SUPREME COURT, U. S.

In the

Supreme Court of the United States

LINDA GOMEZ, INDIVIDUALLY AND AS NEXT FRIEND OF ZORAIDA GOMEZ,	)	
Appellant,	)	
v.	)	No. 71-575
FRANCISCO OCASIO PEREZ,	)	
Appellee.	)	

Washington, D.C.
December 6, 1972

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LINDA GOMEZ, INDIVIDUALLY AND AS NEXT FRIEND OF ZORAIDA GOMEZ, Appellant v. FRANCISCO OCASIO PEREZ, Appellee	No. 71-575

Washington, D. C.

Wednesday, December 6, 1972

The above-entitled matter came on for argument at 10:49 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

STANLEY DALTON WRIGHT, ESQ., Bexar County Legal Association, 203 W. Nueva Street, San Antonio, Texas 78207, for the Appellant.

JOSEPH JAWORSKI, ESQ., 1808 First City National Bank Bldg., Houston, Texas 77002, for the Appellee.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments in 71-575, Gomez against Perez.

Mr. Wright, you may proceed.

ORAL ARGUMENT OF STANLEY D. WRIGHT, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. WRIGHT: Mr. Chief Justice, and may it please the Court:

When Linda Gomez met Francisco Perez in 1968, I submit that she at that time did not consciously think that she could have a child and hopefully get support for an illegitimate child. The law of the State of Texas, of course, at that time and, of course, to now has been construed to provide squarely to the contrary.

I wish to begin by reciting from a Texas case, Beaver v. State, which I think illustrates the attitude of the Texas courts and therefore the present Texas law on the subject of illegitimacy. When the word "child" or "children" is used in a statute, unless the statute clearly reflects to the contrary, it means a legitimate child or children only. While there is some conflict of authorities upon the meaning of the word "child" when used in a statute, deed, or will, the decided weight of authority is in favor of the construction that the use of such word refers alone to legitimate children.

The Texas court --

QUESTION: I am not sure I follow your point on that. Is this true in virtually all the States?

MR. WRIGHT: Yes, your Honor, it is true in most States. The difference is that in most States, the statutes of the States have provided for support for illegitimate children, have also provided for inheritance by illegitimate children. And, of course, the statutes under attack in the cases Levy v. Louisiana, Glona, and Weber all dealt with statutes which precluded support for illegitimate children.

My purpose in reading that cite, of course, was only to succinctly state the Texas law on the subject of illegitimacy. I did not intend to recite that for any unique proposition of law. That particular cite does give, I think, the best illustration of the status of illegitimates in Texas.

The Texas courts have taken that attitude for reasons which are not to me clear. Apparently, and in the lower court opinion in this case, the primary consideration of the courts has been that to determine paternity would require very stringent evidence problems for which the courts are not adequate to deal with at this point. The courts have asked that legislation be passed in order to provide proper safeguards to determine paternity rather than use the common law rules of evidence.

In dealing with this subject, I submit that problems of proof such as the issue of paternity in the State of Texas

first of all should not be a valid consideration in refusing to determine constitutional rights.

Secondly, I submit that the problems of proof which the courts refused to deal with in determining paternity for purposes of support for illegitimates in the State of Texas are problems of proof that the courts in the State of Texas have dealt with and are dealing with today and will continue to deal with. Therefore, the refusal to meet these problems of proof for purposes of support for illegitimates is an invidious discrimination.

An example of the situations in which this area, this problems of proof area, is dealt with daily by the Texas courts can be found in the cases of James v. James, 253 SW 1112, in which the Court found not only paternity, but also found legitimation of the child. Therefore, the child did inherit part of the paternal grandparents' estate.

The case of Robinson v. Seales, 1923 Civil Appeals opinion, as was the case of James v. James, found at 242 SW 754 was another case dealing with the legitimation of a child pursuant to what is now Section 42 of the Probate Code. Again in that case the Court dealt with the issue of paternity, resolved the issue of paternity, dealt with and resolved the issue of legitimation in favor of the child. And again the child participated in the distribution of an estate.

Ray v. Thompson is another case dealing with real

property in which again the issue of paternity was met and resolved by the Court. In that case at page 196 of 261 S.W.2d, it was a 1953 case, in the actual opinion of the Court of Civil Appeals it states that the lower court's findings of fact was, one, that Lula Mitchell Thompson was the daughter of General Mitchell. Again, we have a Texas court confronted with and dealing with and resolving the issue of paternity of a child. I do not therefore believe that the problems of proof argument is a rational relationship to justify the State's present policy in not dealing with and allowing for support for illegitimates.

I could give many other cites on that subject. I do have many other cites in my brief on that subject to illustrate the fact that the courts, by saying that the problems of proof are too great are incorrect and are inconsistent with their own policies and their own decisions daily.

The problems of proof argument does have one other aspect which I would like to deal with, and that is under present Texas law if Linda Gomez had asserted a common law marriage relationship, if we could have in the lower courts stated that the necessary intent existed on her part to create the common law marriage relationship, then in spite of the fact that Francisco Perez was a married man, we would have been able to claim a putative relationship and under Texas law we would have been able to have a judicial declaration

that that putative relationship existed; we would have therefore had a legitimate child and we would have been able to obtain support.

