



January 2007

Family Law: Parent and Child

Linda B. Thomas

Ardita L. Vick

Recommended Citation

Linda B. Thomas & Ardita L. Vick, *Family Law: Parent and Child*, 60 SMU L. REV. 1053 (2007)
<https://scholar.smu.edu/smulr/vol60/iss3/16>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

FAMILY LAW: PARENT AND CHILD

Linda B. Thomas*
Ardita L. Vick**

TABLE OF CONTENTS

I. INTRODUCTION	1054
II. CHILD SUPPORT	1054
A. INTEREST ON CHILD SUPPORT	1054
B. OFFSETS AND REIMBURSEMENTS	1055
C. DISABILITY OF OBLIGOR	1057
D. IMPLIED CONTRACT TO PAY CHILD SUPPORT	1058
III. PATERNITY	1060
A. EQUITABLE ESTOPPEL.....	1060
B. FROZEN EMBRYO AGREEMENTS.....	1062
C. BILL OF REVIEW	1063
IV. SUIT AFFECTING THE PARENT-CHILD RELATIONSHIP	1064
A. VENUE	1064
1. <i>Forfeiture of Right to Transfer</i>	1065
2. <i>Timeliness of Motion to Transfer</i>	1065
3. <i>Possession of Child</i>	1066
B. ARBITRATION	1067
C. GRANDPARENT ACCESS	1068
D. SECURING TESTIMONY OF CHILDREN	1068
V. TERMINATION.....	1070
A. GROUNDS FOR TERMINATION.....	1070
1. <i>Grounds in Termination Order</i>	1071
2. <i>Spanking</i>	1072
B. FAILURE TO DISMISS	1073
C. APPEAL	1074
1. <i>Statement of Points</i>	1075
2. <i>Constitutionality of Appeal Process</i>	1076
D. INEFFECTIVE ASSISTANCE OF COUNSEL.....	1078
VI. CONCLUSION	1079

* Chief Justice, Fifth District Court of Appeals at Dallas. Chief Justice Thomas received her B.A. from the University of Texas at Arlington and her J.D. from Southern Methodist University.

** Solo Attorney, Fifth District Court of Appeals at Dallas. Ms. Vick received her B.S. from the University of Houston and her J.D. from Baylor University.

I. INTRODUCTION

DURING the Survey period, Texas appellate courts were active not only in interpreting the statutory provisions governing the parent-child relationship but also in applying contract and common law principles to issues not directly addressed by the Texas Family Code. The courts also struggled with arguably inequitable outcomes, most notably in the procedure applicable to the appeal of a termination order. Although only a few of the opinions issued during the Survey period are discussed below, the selected opinions are intended to provide insight into the various approaches the trial and appellate courts are taking in this area of law. Whether based on statute, contract law, or equitable principles, much of the reasoning can be applied outside the specific fact pattern in any case.

II. CHILD SUPPORT

A. INTEREST ON CHILD SUPPORT

During the 2001 session, the Texas Legislature amended section 157.265 of the Family Code, lowering the interest accrued on delinquent child support payments from twelve percent to six percent effective January 1, 2002.¹ In *In re M.C.C.*,² the Texas Supreme Court considered whether the trial court erred in retroactively applying section 157.265 to delinquent child support due before January 1, 2002, and, consequentially, reducing the interest owed by the father.

The divorce decree in *M.C.C.* required the father to make child support payments beginning in July 1993.³ The father did not make all required payments, and, in November 2001, the Attorney General filed a motion to enforce. The trial court entered an order on May 16, 2002, reducing the unpaid child support to a formal judgment using the six percent interest rate in section 157.265. The Fort Worth Court of Appeals affirmed the judgment, holding that the plain language of the statute required that it be applied retroactively.⁴ This decision conflicted with the prospective application of the statute by the Dallas, Amarillo, and Waco Courts of Appeals.⁵

The Texas Supreme Court concluded the 2001 amendment “does not indicate an intention by the Legislature to make the statute retroactive.”⁶

1. Act of May 18, 2001, 77th Leg., R.S., ch. 1491, § 1, 2001 Tex. Gen. Laws 5294, 5294, amended by Act of May 12, 2005, 79th Leg., R.S., ch. 185, § 1, 2005 Tex. Gen. Laws 339, 339.

2. 187 S.W.3d 383 (Tex. 2006) (per curiam).

3. *Id.* at 384.

4. *In re M.C.C.*, 142 S.W.3d 504 (Tex. App.—Fort Worth 2004), *rev'd*, 187 S.W.3d 383 (Tex. 2006) (per curiam).

5. *In re A.R.J.*, 97 S.W.3d 833, 834-35 (Tex. App.—Dallas 2003, no pet.); *In re Hurd*, No. 07-02-00334-CV, 2003 WL 1961142, at *2-3 (Tex. App.—Amarillo Apr. 28, 2003, no pet.); *In re A.B.L.*, No. 10-02-00267-CV, 2003 WL 21470071, at *1 (Tex. App.—Waco June 25, 2003, no pet.) (mem. op.).

6. *In re M.C.C.*, 187 S.W.3d at 385.

Therefore, (1) “any unpaid child support payments that have not been judicially confirmed . . . include twelve percent interest accrued through December 31, 2001”: (2) “beginning January 1, 2002, the unpaid child support that is not judicially confirmed, including the twelve percent interest” that has already accrued, starts “accruing any new interest at the rate of six percent”; and (3) “any unpaid child support that was judicially confirmed before January 1, 2002,” accrues interest at the rate set in the trial court’s order, not at the statutory six percent rate.⁷

B. OFFSETS AND REIMBURSEMENTS

The Texas Supreme Court also considered the application of section 157.008 of the Family Code, which allows an offset or reimbursement of ordered child support payments during periods when the obligor has, by agreement, possessed a child for periods exceeding court-ordered possession.⁸ In *In re A.M.*,⁹ a 1982 Texas Supreme Court case, the court ordered the father to make monthly child support payments for his two children. However, from December 15, 1985, through June 18, 1988, the mother relinquished possession of both children to the father. On May 20, 1994, the mother again relinquished possession of the older child to the father, and the child reached emancipation while living with the father. The younger child turned eighteen on October 25, 1997, ending the father’s support obligation.¹⁰

The father failed to make all ordered child support payments, and, on November 17, 1998, the Attorney General sued the father to reduce the unpaid child support to judgment.¹¹ “In defense, [the father] asserted that [the mother] had voluntarily relinquished control of the children for periods exceeding of court-ordered visitation and that he was therefore entitled to an offset” under section 157.008.¹² The father also filed a motion seeking reimbursement from the mother for support he provided to the children during the excess periods of possession. Although the mother appeared at trial, the trial court deemed the mother’s failure to file a written answer as an admission of the father’s allegations in the motion for reimbursement.¹³

7. *Id.* In 2005, the Texas Legislature added subsections (d) through (f) to section 157.265, statutorily applying the six percent interest rate to child support payments that became due on or after January 1, 2002. However, for unconfirmed arrearages in existence on January 1, 2002, the higher interest rate applies to payments due before January 1, 2002, and the lower rate applies to the cumulative total of arrearages and interest after that date. TEX. FAM. CODE ANN. § 157.265 (d)-(e) (Vernon Supp. 2006). Further, a judgment for child support rendered prior to January 1, 2002, is governed by the law in effect on the date the judgment was entered. *Id.* § 157.265(f).

8. TEX. FAM. CODE ANN. § 157.008 (Vernon 2002).

9. 192 S.W.3d 570 (Tex. 2006).

10. *Id.* at 579.

11. *Id.*

12. *Id.* at 573.

13. *Id.*

The trial court found the father owed \$35,450 in unpaid child support but was also entitled to an offset of \$26,100 and reimbursement of \$15,196.86 because of his excess possession of the children. The trial court affirmed the judgment of the child support master against the father in the amount of \$2,331, finding the master had discretion not to allow all offsets and credits and to assess no interest.¹⁴

The Corpus Christi Court of Appeals reversed, concluding the mother's failure to file a written answer required the trial court to give credit for the full amount of offsets and credits to the father.¹⁵ The Attorney General and the mother appealed, contending section 157.008 did not allow the father to receive both an offset and a reimbursement for each month of extra possession.¹⁶

The father argued section 157.008(a) provided an affirmative defense while section 157.008(d) gave him a claim for affirmative relief, and, accordingly, he was entitled to both an offset and reimbursement.¹⁷ Under this construction, section 157.008 "actually operates to shift the court-ordered support obligation from the obligor to the obligee during voluntary periods of excess possession."¹⁸

To be entitled to either an offset or to reimbursement, section 157.008 requires (1) the obligee to voluntarily relinquish actual possession and control of the child to the obligor (2) for a period exceeding court-ordered periods of possession and access to the child (3) during which the obligor supplied actual support.¹⁹ The supreme court determined the remedies are alternative, not cumulative.²⁰ Whether the obligor is entitled to offset or reimbursement depends on whether the parent continued to pay child support during the period of excess possession.²¹ If the obligor paid child support during the period of excess possession, he is entitled to reimbursement.²² If the obligor did not pay child support, he is limited to an offset.²³ Additionally, the supreme court concluded the right to seek reimbursement is purely defensive; it does not give the obligor an independent right to seek reimbursement for support provided by the obligor during the period of excess possession.²⁴ In other words, it does not shift the child support obligation from the obligor to the obligee.

