

BILL ANALYSIS

Senate Research Center
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S.B. 1564
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Health & Human Services
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AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

Due to current court procedure, pregnant minors can undergo abortions without any parental involvement. Chapter 33 (Notice of Abortion), Family Code, allows pregnant minors to petition judges for permission to undergo abortions without parental involvement via "judicial bypass."

S.B. 30, 76th Legislature, Regular Session, 1999, was passed as the Texas Parental Notification Law, marking the first step toward protecting parental rights. This law requires that a parent, legal guardian, or managing conservator be notified of the pregnant, unemancipated minor's intent to seek an abortion; the notice may be provided in person, by telephone, or by certified mail. The law includes judicial bypass, leaving room for a judge to decide whether an abortion or involving a parent is in the best interest of the pregnant teen. S.B. 419, 79th Legislature, Regular Session, 2005, amended Section 164.052, Occupations Code, to include the statutory language of parental consent. This required an abortion facility to secure consent from a parent, legal guardian, or managing conservator before a minor undergoes an abortion, but the logistics of consent are loose. Furthermore, with the latitudinous judicial bypass still in statute, neither parental notification nor parental consent are effectively required for an abortion for a pregnant teen.

S.B. 1564:

- requires all women to show proof of age at an abortion clinic to confirm status an adult or show a court order stating that the woman is an emancipated minor;
- strengthens medical emergency language that might otherwise be used to ignore parental involvement requirements;
- requires the abortion provider to verbally or in writing notify the guardian of any emergency abortion for a minor (who did not have consent or notice) within two days of the abortion;
- requires that the bypass request be made in the woman's county of residence unless the county has a population of less than 50,000, in which case she may go to an adjacent county;
- requires that the bypass request be made in a county court, a court having probate jurisdiction, or district court, including family district court;
- requires that the bypass request include a current address;
- prohibits the attorney ad litem from also being her guardian;
- prohibits the clergy from also being her guardian;
- prohibits "another appropriate person selected by the court" from being a guardian;
- removes the automatic granting of the bypass if the judge or appellate court does not rule within 48 hours;
- raises the standard for the judge from "preponderance of the evidence" to "clear and convincing evidence";
- removes the emotional abuse of the minor as a reason for judicial bypass; physical and sexual abuse remain;
- prohibits the cost of the judicial bypass from being paid for by the state;
- requires the abortion provider to report the name of the suspected abuser to the Department of Family and Protective Services and law enforcement;
- dictates that law enforcement has a duty to respond and write a report within 12 hours of notification;
- requires the Supreme Court of Texas to adopt rules for data collection;

- dictates that violating consent and notice requirements is a prohibited practice under the Occupations Code and that it will result in the loss of license; and
- establishes mandatory criminal penalties for violating the consent and notice requirements.

As proposed, S.B. 1564 amends current law relating to the regulation of abortion procedures, provides civil penalties, and affects the prosecution of a criminal offense.

[**Note:** While the statutory reference in this bill is to the Texas Department of Health (TDH), the following amendments affect the Department of State Health Services, as the successor agency to TDH.]

[**Note:** While the statutory reference in this bill is to the Texas State Board of Medical Examiners (TSBME), the following amendments affect the Texas Medical Board, as the successor agency to TSBME.]

RULEMAKING AUTHORITY

Rulemaking authority is expressly granted to the Supreme Court of Texas in SECTION 11 (Section 22.019, Government Code) of this bill.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Section 33.001, Family Code, by amending Subdivision (1) to redefine “abortion” and adding Subdivisions (3-a) and (4-a) to define “perform” and “positive proof of age.”

SECTION 2. Amends Chapter 33, Family Code, by adding Section 33.0011, as follows:

Sec. 33.0011. POSITIVE PROOF OF AGE. (a) Prohibits a physician, except in the case of a medical emergency, as defined by Section 171.002 (Definitions), Health and Safety Code, or as provided by this chapter, from performing or attempting to perform an abortion on any pregnant woman unless the physician has obtained positive proof of age demonstrating that the pregnant woman is not a minor or a certified copy of the court order proving that the pregnant woman is an emancipated minor.

