SMU | Dedman School of Law

SMU Law Review

Volume 21
Issue 1 *Annual Survey of Texas Law*

Article 6

1967

Family Law

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FAMILY LAW

by

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DURING the survey period, Texas family law began to react perceptively to the tensions created by changing patterns of family life. Our courts were nearly overwhelmed by cases involving various family law matters. The most recent statistics—those for 1965[1]—indicate the combined total of divorce and annulment suits filed was 61,491; 41,365 of the disposed cases were prosecuted to judgment.[2] Only 158 of these approximately one-third of one per cent, resulted in denial of divorce or annulment. Excluding criminal cases, nearly two-fifths of the district court cases fell in the class of dissolution of marriage.[3]

These figures of course do not include the vast number of other types of actions heard by courts in which family law was at issue. The last available figure—that for 1963[4]—showed that Texas courts granted 9,620 adoptions, trailing only California among all the states. No figures are available for actions involving rights to custody or juvenile proceedings, but it may safely be assumed that the number is large.

Most family law is made in the trial courts. But, even so, several important developments in family law did occur at the appellate level. Most significant were cases touching upon adoption practice, bastardy, and child custody—those sensitive areas of law in which the interests of children are most intimately affected.

I. ADOPTION

In adoption law major developments result from the holding of the Supreme Court of the United States in *Armstrong v. Manzo*[5] and that of the Supreme Court of Texas in *Hendricks v. Curry*.[6] The *Armstrong* case held that the failure of a Texas court to give notice of a pending adoption to the child's father was violative of due process of law under the fourteenth amendment. Causing almost as much dismay among the bar and judiciary

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[1] TEX. CIV. JUDICIAL COUNCIL 88 (1965).

[2] For an idea of the growth of actions for dissolution of marriage, compare TEXAS CIVIL JUDICIAL COUNCIL, JUDICIAL STATISTICS—STATE OF TEXAS 5 (1955). Figures reported there indicate that ten years ago 47,511 divorce suits were disposed, 33,415 of these resulting in granting of divorce.

[3] TEX. CIV. JUDICIAL COUNCIL, *op. cit. supra* note 1, at 88.

[4] BUREAU OF THE CENSUS, STATISTICAL ABSTRACT No. 313 (86th ed. 1965).

[5] 380 U.S. 545 (1965); the Supreme Court's opinion was adopted by the court of civil appeals on remand, *In re* Adoption of Armstrong, 394 S.W.2d 552 (Tex. Civ. App. 1965).

[6] 401 S.W.2d 796 (Tex. 1966), 20 Sw. L.J. 684 (1966).

was the *Hendricks* case, with its holding that dependent child proceedings were, in effect, limited to truly dependent or neglected children and thus not available as a basis for adoption except in a small number of cases. As a result of the two opinions, the procedures that must be followed in Texas to insure that an adoption decree will be a final, binding determination of family status are altered radically.

By way of background to the problems raised by these cases, Texas' adoption statute, article 46a, has long provided that no adoption may be decreed without the "written" consent of the parent, or parents, of the child to be adopted.[7] Parental consent may, however, be dispensed with if a parent has (1) deserted the child for two years, leaving it in the "care, custody, control and management" of others; or (2) failed to contribute to the support of the child "substantially" and "commensurate with his financial ability" for two years; or (3) had his parental rights terminated by a court of "competent jurisdiction."[8] Upon allegation and affidavit of any of these circumstances, the statute permits designated judges to consent to the adoption in lieu of the parent or parents whose rights in their children are forfeited by their conduct. As practice developed around this statute, notice to parents was dispensed with if their consent was not required.[9]

In *Armstrong v. Manzo*,[10] Armstrong, the father, was given no notice of his child's pending adoption by Manzo, the stepfather. Manzo's wife, the mother, gave her consent, but Armstrong's consent was deemed unnecessary because of his alleged failure to support the child.[11] Accordingly, the judge of the local juvenile court signed the requisite consent (as authorized by article 46a(b), and Manzo's petition for adoption was granted by the district court. Armstrong was then informed by letter of the trial court's action; he immediately commenced proceedings to set aside the adoption decree. The trial court refused to grant him relief, and Armstrong's appeal to the court of civil appeals was fruitless.[12] His petition to the Supreme Court of the United States for writ of certiorari was granted.

