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FAMILY LAW: PARENT AND CHILD

James W. Paulsen*

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The Survey year saw a very active legislative session, which combined a fundamentally nonsubstantive revision of Title 1 of the Family Code with numerous substantive amendments to the Code. Two useful summaries of legislative changes have already appeared;¹ this Survey also will mention some of the high points under the relevant topics. Readers should be warned that a single conservatorship decision, *Fowler v. Jones*,² occupies a substantial portion of the discussion this year because, though not significant in and of itself, the case raises some very serious questions about the “nonsubstantive” codification process through which the entire Family Code has been rewritten in the course of the last two legislative sessions.

Though not strictly on topic, it is appropriate to note that this Survey year saw the passing of Professor Eugene L. Smith, a true giant in the Texas family law community. A short memorial by a long-time friend has appeared in print.³ Gene Smith played a large part in the drafting of the

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1. See Stewart W. Gagnon & Howard G. Baldwin, Jr., *Laws Regarding the Family, Terminations and Adoptions, and Protective Orders*, 60 TEX. B.J. 794 (1997); *Amendments to the Texas Family Code 75th Legislature, Regular Session (1997)*, 1997-3 ST. B. SEC. REP. FAM. L. 6-87 [hereinafter *Family Law Section Summary*]. The Gagnon and Baldwin piece, while admirably timely, contains some statute numbers that changed in the legislative shuffle.

2. 949 S.W.2d 442 (Tex. App.—Austin 1997, pet. filed).

3. See Joseph W. McKnight, *Eugene L. Smith, 1933-1997: An Appreciation of His Achievements*, 1997-4 ST. B. SEC. REP. FAM. L.

Family Code, in particular, the provisions on the parent-child relationship. He was instrumental in starting the excellent continuing legal education programs still offered by the State Bar's Family Law Section today. As a long-time professor at Southern Methodist University, Texas Tech, and the University of Houston, Gene also influenced an entire generation of family lawyers and lashed many of them with his trademark caustic wit. Finally, perhaps as one of his obscure jokes, Gene encouraged a young lawyer of his acquaintance to take up the teaching profession, advice for which this writer will be forever grateful. Gene's line, if memory serves, was, "You're not nearly as dumb as some of the lawyers I know."

I. FEDERAL DEVELOPMENTS: THE CONSTITUTIONALITY OF THE CHILD SUPPORT RECOVERY ACT OF 1992

In *United States v. Bailey*,⁴ a long delayed ruling from the Fifth Circuit, the court reversed a decision by District Judge Biery of San Antonio⁵ that had declared the federal Child Support Recovery Act (CSRA)⁶ unconstitutional. In a typical application of the Act, Keith Bailey, a divorced father subject to Texas court order to make child support payments, moved to Tennessee and stopped paying. In defense to a Texas prosecution under the CSRA, Bailey argued that the Act was unconstitutional. District Judge Biery agreed and ruled that the Act exceeded Congress's constitutional authority under the Commerce Clause and was an infringement on traditional state power over the marriage relationship, exemplified by the domestic relations exception to federal jurisdiction.⁷

Under ordinary circumstances, the Fifth Circuit's decision to affirm the constitutionality of the CSRA on Commerce Clause grounds would hardly be worth mentioning. In proposing the legislation, the House Judiciary Committee found that more than five billion dollars was owed by "deadbeat dads" in 1989,⁸ that more than half of all child support obligors who moved out of state sent payments occasionally, seldom, or never, and that delinquent out-of-state obligors made "a mockery of State law by fleeing across State lines to avoid enforcement actions by State courts and child support [collection] agencies."⁹ In fact, by the time the Fifth Circuit ruled in *Bailey*, six other federal circuits had already held the CSRA to be constitutional.¹⁰

4. 115 F.3d 1222 (5th Cir. 1997) *reh'g en banc denied*, 127 F.3d 36 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 866 (1998).

5. *See* *United States v. Bailey*, 902 F. Supp. 727 (W.D. Tex. 1995), *rev'd*, 115 F.3d 1222 (5th Cir. 1997).

6. 18 U.S.C. § 228 (1995).

7. *See, e.g.* *Ankenbrant v. Richards*, 504 U.S. 689 (1992).

8. *See* 138 CONG. REC. H7324, H7327 (daily ed. Aug. 4, 1994) (statement of Rep. Hoagland).

9. *Bailey*, 115 F.3d at 1225 (quoting 138 CONG. REC. H7324, H7326 (daily ed. Aug. 4, 1992) (statement of Rep. Hyde)).

10. *See* *United States v. Bongiorno*, 106 F.3d 1027 (1st Cir. 1997), *reh'g denied*, 110 F.3d 132 (1997); *United States v. Parker*, 108 F.3d 28 (3d Cir. 1997), *cert. denied*, 118 S. Ct. 111 (1997); *United States v. Johnson*, 114 F.3d 476 (4th Cir. 1997), *cert. denied*, 118 S. Ct.

What is disturbing, though perhaps not particularly surprising, is the fact that it took the Fifth Circuit so long to issue a ruling, that the ruling which finally emerged is limited in scope, and that even this limited ruling drew a vigorous dissent.¹¹ The Fifth Circuit found that under the three-category test set out by the Supreme Court in *Lopez*,¹² congressional regulation aimed at deadbeat parents involved “channels” and “instrumentalities” of interstate commerce.¹³ The court expressly declined to decide whether the third category, “those activities having a substantial relation to interstate commerce,” applied.¹⁴ Thus, the court placed particular emphasis on the fact that Bailey’s child support payments “must of necessity invoke interstate transportation routes.”¹⁵

Bailey’s argument that the CSRA punished him for *failing* to use channels of interstate commerce, fell on deaf ears. Properly viewed, the Fifth Circuit explained, Bailey’s change of residence caused his debt to take on an interstate character. The debt, therefore, “continue[d] to move in interstate commerce” so long as Bailey resided in another state.¹⁶ Moreover, Bailey placed *himself* in interstate commerce channels by moving out of Texas.¹⁷ The court stated “[i]f Congress can take measures under the Commerce Clause to foster potential interstate commerce, it surely has power to prevent the frustration of an obligation to engage in commerce.”¹⁸

The United States Supreme Court’s *Lopez* decision, characterized by the dissenting judge in *Bailey* as a “landmark in constitutional law,”¹⁹ has generated considerable uncertainty as to the reach of congressional power under the Commerce Clause. The Fifth Circuit took what many observers felt was an excessively conservative position when it decided *Lopez*. The U.S. Supreme Court’s decision in that case vindicated the Fifth Circuit and established that “Congress’s power under the Com-

258 (1997)); *United States v. Sage*, 92 F.3d 101 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 784 (1997); *United States v. Mussari*, 95 F.3d 787 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1567 (1997); *United States v. Hampshire*, 95 F.3d 999 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 753 (1997).

11. The dissenting opinion, by Judge Jerry Smith, began with a concise summary of his argument. “Rather than rigorously enforcing the limitations on federal power, as *Lopez* commands, the panel majority upholds the constitutionality of a statute that contains no reference to interstate commerce, regulates an activity that is not commercial, and invades the field of family law, a traditional area of exclusive state sovereignty.” *Bailey*, 115 F.3d at 1233 (Smith, J., dissenting).

12. See *United States v. Lopez*, 514 U.S. 549 (1995).

13. See *Bailey*, 115 F.3d at 1226.

14. *Id.* The “substantially affects” category for permissible regulation comprised a substantial part of the dissenting judge’s opinion. The majority professed itself “puzzled” by this analysis and emphasized in a footnote that “we make no effort to defend the constitutionality of the CSRA on the basis that the failure to pay court-ordered child support ‘substantially affects’ interstate commerce.” *Id.* at 1226 n.2.

15. *Id.* at 1227.

16. *Id.* at 1228.

17. See *id.* at 1228-29.

18. *Id.* at 1229 (quoting *United States v. Sage*, 92 F.3d 101, 105-06 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 784 (1997)).

19. *Id.* at 1233 n.1 (Smith, J., dissenting).

merce Clause must have some limits."²⁰ The *Bailey* dissent attempted to invoke this perceived new conservatism.²¹ Therefore, the failure of the requests for en banc review by the Fifth Circuit and certiorari consideration by the U.S. Supreme Court should give some comfort to supporters of the CSRA.

II. THE PARENTAL IMMUNITY DOCTRINE

In the state courts, one decision of general interest to family law practitioners deserves some preliminary notice. *McGee v. McGee*,²² a child abuse case from the Waco Court of Appeals, addressed some interesting issues relating to the parental immunity doctrine. In *McGee*, a physically and sexually abused child sued his stepfather and obtained a judgment for \$175,000.²³ Trial court pleadings and appellate strategy alike were aimed toward claiming homeowners' insurance coverage (that is, coverage for negligence but a policy exclusion for intentional acts), a tactic the appellate court pointedly disapproved.²⁴ The court of appeals declined an opportunity to infer intent as a matter of law from the stepfather's conduct²⁵ and therefore refused to disturb the jury's negligence finding.

The stepfather's immunity defense, however, was another matter. In Texas, parental immunity has been abolished as a defense in limited circumstances, namely, intentional misconduct and actions arising from an employment relationship or operation of a motor vehicle.²⁶ The immunity rule has been retained, however, for alleged acts of ordinary negligence which involve a reasonable exercise of parental authority or the exercise of ordinary parental discretion with respect to provisions for the

20. *United States v. Kirk*, 105 F.3d 997, 999 (5th Cir. 1997) (en banc) (quoting *United States v. Rybar*, 103 F.3d 273, 291 (3d Cir. 1996) (Alito, J., dissenting)).

21. See, e.g., *Bailey*, 115 F.3d at 1233 (Smith, J., dissenting) (stating that "[t]he lessons of *Lopez* are lost, however, in the instant case.").

22. 936 S.W.2d 360 (Tex. App.—Waco 1996, writ denied).

23. The judgment was comprised of \$20,000 for mental anguish and medical care attributable to the assaults, \$50,000 attributable to negligent conduct, and \$105,000 in punitive damages. See *id.* at 363. Only the negligence findings were appealed.

24. The Waco Court of Appeals commented that "several aspects of [the] case are disconcerting." *Id.* In particular, the court questioned the validity of an indemnity agreement executed in the prior divorce suit, whereby mother and stepfather agreed to delay resolution of the tort claims, and the mother agreed to indemnify the father for any tort recovery not covered by insurance. The court commented on the "irony" of such a hold-harmless agreement and stated that the litigation "makes us question the public-policy considerations that allow agreements designed to facilitate insurance coverage while allowing the insured to effectively escape liability." *Id.* at 363-64 nn.2-3. The existence of this agreement did not, the court ruled, constitute *res judicata* as to the son's claim. See *id.* at 364-65.

25. The court found that some of the stepfather's acts were "separate and apart" from his assaults. *Id.* at 365. Relying on *State Farm Fire & Cas. Co. v. S.S.*, 858 S.W.2d 374 (Tex. 1993), the Waco Court of Appeals ruled that while intent to harm might be inferred as a matter of law when sexual misconduct with a minor was involved, the jury was entitled to find that some of the stepfather's acts did constitute negligence and "were not intertwined with the sexual misconduct." *McGee*, 936 S.W.2d at 366.

26. See, e.g., *Hoffmeyer v. Hoffmeyer*, 869 S.W.2d 667, 668 (Tex. App.—Eastland 1994, writ denied).

care and necessities of the child.²⁷ The court acknowledged that there might be some question as to whether gross negligence should be classified as "negligence" or "intentional misconduct" for purposes of immunity, but it ruled that under the jury submission in the case at hand, any misconduct was unintentional.²⁸

The remaining question was whether a stepparent, who may exercise parental authority, should be entitled to the shield of parental immunity. One Texas appellate court has extended the immunity to a stepparent,²⁹ and the Waco court in *McGee* agreed.³⁰ The court acknowledged that a stepparent is not classified as a "parent" under the Family Code,³¹ but it placed considerable emphasis on the fact that the defendant stepfather was "the only father figure that [the child] had ever known," and that the child would have been adopted but for the mother's wish that he keep his biological father's name.³² The court ruled for the insurance company, and only the claims not barred by parental immunity were excluded by the policy terms.

Regarding the application of the parental immunity doctrine to step-parents, *McGee* seems unexceptional, though the logic of the result might be questioned on more general grounds. While some jurisdictions have held that a person standing in loco parentis,³³ including a stepfather,³⁴ is entitled to the benefits of parental immunity, others have declined to do so or have construed the concept narrowly.³⁵ If there is any trend, it might be toward the abolition of parental immunity in general and away

27. See *Felderhoff v. Felderhoff*, 473 S.W.2d 928, 930 (Tex. 1971).

28. See *McGee*, 936 S.W.2d at 370 (on rehearing). The court noted that the jury was charged under the then-current statutory definition of gross negligence, namely, "that the act or omission in question was the result of actual conscious indifference. . . ." *Id.* at 370 n.3. The court also commented that "gross negligence could form the basis for another exception" to the parental immunity doctrine, but it concluded that "we are not so inclined." *Id.* at 370.

29. See *Hall v. Martin*, 851 S.W.2d 905 (Tex. App.—Beaumont 1993, writ denied), cert. denied, 114 S. Ct. 1399 (1994).

30. See *McGee*, 939 S.W.2d at 369.

31. See *McGee*, 936 S.W.2d at 369 n.1 (on rehearing) (citing TEX. FAM. CODE ANN. § 101.024 (Vernon 1996)).

32. *McGee*, 936 S.W.2d at 367 (quoting mother's trial testimony).

33. See, e.g., *Mitchell v. Davis*, 598 So. 2d 801 (Ala. 1992) (foster parents); *Bennett v. Bennett*, 390 S.E.2d 276 (Ga. 1990) (grandparents); *Brown v. Phillips*, 342 S.E.2d 786 (Ga. 1986) (foster parents); *Gerrity v. Beatty*, 373 N.E.2d 1323 (Ill. 1978) (teacher); see also generally W.W. Allen, Annot., *Responsibility of Parent or Person in loco parentis for Personal Tort Against Minor Child*, 19 A.L.R.2d 423 (1951).

34. See, e.g., *Lawber v. Doil*, 547 N.E.2d 752 (Ill. 1989); *London Guar. & Accident Co. v. Smith*, 64 N.W.2d 781 (Minn. 1954); *Bricault v. Devau*, 157 A.2d 604 (Conn. Super. Ct. 1960).

35. See, e.g., *Newsome v. Dep't of Human Resources*, 405 S.E.2d 61 (Ga. 1991) (declining to permit defense for foster parents when children had been removed and placed with another family); *Mayberry v. Pryor*, 374 N.W.2d 683 (Mich. 1985) (declining to extend doctrine to foster parents); *Buffalo v. Buffalo*, 441 N.E.2d 711 (Ind. Ct. App. 1982) (declining to permit defense for noncustodial parent); *Turner v. Turner*, 304 N.W.2d 786 (Iowa 1981); *Gulledge v. Gulledge*, 367 N.E.2d 429 (Ill. 1977) (declining to extend to grandparents with temporary custody); *Brown v. Cole*, 129 S.W.2d 245 (Ark. 1939) (declining to permit defense for adoptive parents).

from any expansion of the doctrine to include non-parents.³⁶ At this point in the development of Texas law, however, the Waco court's opinion does not seem unduly offensive. The Texas Supreme Court's use of language referring to the "exercise of parental authority"³⁷ can logically be read as referring not only to parents, but to others standing in *loco parentis*. While some further restriction or even the complete abolition of the parental immunity doctrine might be wise, on much the same grounds that the Texas interspousal immunity doctrine already has been abolished³⁸ that decision is best made by the Texas Supreme Court in the first instance.

The *McGee* panel's other ruling, emphasizing a distinction between conduct that constitutes merely "conscious indifference" to the child's welfare, as opposed to "intentional" misconduct that would fall outside the scope of parental immunity, is more questionable. Although at least one other court has included grossly negligent behavior within the ambit of parental immunity,³⁹ the distinction between gross negligence and intentional misconduct seems thin, and the Waco court recognized as much.⁴⁰ The Texas Supreme Court stated in *Felderhoff* that the parental immunity doctrine is restricted to "ordinary negligence and unintentional wrongs."⁴¹ The Waco court in *McGee* quoted this language, but concluded, relying on another court of appeals' summary of the three exceptions to parental immunity, that grossly negligent conduct fits none of the exceptions.⁴² It would, however, be just as reasonable to conclude that

36. See, e.g., Samuel Mark Pipino, Comment, *In Whose Best Interest? Exploring the Continuing Viability of the Parental Immunity Doctrine*, 53 OHIO ST. L.J. 1111, 1115 (1992) (stating that "[f]ar from being established as a steadfast rule, though, immunity for those in loco parentis has been qualified in a number of recent decisions").

37. *Felderhoff*, 473 S.W.2d at 930.

