

**Family Law—Parental Rights—Principles of Res Ipsa Loquitur Apply to Proof of Child Abuse and Neglect.** *Higgins v. Dallas County Child Welfare Unit*, 544 S.W.2d 745 (Tex. Civ. App.—Dallas 1976, no writ).

The Dallas County Child Welfare Unit petitioned the juvenile court for termination of the parent-child relationship between Sammy and Hazel Higgins and their child, Patrick Higgins.<sup>1</sup> The welfare unit based its request for termination on Texas Family Code section 15.02(1)(D) and (E), which provide for involuntary termination of the parent-child relationship if the court finds that the parent has abused or neglected the child.<sup>2</sup> At the age of fifteen months Patrick was admitted to Parkland Hospital after his mother noticed a swelling in both his hands and feet. Doctors diagnosed his condition as an upper respiratory infection.<sup>3</sup> Following a ten-day hospital stay for treatment of this condition, the hospital released Patrick, but four days later it readmitted him after his mother observed a swollen knee. At that time x-ray pictures were taken and the treating physician found fractures of both legs.<sup>4</sup> As neither parent could explain how the fractures occurred, doctors pronounced Patrick the subject of a “possible battered child syndrome,”<sup>5</sup> and the juvenile court placed him under the temporary managing conservatorship of the Dallas County Child Welfare Unit.<sup>6</sup> Three caseworkers visited the Higgins family while Patrick was under this temporary manag-

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1. *Higgins v. Dallas County Child Welfare Unit*, 544 S.W.2d 745, 746 (Tex. Civ. App.—Dallas 1976, no writ).

2. TEX. FAMILY CODE ANN. § 15.02(1)(D) and (E) (Supp. 1976). The applicable sections read as follows:

A petition requesting termination of the parent-child relationship with respect to a parent who is not the petitioner may be granted if the court finds that:

(1) the parent has:

. . . .

(D) knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child; or

(E) engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child;

(K) . . . and in addition, the court further finds that

(2) termination is in the best interest of the child.

3. *Higgins v. Dallas County Child Welfare Unit*, 544 S.W.2d 745, 747 (Tex. Civ. App.—Dallas 1976, no writ).

4. *Id.*

5. *Id.* at 747.

6. *Id.*

ing conservatorship. At the trial the first caseworker testified that Mr. Higgins did not relate well with Patrick and that Patrick would have nothing to do with his father.<sup>7</sup> The second and third caseworkers both testified that the parents were uncooperative when asked to attend family counseling sessions.<sup>8</sup> Neither the welfare unit nor Mr. and Mrs. Higgins called as a witness the neighbor with whom Patrick stayed while his mother worked. The neighbor had kept Patrick for a period beginning prior to his first hospital admission.<sup>9</sup>

Although the jury declined to find that Mr. and Mrs. Higgins had personally abused the child, it found by a preponderance of the evidence that they had knowingly placed and knowingly allowed Patrick to remain in conditions and surroundings that endangered his physical well-being and that it was in the child's best interest to terminate parental rights.<sup>10</sup> Mr. and Mrs. Higgins appealed on the ground that there was insufficient evidence to support the jury finding.<sup>11</sup> The Dallas Court of Civil Appeals sustained the Higgins' claim and reversed and remanded the case.<sup>12</sup> However, the court held that a *res ipsa loquitur* type of circumstantial evidence can be sufficient to establish child abuse or neglect under Texas Family Code section 15.02(1)(D) and (E).<sup>13</sup>

In *Higgins v. Dallas County Child Welfare Unit*<sup>14</sup> the welfare agency argued that the doctrine of *res ipsa loquitur* should be applied in child abuse and neglect cases and that under this doctrine there was sufficient evidence to support the verdict.<sup>15</sup> The court observed that the application of *res ipsa loquitur* to child abuse and neglect cases was a question of first impression in Texas.<sup>16</sup> While not adopting the tort theory of *res ipsa loquitur* with all its procedural ramifications,<sup>17</sup> the court concluded that circumstantial evidence of

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7. *Id.* at 747-48.

8. *Id.* at 748.

9. *Id.*

10. *Id.* at 748-49.

11. *Id.* at 749.

12. *Id.* at 747.

