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Vernon's Annotated Texas Civil Statutes Article 2338-1, Section 3(f), Defining Delinquent Child as One Who Habitually So Deports Himself as to Injure or Endanger the Morals or Health of Himself or Others, is Not Unconstitutionally Vague.

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INFANTS—JUVENILE LAW—VERNON'S ANNOTATED TEXAS CIVIL STATUTES ARTICLE 2338-1, SECTION 3(f), DEFINING DELINQUENT CHILD AS ONE WHO "HABITUALLY SO DEPORTS HIMSELF AS TO INJURE OR ENDANGER THE MORALS OR HEALTH OF HIMSELF OR OTHERS," IS NOT UNCONSTITUTIONALLY VAGUE. *E.S.G. v. State*, 447 S.W.2d 225 (Tex. Civ. App.—San Antonio 1969, writ ref'd n.r.e.).

Appellant, a girl fourteen years old, was away from home for days at a time, living with another girl reputed to be a prostitute. On one occasion appellant's mother and a policeman located her in a downtown transient apartment with a young adult male. She had been away from home for over a week. The juvenile court found appellant to be a juvenile delinquent within the statutory definition providing that a delinquent child is one who "habitually so deports himself as to injure or endanger the morals or health of himself or others."[1] Held—*Affirmed.* Texas Revised Civil Statutes Annotated, article 2338-1, section 3(f) is not unconstitutionally vague.

In 1943, the Texas Legislature adopted the Juvenile Act,[2] setting forth the procedure for handling delinquent children in Texas. The purpose of the Juvenile Act is "to secure for each child under its jurisdiction such care, guidance and control, preferably in his own home, as will serve the child's welfare and the best interests of the State."[3]

The Act defines a "child" as any female person over the age of ten years and under the age of eighteen years and any male person over the age of ten years and under the age of seventeen years,[4] and defines a delinquent child as any child who

(a) violates any penal law of this state of the grade of felony; or
(b) violates any penal law of this state of the grade of misdemeanor where the punishment prescribed for such offense may be by confinement in jail; or
(c) habitually violates any penal law of this state of the grade of misdemeanor where the punishment prescribed for such offense is by pecuniary fine only; or
(d) habitually violates any penal ordinance of a political subdivision of this state; or
(e) habitually violates a compulsory school attendance law of this state; or

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1 TEX. REV. CIV. STAT. ANN. art. 2338-1, § 3 (f) (1964).
2 TEX. REV. CIV. STAT. ANN. art. 2338-1 (1964).
3 TEX. REV. CIV. STAT. ANN. art. 2338-1, § 1 (1964).
4 TEX. REV. CIV. STAT. ANN. art. 2338-1, § 3 (1964).

(f) habitually so deports himself as to injure or endanger the morals or health of himself or others; or
(g) habitually associates with vicious and immoral persons.[5]

Texas courts have held that when the acts committed by the juvenile fall into one of the definitions other than subsection (a) or (b) above, he becomes a delinquent child only by "habitually" performing the act or acts prohibited by the statute.[6]

The Act further provides:

(1) No adjudication upon the status of any child in the jurisdiction of the juvenile court shall operate to impose any of the civil disabilities ordinarily imposed by conviction, nor shall any child be deemed a criminal by reason of such adjudication, nor shall such adjudication be deemed a conviction, nor shall any child be charged with or convicted of any crime except perjury in any court except as provided in Section 6 of this Act.

(2) The disposition of a child or any evidence given in the court shall not be admissible as evidence against the child in any case or proceeding in any court other than the juvenile court, nor shall such disposition or evidence operate to disqualify a child in any further civil service examination, appointment or application. However, nothing in this subsection prevents a showing before the district court or the grand jury that the child has been transferred for criminal proceedings under Section 6 of this Act.[7]

The judicial interpretations of the purposes of the Act in Texas vary to some degree, but may be generally stated as follows: (1) "the underlying purpose is to guide and direct juveniles; not to convict and punish them";[8] (2) "to transfer jurisdiction over delinquent children from criminal courts to civil courts";[9] (3) "to change the method of handling delinquent children from criminal to civil procedure."[10]