14. *Id.*

15. *Id.*

16. *Id.*

17. Section 157.008(a) of the Family Code gives an obligor an affirmative defense "in whole or in part to a motion for enforcement of child support that the obligee voluntarily relinquished to the obligor actual possession and control of a child." TEX. FAM. CODE ANN. § 157.008(a). Section 157.008(d) allows "an obligor who has provided actual support to the child during a time subject to an affirmative defense under this section" to request reimbursement for that support from the obligee. *Id.* § 157.008(d).

18. *Id.*; see § 157.008(a)-(b).

19. *In re A.M.*, 192 S.W.3d at 574.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

The supreme court then turned to the proof necessary to establish the amount of support provided during the period of excess possession. The courts of appeals had taken a number of approaches including: (1) allowing the obligor to use the court-ordered support amount to measure the offset without providing an exact accounting of actual expenditures; (2) requiring the obligor to provide a more precise accounting of the support provided; and (3) varying the level of proof based on the circumstances of the case.²⁵ In *A.M.*, it was undisputed the father had solely supported the children during the periods of excess possession. It was, therefore, a reasonable presumption that the father “was entitled to equate his monthly child support obligation to the actual support he provided each child.”²⁶

C. DISABILITY OF OBLIGOR

In *In re G.L.S.*,²⁷ the San Antonio Court of Appeals considered the equities involved in failing to apply to delinquent child support a lump sum payment made to a child due to the father’s disability. Although the court ultimately followed the reasoning of the Houston First Court of Appeals in *Attorney General of Texas v. Stevens*,²⁸ and concluded that the Family Code prohibited the trial court from granting an equitable offset as to the father’s past due child support, it invited the Texas Legislature to address the issue.²⁹

In *G.L.S.*, the father was ordered to pay child support for two children beginning in January 1990.³⁰ On June 13, 2003, the Social Security Administration notified the father that he was entitled to monthly disability benefits beginning in May 2001. As a result, the oldest child, who had turned eighteen in October 2001, received a lump sum payment of \$1,878.00. In July 2003, the youngest child received a lump sum payment of \$14,804.00 for the monthly benefit from May 2001 through July 2003. The child would continue to receive \$653.00 per month until she turned eighteen.³¹

The father failed to make all ordered payments, and, in April 2004, the Attorney General sought to confirm the child support arrearage. In August 2004, the trial court confirmed an arrearage for unpaid child support of \$14,982.47 and a medical support arrearage of \$6,184.81. The trial court also ordered the father to pay current child support of \$250.00 per

25. *Id.* at 575; see *Gonzalez v. Tippit*, 167 S.W.3d 536, 543 (Tex. App.—Austin 2005, no pet.); *Beck v. Walker*, 154 S.W.3d 895, 905 (Tex. App.—Dallas 2005, no pet.); *Curtis v. Curtis*, 11 S.W.3d 466, 472-74 (Tex. App.—Tyler 2000, no pet.).

26. *In re A.M.*, 192 S.W.3d at 576. Justice Johnson dissented as to this portion of the court’s opinion and would have held the father to a more precise accounting as to the amount of support provided during the periods of excess possession. *Id.* at 576-77 (Johnson, J. dissenting).

27. 185 S.W.3d 56 (Tex. App.—San Antonio 2005, no pet.).

28. 84 S.W.3d 720, 725 (Tex. App.—Houston [1st Dist.] 2002, no pet.).

29. *In re G.L.S.*, 185 S.W.3d at 61.

30. *Id.* at 57.

31. *Id.* at 58.

month.³²

The father appealed, contending he was entitled to a credit or offset against the support payments for social security disability benefits paid to the children as a result of his disability.³³ The court of appeals first noted that section 154.132 of the Family Code governs the effect of disability payments on future child support payments.³⁴ Because the record did not reflect that the trial court calculated the amount of child support the father would be required to pay in the future in accordance with section 154.132, the court of appeals reversed and remanded the issue of future support to the trial court.³⁵

The court then turned to the issue of the unconfirmed arrearages. Section 157.262(a) of the Family Code prohibits a trial court from reducing or modifying the amount of child support arrearages.³⁶ However, the money judgment for a child support arrearage may be subject to a counterclaim or offset as provided by subchapter F of chapter 157 of the Family Code.³⁷ Because subchapter F does not provide for an offset or counterclaim for payments made to the child due to the parent's disability, the trial court's determination of the amount of arrearage was a "mechanical tally" that could not include the offset.³⁸ Although the legislature "recognized the equity in granting a credit for social security disability benefits when establishing or modifying child support," it did not do so for arrearages, and "may have decided to only grant the credit prospectively because of the delays in the Administration's processing of disability claims."³⁹ The court of appeals then agreed with *Stevens* that "whether an obligor is entitled to an offset against past unconfirmed child support arrearages is an issue for the Legislature to decide."⁴⁰ Until the legislature takes action, sections 157.262(a) and (f) of the Family Code preclude a finding that the trial court abused its discretion in refusing a credit for the disability payment to the child against the unconfirmed child support arrearages.⁴¹

D. IMPLIED CONTRACT TO PAY CHILD SUPPORT

In *In re Marriage of Eilers*,⁴² the Waco Court of Appeals considered whether the husband could be required to pay child support for a child

32. *Id.*

33. *Id.*

34. *Id.* at 58-59; TEX. FAM. CODE ANN. § 154.132 (Vernon 2002) (requiring a court to apply child support guidelines by determining the amount of child support that would be ordered under guidelines and subtracting the amount of benefits or the value of the benefits paid to or for the child as a result of obligor's disability).

35. *In re G.L.S.*, 185 S.W.3d at 59.

36. *Id.*; see § 157.262(a).

37. *In re G.L.S.*, 185 S.W.3d at 59; see § 157.262(f).

38. *In re G.L.S.*, 185 S.W.3d at 59-60.

39. *Id.* at 61.

40. *Id.*

41. *Id.*

42. 205 S.W.3d 637 (Tex. App.—Waco 2006, pet. denied).

who was neither the biological nor the adopted child of either party to the marriage. During the marriage, the parties had two biological children and assumed custody of another child pursuant to a notarized "Power of Attorney Delegating Parental Authority" that was executed by the child's biological mother.⁴³ When the wife filed for divorce, she sought child support for all three children. After the husband filed an amended counter-petition specifically denying paternity of the non-biological child, the wife alleged the husband equitably adopted the child or, alternatively, contractually agreed to pay child support for the child. The trial court ordered the husband to pay child support for all three children.⁴⁴

The court of appeals made short work of the wife's equitable adoption argument, noting Texas courts have "consistently rejected the application of equitable adoption in cases involving child custody or child support."⁴⁵ However, the court of appeals agreed with the wife that the husband could enter into an implied contract to pay child support.⁴⁶ As with any implied contract, an implied contract to pay child support can arise from the acts and conduct of the parties and can be inferred from the circumstances.⁴⁷

The husband argued the power of attorney was void as against public policy and did not evidence that he accepted financial responsibility for the child. The court of appeals rejected the first argument, noting that statutes in effect for the past century have permitted parents to execute documents transferring custody of their children to other adults or institutions, and the Family Code expressly allows for such relinquishment.⁴⁸

The court of appeals next considered whether the surrounding facts and circumstances demonstrated the husband had agreed to financially support the child.⁴⁹ The husband signed the power of attorney as a custodian, took possession of the child, and treated the child as his son from that point forward. Further, by signing the power of attorney, the husband agreed he would be financially responsible for the child. This was sufficient to establish an implied contract to pay child support.⁵⁰

However, an implied contract to pay child support is a contractual debt, not a statutory obligation.⁵¹ Accordingly, the wife had to establish the existence of the debt, the husband's agreement to be liable for the debt, that the wife was authorized to collect the debt, and the balance due and owing on the debt.⁵² The wife failed to establish the last element because the implied contract was vague regarding the amount of support

43. *Id.* at 639.

44. *Id.* at 639-40.

45. *Id.* at 641.

46. *Id.* at 642.

47. *Id.*

48. *Id.* at 643-44 (citing TEX. FAM. CODE ANN. § 161.103 (Vernon Supp. 2006)).

49. *Id.* at 644.