If we had taken that approach, the problems of proof which the Court would have faced would have not only been the issue of paternity itself and whether or not support should be allowed, the Court would also have been required to deal with the intent of Linda Gomez, another very serious and another very stringent determination on their part.

Therefore, I am saying merely that in the problems of proof area, what we are asking the Court to do in allowing for support for illegitimates is not something which would be a severe burden on the courts, not something which would be a greater burden on the courts than the burdens which these courts face daily on the very subject that we are dealing with today.

Section 42 of the Probate Code which I mentioned deals with legitimation of a child. It's the only statute in the State of Texas dealing with legitimation and allows for legitimacy of a child if the parents of that child subsequent to the birth of the child marry. In that situation there is no presumption of legitimacy such as we have in the ceremonial marriage or the common law marriage in which a child is born subsequent to the creation of the marriage. Without the benefit of the presumption in any divorce action, the courts

where Section 42 of the Probate Code comes into play are required to deal with the issue of paternity and resolve it and also resolve issues of support.

QUESTION: (Inaudible)

MR. WRIGHT: Yes.

QUESTION: Therefore, ...involve the constitutionality of the State statute whose constitutionality your State Court has upheld. That would provide jurisdiction for appeal.

MR. WRIGHT: Yes.

QUESTION: And yet I understand that at the time you brought this lawsuit, that statute was not in effect, and I can't find anywhere in the opinion or dissenting opinion of the Texas Court where the statute was even mentioned.

MR. WRIGHT: The jurisdictional basis for an appeal rather than writ of certiorari, I believe, is found in Article I of the Texas Civil Statutes. Article I is a statutory adoption of the common law. Admittedly, it is the common law principle that we are facing each day.

QUESTION: It is dealing here with Texas common law which says that the mother of an illegitmate child cannot collect money from the putative father of the child. Is that it?

MR. WRIGHT: That's correct.

QUESTION: Common law.

MR. WRIGHT: That's correct. I do believe Article I

is a sufficient statutory basis --

QUESTION: Well, that would give sufficient statutory basis, I suppose then, to make any decision of your courts appealable as of right.

MR. WRIGHT: Yes.

QUESTION: Wouldn't it?

MR. WRIGHT: That's correct.

QUESTION: Do you think that statute goes that far to make every decision of the Texas courts involving State common law appealable as a right here by contrast to the other 49 States where you have to petition for certiorari?

MR. WRIGHT: I, of course --

QUESTION: That makes Texas a very special State.

MR. WRIGHT: I, of course, could not argue for such a construction.

QUESTION: That's the thrust of your argument. That's where it leads, isn't it?

MR. WRIGHT: That's correct. 4.02, which was not in existence at the time, did have, of course, predecessors. 4.02 of the Family Code was part of a comprehensive code which became effective in January 1970. Prior to that there were various civil statutes on the subject of marriage, on the subject of divorce, and, of course, on the subject of child support.

If this Court were to consider there be jurisdictional

problems in this matter, I would submit that pursuant to 28 U.S.C. 2101 that if in fact we should not have brought our case to this Court by means of appeal, that that issue alone is not sufficient for the Court to refuse to hear and decide this action and that Section 2101 will allow for this Court to treat the direct appeal approach as a writ of certiorari.

QUESTION: (Inaudible) writ research, then we would still be in a position to deal with it, not pro temp as though we had it before us initially, would we not?

MR. WRIGHT: Yes, Mr. Chief Justice. In the case of Edward Garrity v. State of New Jersey, 385 U.S. 493, I believe, there is a good illustration of the fact that the Court at any time can treat the appeal as a writ of certiorari, dismiss the appeal, assume the writ of certiorari and go to the merits of the case and determine them.

QUESTION: Your basic claim is an equal protection claim, twofold, is it not?

MR. WRIGHT: Yes, Mr. Justice.

QUESTION: Do you understand that your Court dealt with that claim? In their opinion they seem to just simply be dealing with the fact that the common law of Texas did not allow recovery by the mother of an illegitimate child from the putative father of that child without any consideration at all as to what, if any, were the rights of the mother of a legitimate child to recover from the father.

MR. WRIGHT: The Court of Civil Appeals in this case did, of course, have a very brief opinion, with the exception, of course, of the dissenting opinion of Mr. Justice Cadena, and we, of course, did assert and it can be shown by the record, we did assert in the appeal, in the Motion for Rehearing and the Application for Writ of Error to the Texas Supreme Court, we did assert our equal protection argument. The fact that the Court of Civil Appeals refused to discuss the argument in its opinion, I do not believe can be considered to be a refusal by the Court to hear the case.

QUESTION: You did raise it in the trial court, did you?

MR. WRIGHT: It was raised in the trial court.

QUESTION: Was it taken to the trial court in Texas in your initial submission or only on rehearing?

MR. WRIGHT: Mr. Justice, it was taken to the Fourth Court of Civil Appeals which granted a -- or which rendered a 2-page opinion, the minority opinion.

QUESTION: It was presented to them?

MR. WRIGHT: Yes, Mr. Justice. It was decided --

QUESTION: In The opinion in the jurisdictional statement where that opinion appears, they certainly do treat it, say you have made the contention, although they don't deal with it.

MR. WRIGHT: Yes, Mr. Justice. They do state on

page 41 of that opinion, "Appellant asserts that such judgment denying such child the support of her father constitutes a denial of equal protection of law under the Fourteenth Amendment of the United States Constitution." That opinion can be found --

QUESTION: On this point, are you asking to hold the Texas statute unconstitutional?

