SUBJECT: Parental consent for an abortion involving a minor

COMMITTEE: State Affairs — committee substitute recommended

VOTE: 6 ayes — Swinford, Miller, Cook, Gattis, J. Keffer, Wong

3 nays — Farrar, Martinez Fischer, Villarreal

WITNESSES: For — Beverly Nuckols, Joe Pojman, and Brent Haynes, Texas Alliance for Life; Molly S. White, Redeemed for Life; Dee Dee Alonzo; Maria Mayela Banks; Mary Binder; Tama Chunn; Nicole Holloway; Ninfa Lambert; Clayton Trotter

Against —Rebecca Anderson, People for the American Way and League of United Latin American Citizens (LULAC); Amy Hagstrom Miller, Whole Women's Health National Coalition of Abortion Providers; Carla Holeva, Planned Parenthood of West Texas; Hannah Riddering, Texas National Organization for Women; John Ament; Martha Bryson; Patti Edelman; Katherine Forde; Susan Hays; Rita Lucido; Molly Solomon; Meg Walsh

On — Cindy Bednar, Evelyn Delgado, Department of State Health Services; Alex Albright; Craig Enoch

BACKGROUND: SB 30 by Shapiro (Family Code, Chapter 33), enacted in 1999, requires the physician of an unmarried minor seeking an abortion to notify one of her parents or her court-appointed managing conservator or guardian and then wait 48 hours before performing the abortion. It does not require the consent of the parent or guardian.

The law allows exceptions for medical emergencies or when the minor obtains a judicial bypass of the parental notification requirement by applying to a county court at law, a probate court, or a district court. The judge must grant the minor permission to consent to an abortion without parental notification if the judge determines by a preponderance of the evidence that:

- the minor is mature and sufficiently well informed to give consent;
- notification would not be in the minor's best interest; or
- notification might lead to physical, sexual, or emotional abuse.

The proceedings must be conducted expeditiously and must protect the minor's anonymity and confidentiality. If the judge denies permission, the minor may appeal to the court of appeals. If either the trial judge or the court of appeals fails to rule within two business days, permission is granted automatically. Under procedural rules issued by the Supreme Court in December 1999, a minor may appeal denial of a judicial bypass to the Supreme Court, but that court has no specific deadline other than to rule "as soon as possible."

The Texas Supreme Court has reviewed the decisions of trial-court judges who ruled against minors seeking to bypass the requirement that their parent or guardian ad litem guardian be notified in advance of the minor's desire to obtain an abortion. The court has issued new legal guidelines for lower courts to follow in such cases and requires trial judges to make specific findings concerning their decisions. The court also established legal standards for appellate review of a trial judge's decision denying a minor's request to bypass the parental notification requirement.

In 2000, the high court made six decisions involving application of the parental notification bypass provision in four separate cases: *In re Jane Doe 1 (I)* 19 S.W.3d 249; *In re Jane Doe 1 (II)* 19 S.W.3d 346.; *In re Jane Doe 2* 19 S.W.3d 278; *In re Jane Doe 3* 19 S.W.3d 300; *In re Jane Doe 4 (I)* 19 S.W.3d 322; and *In re Jane Doe 4 (II)* 19 S.W.3d 337.

DIGEST:

CSHB 1212 would amend the Family Code by adding chap. 34, which would prohibit a physician from performing an abortion on an unemancipated minor without consent from the minor's parent or guardian. An affidavit by the physician stating that consent had been obtained, including a copy of the parent or guardian's identification and an affidavit of consent written by the parent or guardian, would be maintained in the minor's medical records. In the absence of government-issued identification, a physician would be required to assume the patient was a minor and would be required to exercise due diligence to determine the patient's age.

A facility would add to its state report information about an abortion performed on a minor, including whether consent for the abortion was

obtained from a parent or guardian, whether the minor was emancipated, whether the minor had a valid court order authorizing the abortion without consent and if the court granted the order by action or inaction, whether the abortion was performed because of a medical emergency, and whether suspected child abuse was reported and the age of the patient's sexual partner.