38. In an early decision adopting the parental immunity doctrine, the Tennessee Supreme Court explicitly analogized the parental immunity doctrine to the interspousal immunity doctrine. See *McKelvey v. McKelvey*, 77 S.W. 664, 665 (Tenn. 1903). While Tennessee has followed the nationwide trend of eliminating interspousal immunity, the Tennessee Supreme Court has recognized the "continuing vitality" of parental immunity. See *Barranco v. Jackson*, 690 S.W.2d 221, 222 (Tenn. 1985). Texas abolished the interspousal immunity doctrine "as to any cause of action" in 1987. See *Price v. Price*, 732 S.W.2d 316, 319 (Tex. 1987).

39. See *Hoffmeyer v. Hoffmeyer*, 869 S.W.2d 667, 668 (Tex. App.—Eastland 1994, writ denied). The *Hoffmeyer* court also cited *Hall v. Martin*, 851 S.W.2d 905 (Tex. App.—Beaumont 1993, writ denied), for the proposition that the Texas parental immunity doctrine covers acts of gross negligence. See *Hoffmeyer*, 869 S.W.2d at 668. While *Hall v. Martin* did involve a "negligence and gross negligence suit," in the court's own terms, there is no indication in the text of the case that the issue of gross negligence was considered by the court. See *Hall*, 851 S.W.2d at 907. To the contrary, the *Hall* opinion states:

It is important to note that in Texas an unemancipated minor may not sue his parents for damages based on *ordinary negligence* involving parental functions. This doctrine encompasses those alleged acts of *ordinary negligence* which involve a reasonable exercise of parental authority or the exercise of ordinary parental discretion with respect to the provisions for the care and necessities of the child.

Hall, 851 S.W.2d at 910-11 (emphasis added).

40. See *supra* note 27 and accompanying text.

41. *Felderhoff*, 473 S.W.2d at 931.

42. See *supra* note 27 and accompanying text.

the Texas Supreme Court's statement defining the scope of parental immunity as encompassing "*ordinary negligence and unintentional wrongs*" should be read as implying two negatives; specifically, that *gross negligence and intentional wrongs* are not protected by the parental immunity doctrine. This reading also would be consistent with the high court's statement in the 1992 *Shoemake* decision that parental decisions cannot be questioned in tort suits "[i]n the absence of culpability *beyond ordinary negligence*."⁴³

The Waco court also expressed concern that a decision not to extend the parental immunity doctrine to gross negligence would run counter to the basic public policy objective of parental immunity, which is "avoiding undue judicial interference with parental discretion."⁴⁴ Again, however, this supposition could reasonably be questioned. The Texas Supreme Court has stated that the purpose of the doctrine is to "avoid[] *undue* judicial interference with parental discretion not all interference."⁴⁵ More particularly, the Court has stated that the rule of immunity is retained as to "alleged acts of ordinary negligence which involve a *reasonable* exercise of parental authority or the exercise of *ordinary* parental discretion with respect to provisions for the care and necessities of the child."⁴⁶

In *McGee*, the jury instruction for gross negligence specifically stated that "gross negligence" means "more than momentary thoughtlessness, inadvertence, or error of judgment."⁴⁷ Instead, the instruction required a finding of "such an entire want of care as to establish that the act or omission in question was the result of actual conscious indifference to the rights, welfare, or safety of the persons affected by it."⁴⁸ Opinions may differ on the point, but to this reader at least, the conduct necessary to secure an affirmative answer to such an instruction most assuredly is beyond the bounds of "*reasonable* exercise of parental authority" or "*ordinary* parental discretion." In such a case, there arguably has been a breakdown in the parental relationship sufficient to justify legal intervention.⁴⁹ If this is the case, one might reasonably question the *McGee* court's conclusion that "[t]o the extent it applies, the [parental immunity] doctrine protects negligent conduct, no matter how loathsome."⁵⁰ That quite possibly is not, and surely need not be, the law. One might hope,

43. *Shoemake v. Fogel, Ltd.*, 826 S.W.2d 933, 936 (Tex. 1992) (emphasis added).

44. *McGee*, 936 S.W.2d at 370 (on rehearing) (citing *Shoemake*, 826 S.W.2d at 936).

45. *Shoemake*, 826 S.W.2d at 936 (emphasis added).

46. *Jilani v. Jilani*, 767 S.W.2d 671, 672 (Tex. 1988) (quoting *Felderhoff*, 473 S.W.2d at 933) (quoted in *McGee*, 936 S.W.2d at 367) (emphasis added).

47. *McGee*, 936 S.W.2d at 730.

48. *Id.*

49. Accord Sandra L. Haley, Comment, *The Parental Tort Immunity Doctrine: Is it a Defensible Defense?*, 30 U. RICH. L. REV. 575, 584 (1996) (noting that many states have created an exception to the parental immunity doctrine for reckless conduct and that "[s]uch actions by a parent circumvent and step outside of the parent-child relationship").

50. *McGee*, 936 S.W.2d at 367 n.8.

even though writ was denied in *McGee*, that the Texas Supreme Court eventually will see fit to address the issue.

It might seem difficult to end such a discussion on a light note, but the Texas Legislature has found a way. In the 1997 session, state lawmakers addressed what they saw as a burning issue in parental immunity, that being the prom night "trashing" of hotel rooms. Accordingly, the Legislature not only raised the property damage liability of parents for the wilful and malicious conduct of their children from \$15,000 to \$25,000 per occurrence;⁵¹ lawmakers added a new statutory provision that specifically defines "occurrence" for hotels as "one incident on a single day in one hotel room."⁵²

III. STATUS

In 1994 the Texas Supreme Court decided *In re J.W.T.*,⁵³ which established that a biological father in Texas has the right to assert paternity claims against the parties to an intact marriage, so long as the assertion of paternity is accompanied by "early and unqualified acceptance of parental duties."⁵⁴ The 1995 Texas Legislature clarified the details of such an action, imposing a statute of limitations and other requirements for suit.⁵⁵ In the 1997 session the Legislature further elaborated on the new statutory scheme. For example, if the mother is deceased, her close relatives now have standing to contest paternity.⁵⁶ More importantly, Texas now has a paternity registry statute.⁵⁷

The new paternity registry statute provides that any man who has sexual intercourse is presumed to know that a pregnancy could follow.⁵⁸ Therefore, the man is required, whether he knows the woman is pregnant or not, to establish his rights to any resulting child by filing a "notice of intent to claim paternity" with the state Bureau of Vital Statistics within thirty days after the child's birth.⁵⁹ Failure to file could result in termination of his parental rights without further notice.⁶⁰

51. See TEX. FAM. CODE ANN. § 41.002 (Vernon Supp. 1998).

52. *Id.* § 41.0025(b).

53. 872 S.W.2d 189 (Tex. 1994). The decision is discussed in detail in an earlier Survey. See James W. Paulsen, *Family Law: Parent and Child, Annual Survey of Texas Law*, 47 SMU L. REV. 1197, 1197-1205 (1994) [hereinafter Paulsen, 1994 Annual Survey].

54. See *In re J.W.T.*, 872 S.W.2d at 198.

55. These changes are summarized in an earlier Survey. See James W. Paulsen, *Family Law: Parent and Child, Annual Survey of Texas Law*, 49 SMU L. REV. 1063, 1065 (1996) [hereinafter Paulsen, 1996 Annual Survey].

56. See TEX. FAM. CODE ANN. § 160.101(a)(2) (Vernon Supp. 1998) (stating that the presumption of paternity may be contested by "a person related within the second degree of consanguinity to the biological mother of the child, if the biological mother of the child is deceased").

57. See *id.* §§ 160.251-.263.

58. See *id.* § 160.254(a).

59. See *id.* § 160.254(b) (setting out the filing requirement); § 160.256(c) (establishing the 30 day limit). There is a minor conflict in statutory wording. Section 160.254(b) refers to the document as a "notice of intent to assert," though the notice elsewhere is referred to as a "notice of intent to claim paternity." See, e.g., *id.*, § 160.256(a).

60. See *id.* § 160.258.

The U.S. Supreme Court has upheld the validity of paternity registries.⁶¹ That conclusion is not necessarily binding on Texas, however, because the Texas Supreme Court in *In re J.W.T.* ruled that Texas biological fathers have broader rights under state law than those guaranteed by the Constitution.⁶² Nonetheless, the Texas paternity registry statute is likely to withstand state constitutional scrutiny because the statute is less sweeping in its scope than it might first appear.⁶³ For instance, the statute does not cut off the rights of a putative father who fails to file with the registry but who does file a legal action to establish paternity before his rights are otherwise terminated.⁶⁴ In addition, the statute requires that a biological father whose whereabouts and identity are known is to receive notice of a suit to terminate parental rights whether he has filed with the paternity registry or not.⁶⁵ Accordingly, the main effect of the new statute is to substitute a paternity registry for service by publication, which is a "wholly impractical method of notice."⁶⁶

Several noteworthy paternity cases were decided during the Survey period. The most interesting of these, principally because of the parties involved, is the appeal following retrial of the venerable *In re J.W.T.* decision.⁶⁷ As already mentioned,⁶⁸ the original appeal of this case resulted in a notable constitutional ruling on the rights of Texas biological fathers.⁶⁹ In brief,⁷⁰ husband Randy T. and wife Judy T. were separated. Judy T. was living with Larry G. and planned to marry him after her divorce was finalized. While living together, Larry G. and Judy T. conceived a child, J.W.T. Before the child's birth, however, Randy T. and Judy T. reconciled. Larry G. sought a judicial determination of paternity and visitation rights. While blood tests showed a 99.41% probability that Larry G. was the biological father, the trial court denied Larry G. stand-

61. See *Lehr v. Robertson*, 463 U.S. 248 (1983) (upholding New York statute).

62. In *In re J.W.T.*, the Texas Supreme Court noted but expressly declined to follow a contrary United States Supreme Court decision, *Michael H. v. Gerald D.*, 491 U.S. 110 (1989). The Texas court noted that it reached the result, upholding rights of a putative biological father, "wholly under our Texas due course of law guarantee, which has independent vitality, separate and distinct from the due process clause of the Fourteenth Amendment to the U.S. Constitution." *In re J.W.T.*, 872 S.W.2d at 197.

63. Cf. *Family Law Section Summary* (Howard G. Baldwin, Jr. & John J. Sampson, Introductory Comment), *supra* note 1, at 43 (stating that "[w]hether the statutory scheme . . . will be deemed to be an arbitrary restriction of the natural father's rights is one that ultimately can only [] be resolved in the courts," but noting that "the most objectionable aspects of the New York scheme [approved by the United States Supreme Court in *Lehr*] do not appear in the Texas statute").

64. See TEX. FAM. CODE ANN. § 160.258 (Vernon Supp. 1998) (stating that a man who does not file within 30 days of birth is not entitled to contest paternity "other than by filing a suit to establish paternity before the termination of the man's parental rights").

65. See *id.* § 161.002(b)(2).

66. *Family Law Section Summary* (Howard G. Baldwin, Jr. & John J. Sampson, Introductory Comment), *supra* note 1, at 43.

67. *In re J.W.T.*, 945 S.W.2d 911 (Tex. App.—Beaumont 1997, n.w.h.).

68. See *supra* notes 52 and 53.

69. See Paulsen, 1994 *Annual Survey*, *supra* note 52, at 1197-1205.

70. The summary of facts is taken from the Texas Supreme Court's *In re J.W.T.* opinion. See *In re J.W.T.*, 872 S.W.2d at 189-90.

ing and dismissed his claim. The Texas Supreme Court held that an alleged biological father in Larry G.'s position had standing to claim paternity, especially when he had shown diligence in pursuing his parental rights.⁷¹

On remand, however, despite the apparently conclusive scientific evidence pointing to Larry G.'s paternity, the trial court ruled that Judy T. and Randy T. were the parents. The trial court acknowledged that the blood test results placed the burden of proof on Judy T. and Randy T., but it held that they had presented sufficient contrary evidence to meet that burden.⁷² The Beaumont Court of Appeals reversed and remanded the case for yet another hearing.

The Beaumont court noted in its opinion that under applicable case law scientific testing that excludes ninety-five percent of the male population, but that does not exclude the alleged father, constitutes a "prima facie showing of paternity" and shifts the burden of proof to the side contesting paternity.⁷³ The evidence offered by Randy T. and Judy T., and accepted by the trial court, boiled down to nothing more substantial than a perceived physical resemblance between Randy T. and J.W.T., as well as similar birthmarks. Contrary evidence, however, was overwhelming. Randy T. had undergone a vasectomy.⁷⁴ Blood tests also proved, in the words of the lab report, that Randy T. "cannot be the biological father of the child."⁷⁵ Accordingly, relying on a Texas Supreme Court ruling that a "properly conducted blood test positively excluding the alleged father is clear and convincing proof of non-paternity,"⁷⁶ the Beaumont court reversed the trial court's finding of paternity, rendered judgment that Larry G. was the father, and remanded the case to consider issues of support and visitation.⁷⁷

The trial court's reluctance to accept scientific proof in *In re J.W.T.* is perhaps a case of post-O.J. Simpson jitters. More likely, however, it is nothing more than an extreme example of the likely reaction of many judges to the public policy implications of the original *J.W.T.* ruling: "Outsiders" to an intact marriage may have some constitutional rights, in the Texas Supreme Court's view, but that does not mean that they should

71. Larry G. had arranged and paid for prenatal care, brought an action to establish the child's paternity before birth, and continued to try to maintain contact with the child. See *In re J.W.T.*, 872 S.W.2d at 189.

72. See *In re J.W.T.*, 945 S.W.2d at 913.

73. *Id.* (quoting *County of Alameda v. Smith*, 867 S.W.2d 767, 769 (Tex. 1993)). Under the current statute, a test excluding 99% of the population but not the alleged father shifts the burden to those contesting the alleged father's paternity. See TEX. FAM. CODE ANN. § 160.106(c) (Vernon 1996).

74. Randy T. testified that the vasectomy had been reversed but offered no medical evidence to back up his belief. See *In re J.W.T.*, 945 S.W.2d at 913.

75. *Id.*

76. *Id.* (quoting *Murdock v. Murdock*, 811 S.W.2d 557, 560 (Tex. 1991)). The same result would obtain under the current statute, which provides that "[t]he court shall dismiss with prejudice a claim regarding a presumed father whose paternity is excluded by scientifically accepted paternity testing." TEX. FAM. CODE ANN. § 160.110(d) (Vernon 1996).

77. See *In re J.W.T.*, 945 S.W.2d at 913.

expect much sympathy from judges when it comes to the exercise of discretion.

Consider *G.K. v. K.A.*,⁷⁸ for example. G.K., a man having marital problems, conceived a child during an adulterous relationship with K.A. He reconciled with his wife, but also filed a voluntary paternity suit. The trial court found paternity and named G.K. possessory conservator of the child. However, contrary to the statutory presumption,⁷⁹ the court granted only limited visitation rights until the child reaches six years old. The court also refused to give the child her biological father's surname.⁸⁰ The Austin Court of Appeals affirmed, citing the "animosity and turbulence" inherent in the situation.⁸¹ G.K.'s wife, who did not have a high regard for the mother, would be a primary care giver, and the child would not be likely to understand the basis of any animosity until an older age. It is not at all difficult to imagine the trial court, on remand in *In re J.W.T.*, making similar findings of "animosity and turbulence" that undoubtedly also are present in that three-party relationship.⁸²

A few other cases, all from San Antonio, are worth brief mention. In *In re A.M.*,⁸³ the San Antonio Court of Appeals confirmed that the two-year statute of limitations for suits by biological fathers when there is a presumed father applies to suits involving children born before the effective date of the statute.⁸⁴ *In re J.A.M.*,⁸⁵ from the same court, held that blood tests do not have to meet the requirements of the business records exception to the hearsay rule.⁸⁶ *Villanueva v. Office of the Attorney General*⁸⁷ found an Indiana divorce recital that a child was "of the parties" sufficient to bar paternity litigation in Texas. Finally, the San Antonio

78. 936 S.W.2d 70 (Tex. App.—Austin 1996, writ denied).

79. By statute, the standard possessory order is to take effect on the child's third birthday. See TEX. FAM. CODE ANN. § 153.254(a) (Vernon 1996).

80. The Austin court noted a line of cases holding that a father has a protected interest in having a child retain his surname. See, e.g., *In re Griffiths*, 780 S.W.2d 899, 900 (Tex. App.—Amarillo 1989, no writ). The case at hand was distinguished, however, on the ground that the child had never borne the father's surname, as well as on considerations of the adulterous nature of the affair that led to the birth. See *G.K.*, 936 S.W.2d at 73.

81. *G.K.*, 936 S.W.2d at 72. The Austin court did reverse an award of attorney's fees in K.A.'s favor, based principally on the trial court's failure to support the award with proper written findings or judgment recitals. See *id.* at 73-74.

82. The court's reasoning on the point is not particularly compelling. Taken to its logical conclusion, the argument could be used any time a marriage breaks up because of adultery, and the adulterous couple then marry and request visitation. Of course, many ex-spouses do not get along particularly well with their replacements, prior adultery or not.

