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FAMILY LAW

by

Joseph W. McKnight*

THE MOST significant event in Texas family law during the past year was the enactment of title 1 of the Family Code,¹ which deals with the law of husband and wife. This recodification and revision incorporates the provisions of the Matrimonial Property Act of 1967 and became effective January 1, 1970. Title 2 (Children) will be introduced at the regular session in 1971. As the principal provisions of title 1 of the Family Code are extensively discussed elsewhere,² this survey of developments in family law will be confined in the main to comments on judicial developments. Several recent cases influenced the new legislation.³

I. HUSBAND AND WIFE

Family Property. In *Burleson v. Burleson*⁴ the husband filed suit for divorce in a district court in Harris County. While the action was pending the wife brought suit and was granted a divorce in Nevada, though the court made no disposition of the matrimonial property. The wife then asserted her Nevada divorce as a defense to the husband's suit in Harris County and filed a counterclaim asking for a division of the community estate.⁵ The case was transferred to a domestic relations court for trial. The husband took a nonsuit, leaving the wife's counterclaim as the only matter to be tried. On a jury finding that the wife had not been a bona fide resident of Nevada, and thus that the divorce there was invalid, the trial court concluded that the marriage was still subsisting and dismissed the wife's counterclaim. On the wife's appeal, the Houston court of civil appeals held that the Nevada decree was worthy of full faith and credit and remanded the case to the trial court for a division of the community property. The court did not say, however, whether the trial court was to act as a divorce

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¹ TEX. FAMILY CODE ANN. tit. 1, §§ 1.01-5.86 (1969).

² See Hawke, *Divorce Procedure: A Fraud on Children, Spouses and Society*, 32 TEX. B.J. 163 (1969); McKnight, *Recodification and Reform of the Law of Husband and Wife*, 33 TEX. B.J. 34 (1970); McKnight, *Marital Policy Changes*, 31 TEX. B.J. 627 (1968); McSwain, *Revision of Marital Property Rights Statutes*, 31 TEX. B.J. 1013 (1968); Simpkins, *Marriage, Annulment and Divorce Revision and Codification*, 31 TEX. B.J. 1015 (1968); Simpkins, *Divorce Law Changes*, 31 TEX. B.J. 629 (1968).

³ For example, the holdings in *Walter v. Walter*, 443 S.W.2d 183 (Tex. Civ. App.—Houston 1968), and the earlier case of *Foix v. Jordan*, 421 S.W.2d 480 (Tex. Civ. App.—El Paso 1967), *error ref. n.r.e.*, were influential in the formulation of the provisions of § 2.03 with respect to validation of marriages celebrated by an unauthorized person, as well as the codification of the Texas rules of informal marriage in §§ 1.91 and 1.92. In addition to the Family Code, the 1969 regular session of the legislature also enacted a number of miscellaneous bills in the family law field including amendments to the Juvenile Act, TEX. REV. CIV. STAT. ANN. art. 2338-1 (Supp. 1969).

⁴ 419 S.W.2d 412 (Tex. Civ. App.—Houston 1967), *briefly discussed in* McKnight, *Matrimonial Property*, *Annual Survey of Texas Law*, 22 Sw. L.J. 129, 138 n.50 (1968); *Rasor*, *Family Law*, *Annual Survey of Texas Law*, 23 Sw. L.J. 60, 68 (1969); *VanDerCreek*, *Texas Civil Procedure*, *Annual Survey of Texas Law*, 22 Sw. L.J. 174, 178 (1968).

⁵ "Partition of the community property" is the phrase used throughout the opinion.

court in making an equitable division of the matrimonial property or whether it should make a partition of the formerly community estate as an ordinary district court. In the meantime, during the 1967 legislative session, as a result of the enactment of the family district court bill, domestic relations courts acquired the jurisdiction in family law matters of ordinary district courts.⁶ On remand, the trial court divided the property and the matter was again appealed. In the recent case of *Carter v. Burleson*⁷ the trial court apparently acted as a district court in making the partition. The point, however, is unsettled and remains a nice question of jurisdiction.⁸

In *Carter* another problem arose when the husband died before the court considered the wife's counterclaim on remand.⁹ His independent executrix was substituted as a party to the suit. The trial court awarded to the executrix a cause of action for alienation of affection which had been filed by the husband as a separate suit during the marriage. The cause of action for alienation of affection was clearly the separate property of the husband and not a community asset. Although there is not yet any judicial pronouncement with respect to the constitutionality of article 4615¹⁰ (restated as section 5.01 (a) (3) of the Family Code¹¹), a long line of cases (to which *Carter* is the most recent addition) supports the proposition that certain recoveries for injuries to a spouse may constitute his or her separate property, apart from those occasioned by the loss of a separate property interest *in specie*. The only means we have of measuring the value of any loss is in terms of property value. In those instances, however, when the loss has been an essentially personal one,¹² the courts have treated the recovery as separate property of the injured spouse. In 1915 the legislature attempted to make recoveries for all personal injuries of a married woman her separate property.¹³ This statute was obviously too broad as it included recoveries based on loss of earning power. It was therefore struck down as unconstitutional, because the earning power of either spouse is the very essence of community property.¹⁴ In 1967 the legislature revised article

⁶ The sections of this bill are scattered throughout TEX. REV. CIV. STAT. ANN. art. 2338 (Supp. 1969).

⁷ 439 S.W.2d 381 (Tex. Civ. App.—Houston 1969).

⁸ It should also be noted that the court deducted the amount of the wife's attorney's fees from the jointly owned property rather than charging it all to the husband's share, since the attorney's services were rendered while the existence of the marriage was still before a Texas court. The wife was also awarded one-half of the interest accrued on community savings accounts.

⁹ In *Dunn v. Dunn*, 439 S.W.2d 830 (Tex. 1969), the trial court announced an oral judgment of divorce and an equal division of community property. Before a written judgment was entered, the husband died. The wife filed a motion to dismiss. The Texas supreme court held that there was a final judgment prior to the husband's death.

¹⁰ For a discussion of this issue, see McKnight, *Personal Injury as Separate Property—A Legislative History and Analysis of the New Article 4615*, 3 TRIAL LAW. F. 7 (1968). For a different approach, see Comment, *The Community Property Defense to Texas Torts*, 21 BAYLOR L. REV. 529 (1969).

¹¹ TEX. FAMILY CODE ANN. tit. 1, § 5.01 (a) (3) (1969), formerly TEX. REV. CIV. STAT. ANN. art. 4615 (Supp. 1969).

¹² *Wright v. Tipton*, 92 Tex. 168, 46 S.W. 629 (1898) (statutory penalty); *Nickerson v. Nickerson*, 65 Tex. 281 (1886) (false imprisonment); *Norris v. Stoneham*, 46 S.W.2d 363 (Tex. Civ. App.—Eastland 1932) (alienation of affection).

¹³ Act of Mar. 15, 1915, Tex. Laws 1915, ch. 54, at 103 (repealed 1967).

¹⁴ *Bell v. Phillips Petroleum Co.*, 278 S.W.2d 407 (Tex. Civ. App.—Amarillo 1954), *error ref. n.r.e.*; *Northern Tex. Traction Co. v. Hill*, 297 S.W.2d 778 (Tex. Civ. App.—El Paso 1927).

