

In the

ORIGINAL

Supreme Court of the United States

LOIS MAE MILLS,

Appellant

v.

DAN HABLUETZEL

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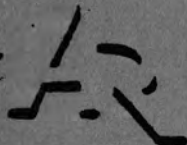
No. 80-6298

Washington, D. C.

Tuesday, January 12, 1982

Pages 1 thru 43

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REPORTING

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 LOIS MAE MILLS, :

4 Appellant :

5 v. : No. 80-6298

6 DAN HABLUETZEL :

7 - - - - -x

8 Washington, D.C.

9 Tuesday, January 12, 1982

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States
12 at 10:21 a.m.

13 APPEARANCES:

14 MICHAEL S. MANKINS, ESQ., Coastal Bend Legal Services,
15 117 W. Sinton, Sinton, Texas 78387; on behalf of the
 Appellant.

16 LOLA L. BONNER, ESQ., P.O. Drawer 908, Rockport,
 Rockport, Texas 78382; on behalf of Appellee.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments first this morning in Mills against Habluetzel. Mr. Mankins, you may proceed whenever you are ready.

ORAL ARGUMENT OF MICHAEL S. MANKINS, ESQ.

ON BEHALF OF THE APPELLANT

MR. MANKINS: Mr. Chief Justice, may it please the Court, the suit today is to determine whether the state of Texas can prohibit illegitimate children over the age of one year from seeking a determination of paternity and obtaining child support from their natural fathers.

This prohibition is found in Section 13.01 of the Texas Family Code, which is a one-year statute of limitations. Stated simply, a suit to establish the parent-child relationship cannot be filed after the child turns one year old if the child is illegitimate.

Now, what Texas has done is to establish two limitations periods; one of one year for illegitimate children, and one of 18 years for legitimate children. There is no limitation at all for legitimate children, or children born during a marriage. They can file for child support under Texas law at any time until they turn 18.

Now, it is important to note and keep in mind that this 13.01 is the only limitation period that applies for any interest that a child may have in the state of Texas for any

1 other kind of lawsuit. All other limitations involving an
2 interest in children are tolled either by statute in Texas or
3 by case law in Texas. Only 13.01 applies to an interest that
4 a child might have.

5 This suit was originally filed by the natural mother
6 of the child, Lois Mae Mills, and the Department of Human
7 Resources against the appellee. At the time the suit was
8 filed Archie Burton Duncan, the illegitimate child who is the
9 subject of the suit, was approximately 20 months old. The
10 trial court dismissed the case, citing 13.01 on the -- at that
11 time -- respondent's motion. The Corpus Christi Court of
12 Civil Appeals affirmed and did note that the Fourteenth
13 Amendment allegations of the petitioner at the Court of Civil
14 Appeals was meritless. The Texas Supreme Court refused writ
15 of error and refused to hear the case on a motion for
16 rehearing.

17 QUESTION: Counsel, I noticed in the very short
18 opinion of the Texas Court of Civil Appeals on page 16 of the
19 appendix beginning there that simply about one sentence is
20 devoted to the constitutional provision. They simply say by
21 points of error, such-and-such -- TDHR asserts that Section
22 13.01 of the Family Code is unconstitutional, or in the
23 alternative, is tolled by reason of infancy. "We have
24 addressed these issues and found them to be meritless in the
25 Hernandez case above-mentioned, and based on the reasons set

1 forth in Hernandez, we overrule points of error one through
2 three."

3 They don't specify whether it's the Texas
4 Constitution or the United States Constitution.

5 MR. MANKINS: The only thing -- you'd have to look
6 to Hernandez itself. I think we did quote some Hernandez in
7 our Joint Appendix. They don't really address it very much at
8 all.

9 QUESTION: In Hernandez they don't either.

10 MR. MANKINS: Okay. The only thing I can say is it
11 was argued at some length, or was briefed and argued at some
12 length in the Texas Court of Civil Appeals, and that's all the
13 court chose to say about it.

14 Now, there has been one change, or a major change,
15 in this law since this suit was filed and since it was
16 determined in Texas. The one-year statute of limitations has
17 been changed now under 13.01 to a four-year statute of
18 limitations. This went into effect on September 1, 1981. It
19 does not affect this case in any way, first because Texas has
20 ruled that limitations are a substantial procedure and that
21 once the limitation has run it becomes a vested right of the
22 defendant to use it as a defense; and secondly, the child in
23 this suit was over four years old on September 1, 1981, so
24 even if it could have been used, the child here could not have
25 used the four-year statute of limitations.

1 QUESTION: And I gather the new statute has no
2 tolling provision, either.

3 MR. MANKINS: There is no tolling provision. The
4 only change in the new statute is they deleted the word "one"
5 and added the word "four."

6 QUESTION: Now, did you say that the tolling
7 provisions are either by statute or decision? Those by
8 statute, do they expressly write in the tolling provision, do
9 they, for infancy?

10 MR. MANKINS: Yes. It is Article 5535 of the Texas
11 Revised Civil Statutes that toll all of the limitations found
12 in Title 91 of the Texas Laws. Title 91 has your two-year
13 statute of limitations for torts, your four-year statute of
14 limitations for written contracts, and all of your general
15 land limitations. That is a five, a ten and even a 25-year
16 statute. All of those are tolled under 5535.

17 There are other limitations, such as found in
18 worker's compensation cases, and under Texas law
19 municipalities can have limitations on suits against cities
20 written into the municipal code. Those limitations have been
21 tolled by common law. The Texas Supreme Court has ruled that,
22 for instance, in worker's compensation cases where a minor has
23 a worker's compensation claim, that the six-month limitation
24 there is tolled because of past cases and by public policy.
25 It is only 13.01 which is not tolled.

1 QUESTION: Mr. Mankins, would it be your position
2 that a longer statute of limitations than the one year might
3 be valid?

4 MR. MANKINS: Well, one year -- if you look at what
5 legitimate children can do, which is file at any time up until
6 they are no longer minors, which is 18 in Texas. Texas has
7 done this by making it four years now. But since there is no
8 tolling provision, the difference between four years and 18
9 years -- I still say all of the arguments are still the same
10 and really feel that there is no real difference, since we
11 have a difference.

