

- SUBJECT:** Reporting statistics on judicial bypass of parental notification for abortion
- COMMITTEE:** State Affairs — favorable, without amendment
- VOTE:** 6 ayes — Marchant, J. Davis, B. Cook, Elkins, Gattis, Goodman  
0 nays  
3 absent — Lewis, Villarreal, Madden
- SENATE VOTE:** On final passage, April 24 — voice vote (Barrientos, Ellis, Gallegos, Hinojosa, Shapleigh, Van de Putte, Wentworth, West, Whitmire recorded nay)
- WITNESSES:** For — Teresa Collett; Clayton Trotter; (*Registered, but did not testify*): Christi Collett, MerryLynn Gerstenschlager, Texas Eagle Forum; Joe Kral, Texas Right to Life; Joseph Pojman, Texas Alliance for Life  
  
Against — Susan Hays; Shamiso Maswoswe, ACLU of Texas; (*Registered, but did not testify*): Jennifer Bilbrey, Planned Parenthood of San Antonio and South Central Texas; Shannon Noble, Women’s Issues Network; Heather Paffe, Texas Association of Planned Parenthood Affiliates; Hannah Riddering, Texas National Organization for Women; Peggy Romberg, Women’s Health and Family Planning Association of Texas; Shelly Strauss; Danielle Tierney, Planned Parenthood of the Texas Capital Region
- BACKGROUND:** The 76th Legislature in 1999 enacted SB 30 by Shapiro, codified as Family Code, ch. 33. The law 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 48-hour period for notification may be waived by an affidavit filed by the parent, conservator, or guardian. The law provides two exceptions to the notification requirement: a medical emergency and a judicial bypass.  
  
The physician may perform the abortion without notifying the parent or guardian if the physician determines and certifies in writing to the Texas Department of Health the existence of a medical emergency requiring an

immediate abortion to prevent the minor's death or serious risk of substantial and irreversible impairment of a major bodily function. Under the judicial bypass procedure, a minor who does not wish her parents to be notified may apply for approval from any county court at law, probate court, or district court, including family district courts. The judge must grant the minor permission to consent to an abortion without notifying a parent if the judge finds by a preponderance of the evidence that:

- notification would not be in the minor's best interest;
- the minor is mature and capable of making the decision to have an abortion without notifying a parent; or
- notification might lead to physical, sexual, or emotional abuse.

A court must keep a record of all testimony and proceedings. If a court fails to rule on an application or to issue written findings of fact and conclusions of law within the time allotted, the application is deemed granted. If a court denies a minor's application for bypass, she may file an appeal to the court of appeals that has jurisdiction over civil matters in the county in which the denied application was filed. If the court fails to rule within the established time period, the application is deemed granted.

Proceedings must be conducted in a manner that protects the minor's anonymity and confidentiality. Applications and court documents pertaining to the proceedings are deemed confidential and privileged and are not subject to discovery under the Public Information Act or by other legal process.

The Texas Supreme Court in December 1999 adopted rules and forms to implement SB 30. The rules and forms require the court not to identify the minor. Only one form, a separate verification page, filed under seal and kept apart from the bypass application, may include the minor's name or any other identifying information. All aspects of the bypass proceeding must be confidential, including the judge's name and decision. The only people who may receive information about the proceedings are the minor, her guardian ad litem, her attorney, a person designated by the minor in writing to receive information, a governmental agency or attorney (but only in connection with a criminal or administrative action seeking to assert or protect the minor's interests), or another clerk or court in the same or related proceeding.

Court clerks must give assistance in a manner designed to protect the minor's confidentiality and anonymity. Court hearings must be held in a confidential place such as the judge's chambers, closed to the public, and should be as informal as possible. The required record of proceedings may be made by electronic means if no court reporter is available, and a transcription of that record is required if the decision is appealed or if allegations of past or potential abuse arise. Appeals procedures in the rules follow the confidentiality restrictions in the statute. A court of appeals may issue an opinion on an application, but that opinion may be transmitted only to the Supreme Court confidentially. The rules provide for appeals to the Supreme Court as well as to the court of appeals.