4615 and defined a recovery for personal injuries as separate property when measured in terms other than loss of earning power during marriage.¹⁵

In *Whitley v. Whitley*¹⁶ it was concluded that the two-year statute of limitations is applicable to actions for alienation of affection and begins to run from the time of loss of consortium and not from the time of lessening of affection of one spouse toward the other. Repeating earlier authority, the court concluded that joinder of spouses is not necessary in bringing such an action. Relying on a 1968 case,¹⁷ however, a court of civil appeals has once again concluded¹⁸ that joinder of spouses is necessary in suing for a personal injury of either spouse when the recovery would constitute community property.¹⁹ The injury took place in mid-1967 but the trial was held about a year later. Nothing, however, was said about the statute law applicable at either time.

Somewhat reminiscent of the dispute litigated in *Lederle v. United Services Automobile Ass'n*²⁰ is a recent case in the New Mexican federal district court, *Robertson v. U-Bar Ranch*.²¹ There a Texas married woman was injured due to the negligence of her husband while both were in New Mexico. As in *Lederle*, the defendant sought application of the Texas law of community property and the use of the doctrine of imputed negligence to bar recovery. Under New Mexican law, however, recovery of a married woman for injury and pain and suffering as a result of negligence is treated as her separate property and the fact that her husband contributed to the cause of the accident is irrelevant. The federal court in New Mexico applied the New Mexican law (the *lex loci*) in awarding the wife recovery.²²

Business associations in which one of the spouses is involved has continued to create problems in characterizing matrimonial property as separate or community.²³ *Ryan v. Fort Worth National Bank*²⁴ arose out of a partnership transaction. The husband and his partner, joined by their wives, made a conveyance of real property, reserving to the partners and their named spouses certain mineral interests. A dispute arose as to whether this reservation vested in the wives any property interest. The court con-

¹⁵ For example, recovery for pain and suffering.

¹⁶ 436 S.W.2d 607 (Tex. Civ. App.—Houston 1968).

¹⁷ *General Ins. Co. v. Casper*, 426 S.W.2d 606 (Tex. Civ. App.—Tyler 1967), *error ref. per curiam*, 431 S.W.2d 311 (Tex. 1968), *noted in* McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 23 Sw. L.J. 44, 55 (1969).

¹⁸ *Travelers Ins. Co. v. Jacks*, 441 S.W.2d 312 (Tex. Civ. App.—El Paso 1969) (workman's compensation case).

¹⁹ The court's decision is contrary to the legislative intent in enacting article 4626 in 1967 which was reenacted as TEX. FAMILY CODE ANN. tit. 1, § 4.04 (1969).

²⁰ 394 S.W.2d 31 (Tex. Civ. App.—Waco 1965); *dismissed ab initio as moot*, 400 S.W.2d 749 (Tex. 1966), *discussed in* Comment, *Lederle—A Vote for the Domicile Rule in Interspousal Conflicts Cases*, 18 BAYLOR L. REV. 477 (1966), *and noted*, 44 TEXAS L. REV. 551 (1966). It involved the injury of a Texas married woman in Oklahoma.

²¹ 303 F. Supp. 730 (D.N.M. 1968).

²² On the other hand, in Arizona, which does not sanction interspousal tort actions, the supreme court of that state used the newer, significant contacts doctrine to allow a wife to sue her husband for injuries sustained in an automobile collision in Arizona. The court held the law of the domicile of the couple, New York, should apply. *Schwartz v. Schwartz*, 447 P.2d 254 (Ariz. 1969).

²³ A case illustrating difficulties of proof with respect to separate partnership interests is *Cox v. Cox*, 439 S.W.2d 852 (Tex. Civ. App.—San Antonio 1969).

²⁴ 433 S.W.2d 2 (Tex. Civ. App.—Austin 1968).

cluded that the reservation of title in the grantees amounted to nothing more than a reservation in favor of the community estate of the couples and vested no title to the mineral interests in the individual spouse. Even if the husband uses community funds to purchase land and *takes title* in the wife's name, this merely opens the way for parol evidence to show that the husband intended a gift to the wife.²⁵ There was no such evidence offered here.

The divorce case of *Dillingham v. Dillingham*²⁶ involved a corporate situation. The corporation was wholly owned by the husband as his separate estate. Though a divorce court, of course, can make any reasonable division of the community or separate personalty that it sees fit,²⁷ here the court concluded that the corporate acquisitions were for the community estate and disposed of them accordingly.²⁸ In this refinement of the rule in *Norris v. Vaughn*²⁹ the court relied heavily on a 1945 opinion of the Attorney General³⁰ dealing with inheritance tax liability in a similar situation. It recognized that to hold otherwise would enable a party to evade Texas community property law by conducting business through an alter ego corporation.

Another business related situation was *Gillis v. Gillis*.³¹ In ascertaining the community estate made available for division on divorce, the court included the value of the husband's contracts to manage two mutual insurance companies. Using community funds, the husband had paid the former manager to step aside so that he could get the managerial contracts. Though the contracts were by their terms non-assignable and it would be contrary to a rule of the State Board of Insurance³² to market them, it was shown that such contracts are in fact very marketable and dealing in them is a common occurrence. Though the husband's position may not be "property" in the strict sense, it clearly has a value and it yields a definite profit. The husband could (with his powers) convert the two mutual companies into stipulated premium corporations in which he would eventually own all the stock.

In a recent California case it was concluded that a divorce court has the power to assign a portion of the husband's state retirement benefits to the wife notwithstanding a non-assignability provision of the retirement law.³³ This should be useful authority for those who seek to turn the tide of Texas cases which have reached the contrary conclusion.³⁴ Several new retirement plan cases came before the Texas appellate courts during the past year but none appears to have turned on a non-assignability argument. In

²⁵ *Higgins v. Johnson's Heirs*, 20 Tex. 389 (1857).

²⁶ 434 S.W.2d 459 (Tex. Civ. App.—Fort Worth 1968).

²⁷ See *Keene v. Keene*, 445 S.W.2d 624 (Tex. Civ. App.—Fort Worth 1969).

²⁸ It also noted that even if the interest had been mistakenly characterized as separate by the trial court, its division would have been upheld on appeal as a proper exercise of the divorce court's discretion.

²⁹ 152 Tex. 491, 260 S.W.2d 676 (1953).

³⁰ TEX. ATT'Y GEN. OP. NO. O-6595 (1945).

³¹ 435 S.W.2d 171 (Tex. Civ. App.—Fort Worth 1968).

³² *Id.* at 174.

³³ *Phillipson v. Board of Administration*, 80 Cal. Rptr. 411 (Ct. App. 1969).

