

Each of these assertions, if proved by a preponderance of the evidence, is a statutory basis for granting the application.<sup>9</sup>

The trial court appointed an attorney to represent Doe, appointed another attorney to act as her guardian ad litem, and conducted a hearing that they attended with Doe, all as required by law.<sup>10</sup> Doe was the only witness at the hearing, and her testimony was very brief, much of it consisting of simple “yes” answers to questions put to her by her attorney, her guardian, and the court. Doe’s attorney and guardian did not testify but engaged in extensive colloquy with the court.

Doe testified that she is a high school junior “doing pretty good” in school, that she is engaged in typical extracurricular activities, and that she is planning to go to college. She is six weeks’ pregnant. She had been taking birth control pills but “skipped”. The father is also a junior in high school, whom Doe has been seeing for several months. She has discussed her situation with him, and they have agreed that she should get an abortion.

The focus of the hearing was not whether Doe was well informed of the risks of abortion, her alternatives, and the risk of emotional and psychological harm. Doe’s testimony on all these matters consists entirely of her answers to the following two questions asked by her guardian:

Q We’ve talked and you have indicated to me that you understand the abortion process; is that right?

A Yes, ma’am.

Q What you are telling the court is that you are not ready to have a child and become a mother at this point; is that true?

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<sup>9</sup>T EX. FAM. CODE § 33.003(i).

<sup>10</sup> *Id.* § 33.003(e)-(g).

A Yes, ma'am.

Doe's guardian then stated:

I have nothing further, Your Honor, only to tell you that I have talked to her and I believe she is informed. I believe that it is in her best interest to waive the parental notification at this time and that she be allowed to have the abortion.

Doe's attorney added:

We have discussed it also with her boy friend who is also in school and is unable to support a child. . . . They have talked it over at length. . . . [T]hey feel it's — the child would end up in a home that — is not going to be conducive to a good, healthy child in the future.

Even assuming that the attorney's and guardian's statements were evidence for the trial court to consider — and they may well not have been — these summary statements and Doe's "yes" answers to two questions are plainly insufficient to show that Doe was "mature or sufficiently well informed" to obtain an abortion without notifying her parents, and no MEMBER of this Court thinks otherwise.

But this issue, as I say, was not the focus of the hearing. Rather, the hearing dwelt on why Doe did not want to tell her parents that she wanted to have an abortion. Doe testified:

Q Now, why would you not want to tell your parents?

A Because my — Well, really my dad. He's an alcoholic and a lot of times he doesn't react — He reacts, but he takes things out of proportion. He takes it out on my mom instead of us.

Q Has he ever become physical with your mom?

A Yes.

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Q You believe that if you are forced to tell your parents that you would be subjected to emotional abuse; is that correct?

A Yes.

Doe's guardian summarized: "she is not sure what her father will do in this case. If he's sober he's fine, but if he's intoxicated she has no idea."

The trial court then engaged Doe in a discussion to try to understand her concerns about telling her parents. Doe explained that she knew she could tell her mother, although it would hurt her mother to know. Asked if her mother would be hurt more if she were not told, Doe answered, "Yeah, I guess." Doe explained that if she told her mother, her mother would tell her father, and then her father might become intoxicated and take it out on her mother. 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.

Doe did not mention any specific instance or describe how severe her father's reaction might be.

Doe's attorney told the court that Doe would probably tell her mother at some point whether she was required to or not, and Doe did not contradict that statement. Doe then answered questions by the court as follows:

Q I think — I mean, do you think it would be easier to tell your mother after you had the procedure?

A I think so.

Q Do you believe that your mother is going to share this information with your dad?

A Yes, she will. She won't keep that from him.

Q Has your dad ever physically abused you?

A Me, no.

Q Okay.

A It's more like problems at home and having to do with like me . . . . He will take — just find a reason to take it out on my mom.

Q Don't you think he's going to be even more upset when he finds out that this occurred without his knowledge?

A I guess. I don't know.

