THOMPSON & KNIGHT LLP

MEMORANDUM

TO: SCAC "SUBCOMMITTEE ON LEGISLATIVE MANDATES"
(Hon. Jan Patterson; Hon.. Jane Bland; Carlos Lopez; Hon. Bob Pemberton; Pete Schenkkan; Hon. Stephen Yelenosky)

CC: Chip Babcock

FROM: Jeffrey S. Boyd

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SUBJECT: Parental Bypass Issue

Chip Babcock has asked me to chair a SCAC Subcommittee on Legislative Mandates this term, and has informed me that he has appointed each of you as members of that Subcommittee. My thanks to each of you, and especially to Justice Patterson, who has agreed to serve as the Subcommittee's vice-chair.

At this time, Chip and Justice Hecht have assigned us one issue to address:

> *Whether the 2005 amendment of the Texas Occupations Code adding a "Parental Consent" requirement in section 164.052(a)(19) requires revisions to the Court's Parental Notification Rules and, if so, what revisions are required?*

Chip has asked that we come to the SCAC's April 14 meeting (next Friday) prepared to explain the issue to the full Committee and provide our preliminary thoughts. After receiving the full Committee's feedback, we will likely be requested to consider the issue further.

With apologies for the short notice, I would like for each of you to review the attached materials related to this issue, and then participate in a Subcommittee conference call next week. Would you please respond (see my contact info above) as soon as possible to let me know your availability for a 1-hour conference call on Wednesday or Thursday of next week. In the meantime, I am providing this memo and the attached materials to provide some background on the issue and some guidance for our discussion next week.

In 1999, the Texas Legislature adopted a "Parental ***Notification*** Law" to govern the performance of abortions on minors. Specifically, section 33.002 of the Family Code, which became effective January 1, 2000, provides that "a physician *may not perform* an abortion on a pregnant unemancipated minor *unless*:"

(1) the physician gives at least 48 hours ***notice***, in person or by telephone, to a parent or managing conservator of the minor; or
(2) a court issues an order authorizing the minor to consent to the abortion without ***notification*** to a parent or conservator, as provided by Section 33.003 or 33.004; or
(3) a court by its inaction "constructively" authorizes the minor to consent as provided by Section 33.003 or 33.004; or
(4) the physician concludes and certifies that an immediate abortion is necessary to avert the minor's death or irreversible physical impairment.

TEX. FAMILY CODE § 33.002(a). At the same time, the Legislature adopted sections 33.003 and 33.004 to provide the process and standards by which a minor may seek, and trial and appellate courts may issue, an order authorizing the minor to consent without ***notification***. For example, section 33.003(i) provides that the court "shall" enter such an order if the court finds that:

- the minor is mature and sufficiently well informed to make the decision without ***notification*** to the parent or conservator, or
- ***notification*** would not be in the minor's best interest, or
- ***notification*** may lead to abuse of the minor.

Id. § 33.003(i).

As required by the Legislature, the Supreme Court adopted the Texas Parental Notification Rules (also effective Jan. 1, 2000), to ensure that "the process established by Sections 33.003 and 33.004 . . . may be conducted in a manner that will ensure confidentiality and sufficient precedence over all other pending matters to ensure promptness of disposition." These Rules govern such things as expedition of decisions, anonymity, confidentiality, judicial disqualification and recusal, attorneys ad litem, amicus briefs, and hearings and rulings in the trial courts, courts of appeals, and Supreme Court.

Following the adoption of sections 33.002-.004 and the Parental Notification Rules, the Supreme Court issued several opinions construing the statutory requirements and procedures. *See In re Jane Doe 11*, 92 S.W.3d 511 (Tex. 2002); *In re Jane Doe 10*, 78 S.W.3d 338 (Tex. 2002); *In re Jane Doe 1(III)*, 19 S.W.3d 346 (Tex. 2000); *In re Jane Doe 4(II)*, 19 S.W.3d 337 (Tex. 2000); *In re Jane Doe 4*, 19 S.W.3d 322 (Tex. 2000); *In re Jane Doe 3*, 19 S.W.3d 300 (Tex. 2000); *In re Jane Doe 1(II)*, 19 S.W.3d 300 (Tex. 2000); *In re Jane Doe 2*, 19 S.W.3d 278 (Tex. 2000); *In re Jane Doe 1(I)*, 19 S.W.3d 249 (Tex. 2000). The Court did not reach any constitutional issues in these cases.

Last year, through section 1.42 of Senate Bill 419, the Legislature amended the Texas Occupations Code to adopt a "Parental ***Consent*** Law," which became effective on September 1, 2005. Specifically, the Legislature added Subsection (19) to section 164.052(a), to provide that "[a] physician or an applicant for a license to practice medicine *commits a prohibited practice* if that person . . . performs an abortion on an unemancipated minor . . . "

- ". . . without the ***written consent*** of the child's parent, managing conservator, or legal guardian . . . "
- ". . . *or without a court order, as provided by Section 33.003 or 33.004, Family Code . . .*,"
- unless the physician concludes that an immediate abortion is necessary to avert the minor's death or irreversible impairment *and* there is insufficient time to obtain a parent's consent.