12 Texas, for children, can make any kind of limitation
13 period they want. The problem is they have made one for
14 legitimate children and another one for illegitimate children.

15 QUESTION: Can you think of any reason why they did
16 that?

17 MR. MANKINS: Well, the only reason we have is what
18 the Texas courts have said, and this is the standard reasons
19 that first-year law students learn, and also, the standard
20 reasons that have been cited in other states that have upheld
21 these type of limitations for illegitimate children. That is,
22 prevention of stale and fraudulent claims.

23 There are no other reasons --

24 QUESTION: There's no problem of proof of paternity
25 with respect to a legitimate child, is there?

1 MR. MANKINS: No. In Texas it is presumed that the
2 legitimate child is the child of the father or the husband of
3 the marriage.

4 QUESTION: And you don't think that that difference
5 is enough to justify the statute of limitations, of any kind.

6 MR. MANKINS: Well, I don't think it is, mainly
7 because first, the blood test evidence which I think this
8 Court recognized the validity of in Little v. Streater decided
9 in June of last year, plus the fact that you've got the
10 situation, which has happened in Texas, where under Texas law
11 a husband, a father, of children born during a marriage can
12 disclaim paternity at any time during a divorce proceeding,
13 and show, through blood test, that he is not, in fact, the
14 natural father of the children or the child of the marriage.

15 Under Texas law, if the child is over one year old
16 and now over four years old, that child is without a remedy to
17 go against his true natural father and obtain child support.

18 QUESTION: Tell me, Mr. Mankins, those statutes that
19 you said tolled during infancy, this by legislation, would
20 that include proceedings brought by illegitimates?

21 MR. MANKINS: Illegitimates on any other type of
22 claim, yes, sir.

23 QUESTION: In other words, the limitation without
24 tolling is limited to a paternity suit, is that it?

25 MR. MANKINS: Only in paternity suits --

1 QUESTION: In every other respect, there would be
2 tolling in favor of the illegitimate.

3 MR. MANKINS: That is right. If the illegitimate
4 child was struck down by a car, the two-year limitation for
5 torts in Texas would not start running until that child turned
6 eighteen.

7 QUESTION: Mr. Mankins, do I correctly understand
8 that the Texas Supreme Court has now under consideration a
9 case involving this very statute and the constitution --

10 MR. MANKINS: Yes, Your Honor. The Texas Supreme
11 Court refused the writ in our case. Then, the Ft. Worth Court
12 of Civil Appeals ruled that 13.01 was, in fact,
13 unconstitutional, citing the Fourteenth Amendment to the U.S.
14 Constitution. At that point there was a conflict between two
15 courts of civil appeals opinions; one in Ft. Worth in our
16 case, and Corpus Christi. And the Texas Supreme Court did
17 grant the writ based on that, and did hear argument on this
18 case in February of last year.

19 QUESTION: It has not decided it?

20 MR. MANKINS: Has not decided opinion as of the last
21 time I checked, which was about a week ago.

22 QUESTION: Are they waiting for this Court, or
23 should we wait for them?

24 MR. MANKINS: Well, I personally don't know.
25 Insiders have told me that they are waiting on this Court.

1 But whether that is correct or not, I have no idea.

2 QUESTION: What is the normal pattern in that court
3 in terms of the time? Do they normally get all their opinions
4 out before they arise?

5 MR. MANKINS: They are determined generally much
6 quicker than that; 90 days to six months, I have been told. I
7 do not have extensive experience even in the Texas Supreme
8 Court. Much quicker. The cases I have had up there have been
9 decided quicker than that.

10 QUESTION: You are not in the Ft. Worth case?

11 MR. MANKINS: No, Your Honor. Under a strange
12 interpretation of the Texas Supreme Court's rules on taking
13 conflicts, our case, even though the Ft. Worth case was
14 decided just shortly after our case was decided and before our
15 case had gotten -- we were already past the Court of Civil
16 Appeals in Corpus Christi, had filed our writ in the Supreme
17 Court of Texas, but we could not claim conflict under the
18 Texas Supreme Court rules. The Ft. Worth case conflicted with
19 us, but our case does not conflict with theirs.

20 QUESTION: Can you tell me whether there was a
21 challenge to the statute under the Texas Constitution in that
22 case, or is it just the federal question? Do you know?

23 MR. MANKINS: In the Ft. Worth case?

24 QUESTION: Yes.

25 MR. MANKINS: I do not know. The only thing I do

1 know, I do know it was challenged under the U.S. Constitution,
2 Fourteenth Amendment.

3 QUESTION: This case is stiled in the Court of Civil
4 Appeals "In the Matter of A.B.D., a Minor Child." And one
5 gets the impression from reading it, being unfamiliar with
6 Texas procedure anyway, as I am, that the Texas Department of
7 Human Resources was the plaintiff.

8 MR. MANKINS: Well, the Department of Human
9 Resources, by both federal law and state law, they were
10 supplying support. Archie Burton Duncan and his mother were
11 receiving AFDC, \$86 a month in the state of Texas, and when
12 you receive AFDC both by federal law and state law, which has
13 been enacted, automatically any rights to child support are
14 assigned by law to the state.

15 QUESTION: And the state must bring the action.

16 MR. MANKINS: And the state must bring the action.
17 Well, the mother could theoretically bring the action by
18 herself, but generally, in an AFDC case, it will be the state
19 who will bring the action.

20 QUESTION: Did you represent the Texas Department of
21 Human Resources in the state proceedings?

22 MR. MANKINS: Not in this proceeding. I worked for
23 the Department of Human Resources in this area and filed
24 numerous suits exactly like this. Then I switched jobs and
25 went to work for Coastal Bend Legal Services with an office in

1 Sinton, and I was familiar with this case. And because the
2 Texas Constitution prohibits anyone but the Texas Attorney
3 General from representing the case on appeal, I took over the
4 case on appeal for the Department of Human Resources.