**DIGEST:**

SB 331 would require the Texas Supreme Court to adopt rules governing the collection of statistical information related to the use of judicial bypass procedures in Family Code, ch. 33. The number of applications and appeals filed, granted, denied, and deemed to be granted because of a court's inaction would have to be made available to the public in an aggregate form on a regional basis, as determined by the court.

The bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect September 1, 2003.

**SUPPORTERS  
SAY:**

Judicial bypass of parental notification is a unique procedure in the law that allows a child to bypass parental involvement on a major health decision through a lawyer, excluding parents from the judicial determination regarding their child. SB 331 would create a responsible, anonymous mechanism to allow the public to know how the judicial bypass procedure has been implemented. At present, no one knows if courts in some areas of Texas approve bypass requests more often than courts in other areas, or even how many bypasses are approved in the aggregate. The public should have access to summary data to verify that the judicial bypass procedure works as the Legislature intended it to work and that the procedure is not a "rubber stamp" for minors' attempts to obtain abortions without parental notification.

The judicial bypass law requires that proceedings be confidential, and SB 331 would not impinge on that confidentiality. The Texas Supreme Court would have to develop guidelines for data collection, which it can do without

violating the law's confidentiality requirements. The data would have to be collected in aggregate form on a regional basis, which would protect the identity of petitioners as well as of attorneys and judges. Reporting would in no way involve information specific to an applicant, nor would it affect minor's rights to seek a judicial bypass. In all other types of judicial proceedings, public records of litigation exist to show how laws are implemented. Since judicial bypass records are outside of the public's view, it is incumbent upon the Legislature to obtain as much information as possible.

The broad confidentiality of bypass proceedings goes far beyond what is required to protect the anonymity of the minor involved and makes such proceedings so secretive that they may violate the "open courts" provision of the Texas Constitution (Art. 1, sec. 13). The public should be allowed to know how judges are deciding these cases, so long as the minor's anonymity is protected. However, it was never the Legislature's intention that SB 30 protect the anonymity of judges. Judges are called upon constantly to make controversial decisions that may have political ramifications, and rulings in judicial bypass proceedings simply are another in a long list of such cases.

The public has the right to know how judges rule on this important public policy issue. Judges should be held accountable even for decisions that may subject them to political pressure. Unless judges' decisions are made public, 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. The only way for judges to prove that they are applying this law fairly is to release these records to the public. Also, judges who are held accountable for their rulings should have the opportunity to explain why they ruled a certain way in a particular case. That explanation could come in the form of the release of edited findings of fact related to the case.

While many other types of records are kept confidential, none are as secretive as these applications are. Any interested member of the public may request the number of cases a judge in a juvenile court has heard and an aggregation of the rulings the judge has issued in those cases. To prevent the public from discovering that kind of information in parental notification cases goes against the principle that government must be accountable to the people.

Additionally, the information provided would assist the Legislature in its upcoming study of judicial redistricting. It would inform legislators about the relative workload of each court so that new districts could be drawn to balance the workload between districts. It would be relatively easy for courts to report the data. Courts already submit monthly reports of the number of other cases that they try. Forms would simply have to be amended to include questions on judicial bypasses filed, granted, and denied. Amending the forms would not be overly burdensome to any party involved in data collection.

Another aspect of governmental accountability concerns TDH funding of attorneys for minors seeking judicial bypass. Some girls pay attorneys privately, but TDH records indicate that it reimburses attorneys approximately \$400,000 annually for representing minors in bypass cases. However, TDH and the Legislature have no way of knowing if that money is spent effectively. Public money in almost all other cases is fully auditable to ensure that taxpayers' resources are well spent. Judicial bypass attorney's fees should be no exception to that accountability.

Estimated filing statistics based on TDH reimbursement of attorneys indicate that many more bypass applications are filed in Austin and San Antonio relative to other parts of the state. It is possible that minors are being directed toward judges who are more likely to grant applications and away from judges who are more likely to deny them. This "forum shopping" destroys the integrity of a judicial process that is intended to be objective and based on the merits of each case. If the judges' rulings are made public, it will be easier for the public to know if certain judges are displaying a tendency toward unilaterally granting or denying such applications and to hold them accountable.