50. *Id.*

51. *Id.*

52. *Id.*

to be paid.⁵³

The court of appeals again turned to contract law and concluded that when a contract is silent or ambiguous about a particular term, a trial court may supply a reasonable term to effectuate the parties' intentions.⁵⁴ The trial court used the statutory child support guidelines to establish the amount of child support to be paid under the implied contract.⁵⁵ The child support guidelines are "presumed to be reasonable" and the trial court did not abuse its discretion in relying on the guidelines to supply the missing contractual term.⁵⁶ However, the court of appeals modified the trial court's judgment to reflect that the obligation was a contractual obligation, while the support for the other two children was a statutory obligation.⁵⁷

III. PATERNITY

A. EQUITABLE ESTOPPEL

Although the vast majority of paternity cases during the Survey period involved an individual contesting a designation as the biological father of a child, in *Hausman v. Hausman*,⁵⁸ the San Antonio Court of Appeals addressed a situation in which the presumed father knew he was not the biological father of the child but wanted to be named the child's parent.

The child was conceived and born during the parties' marriage. During the divorce proceedings, the husband obtained a paternity test because he heard another man was claiming to be the child's biological father. Although the test revealed the husband was not the biological father of the child, the husband sought to be named a joint managing conservator. The trial court found that although the husband was not the child's biological father, the wife was equitably estopped from denying the husband's paternity.⁵⁹ The trial court then established the parent-child relationship between the husband and the child.⁶⁰ After a jury trial on the custody issues, the trial court named the husband and the wife joint managing conservators of the child with the husband having the exclusive right to determine the child's primary residence.⁶¹

On appeal, the mother argued that section 160.608 of the Family Code prohibited the trial court from taking any action based on a finding of equitable estoppel other than to deny an order for genetic testing.⁶² The

53. *Id.* at 645.

54. *Id.*

55. *Id.*

56. *Id.*; see TEX. FAM. CODE ANN. § 154.122(a) (Vernon 2002).

57. *In re Marriage of Eilers*, 205 S.W.3d at 645.

58. 199 S.W.3d 38 (Tex. App.—San Antonio 2006, no pet.).

59. *Id.* at 40-41.

60. *Id.*

61. *Id.*

62. *Id.* at 41; see TEX. FAM. CODE ANN. § 160.608(a) (Vernon Supp. 2006) (providing that in a proceeding to adjudicate parentage, the trial court may deny a motion for genetic testing if it determines the conduct of the mother or putative father estops that party from denying parentage and it would be inequitable to disprove father-child relationship).

court of appeals disagreed, concluding section 160.608 addresses only whether the trial court can deny a motion requesting genetic testing and does not address the trial court's authority regarding orders determining parentage.⁶³ Equitable estoppel is applied in paternity actions in order to achieve fairness between the parties by holding them to their prior conduct regarding the paternity of the child.⁶⁴ Although this theory also underlies section 160.608, "nothing in section 160.608 or any other provision of the [Family Code] appears to broadly divest a trial court of its authority to apply the principles of equitable estoppel in paternity cases."⁶⁵ Accordingly, section 160.608 did not preclude the trial court from finding the wife was equitably estopped from contesting the husband's paternity.⁶⁶

The wife next argued that, since the genetic testing excluded the husband as the biological father of the child, section 160.631(d) of the Family Code required the trial court to adjudicate the husband as not being the father of the child.⁶⁷ The court of appeals rejected the argument, noting that the trial court had not adjudicated the husband as being the father of the child.⁶⁸ Rather, the trial court established the parent-child relationship based on its equitable power to estop the wife from denying the husband's paternity.⁶⁹

The court of appeals then considered the wife's argument that the evidence was insufficient to support the equitable estoppel finding. The wife contended the husband had to establish equitable estoppel by clear and convincing evidence because section 160.608(d) establishes a clear and convincing standard in order for the trial court to deny a motion for genetic testing.⁷⁰ The court of appeals concluded section 160.608(d) does not apply when the trial court is exercising its equitable jurisdiction and, although not clearly stated, apparently applied a preponderance of the evidence standard to the sufficiency analysis.⁷¹

In order for the wife to be equitably estopped, she must have

- (1) made a false representation or concealment of material facts; (2) with knowledge, actual or constructive, of those facts; (3) to a party without knowledge, or the means of knowledge, of those facts; (4) with the intention that it be acted upon; and (5) the party to whom it was made must have relied on the misrepresentation to his prejudice.⁷²

63. *Hausman*, 199 S.W.3d at 41-42.

64. *Id.* at 42 (quoting *In re Shockley*, 123 S.W.3d 642, 651-52 (Tex. App.—El Paso 2003, no pet.)).

65. *Id.*

66. *Id.*

67. *Id.* at 42-43; see TEX. FAM. CODE ANN. § 160.631(d) (Vernon 2002) ([u]nless results of genetic testing are admitted to rebut other results of genetic testing, a man excluded as the father of a child by genetic testing shall be adjudicated as not being the father of the child.).

68. *Hausman*, 199 S.W.3d at 43.

69. *Id.*

70. TEX. FAM. CODE ANN. § 160.608(d).

71. *Hausman*, 199 S.W.3d at 43.

72. *Id.*

Here, there was evidence the wife engaged in unprotected sexual relations with another man and did not tell the husband about those relations. The wife represented to the husband that he was the child's father, frequently commented on the similarity between the husband's and the child's appearances, and referred to the husband as the child's "daddy."⁷³ By attending prenatal care, paying for medical care, and caring for the child as his son, the husband relied on the wife's representations and concealment of material facts.⁷⁴ Accordingly, the evidence was legally and factually sufficient to support the trial court's finding the wife was equitably estopped from denying the husband was the child's father.⁷⁵

B. FROZEN EMBRYO AGREEMENTS

In a case of first impression in Texas, the Houston First Court of Appeals considered the validity of agreements governing the disposition of frozen embryos in *Roman v. Roman*.⁷⁶ The husband and the wife married in 1997 and, after a few years, began trying to have a child.⁷⁷ Because they were unsuccessful in doing so, they decided to attempt in vitro fertilization, which involves the fertilization of the wife's egg with the husband's sperm in a laboratory procedure. During this process, the husband and wife signed a number of documents including an Informed Consent for Cryopreservation of Embryos authorizing the storage of embryos created during the laboratory procedure in a frozen state until the medical facility determined that appropriate conditions existed for the transfer of the embryos to the wife's uterus. The husband and the wife chose in the agreement to discard the embryos in case of divorce.⁷⁸

Following the laboratory procedure, three embryos reached a stage of development to warrant the cryopreservation process. The medical facility scheduled the implantation of these embryos into the wife's uterus. However, the night before the scheduled implantation, the husband withdrew his consent to the implantation. The husband subsequently filed for divorce.⁷⁹ The parties agreed to the division of the marital property other than the embryos. The husband requested that the trial court uphold the embryo agreement. The wife wanted to have the embryos implanted and stated that if any children were born from the embryos, the husband would not have parental rights or responsibilities. The trial court awarded the embryos to the wife and made a finding that the embryos were community property subject to a just and right division.⁸⁰ The husband appealed, arguing the trial court erred in awarding the embryos to

73. *Id.*

74. *See id.* at 43-44.

75. *Id.* at 44.

76. 193 S.W.3d 40, 41-42 (Tex. App.—Houston [1st Dist.] 2006, pet. filed).

77. *Id.* at 42.

78. *Id.*

79. *Id.* at 43.

80. *Id.*

the wife in violation of the embryo agreement.⁸¹

After an extensive analysis of cases from other states pertaining to frozen embryo agreements, the court of appeals concluded that the emerging majority view is that "written embryo agreements between embryo donors and fertility clinics to which all parties have consented are valid and enforceable so long as the parties have the opportunity to withdraw their consent to the terms of the agreements."⁸² However, the court of appeals still had to determine whether the agreements were against public policy in Texas.⁸³

Turning to the Family Code, the court of appeals noted Texas has enacted laws regarding children of assisted reproduction as well as gestational agreements.⁸⁴ Although these statutes do not address how to determine the disposition of the embryos in case of death or divorce, the court of appeals concluded they demonstrate the public policy of Texas that permits a husband and wife to voluntarily enter into agreement prior to implantation providing for an embryo's disposition in the event of divorce, death, or changed circumstances.⁸⁵ The agreements must be voluntary, be entered into prior to cryopreservation, and be subject to a mutual change of mind.⁸⁶ If the agreement meets all criteria, it should be presumed valid and enforced between the parties.⁸⁷

The court of appeals then turned to contract law to determine whether the agreement at issue was valid.⁸⁸ Both parties acknowledged they had signed the agreement and initialed the section regarding disposition of the embryos in case of divorce. The evidence showed the wife was aware of and understood the significance of her decision. Further, the parties chose to give the embryos to the surviving spouse in case of death, indicating the parties were aware of other choices regarding the disposition of the embryos. Finally, the agreement allowed the parties to withdraw their consent to the procedure. Therefore, the court of appeals concluded that the trial court erred by rewriting, rather than enforcing, the parties' agreement.⁸⁹

C. BILL OF REVIEW

In *Kiefer v. Touris*,⁹⁰ the Texas Supreme Court considered whether a bill of review setting aside the parentage adjudication in a divorce decree was a final judgment. The husband and the wife married in 1995. In 1996, the wife began an extra-marital affair and, in 1998, became preg-

81. *Id.*

82. *Id.* at 48.

