

IN THE SUPREME COURT OF TEXAS

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No. 00-0213
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IN RE JANE DOE 4

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APPEAL UNDER SECTION 33.004(f), TEXAS FAMILY CODE
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JUSTICE HECHT, dissenting.

This is the Court's fifth Parental Notification Act¹ decision in less than a month. In each case, the trial court denied the minor's application for authority to obtain an abortion without telling her parents, the court of appeals affirmed, and this Court set aside the lower courts' rulings. In this case and three others,² the Court has remanded for the trial court to try again. In one case,³ after a remand, the Court reversed the lower courts and granted the minor's application outright. The Court in that case even refused to explain its ruling, breaking its long-established practice of accompanying its judgment with an opinion.⁴

¹T EX. FAM. CODE § 33.001-.011.

² *In re Doe 1(I)*, ___ S.W.3d ___ (Tex. 2000); *In re Doe 2*, ___ S.W.3d ___ (Tex. 2000); *In re Doe 3*, ___ S.W.3d ___ (Tex. 2000).

³ *In re Doe 1(II)*, ___ S.W.3d ___ (Tex. 2000) (Hecht, J., dissenting).

⁴ *Id.*

How is it that no court we know of has ever correctly denied a minor’s application? Is it that trial and appellate judges across Texas have suddenly become so incompetent that they cannot read and apply a statute properly? Hardly. Take, for example, the trial court in *In re Doe 3*. It found that the minor would not be emotionally abused if she told her parents that she was pregnant and wanted an abortion. The court of appeals affirmed. This Court, doubting the trial court’s finding, remanded the case for further hearing.⁵ Four JUSTICES — JUSTICE ENOCH, JUSTICE BAKER, JUSTICE HANKINSON, and JUSTICE O’NEILL — would have held that the minor had proved conclusively that she would suffer abuse and that no reasonable judge could have thought otherwise.⁶ On remand, the minor decided to tell her mother, and the trial court proved right after all: no abuse resulted. As the minor’s lawyer told the trial court, “it turns out that you were completely right.” And hence, this Court was completely wrong.

Unfazed, the Court continues on its course of setting aside every denial of a minor’s application for an abortion without parental notification. It is not that the lower courts are persistently wrong. The basis for the Court’s five parental notification decisions is the majority’s deep-seated ideology that minors should have the right to an abortion without notice to their parents, free of any significant restriction. The existence and force of that ideology are evident in two elements present in every one of the Court’s five decisions. First, the Court has steadfastly refused to give trial courts’ fact-findings the deference they would command in any other context. The reason for this lack of deference is that the Court intends to act as the trial court in these cases, even

⁵ *In re Doe 3*, ___ S.W.3d ___ (Tex. 2000).

⁶ *Id.* at ___ (Enoch, J., concurring and dissenting).

though it cannot see or hear the witnesses or assess their credibility. The Court refers to this unique procedure as “meaningful appellate review”,⁷ but what is most meaningful about it — indeed, what is unprecedented — is that five or six JUSTICES in an Austin courthouse are ensuring that minors throughout the State, sight unseen, can obtain abortions without telling their parents. Second, the Court has simply refused to acknowledge that the Legislature’s purpose in adopting the Parental Notification Act was to make it harder, not easier, for minors to obtain abortions without parental notification. Surely no friend or foe of the legislation who struggled through the two legislative sessions that it took to pass the statute had any idea that it would actually facilitate teenage abortion, yet that is how the Court has construed it: no application is to be denied. The Legislature’s plain purposes in adopting the Act were to protect parents’ rights to raise their children and to discourage teenage pregnancy and abortion. JUSTICES of this Court may disagree with legislative policy — and with respect to parental notification they very definitely do — but they may not substitute their views for the Legislature’s. As I have already observed: “To substitute judicial intent for legislative intent, and Supreme Court findings for trial court findings, is judicial activism.”⁸ That activism continues.

