To: Supreme Court Advisory Committee

From: Judicial Bypass Subcommittee

Date: October 9, 2015

RE: H.B. 3994: Proposed Amendments to Parental Notification Rules and Forms

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The 84th Legislature passed H.B. 3994, which amended Chapter 33 of the Family Code, effective January 1, 2016. Chapter 33 provides a means to obtain a court order to "bypass" the parental notification and consent requirements that the law mandates before an unemancipated minor may have an abortion. In 1999, when Chapter 33 was originally adopted, the Court promulgated rules and forms for the judicial bypass. These rules and forms must be amended in light of the 2015 amendments to Chapter 33.

The Subcommittee attaches its proposal—in both red-lined and clean copy—for this Committee's consideration and comment, and a copy of the amendments. The Subcommittee identified the following areas for discussion:

Confidentiality v. Anonymity. Previously, Chapter 33 required all bypass proceedings to be confidential and anonymous. The amendments to Chapter 33 removed references to anonymity and a provision that allowed a minor to use initials and pseudonyms. The statute still requires that the proceedings be confidential. The practical distinction between confidentiality and anonymity is not clear.

In any event, the anonymity requirement is a necessary component of the constitutionally required bypass procedure:

> A pregnant minor is entitled in such a proceeding to show either: (1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes; 2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests. The proceeding in which this showing is made must assure that a resolution of the issue, and any appeals that may follow, will be completed with ***anonymity*** and ***sufficient expedition*** to provide an effective opportunity for an abortion to be obtained.

Bellotti v. Baird, 443 U.S. 622, 643-44 (1979) (emphasis added).

Also, significantly, Chapter 33 does not require (and has never required) the minor's name be included in any filing. Nor does the statute prohibit the use of pseudonyms or initials. And the supreme court has previously determined that all minors who find themselves the subject of a judicial proceeding deserve the privacy protection that

pseudonyms and initials provide whenever it is possible. *See, e.g.*, TEX. R. CIV. P. 21c(a), (b) (unless required by statute, minor's name should not be in included in court case records); TEX. R. APP. P. 9.8 (adopting procedures to protect minor's identity in all appeals). Therefore, the subcommittee's proposal continues to allow a minor to use initials or pseudonyms. The proposal also deletes the previous requirement that the minor's name be included on the verification page of the application. While, as a practical matter, the minor's name will be included on that document if the minor completes the application herself and signs the required verification, the statute does not require that her name appear if someone completes the application on her behalf.

Two members of the Subcommittee, however, disagree with the statement above and submitted this comment. They expressed concern that the proposed rule revisions may not sufficiently reflect the Legislature's intent when enacting the 2015 amendments to Chapter 33. Especially against the backdrop of the Texas Supreme Court's emphasis on (and deference to) statutory text as the primary guide to legislative intent, they reason, it is potentially significant that the Legislature has replaced a former requirement that judicial-bypass proceedings "be conducted in a manner that protects the *anonymity* of the minor," accompanied by an express authorization to use pseudonyms or initials, with a provision requiring that the proceedings "be conducted in a manner that protects the *confidentiality of the identity* of the minor" and deleting any authorization to use pseudonyms. In their view, "confidentiality of the identity of the minor" would imply that the identity of the minor is made known, at least within the confidential proceeding, as opposed to being kept unknown (i.e., anonymous). While they acknowledge that some continued form of anonymity protection would seemingly be necessary in order to comply with the statutory requirement of *confidentiality* when and if the existence of a bypass proceeding is made public (e.g., Texas Supreme Court opinions), they conclude that the amended statute may represent legislative intent that the minor's actual name be reflected in the confidential court papers to a greater degree than would be done in the Subcommittee's proposal, which would not only carry forward the current Rule 1.3(b) requirement that the minor's name not appear "in any order, decision, finding or notice, or on the record," but also would eliminate the current limited exception requiring the minor's name to be reflected in a "verification page."

The purpose of these statutory amendments, these members further suggest, may relate to other amendments the legislature made to Chapter 33 in 2015. These include new provisions calculated to combat "forum shopping" (including prohibitions against strategic nonsuiting and refiling), a new res judicata provision, and a new requirement that the minor's attorney "fully inform himself or herself of the minor's application history . . . and whether a prior application has been filed or initiated." Administration and enforcement of these new requirements would seemingly be undermined, the reasoning goes, if minors were identified only as "Jane Doe" in the files and even courts could not ascertain or verify a minor's application history from those records.