In reversing the judgment, the Court stated:

> It is clear that failure to give the petitioner [Armstrong] notice of the pending adoption proceeding violated the most rudimentary demands of due

[7] TEX. REV. CIV. STAT. ANN. art. 46a, § 6 (Supp. 1966).

[8] *Ibid.*

[9] The Texas court's justification of the absence of a requirement of notice is based upon the availability of a subsequent hearing to the parent who did not receive notice; the argument has recently been restated in Gunn v. Cavanaugh, 391 S.W.2d 723 (Tex. 1965), 44 TEXAS L. REV. 364.

[10] 380 U.S. 545 (1965).

[11] See text accompanying note 7 *supra*. For the quantum of proof of non-support, see Burrell v. VanLoh, 404 S.W.2d 560 (Tex. Civ. App. 1966); Gilley v. Anthony, 404 S.W.2d 60 (Tex. Civ. App. 1966).

[12] *In re* Adoption of Armstrong, 371 S.W.2d 407 (Tex. Civ. App. 1963) *error ref. n.r.e.*

> process of law. . . . [Although questions of the sufficiency of notice can arise] as to the basic requirement of notice itself there can be no doubt where, as here, the result of the judicial proceeding was permanently to deprive a legitimate parent of all that parenthood implies.[13]

With similar directness the Court disposed of the argument that the absence of notice to the parent was cured by the subsequent hearing afforded him:

> It [the opportunity to be heard required by due process] is an opportunity which must be granted at a meaningful time and in a meaningful manner. The trial court could have accorded this right to the witness only by granting his motion to set aside the decree and consider the case anew. . . . Only that would have restored the petitioner to the position he would have occupied had due process of law been accorded to him in the first place.[14]

Gauging the effect of the *Armstrong* case is not difficult, at least insofar as Texas adoption practice is concerned: failure to serve notice of a pending adoption on a non-consenting parent will result in a decree that is a nullity as to that parent.[15] A non-consenting, unnotified parent thus does not lose any of the parental rights[16] he would have had if there had been no adoption.

Closing the door on *ex parte* adoption was no more consternating to the bar than the decision in *Hendricks v. Curry*.[17] There the Supreme Court of Texas circumscribed the use of article 2330,[18] the dependent child statute. This statute permits a court to adjudge a child dependent or neglected if the child is "dependent upon the public for support," "destitute, homeless or abandoned," or without "proper parental care or guardianship."

The importance of dependency proceedings in Texas adoption law cannot be exaggerated because of the common use of such a proceeding as a prelude to adoption. Commonly, attorneys in both privately[19]—and institutionally[20]—arranged adoptions commence a dependent child proceeding prior to or contemporaneous with the adoption suit. Under the adoption statute, a finding that a child is dependent or neglected is a sufficient[21] termination of parental rights to justify substitution of court consent to an adoption for that of the parents. Aside from the aspect of consent, the

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[13] 380 U.S. at 550.

[14] *Id.* at 552.

[15] Whitehead v. Lout, 395 S.W.2d 68 (Tex. Civ. App. 1965); Note, *Notice and Adoption—The Requirements of Due Process*, 19 Sw. L.J. 413, 418 (1965).

[16] Parental rights include, *inter alia*, those of custody, inheritance, companionship and services. TEX. CIV. STAT. ANN. art. 46a, § 9 (1959).

[17] 401 S.W.2d 796 (Tex. 1966).

[18] TEX. REV. CIV. STAT. ANN. art. 2330 (1964).

[19] See, *e.g.*, Leddon v. Herman, 402 S.W.2d 512 (Tex. Civ. App. 1966).

[20] See, *e.g.*, Home of the Holy Infancy v. Kaska, 397 S.W.2d 208 (Tex. 1965).