83. *Id.* at 48-49.

84. *Id.* (citing TEX. FAM. CODE ANN. §§ 160.701-707 (Vernon 2002), §§ 160.751-763 (Vernon Supp. 2006)).

85. *Id.* at 49-50.

86. *Id.* at 49.

87. *Id.* at 50.

88. *Id.*

89. *Id.* at 54-55.

90. 197 S.W.3d 300 (Tex. 2006) (*per curiam*).

nant. When the husband and the wife divorced in 2000, the divorce decree adjudicated them the parents of the child and named them joint managing conservators.⁹¹

The wife did not disclose to the biological father that she was divorced or that the husband had been adjudicated a parent and ordered to pay child support. She did, however, send him a proposed agreement that acknowledged both their relationship and that the child was born of the relationship. The agreement named the wife and the biological father as joint managing conservators and required the biological father to pay child support. Although the biological father did not sign the agreement, he began paying child support to the wife. In 2002, the biological father filed a petition for voluntary paternity in a different court than the one that handled the wife's divorce. Paternity testing established to a 99.9% certainty that he was the child's biological father.⁹²

After learning about the divorce decree, the biological father filed a bill of review in the divorce court, seeking to set aside the decree's parentage determination.⁹³ The trial court granted the bill of review by summary judgment and set aside the parentage determination in the divorce decree but did not enter a new adjudication of parentage.⁹⁴ The husband and the wife appealed.⁹⁵

The supreme court noted a bill of review setting aside a prior judgment but not disposing of all issues in the case on the merits is not a final judgment.⁹⁶ Because the trial court had not entered a new adjudication of parentage with its attendant custody and support orders, the summary judgment was not final.⁹⁷ Even though the biological father's voluntary paternity petition was pending in another court, the divorce court had exclusive, continuing jurisdiction over any suit affecting the parent-child relationship ("SAPCR").⁹⁸ Accordingly, the divorce court had jurisdiction over the parentage issue.⁹⁹

IV. SUIT AFFECTING THE PARENT-CHILD RELATIONSHIP

A. VENUE

Generally, venue for a SAPCR is the county where the child resides.¹⁰⁰ With some statutory exceptions, once the trial court issues a final order in a SAPCR, it acquires continuing, exclusive jurisdiction over matters af-

91. *Id.* at 301.

92. *Id.* at 302.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 302 n.3.

99. *Id.*

100. TEX. FAM. CODE ANN. § 103.001(a) (Vernon 2002).

fecting the parent-child relationship.¹⁰¹ However, if a motion to modify or enforce an existing order is filed, that motion is subject to mandatory transfer to another county if the child has resided in the second county for six months or longer.¹⁰²

1. *Forfeiture of Right to Transfer*

In *Huey v. Huey*,¹⁰³ the divorce decree restricted the geographical residence of the children to Collin County and any contiguous county. The father filed a motion to modify, alleging, among other things, that the mother violated the divorce decree by moving the children to Howard County, a county not contiguous to Collin County, and by residing with a person to whom she was neither married nor related. At the hearing on the father's motion, both parties announced they were ready to proceed. However, after the father called his first witness, the mother informed the trial court she had filed a motion to transfer the matter to Howard County based on the children's residence in that county. The trial court denied the motion to transfer and granted the father's motion to modify.¹⁰⁴

On appeal, the mother argued section 155.201(b) of the Family Code required the trial court to transfer the case because the children had resided in Howard County for over six months.¹⁰⁵ The court of appeals disagreed, concluding that the mother's conduct in moving the children to Howard County directly contravened the existing divorce decree and was, in effect, an attempt to establish the children's residence in a county proscribed by the decree.¹⁰⁶ The mother forfeited her right to have the case transferred under section 155.021 by moving the children in violation of the decree.¹⁰⁷

2. *Timeliness of Motion to Transfer*

The Houston Court of Appeals for the Fourteenth District addressed when the motion to transfer is required to be filed in *In re Compton*.¹⁰⁸ In *Compton*, the 306th District Court of Galveston County entered a final order affecting the parent-child relationship in May 2004.¹⁰⁹ The child and the mother then moved to Harris County. On February 4, 2005, the father filed a motion in the Galveston court, seeking to modify custody and requesting a temporary restraining order ("TRO") and a temporary injunction. The Galveston court granted the TRO on February 5, 2005,

101. § 155.001(a). The exceptions are final orders that (1) are a voluntary or involuntary dismissal of a SAPCR; (2) find an alleged or presumed father is not the father of the child; and (3) are a final order of adoption. *Id.* § 155.002(b).

102. § 155.201(b) (Vernon Supp. 2006).

103. 200 S.W.3d 851 (Tex. App.—Dallas 2006, no pet.).

104. *Id.* at 852.

105. *Id.*

106. *Id.* at 853.

107. *Id.*

108. 185 S.W.3d 526 (Tex. App.—Houston [14th Dist.] 2006, no pet.).

109. *Id.* at 527.

and set a show cause hearing for February 10, 2005. The hearing was concluded on February 15, 2005, and the next day the associate judge awarded temporary custody of the child to the father.¹¹⁰

In the interim, on February 11, 2005, the mother filed a motion to transfer the suit to Harris County because the child had resided there for the preceding six months. The trial court denied the transfer and the mother sought mandamus relief.¹¹¹

The transfer was mandatory under section 155.201 if the mother timely filed the motion.¹¹² The motion was timely if it was “made on or before the first Monday after the 20th day after the date of service of citation or notice of the suit or before the commencement of the hearing, whichever is sooner.”¹¹³ It was undisputed the mother filed the motion prior to her answer date. The issue was whether “the hearing” referenced in section 155.204(b) was any hearing in the case, as alleged by the father, or the final hearing on the merits, as claimed by the mother.¹¹⁴

The court of appeals agreed with the mother, noting that the legislature’s use of “the hearing,” rather than “a hearing” or “any hearing” suggested a “single, particular hearing” was intended.¹¹⁵ The court of appeals also rejected the father’s argument that, because Texas Rule of Civil Procedure 245 requires forty-five days notice of a trial setting, the answer date could never occur prior to the final hearing date, making that portion of section 155.204(b) meaningless.¹¹⁶ In the court’s opinion, a small, simple, or uncontested case could have a final hearing prior to the party’s answer date.¹¹⁷ Accordingly, “the hearing” in section 155.204 refers to “whatever final hearing is conducted to ultimately dispose” of the pending matter.¹¹⁸ Therefore, a hearing on a motion for temporary relief or another matter, such as a request for temporary orders, conducted before the party’s answer date is not a deadline for filing a motion to transfer venue.¹¹⁹ Because the mother’s motion was timely, she was entitled to mandamus relief.¹²⁰

3. Possession of Child

During the Survey period, the Beaumont Court of Appeals had occasion to address the proper venue for filing an original SAPCR. In *In re Narvaiz*,¹²¹ the mother and the father had a child out of wedlock in 1999. They lived in Montgomery County until December 2000, when the

110. *Id.*

111. *Id.*

112. *Id.*

113. TEX. FAM. CODE ANN. § 155.204(b) (Vernon Supp. 2006).

114. *In re Compton*, 185 S.W.3d at 527-28.

115. *Id.* at 528.

116. *Id.* at 529.

117. *Id.*

118. *Id.* at 531.

119. *Id.*

120. *Id.*

121. 193 S.W.3d 695 (Tex. App.—Beaumont 2006, orig. proceeding) (per curiam).

mother moved out of the county. In February 2003, the mother and the child moved to San Antonio.

Between February 2003 and mid-July 2005, the parents exchanged possession of the child every one or two weeks. In June 2005, the mother enrolled the child in school for August 2005 in Bexar County, the mother's county of residence.¹²² The next month, the father told the mother he was not returning the child and would enroll her in school in Montgomery County, the father's county of residence. The mother told the father that if he would return the child to her, he could have the child before school started. The father returned the child to the mother, who did not return the child as promised. The father filed suit in Montgomery County, seeking to be named a joint managing conservator of the child with the exclusive right to designate the child's primary residence and requesting the mother be required to pay child support.¹²³

The mother filed a motion to transfer venue to Bexar County. After an evidentiary hearing, the trial court found the parents were sharing the actual care, control, and possession of the child and, thus, suit could be brought in either county of residence.¹²⁴ The trial court denied the motion to transfer and the mother filed a petition for writ of mandamus.¹²⁵

The court of appeals noted venue in a SAPCR is based on the residence of the child.¹²⁶ However, if the child's parents do not reside in the same county, then the residence of the child is determined by the county in which the parent having *actual* care, control, and possession of the child resides.¹²⁷ It was undisputed the only reason the father did not have possession of the child when he filed the SAPCR was because the mother failed to return the child as promised. However, the court of appeals determined the statute does not base venue on constructive possession.¹²⁸ Because the father did not have actual care, control, and possession of the child at the time he filed the SAPCR, venue was not proper in Montgomery County.¹²⁹

B. ARBITRATION

Section 153.0071 of the Family Code allows the parties to a SAPCR to agree to arbitration.¹³⁰ In *In re T.B.H.-H.*,¹³¹ the parties reached an agreement to arbitrate, and the trial court subsequently entered an order in accordance with the arbitrator's award. The mother filed a motion for

122. *Id.* at 697.