³⁴ See McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 23 Sw. L.J. 44, 46 (1969).

each instance the interest in the plan was treated as a part of the community estate. In *Busby v. Busby*,³⁵ a separate suit following a divorce, the court partitioned the husband's past and future air force retirement benefits equally between the husband and the wife.³⁶ In *Webster v. Webster*³⁷ a similar result was reached, but since the couple had been married only twenty of the twenty-four years that the husband had served in the air force, the community interest in the military retirement plan was computed at 20/24ths of the whole amount.³⁸

In recent cases the courts of civil appeals have given a very broad application of the supreme court's decision in *Francis v. Francis*³⁹ which upheld the validity of a contractual property settlement between a husband and wife involving periodic post-divorce payments for the wife. At the end of his opinion in *Francis* Chief Justice Calvert made this observation: "Obligations of this type may be void or unenforceable for other reasons [than that they constitute permanent alimony] but none are urged here"⁴⁰ The court seems to be alluding to the situation when, for reasons of public policy (e.g., a contractual settlement to buy a divorce), fraud or duress—or the mere lack of any community property to divide—there would be no enforceable contract. But if the contract is not voidable and there is no attack on the consideration supporting the agreement, it would seem that any such contract is enforceable to sustain periodic payments to the wife *as her share of the community estate*. In neither *Brown v. Brown*⁴¹ nor *Gent v. Gmenier*,⁴² in both of which the contractual alimony was upheld, does it appear that the existence of a property interest to settle was disputed, though in the former it was argued that "the consideration . . . was the agreement . . . to obtain a divorce."⁴³ The acid test for *Francis* will be a case involving a property settlement when there was no existing "estate" to divide, though there is a large future earning potential in the husband.⁴⁴ But the enactment of the new non-fault ground for divorce⁴⁵ makes the need for "buying a divorce" less pressing and hence the incidence of such settlement agreements may be curtailed.⁴⁶ Furthermore, the

³⁵ 439 S.W.2d 687 (Tex. Civ. App.—Austin 1969).

³⁶ As the above discussion of *Dillingham* indicates, a *divorce* court could have made a *different* division based on justice and equity. See note 26 *supra*, and accompanying text.

³⁷ 442 S.W.2d 786 (Tex. Civ. App.—San Antonio 1969).

³⁸ In *Weaver v. Morris*, 442 S.W.2d 915 (Tex. Civ. App.—Eastland 1969), a collateral attack was made on a prior divorce decree, asserting error in allocating part of the husband's air force retirement pay to the wife on the ground that it did not consider time during marriage that the spouses resided in Texas. The decree was held not subject to collateral attack.

³⁹ 412 S.W.2d 29 (Tex. 1967).

⁴⁰ *Id.* at 33.

⁴¹ 442 S.W.2d 461 (Tex. Civ. App.—Eastland 1969).

⁴² 435 S.W.2d 293 (Tex. Civ. App.—Dallas 1968).

⁴³ 442 S.W.2d at 461.

⁴⁴ The foreign property settlement before the court in *Dicker v. Dicker*, 434 S.W.2d 707 (Tex. Civ. App.—Fort Worth 1968), involved the latter factor.

⁴⁵ TEX. FAMILY CODE ANN. tit. 1, § 3.01 (1969) (insupportability without reasonable expectation of reconciliation).

⁴⁶ See Comment, *Substitutes for Alimony—A Review of Methods for Providing Periodic Support Payments Subsequent to Divorce*, 20 BAYLOR L. REV. 314 (1968); Comment, *Permanent Alimony—Disguised in Property Settlement Agreements*, 11 SO. TEX. L.J. 269 (1969). The tax aspects of "contractual alimony" are treated by Bailey, *Tax Aspects of Texas Divorce*, 6 HOUS. L. REV. 148, 155 (1969). See also *Phinney v. Mauk*, 411 F.2d 1196 (5th Cir. 1969).

principle enunciated in *Andrews v. Andrews*⁴⁷ would seem to bar later attack on settlements made for "the purchase of freedom." There the court held that if the husband perpetrates a fraud on the divorce court by not divulging that a property settlement agreement was entered into *to buy a divorce*, equity will not allow him a bill of review to upset the judgment incorporating the property settlement. In an attack by the wife on a property settlement alleging fraud and misrepresentation of the value of the community estate, the court concluded in *Bell v. Bell*⁴⁸ that *res judicata* did not operate against her, but if the property settlement agreement was fair and reasonable to the wife it would not be set aside in spite of the misrepresentations.⁴⁹

Family Creditors. The continued appearance of the defense of coverture of a married woman in contract actions indicates how slow the impact of law reform can be⁵⁰ and sometimes word of statutory revision⁵¹ may not reach all the courts. As Professor Huie long ago remarked, the 1911 statute for the removal of disabilities of a married woman for mercantile and trading purposes⁵² was not on its face as clear as it might be and the decisions construing it were not as helpful as one might hope.⁵³ We now have a judicial interpretation of this old article seven years after its repeal. The San Antonio court of civil appeals concluded that emancipation under the statute did not relieve a married woman of the necessity of complying with the provisions of the statutes requiring the joinder of her husband and her execution of a separate acknowledgment when conveying her separate realty.⁵⁴

The exemption of the home from creditors' claims is one of the oldest institutions of Texas jurisprudence. In November 1970, the people of Texas will vote on a constitutional amendment passed at the last regular session of the legislature to raise the ground valuation of the urban homestead from \$5,000 to \$10,000. But whatever the valuation, the existence of the homestead must be established by the necessary requisites of the existence of a family, intention and occupation. The problem of the existence of a family and existence of a "homestead on a homestead" is presented in *Henry S. Miller Co. v. Shoaf*.⁵⁵ In a divorce proceeding the home was awarded to the wife. In such a situation when there are no children the house normally loses its homestead character. But at that time the wife's dependent mother was living with her and the court concluded that the "new" or "continuing separate" family existed *eo instanti* on the

⁴⁷ 411 S.W.2d 244 (Tex. Civ. App.—Fort Worth 1969).

⁴⁸ 434 S.W.2d 699 (Tex. Civ. App.—Beaumont 1968).

⁴⁹ Cf. *In re Estate of Harber*, 449 P.2d 7 (Ariz. 1969).

⁵⁰ See, e.g., *Sitton v. United States*, 413 F.2d 1386 (5th Cir. 1969).

⁵¹ See *Ace Rican Health Spas v. Patzakis*, 446 S.W.2d 743 (Tex. Civ. App.—Houston 1969).

⁵² Tex. Laws 1911, ch. 52, at 92 (repealed 1963).

⁵³ Annot., Huie, *The Community Property Law of Texas*, 13 TEX. REV. CIV. STAT. ANN. 1 (1960).

⁵⁴ *Brazell v. Tschirhart*, 438 S.W.2d 603 (Tex. Civ. App.—San Antonio 1969).

⁵⁵ 434 S.W.2d 243 (Tex. Civ. App.—Eastland 1968).

termination of the first family.⁵⁶ It has long been established that "the acquisition of unimproved property with the intention of its becoming homestead, followed in a reasonable time by acts evidencing that intention and the subsequent actual use and occupancy of the property as a homestead, impresses the homestead character upon the property from the moment of its acquisition"⁵⁷

A recent case⁵⁸ held that non-joinder of the wife is no defense to a mechanic's and materialman's lien when the contract for construction was made before the new homestead was occupied, even if most of the materials were delivered *after* occupancy.⁵⁹ A case involving the question of the extent of occupancy needed to make property a homestead was recently decided by the Austin court of civil appeals.⁶⁰ A couple repaired an existing dwelling and very briefly occupied it. They then moved to other premises which were not purchased until after the husband died. The Austin court concluded that the homestead interest was established and maintained.