83. 936 S.W.2d 59 (Tex. App.—San Antonio 1996, no writ). The last name of "A.M.," by the way, is most likely "Malatek." The opinion refers to the child by initials only, but identifies husband and wife as Dennis and Tami Malatek, which tends to defeat the purpose of using the child's initials. See *id.* at 60.

84. See TEX. FAM. CODE ANN. § 160.110(f) (Vernon 1996).

85. 945 S.W.2d 320 (Tex. App.—San Antonio 1997, n.w.h.).

86. By statute, "[a] verified written report of a parentage testing expert is admissible at the trial as evidence of the truth of the matter it contains." TEX. FAM. CODE ANN. § 160.109(b) (Vernon 1996). At least one prior case has ruled that this statute dispenses with the need for a business records predicate. See *De La Garza v. Salazar*, 851 S.W.2d 380, 382 (Tex. App.—San Antonio 1993, no writ).

87. 935 S.W.2d 953 (Tex. App.—San Antonio 1996, writ denied).

court ruled that an order establishing paternity is final even if the issue of the child's surname remains unresolved.⁸⁸

IV. CONSERVATORSHIP

A number of recent minor statutory changes affect conservatorship issues in Texas courts. Of particular note is the fact that the 1997 Legislature clarified some ambiguity relating to the scope of a jury trial on custody-related issues. In Texas, unlike other states, the jury potentially plays a large role in divorce and custody disputes.⁸⁹ The general Texas rule always has been that a jury determines who will be the conservator, but the judge determines what the terms of the conservatorship will be. The 1995 statute creating a rebuttable presumption of joint managing conservatorship⁹⁰ arguably undermined the role of the jury by setting up a presumption of joint managing conservatorship in all cases. If joint managing conservatorship is presumed, the argument went, then the only relevant issue—the “detail” of who actually has primary physical possession of the child—would be decided by the judge. The 1997 Legislature addressed this question by providing that a party is entitled to a binding jury verdict on the question of the child's primary residence but not on any other details of conservatorship.⁹¹

The 1997 legislative session also modified the circumstances under which a child's choice of managing conservator will be taken into account. As before, a child twelve years of age or older is permitted to select the managing conservator, subject to court approval.⁹² The Legislature, however, now has reduced from twelve to ten the age at which a party can require an on-the-record interview of the child.⁹³

Several amendments address child abuse issues. The Family Code now specifically permits the admission of hearsay statements by a child twelve

88. *In re J.D.G.*, 940 S.W.2d 246 (Tex. App.—San Antonio 1997, n.w.h.). The gist of the argument was that, because the Family Code provides “[i]f parentage is established, the order shall state the name of the child,” an order that established paternity but that did not contain a finding as to the child's surname was not final. TEX. FAM. CODE ANN. § 160.006(c) (Vernon 1996). The court, however, placed more reliance on the statutory language that “[t]he effect of an order declaring that an alleged parent is the biological parent of the child is to confirm or create the parent-child relationship between the parent and the child for all purposes.” *Id.* § 160.006(b).

89. This right, however, is not often exercised. *Accord Family Law Section Summary* (John J. Sampson, Comment to § 105.002), *supra* note 1, at 23 (stating that “[i]n truth, jury trials are more talked about and written about than actually conducted because of the time and cost involved”).

90. See TEX. FAM. CODE ANN. § 153.131(b) (Vernon 1996).

91. See *id.* § 105.002(c). Advisory issues may, however, be submitted. See *id.* § 105.002(c)(3) & (d).

92. See TEX. FAM. CODE ANN. § 153.008 (Vernon Supp. 1998). The court can disregard the child's choice. Cf. *Cole v. Cole*, 880 S.W.2d 477 (Tex. App.—Fort Worth 1994, no writ) (opining that a court could disregard the expressed wishes of a fifteen-year-old, in a case in which there was some evidence that the father permitted large parties, left naked strippers lying in bed, and permitted the boys to drink beer and shoot high-caliber rifles).

93. See TEX. FAM. CODE ANN. § 153.009(b) (Vernon Supp. 1998).

years of age or younger on the subject of abuse.⁹⁴ The finding of a history of family violence explicitly negates the presumption of joint managing conservatorship, as well as the presumption that one or both parents should be appointed as managing conservators.⁹⁵ The statutory provision that a false report of child abuse is admissible in a suit involving terms of conservatorship⁹⁶ also has been enhanced by a provision for a fine up to \$500 on a court finding that a knowing false report of child abuse has been made in connection with a pending suit.⁹⁷

The 1997 Legislature also added a new category of parties with standing to file suits affecting the parent child relationship. Foster parents now can sue, provided the child has been in the home for at least eighteen months.⁹⁸ While the new provision removes any doubt as to the right of foster parents to claim standing independently from the Texas Department of Protective and Regulatory Services, it may also have the effect of restricting foster parent rights. As Professor Sampson has pointed out,⁹⁹ if one applies the maxim of statutory construction that specific provisions control over general, this new provision would prevent foster parents from arguing under a general standing provision that they are persons who have had "actual care, control and possession of the child for not less than six months."¹⁰⁰

Two cases issued during the Survey period raise an interesting question of standing and highlight some very troubling statutory construction problems occasioned by recent revision of the Family Code. Before the 1995 rewrite of large portions of the Family Code, standing was granted to the catch-all category of anyone who had "actual possession and control of the child for at least six months immediately preceding the filing of the petition."¹⁰¹ After the 1995 revision the replacement statute reads "for not less than six months preceding the filing."¹⁰² The obvious difference is deletion of the word "immediately."

*In re Garcia*¹⁰³ issued from the Amarillo Court of Appeals in April 1997. An unrelated couple with whom the child had resided for "most of the past two years"¹⁰⁴ brought suit to be named managing conservators. The mother challenged standing, pointing out that while aggregate peri-

94. The statute provides that the court must find, in a hearing outside the jury's presence, that the statement is reliable and the child either is available to testify or that the statement should be used in lieu of live testimony to protect the child's welfare. *See id.* § 104.006.

95. *See id.* § 153.131.

96. *See id.* § 153.013(b).

97. *See id.* § 153.013.

98. *See id.* § 102.003(12).

99. *See Family Law Section Summary* (John J. Sampson, Comment to § 105.002), *supra* note 1, at 21.

100. TEX. FAM. CODE ANN. § 102.003(9) (Vernon 1996).

101. Act of May 21, 1985, 69th Leg., R.S., ch. 802, § 1, 1985 Tex. Gen. Laws 2841, 2842 (codified at TEX. FAM. CODE ANN. § 11.03(a)(8) (Vernon 1986) (repealed 1995)).

102. TEX. FAM. CODE ANN. § 102.003(9) (Vernon 1996).

103. 944 S.W.2d 725 (Tex. App.—Amarillo 1997, n.w.h.).

104. *Id.* at 726.

ods of possession during that time may have exceeded six months, there was no uninterrupted six-month period of possession terminating at or near the time of filing suit, as required by prior case law.¹⁰⁵ The Amarillo court agreed.

The court addressed, in some detail, the effect of the excision of the word “immediately” in the revision process. The panel bemoaned the fact that there was no “discovered legislative history, commentary, or judicial decision explicating why the word ‘immediately’ . . . was deleted from the rephrasing of the same requirement in the current section 102.003(q),”¹⁰⁶ The court therefore found it necessary to resort to general principles of statutory construction.

The Amarillo court noted that pre-amendment case law established that a short break between the “six months possession” and the filing of suit did not violate the requirement that possession occur “immediately preceding” the filing.¹⁰⁷ The court referred to accepted rules of statutory construction, specifically, that the Legislature is presumed to know the existing law¹⁰⁸ and that every omission from a statute is assumed to have a purpose.¹⁰⁹ The parent argued, and the court agreed, that “the deletion was simply an effort to eliminate the argument that a brief gap between loss of possession and filing suit would deny standing to bring the action.”¹¹⁰ The contrary interpretation urged by the nonparents was unacceptable, in the court’s view, because it would permit persons with stale claims to aggregate scattered periods of possession stretching back over many years and eventually cobble together a “six month” period to establish standing.

Leaving the Amarillo court’s public policy concerns to the side for the moment, the conclusion reached by the court seems very questionable on its face. The Amarillo court viewed the amendment as “an effort to eliminate the argument that a brief gap between loss of possession and filing suit”¹¹¹ could defeat standing. But if the issue was already settled in favor of standing, as the opinion implies, there was no “argument” to eliminate; thus, there was no need for legislative action in the first place.

In similarly flawed analysis, the Amarillo court correctly stated that “an omission in the enactment is presumed to be intentional.”¹¹² However, it then proceeded to interpret the amended language in the same way that the language would have been read before the amendment; that

105. See *Williams v. Anderson*, 850 S.W.2d 281, 284 (Tex. App.—Austin 1993, writ denied).

106. *In re Garcia*, 944 S.W.2d at 727.

107. See *id.*; see also *T.W.E. v. K.M.E.*, 828 S.W.2d 806, 808 (Tex. App.—San Antonio 1992, no writ) (three-week break).

108. See *In re Garcia*, 944 S.W.2d at 727 (citing *Acker v. Texas Water Comm’n*, 790 S.W.2d 299, 301 (Tex. 1990)).

109. See *id.* (citing *In re Ament*, 890 S.W.2d 39, 41 (Tex. 1994)).

110. *Id.*

111. *Id.*

112. *Id.*

is, as allowing a brief break between possession and suit. This interpretation arguably makes the amendment meaningless.

Ironically, if the Amarillo court in *Garcia* had waited a month or two before issuing its opinion, it would not have had to complain about a lack of guidance. On July 3, 1997, the Austin Court of Appeals—the same court that entered one of the two pre-amendment opinions relied upon by the Amarillo court in *Garcia*¹¹³—weighed in on the issue with an opinion in *Fowler v. Jones*.¹¹⁴ Both the reasoning and the result in *Fowler* are contrary to *Garcia*.

The facts of *Fowler* are a bit exotic, even for a family law case. Fowler and Jones were involved in a same-sex communal relationship. Jones conceived a child through artificial insemination. The child was born in 1992, and the three lived together until the relationship broke up in 1994. Jones subsequently permitted Fowler to visit the child periodically until June 1995 when Jones denied Fowler further access and legally changed the child's surname, which originally had been Fowler-Jones.

Fowler filed suit in October 1995 and claimed standing because she was a person with actual care, control, and possession of the child for at least six months preceding the filing of the suit.¹¹⁵ Jones admitted that Fowler had possession for more than six months, in a historical sense. However, she defended on the basis that Fowler had not had actual possession of the child since May 1994, some seventeen months before suit was filed. The trial court agreed that this fact defeated standing and dismissed the suit.

The Austin Court of Appeals reversed, ruling that the Legislature's deletion of the word "immediately" in the recodification process effected a substantive change in the statute. The court noted that the question "appears to be one of first impression,"¹¹⁶ evidently because the Amarillo opinion had not been called to the court's attention. The court first addressed whether the amendment was a substantive or non-substantive change. This surely was a relevant inquiry, especially considering that the state is most of the way through a massive non-substantive codification of the old "Revised Civil Statutes," and the amendment in question was part of a wholesale renumbering of the Family Code that was begun in the 1995 legislative session and completed in the 1997 session. The court

113. See *supra* note 102.

114. 949 S.W.2d 442 (Tex. App.—Austin 1997, pet. filed) (author's note: *Fowler v. Jones* was reversed as this issue was at press and will be discussed more fully in next year's Survey).

115. Fowler also claimed standing on the ground that she was a "parent." She apparently did not appeal the trial court's adverse decision on this point, nor did she raise a constitutional challenge to the Family Code's definition of "parent" to exclude same-sex couples. See *Fowler*, 949 S.W.2d at 443-44 and 444 n.2. See also TEX. FAM. CODE ANN. §§ 102.003(1) (Vernon 1996) (stating that suit can be brought by a "parent") and 101.024 (Vernon 1996) (defining "parent" as "the mother, a man presumed to be the biological father or who has been adjudicated to be the biological father by a court of competent jurisdiction, or an adoptive mother or father"). *Id.* §§ 102.003(1), 101.024.

116. *Fowler*, 949 S.W.2d at 444.

noted the presumption that a legislative change is intended to be substantive,¹¹⁷ and observed that the enactment in question contained no contrary recitals, as would be expected of a non-substantive revision.¹¹⁸

Assuming a substantive revision, the Austin court next determined what change was intended by deletion of the word "immediately." Jones argued that the word "immediately" was deleted on the ground of redundancy, because the concept of immediacy is implicit in the word "preceding."¹¹⁹ The Austin court turned to a handy dictionary, *Webster's Third New International*, and found "preceding" defined simply as "going before."¹²⁰ The court commented that "[w]e infer from this definition that the word does not always constitute a qualifier of temporal immediacy."¹²¹ The most logical alternative interpretation, and the one accepted by the court, was that the Legislature's deletion of the word "immediately" meant that "any six month period" of possession before the filing of the suit was sufficient to sustain standing.¹²²

Like the Amarillo court in *Garcia*, the Austin court in *Fowler* considered the question of whether its ruling was good public policy. Yet while the Amarillo court focused on the possibility that elimination of an "immediacy" requirement would "sanction[] stale claims with their attendant harmful effects,"¹²³ the Austin panel took a broader view, opining that "[r]equiring the six-month period to precede immediately the filing of suit could lead to a more absurd result."¹²⁴ The court explained:

[P]arties who have co-parented a child may separate and try to reconcile, or voluntarily agree to visitation; if their separation becomes final or difficulties in visitation arrangements arise even one day and six months after their separation, any step-parent or party not legally or biologically related to the child may be deprived of standing to have a hearing on the merits.¹²⁵

117. See *Fowler*, 949 S.W.2d at 444 (citing *Friedrich Air Cond. & Refrig. Co. v. Bexar Appraisal Dist.*, 762 S.W.2d 763, 767 (Tex. App.—San Antonio 1988, no writ)).

118. The statute is titled a "recodification" of statutes. See Tex. H.B. 655, 74th Leg., R.S., 1995 Tex. Gen. Laws 113-282, 113 [hereinafter *Title 5 Recodification Bill*]. The statute does not, however, contain the usual statutory disclaimer of intent to make substantive changes that one finds in codes passed as part of the state's continuing non-substantive codification process. See, e.g., TEX. GOV'T CODE ANN. § 1.001(a) (Vernon 1988) (stating that "[t]his code is enacted as a part of the state's continuing statutory revision program" and that "[t]he program contemplates a topic-by-topic revision of the state's general and permanent statute law without substantive change"). To the contrary, section 3 of the Act states that "[t]he enactment of this Act does not by itself constitute a material and substantial change in circumstances sufficient to warrant modification of a court order," and that "[t]he change in law made by this Act does not affect a proceeding under the Family Code pending on the effective date of this Act." *Title 5 Recodification Bill*, supra at 282 (§§ 3(b) and 3(a)) (emphasis added).

119. See *Fowler*, 949 S.W.2d at 445.

120. See *id.* (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1783 (1986)).

121. *Id.*

122. See *id.*

123. *Garcia*, 944 S.W.2d at 727.

124. *Fowler*, 949 S.W.2d at 445.

125. *Id.*

Stated differently, the Austin court evidently believed that Fowler should not be penalized for her attempt to work out an informal arrangement with Jones before resorting to the courts.¹²⁶ Moreover, as the court noted in closing, a decision that a party has standing does not mean that the party will prevail but merely that the court will have an opportunity to decide each case by determining whether the child's best interests would be served by continuing contact with the party.

Were this the end of the story, one might simply conclude that the question is ripe for the Texas Supreme Court's attention and move on to another subject. But the plot thickens. While *Fowler* was on rehearing, State Representative Toby Goodman, sponsor of the 1995 Title 5 recodification at issue in *Fowler*, learned of the language dispute. Representative Goodman wrote a letter to the Austin Court of Appeals, stating that the legislation in question was "intended as a *non-substantive* recodification bill."¹²⁷ This undoubtedly came as news to both the Amarillo and Austin panels who, while disagreeing on what the deletion of "immediately" meant, were in complete agreement that it surely must have meant *something*.¹²⁸ Representative Goodman went on to explain that the change occurred when a computer disk containing the completed bill was referred to the Texas Legislative Council for proofreading and style changes.¹²⁹ For the rest of the story, Representative Goodman attached a letter from a member of the Texas Legislative Council, prepared in response to Representative Goodman's inquiry.

The Legislative Council letter is emphatic: "The reason this change was made," it states, "is that the phrase 'immediately preceding' is redundant."¹³⁰ To prove the point, the letter referred to the current edition of *Merriam-Webster's Collegiate Dictionary*, which defines "preceding" as "that *immediately* precedes in time or place."¹³¹ The writer then quoted the *Black's Law Dictionary* definition of "preceding," "next before,"¹³² and pointed out that *Black's* is "the most frequently cited dictionary in

126. This public policy rationale would find support in recent legislative enactments urging alternative dispute resolution as an alternative to legal action in family law matters. See, e.g., TEX. FAM. CODE ANN. § 102.0085 (Vernon Supp. 1998) (requiring a boldface acknowledgement of the availability of ADR in a party's first court filing in family law matters).