123. *Id.*

124. *Id.* at 697-98.

125. *Id.*

126. *Id.* at 698 (citing TEX. FAM. CODE ANN. § 103.001(a) (Vernon 2002)).

127. *Id.* (citing §103.001(c)(2)).

128. *Id.* at 700.

129. *Id.*

130. TEX. FAM. CODE ANN. § 153.0071(a) (Vernon Supp. 2006) (stating that parties can agree in writing for the trial court to refer SAPCR to binding or non-binding arbitration).

131. 188 S.W.3d 312 (Tex. App.—Waco 2006, no pet.).

new trial, contending the order was not in the best interest of the child.¹³²

The Waco Court of Appeals noted section 153.0071(b) allows the trial court to substitute its judgment for that of the arbitrator when the trial court determines at a non-jury hearing that the award is not in the best interest of the child.¹³³ However, the mother was required to request the best interest hearing to invoke the right to the hearing and preserve the complaint for appeal.¹³⁴ The best interest hearing must be held before the trial court enters an order on the arbitrator's award.¹³⁵ By failing to timely file a motion to vacate the arbitrator's award, the mother waived her right to a best-interest hearing.¹³⁶

C. GRANDPARENT ACCESS

In *In re Mays-Hooper*,¹³⁷ the Texas Supreme Court reviewed a trial court's order granting a grandmother access to her grandchild over the mother's objections. The supreme court noted the facts were almost identical to those in *Troxel v. Granville*¹³⁸ in that a child was born during the marriage, the parties divorced, the father subsequently died, and then conflicts arose between the mother and her ex-mother-in-law about the grandmother's visitation with the child. Without "sorting out" the various opinions in *Troxel*, the supreme court noted a plurality of four justices found the visitation statute in *Troxel* unconstitutional as applied because the child's mother was not unfit, her decisions about grandparent access were given no deference, and the mother was willing to allow some visitation.¹³⁹ Due to the factual similarities between the two cases, if the trial court's order in *Troxel* was unconstitutional, the order in *Mays-Hooper* must also be unconstitutional.¹⁴⁰ The court declined to analyze the statute further because it had been amended during the 2005 legislative session.¹⁴¹

D. SECURING TESTIMONY OF CHILDREN

In *In re Z.A.T.*,¹⁴² the Waco Court of Appeals considered whether the trial court abused its discretion in refusing to grant an incarcerated father's motion requesting the mother be required to produce the children

132. *Id.* at 314.

133. *Id.* at 315 (citing § 153.0071(b)).

134. *Id.*

135. *Id.*

136. *Id.*

137. 189 S.W.3d 777 (Tex. 2006) (orig. proceeding) (per curiam).

138. 530 U.S. 57 (2000).

139. *In re Mays-Hooper*, 189 S.W.3d at 777-78 (citing *Troxel*, 530 U.S. at 68-71).

140. *Id.* at 778.

141. *Id.* The amendment requires a grandparent seeking access to or possession of a grandchild to overcome a presumption that a parent acts in the best interest of the child by proving the denial of access to or possession of the grandchild will significantly impair the child's physical health or emotional well-being. TEX. FAM. CODE ANN. § 153.433 (Vernon Supp. 2006).

142. 193 S.W.3d 197 (Tex. App.—Waco 2006, pet. denied) (plurality opinion).

to testify at the hearing on the father's motion to modify. The court initially reversed and remanded for a new trial.¹⁴³ However, the trial court filed a "Request for Reconsideration of Memorandum Opinion," asserting the court of appeals was incorrect in finding the trial court had refused to permit the children to testify, and setting out the procedure used by the trial court for having a child witness subpoenaed through their parent or guardian. The court of appeals essentially granted the trial court's motion to reconsider, withdrew its opinion, and affirmed the trial court's order.¹⁴⁴

The parties divorced in December 2002, and the mother was named sole managing conservator of the children. The father, who was incarcerated at the time of the divorce under a forty-year sentence, proceeded to file numerous proceedings with respect to his parental and custodial rights.¹⁴⁵ This appeal involved the father's latest motion to modify the conservatorship provisions of the decree and the mother's competing petition to limit the father's repeated filings and to prevent him from communicating with her or the children other than through her attorney or some other designated person. The father filed a motion seeking to require the mother to bring the children to the hearing.¹⁴⁶ The trial court denied the motion.¹⁴⁷

Along with numerous other issues, the father contended the trial court abused its discretion by denying the motion and violated his right to due process by excluding the children from testifying at the hearing. In the lead opinion, Justice Reyna concluded the father's failure to request subpoenas for the children was "fatal to his contention."¹⁴⁸ Justice Reyna recognized there was no statute or rule providing for the issuance of a subpoena to a child witness in a civil trial.¹⁴⁹ However, a child who "possess[es] sufficient intellect to relate transactions with respect to which they are interrogated" is a "person" who may testify in a civil proceeding.¹⁵⁰ Texas Rule of Civil Procedure 176.2(a) "authorizes a civil litigant to obtain a subpoena commanding a 'person' to 'attend and give testimony' at a hearing or trial."¹⁵¹

Although there are potential drawbacks to issuing a subpoena for a child witness, such as straining the relationship between the parents or between one of the parents and the child, "the law does not provide another means by which a parent may compel his or her child's testimony."¹⁵² Further, there are means available, such as a motion to quash,

143. See generally *In re Z.A.T.*, No. 10-04-00347-CV, 2005 WL 3072854 (Tex. App.—Waco Nov. 16, 2005, no pet.) (op. withdrawn).

144. *In re Z.A.T.*, 193 S.W.3d at 211.

145. *Id.* at 202.

146. *Id.* at 206.

147. *Id.*

148. *Id.*

149. *Id.* at 207.

150. *Id.* (citing TEX. R. EVID. 601(a)).

151. *Id.* (citing TEX. R. CIV. P. 176.2(a)).

152. *Id.*

a protective order, or sanctions, to address an inappropriate subpoena.¹⁵³

Chief Justice Gray concurred in the judgment only, first stating the court of appeals was setting a dangerous precedent by responding to a trial court's motion for reconsideration.¹⁵⁴ Chief Justice Gray noted the trial court's procedure was to have a subpoena for a child witness served on their parent or guardian.¹⁵⁵ Although Chief Justice Gray did not fault this alternative procedure used by the trial court, he noted a careful practitioner needs to strictly comply with the rules regarding subpoenaing a witness in order to preserve the issue for appeal.¹⁵⁶

In Chief Justice Gray's view, the father's issues on appeal did not comport with the issues decided by the trial court and should not be reviewed.¹⁵⁷ Further, the father waived any error by not making a bill of exception as to what the children's testimony would have been and by not requesting a continuance due to the absence of a witness.¹⁵⁸ However, if the merits of the issue are reached, the trial court did not abuse its discretion in denying the motion because there were procedures to compel the attendance of witnesses that the father did not use.¹⁵⁹

Justice Vance dissented, concluding there was no specific, applicable statutory authority that allowed the father to personally serve the children with subpoenas or to have the children served through the mother.¹⁶⁰ Therefore, the father's motion was a reasonable attempt to compel the children's attendance.¹⁶¹ The trial court abused its discretion by denying the motion without informing the father of the available alternative procedure to subpoena the children through the mother.¹⁶²

V. TERMINATION

A. GROUNDS FOR TERMINATION

A trial court can terminate a party's parental rights only if there is clear and convincing evidence (1) of a statutory ground for termination, and (2) that termination is in the best interest of the child.¹⁶³ During the Survey period, the two Houston Courts of Appeals considered the necessary grounds for termination from two different aspects, with the First district changing course on what grounds can be considered on appeal and the Fourteenth District addressing the issue of whether spanking, by itself, is sufficient to support the termination of parental rights.

153. *Id.*

154. *Id.* at 212.

155. *Id.*

156. *Id.* at 214.

157. *Id.*

158. *Id.*

159. *Id.* at 215.

160. *Id.* at 218-19.

161. *Id.* at 219.