Today’s decision provides further evidence of the Court’s ideological motivations. The Court states that a minor must be allowed to have an abortion without telling her parents if she “clearly” shows that if they knew, they would withdraw their support and sever contact with her if they legally could. (There is no issue of illegal abandonment in this case.) It is in a minor’s best interest, a majority of the Court believes, to conceal her pregnancy from her parents and to obtain

⁷ *Ante*, at ____.

⁸ *Id.* at ____ (Hecht, J., dissenting).

an abortion without telling them if she feels that they would strongly disapprove of her and her conduct. In other words, ignorance is bliss, or at least parental ignorance is filial bliss; what the folks don't know won't hurt them — and more importantly, won't hurt their kids. This is a tragically distorted view of parental authority, individual responsibility, and family relationships. No parent likes hearing of a child's misconduct. In the very short term, any child is better off not having to face parental disapproval in the shallow sense that she can put off that painful consequence of her behavior. But in the long term, a child is not better off hiding critical aspects of her life from parents interested in her well-being simply because she thinks they will not approve. Parents should help their children all they can, but it is not in a child's best interest to fool her parents into thinking something untrue, and that is precisely what the Court condones by today's decision. A parent's role is not confined to furnishing room and board, looking over report cards, and handing out allowances. Parents need to know who their children's friends are, what their dreams and frustrations are, whether they are exposed to drugs or other perils, and what guidance they need to achieve adulthood. Concerned parents have the right and the responsibility to disapprove of what they believe to be a child's misbehavior, if necessary, in forceful terms. Deceit cannot be the price of approval. The Court rejects these principles and their reflection in the Parental Notification Act.

The Court continues to refuse to construe and apply the Act as the Legislature intended, and therefore I remain in 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 application⁹ 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.

Each of these assertions, if proved by a preponderance of the evidence, is a statutory basis for granting the application.¹⁰

The trial court appointed an attorney to represent Doe and also act as her guardian ad litem, as permitted by statute.¹¹ At the hearing, Doe was the only witness, and her testimony was very brief — just six pages in the reporter’s record — most of it consisting of simple “yes” answers to her attorney’s questions.

Doe testified that she is a high school senior making straight A’s and planning to go to college. She is almost twelve weeks’ pregnant. The father, 16, a junior in high school, was to accompany Doe to court but did not do so. Concerning her thought process in deciding to have an abortion, the entirety of Doe’s testimony is as follows:

⁹P ARENTAL NOTIFICATION RULES, FORM 2A.

¹⁰T EX. FAM. CODE § 33.003(i).

¹¹ *Id.* § 33.003(e).

Q Now, we also talked about the ramifications of what you're doing, have we not?

A Yes.

Q And we have talked about that life is very sacred, have we not?

A Yes, we have.

Q And you know that if the Court grants this, in essence what you are going to do is end a — a life that is already starting now?

A I realize that.

Q And you also realize that there are certain inherent dangers in performing any type of surgical procedures, including abortion? You understand that?

A Uh-huh. Yes, sir.

Q All right. Do you think you have had sufficient time to think about this?

A I think so.

Concerning her best interest and the possibility that her parents would emotionally abuse her if she told them that she is pregnant and wants an abortion, Doe testified:

Q I believe you told me about your sister being kind of in the same predicament; is that right?

A That's right.

Q And ever since she told your parents, they have never talked to her?

A . . . , yes.

Q And you are afraid that if you would tell your parents that the same thing would happen to you?

A Uh-huh. Completely.

Q And that would be some type of emotional abuse towards you, wouldn't it?

A Yes, it is.

Q They don't physically abuse you or anything like that?

A No.

* * *

Q Now, do you believe that if the Court grants this, this is in your best interest?

A Yes.

Q And I think you told me that you might sometime in the future tell your parents about this, but right now is not the time to do it?

A No.

Q All right.

A No.

Following this examination by Doe's attorney, the trial court asked two additional questions:

Q Okay. Tell me about your sister's situation.

A When she was 18 — 17 or 18. It was about [] years ago — she fell into a similar problem. She told my parents. My parents are very strict. They go — they have their beliefs and their ideas of what should happen, and they went with them. And they basically kicked her out of the house. Told her that she is on her own. They haven't spoken since. It is — we never mention her. It's — and if we do, it is — it happens that — it is like it happens all over again, going through the thing and all of that.