The 1967 statutory revision of the matrimonial property law provided a judicial means for insuring that purchasers of community property have good title in various instances labeled "unusual circumstances."⁶¹ The correlative provisions in the Family Code are made specifically cumulative of existing rules.⁶² *Fort Worth v. Brandt*⁶³ is an example of the anomalous distinction between *Donaldson v. Meyer*⁶⁴ and *Reynolds Mortgage Co. v. Gambill*⁶⁵ in the operation of these existing rules. Relying on *Donaldson*, the Fort Worth court of civil appeals held that a conveyance of homestead property is *invalid* if made by a competent *wife* when the husband is incompetent, but not so adjudicated, and no necessitous circumstances to require sale exist. In *Reynolds* a conveyance by a sane *husband* of an insane wife in like circumstances was sustained. A rational explanation for the distinction is hard to come by. At the time these two cases were decided the husband would normally have been presumed to be the sole manager of the community property in issue were it not for its homestead character. That is still the normal situation today, but the 1967 reforms make it less likely. If this analysis provides any reason for the distinction drawn in the *Donaldson* and *Reynolds* cases, a determination that the com-

⁵⁶ As to the homestead exemption from state and county taxes, a recent Attorney General's opinion establishes that the responsibility for determining exemptions belongs to the county tax assessor-collector, though the commissioner's court of the county may take away an exemption. TEX. ATT'Y GEN. OP. No. M-328 (1969).

⁵⁷ *Harkrider-Keith-Cooke Co. v. Smith*, 284 S.W. 612, 614 (Tex. Civ. App.—Austin 1926), relying *inter alia* on *Cameron & Co. v. Gebhard*, 85 Tex. 610, 22 S.W. 1033 (1893).

⁵⁸ *Floyd v. Rice*, 444 S.W.2d 834 (Tex. Civ. App.—Beaumont 1969).

⁵⁹ As to an architect's position with respect to a mechanic's and materialman's lien, if he has no contract with the building contractor, has no written contract with the husband and wife, and does not supervise as the statute requires, he has no lien capable of perfection under the statute. *Lancaster v. McKenzie*, 439 S.W.2d 728 (Tex. Civ. App.—El Paso 1965).

⁶⁰ *Simank v. Alford*, 441 S.W.2d 234 (Tex. Civ. App.—Austin 1969).

⁶¹ TEX. REV. CIV. STAT. ANN. arts. 4617, 4618 (Supp. 1969), *replaced by* TEX. FAMILY CODE ANN. tit. 1, §§ 5.25, 5.83, 5.85 (1969). An example is when one spouse is incompetent, but not so adjudicated.

⁶² TEX. FAMILY CODE ANN. tit. 1, §§ 5.25(i), 5.86 (1969).

⁶³ 444 S.W.2d 210 (Tex. Civ. App.—Fort Worth 1969).

⁶⁴ 261 S.W. 369 (Tex. Comm'n App. 1924), *opinion adopted*; *cf.* *Magnolia Petroleum Co. v. Still*, 163 S.W.2d 268 (Tex. Civ. App.—Texarkana 1942), *error ref.*

⁶⁵ 115 Tex. 273, 280 S.W. 531 (1926).

munity property (on which the homestead is located) would be subject to the wife's sole management were it not for its homestead character might provide an argument that the authority of *Reynolds* should prevail over *Donaldson*⁶⁶ when the competent wife is the seller.

Nineteen sixty-seven legislation expanded the jurisdiction of domestic relations and juvenile courts in metropolitan areas to give them the same authority that district courts have in dealing with third party claims in family law disputes.⁶⁷ But even though third party creditors may now be joined in divorce actions in these courts, this does not give the divorce court discretion to absolve one spouse or the other from contractual liability entered into by that spouse.⁶⁸

An interesting situation developed in *Williamson v. Kelley*⁶⁹ as a result of a tax squeeze. There the widow in possession of the homestead which had been the separate property of her late husband, sought to have it sold and the proceeds re-invested because the property values had increased to a point that the payment of taxes had become extremely burdensome upon her.⁷⁰ The Fort Worth court of civil appeals held that equitable relief was unavailable in this circumstance, if the husband's heirs were unwilling to join in seeking relief. The court distinguished *Johnston v. Johnston*,⁷¹ where all parties in interest agreed to such a sale. To grant the widow the relief sought would deprive the heirs of their title to the realty without their consent. The heirs could insist on their rights at law and thus foreclose the operation of equitable principles.

Certain other post mortem problems involved non-homestead property. In *Gray v. Gray*⁷² the widow qualified as community administratrix in 1928. In 1960 the wife conveyed certain real property "individually and as community administratrix." The appellate court concluded that the community administratrix did not convey the husband's share of the community property since section 167 of the Probate Code⁷³ precludes the community administratrix from appropriating community property to her own benefit. This provision was added in 1955 and had not previously been before an appellate court for construction.⁷⁴ This is a salutary de-

⁶⁶ Another reason for the distinction is suggested in the Interpretative Commentary to section 157 of the Probate Code. It remarks that "fears concerning the business acumen of women" were reflected in the last three sentences of section 157 as enacted and until amended in 1957. TEX. PROB. CODE ANN. § 157, Interpretative Commentary (1956). For a complete analysis of the authorities, see Comment, *Conveying the Homestead Without Joinder of Both Spouses*, 20 Sw. L.J. 794, 806, 809 (1966).

⁶⁷ See generally TEX. REV. CIV. STAT. ANN. art. 2338 (Supp. 1969).

⁶⁸ *Broadway Drug Store v. Trowbridge*, 435 S.W.2d 268 (Tex. Civ. App.—Houston 1968). It may also be noted that in attempting to show that a former husband is liable for his wife's purchase of necessities, their divorce judgment is not admissible as a prior inconsistent statement to impeach the wife's testimony when the judgment did not reflect any statements of the wife and did not contain any statements of her attorney at the prior trial, and the attorney was not called as a witness. *Gabel v. Blackburn Operating Corp.*, 422 S.W.2d 818 (Tex. Civ. App.—Amarillo 1969).

⁶⁹ 444 S.W.2d 311 (Tex. Civ. App.—Fort Worth 1969).

⁷⁰ She had entered into an agreement to pay the taxes as part of a settlement of a prior dispute.

⁷¹ 276 S.W. 776 (Tex. Civ. App.—Dallas 1925).

⁷² 424 S.W.2d 309 (Tex. Civ. App.—Fort Worth 1968), *error ref. n.r.e.*

⁷³ TEX. PROB. CODE ANN. § 167 (1956).