(b) Requires that a copy of the positive proof of age submitted under Subsection (a) be kept in the woman's medical record until the later of:

- (1) the woman's 25th birthday; or
- (2) the seventh anniversary of the date of the certification.

SECTION 3. Amends Section 33.002, Family Code, by amending Subsections (a), (d), (e), and (g) and adding Subsection (g-1), as follows:

(a) Prohibits a physician, subject to Sections 33.003 (Judicial Approval) and 33.004 (Appeal), from performing an abortion or attempting to perform an abortion on a pregnant unemancipated minor unless written consent of the minor's parent, managing conservator, or legal guardian is obtained under Section 164.052(a)(19) (providing that performing an abortion on an unemancipated minor without written consent of a guardian is a prohibited practice), Occupations Code, and:

- (1) Makes a nonsubstantive change; or
- (2) the physician who is to perform the abortion, rather than the physician performing the abortion:
 - (A) concludes that a medical emergency exists as defined by Section 171.002, Health and Safety Code;

(B) certifies in writing to the Department of State Health Services (DSHS), rather than the Texas Department of Health (TDH), and in the patient's medical record the medical indications supporting the physician's judgment that a medical emergency exists as defined by Section 171.002, Health and Safety Code; and

(C) provides the notice required by Section 33.0021, rather than the circumstances described by Paragraph (A) exist.

Deletes existing text of Subdivision (2) prohibiting a physician from performing an abortion on a pregnant unemancipated minor unless the judge of a court having probate jurisdiction, the judge of a county court at law, the judge of a district court, including a family district court, or a court of appellate jurisdiction issues an order authorizing the minor to consent to the abortion as provided by Section 33.003 or 33.004.

Deletes existing Subdivision (3) prohibiting a physician from performing an abortion on a pregnant unemancipated minor unless a probate court, county court at law, district court, including a family district court, or court of appeals, by its inaction, constructively authorizes the minor to consent to the abortion as provided by Section 33.003 or 33.004.

Deletes existing Subdivision (4) prohibiting a physician from performing an abortion on a pregnant unemancipated minor unless the physician performing the abortion concludes that on the basis of the physician's good faith clinical judgment, a condition exists that complicates the medical condition of the pregnant minor and necessitates the immediate abortion of her pregnancy to avert her death or to avoid a serious risk of substantial and irreversible impairment of a major bodily function.

(d) Requires, rather than authorizes, a physician to execute for inclusion in the minor's medical record an affidavit stating that, according to the best information and belief of the physician, notice has been provided as required by this section, rather than notice or constructive notice has been provided as required by this section. Deletes existing text providing that execution of an affidavit under this subsection creates a presumption that the requirements of this section have been satisfied.

(e) Requires DSHS, rather than TDH, to prepare a form to be used for making the certification required by Subsection (a)(2)(B), rather than Subsection (a)(4). Makes a nonsubstantive change.

(g) Provides that a physician who with criminal negligence performs or attempts to perform an abortion, rather than a physician who intentionally performs an abortion, on a pregnant unemancipated minor in violation of this section commits an offense. Provides that an offense under this subsection is punishable by a fine not to exceed \$10,000. Defines "criminal negligence" rather than "intentionally."

(g-1) Provides that a physician performing an abortion and a pregnant unemancipated minor seeking an abortion under this section are subject to the requirements established under Chapter 171 (Abortion), Health and Safety Code. Provides that the physician is also subject to the requirements established under Section 164.052(a)(19), Occupations Code.

