

IN THE SUPREME COURT OF TEXAS

No. 00-0193

IN RE JANE DOE 3

APPEAL UNDER SECTION 33.004(F), FAMILY CODE

JUSTICE OWEN, dissenting.

A majority of the Court has failed to agree on the what the Legislature intended in section 33.003(i) of the Family Code when it used the term “emotional abuse,” which is not defined in Chapter 33. I would apply the definition employed by the Legislature in section 261.001 of the Family Code. A majority of the Court has also failed to agree on the judgment that this Court should render, even though a majority of the Court does agree that there was no error in either the court of appeals’ judgment or the trial court’s judgment. Because the interest of justice does not require a remand in this case, I would affirm the court of appeals’ judgment. Accordingly, I dissent.

I

Jane Doe contends in this Court 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. She has never been physically abused by either of her parents, and there was no indication that she thought that either of her parents would physically abuse her if they were notified that she was seeking an abortion. However, Jane Doe testified that her father had “become physical” with her mother when he was

intoxicated, sometimes because of something that Jane Doe had done. Jane Doe said that she feared that if her father were notified, her mother would be subjected to physical abuse, and that would amount to emotional abuse of Jane Doe. Jane Doe similarly said that she feared that notification of her mother would result in physical abuse of her mother, and correspondingly to emotional abuse of Jane Doe, because her mother would inform her father of Jane Doe's pregnancy and of her intention to have an abortion. This was the only evidence regarding emotional abuse.

The Legislature chose to use the words "emotional abuse" in section 33.003(i). The Legislature did not use the term "emotional distress," even though there is a considerable body of law from this Court regarding emotional distress. This indicates that the Legislature meant emotional abuse to mean something other than severe emotional distress, which this Court has said is "distress that is so severe that no reasonable person could be expected to endure it," and includes "all highly unpleasant mental reactions such as embarrassment, fright, horror, grief, shame, humiliation, and worry." *GTE Southwest, Inc. v. Bruce*, 998 S.W.2d 605, 618 (Tex. 1999).

Although the Legislature did not define "emotional abuse" in section 33.003, it has done so elsewhere in the Family Code. "Abuse" includes "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). "Abuse" also includes "causing or permitting the child to be in a situation in which the child sustains a mental or emotional injury that results in an observable and material impairment in the child's growth, development, or psychological functioning." *Id.* § 261.001(1)(B). These definitions appear in the chapter of the Family Code that requires a person to make a report to specified authorities when "a child's physical or mental health

or welfare has been adversely affected by abuse or neglect.” *Id.* § 261.101(a). Courts should be guided by those definitions in construing and applying section 33.003(i) of the Family Code for at least two reasons.

First, we have from the Legislature a clear statement of what it considers to be emotional abuse of a minor. It seems that, rather than fashioning its own definition, a court should apply the Legislature’s definition of “abuse” when interpreting other provisions of the same Code unless there is a good reason for not doing so. Deference to the Legislature’s definition of emotional abuse is appropriate in interpreting section 33.003(i) because there is some symmetry between the requirement to report abuse and the bypass of parental notification if there may be abuse. Section 261.001 attempts to set forth concrete boundaries as to when a person is required under section 261.101 to report abuse. *See* TEX. FAM. CODE §§ 261.001(1), 261.101(a). Similarly, section 33.003 attempts to set boundaries as to when a court is required to deny a parent the knowledge that his or her child is about to undergo an abortion. Imposing an affirmative obligation to report emotional abuse and the bypass of parental rights because of potential emotional abuse are matters that the law does not treat lightly.

Second, for the reasons articulated in Justice Gonzales’s opinion, it is sometimes difficult to define what constitutes an emotional injury. *See* ___ S.W.3d at ___. The Family Code attempts to give objective standards for determining when there has been emotional abuse. The abuse must be “observable and material” and it must impair “the child’s growth, development, or psychological functioning.” TEX. FAM. CODE § 261.001(1)(B). This objective definition is particularly appropriate in the context of the relationship between parent and child. A parent must have wide latitude to exert

influence over and to discipline a child. Often, influence or discipline is intended to and does cause emotional distress. But, emotional distress of that nature cannot be the basis for denying a parent information as basic as the fact that his or her child is pregnant and intends to have an abortion.