⁷⁴ The Interpretative Commentary to section 167 merely notes that the last sentence of the sec-

parture from the old statute and the opinions construing it. In *Brunson v. Yount-Lee Oil Co.*⁷⁵ for example, the Texas supreme court held that the qualified community administrator had the power to sell community property regardless of the existence of community debts. "His bond and his fair dealing with the property are the protection," the court noted,⁷⁶ given to claimants thereafter.⁷⁷ By construing the conveyance in the limited sense that the court does in *Gray*, the potential for abuse by the qualified community administrator is greatly curbed. Fear of such abuses has caused courts to be reluctant to appoint community administrators and bonds have proved difficult to obtain.⁷⁸ The purchaser must see to his own protection. The difference between the unqualified community survivor and the qualified community administrator is considerably narrowed by this construction of section 167.⁷⁹

In *Meletio Electrical Supply Co. v. Martin*⁸⁰ a suit was brought by the executor of a decedent's estate to set aside a conveyance of two tracts of land to the decedent's widow as a transfer to defraud creditors. A judgment creditor of the decedent intervened on behalf of the executor. The court held that neither had standing to maintain an action to divest title from the grantee and place it in the decedent's estate. The executor stood in the shoes of the grantor who could not have maintained such a suit.⁸¹ The creditor's error was in failing "to seek to foreclose its judgment or otherwise subject the property allegedly fraudulently conveyed by the decedent to the payment of the debt"⁸² rather than attempting to divest title from the grantee to the executor.⁸³

II. CHILDREN

Adoption. It has been already noted⁸⁴ that the courts have had some difficulty in applying the opinion of the Texas supreme court in *Leithold*

tion was intended to forbid a community administrator from mortgaging the estate to secure his individual debts. TEX. PROB. CODE ANN. § 167, Interpretative Commentary (1956).

⁷⁵ 122 Tex. 237, 56 S.W.2d 1073 (1933).

⁷⁶ *Id.* at 243, 56 S.W.2d at 1075.

⁷⁷ See also *Beaton v. McFarland*, 134 Tex. 652, 134 S.W.2d 1058 (1940); *Fidelity Union Ins. Co. v. Hutchins*, 134 Tex. 268, 133 S.W.2d 105, 135 S.W.2d 695 (1940); *Patterson v. Twaddell*, 301 S.W.2d 680 (Tex. Civ. App.—Amarillo 1957), *error ref. n.r.e.*

⁷⁸ See TEX. PROB. CODE ANN. §§ 155, 168, 174, Interpretative Commentary (1956).

⁷⁹ On the community survivor's right to sell community property to pay community debts, see *Burns v. Burns*, 439 S.W.2d 452 (Tex. Civ. App.—Texarkana 1969). In *Coakley v. Reising*, 436 S.W.2d 315 (Tex. 1968), the supreme court noted *obiter* that in the *absence of debts* a widow-administratrix may maintain a suit in her individual capacity (as opposed to that of administratrix) as to the title to property of her late husband in which she maintains an interest.

⁸⁰ 437 S.W.2d 927 (Tex. Civ. App.—Waco 1969).

⁸¹ *Markward v. Murrah*, 138 Tex. 34, 156 S.W.2d 971 (1941); *John Hancock Mut. Life Ins. Co. v. Morse*, 132 Tex. 534, 124 S.W.2d 330 (1939); *Wilson v. Demander*, 71 Tex. 603, 9 S.W. 678 (1888).

⁸² 437 S.W.2d at 927.

⁸³ *Willis & Bro. v. Smith*, 65 Tex. 656 (1886); *Cobb v. Norwood*, 11 Tex. 556 (1854); *Heard v. McKinney*, 1 Posey 83 (Tex. Comm'n App. 1880); *Moore v. Belt*, 206 S.W. 225 (Tex. Civ. App.—Amarillo 1918). See also *Chandler v. Welborn*, 282 S.W.2d 940 (Tex. Civ. App.—Eastland 1955).

⁸⁴ *Rasor, Family Law, Annual Survey of Texas Law*, 23 Sw. L.J. 69, 70 (1969).

v. Plass.⁸⁵ However, some courts still appear to be encountering this difficulty.⁸⁶

Article 46(a)(6)⁸⁷ provides that a parent's consent to adoption may be dispensed with on proof of two years of abandonment and non-support of the child by that parent. These acts do not, however, make it mandatory for the judge to give his consent to adoption by another person. This is made abundantly clear in *Rubey v. Kuehn*⁸⁸ where the trial court withheld its consent to the adoption by the mother's new husband in spite of proof that the child's father abandoned and failed to support the child for two years. Giving the court all available views of the facts so that it can exercise its discretion properly is one of the principal reasons for giving notice to the non-consenting actual parent in the adoption proceeding. If there is no notice, there is no contest, and the court will not have all the necessary facts before it. The best interest of the child requires that all the facts should be fully developed.

The question of the necessity of the appointment of a guardian *ad litem* or attorney *ad litem* in adoption proceedings has twice been before the appellate courts in the last year.⁸⁹ In both instances the appellate court concluded that if representation were not sought for the infant in the trial court, no fundamental error had been committed by the failure to appoint a representative.⁹⁰

Parental Responsibility. In *Tbarp v. Tbarp*⁹¹ an appellate court for the first time considered the applicability of the statute requiring support of a child over eighteen years of age who needs custodial care⁹² when the decree of divorce and child support order were made prior to the enactment of the statute in 1961. The child was under eighteen at the time the original order was made and at the time the statute was enacted. After the effective date of the statute and after the child became eighteen the custodial parent sought to invoke the provisions of the statute. The Houston court of civil appeals distinguished the situation in *Ex parte Hatch*⁹³ where the Texas supreme court concluded that when the legislature raised the parental support age from sixteen to eighteen, children who had become eighteen before the statute was passed were not affected. In *Tbarp* the

⁸⁵ 413 S.W.2d 698 (Tex. 1967), discussed by Smith, *Family Law, Annual Survey of Texas Law*, 22 Sw. L.J. 115, 118 (1968).

⁸⁶ See, e.g., *McFarland v. Boyd*, 431 S.W.2d 41 (Tex. Civ. App.—Amarillo 1968).

⁸⁷ TEX. REV. CIV. STAT. ANN. art. 46(a)(6) (Supp. 1969).

⁸⁸ 440 S.W.2d 95 (Tex. Civ. App.—Houston 1969). But the child who gains a new father through adoption loses his right to workmen's compensation benefits for his actual father's death. *Patton v. Shamburger*, 431 S.W.2d 506 (Tex. 1968), noted in 6 Hous. L. Rev. 387 (1968).

⁸⁹ *Grider v. Noonan*, 438 S.W.2d 631 (Tex. Civ. App.—Corpus Christi 1969) (attorney *ad litem*); *Rethaber v. Baumann*, 433 S.W.2d 721 (Tex. Civ. App.—San Antonio 1968) (guardian *ad litem*).

⁹⁰ See Note, *Family Law—Change of Name Proceedings—Failure To Appoint Guardian Ad Litem for Minor Not Fundamental Error*, 22 Sw. L.J. 649 (1968).

⁹¹ 438 S.W.2d 391 (Tex. Civ. App.—Houston 1969).

⁹² TEX. REV. CIV. STAT. ANN. art. 4639a-1 (Supp. 1969).

⁹³ 410 S.W.2d 773 (Tex. 1967).