From the court's extended discussions with Doe's attorney and guardian it is apparent that all believed that Doe would tell her mother about her decision to have an abortion, either before or after the abortion was performed, that her mother would then tell her father, and that her father might react in anger toward her mother, although he might not. As Doe's guardian told the court: "[Doe] is not sure what her father will do in this case. If he's sober he's fine, but if he's intoxicated she has no idea." The court expressed doubt whether the father's response would be abusive, and if so, whether it would be avoided or exacerbated by attempting to keep the matter from him.

At the conclusion of the hearing the trial court stated that it would deny Doe's application. The court issued its findings and conclusions on standard Form 2D as permitted by Rule 2.5(a) of the Parental Notification Rules. The court made no findings concerning whether Doe was mature or sufficiently well informed to have an abortion without telling her parents, or whether telling them

would not be in her best interest or might lead to physical or emotional abuse. Doe appealed, and the court of appeals affirmed by a divided vote.

## II

No MEMBER of this Court thinks that Doe came close to proving by a preponderance of the evidence that she is “mature and sufficiently well informed”, within the meaning of the statute, to have an abortion without telling her parents. Doe does not even argue her second assertion in her application, that it is not in her best interest to tell her parents, apart from her emotional abuse argument. Yet JUSTICE GONZALES and CHIEF JUSTICE PHILLIPS would nevertheless remand the case to the trial court so that Doe can try again on both these issues. This, they say, is in the interest of justice and authorized by the Rules of Appellate Procedure and by precedent of this Court. I do not agree that a remand on these issues is either authorized or in the interest of justice.

## A

Two days ago in *Doe 2* the Court held<sup>11</sup> that it can vacate a court of appeals’ judgment and order a new trial on the authority of Rule 60.2(f), which permits the Court to “vacate the lower court’s judgment and remand the case for further proceedings in light of changes in the law.”<sup>12</sup> The Court’s peculiar reasoning was that although the rule had never been used to order a new trial, neither did it preclude that use, so therefore it was all right. In other words, the Court can do

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<sup>11</sup> *In re Doe 2*, \_\_\_ S.W.3d \_\_\_, \_\_\_ (Tex. 2000).

<sup>12</sup> EX. R. APP. P. 60.2(f).

anything it is not prohibited from doing. I did not agree, for reasons that I expressed,<sup>13</sup> but I accede to the Court's holding as I am bound to do.

Now that the Court has held that Rule 60.2(f) *can* be used to order a new trial in light of changes in the law, the question here is whether a new hearing *should be* ordered in this case as in *Doe 2*. The only arguable change in the law since the trial court heard this case was in *Doe 1*, where the Court says it clarified what section 33.003(i) of the Family Code means by “mature and sufficiently well informed”. (Doe does not make a “best interest” argument here.) Again, for reasons I explained in *Doe 2*,<sup>14</sup> I do not agree that *Doe 1* was a change in the law, and I certainly do not agree that it was a change warranting a new hearing in *Doe 1* or *Doe 2*. But even given the decision in *Doe 2*, the present case is different. The minors in *Doe 1* and *Doe 2* both tried to show that they were mature and sufficiently well informed to have an abortion without notifying their parents, but their proof fell short of the Court's standards. One can make the argument — though I do not agree with it — that they may have been surprised to learn in *Doe 1* that more evidence should have been offered. The minor in the present case, on the other hand, made no real attempt to prove that she was mature and sufficiently well informed as the minors in *Doe 1* and *Doe 2* did. Her evidence consisted entirely of “yes” answers to two brief questions, one asking whether she “understand[s] the abortion process,” and the other asking whether she was telling the court that she was “not ready to have a child and become a mother”. No reasonable person could have thought that such testimony would constitute proof by a preponderance of the evidence within the meaning of

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<sup>13</sup> *Doe 2*, \_\_\_ S.W.3d at \_\_\_ (Hecht, J., dissenting)

<sup>14</sup> *Id.*

section 33.003(i), and thus have been surprised to learn from *Doe 1* that more is necessary. Even if new hearings on the “mature and sufficiently well informed” issue were appropriate in *Doe 1* and *Doe 2*, a new hearing on that issue should not be ordered in this case.