Emergencies. In emergency situations where consent could not be obtained, a physician could perform an abortion on an unemancipated minor to prevent death or serious impairment. If a physician made that determination, the physician would certify in writing in the patient's medical record and to the Department of State Health Services (DSHS) the medical indications supporting that determination. The certificate to DSHS could not include identifying information about the minor and would not be subject to open records disclosure or discovery, subpoena, or other legal process.

If a physician were charged with inappropriately performing an abortion on a minor in an emergency situation, the physician could request a hearing before the Texas State Board of Medical Examiners to determine whether the physician's actions were medically appropriate, and the board's findings would be admissible. A trial could be postponed for 30 days to permit a hearing by the medical board.

Judicial bypass. A minor who sought an abortion without a parent's or guardian's consent could petition a court with probate jurisdiction, county court, or district court, including family district court, for the minor's county of residence or the county in which the abortion would be performed.

The petition would include a statement that the minor was pregnant, unmarried, under 18 years of age, had not been emancipated, and wished to have an abortion without a parent or guardian's consent. The petition and records could use a pseudonym or the minor's initials, rather than her full name. If the minor had retained an attorney, contact information for the attorney would be included. The petition would be retained by the clerk of the court and a copy delivered to the judge.

The court would appoint a guardian ad litem for the minor to represent the minor's best interests. The guardian ad litem could not be the minor's attorney but could be the minor's grandparent, adult brother or sister, adult

aunt or uncle, a psychiatrist or certified psychologist, a Department of Family and Protective Services employee, member of the clergy, or other person selected by the court. The guardian ad litem would be immune from liability for acting in good faith. The court also would appoint an attorney if the minor had not retained one.

The court could not notify a parent or guardian that the minor was pregnant and wanted to have an abortion. Court proceedings would be conducted to protect the anonymity of the minor, including confidential docketing and records. The court could not charge filing fees or court costs to the minor.

The minor would have to appear in person before the judge during the hearing. The judge would have to issue a ruling by no later than 5 p.m. on the fifth business day after the date the petition was filed. The court could grant an extension, upon a minor's request, and the ruling would be due five business days after the minor was ready to proceed.

To authorize a minor to obtain an abortion without a parent's or guardian's consent, the court would have to determine whether by clear and convincing evidence:

- a minor was sufficiently mature and well informed to make a decision about an abortion without the consent of a parent or guardian;
- the abortion would be in the best interests of the minor; or
- obtaining consent would lead to abuse of the minor.

The court could ask about the minor's reasons for seeking the abortion and consider whether the minor was informed of DSHS information materials.

If the court failed to issue a ruling in the specified time, the application would be deemed granted, and the clerk of the court would issue a certificate to that effect. If the abortion were performed with a court order, the order would be included in the minor's medical records. The order would be confidential and could be issued only to the minor, the minor's guardian ad litem, the minor's attorney, another person designated to receive the order by the minor, or a government agency or attorney in a criminal or administrative action seeking to assert or protect the interest of the minor.

The court could order the state to pay costs of an attorney ad litem or guardian ad litem, court costs, court reporter fees.

Appeals. A minor could appeal a decision to the court of appeals with jurisdiction over civil matters in the county where the application was filed and could obtain an expedited appeal. The appeals court would have to rule by 5 p.m. on the fifth business day after the date the petition was filed. The court could grant an extension, upon a minor's request, and the ruling would be due five business days after the minor was ready to proceed. If the court failed to issue a ruling in the specified time, the application would be deemed granted, and the clerk of the court would issue a certificate to that effect. Confidentiality, anonymity, record-keeping, prohibiting notification, and fees or court costs also would be in effect for an appeal.

Reporting. For each case, the court would report to the Office of Court Administration: the number and style of the case, the applicant's county of residence, the county where the court was located, the filing date of the case, the date of disposition of the case, and the nature of the disposition. The Office of Court Administration would publish annually a report including the county where the court was located and the nature of the disposition in aggregate by judicial region.

Penalties. A physician who intentionally, knowingly, recklessly, or with criminal negligence performed an abortion on a minor without consent or in accordance with ch. 34 would commit an offense under the physicians' licensing code, a class A misdemeanor (up to one year in jail and/or a maximum fine of $4,000). Use of a false identification by a minor would be a defense to prosecution unless the identification were clearly false or the physician knew the patient's actual age or identity.