SECTION 4. Amends Chapter 33, Family Code, by adding Section 33.0021, as follows:

Sec. 33.0021. MEDICAL EMERGENCY NOTIFICATION; AFFIDAVIT FOR MEDICAL RECORD. (a) Requires the physician, if the physician who is to perform the abortion concludes under Section 33.002(a)(2) that a medical emergency exists and that there is insufficient time to provide the notice required by Section 33.002, to verbally

inform the parent, managing conservator, or guardian of the unemancipated minor within two hours after the time a medical emergency abortion is performed on the minor of:

(1) the performance of the abortion; and

(2) the basis for the physician's determination that a medical emergency existed, as defined by Section 171.002, Health and Safety Code, that required the performance of a medical emergency abortion without fulfilling the requirements of Section 33.002.

(b) Requires a physician who performs an abortion as described by Subsection (a) to send a written notice of the medical emergency abortion to the last known address of the parent, managing conservator, or guardian by certified mail, restricted delivery, return receipt requested. Authorizes the physician to rely on last known address information if a reasonable and prudent person, under similar circumstances, would rely on the information as sufficient evidence that the parent, managing conservator, or guardian resides at that address. Requires the physician to keep in the minor's medical record the return receipt from the written notice or, if the notice was returned as undeliverable, the notice.

(c) Requires the physician who performs the abortion on the minor to execute for inclusion in the medical record of the minor an affidavit that explains the specific life-threatening physical condition of the minor that necessitated the immediate abortion.

SECTION 5. Amends Section 33.003, Family Code, by amending Subsections (a), (b), (c), (e), (f), (h), (i), and (j) and adding Subsections (o), (p), and (q), as follows:

(a) Authorizes a pregnant minor to file an application for a court order authorizing the minor to consent to the performance of an abortion without the consent of or notification to either of her parents or a managing conservator or guardian, rather than authorizes a pregnant minor who wishes to have an abortion without notification to one of her parents, her managing conservator, or her guardian to file an application for a court order authorizing the minor to consent to the performance of an abortion without notification to either of her parents or a managing conservator or guardian.

(b) Requires that the application be filed in, rather than authorizes the application to be filed in:

(1) a county court at law in the minor's county of residence, rather than any county court at law;

(2) a court having probate jurisdiction in the minor's county of residence, rather than any court having probate jurisdiction; or

(3) a district court, including a family district court, with jurisdiction over the minor's county of residence, rather than any district court, including a family district court in this state.

Makes nonsubstantive changes.

(c) Requires that the application be made under oath and include:

(1) and (2) Makes no change to these subdivisions;

(3) a statement that the minor wishes to have an abortion without the consent or notification of either of her parents or a managing conservator or guardian;

(4) a statement as to whether the minor has retained an attorney and, if she has retained an attorney, the name, address, and telephone number of her attorney; and

(5) a statement about the minor's current residence, including the minor's physical address, mailing address, and telephone number.

(e) Requires the court to appoint a guardian ad litem for the minor. Prohibits the guardian ad litem from also serving as the minor's attorney ad litem, rather than authorizes the court, if the guardian ad litem is an attorney admitted to the practice of law in this state, to appoint the guardian ad litem to serve as the minor's attorney.

(f) Authorizes the court to appoint to serve as guardian ad litem:

(1) a person who may consent to treatment for the minor under Sections 32.001(a)(1)-(3) (authorizing a grandparent, adult brother or sister, or adult aunt or uncle of the child to consent to medical treatment of a child as set forth when the person having the right to consent cannot be contacted);

(2) an appropriate employee of the Department of Family and Protective Services (DFPS); or

(3) an attorney who is licensed to practice law in this state and is in good standing with the State Bar of Texas.

Deletes existing text of Subdivision (2) authorizing the court to appoint to serve as guardian ad litem a psychiatrist or individual licensed or certified as a psychologist under Chapter 501 (Psychologists), Occupations Code.

Deletes existing Subdivisions (4) and (5) authorizing the court to appoint to serve as guardian at litem a member of the clergy or another appropriate person selected by the court.

Makes nonsubstantive changes.

(h) Deletes existing text providing that, if the court fails to rule on the application and issue written findings of fact and conclusions of law within the period specified by this subsection, the application is deemed to be granted and the physician is authorized to perform the abortion as if the court had issued an order authorizing the minor to consent to the performance of the abortion without notification under Section 33.002.