[21] Strictly speaking, a dependency proceeding is a temporary change of custody for the benefit of the child neglected by its parents and dependent upon the public for support. TEX. REV. CIV. STAT. ANN. art. 2337 (1964).

so-called "d/n" proceeding is attractive because of its speed and the absence of a requirement of notice to a parent outside the county in which the action is brought.[22] *Hendricks v. Curry* illustrates graphically the reliance of the bar on the statute in adoption cases and the abuses possible under a statute that was intended primarily for the protection of waifs.

Betty Shellenberger Hendricks prior to her marriage bore a child out of wedlock. In a private arrangement with an attorney, she surrendered the infant and gave her written consent to its adoption by a couple represented by the attorney. The Currys were that couple; they filed their petition for adoption in Dallas County, alleging Mrs. Hendricks' consent as a basis for granting the adoption. Prior to the hearing the mother withdrew her consent after learning the Currys' identity and filed a petition for a writ of habeas corpus by which the Currys' and her relative rights of custody could be tested. A nonsuit was immediately taken by the prospective adopters, who then instituted both dependency and adoption proceedings in an adjacent county. No notice was given Mrs. Hendricks of either action, and the child was adjudged dependent two days later. This judgment was then made the basis of an allegation in the adoption petition justifying the waiver of the mother's consent. When Mrs. Hendricks learned of the various proceedings, she filed an action to set aside the dependency judgment and a petition of intervention in the adoption suit. After a hearing on the respective claims of the parties the trial court let stand its finding of dependency and granted the Currys' adoption petition. This judgment was affirmed by the court of civil appeals.[23]

This record presented a Gordian knot of difficulties to the supreme court. Two principal questions were raised—the question of the binding effect of a dependency order entered without notice to Mrs. Hendricks and that of the applicability of article 2330 to the fact situation. The court refused the Alexandrian solution of striking down the dependency proceeding on the constitutional notice problem suggested by *Armstrong v. Manzo*. Instead they read the statute closely and by a restrictive construction effectively foreclosed dependency proceedings as the first step of a two-step adoption process in all but a few cases. As the court applied the statute, the facts did not support a finding that the child was dependent, and thus Mrs. Hendricks' consent to the adoption was necessary. Since her consent had been withdrawn, the adoption was an apparent nullity.[24]

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[22] TEX. REV. CIV. STAT. ANN. art. 2332 (1964). This provision is of doubtful constitutionality; without any doubt a custody decree rendered without notice would not be entitled to full faith and credit in a sister state. May v. Anderson, 345 U.S. 528 (1954).

[23] Hendricks v. Curry, 384 S.W.2d 181 (Tex. Civ. App. 1965).

[24] *Semble* as to the holding that the adoption was a nullity. The court reversed and rendered the judgment of adoption on the ground that vacating the judgment of dependency left no basis for the adoption decree since without it Mrs. Hendricks' consent would be required, and this had been withdrawn. 401 S.W.2d at 802.

Under the not untypical circumstances of this case, the court could have sustained the finding of dependency only by holding that the child was dependent upon the public for support, was destitute, homeless or abandoned, or did not have proper parental care or guardianship.[25] Justice Smith's opinion pointed out first that the child was obviously not dependent upon the public for support because the Currys were entrusted with both *de facto* custody and obligation to support, and thus no basis for a dependency finding based on that portion of the statute could be found in the evidence.

As to the second alternative, the court held that a parent's relinquishment of custody coupled with consent to adoption does not constitute "abandonment" under article 2330 and was not evidence that would support a judgment of dependency. Sensibly, the court held that the same definition of "abandonment" should apply in dependency proceedings as in adoption proceedings, namely acts "as would apply conscious disregard or indifference"[26] to the child. Using this standard, the court stated that Mrs. Hendricks' conduct was "all too plain to permit of quibbling" not abandonment.[27]

With respect to the third possibility, that the Hendricks' child was dependent because it had not "proper parental care," the court construed "parental" broadly, holding that the word was not intended to apply only to parents. Instead, the "parental care" as used in the dependency statute has a broader significance, designating not only parents but also "persons who occupy a parental position in the life of a child, either permanently or temporarily."[28] Since the Currys were furnishing "proper parental care" within the ambit of this broad definition, no evidence was presented to the trial court which would justify a judgment of dependency on that ground.