127. Letter from Toby Goodman to Third Court of Appeals, July 28, 1997, *reprinted in* 1997-4 ST. B. SEC. REP. FAM. L. 31 (1997) (emphasis added) [hereinafter "Goodman Letter"].

128. See *supra* notes 108 and 116 and accompanying text.

129. See Goodman Letter, *supra* note 126.

130. Letter from Mike Marshall, Legislative Counsel, to Rep. Toby Goodman, July 24, 1997, *reprinted in* 1997-4 ST. B. SEC. REP. FAM. L. 31 (1997) [hereinafter "Legislative Council Letter"].

131. *Id.* at 31 (citing MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 916(10th ed. 1995) [hereinafter MERRIAM WEBSTER'S]) (emphasis added).

132. *Id.* (citing BLACK'S LAW DICTIONARY 1340(4th ed. rev. 1968)). The Legislative Council letter incorrectly identifies the edition simply as the "4th," but the 1968 publication date makes it clear that the reference actually is to the "4th revised," rather than the 1951 fourth edition. See BLACK'S LAW DICTIONARY (4th ed. 1968).

[attorney general] opinions and [appellate court] decisions.”¹³³ The upshot of all this would seem to be, as Professor Sampson wryly observed, that whether the 1995 change in the statute is interpreted as substantive or not depends on which dictionary one happens to have on one’s desk.¹³⁴

The problem raised by *Garcia* and *Fowler*, however, may be considerably more serious than a single instance of “dueling dictionaries.” The Texas Legislative Council exercises pervasive influence over the drafting of Texas statutes, and now has had a hand in the part-substantive rewrite of the entire Family Code. Because the explanatory letter presented in the *Fowler* case offers a rare window into the arcane procedures apparently employed by the Legislative Council, a somewhat more detailed analysis is in order. The result of that analysis, in this writer’s opinion, is that the Texas Legislative Council’s “non-substantive” substantive rewrite of section 102.003(9) was inept and that its attempt to defend the result is disingenuous at best.

To begin, the Texas Legislative Council does not seem to understand that reference to a dictionary definition, standing alone, is a very dangerous way to decide what a word means.¹³⁵ This is why the introductions to many dictionaries contain disclaimers, such as that found in *Black’s Law Dictionary*, titled “A Final Word of Caution.”¹³⁶ A dictionary by its very nature must remove words from context. Unfortunately, the meaning of words sometimes cannot be understood except in the context in which those words are used. Take, for example, the sentence, “Do you want some coke?” The word “coke” means something very different, depending on whether the question is asked at a soda fountain, a crack house, or an iron foundry.

An easy example of the danger inherent in taking words out of context is found in the Texas Legislative Council’s attempt to explain its unilateral decision to remove the word “immediately” from the statute in reliance on a single line in a general dictionary. “Preceding,” according to *Merriam-Webster’s*, means something “that immediately precedes in time or place.”¹³⁷ Therefore, the Legislative Council reasoned the word “immediately” is redundant and should be eliminated, presumably to save the taxpayers a little ink and paper. One thing, however, that didn’t occur to the Legislative Council is that any definition that contains the word

133. Legislative Council Letter, *supra* note 129, at 32.

134. See John J. Sampson, *Editor’s Note*, 1997-4 ST. B. SEC. REP. FAM. L. 32 (1997) (stating that “[i]t appears this case turned on which version of Webster’s Dictionary was available in the offices of the respective decisionmakers”).

135. See generally, e.g., James I. Luck, F. Scott McCown & James W. Paulsen, *The Role of Societal Context in Proposition Formulation*, THE FORENSIC, March-April 1978 (on file with author).

136. See BLACK’S LAW DICTIONARY at iv (6th ed. 1990) (stating, in part, that “the type of legal issue, dispute, or transaction involved can affect a given definition usage. Accordingly, a legal dictionary should only be used as a ‘starting point’ for definitions.”).

137. MERRIAM WEBSTER’S, *supra* note 130, at 916.

being defined is not much of a definition in the first place.¹³⁸ More subtly, the Legislative Council apparently did not consider the fact that *Merriam-Webster's* definition also contains a usage example, namely, "the preceding day."¹³⁹ In this context, it is understood that if today is Wednesday, the phrase "the preceding day" conveys the concept of immediacy. In that specific context, "preceding" does unambiguously refer to yesterday, or Tuesday. The clarity, however, comes not from the inherent meaning of "preceding," but from use of the definite article "the." If, by contrast, one simply were to say "a preceding day," the listener could not be certain whether the day identified is yesterday, last Tuesday, or a fortnight ago.

If the Legislative Council had looked just a little bit beyond the first sentence of the dictionary definition of the word "preceding," drafters would have found other language that ought to have given pause. For example, while the definition of "preceding" contains the word "immediately," the definition of the word "precede" does not.¹⁴⁰ Moreover, the paragraph-length usage summary accompanying the definition of the word "preceding" contains a very telling qualification, that "Preceding *usu[ally]* implies being immediately before in time or in place."¹⁴¹ The obvious conclusion is that, if "preceding" *usually* implies "immediately," then at least *occasionally* it does not. If this is so, as the Legislative Council's own preferred dictionary definition states, then the removal of the word "immediately" does not eliminate a simple redundancy; rather, the deletion removes some clarity.

Again, if this were the extent of the confusion, one could just say that the Texas Legislative Council made a bad call and leave it at that. But there is more. Not having a *Merriam-Webster's* close at hand when he first read the Legislative Council's explanation for the statutory change, this writer chose the unscientific but decidedly expedient method of simply checking out the definitions in all the word books on his office shelf. The box score: Of seven books consulted, not one even hints that the word "immediately" is part of the definition of "preceding."¹⁴² Add to

138. In other words, how would anyone who consulted *Merriam-Webster's* to learn what the word "preceding" meant find out from a definition that contains the very word whose meaning the reader is trying to ascertain? See generally, e.g., *Lee v. City of Houston*, 807 S.W.2d 290, 292 (Tex. 1991) (complaining about the uselessness of circular definitions); *RR Comm'n of Tex. v. Ennis Transp. Co.*, 695 S.W.2d 706, 710 (Tex. App.—Austin 1985, writ ref'd n.r.e.) (denouncing the use of circular definitions).

139. *MERRIAM WEBSTER's*, *supra* note 130, at 916.

140. *See id.*

141. *Id.*

142. *See AMERICAN COLLEGE DICTIONARY* 953 (Clarence L. Barnhart et al. eds, 1955) (defining "preceding" as "that precedes; previous"); *AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE* 1030 (William Morris ed. 1976) (defining "preceding" as "[e]xisting or coming before; previous"); *BERGEN EVANS & CORNELIA EVANS, A DICTIONARY OF CONTEMPORARY AMERICAN USAGE* 384 (1957) (on file with author) (defining "precede" as "to go before, as in place, order, rank, importance, or time"); *BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE* 680-81 (2d ed. 1995) (defining "precede" as "to go ahead of; to come before"); *WEBSTER'S NEW COLLEGIATE DICTIONARY* 664 (1949) (defining "preceding" as "[t]hat precedes; going before in time, order, arrange-

this the Austin Court of Appeals' dictionary research, and one might reasonably wonder whether the Texas Legislative Council, once put on the spot to explain how a "non-substantive" change has been given substantive effect by a court, had to go to some trouble to find a dictionary that *did* contain the word "immediately" as part of the definition of "preceding."¹⁴³

A further surprise came when the second source relied upon by the Legislative Council to justify its drafting decision, namely, *Black's Law Dictionary*, was examined. The word "precede" does not appear as a defined term in the current edition.¹⁴⁴ The Legislative Council evidently chose to rely on the two-word definition of "preceding" ("next before") from a twenty-year-old edition of *Black's* because it was the last edition that contained any definition of "preceding."¹⁴⁵ One would think that it might have occurred to someone at the Legislative Council, while in the process of digging back through old editions of *Black's*, to wonder just why the definition had been dropped from later editions of the dictionary. The likely reason is simple: It is a terrible definition, by any standard. Put succinctly, the definition of "preceding" in the 1968 version of *Black's* is a two-word misquotation from a 1915 Alabama court decision.¹⁴⁶ That definition, in turn, was generated by reference to highly specific considerations of Alabama public policy¹⁴⁷ which are not

ment, etc.; precedent"); THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (COLLEGE EDITION) 1520 (2d ed. 1969) (defining "precede" as "to go before, as in place, order, rank, importance, or time"); WEBSTER'S NEW INTERNATIONAL DICTIONARY 1943 (William Allan Neilson et al., eds. 2d ed. 1949) (defining "preceding" as "[t]hat precedes; going before, as in order, rank, time, or place; foregoing").

143. In fairness to the Texas Legislative Council, however, the writer would concede that *Merriam-Webster's* Tenth Edition is a more current, and probably more popular, dictionary than anything he owns.

144. See generally BLACK'S LAW DICTIONARY (6th ed. 1990) (not containing a definition of the word "preceding").

145. Another possible explanation is that, due to financial austerity measures, the Texas Legislative Council does not have any copies of *Black's Law Dictionary* more recent than the 1968 revision. The Legislative Council does, however, have state-of-the-art Tenth (1995) Editions of *Merriam-Webster's*, so this explanation is unlikely.

146. The definition of "preceding" found in the 1968 version of *Black's* is "[n]ext before." BLACK'S LAW DICTIONARY 1340 (4th ed. rev. 1968). The Alabama case from which the definition is derived states that "'preceding' means generally next before." *Smith v. Gibson*, 68 So. 143, 144 (Ala. 1915) (emphasis added). Omission of the qualifier "generally" in the dictionary, of course, gives the reader a sense of certainty that the Alabama Supreme Court in *Gibson* did not intend to convey.

147. The Alabama Supreme Court in *Gibson* was comparing a divorce pleading to required statutory terminology. The statute required that a divorce complaint allege residency for the three years "next before" filing of suit. The pleading recited that petitioner had been a resident for three years "preceding" the suit. The question was whether the variance in the pleading from the statutory language was fatal.

The broader factual context in which the question was raised was critical. The divorce in question was approximately twenty years old. The former wife, believing herself legally divorced, had remarried, and her second husband had since died. The suit was brought by the deceased husband's children by a prior marriage, who sought to have their stepmother's prior divorce declared void so that the stepmother would not be permitted to share in their father's estate.

The decision was grounded principally on the fact that the suit was a collateral attack on a prior judgment. In such a case, under Alabama law, courts had long been required to

comparable to the Texas statute under consideration in *Garcia and Fowler*.¹⁴⁸

While the discussion has occupied several pages, the Texas Legislative Council's error ultimately is quite simple: The drafting mistake stems from a failure to use common sense. When the writer first read the Legislative Council's letter, his reaction was to hunt down some friends (mainly, anyone who foolishly entered the faculty lounge while he was present) and take an informal poll. Nine out of ten lawyers surveyed thought that the word "immediately" did add something important to the word "preceding," as previously used in the statute.¹⁴⁹ Dropping the word "immediately" from a statute simply doesn't pass the smell test. Detailed discussion of definitions only shows that the smell gets worse and worse the closer one gets to the subject. An elementary principle of statutory interpretation is that the common usage of words, not some obscure dictionary definition is most important.¹⁵⁰ In other words, rather than take the Austin court to task for its altogether reasonable conclusion that deletion of the word "immediately" meant something, the Legislative Council would be more productively engaged in a little institutional soul-searching to determine how it has become so detached from the real world on this, and possibly some other, language issues.

A second point worth making is that, even putting definitions of "preceding" aside, the Legislative Council did not do a good job of drafting. The charge of the Texas Legislative Council, in its statutory revision program, is to "clarify and simplify" the statutes, while making no substan-

construe the pleadings "most favorably for the maintenance of the decree," so that "where words are susceptible of two or more constructions, [the court should] adopt that which will sustain the decree." *Smith v. Gibson*, 68 So. at 144 (quoting *King v. Kent's Heirs*, 20 Ala. 542, 554 (Ala. 1857)). Thus, if the word "preceding" could be read to mean "next before," the court was legally required to read it so.

Had the Alabama pleadings rule not come into play, several other public policy considerations might have. Perhaps Alabama, like Texas, construes divorce pleadings liberally. Likewise, Alabama, like Texas, might exercise a presumption in favor of the validity of the most recent marriage. And perhaps Alabama judges, as with Texans, have a soft spot in their judicial hearts where widows are concerned.

148. A final and somewhat ironic point might be made. While the Texas Legislative Council's zeal in tracking down dictionary definitions of "preceding" that contain the concept of immediacy is in some sense admirable, the Council failed to note a far more relevant definition that was right under its institutional nose. Chapter 312 of the Government Code, which contains general rules of statutory construction, is located just a flip of a few pages away from chapter 323, the Texas Legislative Council's organic statute. Chapter 312 also contains some general definitions to be used in all general state statutes, such as the Family Code. There, the word "preceding" is specifically defined as "when referring to a title, chapter, or article," as "that which came *immediately* before." TEX. GOV'T CODE ANN. § 312.011(11) (Vernon Supp. 1988).

149. The tenth is a noted faculty contrarian on just about any issue.

150. See TEX. GOV'T CODE ANN. § 311.011(a) (Vernon Supp. 1988) (stating that, in construing a code provision, "[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage"); *id.* § 312.002(a) (stating that, when construing a revised statute, except when used as words of art or the equivalent, "words shall be given their ordinary meaning").

tive change.¹⁵¹ Removing “immediately” surely removes some clarity from the statute, whether it technically changes the substance or not. In addition, though, one might also question whether retention of the word “preceding,” when it could have been replaced with the shorter plain English equivalent “before,” does not also represent a missed opportunity to “simplify” the law.¹⁵²

A final and important question is whether, despite all this discussion of the Legislative Council’s drafting error, the Austin court might have erred in *Fowler* by refusing to modify its decision on rehearing. Whatever the linguistics of the matter, one might reasonably argue that the legislative intent is now clear: No substantive change was intended.¹⁵³ Therefore, the argument goes, the court should give effect to the Legislature’s demonstrated intent, whether the statutory language accurately reflects that intent or not.

Unfortunately, the issue presented is more than a little complicated. If Title 5 of the Family Code had been passed in 1995 as part of the state’s continuing codification program, then the Austin court would have been directed by the Code Construction Act to give effect to the Legislature’s intent, whether or not the statute is considered ambiguous on its face.¹⁵⁴ Unfortunately, this was not simply a recodification. The 1995 revision was a substantive recodification,¹⁵⁵ in which the Texas Legislative Council simply was asked to perform its statutory function of providing assistance in the drafting of legislation.¹⁵⁶ Under those circumstances, the Austin court arguably was required to follow ordinary rules of statutory construction, as it recognized and did.¹⁵⁷

Thus, while the Austin Court of Appeals in *Fowler* did not have the benefit of the “legislative history” contained in Representative Goodman’s letter and the Texas Legislative Council’s attachment at the time the original opinion issued,¹⁵⁸ the additional information arguably should

151. See TEX. GOV’T CODE ANN. § 323.007(a) (Vernon 1988) (setting out the principal purpose of the program as “to clarify and simplify the statutes”); *id.* § 323.007(b) (prohibiting the Council from “alter[ing] the sense, meaning, or effect” of any statute).

152. See BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 681 (1995) (recommending that “‘preceding,’ when used simply for *before*, is best replaced by that word”).

153. See Goodman letter, *supra* note 126.

154. See TEX. GOV’T CODE ANN. § 311.023(3) (Vernon 1988) (stating that “[i]n construing a statute, whether or not the statute is considered ambiguous on its face, a court may consider among other matters the . . . legislative history”).

155. See *Title 5 Recodification Bill*, *supra* note 117 and accompanying text.

156. See TEX. GOV’T CODE ANN. § 323.006(a)(5) (Vernon Supp. 1998) (stating that “[t]he council shall . . . assist the legislature in drafting proposed legislation”).

157. The Austin Court of Appeals clearly understood the situation. The court commented in a footnote that “[w]e apply this analysis, rather than the usual presumption that the legislature does not intend to effect substantive change by ‘codifying’ or ‘recodifying’ statutes . . . because the legislature, in enacting the 1995 amendments, did not purport to effect a mere ‘codification’ of statutes.” *Fowler*, 949 S.W.2d at 445 n.4.