5 QUESTION: Isn't there something of a parties
6 problem there?

7 MR. MANKINS: I'm sorry, I don't understand.

8 QUESTION: Well, if your client, Lois Mae Mills, was
9 not a party before the Texas Court of Civil Appeals, can she
10 then step in and be a party in this Court?

11 MR. MANKINS: Well, she was a party at the Court of
12 Civil Appeals.

13 QUESTION: Well, that is probably what I don't
14 understand. She was a party as well --

15 MR. MANKINS: She was a party. In fact, in the
16 original petition, both her and the child were named as
17 parties. Under Texas law, these are confidential cases until
18 there is a final decree, and at the request of either side --
19 and I do not know who requested -- well, I believe it was the
20 appellee here -- this case was styled "In the Interest of
21 A.B.D."

22 Now, this case is the 16th case, I believe, that
23 this Court has heard involving the rights of illegitimate
24 children since 1968. Now, this Court has, in these cases,
25 basically determined that where a state attempts to restrict

1 the rights of illegitimate children and where these rights are
2 fundamental personal rights, then the state must show some, as
3 this Court has said, significant interest or significant
4 relationship to be served.

5 In other words, the rule seems to be under the
6 Fourteenth Amendment that we are going to look behind the
7 words and look at the reality of the situation. The reason
8 being that the state is seeking to restrict what is
9 fundamental personal rights. Clearly, the determination of
10 paternity, the establishment of paternity and the obtaining of
11 child support is such a fundamental personal right.

12 Texas can discriminate against illegitimate
13 children, under the Fourteenth Amendment. But in order to do
14 so, it must have some awfully good reason for doing so. In
15 other words, we are not going to let states simply use any
16 reason that comes to mind in order to foster a classification
17 or a disfavored class of illegitimate children. And clearly,
18 a very short limitation time does not serve the purposes of
19 illegitimate children, and in fact, it hinders their obtaining
20 child support and getting their paternity determined.

21 QUESTION: Did I get the impression from what you
22 said earlier that any limitation short of 18 years would be
23 unconstitutional?

24 MR. MANKINS: No, I don't. I think, once again,
25 Texas can establish any limitation it wants for obtaining

1 child support. I think it could establish for legitimate and
2 illegitimate children. It's the fact that we have two of them
3 here that is the problem.

4 QUESTION: That is what I'm talking about, just this
5 case for illegitimate children. Do I understand you to say
6 there cannot be any statute of limitations short of age 18?

7 MR. MANKINS: I think as long as its legitimate
8 children have that right until 18 I think illegitimate
9 children should have that right. I think that is correct.

10 QUESTION: Mr. Mankins, do you also have an argument
11 that in any event, illegitimates are discriminated against
12 only in parternity suits? I think you already told me --

13 MR. MANKINS: That is --

14 QUESTION: And in every other kind of suit where a
15 legitimate may benefit from tolling, a minor benefit from
16 tolling, so also does an illegitimate.

17 MR. MANKINS: That is correct.

18 QUESTION: It is only in this particular kind of
19 proceeding that there is a discrimination against the
20 illegitimate.

21 MR. MANKINS: That is right.

22 QUESTION: So it's more than just a discrimination
23 as between legitimates and illegitimates, isn't it?

24 MR. MANKINS: Well, that is correct.

25 QUESTION: It is within the class of illegitimates

1 there's also a discrimination, you contend.

2 MR. MANKINS: That is correct. If having this
3 limitation is important, -- and in Department of Human
4 Resources v. Chapman which said this was a valid law for the
5 reason that we are going to prevent stale and fraudulent
6 claims -- if that was so important an interest that the state
7 needed to protect, the question, of course, is then why isn't
8 it important in any other case? Why is preventing stale and
9 fraudulent claims so important here when it is not important
10 in a worker's comp case, when it is not important in an
11 automobile wreck case, in effect; when it is not important if
12 an illegitimate has an interest in land?

13 QUESTION: Well, do you have a paternity issue in
14 these other cases?

15 MR. MANKINS: No, you don't.

16 QUESTION: Well, is that not the difference that
17 Texas relies on?

18 MR. MANKINS: Well, the problem with that is that
19 paternity is probably -- paternity suits are probably better
20 at withstanding time as far as evidence is concerned, the
21 stale evidence argument for restricting these cases, because
22 of the availability of blood tests. Here, the blood test --
23 that is very good evidence and it lasts as long as you've got
24 blood in your veins, and they can do these blood tests at any
25 time.

1 QUESTION: A blood test is only a negative test, is
2 it not?

3 MR. MANKINS: Well, it is a negative test, but the
4 exclusion rates are so high, routinely 98% to 99%. Also,
5 according to Dr. Terasaki who is a pioneer in this, now 100%
6 exclusion are now possible. They are expensive but they are
7 possible. With that kind of evidence, the evidence itself in
8 the case does not become stale.

9 Plus, in paternity cases, generally blood test
10 evidence is the only real objective evidence you ever have.
11 The question is did the alleged father have sexual relations
12 with the natural mother nine months before the birth of the
13 child. And then, is he the father of the child. Whether or
14 not he had sexual relations with the natural mother is
15 something only the natural mother and the father are going to
16 know anyway, so as a general rule, you don't have any other
17 witnesses whose memories are going to fade, who are going to
18 get lost, and you are not going to be losing any sort of
19 documentary evidence.

20 If anybody is harmed by the passage of time, it
21 would be the natural mother and the child themselves, but
22 clearly, they have the burden of proof, and if there's going
23 to be any evidence that is lost, it is going to be their
24 evidence.

25 QUESTION: Would you agree that the state could

1 rationally require the plaintiff in this case to have a
2 heavier burden of proof than the plaintiff in a case of
3 establishing paternity by a legitimate parent? In other
4 words, in the legitimate case, presumably you could say that
5 all he has to do is prove that the person who was married to
6 his mother is -- that the male was married to his mother, and
7 that would be sufficient to establish paternity.

8 But in this case, could the state rationally say
9 that in addition to proving that the two parties were living
10 together at the time of birth, or prior to the birth, that
11 they had certain other things that had to be proved? Would
12 that be constitutional?