These interpretations were somewhat jolted in 1967 when the Supreme Court of the United States set forth the *Gault* decision,[11] the effects of which have yet to be fully determined. In its detailed analysis of the juvenile system in the State of Arizona, the Court concluded that the juvenile offender had the rights: (1) to adequate notice of the

5 *Id.*
6 *Ex parte* Yelton, 298 S.W.2d 285 (Tex. Civ. App.—Beaumont 1957, no writ).
7 TEX. REV. CIV. STAT. ANN. art. 2338-1, § 13 (d) and § 13 (e) (1964).
8 State v. Thomasson, 154 Tex. 151, 275 S.W.2d 463 (1955).
9 *Id.*; In the Matter of Gonzales, 328 S.W.2d 475 (Tex. Civ. App.—El Paso 1959 writ ref'd n.r.e.).
10 State v. Thomasson, 154 Tex. 151, 275 S.W.2d 463 (1955); Hultin v. State, 171 Tex. Crim. 425, 351 S.W.2d 248 (1961).
11 Application of Gault, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967).

proceeding, (2) to counsel, (3) to confrontation and to cross-examination of witnesses, and (4) to privilege against self-incrimination.[12] Though the Court in *Gault* explicitly limited its holding to the adjudicatory stage of the juvenile proceeding,[13] the Court's opinion attacked the whole system for the treatment of juveniles and its underlying purposes when it stated:

> Failure to observe the fundamental requirements of due process has resulted in instances, which might have been avoided, of unfairness to individuals and inadequate or inaccurate findings of fact and unfortunate prescriptions of remedy. Due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise.[14]

In referring to the benefits received by juvenile delinquents, similar to those set out in section 13(3) of article 2338-1,[15] the Court pointed out that: "the observance of due process standards, intelligently and not ruthlessly administered, will not compel the States to abandon or displace any of the substantive benefits of the juvenile process."[16]

The effects of *Gault* on the juvenile law in Texas may be seen by a brief analysis of a few Texas cases that have interpreted it. In *Leach v. State*,[17] the Houston Court of Civil Appeals (14th Dist.), reversed the commitment of a child charged under section 3(f) of article 2338-1 and committed by the juvenile court upon the testimony of a probation officer who admittedly failed to inform the child she had a right to an attorney. The majority opinion, though not ruling on the constitutionality of section 3(f) of article 2338-1, gave the following interpretation of *Gault*: "*In re Gault* requires that the same principles applicable to adults be applied to juveniles in this type of case when the question reaches constitutional dimensions."[18] The court in *Leach* also pointed out that no witness should be permitted to testify as to whether the child being tried measures up to the standard or the conduct provided in article 2338-1, section 3(f).[19]

On another occasion, the same court that rendered the opinion in the *Leach* case held in *Collins v. State*[20] that while a juvenile proceed-

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12 *Id.*
13 *Id.*
14 *Id.*
15 TEX. REV. CIV. STAT. ANN. art. 2338-1, § 13 (3) (1964).
16 Application of Gault, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967).
17 428 S.W.2d 817 (Tex. Civ. App.—Houston [14th Dist.] 1968, no writ).
18 *Id.*
19 *Id.*
20 Collins v. State, 429 S.W.2d 650 (Tex. Civ. App.—Houston [14th Dist.] 1968, no writ), citing Application of Gault, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967).

ing is a civil proceeding, "since it is a proceeding which seeks to deprive the defendant of his liberty, the defendant is guaranteed all of the privileges and immunities which he would have if it were a criminal proceeding."

Finally, in 1969, the Supreme Court of Texas was called upon to give its interpretation of *Gault* in *State v. Santana.*[21] It should be pointed out that the holding in *Collins* was expressly disapproved by the Supreme Court of Texas, since the court stated:

> It is stongly urged here and in some contemporaneous writings that the opinion in *Gault* means that a juvenile proceeding which may end in depriving a person of his liberty, is, in reality, a criminal trial; and that to satisfy the due process and equal protection clauses, juvenile proceedings must be accompanied by all of the same measures and protections afforded in criminal trials. We do not so read *Gault.* The *Gault* opinion goes out of its way to say it does *not* mean to so hold.[22]

In *State v. Santana,* the court held that the Constitution of the United States did not require that juvenile trial be adversary in nature and that the "beyond a reasonable doubt" test was not required for findings therein.[23] In its opinion, the court gave the following interpretation of *Gault*:

> We ascribe to the *Gault* Court not a desire to abolish the attempt of the state to treat and rehabilitate the child through juvenile proceedings, but a laudable mandate that in juvenile proceedings, the rights of the child be preserved; that the proceedings be conducted with basic fairness. Instead of the worst of both worlds under the abused juvenile proceedings, the *Gault* court, it is thought, desired to preserve the best of both worlds for the minor; i.e., the individual, particularized treatment of the disturbed, rebellious or wayward minor, while at the same time, insuring that the hearings be conducted with dignity and fairness and with the essentials of due process being observed.[24]

Thus, the court accepted the view of the Supreme Court of the United States, as set forth in *Kent v. United States,*[25] that the hearing did not have to conform with all of the requirements of a criminal trial, but that it must measure up to the essentials of due process.

In giving the above interpretation, the Texas court said: "The policy of the juvenile laws has been fixed by the Texas Legislature; and we

21 444 S.W.2d 614 (Tex. Sup. 1969), *judgment vacated,* 38 U.S.L.W. 3401 (April 24, 1970).
22 *Id.*
23 *Id.*
24 *Id. See* In the Matter of Winship, — U.S. —, 90 S. Ct. 1068, — L. Ed. 2d — (1970).
25 383 U.S. 541, 86 S. Ct. 1045, 16 L. Ed. 2d 84 (1966).

conceive it to be our duty to uphold the spirit of that law while at the same time insuring to minors the basically fair proceedings required by *Gault* and the Constitutions of Texas and the United States."[26] In effect, the Supreme Court of Texas stated that a juvenile delinquent is entitled to the "best of both worlds," *i.e.*, the essentials of due process, and the substantive benefits accorded juveniles under article 2338-1, namely, section 13(3), and the treatment of the case as a civil case. At the same time, the court denied the juvenile the protection heretofore accorded adults, namely, that the evidence establish "beyond a reasonable doubt"[27] that the adult has committed the act complained of.

In *E.S.G. v. State*, the San Antonio Court of Civil Appeals held that article 2338-1, section 3(f) was not unconstitutionally vague.[28] In support of its holding, the majority of the court set forth the following reasons: (1) "In thirty-three States a child can be found delinquent if he is guilty of immoral conduct, and the various States' definitions of immoral conduct are all somewhat similar to section 3(f)." (2) "The need to correct habits and patterns of behavior which are injurious to the health or morals of the child goes to the very heart of our Juvenile Act." (3) "This case history illustrates the need for a provision such as found in Sec. 3(f)." and (4) "[S]ince the petition filed under section 3(f) must allege the specific acts of conduct which brings the child within the prohibited behavior. This protects the rights of the child in the adjudicatory stage of the proceedings."[29]

On the other hand, the dissenting opinion dealt in a more direct manner with the issue before the court, that issue being whether the essentials of due process must be accorded juveniles in the pre-adjudicatory stage of the proceedings. Notwithstanding the holding that section 3(f) of article 2338-1 is unconstitutionally vague, the dissent points out the following: (1) "If a statute is, in reality, not vague, the result would be that, after the decision in the particular case, the statute is sufficiently clear and precise to enable men of common intelligence and understanding to determine what is prohibited and what is permissible." (2) "The application of less strict constitutional standards to juvenile proceedings has sometimes been justified by distinguishing between proceedings, such as criminal cases, where the adjudication relates to past conduct, and those cases, such as juvenile cases, where the purpose of the inquiry is to determine a present or future condition. The distinction is, at best, illusory." and (3) section 3(f) "establishes the judge or jury as the arbiter of the behavior and morals of every child.