(i) Requires the court to determine by clear and convincing evidence, rather than by a preponderance of the evidence, whether the minor is mature and sufficiently well informed to make the decision to have an abortion performed without the consent of or notification to either of her parents or a managing conservator or guardian or whether consent or notification would not be in the best interest of the minor. Requires the court to determine by a preponderance of the evidence whether consent or notification may lead to physical or sexual abuse of the minor, rather than physical, sexual, or emotional abuse of the minor. Requires the court to enter an order authorizing the minor to consent to the performance of an abortion without the consent of or notification to either of her parents or a managing conservator or guardian and to execute the required forms if the court finds that the minor is mature and sufficiently well informed, and:

(1) that consent or notification would not be in the minor's best interest; or

(2) that consent or notification may lead to physical or sexual abuse of the minor.

Deletes existing text requiring the court, if the court finds that the minor is mature and sufficiently well informed, that notification would not be in the minor's best interest, or that notification may lead to physical, sexual, or emotional abuse of

the minor, to enter an order authorizing the minor to consent to the performance of the abortion without notification to either of her parents or a managing conservator or guardian and to execute the required forms.

Makes nonsubstantive changes.

(j) Prohibits the court, if the court finds that the minor does not meet the requirements of Subsection (i), from authorizing the minor to consent to an abortion without the consent required by Section 164.052(a)(19), Occupations Code, or notification authorized under Section 33.002(a)(1).

(o) Prohibits a minor who has filed an application under this section from withdrawing or otherwise non-suiting her application without the permission of the court.

(p) Prohibits a minor who has filed an application and has obtained a determination by the court as described by Subsection (i) from initiating a new application proceeding and provides that the prior proceeding is res judicata of the issue relating to the determination of whether the minor may or may not be authorized to consent to the performance of an abortion without the consent of or notification to either of her parents or a managing conservator or guardian.

(q) Requires an attorney retained by the minor to assist her in filing an application under this section to 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. Requires the attorney representing the minor, if the attorney assists the minor in the application process in any way, with or without payment, to attest to the truth of the minor's claims regarding the venue and prior applications in a sworn statement. Provides that an attorney that negligently makes a misrepresentation in a sworn statement made under this subsection violates this chapter and is subject to civil penalties under Section 33.012.

SECTION 6. Amends Sections 33.004(b) and (f), Family Code, as follows:

(b) Deletes existing text providing that, if the court of appeals fails to rule on the appeal within the period specified by this subsection, the appeal is deemed to be granted and the physician may perform the abortion as if the court had issued an order authorizing the minor to consent to the performance of the abortion without notification under Section 33.002.

(f) Requires that an expedited confidential appeal be available to any pregnant minor to whom a court of appeals denies an order authorizing the minor to consent to the performance of an abortion without the consent of or notification to either of her parents or a managing conservator or guardian.

SECTION 7. Amends Section 33.008, Family Code, as follows:

Sec. 33.008. **PHYSICIAN'S DUTY TO REPORT ABUSE OF A MINOR; INVESTIGATION AND ASSISTANCE.** (a) Requires the physician or physician's agent, if a minor claims to have been physically or sexually abused by a person responsible for the minor's care, custody, or welfare, as that term is defined by Section 261.001 (Definitions), to immediately report the suspected abuse and the name of the abuser to DFPS and to a local law enforcement agency and to refer the minor to DFPS for services or intervention that may be in the best interest of the minor, rather than requires a physician who has reason to believe that a minor has been or may be physically or sexually abused by such a person to immediately report the suspected abuse to DFPS and to refer the minor to DFPS for services or intervention that may be in the best interest of the minor. Requires the local law enforcement agency to respond and to write a report within 12 hours of being notified of the alleged abuse. Requires that a report be made

regardless of whether the local law enforcement agency knows or suspects that a report about the abuse may have previously been made.