The bill also would establish coercion of a minor to have an abortion and assault to force a pregnant minor to have an abortion as offenses punishable as a state-jail felony (180 days to two years in a state jail and an optional fine of up to $10,000).

Report abuse. A physician, guardian ad litem, or attorney who suspected abuse of a minor, including sexual abuse, would be required to report it to appropriate authorities. Information received by DFPS would be confidential unless needed to prove abuse.

***Information materials*.** DSHS would produce and distribute informational materials explaining in English and Spanish the rights of a minor, including judicial bypass procedures, and alternatives to abortion and the health risks associated with abortion.

The bill would take effect September 1, 2005, and would apply to abortions performed on or after January 1, 2006 and to offenses committed on or after that date. A physicians' duty to obtain consent would take effect January 1, 2006.

SUPPORTERS SAY:

CSHB 1212 would improve parental involvement in a minor's decision about whether or not to have an abortion. While Texas has a notification requirement, physicians do not always follow it, and parents may find out too late or not at all. The bill would make Texas consistent with neighboring states as well as 18 other states currently requiring parental consent.

Parental involvement is important. By involving parents in a medical procedure performed on their children, parental notification laws could reduce the medical risk to minors. Parents are a key source of important medical information that may be relevant to surgery, such as allergies, medical conditions, and medical histories. After a minor had an abortion, a parent who had been notified could watch for and react to any possible negative consequences, such as infection or depression. Some school districts require consent of the parent before giving children aspirin in school and Texas requires it for ear-piercing, so the state should require parental consent for the much more serious procedure of abortion.

This bill would not compromise a minor's ability to obtain authorization for an abortion without consent under certain circumstances. The judicial bypass provisions would ensure that the process would be expeditious, and the short delay caused by judicial bypass would not make the abortion more dangerous.

Parental consent, rather than notification, could make the decision process less difficult for a minor. Under the notification law, a minor whose parents had a moral objection to the procedure could be subject to intense negotiation, threats, or other intervention by parents and others. With required consent, parents have veto power and would not be required to convince their child.

Coercion. Parents should not be able to force a minor to have an abortion. Some parents believe that it always is the right course of action for their pregnant daughters. Because the law does not explicitly require the consent of the minor, a parent could force a minor to have an abortion against her will. Making it an offense would ensure that coercion carried an appropriate penalty to discourage it from ever happening.

***Judicial bypass*.** HB 1212 would close some of the loopholes in the state's notification laws and would meet the standards set by the U.S. Supreme Court. In *Bellotti v. Baird* (*Bellotti* II), 443 U.S. 622 (1979), the U.S. Supreme Court held that states may limit the rights of minors to have abortions by requiring parental notification or consent, but the minor must have recourse to a meaningful judicial process to circumvent this requirement when necessary. The court held that the bypass procedure must meet four tests. It must be confidential, expeditious, consider the best interest of the minor, and consider the minor's maturity and ability to make her own decisions.

Confidentiality. The bill would take every precaution to protect a minor's confidentiality and anonymity during a judicial process. Limiting venue would not necessarily compromise confidentiality as a minor could seek a judicial bypass in the county where the abortion would be performed, which could be far away from the minor's home county. Changing the standard of evidence also would not compromise confidentiality as a minor who was capable of seeking out a judicial bypass also would likely be able to collect evidence to support her case. Whether or not an entire court file should be confidential would be largely up to the Supreme Court to decide, as it did with parental notification, and the intent that the minor be protected with anonymity is quite clear in this bill.

Expeditious. Five days is the right balance between a minor's right to an expeditious resolution and to a well-reasoned decision. Two days simply would not be enough time to hold a trial, consider the evidence, and write the decision and findings of fact.

Best interests. HB 1212 would better protect the best interests of a minor by requiring a judge to determine if an abortion were in her best interests, not just whether or not parental involvement were in her best interests. By bypassing notification or parental consent, the minor likely would go ahead with an abortion, and the court should ensure that it is the right course of action.

The bill would satisfy the "best interests" test because it explicitly states that a guardian ad litem would represent the minor's best interests. Fears that a person could be appointed whose beliefs prevented that person from representing the minor's interests are unfounded. Also, the existing notification law permits judges to appoint a relative or clergy member as guardian ad litem.