158. This discussion proceeds on the basis that comments of an individual legislator and professional staff “after the event” can be considered legitimate evidence of legislative history. There are some good reasons, however, for a contrary view, particularly when the purported “legislative history” is generated in response to a pending court case. *Cf.* C. &

not have changed the result. In construing a statute, the Texas rule is that the best evidence of legislative intent is the language of the statute itself.¹⁵⁹ Legislative history is relevant only if the statute is ambiguous or if application of its plain language would lead to an absurd result.¹⁶⁰ In 1995, the Legislature took out a qualifying term that previously made it clear that the six-month period of possession necessary to establish standing must occur “immediately” before suit was filed. The new language is not ambiguous; it is simply broader than the old. Nor is the result absurd. As the Austin court pointed out, a rule permitting more people to have standing simply lets the arguments in relation to the child be heard; it does not mandate any particular result.¹⁶¹ Moreover, the result is consistent with the Legislature’s recent tendency to broaden statutory grounds for standing.¹⁶²

On the other hand, the Family Code is an unusual document. While the original 1969 enactment was not part of the state’s formal codification project, one provision of the bill (which, unfortunately, has not been brought forward as a section in the rewritten document) stated that “[t]he Code Construction Act . . . applies to the construction of the Family Code except to the extent that the context of a provision may otherwise require.”¹⁶³ Thus, through its explicit incorporation of the Code Construction Act, the original intent of the Family Code was to permit consideration of legislative intent, no matter how clear a statutory provision might be. Before concluding that the Austin court was wrong, however, two additional problems must be considered. First, the 1969 enactment contained only old Title 1, relating to husband and wife. Title 2, which addressed the parent-child relationship and contained the prede-

H. Nationwide, Inc. v. Thompson, 903 S.W.2d 315, 329 (Tex. 1994) (Hecht, J., concurring and dissenting) (stating that “[e]xplanations produced, after the fact, by legislators are not statutory history and can provide little guidance as to what the individual legislature collectively intended”); Op. Tex. Att’y Gen. No. 94-029 (stating that “[a] legislator’s after-the-fact statement about the intent of particular enacted legislation cannot be used to prove the intent of the enactment”). On the other hand, the facts of this particular matter—that the Texas Legislative Council made the changes on a computer disc as part of a “tidying up” of the statute—seem reasonably clear. See *supra* note 126. In light of the express statutory provision prohibiting the Legislative Council from making any change in the “sense, meaning, or effect of a statute” (at least when drafting subject-matter codes), the explanation makes a whole lot of sense. TEX. GOV’T CODE ANN. § 323.007(b) (Vernon 1988).

159. See, e.g., Government Personnel Mut. Life Ins. Co. v. Wear, 251 S.W.2d 525, 529 (Tex. 1952) (stating that “[i]t is the duty of courts to construe a law as written, and, if possible, ascertain its intention from the language used therein . . .”).

160. See, e.g., Roland v. State, 951 S.W.2d 169, 173 (Tex. App.—Fort Worth 1997, pet. filed) (stating that “the literal text of a statute is the only definitive evidence of what the Legislature intended” and therefore the “plain meaning” of the statute must be followed, unless enforcement according to the statute’s terms “would work an absurd result, . . .”); Houston Chron. Pub. Co. v. Woods, 949 S.W.2d 492, 497 (Tex. App.—Beaumont 1997, no writ) (stating the exception to the “plain meaning” rule “where application of a statute’s plain language would lead to absurd consequences that the Legislature could not possibly have intended . . .”).

161. See *supra* notes 123-25 and accompanying text.

162. See, e.g., *supra* notes 97-101 and accompanying text.

163. Tex. H.B. 53, 61st Leg., R.S., 1969 Tex. Gen. Laws 2707, 2733.

cessor section to the provision at issue in *Garcia* and *Fowler*, was not added until 1973.¹⁶⁴ Should the provision from old Title 1, referring to the "Family Code," be taken as extending the Code Construction Act to interpretation of provisions added later? This writer, at least, is not sure. Second, even if the Code Construction Act did apply to old Title 2, does it apply to amendments? The Code Construction Act applies to subsequent amendments of codes enacted "as part of the state's continuing statutory revision program."¹⁶⁵ The Family Code, however, was not formally part of this program, and the language incorporating the Code Construction Act did not specifically extend its application to later amendments.¹⁶⁶

No matter what the ultimate resolution of this bizarre and convoluted issue, the Texas Supreme Court at some point ought to address a statutory construction issue that is becoming more important as the state's grand statutory codification project nears completion. Does it make any sense to have a few "substantive" codes or statutes governed by one set of rules of statutory construction, while the great bulk of the state's laws are governed by another? Ultimately, it may be better for the Texas Supreme Court simply to abandon the long-settled "plain meaning" rule of statutory construction in favor of a new rule that always would admit evidence of legislative history to clarify a statute's intent, whether a statute formally is governed by the Code Construction Act or not. Until such clarification is forthcoming, however, it is difficult to determine whether the Austin court was right or wrong in declining to consider contrary "legislative history" for a statute it considered to be unambiguous.

One final piece, however, must be added to the puzzle. It is possible to prove definitively that the 1995 deletion of the word "immediately" was not intended to change prior law, using only methods of statutory construction that do not depend on the Texas Legislative Council's after-the-fact explanation of its intent. While its letter discussing the *Fowler* case does not disclose the fact, the Texas Legislative Council doctored at least one other provision in the 1995 revision of the Family Code by omitting "immediately" from the phrase "immediately preceding." Fortunately, giving literal effect to the Legislative Council's second effort would create a result so absurd and so contrary to the obvious purpose of the statute that the only reasonable conclusion is that removal of the word "immediately" really was not intended to effect any substantive change.

164. See Tex. S.B. 168, 63d Leg., R.S., 1973 Tex. Gen. Laws 1411.

165. TEX. GOV'T CODE ANN. § 311.002 (1), (2) (Vernon 1988).

166. The writer would be remiss if he did not note, however, that a number of judicial decisions have applied the Code Construction Act to matters of Family Code interpretation without regard for any of the nuances set out here. See, e.g., *Lowell v. State*, 525 S.W.2d 511, 515 (Tex. Crim. App. 1975). One sometimes gets the distinct impression that the Code Construction Act often is applied not because a court knows about the language in the original statute but simply because the title "Family Code" contains the word "Code."

The change is found in one of the state's more important family law enactments, the Uniform Child Custody Jurisdiction Act (UCCJA), now chapter 152 of the Family Code. To be more specific, the Texas Legislative Council's non-substantive tinkering effected a redrafting of the definition of "home state," the very core of the statute. The main goals of the UCCJA are to "avoid jurisdictional competition" and "promote cooperation" with other states¹⁶⁷ by setting up a scheme in which litigation takes place in a child's "home state." The "home state" is or was, defined as the state of continuous residence for six months "immediately preceding" the action. A new home state can be acquired by six month's continuous residence (temporary absences excepted), but the statute does not envision more than one "home state" at a time. The old state may remain the "home state," providing one of the parents still resides there, until the six month period in the new jurisdiction is completed.¹⁶⁸ Otherwise, the court engages in "significant connection" analysis to determine whether its jurisdiction over the child is appropriate.¹⁶⁹

Taken as a whole, the purpose of the statute is to provide an orderly scheme in which the child never has more than one "home state"¹⁷⁰ and in which current (and likely future) contacts are the most significant.¹⁷¹ The Legislative Council's "non-substantive" deletion of the word "immediately" from the definition of "home state" makes hash of this carefully tailored scheme. "Home state" is determined on the day suit is filed. Under the old wording, "home state" was defined as the state in which the child, "immediately preceding" the time involved, had lived for at least six months. Now, considered in isolation, the post-1995 definition of "home state" could be any state in which a child has accumulated any six months' continuous residency at some point in his or her life "preceding" the filing of suit.

Under any method of statutory construction, such an absurd result—a one-word change that throws a monkey wrench into a carefully-crafted statutory scheme—cannot be countenanced. It makes far more sense to conclude the apparent change was an accident. An even simpler way to reach the same result would be to note that one of the purposes of the statute, as with any uniform act, is to make uniform the law of those states that enact it.¹⁷² A change that would result in such radical divergence from the law of other states should be disregarded on public policy grounds, unless there is strong evidence that the Legislature actually intended to commit an act of statutory sabotage. From here, it is only a

167. TEX. FAM. CODE ANN. § 152.001(a)(1), (2) (Vernon 1996).

168. See *id.* § 152.003(a)(1)(B).

169. See *id.* § 152.003(a)(2).

170. This is shown, for example, in repeated references to "the home state." See, e.g. *id.* §§ 152.002(6), 152.003(a)(1)(A) (emphasis added).

171. See, e.g., *id.* § 152.003(a)(2)(A), (B) (stating that a court should assume jurisdiction when there is no home state and the child and a party to the suit "have a significant connection with this state other than mere physical presence" and the state has available "substantial evidence concerning the child's present or future care, protection" and so forth).

172. See TEX. FAM. CODE ANN. § 152.001(9) (1996).

short step to the logical conclusion that, the excision of the word "immediately" from the UCCJA could not have been intentional. Likewise, an identical change at the same time in the section of the Family Code at issue in *Garcia* and *Fowler* doubtless was not intentional, either. So perhaps the result in *Fowler* is wrong but only because the Austin court erred in attributing too much rationality to the Legislature and its minions.¹⁷³

Other than *Garcia* and *Fowler*, the Survey year offers comparatively little of real interest in the area of conservatorship. The only arguably relevant decision from the Texas Supreme Court during this period is one of those "only in Texas" cases that demonstrates that both litigants and courts sometimes have too much time on their hands. In *Ex parte Shaklee*¹⁷⁴ the divorce court awarded custody of the children to the mother and custody of the "four wheeler" to the father. In a strangely worded order, the children were given visitation rights for the four wheeler whenever they were in summer school and their father did not "want[] to take it to Colorado to go elk hunting."¹⁷⁵

The father refused to turn over the four wheeler to the children for a fifteen-month period. The trial court found him in contempt, stating that the father had the ability to comply with the court order on any day "he was not in Colorado elk hunting."¹⁷⁶ The Supreme Court declared the contempt order void on due process grounds because the record contained no specification of the number of days or times the father had violated the order or whether the thirty days in jail assessed for each offense were meant to run consecutively or concurrently. The Texas Supreme Court also cautioned that any attempt to carve a continuing contemptuous act into separate violations could, in some cases, run afoul of the six-month maximum sentence for criminal contempt.¹⁷⁷

Oddly enough, the Texas Supreme Court elected not to address what was arguably the most glaring defect in the proceedings. To reiterate, the order the father was supposed to have violated gave him possession of the four wheeler "during the period of time he *wants* to take it to Colorado to go elk hunting."¹⁷⁸ Under facts like these, one easily could imagine that at all times the father was not actually in Colorado elk hunting, he could be found in his garage, caressing his four-wheeler and wishing he was in Colorado.

One arguably significant and clearly erroneous UCCJA decision of note, *Lemley v. Miller*,¹⁷⁹ has issued from the Austin Court of Appeals. The parties were divorced in Oklahoma. Lemley, the custodial parent,

173. It might be wise, for reasons that should not require discussion, for the Texas Legislative Council or the Legislature to adopt a strict "hands off" policy toward Texas statutes that incorporate uniform laws. Failing that, the writer suggests that the Legislature should at least keep the Texas Uniform Commercial Code out of the Legislative Council's hands.

174. 939 S.W.2d 144 (Tex. 1997).

175. *Id.* at 144.

176. *Id.* at 145.

177. See TEX. GOV'T CODE ANN. § 21.002(b) (Vernon 1988).

178. *Shaklee*, 939 S.W.2d at 144 (emphasis added).

179. 932 S.W.2d 284 (Tex. App.—Austin 1996, no writ) (per curiam).

moved to Texas for some time and after sojourns in Louisiana and Germany, returned to Texas. Miller, the noncustodial parent, remained in Oklahoma. The Austin Court of Appeals relied on the UCCJA to confirm jurisdiction over Lemley's request to modify visitation based on two theories, either that Texas was the child's "home state"¹⁸⁰ or that the child had no home state and Texas had significant connections, access to significant evidence, and could serve the best interest of the child.¹⁸¹

The problem with the decision, as pointed out to the Austin court in an amicus curiae letter filed after the decision was issued,¹⁸² was the court's initial assumption that "[j]urisdiction in child custody determinations is governed by the Family Code."¹⁸³ The truth of the matter is that, in cases like this, the federal Parental Kidnapping Prevention Act (PKPA)¹⁸⁴ is dispositive. In particular, the federal legislation would grant Texas jurisdiction to modify child custody only if Oklahoma, the state in which the divorce was rendered, no longer remains "the residence of the child or any contestant"¹⁸⁵ or if Oklahoma had "declined to exercise" its jurisdiction.¹⁸⁶ Because neither of these conditions were met, Texas had no jurisdiction.

Lemley has come under heavy fire from the family law bar, and for good reason.¹⁸⁷ Nonetheless, one should not judge the Austin court too harshly. The interaction between the UCCJA and the PKPA can be confusing even to experts, and there is no indication that either party in the case called the court's attention to the PKPA. Nor did the losing party file a motion for rehearing.¹⁸⁸ Accordingly, by the time the Austin court was apprised of the applicable law, it may have felt it lacked the ability to modify the opinion.¹⁸⁹ Fortunately, *Lemley* should have little long-term impact on the law. The El Paso Court of Appeals has already declined to follow *Lemley* and has explained its refusal in a pointed opinion.¹⁹⁰

180. See TEX. FAM. CODE ANN. § 152.003(a)(1) (Vernon 1996).

181. See *id.* § 152.003(a)(2).

182. See Letter from John J. Sampson and Harry L. Tindall to the Third Court of Appeals (Nov. 21, 1996) reprinted in 1997-1 ST. B. SEC. REP. FAM. L. 22-24.

183. *Lemley*, 932 S.W.2d at 285.

184. 28 U.S.C. § 1738A (1995).

185. *Id.* § 1738A(d).

186. *Id.* § 1738A(f).

187. See, e.g., Commentary by David Gray, 1997-1 ST. B. SEC. REP. FAM. L. 22 (describing *Lemley* as "truly terrible" and giving it the 1996 "Stupid [Dallas] Appellate Opinion Award").

188. Telephone Interview with clerk's office, Austin Court of Appeals (Feb. 18, 1998).

189. Under the rules, a motion for rehearing can only be filed by a "party." TEX. R. APP. P. 100(a). Likewise, a decision to change the publication status of an opinion is usually prompted by the application of a "party." See *id.*, Rule 90(c). Moreover, the amicus-style letter calling the court's mistake to its attention was not filed until after the date the mandate should have issued. See *id.*, Rule 86(a)(1). In the writer's view (which the Austin court may or may not share), the opinion could have been ordered nonpublished under Rule 90(c), even after the date the mandate issued. Nonetheless, because the opinion by that time may have already appeared in West Publishing Company's advance sheets, the court may have felt reluctant to do so.

190. See *Coots v. Leonard*, 1997 Tex. App. LEXIS 5700, at *16-18 (Tex. App.—El Paso Oct. 30, 1997, no pet. h.).

In another UCCJA decision,¹⁹¹ the Texarkana Court of Appeals held that a habeas corpus action seeking the return of a child in accordance with another state court's judgment could be filed in "any district court or other appropriate court," as stated in the UCCJA.¹⁹² The court refused to apply a Family Code provision setting habeas corpus actions in the court of continuing jurisdiction or the county where the child is found,¹⁹³ using the rationale that the UCCJA is a "special provision" that prevails over the more general habeas corpus statute.¹⁹⁴

During the Survey period there were several cases that involved grandparent rights. The Houston Court of Appeals (First District) has ruled¹⁹⁵ that grandparent standing is not cut off by termination of the parent's rights or by adoption, providing that the grandparents "request relief,"¹⁹⁶ defined as "file suit,"¹⁹⁷ before the termination or adoption takes place. The Corpus Christi Court of Appeals granted mandamus to reverse a trial court decision temporarily granting primary managing conservatorship to the deceased mother's parents¹⁹⁸ on the ground that the affidavit accompanying the petition did not provide adequate proof that the father's appointment would significantly impair the child's health or development, at least as would be required at the temporary restraining order stage.¹⁹⁹ Finally, the Texarkana court granted a stepgrandmother standing to intervene²⁰⁰ and eventually affirmed an award of primary joint managing conservatorship in her favor.

*In re Rodriguez*²⁰¹ presents an interesting and difficult question of public policy. An unmarried mother entered into an open adoption. Unfortunately, she chose to identify the wrong man as the child's father. Two or so years into the adoption, the biological father found out. The jury granted managing conservatorship to the couple who had been acting as adoptive parents, but gave visitation rights to the biological father.

The principal problem, for both trial and appellate courts, was an apparent conflict between the Family Code and Texas Supreme Court authority. Under the Code, a parent is to be named managing conservator unless "the appointment would significantly impair the child's physical

191. See *Revey v. Peek*, 951 S.W.2d 920 (Tex. App.—Texarkana 1997, orig. proceeding).

192. TEX. FAM. CODE ANN. § 152.015(a) (Vernon 1996).

193. See *id.* § 157.371(a).

194. *Revey*, 951 S.W.2d at 925.

195. See *Bowers v. Matula*, 943 S.W.2d 536 (Tex. App.—Houston [1st Dist.] 1997, n.w.h.).

196. See TEX. FAM. CODE ANN. § 153.433 (1) (Vernon 1996) (stating that grandparents can seek reasonable access to a child if, "at the time the relief is requested, at least one" parent's rights have not been terminated).