We have repeatedly held that “an errorless judgment of a trial court cannot be reversed in the interest of justice or to permit the losing party to have another trial.”<sup>15</sup> Former Chief Justice Calvert, surveying the history of Texas law on this subject in a law review article published in 1972, explained bluntly: “Attorneys frequently interpret [the rules and cases] as authorizing the supreme court to *reverse* trial court judgments in the interest of justice. Not so.”<sup>16</sup> He added that “to endow the court with unbridled discretion to set aside or change lower court judgments at will . . . would surely not be acceptable to lawyers, and it is doubtful that it would even be welcomed by the court’s justices.”<sup>17</sup> In most circumstances Chief Justice Calvert’s observation would ring true, but he did not anticipate the current JUSTICES’ determination to see to it that minors’ applications for abortions without parental notification not be denied. The Court’s repeated remands in the interest of justice in parental notification cases cannot be justified because of a change in the law. It should hardly come as a surprise to a minor or her attorney that she must make some minimal showing before she can obtain an abortion without parental notification, and that is all the Court has required.

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<sup>15</sup> *Uselton v. State*, 499 S.W.2d 92, 99 (Tex. 1973); accord *Scott v. Liebman*, 404 S.W.2d 288, 294 (Tex. 1966) (citing cases).

<sup>16</sup> Robert W. Calvert, “. . . in the Interest of Justice”, 4 ST. MARY’S L.J. 291, 300-301 (1972) (emphasis in original).

<sup>17</sup> Calvert, *supra* note 14, at 291.

JUSTICE GONZALES and CHIEF JUSTICE PHILLIPS say that “the parental notification and judicial bypass provisions of the Family Code are unique and novel.” This is simply not so. Many other states have had parental notification and consent statutes for decades. The Texas statute was modeled on other states’ laws long in effect. Indeed, *Doe 1* cites other states’ law in construing the Texas statute.<sup>18</sup> If the Court did not think other states’ laws provided guidance in construing the Texas statute, why did it cite other state court cases? Even if other states’ laws were wholly ignored, to say, as JUSTICE GONZALES and CHIEF JUSTICE PHILLIPS do that “[t]here is no other procedure in our jurisprudence from which the attorneys and their clients could draw fair notice of the proceeding’s requirements” is plainly wrong. The “best interest of the child” standard is well known in Texas law and applied daily in hundreds of cases across the State. Courts are accustomed to assessing the maturity of children in numerous contexts, such as family law matters and juvenile prosecutions. Physical, sexual, and emotional abuse is routinely reported, investigated, and prosecuted. Whether a person is well informed on a subject is not a unique question. JUSTICE GONZALES and CHIEF JUSTICE PHILLIPS act as if the Legislature created the concepts of maturity, best interest, and abuse for the first time in the Parental Notification Act. Nothing could be further from the truth. A remand cannot be justified because the Act so changes the law that lawyers and their clients were unfairly caught off-guard.

There is simply no procedural vehicle for the Court’s remands in this case and its two predecessors, other than a judicial fiat.

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<sup>18</sup> *In re Doe 1*, \_\_\_ S.W.3d at \_\_\_ n. 2.

## **B**

Nor is a remand in the interest of justice. As I have said, the only significant pronouncement in *Doe 1* and *Doe 2* was that the Parental Notification Act means almost nothing. The state of the law is not much different than it was before the Act was passed, only now a minor must take the trouble of going to court and reciting enough things to satisfy *Doe 1* and *Doe 2*. The injustices of the Court's remand procedure are several. It is unjust to bounce a minor from this Court to the trial court and back when this Court cannot agree on what she must show to prevail. The Court is deeply fractured on what Doe must prove. It is unjust to the trial court to force reconsideration of an issue without explaining the error in its first ruling. It is unjust to the Legislature to prod and prod trial courts to allow teenage abortions when that body passed a statute to accomplish the opposite purpose. It is unjust to parents to provide minors multiple opportunities to deprive their parents of their legitimate, fundamental right to involve themselves in their children's decisions, especially one as momentous as whether to have an abortion. And it is unjust to this Court to encourage minors to appeal every case here with the lure that this Court will automatically reconsider it on the merits. It is unjust for this Court to assume the role of surrogate parents to all minors who want abortions without telling their parents, but that is precisely what the Court has done with its unrelenting remands.