13. *Id.* at 750.

14. 544 S.W.2d 745 (Tex. Civ. App.—Dallas 1976, no writ).

15. *Id.* at 749-50.

16. *Id.* at 750. The court first interpreted the pertinent subsections of Texas Family Code § 15.02. It concluded that subsection (D) protects a child if a parent knowingly neglects it by exposing it to dangerous surroundings and that subsection (E) concerns aggressive behavior by a parent toward a child that results in harm to the child's physical or emotional health. *Id.* at 749.

17. These include the effect on burden of proof, burden of going forward with the

the child's injuries and the parent's control of the child can be sufficient to prove child abuse and neglect.<sup>18</sup> The court adopted a two-part test similar to the traditional *res ipsa* test. First, the party seeking to terminate the parent-child relationship must show serious injury or detriment to the child's health that would normally not occur in the absence of parental abuse or neglect.<sup>19</sup> Second, the party must show parental control of the child during the time that the injuries are alleged to have occurred.<sup>20</sup> The jury is authorized to infer abuse or neglect from proof of these two elements.<sup>21</sup> The court reasoned that such an approach to proof in abuse and neglect cases is necessary because of the difficulty of obtaining proof of neglectful or abusive conduct on the part of the parent. The court cited as examples the facts that abusive actions take place most often in the privacy of the home, that parents generally refuse to testify against one another, and that the young victims are often unable or too frightened to testify.<sup>22</sup>

Having determined that the Dallas County Child Welfare Unit could present a *res ipsa* case, the court then turned to the question whether the evidence the agency had offered supported the jury finding of neglect. The court concluded that the evidence was insufficient as to both elements of the *res ipsa* test. First, evidence was lacking on the extent of Patrick's injuries during his first hospital visit.<sup>23</sup> Second, the record did not reflect who cared for the child on what occasions because the neighbor keeping Patrick was not called to testify.<sup>24</sup> Also, there was no evidence that the conditions at the neighbor's house were unsafe or that Mr. and Mrs. Higgins were aware of such conditions.<sup>25</sup> Thus, the court concluded that the evidence was factually insufficient to support the jury's finding of neglect.<sup>26</sup>

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evidence, pleading, defendant's evidence. Prosser, *The Procedural Effect of Res Ipsa Loquitur*, 20 MINN. L. REV. 241 (1936), and issue submission, 12 HOUS. L. REV. 962 (1975).

18. *Higgins v. Dallas County Child Welfare Unit*, 544 S.W.2d 745, 750 (Tex. Civ. App.—Dallas 1976, no writ).

19. *Id.*

20. *Id.*

21. *Id.* at 750.

22. *Id.*

23. *Id.*

24. *Id.* at 750-51.

25. *Id.*

26. The Higgins also asserted that (1) the welfare unit must prove its allegations by clear and convincing evidence instead of the preponderance standard and (2) the court improperly framed the special issues to include both parents. *Id.* at 747, 749. The court noted that a preponderance of the evidence standard is provided for in TEX. FAMILY CODE ANN. § 11.15

*Higgins v. Dallas County Child Welfare Unit*<sup>27</sup> is an example of a movement toward providing greater protection to children by relaxing evidentiary rules in child abuse and neglect cases.<sup>28</sup> One important element of this movement is the adoption of a *res ipsa* theory of proof of abuse and neglect.<sup>29</sup> The development of the "battered child syndrome" diagnosis<sup>30</sup> has provided the basis of a *res ipsa* form of proof. The syndrome means that the child has been the victim of multiple and serious injuries that are not normally caused by accidental means.<sup>31</sup>

New York has taken the lead in employing the concept of the "battered child" and relaxing evidentiary rules to better serve the interest of the child. In *In re S.*,<sup>32</sup> the family court borrowed the principle of *res ipsa loquitur* from the law of negligence to hold that circumstantial evidence of only the condition of the child and parental control during the time the injuries occurred is sufficient to establish parental abuse and neglect.<sup>33</sup> The court gave no reasoning for its decision other than that the evidence of the battered child speaks for itself.<sup>34</sup> Four years later the New York Legislature enacted

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(1975) and held that the same standard applies to § 15.02 cases. *Higgins v. Dallas County Child Welfare Unit*, 544 S.W.2d 745 (Tex. Civ. App.—Dallas 1976, no writ). Regarding the joining of the parents in the special issues, the court concluded that each parent should have his rights in a parental termination proceeding submitted separately to the jury. The court reasoned that this was the legislative intent of Texas Family Code § 15.02 because the section refers to parent in the singular and that a joint submission would require the jury to refuse to terminate parental rights even though it was convinced one parent was abusive or neglectful. *Id.*

27. 544 S.W.2d 745 (Tex. Civ. App.—Dallas 1976, no writ).