13 MR. MANKINS: I would say it would not be. Clearly,
14 it makes a better situation because it is going to be easier
15 to prove. But once again, what interest would that serve in
16 having a higher burden of proof in an illegitimate case
17 proving paternity as opposed to a case where the father of an
18 illegitimate child is trying to disprove paternity? It seem
19 to me the proof is --

20 QUESTION: I suppose the answer to that might be
21 that common experience teaches us there is a greater
22 probability of accuracy in one situation than the other.

23 MR. MANKINS: Well, if that could be shown. I am
24 not sure that could be shown.

25 QUESTION: There are more false claims in the

1 illegitimacy area than there are in the legitimacy area.

2 MR. MANKINS: Well, the problem with that is I have
3 simply never -- everybody talks about these fraudulent claims
4 as an attempt for blackmail, but with the type of testing
5 procedures we have in blood tests, with the other protections
6 that the alleged father has, the actuality of fraudulent
7 claims is virtually non-existent. It really does not ever
8 happen.

9 Certainly, men deny, and the appellee here is
10 denying he is the father, but as far as --

11 QUESTION: That surely doesn't happen in Texas
12 anyway.

13 MR. MANKINS: Yes, that would be where my experience
14 is, clearly. Now, it may be happening somewhere else, but it
15 is not happening as a rule in Texas. But once again, that is
16 the problem I have with that kind of rule. It puts an extra
17 burden on illegitimates, which, if it could be shown that
18 there was a greater possibility or a greater potential for
19 these kinds of fraudulent cases, sure, they then could require
20 an extra burden because then the restriction on fraudulent
21 cases would make some rational sense.

22 But I have not personally seen it. There is nothing
23 in the case law that indicates this is the situation, and the
24 type of evidence, once again, with blood tests and the
25 protections that the alleged father has in these cases, I

1 think prevents that from happening. Certainly, in Texas.

2 In Texas, the venue is in the father's home town or
3 home county if he wants it, the suit is confidential. Under
4 Texas law, if the mother is excluded, the mother and natural
5 child take blood tests and the father is excluded, the suit is
6 automatically dismissed on motion. The mother and the child
7 do not have the right to go forward with evidence, even with
8 an exclusion and try to show that the man is the natural
9 father.

10 Also, if the mother and the natural child, under
11 Texas law, refuse to take the blood test, the case is
12 dismissed. Whereas, if the alleged father refuses, then he
13 can be held in contempt, but that is all.

14 QUESTION: Let me put the question a little
15 differently. Would it be constitutional for the state of
16 Texas to say that in cases like this, there must be a blood
17 test, but in cases involving legitimate children there is no
18 need for a blood test?

19 MR. MANKINS: Well, I think that is the law in Texas.

20 QUESTION: Then there is some difference in the
21 treatment --

22 MR. MANKINS: There is some difference, and we don't
23 have any problem with that. I don't have any problem, and
24 that is what 13.02(a) does require; it does require blood
25 test. The court -- it is in mandatory language -- shall

1 appoint a blood test expert to make these tests. And I don't
2 see any problem with that at all.

3 The problem we have is if you have all of those, if
4 the state recognizes the validity of blood tests, recognizes
5 their accuracy, recognizes the fact that if the alleged father
6 is excluded the case is dismissed right there, no trial -- if
7 they recognize all of that, then why have the one-year statute
8 of limitations? Clearly, meritorious suits are being
9 dismissed that could otherwise be proved up.

10 QUESTION: Did you say that if the putative father
11 refuses to take the blood test, there is a sanction of
12 contempt?

13 MR. MANKINS: Contempt, \$500 and six months in jail
14 is the maximum sentence.

15 QUESTION: Well, may there also be a finding of
16 paternity against him?

17 MR. MANKINS: No. Texas -- 13.01, in fact, there is
18 some disagreement on this in Texas, but under some of the
19 trial court rulings -- there is no appellate ruling on this at
20 all -- the fact of the refusal cannot even be used in
21 evidence. The language is a little obscure under the Family
22 Code, but it says something --

23 QUESTION: What happens to the mother's paternity
24 claim if the putative father refuses to submit to a blood test?

25 MR. MANKINS: She has a real tough case.

1 QUESTION: She cannot ever --

2 MR. MANKINS: She can go forward with the lawsuit.

3 She can go ahead. She and the child can go ahead and try the

4 case. There just won't be blood test evidence. It will be

5 the standard kind of --

6 QUESTION: I know, but if she does, she may prevail

7 and there may be a judgment of paternity then.

8 MR. MANKINS: She may.

9 QUESTION: In addition to the sanction of contempt.

10 MR. MANKINS: Right. But the opposite -- if the

11 mother of the child refused to take the blood test, the case

12 is dismissed. So that is going to put -- and with the

13 accuracy of the blood test -- that is going to put a serious

14 roadblock in Texas to fraudulent claims.

15 QUESTION: Incidentally, blood testing hasn't yet,

16 if it ever can, evolve -- the technology hasn't evolved to the

17 point where it can be affirmative on the issue of --

18 MR. MANKINS: Well, once again, we are talking about

19 medical terms, and it's a double negative. Dr. Terasaki says

20 he can get 100% exclusion right now.

21 QUESTION: What does that mean?

22 MR. MANKINS: It means that all possible non-fathers

23 would be excluded.

24 QUESTION: Does it follow then that this particular

25 person is the father?

1 MR. MANKINS: That is what I think. If all other
2 potential non-fathers are excluded -- if you have 100%
3 exclusion rate, that means you have 100% inclusion rate.

4 QUESTION: If you look at our recent cases, I think
5 out in Connecticut you will find that all it does is prove who
6 could not be.

7 MR. MANKINS: Could not be, that is correct.

8 QUESTION: It is a negative test, which is only a
9 fraction, although a large fraction, of the total. But it's
10 nothing like 100%, as you suggest. That is an incorrect
11 statement.