162. *Id.*

163. TEX. FAM. CODE ANN. § 161.001 (Vernon Supp. 2006).

1. Grounds in Termination Order

In *Thompson v. Texas Department of Family & Protective Services*,¹⁶⁴ the trial court's order terminating the father's parental rights recited only one statutory ground for the termination.¹⁶⁵ The Houston Court of Appeals for the First District rejected the father's argument that the listed ground was the only basis for the trial court's judgment that could be considered by the court of appeals.¹⁶⁶ Rather, because the trial court made no findings of fact, the judgment would be affirmed if any legal theory supported the termination.¹⁶⁷ The court then concluded the evidence was sufficient to support the termination on a statutory ground different than the one recited in the termination order.¹⁶⁸

The Houston Court of Appeals for the First District sitting *en banc* revisited and overruled *Thompson* in *Cervantes-Peterson v. Texas Department of Family & Protective Services*.¹⁶⁹ In *Cervantes-Peterson*, the Texas Department of Family and Protective Services (the "Department") pleaded two statutory grounds for termination, but the trial court recited only one ground in its termination order.¹⁷⁰ On appeal, the Department relied on *Thompson* and argued that the trial court could have made implied findings on the other statutory ground, and by failing to challenge the implied findings on appeal, the mother had essentially waived any error.¹⁷¹

The court of appeals interpreted the Department's argument as requiring the court of appeals to affirm a termination order "if the parent fails to challenge on appeal grounds not found in the termination order but supported by the evidence."¹⁷² The court of appeals rejected this argument, noting section 161.206 of the Family Code requires the trial court to find grounds for the termination and then render an order of termination.¹⁷³ The court of appeals then overruled *Thompson* and concluded that the ground, or grounds, for the termination in the trial court's judgment can form the basis for an appeal, and that the court of appeals reviews the sufficiency of the evidence to support the specific statutory grounds found by the trial court in the termination order.¹⁷⁴

164. 176 S.W.3d 121 (Tex. App.—Houston [1st Dist.] 2004, pet. denied), *overruled by* *Cervantes-Peterson v. Tex. Dep't of Family & Protective Servs.*, No. 01-05-00307-CV, 2006 WL 2195241, at *6 (Tex. App.—Houston [1st Dist.] Aug. 3, 2006, no pet.) (en banc).

165. See § 161.001 (listing statutory grounds for termination of parent-child relationship).

166. *Thompson*, 176 S.W.3d at 125.

167. *Id.*

168. *Id.* at 125-28.

169. *Cervantes-Peterson*, 2006 WL 2195241, at *6.

170. *Id.* at *4.

171. *Id.*

172. *Id.*

173. *Id.* at *5; see TEX. FAM. CODE ANN. § 161.206 (Vernon Supp. 2006) (if the trial court finds by clear and convincing evidence grounds for termination, it shall render an order terminating parent-child relationship).

174. *Cervantes-Peterson*, 2006 WL 2195241, at *6.

2. *Spanking*

In *In re J.A.J.*,¹⁷⁵ the Department removed an eight-year-old child after his stepfather choked the child with shoestrings, leaving visible marks on the child's neck. Immediately after the removal, the Department caseworker discovered a six-inch wide bruise on the back of the child's leg. The mother admitted she had spanked the child with a belt the previous day after he attempted to "burn down the house."¹⁷⁶ The mother also admitted the spanking left marks and bruises on the child. Approximately ten months later, the trial court terminated the mother's parental rights to the child.¹⁷⁷

The mother argued on appeal that the evidence was legally and factually insufficient to support the termination. After concluding the evidence was insufficient to support termination on any other ground found by the trial court, the court of appeals turned to the mother's admitted spanking of the child.¹⁷⁸ Based on the evidence at trial, the court of appeals framed the issue as "whether infrequent spankings of a child that leave 'marks' or visible bruises 24 hours after the spanking constitute sufficient evidence" to support a finding the mother endangered the child's physical or emotional well-being to a degree that warranted termination of her parental rights.¹⁷⁹

The court of appeals noted the "propriety of corporal punishment" is a controversial subject.¹⁸⁰ Although spanking as a form of discipline has fallen under attack, "at least ninety percent of American parents have used corporal punishment at some time" in disciplining their children.¹⁸¹ Further, there is evidence that "authoritative" styles of discipline, "characterized by strict discipline, high demands for obedience, and high levels of warmth, tend to produce better-adjusted children than non-authoritative styles."¹⁸² At least one sociologist has suggested there may be a "direct correlation between the declining use of corporal punishment and rising juvenile violence."¹⁸³ Nevertheless, courts have increasingly concluded that "spanking with a belt constitutes child abuse and may be considered as a fact in terminating a person's parental rights."¹⁸⁴

175. No. 14-04-01031-CV, 2006 WL 2291175 (Tex. App.—Houston [14th Dist.] Aug. 10, 2006, no pet.) (op. on reh'g). The court issued a previous opinion on December 13, 2005 that was withdrawn and replaced with the August 10, 2006 opinion. A second motion for rehearing was overruled by the court of appeals on February 1, 2007.

176. *Id.* at *1.

177. *Id.* at *1-2.

178. *Id.* at *2-5.

179. *Id.* at *5.

180. *Id.* at *6.

181. *Id.*

182. *Id.*

183. *Id.* (citing Steven L. Nock, *Violence in the Family: Is Spanking Universal?*, 8 VA. J. SOC. POL'Y & L. 61, 67 (2000)).

184. *Id.* (citing *In re Adrian H.*, No. A102631, 2003 WL 23100264, at *3 (Cal. Ct. App. Dec. 31, 2003); *In re T.M.K.*, No. COA04-1019, 2005 WL 1804792, at *1 (N.C. Ct. App. Aug. 2, 2005); *In re T.A.*, 663 N.W.2d 225, 236 (S.D. 2003); *In re J.A.H.*, 502 N.W.2d 120, 123-24 (S.D. 1993)).

The court's role was not to impose a legal standard consistent with its personal ideas on how best to discipline a child.¹⁸⁵ Rather, it was required to determine if the child's welfare had been compromised.¹⁸⁶ While there was some evidence the mother may have used excessive force on the child, the record did not support a finding the mother had regularly and excessively hit the child.¹⁸⁷ Accordingly, the evidence was insufficient to support the termination order.¹⁸⁸

B. FAILURE TO DISMISS

The Texas Legislature has determined that children removed from their homes by the Department should not remain in the Department's care indefinitely.¹⁸⁹ To further this goal, the legislature enacted section 263.401(a) of the Family Code requiring a trial court to dismiss a SAPCR filed by the Department if a final order has not been entered by the first Monday after the one-year anniversary of the date when the trial court appointed the Department temporary managing conservator of the child.¹⁹⁰ The statute allows for a maximum extension of 180 days.¹⁹¹ If the trial court has not rendered a final order at the expiration of the additional 180 days, then the court must dismiss the SAPCR.¹⁹²

In *In re Texas Department of Family & Protective Services*,¹⁹³ the dismissal date after the 180-day extension was July 24, 2004. The termination trial began on July 19, 2004.¹⁹⁴ On Thursday, July 22, 2004, the mother and the great-grandmother, who had intervened in the proceedings, filed motions to dismiss for failure to render a final order before the statutory deadline. The Department rested its case on Friday, July 23, 2004, and the trial recommenced on Tuesday, July 27, 2004. The next day, the jury returned a unanimous verdict terminating the mother's parental rights and appointing the Department, rather than the great-grandmother, as sole managing conservator of the children.¹⁹⁵

The great-grandmother and the mother filed petitions for writ of mandamus with the Austin Court of Appeals, "seeking to compel the trial court to dismiss the case for failure to render a final order before the

185. *Id.* at *7.

186. *Id.*

187. *Id.*

188. *Id.*

189. See SENATE COMM. ON JURISPRUDENCE, BILL ANALYSIS, TEX. S.B. 34, 75th Leg., R.S. (1997).

190. TEX. FAM. CODE ANN. § 263.401(a) (Vernon Supp. 2006).

191. *Id.* § 263.401(b)-(c).

192. *Id.* § 263.401(c). Section 263.403 provides an exception to the dismissal rule if the trial court orders the monitored return of the child to the parent. *Id.* § 263.403(a).

193. 210 S.W.3d 609 (Tex. 2006) (orig. proceeding). Although the date of this opinion is after the Survey period, on September 22, 2006, the supreme court issued a per curiam opinion substantially the same as the new majority opinion. See generally *In re Tex. Dep't of Family & Protective Servs.*, No. 04-1043, 2006 WL 2708467 (Tex. Sept. 22, 2006) (orig. proceeding) (per curiam) (op. withdrawn).

194. *In re Tex. Dep't of Family & Protective Servs.*, 210 S.W.3d at 611.