28. Brown, *Medical and Legal Aspects of the Battered Child Syndrome*, 50 CHI.-KENT L. REV. 45, 70 (1973); Katz, *Legal Research on Child Abuse and Neglect: Past and Future*, 11 FAM. L.Q. 151, 167-68 (1977).

29. The doctrine of *res ipsa loquitur* is that an inference of negligence may be drawn from proof that the defendant had control of the instrumentality causing injury and that the accident was of the type that does not occur in the absence of negligence. See PROSSER, *HANDBOOK OF THE LAW OF TORTS* §§ 39-40 (4th ed. 1971). Some courts hold that *res ipsa* creates a rebuttable presumption of negligence while others, including Texas, hold that the doctrine merely creates a permissive inference of negligence. *Gulf, C. & S.F. Ry. v. Dunman*, 27 S.W.2d 116, 118 (Tex. Comm'n App. 1930, opinion adopted).

30. Note, *The Battered Child: Logic in Search of Law*, 8 SAN DIEGO L. REV. 364, 365-68 (1971).

31. *People v. Jackson*, 18 Cal. App. 3d 504, 95 Cal. Rptr. 919, 921 (1971). Medical experts recognize certain criteria as indicative of a "battered child." These include a child under the age of three, evidence of repeated bone injuries, subdural hematomas with or without skull fracture, soft tissue injury, and the explanation for the injury does not fit the injury. *Id.*

32. 46 Misc. 2d 161, 259 N.Y.S.2d 164 (Fam. Ct. 1965).

33. 259 N.Y.S.2d at 165.

34. *Id.*

the Children's Bill of Rights, Article 10 of the New York Family Court Act.<sup>35</sup> Section 1046(a)(ii) provides that proof of injuries that would not ordinarily occur except by an act or omission of the parent or person responsible for the child is prima facie evidence of child abuse or neglect.<sup>36</sup> Pursuant to this statutory provision, the family court in *In re Tashyne L.*<sup>37</sup> received evidence of a three-month old child admitted to the hospital with acute abrasions, dehydration, respiratory distress, and multiple fractures. The trial judge also concluded that the parents had control of the infant during the time that the injuries occurred. The appellate court held that this evidence supported a finding that the child was abused.<sup>38</sup>

Since its enactment, section 1046(a)(ii) of the Children's Bill of Rights has withstood both due process and fifth amendment challenges. In *In re J R*<sup>39</sup> the family court considered a mother's claim that the statutory prima facie case of abuse or neglect deprived her of her children without due process of law. The mother's primary argument was that the statute altered the burden of proof by creating a presumption that the parent must rebut in order to preserve his parental rights.<sup>40</sup> The court concluded that the statutory presumption did not violate due process. It reasoned that the burden of proof did not shift because the party seeking to terminate the parental rights must still prove the elements of injury and control;<sup>41</sup> after injury and control are proved, only the burden of going forward with the evidence shifts to the parent, who may then offer explanations of the injuries or rebut control.<sup>42</sup> *In re S.*<sup>43</sup> concerned the question whether this requirement of explanation violated the self-incrimination protection of the fifth amendment. The family court found no fifth amendment violation because the parents are not required to testify. However, if they do not testify, they must suffer the consequences of termination.<sup>44</sup>

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35. N.Y. FAM. CT. ACT (McKinney 1975). See also CONN. GEN. STAT. ANN. § 17-38a(f)(4) (West 1975) and R.I. GEN. LAWS § 40-11-7 (Supp. 1976).

36. N.Y. FAM. CT. ACT § 1046(a)(ii) (McKinney 1975).

37. *In re Tashyne L.*, 53 App. Div. 2d 629, 384 N.Y.S.2d 472 (1976).