MR. WRIGHT: Mr. Justice, that issue was presented in the responsive brief in this matter, and I do not assert that the statute itself, 4.02 of the Family Code, should be declared unconstitutional.

QUESTION: When was that effective?

MR. WRIGHT: 4.02 was effective on the 1st of January 1970.

The Court of Civil Appeals decided the case March 10, 1971.

QUESTION: 4.02 was the law of Texas at the time the Court of Appeals acted.

MR. WRIGHT: At the time the Court of Appeals acted.

QUESTION: And wouldn't you suppose that the case would be decided in accordance with the then existing law?

MR. WRIGHT: Yes, Mr. Justice.

QUESTION: That is, Section 4.02 was construed not to extend liability to the putative father in this case.

MR. WRIGHT: That is correct, Mr. Justice.

QUESTION: You brought your lawsuit on September 18, 1969, before the effective date of the statute.

MR. WRIGHT: Yes.

QUESTION: The statute, so far as I can find, wasn't mentioned in the trial court or the appellate court and it was not in existence at the time you brought your lawsuit.

QUESTION: But it was in existence when the appellate court made its decision?

MR. WRIGHT: Yes, Mr. Justice.

QUESTION: Did you even mention the statute there, 4.02?

MR. WRIGHT: In the appellate court. Yes, Mr. Justice. The brief in the Court of Civil Appeals, Fourth Court of Civil Appeals, did mention the statute as I recall.

QUESTION: (Inaudible) mentioned.

MR. WRIGHT: In the majority opinion, that is correct, Mr. Justice.

QUESTION: The Court dealt with the common law of Texas that held that --

MR. WRIGHT: That's correct, Mr. Justice.

QUESTION: It didn't contrast what the rights be of a legitimate mother against the father of a legitimate child, if any.

MR. WRIGHT: That is correct, Mr. Justice.

QUESTION: You did, you say, cite 4.02 in your

brief to the appellate court?

MR. WRIGHT: As I recall, 4.02 was mentioned in the merit brief.

QUESTION: In the opinion is a sentence, "At the present time there is no Texas statute imposing on the father the duty to support and maintain an illegitimate child." Now, since 4.02 at the present time was on the books, can we take it that that is an interpretation of 4.02?

MR. WRIGHT: Yes, Mr. Justice, it's either an interpretation of -- well, it obviously is an interpretation of 4.02 contrary to our assertions. We asserted that 4.02 could apply to the illegitimate.

QUESTION: That's why you say that 4.02 as construed is unconstitutional?

MR. WRIGHT: Yes, Mr. Justice. However, if we were in fear that a ruling on 4.02 would of necessity require striking down 4.02 as totally unconstitutional thereby relieving all fathers of support obligations, then I submit that we could treat this matter as a writ of certiorari and decide the common law of Texas and leave 4.02 in existence.

QUESTION: But for constitutional purposes under the Fourteenth Amendment, it doesn't make any difference whether the Texas rights are given or denied by statute or by common law, does it?

MR. WRIGHT: That's correct, Mr. Justice. I believe

that the case of Shelley v. Kraemer is a very good example of the ability of the court and the jurisdiction of a court to deal strictly with common law issues.

QUESTION: I don't think you can successfully maintain that even though the statute of Texas may satisfy equal protection, nonetheless we just want the common law analyzed, and if that doesn't satisfy equal protection, strike that down. I think you have got to take the statute and common law together for purposes of your equal protection claim, don't you?

MR. WRIGHT: It was not my opinion that we would necessarily have to take both together. We, of course, also in the State of Texas have 602 --

QUESTION: If you had accepted the construction of 4.02 to the effect that 4.02 simply doesn't reach the duties of an unwed father, it deals only with spouses and married people, and you have to look elsewhere for the duty, if any, of an unwed father, if that's the position, then you are then dealing with some non-statutory law of Texas, as Mr. Justice Stewart says.

MR. WRIGHT: As is illustrated by the mother's liability in the State of Texas for support of illegitimates --

QUESTION: Under what law or statute? How do we know she had any liability? Or how, indeed, do we know that the father of a legitimate child had any liability prior to

the enactment of 4.02?

MR. WRIGHT: The case of Galveston Railway v. Walker, I believe, is cited for the proposition that the mothers of illegitimates do have liability for support of those children. They may be sued for necessaries, of course. Yet this exists outside 4.02 of the Family Code and outside 602 of the Penal Code.

Then it seems that any obligation on the part of a father of an illegitimate could as easily and as well exist outside.

QUESTION: If the father of an illegitimate child had custody of the child, could he sue the mother for the child's support? That's the left side of this coin.

MR. WRIGHT: That's my interpretation of the law.

QUESTION: There is no court decision interpreting the law?

MR. WRIGHT: There are no decisions I am aware of. Of course, this may be due to the fact that the father of an illegitimate was always considered not to have any rights. The case of Stanley v. Illinois, I believe, does change that in the State of Texas, and I do believe pursuant to that case that the father of an illegitimate may have custodial privileges now in the State of Texas.

