SUBJECT: Requiring parental consent for an abortion by a minor

COMMITTEE: State Affairs — favorable, without amendment

VOTE: 5 ayes — Swinford, Miller, Cook, J. Keffer, Wong

1 nay — Farrar

3 absent — Gattis, Martinez Fischer, Villarreal

SENATE VOTE: On final passage, May 18 — 25 - 5 (Ellis, Hinojosa, Shapleigh, Wentworth, Whitmire)

WITNESSES: *(On House companion bill, HB 1212 by P. King:)*
For — Beverly Nuckols, Joe Pojman, 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 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 has 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:

SB 1150 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. A copy of the parent or guardian's identification and an affidavit of consent written by the parent or guardian would have to be maintained in the physician's records, and an affidavit by the physician stating that consent had been obtained also could be included in the minor's medical records.

Emergencies. In emergency situations, 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 have to 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 any court with probate jurisdiction, county court, or district court, including family district court, in the state.

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's 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 be the minor's attorney or 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, a 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. All court documents would be confidential and

privileged and not subject to open records or to discovery, subpoena, or other legal process. The court could not charge filing fees or court costs to the minor.

The judge would have to issue a ruling by no later than 5 p.m. on the second 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 two 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 a preponderance of evidence:

- a minor was sufficiently mature and well informed to make a decision about an abortion without the consent of a parent or guardian;
- obtaining consent would not be in the minor's best interest; or
- obtaining consent would lead to physical, sexual, or emotional abuse of the minor.

If the court failed to issue a ruling in the specified time, the application would be deemed granted and the physician could perform the abortion as if the court had issued an order authorizing it. An 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, and 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 second 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 two 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 physician could perform the abortion as if the court had issued an order authorizing it. Confidentiality,

anonymity, record-keeping, notification prohibition, and fees or court costs also would be in effect for an appeal.

Penalties. A physician who intentionally performed an abortion on a minor without parental consent or not in accordance with ch. 34 would commit an offense punishable by a fine of up to $10,000. 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.

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 physician's duty to obtain consent would take effect January 1, 2006.

SUPPORTERS SAY:

SB 1150 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 consent laws 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 at least should require parental consent for the much more serious procedure of abortion.

The 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 objected to the procedure could be subject to intense negotiation, threats, or other intervention by parents and others. With required consent, parents would have veto power and would not have to convince their child.

***Judicial bypass*.** SB 1150 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 could 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. The provisions set forth in SB 1150 are similar to the protections offered by the existing notification statutes.

The changes proposed in HB 1212, the House companion bill, would have failed 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. The sooner a decision is made, the better is it for the minor. Two days is sufficient time for a court to determine whether or not a minor meets the criteria for obtaining an abortion without consent. It has worked well for the notification requirements and strikes the right balance between the right of a minor to a speedy resolution and the practical considerations of a court's schedule.

Best interests. SB 1150 would protect the best interests of a minor by requiring a judge to determine if obtaining consent were in her best interests, which would take into account the possible ramifications of requiring parental involvement. It is the same standard applied in notification cases.

Requiring a judge to determine whether or not an abortion was in the best interests of a minor, as proposed in HB 1212, would 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. 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.

SB 1150 would satisfy the "best interests" test because it explicitly would state 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. SB 1150 appropriately would leave a determination of maturity up to the judge who hears the entire case. Setting arbitrary rules about what type of informational materials a minor

had read would not be in the spirit of the maturity test. Instead, a judge should be free to ask questions and evaluate the minor's answers to determine if she is mature and well-informed enough to make this important decision without a parent or guardian's consent.

The bill appropriately would not require the judge to decide whether an abortion were in a minor's best interests. A minor who was mature enough to make the decision to have an abortion should be able to make that decision. If a judge were required to determine if an abortion were in the minor's best interests, it would be assumed that 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.

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.

Preponderance of evidence. SB 1150 would maintain the standard of evidence established in notification cases, not change it to the more challenging 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. The bill also would maintain the venue options offered to minors in notification cases and not limit it to the county of residence or where the abortion would be performed. 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. 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. SB 1150 would protect judges and courts from retaliatory actions and potential harm. HB 1212 proposed releasing information about the courts in ways that are not allowed under the notification statutes. 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 hearings.

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.

Coercion. SB 1150 appropriately does not include provisions prohibiting coercion of a minor to have an abortion, unlike HB 1212, the House companion bill. 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 have required the minor's consent to an abortion was 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 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.

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 a state attorney general's 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, plus she also 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.

Judicial bypass. While SB 1150 is much closer than HB 1212 to the notification statutes when it comes to judicial bypass provisions, the bill still could 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.

OTHER OPPONENTS SAY:

While SB 1150 would ensure parental involvement in a minor's abortion by requiring parental consent, it would leave many of the loopholes in the notification statutes. HB 1212 by P. King, the companion bill, would have closed many of these loopholes, and SB 1150 should be amended to including its language on judicial bypass. The key elements in HB 1212 were:

- changing the timeline for a judicial decision from two to five days;
- limiting venue to the minor's county of residence or where the abortion would be performed;
- changing the standard of evidence from preponderance of evidence to clear and convincing evidence;
- requiring courts to report certain information about judicial bypass cases and holding parts of the court proceedings confidential;
- requiring a judge to determine whether the abortion would be in the minor's best interests;
- making coercion to obtain an abortion an offense; and
- requiring a minor to have received certain information to be deemed well-informed.

Confidentiality. 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 have better protected 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.

Mature and well-informed minor. HB 1212 appropriately would have offered 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 Nathan 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. Justice Hecht 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 state-issued materials already required to be provided to women before an abortion also 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 slants 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. HB 1212 would have permitted aggregate information about judicial bypasses to be made public, allowing Texas residents to evaluate the judges in their area. 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.

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.

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 happening.

NOTES:

The companion bill, HB 1212 by P. King. was laid on the table subject to call during House floor consideration on May 12 after being recommitted on a point of order on May 10.

An amendment added on the House floor on May 16 to the Board of Medical Examiners sunset bill, SB 419 by Nelson, would require consent of a parent or guardian before a physician performed an abortion. It would allow a court order authorizing an abortion without parental consent, but does not specify record keeping or requirements for judicial proceedings.