

In the Matter of B.W.

How Texas Treats Victims
of Sexual Exploitation:
The Texas Family and Penal Code

Ann Johnson Johnson Law Firm PC 5000 Caroline Houston, Texas 77004 713-523-5000	Mike Choyke Wright & Close, L.L.P. Three Riverway, Suite 600 Houston, Texas 77056 713-572-4321
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Texas Supreme Court

In the Matter of B.W.

Narrow question of “whether the Legislature, by its wholesale incorporation of Penal Code offenses into the juvenile justice provisions of the Family Code, intended to permit prosecution of a 13-year old child for prostitution considering its specific pronouncement that a child under 14 is legally incapable of consenting to sex with an adult.”

313 S.W.3d 818 (Tex. 2010)

In the Matter of B.W.

- Specific Legal Question:
 - Consent to sex with an adult
(Not Conduct)
- Public Policy:
 - Human Trafficking and
Sexual Exploitation Victims

Texas Supreme Court

In the Matter of B.W.

We conclude that transforming a child victim of adult sexual exploitation into a juvenile offender was not the Legislature’s intent and reverse the court of appeals’ judgment.

B.W. at 818.

B.W. Case History

- Jan. 11, 2007
- 10:30 a.m. (Tuesday)
- H.P.D. “Vice” Sting
- Agree to Sex for a Fee:
\$20.00 - Oral Sex

B.W. Case History

- Harris County District Attorney accepted charges of prostitution on B.W. as an adult. (B.W. lied about her age)
- H.C.D.A. discovers B.W. is only 13 years old.
- Upon discovery B.W. was a 13-year-old child, charges dropped in the County Court and the case was filed in Juvenile Court.

OFFENDER OR VICTIM?

A Child Agreed to Sex for a Fee
with an Adult



PROSECUTE

§ 51.03 Fam.
§ 43.02 Pen.

PROTECT

§ 261.001 Fam.
§ 21.11 Pen.
§ 22.011 / 22.021 Pen.
§ 43.05 / 43.06 Pen.
May v. State,
919 S.W.2d 422 (Tex. Crim. App. 1996)

D.A. – Child as Offender

§ 51.03: Delinquent Conduct

Conduct, other than a traffic offense,
that violates a penal law of this state
or of the United States punishable by
imprisonment or confinement in jail

Texas Family Code

D.A. - Child as Offender

§ 43.02 – A person commits an
offense if he knowingly: (1) offers
to engage, agrees to engage, or
engages in sexual conduct for a
fee

Texas Penal Code

Texas Supreme Court

In the Matter of B.W.

The notion that an underage child cannot legally consent to sex is of longstanding origin and derives from the common law ... Texas follows the majority of states which have established a two-step scheme that differentiates between sex with a younger child and sexual relations with an older teen. The rule's underlying rationale is that younger children lack the capacity to appreciate the significance or the consequences of agreeing to sex, and thus cannot give meaningful consent.

B.W. at 820-21.

Texas Supreme Court

In the Matter of B.W.

It is difficult to reconcile the Legislature's recognition of the special vulnerability of children, and its passage of laws for their protection, with an intent to find that children under fourteen understand the nature and consequences of their conduct when they agree to commit a sex act for money, or to consider children quasi-criminal offenders guilty of an act that necessarily involves their own sexual exploitation.

B.W. at 821-22.

Texas Legislature

Human trafficking is a modern day form of slavery ... Texas has 20 percent of the market in the United States, and Houston is currently the world's largest center for human trafficking ...

House Comm. On Human Services,
Bill Analysis, Tex. C.S.H.B. 4009, 81st Leg (2009)

Texas Legislature

The vast majority of domestic victims of human trafficking are minors; approximately 70 percent fall into the sex trade.

House Comm. On Human Services,
Bill Analysis, Tex. C.S.H.B. 4009, 81st Leg (2009)

Texas Legislature

Unfortunately, most of these children are criminalized and placed with Child Protective Services with the result that the child does not receive the necessary services and often falls back under the thumb of traffickers.

House Comm. On Human Services,
Bill Analysis, Tex. C.S.H.B. 4009, 81st Leg (2009)

Victim of Sexual Exploitation

B.W. represented neither a typical criminal case, nor a typical juvenile case

- 13 Year-Old
- C.P.S. "runaway" for 14 months
- Reportedly "Living with 32 year-old boyfriend who was having sex with her."
- Sexually transmitted diseases

Victim of Sexual Exploitation

- “emotionally impoverished, discouraged and dependent adolescent”
- “exhibits patterns of feeling sad, downhearted, unworthy ... yearns for acceptance from others, although her hopes appear to be waning rapidly.”

Texas Family Code

§ 261.101 – Persons Required to Report
(a)A person having cause to believe that a child’s physical or mental health or welfare has been adversely affected by abuse or neglect by any person shall immediately make a report

Texas Family Code

§ 101.003: Child or Minor

- a person under 18
- is and has not been married
- who has not had disabilities of minority removed

Texas Family Code

§ 261.301: Investigation of Report

(a) With assistance from the appropriate state or local law enforcement agency ..., the department or designated agency shall make a prompt and thorough investigation of a report of child abuse ... allegedly committed by a person responsible for a child's care, custody, or welfare.

Texas Family Code

§ 261.001(1): "Abuse" defined

(E) Sexual conduct harmful to a child's mental, emotional, or physical welfare, including conduct that constitutes the offense [under Penal Code sections] 21.02, 21.11, 22.011, 22.021.