Houston court therefore concluded that the amendment was applicable to revision of the original court order to require support.⁹⁴

In *Frazier v. Levi*⁹⁵ a matter of parental responsibility as well as of public interest was raised in connection with a parental guardian's application for the sterilization of a mentally incompetent ward, her thirty-four-year-old mentally retarded daughter. The application was based wholly on social and economic grounds, as there were no medical or physical reasons shown for the operation. The parental guardian was a woman of poor health and unable physically, financially and emotionally to care for any more children of her ward. She and her husband were providing for the ward and the ward's two children, both of whom were also mentally retarded. The ward had the mentality of about a six-year-old child and was sexually promiscuous. Further, while she was unable to support herself or her children, she was in good physical health. The appellate court affirmed the trial court's refusal to grant the petition for sterilization under section 229 of the Probate Code which provides:

The guardian of the person is entitled to charge and control of the person of the ward, and the care of his support and education, and his duties shall correspond with his rights. It is the duty of the guardian of the persons of a minor to take care of the person of such minor, to treat him humanely, and to see that he is properly educated; and, if necessary for his support, to see that he learns a trade or adopts a useful profession.⁹⁶

The court, however, went on to intimate that if the legislature should adopt a statute authorizing sterilization with adequate due process safeguards, such a statute would be constitutional.⁹⁷

Several habeas corpus cases arose out of the failure to make child support payments. In *Ex parte Herring*⁹⁸ the court held that the trial court's order committing the husband for contempt did not afford him due process when he had no personal notice or knowledge of the hearing at which he was ordered to show cause for failure to support his child. It was not shown that he was deliberately avoiding service of process. In this instance his attorney was served with notice pursuant to rules 308-A and 21a,⁹⁹ but his attorney replied that she had not been recently with her client and

⁹⁴ The obverse of parental responsibility and care is parental liability for a wrongful act of the child. The doctrine of *respondeat superior* was deemed controlling in *Smith v. Cox*, 446 S.W.2d 52 (Tex. Civ. App.—Corpus Christi 1969). There, the seventeen-year-old, apparently unmarried (though married at the time of the trial) daughter of the defendant, was involved in an automobile collision in the course of performing a family errand on behalf of her parents. The father-principal was held responsible for the injuries proximately caused by his daughter's acts. Under TEX. REV. CIV. STAT. ANN. art. 4620 (1967), re-enacted as TEX. FAMILY CODE ANN. tit. 1, § 5.61(d) (1969), all community property of the parents would be liable for this *tortious* liability. It seems to have been assumed that the father was the principal in the transaction though the facts seem to indicate that the mother was the principal. But if the mother-principal had been the defendant, the results would have been identical.

⁹⁵ 440 S.W.2d 393 (Tex. Civ. App.—Houston 1969).

⁹⁶ TEX. PROB. CODE ANN. § 229 (1956).

⁹⁷ That the legislature is cognizant of related problems is borne out by the fact that during the last regular session statutes were passed allowing non-parental custodians of minor children to give consent for the child's medical treatment. TEX. REV. CIV. STAT. ANN. art. 4447h (Supp. 1969). In the instance of venereal infection, minors themselves may give consent for their own treatment. TEX. REV. CIV. STAT. ANN. art. 4445b (Supp. 1969).

⁹⁸ 438 S.W.2d 801 (Tex. 1969).

⁹⁹ TEX. R. CIV. P. 21a, 308-A.

that she did not regard service upon her, as his attorney, as being sufficient. The Texas supreme court concluded that such service was insufficient for the purposes of due process. It would be useful in such cases as these for the attorney for the respondent to report to the court an inability to contact the client.

A pair of habeas corpus proceedings in child support cases in courts of civil appeals touch on other aspects of such proceedings in those courts. In one¹⁰⁰ the petitioner's right to initiate an original proceeding in the appellate court was questioned because the grounds stated contradicted recitals in the judgment of the committing court. The relator asserted that no contempt motion was filed against him, that he was not served with notice and had no notice and that he had made no appearance personally or by attorney. The judgment recited that he had been duly cited and appeared. The appellate court held the judgment regular on its face and not subject to collateral attack by way of a writ of habeas corpus. In *Ex parte Fiedler*¹⁰¹ the right to initiate proceedings in a court of civil appeals pursuant to article 1824a¹⁰² as amended in 1969 was upheld. The relator asserted that he had been held in contempt in the face of his demonstrated inability to make the payments ordered. The amended statute confers concurrent jurisdiction on the courts of civil appeals and the supreme court to issue writs of habeas corpus in certain domestic relations cases. A petition for a writ of habeas corpus had been filed in a district court and denied. Though the relator had a right to appeal, it was held he could still seek an original writ if confined under a void judgment or order, as he alleged.¹⁰³

In the area of custody several cases dealt with well established general rules concerning change of custody, including the rule that venue properly lies where the custodian resides.¹⁰⁴ There were, of course, several cases dealing with the circumstances in which the plea of privilege as to venue is waived. In one¹⁰⁵ an order placing temporary custody of a child with the petitioning parent was held not to destroy the permanent custodian's right to a hearing in her county of residence on the *change* of custody. Nor would the permanent custodian's motion to increase child support and modify visitation rights made in conjunction with the non-custodian's

¹⁰⁰ *Ex parte Williams*, 446 S.W.2d 587 (Tex. Civ. App.—Houston 1969); *cf.* *Delgado v. Delgado*, 253 S.W.2d 708 (Tex. Civ. App.—San Antonio 1952).

¹⁰¹ 446 S.W.2d 698 (Tex. Civ. App.—San Antonio 1969).

¹⁰² TEX. REV. CIV. STAT. ANN. art. 1824a (Supp. 1969).

¹⁰³ A strong dissent was filed by Justice Cadena on the ground that the majority's construction of the statute would overwhelm the courts with habeas corpus proceedings. 446 S.W.2d at 702. Anticipating this argument, the majority pointed out that the same fears could have been raised as to prior law, that no such abuses had arisen, and if they should arise they could be controlled. It was pointed out that leave is required before a writ of habeas corpus is filed in either a court of civil appeals or the supreme court. *Id.* at 701.

¹⁰⁴ *Hagle v. Leeder*, 442 S.W.2d 908 (Tex. Civ. App.—Austin 1969); *Campbell v. Campbell*, 441 S.W.2d 658 (Tex. Civ. App.—Amarillo 1969); *Rucker v. Rucker*, 441 S.W.2d 317 (Tex. Civ. App.—El Paso 1969); *Czichos v. Meserve*, 438 S.W.2d 823 (Tex. Civ. App.—San Antonio 1969). *Hagle* also stands for the proposition that if the defendant is a married woman, she is deemed to live in the county where her husband lives and if he is in military service, venue lies in the county where he lived before joining the military service, in the absence of a showing that he had changed his residence.