12 MR. MANKINS: Well, Dr. Terasaki made that statement
13 in one of his articles, which we have cited in the brief. I
14 have never seen a 100% exclusion rate. I have seen exclusion
15 rates over 99.25, .44, something like that.

16 QUESTION: What do you mean you have seen them?

17 MR. MANKINS: Had them in our cases, where we have
18 done blood tests and said that the alleged father was not
19 excluded and that the probability of exclusion was that they
20 have excluded 99.25 or .21 percent of all potential fathers,
21 based on --

22 QUESTION: That would still leave the defendant and
23 some others.

24 MR. MANKINS: It still would leave the defendant and
25 some others, and, of course, that is for him to argue to the

1 judge or the jury. Our position being that if we had that
2 kind of evidence, of course, that he was having sexual
3 relations and we have this and this is the evidence.

4 QUESTION: Even in the doctor's article about the
5 100% exclusion rate, he didn't say that is true of all cases.
6 Just there was a particular case in which he -- isn't that
7 right?

8 MR. MANKINS: Well -- no, I understood it as saying
9 that they could test now for enough -- in fact, genes on the
10 DNA molecule -- that they could get 100% exclusion rate.

11 QUESTION: In all cases?

12 MR. MANKINS: Well, that is the way I understood
13 it. But he did not go into any details on this. It is not
14 currently done in any cases.

15 QUESTION: Apart from that article, isn't the
16 general understanding that the degree of reliability varies
17 with the various factors that are involved in particular kinds
18 of blood and the like.

19 MR. MANKINS: It does vary. Almost all of them are
20 in the 90% rate with about 25% now, according to some of the
21 experts we cited, over 98%. So one in four over 98%; the rest
22 of them are probably over 92%.

23 QUESTION: Mr. Mankins, let me back up a minute.
24 The putative father does not take the blood test. Can the
25 mother bring that up as evidence?

1 MR. MANKINS: Once again, this is confusing in Texas
2 law. We don't have an opinion from an appellate court in
3 Texas as to what this means. The Family Code says if he
4 doesn't take the blood test, the fact that he did not take the
5 blood test, the evidence can only be introduced to show that
6 he is not excluded. Some of the trial courts ruled that it is
7 like the Fifth Amendment; you cannot say that he didn't do it,
8 but you can argue that no blood tests have been made and he is
9 not excluded under blood test. Some trial courts have said
10 that you can open up the whole thing; show that you tried to
11 get him to take the blood test and he refused.

12 QUESTION: So there is great protection on the
13 father still.

14 MR. MANKINS: I think there is abundant protection
15 on the father.

16 QUESTION: A little too much?

17 MR. MANKINS: Well, certainly with 13.01, you're
18 excluding cases that could otherwise be tried, and with no
19 real reason when you look at all the other protections given
20 to the natural father.

21 QUESTION: Mr. Mankins, the reason for your
22 paternity suit, I suppose, is to establish the base for
23 support.

24 MR. MANKINS: Right, that is correct.

25 QUESTION: Suppose the putative father, knowing the

1 mother, tendered support for 18 months and then decided to
2 quite. Is she out in the cold?

3 MR. MANKINS: I think she would be, under Texas
4 law. There is no opinion, again, in Texas on an estoppel
5 argument. The only thing we have that is close to it is
6 Department of Human Resources v. Hernandez, the companion case
7 to this case, decided by the Corpus Christi Court of Civil
8 Appeals.

9 They, in talking about tolling generally and about
10 why this case should not be tolled, said that well, if the
11 limitations runs against the mother but it doesn't run against
12 the minor child, then we are defeating the policy of a
13 limitation in paternity anyway. Implying that estoppel, which
14 would also defeat the policy of limitation in paternity, would
15 also not apply.

16 But Texas, unlike other states, does not have any
17 estoppel clause in their limitation period. Other states
18 which have limitation periods on these type of cases have, in
19 the limitation itself, the fact that if the father voluntarily
20 supports the child, then the limitation starts running after
21 he stops supporting. Texas doesn't have any of that and we
22 don't have an opinion as to whether Texas would have that if
23 that was used as a defense for limitation.

24 QUESTION: Well, Mr. Mankins, earlier in your
25 argument you talked about the change in the law. Must we

1 decide that the one-year statute is unconstitutional, or the
2 four, or both?

3 MR. MANKINS: Well, of course, the four is simply
4 not before the Court, it is not in this case. I simply, as my
5 personal opinion, think if the one year is unconstitutional --

6 QUESTION: Well, why isn't it in the case?

7 MR. MANKINS: Because only the one-year applies to
8 us. Article I, Section 16 of the Texas Constitution and the
9 decisions by the Texas Supreme Court under that state that
10 when a limitation runs, it becomes a vested defense of the
11 defendant. It had run in this case --

12 QUESTION: That may be so, but what if we agreed
13 with you that well, therefore, because of that rule the
14 one-year statute is here. Suppose we said that is
15 unconstitutional? Then wouldn't you have to reach the
16 four-year statute?

17 MR. MANKINS: I think all the arguments that could
18 be made for the one --

19 QUESTION: Then the question would be, are you
20 barred by some other rule. And they would say yes, you are
21 barred by the four-year statute, then we'd have to reach that,
22 wouldn't we?

23 MR. MANKINS: The Texas Supreme Court could very
24 well make that determination.

25 QUESTION: What do you mean, the Texas Supreme Court?

1 MR. MANKINS: Well, they would have to read the
2 opinion, and if it was narrowly written, only applying to one
3 year -- certainly, I think if the one year is
4 unconstitutional, the four year is unconstitutional because it
5 is the same situation all over again. Why have a limitation
6 of four years when there is no other limitation involving the
7 rights of children or illegitimate children in any other kind
8 of lawsuit.

9 QUESTION: Is there another reason why the four-year
10 statute is before us? The statute of limitations is an
11 affirmative defense; did your opponent plead the four-year
12 statute of limitations as a defense in this case?