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26 State v. Santana, 444 S.W.2d 614 (Tex. Sup. 1969).
27 TEX. PENAL CODE ANN. art. 9 (1952).
28 E.S.G. v. State, 447 S.W.2d 225 (Tex. Civ. App.—San Antonio 1969, writ ref'd n.r.e.)
29 *Id.*

The situation is ripe for overreaching, for imposition of the judge's or jury's own code of youthful conduct."[30]

At this point, mention must be made of the fact that recently, the Supreme Court of the United States also refused to answer the question that was presented to the Court in *E.S.G. v. State.* In *State v. Mattiello*,[31] which involved a constitutional attack on a statute similar to the one under attack in *E.S.G.*, the appellate division of the circuit court affirmed the commitment of a juvenile under the statute that defined a delinquent child as one "in manifest danger of falling into habits of vice." The Supreme Court, after hearing argument, dismissed the petition for want of a properly presented federal question.[32]

In order to provide a more complete treatment of the legal issue and decision in *E.S.G.*, it is necessary to set out briefly the law applicable to an adult facing a conviction under a similar statute. To begin with, article 1, section 10, of the Texas Constitution[33] provides in part that an accused shall have the right ". . . to demand the nature and cause of the accusation against him, and to have a copy thereof. . . ." Under this section of the constitution it has been held that the penal law creating the offense with which the defendant is charged must be sufficiently definite to be understood; otherwise, it is a violation of this provision.[34] This holding is in line with the holdings of the Supreme Court of the United States,[35] which generally are cited for the proposition that:

> . . . the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it, what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.[36]

In addition to the above mentioned provision in the Texas Constitution, article 6 of the Penal Code of Texas provides:

> Whenever it appears that a provision of the penal law is so indefinitely framed or of such doubtful construction that it cannot be

30 *Id.*
31 225 A.2d 507 (Conn. App. 1966).
32 Mattiello v. Connecticut, 395 U.S. 209, 89 S. Ct. 1767, 23 L. Ed. 2d 212 (1969).
33 TEX. CONST. art. 1, § 10.
34 *Ex parte* Meadows, 133 Tex. Crim. 292, 109 S.W.2d 1061 (1937).
35 Giaccio v. Pennsylvania, 382 U.S. 399, 86 S. Ct. 518, 15 L. Ed. 2d 447 (1966); Musser v. Utah, 333 U.S. 95, 68 S. Ct. 397, 92 L. Ed. 562 (1948); Lanzetta v. New Jersey, 306 U.S. 451, 59 S. Ct. 618, 83 L. Ed. 888 (1939).
36 Connally v. General Const. Co., 269 U.S. 385, 46 S. Ct. 126, 70 L. Ed. 322 (1926).

> understood, either from the language in which it is expressed, or from some other written law of the State, such penal law shall be regarded as wholly inoperative.[37]

As was pointed out by the concurring opinion in *Leach v. State*,[38] the Texas courts have consistently followed the proposition set forth by the Supreme Court of the United States in the previously mentioned *Connally* opinion;[39] therefore, numerous Texas statutes have been held unconstitutional due to their vagueness.[40]

A close analysis of the law that has been mentioned to this point, and of the majority opinion in the instant case, reveals a successful evasion of the legal issue presented to the court for its determination. Instead of stating whether a juvenile in Texas is entitled to the same "essentials of due process" accorded adults in the pre-adjudicatory stage of a proceeding, the court merely stated that the juvenile is protected during the adjudicatory stage, since a petition filed under section 3(f) of article 2338-1[41] must allege the specific conduct that brings the child within the prohibited behavior.[42] It seems clear that the constitutional attack on section 3(f) for vagueness necessarily involved a determination of whether a juvenile was entitled to the same rights accorded adults in the pre-adjudicatory stage; for by presenting such question before the court, the appellant in effect asked the court to determine whether the statutory definition in question was sufficient to give notice to all juveniles of what conduct is prohibited. It is no answer to such question to state that the juvenile is protected since the petition must allege specific acts of misconduct to bring the child within the prohibited behavior.

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37 TEX. PENAL CODE ANN. art. 6 (1952).