(b) Requires the appropriate local law enforcement agency and DFPS to investigate suspected abuse reported under this section and, if warranted, refer the case to the appropriate prosecuting authority, rather than requires DFPS to investigate suspected abuse reported under this section and, if appropriate, assist the minor in making an application with a court under Section 33.003.

(c) Authorizes a law enforcement officer or appropriate agent from DFPS, when the local law enforcement agency responds to the report of physical or sexual abuse as required by Subsection (b), to take emergency possession of the minor without a court order to protect the health and safety of the minor as described by Chapter 262 (Procedures in Suit by Governmental Entity to Protect Health and Safety of Child).

SECTION 8. Amends Chapter 33, Family Code, by adding Section 33.0085, as follows:

Sec. 33.0085. DUTY OF JUDGE OR JUSTICE TO REPORT ABUSE OF MINOR. (a) Requires a judge or justice who, as a result of court proceedings conducted under Section 33.003 or 33.004, has reason to believe that a minor has been or may be physically or sexually abused by a person responsible for the minor's care, custody, or welfare, as that term is defined by Section 261.001, notwithstanding any other law, to:

(1) immediately report the suspected abuse and the name of the abuser to DFPS and to a local law enforcement agency; and

(2) refer the minor to DFPS for services or intervention that may be in the best interest of the minor.

(b) Requires the appropriate local law enforcement agency and DFPS to investigate suspected abuse reported under this section and, if warranted, refer the case to the appropriate prosecuting authority.

SECTION 9. Amends Section 33.010, Family Code, as follows:

Sec. 33.010. CONFIDENTIALITY. Deletes a reference to Section 33.009 (Other Reports of Sexual Abuse of a Minor) and makes no further change to this section.

SECTION 10. Amends Chapter 33, Family Code, by adding Sections 33.012 and 33.013, as follows:

Sec. 33.012. CIVIL PENALTY. (a) Provides that a person who intentionally, knowingly, recklessly, or negligently violates this chapter is liable to this state for a civil penalty of:

(1) \$10,000 for the first violation;

(2) \$50,000 for the second violation;

(3) \$100,000 for the third violation; or

(4) an amount greater than \$100,000 that is sufficient to deter future violations for each succeeding violation.

(b) Provides that each performance or attempted performance of an abortion in violation of this chapter is a separate violation.

(c) Prohibits a civil penalty from being assessed against a minor on whom an abortion is performed or attempted.

(d) Provides that it is not a defense to an action brought under this section that the minor gave informed and voluntary consent.

Sec. 33.013. CAPACITY TO CONSENT. Provides that an unemancipated minor does not have the capacity to consent to any action that violates this chapter.

SECTION 11. Amends Subchapter A, Chapter 22, Government Code, by adding Section 22.019, as follows:

Sec. 22.019. PUBLIC INFORMATION REGARDING CERTAIN PETITIONS AND MOTIONS. (a) Requires the Supreme Court of Texas (supreme court) to adopt rules governing the collection of statistical information relating to applications and appeals granted under Sections 33.003(h) and 33.004(b) (requiring the court of appeals to rule on an appeal under this section not later than 5 p.m. on the second business day after the date the notice of appeal is filed with the court that denied the application), Family Code. Requires that the information collected by the supreme court include:

- (1) the number of judicial bypass cases;
- (2) the number of judicial bypass cases in which the court appointed a guardian ad litem;
- (3) the number of judicial bypass cases in which the court appointed an attorney;
- (4) the number of judicial bypass cases in which the judge issued an order authorizing an abortion without consent or notification; and
- (5) the number of judicial bypass cases in which the judge denied an order, the number of appeals filed as a result of a denial, the number of denials that were affirmed, and the number of denials that were reversed.

(b) Requires that the information collected under this section be available to the public in aggregate form by county.

(c) Provides that identifying information about a minor collected under this section is confidential and is not subject to disclosure under Chapter 552 (Public Information).