195. *Id.*

dismissal date.”¹⁹⁶ The court of appeals granted the requested relief, and the Department sought mandamus relief from the Texas Supreme Court.¹⁹⁷

The supreme court first considered whether the mother and the great-grandmother waived their complaint that the trial court failed to render a timely final order. Section 263.402 of the Family Code allows a party to obtain a dismissal by filing a motion to dismiss before the Department introduces all its evidence, other than rebuttal evidence, or by filing a motion for final order before the dismissal deadline passes.¹⁹⁸ The mother and the great-grandmother preserved their complaint by filing motions to dismiss before the Department rested its case.¹⁹⁹ Accordingly, the trial court abused its discretion by failing to dismiss the case.²⁰⁰

The supreme court then considered whether the mother and the great-grandmother were entitled to mandamus relief. The supreme court acknowledged that child custody cases need to be resolved expeditiously and that an appeal is often “inadequate to protect the rights of parents and children.”²⁰¹ However, section 263.405 of the Family Code addresses this concern by providing for an accelerated appeal with shortened deadlines, an expedited filing of the record, and the requirement that the appellate court “render its final order or judgment with the least possible delay.”²⁰² Because the trial was in process when the dismissal deadline passed and because the Department already had physical possession of the children when the petitions for writ of mandamus were filed, an accelerated appeal was an adequate remedy at law.²⁰³ Accordingly, neither the mother nor the great-grandmother was entitled to relief by mandamus.²⁰⁴ However, mandamus relief could be available in situations involving the “impending transfer of physical possession of the children or a trial court’s unreasonable delay in entering a final decree.”²⁰⁵

C. APPEAL

Section 263.405 of the Family Code provides for an accelerated appeal of a final order in cases where the Department has assumed the care of the child.²⁰⁶ An order is final if it

(1) requires that a child be returned to the child’s parent; (2) names a relative of the child or another person as the child’s managing con-

196. *Id.* There is no record on the Austin Court of Appeals’ website of either the great-grandmother or the mother appealing the termination order.

197. *Id.*

198. *Id.* at 613 (citing TEX. FAM. CODE ANN. § 263.402 (Vernon 2002)).

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.* (quoting TEX. FAM. CODE ANN. § 263.405 (Vernon Supp. 2006)).

203. *Id.* at 614.

204. *Id.* Justice O’Neill filed a dissenting opinion concluding the court of appeals properly granted mandamus relief to the mother and the great-grandmother. *Id.* at 614-16.

205. *Id.* at 614.

206. TEX. FAM. CODE ANN. § 263.405 (Vernon Supp. 2006).

servator; (3) without terminating the parent-child relationship, appoints the Department as the managing conservator of the child; or (4) terminates the parent-child relationship and appoints a relative of the child, another suitable person, or the Department as managing conservator of the child.²⁰⁷

Under section 263.405, within fifteen days of the trial court signing the final order, the party must file with the trial court either a statement of the points the party intends to appeal or a statement of points combined with a motion for new trial.²⁰⁸ The notice of appeal must be filed within twenty days of the trial court entering the final order.²⁰⁹ Within thirty days of signing the final order, the trial court must hold a hearing to determine whether a new trial should be granted, whether any claim of indigency should be sustained, and whether the appeal is frivolous as provided by section 13.003(b) of the Civil Practice and Remedies Code.²¹⁰ The appellate record must be filed within sixty days after the final order is entered and the appellate court is required to “render its final order or judgment with the least possible delay.”²¹¹

1. Statement of Points

After the Texas Legislature enacted section 263.405 in 2001, the courts of appeals addressed the impact of the statement of points required to be filed in the trial court and almost uniformly held the statement of points was not jurisdictional and did not affect the party’s right to raise an issue on appeal.²¹² During the 2005 legislative session, the legislature reacted to these opinions by enacting section 263.405(i) of the Family Code mandating that, for any appeal filed after September 1, 2005, the appellate court could not “consider any issue that was not specifically presented to the trial court in a timely filed statement of points on which the party intends to appeal or in a statement combined with a motion for new trial.”²¹³ Further, a claim in the statement of points that the evidence is

207. *Id.* § 263.401(d).

208. *Id.* § 263.405(b).

209. *Id.* § 263.405(c); TEX. R. APP. P. 26.1(b).

210. *Id.* § 263.405(d).

211. *Id.* § 263.405(a), (f).

212. *In re S.P.*, 168 S.W.3d 197, 201 (Tex. App.—Dallas 2005, no pet.) (determining a statement of points is not jurisdictional and is not an additional requirement for preserving error); *In re T.A.C.W.*, 143 S.W.3d 249, 250 (Tex. App.—San Antonio 2004, no pet.) (maintaining a failure to timely file statement of points did not deprive the appellate court of jurisdiction); *In re S.J.G.*, 124 S.W.3d 237, 243 (Tex. App.—Fort Worth 2003, pet. denied) (concluding the failure to file statement of points is not a jurisdictional defect that prevents an appellate court from addressing issues on appeal); *In re W.J.H.*, 111 S.W.3d 707, 712 (Tex. App.—Fort Worth 2003, pet. denied) (concluding a failure to include issue in statement of points does not preclude a party from raising an issue on appeal unless the opponent shows prejudice). *But see In re T.C.*, No. 07-03-0077-CV, 2003 WL 21658314, at *2 (Tex. App.—Amarillo July 15, 2003, no pet.) (mem. op.) (determining an issue not included in the statement of points is not preserved for review on appeal).

213. *Id.* § 263.405(i); see HOUSE COMM. ON JUVENILE JUSTICE AND FAMILY ISSUES, BILL ANALYSIS, TEX. H.B. 409, 79th Leg., R.S. (2005) (stating recent appellate decisions have effectively repealed the legislature’s attempt to address the post-judgment delay issue

legally or factually insufficient is not specific enough to preserve the issue for appeal.²¹⁴ Appellate decisions issued during the Survey period comply with the legislature's directive by concluding if an issue is not presented to the trial court in a statement of points or in a statement of points combined with a motion for new trial, that issue is not preserved and may not be considered on appeal.²¹⁵

In his concurrence in *In re E.A.R.*,²¹⁶ Justice Vance questioned the procedural due-process aspects of subsection 263.405(i). In Justice Vance's view, the strict deadlines in section 263.405, coupled with time delays an indigent parent may experience in obtaining appointed appellate counsel, could deprive appellate review of any issues.²¹⁷ However, because the constitutional issues were not before the court, Justice Vance concurred in the affirmance of the trial court's termination order.²¹⁸ The Fort Worth Court of Appeals has joined Justice Vance "in questioning the practical applications and constitutional validity of this statute."²¹⁹

2. *Constitutionality of Appeal Process*

In *In re K.D.*²²⁰ and *In re T.C.*,²²¹ the Fort Worth Court of Appeals considered whether section 263.405 was unconstitutional "because it treats an indigent party's appeal differently than a non-indigent party's appeal and because it makes a distinction between parents in a private termination case and parents in a termination case brought by the Department."²²² In both cases, appellants argued the statute allows a trial court to deny an indigent appellant a record of the trial, while a non-indigent appellant could purchase the record.²²³ Further, section 263.405 "subjects a parent whose parental rights have been terminated in a suit brought by the government to a hearing held by the trial court to determine whether [the] appeal is frivolous, while a parent whose parental rights have been terminated in a suit brought by an individual is able to

and that House Bill 409 conclusively establishes the legislature expects litigants to comply with subsection 263.405(b)).

214. *Id.* § 263.405(i).

215. *In re D.A.R.*, 201 S.W.3d 229, 230 (Tex. App.—Fort Worth 2006, no pet) (cannot consider issue on appeal not raised in statement of points); *In re E.A.R.* 201 S.W.3d 813, 813-14 (Tex. App.—Waco 2006, no pet.) (failure to file statement of points precluded appellate court from considering issues on appeal); *In re S.E.*, 203 S.W.3d 14, 15 (Tex. App.—San Antonio 2006, no pet.) Although slightly outside the Survey period, the Houston Court of Appeals for the Fourteenth District and the El Paso Court of Appeals have also concluded they cannot consider any issue on appeal not raised in a timely filed statement of points. *In re A.H.L., III.*, 214 S.W.3d 45, 53 (Tex. App.—El Paso 2006, pet. denied); *In re C.M.*, 208 S.W.3d 89, 91-92 (Tex. App.—Houston [14th Dist.] 2006, no pet.).

216. 201 S.W.3d at 814.

217. *Id.* at 816-17.

218. *Id.* at 818.

219. *In re D.A.R.*, 201 S.W.3d at 231.

220. 202 S.W.3d 860 (Tex. App.—Fort Worth 2006, no pet.) (op. on reh'g).

221. 200 S.W.3d 788 (Tex. App.—Fort Worth 2006, no pet.).

222. *In re K.D.*, 202 S.W.3d at 863.