Because of these two important cases Texas adoption practice must be altered radically. Dependency proceedings as an integral part of either private or institutional adoptions are limited to those relatively rare instances in which the child is truly neglected by its parents and dependent upon the public for support.[29] Removing (as a practical matter) dependency judg-

[25] These three possibilities are alternatives in article 2330, as are findings that the child is a person ". . . who habitually begs or receives alms, or who is found living in any house of ill fame or with any vicious or disreputable person, or . . . whose parents or guardian permit it to use intoxicating liquor except for medicinal purposes or to become addicted to the use of such liquor . . . ."

[26] 401 S.W.2d at 801.

[27] *Ibid.*

[28] *Id.* at 802.

[29] This may be an overstatement, but Home of the Holy Infancy v. Kaska, 397 S.W.2d 208 (Tex. 1966) discussed in the next section, causes me to doubt that I exaggerate. There the father of a child conceived out of wedlock was permitted to plead and prove his parental interest in the child, and hence his right to litigate custody, *after* the child had been declared dependent. The court said rather pointedly "Plaintiff had no notice . . . and the child was not, in fact, dependent and neglected." *Id.* at 209, even though the points were not in issue.

ments as a basis for dispensing with consent leaves only the two two-year exceptions of abandonment and non-support. Adoptions without consent will be rare, now, as was probably intended. In those few actions that will be attempted, the constitutional requirement that notice be given a non-consenting parent will result in decrees that do not bind the adopted child's parents unless personal jurisdiction was obtained.

We may fairly say that the *Armstrong* and *Hendricks* cases preclude all but those adoptions in which parental consent is given. But does the problem end if consent is given? Consent to adoption is not waiver of process,[30] and even if it were, article 2224[31] prohibits waiver of process or entry of appearance until an action is commenced. An adoption proceeding is rather clearly an action, and the parent constitutionally (and statutorily)[32] has an interest in the subject matter of the suit—his child. If this analysis of consent-waiver is accepted by the Texas courts, no adoptions under the present statute would be binding on the parents unless it could be shown that the court had jurisdiction of their persons by virtue of service or appearance.

II. Marriage and Legitimacy

One notable case was decided in the past year in this area of family law. *Home of the Holy Infancy v. Kaska*[33] involved the meaning of section 42 of the Probate Code, which provides that: "Where a man, having by a woman a child or children shall afterwards intermarry with such woman, such child or children shall thereby be legitimate and made capable of inheriting his estate." The question of the construction and application of this provision arose in an unusual fashion.

Kaska's child was conceived by the mother out of wedlock; subsequent to conception, but before birth, Kaska married the woman. However, the marriage was annulled on the mother's application before the child was born. She then placed the child for adoption with the Home of the Holy Infancy, a licensed child placement agency. Her consent to an adoption to be arranged by the agency was also given. The home had the child declared dependent and neglected under a fictitious name and placed the child for adoption; Kaska did not consent to this adoption.

Kaska learned somehow that the home had information of his child's whereabouts and instituted a custody suit. As presented to the supreme court, the question was one of standing—more specifically, of whether the child was legitimate under these facts. If legitimate, Kaska could bring the

[30] Compare Leddon v. Herman, 402 S.W.2d 512 (Tex. Civ. App. 1966), holding invalid a mother's waiver of service and consent to judgment in a dependency proceeding.

[31] Tex. Rev. Civ. Stat. Ann. art. 2224 (1964).

[32] See note 16 *supra*.