¹⁰⁵ *Calloway v. Calloway*, 442 S.W.2d 926 (Tex. Civ. App.—Eastland 1969).

suit to change custody constitute a waiver of the permanent custodian's plea of privilege.¹⁰⁶ Nor would a motion of a divorced wife to have her former husband held in contempt for failure to comply with a divorce judgment constitute a waiver of the plea of privilege in the husband's counterclaim for change of custody.¹⁰⁷ When a change of custody proceeding was brought under the number and style of the prior divorce action and also mislabeled as a motion, it was held this would not constitute reversible error if objection was not made at the trial.¹⁰⁸

Three cases focus on *res judicata* and full faith and credit problems encountered in custody cases. In *Knowles v. Grimes*¹⁰⁹ the Texas supreme court reiterated the rule that a change of conditions is the paramount criterion in awarding a change of custody following a custody determination in another state. In that case, the paternal aunt and uncle of the child had been awarded custody by an Alabama court. A suit for a change of custody was filed in Texas in July following the Alabama decree made the prior January. The child was visiting her mother and stepfather pursuant to the decree when the suit was filed. The final judgment of the Alabama court was *res judicata* as to the best interests of the child under the conditions existing at the time of that decree. In the view of the trial court the fact that the mother was no longer employed, that she was more emotionally stable, and that there had been some improvement in home and financial circumstances were not sufficient to show a material change. The court of civil appeals reversed and rendered judgment in favor of the mother. The supreme court reversed, reinstating the conclusion of the trial court to the effect that there was no evidence of materially changed conditions. The court restated its 1963 conclusion that "as a matter of public policy, there should be a high degree of stability in the home and surroundings of a young child, and, in the absence of materially changed conditions, the disturbing influence of re-litigation should be discouraged."¹¹⁰ Further, a mere admission on the part of the Alabama custodian of the good character and motives of the actual parent would not constitute "changed circumstances."¹¹¹ But the Corpus Christi court of civil appeals in *Dobrmann v. Chandler*¹¹² reached a strikingly dissimilar conclusion to that of the supreme court in *Knowles* on very similar facts. *Dobrmann* was a habeas corpus proceeding brought by the father for custody of his three-year-old daughter. Custody had been awarded to the father by a North Dakota court. The mother had taken the child from North Dakota to Texas almost a year prior to the entry of the North Dakota judgment. Two months after the judgment the husband brought

¹⁰⁶ *Nixon v. Rohrback*, 438 S.W.2d 957 (Tex. Civ. App.—San Antonio 1969).

¹⁰⁷ *Hollingsworth v. Hollingsworth*, 441 S.W.2d 619 (Tex. Civ. App.—Amarillo 1969).

¹⁰⁸ *Huber v. Buder*, 434 S.W.2d 177 (Tex. Civ. App.—Fort Worth 1968).

¹⁰⁹ 437 S.W.2d 816 (Tex. 1969).

¹¹⁰ *Id.* at 817, citing *Mumma v. Aguirre*, 364 S.W.2d 220 (Tex. 1963), and *Ogletree v. Crates*, 363 S.W.2d 431 (Tex. 1963).

¹¹¹ The best interest of the child was also stressed as the vital factor in refusing an award of change of custody in *Blair v. Blair*, 434 S.W.2d 945 (Tex. Civ. App.—Dallas 1968). Here also a modest improvement in the mother's ability to care for children seven and eight years old and her improved mental condition was held not to warrant a change of custody given to the father.

¹¹² 435 S.W.2d 232 (Tex. Civ. App.—Corpus Christi 1968).

his habeas corpus proceeding in Texas. The jury found that a material change in conditions had occurred and that the best interests of the child required a change of custody. The only difference between *Dobrmann* and *Knowles* is that the trial court found a change of conditions in the latter but not in the former. The Corpus Christi court held that "the remarriage and the new home, along with other factors affecting this child's welfare, can amount to such a material change."¹¹³ In a case similar to *Dobrmann* the Fort Worth court followed *Knowles* in reversing the trial court's order to change custody when the record did not reveal evidence of materially changed conditions.¹¹⁴

That the presumption favorable to a child's being put in the custody of its actual parent will not become operative unless a change of conditions can be shown was also stressed in *Knowles*. Another facet of this presumption is illustrated by *Tiller v. Villasenor*.¹¹⁵ There the surviving mother sought custody of her children after the death of the father. The court said that there was a rebuttable presumption that the best interests of the children would be served by awarding them to their actual parent, but it is not necessary to prove that the actual parent was disqualified as unfit to rebut this presumption. The presumption could be rebutted by the children's preference for living with their uncle, even if they said they loved their mother.

Juvenile Delinquency. In *E.S.G. v. Texas*¹¹⁶ the language of the statute defining a delinquent child was attacked as unconstitutionally vague. The statute provides that "any child who . . . habitually so deports himself as to injure or endanger the morals or health of himself or others" is a delinquent.¹¹⁷ The majority of the San Antonio court rejected this argument, but it was enthusiastically adopted in a strong dissent by Justice Cadena.¹¹⁸ He does not note, however, that the Arizona statute under which young Gault¹¹⁹ was adjudged a juvenile delinquent¹²⁰ contains language identical to that of the Texas statute under attack.¹²¹ In *Gault* there was no attack on this provision as the other ground on which the child was declared delinquent was not deemed subject to attack as unconstitutionally vague.

¹¹³ *Id.* at 235. A strong dissent was registered by Justice Sharpe. As he points out, it is not clear what the "other factors" were in this case. *Id.* at 237.

¹¹⁴ *Reinhart v. Mancuso*, 447 S.W.2d 716 (Tex. Civ. App.—Fort Worth 1969).

¹¹⁵ 426 S.W.2d 257 (Tex. Civ. App.—Houston 1968).

¹¹⁶ 447 S.W.2d 225 (Tex. Civ. App.—San Antonio 1969).

¹¹⁷ TEX. REV. CIV. STAT. ANN. art. 2338-1, § 3(f) (Supp. 1969).

¹¹⁸ 447 S.W.2d 225, 227 (Tex. Civ. App.—San Antonio 1969). Among other authorities he cites Barrett, "Delinquent Child": A Legal Term Without Meaning, 21 BAYLOR L. REV. 352 (1969). He appears to have missed the concurring opinion of Justice Johnson in *Leach v. State*, 428 S.W.2d 817, 821 (Tex. Civ. App.—Houston 1968), where the same conclusion was reached.

¹¹⁹ *In re Gault*, 387 U.S. 1, 8-9 (1967), discussed in Rasor, *Family Law, Annual Survey of Texas Law*, 23 SW. L.J. 60, 60 (1969), and Steele, *Criminal Law and Procedure, Annual Survey of Texas Law*, 22 SW. L.J. 211, 213-15 (1968). See also Tenney, *The New Dilemma in the Juvenile Court*, 47 NEB. L. REV. 67 (1968); Comment, *Application of Gault: Its Effects on Juvenile Delinquency Proceedings in Texas*, 20 BAYLOR L. REV. 113 (1968).

¹²⁰ ARIZ. REV. STAT. ANN. § 8-201-6(d) (1956).

¹²¹ The social worker's report was phrased almost exactly like the statute. Cox, *Lawyers in Juvenile Court*, 13 CRIME & DELINQUENCY 488, 491 (1967).