38. 384 N.Y.S.2d at 474.

39. 87 Misc. 2d 900, 386 N.Y.S.2d 774 (Fam. Ct. 1976).

40. 386 N.Y.S.2d at 779.

41. *Id.* at 780.

42. *In re Young*, 50 Misc. 2d 271, 270 N.Y.S.2d 250, 253 (Fam. Ct. 1966).

43. 66 Misc. 2d 683, 322 N.Y.S.2d 170 (Fam. Ct. 1971).

44. 322 N.Y.S.2d at 177. The res ipsa theory as used in child abuse and neglect cases is analogous to the evidentiary theory in two homicide convictions. In *Commonwealth v. Paquette*, 451 Pa. 250, 301 A.2d 837 (1973) a stepfather was convicted for the murder of his infant

Texas, like other states, has dealt with the problem of child abuse and neglect statutorily.<sup>45</sup> Effective January 1, 1974, section 15.02 of the Parent and Child Title of the Texas Family Code replaced the antiquated provisions of Art. 2330, "Dependent or neglected child."<sup>46</sup> In section 15.02 the legislature outlined more specifically what conduct of parents justifies involuntary severance of the parent-child relationship.<sup>47</sup> However, the Family Code section did not specify in detail the evidentiary standards applicable to abuse and neglect cases; consequently, the courts have had to decide such questions.

Before *Higgins v. Dallas County Child Welfare Unit*,<sup>48</sup> Texas courts allowed circumstantial evidence, including evidence relating to the child's injury and the parental control of the child, to prove abuse and neglect. However, the courts required more than just evidence of injury and control; the primary focus of cases was on the conduct or condition of the parent rather than the condition of the child. For example, in *Carter v. Dallas County Child Welfare Unit*,<sup>49</sup> the court held that evidence of the schizophrenic condition of the mother which by its nature caused or forced her to engage in conduct which endangered the physical and emotional well-being of her children supported a termination of parental rights. Similarly, in *Patton v. Welch*<sup>50</sup> the father's criminal record evidenced conduct that caused him to abuse his children, and in *H.W.J. v. State Department of Public Welfare*<sup>51</sup> the fact of the father's imprisonment was a condition that caused conduct that endangered the physical and emotional well-being of his child. Other cases focused on such evidence of parental conduct as lack of cooperation with welfare authorities,<sup>52</sup> repeated absences and poor records by the children at

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stepchild. The court held that evidence that the adult had sole custody of the child for the period of time in which the child suffered serious injuries that were not accidental was sufficient to allow the jury to infer that the adult inflicted these wounds. 301 A.2d at 840. See also *State v. Loss*, 295 Minn. 271, 204 N.W.2d 404 (1973).

45. Katz, *Child Neglect Laws in America*, 9 FAM. L.Q. 372 (1975).

46. TEX. REV. CIV. STAT. ANN. art. 2330 (1971). This provision had been in effect since 1907.

47. See note 2 *supra*.

48. 544 S.W.2d 745 (Tex. Civ. App.—Dallas 1976, no writ).

49. 532 S.W.2d 140 (Tex. Civ. App.—Dallas 1976, no writ).

50. 538 S.W.2d 7 (Tex. Civ. App.—Waco 1976, writ ref'd n.r.e.).

51. 543 S.W.2d 9 (Tex. Civ. App.—Texarkana 1976, no writ).

52. *Moreland v. State*, 531 S.W.2d 229 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ).

school,<sup>53</sup> cluttered and unsanitary households,<sup>54</sup> inability to acknowledge a family problem,<sup>55</sup> sexual relationships of the parent,<sup>56</sup> feeding the children sour milk,<sup>57</sup> and repeated failure to pick up the child at a babysitter's.<sup>58</sup> Also, the court has considered testimony that the parent is not apt to follow through with long-range goals, such as establishing a career or home and that the mother wants to keep her baby to get back at her parents.<sup>59</sup>