[33] 397 S.W.2d 208 (Tex. 1965), 19 Sw. L.J. 855.

action; if illegitimate, he had no interest in the child and therefore no standing.[34]

In holding that the child was legitimate, the court had to overcome difficult constructional problems. First, the provision in question is entitled "Inheritance Rights of Illegitimate Children," making possible a construction limiting its application to rights of inheritance only. Second, Kaska did not marry the mother after the birth of the child, as one construction of the statute would seem to require for legitimation. Third, the marriage was annulled, and a traditional doctrine of annullment is that the annulled marriage is void *ab initio*, resulting in bastardization of the progeny of an annulled marriage under a theory of relation back of the annulment decree to the date of marriage.

Justice Walker's opinion overcame the difficulties, giving Kaska the right to maintain his custody suit and inferentially requiring that he consent to the adoption. The court rejected easily the argument that section 42 does not fully legitimate bastards when its conditions are met. Statutory history, holdings under similar statutes, and the internal structure and provisions of the statute itself were relied upon to reach the conclusion that the legal relationship existing between a father and his legitimated child is "the same as that existing between a father and his legitimate child."[35] As to the problem of the child's birthday vis-à-vis the date of the marriage, the court reasoned that a holding other than legitimation by marriage anytime after conception would result in a hiatus of several months, and refused so to construe the statute.

Recognizing that the effect of annulment on legitimacy was the most difficult of the questions presented in the case, the court refused to apply the common-law rule which bastardizes children of an annulled marriage and chose to follow the rule that the doctrine of relation back of the annulment decree should not be used in determining legitimacy. Pointing out that if the Kaskas had remained married the child would have been legitimate, the court found no justice in a principle bastardizing children when a marriage is dissolved for prenuptial causes, particularly when the opposite result would have been reached if the marriage was dissolved by divorce for postnuptial causes.[36]

The enlightened approach by the court to the problem of illegitimacy is most commendable. Texas now falls with that group of states having liberal legitimation provisions. Because Texas stands almost alone in her refusal

[34] In Texas the father of an illegitimate child has no legal relationship to the child. Absent are obligations of support and rights of inheritance, custody, etc. Home of the Holy Infancy v. Kaska, 397 S.W.2d 208, 209-10 (Tex. 1965).

[35] *Id.* at 211.

[36] TEX. REV. CIV. STAT. ANN. art. 4639 (1960) provides: "A divorce shall not in anywise affect the legitimacy of the parents so divorced . . . ."

to require support from fathers of illegitimates, however, the gain from the decision unfortunately is merely an amelioration of a harsh body of law. The court did all it can. Legislation must complete the task.

III. Divorce and Annulment

Little need be said of annulment. The *Kaska* case was the only decision in which annulment was involved; the refusal of the supreme court to relate the decree of annulment back to the date of marriage if rights of parties other than the spouses are involved is significant only against the background of common-law principles of voidness *ab initio*. Presumably relation back will still apply when rights, for example in property, of the parties to the annulment are involved.[37]

Divorce cases reaching the courts of civil appeals during the past year were probably indicative of appellate uncertainty of their place in the divorce process. The majority of the appeals involved divorces sought on the basis of cruel treatment by one spouse or the other.[38] Tracing the statutory requirement that divorces be granted only on "full and satisfactory" evidence,[39] the courts' unhappiness with the facts brought before them seemed patent. Virtually all the courts recited with litanous regularity the well-established rules governing review of divorce proceedings; then reached often-divergent results. Mild physical and verbal abuse justifies both granted[40] and denied[41] divorces, as did evidence of little more than incompatibility.[42]

Probably the most graphic illustration of the problems besetting the courts in divorce suits occurred when a court of civil appeals divided on the question of whether the plaintiff's evidence was "full and satisfactory."[43] The majority and minority could not agree on whether insults, arguments and possible mild physical abuse constituted cruelty, but the majority was unwilling to reverse the trial court's granting of the divorce.

[37] In the *Kaska* case the court states "The annulment decree may relate back to the time of the marriage as between the parties . . . ."