As for any asserted constitutional objections, these members would observe that such arguments are myriad and diverse in this jurisprudentially volatile area and could be debated

at length without definitive resolution. The Explanatory Statement to the current rules acknowledges this, and also reflects a historical approach of drafting the bypass rules "merely [to] track statutory requirements of the Legislature" and leaving any potential constitutional debates to "adversarial proceeding[s] with full briefing and argument." These members would urge the same approach here.

Consequence for Failure to Rule. The amended statute no longer provides a consequence if a trial court does not comply with its obligation to rule within the statutory deadline. Previously, the application would be deemed granted as a matter of law. The amendments removed that provision. The omission leaves a significant gap in the bypass procedure.

The committee identified several potential problems, but the two critical ones being:

- a trial court holds a hearing but refuses to rule; or
- a trial court refuses to hold a hearing at all.

The committee considered several proposals on how to expeditiously address these issues. One proposal would, by rule, deem an application denied upon the passing of the statutory deadline. Another proposal would allow the regional presiding judge to appoint a different judge to hear the case if a trial court refused to set a hearing. Yet another would require the clerk to certify the lack of decision (similar to what is done now), allow the applicant to show by affidavit what it would have presented at the trial (similar to an offer of proof), and provide that the certification itself was an appealable order.

Ultimately, the subcommittee decided that to adopt an expedited motion procedure (in the nature of a writ of mandamus but more akin to a motion used to review an indigency determination) and to allow the motion to be filed directly with the supreme court. The supreme court is in a better position to act if the non-compliance is the refusal to find a judge to hear the case. A direct motion to the supreme court would also ensure an expeditious appellate writ for non-compliance. Although the subcommittee was cognizant of the potential burden on the high court, the subcommittee had enough confidence on the judiciary as a whole to believe that very rarely would a trial court refuse to set a hearing or refuse to rule, potentially in violation of the Code of Judicial Conduct. *See* Canon 3B(1) ("A judge shall hear and decide matters assigned to the judge except those in which disqualification is required or recusal is appropriate.").

E-filing. The referral from the supreme court specifically asked the committee to consider whether applications under Chapter 33 should be e-filed. The subcommittee recommends that bypass applications be exempted from the e-filing mandate.

The statewide e-filing rules already provide that "documents to which access is otherwise restricted by law or court order" "must not be filed electronically." TEX. R. CIV. P. 21(f)(4)(B); *see also* TEX. R. APP. P. 9(c) (documents to which access is restricted by law must not be electronically filed). Chapter 33 demands confidentiality and clearly restricts access to any documents related to the proceeding. Thus, the rules already contemplate that a judicial bypass application would not be e-filed. The subcommittee recommends the prohibition be expressly included in the draft rules.

That said, the subcommittee was concerned that a minor or her attorney may be too far away from the courthouse – particularly the supreme court or a court of appeals – to file in person. (Practically speaking, trial court filings are always done in person because showing up in person is the only way to get a hearing set promptly.) Therefore, the subcommittee amended Rule 1.5(a) to allow bypass papers to be filed by fax or email.

Attorney Sworn Statement. Another new requirement in Chapter 33 is an obligation on the part of an attorney retained to assist in filing the application to file a sworn statement regarding the proceeding. The statute now requires the application to "be accompanied by the sworn statement of the minor's attorney under Subsection (r), if the minor has retained an attorney to assist the minor with filing the application …." TEX. FAM. CODE §33.003(c)(3). In turn, subsection (r) provides:

> an attorney retained by the minor to assist her in filing an application under this section shall fully inform himself or herself of the minor's prior application history, including the representations made by the minor in the application regarding her address, proper venue in the county in which the application is filed, and whether a prior application has been filed and initiated. If an attorney assists the minor in the application process in any way with or without payment, the attorney representing the minor must attest to the truth of the minor's claims regarding the venue and prior applications in a sworn statement.

TEX. FAM. CODE §33.003(r).

Because the statute specifically refers to the "attorney who assists the minor in filing an application," it appears that the intent was to cover attorneys who were assisting the minor with the application, not attorneys who were appointed by the court to represent the minor after she filed a pro se application. It also would not apply to a hot-line volunteer who happened to be an attorney who did not assist in the application.