TEX. OCC. CODE § 164.052(a)(19) (hereinafter "Subsection (19)").

Subsection (19) seems to be inartfully drafted and raises numerous issues. For example, whereas section 33.002 says a physician cannot perform the abortion *unless* he/she gives the required notice *or* the court issues an order, Subsection (19) provides that a physician commits a prohibited act *if* he/she performs an abortion "without the written consent . . . or without a court order," which could be read to mean that the abortion is prohibited if either is absent (i.e., *both* are required). Also, because the Legislature did not amend or delete Family Code sections 33.002-.004, *both* provisions apparently now apply, which raises several additional issues. For example:

- Apparently, to perform an abortion on the ground that an immediate abortion is necessary to avert the minor's death or irreversible physical impairment (i.e., in the absence of parental notification/consent or a court order):
  - under section 33.003(a)(4), the physician must not only conclude, but also *certify*, that such is the case, even though Subsection (19) does not require such certification; and
  - under Subsection (19), the physician must also conclude that "there is insufficient time to obtain a parent's consent," even though section 33.002 does not require such a conclusion.
- To perform the abortion based on the ground of parental notification/consent, must the physician *both:* (1) give at least 48 hours notice to the parent or conservator in person or by telephone (as required by section 33.002), *and* (2) obtain written consent (as required by Subsection (19))? In other words, if a minor presents herself to the physician with a valid written consent, can the physician perform the abortion then, or must he/she still contact the parent in person or by phone and wait 48 hours?
- Under section 33.003(h), a trial court that fails to timely issue a ruling, findings, and conclusions is deemed to have "constructively authorized" the abortion, thus permitting the physician to proceed as if an order had been entered. Section 32.002 expressly permits the abortion based on such constructive authorization. But Subsection (19) does not mention "constructive authorization," and expressly allows the abortion *only* if there's "written consent," "a court order," or a

conclusion that the abortion is immediately necessary. Did this omission indicate a legislative intent to remove the "constructive authorization" basis, or does section 32.002 still allow the physician to perform the abortion without an actual "court order?"

While these are interesting issues (as are the various constitutional issues that both 33.002 and Subsection (19) may create), they are probably (but perhaps not necessarily) outside of the scope of our Subcommittee's task. Our more narrow issue is whether the enactment of Subsection (19) requires revisions to the Parental Notification Rules. In a letter dated March 7, 2006, Justice Hecht has advised that "[t]he Supreme Court has tentatively concluded" that it does not, but requests that the SCAC provide "any counsel it may offer on the matter."

In preparation for our conference call next week, please be prepared to discuss, at least:

1. Whether and how the Parental Notification Rules (and/or Forms?) should be amended so that they refer to (or at least acknowledge the existence of) Subsection (19);[1]
2. Whether and how the Parental Notification Rules (and/or Forms?) should be amended so that they refer to the requirement of "written consent," instead of, or in addition to, the requirement of "notification;"[2]
3. Whether and how the Introduction and/or Comments to the Rules should be revised to provide guidance in light of the adoption of Subsection (19);
4. Whether the Rules (and/or Forms) need any revisions unrelated to Subsection (19) and, if so, whether we should consider those as part of our current task; and
5. Whether and how our Subcommittee (or the SCAC as a whole) should solicit input on these issues from practitioners, judges, legislators, or the public?

I look forward to working with all of you on this Subcommittee and appreciate, in advance, all of the time and thought you will devote to it. I know that each of you will have great input for consideration. (Justice Pemberton, for example, was the Rules Attorney when the Parental Notification Rules were originally adopted, and has prepared and delivered presentations on those Rules, so his background knowledge will certainly be helpful).

Please respond as soon as possible regarding your availability next week.

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[1] The current Rules refer to Chapter 33 of the Family Code, but not to Subsection (19).

[2] For example, Rule 2.1(c)(1)(C) requires the minor to submit to the court an application that states that she "wishes to have an abortion without *notifying* either of her parents or a managing conservator or guardian." At first glance, it may seem that this should be changed to require her to state that she wishes to have the abortion without "obtaining written consent." But section 33.003 expressly allows the court's order as an alternative to "notification," not "consent," and Subsection (19) does not alter section 33.003. So, for example, under section 33.003(i), the court "shall" enter the authorization order if the court finds that "*notification* would not be in the minor's best interest," or that "*notification*" may lead to abuse. Subsection (19) did not alter that. So under the statutes, in the absence of written consent, the court must still consider whether mere *notification* would not be in the minor's best interest, or may lead to abuse. Because the Rules address the process under sections 33.003 and 33.004, and because Subsection (19) did not revise those sections at all, it seems the Rules should also remain the same.

ATTACHMENTS:

1. March 7, 2006 Letter from Justice Hecht
2. Texas Family Code Chapter 33
3. Texas Parental Notification Rules
4. Texas Occupations Code § 164.052.