**OPPONENTS  
SAY:**

SB 331 would not help the public determine if SB 30 is being implemented effectively or not, because the information it would require is insufficient to make such an assessment. The required statistical reports would not include the facts of cases along with the aggregate statistics, making it impossible to judge whether or not courts in some areas of the state were biased for or against judicial bypasses. Without the facts of the case, the public would have no way of knowing whether applicants had met their burden of proof or whether the judge's decision was appropriate for the minor's situation.

In some regions of the state, aggregating judges for reporting purposes would not protect their anonymity. For example, the Panhandle could be considered one region, but because it has so few judges that hear judicial bypass cases, it would be possible to make an educated inference about a particular judge's decision record. Furthermore, appellate courts already are grouped by region, so the bill would provide appellate judges no anonymity at all. It would be possible to require reporting while maintaining anonymity, but SB 331 would not balance those two goals well.

No public purpose would be served by evaluating judges regionally on how they rule in judicial bypass cases. Judges do not decide issues on the basis of their own particular views but on the facts of the case at hand. Such facts would be so specific that they could not be released without infringing on the minor's confidentiality. The only purpose served by releasing these rulings would be to label judges or judicial regions "pro-choice" or "pro-life" on the basis of their decisions. The release of those rulings 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 minor's confidentiality as well as the Code of Judicial Conduct.

Also, the release of statistics on rulings could make judges the target of groups or individuals with certain views on abortion who might seek to harm them, either physically or by harassing and picketing judges at home and at work. Fear of this outcome 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.

SB 331 would endanger judges' objectivity, which is essential to the minor's due process. If the Texas Supreme Court defined regions in a way that revealed the number of applications a particular judge had granted or denied, some voters might hold the judge accountable on the basis of a single statistic, which might not necessarily reflect the judge's philosophy because of the particular facts involved in each case. Even judges who personally oppose abortion may have difficulty denying bypass applications on the grounds required by the law. All judges, regardless of their philosophy, could be targeted unfairly by groups on either side of the abortion issue if the records of their rulings were released.

Public disclosure of rulings on bypass applications is not necessary for judicial accountability. Judges can be held accountable through the appeals process and through disciplinary action, if necessary. Also, the reporting called for in SB 331 is inconsistent with how courts keep records. Although much information is reported about civil cases, courts do not report statistics regularly on the frequency with which the plaintiff or defendant wins. It could be burdensome on courts to invest in the technology and personnel resources necessary to establish reporting systems to comply with the bill.

Nearly every other state with judicial bypass procedures requires strict confidentiality, either by statute or by rule, prohibiting the release of all but aggregate statistical data about such hearings. To some degree, records in many other court proceedings are kept secret, including records relating to adoptions, juvenile justice, grand jury investigations, and even certain settlements. Only the divisive nature of the abortion debate has made the confidentiality of judicial bypass records an issue.

Since this bill would require a different reporting system for judicial bypasses than for any other civil procedure, it would single out one group — minor women — for particular treatment, which could violate the Equal Rights clause of the Texas Constitution, Art. 1, sec. 3(a). The bill also could have the unintended consequence of being detrimental to pregnant minors' health. In rural areas of Texas where a limited number of judges are available to rule on judicial bypass applications, if those judges' records show a disposition to deny applications, minors might seek other methods to end their pregnancies, some of which could endanger the minors' health or lives.

Forum shopping is unethical, and attorneys who represent applicants in judicial bypass procedures do not use this practice. Also, forum shopping is impractical from the minor's point of view. Judicial bypass applicants are mostly minors in abusive situations who are not at ease to travel across the state. The reason why filing statistics show more filings in some areas of the state is because only about 15 of Texas' 254 counties have abortion facilities. Many minor women have to travel to urban counties to obtain an abortion, so they file for a bypass in that urban county. Rather than judicial bias, filing data reflect the lack of access to abortion across much of the state.