Q And where is she now?

A I have no idea. I haven't had any contact with her in [____] years.

Doe never explained the circumstances of her sister's "predicament" or "problem". Doe was unsure of her sister's age and did not say whether she was still in high school at the time. She did not state whether her sister had had prior problems with her parents that contributed to the difficulty in their relationship. She did not explain why she herself had had no contact with her sister in several years.

At the conclusion of the hearing the court stated that it would think about the case and rule before 5:00 p.m. of the next business day, the deadline prescribed by statute.¹² Although the statute requires a trial court to rule on an application "immediately after the hearing is concluded",¹³ Doe did not object to the delay and has not complained of it on appeal. The trial court issued written findings of fact, including the following:

The applicant IS NOT mature and sufficiently well informed to make the decision to have an abortion performed without notification to either of her parents
.....

Notifying either of the applicant's parents . . . WOULD NOT be in her best interest.

Notifying either of the applicant's parents . . . WOULD NOT lead to physical, sexual, or emotional abuse of the applicant.

Three days later the trial court issued findings nunc pro tunc. The only change was to omit the "NOT" in the second finding quoted above. Doe has not complained on appeal of this procedure, nor does it appear to have harmed her.

The court of appeals affirmed the trial court's ruling without opinion.

¹² EX. FAM. CODE § 33.003(h).

¹³ *Id.* § 33.003(g).

II

The factual basis for Doe’s “best interest” and “emotional abuse” assertions is the same. Thus, the three grounds on which Doe bases her application conflate to two: whether she is mature and sufficiently well informed to have an abortion without telling her parents, and whether it is not in her best interest to tell her parents because they may sever their relationship with Doe, thereby causing her emotional abuse.

A

The Court concludes that Doe did not establish the first ground for her application — “mature and sufficiently well informed” — and she clearly did not. Her simple affirmative answers to five questions posed by her lawyer do not begin to show whether she is mature or whether she had sufficient information about abortion and its alternatives to make a decision. Doe does not argue here that she offered evidence on these issues; she only complains that the trial court did not make specific findings on whether she is mature and sufficiently well informed to have an abortion without notice to her parents. Absent any evidence, there was nothing the trial court could find, other than that she failed to carry her burden of proof.

The Court’s remand for reconsideration in light on *In re Doe 1(I)*¹⁴ is completely unjustified. By no stretch of the imagination could any reasonable person have thought that “mature and sufficiently well informed” could be proved by the brief evidence Doe gave. It is one thing for the Court to remand a case for further consideration in light of developments in the law that may not

¹⁴ ___ S.W.3d ___ (Tex. 2000).

have been anticipated, but it is another thing altogether to remand when a party has made no attempt to adduce even minimal proof. Tellingly, Doe does not complain in this Court that she was surprised by the decision in *Doe I(I)*, and that if she had known of it, she would have presented other evidence. Absent such complaint, or any hint that it could be made, the Court’s remand has no basis other than the majority’s determination that no application will be denied.

B

Doe offered very little more evidence on the other ground of her application — her best interest and any likelihood of emotional abuse. She said only that years earlier her sister had been in “kind of . . . the same predicament” and that her parents, being “very strict”, “went with” “their ideas of what should happen,” “basically kicked her out of the house”, “told her that she [was] on her own”, and “haven’t spoken since.” Doe did not give any details of her sister’s “predicament”. She was unsure of her sister’s age when the situation occurred, and she did not indicate whether her sister’s circumstances were such that her parents were legally obligated to support her.¹⁵ Doe did not explain whether other circumstances in her sister’s life had contributed to a deterioration in her relationship with their parents, or whether subsequent events had solidified the estrangement. At the time that situation occurred, which was before the Parental Notification Act was passed, Doe’s sister could have obtained an abortion without telling her parents, even if she was a minor.