## **III**

The record supports the trial court's decision that Doe failed to prove by a preponderance of the evidence that she would be subject to emotional abuse if she told her parents that she is pregnant and wants an abortion. Doe testified that her father is an alcoholic, that he sometimes "reacts, . . .

takes things out of proportion . . . [and] takes it out on” Doe’s mother. Doe gave no examples. Asked if her father had “ever become physical with your mom”, Doe answered yes. But again, Doe did not explain. Did he beat her? Doe did not say so. Did he grab her arm? Was that abusive? Doe never said. When Doe’s attorney, not Doe, argued that Doe should not have to witness “her mother [being] physically abused by her father in a drunken rage” and the court asked whether “that happens” or “other things trigger that off,” Doe simply answered “yes”. But Doe’s guardian told the court that Doe was “not sure what her father will do in this case.” Doe did not describe even a single instance of her father’s conduct to show when it could occur, or over what issues, or how severe it was, or how it affected her mother, or how severely it affected her. She did say that her father had never physically abused her, and that his conduct was never aimed at her.

Chapter 33 of the Family Code does not define what threat of “emotional abuse” must be proved to permit a trial court to authorize a minor to have an abortion without telling her parents, but there are clues. Section 33.008 requires that a physician who believes that a minor may suffer physical or sexual abuse as defined in section 261.001 of the Family Code must report the suspected abuse to the Department of Protective and Regulatory Services.<sup>19</sup> This reference in section 33.008 strongly suggests that abuse within the meaning of section 33.003(i) is the same as abuse defined in section 261.001. That statute is part of chapter 261 of the Family Code, which requires that child abuse and neglect be reported and investigated. Section 261.001(1)(A) defines “abuse” as including “mental or emotional injury to a child that results in an observable and material impairment in the

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<sup>19</sup> EX. FAM. CODE § 33.008.

child’s growth, development, or psychological functioning”.<sup>20</sup> Absent a clearer indication of legislative intent, I would use this definition, prescribed in a related context and referred to in chapter 33, in applying section 33.003(i).

The record contains no evidence whatsoever that Doe would suffer “an observable and material impairment in [her] growth, development, or psychological functioning” if she told her parents that she is pregnant and wants an abortion. Doe’s testimony lacked specifics. Although the trial court seemed to believe Doe that her father might react adversely to news of Doe’s pregnancy and desired abortion — which he certainly might be expected to do if he is not completely apathetic — it clearly doubted that Doe’s father’s reaction would rise to the level of emotional or physical abuse. Attempting to encourage Doe, the trial court offered: “Sometimes we, in our minds, think it’s going to be a lot, lot worse than what it actually is going to be.” The trial court was also skeptical that Doe could keep the news from her father for long, given her intent to tell her mother, and the court expressed concern that Doe’s relationship with her parents would be more adversely affected if she did not tell them of her situation before she had an abortion.

The trial court was free to credit Doe’s testimony as much as it did and still harbor doubts about other aspects of it. With those doubts, the court could well conclude that Doe had not proved by a preponderance of the evidence that telling her parents, or just her mother, would expose Doe to emotional abuse, and thus had not satisfied that requirement in section 33.003(i) for waiving parental notification. Given the brevity of Doe’s testimony and the complete lack of specificity in

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<sup>20</sup> *Id.* § 261.001(1)(A).

her assertions, the trial court could rationally find that her concerns, while real, did not show a likelihood of abuse.

The trial court's denial of Doe's application is supported by evidence in the record and should be affirmed.