197. Cf. *id.* § 153.432 (a)(1) (providing that a grandparent may "request access" by "filing . . . an original suit").

198. See *Dohrn v. Delgado*, 941 S.W.2d 244 (Tex. App.—Corpus Christi 1996, no writ).

199. See TEX. FAM. CODE ANN. § 153.131 (Vernon 1996).

200. See *In re Hidalgo*, 938 S.W.2d 492 (Tex. App.—Texarkana 1996, no writ); see also TEX. FAM. CODE ANN. § 102.004(b) (Vernon 1996) (granting standing to intervene in favor of a grandparent "or other person deemed by the court to have had substantial past conduct with the child").

201. 940 S.W.2d 265 (Tex. App.—San Antonio 1997, writ denied).

health or emotional development."²⁰² In the 1990 *Lewelling*²⁰³ decision, however, the Texas Supreme Court seemed to require an identification of "some act or omission" by the parent that causes harm to the child.²⁰⁴ The problem in *Rodriguez* was that, despite substantial evidence "the appointment" would cause harm to the child by disrupting the two-year bonding process with the adoptive parents, this was not the biological father's fault.²⁰⁵

The San Antonio Court of Appeals termed this a "difficult case of first impression"²⁰⁶ and confirmed the award of managing conservatorship to the adoptive parents. At the risk of boiling an elaborately reasoned opinion down to a catch-phrase, the court concluded that the Texas Supreme Court's language in *Lewelling* was an artifact of its facts, not a deliberate attempt by the Court to read an extra element into the statutory language.²⁰⁷ In dissent, Justice Carr argued that the court was bound by "the prism of the *Lewelling* view" of the statutory requirements.²⁰⁸

The Texas Supreme Court's decision to deny writ may be an indication that the high court approves the San Antonio panel's reading of *Lewelling*.²⁰⁹ On the other hand, error preservation issues clouded the case.²¹⁰ In the writer's opinion, the San Antonio panel's ruling is correct. In *Rodriguez*, all the parties appear to be relatively innocent of wrongdoing. The biological father still has substantial visitation rights. On an issue such as this, when one's view of the "rightness" of the result essentially boils down to a public policy decision, it seems better to prefer the Legislature's language over a possibly unintentional gloss on that language by the courts.²¹¹

V. SUPPORT

The Survey period was not a particularly active one, so far as the subject of child support goes. The single most interesting development was the grudging retreat by the 1997 Legislature from a controversial statute enacted during the 1995 session. That statute, discussed in some detail in a previous Survey,²¹² forbade the issuance of a marriage license to anyone who checked "false" in response to an application question asking if

202. TEX. FAM. CODE ANN. § 153.131(a) (Vernon 1996).

203. *Lewelling v. Lewelling*, 796 S.W.2d 164 (Tex. 1990).

204. *Id.* at 168.

205. *Rodriguez*, 940 S.W.2d at 267.

206. *Id.* at 266.

207. *See id.* at 273.

208. *Id.* at 275 (Carr, J., dissenting).

209. The writer is aware of the hazards of making such guesses. *See, e.g.*, Ted Z. Robertson & James W. Paulsen, *The Meaning (If Any) of an N.R.E.*, 48 TEX. B.J. 1306 (1985).

210. *See Rodriguez*, 940 S.W.2d at 274 n.2 (discussing possible waiver of error in jury charge).

211. The *Rodriguez* court did point out that, in a decision that postdates *Lewelling*, the Texas Supreme Court simply quoted the statutory language, rather than *Lewelling*. *See Rodriguez*, 940 S.W.2d at 273 (citing *Brook v. Brook*, 881 S.W.2d 297 (Tex. 1994)).

212. *See Paulsen, 1996 Annual Survey, supra* note 54 at 1078-80.

he or she was current on child support obligations.²¹³ The legislative intent, of course, was to prohibit anyone behind on child support obligations from entering into any new relationships that might produce still more children.

The problem with this legislation, or so this writer and others opined when it first was enacted,²¹⁴ was that the United States Supreme Court had long since declared similar schemes to be invalid. In *Zablocki v. Redhail*,²¹⁵ the Court opined that a Wisconsin statute similar to the Texas enactment was unconstitutional because it “significantly interfere[d]” with a fundamental right, the right to marry.²¹⁶ A 1996 Texas Attorney General opinion concluded that the new Texas statute shared the same infirmity.²¹⁷

The sole arguable difference between the Texas statute and the Wisconsin statute held invalid in *Zablocki* was that, unlike Wisconsin, Texas recognizes the institution of informal marriage. This distinction was highlighted in an article in the *Baylor Law Review*²¹⁸ which argued that “[t]he A.G. Opinion should be withdrawn” and the Texas statute should be held valid because, due to the unrestricted availability of informal marriage, the “Texas legislation neither deprives the indigent of a constitutionally protected liberty interest nor directly and substantially interferes with one’s fundamental right to marry.”²¹⁹

This writer respectfully disagrees. To the extent that the availability of informal marriage would have helped the Texas legislation avoid the shoals of *Zablocki*, the enactment would have foundered on the rocks of the equally fundamental First Amendment guarantee of free exercise of religion. While informal marriage confers the same civil status as does an executed marriage license in Texas, state statutes arguably prohibit priests, rabbis, and other religious functionaries from performing a marriage unless the parties have a valid marriage license.²²⁰ Thus, the statute would have infringed the religious rights of those who view marriage as a religious sacrament, but who are not current in child support.²²¹ Moreover, the “common law alternative” argument proves too much. If the

213. Act of May 26, 1995, 74th Leg., R.S., ch. 655, § 5.04 1995 Tex. Gen. Laws 3543, 3559 (amended 1997) (current version at TEX. FAM. CODE ANN. § 2.004 (Vernon Supp. 1998)).

214. See, e.g., Paulsen, *1996 Annual Survey*, *supra* note 54 at 1079-80.

215. 434 U.S. 374 (1978).

216. *Id.* at 383.

217. See Op. Tex. Att’y Gen. No. DM-384 (1996).

218. See R. Michael Rogers, *Use of the Texas Marriage License Statutes as a Child Support Collection Device Does Not Violate Equal Protection*, 48 BAYLOR L. REV. 1153 (1996).

219. *Id.* at 1170.

220. TEX. FAM. CODE ANN. §§ 2.202-203, 2.206 (Vernon Supp. 1997).

221. The *Baylor Law Review* article contains a telling qualification. After stating in text that “[c]ase law does not indicate that there is an equal protection right to a licensed wedding ceremony,” Professor Rogers adds in a footnote: “A first amendment free exercise issue may exist regarding a right to a religious ceremony; however, that was not addressed in the Attorney General Opinion, and is beyond the scope of this Article.” Rogers, *supra* note 216 at 1162 n.35.

statute really does not impede the right of a delinquent child support obligor to remarry, then it would be questionable whether the statute could pass muster under a "rational basis" analysis, much less survive "strict scrutiny" review.²²²

In any event, Texas courts will not be required to address the issue since the 1997 Legislature repealed the restriction. As amended, a delinquent child support obligor must still indicate that status on a marriage license application;²²³ the clerk, however, is specifically forbidden from refusing to issue a license on that ground.²²⁴ The apparent intent of the Legislature was to assure that a prospective spouse be "fully informed about the character of his or her choice in a mate."²²⁵ However, the statute does not require the disclosure of information such as whether the applicant is a convicted felon, has a history of sexually transmitted diseases, or is currently heading into his or her eighth marriage.²²⁶

A large number of technical amendments affecting support were made in the 1997 legislative session, as well as several substantive amendments, designed to streamline the process of determining and collecting child support. The most significant change is the new provision that authorizes modification of child support merely on a showing that three years have passed since the last support order, and that support now deviates from the guidelines by at least twenty percent or one hundred dollars per month.²²⁷ The problem of ensuring health insurance coverage was addressed through new provisions for cash medical support payments when other insurance is unavailable, together with presumptive guidelines for those payments.²²⁸ Wage withholding orders are now required in all instances,²²⁹ though service of the order on employers is not automatic.²³⁰ A child support lien now automatically arises whenever support is overdue, providing other statutory prerequisites are met.²³¹ Support for a disabled adult child can now flow directly to that child²³² and parties may agree that a contingency provided for in a court order (death, high school graduation, removal of disabilities, etc.) has occurred without the require-

222. Professor Rogers disputes this contention, and cites anecdotal evidence of a Travis County clerk who believed that "at least four, perhaps six" individuals paid delinquent child support before securing a marriage license. *Id.* at 1169 (quoting Dana DeBeauvoir, Travis County Clerk). Given the fact that the Travis County clerk's office was apparently the only one to continue zealous enforcement of the statute in the face of an attorney general's opinion questioning its constitutionality, one might reasonably wonder whether these individuals were informed of their "common law" alternative. *See id.* at 1169.

223. *See* TEX. FAM. CODE ANN. § 2.004(7) (Vernon Supp. 1998).

224. *See id.* § 2.009(d).

225. *Family Law Section Summary*, *supra* note 1, at 7.

226. *Cf. id.* (stating "Don't you just love it?").

227. *See* TEX. FAM. CODE ANN. § 156.401(a)(2) (Vernon Supp. 1998).

228. *See id.* § 154.182(b)(4)-(6).

229. *See id.* § 154.007(a).

230. *See id.* § 158.002.

231. *See id.* § 157.312(d).

232. *See id.* § 154.302(b). The adult child is granted standing to sue for enforcement. *See id.* § 154.303(a).

ment of an additional court order.²³³

One support decision involving a contempt proceeding was issued by the Texas Supreme Court during the Survey period. In *Ex parte Acker*,²³⁴ the former wife challenged two contempt orders. The first contempt claim arose from Acker's failure to abide by the terms of an agreed order on arrearages. Acker argued that, contrary to the statute, she was not informed of her right to counsel in the original hearing.²³⁵ A unanimous Court ruled that the Family Code's requirement that "incarceration is a possible result of the proceedings"²³⁶ was satisfied by the agreed order's alternative provision for commitment to jail if Acker did not abide by the terms of the order. The Court also ruled that, while the right to appointed counsel might be limited to indigent parties, the statute requires all parties, indigent or not, to, at a minimum, be informed of their right to legal representation.²³⁷

The Court was not unanimous in its ruling on Acker's second complaint. The divorce decree required Acker to pay fifty dollars per month in health insurance beginning "on the 1st day of June."²³⁸ The problem was that the decree did not specify a year. Acker resolved this ambiguity in her favor by not paying health insurance support for six years, whereupon she was held in contempt.

Chief Justice Phillips, writing for the majority, noted that "June" probably referred to "June 1990," since the divorce hearing was held in May of that year.²³⁹ Nonetheless, because a decree must "set forth the terms of compliance in clear, specific and unambiguous terms" to be enforceable by contempt,²⁴⁰ and because the order was not signed until November 1990, the Court ordered Acker discharged. Writing for the three dissenting justices, Justice Priscilla Owen argued that "[e]ven if [Acker] was uncertain in her own mind about whether her obligations commenced on June 1 of 1990 or June 1 of 1991, she knew that those obligations began on June 1, 1991 at the latest."²⁴¹

Reyes v. Reyes,²⁴² a decision from the Waco Court of Appeals, is initially troubling in its result, but somewhat more palatable on close reading. In *Reyes*, the Waco court upheld a trial court decision to the effect that a prison sentence constitutes "voluntary underemployment."²⁴³ At

233. *See id.* § 158.402.

234. 949 S.W.2d 314 (Tex. 1997).

235. *See* TEX. FAM. CODE ANN. § 157.163(b) (Vernon 1996)(providing that "[i]f the court determines that incarceration is a possible result of the proceedings, the court shall inform a respondent not represented by an attorney of the right to be represented by an attorney and, if the respondent is indigent, of the right to the appointment of an attorney").

236. *Id.*

237. This conclusion seems to follow naturally from a plain reading of the statute.

238. *Acker*, 949 S.W.2d at 316.

239. *Id.* at 317.

240. *Id.* at 317 (quoting *Ex parte Chambers*, 898 S.W.2d 257, 260 (Tex. 1995)).

241. *Id.* at 319 (Owens, J., dissenting) (emphasis in original).

242. 946 S.W.2d 627 (Tex. App.—Waco 1997, n.w.h.).

243. *Id.* at 628.

the time of the support hearing, Reyes was halfway through a twelve year sentence for sexually assaulting his wife's underage niece. Though eligible for parole, Reyes was still incarcerated at the time of the hearing. The trial court nonetheless imposed a monthly support obligation consistent with what a person employed forty-hours per week in a minimum wage job would earn.

Though startling on first reading, the Waco court's decision to affirm can be understood as a combination of extreme deference to the trial court's rulings, combined with severe procedural defaults on the part of a pro se litigant. While the Waco court discussed the facts in some detail, the actual holding was narrow. The court observed that when no evidence is presented of a spouse's actual income, a trial court should presume employment at a forty-hour per week minimum wage job.²⁴⁴ Because the inmate spouse presented no evidence of his net resources or his "alleged inability to earn an income while incarcerated,"²⁴⁵ the Waco court ruled that the trial court did not clearly abuse its discretion in applying the statutory presumption.

Two observations about the Waco court's opinion are in order. First, the ruling is extraordinarily harsh in its application of rigid pleading and error preservation rules to a pro se litigant. The inmate presented no evidence of his net resources, or of his inability to earn money, because he was not present at the hearing. Some record evidence supported the inmate's claim that the trial court failed to issue a requested bench warrant to compel his appearance, but the Waco Court of Appeals declined to consider the point because the inmate had not formally requested inclusion of the motion for a bench warrant as a part of the record and had not raised the trial court's failure to rule on the motion by point of error. Likewise, the inmate's argument that the trial court failed to consider his "Declaration of Inability to Pay Child Support" was dismissed because the document was not part of the record.²⁴⁶ This is understandable, however, since the inmate was not present at trial to urge its admission. From a strictly procedural point of view the Waco court's decision may not be objectionable, but it certainly leaves a reader with little confidence that justice was done.²⁴⁷

The second point that deserves emphasis is the fact that the rationale bears little resemblance to what actually happened at trial. Judging from the Waco court's rendition of the facts, the trial court did not rely on the inmate's failure to present evidence of resources. Rather, the Attorney General's Office urged the fact of Reyes' incarceration be considered as evidence of voluntary underemployment, specifically, that the decision to commit the crime was voluntary, though the resulting imprisonment

244. *See id.* at 630.

245. *Id.*

246. *Id.*

247. One might reasonably wonder why the trial court was not required to take judicial notice of the general unavailability of 40 hour, minimum wage jobs in prison.

might be involuntary. Likewise, Reyes' ex-wife did not rely on the statutory presumption. Rather, she presented evidence that Reyes was capable of earning the minimum wage as proof of baseline employability. Evidently the trial court believed that parole was likely when it set the level of support, because the court commented that a future motion to quash collection efforts might be warranted if Reyes continued to be incarcerated.

This case appears to be an effort by the Attorney General's Office to implement a policy to impose child support obligations on prison inmates, despite severe doubts as to the wisdom of that policy. At trial, the ex-wife's attorney announced that "a representative from the Attorney General's Office had asked him to request from the trial court that child support be awarded retroactively to the date when [Reyes] was first incarcerated."²⁴⁸ The trial court "expressed its view that a parent should not be required to pay child support if he is incarcerated and, consequently, without an income or other ability to make child support payments."²⁴⁹ On appeal, the ex-wife did not attend the hearing. Instead, the case was briefed and argued by representatives from the Attorney General's Office.

For what it is worth, particularly since the problem may arise again, this writer would join with the trial court in expressing doubt as to the soundness of the Attorney General's argument. The fact that Reyes and most other inmates are not sympathetic defendants should not blind one to some of the severe problems faced by the Attorney General's position. To call a prison sentence "voluntary underemployment" is equivalent to calling death a failure to exercise visitation rights. The Attorney General's position is black humor, not sober statutory construction.

Moreover this position, if persisted, begs for a constitutional challenge. The logical consequence of child support orders that view a prison sentence as voluntary underemployment is a termination proceeding based on failure to support the child, or perhaps a criminal nonsupport action.²⁵⁰ Surely, the same conduct that lands a parent in prison can be grounds for termination of parental rights. Indeed, by virtue of a 1997 legislative amendment, voluntary criminal conduct that results in a two-year prison sentence now is an independent ground for termination of parental rights.²⁵¹ Here, however, a parent's rights could ultimately be terminated not for bad conduct, but by reason of indigency alone. That result would be contrary to the intent of the Family Code's support provisions²⁵² and is a likely violation of the United States Constitution as well.

248. *Reyes*, 946 S.W.2d at 628.