13 MR. MANKINS: No, because it didn't -- it wasn't the
14 law.

15 QUESTION: How can it be before us?

16 MR. MANKINS: That is what I'm saying -- it is not
17 before this Court at this time. But my argument is that even
18 though it is not before the Court, certainly, if the one year
19 is unconstitutional, for all the same reasons the four year is
20 going to be unconstitutional. Why have the four year statute
21 here when you don't have a limitation for anybody else. And,
22 of course, the evidence for four years is just as good 36
23 months later as it would be after one year.

24 QUESTION: On page 6 of your brief, you have the
25 statement, blood test as evidence virtually can prove or

1 disprove paternity because the blood lasts forever. Now, the
2 first half of that statement is clearly incorrect, isn't it?
3 It doesn't prove -- it can only prove in 99% or whatever the
4 good doctor said.

5 MR. MANKINS: Well, it is incorrect in that, as you
6 state, it does not affirmatively state who the father is. But
7 it excludes so many people that coupled with the other
8 evidence that you normally have in the type of lawsuit, makes
9 a very strong case. It's the type of --

10 QUESTION: Well, the correct statement would be
11 blood tests can disprove paternity.

12 MR. MANKINS: Blood tests can certainly disprove
13 paternity.

14 QUESTION: Of course, your statement is that it
15 virtually can prove.

16 MR. MANKINS: Well, that is from a lawyer who has
17 tried about 60 of these, and this type of evidence is
18 overwhelming when you get it to a jury. And a judge, for that
19 matter. They are going to look at this and really, this is
20 very strong evidence.

21 QUESTION: Of course, you can't make the state rely
22 on the one-year statute.

23 MR. MANKINS: I don't understand, Your Honor.

24 QUESTION: Well, you say the defendant has a vested
25 interest in the one-year statute, and even if it is repealed,

1 it can rely on it.

2 MR. MANKINS: No. If it's repealed, then we would
3 go back to the common --

4 QUESTION: I know. But if it's amended, like it has
5 been.

6 MR. MANKINS: He can't rely on it in this case, no.

7 QUESTION: What do you mean he can't?

8 MR. MANKINS: Because the one year had already run
9 when we filed the case under Texas law, and plus, the child
10 was over four when the four-year went into effect.

11 QUESTION: My question is why isn't the case moot?
12 The one-year statute is gone.

13 MR. MANKINS: Well, it's not gone in Texas.

14 QUESTION: Why?

15 MR. MANKINS: Because Texas court has not ruled that
16 it's unconstitutional, other than in the Ft. Worth Court of
17 Civil Appeals.

18 QUESTION: I know, but it has been repealed. The
19 one has been changed to four. Why should we decide on the
20 one-year?

21 MR. MANKINS: Because all children born after
22 September 1, 1975 who are illegitimate and who were not one
23 year old by September 1, 1981 and who have not had a lawsuit
24 to determine paternity are still barred by 1301.

25 QUESTION: Why?

1 MR. MANKINS: Because 1301 was the law that was in
2 effect when they were born.

3 QUESTION: Yes, but if the state didn't plead the
4 one-year statute you wouldn't be barred by it.

5 QUESTION: But they did plead the one-year statute.

6 QUESTION: I know, but if the state got up and said
7 well, he waived the one-year statute, --

8 MR. MANKINS: No, the state can't waive it, though.
9 The defendant -- it is his vested right under the Texas
10 Constitution. If we have a child that was born in 1977 and I
11 go back to San Patricio County --

12 QUESTION: The defendant's vested right?

13 MR. MANKINS: Defendant's vested right.

14 QUESTION: Well, that's -- and what does he do?

15 MR. MANKINS: He is the alleged father. And if we
16 file a lawsuit in San Patricio County on a child born in 1977,
17 the defendant today can plead the one-year statute of
18 limitations under Texas law.

19 QUESTION: You don't have to make it hypothetical.
20 The reason you're going to lose this case is because of that
21 one-year statute -- that's the only reason you can't prove
22 paternity, isn't it?

23 MR. MANKINS: That's correct.

24 QUESTION: We don't have to talk about hypothetical
25 cases.

1 QUESTION: You can't go back with it.

2 MR. MANKINS: I cannot go back.

3 QUESTION: And the four-year statute can't be
4 involved because you did file within less than four years,
5 didn't you?

6 MR. MANKINS: Well, the child was -- yes, that's
7 correct.

8 QUESTION: I mean, when you brought this proceeding
9 it was within four years, so the four-year statute can't be a
10 bar to this proceeding.

11 MR. MANKINS: That's correct.

12 QUESTION: The only thing at issue here is whether
13 the one-year statute prevents you from recovering.

14 MR. MANKINS: That's correct.

15 CHIEF JUSTICE BURGER: Ms. Bonner?

16 ORAL ARGUMENT OF LOLA L. BONNER, ESQ.

17 ON BEHALF OF THE APPELLANT

18 MS. BONNER: Mr. Chief Justice and may it please the
19 Court, the appellee in this case did, indeed, file a motion to
20 dismiss as moot after the time the four-year statute of
21 limitations became effective on September 1, 1981, taking the
22 position that a child born subsequent to September 1, 1977 in
23 Texas could probably file the suit, and Texas would give
24 retroactive effect to the new statute, which became effective
25 on September 1, 1981.

1 That issue has not been decided by the Texas courts,
2 which is the reason appellee filed a motion to dismiss as
3 moot, seeking time for the Texas court to decide whether or
4 not it was going to give retroactivity to the new four-year
5 statute.

6 QUESTION: Are you suggesting that the proper remedy
7 would have been to bring a new suit a year ago before the four
8 years had elapsed?

9 MS. BONNER: It's true. Why litigate the one-year
10 when you have the four-year looming before you?

11 QUESTION: Ms. Bonner, you represent the putative
12 father, right?

13 MS. BONNER: I do.

14 QUESTION: Have you waived that defense?

15 MS. BONNER: Not at all.

16 QUESTION: You are not contending that is an
17 obstacle to your client having to pay support money, are you
18 not?

19 MS. BONNER: Not at all, sir, because the child --

20 QUESTION: Then why don't you waive the defense?

21 MS. BONNER: The child in this case was born in
22 February of 1977.

23 QUESTION: But he filed suit less than four years
24 after he was born. If the one-year statute isn't an obstacle,
25 why don't you just say let's go to trial?