This again presents another problem pursuant to Texas law which I have dealt with in the brief. If the

father of an illegitimate does have custodial rights to that child, Article 2330 of the Texas Civil Statutes is the article whereby the State or an individual party can terminate parental privileges. The basis for that would be abandonment or, in the alternative, nonsupport of that child. If a father of an illegitimate does have custody of that child and at the same time does not, under Texas law, have any obligation to support that child, then in the State of Texas we are going to have fathers with custodial rights not subject to termination for failing to provide adequate support for the children. If the Texas courts are not willing to accept such a gross result, then I believe the Texas courts under the present law will not, as a matter of course, blanketly grant support obligations on behalf of illegitimates running to the father. What they may do is simply state that the father of an illegitimate with custody does have the obligation of support and thereby parental privileges can be terminated pursuant to 2330. This, of course, would be a totally irrational relationship. The State would have no sound basis for saying that only those fathers with custody should have obligations of support.

I briefly want to mention that the responsive briefs filed state that the State and the respondent state that there is no insurmountable barrier in the State of Texas for support for illegitimates, and they state that a child

whose parents afterward marry or whose parents had or have had a common law marriage therefore can require support from the father for the child. Of course, that is not the category of children that we are dealing with today. The legitimation statute, Section 42 of the Probate Code is the statute referred to in the fact that the parties may afterward marry. The common law marriage can be created.

But in both of these situations the children we are dealing with there and the children who can get support from fathers are not illegitimate children, such as the appellant in this case.

I briefly would like to state that this Court can determine this issue in our favor regardless of the equal protection test used, whether it be a rational relationship test or a compelling interest test. The rational relationship test, I believe, is satisfied in our case simply by the classification itself.

QUESTION: It's not clear to me where you find the classification. Certainly 4.0 doesn't make a classification. It says each spouse has the duty. And I suppose if two people are not married, then they are not spouses, neither the mother nor the father.

MR. WRIGHT: That's correct, Mr. Justice. The classification is, of course, contained in the case law in the State of Texas. Any statutory --

QUESTION: You just told me there is no case that says that a father who has custody of an illegitimate child can collect support from the mother. And until and unless that were the case law of Texas, you wouldn't have any equal protection claim, would you?

MR. WRIGHT: Yes, Mr. Justice. I believe -- I thought that I had explained the absence of any cases to that effect. I do believe that would be the law in the State of Texas.

QUESTION: It might be some day, but we don't sit here to deal with speculative questions like that.

MR. WRIGHT: Yes, Mr. Justice. Inasmuch as the fathers have never had custodial rights to begin with in the State of Texas --

QUESTION: The person with custody of a child has the obligation of support, man, woman, or great aunt.

MR. WRIGHT: This should be the Texas law. I assume when that is confronted by a Texas court, that will be the decision. But taking the present Texas law and taking the case of Stanley v. Illinois and taking Article 2330 of the Civil Statutes and combining them, I would say that it is entirely possible for the father of an illegitimate to have custodial rights and not legally have the support burden, a totally inconsistent result.

QUESTION: So what happens in Texas is that law

evolves in the future. That's what you are telling us, isn't it?

MR. WRIGHT: That's correct, Mr. Justice.

QUESTION: We would have to guess.

MR. WRIGHT: But the classification by the case law of legitimate children and illegitimate children alone in determining support obligations is, of course, the primary classification we are attacking. There is no rational relationship between the needs of the child and the fact that the parents of that child chose not to perform a marriage ceremony,not even formulate the necessary intent to create a marriage. The parties may be guilty of wrongdoing, but I do not see how the courts in the State of Texas can say the illegitimates themselves are guilty of any wrongdoing.

QUESTION: In this very case, the illegitimate child is denied a support order against the father. Is that right?

MR. WRIGHT: That's correct, Mr. Justice.

QUESTION: And what you are complaining is by official rule, that's the rule in Texas.

MR. WRIGHT: In effect, that's correct, Mr. Justice.

QUESTION: Whereas, whether under 4.02 or whatever it may be, had this child been a legitimate child of the father, she would have gotten an order for support. Is that it?

MR. WRIGHT: That's correct.

QUESTION: Therefore, there is the discrimination, isn't it?

MR. WRIGHT: This is the discrimination we are attacking.

QUESTION: We don't have to knock 4.02 down. All you have to show, it seems to me, is that because this child was illegitimate, she is not getting a support order that were she legitimate she would get from this very defendant.

MR. WRIGHT: That's correct, Mr. Justice. And I believe on that basis, we can leave 4.02 in existence.

QUESTION: Then why get yourself all tangled up in 4.02? I don't understand it. You don't have to.

MR. WRIGHT: That's correct. And to be honest, I must agree. I did not take part in preparation of the jurisdictional statement, and accordingly did not wish to delete anything at the brief on the merits. And I do hope the Court will consider, if necessary, the possibility of treating this matter as having come up on a writ, determine the merits of the matter whether it be -- well, of necessity it would be the common law -- determine the merits of the matter in our favor.

QUESTION: Where do you say we can find the law of Texas that was just described by my brother Brennan which says that a child has the right of action against a legitimate father for support? What cases?

MR. WRIGHT: A legitimate child?

QUESTION: Yes. The basis for your equal protection claim.

MR. WRIGHT: 4.02, of course, states an obligation.

QUESTION: It's either in this case or it isn't. And if it is --

MR. WRIGHT: All the case law in the State of Texas, of course, pursuant to the divorce statutes state that very proposition.