¹⁵ See TEX. FAM. CODE § 151.003(b) (“The duty of a parent to support his or her child exists while the child is an unemancipated minor and continues as long as the child is fully enrolled in an accredited secondary school in a program leading toward a high school diploma until the end of the school year in which the child graduates.”). See also *id.* § 154.001(a) (“The court may order either or both parents to support a child in the manner specified by the order . . . until the child is 18 years of age or until graduation from high school, whichever occurs later . . .”).

We have held that when the best interest of a child must be determined, “[w]ith the opportunity to observe the appearance and demeanor of the witnesses, to weigh their testimony, and evaluate the virtues of parties, no one is in a position to do this better than the trial court.”¹⁶ The trial court’s unique opportunity to assess a witness’s credibility and demeanor is nowhere more important than in these parental notification cases where no one is present to cross-examine or contradict the minor. There is no way for this Court to make the same assessment based on a reporter’s transcript of the testimony. If the witness’s testimony is not extensive and detailed enough to indicate credibility, the trial court’s assessment cannot be second-guessed on appeal.

An interested witness’s testimony is not conclusive, even when no one is present to dispute it. In *Holt Atherton Indus., Inc. v. Heine*, the trial court rendered a default judgment against the defendant after it failed to appear and answer.¹⁷ The judgment included an award for lost profits, based upon the plaintiff’s affirmative answer to a single question concerning the existence and amount of those damages.¹⁸ This Court reversed, holding that the plaintiff’s simple assertion of damages was not sufficient evidence to support recovery.

The Court correctly states that

because trial courts can view a witness’s demeanor, they are given great latitude in believing or disbelieving a witness’s testimony, particularly when the witness is interested in the outcome. Acting as factfinder, a trial judge can, therefore, reject the uncontroverted testimony of an interested witness unless it is readily controvertible,

¹⁶ *Taylor v. Meek*, 276 S.W.2d 787, 790 (Tex. 1955).

¹⁷ 835 S.W.2d 80, 84 (Tex. 1992).

¹⁸ *Id.*

it is clear, positive, direct, and there are no circumstances tending to discredit or impeach it.¹⁹

To illustrate this rule, the Court cites *Griffin Indus., Inc. v. Thirteenth Court of Appeals*, which held that an appellant's evidence of her financial circumstances established her right to appeal as an indigent, and that the trial court was not free to disbelieve her.²⁰ The appellant had testified in detail about her education; her work history; her efforts to gain employment; her physical problems; the sources and amount of her income; her expenses for rent, utilities, and groceries; her assets, including her car and clothes; her debts, including taxes, attorney fees, and court costs; and her family situation.²¹ We held that the trial court could not disbelieve appellant's evidence of her financial condition merely because she *may* have misrepresented her marital status in the past to obtain welfare benefits.²²

Applying the rule in this case, the Court correctly concludes that Doe's testimony is no evidence that telling her parents of her pregnancy would result in her being abused, and no evidence that it would be in her best interest to avoid disclosing her circumstances to her parents. Doe's testimony is not merely lacking in clarity, as the Court says, but is neither positive nor direct. One need only compare the testimony I have quoted above, which is virtually the entire record, with the evidence cited in *Griffin* to see how inadequate Doe's testimony was to prove her best interest and

¹⁹ *Ante*, at ____.

²⁰ 934 S.W.2d 349 (Tex. 1996).

²¹ *Id.* at 350-351.

²² *Id.*

any possibility of emotional abuse. Wholly vague and lacking in details, Doe's testimony no more than hints at any real problem that would result from her telling her parents of her pregnancy. As with the other ground for Doe's application, no remand is warranted on such a slim showing.²³

But the fundamental deficit in Doe's proof is not merely lack of clarity. Even if she had been more detailed, she could not use her parents' likely disapproval, however severe, to justify deceiving them. I vehemently disagree with the Court's statement that if Doe had clearly shown that her parents would withdraw their support if they were told of her pregnancy, and if they could do so legally, then the trial court would have had no choice but to grant her application. In a very simplistic sense, it is in Doe's best interest not to tell her parents that she is unexpectedly pregnant, just as it would be in her best interest not to tell them that she had suddenly dropped out of school and decided not to graduate, or that she was using drugs, or that she had stolen from a convenience store, or that she had hit someone with her car. Concerned parents do not relish hearing such news about their children, and they are certainly happier before they know the facts, just as the child was happier before the events occurred. But it is not in a child's best interest to fool a parent into being

