

Support HB 3994: Judicial Bypass Reform by Rep. Geanie Morrison

Goal: Texas Alliance for Life supports amending Chapter 33, Family Code, to reform the judicial bypass system.

What is a Judicial Bypass?

In Texas, before a physician can perform an abortion on a minor girl (17 years or younger), he or she must obtain the written, notarized consent of the minor's parent or guardian. The Supreme Court of the United States mandates any state that requires consent to have an alternate means for a minor to obtain an abortion. The intent behind this mandate is to protect minors from abusive parents or guardians. In Texas, this alternate route of consent is known as a "judicial bypass." A judicial bypass is an order granted by a judge that allows the physician to perform an abortion on the minor without her parent's involvement.

Reforms Needed:

First, venue needs to be restricted. Currently, minors may seek a judicial bypass in any court in Texas. This needs to be restricted to the minor's county of residence, or, if the county is small enough that anonymity is threatened, a neighboring county.

Because the procedure is *ex parte*, several procedural safeguards are needed. The roles of the guardian ad litem and attorney ad litem need to be separated. There needs to be an explicit presumption that parental notification and consent is in the minor's best interest. The burden of proof needs to be raised from a "preponderance of the evidence" to "clear and convincing." There also needs to be a better record of fact finding prepared for the court of appeal to review. The bill should also give judges more guidance in following the legislative intent of the judicial bypass. This bill provides judges with a non-exhaustive list of things they may consider. Further, the court needs more than two business days to issue a ruling. Considering the gravity of the outcome of the case, five days is a more appropriate amount of time for fact-finding and deliberations.

Finally, there needs to be better record-keeping. The courts need to report to the Office of Court Administration how many of these cases are being heard and how they are being disposed of. There also needs to be improved record-retention, with an allowance for minors to access their case records.

Background

Statutory Background

In 1999, Texas enacted a law that requires a parent to be notified before a physician can perform an abortion on a minor. This notification requirement, codified in Chapter 33 of the Family Code, contains an alternate procedure for obtaining an abortion without parental involvement. This procedure is a judicial bypass, through which a minor can

obtain a court order authorizing the physician to perform an abortion without parental notification if the judge makes certain findings.

In 2005, the Legislature passed SB 419, which requires physicians to obtain the written, notarized consent of a parent before performing an abortion on the minor. Obtaining this consent also serves to satisfy the notification requirements. The consent law is codified in Sec. 164.052(a)(19), Occupations Code, and it references the judicial bypass procedure found in Chapter 33 of the Family Code.

State Administrative Rules

As per the statute, the Texas Supreme Court also promulgated rules for judicial bypasses. The rules can be found here: <http://www.supreme.courts.state.tx.us/rules/pnr/pnr-rules-eff-030107.pdf>.

In lieu of SB 419, in September 2006, the Texas Medical Board promulgated rules governing abortions performed on minors, including a six-page form that requires the parent or guardian's signature be notarized. See 22 TAC 165.6. A link is given here: http://www.tmb.state.tx.us/rules/docs/Board_Rules_Effective_01-02-2013.pdf.

Federal Case Law

The U.S. Supreme Court, in *Bellotti v. Baird*, 443 U.S. 622 (1979) (Bellotti II), set out the four requirements any alternative procedure to parental consent must contain. First, a minor must be given an opportunity to prove that she is mature and well-informed enough to make the decision to have an abortion independent. Second, even if she cannot prove she is mature enough, she must be able to present that the desired abortion would be in her best interest. Third, the procedure must ensure the minor's anonymity. And finally, the procedure must be done expeditiously.

Other relevant federal cases are *Planned Parenthood v. Casey* (1992) which established that parental consent was not an undue burden for a minor woman seeking an abortion; *Hodgson v. Minnesota* (1990), which found that a two-parent notification requirement was unconstitutional, but a judicial bypass procedure saves the statute from being unconstitutional; *Ohio v. Akron Ctr. for Reproductive Health* (1990), which upheld Ohio's judicial bypass procedure that required the minor to prove she was mature and well informed enough by a clear and convincing evidence standard, required the court to appoint a guardian ad litem and an attorney ad litem, and provided for a 5-day period of inaction before a constructive authorization was granted.

State Case Law

The Texas Supreme Court heard several cases in 2000 that ruled on the meaning of Chapter 33. None addressed the constitutionality of the law. The Texas Supreme Court cases are *In re Jane Doe*, No. 00-0140 (February 25, 2000); *In re Jane Doe 2*, No. 00-0191 (March 7, 2000); *In re Jane Doe 3*, No. 00-0193 (March 13, 2000); *In re Jane Doe 4*, No. 00-0317 (April 11, 2000); *In Re Jane Doe 5*, No. 00-0224 (June 22, 2000).