Mature and well-informed minor. HB 1212 appropriately would offer more guidance to courts in determining whether a minor were mature and well informed enough to make a decision to have an abortion. The standards set by the Texas Supreme Court in considering judicial bypass for parental notification were too low, according to Justice Hecht in his Doe 1 (I) dissenting opinion. The court's guidelines – by not requiring that the information obtained by a minor to show that she is well-informed be complete and balanced by the differing views of those who may oppose abortion – trivialized the requirement. He said that to be entitled to an abortion without parental notification under the court's guidelines, "all a minor need tell the trial court is: that she has consulted with a clinician who told her that abortion presented insignificant physical risks to her, that some people regret having an abortion but not very often, and that she could always have the child and keep it or put it up for adoption; and that she carefully considered all the clinician said." By requiring that the state-issued materials be provided to and understood by a minor, the state would ensure that balanced, neutral information would be available.

Clear and convincing evidence. The bill would set a reasonable burden of evidence so that fair weight and consideration could be given all information about the minor. The preponderance of evidence standard established for judicial bypass of notification unfairly weighted the minor's testimony in her favor. The Texas Supreme Court in *In re Jane Doe 4 (I)*, issued March 22, 2000, said if the minor's uncontroverted testimony was clear, positive, and direct and not impeached or discredited by other circumstances, the trial court must accept it as fact. The court noted that the minor's testimony would not be controverted because, with bypass proceedings being nonadversarial and confidential, no one would be likely to present contrary evidence challenging the minor's assertions. Without anyone to present contrary testimony, such as a parent or guardian, the minor's testimony has far more weight than it would under other circumstances. By changing the standard of evidence to clear and convincing, the minor's testimony would be given weight relative to other information.

Venue. Limiting the venue for judicial bypasses to the minor's county of residence or the county where the abortion would be performed would prevent forum shopping. Courts currently may seek reimbursement from the state for costs and fees associated with parental notification judicial bypass cases. By that measure, some counties are overrepresented in the number of judicial bypass cases heard in their courts, suggesting that minors' lawyers may forum shop for sympathetic courts. All cases should be handled without bias one way or another.

Judiciary information. This bill would permit aggregate information about judicial bypasses to be made public, allowing Texas residents to evaluate what the judges in their area have worked on. The public should be allowed to know how the judiciary is deciding these cases, so long as the minor's anonymity was protected. Judges are called upon constantly to make difficult decisions that may have political ramifications, and rulings in judicial bypass proceedings are simply another in the long list of such cases. Confidence in the judiciary may erode because the public may believe that judges are allowed to rule on these cases based on their personal views.

OPPONENTS SAY:

The existing notification law adequately ensures parental involvement in a minor's decision about whether or not to have an abortion. Parents who otherwise might be left out of their daughters' life choices have a chance to counsel and advise them. There is no actual evidence that parents are not being notified under the existing law. No court case has been brought by a parent against a provider alleging that the physician performed an abortion on an identified minor without first notifying the parents.

Texas' notification law makes Texas' requirements consistent with those of comparable states, such as New York and Florida that, along with 10 other states, require parental notification. All of Texas' neighboring states do not require consent as New Mexico's and Oklahoma's consent statutes currently are not in effect because they are enjoined by the courts or as a result of an attorney general opinion. California's consent statute also is currently enjoined by the courts based on state constitutional challenges.

Requiring parental consent could endanger a woman's health. Many young women who are pregnant wait as long as possible before seeking medical care and are likely to put off their decisions even longer if required to get consent from parents. Any delay increases the medical risk for a pregnant girl, and the risk grows as the pregnancy progresses. Judicial bypass can

delay access to abortion by several weeks because a girl must travel to the county courthouse twice, once to file and once at trial, then at least twice to the abortion provider, and she may have to appeal to a higher court. The timeframes in the notification law are more reasonable. Even though they may delay an abortion, it is not for very long and requires less travel, as the minor may appear by videoconference in court.