[38] Tex. Rev. Civ. Stat. Ann. art. 4629(1) (1960) permits divorce if "either party is guilty of excesses, cruel treatment, or outrages . . . [which] render living together insupportable." An exception to the cruelty pattern was a decision of one of the infrequent cases of divorce under the seven-year "living apart" provision, Tex. Rev. Civ. Stat. Ann. art. 4629(4) (1960), of the divorce statute. The Waco court correctly held that fault was not a necessary element of proof and that the usual defenses were not available. Fields v. Fields, 399 S.W.2d 958 (Tex. Civ. App. 1966). The wife based her defense to the action on a claim that the period of separation was made possible (or necessary) because the husband contracted a bigamous marriage, preventing her from living with him.

[39] Tex. Rev. Civ. Stat. Ann. art. 4632 (1960).

[40] Ritter v. Ritter, 395 S.W.2d 655 (Tex. Civ. App. 1965).

[41] Boenker v. Boenker, 405 S.W.2d 843 (Tex. Civ. App. 1966).

[42] Cote v. Cote, 404 S.W.2d 139 (Tex. Civ. App. 1966) *error dismissed* (divorce granted); Fletcher v. Fletcher, 397 S.W.2d 911 (Tex. Civ. App. 1965) (divorce denied); Gentry v. Gentry, 394 S.W.2d 544 (Tex. Civ. App. 1965) (divorce denied).

[43] 404 S.W.2d 139 (Tex. Civ. App. 1966) *error dismissed*.

The wife had based her suit for divorce on the husband's cruelty. Evidence adduced at the trial seemed to reflect that dissension was caused primarily by the wife's superior earning ability. His acts of cruelty consisted of public disparagement ("perhaps because of"[44] the fact her earnings constituted seventy per cent of family income), closing her charge accounts, and withdrawing money from a joint bank account. The court said, "The trial judge was justified in finding that this course of conduct, when directed toward a woman whom the judge observed and whose sensibilities, character and personality he had a chance to evaluate, was of such nature as to render the further living together . . . insupportable."[45] The dissenter was unable to find proof justifying a divorce; he pointed out divorce does not lie for "incompatibility, or because they [the spouses] live unhappily together, for marital wranglings, or merely because they possess tempers."[46]

The case indicates as well an increasingly-limited definition of condonation. The parties lived together from August, when divorce was first discussed by them, to January, when the divorce was filed. Indeed, they breakfasted together in their home the morning the husband was served with citation. On this issue the court said: [C]ondonation involves not only the concept of forgiveness by the offended, it also proceeds on the idea of repentance by the offender, and it is not operative where subsequent facts show that no repentance, in fact, existed."[47] The dissenting judge did not comment on this part of the case, but the parties' objectivity toward divorce appeared to disturb him.

IV. Child Custody and Support

Strong judicial opinions that placed children's welfare above the parents' wishes indicated the courts' increasing concern about near-absolute parental rights. In important cases the supreme court refused to hold that proof of parenthood alone entitles a litigant to custody against proof that the best interests of the child require custody in others. The courts of civil appeals were similarly occupied with problems of custody in which the interests of parents were pitted against the claims of third parties.

Certainly the most important supreme court case was *Herrera v. Herrera*.[48] There the child's mother instituted a custody suit by a petition for habeas corpus against the paternal grandparents, basing her right to custody of the eight-year old boy almost totally upon her maternity. She sought to

[44] *Id.* at 141.
[45] *Ibid.*
[46] *Id.* at 146.
[47] *Id.* at 142. Compare Ritter v. Ritter, 395 S.W.2d 655 (Tex. Civ. App. 1965) in which the parties lived together for seven years while the acts of cruelty were taking place; condonation was held not to exist because of the continuance of hostilities after separation.
[48] 409 S.W.2d 395 (Tex. 1966).

remove the child from the grandparents' home where he had lived since infancy, when the mother relinquished custody to them. Evidence indicated that both mother and grandparents were in a position to offer to the child substantially equivalent living conditions. Indeed, the trial court found that *both* the mother and the grandparents were "fit and proper" persons to be awarded custody.[49] However, the evidence also showed that the child did not know his mother, did not want to live with her in preference to the grandparents, and was disturbed at the prospect of the possible change. The trial court refused to restore custody to the mother, but the court of civil appeals reversed.[50]