1 MS. BONNER: Well, I don't see that the appellee in
2 this case was in a position to do that because by the time our
3 legislature promulgated and formulated the new four-year
4 statute, this case had already been refused in the Supreme
5 Court of the United States.

6 QUESTION: Yes, but you haven't lost your right to
7 waive the defense. You could say right now we will waive the
8 defense and go to trial. The case isn't moot as long as you
9 maintain there's a limitations bar.

10 MS. BONNER: Fine. What the appellee was attempting
11 to do was give the Texas courts an opportunity to decide
12 whether or not they would apply retroactivity to the new
13 statute before we came up here. Because it would appear to me
14 -- and I disagree with Mr. Mankins when he suggests that the
15 Texas courts are not going to give retroactivity for this
16 reason. There are several cases which refer to not giving
17 retroactivity to the one-year statute, which became effective
18 in our state on September 1, 1975. The reason, to me, is
19 clear. That was a substantive right which was granted by the
20 Texas legislature for the first time as an avenue for
21 establishing paternity.

22 Now, appellant would have you believe that Article
23 13.01 of our Texas Family Code is a support statute, and it is
24 not. It is a paternity statute. Now, it is true that it is a
25 predicate, an avenue, for an illegitimate child to establish

1 paternity, whereupon then it can establish support. It does
2 many other things. It gives that illegitimate child an
3 opportunity to declare itself an heir-at-law for purposes of
4 inheritance from an intestate biological father. It gives
5 that illegitimate child an opportunity to qualify for social
6 security benefits in the event of the death of the worker
7 holding a social security account number. It likewise gives
8 that illegitimate child an opportunity to establish paternity
9 for the purpose of becoming entitled to worker's compensation,
10 to life insurance policies and those kinds of things.

11 Now, this avenue in Texas was not available to an
12 illegitimate child until September 1, 1975. It was this
13 Court's mandate in a support case entitled Gomez v. Perez, but
14 it goes far beyond enabling an illegitimate child to enforce
15 support. It does other things.

16 Appellant takes the position that a legitimate child
17 in Texas can enforce support at any time until it attains the
18 age of 18 years, under our Texas law. So can the illegitimate
19 child if it will take the step to prove paternity. If the
20 illegitimate child takes that step and establishes paternity,
21 then it, too, may enforce support until it attains the age of
22 18 years.

23 QUESTION: Now they can do it over a span of four
24 years -- establish paternity.

25 MS. BONNER: That is correct, establish paternity,

1 which is a necessary prerequisite in illegitimacy. Otherwise,
2 how do you enforce support? Do you enforce it against all of
3 the men of the world, or must you not establish this is the
4 proper father, biological father, from whom I am going to seek
5 my support.

6 Now, the Texas legislature did not limit the right
7 of the trial to bring this suit within the one-year period of
8 time to establish this paternity. It obviously gave the Texas
9 Department of Human Resources the right. It gave anyone who
10 had an interest in that child the right to bring the suit,
11 including the father.

12 Now, on September 1, 1975, we had our first --

13 QUESTION: Who would the father sue in such
14 litigation?

15 MS. BONNER: To establish paternity?

16 QUESTION: Yes.

17 MS. BONNER: He may establish paternity voluntarily
18 by going into --

19 QUESTION: That doesn't require a lawsuit.

20 MS. BONNER: Well, but he may --

21 QUESTION: And he can do it more than one year after
22 the child was born, couldn't he?

23 MS. BONNER: Yes, he could waive that. Yes, that is
24 correct. And incidentally, I want to touch on this, about the
25 blood test. Now, I know nothing about the blood test. All I

1 know is what I read from the opinions rendered by this Court.
2 But it is my understanding that a blood test does not show
3 that you are the father; it simply shows that you are not the
4 father.

5 Now, at that point, you must proceed on other
6 evidence. If the one-year statute is held to be
7 unconstitutional by this Court, then we revert to pre-1975
8 law, which is governed by Gomez v. Perez, and in the case of
9 the Texas Department of Human Resources v. Delley, that court
10 has held, and so far as I know or believe, this is the law --
11 that a pre-1975 child has until four years passed, attaining
12 the age of 18.

13 So that a child in Texas, should this one-year
14 statute of limitations be held unconstitutional, may wait
15 until they are 21 years, 11 months old, and file the suit to
16 establish paternity.

17 Now, if that blood test does not show that the
18 alleged father is not the father, then the case proceeds on
19 other evidence.

20 QUESTION: Well, how does that help the child here?
21 It doesn't help the child involved in this case.

22 MS. BONNER: It wouldn't help any child, because his
23 right to support has --

24 QUESTION: Well, if you say that this child was
25 bound by the one-year statute and therefore has no cause of

1 action, are you saying that that child can, 18 years from now,
2 say that it is?

3 MS. BONNER: Only if this Court says that that
4 one-year statute of limitations which governed this case is
5 unconstitutional.

6 QUESTION: Oh, I see. I thought you said just the
7 opposite.

8 QUESTION: Just to clarify this a little more, if
9 this Court were to rule the one-year statute of limitations
10 invalid, then the appellant would be able to proceed to
11 establish paternity.

12 MS. BONNER: That is correct.

13 QUESTION: And then thereafter, conceivably could
14 seek support from the father if paternity is established.

15 MS. BONNER: Right.

16 QUESTION: And you are still asserting the one-year
17 statute of limitations as a defense on behalf of your client.

18 MS. BONNER: I did at the trial level of this case,
19 yes. The trial of this case was never heard on the merits.
20 Paternity wasn't even mentioned. The case was dismissed
21 because it was barred by a statute of limitations. No trial
22 on the merits was held. Which is the reason I requested in
23 the Texas court that the style be changed to "In Re: A.B.D."
24 in lieu of the manner in which appeal was taken to the United
25 States of America, because -- and counsel pointed out the fact

1 that these cases are confidential. I respectfully disagree
2 with that. We have my client's name all over the pleadings in
3 these cases which are very public. There have been articles
4 in our state concerning this very case, naming my client,
5 against whom paternity has never been established.