In Texas and most other states, minors are assured of confidentiality when they seek sensitive medical services, such as pregnancy and delivery, treatment of sexually transmitted disease, and therapy for drug abuse. These conditions often entail greater health risk than abortion, yet the decision is left to the minor and remains confidential. Mandatory consent for abortion cannot be compared to receiving aspirin in school because school districts have adopted those policies voluntarily to protect themselves from liability concerns.

Requiring parental consent, rather than notification, could increase the number of judicial bypass cases. Young women who have been abandoned by their parents or whose only surviving parent is in jail would be forced to go to court, even if the reason consent could not be obtained was not a parent's objections. The panoply of family situations for young women could not be adequately accounted for under a parental consent law. Notification strikes the right balance between encouraging parental involvement and respecting some women's' family situations.

Coercion. No woman should be forced to have an abortion, a philosophy already protected under law. The counseling required before any woman has an abortion includes a thorough discussion of her reasons for wanting an abortion, her understanding of the risks involved, and questions about anyone else who may have motivated her to seek an abortion. The section of HB 1212 that would require the minor's consent to an abortion is a good idea, but creating an offense for "coercion" could have far-reaching consequences.

The definition of coercion in the Penal Code, sec. 1.07(a)(9), includes a threat, however communicated, to commit an offense, inflict bodily injury in the future on the person threatened or another, accuse a person of any offense, or to expose a person to hatred, contempt, or ridicule. Parents or a boyfriend who believed an abortion would be in the minor's best interest could go to jail under HB 1212 if their discussion were perceived as coercion. The decision should be up to the woman and the emotional and

heated discussions that could lead up to that decision should not be turned into a criminal offense.

***Judicial bypass*.** The determinations required by a judge in this bill would not meet the standards set by the U.S. Supreme Court in *Bellotti v Baird* (*Bellotti* II).

Confidentiality. HB 1212 would fail the confidentiality test in a number of ways, including the potential breach of confidentiality caused by limiting venue. Changing the standard of evidence from preponderance of evidence, as is now required under the notification statute's judicial bypass provisions, to clear and convincing evidence would further compromise confidentiality as the minor's testimony alone would not be sufficient to meet the burden of proof. Obtaining documentary evidence and calling witnesses would compromise confidentiality.

Holding only the court order and application confidential, not the rest of the case file, could permit the public to obtain information about the case and identify the minor. Transcripts of testimony and other documents would be accessible and could contain enough information, such as where the minor goes to school, what activities she may participate in, and what her family life is like, to make identification possible.

Expeditious. Five business days may not meet the standard for an expeditious resolution. There is no indication that judges have had a hard time meeting the two-day deadline in the past. The sooner a decision is made, the better is it for the minor.

Best interests. Requiring a judge to determine whether or not an abortion was in the best interests of a minor would far exceed the judiciary's authority. The court should decide matters of law relating to the issue before them. In the case of notification or parental consent, the issue before the judge would be whether or not the law requiring notification or consent was in the minor's best interests. Broadening the judiciary's scope to include whether or not the consequence of the decision were appropriate would be akin to a judge, when awarding money to a defendant, deciding what the person should spend the money on.

The requirement that a judge – and not the minor – determine whether or not an abortion was in the minor's best interests arguably could be counter to the U.S. Supreme Court's opinion in *Planned Parenthood of*

Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992) that a consent requirement could not pose a substantial obstacle to a woman's constitutional right ultimately to choose an abortion.

The bill also would fail the "best interests" test because it would not require any special training or qualifications to be a guardian ad litem in one of these cases. A judge could appoint someone without any knowledge of the law or an individual with competing interests, such as a grandparent or uncle whose loyalties could be divided between the minor and the parent. While in the case of an absent parent, this may make sense, it may not be in the complete best interests of the child in many cases.

Explicitly including members of the clergy also could be problematic for the requirement that the guardian ad litem represent the minor's best interests. While many clergy can serve in a completely appropriate counseling role for minors, permitting all clergy, regardless of spiritual or religious beliefs about abortion, to serve as guardian ad litem may not be in the minor's best interests. It also could permit judges who personally object to abortion to stack the proceedings against the minor.