The requirement that an attorney (as opposed to a client) swear to the contents of an application is rare, if not unprecedented. The requirement under these circumstances is particularly impossible given that any records concerning a "prior application" are sealed,

inaccessible to the minor's attorney, and physically checking or inquiring of the minor's residence might violate the confidentiality requirements. Thus, the subcommittee believes, the attorney will ordinarily be limited to representations from the minor about these issues. Thus, consistent with Texas Rule of Civil Procedure 13, concerning the effect of signing pleadings, the proposed rule requires the attorney to swear that the underlying facts are true "to the best of their knowledge, information, and belief formed after reasonable inquiry."

Moreover, under current law, a declaration made under penalty of perjury will suffice for sworn accounts. TEX. CIV. PRAC. & REM. CODE §132.001 ("[A]n unsworn declaration may be used in lieu of a written sworn declaration, verification, certification, oath, or affidavit required by statute…."). The proposed rule incorporates this alternative.

Report to OCA. The new statute requires trial court clerks to submit quarterly reports to the Office of Court Administration regarding judicial bypass proceedings and OCA to then publish a report on these proceedings—but only by court of appeals district. The subcommittee decided the reporting need not be included in the rules provision. The only proposed amendment in response to the reporting requirements is a reminder in Rule 2.2(b) that the case number and style of the case should not identify the court or the assigned judge or the minor to protect confidentiality.

Abuse Reporting. There are several reporting requirements relevant to a judicial bypass proceeding:

- Section 33.009 has always required a "court or the guardian ad litem or attorney ad litem for the minor shall report conduct reasonably believed to violate [Penal Code] Section 21.02 [continuous sexual assault], 22.011 [sexual assault], 22.021 [aggravated sexual assault], or 25.02 [prohibited sexual acts, aka incest]" to an appropriate agency. The statute provides several options concerning to whom the report should be made.

- H.B. 3994 added new section 33.0085 that places a duty on a "judge or justice" to report if a minor may be "physical or sexually abused" to DFPS and local law enforcement.

- Section 261.001, Family Code, has long provided a general obligation on a "person" and "professionals" to report "abuse and neglect" which Section 261.001 defines with a laundry list of types of abuse including Penal Code Sections 21.02 (continuous sex assault), 22.011 (sex assault), 22.021 (aggravated sex assault), and 21.11 (indecency with a child). Chapter 261 also provides several options concerning to whom the report should be made.

The subcommittee studied these requirements and determined that there was not much difference in the types of abuse that may need to be reported. For example, Section 261.001 does not list Penal Code 25.02 (incest) but would require reporting it given the broad

categories of abuse described. And Section 33.009 does not include Penal Code 21.11 (indecency with a child) but Penal Code 22.011 (sex assault) prohibits the same acts (namely sex with someone under 17 when the age difference is more than 3 years, forcible sex, etc.). The main difference appears to be that there is less discretion concerning to whom the report must be made. There is more discretion under Sections 33.009 and 261.103. The judge must very clearly report to both DFPS and local law enforcement.

The amendments proposed simply alert the relevant entities to the statutory reporting requirements.

Ad litems. Current Rules reference the application of Chapter 107, Family Code, as reflecting legislative intent that competent and qualified person represent the minor and serve as guardian ad litem. *See* Rule 2, Cmt. 3. In 2015, the Legislature passed two bills greatly expanding Chapter 107. *See* H.B. 3003, H.B. 1449. These bills amend or add subchapters to Chapter 107 that do not concern bypass proceedings. Consequently the references to the standards for ad litem in the Rules should be directed to Chapter 107, Subchapter A, as those are the relevant provisions.

The Legislature also passed H.B. 1369 which adds a new chapter 36 to the Government Code concerning judicial reports of ad litem payments. The language is similar to the miscellaneous order of the Supreme Court referenced in current Rule 1.9(e) but Chapter 36 specifically exempts from reporting certain types of cases including any that are confidential under state or federal law. Tex. Gov't Code § 36.003(2). Consequently the language in Rule 1.9(e) is amended with updated references to reporting laws and the exemption or confidential bypass cases.

The rules reference both the "attorney" and the "attorney ad litem." These references are meant to include any counsel who represents the minor whether retained, volunteered, or is appointed by the court.