QUESTION: As my brother Brennan just put your case to you, it was based upon the proposition that a legitimate child has a right of action against his legitimate father for support, and an illegitimate child does not have such a right of action against his father for support.

Now, we know the latter is true, because that is what the court in this case held. But how about the former proposition? Where can I find that in the Texas law?

MR. WRIGHT: The case of Kaska v. Home of Holy Infancy is the latest statement by the Texas Supreme Court on the subject of support. The decision was rendered in 1965, and that case contains a brief review of the Texas case law on the subject.

QUESTION: 397 S.W. 2d.

MR.WRIGHT: Yes, Mr. Justice. At page 210 the Court states, referring to the fact that some States allow

custodial privileges on the part of fathers of illegitimates. There are no similar statutes in Texas. And here a father is not under a common law or statutory duty to support his illegitimate child. The Court in this case found the child to in fact be a legitimate child and the Court in this case did grant custody of the child to the father. The case did not deal directly with the question of support from the father of a legitimate child. That is a proposition of Texas law that, although it can be found in an abundance of cases, I am not sure I have a case with me on that point. I will perhaps improperly assume that that proposition --

QUESTION: If that law isn't clear, why did they have to enact the statute 4.02?

MR. WRIGHT: The statute 4.02 is part of a comprehensive reorganization of the laws of divorce in the State of Texas, a codification and a centralization of all those laws. At that time the State of Texas through the legislature first passed the no-fault divorce concept and pursuant to that codification, of course, 4.02 came about, which was a restatement of the Texas law of support liability of fathers toward children.

602 of the Penal Code also exists. And 602 of the Penal Code states the obligation of support in terms of parents, not in terms of spouses.

Mr. Justice, I apologize. I just saw the coding.

MR. CHIEF JUSTICE BURGER: Mr. Jaworski.

ORAL ARGUMENT OF JOSEPH JAWORSKI, ESQ.

ON BEHALF OF THE APPELLEE

MR. JAWORSKI: Mr. Chief Justice, and may it please the Court:

QUESTION: May I ask you, please, Mr. Jaworski, were this a legitimate child of the appellee, would she be administered a support order?

MR. JAWORSKI: Yes, your Honor.

QUESTION: Under what? 4.02?

MR. JAWORSKI: Yes, sir.

I will deviate from my prepared argument for a moment to answer, if the Court please, some of the questions that were propounded to counsel. In all fairness, and because I am appearing in the capacity I am today, I feel it encumbent to make some of the remarks that I am going to make right now.

First, the statute itself, that is 4.02, applies only to spouses, and by interpretation you can strain that argument, that interpretation,to mean it only applies to legitimate children.

QUESTION: Would it be correct to read the opinion of the majority on page 19, third full paragraph,as though it read "At the present time we do not read Section 4.02 as imposing on the father any duty," and so forth?

MR. JAWORSKI: In all fairness, I would say, yes. That was the next point I was going to make, your Honor.

QUESTION: It's rather odd that since this was the fulcrum of the argument that no one in either opinion mentioned the statute.

MR. JAWORSKI: I have to agree, your Honor.

QUESTION: When the original case was brought, it was not based in any way on the statute and could not have been because the statute was not then in existence.

MR. JAWORSKI: That is correct.

QUESTION: The issues therefore, in this lawsuit were not framed and could not possibly have been framed in terms of the statute. Isn't that correct?

MR. JAWORSKI: I must agree, the statute was --

QUESTION: What is the normal rule in litigation when the law changes when a case is on appeal? What is the law that applies?

MR. JAWORSKI: That was the third point I was going to make, your Honor. That is that in Texas, my understanding is that the law that is in force at the time that the opinion is rendered would be the applicable law. So in all fairness, I would make the same analysis that the Chief Justice made in respect of the opinion.

To answer the question of the Court on the other hand, 4.02 was not mentioned in any of the briefs.

QUESTION: In the appellate court?

MR. JAWORSKI: That is correct, before the Court of Civil Appeals or in the Supreme Court on the Application for Writ of Error. At least the review that I have just made of the briefs --

QUESTION: Well, you know, it has happened in this Court many times when a State law has changed between the time of the decision and our consideration, we vacate and remand to consider a new State statute or something. Do you think that the Texas court had this statute in mind at all, decided this case with 4.02 in mind? Or do you know?

MR. JAWORSKI: I do not know, but I would answer that question affirmatively.

QUESTION: What would you suggest -- let's assume 4.02 had been passed last week and this case had been decided the way it was without any reference to 4.02 because it wasn't in existence. 4.02 was passed last week and then this argument in this case comes today. What would we do?

MR. JAWORSKI: Mr. Justice, I would suggest that it be remanded for a new trial at that point.

QUESTION: You mean for reconsent to the Texas Court of Appeals. Let them decide what to do with it themselves.

MR. JAWORSKI: To the Texas Court of Appeals or even further than that to the trial court.

QUESTION: It would be up to them, though.

MR. JAWORSKI: Yes, sir.

QUESTION: Simply vacate the appellate court judgment and send it back and let them reconsider in light of the new statute.

MR. JAWORSKI: That's correct. And the reason I even went further is that I then believe that the appellate court would send it back to the trial court at that point.

QUESTION: Isn't it possible that both the Court of Civil Appeals and the Supreme Court thought the statute didn't apply because there were no spouses involved in this litigation?