#### IV

JUSTICE GONZALES and CHIEF JUSTICE PHILLIPS attempt to define "emotional abuse" as used in section 33.003(i) of the Family Code. They begin by rejecting the definition of abuse in section 261.001 of the Family Code because it expressly does not apply outside chapter 261 (they're correct, of course), and because section 261.001 states that it is not all-inclusive (correct again), and because section 33.003(i) does not refer to section 261.001 (no question). That said, they then simply make up their own definition of abuse. Now, as between a definition a few pages over in the Family Code which does not expressly apply in these circumstances but is certainly usable, and a definition invented from scratch, it seems to me that the former is rather clearly preferable. The fact that section 261.001 is not prescribed for use in section 33.003(i) says nothing about whether it could or should be use. JUSTICE GONZALES and CHIEF JUSTICE PHILLIPS do not say that section 261.001 cannot be used in the present context, only that they do not want to use it for reasons not stated.

JUSTICE GONZALES and CHIEF JUSTICE PHILLIPS then say, I think rightly, that "emotional abuse contemplates unreasonable conduct causing serious emotional injury."<sup>21</sup> That is certainly true under section 261.001. Emotional abuse, they say, is not "[s]ome degree of familial discord", or

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<sup>21</sup> *Ante*, at \_\_\_\_.

embarrassment, or mere “parental disappointment and disapproval”.<sup>22</sup> It is not established merely by “evidence that the minor would be upset or have feelings of short term feelings of guilt or anxiety”.<sup>23</sup> All of this seems fairly sensible.

But what do JUSTICE GONZALES and CHIEF JUSTICE PHILLIPS really mean by their words? This: that “[t]he scant direct evidence [in the present case], combined with reasonable inferences, might be sufficient to support a finding [of emotional abuse]”.<sup>24</sup> What “reasonable inferences”? Do they mean “inferences” or “guesses”? I do not see how the likelihood of Doe’s father reacting adversely, or the seriousness of such a reaction, or the probable impact on Doe can be inferred from a record with no specific facts when Doe herself does not know what might happen. If JUSTICE GONZALES and CHIEF JUSTICE PHILLIPS think that the evidence in the present record is enough to prove abuse by a preponderance of the evidence, then they do not mean much by “unreasonable conduct causing serious emotional injury” or “mere assertion”. In essence, JUSTICE GONZALES and CHIEF JUSTICE PHILLIPS say that if they had been the trial judge, they might well have found emotional abuse. Such a result would show that the words of their definition lack any real content.

Doe offered no evidence of a significant risk of unreasonable conduct causing serious emotional injury. In fact, she did not claim to have ever sustained serious emotional injury as a result of her father’s conduct. If JUSTICE GONZALES and CHIEF JUSTICE PHILLIPS really mean what

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<sup>22</sup> *Ante*, at \_\_\_\_.

<sup>23</sup> *Ante*, at \_\_\_\_.

<sup>24</sup> *Ante*, at \_\_\_\_.

they say about emotional abuse, Doe’s evidence could not meet their definition. For them to conclude otherwise casts doubt on their definition.

## V

JUSTICE ENOCH, JUSTICE BAKER, JUSTICE HANKINSON, and JUSTICE O’NEILL would hold that Doe proved as a matter of law that she would suffer emotional abuse if she told her parents that she wanted an abortion. Wrapping themselves in transparent spousal abuse rhetoric, these JUSTICES cannot conceive how any reasonable person could take a view contrary to theirs.

Well, the reasons are not elusive. First: there is no evidence in the record before us, even taking the statements of the attorney and guardian as testimony (which they may not be<sup>25</sup>), that Doe’s telling her parents of her intention to obtain an abortion might “result[] in an observable and material impairment in the child’s growth, development, or psychological functioning”, the definition of abuse in section 261.001(1)(A) of the Family Code. Doe certainly did not prove such abuse as a matter of law. Second: even if one were to apply a lower threshold for finding abuse, Doe still did not establish its likelihood as a matter of law. Doe’s guardian stated that *Doe was not sure what her father would do*, and Doe did not disagree. JUSTICE ENOCH and those who join him studiously avoid this statement in the record. Third: if Doe’s testimony proved a threat of abuse as a matter of law, then almost any minor worried about a paternal outburst at the news of her pregnancy and desire to have an abortion is entitled to a judicial bypass under chapter 33 as a matter of law. “I just know,”