249. *Id.*

250. See TEX. PEN. CODE ANN. § 25.05 (Vernon 1994).

251. See TEX. FAM. CODE ANN. § 161.001(1)(Q) (Vernon Supp. 1998).

252. A more equitable interpretation of the Texas Family Code was presented during the Survey period by *In re D.L.B.*, 943 S.W.2d 175 (Tex. App.—San Antonio 1997, n.w.h.). The court noted:

Other cases from the courts of appeals are considerably more mundane. The Tyler Court of Appeals has held, in a ruling arguably contrary to the prior conclusion of the Beaumont court,²⁵³ that a child support contemnor who has been placed on probation is not sufficiently deprived of his liberty to seek a writ of habeas corpus.²⁵⁴ The Houston Court of Appeals (Fourteenth District) held in a criminal case that a prior contempt proceeding does not bar prosecution for criminal child support on double jeopardy grounds.²⁵⁵ The Corpus Christi Court of Appeals has ruled that so far as responding to wage withholding orders is concerned, a nonemployer is not held to the same pleading deadlines as an employer.²⁵⁶

Finally, several cases on the computation of support deserve brief mention. The Dallas Court of Appeals ruled that income tax returns are not conclusive on the question of an obligor's income, in part because "calculations prepared under one set of rules do not necessarily comply with the requirements of the other."²⁵⁷ The court therefore gave credence to the obligor's injudicious statements to his ex-spouse about unreported income and gold reserves held in European banks. Two cases out of San Antonio relate to the question of voluntary underemployment. In one, the court declined to address the question of whether a forty-three-year-old man with a B.B.A. from the University of Texas was really capable of earning only five dollars per hour as a mechanic's helper by ruling that he still had substantial resources, including investments and a home, that could be reached to meet support obligations.²⁵⁸ In the second case, the San Antonio court held that an obligor who quit his second job in order to prepare for law school should be considered voluntarily underemployed and held to the support level derived from his previous income level.²⁵⁹

The fact that the parent is incarcerated can contribute to a finding that the parent engaged in a course of conduct which endangered the child's physical or emotional well-being. . . . If the conduct for which the parent is incarcerated shows voluntary and deliberate actions, it qualifies as conduct endangering the emotional well-being of a child. . . . Termination cannot be based on failure to support the child unless there is also evidence of the ability to pay support.

Id. at 177 (citations omitted).

253. See *Ex parte Connor*, 746 S.W.2d 527 (Tex. App.—Beaumont 1988, orig. proceeding) (holding that probation constitutes a sufficient restraint on liberty to warrant the writ).

254. See *Ex parte Hughey*, 932 S.W.2d 308 (Tex. App.—Tyler 1996, orig. proceeding). The Tyler court stated that it would decline to follow the Beaumont court's decision in *Ex parte Connor* "[a]bsent a more detailed recitation of the facts and a more persuasive analysis." *Ex parte Hughey*, 932 S.W.2d at 310.

255. See *State v. Johnson*, 948 S.W.2d 39 (Tex. App.—Houston [14th Dist.] 1997, no pet. h.).

256. See *Dotzler v. Coldwell Banker Island Realtors*, 941 S.W.2d 315 (Tex. App.—Corpus Christi 1997, n.w.h.).

257. *Hudson v. Markum*, 948 S.W.2d 1, 4 (Tex. App.—Dallas 1997, writ denied).

258. See *In re G.J.S.*, 940 S.W.2d 289 (Tex. App.—San Antonio 1997, n.w.h.).

259. See *In re S.B.C.*, 952 S.W.2d 15 (Tex. App.—San Antonio 1997, n.w.h.).

VI. TERMINATION AND ADOPTION

In *M.L.B. v. S.L.J.*,²⁶⁰ the U.S. Supreme Court ruled that the state of Mississippi could not condition an appeal from an order terminating parental rights on the mother's advance payment of transcript preparation fees. The Court held that the state could not deny the mother, "because of her poverty, appellate review of the sufficiency of the evidence on which the trial court found her unfit to remain a parent."²⁶¹ The Court further explained that while the Constitution does not guarantee a right to an appeal,²⁶² once the state has granted that right, it may not "bolt the door to equal justice."²⁶³

Several recent Texas courts of appeal decisions have grappled with an analogous question. The requirement that the grounds for termination of parental rights be proved by "clear and convincing evidence" is not only required by Texas statute²⁶⁴ but the heightened standard of proof is also required by the U.S. Supreme Court.²⁶⁵ But what should the standard of review be on appeal?

Over the past few years, a deep division in opinion on the question has developed among the various courts of appeal. Beginning with a 1982 Dallas decision,²⁶⁶ followed by decisions from Amarillo, Houston (First District) and San Antonio,²⁶⁷ as well as a couple of law review commentators,²⁶⁸ Courts have stated or intimated that a "clear and convincing" standard at trial should require different treatment on appeal. Other courts, including Austin, Corpus Christi, Fort Worth, Houston (Fourteenth District) and Texarkana,²⁶⁹ now seem to favor an unaltered standard of review, even though earlier decisions from most of those courts

260. 117 S. Ct. 555 (1996).

261. *Id.* at 559.

262. *Id.* at 560 (quoting *Griffin v. Illinois*, 315 U.S. 12, 24 (1956) (Frankfurter, J., concurring in judgment)).

263. *Id.* at 560 (quoting *Griffin*, 315 U.S. at 24); see also *Ex parte Shumake*, 953 S.W.2d 842, 843-44 (Tex. App.—Austin 1997, no pet. h.) (discussing the constitutional standards in a criminal context).

264. See TEX. FAM. CODE ANN. § 161.001 (Vernon 1996).

265. See, e.g., *Santosky v. Kramer*, 455 U.S. 745, 769-70 (1982).

266. See *Neiswander v. Bailey*, 645 S.W.2d 835 (Tex. App.—Dallas 1982, no writ); see also *Wetzel v. Wetzel*, 715 S.W.2d 387 (Tex. App.—Dallas 1986, no writ).

267. See, e.g., *Neal v. Texas Dep't of Human Servs.*, 814 S.W.2d 216, 222 (Tex. App.—San Antonio 1991, writ denied); *Williams v. Texas Dep't of Human Servs.*, 788 S.W.2d 922, 926 (Tex. App.—Houston [1st Dist.] 1990, no writ); *In re L.R.M.*, 763 S.W.2d 64, 66-67 (Tex. App.—Fort Worth 1989, no writ); *In re Estate of Glover*, 744 S.W.2d 197, 199 (Tex. App.—Amarillo 1987), writ denied *per curiam*, 744 S.W.2d 939 (Tex. 1988).

268. See W. Wendell Hall, *Revisiting Standards of Review in Civil Appeals*, 24 ST. MARY'S L.J. 1041, 1149 (1993); Justice Bill Vance, *The Clear and Convincing Evidence Standard in Texas: A Critique*, 48 BAYLOR L. REV. 391, 412-16 (1996).

269. See, e.g., *In re J.J.*, 911 S.W.2d 437, 439-40 (Tex. App.—Texarkana 1995, writ denied); *In re W.S.*, 899 S.W.2d 772, 776 (Tex. App.—Fort Worth 1995, no writ); *Oadra v. Stegall*, 871 S.W.2d 882, 892 (Tex. App.—Houston [14th Dist.] 1994, no writ); *D.O. v. Texas Dep't of Human Servs.*, 851 S.W.2d 351, 353 (Tex. App.—Austin 1993, no writ); *In re A.D.E.*, 880 S.W.2d 241, 245 (Tex. App.—Corpus Christi 1994, no writ).

suggested otherwise.²⁷⁰ The situation remains confused. Even the Dallas Court of Appeals, responding to recent criticism that its own cases set out conflicting standards, admitted that “the cases cause confusion” before concluding with the assurance that they “can be reconciled.”²⁷¹

In two cases, both issued May 8, 1997,²⁷² the El Paso Court of Appeals addressed the question in some detail and cast its lot with the “different standard of review” courts. If one adds in a decision by the Waco Court of Appeals that issued after the Survey period ended,²⁷³ this makes a near even split among the courts, with perhaps a slight edge to the “different standard” courts.²⁷⁴

As the El Paso court observed in *Edwards v. Texas Department of Protective and Regulatory Services*,²⁷⁵ those Texas courts that do not to apply a heightened standard of review rely on statements in older Texas Supreme Court cases, to the effect that there are only two standards of review on appeal, factual sufficiency and legal sufficiency.²⁷⁶ The problem with relying on those cases, however, as even one court that follows the decisions has remarked,²⁷⁷ is that they were written at a time when the Texas Supreme Court recognized only one standard of proof—preponderance of the evidence—at trial.²⁷⁸ The El Paso court believed that because the underlying basis of the decisions changed,²⁷⁹ the apparent mandate of those early cases need not be followed. Moreover, added the court, “we find it incongruous to require the trial court to apply a higher standard of proof when deciding the case while requiring the appellate court to use the same standard of review as in cases decided by a preponderance of the evidence.”²⁸⁰

270. See, e.g., *Ybarra v. Texas Dep't of Human Servs.*, 869 S.W.2d 574, 580 (Tex. App.—Corpus Christi 1993, no writ); *In re L.R.M.*, 763 S.W.2d at 66; *G.M. v. Texas Dep't of Human Resources*, 717 S.W.2d 185, 186 (Tex. App.—Austin 1986, no writ).

271. *Combs v. Dallas County Child Protective Servs.*, No. 05-96-00484-CV, 1997 WL 499689 (Tex. App.—Dallas Aug. 25, 1997, pet. filed) (not designated for publication under TEX. R. APP. P. 90(i)).

272. See *In re B.R.*, 950 S.W.2d 113 (Tex. App.—El Paso 1997, n.w.h.); *Edwards v. Texas Dep't of Protective & Regulatory Servs.*, 946 S.W.2d 130 (Tex. App.—El Paso 1997, n.w.h.); cf. *In re G.B.R.*, 953 S.W.2d 391 (Tex. App.—El Paso 1997, n.w.h.) (raising the same issue in the context of a Branch Davidian civil commitment appeal).

273. See *Spangler v. Texas Dep't of Protective & Regulatory Servs.*, 962 S.W.2d 253 (Tex. App.—Waco 1998, no pet. h.).

274. It also is worth noting that, during the Survey period, the San Antonio Court of Appeals recognized that “the courts of appeal have disagreed over whether an intermediate standard of review should be used,” but reaffirmed its commitment to an intermediate standard. *In re H.C.*, 942 S.W.2d 661, 663 n.2 (Tex. App.—San Antonio 1997, n.w.h.).

275. 946 S.W.2d at 136.

276. See *State v. Turner*, 556 S.W.2d 563, 565 (Tex. 1977); *Meadows v. Green*, 524 S.W.2d 509 (Tex. 1975).

277. See *In re J.J.*, 911 S.W.2d 437, 440 n.1 (Tex. App.—Fort Worth 1995, writ denied).

278. See, e.g., *Turner*, 556 S.W.2d at 566 (stating that civil commitment requires only a “preponderance of the evidence” burden at trial).

279. See *In re G.M.*, 596 S.W.2d 846, 847 (Tex. 1980) (recognizing that clear and convincing evidence is required in proceedings for involuntary termination of parental rights).

280. *Edwards*, 946 S.W.2d at 136-37.

With one or two exceptions,²⁸¹ the Texas appellate courts that have wrestled with this issue have chosen not to look to other state jurisdictions for guidance. If they had, it would not have helped much.²⁸² Decisions range from an insistence on de novo analysis of the trial court's ruling,²⁸³ through some form of heightened review,²⁸⁴ to deferential²⁸⁵ or

281. The first Texas case to address the question did look to two California decisions for guidance. See *Neiswander*, 645 S.W.2d at 835-36; see also *In re L.R.M.*, 763 S.W.2d at 65-66 (citing decisions from nine other jurisdictions).

282. Readers should not place undue reliance on the lists that follow. The labeling and application of standards of review are often idiosyncratic, and proper interpretation requires more knowledge of the particular jurisdiction's jurisprudence. For example, while Idaho appears to follow a "clearly erroneous" standard of review in termination cases, as in other civil cases, the Idaho Supreme Court has stated that it actually applies a "de facto" standard.

The substantial evidence or clearly erroneous standard of appellate review . . . is not applied identically in all instances: the appellate standard of review parallels the trial court's burden of proof. Obviously, the substantial evidence test requires a greater quantum of evidence in cases where the trial court finding must be supported by clear and convincing evidence. Thus, in termination proceedings, if there is evidence in the record from which the trial court may properly conclude that the issue has been resolved by clear and convincing evidence, the appellate court will not set that resolution aside.

In re Aragon v. State Dep't of Health and Welfare, 818 P.2d 310, 317 (Idaho 1991) (quoting *In re Bush*, 749 P.2d 492, 495 (Idaho 1988)).

283. See, e.g., *In re E.B.L.*, 501 N.W.2d 547, 549 (Iowa 1993) (applying a de novo standard of review, though recognizing that the reviewing court can "give weight" to the trial court's conclusions, in light of that court's greater ability to gauge the evidence); *In re J.L.M.*, 451 N.W.2d 377, 382 (Neb. 1990) (stating a de novo standard of review but adding that "where evidence is in conflict, the Supreme Court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts rather than another"); *J.S.P.L. v. Wessman*, 532 N.W.2d 653, 664 (N.D. 1995) (stating that "[o]ur standard of review is similar to trial de novo"); *S. v. Jenkins*, 651 P.2d 1374, 1375 (Or. Ct. App. 1982) (stating that "we must apply the higher standard of proof in our de novo review of the record"); *Farmer v. Dep't of Children Servs.*, 1997 Tenn. App. LEXIS 938, at *18 (Ct. App., Dec. 30, 1997) (stating that "[t]he standard of review by this Court of a decision terminating parental rights is de novo upon the record with the presumption of correctness of the findings of fact by the Trial Court"); cf. *In re Adoption of Olopai*, 1990 U.S. Dist. LEXIS 7272, at *2-3 (N. Mar. I. App. Div., Apr. 30, 1990) (citing *In re Nalani C.*, 245 Cal. Rptr. 264, 267 (Ct. App. 1988)) (stating that "[t]he standard for review is de novo" but adding that, "[a]pplying the substantial evidence test, the Court must review the record in the light most favorable to the judgment below to determine whether a reasonable trier of fact could find that the termination of parental rights is appropriate based on clear and convincing evidence"); *West Virginia Dep't of Health & Human Res.*, 489 S.E.2d 281, 286 (W. Va. 1997) (implying a plenary standard of review).

284. See, e.g., *In re Nalani C.*, 245 Cal. Rptr. at 267 (stating that the court applies the "substantial evidence" test, but explaining that the test involves a search of the entire record to determine whether a rational trier of fact could find that termination of parental rights was supported by "clear and convincing" evidence); *In re Jones*, 538 A.2d 1113 at 6 (Del. 1988) (stating that "[t]he standard of review that applies to termination of parental rights appeals is whether the findings of fact are supported by clear and convincing evidence and are the product of an orderly and logical deductive process"); *Blackburn v. Blackburn*, 292 S.E.2d 821, 826 (Ga. 1982) (stating that, in a manner similar to criminal appeals, the test is "whether after reviewing the evidence in the light most favorable to the appellee, any rational trier of fact could have found by clear and convincing evidence that the natural parent's rights to custody have been lost"); *In re C.D. v. Tippecanoe County Dep't of Pub. Welfare*, 614 N.E.2d 591, 598 (Ind. Ct. App. 1993) (stating that "[j]ust as the burden of proof below is substantially enhanced when, as here, constitutional rights and liberties are put at civil risk, the standard of review at the appellate level is correspond-

ingly more stringent” and expressing the review standard as “whether substantial ‘clear and convincing’ evidence was presented below which supports the trial court’s judgment”); *In re Brianna K.*, 675 A.2d 980, 982 (Me. 1996) (stating that “the appropriate standard of appellate review is whether the factfinder could reasonably have been persuaded that the required factual findings were proved to be highly probable”); *In re S.Z.*, 547 N.W.2d 886, 893 (Minn. 1996) (stating that the trial court’s findings must be “supported by substantial evidence and are not clearly erroneous” and that “[t]his court gives some deference to the district court, but closely inquires into the sufficiency of the evidence to determine whether the evidence is clear and convincing”); *In re M.J.A.*, 826 S.W.2d 890, 896 (Mo. Ct. App. 1992) (stating that “we will affirm the judgment unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law”); *In re Eventyr J.*, 902 P.2d 1066, 1069 (N.M. Ct. App. 1995) (stating that “[o]ur standard of review is therefore whether, viewing the evidence in the light most favorable to the prevailing party, the fact finder could properly determine that the clear and convincing evidence standard was met”); *In re Scott*, 383 S.E.2d 690, 691 (N.C. Ct. App. 1989) (stating that “[i]n cases involving a higher evidentiary standard . . . we must review the evidence in order to determine whether the findings are supported by clear, cogent, and convincing evidence”) (quoting *In re Montgomery*, 316 S.E.2d 246, 253 (N.C. Ct. 1984); *In re Adoption of Holcomb*, 481 N.E.2d 613, 621 (Ohio 1985) (stating that “[o]nce the clear and convincing standard has been met to the satisfaction of the probate court, the reviewing court must examine the record and determine if the trier of fact had sufficient evidence before it to satisfy this burden of proof” and that “[t]he determination of the probate court should not be overturned unless it is unsupported by clear and convincing evidence”).