MR. JAWORSKI: Well, your Honor, I have to believe that because at the time that the opinion was written, the --

QUESTION: There are no spouses in this case, are there?

MR. JAWORSKI: That's right. 4.02 was in existence and, two, it had reference to spouses, and three, there have been hotly debated arguments in our Texas legislature since 1968 and 1969 on this subject. So I just believe that --

QUESTION: And the court purposely said there are no statutes which cover this.

MR. JAWORSKI: That's right.

QUESTION: Because there are no spouses. The statute is limited to spouses.

MR. JAWORSKI: I agree, your Honor.

QUESTION: Of course, are you suggesting that just because the statute was passed in 1970 and this case was decided by the Court of Civil Appeals in 1971, it was presumed to know all the statutory law that might cover the case even though it wasn't quoted by counsel?

MR. JAWORSKI: I believe it should be presumed.

QUESTION: I think that presumption (inaudible)

(Laughter.)

MR. JAWORSKI: Well, someone made reference to the Texas courts, and maybe that's applicable.

At any rate, levity has no place here. I would say that I am prepared to meet the argument on its merits squarely, was invited to argue in support of a judgment below, am prepared to do so if it please the Court.

QUESTION: (Inaudible) on that score, Mr. Wright and Mr. Jaworski.

MR. JAWORSKI: Thank you, sir.

Assuming jurisdiction, today this Court is presented with the issues squarely of whether Texas should require or sanction paternity litigation, whether it be by statute or by common law. A reversal of the decision below and the judgment in the trial court reads that it is based upon a finding of law that there is no civil liability on the part of a father to support an illegitimate child. That's the

gravamen of the judgment in the trial court. A reversal of the decisions in that judgment would in my judgment be a departure from a century of constitutional adjudication under the equal protection clause. A decision by this Court would in effect be a decision never before made by this Court in the area of family law. It would extend the case of Levy and the Weber case which have been referred to in the briefs extensively. And it would disregard, in my view, the holdings in Dandridge v. Williams and Morey v. Doud.

We submit that there is no support in law or in human experience for the result sought. The sound principles of Dandridge, we submit, must obtain. Texas has the traditional right to draw arbitrary classifications to facilitate potentially difficult problems of proof and to enhance the administration of justice.

Now, with the Court's permission, we would like to with the time remaining address our attention first to the applicable test in the event that the jurisdiction issue is passed to reflect that the applicable test is rational relationship to a valid legislative purpose.

Two, Texas' valid legislative purpose is (1) to minimize problems of proof, and (2) to avoid adverse effects upon the administration of justice.

QUESTION: Do you have to go so far as to say that Texas' justice is inferior to 48 States that have found that

they could do it?

MR. JAWORSKI: Mr. Justice, that is the heart of the argument which we make, and that is that the experience in the other 48 States has been abysmal at best.

QUESTION: You are prepared to prove this?

MR. JAWORSKI: Yes, sir, your Honor. In our brief, please the Court --

QUESTION: But if your brief had convinced me, I wouldn't have asked the question.

MR. JAWORSKI: I shall address myself to that. Passing the applicable standard, if the Court please --

QUESTION: If you are going to get to it, take it in your own time.

MR. JAWORSKI: I shall, your Honor.

QUESTION: O.K.

MR. JAWORSKI: Going to the applicable standard, the ACLU in its amicus brief has raised the very narrow issue of whether classifications of illegitimates is a suspect classification as this Court views that terminology, therefore requiring more active review.

Now, we submit that the rational relationship test is applicable and, indeed, the appellants agree with that by stating, and I quote from page 12 of their brief, "The test is whether the state's classification is based upon a difference which bears a substantial, reasonable and just

relation to the object for which it is proposed."

Dandridge indeed supports this contention. It states clearly if the classification has some reasonable basis, it does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality. The Dandridge case, we submit respectfully to this Court, is controlling here. It is closely analogous to the facts that are presented here on the merits. In the words of this Court, that case involved the administration of public welfare assistance and involved the most basic economic needs of impoverished human beings and involved the attack upon the administration of public welfare assistance. And then the Court held that there was no basis for a different constitutional standard.

Now, passing to the question posed by Mr. Justice Marshall, and that is the fundamental inquiry here, that is, whether Texas has a valid rational interest in precluding paternity suits. What is Texas' valid interest? And if it has an interest, is it rational?

We meet this issue head on. The answer is, first, to minimize the very meaningful and apparent problems of proof, and two, to minimize the danger of fraud and uncertainty and inconclusiveness that surrounds paternity litigation.

Now, the right of a State to make such classifications is traditional. Texas or any other State, for that matter,

has the valid prerogative to draw arbitrary lines to facilitate problems of proof. This very Court has recently explicitly recognized this. And I am speaking of the Weber case. The Court said in that opinion at 1406, "Our decision fully respects Louisiana's choice on this matter.... The State interest in minimizing problems of proof is not significantly disturbed by our decision." And I should emphasize the word "minimize." Obviously, there are many different schemes and many different statutes in many different States. Counsel alluded to statutes in other States which -- and I believe he said all States -- allow inheritance by illegitimate children. That's simply in error. There are 48 States and there are 48 different statutes, and there is no uniform statute for trying paternity suits.