38 Leach v. State, 428 S.W.2d 817 (Tex. Civ. App.—Houston [14th Dist.] 1968, no writ).

39 Connally v. General Const. Co., 269 U.S. 385, 46 S. Ct. 126, 70 L. Ed. 322 (1926).

40 The following are statutes that have been held unconstitutional in Texas due to their vagueness: (1) a 1918 statute making a person driving a motor vehicle or motorcycle toward an intersection of a public street or highway with railroad tracks, where the view of the said crossings is obscured either wholly or partially, who fails to reduce the speed of the vehicle not to exceed six miles per hour at some point not nearer than thirty feet of such track, unless there are flagmen or gates showing way to be clear, is guilty of misdemeanor. Graham v. Hines, 240 S.W. 1015 (Tex. Civ. App.—Galveston 1922, writ ref'd); (2) a 1918 statute forbidding the operating or driving of motor vehicles on any public highway where the territory contiguous thereto is closely built up, at greater rate of speed than eighteen miles per hour. *Ex parte* Slaughter, 92 Tex. Crim. 212, 243 S.W. 478 (1922); (3) a 1925 statute declaring that whoever needlessly kills an animal is guilty of an offense. Cinadr v. State, 108 Tex. Crim. 147, 300 S.W. 64 (1927); (4) a 1925 statute denouncing a disturbance by one disguised in such a manner as to render identity "difficult to determine." Anderson v. State, 113 Tex. Crim. 450, 21 S.W.2d 499 (1929); (5) a statute providing that failure of any person, firm, etc., engaged in manufacturing, distributing, etc., of liquid petroleum gas to comply within forty-eight hours after receipt of order of the Railroad Commission to comply with statute regulating distribution of such gas or any order of Railroad Commission, shall subject such person and officers and executives of such named concerns to penalties. Eubanks v. State, 203 S.W.2d 339 (Tex. Civ. App.—Austin 1947, writ ref'd).

41 TEX. REV. CIV. STAT. ANN. art. 2338-1, § 3 (f) (1964).

42 E.S.G. v. State, 447 S.W.2d 225 (Tex. Civ. App.—San Antonio 1969, writ ref'd n.r.e.).

As was stated by the Supreme Court of the United States in *Lanzetta v. State of New Jersey*,[43] "[i]t is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression . . . ." To state that "the need to correct habits and patterns of behavior which are injurious to the health or morals of the child goes to the very heart of our Juvenile Act"[44] or that "the use of words of general meaning is the essence of our code system,"[45] does not provide an answer to the legal issue before the court. As pointed out by the Supreme Court in *Lanzetta*, the mere objective of the law does not make a vague statute constitutional.[46] In 1944, the Supreme Court of Texas, while pointing out that the power to enact laws was vested in the Legislature, stated: "If any law, or part thereof, undertakes to nullify the protection furnished by the Constitution, such law, or part thereof, that conflicts with the Constitution is void."[47]

Another statement often used in defense of decisions such as the one in the instant case is that a juvenile proceeding is a civil proceeding and not a criminal proceeding. This view was expressly rejected by the Supreme Court in *Gault*; and, as pointed out by the Supreme Court in *Giaccio v. Pennsylvania*,[48] regardless of whether an act is penal or civil it must meet the due process requirements of the fourteenth amendment. In that case, the Court stated:

> Both liberty and property are specifically protected by the Fourteenth Amendment against any state deprivation which does not meet the standards of due-process, and this protection is not to be avoided by the simple label a state chooses to fasten upon its conduct or its statute.[49]

Section 13(3) of article 2338-1[50] is also often mentioned in defense of opinions such as the one in the instant case. However, as has been pointed out, "it may be questioned whether these provisions of the Act really work. Prosecutors in criminal cases always seem to know about the juvenile record of the defendant and many prospective employers also seem to get the word about them."[51] The majority opinion in *Gault* also pointed to the above mentioned defects in the system and stated: "there is no reason why the application of due process requirements should interfere with such provisions."[52]

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43 306 U.S. 451, 59 S. Ct. 618, 83 L. Ed. 888 (1939).
44 E.S.G. v. State, 447 S.W.2d 225 (Tex. Civ. App.—San Antonio 1969, writ ref'd n.r.e.).
45 Lanzetta v. New Jersey, 306 U.S. 451, 59 S. Ct. 618, 83 L. Ed. 888 (1939).
46 *Id.*
47 Dendy v. Wilson, 142 Tex. 460, 179 S.W.2d 269 (1944).
48 382 U.S. 399, 86 S. Ct. 518, 15 L. Ed. 2d 447 (1966).
49 *Id.*
50 TEX. REV. CIV. STAT. ANN. art. 2338-1, § 13 (3) (1964).
51 Billings, *The New Juvenile Delinquent Law*, 31 TEX. B.J. 203 (1968).
52 Application of Gault, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967).