Mature and well-informed minor. This bill would put the maturity test in direct conflict with the judge's evaluation. A minor who was mature enough to make the decision to have an abortion should be able to make that decision. This bill, however, would state that the judge would have to make the decision about whether or not an abortion were in the minor's best interests. The provisions in the bill assume no minor is mature enough to make that decision. The Texas Supreme Court in *In re Jane Doe 1*, issued February 25, 2000, held that a trial court should not make a blanket determination that every minor was too immature to make a decision about having an abortion.

The bill would require a minor to be informed by misleading sources of information, namely the scientifically erroneous and inflammatory materials published under the Woman's Right to Know Act. This would be counter to the standards for judicial bypass of parental notification developed by the Texas Supreme Court. This bill would change the source of information from a healthcare provider to a political document that was neither reliable nor informed.

In establishing standards to determine whether a minor was mature and sufficiently well informed, the Texas Supreme Court said, in *In re Jane*

Doe 1, issued February 25, 2000, that a trial court should take into account the totality of circumstances that the minor presents, including that she is well informed. In order to establish that she is sufficiently well informed, a minor must show that she has obtained information from a healthcare provider about the health risks associated with an abortion and that she understands those risks, she understands the alternatives to abortion, and she is aware of the emotional and psychological aspects of undergoing an abortion. She must show that she has received information about these risks from reliable and informed sources.

Clear and convincing evidence. Changing the standard of evidence from preponderance of evidence to clear and convincing would make it nearly impossible for a minor successfully to present her case. Not only does calling witnesses and gathering documentation compromise a minor's confidentiality, it also can be extremely difficult for a person without independent transportation, income, or communication, such as a fax machine, to do. The court should accept as fact a minor's uncontroverted testimony if it was clear, positive, and direct and not impeached or discredited by other circumstances. To require additional support would, in effect, treat a minor's testimony as not factual.

Venue. Limiting venue to the county where the minor lived or a nearby county, especially in rural areas, could compromise confidentiality. People working in or attending to other matters at the local courthouse may know the minor and attempts to secure an attorney also could compromise her anonymity in a small county.

The perception that forum shopping goes on today is based on incomplete information. The lawyers on these cases often do the work pro bono, which means their costs would not show up in any expense reports by courts. This can skew the numbers when presented on a county-by-county basis.

Judiciary information. The only purpose served by releasing information about the courts that hear these cases — even in aggregate — would be to label judges "pro-choice" or "pro-life" on the basis of their decisions. In rural areas, it could be quite easy to determine which judges were the basis for reports. The release of information could subject judges to unwarranted political attacks to which they could not present a defense because explaining a decision in a particular case could violate the confidentiality of the minor as well as the Code of Judicial Conduct.

Also, the release of information about these courts could make the judge a target of groups or individuals with certain views on abortion who might seek to harm the judge, either physically or by harassing and picketing the judge at home and at work. Fear of harm to the judge or the judge's family, as well as the possible harassment by picketers, could make judges more likely to recuse themselves from hearing such applications. If too many judges chose this route to avoid developing a record on these cases, it would become more difficult for minors seeking judicial bypass to obtain a hearing.

Judicial accountability would not be improved by making information about these cases available to the public. Judges are held accountable through the appeals process and through disciplinary action, if necessary. There is no need to release this sensitive and potentially inflammatory data. Not only would it not enhance accountability, it could distort a judge's philosophy. Even judges who personally oppose abortion could have difficulty denying bypass applications on the grounds required by the law.

OTHER OPPONENTS SAY:

This bill would not go far enough in permitting the public to have insight into how judges ruled in these cases. In the only case in any state that has addressed this issue, the court ruled that the records must be released to the public, *State ex rel. The Cincinnati Post v. Court of Appeals,* 604 N.E.2d 153 (Ohio 1992). In that case, the Ohio Supreme Court determined that the open-courts provision of the Ohio constitution, worded similarly to Texas' provision, required the release of appellate court decisions on judicial bypass procedures.

NOTES:

The committee substitute differs from the filed version in that it would limit venue for judicial bypass cases, establish clear and convincing evidence as the standard for evidence, remove the requirement that the judge's name be reported to the state, require the minor to appear before the judge, add assault on a pregnant minor as an offense, require a physician to keep a copy of a court order and the physician affidavit in the minor's medical files, among other changes.

The companion bill, SB 1150 by Harris, has been referred to the Senate State Affairs Committee.