

# IN THE SUPREME COURT OF TEXAS

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No. 02-0376

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IN RE JANE DOE 10

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APPEAL UNDER SECTION 33.004(F), FAMILY CODE

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JUSTICE HECHT, concurring in the judgment.

Nothing in any statute or rule governing parental notification proceedings prescribes that a minor's application to have an abortion without notice to either of her parents must be granted if the trial court issues a timely ruling but fails to make a finding on a ground asserted by the minor and supported by some evidence. The only relevant statutory provision states: "If the court fails to rule on the application *and* issue written findings of fact and conclusions of law within the [specified] period . . . , the application is deemed to be granted . . . ."<sup>1</sup> Plainly, an application is deemed granted by this provision only when the trial court fails *both* to rule *and* to make findings within the specified time. No statute prescribes the same result if the trial court's only failure is to make a timely finding. In all other civil proceedings, of course, findings can be made late, and omitted findings are presumed in favor of a trial court's rulings, not against them.<sup>2</sup> One might expect similar procedures in parental notification proceedings. But from the beginning this Court has steadfastly

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<sup>1</sup> TEX. FAM. CODE § 33.003(h) (emphasis added).

<sup>2</sup> See TEX. R. CIV. P. 299.

refused to follow rules applicable to civil cases generally or to take chapter 33 of the Family Code on its face if distorting one or the other would do more to keep children’s abortions secret from their parents. So it is true, as the Court says today, that we have stated — probably merely in dicta, but we are way past quibbling over such niceties now — that if the trial court fails to make a finding on a ground asserted by a minor, and there is any evidence to support that ground, the application must be granted.<sup>3</sup>

I did not agree with this judicial rewriting of the statute,<sup>4</sup> but it is now quite clearly the law, and “in the area of statutory construction,” as both this Court and the United States Supreme Court have recognized, “the doctrine of stare decisis has its greatest force.”<sup>5</sup> This rule is not inflexible, of course; indeed, four of the JUSTICES who comprise today’s majority refused to apply it only a few weeks ago in *Utts v. Short*.<sup>6</sup> But I agree that *stare decisis* is important here, and therefore I agree with the Court that if there is any evidence in the record before us that the minor “may” — the operative word in section 33.003(i)<sup>7</sup> — be physically or emotionally abused if she discloses her desire to have an abortion to either of her parents, then the trial court’s decision must be reversed.

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<sup>3</sup> *In re Doe 1(II)*, 19 S.W.3d 346, 357 (Tex. 2000).

<sup>4</sup> *Id.* at 366, 379-381 (Hecht, J., dissenting).

<sup>5</sup> *Marmon v. Mustang Aviation, Inc.*, 430 S.W.2d 182, 186 (Tex. 1968) (citing *Moss v. Gibbs*, 370 S.W.2d 452, 458 (Tex. 1963), and *United States v. South Buffalo Ry.*, 333 U.S. 771, 774-775 (1948)).

<sup>6</sup> \_\_\_ S.W.3d \_\_\_, \_\_\_ (Tex. 2002) (Baker, J., joined by Enoch, Hankinson, and O’Neill, JJ.) (arguing that the Court should overrule its decision in *Drilex Sys., Inc. v. Flores*, 1 S.W.3d 112 (Tex. 1999), construing chapter 33 of the Texas Civil Practice and Remedies Code, because *Drilex* “is only slightly over two years old”).

<sup>7</sup> TEX. FAM. CODE § 33.003(i) (“If the court finds 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.”).

There is some evidence that the minor's father may physically abuse her if she were to discuss the matter with him. According to her, he has been physically abusive to her siblings over far less serious matters. There is no evidence that her mother would be physically abusive. As to whether her mother might be emotionally abusive, the minor's scant testimony on the subject is somewhat equivocal. In its entirety, that testimony is as follows:

Q And have you ever had a conversation with either of your parents regarding what would happen or what the consequences of your becoming pregnant would be?

A My father, no, because my father and I aren't very close. My mother, yes. We have had a conversation about what would happen if I were to come home pregnant, and that conversation basically went, if I were to — if I was ever pregnant, I might as well not come home. I'd have no place to stay. I'd have no freedom, no liberties. My car would be taken away. My cell phone would be taken away. I wouldn't have all the luxuries that I do now.

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Q And based upon your earlier testimony, if you were to approach your mother to discuss your pregnancy and your options, do you feel certain that she would ask you to leave the house?

A Yes. She probably wouldn't ask me to leave. She'd, like, tell me to leave, I'm pretty sure.

The minor's two answers are hard to square. On the one hand, she fears that her mother might keep her at home without a car, cell phone, or other "luxuries", and on the other she is concerned that her mother might expel her from home altogether. In any other kind of case I doubt a majority of the Court would say that evidence this weak can be credited towards a party's burden of proof. But again, this Court does not treat parental notification proceedings as other cases. I believe a fair reading of our precedents is that the testimony I have quoted, as ambiguous as it is, is enough for

the minor's application to be granted in the absence of a finding by the trial court to the contrary. Accordingly, I agree with the Court's conclusion that because the trial court failed to discharge the responsibility that this Court — not the Legislature — has placed on it, the trial court's decision must be reversed.

Before ruling in this case, the trial court took a recess, in the judge's words, "to review some of the Supreme Court cases on this." I find it hard to understand how the trial court could have done much of a review and overlooked this Court's insistence on detailed findings on issues raised by the minor, especially issues related to her credibility which the trial court alone is in a position to judge. I can well understand a trial court's thinking that a statute — even a statute related to abortion — should mean what it says, but even a cursory review of our cases should make plain that the law in parental notification proceedings is not to be found in chapter 33 of the Family Code but in this Court's revisions to that statute in its numerous *Doe* decisions. As we have construed chapter 33, a trial court does not discharge its responsibility in parental notification proceedings without making specific findings, especially on matters of credibility.<sup>8</sup> We have remanded cases in the past when trial courts could not have anticipated that requirement. There is no need to continue to do so.

It should be noted, however, that a trial court is not bound to grant a minor's application based solely on her fear that her parents would force her out of the home if they knew she was pregnant. If that were evidence enough, then virtually every application would be granted. In ten cases, we have yet to see one in which the minor did not say that she feared her parents would throw

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<sup>8</sup> See *In re Doe 1*, 19 S.W.3d 249, 257 (Tex. 2000); *In re Doe 2*, 19 S.W.3d 278, 282 (Tex. 2000); *In re Doe 4*, 19 S.W.3d 322, 325 n.1 (Tex. 2000).

her out. Not all such fears are justified. In one case we know of, after remand from this Court, the minor decided to tell her mother after all, and no abuse resulted.<sup>9</sup> We must assume that most parents will do their best to support their children at least as much as the law requires.<sup>10</sup>

For these reasons I concur in the Court's judgment.

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Nathan L. Hecht  
Justice

Opinion delivered: April 29, 2002

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<sup>9</sup> *In re Doe 4*, 19 S.W.3d 322, 327-328 (Tex. 2000) (Hecht, J., dissenting).

<sup>10</sup> See TEX. FAM. CODE § 151.001(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 . . .”).