The fact of potential danger, I expressly submit, is a fact that is difficult to find issue with. It's really undisputed by commentators and authorities on the subject. It's undisputed by Professor Krause who is recognized by everyone involved in paternity litigation as the authority today in respect to paternity suits and illegitimacy as a whole. And these people unanimously agree that wholesale perjury and corruption is just a fact of life in a paternity litigation, and it's supported by empirical data.

Now, I'll be the first to admit that empirical data can, you know, be disregarded. You can consider it not worthy

of --

QUESTION: Does the data include any itemization of convictions for perjury? No, it does not.

MR. JAWORSKI: No, sir, not to my knowledge.

QUESTION: That's right. It's just an impression that people committed perjury.

MR. JAWORSKI: Yes, sir, but the authorities that I quote, your Honor, at pages 16 and 17 of our brief, were based upon lie detector tests that these people -- in one test there were a thousand of them -- submitted to lie detector tests --

QUESTION: Which is also questionable.

MR. JAWORSKI: Yes, sir.

QUESTION: Lie detector tests.

MR. JAWORSKI: Yes, sir, but my understanding of the studies that have been made in respect of lie detector tests is that they are 95 percent accurate.

QUESTION: In what percentage of divorce cases are there perjury?

MR. JAWORSKI: I have not read any empirical data in respect of divorce cases, your Honor.

QUESTION: Well, with the same data, would you abolish that? Would you abolish divorces if you found the same data?

MR. JAWORSKI: I would not abolish divorces if you

found the same data, but --

QUESTION: For example, in New York where at one time the only ground for divorce was adultery and thousands of divorces were granted every day, but no convictions were ever made of the crime of adultery. But they still left the divorce law there.

MR. JAWORSKI: My answer to that, your Honor, is one that would be by way of example in Texas. We found in Texas that there was wholesale perjury in divorce cases.

QUESTION: And you amended your divorce law, and New York amended its divorce law, did it not?

MR. JAWORSKI: Yes, your Honor.

QUESTION: But did you abolish divorce? You didn't.

MR. JAWORSKI: No, sir.

QUESTION: You amended the law.

QUESTION: To eliminate the perjury.

MR. JAWORSKI: Yes, sir, that's right.

QUESTION: Why not do that here?

MR. JAWORSKI: The point is, your Honor, that in paternity litigation it is impossible to eliminate it for the reasons I shall articulate. In divorce cases when you have two people standing up and they have a statute which makes a divorce almost as a matter of right such as we have now in Texas, there is no problem. In the question of paternity litigation, you have the inherent problem of the inconclusive-

ness of paternity, particularly, your Honor, when you have a woman who has had access to a number of men during the conceptual period.

QUESTION: Well, supposing you have a case where a woman who goes out with a man and they have 18 eye witnesses including 6 bishops of the Church to see them go in the room together and is followed by a letter to him in which he writes back under a notory's seal that "I am the father of that child."

MR. JAWORSKI: Your Honor --

QUESTION: That woman could not get redress in Texas. Am I right or wrong?

MR. JAWORSKI: You are correct, your Honor, under the present scheme, under the present status of the law and the common law in Texas. That is an unlikely hypothesis, I respectfully submit.

The more normal situation is the one which was presented here.

QUESTION: Does Texas law impose a duty upon the custodian of a child to support the child?

MR. JAWORSKI: Yes, sir. And that custodian is the mother.

QUESTION: Well, let's assume it's not the mother. Let's assume it's an uncle or an aunt or an older -- or a generation ahead, a half-brother or sister.

MR. JAWORSKI: Yes, sir.

QUESTION: Does Texas law impose a duty?

MR. JAWORSKI: Yes, sir.

QUESTION: On the custodian --

MR. JAWORSKI: Yes, sir.

QUESTION: -- of the child.

MR. JAWORSKI: Yes, sir, to support the child.

QUESTION: So if the illegitimate father were the custodian, if I understand your answer, he would have a duty to support --

MR. JAWORSKI: Yes, sir.

QUESTION: -- just as the illegitimate mother who is the custodian has a duty to support.

MR. JAWORSKI: This is correct, your Honor.

QUESTION: Now, by contrast, does Texas law impose a duty upon an illegitimate mother of a child to support that child if that child is in the custody of somebody else?

MR. JAWORSKI: No, sir, your Honor.

QUESTION: Then, doesn't the equal protection claim evaporate in this case without your making the elaborate arguments you are making?

MR. JAWORSKI: I think that analysis can certainly be made, your Honor, yes, sir.

QUESTION: Do I understand, then, from your response to Mr. Justice Marshall that there isn't such a thing in

Texas as an acknowledgement of paternity procedure at all?

MR. JAWORSKI: There is none in Texas today.

There is a proposal that has been submitted, your Honor, to the Texas legislature since 1969. It has been submitted twice. And it is a paternity statute. And I think that in response to your question that on its face helps support and in fact confirms that which we state in our brief. And that is that wholesale perjury and wholesale abuses obtain in paternity litigation.

A little history might be appropriate here. This paternity statute was prepared, it was studied in 1968, and it was submitted twice to our Texas legislature and rejected both times.

QUESTION: Could I interrupt you for one factual piece of information? As I understand, at the time of the conception here, the putative father was married to someone else.

MR. JAWORSKI: Yes, sir, your Honor.

QUESTION: Does the record disclose whether at this time he is still married?

MR. JAWORSKI: The record does not disclose that, your Honor. The record discloses that the man was in the service at Fort Hood in Killeen, Texas, and has not been heard of since. The Court refused to grant -- that is the trial court -- refused to grant his Plea in Abatement.