The theme of *Gault* pervades in many of the juvenile delinquency cases. In a recent civil appeals case¹²² the district judge revoked a juvenile's probation and the juvenile appealed. The Fort Worth appellate court concluded that since the juvenile did not have counsel and was not advised of his right to counsel in the juvenile proceedings, the original adjudication was invalid and hence there was no probation to revoke.¹²³

*Ciulla v. Texas*¹²⁴ was a case of evidence illegally obtained in the arrest of a juvenile. The juvenile was arrested for a minor traffic offense and signed the citation agreeing to make an appearance as directed. As to the traffic violation he should then have been released. But the officer, apparently having suspicions about the ownership of the automobile, took the youth to the police station and turned him over to the juvenile authorities. He was not taken before a magistrate. About five hours later the juvenile's person was searched without his consent or a search warrant and marijuana was found. On an appeal taken on an adjudication of delinquency, it was concluded that the arrest was made without probable cause. It was further found that the juvenile should have been immediately taken before a magistrate. Hence the appellate court held that the marijuana could not be admitted into evidence. This case enunciates the proposition that a juvenile has the same rights as an adult to the application of the exclusionary rule for illegally obtained evidence.¹²⁵ The court also intimates that if the arrest had been properly made, the failure to take the juvenile before a magistrate would have produced the same result. This would go further than the Texas Court of Criminal Appeals has gone with respect to its interpretation of articles 14.04 and 15.17 of the Code of Criminal Procedure.¹²⁶ The Fifth Circuit Court of Appeals appears to agree with the Texas Court of Criminal Appeals.¹²⁷

The Amarillo court of civil appeals concluded with regard to burden of proof in juvenile delinquency cases that proof beyond a reasonable doubt was necessary.¹²⁸ But the Texas supreme court reversed,¹²⁹ holding that juvenile delinquency need be proved only by a preponderance of the evidence, the normal civil standard.¹³⁰

¹²² *Gutierrez v. State ex rel. Wichita County*, 433 S.W.2d 777 (Tex. Civ. App.—Fort Worth 1968).

¹²³ See also *Leach v. State*, 428 S.W.2d 817 (Tex. Civ. App.—Houston 1968), noted in 22 Sw. L.J. 889 (1968).

¹²⁴ 434 S.W.2d 948 (Tex. Civ. App.—Houston 1968).

¹²⁵ See TEX. CODE CRIM. PROC. ANN. art. 38.23 (1966).

¹²⁶ *Corbin v. State*, 426 S.W.2d 238 (Tex. Crim. App. 1968); *Hearn v. State*, 411 S.W.2d 543 (Tex. Crim. App. 1967); TEX. CODE CRIM. PROC. ANN. arts. 14.04, 15.17 (1966).

¹²⁷ See *Ganez v. Beto*, 406 F.2d 1000 (5th Cir. 1968). In *Mallory v. United States*, 354 U.S. 449 (1957), the federal exclusionary rule is defined generally, and in *McNabb v. United States*, 318 U.S. 332 (1943), the Supreme Court applied the federal exclusionary rule to the states. But there is nothing there said about that part of *Mallory* dealing with taking prisoners before a state magistrate.

¹²⁸ *Santana v. State*, 431 S.W.2d 558 (Tex. Civ. App.—Amarillo 1968).

¹²⁹ *State v. Santana*, 444 S.W.2d 614 (Tex. 1969) (three justices dissented), noted in 23 Sw. L.J. 914 (1969).

¹³⁰ The issue was raised but not ruled on in *DeBacker v. Brainard*, 396 U.S. 28 (1969). The answer may be forthcoming in *In re Winship*, 90 S. Ct. 179 (1969), where the Supreme Court noted probable jurisdiction.

Transfers of juveniles to district court to stand trial as adults¹³¹ were scrutinized in two cases involving allegations of homicide.¹³² *Dillard v. Texas*,¹³³ the later and more significant of these cases, involved a juvenile who at sixteen committed the acts alleged and at that age the juvenile court waived jurisdiction and transferred him to district court for trial as an adult. In the hearing before the juvenile court the state did not pursue its delinquency petition but merely sought a transfer. Thus no adjudication of delinquency was made but the transfer was ordered. While his appeal from the order was pending, he became seventeen. The appellate court concluded that the prisoner's attaining age seventeen made the cause moot and hence any errors committed in the juvenile court were beside the point. In a concurring opinion Justice Johnson expresses his concern for the present state of the Juvenile Act and its operation. Since the Act does not state whether age at the time the act is committed or at the time of trial is controlling, waiting to take action against a juvenile offender until he is seventeen allows the Juvenile Act to be circumvented.

In *In re Gutierrez*¹³⁴ the Fort Worth court of civil appeals held that a juvenile delinquent was properly refused bond pending his appeal from commitment ordered in a delinquency proceeding. The court rested its decision on the discretion given the trial judge. Section 21 of the Juvenile Act provides that an appeal from the juvenile court will not discharge the juvenile from custody "unless that court shall so order. However, the appellate court may provide for a recognizance bond."¹³⁵ Allowance of a bond pending trial in the juvenile court is not provided for by statute; the child is either released or detained.¹³⁶ The right to bail in general is essentially an issue of equal protection and is currently unresolved as a United States constitutional issue. In Texas criminal law, apart from capital cases where proof is necessary, bail is a matter of right. Under Texas law prior to the enactment of juvenile delinquency legislation an offender under seventeen years of age was not subject to capital punishment and all accused persons under seventeen were therefore entitled to bail.¹³⁷ Texas is by no means alone in its handling of this problem.¹³⁸

In *Ciulla v. Hardy*¹³⁹ the question was that of the duty of a district clerk and juvenile court reporter to prepare and furnish a transcript and statement of facts in a juvenile case when there is a showing that the child

¹³¹ Pursuant to TEX. REV. CIV. STAT. ANN. art. 2338-1, § 6 (Supp. 1969); see Mountford & Berenson, *Waiver of Jurisdiction: The Last Resort of the Juvenile Court*, 18 KAN. L. REV. 55 (1969).

¹³² *Dillard v. State*, 439 S.W.2d 460 (Tex. Civ. App.—Houston 1969); *In re Buchanan*, 433 S.W.2d 787 (Tex. Civ. App.—Fort Worth 1969).

¹³³ 439 S.W.2d 460 (Tex. Civ. App.—Houston 1969). For further discussion of *Dillard*, see Comment, *Trial of Juveniles as Adults—Past, Present and Future*, 21 BAYLOR L. REV. 333, 340 (1969).

¹³⁴ 431 S.W.2d 428 (Tex. Civ. App.—Fort Worth 1968).

¹³⁵ TEX. REV. CIV. STAT. ANN. art. 2338-1, § 21 (1964).

¹³⁶ *Id.* § 11.

¹³⁷ *Wilcox v. State*, 32 Tex. Crim. 284, 22 S.W. 1109 (1893); *Walker v. State*, 28 Tex. Crim. 503, 13 S.W. 860 (1890); *Ex parte Walker*, 28 Tex. Crim. 246, 13 S.W. 861 (1890).

¹³⁸ See Comment, *In re Gault and the Persisting Questions of Procedural Due Process and Legal Ethics in Juvenile Courts*, 47 NEB. L. REV. 558, 573 (1968).

¹³⁹ 431 S.W.2d 364 (Tex. Civ. App.—Houston 1968).

and his parents are unable to pay the cost of a transcript. The Houston court of civil appeals held that the clerk should furnish the transcript without cost and the child by his next friend was entitled to perfect the appeal without giving security for costs.¹⁴⁰

¹⁴⁰ See also *Lee v. McKay*, 414 S.W.2d 956 (Tex. Civ. App.—San Antonio 1967), commented on by Steele, *Criminal Law and Procedure, Annual Survey of Texas Law*, 22 Sw. L.J. 211, 214 (1968). It is worthy of note that at its last regular session the legislature enacted legislation codifying the rule in *Ciulla*. TEX. REV. CIV. STAT. ANN. art. 2338-1, § 21-A (Supp. 1969). See Tex. Laws 1969, ch. 171, at 505, for provisions of a new § 7-B of the same article, providing for counsel for the indigent juvenile.