In light of the Legislature's determination of what rises to the level of emotional abuse of a minor, there is no evidence in the record that Jane Doe may be subjected to emotional abuse. Further, the trial court was not required to assume, as a matter of law, that if Jane Doe's mother were notified that her daughter was about to have an abortion, her mother would then tell her father. While there may be more than a scintilla of evidence that Jane Doe's mother would convey that information to her father, the evidence was not conclusive. (The Court is not confronted with a situation in which the minor's parents have divorced and both have been appointed conservators. *See* TEX. FAM. CODE § 153.076 (requiring that an order appointing both parents conservators must reflect that "each parent has a duty to inform the other parent in a timely manner of significant information concerning the health, education, and welfare of the child"). The constitutionality of section 153.076 if applied in parental notification matters is questionable in light of *Hodgson v. Minnesota*, 419 U.S. 417, 450-52 (1990).)

Finally, the evidence of physical abuse of Jane Doe's mother was not so direct, clear, and positive that a trial court was required to conclude as a matter of law that if one of Jane Doe's parents were notified, then Jane Doe may be emotionally abused. Jane Doe did not explain what she meant when she said that her father had "become physical" with her mother. She did not describe any of the incidents in which she believed that her father had abused her mother.

In sum, there was legally sufficient evidence to support the trial court's failure to find that notification of a parent may lead to emotional abuse of Jane Doe, and Jane Doe did not establish her contentions as a matter of law.

II

I joined the Court's judgment in *In re Jane Doe*, __ S.W.3d __ (Tex. 2000) (*Jane Doe I*), remanding that case to the trial court for further proceedings. Jane Doe 1 contended that she was "mature and sufficiently well informed to make the decision to have an abortion" within the meaning of section 33.003(i), and she offered more than cursory evidence in an attempt to support her contention. Prior to the decision in *Jane Doe I*, no Texas court had interpreted "sufficiently well informed," at least not in an opinion that was publicly available. Courts in other jurisdictions have not agreed on the type of showing necessary to prove that a minor is "sufficiently well informed" or the type of evidence that bears on the inquiry. Compare *In re Anonymous 2*, 570 N.W.2d 836, 839 (Neb. 1997), with *In re Anonymous*, 660 So.2d 1022, 1023 (Ala. App. 1995). I therefore concurred with the Court that in the interest of justice, Jane Doe 1 and the trial court should have the benefit of this Court's interpretation of "sufficiently well informed."

The provision in section 33.003(i) regarding physical, sexual, or emotional abuse is a different matter. Although individual justices on this or other courts may disagree whether particular facts establish abuse as a matter of law, the terms "physical abuse" and "emotional abuse" have clear connotations from the standpoint of what evidence is relevant to the inquiry. Practitioners understand what type of evidence they must marshal. Jane Doe 3 had ample opportunity through her

counsel and her ad litem to offer evidence of potential abuse. The fact that Jane Doe 3 did not meet her burden of proof does not require a remand.

Nor does the fact that Jane Doe 3 argues in this Court that she is mature and sufficiently well informed to make the decision to have an abortion support remanding this case for another hearing based on the decision in *Jane Doe I*. Jane Doe 3 made virtually no attempt in the trial court to prove that she was mature and sufficiently well informed. Her testimony focused almost exclusively on whether she might be subjected to emotional abuse if one of her parents were notified. Under these circumstances, the interest of justice is not served by a remand.

III

A brief word about two of the opinions in this case is in order. I note that both JUSTICE HECHT's and JUSTICE ENOCH's opinions rely on thoughts and subjective conclusions that they ascribe to the trial court based on their widely divergent views of what motivated certain questions that the court posed to Jane Doe 3 and vague statements that the court made during the hearing. JUSTICE ENOCH goes so far as to make repeated assertions about what the trial court believed. Those assertions are wholly unsupported by the record. But even had the trial court made unequivocal statements during the hearing, it would be impermissible to rely upon such statements. Appellate courts are "not entitled to look to any comments that the judge may have made" during a bench trial to determine the basis for its ruling. *In re W.E.R.*, 669 S.W.2d 716, 716 (Tex. 1984). We should not be reviewing what we think the trial court did or did not believe but rather the trial court's judgment and whether there is evidence to support the trial court's express and any omitted findings and conclusions that are necessary to support that judgment.

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I join in parts I and II of JUSTICE GONZALES'S opinion, but for the reasons considered above, I would affirm the judgment of the court of appeals. I therefore dissent.

Priscilla R. Owen
Justice

OPINION DELIVERED: March 13, 2000