The supreme court ruled in favor of the grandparents while reiterating the established rule that the best interests of the child are paramount. The opinion pointed out that custody with the parents is presumptively in the best interests of a child, but the presumption is rebutted by proof that the welfare of the child requires custody to be placed in others. Per *Herrera* and many other cases,[51] this difficult determination is entrusted to the trial court and may be tested on appeal only by the standard of abuse of discretion.[52]

Hendricks v. Curry[53] and *Home of the Holy Infancy v. Kaska*[54] similarly recognized the right of the courts and the state to determine whether a child's parents are fit to have custody. In each case a parent brought habeas corpus proceedings against persons who had been given custody of the child but who were unrelated to the child. Although the issue of custody merely furnished the framework for deciding questions of broader import in each case the supreme court carefully severed the issue of right to custody and remanded to the trial court for determination of that issue. A spate of decisions by courts of civil appeals also recognized that the parents' right of custody is not inviolate, even against third persons.[55]

What may be a hiatus in the law is revealed by these opinions. With *Hendricks v. Curry's* limitation of dependency proceedings to the few cases in which proof exists that a child is a waif or that his surroundings are conducive to moral or physical danger, no procedure is available to deprive a parent of custody when the "best interests" of the child so require. Be-

[49] *In re* Herrera, 402 S.W.2d 782 (Tex. Civ. App. 1966).

[50] *Ibid.* The opinion of the Amarillo Court of Civil Appeals is well worth reading in conjunction with that of the supreme court because the two together point up the problem of the conflict that may exist between the parent's and the child's rights.

[51] *E.g.*, Mumma v. Aguirre, 364 S.W.2d 220 (Tex. 1963).

[52] The court of civil appeals was able on the same facts to find that an abuse of discretion existed.

[53] 401 S.W.2d 796 (Tex. 1966). For discussion, see text accompanying notes 17-29 *supra.*

[54] 397 S.W.2d 208 (Tex. 1966). For discussion, see text accompanying notes 33-36 *supra.*

[55] Cox v. Young, 405 S.W.2d 480 (Tex. Civ. App. 1966) (father versus stepfather); Leddon v. Herman, 402 S.W.2d 512 (Tex. Civ. App. 1966) (mother versus adopting parents); Barrie v. Costello, 401 S.W.2d 707 (Tex. Civ. App. 1966) (mother versus maternal grandmother); Scozzari v. Curtis, 398 S.W.2d 819 (Tex. Civ. App. 1966) (father versus maternal grandparents).

tween "best interests" and "dependent and neglected" exists a considerable gulf. If the parent surrenders custody to someone who wishes to stand in loco parentis and has any reasonable basis for that claim, the question of the child's welfare can be presented to a court when the parent seeks to re-establish his right to custody by habeas corpus. But if the child is in the parent's custody, the stricter standard prevails. That this distinction between depriving or restoring a parent's right of custody should exist is at least arguable. A greater showing of unfitness for custody properly may be requisite when the parent has custody of his child than when he is seeking to regain custody for a change is sought contrary to the normal run of affairs.[56] If the interest of the child should be the dominant consideration, however, the narrow range of grounds in the dependency statute should be expanded.

All the news in custody cases did not arise from independent suits. Cases involving determinations of custody in divorce were frequent. Article 4639[57] authorizes the court in divorce proceedings "to give the custody and education of the children to either father or mother, as the court shall deem right and proper." Article 4639a(1)[58] further empowers the trial court to make such orders of custody and support as are for the "best interest" of the children. Perennial problems arise under these provisions concerning the power of the courts to arrange custody and visitation and otherwise regulate the life of the child consistent with parental desires. *Ex parte Miller*[59] presented such a problem. Upon their divorce the spouses agreed to give custody of the children to the mother and to place a daughter in a particular school; this agreement was incorporated into the divorce decree. The trial court then held the mother in contempt for refusing to place the child in the school. On writ of habeas corpus the supreme court held that the statutes did not empower the divorcing court to order attendance at a particular school.