SECTION 12. Amends Section 164.052(a), Occupations Code, as follows:

(a) Provides that a physician or an applicant for a license to practice medicine commits a prohibited practice if that person:

- (1)-(18) Makes no change to these subdivisions;
- (19) Makes a nonsubstantive change;
- (20) otherwise performs an abortion on an unemancipated minor in violation of Chapter 33 (Notice of Abortion), Family Code; or
- (21) performs or induces or attempts to perform or induce an abortion in violation of Subchapter C (Abortion Prohibited at or After 20 Weeks Post-Fertilization), Chapter 171, Health and Safety Code.

Deletes existing text of Subdivision (19) providing that a physician or an applicant for a license to practice medicine commits a prohibited practice if that person authorizes the minor to consent to the abortion, unless the physician concludes that on the basis of the physician's good faith clinical judgment, a

condition exists that complicates the medical condition of the pregnant minor and necessitates the immediate abortion of her pregnancy to avert her death or to avoid a serious risk of substantial impairment of a major bodily function and that there is insufficient time to obtain the consent of the child's parent, managing conservator, or legal guardian.

Makes a nonsubstantive change.

SECTION 13. Amends Section 164.055(b), Occupations Code, to delete existing text providing that the criminal penalties provided by Section 165.152 (Practicing Medicine in Violation of Subtitle) do not apply to a violation of Section 170.002 (Prohibited Acts; Exemption) or Subchapter C, Chapter 171, Health and Safety Code.

SECTION 14. Repealers: Section 33.001(2) (defining “fetus”), Family Code.

Repealers: Sections 33.002(b) (authorizing a physician to perform an abortion on a pregnant minor, if a parent cannot be notified after a reasonable effort, and if the physician gives 48 hours constructive notice to the parent), (c) (relating to waiving the requirement that 48 hours actual notice be provided under this section), (f) (providing that a physician’s certification that immediate abortion of a minor’s pregnancy is necessary to prevent death or serious injury to the minor is confidential and privileged), (h) (providing that it is a defense to prosecution under this section that the minor falsely represented her age or identity to the physician to be at least 18 years of age), and (i) (authorizing the defendant, in relation to the trial of an offense under this section in which the conduct charged involves a conclusion made by the physician that the immediate abortion of a minor’s pregnancy was necessary to prevent death or serious injury to the minor, to seek a hearing before the Texas State Board of Medical Examiners), Family Code.

Repealer: Section 33.003(k) (prohibiting the court from notifying a parent, managing conservator, or guardian that a pregnant minor who wishes to have an abortion without notification to such a person, is pregnant or that the minor wants to have an abortion), Family Code.

Repealer: Section 33.005 (Affidavit of Physician), Family Code.

Repealer: Section 33.009 (Other Reports of Sexual Abuse of a Minor), Family Code.

SECTION 15. Provides that, if any court enjoins, suspends, or delays the implementation of the changes in law made by this Act to Chapter 33, Family Code, and Section 164.052 (Prohibited Practices By Physician or License Applicant), Occupations Code, the former law, as the law existed immediately before the effective date of this Act, becomes or remains in effect and continues in effect. Provides that, at the time a temporary or permanent restraining order or injunction described by this section is stayed or dissolved, or otherwise ceases to have effect, the changes in law made by this Act become immediately effective.

SECTION 16. Provides that the legislature intends that every application of this Act to every individual woman shall be severable from each other. Provides that, in the unexpected event that the application of this Act is found to impose an impermissible undue burden on any pregnant woman or group of pregnant women, the application of the Act to those women shall be severed from the remaining applications of the Act that do not impose an undue burden, and those remaining applications shall remain in force and unaffected, consistent with Section 15 of this Act.

SECTION 17. Makes application of this Act prospective.

SECTION 18. Provides that information obtained before the effective date of this Act by DFPS or another entity under Section 33.009, Family Code, as it existed before the effective date of this Act, remains confidential to the extent provided by Section 33.010, Family Code, as it existed before the effective date of this Act.

SECTION 19. Effective date: upon passage or September 1, 2015.