223. *Id.*; *In re T.C.*, 200 S.W.3d at 790.

freely appeal the termination order.”²²⁴

Turning to the first argument, the Fort Worth Court of Appeals concluded section 263.405 requires the trial court to hold a hearing within thirty days of the final order at which the trial court determines whether a new trial should be granted, whether any claim of indigency should be sustained, and whether any appeal would be frivolous.²²⁵ Section 263.405(d) does not set out the test for determining whether a party is indigent and, therefore, entitled to a free record.²²⁶ Rather, that test is found in section 13.003 of the Civil Practice and Remedies Code, which requires (1) an affidavit of inability to pay the cost of the appeal, and (2) a finding by the trial court that the appeal is not frivolous and that the reporter’s and clerk’s record are needed to decide the issue presented by the appeal.²²⁷

Reading section 263.405 and section 13.003 together, the court of appeals determined that there are two statutory consequences of a trial court finding an appeal would be frivolous.²²⁸ First, under section 263.405(g), the scope of appellate review is limited to the trial court’s determination that the appeal is frivolous.²²⁹ This limitation on the scope of appellate review following a frivolousness determination is applicable to both indigent and non-indigent appellants.²³⁰

The second statutory consequence of a frivolousness determination is the denial of a free appellate record to an indigent appellant.²³¹ The court of appeals concluded the disparate impact of the second consequence of a frivolousness determination is immaterial because of the first consequence.²³² Once the trial court determines any appeal would be frivolous, “the scope of appellate review is statutorily limited to a review of the trial court’s frivolousness finding.”²³³ Nothing in the statute suggests a non-indigent appellant has a right to file any record on appeal other than the record of the frivolousness hearing.²³⁴ Further, the record of the frivolousness hearing is required to be provided without the advance payment of costs.²³⁵ Accordingly, any appellant, regardless of whether they are indigent, is statutorily guaranteed the same limited ap-

224. *In re T.C.*, 200 S.W.3d at 790.

225. *Id.* at 791 (citing TEX. FAM. CODE ANN. § 263.405(d) (Vernon Supp. 2006)); *In re K.D.*, 202 S.W.3d at 564.

226. *In re K.D.*, 202 S.W.3d at 864; *In re T.C.*, 200 S.W.3d at 791.

227. *In re K.D.*, 202 S.W.3d at 864; *In re T.C.*, 200 S.W.3d at 791. An appeal is frivolous under section 13.003 if it lacks an arguable basis in law or fact. *In re K.D.*, 202 S.W.3d at 866.

228. *In re K.D.*, 202 S.W.3d at 865; *In re T.C.*, 200 S.W.3d at 791.

229. *In re K.D.*, 202 S.W.3d at 865; *In re T.C.*, 200 S.W.3d at 791.

230. *In re K.D.*, 202 S.W.3d at 865; *In re T.C.*, 200 S.W.3d at 791-92.

231. *In re K.D.*, 202 S.W.3d at 865; *In re T.C.*, 200 S.W.3d at 792.

232. *In re K.D.*, 202 S.W.3d at 865; *In re T.C.*, 200 S.W.3d at 792.

233. *In re K.D.*, 202 S.W.3d at 865; *In re T.C.*, 200 S.W.3d at 792 (citing TEX. FAM. CODE ANN. § 263.405(g) (Vernon Supp. 2006)).

234. *In re K.D.*, 202 S.W.3d at 865; *In re T.C.*, 200 S.W.3d at 792.

235. *In re K.D.*, 202 S.W.3d at 865; *In re T.C.*, 200 S.W.3d at 792.

pellate review of the trial court's frivolousness finding.²³⁶

The court of appeals then turned to the contention that the statute unconstitutionally limited an appeal to the trial court's frivolousness determination in a state-initiated termination, while a parent facing termination initiated by a private party has the right to a full appeal under section 109.002 of the Family Code.²³⁷ The court of appeals concluded an indigent parent in a termination initiated by a private party who requested a free record would be subject to a determination of whether any appeal would be frivolous under section 13.003 of the Civil Practice and Remedies Code.²³⁸ If the trial court determined the appeal would be frivolous, the indigent parent in a termination initiated by a private party would be limited to appellate review of the trial court's frivolousness determination.²³⁹ Therefore, indigent parents in a private termination proceeding are in the same position as indigent parents in a state-initiated proceeding.²⁴⁰ Accordingly, section 263.405 does not violate an indigent appellant's equal protection or due process rights.²⁴¹

The court of appeals finally considered the contention that section 263.405 was unconstitutional because it denies an appellant the right to appeal with a full record. The court of appeals noted an appellate court has the authority to order the preparation of a full record when necessary to review a trial court's determination that an appeal raising a factual sufficiency complaint is frivolous.²⁴² Because the court of appeals had ordered, and reviewed, the full record in both cases, neither appellant was denied a meaningful appeal.²⁴³

D. INEFFECTIVE ASSISTANCE OF COUNSEL

In Texas, there is a statutory right to counsel for indigent persons in cases brought by the State to terminate parental rights.²⁴⁴ This right embodies the right to effective counsel.²⁴⁵ To establish ineffective assistance of counsel, the appellant must establish that counsel's assistance fell below an objective standard of reasonableness and that the deficient assistance prejudiced the appellant.²⁴⁶ The record must affirmatively

236. *In re K.D.*, 202 S.W.3d at 865; *In re T.C.*, 200 S.W.3d at 792.

237. TEX. FAM. CODE ANN. § 109.002 (Vernon 2002) (allowing appeal from final termination order "as in civil cases generally").

238. *In re K.D.*, 202 S.W.3d at 865; *In re T.C.*, 200 S.W.3d at 792.

239. *In re K.D.*, 202 S.W.3d at 865-66; *In re T.C.*, 200 S.W.3d at 792.

240. *In re K.D.*, 202 S.W.3d at 865-66; *In re T.C.*, 200 S.W.3d at 792.

241. *In re K.D.*, 202 S.W.3d at 866; *In re T.C.*, 200 S.W.3d at 792.

242. *In re K.D.*, 202 S.W.3d at 866; *In re T.C.*, 200 S.W.3d at 793 (citing *In re M.R.J.M.*, 193 S.W.3d 670, 676 (Tex. App.—Fort Worth 2006, no pet.) (en banc)). The San Antonio Court of Appeals used the same procedure in ordering the full reporter's record to determine whether the trial court abused its discretion in finding the mother's complaint that the trial denied her a jury trial was frivolous. *In re M.N.V.*, 216 S.W.3d 833, 835 (Tex. App.—San Antonio 2006, no pet.).

243. *In re K.D.*, 202 S.W.3d at 866; *In re T.C.*, 200 S.W.3d at 793.

244. TEX. FAM. CODE ANN. § 107.013 (Vernon Supp. 2006).

245. *In re M.S.*, 115 S.W.3d 534, 544 (Tex. 2003).

246. *Id.* at 545 (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

demonstrate the alleged ineffectiveness.²⁴⁷

In *In re K.K.*,²⁴⁸ the Waco Court of Appeals considered the impact of an accelerated appeal in termination cases on an indigent parent's right to raise an ineffective assistance of counsel claim on appeal. The court of appeals was confronted with the mother's and one of the father's contention they received ineffective assistance of counsel because neither of their attorneys moved to dismiss the termination case based on the statutory deadline in section 263.401 of the Family Code.²⁴⁹ The court of appeals acknowledged the absence of a record on the ineffective assistance claim almost certainly precluded the parents from prevailing on that issue on appeal.²⁵⁰ The court of appeals struggled with the equities, noting the applicable post-trial deadlines not only deprive an indigent parent in a termination proceeding of a meaningful appeal, but make it a:

practical impossibility for an indigent parent to obtain appointed appellate counsel, file a motion for new trial alleging ineffective assistance, and submit evidence (either by testimony or affidavit from appointed trial counsel) to develop a record that shows trial counsel's reasons or strategies for the conduct that is the basis for the ineffective-assistance claim.²⁵¹

The court of appeals concluded it was a "useless gesture" to provide indigent parents with the right to effective assistance of counsel, "but not to provide them with the procedural ability to prevail on a meritorious ineffective-assistance claim."²⁵²

Due to this concern, the court of appeals abated the case and remanded it to the trial court for an evidentiary hearing at which the mother and the father could develop their ineffective assistance claims.²⁵³ Chief Justice Gray dissented to the "new procedure created out of whole cloth by the majority."²⁵⁴ In Chief Justice Gray's view, section 161.211 of the Family Code allows appellate counsel the option of simultaneously filing a writ of habeas corpus to develop the record on the ineffective assistance claim.²⁵⁵

VI. CONCLUSION

Painting with a broad brush, the cases during the Survey period provide guidance to litigants and trial courts about the substantive and procedural rules being applied to a number of issues affecting the parent-child relationship, hopefully leading to more consistent results in this

247. *In re J.W.*, 113 S.W.3d 605, 616 (Tex. App.—Dallas 2003, pet. denied).

248. 180 S.W.3d 681 (Tex. App.—Waco 2005, no pet.) (per curiam).

249. *Id.* at 683.

250. *Id.*

251. *Id.* at 686.

252. *Id.*

253. *Id.* at 688.

254. *Id.* at 689.

255. *Id.*; see TEX. FAM. CODE ANN. § 161.211 (Vernon 2002) (stating termination judgment is not subject to collateral attack after six months from date of signing).

practice area. Although the courts applied the Family Code to issues affecting the parent-child relationship, the cases demonstrate there are many issues not addressed by the Family Code that must be analyzed under common law and contract principles. It also appears the courts are increasingly relying on equitable theories in attempting to address many difficult, but not unusual, fact patterns. This requires the litigant to carefully look at his case from many different aspects prior to framing the issues for either the trial court or the appellate court.