QUESTION: I asked this because your brief contains an intimation that children can be legitimatized by the marriage of their parents, and I take it this just, you are speaking merely in general terms.

MR. JAWORSKI: I am, your Honor.

QUESTION: Not in specific terms to these particular people.

MR. JAWORSKI: That is correct, your Honor.

Going back to the legislative history and the statute which has been proposed, I would point out to the Court that a similar statute has been prepared, or similar bill, and is to be submitted to the next session of the Texas legislature.

Now, that proposed bill is set forth in full at Appendix A in our brief. Now, that bill on its face confirms that paternity suits are fertile field for corruption.

One, it provides for a one-year statute of limitations versus two and four for tort and contract actions in Texas.

Two, it provides for pretrail screen, very carefully, in camera, to determine whether this is an extortionate type of a demand being made by this woman. The child and the mother both must submit to blood tests or the case will be dismissed out of hand to determine whether there is a possibility of paternity.

During this pretail procedure if a possibility of paternity is not established by clear and convincing evidence, not just a preponderance of evidence, but clear and convincing evidence, then the records are sealed, the case is dismissed, the records are sent to Austin, our State capital, and they are never to be reviewed again, except by court order.

QUESTION: Do the illegitimates inherit in Texas?

MR. JAWORSKI: Through their mother only, your Honor.

QUESTION: But no rights against the father?

MR. JAWORSKI: No, sir.

QUESTION: And he can confer that right on them by acknowledging paternity, you indicated before.

MR. JAWORSKI: Yes, sir. Section 40 --

QUESTION: I thought you responded to Justice Blackmun that there was no statute to recognize them.

MR. JAWORSKI: No, sir, I didn't mean to say that. I meant to say that in this particular case the father, the nominated father, was married, and I know not whether he is married now.

QUESTION: But if there was an acknowledgment, can you get a support order? Let's assume that some man wrote a letter and said I agree, I confess, I am the father and I acknowledge it, and then said but I won't support, could there be a support order entered against him?

MR. JAWORSKI: My understanding is, yes, --

QUESTION: I thought you said no to Justice Blackmun.

MR. JAWORSKI: Let me see the -- the applicable statute is Section 42 of the Probate Code.

I must correct myself.

QUESTION: Does that work for both support and inheritance or just inheritance?

MR. JAWORSKI: It would work for legitimation. And once the child is legitimated, then he would inherit and he would have all the rights of a legitimate child.

QUESTION: Here, if the father was still married, that section would not apply because the child could not be legitimated.

MR. JAWORSKI: That's right. Section 42 -- and I want to make myself clear because I don't believe that it was clear before -- Section 42 of the Probate Code is the applicable statute, and it says that where a man and a woman have an illegitimate child and thereafter enter marriage, then the child becomes legitimated for all purposes.

QUESTION: But some States -- these questions address the fact that some States, for example Louisiana, have a statute that even if the father is in fact married, if he acknowledged paternity of the child, then certain obligations ensue. Texas, I gather, has no such statute.

MR. JAWORSKI: No, sir. In other words, Texas'

total family scheme is one of where the mother has the custody and all of the rights and obligations that flow from it.

My time is about to expire and I was prepared to submit to this Court argument to the effect that there are both rights and responsibilities, not only responsibilities but rights that flow to a mother by reason of her custody of the illegitimate child.

QUESTION: She can inherit from that child.

MR. JAWORSKI: Yes, sir, she can.

But there are substantial reasons why a father should not be allowed to later come in and try to inherit from that child. The problems of proof become compounded,if the Court follows me, in that respect. If this Court held that a paternity statute or a paternity action must obtain in Texas, then under the situation Mr. Chief Justice Burger suggested, then the father could come in 15, 20 years later and try to inherit from the illegitimate child, and the problems of proof would be paramount and compounded.

QUESTION: Mr. Jaworski, may I ask you a question?

MR. JAWORSKI: Yes, sir.

QUESTION: In response to the question asked by Mr. Justice Stewart with respect to the obligation of one who has custody of the child, you said that the obligation would be to support. Does that apply to a formal order designating

someone as custodian, or does it apply to custody de facto without any formal designation of custodian by a court? Does it apply to both, or only to the formal designation?

MR. JAWORSKI: Your Honor, I have to plead semi-ignorance on that. My understanding is that it applies both ways, either a formal custody order or as a matter of de facto custody you have that obligation, and if that obligation is not fulfilled, then action can be brought to enforce that.

The description of the bill itself in response to Mr. Justice Marshall's question, I think, might lay at rest the issue of whether wholesale abuses do obtain in paternity litigation. The author of the bill that is to be presented at the next session says that an "intricate system of protections are built into the statute designed to prevent bad faith, extortion, and publicity."

For reasons I have expressed, the Texas scheme makes good sense, and I request that the relief requested in our brief be granted.

Thank you, your Honor.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Jaworski.

You acted by appointment of the courts, and we thank you for your assistance to the Court and to the Texas court whose position you were defending.

MR. JAWORSKI: It was my privilege, your Honor.

MR. CHIEF JUSTICE BURGER: And thank you, Mr.

Wright.

The case is submitted.

[Whereupon, at 11:53 o'clock a.m., the case in the above-entitled matter was submitted.]