In contrast, *Higgins v. Dallas County Child Welfare Unit*<sup>60</sup> allows, by a *res ipsa loquitur* theory, the condition of the child to be sufficient proof of abuse or neglect on the part of the parent. The court's rationale for adopting this theory is that it is difficult to acquire evidence of abusive or neglectful parental conduct.<sup>61</sup> Focusing on the child to determine parental conduct provides a less stringent evidentiary standard yet still implements the purpose of section 15.02. Because the primary objective of section 15.02 should be to protect children, the foremost concern should not be the parent's conduct *per se*; rather, it should be how that conduct affects the child. The courts are not concerned whether the parent has, for example, a psychological problem unless that problem adversely affects the child. A *res ipsa* evidentiary approach is consistent with this concern.<sup>62</sup>

However, although *res ipsa* focuses on the child, it does not do so to the extent that it unjustly infringes on parental rights. The party seeking termination must prove that the child's injuries are of a type that ordinarily occur by non-accidental means.<sup>63</sup> Testimony of medical experts should be required to explain that the multiple and severe injuries of the child evidence a "battered

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53. *Id.*

54. *Id.*

55. *Id.*

56. *In re RDP*, 526 S.W.2d 135 (Tex. Civ. App.—Dallas 1975, no writ).

57. *Id.*

58. *Id.*

59. *DF v. State*, 525 S.W.2d 933 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ).

See also *In re Susan Lynn M.*, 53 Cal. App. 3d 300, 125 Cal. Rptr. 707 (1976); *In re C.O.*, 541 P.2d 330 (Colo. Ct. App. 1975); *Sanchez v. Walker County Dep't of Family & Children Servs.*, 138 Ga. App. 49, 225 S.E.2d 441 (1976); *In re Bessette*, 551 P.2d 653 (Mont. 1976); *In re Norwood*, 194 Neb. 595, 234 N.W.2d 601 (1975); New Jersey Div. of Youth & Family Servs. v. *Huggins*, 148 N.J. Super. 86, 371 A.2d 841 (Camden County Ct. 1977).

60. 544 S.W.2d 745, 750 (Tex. Civ. App.—Dallas 1976, no writ).

61. *Id.*

62. The *res ipsa* inference does not replace the use of conduct evidence in proving child abuse and neglect if available, but merely supplements it. *Id.*

63. *Id.*

child," rather than an accidental fall or a tussle with a sibling. Also, the parent has the opportunity to offer a reasonable explanation for the injuries and thereby rebut the inference of abuse or neglect created by the existence of the injuries. Thus, the *res ipsa* theory also conforms to the purpose of section 15.02 by insuring that parental rights are not terminated unless the parent has engaged in abusive or neglectful conduct.

The procedural implications of the two-part test of *Higgins* is a problem future cases must decide. The language of the court suggests that a finding of the two elements of the test will create only an inference of abuse or neglect.<sup>64</sup> If the test creates only an inference, the issue of abuse or neglect is a jury question, and the jury may decide for or against termination whether the parent presents any rebuttal or not.<sup>65</sup> The creation of a mere inference is consistent with the tort application of *res ipsa* in Texas;<sup>66</sup> however, the *Higgins* court specifically declined to adopt the procedural ramifications of the tort theory of *res ipsa*.<sup>67</sup> The New York decisions create more than an inference of abuse or neglect; they create a rebuttable presumption,<sup>68</sup> and the parent must offer some evidence to rebut the presumption or lose parental rights.<sup>69</sup> The most desirable procedural effect is the creation of an inference. The creation of a rebuttable presumption would place too great a burden on the parent to prove he did not commit a wrongful act. In light of the strong feeling for preservation of parental rights if at all possible, the creation of an inference would best safeguard the parent against wrongful termination.

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64. *Id.*

65. C. McCORMICK, *McCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE* § 342 (2d ed. 1972).

66. See note 29 *supra*.

67. *Higgins v. Dallas County Child Welfare Unit*, 544 S.W.2d 745, 750 (Tex. Civ. App.—Dallas 1976, no writ). See note 17 *supra*.

68. *In re J R*, 87 Misc. 2d 900, 386 N.Y.S.2d 774, 780 (Fam. Ct. 1976); *In re Young*, 50 Misc. 2d 271, 270 N.Y.S.2d 250, 253 (Fam. Ct. 1966).

69. See C. McCORMICK, *McCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE* § 342 (2d ed. 1972).