6 But walking further in the proof of these cases
7 where the blood test does not show that the father is not the
8 child, what man has kept records for 21 years and eight months
9 which could possibly disprove that the mother of the putative
10 child had access to him, or vice versa?

11 QUESTION: It would be unlikely you would have a
12 21-year old suing for support, isn't it?

13 MS. BONNER: That is correct. But if you had a
14 16-year old. In one of the cases in which I am presently
15 involved we have a three-year old.

16 QUESTION: You were referring to the other
17 consequences; rights of inheritance and so forth, which might
18 be worth a great deal more than the support.

19 MS. BONNER: Absolutely. Absolutely.

20 QUESTION: Are you saying in your earlier remarks
21 that essentially, this is not a support case; this is just
22 another paternity case, and that the support is simply a
23 collateral consequence of the results of the paternity case.

24 MS. BONNER: No. This is a support case. I am
25 suggesting that Article 13.01, the statute being attacked, is

1 not a support statute. It is a paternity statute. And our
2 state legislature has said fine, to illegitimate children we
3 will afford you an opportunity to establish paternity. Now,
4 once you do that you are entitled to support, inheritance,
5 social security benefits, worker's compensation and on and
6 on. Which is the point I was attempting to make.

7 We take the position that the state legislature has
8 the right to set a limit, a time limit, on the right of the
9 illegitimate child or its mother or the TDHR or anyone else
10 interested in the child to bring that. And obviously, you
11 have more than 12 months anyway. You actually have 21
12 months. Under our statute, the suit to establish paternity
13 may be filed before the child is born.

14 Now, there is a provision that if that happens, then
15 the blood test for the child should be made after the child is
16 born. But a woman is going to know that she is enciente long
17 before the nine-month period of time has expired. So in
18 addition to that nine months, then she has the one-year period
19 additionally, because the statute, subject of this case, says
20 that a suit to establish paternity may be brought within --
21 must be brought within one year from the date of the birth of
22 the child; otherwise, it is barred.

23 QUESTION: In any event, you do concede that the
24 statute was the Texas legislature's response to Gomez against
25 Perez.

1 MS. BONNER: I think I would have to say that is
2 true.

3 QUESTION: To that extent, it's a support statute.
4 To that extent, anyway.

5 MS. BONNER: I think that's true, but it does do
6 other things. It does do other things. It provides an
7 illegitimate child an avenue.

8 In attempting to look down the road as to what might
9 happen, I would hate for our state to end up with a situation
10 where we have discrimination among the class, that class being
11 known as illegitimates. For example, from and after September
12 1, 1981, an illegitimate child has four years in which to file
13 the suit. If this Court holds that Texas did not have the
14 right to set a one-year statute of limitations in paternity
15 matters, holds it unconstitutional, under the existing Texas
16 law, that child will have until four years after it attains
17 the age of 18.

18 So you have one illegitimate child who has four
19 years to bring the suit, and you have another illegitimate
20 child who has until they are 22 years of age to bring the suit
21 --

22 QUESTION: Well, Texas can enact another statute to
23 take care of that, can't they?

24 MS. BONNER: Yes, they could. And frankly, I
25 anticipated the question, why do you think the Texas

1 legislature said one year at first and now it is saying four.
2 And the only answer that I can give is that you know the
3 thinking minds of the legislators better than I, and we have
4 all seen in our lifetimes that when a new act or a new law is
5 effectuated or promulgated and enacted, they start off
6 somewhat easily, and then perhaps bear down. We see that more
7 frequently I think in the tax field than we do in fields like
8 paternity.

9 QUESTION: Your opponent argued that the four-year
10 statute had run and that he would be barred for one reason or
11 another if he went back. But if he has a pending case, which
12 he surely has, under the one-year statute, do you believe the
13 four-year statute has already run on him?

14 MS. BONNER: I do. Even if our Texas courts gave
15 retroactive effect, which I believe they will, to the new law,
16 the new four-year statute, it would cover children born from
17 and after September 1, 1977, that this case would, at that
18 point, be barred because of the birth of this child in
19 February of 1977.

20 QUESTION: Even though the suit was brought within
21 the four years?

22 MS. BONNER: Yes. That is just my opinion.

23 QUESTION: Ms. Bonner, do you know anything about
24 the Miller case? It is the situation challenged under the
25 Texas Constitution as well as the United States Constitution.

1 MS. BONNER: Article 1 of the Texas Constitution is
2 mentioned. However, the case was decided on discrimination
3 under the Fourteenth Amendment of the United States
4 Constitution, but not because of illegitimate children. That
5 decision stated that the paternity statute discriminated
6 because it was a paternity suit and not a maternity. There
7 was no provision for a maternity suit. And as a consequent
8 result, it was unconstitutional under the Fourteenth Amendment
9 of the United States Constitution.

10 QUESTION: Do you have any guess as to why the case
11 is pending undecided? Are they waiting for this case?

12 MS. BONNER: I would have to concur with my opposing
13 counsel.

14 QUESTION: I suppose we could find out.

15 MS. BONNER: I am sure that this Court could.

16 QUESTION: Did you say that the -- was the judgment
17 in the Ft. Worth case based on the federal constitution?

18 MS. BONNER: Yes.

19 QUESTION: Only?

20 MS. BONNER: It mentioned the Texas Constitution but
21 not as it related to the discrimination because it was a
22 paternity suit and not a maternity suit. That went on the
23 Fourteenth Amendment.

24 QUESTION: Is there a great demand for maternity
25 suits?

1 MS. BONNER: Not to my knowledge.

2 CHIEF JUSTICE BURGER: Thank you, counsel, the case
3 is submitted.

4 (Whereupon, at 11:15 a.m. the oral argument in the
5 above-entitled case ceased.)

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CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

Lois Mae Mills, Appellant V. Dan Habluetzel. No. 80-6298

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BY Suzanne Young

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