Texas Penal Code

§ 21.02 – Continuous Sexual Abuse of a Young Child or Children (25-99, Life)

§ 21.11 – Indecency with a Child (2-20)

§ 22.011 – Sexual Assault (2-20)

§ 22.021 – Aggravated Sexual Assault
(5-99 or 25-99, Life)

Texas Family Code

§ 261.001(1): "Abuse" defined

(G) Compelling or encouraging the child to engage in sexual conduct as defined by Section 43.01, Penal Code

Texas Penal Code

§ 43.01 – Prostitution means the offense defined in Section 43.02.

§ 43.02 – A person commits an offense if he knowingly: (1) offers to engage, agrees to engage, or engages in sexual conduct for a fee

Texas Supreme Court

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Children are the victims,
not the perpetrators,
of child prostitution.

B.W. at 826.

Texas Supreme Court
In the Matter of B.W.

Children do not freely choose a life of prostitution, and experts have described in detail the extent to which they are manipulated and controlled by their exploiters.

B.W. at 826.

N.C.M.E.C. and D.O.J.

- “prostitution of children is closely tied to life on the streets”
- “up to 300,000 prostituted children”
- Pimps “look for young girls who are lonely or rebellious, with low self esteem” and “prey disproportionately on young runaway”

Eva J. Klain, J.D., “Prostitution of Children and Child-Sex Tourism: An Analysis of Domestic and International Responses,” N.C.M.E.C. (April 1999)

Texas Human Trafficking Prevention Task Force Report

- Texas Dept. Public Safety reports **11,942** juveniles arrested as runaways in 2009.
- U.S. Dept. Health Human Services estimates children are approached by traffickers with **48 hours**.

Report at 3.

N.C.M.E.C. and D.O.J.

A call to bring children into the system “to successfully prosecute pimps and others for violations such as pandering, soliciting, or promoting prostitution.”

Klain, “Prostitution of Children”

Child Prostitution

“most overlooked and under investigated form of child sexual abuse.”

Special Agent Sgt. Fransen

Texas Human Trafficking Prevention Task Force Report

Acc. to the Texas Dept. of Criminal Justice there are:

- 8 inmates serving sentences convicted of human trafficking.
- 56 inmates serving sentences for compelling prostitution-related offenses.
- Of those 56 **only 10 for compelling children** under the age of 17.

Report at 2.

According to the State Department, the number of victims identified reflects

.4%

of the victims in existence.

Report at 8.

Child Victim Identification Challenges:

- Lack of general understanding about human trafficking among those that come in contact with children
- Lack of self-identification as victim
- Contradictory laws

Report at 12.

Texas Supreme Court

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Child Prostitutes:

Most of these children are controlled by their pimps through a combination of emotional and financial security mixed with violence and drugs, and unaware that the treatment they are receiving is against the law.

B.W. at 824-25.

Texas Supreme Court
In the Matter of B.W.

“[P]imps and other sexual exploiters of children may still be prosecuted for compelling prostitution and other crimes of sexual exploitation even though the child herself may not be prosecuted.”

B.W. at 824.

Protection of Child Prostitutes
without Adjudication

A law enforcement officer may take possession of a child with a court order if a person of ordinary prudence and caution would believe there is an immediate danger to the physical health or safety of the child or that the child has been the victim of sexual abuse.

B.W. at 825,
citing Texas Family Code § 262.104(a)(1) & (3).

Protection of Child Prostitutes
without Adjudication

Law enforcement or another appropriate agency “shall make a prompt and thorough investigation of a report of child abuse.”

B.W. at 825,
citing Texas Family Code § 261.301(a).

Protection of Child Prostitutes
without Adjudication

Prosecute the Pimp:

A person commits an offense if the person knowingly: (1) causes another by force, threat, or fraud to commit prostitution; or (2) causes by any means a child younger than 18 years to commit prostitution, regardless of whether the actor knows the age of the child at the time the actor commits the offense.

Texas Penal Code § 43.05, eff. Sept 1, 2009.

Protection of Child Prostitutes
without Adjudication

Texas Legislature provides immunity:

A party to an offense under this subchapter may not be prosecuted for any offense about which he is required to furnish evidence or testify, and the evidence and testimony may not be used against the party in any adjudicatory proceeding except a prosecution for aggravated perjury.

Texas Penal Code § 43.06(b).

Adjudication of Victims?

- No affirmative defenses to assert
- No "outcry" requirement?

Tex. Code Crim. Proc. art 38.07

(b) the requirement that the victim inform another person of an alleged offense does not apply if at the time of the alleged offense the victim was a person: (1) 17 years of age or younger.

Adjudication of Victims?

Due Process Violation?

Juvenile proceedings must measure up to
"the essentials of due process and fair treatment"

In re Gault, 387 U.S. 1, 30-31 (1967)

Adjudications may be used against the child in
subsequent proceedings.

Tex. Fam. Code § 51.13

Tex. Code Crim. Proc. art 37.07 § 3

Prostitution is a crime of moral turpitude

Cf. Holgin v. State, 480 S.W.2d 405, 408
(Tex. Crim. App. 1972)

Texas Legislative Efforts

- The Attorney General submitted the Texas Human Trafficking Prevention Task Force Report to the Texas Legislature, January 2011
- Proposed Legislation

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