285. A fair number of jurisdictions appear to apply the “clear error” standard of review, which the Texas Supreme Court views as “similar, although not identical” to the Texas “abuse of discretion” standard. *Goode v. Shoukfeh*, 943 S.W.2d 441, 446 (Tex. 1997). *See, e.g., Varnadore v. State Dep’t of Human Resources*, 543 So. 2d 1194, 1196 (Ala. Civ. App. 1989) (stating that “[t]he trial court is presented the evidence ore tenus; therefore, its decision is presumed to be correct and will be set aside only if the record reveals the decision to be plainly and palpably wrong”); *In re S.A. v. State*, 912 P.2d 1235, 1237 (Alaska 1996) (stating that “we will overturn the superior court’s findings of facts if they are clearly erroneous. We will declare a trial court’s findings to be clearly erroneous if a review of the entire record leaves us with a definite and firm conviction that a mistake has been made.”); *In re Appeal in Maricopa County Juvenile Action No. JS-8441*, 857 P.2d 1317, 1319 (Ariz. Ct. App. 1993) (stating that “the issue on appeal is whether any reasonable evidence supports the juvenile court’s findings” and that “[o]n appeal, this court will accept the findings of the juvenile court unless they are clearly erroneous; we will not reweigh the evidence”); *In re Romance M.*, 641 A.2d 378, 383 (Conn. 1994) (stating that “[w]e will overturn such a finding of fact only if it is clearly erroneous in light of the evidence in the whole record”); *In re L.L.S.*, 577 N.E.2d 1375, 1385 (Ill. Ct. App. 1991) (stating as a “well settled” rule that “[t]he findings of the trial court must be given great deference since it has the opportunity to view and evaluate the testimony of the witnesses, and the trial court’s decision should not be reversed on appeal unless it is contrary to the manifest weight of the evidence”) (quoting *In re Allen*, 527 N.E.2d 647, 651 (Ill. Ct. App. 1988); *In re G.A.*, 664 So. 2d 106, 110 (La. Ct. App. 1995) (stating that a trial court’s decision will be reversed only if “manifestly erroneous or clearly wrong”); *In re Springer*, 432 N.W.2d 342, 346 (Mich. Ct. App. 1988) (stating that “[t]he appropriate standard of review in cases involving termination of parental rights is whether the findings of the probate court are clearly erroneous,” and defining that standard as satisfied “when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made”); *In re P.E.*, 934 P.2d 206, 209 (Mont. 1997) (stating a “clearly erroneous” standard of review); *People ex rel. South Dakota Dep’t of Soc. Servs.*, 510 N.W.2d 119, 121 (S.D. 1993) (stating a “clearly erroneous” standard of review); *M.S. v. Lochner*, 815 P.2d 1325, 1328 (Utah Ct. App. 1991) (stating that “[w]e overturn findings of fact in a parental termination proceeding only if they are clearly erroneous,” adding, “[t]o obtain a reversal on clear error grounds, an appellant must marshal all the evidence supporting the challenged findings and then show that despite that evidence, the findings are clearly lacking in support”); *In re G.S.*, 572 A.2d 1350, 1351 (Vt. 1990) (stating that “[a]s long as the court applied the proper standard, we will not disturb its findings unless they are clearly erroneous, and we will affirm its conclusions if they are supported by the findings”).

almost non-existent review.²⁸⁶

It appears that the Texas courts that favor a stricter appellate standard have a somewhat stronger argument. First, the old decisions on which other courts rely are suspect because they assume an unconstitutionally low burden of proof at trial. Second, in view of the great regard the Texas Supreme Court recently has shown for parental rights,²⁸⁷ it would be anomalous to apply a low-level standard of appellate review.

Finally, a good argument can be made that failure to apply a higher standard of review on appeal is a constitutional violation. *Bose Corp. v. Consumers Union of United States, Inc.*²⁸⁸ offers a productive analogy. The question in *Bose* was whether the normal federal "clearly erroneous" standard of appellate review²⁸⁹ governed the appeal of a defamation case, despite the constitutional requirement of independent review of proof of "actual malice" offered at trial.²⁹⁰ After observing that the conflict between the two requirements "is in some respects more apparent than real,"²⁹¹ the U.S. Supreme Court concluded that "[a]ppellate judges in such a case must exercise independent judgment and determine whether the record establishes actual malice with convincing clarity."²⁹²

Parental rights are no less fundamental than rights of free speech. It would therefore seem that a more searching standard of review than that employed by a number of Texas appellate courts is in order. Moreover,

286. See, e.g., *In re A.R.*, 679 A.2d 470, 474 (D.C. Cir. 1996) (stating that "[t]he trial court's determination as to whether this standard has been met is reviewable only for abuse of discretion"); *In re Baby E.A.W.*, 647 So.2d 918, 923 (Fla. Dist. Ct. App. 1994) (stating that "a trial court's determination that evidence is clear and convincing will not be overturned unless it may be said as a matter of law that no one could reasonably find such evidence to be clear and convincing"); *In re S.M.Q.*, 796 P.2d 543, 544 (Kan. 1990) (stating that "[t]he applicable scope of review . . . is not whether the record contains substantial competent evidence of a clear and convincing nature but whether there is substantial competent evidence in the record to support the trial court's decision that the parent was unfit and that parental rights should be terminated"); *K.L.H. v. State*, 858 P.2d 1296, 1299 (Okla. Ct. App. 1993) (stating that "[i]n a termination proceeding tried to a jury, the verdict of the jury is conclusive as to all disputed facts, and where there is any competent evidence reasonably tending to support the verdict, we will not disturb the judgment based on that verdict"); *In re C.A.E.*, 532 A.2d 802, 803 (Pa. 1987) (stating that "the scope of appellate review . . . is limited to the determination of whether the decree of termination is supported by competent evidence"); *In re S.Y.M.*, 924 P.2d 985, 987 (Wyo. 1996) (stating that termination decisions are the subject of "strict scrutiny," but adding, "[e]xacting though such scrutiny may be, we undertake examination of the evidence in a light most favorable to the party prevailing below, assuming all favorable evidence to be true while discounting conflicting evidence presented by the unsuccessful party").

287. See, e.g., *In re J.W.T.*, 872 S.W.2d 189 (Tex. 1994) (expanding Texas constitutional rights of biological father beyond those afforded under the United States Constitution).

288. 466 U.S. 485 (1984).

289. See FED. R. CIV. P. 52(a) (stating that "[f]indings of fact . . . shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses").

290. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-86 (1964) (stating that an appellate court is required to "make an independent examination of the whole record" to assure that "the judgment does not constitute a forbidden intrusion on the field of free expression").

291. *Bose Corp.*, 466 U.S. at 499.

292. *Id.* at 514.

given the U.S. Supreme Court's concern with the provision of an appellate record in a termination case,²⁹³ it is difficult to imagine that the Court would require a full record be provided, yet countenance a standard of appellate review that would afford the record no significant review.

Whatever the proper resolution of the issue it is ripe for the Texas Supreme Court's consideration. More than two years ago, the Texarkana Court of Appeals, though deciding not to apply a new intermediate standard of review for termination cases, summarized conflicting cases and noted: "[I]n light of this uncertainty, we believe it might be appropriate for the supreme court to revisit this issue."²⁹⁴ The Texas Supreme Court's decision not to grant review in that case was disappointing, and the situation is only getting worse. Perhaps the Texas Supreme Court is waiting for further guidance from the U.S. Supreme Court or perhaps the court feels that any announced standard of appellate review is so difficult to establish that the precise words of the review formula might not make any practical difference. Nonetheless, until the issue is addressed by the U.S. Supreme Court, it would be more practical to have all the Texas appellate courts (in particular, the two that share overlapping appellate jurisdiction in Houston) using the same standard of review.

The 1997 Legislature was active on termination issues as well. Several more specific grounds for termination of parental rights have been added. These include voluntary misconduct that results in a prison sentence of two years or more, death or serious injury to a child while engaged in one of a laundry list of criminal violations, repeated drug use that endangers a child, conduct that causes a child to be born addicted to drugs, or failure to comply with a court order specifying conditions for return of a child in the care of state authorities.²⁹⁵ A new statutory provision provides that parental rights can be terminated when the pregnancy is the result of a criminal sexual assault.²⁹⁶ Finally, another new section provides a six-month limit on direct and collateral attacks of termination orders.²⁹⁷

Several termination decisions from the courts of appeal are worth brief note. The San Antonio Court of Appeals affirmed the termination of a mother's parental rights because of appellate error.²⁹⁸ The mother's due process and equal protection claims were over ruled with the observation that "the strict application of the time limits regarding filing of the statement of facts did not deprive the parent[] of due process or [equal pro-

293. See *supra* notes 193-209 and accompanying text.

294. *In re J.J.*, 911 S.W.2d at 440 n.1.

295. See TEX. FAM. CODE ANN. § 161.001(1)(L), (0) - (R) (Vernon Supp. 1998); see also *supra* note 249 and accompanying text.

296. See TEX. FAM. CODE ANN. § 161.007 (Vernon 1996).

297. See *id.* § 161.211.

298. *Guerra v. Texas Dep't of Protective & Regulatory Servs.*, 940 S.W.2d 295 (Tex. App.—San Antonio 1997, n.w.h.) (disregarding late-filed statement of facts and refusing to go behind a brief filed by reluctant appellate counsel).

tection of this] law.”²⁹⁹ The Houston Court of Appeals (Fourteenth District) affirmed the termination of a presumed father’s rights on endangerment grounds despite the fact that a ruling had not yet been made on the man’s suit to establish paternity.³⁰⁰ In the “no great surprise” category, the Waco Court of Appeals affirmed the termination of parental rights as to three children in large part because the father admitted to sexually abusing his seven-year-old daughter.³⁰¹ The Eastland Court of Appeals,³⁰² citing constitutional concerns, also refused to apply the new “constructively abandoned” ground³⁰³ to a case in which the children had not been in the state’s care for at least one year after the effective date of the statute, despite legislative language that is arguably contrary.³⁰⁴

In *Cornelison v. Newbury*,³⁰⁵ the Waco Court of Appeals reversed a summary judgment terminating parental rights in an adoption setting. The biological mother, Ms. Newbury, left her newborn child with the Cornelisons, who were named temporary managing conservators. The mother expressed an interest in having the Cornelisons adopt her child and obtained from the biological father a waiver of interest, but did not sign an affidavit of relinquishment of parental rights herself. No later than six weeks after birth, Ms. Newbury indicated that she wished to reclaim the child. The Cornelisons responded by filing suit to terminate Ms. Newbury’s rights on the theory that she had “voluntarily left the child alone or in the possession of another not the parent and expressed an intent not to return”³⁰⁶ and obtained summary judgment. The court of appeals reversed on the ground that there was some evidence of nonabandonment,³⁰⁷ but expressed considerable concern about the birth mother’s subsequent actions.³⁰⁸

299. *Id.* at 298 (quoting *Krasniqi v. Dallas County Child Protective Servs. Unit of Texas Dep’t of Human Servs.*, 809 S.W.2d 927, 932, (Tex. App.—Dallas 1991, writ denied), *cert. denied*, 503 U.S. 1006 (1992)).

300. *See R.W. v. Texas Dep’t of Protective & Regulatory Servs.*, 944 S.W.2d 437 (Tex. App.—Houston [14th Dist.] 1997, n.w.h.). The man had left the child alone with its cocaine-abusing, suicidal mother. The court acknowledged that under some circumstances the decision to terminate rights before an adjudication of paternity might be unfair, but emphasized that the man was a presumed father and had never denied paternity.

301. *See Lucas v. Texas Dep’t of Protective & Regulatory Servs.*, 949 S.W.2d 500 (Tex. App.—Waco 1997, pet. filed).

302. *See In re R.A.T.*, 938 S.W.2d 783 (Tex. App.—Eastland 1997, writ denied).

303. *See TEX. FAM. CODE ANN.* § 161.001(1)(N) (Vernon 1996).

304. *See In re R.A.T.*, 938 S.W.2d at 784 n.2 (noting that the implementing language stated that the amendment applies to “a pending suit affecting the parent-child relationship without regard to whether the suit was commenced before, on, or after the effective date”).

305. 932 S.W.2d 729 (Tex. App.—Waco 1996, no writ).

306. *TEX. FAM. CODE ANN.* § 161.001(1)(A) (Vernon 1996).

307. The birth mother’s affidavit stated that she changed her mind about the adoption “almost immediately” and contacted the Cornelisons within two weeks. This evidence, however, was controverted at trial. *Cornelison*, 932 S.W.2d at 731.

308. The Cornelisons’ affidavit stated that Ms. Newbury “did not take any initiative to see the child . . . did not send gifts to the child or any money to the Cornelisons to help defray the expense of caring for the child, and that she did not ever inquire about the child’s well-being.” *Id.* at 732. The Waco court commented that these actions, if true, are “inconsistent with [the] assertion” that Ms. Newbury changed her mind “almost immediately.” *Id.*

The 1997 legislative session made several changes in adoption law. New provisions provide for adoption by a former step-parent if parental rights have been terminated as to one biological parent.³⁰⁹ Background checks are now required for all prospective adoptive parents unless the adoption is by a close relative.³¹⁰ Adoption hearings are granted preferential settings on request,³¹¹ and direct and collateral attacks on adoptions are limited to a six-month period.³¹² Finally, courts are now required to provide adoptive and biological parents who are in the process of relinquishing parental rights with information relating to the state's voluntary adoption registry.³¹³

In the sole adoption decision of note during the Survey period, the Texas Supreme Court addressed an adoptive child's rights to information about her natural parents. In *Little v. Smith*,³¹⁴ the petitioner sought to assert inheritance rights to her biological grandmother's estate. Adopted in 1932, Katherine Smith knew from age ten that she was adopted. However, Ms. Smith did not begin to seek information relating to her birth parents until her son was diagnosed with a malignant tumor in 1987. She eventually discovered information that her adoptive mother had kept, substantiated by redacted records released by the adoption agency, giving the names of the persons believed to be her biological parents. When Smith contacted her "uncle," however, he informed her that her mother had died some twenty years earlier. He also expressed doubt as to the truth of Smith's story. Ms. Smith did further research in newspaper and court records, and discovered that her "grandmother" had died in 1982, leaving a substantial estate of which her "uncle" was executor.

Ms. Smith brought suit in 1992, seeking her share of the estate. The estate defended on statute of limitations and public policy grounds, arguing that even if one assumed for summary judgment purposes that Ms. Smith's "uncle" knew his sister had given up an out-of-wedlock child for adoption, adoption records were sealed and it would have been impractical to seek out Ms. Smith. Smith argued that a discovery rule should apply, and the court of appeals agreed, at least to the extent of her tort claims against the executor "uncle."

The Texas Supreme Court reversed and rendered judgment in favor of the estate beneficiaries. The Court noted the general public policy in favor of statutes of limitation and the fact that limitation statutes in estate matters "provide stability and security to personal affairs and protect property rights."³¹⁵ The Court, however, also acknowledged the difficulty that adoptees might encounter in trying to ascertain the identities of their biological parents. The Court's solution was to rely on the Legisla-

309. See TEX. FAM. CODE ANN. § 162.001(b)(3), (4) (Vernon Supp. 1998).

310. See *id.* § 162.0025.

311. See *id.* § 162.0045.

312. See *id.* § 162.012 (Vernon 1996).

313. See *id.* § 162.018(d) (Vernon Supp. 1998).

314. 943 S.W.2d 414 (Tex. 1997).

315. *Id.* at 417 (quoting *Mooney v. Harlin*, 622 S.W.2d 83, 85 (Tex. 1981)).

ture to decide between competing public policies, and to take the statutory scheme governing confidentiality of adoption records as evidence of that priority. Under the Family Code, detailed information about birth parents is available;³¹⁶ names and specific identifying information, however, are redacted³¹⁷ and can be obtained only upon a court order based on "good cause."³¹⁸ The Court intimated that general curiosity about possible inheritance rights would not constitute good cause,³¹⁹ though medical necessity might. Moreover, the State's elaborate adoption registry statutes in the Court's view,³²⁰ "are designed to maintain the confidentiality of the identities of adoptees, their natural parents, and biological siblings unless there is a *mutual* desire for that information to be disclosed."³²¹ For similar reasons, Smith's tort claims against her "uncle" executor were also barred.

316. See, e.g., TEX. FAM. CODE ANN. § 162.007 (Vernon 1996).

317. See, e.g., *id.* § 162.006.

318. See *id.* § 162.022.

319. The opinion states that "[t]he statutes contain no indication that an adoptee can circumvent these [voluntary adoption registry] procedures simply by asking a court to open the adoption records so that any inheritance rights can be asserted." *Little*, 943 S.W.2d at 419.

320. See TEX. FAM. CODE ANN. §§ 162.401-.422 (Vernon 1996 & Supp. 1998).

321. *Little*, 943 S.W.2d at 419 (emphasis added).