²³ Ironically, JUSTICE BAKER, joined by JUSTICE ENOCH, dissented in *Griffin*, stating:

In a nonjury trial or hearing, the trial court is the sole judge of the witness' credibility and the testimony's weight. The trial court, as the fact-finder, has the right to accept or reject all or any part of any witness' testimony. The trial court may believe one witness and disbelieve others. The trial court may resolve inconsistencies in any witness' testimony.

The reviewing court is not a fact-finder and cannot pass upon a witness' credibility or substitute its judgment for that of the fact-finder even if there is conflicting evidence that would support a different conclusion. The trial court as the fact-finder is exclusively in a position to observe the witnesses and to evaluate their testimony and credibility.

Griffin, 934 S.W.2d at 355 (Baker, J., dissenting) (citations omitted). Apparently JUSTICE BAKER and JUSTICE ENOCH have abandoned these views, because if they continued to hold them, they could not join the majority in this case in completely disregarding the trial court's findings, which were obviously based in part on its assessment of Doe.

happy when knowing the truth would cause the parent to disapprove of the child's behavior. In the short term, the child may avoid the unpleasantness of parental displeasure, but in the long term the child risks lasting injury to the relationship and injury to her own character. She also cuts herself off from the support that may come unexpectedly, as it did for the minor in *Doe 3*. A concerned parent has not only the right but the duty to know.

The Court's contrary view — which is certainly not supported by the Parental Notification Act but is simply imposed by the Court — is destructive of family relationships, individual responsibility, and parental authority. Taking Doe at her word that her parents' reaction to disclosure of her unexpected pregnancy will be severely critical, I do not see how their continued approval of Doe, obtained by Doe's deceit, would be preferable. No doubt Doe would continue to enjoy her parents' support, but she would know that she had taken advantage of their ignorance, obtaining their uncritical affection under false pretenses. To say that this is in Doe's best interest trivializes the concept. A child's best interest must be gauged not merely by the lack of unpleasant disruptions in life but by the construction and destruction of character and relationships. Her application granted, Doe would contend in the longer term with the knowledge that not only had she disappointed her parents, but she intentionally misled them when they had a right to know the truth. It cannot be good for a family relationship — or any relationship — for one member to know that it is built on a falsehood. Nor does it promote individual responsibility for a person to escape the consequences of her actions simply by concealing them from others. Perhaps Doe's parents would be more supportive than Doe expects, as Doe 3's mother was, but even if it turned out that they were not, the

decision to deny them their right to know of a “grave and indelible”²⁴ event in their daughter’s life should not be made without the most compelling evidence.

Doe’s parents cannot legally abandon her as long as they are obliged by law to support her. After that, they are free to do as they choose. It is certainly to be hoped that they would not choose to end all relationship with their daughter because of her pregnancy, and that Doe and her parents would work to rebuild their relationship. But Doe’s parents should decide for themselves. Deceiving them cannot, in the end, be in Doe’s best interest.

* * * * *

For six weeks the Court has worked on little else than parental notification cases. That is not the Legislature’s fault; it is the Court’s fault. The Legislature clearly intended to set high standards for obtaining an abortion without parental notification, and to afford trial courts discretion in their decisions. Had the Court construed the statute in accordance with the Legislature’s intent, it would have denied the appeals in these cases and upheld the trial courts. Ignoring legislative will, a majority of this Court has commandeered the process to steer it directly and without fail to a judicially predetermined destination. The penalty is an unending flow of appeals from which it cannot extricate itself so long as the lower courts refuse to surrender their judgment to this Court’s prodding.

I would affirm the lower courts. From the Court’s refusal to do so, I dissent.

²⁴ *Bellotti v. Baird*, 443 U.S. 622, 642 (1979) (*Bellotti II*).

Nathan L. Hecht
Justice

Opinion delivered: March 22, 2000