However, the trial court's power under article 4639a to limit the child's residence to a particular county was sustained in *Lebowitz v. Lebowitz*,[60] although the order in question was held to be an abuse of discretion under the facts of the case. There the jury awarded custody to the mother, who contended the residence limitation contravened the jury's finding and was thus beyond the power of the court.[61] In overruling this contention the

[56] A parent is the natural guardian of his child and as such entitled to custody. TEX. PROB. CODE ANN. § 109 (1956).

[57] TEX. REV. CIV. STAT. ANN. art. 4639 (1960).

[58] *Ibid.*

[59] 400 S.W.2d 295 (Tex. 1966).

[60] 403 S.W.2d 871 (Tex. Civ. App. 1966).

[61] Article 4639a, § 1 was amended in 1961 to provide the court's custody order "must conform to that [the jury's] determination" of custody. TEX. REV. CIV. STAT. ANN. art. 4639a, § 1 (Supp. 1966).

court reaffirmed the "large equity powers and obligations"[62] of a court to form orders for the welfare of the children.[63]

Support cases in the past year typically were based on questions of evidence. Two cases construed article 4639a-1,[64] which authorizes a divorcing court to require support payments for any unmarried child who is: "(1) . . . physically or mentally unsound and requires custodial care, and (2) . . . cannot adequately take care of and provide for himself, and (3) . . . has no personal estate or income sufficient to provide for himself." Both cases concerned children above eighteen years of age who were unemployable except in special settings, one because of mental retardation[65] and the other because of schizophrenia.[66] Neither court was willing to require the father to support his children. A restrictive definition of custodial care was adopted that limited the power of a court to utilize the statute's provisions to near-institutional cases. In *Aversa v. Aversa*[67] the court attributed to the legislature an intent to provide only for care "which involves a degree of attention requiring more or less continuous personal supervision."[68] This is indeed a close, harsh construction of the statute, but one that will probably be followed.

In *Hutchings v. Bates*,[69] the supreme court decided on first impression that a child support agreement (as opposed to an order of the court) was a contractual obligation enforceable against the estate of a deceased father. Recognizing that two views of the obligation to support are possible, the court opted for the one they thought "more likely to carry out the intention of the parties and achieve just results."[70] Again, the supreme court came down on a result favoring the interests of children, pointedly rejecting a line of authority that was more legalistic than humane.

V. Conclusion

Family law cases decided during the survey period reflected more than anything else the courts' problems with an archaic body of law. The supreme court obviously is concerned; the number and significance of their

[62] 403 S.W.2d at 874.

[63] A recent case held these powers do not extend to requiring the child's custodian's written consent to visitation, however, despite a trial court finding that this was a reasonable limitation required for the children's best interests. Hill v. Hill, 404 S.W.2d 641 (Tex. Civ. App. 1966). The appellate court probably felt that the trial court relinquished its power to the custodian by this condition.

[64] Tex. Rev. Civ. Stat. Ann. art. 4639a-1 (Supp. 1966).

[65] Byrne v. Byrne, 398 S.W.2d 432 (Tex. Civ. App. 1965).

[66] Aversa v. Aversa, 405 S.W.2d 157 (Tex. Civ. App. 1966) *error dismissed.*

[67] *Ibid.*

[68] *Id.* at 159.

[69] 406 S.W.2d 419 (Tex. 1966), for further discussion see Galvin, *Wills and Trusts*, this Survey at footnote 27. For commentary on the civil appeals holding, see 19 Sw. L.J. 666 (1965).

[70] *Id.* at 421.

opinions involving the welfare of children are unequaled in recent years. More important than the number of cases, though, was the court's broadly humanitarian concern for the interests of children. Their responsiveness to these delicate problems and their willingness to work out difficult but just solutions was the most important development of the period.