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<sup>25</sup> See *United States v. Marks*, 949 S.W.2d 320, 326-327 (Tex. 1997) (“While it is true that an attorney’s unsworn statements are not evidence, it is not true . . . that they have no special significance.”); *Banda v. Garcia*, 955 S.W.2d 270, 272 (Tex. 1997) (per curiam) (“Normally, an attorney’s statements must be under oath to be considered evidence.”).

she might well say, “that if I tell my father I’m pregnant and want an abortion, he’ll yell at me and cause me emotional abuse.” If that is all the Legislature meant by emotional abuse, it might as well have spared itself the effort of passing the statute. This, actually, is JUSTICE ENOCH’s view: the statute doesnot set a very high standard. But it is simply impossible to think, after all the time and effort expended in the enactment of chapter 33, that the Legislature intended nothing more than what JUSTICE ENOCH thinks it did.

Concerning the Legislature’s purposes, JUSTICE ENOCH and his associates now assert — remarkably — that they have agreed with me all along. Why, of course, they say, the Legislature intended to encourage parent’s involvement in their children’s lives and to discourage teenage pregnancy and abortion — just as I have repeatedly stated.<sup>26</sup> Where in *Doe 1* or *Doe 2* did any of those JUSTICES acknowledge this plain legislative intent? Nowhere. Why, to be sure, they now say, parents have fundamental, constitutional rights to raise their children — citing as their authority my dissenting opinions which they did not join.<sup>27</sup> They profess to hold these views, but they have yet to apply them in a case.

“Abuse is abuse”,<sup>28</sup> JUSTICE ENOCH and his associates observe, and that is certainly hard to contradict. But tautologies aside, the fact is, Doe simply did not prove abuse in this case by a preponderance of the evidence. JUSTICE ENOCH mischaracterizes the trial court as holding that because Doe’s father will be upset eventually when he finds out about her abortion, she might as well

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<sup>26</sup> *Post*, at \_\_\_\_.

<sup>27</sup> *Post*, at \_\_\_\_.

<sup>28</sup> *Post*, at \_\_\_\_.

tell him now — that the trial court weighed Doe’s father’s immediate abuse against his eventual abuse. But that is an unfair mischaracterization of the trial court’s view. The minor’s guardian stated that Doe was not sure what her father would do if he were told of her situation. How can this statement, which the trial court obviously and reasonably believed, be ignored by anyone who really believes that parents have a fundamental right to be involved in their children’s decisions? The answer is that the guardian’s statement can be disregarded only by someone bent on denying parental notification in every case.

## VI

This is the Court’s third parental notification case in less than two weeks. It should begin to take stock of what has happened in these past few days. The Court has:

- construed a major statute, the Parental Notification Act, without once referencing its legislative purposes and history;
- construed the Act without benefit of the views of the Attorney General or anyone else who participated in the drafting and enactment of the legislation;
- determined the appellate standard of review without briefing of any kind; and
- set aside three (reversed once, vacated twice) trial court decisions even though they were based on sufficient evidence, were not an abuse of discretion, and were otherwise free of error — essentially according no deference to the trial court’s factual determinations
- in a fourth case, summarily reversed the lower courts without explanation and ordered an application granted.

Further, parental notification cases have completely exhausted the Court’s resources for the past three weeks, and no relief is in sight. Though the Court was understandably under intense time pressure to rule on these appeals, it should give serious consideration to where its decisions are

leading. Fourteen years ago Justice O'Connor complained that the United States Supreme Court's abortion decisions "have already worked a major distortion in the Court's constitutional jurisprudence."<sup>29</sup> This Court's parental notification decisions are distorting its substantive and procedural jurisprudence and dominating its docket in ways that can never be reconciled in other cases.

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The trial court considered Doe's application sensitively and sympathetically and reached a reasoned conclusion, which this Court abruptly sets aside. Not one parental notification ruling that has reached us has the Court let stand. Today's ruling is no more defensible than *Doe 1(I)*, *Doe 1(II)*, and *Doe 2*, no less contradictory of the Legislature's intent, and no less destructive of parental and familial rights. I dissent.

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Nathan L. Hecht  
Justice

Opinion delivered: March 13, 2000

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<sup>29</sup> *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 814 (1986) (O'Connor, J., dissenting).